Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 10/6/2020 11:48 PM
Envelope: 2781342
Reviewer: Victoria H

STATE OF RHODE ISLAND PROVIDENCE, SC		SUPERIOR COURT
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	:	
v.	:	C.A. No.: PC-2017-3856
ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, AS AMENDED	:	HEARING DATE: October 9, 2020 at 11:00 a.m.

MEMORANDUM IN SUPPORT OF THE PLAN RECEIVER'S OBJECTION TO THE MOTION OF THE PROSPECT ENTITIES TO HOLD THE PLAN RECEIVER IN CONTEMPT AND FOR ATTORNEYS FEES

October 6, 2019

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Stephen Del Sesto (the "Plan Receiver"), as Plan Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), submits this memorandum in opposition to the Prospect Entities' Motion to Adjudge Stephen Del Sesto, as Plan Receiver, in Contempt and for an Award of Attorneys' Fees.[1] In support of this objection the Plan Receiver submits herewith the Affidavit of Stephen P. Sheehan dated October 6, 2020 ("Sheehan Aff."), the Affidavit of Stephen Del Sesto dated October 6, 2020 ("Del Sesto Aff"), the Affidavit of Thomas Hemmendinger dated October 6, 2020 ("Hemmendinger Aff."), and the documents appended thereto.

I. Summary of argument

The Plan Receiver's actions were entirely consistent with both the plain meaning and the intent of the Order dated November 16, 2018.

The order only requires advance notice in the event of the Plan Receiver "implementing, or directing that CCCB implement," rights that are "derivative" of the rights of CCCB in Prospect Chartercare. The Plan Receiver did not violate this order by opposing the regulatory applications filed by the Prospect Entities. Any member of the public had an absolute statutory right to object to Prospect Entities' regulatory filings, regardless of whether the objector has a financial interest in the transaction. These agencies solicited public comment to the applications of the Prospect Entities and accepted the Plan Receiver's objections solely as public comment. Thus, in filing those objections, the Plan Receiver was exercising his rights as Plan Receiver, his statutory rights to comment along with the general public, and his constitutional rights of free

[1] Including the Prospect Entities' request for injunctive relief.

speech and to petition the government. However, he was not "implementing" any "rights derivative of CCCB's interest."

The Plan Receiver also did not direct the Liquidating Receiver to appoint new directors to Prospect Chartercare. The Prospect Entities' claim that he did is completely unsupported. Indeed, all the evidence is that the Liquidating Receiver properly consulted with, but was never directed by, the Plan Receiver.

The Plan Receiver also did not intervene in the regulatory proceedings. The Rhode Island Attorney General ("RIAG") and the Department of Health ("DOH") expressly refused to allow the Plan Receiver any special status based upon the rights of CCCB in Prospect CharterCARE. Instead, the RIAG and the DOH have accorded the Plan Receiver and the Liquidating Receiver the same rights they have accorded other members of the general public.

Prospect's motion to adjudge the Plan Receiver in contempt improperly interferes with the Plan Receiver's authority and obligation to assert the claims of the Receivership Estate, in violation of the Order appointing him Permanent Receiver. Thus, it is the Prospect Entities and not the Plan Receiver that should be adjudged in contempt. Moreover, the Prospect Entities' motion violates Rule 11 and is both frivolous and intended to stifle lawful dissent, and, therefore, a violation of Rhode Island's Anti-SLAPP statute, R.I. Gen. Laws § 9-33-2. The Plan Receiver is therefore entitled as of right to his attorneys' fees in defending this motion.

In addition, the Court has discretion under R.I. Gen. Laws § 9-33-2 to impose punitive damages. That relief is called for in this case, especially since the Prospect Entities are requesting that the Court compel both the Plan Receiver and the Liquidating

Receiver to withdraw their objections to the Prospect Entities' applications to regulatory agencies. That is an extraordinary violation of the Plan Receiver's obligations to assert the rights of the Receivership Estate, his right to participate in public comment, and his rights of petition and free speech, all in a matter of great public concern. The Plan Receiver requests that the Court award him punitive damages for deposit into the Plan in an amount sufficient to punish the Prospect Entities and make that punishment smart. The Plan Receiver suggests that the Court award at least the sum of five hundred thousand dollars ($500,000).

The Plan Receiver did not violate the Order dated November 16, 2018. However, even if that were assumed, *arguendo*, the Prospect Entities waived any right to rely on the notice provision in the Order dated November 16, 2018 and are guilty of laches and unclean hands.

II. Relevant facts

A. Introduction

The Prospect Entities' motion to adjudge in contempt is based upon a notice provision in the order of the Court dated November 16, 2018, and, first, the Plan Receiver's submissions to the Rhode Island Attorney General and Department of Health in opposition to the Prospect Entities' pending applications to those regulatory bodies, and, second, the Plan Receiver's alleged direction of Thomas Hemmendinger as the Liquidating Receiver for CharterCARE Community Board ("CCCB") in connection with the Liquidating Director's appointment of certain directors of Prospect CharterCARE LLC ("Prospect Chartercare").

The following facts demonstrate that:

1. the Plan Receiver's conduct in the regulatory proceedings did not violate the notice provision in the subject order;

2. the Plan Receiver did not direct the Liquidating Receiver in connection with the appointment of the directors;

3. the Prospect Entities waived any right to rely on the notice provision in the Order dated November 16, 2018 and are guilty of laches and unclean hands if they even had such a right.

The facts that prove ## 1-2 are relatively simple. The facts that prove # 3 are more involved and concern the Prospect Entities' conduct in several different judicial and administrative proceedings.

B. The Order dated November 16, 2020

The Prospect Entities allege that the Plan Receiver violated the notice provision in the Order that the Court entered nearly two years ago, dated November 18, 2018 (the "Order dated November 18, 2018"), in which this Court approved the proposed settlement agreement ("PSA") between the Plan Receiver and the Plan participants, on the one hand, and St. Joseph Health Services of Rhode Island ("SJHSRI"), Roger Williams Hospital ("RWH"), and CCCB.

