UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-11435-jmp; ADV Nos. 11-01267-jmp, 11-01269-jmp

- -x

In the Matter of:

CHARTER COMMUNICATIONS, INC., Debtor.

- -x

LAW DEBENTURE TRUST COMPANY OF NEW YORK

Plaintiff.

v.

CHARTER COMMUNICATIONS, INC., ET Al.,

Defendants.

And CHARTER COMMUNICATIONS, INC.,

Plaintiff.

v.

LAW DEBENTURE TRUST COMPANY OF NEW YORK

Defendant.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

February 7, 2012, 2:03 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Adversary Proceeding: 11-01267-jmp LAW DEBENTURE TRUST COMPANY OF NEW YORK, solely in v. CHARTER COMMUNICATIONS, INC., et al

1) Motion Filed by the Defendants for Summary Judgment

Adversary Proceeding: 11-01269-jmp Charter Communications, Inc. v. Law Debenture Trust Company of New York

1) Motion Filed by the Defendant for Summary Judgment

Transcribed by: Aliza Chodoff

A P P E A R A N C E S :

KIRKLAND & ELLIS LLP

Attorneys for Debtors

655 Fifteenth Street, N.W.

Washington, DC 20005

BY: JEFFREY G. LANDIS, ESQ.

DANIEL T. DONOVAN, ESQ.

ZEICHNER ELLMAN & KRAUSE LLP

Attorneys for Law Debenture Trust Company of New York

575 Lexington Avenue

New York, NY 10022

BY: BRYAN D. LEINBACH, ESQ.

ROSS & ORENSTEIN LLP

Attorneys for Law Debenture Trust Company of New York

222 South Ninth Street

Suite 470

Minneapolis, MN 55402

BY: JOHN B. ORENSTEIN, ESQ.

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Be seated, please. I thought you'd enjoy the souvenirs from the confirmation hearing. Let's introduce ourselves and proceed.

MR. ORENSTEIN: John Orenstein for Law Debenture, Your Honor, and to my left is Bryan Leinbach.

MR. LEINBACH: Good morning, Your Honor.

MR. DONOVAN: Good morning, Your Ho -- good afternoon, Your Honor. Dan Donovan for Kirkland & Ellis. With me is my partner, Jeff Landis.

MR. LANDIS: Good mor -- good afternoon, Your Honor.

THE COURT: Thanks for your flexibility. We had a parade out front to -- this morning, and probably just as well that you missed it. Well, I don't know. Maybe you would have wanted to see it, but it was hard to get to the building.

So let's proceed.

MR. ORENSTEIN: Good afternoon, Your Honor. First of all, I want to thank the Court for wading through six briefs on this issue. I stand here wondering if the Court had the sensation of the briefs appearing like ships passing in the night. This is, I think, one of those cases where how you see the issue at the very start determines where you end up. And of course, Charter and Law Debenture see this very differently.

I want to spend some time on what I think the issue

is.

THE COURT: Before we start, I have a question about confidentiality.

MR. ORENSTEIN: Okay.

THE COURT: An awful lot of the materials are under seal. And at least certainly the papers go out of their way to conceal the identity of the law firm that was the subject of the malpractice litigation that led to the creation of the fund that we're now fighting over. Since I don't know everybody who's in the courtroom right now, I want to be clear that we either can use that name or should not use that name for purposes of the argument that we're having.

MR. ORENSTEIN: I'm in the habit of not using their name.

MR. DONOVAN: I agree, Your Honor, if that seems --

THE COURT: Fine.

MR. ORENSTEIN: But if it's helpful, I know that aside from personnel from Charter and Kirkland & Ellis, there's a gentleman from one of the bondholders. And that bondholder has agreed to abide by the confidentiality restrictions in this case and has received information with the consent of Charter and --

THE COURT: Fine.

MR. ORENSTEIN: -- the law firm.

THE COURT: Well, since we're not sealing the record

of the argument, I think it probably makes sense for good order that we simply refer to it as the former law firm or some similar designation.

MR. ORENSTEIN: The way I'd like to start, I guess, is if you really step back and ask yourself now what would we do to find out who was entitled to settlement proceeds, I think the first think anybody would do is look at the settlement agreement. You'd say okay, who was supposed to pay who? And this settlement agreement is very clear on that subject. By this settlement agreement, I mean Exhibit 24 to Law Debenture's moving papers. It's the settlement agreement the law firm and -- and this actually important -- between the law firm and four Charter entities.

They are CCI, Holdco, Holdings and CC V. They are defined in the agreement as Charter. Sure enough, when you go to the page that talks about paying the settlement, it says on page 3 that "the law firm shall deliver to Charter the sum." Later, when -- not much later, the agreement is amended to provide specific wiring instructions. It says that the funds are payable to Charter at these wiring coordinates. Charter is those four entities.

If this Court had nothing else in front of it but the agreement and there was no other record, I think one would have to conclude that they all own it because they all were paid. They all were entitled to it; these four entities.

Now, I think what we're really doing, whether both parties acknowledge it or not, is trying to ask the Court to move away from what I think of as that default position. No, it's not all four because somebody has a superior claim of ownership to somebody else. Now, my simple analysis there is fortified by the escrow agreement, which says that the proceeds will be distributed -- rather that what the parties to the escrow are awaiting is the appropriate distribution of the escrow amount among the Charter parties. And the Charter parties are CCI, Holdco, Holdings, CC V. Here, they invite one more to the party, and that's CCO.

