

**STATE OF RHODE ISLAND
PROVIDENCE, SC.**

SUPERIOR COURT

St. Joseph Health Services of Rhode Island,
Inc.

vs.

PC 2017-3856

St. Joseph Health Services of Rhode Island
Retirement Plan, as amended

**ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.'S (1) OBJECTION TO
THE MOTION OF SPECIAL COUNSEL TO COMPEL AND FOR MONETARY
SANCTIONS, AND (2) COUNTERMOTION FOR A PROTECTIVE ORDER**

St. Joseph Health Services of Rhode Island, Inc. objects to the above-identified Motion, and for the reasons set forth in its accompanying Memorandum and those it may present at the scheduled hearing, it respectfully requests that the Court deny the Motion and enter a protective order substantially in the form attached to SJHSRI's Memorandum.

St. Joseph Health Services
of Rhode Island, Inc.,

By its attorney,

/s/ George E. Lieberman

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2017, I caused to be served a true copy of the within document through the Rhode Island Judiciary's Electronic Filing System on all parties designated for electronic service on the electronic filing system. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System. Additionally, this document was served on the following by electronic mail.

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**MEMORANDUM OF LAW OF ST. JOSEPH HEALTH SERVICES OF RHODE
ISLAND, INC. IN SUPPORT ITS (1) OBJECTION TO THE MOTION OF SPECIAL
COUNSEL TO COMPEL AND FOR MONETARY SANCTIONS, AND (2) COUNTER
MOTION FOR A PROTECTIVE ORDER**

ST. JOSEPH HEALTH SERVICES
OF RHODE ISLAND, INC.,

By its attorney,

/s/ George E. Lieberman

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I. PRELIMINARY STATEMENT

Initially, St. Joseph Health Services of Rhode Island (“SJHSRI”) rejects Max Wistow’s (“SC”) accusations that SJHSRI “demanded” a reduction in the benefits of the pensioners and/or has no regard for the pensioners. Such claims are false and seem intended to be inflammatory. To the contrary, SJHSRI sought the appointment of a receiver because it believed that it was the best approach to protect the pensioners. SJHSRI made a recommendation to the Court as to the Plan based upon the information it had at the time.¹ One alternative to filing the petition was for SJHSRI to liquidate the pension plan, leaving hundreds of participants without any benefits whatsoever.

Secondly, SJHSRI has timely and properly responded to the two (2) subpoenas at issue, including three productions of documents, and disputes SC’s unfair and inaccurate accusations that SJHSRI has delayed responding to the subpoenas.² SJHSRI has worked diligently to respond to the subpoena dated October 18, 2017 (“First Subpoena”) and subpoena dated December 1, 2017 (“Compliance Subpoena”). Additionally, SJHSRI has attempted to work cooperatively with SC. SJHSRI’s efforts to comply with SC’s subpoenas are well known to SC who has received numerous communications from SJHSRI, and has had numerous conversations with SJHSRI’s

¹ Similarly, the Receiver (and specifically not SC despite SC’s representations otherwise) is tasked with making a recommendation to the Court based upon available information. It is quite possible that the Receiver’s recommendation will be consistent with SJHSRI’s recommendation to the Court.

² Apparently, everyone SC subpoenaed should have anticipated his subpoenas, is delaying or “dilatatory,” has asserted “baseless” or “senseless” objections, and is essentially acting in bad faith. See Motion to Compel Attorney General, p. 2; Objection to Attorney General’s Emergency Motion, p. 1; Motion to Compel Bishop, p. 2, 3, 8; Motion to Compel SJHSRI, p. 1, 2. Perhaps the truncated time limits, broad and far-reaching requests for documents, SC’s unwillingness to engage in cooperative dialogue, and intentional subversion of procedural rules could be the root cause of the issues consistently presented to the Court by SC.

counsel, regarding compliance.³

SJHSRI's good faith conduct and its efforts to work cooperatively with SC are demonstrable. SJHSRI provided documents to SC even before the entry of the Order authorizing the Receiver to engage SC ("SC Order"). In addition, before the SC Order, SJHSRI (through its counsel) met with both the Receiver and SC and offered to provide documents and/or information to them. SC specifically rejected this cooperative approach, insisting that he wanted production to be made in response to a subpoena.⁴ This approach by SC affected production of documents and increased the expenses of all parties, including those of SJHSRI. Indeed, from the very start of discussions and activities as to production of documents, SJHSRI has worked to produce documents in a timely manner, a very burdensome task considering the extremely extensive requests spanning some 72 years and covering 61 topics, most of which topics are virtually unlimited. See e.g. First Subpoena, ¶ 41 ("all documents given to employees or perspective employees referring to the Plan...") and ¶ 42 ("all documents relating to recruitment advertisements for employees...to whom the Plan was or could be applicable..."). The overly broad and essentially unlimited requests in the First Subpoena cannot be passed over lightly, particularly when SJHSRI does not have any employees to assist in production efforts.

II. FACTUAL BACKGROUND

As a backdrop to reviewing SC's Motion to Compel, this Court should consider that

³ SC omits (whether innocently or intentionally) from his Motion to Compel SJHSRI's letters to SC and conversations with SJHSRI's counsel regarding production of documents wherein SJHSRI's counsel advised SC of when and where potentially responsive documents were gathered, the status of collection and scanning efforts, and the approximate timing of productions. Instead, SC misstates the circumstances surrounding SJHSRI's efforts by selectively quoting various letters or emails.

⁴ The Court should note that SC demanded the documents be produced in response to a subpoena even before the order approving his engagement was sought or entered. Such a predisposition for, and unnecessary reliance on, court intervention is evident from SC's filings.

SJHSRI (i) already made three productions in response to the First Subpoena, (ii) consistently communicated to SC the status of SJHSRI's efforts to collect, scan and produce documents, (iii) was inundated with unreasonable demands by SC, (iv) was subjected to a letter writing campaign lodged by SC (presumably to justify his Motion to Compel), and (v) is accused of bad faith conduct regarding its response to the First Subpoena even though SC has not received or reviewed documents in response to the Compliance Subpoena.⁵ How can SC makes such definitive accusations of bad faith conduct in a written pleading to the Court without reviewing the documents SJHSRI intends to produce in response to the Compliance Subpoena?

From the outset, SJHSRI began communicating with SC concerning production in response to the First Subpoena. As early as November 1, SJHSRI advised SC that SJHSRI was working on the response and sought clarification of certain requests. On November 2, 2017, SJHSRI provided

⁵ SC's unequivocal written statements to the Court indicate that SC's allegations of bad faith were made without support. Specifically, SC represented to the Court;

“Accordingly, as discussed below, Special Counsel is also seeking documents concerning SJHSRI's efforts (or lack of effort) to produce documents. Such requests may well issue to other parties in the next few days. SJHSRI's failure to produce even those documents which would disclose whether it is making a good faith effort to comply with the subpoena is strong indication that SJHSRI has much to hide, not only on the merits, but also on the issue of whether or not it is proceeding in good faith in the very case it initiated.”

Motion to Compel SJHSRI, p. 2. Further, SC poses a question to the Court rather than making a factual assertion regarding SJHSRI's response to the second subpoena. SC asks:

“Are we to assume that all such “requests” were solely oral, and, if so, that there are no documents (such as emails or internal memoranda identifying what was said and by whom, and what was requested) referring to such requests?”

Motion to Compel, p. 16. Perhaps this Court should consider why SC is using the subpoena power granted in the SC Order (to subpoena third parties in furtherance of an investigation) as a weapon to unilaterally conclude, and represent to the Court, that SJHSRI “has much to hide.” Motion to Compel SJHSRI, p. 2. It is hard to believe that this Court, in overseeing this receivership proceeding, intended SC (an attorney hired by the court-appointed fiduciary) to engage in specious allegations of misconduct in the Court's name.

documents to SC and offered to work cooperatively with SC. See **Exhibit 1**. At that time, SJHSRI also cautioned that SJHSRI would need additional time to reply “particularly in light of the broad scope [of the subpoena] and, [the] very short time frame for compliance.” See **Exhibit 1**. SJHSRI also sought SC’s agreement that “no formal objection [to the subpoena] is required” and stated to SC that SJHSRI hoped that SC “shared our view of this cooperative approach...” *Id.* Unfortunately, SC has not shared SJHSRI’s cooperative view, but instead has initiated needless motion practice at substantial expense, thereby unnecessarily burdening the Court and consuming funds that might otherwise be available to the pensioners.