The Order states as follows:

> The Petition for Settlement Instructions is granted, and the PSA [Proposed Settlement Agreement] may be filed with the Federal Court at an appropriate time for approval. The PSA is approved for purposes of this proceeding, subject to the following two conditions: (1) the Receiver refrains from exercising any rights under the PSA prior to the federal court's determination of whether to approve the PSA; and (2) until such time as the determination in condition 1 is made, then, prior to implementing, or directing that CCCB implement, any rights, whatsoever, in favor of the Receiver (or the Plan) derivative of CCCB's rights in CCF [CharterCARE Foundation] or PCC [Prospect Chartercare], the Receiver

> must provide all parties, including but not limited to the Objectors, with twenty (20) days written notice. All prior Orders remain in full force and effect.

Exhibit A to the Prospect Entities' Motion to Adjudge in Contempt. The Prospect Entities assert that the Plan Receiver violated condition # 2 by allegedly implementing or directing CCCB to implement rights in favor the Plan Receiver that are derivative of CCCB's rights in Prospect Chartercare.

The Court has characterized these two conditions as follows:

> These two conditions are designed to ensure the Objectors have an appropriate opportunity—in an appropriate proceeding—**to contest objectionable terms prior to their implementation by the Receiver**. Further, these conditions strike a balance between allowing the Receiver to proceed with the PSA while protecting the Objectors from any possible prejudice.

St. Joseph Health Services of Rhode Island, Inc. v St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151, at *14 (R.I. Super. Oct. 29, 2018) (emphasis supplied).

C. The 2014 Asset Sale and the Attorney General's approval thereof

Prior to addressing the Prospect Entities' regulatory filings, it is necessary to refer to the Asset Purchase Agreement ("APA") pursuant to which Fatima Hospital and Roger Williams Hospital were sold to Prospect Entities in 2014,[2] and the Amended & Restated Limited Liability Agreement of Prospect CharterCARE LLC (the "LLC Agreement").[3] First, pursuant to the APA and the LLC Agreement, CCCB would own (at least initially[4])

[2] See Sheehan Aff. Exhibit 1 (Asset Purchase Agreement, without exhibits).

[3] See Sheehan Aff. Exhibit 2 (LLC Agreement, without exhibits).

[4] Prospect East's 85% share was based upon the assumption that the Prospect Entities would comply with their obligations to make required contributions of long term and routine capital totaling over

15% of Prospect Chartercare.[5] Second, Prospect East was required to contribute (initially) $50 million in long term capital contributions to Prospect Chartercare over (initially) a four year period ending on June 20, 2018. This obligation was guaranteed by Prospect Medical Holdings, Inc. ("Prospect Medical"). Third, over the same four years, Prospect Chartercare was required to make $10,000,000 in annual investments for routine capital requirements.

The LLC Agreement (and the APA in essentially the same terms) referred to the obligation for long-term capital contributions as follows:

> (b) The Prospect Member [Prospect East] hereby commits to make additional Capital Contributions to the Company [Prospect Chartercare] in an aggregate amount of the Long-Term Capital Commitment, to be made within four (4) years of the date of this Agreement [June 20, 2014] at such times and in such increments as the Board of Directors causes the Manager to request. **With respect to each request for a Capital Contribution from the Prospect Member pursuant to the Long-Term Capital Commitment: (i) such request shall be supported by a return-on-investment calculation or a material needs assessment (in each case, acceptable to both Members); and (ii) the Capital Contributions shall neither reduce CCHP's interest or Units in the Company nor increase the Prospect Member's interest or Units in the Company. Subject to the foregoing, and except as otherwise provided in Sections 4.2(c) and (d) below, the Company shall cause the Long-Term Capital Commitment to be used by the Company or the Company Subsidiaries on (x) the development and implementation of physician engagement strategies, and (y) projects related to facilities and equipment ("Capital Projects").** . . .

Sheehan Aff. Exhibit 2 (LLC Agreement) § 4.2(b) (emphasis supplied).

$90,000,000. If not, the percentage ownership in Prospect Chartercare must be recalculated to reduce Prospect East's share to account for its failure to make these contributions, and to increase CCCB's share. That issue is being litigated in CharterCARE Community Board v. Lee, et al., PC-2019-3654 ("CCCB v. Lee").

[5] See Sheehan Aff. Exhibits 1 (APA) at Section 2.5(b) and 2 (LLC Agreement) § 4.2(b).

Broken down into elements, this provision required the following, with respect to each alleged contribution to the Long-Term Capital Commitment:

a. Each capital contribution had to be made for either "the development and implementation of physician engagement strategies," or "projects related to facilities and equipment;"

b. Each capital contribution had to be preceded by a "return-on-investment calculation or material needs assessment;"

c. Each capital contribution had to be approved by Prospect Chartercare's Board of Directors; and

d. Each capital contribution had to be approved by CCCB's Board of Directors.

Both the Plan Receiver and CCCB (initially and then the Liquidating Receiver on behalf of CCCB) have been endeavoring in CCCB v. Lee for well over two years to determine whether these requirements were met with respect to *any* (much less all) contribution(s) that the Prospect Entities contend qualified as a long-term capital contribution.

On July 21, 2020, the Court in CCCB v. Lee ordered that the Prospect Entities produce several categories of documents, including the following:

> *Category 2.:* DOCUMENTS IDENTIFYING ALL OF THE LONG-TERM CAPITAL CONTRIBUTIONS (AS DEFINED IN LLC AGREEMENT)
>
> *Category 3:* ALL RETURN-ON-INVESTMENT ANALYSES FOR ANY TRANSACTION CLAIMED TO BE A LONG-TERM CAPITAL CONTRIBUTION
>
> *Category 4:* ALL CAPITAL NEEDS ASSESSMENTS FOR ANY TRANSACTION CLAIMED TO BE A LONG-TERM CAPITAL CONTRIBUTION
>
> *Category 5:* ALL DOCUMENTS SHOWING NOTICE TO CCCB OF ##2, 3 OR 4

> *Category 6:* ALL DOCUMENTS SHOWING THAT ##2, 3 OR 4 WERE ACCEPTABLE TO CCCB

Sheehan Aff. Exhibit 36 (Order dated July 21, 2020) at 3.

Prospect purported to comply with this order and produced documents on September 18, 2020. Sheehan Aff. ¶ 2. However, Prospect produced:

- no documents showing a return on investment analysis for any of the alleged long-term capital contributions;
- no documents showing a capital needs assessment for any of the alleged long-term capital contributions;
- no documents showing notice to CCCB of any long-term capital contributions, return-on-investment analyses, or capital needs assessments, for any of the alleged long-term capital contributions; and
- no documents showing that any of the alleged long-term capital contributions, return-on-investment analyses, or capital needs assessments were acceptable to CCCB.