Now, we'll come back to CCO in a minute. But finally, as another data point, I recall what the statements of financial affairs of the debtors said when they initially filed them in this case. And these proceeds were noted as income on four and only four parties' statements. That was CCI, Holdco, Holdings and CC V, with an explanatory note that said we really don't know who is -- who's legally -- who is entitled to these just yet.

So to me and to Law Debenture, the question is either they all own it or somebody has a superior claim. And who is that? Charter's approach is slightly but critically different in this regard. Their approach is to say CCI and Holdco don't own the proceeds, and you really don't have to worry about who does. They don't make a, I think, a very strong effort to say

that Holdings owns it or that CC V owns it. Their point is really look, there's one thing we know and that is that CCI and Holdco they're not in the business of owning directly things like the Bresnan preferred interests, and so they can't own these proceeds.

Now, the first point I want to make is that really isn't the right approach. If four parties get money under a settlement agreement, but we find that two of them are not entitled to it, then the other two are. It is a zero sum game. So ruling that CCI and Holdco don't own these funds is a ruling that Holdings and CC V do. And that would not make sense. And a lot of our brief -- our briefs -- much of our briefing is directed to the point that it doesn't make sense to say that CC V owns this or that Holdings owns it. I'm going to come back to that, but I wanted to point out that divergence in approach and why it's important to ask yourself who of these four is the right choice.

Now, there's another place where we diverge dramatically, I think. And that is okay, so I've said how we -- what we have to ask ourselves, namely who's the owner of four. Now, how do we determine ownership? The main way that we try to determine ownership is to ask who had a right to the interests that were being compensated for here. I think everybody agrees that if you go way back to what this case was about against the law firm it was oops, we didn't get thirty

percent of Bresnan as represented by preferred interests in something called CC VIII. We didn't get that. We were supposed to get it. The contract was supposed to say we get it.

We say whose contract was that? Who under the contract was supposed to get this interest? And Charter asks a different question. They say if these interests had gotten into the Charter family, who would have ended up with them ultimately. Again, our position is really that's the wrong question because -- let's just dwell on this for a minute. And let's assume that somebody -- we don't know who -- we don't know which -- some entity in Charter would have ended up with the Bresnan preferred interests; call it the CCH preferred. And it wouldn't have been Holdco. Let's assume that's the case.

Who would have decided where it goes? The answer is the owner gets to decide where it goes. That's one of the rights and privileges of ownership. If you get to be the guy or the entity who says I think CCHC should have it or I think CCH I or CC V, that's because you own it. And if there's one thing we all have to agree on it's that the marquee question is ownership. That's what's in the plan. I sometimes read the briefs and felt that Charter wasn't comfortable with the term "ownership." In another context in this Court, it seemed to me that it was looked on as a dubious term. But here, it's in the

plan.

And we didn't put it there, and Charter did. So that's what we have to interpret. We ask ourselves who would have owned this, not what would they have done with it once they got it. I look at this as -- I hesitate to bring in hypotheticals, but I'm going to go off on a limb and try this. I want to buy Black Acre. I want to buy it because I want to give it to my grandson. But I hire a lawyer and because my lawyer doesn't do the job right I only get seventy percent of Black Acre. So I have to negotiate. I get another fifteen percent, and then I sue my lawyer for the balance. Who is it who really has the claim here? Who really has the damages? Who lost the right? Does anybody think it's my grandson?

I think it's me because granted giving to my grandson might have suited my family's strategy, but I lost the right. I lost the contract.

THE COURT: Can I break in and ask you a question? And it's somewhat based on your hypothetical, and you may be sorry you brought this up.

MR. ORENSTEIN: I agree.

THE COURT: That's a very simplistic approach to what's actually, as I see it, a much more nuanced question because we're not dealing with the ownership of the Bresnan preferred interests. We're dealing with a derivative. We're dealing with settlement proceeds associated with a litigation

that never went to trial. I read the mediation statements, and the more I have read in respect to this dispute, frankly, the murkier the question of ownership becomes and the harder it is for me to find that either side is entitled to summary judgment here at all.

And it raises a very fundamental question, which is how does one establish a right of ownership with respect to an asset that isn't Black Acre; instead, it's the residue of a settlement fund that was created carefully not to admit liability, not to assign any claim to a particular value and in effect is a without prejudice fund of cash. Your argument is that standing is equivalent to ownership, but I want you to know that's not clear to me. And your Black Acre question is in effect a standing question and could be an equivalent to ownership.

Let's not deal with Black Acre. Let's deal with the fuzzy intangible that we're stuck with.

MR. ORENSTEIN: I'm actually glad I raised the hypothetical so that I now see a little more about what the Court is thinking. To deal with what the Court terms the "intangible," well, I still think of it as a fund -- a sum of money.

THE COURT: It clearly is a sum of money.

MR. ORENSTEIN: So -- and so, I ask myself how did it get there, and I come back to the settlement agreement itself.

So if -- the way the Bresnan preferred and the underlying property relates the fund, again, goes to what's the appropriate question to ask to determine ownership here. Now, I think you're suggesting, Your Honor, that it's not appropriate to ask who would have gotten the Bresnan preferred if things had gone right. And if that's the case, you have to ask then how did the damages -- what were the damages here for. What were the claims?