For instance, SC’s letter dated November 6, 2017 advised SJHSRI that SC “expect[ed]... at least partial compliance with the subpoena by November 8, 2017, i.e. the date of its return.” See **Exhibit 2**.⁶ Despite acknowledging the difficulty of responding to the First Subpoena within SC’s artificially-created time frame, SC claimed that SJHSRI was delaying. SJHSRI even had to remind SC that SC had previously acknowledged that the response time was short. In a letter dated November 7, 2017, SC was reminded that he had acknowledged the time frame was short and “when coupled with broad requests, it is not an insignificant task.” See **Exhibit 3**. SJHSRI sought to speed up the production by attempting to clarify the documents sought by SC, including establishing some reasonable time limitations. Specifically, in its November 7, 2017 letter to SC, SJHSRI identified that many of the requests as worded spanned the time 1898 to the present, and reminded SC that SC had not attached a specific time period to his prior informal request, so SC’s claim of SJHSRI being “in arrears” as to production did not seem accurate. See **Exhibit 3**.

More importantly, (and particularly relevant to the Court’s analysis of SC’s Motion to

⁶ On the return date, SJHSRI produced documents bates stamped SJHSRI1 to SJHSRI4606 in response to the First Subpoena, satisfying SC’s request for partial compliance.

Compel which omits SJHSRI advising SC of its efforts to comply), in SJHSRI's November 8, 2017 letter to SC, it detailed SJHSRI's production efforts, explaining dates, communications with Prospect, retention of a vendor to scan documents, and communicating with entities as to possible responsive documents. See Exhibit 4. In the letter, SJHSRI asked SC to agree to a protective order so that SJHSRI could produce documents without first reviewing them, a proposal aimed to expedite production. See Exhibit 4. SC, without explanation, did not respond to the request for an agreed protective order. Moreover, despite three (3) additional requests by SJHSRI to SC for a protective order, SC still refuses to agree to a protective order.

On November 8, 2017, the First Subpoena's return date, SJHSRI timely responded, producing documents bates stamped SJHSRI1 to SJHSRI4606. Just one day later, on November 9, 2017, SJHSRI served its First Supplemental Response to the First Subpoena, producing additional documents bates stamped SJHSRI4607 to SJHSRI4726. By email on November 21, 2017, SJHSRI provided to SC a summary of the Cy Pres transfers, and once again advised of the progress of scanning SJHSRI's corporate records and again asked SC to agree to a protective order which would serve to expedite production. See Exhibit 5. As before, SC did not respond to the request for a protective order. On December 12, SJHSRI served its Second Supplemental Response to the First Subpoena, producing documents bates stamped SJHSRI4727 to SJHSRI4746.

The Court should note that SC has even gone so far as demanding that SJHSRI produce documents that were previously produced by SJHSRI to SC and already in his possession. See Exhibit 5.⁷ In response, SJHSRI identified a produced document which satisfied SC's demand for

⁷ This fact is not surprising, given that SJHSRI admitted in open court on December 18, 2017 to not reviewing the more than 4,700 pages of documents already produced by SJHSRI.

information regarding the Cy Pres transfers. See Exhibit 5.⁸ By letter on November 28, 2017, SJHSRI again apprised SC of the status of the First Subpoena response and confirmed SC's agreement to a rolling production of documents. See Exhibit 6.⁹

As the Court may be aware, SJHSRI only had access to records owned by Prospect (that might potentially be responsive to the First Subpoena) for a short period. That access ended abruptly when SC served Prospect with a subpoena seeking the same exact records it sought from SJHSRI.¹⁰ When SJHSRI was permitted access, SJHSRI identified 34 boxes of potentially responsive documents owned by Prospect ("Prospect Records"). Because SJHSRI's access was terminated when Prospect was served with SC's subpoena, SC must pursue the Prospect Records from Prospect.

In a series of emails and phone calls starting on December 19, 2017, SC demanded that the undersigned ("Counsel") call him before 2:00 pm, Wednesday, December 20, 2017.¹¹ Counsel did so. Counsel began the phone call by asking SC to permit him to address both subpoenas. SC refused. SC insisted on discussing only the Compliance Subpoena and was careful not to mention

⁸ It is quite problematic that SC accuses SJHSRI of delay and bad faith when SC has not even reviewed the documents produced to SC.

⁹ The fact that SC agreed to a rolling production, but then filed a Motion to Compel (after only providing notice of the motion to compel on the Compliance Subpoena) cannot be ignored.

¹⁰ SJHSRI was provided access to records purchased by Prospect as part of the 2014 transaction pursuant to the Asset Purchase Agreement, subject to a reservation of Prospect's rights and privileges.

¹¹ It is unclear why SC created an artificial deadline of 2:00pm.

or notify Counsel that SC's motion would concern both subpoenas.¹² SC then demanded that Counsel commit to a date certain as to production of documents in response to the Compliance Subpoena and unless he did, SC would file his motion. SC said that he had long been working on his motion and was prepared to file it immediately following the 2:00pm phone call.¹³ Counsel could not so commit for good reason and so told SC. SC then promptly filed his Motion.

In addition to the December 20, 2017 phone call, the Court should be aware of several additional facts that, with respect, must permeate the Court's consideration of SC's Motion to Compel. First, SC admitted in Court at the hearing on December 18, 2017, that he had not reviewed the more than 4700 pages of documents SJHSRI had already produced. Second, as herein set forth, SJHSRI has attempted to work cooperatively with SC only to be met with meritless accusations repeatedly hurled at it by SC.¹⁴ SC has not provided any basis for his allegations of bad faith, other than conclusive statements or rhetorical questions. See generally Motion to Compel. Merely accusing SJHSRI of bad faith does not make it so. Third, during the previously identified telephone call between SC and Counsel, SC said that he needed the documents identified in the second subpoena so that he could report to the Court as to a reduction in pension benefits. This was both a very surprising and concrete representation by SC given that he previously

¹² SC's refusal to discuss the First Subpoena is just another example of SC's unwillingness to work cooperatively with SJHSRI. While each action of SC and the other subpoenaed parties stand on their own, the Court may note the overly litigious patterns in this case with SC at the center. More than troubling, the refusal to even discuss discovery issues is a violation of Super. R. Civ. P. 37 (hereinafter the Superior Court Rules of Civil procedure referred to as "Rule"), and the lack of Rule 37 certification of a good faith discussion in SC's Motion to Compel is evident. How could SC claim that he discussed the First Subpoena in good faith when he blatantly refused to discuss it with Counsel on the December 20, 2017 phone call.

¹³ It appears unlikely that SC ever intended to genuinely discuss SJHSRI's response to the Compliance Subpoena when SC had a motion to compel ready to be filed before the discussion even started.

¹⁴ It does not seem to be a coincidence that the accusations lodged against SJHSRI are almost identical to the accusations hurled at virtually all other parties SC subpoenaed.

represented in his November 8, 2017 letter to SJHSRI that his duty was to “to investigate potential liability or obligation of any persons or entities to pay damages or funds to the Plan.” See **Exhibit 7**. Paragraph 8 of the Court’s October 27, 2017 Order neither authorizes nor vests power in SC to undertake an investigation as to any “reduction in pension benefits.”¹⁵

Lastly, if SC had permitted Counsel to address both subpoenas, Counsel would have told SC during the December 20, 2017 telephone call (as Counsel told the Court on December 21, 2017) and has since told SC, that SJHSRI is willing to produce all of SJHSRI’s corporate records without first reviewing them, subject to a protective order. Additionally, SJHSRI has advised SC that SJHSRI intends to produce the Prospect Documents to which it may be granted access by Prospect without a review, subject to a protective order. Interested parties may object to such production, but SJHSRI stands ready to so produce the Prospect Documents to which it is granted access.

SJHSRI asks only that SC agree to (or the Court enter) a protective order substantially in the form attached as **Exhibit 8**, which *inter alia* preserves the confidentiality of produced documents and preserves SJHSRI’s objections and privileges as to such documents. SJHSRI would then review the produced documents within 20 days and designate confidential and/or privileged documents in writing to SC. Where appropriate, SC could then challenge the designations. This proposed procedure best ensures prompt production of the records and does not in any way harm

¹⁵ It is troubling that SC has unilaterally expanded the scope of his engagement, apparently usurping the duties of the Receiver in this case. See *e.g.* SC’s Memorandum in Support of his Objections to the Attorney General’s “Emergency Motion,” at p. 1 (“Special Counsel is diligently attempting to quickly investigate the facts to shape a litigation strategy to provide a source of funds from [sic] the more than 2,100 retired and soon-to-be retired nurses of St Joseph Hospital and Our Lady of Fatima Hospital, while at the same time hoping to obtain information that will assist the Receiver and the Court on the issue of whether cuts in pension benefits will be required at the hearing in February, a mere two months from now.”)

SC. See Exhibit 8. SC has refused to agree to this very reasonable proposal.