Sheehan Aff. ¶ 2. Prospect did not seek to excuse its failure to produce such documents; it simply failed to do so. Sheehan Aff. ¶ 2. Thus, it is clear no such documents exist, and, therefore, that these requirements were never met with respect to *any* (much less all) expenditures that the Prospect Entities claims as long-term capital contributions.

The Rhode Island Attorney General required that Prospect East and Prospect Medical comply with their obligations for long-term and routine capital,[6] pursuant to his

[6] The Attorney General included the following three conditions in his approval of the 2014 Asset Sale:

> 17. That PMH [Prospect Medicial Holdings, Inc.] guarantee the full amount of Prospect East's financial obligations contained in the Asset Purchase Agreement pursuant to the form of guaranty approved by the Attorney General.
>
> 18. Prospect CharterCARE, LLC shall report annually to the Attorney General on the proposed form submitted to the Attorney General concerning the funding of its routine and non-routine capital commitments under the Asset Purchase Agreement until the long term capital commitment as defined in the Asset Purchase Agreement has been satisfied.

authority under the Hospital Conversions Act ("HCA"). Moreover, the statute applicable to the Prospect Entities' regulatory submissions provides that an applicant's compliance or failure to comply with conditions imposed in connection with a prior regulatory approval must be considered in connection with any subsequent applications by the same entity or entities.[7] Accordingly, the issue of the Prospect Entities compliance with their obligations to CCB will be addressed in the regulatory proceedings commenced by the Prospect Entities.

The Attorney General engaged Affiliated Monitors Inc. ("AMI") to monitor the Prospect Entities' compliance with these and other conditions. Sheehan Aff. ¶ 6, Exhibit 4 (AMI Retainer Agreement dated as of June 6, 2014) at 10-12. To date AMI has been extremely lax in performing its duties. AMI's undertaking to the Department of the Attorney General (as of June 6, 2014) required regular scheduled reports on compliance with the conditions which included, *inter alia*, the payment of Long Term Capital ("LT Capital") of $50,000,000 and Routine Capital contributions of $40,000,000. Sheehan Aff. ¶ 6, Exhibit 4 (AMI Retainer Agreement dated as of June 6, 2014) at 11. A total of at least 10 reports were required from AMI through June 2018 (when the $50 million LTC and $40 million payments should have been completed). Sheehan Aff. ¶ 6, Exhibit 4 (AMI Retainer Agreement dated as of June 6, 2014) at 1. Nevertheless, AMI

> 19. That Prospect provide information on a timely basis requested by the Attorney General to determine its compliance with the Asset Purchase Agreement and the Conditions of this Decision.

Sheehan Aff. ¶ 5, Exhibit 3 (Attorney General Approval dated May 16, 2014) at 53.

[7] See R.I. Gen. Laws § 23-17.14-8(b)(8) ("(b) In reviewing an application for a conversion involving hospitals in which one or more of the transacting parties is a for profit corporation as the acquiror the department shall consider the following criteria: … (8) Whether the acquiror has demonstrated that it has satisfactorily met the terms and conditions of approval for any previous conversion pursuant to an application submitted under § 23-17.14-6.").

submitted what it described as "the first such report" dated as of December 20, 2018. Sheehan Aff. ¶ 7, Exhibit 5 (AMI Report dated December 20, 2018) at 1. Even though all the Capital contributions should have been completed by June 2018, AMI could and did not say this had been accomplished. Sheehan Aff. ¶ 7, Exhibit 5 (AMI Report dated December 20, 2018) at 20-22.

Sometime in May or June of 2020,[8] AMI submitted its "Second Interim Report." Sheehan Aff. ¶ 8, Exhibit 6 (AMI Second Interim Reported "dated" March 30, 2020). In that Second Interim Report, AMI states that is unable to verify many of the items that the Prospect Entities claimed should be included towards their satisfaction of the LT Obligation and Routine Capital Contributions. Sheehan Aff. ¶ 8, Exhibit 6 (AMI Second Interim Reported "dated" March 30, 2020) at 10-20.

AMI's Second Interim Report does purport to confirm that the Prospect Entities had paid a total of $29,743,173.01 in expenditures that the Prospect Entities claimed qualified as LT Contributions. Sheehan Aff. ¶ 8, Exhibit 6 (AMI Second Interim Reported "dated" March 30, 2020) at 25. However, among other problems with that conclusion, AMI did not evaluate whether, in connection with *any* of these expenditures, the Prospect Entities satisfied the obligations under the LLC Agreement to obtain CCCB's prior approval thereof pursuant to a return on investment calculation or a material needs assessment prepared and submitted to CCCB by the Prospect Entities. Sheehan Aff. ¶ 8, Exhibit 6 (AMI Second Interim Reported "dated" March 30, 2020).

[8] Although AMI's Second Interim Report is dated March 30, 2020, the text of the report includes references to events that took place two months later, in May of 2020. Sheehan Aff. Exhibit 6 (AMI Second Interim Report) at 4 n. 3 ("On May 6 and 7, 2020, Prospect sent additional materials to AMI and the Office of the Attorney General; these were not evaluated for the purposes of this report but will be incorporated into the next one."). Moreover, the RIAG did not provide the Plan Receiver with this report until July 2, 2020. Sheehan Aff. ¶ 9.

D. The Plan Receivership

This proceeding was commenced on August 18, 2017 by the filing of a Petition for the Appointment of a Temporary Receiver. Stephen Del Sesto was appointed Temporary Receiver on that same date. Stephen Del Sesto was appointed Permanent Receiver by order dated October 17, 2017. That Order "restrained and enjoined" the "commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession proceeding, both judicial and non-judicial, or any other proceeding, in law, or in equity or under any statute, or otherwise, against the" Plan Receiver without first obtaining the permission of this Court.