I grant you that we'll never be able to ask ourselves what did the -- how did the parties value their relative claims here. They never did. We know they never did that. They never thought about it. That's what's in the record, and frankly that's why we're here on cross motions. There's nobody who can just say we thought Holdco should get X percent and CC V Y percent. But what we do know is that there were malpractice claims. They all brought them. And the damages had three categories to them.

So one was what was the value of the lost Bresnan preferred. Two was the CCHC note, which was a sort of mitigation damage. And three were the professional fees expended. That much we know, not just from the mediation statement but from the complaint. I think it's worth my taking a second to note exactly where in the complaint that is. It's paragraph 114.

Now, we don't know what fifty-million represents in

terms of the relative proportionment of these damages, but we do know those were the damages sought and there was a compromise. I think it's appropriate to say who could have asserted those damages most directly in the litigation. I think we're talking about not so much standing, but who had the most direct claim to the damages. Legal malpractice after all is about direct injury.

And starting with the least of the damaged categories, if you go to professional fees, well, those were clearly paid by CCO. And I think the record -- I think we're in agreement that CCO was compensated for all that. CCO got twenty-seven million dollars that wasn't put in the escrow, and the testimony at one point in the confirmation hearing was that the professional fees were paid.

So moving up the chain a bit, the CCHC note. That's another component. Well, again, the complaint says this category of damages described as the value of a note that a wholly owned Holdco subsidiary was required to issue. I think that's a statement that this was considered to be and rightly would be Holdco's damage as among the four.

So then you get to the biggest damage item, at least as Charter cast it in its mediation statement. And it may be that -- let's assume for the sake of argument that at least three of these entities had some claim to that. I think you're entitled to ask who had the best claim to that component. And

if we're talking about ownership, we're talking about legal rights. And if we're talking about legal rights, it was Holdco's right that was lost. Nobody else ever had a right to the 120 million dollars or so that is claimed to be the value of the CC VIII units.

So I don't look at that as a standing question. I look at that as there's got to be a criterion by which we decide who gets these damages. And I think the only reasonable criterion is who had the superior and most direct right to 120 million dollars. If we were to take this to trial and not decide it on summary judgment, I'm not sure that the facts would be any different than the facts are before the Court right now.

THE COURT: We agree. In fact, I've done thinking about this and questioning in my own mind well, if you both lost on your summary judgment motions and we went forward to schedule an evidentiary hearing what evidence would you present. And is this in fact a possible conundrum of nobody being able to establish a right to ownership? Neither side being in a position of being able to persuade a finder of fact that there's an ownership interest or that there is no ownership interest, because one of the problems I'm having, and you -- I think you both need to focus on this.

Charter takes the position well, it's one integrated enterprise. You found at confirmation that we in effect were

one business and we could move our cash up and around and we could move our assets down pretty much at all. That doesn't wash, although I'll hear the argument. It doesn't wash because we're not dealing with that issue. We're dealing with a totally different issue that's very discrete. Who has an ownership interest in a settlement fund that by definition doesn't have clear guidelines?

Everybody is looking outside the fund for arguments as to who owns the fund. But my problem is, as I look at the fund, there are no guideposts to tell me who actually owns the fund. Both sides are seeking to argue from extrinsic evidence that they're right. But I'm looking, after considering everything very narrowly, there is nothing to tell me who owns the settlement fund.

MR. ORENSTEIN: Well -- but let's go back to, Your Honor, where I started. Why doesn't an agreement that says A, B, C and D are paid this money? Other things being equal, why doesn't that mean that A, B, C and D own it? It's their --

THE COURT: Well --

MR. ORENSTEIN: -- money.

THE COURT: -- they may, or they may not.

MR. ORENSTEIN: But why may they not? I mean, if there's nothing else that would convince Your Honor that that's -- that something else is true, I don't think you're left with the position that nobody owns. I think you're left

with the position that, according to the settlement agreement, they all own it. And somebody needs to show you why it shouldn't be divided up equally because there's nothing to say that one had -- owned more of it than another or that one owned it more than somebody else. They own it, period. And you're --

THE COURT: Well, it's --

MR. ORENSTEIN: -- right. What we're doing is all looking for some criterion for you to decide that somebody has superior claim of ownership. If you reject all those, I think you're left with the position that it's twenty-five percent a piece. I mean, clearly they own it. There can't be any doubt of that. It -- the agreement says so.

THE COURT: Well, one of the problems with using the term "ownership," which of course is taken from the plan but is awkward as we say it is that what we're really doing with this; who has the right to receive the fund. Which party has the right to receive a distribution of the proceeds that are currently held in escrow absent an agreement? And the awkward construct that we're dealing with is ownership. But people don't talk that way about an escrow fund. We're just kind of struck with that nomenclature because that's what the plan says.

MR. ORENSTEIN: Well, people don't talk that way about an escrow fund, but they do talk that way about a settlement

agreement. You know, a layman's way of saying it would be it's my money. It -- the law firm has agreed to pay John, Bryan, Dan and Jim. John, is it your money? Yeah. Jim, is it yours? Yes. It's their money. If Bryan and I own a house together and we can't agree on how to divide it, I think the Court would just divide it based on the fact that they both own it. I see what you're saying, Your Honor, but we're not left with just the escrow agreement.

I think that it's a very fair reading of a settlement agreement to speak in terms of ownership, and that's probably why -- I can't say this for sure -- but maybe that's why the term is in the plan in the first place. And ownership -- the right to receive a distribution is determined -- it's baked into the plan. Where the money goes is decided in the plan, but it turns on -- unfortunately or not, it turns on the ownership question. I don't think the Court is really answering -- is really being called upon here to answer the question how does the money get distributed. The plan says how it gets distributed.