III. ARGUMENT

A. SC CANNOT IGNORE THE RULES OF PROCEDURE BY SUBPOENAING SJHSRI, WHO IS A PARTY IN THIS ACTION, AND MAKING BURDENSOME AND UNREASONABLE DEMANDS

SJHSRI is a party to this proceeding. Accordingly, Rule 34 controls the procedure by which document requests and responses thereto are made, including the 40-day response time mandated by Rule 34. While SC might have sought production of documents via subpoena and deposition under Rule 30(b)(5), he did not.¹⁶ SJHSRI respectfully submits that the Court's September 13, 2017 Order (primarily providing for the issuance of subpoenas by the Receiver) was intended to make clear that the Receiver, and by extension SC, could issue interrogatories, document requests, notices of depositions, and subpoenas to persons or entities other than parties to the Receivership. This should be apparent from the nature of the Order since the Receiver already had the power to issue interrogatories, Rule 34 document requests, and deposition notices to parties to the Receivership proceeding (such as SJHSRI). In the absence of a civil action brought by the Receiver, and no such action has been authorized or exists, non-party individuals or entities might challenge the Receiver's power to issue such discovery to them. The September 13, 2017 Order makes clear that SC does have the power to issue such discovery requests to non-parties.

Furthermore, notwithstanding the procedural defect, and consistent with SJHSRI's efforts at cooperation, SJHSRI did timely respond to both subpoenas. See Section III.B., *infra*. Setting aside that almost every request in the First Subpoena is an "any and all documents" request without

¹⁶ Even if SC had followed procedural rules (which SC did not), that method would have elicited the same response from SJHSRI, that a protective order was not only necessary to protect privileged documents but also was the most expeditious method pursuant to which documents could be furnished to SC. The fact that SC refused SJHSRI's many requests for an agreed protective order cannot be overlooked.

a time limit, and many of the requested documents were either in the Receiver's possession, custody, or control or easily accessible by the Receiver, SJHSRI produced documents bates stamped SJHSRI1 to SJHSRI4606 on the return date. Furthermore, SJHSRI served its response to the Compliance Subpoena on SC on the return date. Just because SC does not care for the response does not make them untimely.

B. SJHSRI'S RESPONSES AND OBJECTIONS ARE TIMELY

As the Court record reflects, the First Subpoena, served October 19, 2017, had a response date of November 8, 2017, leaving SJHSRI to respond within only 20 days. This manufactured time frame is not the 40 days mandated by Rule 34. Nevertheless, SJHSRI timely responded on November 8, 2017, produced documents, and timely set forth its valid objections.

The same scenario occurred with the Compliance Subpoena served December 4, 2017. The Compliance Subpoena demanded a response on December 15, 2017, a time period of 11 days. Again, SC's manufactured time frame is a violation of the 40 day response time required by Rule 34. Nevertheless, SJHSRI timely served its response on December 15, 2017. SC's argument, as SJHSRI understands it, is that because SC arbitrarily designated the response time as 11:00 a.m., and SJHSRI's responded on the demanded return date at 11:52 a.m., SJHSRI lost all its privileges/objections.¹⁷ This strained position finds no support in the law and SC cites not one Rhode Island case in support of its dubious argument. Moreover, Rules 34 and 45 speak in terms of days as to a response, not hours. See Super. R. Civ. P. 34 and 45. SC cannot rewrite the Rules to suit his own purposes. SC's argument, if accepted, would lead to unfair results not intended by the Rules. For example, if SC designated 3:00 a.m. as the time to respond, would a response at

¹⁷ It should be noted that SJHSRI served its response on SC at 11:52am. Further, it should be noted that none of the purported legal support for SC's argument is controlling in Rhode Island. See Motion to Compel, p. 10.

3:01 a.m. be untimely, resulting in a waiver of all privileges/objections? Such a result is absurd.

SC cannot circumvent the procedural rules. The 40-day response time of Rule 34 is controlling absent a notice of deposition and subpoena to a party. As explained by Professor Kent:

A subpoena normally is not an appropriate mechanism for seeking documents or tangible things from a party during the discovery process and prior to trial. Rule 45 is not designed to circumvent the normal procedures and deadlines for seeking discovery from parties pursuant to Rule 34.

1 Kent, Rhode Island Civil and Appellate Procedure, § 45:3, p. V1-45 (emphasis added, footnote omitted). The language of Rule 34(b), as amended, and the Committee's Notes to that section, make clear that only a written response is required within the proper time due date, and not the actual production of documents. Rule 34(b) provides:

The party upon whom the request is served shall serve a written response within forty (40) days after the service of the request... The Court may allow a shorter or longer time. The response shall state with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in which event the reasons for objection shall be stated.

Super. Ct. R. Civ. P. 34. The Committee's Notes explain that:

The amended subdivision (b) sharpens the procedure with respect to compliance by requiring that the responding party serve a written response within 40 days after service of the request... The response shall state that inspection will be permitted as requested unless it states an objection with the reasons therefore.

Super. Ct. R. Civ. P. 34. Moreover, as Professor Kent emphasized, SC was obligated "to take reasonable steps to avoid imposing undue burden or expense on the persons served with the subpoena." Upon SC's failure to do so, as is the situation here, the Court is authorized to impose sanctions on SC. Id. at § 45:5, p. v1-47. In view of the massive number of documents at issue, of which SC was and is aware, SC failed to take those necessary reasonable steps, thereby unduly

burdening SJHSRI.¹⁸

Rule 34, here controlling, only required that a written response to a document request be served within 40 days, not that documents be produced at that time. See Id. Importantly, demonstrating SJHSRI's good faith, SJHSRI responded to both Subpoenas within the shortened time frame demanded by SC and also produced documents along with its response to the First Subpoena.

C. SJHSRI'S OBJECTIONS ARE SUFFICIENTLY CLEAR AND CERTAIN

There are tens of thousands of documents potentially responsive to SC's First Subpoena. SC demanded that SJHSRI respond within a very truncated and improper time period. It is patently unreasonable to have expected SJHSRI to review the vast number of documents potentially responsive to the First Subpoena within the short time period. Nevertheless, SJHSRI did respond within that time period. SJHSRI undertook a considerable effort to respond (and continues to do so), but understandably had to raise legitimate and universally recognized objections,¹⁹ such as attorney-client privilege and the doctrines of work product and common interest. See Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island, CA No. 13-405S (D.R.I. Aug. 4, 2016); appeal dismissed Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island, 2017 WL 87022 (D.R.I. Jan. 1, 2017).²⁰

¹⁸ SJHSRI is not requesting sanctions because it recognizes that doing so would (i) be a distraction from the purpose of the receivership, (ii) be extremely costly and time consuming, (iii) have no benefit to the pensioners. As the Court is aware, SJHSRI has thus far paid for all of SC's pleadings and hearings in this case through an advance of \$650,000 requested by SC and the Receiver; an advance required for payment of, among other things, SC's fees and expenses.

¹⁹ While SC condemns SJHSRI for raising general objections (which were incorporated in each response and not only made generally at the beginning of the response), SC omits that SJHSRI's response to the First Subpoena was served well before the Court instructed the Diocese not to do so.

²⁰ For the Court's convenience, a copy of both decisions are attached at **Exhibit 9**.

SJHSRI has and will continue to act to provide responsive documents while identifying those withheld and the reason(s) why they are being withheld. Of course, if SC would agree to SJHSRI's proposal as to production, the Court's time and energy would not be wasted addressing SC's Motion. SJHSRI's proposal would work to have the documents in SC's hands on a reasonable schedule and would not in any way prejudice or harm SC (particularly because SC has admitted he has not reviewed the documents SJHSRI already produced).