E. The applications for change in effective control of Fatima and Roger Williams Hospitals

Although it was many months later before the Plan Receiver learned of it (Sheehan Aff. ¶ 10), on November 18, 2019 the Prospect Entities, represented by SJHSRI's former counsel Adler Pollock & Sheehan PC ("APS"), filed applications for change in effective control ("CEC Applications") with the Center for Health Systems Policy and Regulation of the Rhode Island Department of Health ("DOH"), seeking approval for certain transactions involving Prospect Medical and the ultimate owners of Prospect Medical. These CEC Applications were resubmitted on February 12, 2020. Sheehan Aff. Exhibit 7 (CEC Application) at 1.

Applications for change in effective control of a hospital are public records that must be made available to the public upon request. 216 R.I. Code R. 40-10-4.4.3(D)(4) ("All applications reviewed by the licensing agency and all written materials pertinent to

licensing agency review, including minutes of all Health Services Council meetings, shall be accessible to the public upon request."). The Department of Health is required to provide public notice of the applications. See 216 R.I. Code R. 40-10-4.4.3(D)(1) ("Within ten (10) working days of receipt, in acceptable form, of an application for a license in connection with a change in the owner, operator or lessee of an existing hospital, the licensing agency will notify and afford the public thirty (30) days to comment on such application.").

The notice must "[s]tate the date by which a person may submit written comments to the department of attorney general or department of health." R.I. Gen. Laws § 23-17.14-7(b)(3)(iii). Moreover, the notice must state the "date, time and place of informational meeting open to the public which must be conducted within sixty (60) days of the date of the notice." R.I. Gen. Laws § 23-17.14-7(b)(3)(iv).

The Plan Receiver only learned from a third party that the Prospect Entities had filed the above-described CEC Applications. Sheehan Aff. ¶ 10. Counsel for the Plan Receiver reviewed the submissions and learned that Prospect Medical was seeking leave to pay approximately $12 million or more of its cash to a private equity fund to buy shares in Prospect Medical's parent company and transfer those shares to other shareholders in the parent company, with no benefit whatsoever to Prospect Medical. Sheehan Aff. ¶ 11. Counsel concluded that the proposed transaction for which approval was being sought would prejudice the ability of the Plan Receiver and the Plan participants to collect on any judgment they might obtain against Prospect Medical. Sheehan Aff. ¶ 12. Counsel also concluded that the proposed transaction itself was a fraudulent transfer. Sheehan Aff. ¶ 13.

In addition, counsel for the Plan Receiver saw that approval process included the review of Prospect East's compliance (or non-compliance) with the obligation to make the long-term capital contributions called for in the APA and the Attorney Generals' approval of the 2014 Asset Sale, in a proceeding in which none of the Transacting Parties represented the interests of either the Liquidating Receiver of the Plan Receiver. Sheehan Aff. ¶ 14. Indeed, the Transacting Parties' interests were adverse to the interests of the both the Plan Receiver and the Liquidating Receiver.

On April 9, 2020, the Plan Receiver filed with the Department of Health an objection to the CEC Applications. This objection advised that the Plan Receiver was the beneficial owner of CCCB's interest in Prospect Chartercare and detailed the reasons why the applications were contrary to the rights and interests of CCCB and, therefore, should be denied. Sheehan Aff. Exhibit 8 (Plan Receiver's objection dated April 9, 2020) at 10, 15.

These reasons included the fact that the Prospect Entities had not complied with the conditions the RIAG imposed in connection with the 2014 Asset Sale, including specifically the obligations to make the LT Capital Contribution and the Routine Capital Contribution. Sheehan Aff. Exhibit 8 (Plan Receiver's objection dated April 9, 2020) at 22-24.

The Plan Receiver and the Liquidating Receiver also objected to the Prospect Entities' representation by APS, which the Plan Receiver and the Liquidating Receiver contended was an impermissible conflict of interest, because APS had previously represented CCCB and its subsidiaries in connection with the 2014 Asset Sale, which was a substantially related matter, and because the interests of CCCB (and its

subsidiaries) and the Prospect Entities in the CEC Applications were materially adverse.[9] Sheehan Aff. Exhibit 8 (Plan Receiver's objection dated April 9, 2020) at 16-18.

The Plan Receiver also pointed out that the applications contain numerous material misrepresentations and omissions and were materially incomplete. Sheehan Aff. Exhibit 8 (Plan Receiver's objection dated April 9, 2020) at 18-29.

The Prospect Entities promptly received the Plan Receiver's objection, as demonstrated by the fact that APS as their counsel wrote to counsel for the Plan Receiver on April 28, 2020 acknowledging that objection. Sheehan Aff. Exhibit 9 (email trail including email dated April 28, 2020 from Patricia Rocha) at 5-6. However, the Prospect Entities did not at that time assert that the Plan Receiver's conduct violated the order dated November 16, 2018. Sheehan Aff. ¶ 16, Exhibit 9 (email trail including email dated April 28, 2020 from Patricia Rocha) at 5-6.

APS's written communication of April 28, 2020 on behalf of the Prospect Entities claimed that APS had no disqualifying conflict of interest. Sheehan Aff. Exhibit 9 (email trail including email dated April 28, 2020 from Patricia Rocha) at 5-6. APS requested that the Plan Receiver and the Liquidating Receiver "correct the record and withdraw your erroneous contention that AP&S has a conflict." Id. However, no assertion was

[9] The issue of APS' conflict of interest and the adversity between the interests of CCCB and the Prospect Entities is discussed at length in connection with Plaintiffs' motion in the Liquidating Receivership to enjoin APS from representing the Prospect Entities, and is not addressed at length here. It is sufficient to note that the issue of Prospect Entities' lack of compliance with their obligations to make the LT Capital Contribution and the Routine Capital Contribution is being evaluated in connection with the administrative proceedings triggered by the CEC Applications and, as discussed below, the applications under the Hospital Conversion Act. Those obligations arise out of the 2014 Asset Sale, in which APS represented CCCB, and the interests of CCCB concerning that issue are materially adverse to the interests of the Prospect Entities.

made that the Plan Receiver's objection to the CEC Applications violated the notice provisions of the Order dated November 16, 2018. Id.