For better or worse, the Court is being asked to determine who owns the money. Now --

THE COURT: Well, what if the Court were to say to you and to Charter there is inadequate information in the record for the Court to determine who owns it or, to put this more directly, to determine that the entity that the noteholders

that you represent have an interest in owns it?

MR. ORENSTEIN: I'd say that based on the settlement agreement alone we've made a showing that the entities that we're interested in own some portion of the proceeds. It can't be the answer that they don't own any of it because the settlement is payable to all four of them.

THE COURT: So is it your position for purposes of today's argument not that it should be determined that you are entitled to the entire fund, but rather that you should not be declared to have no entitlement to the fund?

MR. ORENSTEIN: No. My position is that the very least that if we were to lose on what we're asking for the right call would be that CCI and Holdco own half the fund. But my position is that there are reasons why CCI and Holdco have the best claim of ownership of the four and that it's legitimate and appropriate for the Court to ask itself who has the best claims of ownership to this money. The appeal to extrinsic evidence; either you want it -- either you think that's okay or you don't.

If you do, I think our extrinsic evidence is the right evidence. But if you don't, then I think you're left with the settlement agreement as is. And if that's all there is, that's pro rata split.

I don't think it would serve any purpose for me to go through arguments we've made then in our brief. I see where

the -- what the Court is thinking. I would just like to see, I think, what Charter would tell you the criterion for distribution -- the criterion for ownership of these funds would be. It just can't be somebody down the chain would get the funds and therefore CCI and Holdco don't own them. And I'll reserve some time for rebuttal.

THE COURT: Fine.

MR. ORENSTEIN: Thank you.

THE COURT: Thank you.

MR. DONOVAN: May I approach, Your Honor?

THE COURT: Yes. Thank you.

MR. DONOVAN: Daniel Donovan, Kirkland & Ellis, for reorganized Charter.

And Your Honor, I want to start with obviously some of the colloquy you've had with Mr. Orenstein. And I want to start with first saying I think our position has been somewhat mischaracterized, so I'd like to walk through Charter's position and make sure I'm clear to the Court on what -- on our position.

But to start, I believe even -- and Your Honor, I'm going to walk you through the transactional documents. If you adopt Mr. Orenstein's position that we should look at the transactional document, the purchase agreement, you still have to find that it's not CCI or Holdco because those rights were assigned. I'm going to walk you through that. So I think even

if you adopt LDT, it's not CCI or Holdco that was entitled to it, and I'll get to your point about the settlement agreement fund.

But I'm going to walk through three different ways to look at this issue. First is the contractual entitled; what I'll call the LDT approach. Under that, I believe the transactional documents will show you that it's not CCI or Holdco. It's Holdings, and then Holdings assigned their rights to CC V that own, and I'm going to get to what I believe to what "own" means as used in the fund. So that's number one.

Number two is we've briefed the issued. Primarily, we said but for the law firm's errors would the CC VIII units have been at CCI or Holdco? We believe the undisputed evidence is no. So if you want to look at a but for world, again, the money that was paid was to compensate for that not happening, in our view. So number two, under a but for world, the money or the units would not have been at CCI or Holdco, therefore they don't own it.

And finally, Your Honor, the third way, which I would call kind of the big picture, which I do think, as I show -- will show you, I think matters, which is how did Charter operate, because remember, at the end of the day, this isn't whether Mr. Orenstein or I or our grandchildren own the funds. It's which entity among the Charter entities, it's kind of intrafamily issue, rather than looking at different outside

entities. And I think that matters, and I probably would use those charts. Thank you.

So those are the three ways. We have contractual entitlement or transactional documents. Two: but for. And three is how in fact did Charter operate as an entity, because it has never been our position that geese, Charter is an integrated entity so it doesn't matter because the test that the plan lays out is -- because at the end of the day we're getting to -- when we cut through it all is does LDT get an additional distribution. And the way we get it is to determine ownership. I understand that, but I think it's important, as you know from the trial, Mr. Orenstein knows, of how Charter operated. So those are the three ways.

So first, Your Honor, because of the question, I'm going to a little out order. If you could to slide 10, I'd like to highlight what I believe is the issue before Your Honor and -- at least the genesis of it. How did you end up having this issue? Well, these funds, as you know, were recovered pre-bankruptcy, but not long before. And what happened was at the outside LDT asserted objections that certain categories of what they said value -- they called it numerous sources of values -- should have been attributed to CCI or Holdco in determining their liquidation value; how much they're entitled to.

In one category, and we redacted some of it as you can

see, is what we've highlighted there is settlement, and that is what we're today about. Due to kind of discovery that had to be had and other negotiations, this issue was kind of put off to the side, which is why we're here today. But that's the genesis. It's no different than did CCI own the intercompany receivable from CCO. Did CCI own the return of an interest payment?

I would submit the analysis is no different than the analysis you heard during the bankruptcy because LDT argued then that they owned or at least had a right to the value that these different categories generated. So I believe that's the genesis when we say well, geese, how did this come about so what should we look at.