D. SJHSRI'S OBJECTIONS TO THE COMPLIANCE SUBPOENA ARE PROPER AND VALID

In the Compliance Subpoena, SC demands production of documents: (a) "relating to [SJHSRI's] communications with Prospect RWH, CharterCare....relating to subpoenas or compliance with subpoenas;" (b) "relating to SJHSRI's efforts to comply with subpoenas;" and (c) "relating to Prospect's efforts to comply with subpoenas...." See Compliance Subpoena, Requests 1(a)-(c). This is an improper demand inquiring into the activities/work product of counsel for SJHSRI in acting on behalf of and defending its client and preparing for possible litigation. It also violates the tenets of the common interest doctrine, which common interest may be shared by, among others, SJHSRI and Prospect. See Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island, CA No. 13-405S (D.R.I. Aug. 4, 2016) appeal dismissed Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island, 2017 WL 87022 (D.R.I. Jan. 1, 2017). Further, SJHSRI is contractually obligated by the joint defense agreement dated September 1, 2013, to not disclose certain materials created by or shared among the common defense group that are parties to the agreement.²¹

Steward Health Care is a salient example of the applicability of the common interest

²¹ If the Court wishes, SJHSRI will provide under seal the joint defense agreement for review, but because the agreement is confidential, SJHSRI cannot publicly disclose it.

doctrine in a proceeding such as this. See Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island, CA No. 13-405S (D.R.I. Aug. 4, 2016) appeal dismissed Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island, 2017 WL 87022 (D.R.I. Jan. 1, 2017). Steward Health Care involved the acquisition of a health care organization (Landmark) by Steward Health from a court-appointed special master. Id. Like the Compliance Subpoena in this proceeding, Blue Cross-Blue Shield (“BCBS”) sought communications among Steward Health (buyer), its predecessor, Caritas Christi, Landmark (selling entity) and the Special Master (court-appointed seller). Id. Magistrate Judge Almond denied BCBS’s motion to compel production of documents, explaining that the “common interest doctrine prevents clients from waiving the attorney-client privilege when attorney-client communications are shared with a third person who has a common legal interest with respect to these communications, for instance, a co-defendant.” Id. The purpose of the common interest doctrine is to “permit allied lawyers and clients –who are working together in prosecuting or defending a lawsuit or in certain other legal transactions – [t]o exchange information among themselves without the loss of privilege.” Id. (bracket in original). Magistrate Judge Almond’s denial of the motion to compel production of documents was upheld on appeal by Chief Judge Smith.

Here, SJHSRI is the selling party, Prospect was the buyer, and there are other parties who were interested in the transaction, including the Attorney General and the Diocese. SC has already accused the various entities of wrongdoing (shockingly before his investigation has been completed), thus demonstrating that applicability of the doctrine. See e.g. SC’s Memorandum in Support of his Objections to the Attorney General’s “Emergency Motion,” at p. 1 (“Special Counsel is diligently attempting to quickly investigate the facts to shape a litigation strategy to provide a source of funds from [sic] the more than 2,100 retired and soon-to-be retired nurses of St Joseph

Hospital and Our Lady of Fatima Hospital, while at the same time hoping to obtain information that will assist the Receiver and the Court on the issue of whether cuts in pension benefits will be required at the hearing in February, a mere two months from now.”). Like the parties in Stewart Health Care, the parties involved in the transaction at issue here may share a common legal interest that they are entitled by law to protect. How SJHSRI’s Counsel is defending his client and/or working with others in doing so, is not the proper subject of inquiry.

As to the work product doctrine, the Court does not need a lengthy dissertation of that doctrine and its importance to know that the Compliance Subpoena runs afoul of that doctrine and seeks documents and or communications that come within the work product doctrine’s long-standing protections.

To be clear, SJHSRI is not seeking to stand in the way of SC’s investigation (assuming arguendo that such investigation is properly conducted and within authority validly granted by the Court). However, in seeking to work with SC in a cooperative manner, SJSHRI likewise must be cognizant of the interests of other parties with whom it has contractual relationships and to whom it may owe duties. These issues have become more significant and pressing in this matter due to SC’s unwillingness to work with SJHSRI in a cooperative manner and his reckless accusations of impropriety hurled at SJHSRI.

E. SC FAILED TO MEET HIS BURDEN AS TO THE IMPOSITION OF SANCTIONS

Our Supreme Court has emphasized that sanctions of the type sought by SC against SJHSRI may only be granted when the moving party clearly proves that the party upon whom sanctions are to be imposed has acted in an outrageous fashion or in bad faith. Senn v. Surgidev Corp, 641 A.2d 1311, 1320 (R.I. 1994) (reversing trial court’s sanction order for abuse of discretion). SC’s conclusory, baseless accusations, no matter how many times repeated, do not

satisfy the heavy evidentiary burden imposed upon SC to prove by competent evidence that SJHSRI has engaged in outrageous or bad faith conduct, which it has not.

IV. CONCLUSION

SJHSRI has timely responded to both subpoenas, produced more than 4,700 pages of documents, and has kept SC apprised of where documents have been gathered, how the collection and scanning process has been proceeding, and when SC should expect additional productions. SJHSRI is fully aware of the Court's sensitivity to the nature and subject of the investigation in this case and has attempted, without success, to work cooperatively with SC. SJHSRI stands ready to produce approximately 37,000 thousand more pages of documents (45 boxes of SJHSRI materials) without prior review but subject to a protective order. SJHSRI is also ready to produce thousands more documents (34 boxes of Prospect's Records) if SJHSRI were granted access, subject to a protective order. It is SC who has created the roadblock, yet he now comes to the Court asking for relief.

For the reasons set forth above, including that (1) SC failed to follow procedure rules, (2) SJHSRI nevertheless timely responded and asserted objections to the subpoenas, and (3) SC failed to meet its burden of proving sanctions should be imposed, SC's motion should be denied. Furthermore, because SC has been recalcitrant and unwilling to agree to a reasonable protective order (as is agreed to in countless civil actions), SC should be compelled by the Court to agree to a protective order substantially in the form attached as **Exhibit 8**.

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2017, I caused to be served a true copy of the within document through the Rhode Island Judiciary's Electronic Filing System on all parties designated for electronic service on the electronic filing system. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System. Additionally, this document was served on the following by electronic mail.

/s/ George E. Lieberman

Max Wistow, Esq.
Wistow, Sheehan & Loveley, PC
61 Weybosset Street
Providence, RI 02903
mwistow@wistbar.com

EXHIBIT 1

From: [Richard Land](#)
To: [Benjamin Ledsham](#)
Cc: [Max Wistow](#); [Stephen P. Sheehan](#); [Steve DeSesto](#); [Andre Digou](#); [David Hirsch](#)
Subject: Re: SJHSRI
Date: Thursday, November 02, 2017 4:39:27 PM

Ben -

Thanks for forwarding this. I have not had a chance to review and will not likely do so until Monday.

As I have discussed with Max on several occasions, it is likely that we will need additional time to comply with the subpoena, particularly in light of the broad scope and very short time frame for compliance. As I have indicated many times, my client wants to work cooperatively with the Receiver and in that regard, we do not intend to object to the subpoena or otherwise seek to limit the scope of the requests other than through discussion and agreement with Max. However, in light of your email, I would ask that you likewise confirm that no formal objection is required of us and that you share our view of the cooperative approach we are all taking to the timing and scope of our response to the subpoena.

Best regards,

Rick

Richard J. Land
Chace Ruttenberg & Freedman, LLP
One Park Row
Suite 300
Providence, RI 02903
(401) 453-6400
rland@crflp.com
Sent from my iPad

On Nov 2, 2017, at 4:05 PM, Benjamin Ledsham <bledsham@wistbar.com> wrote:

Rick,

We received the Attorney General's filing today (attached). We expect compliance with the subpoena, absent relief granted by the court.

We also direct your attention to paragraph 6 of the Order Appointing Permanent Receiver (attached), which requires such documents to be produced.

Best regards,

Benjamin

Benjamin Ledsham, Esq.
Wistow, Sheehan & Loveley, PC

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 12/31/2017 2:53:11 PM
Envelope: 1349604
Reviewer: Lynn G.

61 Weybosset Street
Providence, RI 02903
ph. (401) 831-2700
fax (401) 272-9752
bledsham@wistbar.com

<2017.11.2 Attorney General's Response to Subpoena.pdf>

<2017-10-27 Order appointing permanent receiver.pdf>

EXHIBIT 2

WISTOW, SHEEHAN & LOVELEY, PC

ATTORNEYS AT LAW
61 WEYBOSSET STREET
PROVIDENCE, RHODE ISLAND 02903

TELEPHONE
401-831-2700

FAX
401-272-0752

E-MAIL
MAIL@WISTBAR.COM

MAX WISTOW
STEPHEN P. SHEEHAN
A. PETER LOVELEY
MICHAEL J. STEVENSON
BENJAMIN G. LEDSHAM

November 6, 2017

VIA ELECTRONIC MAIL

Richard J. Land, Esq.
Chace Ruttenberg & Freedman, LLP
One Park Row, Suite 300
Providence, RI 02903

Re: *St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, as amended*, Rhode Island Superior Court, C.A. No. PC 17-3856

Dear Rick:

This is in response to your e-mail of November 2, 2017 to Benjamin Ledsham.

Of course, we intend to cooperate with you in terms of timing of compliance. Nevertheless, I would point out the following:

- a) You are already in arrears on your promise of giving us:
 - (1) the accounting of the application of the assets subject to the Cy-Pres. This was promised to us without regard to the subpoena. Because insuring the property distribution of these assets was your responsibility from at least early 2015, we must insist you tell us when you intend to comply; and
 - (2) an itemization of assets currently in the hands of SJHSRI.
- (b) We expect at least partial compliance with the subpoena by November 8, 2017, i.e. the date of its return.
- (c) As to additional time that you may need, tell us what items require such and an estimate of when we can get full compliance as to each such item.