On July 21, 2020, counsel for the Plan Receiver participated in the informational meeting for these CEC Applications, conducted remotely over ZOOM, by the Health Services Council of the Rhode Island Department of Health. Prospect Entities' Exhibit C (transcript of hearing on July 21, 2020) at 8. Counsel for the Plan Receiver advised the Health Services Council that he was also participating on behalf of the Liquidating Receiver Thomas Hemmendinger. Prospect Entities' Exhibit C at 99. The Prospect Entities were represented at this hearing by three attorneys from APS. Prospect Entities' Exhibit C at 2. Although not representing the Prospect Entities at that meeting, Attorney Preston Halperin, who represents the Prospect Entities in the Receivership Proceeding and signed the Prospect Entities' motion to adjudge the Plan Receiver in contempt, also listened in to and spoke at the hearing. Prospect Entities' Exhibit C at 140-141.

Attorney Arlene Violet also participated in the meeting. Prospect Entities' Exhibit C at 11-12. Ms. Violet asked that the meeting be adjourned immediately to allow the Court to resolve the objection of the Liquidating Receiver to APS representing the Prospect Entities. Prospect Entities' Exhibit C at 11-12. The Health Services Council did not address it. Prospect Entities' Exhibit C at 12.

At this informational meeting, counsel for the Plan Receiver explained that CCCB had been placed into a liquidating receivership in the case of In re CharterCARE Community Board, et al., and that Thomas Hemmendinger was the court-appointed Liquidating Receiver. Prospect Entities' Exhibit C at105-106. Counsel for the Plan

Receiver reiterated the Plan Receiver's objection to APS representing the Prospect Entities and also argued why the CEC Applications should be denied on the merits. Prospect Entities' Exhibit C at 135-136. The meeting was continued to a date to be determined, in part to enable the Health Services Council to hear from additional witnesses and also to allow counsel for the Plan Receiver to further address the Health Services Council. Prospect Entities' Exhibit C at 133-134.

No representative of the Prospect Entities at the informational meeting asserted that counsel for the Plan Receiver's participation in or conduct at the meeting violated the notice provisions of the Order dated November 16, 2018. Prospect Entities' Exhibit C. Similarly, there was no request to preclude counsel for the Plan Receiver from being heard when the informational meeting reconvened. Prospect Entities' Exhibit C.

DOH has tentatively scheduled the next informational meeting concerning the CEC Applications filed by the Prospect Entities for October 13, 2020. Sheehan Aff. ¶ 18. Shortly after filing their motion to adjudge the Plan Receiver in contempt, the Prospect Entities filed their motion papers with the Department of Health in connection with their CEC Applications. Sheehan Aff. ¶ 18.

Counsel for the Plan Receiver and the Liquidating Receiver are concerned about attending the meeting on October 13, 2020 while the instant motion remains pending. Sheehan Aff. ¶ 18. Thus, the Prospect Entities' filing of their motion to adjudge in contempt is already inhibiting the Plan Receiver's exercise of his obligation to protect and preserve the assets of the receivership estate, as well as his right to petition and of free speech as discussed below. However, the Head of the Office of Medical Systems Development has assured counsel for the Plan Receiver that there will be later

opportunities to participate, prior to DOH's decision on the CEC Applications filed by the Prospect Entities. Sheehan Aff. ¶ 18, Exhibit 10 (email by Fernanda Lopes dated October 5, 2020).

F. The applications under the Hospital Conversion Act

Although, as was the case with the CEC Applications, it was many months later that the Plan Receiver learned of it, sometime prior to January 28, 2020 the Prospect Entities filed with of the Office of the Health Care Advocate Section of the Office of the Attorney General ("RIAG") several applications ("HCA Applications") seeking the Attorney General's approval under the Hospital Conversion Act for the same transaction that was the subject of the CEC Applications. Sheehan Aff. ¶ 19, Exhibit 11 (HCA Application submitted by the Prospect Entities). The Prospect Entities resubmitted these applications on February 4, 2020 and March 18, 2020. Sheehan Aff. Exhibit 11 (HCA Application submitted by the Prospect Entities) at 1.

The same requirements for public notice, written comment by the public, and the right of the public to attend informational meetings that apply to the CEC Applications also apply to the Prospect Entities' HCA Applications. See R.I. Gen. Laws § 23-17.14-7(b)(3)(iv).

No notice of these applications was given to the Plan Receiver, to the Liquidating Receiver, or anyone else representing CCCB (or its subsidiaries). Sheehan Aff. ¶ 20. The Plan Receiver later learned of the HCA applications through a third party, at which point counsel were informed that objections to the applications were due by July 27, 2020. Sheehan Aff. ¶ 21. The deadline for members of the public to submit objections has since been extended to October 22, 2020. Sheehan Aff. ¶ 22.

On September 15, 2020, Thomas Hemmendinger ("Liquidating Receiver") in his capacity as the Liquidating Receiver for CCCB, sent a letter to Attorney General Peter Neronha. Sheehan Aff. ¶ 23, Exhibit 12 (letter dated September 15, 2020 from Thomas Hemmendinger to Hon. Peter Nerohna). In his letter, Mr. Hemmendinger explained that CCCB's minority interest in Prospect Chartercare was being held in trust for the Plan Receiver. Sheehan Aff. Exhibit 12 (letter dated September 15, 2020 from Thomas Hemmendinger to Hon. Peter Nerohna) at 1. He then stated as follows:

> It is of obvious importance to the citizens of this state that the above hospitals continue to provide quality medical care and job opportunities. It is also important to the participants of the Plan that the hospitals flourish, since that Plan is the beneficial owner of the interest I hold. For these reasons, I ask you to please consider the requests I am making in this letter.

Sheehan Aff. Exhibit 12 (letter dated September 15, 2020 from Thomas Hemmendinger to Hon. Peter Nerohna) at 1. Mr. Hemmendinger made the following request:

> The Plan Receiver and I intend to object to the HCA application for a number of reasons. In the meantime, the purpose of this letter is to request that you allow us to participate in all interviews and document exchanges that your department may have with representatives of any of the Prospect entities in connection with the HCA application.

Sheehan Aff. Exhibit 12 (letter dated September 15, 2020 from Thomas Hemmendinger to Hon. Peter Nerohna) at 1-2.

On September 21, 2020, Special Assistant Attorney General Jessica Rider responded to Mr. Hemmendinger's letter. Sheehan Aff. ¶ 24, Exhibit 12 (letter dated September 21, 2020 from Jessica Rider to Thomas Hemmendinger). Ms. Rider's letter stated in pertinent part as follows:

> For the reasons set out below, the Attorney General will not grant your request to allow the Liquidating Receiver and Plan Receiver (collectively,

> the "Receivers") to be involved with the investigatory and regulatory process of this HCA review through participation in interviews and document exchanges. The HCA gives explicit and exclusive regulatory authority to the Attorney General and the Department of Health to approve, disapprove, or modify a proposed hospital conversion upon completion of review. The sole statutory provision for third-party participation in that review is through public comment and review of publicly available material. See R.I. Gen. Laws § 23-17.14, et seq.