And before I get into the merits, I also think there's one other issue here, as I do think it's critical is that because this was an objection it is LDT's burden -- it is LDT's burden to prove to you that CCI or Holdco own these proceeds. We briefed it. It was not disputed, and I believe if you believe this is a tough case, and I don't convince, that that is going to become an issue is that Mr. Orenstein on behalf of LDT cannot prove that CCI or Holdco are entitled to them. Therefore, under the escrow agreement, it is then in Charter's discretion where to put it because but for this objection it belongs to reorganized Charter. All the entities are solvent, therefore it can be in Charter's discretion.

I believe it's at Holdings, personally, but I don't believe that's a decision for you under the escrow agreement other than the issue is does CCI or Holdco own them.

And one other issue, Judge. I don't believe you can just say the settlement agreement provides for four entities, therefore it's fifty-fifty, okay? I think that's arbitrary. I think it's also the issue would be here is we all know that wasn't true. In fact, some of the money went to CCO, who wasn't a plaintiff, because when they sat down, everyone looked at it. Everyone agreed that CCO was entitled to that money because they fronted all that for the litigation. So I, frankly, just disagree with Mr. Orenstein on kind of his backup argument that you just split it fifty-fifty.

So against that background, Judge, I'd like to walk through and see where Your Honor was focused, kind of our key points and answer the questions you've raised this morning -- this afternoon, excuse me. And I start with slide 2, and this goes to the point on the but for world and how Charter operated. And that is CCI and Holdco have always been holding companies. They don't own or operate cable assets, and they never generated revenue or cash. And I think that is relevant. It may not be dispositive, but I do believe it's relevant at looking at who would own these assets.

Then, turning to slide 3, Your Honor, there's no dispute. This is kind of the factual chronology that the

parties agree happened; starting all the back in June of 1999, and we're here in 2011. And I may reference back to this for questions. But as you turn to slide 4, Your Honor, this addresses Mr. Orenstein's, what I call, his contract for a transaction argument, which I think is just wrong on the documents, not a dispute of fact, just wrong on the documents. So in 1999, Charter began acquiring cable systems and expanding its network; one of them, as we know, was the Bresnan network.

And in November 1999, Charter entered into an agreement to acquire Bresnan Cable Systems. And on the purchase agreement, as LDT says, well, the name was Holdco. That's true; no dispute. But in December 1999, months before closing, acting as it says, resolved; acting on behalf of CCI in its capacity as the manager of Charter Holdco. We then go below. They say that the officers of Holdco and Holdings, as necessary, and each of them hereby is authorized and directed on behalf of Holdco and Holdings, as necessary, to contribute the Bresnan interests to Charter Holdings and/or one or more subsidiaries of Charter Holdings. Bresnan interest is defined in the minutes as all of the equity interest or assets that were to be acquired from Bresnan.

So Holdco, CCI, as the manager of Holdco, the two entities, LDT argues here, directs and authorizes the contribution of all their interest in that to Holdings. So we then move forward to the next slide, Your Honor, and these are

labeled at the bottom with the exhibits to our summary judgment motion. At the closing, February 14, 2000, the contributed interests, that is anything Holdco received as part of the closing, was contributed down to Holdings, not held at Holdco. So this is the assignment and contribution agreement between Holdings and Holdco; Exhibit 14 to our summary judgment motion.

We then go, Your Honor, to the next slide, 6, which is Exhibit 15. This is another agreement between Holdings and Holdco in which it says "Holding hereby assigns" -- excuse me, "Holdco hereby assigns, transfers and conveys to any and all rights of Charter LLC" -- which is Holdco -- "under the purchase and contribution agreement to purchase the purchased interest to Charter Communications Holdings LLC and Holdings hereby accepts such assignment and assumes and undertakes to discharge, satisfy or perform all obligations of its Holdco."

So again, Your Honor, on the closing date, every -- all the rights were transferred. So even if we're going to look at the LDT argument that we should look at the purchase agreement and it says Holdco, I would submit under that analysis, in fact, Holdings is the owner, and therefore not CCI or Holdco. I don't believe that's the right analysis, but under that analysis, I'd submit, it's Holdings.

Finally, Your Honor, just to kind of close the circle, page 7 is actually an amendment to the purchasing contribution agreement signed by the Bresnan entities as well, memorializing

the actions I went through on slides 5 and 6. And I do that to really rebut Mr. Orenstein's argument that because Holdco was on the purchase agreement Holdco would own it. Even if these units came into Holdco, they were by a Charter CCI resolution and transactional agreements assigned to Holdings. So therefore, under the analysis I submit you have to do, does CCI or Holdco own under a LDT analysis? The answer is no. It's Holdings, and then, as we all know, those -- that was later transferred down to CC V. If I may approach the board?

THE COURT: Just be careful speaking near the board because you're not near a microphone.

MR. DONOVAN: The point was -- is what was held at Holdings -- this is Holdco -- Holdings was then moved down -- all the way down to CC V, which held the equity of CC VIII. And there's no dispute that CC VIII is a Charter entity that actually held the cable operating assets for Bresnan. They were -- the assets were actually held there.

THE COURT: Well, why does this matter? I mean, I'm going to break in in much the same --

MR. DONOVAN: Sure.

THE COURT: -- way that I did during the earlier argument. This is what would have happened had there been no error on the part of the law firm and perhaps good behavior on the part of one of the key parties to this case. I'm sorry, I'm incredibly offended as I've read this, and it's a good

thing that information concerning the conduct of that individual didn't make it into the confirmation hearing because this is not behavior that that individual should be proud of.

MR. DONOVAN: Well, if I may explain, Your Honor, why I think it does matter?

THE COURT: Why which matters?