Richard J. Land, Esq
November 6, 2017

I want to extend you every courtesy, but I need to remind you that there are over 2,700 people being adversely affected by the pension shortfall (some in potentially life changing ways).

Please, let's try to work this out. But I cannot accept general assurances.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Max Wistow', with a long horizontal stroke extending to the right.

Max Wistow

MW/dls

cc: Stephen F. Del Sesto, Esq.

EXHIBIT 3

Chace Ruttenberg & Freedman, LLP

Attorneys at Law

Robert E. Berkelhammer**
Nathan W. Chace
Douglas J. Emanuel**
Robert D. Fine*
Carl I. Freedman
Macrina G. Hjerpe**
Bret W. Jedele
Drew P. Kaplan
Richard J. Land*
Allan M. Shine*
Don E. Wineberg*

Paul T. Cotter*
LuAnn Cserr**
Andre S. Digou*

Bruce R. Ruttenberg, *retired*

* Also admitted in Massachusetts
** Also admitted in Connecticut
* Also admitted in New York
* Also admitted in Washington, D.C.
* Admitted in California
* Admitted U.S. Patent & Trademark Office

November 7, 2017

Max Wistow, Esq.
Wistow, Sheehan & Lovely, P.C.
61 Weybosett Street
Providence, RI 02903

Re: St. Joseph Health Services of Rhode Island ("SJHSRI") Response to Subpoena

Dear Max:

I received your letter dated November 6, 2017. As you are aware, SJHSRI desires to work cooperatively with the Receiver and to respond to the 61 extensive requests in your subpoena. The time frame for responding to your subpoena was short (as you have acknowledged), and when coupled with broad requests, it is not an insignificant task. We have and will continue to work diligently to respond to the subpoena. We will update you with our progress and provide estimates for delivery of requested documents on an ongoing basis.

As I have informed you, the open and far-reaching nature of many of the requests is making it difficult for SJHSRI to reply in a meaningful way. In that respect, we would appreciate you providing more detail, clarifying what entity is involved in the request, and most importantly, providing more specific time references for documents requested. We are working on all of your requests and will continue to do so, but your further explanation and delineation of the following requests at this time would assist SJHSRI in responding to the subpoena:

- Requests 1-5, 7-18, 20-24, 27-29, 35 and 41-43 lack any time limitations. The entities involved were founded in 1898 and have merged or continued in some iteration since. Kindly identify a reasonable time period.

CR & F

- Please clarify what is meant by “any plan documents” in request 2.
- Please identify whose communications you are requesting in requests 14-17.
- Please identify whose contracts are being requested in request 18.
- Please identify whose applications or submissions are requested in request 29.
- Please clarify what is meant by “all other documents” in request 31.
- Please clarify what is meant by “all other documents” in request 33.
- Please clarify what is meant by “all documents relating to the assets of SJHSRI” in request 37 and 38.

Are you requesting warranties, vendor contracts, maintenance records, repair records, and the like? Or are you just seeking financial records? If you are just seeking financial records, would a year-end balance sheet suffice initially?

- With respect to request 43, we presume you are seeking document retention policies for SJHSRI, CharterCare, and RWH. Please confirm.

We appreciate your willingness to work with us. Clarification on these matters and continued cooperative efforts will facilitate SJHSRI's ability to provide meaningful responses to this significant discovery request.

As an aside, I am confused by your suggestion, both in our call and in your letter, that we are “in arrears in terms of compliance.” While I recall discussing these items, I do not recall a specific time period attached to your prior informal request, although there is certainly no intention to delay. I previously spoke with the Receiver regarding these requests, which notably, are also included in your subpoena. Perhaps my communications with the Receiver were not conveyed to you. In any event, we are working on the information regarding the cy pres petition and expect to provide you such information along with asset information in the next few days.

Finally, neither I nor the SJHSRI Board needs to be reminded that there are over 2700 pensioners affected by the financial condition of the pension. SJHSRI's Board sought the appointment of a receiver to protect their interests.

Sincerely,



Richard Land

cc: Stephen Del Sesto, Esq.
David Hirsch

CR & F

EXHIBIT 4

Robert B. Berkelhammer*[†]
Nathan W. Chace
Douglas J. Emanuel*[◊]
Robert D. Fine*
Carl I. Freedman
Macrina G. Hjerpe*[‡]
Bret W. Jedele
Drew P. Kaplan
Richard J. Land*
Allan M. Shine*
Don E. Wineberg*

LuAnn Cserr*[◊]
Andre S. Digou*
Jared R. Sugerman*

Bruce R. Ruttenberg, *retired*

* Also admitted in Massachusetts
[†] Also admitted in Connecticut
[◊] Also admitted in New York
[‡] Also admitted in Washington, D.C.
[‡] Admitted in California
[◊] Admitted U.S. Patent & Trademark Office

November 8, 2017

Max Wistow, Esq.
Wistow, Sheehan & Lovely, P.C.
61 Weybosett Street
Providence, RI 02903

Re: St. Joseph Health Services of Rhode Island ("SJHSRI") Response to
Subpoena

Dear Max:

Enclosed is SJHSRI's response to your subpoena and a USB flash drive containing responsive documents. The documents are bates stamped SJHSRI1 to SJHSRI4606.

As you know, SJHSRI is still in the process of compiling and preparing for production documents responsive to the 61 extensive requests contained in your subpoena. You will see that we have included standard objections based upon the fact that many of the requests are unlimited in time, lack specificity, create an undue burden on SJHSRI, or are otherwise objectionable. You should not interpret such objections, however, as an indication of any lack of cooperation on the part of SJHSRI, RWH or CharterCare Community Board. To the contrary, our clients intend to continue to work with you in good faith. As you and I have discussed, we will continue our efforts to obtain responsive documents and discuss the scope of documents being requested on an on-going basis so that we can be reasonably comprehensive.

CR & F

You had asked that we provide some detail regarding our efforts to respond to the subpoena. In that regard, SJHSRI received the subpoena on October 19, 2017 with a return date of November, 8, 2017. On October 24, 2017, SJHSRI's counsel held a meeting with Moshe Berman, Esq., Addy Kane, and Dan Ison of Prospect CharterCare to identify the location, potential custodians, format and magnitude of potentially responsive documents. SJHSRI's counsel conducted a visual review of the records identified as potentially responsive to your requests and, on October 27, 2017, SJHSRI engaged a vendor to assist SJHSRI in scanning, bates stamping and producing responsive documents. Within the last couple of days, additional document storage which may contain documents responsive to your requests has been identified. It is likely that there may be tens of thousands of pages of documents to be scanned and compiled into the searchable database for your review. Finally, SJHSRI has reached out to Bank of America and other parties to obtain documents potentially responsive to the requests, and has provided correspondence files to its technology vendor to obtain a searchable database to identify additional responsive documents.

On November 2, 2017, SJHSRI's vendor retrieved a vehicle full of records (boxed, binders and loose) that are currently being processed, bates stamped and prepared for review and production. SJHSRI is advised that the first retrieval is anticipated to be fully processed in approximately two weeks. SJHSRI's vendor is scheduled to retrieve additional records on November 9, 2017, which should be fully processed within 30 days. Although these first two retrievals will result in considerable document disclosure, it is quite possible that as we go forward, additional documents are discovered that are potentially responsive to the requests. Should that occur, we would intend to inform you thereof, including a projected date for delivery of the records in electronic form.

In SJHSRI's effort to work with you and to expedite your review of the documents, SJHSRI proposes to produce the documents to you without first engaging in a privilege and confidentiality review. Under these circumstances, we believe it is prudent to request that you agree to a protective order providing that (1) privileged documents, (2) confidential documents, and (3) personally identifiable information not be disclosed absent SJHSRI's written permission or an order of the Court. Alternatively, SJHSRI would need to conduct a privilege and confidential review prior to production, which would take considerable additional time due to the large scope of the requests.

Finally, as you and I have discussed (and as indicated above), we intend to supplement this response on a rolling basis as we identify responsive documents.

Please contact me with any questions.

Sincerely,

A handwritten signature in blue ink that reads "Richard J. Land / ASD". The signature is written in a cursive style.