Sheehan Aff. Exhibit 12 (letter dated September 21, 2020 from Jessica Rider to Thomas Hemmendinger) at 1.

G. The Plan Receiver's Participation in CCCB v. Lee, et al.

On March 11, 2019, CCCB filed its verified complaint in the derivative suit CharterCARE Community Board v. Lee, et al., PC-2019-3654, by and against Prospect Chartercare, LLC, as well as against Prospect East Hospital Advisory Services, LLC ("Prospect Advisory"), Prospect Chartercare, Prospect East, Prospect Medical, and all of the then-members of the Board of Directors of Prospect Chartercare. Sheehan Aff. ¶ 25, Exhibit 14 (verified complaint in CCCB v. Lee).

In that complaint, CCCB noted that it "holds a membership interest in Prospect Chartercare, LLC, which is currently held in trust for the benefit of Stephen Del Sesto as Plan Receiver of the St. Joseph Health Services of Rhoda Island Retirement Plan, pursuant to an agreement dated as of August 31. 2013, and which will revert entirely to CCCB if said agreement is not approved by the United States District Court for the District of Rhoda Island." Sheehan Aff. Exhibit 14 (verified complaint in CCCB v. Lee) ¶ 1. The Complaint alleged several causes of action against the Prospect Entities, including derivative and non-derivate claims against the members of the Board of Directors in Prospect Chartercare. See Sheehan Aff. Exhibit 14, Counts I through XI. In

addition to asserting claims for money damages, the Complaint alleged that Prospect Chartercare, Prospect East, and Prospect Advisory had wrongfully refused to grant CCCB access to the books and records of Prospect Chartercare, which access CCCB required in order to make an informed decision whether or not to exercise the Put option, and requested injunctive relief. See Sheehan Aff. Exhibit 14 ¶ 107.

On March 18, 2019, CCCB filed a Motion for Temporary and Permanent Injunctive and Equitable Relief, seeking, *inter alia*, "an order directing (1) access to books and records, (2) turnover of all information necessary for CCCB to value and exercise CCCB'S Put Option, and (3) the extension of the deadline within which CCCB must exercise its Put Option for the same amount of time that Prospect Chartercare has withheld the necessary information from CCCB." ." Sheehan Aff. ¶ 26, Exhibit 15 (Motion for Injunctive Relief) at 1-2.

Counsel for the Prospect Entities thereafter signed a Stipulation and Consent Order, which the Court signed and entered on April 25, 2019, which obligated Prospect Chartercare to produce certain documents to CCCB that were necessary to make an informed decision whether or not to exercise the Put option. Sheehan Aff. ¶ 27, Exhibit 16 (Stipulation and Consent Order dated April 25, 2019). The Stipulation and Consent order further provided as follows:

> CCCB shall be authorized to share information produced by PCC [Prospect Chartercare] with Stephen Del Sesto, the Plan Receiver for St. Joseph's Health Services of Rhode Island Retirement Plan ("the Plan Receiver"), and each of their respective attorneys, accountants and experts solely for the purpose of evaluating the "put option" so that the Plan Receiver may participate fully and without restriction in the valuation and exercise of the "put option".

Sheehan Aff. Exhibit 16 (Stipulation and Consent Order dated April 25, 2019) ¶ 2.

Thus, the Prospect Entities consented to the Plan Receiver's both signing the Stipulation and Consent Order and receiving the relevant documents concerning the value of CCCB's interest in Prospect Chartercare. Prospect thereby consented to the Plan Receiver's exercise of rights derivative of CCCB's rights in Prospect Chartercare. Prospect did not assert that the Plan Receiver's participation in that Stipulation and Consent Order violated the notice provisions of the Order dated November 16, 2018.

When Prospect Chartercare failed to produce the necessary documents within the agreed upon time, Prospect Chartercare, CCCB, and the Plan Receiver on October 3, 2019 signed and filed with the Court two more Stipulation and Consent Orders, which further extended the time. See Sheehan Aff. ¶¶ 28-29, Exhibits18 and 19 (Stipulation and Consent Orders dated October 3, 2020 and November 21, 2020, respectively). Prospect thereby consented again to the Plan Receiver's exercise of rights derivative of CCCB's rights in Prospect Chartercare. Once again, the Prospect Entities did not assert that the Plan Receiver's participation in that Stipulation and Consent Order violated the notice provisions of the Order dated November 16, 2018.

Thereafter, the Plan Receiver on February 7, 2020, together with Thomas Hemmendinger as Liquidating Receiver for CCCB, filed in CCCB v. Lee their memorandum in support of CCCB's original Motion for Injunctive and Equitable Relief, as well as, on February 20, 2020, a separate motion (with supporting memorandum) to compel production of documents pursuant to the April 25, 2019 stipulation. Sheehan Aff. ¶¶ 30 & 31, Exhibits 20 (Plan Receiver and Liquidating Receiver's memorandum for injunctive relief dated February 7, 2020) and 21 (Plan Receiver and Liquidating Receiver's motion to compel production dated February 7, 2020).

Prospect filed its objection and memorandum on March 3, 2020. Sheehan Aff. ¶ 32, Exhibits 23 & 24 (Prospect objection and memorandum dated March 3, 2020). Prospect asserted several grounds in support of Prospect's request that the Plan Receiver's Motion be denied. Sheehan Aff. Exhibits 23 & 24 (Prospect objection and memorandum dated March 3, 2020). However, Prospect neither objected to the Plan Receiver's participation in those motions nor argued that the Plan Receiver thereby violated the notice provisions of the Order dated November 16, 2018. Sheehan Aff. Exhibits 23 & 24 (Prospect objection and memorandum dated March 3, 2020).