MR. DONOVAN: Well, why -- your original question is why is -- what I just walked through, why does it matter because it didn't happened. It did happen --

THE COURT: But it doesn't matter to me. You have to tell me why it should matter to --

MR. DONOVAN: Sure.

THE COURT: -- me when what I am dealing with has nothing to do with all of these helpful background facts for your position. I'm dealing with a settlement fund that was created with abundant -- without prejudice language; language that made it clear that whatever happened before and whatever the claims may have been had nothing to do with why insurers for the law firm or the law firm itself chose to put this nasty episode behind them. While they did, there were four parties that were plaintiffs, and there were four parties that entered into the settlement agreement.

And it appears that there are four parties who have some interest in that fund. Why isn't that the only question?

MR. DONOVAN: Well, because, Your Honor, the question

is -- this is -- I will tell is -- since neither party cited cases, this is a somewhat unique issue. And it is -- arose, and that's why I -- where I started was -- it arose because this was an objection in the bankruptcy that said you should allocate the value you received -- the total amount at that point, I think, was like sixty million -- to CCI and Holdco. And that would go into our Chapter 7 liquidation analysis. There was disputes about well, we need discovery.

So that's why it was put to the side, but the analysis is no different. And I understand your point. I'm trying to -- what I'm trying to do, Your Honor, is say well, yes, but there's no dispute that one of the parties, CCO, was not a party to the settlement agreement. I do not believe it's dispositive within Charter that simply because those four names were on the settlement agreement that -- I believe that it necessarily must be one of those parties. As we know, half the fund went to CCO, which wasn't on the settlement agreement because it was correct thing to do because they fronted the money.

So what I was trying to highlight there was simply to rebut Mr. Orenstein's argument that because Holdco's name was on the purchase agreement that they are, therefore, have a superior right, in his words. I think I've shown, if anything, Holdings. So then -- and I understand you say well, then, how do I decide who owns it if I -- okay, let's assume I've

convinced you that the LDT approach is not --

THE COURT: Well --

MR. DONOVAN: -- correct --

THE COURT: -- well, let's not assume anything yet.

MR. DONOVAN: Oh, no, no, no.

THE COURT: Let's just --

MR. DONOVAN: I'm --

THE COURT: -- let's just ass -- let's just deal with what is my mindset and what your burden is and, in effect, what Law Debenture Trust's burden is, is to convince me that I have looked at these papers and I've gotten it wrong and that I should be seeing this in the way that's helpful to your position. And my admittedly simplistic view of this, and I appreciate your trying -- your connecting to what happened during the confirmation hearing, that's all prolong. What happened in the confirmation hearing is obviously of interest, but we're in a totally different proceeding here.

We're in an adversary proceeding in which I'm informed by the background, but I'm not compelled to follow the background. I'm compelled to follow the evidence that's presented. And I've reviewed that evidence, and I've reviewed the documents, and I've reviewed your arguments with some care. And the problem for me and ultimately for you is that I've come to the conclusion that much of what I have been shown doesn't matter because the only thing that matters, somewhat

myopically, is a conundrum. The conundrum being parties having created a fund with -- without prejudice language makes it very difficult for a finder of fact to look outside the fund to determine questions of ownership.

That makes much of what you've shown me about the rights of Holdings irrelevant to me. But --

MR. DONOVAN: Let me approach it this way, Your Honor. And I understand where you're coming from, but I don't this it's appropriate, I would submit, that you should only look at that. I agree you start with the settlement fund document, but I don't think that is necessarily the only document you should or, frankly, in these circumstances, have to look at.

THE COURT: I've looked at everything that I thought relevant --

MR. DONOVAN: Right.

THE COURT: -- including a lot of material that was incredibly interesting, and I feel terrible for the poor associate at the law firm who committed this error. And I frankly feel terrible about some of the character traits of individuals associated with Charter, and I've made that point clear already. But those are background facts that are also irrelevant. In effect, the fact of malpractice, I view, is irrelevant. What would have happened if the agreement had been performed without the error is irrelevant. What Charter would have done with the Bresnan assets in terms of pushing them down

to an operating company level is irrelevant in my view.

The only thing that's really relevant is that parties agreed not to go to a trial and instead to create a settlement fund with certain parties having rights under an escrow agreement. What is missing here, from my perspective, is bright line guidance as to how in the absence of an agreement rights in that fund should be determined as a matter of law.

MR. DONOVAN: And Your Honor, I -- I've actually thought about that issue, and we've debated that. Actually, Mr. Orenstein and I have been talking about -- I think the issue here, though, it is not a legal issue. We've agreed the framework and we -- is, from my viewpoint, it's the same as you did do in the bankruptcy and then we used the term "ownership" in the plan. So I don't think it's any different, but I don't it's a legal issue. And I understand we're looking because neither side have cited you cases.

The question is a factual one, whether or not I believe any material disputes, of which of these Charter entities owns these proceeds. And I understand Your Honor. You say we're looking at the settlement agreement, which is the controlling document. But I think the parties agree, and it appears the Court doesn't, is that you do need to look at other factors about what generated those proceeds --

THE COURT: Why?

MR. DONOVAN: -- in a -- well --

THE COURT: Please ex --

MR. DONOVAN: Sure.