Richard J. Land

Enclosure

EXHIBIT 5

From: [Richard Land](#)
To: [Max Wistow](#)
Cc: [Benjamin Ledsham](#); [Andre Digou](#)
Subject: Subpoena Response
Date: Tuesday, November 21, 2017 4:36:42 PM
Attachments: [Binder35.pdf](#)

Max –

Attached is the summary of the Cy Pres transfers as we discussed. These materials were delivered with the First Supplemental Response on or about November 10, 2017. I believe that there was an email cover letter that went along with this, but I have not yet located that – I will forward it if/when it is located.

In terms of further supplemental responses, as I noted, we expect scanning of the first set of documents to be completed early next week (approx. 20 boxes). This timing is consistent with what we advised you in our November 8, 2017 letter. In that letter, we requested that you agree to a protective order so that we can expedite/limit our review of the documents before delivering them to you for your review. Kindly let me know if you would be agreeable to a reasonable protective order.

Approximately 60 additional boxes of documents were delivered for scanning. I will provide further information regarding timing and availability of those documents as soon as possible.

Finally, we are continuing our efforts to review potentially-responsive materials and intend to supplement our responses as and when appropriate.

Best regards,

Rick

Richard J. Land
Chace Ruttenberg & Freedman, LLP
One Park Row, Suite 300
Providence, RI 02903
(401) 453-6400
(401) 453-6411 (Facsimile)
Rland@crflp.com

The information contained in this e-mail message and in any accompanying documents constitutes confidential and/or privileged information that belongs to Chace Ruttenberg & Freedman, LLP. This information is intended only for the use of the individual or entity to whom it is directed. If you are not the intended recipient of this information, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on this information is strictly prohibited. If you have received this e-mail message in error, please

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 12/31/2017 2:53:11 PM
Envelope: 1349604
Reviewer: Lynn G.

immediately notify us by telephone at (401) 453-6400 and permanently delete this message from your computer. Thank you.

EXHIBIT 6

Robert B. Berkelhammer**
Nathan W. Chace
Douglas J. Emanuel*^o
Robert D. Fine*
Carl I. Freedman
Macrina G. Hjerpe**
Bret W. Jedele
Drew P. Kaplan
Richard J. Land*
Allan M. Shine*
Don E. Wineberg*

LuAnn Cserr*^o
Andre S. Digou*
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Bruce R. Ruttenberg, *retired*

* Also admitted in Massachusetts
† Also admitted in Connecticut
^o Also admitted in New York
* Also admitted in Washington, D.C.
* Admitted in California
^o Admitted U.S. Patent & Trademark Office

November 28, 2017

Max Wistow, Esq.
Wistow, Sheehan & Lovely, P.C.
61 Weybosett Street
Providence, RI 02903

Re: St. Joseph Health Services of Rhode Island ("SJHSRI")

Dear Max:

Below is in follow up to our phone conversation yesterday when you requested (1) a status update on SJHSRI's response to the subpoena, and (2) to know SJHSRI's position regarding the Attorney General's objection to the motion to compel response to the subpoena.

SJHSRI continues to collect, review and process potentially responsive documents. SJHSRI has requested access to documents owned by Prospect that may be responsive. Prospect continues to provide access to physical files, subject to Prospect's review of the documents for attorney client privilege, work product or other applicable privilege/objection. With respect to Prospect's electronic data, we have discussed with Prospect collection of electronic data, and while we anticipate some difficulty in retrieving and searching the electronic data due to the broad scope of the subpoena requests, Prospect intends to provide access consistent with SJHSRI's access to physical files subject to Prospect's review of the documents for attorney client privilege, work product or other applicable privilege/objection. We view this process as facilitating a rolling delivery of responsive documents as you previously agreed.

CR & F

As for the Attorney General's objection to your motion to compel response to the subpoena, SJHSRI does not intend to object to the Attorney General producing the confidential exhibits, subject to the attorney client privilege and work product being maintained and protected. We have not reviewed the documents referenced on the Attorney General's exhibit, however a quick reading of the document descriptions suggests that there are only a few items that appear to fall into that category.

Sincerely,



Richard J. Land

EXHIBIT 7

WISTOW, SHEEHAN & LOVELEY, PC

ATTORNEYS AT LAW
61 WEYBOSSET STREET
PROVIDENCE, RHODE ISLAND 02903

TELEPHONE
401-831-2700

FAX
401-272-0752

E-MAIL
MAIL@WISTBAR.COM

MAX WISTOW
STEPHEN P. SHEEHAN
A. PETER LOVELEY
MICHAEL J. STEVENSON
BENJAMIN G. LEDSHAM

November 8, 2017

VIA ELECTRONIC MAIL

Richard J. Land, Esq.
Chace Ruttenberg & Freedman, LLP
One Park Row, Suite 300
Providence, RI 02903

Re: *St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, as amended*, Rhode Island Superior Court, C.A. No. PC 17-3856

Dear Rick:

This is in response to your letter of November 7, 2017.

You have had the subpoena for three weeks. Your associate (Mr. Digou) asked for clarification about two of the requests (#37 and #38) on November 1, 2017, which we provided. You have now waited until after the time for performance and have raised issues that are patent quibbles.

In response to your bulleted points:

- The time limitation is since the inception of the Plan (which paragraph 3 of the Receivership Petition states was in 1965). As you know, I've been appointed to "investigate potential liability or obligation of any persons or entities to pay damages or funds to the Plan (or to assume responsibility for such plan in the future)." Pensioners' claims and those of the Plan may depend on documents dating back to the Plan's inception. (For example, an employee who was 20 years old in 1965 would only be 72 today.) Consequently, all of the requested documents are potentially relevant.
- Plan documents are documents embodying or relating to the Plan.
- Requests ## 14-17 already identify whose communications we are seeking. To the extent you have any documents relating to communications with those persons or entities relating to the referenced subjects (e.g. if you have

Richard J. Land, Esq
November 8, 2017

communications between Bank of America and the Bishop relating to the Plan), we want them.

- Request #18 encompasses contracts, relating to the Plan, between the enumerated entities and anyone.
- Request #29 encompasses anyone's applications or submissions. By way of example, Adler Pollock & Sheehan's letter opinions reference such requests by SJHSRI.
- In request #31, "all other documents" refers to documents relating to that lawsuit, other than those encompassed by request #30.
- In request #33, "all other documents" refers to documents relating to that lawsuit, other than those encompassed by request #32.
- Regarding requests #37 and 38, these are the requests for which you obtained clarification on November 1, 2017, referenced above, which you have apparently disregarded without reading. We think you are being arch (e.g. your reference to warranties). Year-end balance sheets are insufficient, because they are presumably not itemized in any detail.
- Yes, request #43 encompasses document retention policies for SJHSRI, CHARTERCARE, and RWH.

As for the *cy pres* materials, you agreed to provide them the week of October 23, 2017. We agree that request was an informal request, but we do not understand why you have not subsequently provided those *cy pres* materials in response to the subpoena.

Let's not get into a back-and-forth regarding your motives for filing the Petition or the timing thereof.

Frankly, we do not understand why you did not start gathering these types of documents years ago. You have been running the Plan since December 15, 2014 (according to the board resolutions attached to Tim Reilly's letter to you of October 13, 2017). You should have known the Plan was doomed, and should have started gathering such documents to determine whether anyone could have an obligation to pay into the Plan. Especially in light of your decades of receivership practice, you certainly should have known, when you filed the Receivership Petition nearly three months ago, that you would be called upon to turn over such documents to the Receiver upon his appointment.

WISTOW, SHEEHAN & LOVELEY, PC
ATTORNEYS AT LAW

3

Richard J. Land, Esq
November 8, 2017

In any event, the Court ordered you, on October 27, 2017, to turn over such documents. You have not produced one scrap of paper in response to the subpoena or the Court's order. Vague assurances are not sufficient. Compliance with the subpoena and the order is expected and required.

I would like to avoid burdening the Court with motion practice.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Max Wistow', with a long horizontal flourish extending to the right.

Max Wistow

MW/dls

EXHIBIT 8

GIANFRANCESCO & FRIEDEMANN, LLP
Attorneys at Law

ANTHONY J. GIANFRANCESCO, ESQ.*

MERRILL J. FRIEDEMANN, ESQ.*+

GEORGE P. MICROULIS, ESQ.*+

KAYLA S. O'CONNOR, ESQ.*+

*Admitted in Rhode Island, Federal Courts and
First Circuit Court of Appeals

+Admitted in Massachusetts

GEORGE E. LIEBERMAN, ESQ.,*+

Of Counsel

December 21, 2017

Max Wistow, Esq.
Wistow, Sheehan & Lovely, P.C.
61 Weybosett Street
Providence, RI 02903

Re: St. Joseph Health Services of Rhode Island ("SJHSRI")

Dear Max:

This letter is in furtherance of my prior communications and SJHSRI's continuing efforts to work with you as to production of documents.