On April 21, 2020, and without any prior notice to the Prospect Entities, the Plan Receiver, together with Thomas Hemmendinger as Liquidating Receiver for CCCB, filed their Verified First Amended and Supplemental Complaint, in which the Plan Receiver became a named plaintiff in his role "as the holder of the beneficial interest of CCCB's membership interest in Prospect Chartercare." Sheehan Aff. ¶ 33, Exhibit 25 (Plan Receiver and Liquidating Receiver's First Amended and Verified Complaint in CCCB v. Lee). That amended complaint reasserted the claims made in the original complaint and added new claims and additional defendants. Id.

The Prospect Entities filed their Answer on June 15, 2020 and asserted various affirmative defenses. Sheehan Aff. ¶ 34, Exhibit 25 (Prospect Entities' Answer in CCCB v. Lee). However, they did not assert as an affirmative defense (or otherwise contend) that the Plan Receiver's participation as a named plaintiff violated the notice provisions of the Order dated November 16, 2018. Sheehan Aff. Exhibit 25 (Prospect Entities' Answer in CCCB v. Lee).

There have been numerous motions and hearings since then, and at no time have the Prospect Entities even argued in that case that the Plan Receiver's assertion in that case of rights derived from CCCB violated the notice provisions of the Order dated November 16, 2018. Sheehan Aff. ¶ 35.

H. In re Chartercare Community Board, et al.

Thomas Hemmendinger was appointed Permanent Liquidating Receiver by Order dated January 17, 2020. Sheehan Aff. ¶ 36, Exhibit 27 (Order dated January 17, 2020). The order "authorized and directed" him "to hold and administer the Hospital Interests in trust solely for the benefit of the Plan Receiver according to and subject t0 the terms of the Settlement Agreement, including but not limited to prosecution of CharterCARE Community Board v. Samuel Lee, et al., PC-2019-3654." Sheehan Aff. Exhibit 27 (Order dated January 17, 2020) ¶ 5(b).

In addition, the Order stated that "[t]hat the Liquidating Receiver on behalf of the Petitioners shall perform and continue to perform their obligations under the Settlement Agreement, including, but not limited to paragraph 24 of the Settlement A Agreement and that the Liquidating Receiver on behalf of the Petitioners shall perform and continue to perform their obligations under that certain Settlement Agreement dated as of November 21, 201 8 between and among the Plan Receiver, the Petitioners, and others." Sheehan Aff. Exhibit 27 (Order dated January 17, 2020) ¶ 7.

The Order also contained the standard provisions enjoining all persons from interfering with the Liquidating Receiver's performance of his duties, with the following exception that "this injunction shall neither restrain nor enjoin the Plan Receiver and his attorneys and agents in any way concerning Hospital Interests, and the Plan Receiver

and his attorneys and agents are authorized to take such steps as they deem appropriate to protect such Hospital Interests." Sheehan Aff. Exhibit 27 (Order dated January 17, 2020) ¶ 9.

As discussed above, when the Plan Receiver and the Liquidating Receiver became aware of the CEC and HCA Applications filed by the Prospect Entities, they also learned that the Prospect Entities were represented in these proceedings by APS, notwithstanding that APS had previously represented CCCB in connection with the 2014 Asset Sale, and the interest of CCCB were materially adverse to the interests of the Prospect Entities.

On July 10, 2020, the Plan Receiver and the Liquidating Receiver filed their motion in the liquidation receivership, which jointly asked the Court to enjoin APS from representing the Prospect Entities in connection with the pending regulatory proceedings, and from sharing its knowledge or work product with the Prospect Entities or successor counsel. Sheehan Aff. ¶ 37, Exhibits 27 & 28 (Plan Receiver and Liquidating Receiver's Motion and supporting memorandum to enjoin APS).

The Liquidating Receiver asserted the right to seek such relief because the Plan Receivership Estate includes the rights of CCCB and its subsidiaries to preclude APS from acting adversely to their interests in a matter substantially related to their prior representation by APS. Sheehan Aff. Exhibit 28 (Plan Receiver and Liquidating Receiver's supporting memorandum to enjoin APS). The Plan Receiver asserted the right to join in the motion "as the holder of the beneficial interest in the assets and property in which APS is interfering, and for whose benefit the Court has ordered the

Liquidating Receiver to perform the Oldcos' obligations." . Sheehan Aff. Exhibit 28 (Plan Receiver and Liquidating Receiver's supporting memorandum to enjoin APS) at 4.

Both the Prospect Entities and APS strenuously opposed this motion. APS and the Prospect Entities submitted a thirty-four joint opposition memorandum on July 27, 2020, a nine-page joint supplemental memorandum on August 14, 2020, and a thirty-two page joint Second Supplemental memorandum on September 23, 2020. Sheehan Aff. ¶ 38, Exhibits 29, 30 & 31 (APS and Prospect Entities' memoranda). However, neither APS nor the Prospect Entities argued in any of their memoranda that the Plan Receiver's assertion of CCCB's rights vis a vis APS violated the notice provisions of the Oder dated November 16, 2020. Id.

On September 17, 2020, at the very end of a lengthy hearing in In re Chartercare Community Board on the Liquidating Receiver and Plan Receiver's motion of the Liquidating Receiver to enjoin APS from representing the Prospect Entities, counsel for the Prospect Entities contended for the first time that the Plan Receiver's opposition to the CEC Applications and HCA Applications filed by the Prospect Entities with the Department of Health and the Attorney General were a violation of the notice provisions of the Order dated November 16, 2018. Sheehan Aff. ¶ 44, Exhibit 37 (excerpts from the transcript of the hearing on September 17, 2020) at 101-102.

I. The Plan Receiver's Reports to the Court concerning the assertion of rights over CCCB's interest in Prospect Chartercare

From the outset of the Plan Receiver's involvement in CCCB v. Lee, the Plan Receiver's reports to the Court in the Plan receivership have included a summary of his actions concerning CCCB's rights in Prospect Chartercare.

The Plan Receiver's Twelfth Interim Report referred to the Plan Receiver's role in obtaining documents from the Prospect Entities concerning the Put option. Sheehan Aff. ¶ 39, Exhibit 32 (Plan Receiver's Twelfth Interim Report dated January 21, 2020) at 5-6.