THE COURT: Because this is a very fundamental philosophical question as to how a finder of fact is supposed to make a determination as to a fund that is created without regard to background facts. It's about claims. It's about exposure. It's about reputational concerns. It's about putting the past behind you. It's about a whole bunch of things unrelated to either the standing of the plaintiffs who brought the malpractice action against the law firm in the first instance or what Charter would have done with the Bresnan interests if there hadn't been malpractice.

I view all of that as utterly irrelevant to the question.

MR. DONOVAN: And I understand your point on -- that we cannot tell from the settlement agreement what the payment was exactly for. We can't. We all agree on that. It's kind of the traditional settlement.

THE COURT: It's paragraph 5 of --

MR. DONOVAN: Right.

THE COURT: -- the settlement agreement.

MR. DONOVAN: It's just here's the money; you give up your claims. But Your Honor, I do think it is important -- and I'm not asking you to look back at the confirmation. We believe we've resubmitted that evidence. We think its

probative here is, is if you're going to place that money within Charter, which is the inquiry, where do you place it? And we've given you the evidence to show that the only time anybody would ever say it's at Holdco would be now, and that's why we give you this background, not that that's dispositive. But these proceeds were there, and we need to assign them because of this exercise to one of the -- or more of these entities.

And never -- it's not disputed. Never was it held at CCI or Holdco; never was it intended to be held at Holdco. And I understand Your Honor and Mr. Orenstein's point well, but that didn't happen. But that's the inquiry that we have to have. This is the unusual circumstances where there is this money. It was generated through these actions by the law firm, although we're not litigating those claims. We now have to say which entity do they go to. And this would be the only time in twelve years where anyone ever said we should allocate any equity, assets, money, anything related to Bresnan to Holdco or CCI.

So that's where we -- that's why we give you that evidence, not to say it's dispositive by what would have happened. But that's the analysis. This is -- this came up as an objection, and I don't think it's right to just disregard what happened in the bankruptcy. This was the same kind. This was a -- by agreement, put to the side, I agree, to say who

owns it. But the inquiry can't be untethered to that. The inquiry there is well, just like there, CCI or Holdco, then was a different law firm, but they would have had to prove just like they tried to prove other things that they owned it. And that's why I come back to burn.

If this is a tough issue, Judge, then the finding is -- and maybe we do have to have an evidentiary hearing, and we can see if LDT can carry their burden to show that more than likely than not they do own it. I don't think they can. And frankly, I agree. Most of the evidence, I want to think more if there's some additional or people, but they can't carry that burden, okay? And that, I think, is -- and that's why I come back to that inquiry. And that's why we submitted the evidence, and I hope it's not kind of construed as we're saying well, geese, that's what would have happened.

We believe it is the same inquiry as the Chapter 7, and that's why it's important to say never in a single day -- and it's undisputed -- and that's why on slide 12, this is from LDT's brief, is they don't suggest Holdco would have held it. And they don't suggest it was in the business model. Well -- but that's important. It certainly would have been important during the confirmation hearing if that receivable -- if somebody would have testified well, we never intended -- and actually, I think there was testimony that this asset held at CCI or Holdco. And then, the finding was well, not that it was

or wasn't but simply that LDT didn't carry their burden to show that it was so we're not going allocate it to that Chapter 7 analysis.

So Your Honor, I hope with that -- and I know this is a nuanced question to be sure, but I think a couple of things are clear. And that is undisputed that never was these assets, any asset related to Bresnan ever held at CCI or Holdco. So to now hold that these monetary recovery -- and we can dispute what it was for -- would be held there. We believe it's just contrary to the -- all the evidence. And then, number two, it is LDT's burden to the extent it's a nuanced question -- we don't believe they've carried it. And whether or not we have to have a subsequent hearing to confirm that, I'd have to defer on one -- of thinking on what additional evidence I'd want to submit. Thank you.

THE COURT: Did you cover each of the points you mean to cover, because you said that there were three things --

MR. DONOVAN: There were --

THE COURT: -- you were going to be dealing with; contract documents, but for errors and big picture? I just want to make sure --

MR. DONOVAN: May I have one moment, Your Honor? Just --

THE COURT: -- I just want to make sure you said everything you want to say.

MR. DONOVAN: Yeah, the second, Your Honor, the but for, I think you understand. And I'm not saying it -- it's agreed to or -- by anybody, but I do believe, Your Honor, that the evidence is on rebut. And that slide 12 that I gave you that LDT doesn't dispute; if you would look at this kind of in a but for world, which is a traditional malpractice view, what would have happened but for these legal errors, there's no dispute. The units or the money, if it came in earlier, would have been held below CCI or Holdco. So I think under number one, the contract documents, it's Holdings.

Under number two, would it been held at CCI or Holdco? The answer is no. And then, I think the analysis, which is what I was saying before, which is the same analysis you did during the Chapter 7, which was the genesis of this; who owns it, I believe the evidence cannot be disputed that it never was, never intended and never would have been held at CCI or Holdco. So those are the three tests we submit, Your Honor.

THE COURT: Okay.

MR. DONOVAN: Thank you.

THE COURT: Mr. Orenstein, do you have anything more?

MR. ORENSTEIN: Well, I do, and I don't want to take a lot of time to do it because I'm responding to points that I think the -- Judge, you've already said you don't find relevant. But I have to say something about them.

One is repeatedly Mr. Donovan says this arose

essentially because of an objection on the part of Law Debenture. That's partly true, but the objection came because the Charter entities couldn't decide where these funds belonged. In -- before the objection, in the Charter entities' statements of financial affairs, in the notes, they said the funds are being held in escrow and shown on the statements of these four entities until an ultimate determination has been made as to the legal entities entitled to receive some or all of the settlement proceeds and allocation of those proceeds among the entitled entities, presumably those four.