Is attached protective order acceptable to you.?

Please respond.

Thank you.

Sincerely yours,

/s/GEL

George Lieberman

Enc.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

St. Joseph Health Services of Rhode
Island, Inc.

Vs.

PC 2017-3856

St. Josephs Health Services of Rhode
Island Retirement Plan, as amended

PROTECTIVE ORDER

In the above-captioned case, Stephen Del Sesto, Esq. in his capacity as Receiver of St. Josephs Health Services of Rhode Island Retirement Plan, as amended, Receiver, Max Wistow, Esq. in his capacity as Special Counsel to the Receiver, and St. Josephs Health Services of Rhode Island, having agreed to the entry of a protective order on the terms set forth below, and the Court having reviewed and considered the proposed order, and good cause appearing therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED:

1. **Scope.** This protective order (“Order”) shall apply to any documents produced by SJHSRI in connection with any subpoena issued by Special Counsel to SJHSRI.

2. **Non-Disclosure of Confidential Material.** Except as hereinafter provided under this Order or subsequent Court Order, no Confidential Material may be disclosed to any person except as provided in Paragraph 4 below. “Confidential Material” means any documents that are stamped “SJHSRI-CONFIDENTIAL.”

3. **Permissible Disclosure of Confidential Material.** Notwithstanding Paragraph 2, Confidential Material may be disclosed to (a) the Receiver; (b) Special Counsel; (c) the associates, secretaries, paralegal assistants and employees of the Receiver or Special counsel, to the extent reasonably necessary to render professional services; (d) consultants, experts, or investigators retained for the purpose of assisting such counsel; (e) persons with prior knowledge of the Confidential Material; and (f) court officials (including, without limitation, court reporters and any special master or mediator appointed by the Court). Such Confidential Material may also be disclosed to any additional person as the Court may order. This Order shall apply to and be binding upon any individual or entity to whom Confidential Material is disclosed. Prior to sharing Confidential Material with any person in category (d) above, Special Counsel shall provide that person with a copy of this Order and explain its terms and the Court's determination that anyone viewing Confidential Material is bound by this Order. Prior to being furnished with any Confidential Material, all such persons will read a copy of this Order and shall execute an Acknowledgment in the form of Exhibit 1 hereto, an original of which shall be maintained by Special Counsel.

4. **Declassification.** In the event that Special Counsel seeks to disclose Confidential Material in a manner other than provided in Paragraph 3 above, Special Counsel shall file a motion with the Court seeking a ruling that the document designated as Confidential Material is not or should not be entitled to such status or protection. Such motion may be heard upon no less than fourteen (14) business days'

notice to SJHSRI and to any interested third party. SJHSRI and any interested third party shall have ten (10) business days from the service of such motion by Special Counsel to file an opposition to the motion defending the designation as Confidential Material.

5. **Filing of Confidential Material with the Court.** Confidential Material shall not be filed with the Court except under seal and when required in connection with motions as provided for in Paragraph 4 or other matters pending before the Court for which such materials are relevant. Any pleadings, motions, or other papers filed under seal shall be filed in accordance with the Rhode Island Superior Court Rules of Civil Procedure and any other applicable court rules or standing orders, including but not limited to, Supreme Court Rules, Article X, Rule 8 Non-Public Filings.

6. **Confidential Material at Trial or Other Court Proceeding.** Subject to the Superior Court Rules of Civil Procedure and any other applicable rules and standing orders, Confidential Material may be offered in evidence at trial or other court proceeding, provided that the proponent of the evidence gives notice to counsel for SJHSRI and any interested third party (if known), sufficiently in advance so as to enable them to move the Court for an order that the evidence be received *in camera* or under other conditions to prevent unnecessary disclosures. The Court will then determine whether the proffered evidence should continue to be treated as Confidential Material and, if so, what protection, if any, may be afforded to such information at the trial or other court proceeding.

7. **No Waiver.**

(a) Review of Confidential Material by any persons shall not waive any privileges or objections that could be asserted by any person or entity relating to the Confidential Material.

(b) The inadvertent, unintentional, or *in camera* disclosure of Confidential Material shall not, under any circumstances, be deemed a waiver, in whole or in part, of claims of any privilege or any objection that could be asserted. If SJHSRI inadvertently or unintentionally produces any Confidential Material without marking or designating it as such in accordance with the provisions of this Order, SJHSRI may, promptly on discovery of such production, furnish a substitute copy properly marked, along with written notice to the other persons that such document is deemed confidential and should be treated as such in accordance with the provisions of this Order. Each person receiving such written notice must treat such document as Confidential Material from the date such notice is received.

8. **Inadvertent Production of Privileged Material.** The Receiver, Special Counsel, and SJHSRI shall adhere to the obligations imposed by the Superior Court Rules of Civil Procedure regarding privileged material. However, the inadvertent failure of any of them to designate and/or withhold any document as subject to the attorney-client privilege, the attorney work-product doctrine or any other applicable protection or exemption from discovery will not be deemed to waive a later claim as to its appropriate privileged or protected nature, or to stop the producing person from

designating such document as privileged or protected from discovery at a later date in writing and with particularity.

9. **Survival.** The terms of this Order shall survive the conclusion of this matter. All Confidential Material and all copies of same shall be destroyed within thirty (30) days of the conclusion of this matter with a letter or other written confirmation sent by Special Counsel to SJHSRI and all interested third parties certifying that all Confidential Materials and all copies of same have been destroyed.

10. **Amendment or Modification of Order.** This Order may be amended or modified only by the Court after a hearing and notice to the Receiver, Special Counsel, SJHSRI and any interested third party of not less than fourteen (14) business days.

ORDERED:

ENTERED:

Stern, J.
Dated:

Clerk
Dated:

Agreed to:

/s/ Max Wistow

Max Wistow, Esq.
Wistow, Sheehan & Loveley, PC
61 Weybosset Street
Providence, RI 02903
mwistow@wistbar.com

Dated:

Agreed to:

/s/ George E. Lieberman

George E. Lieberman, Esq. (#3860)
Of Counsel
Gianfrancesco & Friedmann
214 Broadway
Providence, RI 02903
george@gianfrancescolaw.com

Dated:

Agreed to:

/s/ Stephen F. Del Sesto

Stephen F. Del Sesto, Esq.
Pierce Atwood LLP
72 Pine Street, 5th Floor
Providence, RI 02903
sdelsesto@pierceatwood.com

Dated:

CERTIFICATE OF SERVICE

I hereby certify that, on December _____, 2017, I filed and served this document through the electronic filing system. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ _____

EXHIBIT 1

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

St. Joseph Health Services of Rhode
Island, Inc.

Vs.

PC 2017-3856

St. Josephs Health Services of Rhode
Island Retirement Plan, as amended

ACKNOWLEDGEMENT

The undersigned declares and states as follows:

1. I have read the attached Order, dated December __, 2017 (“Order”), understand its contents and hereby agree to comply therewith and to be bound thereby. In addition, I consent to the jurisdiction of the Rhode Island Superior Court for the purposes of enforcement of the Order.

2. I agree to use Confidential Material only for purposes of assisting Special Counsel in this matter, and for no other purpose.

3. I agree to retain all Confidential Material in a secure manner and in accordance with the terms of the Order. I also agree not to make copies of any Confidential Material except in accordance with the Order. I further agree not to communicate Confidential Material to any person or entity not qualified to receive it under the terms of the Order.

4. I agree to promptly certify that I have destroyed all Confidential Material and all copies of the same within thirty (30) days of the conclusion of this matter.

5. I agree to comply with all other provisions of the Order.

6. I acknowledge that failure on my part to comply with the provisions of the Order may be punishable by contempt of court and may render me liable to any Party, person, or entity damaged thereby.

Name: _____
(print or type)

Signature: _____

Dated:

EXHIBIT 9

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

STEWARD HEALTH CARE	:	
SYSTEM, LLC, et al.	:	
	:	
v.	:	C.A. No. 13-405S
	:	
BLUE CROSS AND BLUE	:	
SHIELD OF RHODE ISLAND	:	

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A)) is Defendant’s (“BCBSRI”) Motion to Compel Production from Plaintiffs (“Steward”). (Document No. 111). Steward objects. (Document No. 117). A hearing was held on June 30, 2016.

The Motion presents two issues. First, BCBSRI questions the completeness of Steward’s document production. In response, Steward represents that it has “produced all of the non-privileged responsive documents that were located following a comprehensive (and unchallenged) search, collection, and review.” (Document No. 117 at p. 5). BCBSRI’s argument is based primarily on supposition and provides the Court with no convincing support for relief under Rule 37.

Second, BCBSRI seeks the production of all documents withheld or redacted by Steward on the basis of the “common interest” doctrine. It argues that Steward did not share a common interest with the Special Master simply because they were parties to the Landmark acquisition, and actually had inherently divergent goals regarding the transaction. Steward counters that it has not claimed privilege over its communications with the Special Master simply because they were parties to an acquisition. Rather, Steward contends that it has applied the “common interest” doctrine only as to communications:

(1) among Steward (and its predecessor, Caritas Christi), Landmark, the Special Master, and their respective counsel and agents; (2) during the times when an executed Asset Purchase Agreement (“APA”) was in place (August 27, 2010 through December 7, 2010 and May 26, 2011 through September 27, 2012); and (3) constituting or reflecting consultation with their respective attorneys for legal advice on “particular matters of common interest” with respect to Steward’s acquisition of Landmark.

(Document No. 117 at pp. 17-18).¹

The common interest doctrine is not an independent basis for claiming privilege. It is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third-party. “The common-interest doctrine prevents clients from waiving the attorney-client privilege when attorney-client communications are shared with a third person who has a common legal interest with respect to these communications, for instance, a codefendant.” Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002). The purpose is to permit “allied lawyers and clients – who are working together in prosecuting or defending a lawsuit or in certain other legal transactions – [to] exchange information among themselves without loss of the privilege.” United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997).

BCBSRI contends that parties to an acquisition do not share the requisite common legal interest to avoid waiver of shared privileged communications. It also argues that since Steward and the Special Master had inherently divergent goals, they could not have shared a common legal interest. While it is true that Steward was acting in corporate self-interest and the Special Master was acting in the interest of the creditors and the public, they did share a common legal interest in

¹ Plaintiffs represent that they have not invoked the common interest doctrine to the extent a communication between or among these entities was adversarial. (Document No. 117 at p. 18).

the operation of Landmark and consummation of the acquisition during the periods when the APAs were in place.

Neither side cites any case law dealing with this issue in an analogous factual situation. Steward relies upon case law generally holding that the common interest doctrine is not limited to the litigation context and can also apply in transactional contexts. See, e.g., Teleglobe USA, Inc. v. BCE, Inc., 493 F.3d 345, 364 (3rd Cir. 2007); see also Kaiser Steel Corp. v. Frates, 84 B.R. 202, 205 (Banks. D. Colo. 1988) (upholding the common interest doctrine between a debtor-in-possession and creditors committee due to common interests in maximizing the value of the debtor's estate).

Here, Steward has shown the presence of a shared common legal interest during the periods that the APAs were in effect. In fact, the Special Master and Steward entered into an Agreement for Advisory Services (Document No. 117-43) in which Steward was engaged to “provide the services of an experienced team of healthcare executives along with such management and services described herein until the consummation of the transactions contemplated in the APA.” Steward also agreed to provide a “Consultant, as well as an additional number of [Steward’s] employees as necessary to provide the management and other services described herein.” In addition, the Special Master authorized Steward, “on the Owners’ behalf, to exercise reasonable business judgment in the discharge of its duties hereunder, including oversight, supervision, and effective management of the day-to-day business operations of the Facilities through the Consultant.”² This Agreement reflects an interrelationship and commonality of interest well beyond just being parties to a pending acquisition. While the Agreement does contain a disclaimer of any fiduciary or confidential

² The provision also contained a provision allowing Steward to loan up to \$5,000,000.00 to meet “working capital needs.”

relationship between Steward and the Special Master, it does so in a boilerplate section entitled “Independent Contractors” intended to narrow the potential for liability arising out of the cooperative business relationship created by the Advisory Services Agreement. It does not deal with the issue of sharing privileged communications and cannot reasonably be construed as a clear and unequivocal waiver of the attorney-client privilege by Steward.

Conclusion

For the foregoing reasons, BCBSRI’s Motion to Compel (Document No. 111) is DENIED.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
August 4, 2016

Steward Health Care System LLC v. Blue Cross & Blue Shield..., Slip Copy (2017)

2017 WL 87022

Only the Westlaw citation is currently available.
United States District Court,
D. Rhode Island.

STEWARD HEALTH CARE SYSTEM LLC, et al.,
Plaintiffs,
v.
BLUE CROSS & BLUE SHIELD OF RHODE
ISLAND, Defendant.

C.A. No. 13-405 S

Signed 01/10/2017

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ORDER

[William E. Smith](#), Chief Judge

*1 Before the Court is Defendant's appeal from Magistrate Judge Lincoln D. Almond's August 4th, 2016 Memorandum and Order denying Defendant Blue Cross & Blue Shield of Rhode Island's ("BCBSRI") motion to compel the production of documents from Plaintiff Steward Health Care System LLC ("Steward"). (ECF No. 128.) BCBSRI had sought to compel Steward to produce all of the written communications that Steward withheld on the basis of the common interest doctrine. (Mot. to Compel Produc. from Pl. 1, ECF No. 111.) These written

communications (approximately 3,000 of them) were between Steward and Landmark Medical Center's ("Landmark") Special Master, the Special Master's consultant, and Landmark employees (collectively, the "Special Master Parties"). (Mem. of Law in Supp. of Obj. to Mem. and Order ("Obj.") 1-2, ECF No. 128.) Magistrate Judge Almond concluded that Steward and the Special Master Parties shared "a common legal interest in the operation of Landmark and the consummation of the acquisition during the periods when the [Asset Purchase Agreements] were in place." (Mem. and Order 2-3, ECF No. 126.) Magistrate Judge Almond also concluded that an agreement that enabled Steward to participate in the daily management of Landmark during the acquisition process "reflect[ed] an interrelationship and commonality of interest well beyond just being parties to a pending acquisition." (*Id.* at 3.)

BCBSRI contends that Magistrate Judge Almond's conclusions were clearly wrong because the common interest doctrine cannot serve as a shield against the production of these written communications. (Obj. 9, 11, ECF No. 128.) BCBSRI asserts that, because Steward has not yet produced any communications that reveal its reasons for withdrawing from the acquisition of Landmark, the withheld communications must contain the true reasons for Steward's withdrawal. (*Id.* at 2.) The Court is sympathetic to BCBSRI's frustration, but its role in this appeal is circumscribed by 28 U.S.C. § 636.

A district judge may only reconsider a magistrate judge's pretrial ruling "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a). The Court "must accept both the [magistrate judge's] findings of fact and the conclusions drawn therefrom unless, after scrutinizing the entire record, [it] 'form[s] a strong, unyielding belief that a mistake has been made.'" [Phinney v. Wentworth Douglas Hosp.](#), 199 F.3d 1, 4 (1st Cir. 1999) (quoting [Cumpiano v. Banco Santander P.R.](#), 902 F.2d 148, 152 (1st Cir. 1990)).

"The common-interest doctrine ... is 'not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.'" [Cavallaro v. United States](#), 284 F.3d 236, 250 (1st Cir. 2002) (quoting E.S. Epstein, [The Attorney-Client Privilege and the Work-Product Doctrine](#) 196 (4th ed. 2001)). "The common-interest doctrine prevents clients from waiving the attorney-client privilege when attorney-client communications are shared with a third person who has a common legal interest with respect to

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these communications” Id. “The common-interest doctrine is typically understood to apply ‘[w]hen two or more clients consult or retain an attorney on particular matters of common interest’ ” or when a client or client’s lawyer communicates with another lawyer representing a different party in a matter of common interest. Id. at 249–50 (quoting 3 Weinstein’s Federal Evidence § 503.21[1], [2] (J.M. McLaughlin, ed., 2d ed. 2002)).

*2 After carefully considering the record in this case, there is simply no basis for the Court to conclude that Magistrate Judge Almond clearly erred when he concluded that Steward and the Special Master Parties shared a common legal interest at the time that the written communications that BCBSRI seeks to compel were exchanged. The Court acknowledges the “pivotal role that magistrate judges play in overseeing the conduct of the sort of complex pretrial discovery typified by this case,” Ferring Pharm. Inc. v. Braintree Labs., Inc., 168 F. Supp. 3d 355, 358 (D. Mass. 2016) (quoting Gargiulo v.

Baystate Health Inc., 279 F.R.D. 62, 64 (D. Mass. 2012)), so it may not second-guess the magistrate judge’s pre-trial discovery rulings because a different conclusion could have been drawn. See Harvard Pilgrim Health Care of New England v. Thompson, 318 F. Supp. 2d 1, 6 (D.R.I. 2004).

The Court therefore DISMISSES BCBSRI’s Appeal from Magistrate Judge Almond’s Memorandum and Order denying BCBSRI’s Motion to Compel the production of documents from Steward. (ECF No. 128.)

IT IS SO ORDERED.

All Citations

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