And Law Debenture said let's do that. Let's have that determination. If the debtors aren't able to do it, and essentially our inviting that it be done, let's have it done. So I -- I'm not all that certain that it's really Law Debenture's burden when it was Charter who couldn't decide who -- where to put this income in the first place except on multiple Charter parties' income statements.

As to the account of the history of the transaction, I just want to say there is no dispute that Holdco was to supposed to get these units. If it had been done right, it was supposed to go to Holdco. You can talk about the assignment, the February 2000 closing and what the state of affairs was then, but when these units were supposed to go to Paul Allen they were automatically supposed to go to Holdco. Was Holdco supposed to keep them? I don't know how long they would have

kept them, how long it would have taken them to decide where it goes, but it would have been Holdco's decision to make.

Now, having dwelled on per -- probably too long on things you don't find relevant anyway, my one suggestion is we've both apparently missed the mark here. I've never asked this before at a summary judgment hearing, but is there an opportunity for supplemental briefing based on how we know the Judge looks at the issue?

THE COURT: I don't think there's an opportunity for supplemental briefing, but there's going to be an opportunity for something else.

MR. ORENSTEIN: Well, I'll spend a trial day in New York City. Thank you, Your Honor.

THE COURT: Okay. Let me tell you both how I see this, and I'm going to embellish a little bit on what I've already said in colloquy with each of you. It's obvious that the context in which this dispute arises is important for your cases and important for me to know. But as I have analyzed this, it doesn't resolve the question that I view as the critical question before the Court. And that's the ownership question.

And I view the ownership question as being fundamentally equivalent to a right to payment. So I view ownership for purposes of funds that are in an escrow account as being comparable to a right to receive the proceeds in that

fund because otherwise ownership would be meaningless.

Now, one of the problems here is that ownership, if I were to find ownership in each of the four Charter entities, does not necessarily equate to a right to payment. Because of the way this was set up, in effect a problem that was not fully ripe for determination at the confirmation hearing has been set aside for later litigation. That's what we're now having. I don't believe that the material points covered in the confirmation hearing relating the liquidation analysis determine the outcome here. Actually, I believe that we have an almost impossible problem.

How do you determine, absent agreement, rights to payment in an escrow account that nominally belongs to four parties? and regardless of the arguments that had been made on both sides, I don't yet see a basis for determining that any party has no interest or that another party has a priority interest. The background recited by Mr. Donovan is useful in terms of Holdco's history as an entity that did not hold assets. But that does not determine the question at hand.

I believe that this is a matter that should be mediated prior to an evidentiary hearing and that the papers that have already been prepared in support of the cross-motions for summary judgment would function well without a lot of additional effort as mediation statements.

I further believe that if we end up having an

evidentiary hearing that it will be difficult for either side to present through additional evidence a compelling case regardless of who has the burden.

For that reason, I'm going to direct that the parties engage in good faith mediation with a mediator that you find mutually acceptable. And if you can't find a mutually acceptable mediator, I will appoint one.

Now, in terms of additional submissions as suggested by Mr. Orenstein, if, despite good faith efforts to resolve this in mediation, you are still unable to resolve this dispute, you'll be able to submit a joint pre-trial order. And we'll have a pre-trial conference at some point in the future to set a trial schedule and to determine the length of trial, those witnesses who may need to testify and efforts to make this as efficient a process as possible.

Now, there is an open and unresolved issue from a while ago which involves a motion made by Law Debenture Trust on core versus noncore. Has that been resolved?

MR. ORENSTEIN: I think Charter asked for a determination that had --

THE COURT: Was it Charter's motion?

MR. ORENSTEIN: Did we do it?

MR. DONOVAN: No.

THE COURT: I thought it was your motion.

MR. ORENSTEIN: It has not been resolved.

THE COURT: Are you still pressing that point or is that something that you're going to withdraw?

MR. ORENSTEIN: I'll have to talk to Law Debenture about that.

THE COURT: Okay. Now, I've provided a preliminary bench ruling indicating that you weren't going to prevail but that I was going to reserve ultimate judgment until we had a hearing on the merits. I view this as another step along the way of a final adjudication, but it is not yet a final adjudication. And given the arguments that have been made by both parties as to the connection of this dispute to provisions of the plan itself, I think it becomes difficult for Law Debenture to argue that this is not core since it arises under the plan. So give some thought to that as well.

In terms of timing, I think it would be desirable for the parties to move forward with this as promptly as possible given all the work, and it's good work too, that has gone into the papers that I've reviewed. If you think it would be useful to the process for me to ask one of my colleagues to serve as mediator, I would be willing to do that. But I also think that this is a commercial dispute that while significant and nuanced is fairly narrow in its focus.

My final comment for today: if the parties are able by virtue of talking with each other instead of going to mediation to reach some kind of consensual resolution, that

would probably be the best outcome. And I say that recognizing that it is difficult for indenture trustees to compromise their positions at times. But it's also very often highly desirable. So why don't you give that a try as well? And with that, we're adjourned until the next time.

IN UNISON: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 3:10 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.

Aliza Chodoff

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Date: 2012.02.24 15:23:04 -05'00'

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ALIZA CHODOFF

AAERT Certified Electronic Transcriber CET**D-634

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: February 22, 2012