The Plan Receiver's Thirteenth Interim Report stated:

> On February 7, 2020, the Plan Receiver and the Liquidating Receiver for CharterCARE Community Board, St. Joseph's Health Services of Rhode Island and Roger Williams Hospital (the "Liquidating Receiver") filed a Motion for Temporary and Permanent Injunction and Equitable Relief and supportive memorandum (the "CCCB Motion") seeking that the Court direct Prospect CharterCARE, LLC ("Prospect") to provide access to or turn over any and all books, records and other information necessary for the Plan Receiver and Liquidating Receiver to value and exercise the Put Option and extend the date by which the Put Option must be exercised.

Sheehan Aff. Exhibit 33 (Plan Receiver's Thirteenth Interim Report dated March 19, 2020) at 5.

On August 19, 2020, the Plan Receiver included the following statement in his Fourteenth Interim Report to the Court:

> **Your Plan Receiver, along with the Liquidating Receiver and several other parties have filed formal objections to the Prospect Entities and related entities and individuals' application for a Change in Effective Control pending before the Rhode Island Health Services Council ("RIHSC").** Despite the Plan Receiver's and Liquidating Receiver's Objections submitted to the RIHSC and the pending Motion seeking to enjoin AP&S, the RIHSC permitted the initial hearing to proceed with AP&S as counsel rather than wait for this Court's ruling on the Motion. Ultimately, the application will be presented to the Rhode Island Department of Health and Rhode Island Department of the Attorney General under the Rhode Island Hospital Conversion Act.
>
> [Emphasis supplied]

Sheehan Aff. Exhibit 34 (Plan Receiver's Fourteenth Interim Report dated August 19, 2020) at 8. The Plan Receiver also included (*inter alia*) this prayer:

> WHEREFORE, your Receiver prays that this honorable Court enter an order or orders: (1) approving, confirming and ratifying all of the Receiver's acts, doings, and disbursements as Temporary and Permanent Receiver as of the filing of this Fourteenth Report; . . . .

Sheehan Aff. Exhibit 34 (Plan Receiver's Fourteenth Interim Report dated August 19, 2020) at 10.

Counsel for the Prospect Entities was electronically served with all the Plan Receiver's interim reports when the reports were filed. No one, including the Prospect Entities, ever objected that these actions by the Plan Receiver violated the notice provisions of the Order dated November 16, 2018.

On August 25, 2020, with notice to the Prospect Entities, the Court conducted a hearing on the Plan Receiver's Fourteenth Interim Report. Towards the end of the hearing, there occurred the following colloquy:

> [Plan Receiver:] Unless your Honor has any questions, that concludes my report and at the conclusion of my report I am asking the Court to approve, confirm, and ratify all of my acts and doings since the 13th interim report, approve the report, and, as I said, once I get the fee application to your Honor then to make a ruling on the appropriateness of that fee application.
>
> THE COURT: Thank you very much. There were no objections filed. Do either counsel on the line wish to be heard before the Court?
>
> MR. BOYAJIAN: No, your Honor.
>
> THE COURT: Hearing none, the Court approves the 14th interim report of the Special Master ratifying its acts and deeds from [since] the last 13th report.

Sheehan Aff. ¶ 42, Exhibit 35 (transcript of hearing on August 25, 2020) at 9-10. As noted above, the Plan Receiver's referenced acts and deeds that were being ratified by the Court included his objection to the CEC applications.

III. Argument

A. The Plan Receiver has not violated the Order

1. Standard for a finding of contempt

A civil contempt finding "requires a demonstration, by clear and convincing evidence, that a sufficiently specific order of the court has been violated." Town of Coventry v. Baird Properties, LLC, 113 A.3d 614, 621 (R.I. 2011). "'The terms of the order should be specific, clear and precise so that one need not resort to inference or implications to ascertain his duty or obligation thereunder.'" Ventures Management Co., Inc. v. Geruso, 434 A.2d 252, 254 (R.I. 1981) (quoting Sunbeam Corp. v. Ross-Simons, Inc., 134 A.2d 160, 163 (1957)). "Because of the severe consequences of a civil-contempt finding, courts have 'read court decrees to mean rather precisely what they say.' Any ambiguities or uncertainties in court orders are read in the light most favorable to the person charged with contempt." State v. Lead Industries, Ass'n, Inc., 951 A.2d 428, 467 (R.I. 2008) (quoting NBA Properties, Inc. v. Gold, 895 F.2d 30, 32 (1st Cir.1990)). "'As the respondent must obey the order at his peril it should be clear, definite and explicit so that an unlearned man can understand its meaning.'" State v. John, 881 A.2d 920, 925 (R.I. 2005) (quoting Sunbeam Corp. v. Ross-Simons, Inc., *supra*, 134 A.2d at 163)). "This is a reasonable requirement, since contempt of the order may involve punishment by way of not only loss of property but also loss of

liberty." Sunbeam Corp. v. Ross-Simons, Inc., *supra*, 134 A.2d at 163 (citing Ketchum v. Edwards, 153 N.Y. 534, 47 N.E. 918 (1897)).

2. The Receiver did not violate the Order in connection with the regulatory proceedings

The Prospect Entities' motion faults the Plan Receiver for failing to comply with the provision in the Order dated November 16, 2018 that obligated the Plan Receiver to give the Prospect Entities twenty days' notice before "implementing" (or "directing that CCCB implement") any rights that are "derivative of CCCB's rights" in Prospect Chartercare.

However, the actions of the Plan Receiver to which the Prospect Entities complain are not the "implementation" of any rights that are "derivative" of CCCB's rights in Prospect Chartercare. Instead, they were objections to regulators (which have been provided to the Prospect Entities) submitted in response to the regulators' requests for public comment. Moreover, the conduct of the Plan Receiver is consistent with the Court's purpose in requiring the notice provision contained in the Order dated November 16, 2018, to "ensure the Objectors have an appropriate opportunity—in an appropriate proceeding—to contest objectionable terms prior to their implementation by the Receiver." The actions of the Plan Receiver in the regulatory proceedings do not assert any "objectionable terms" concerning CCCB's rights in Prospect Chartercare.

In addition, the Prospect Entities "have an appropriate opportunity—in an appropriate setting—to contest" the Plan Receiver's objections. The Prospect Entities have the right to respond before the RIAG and the DOH to the Plan Receiver's objections, and the regulators have yet to rule.

The regulators were required by statute or rule to solicit public comment, and, as would any other member of the public, the Plan Receiver has the absolute right to file his objections, regardless of whether or not the Plan Receiver claims an economic interest (through CCCB) in Prospect Chartercare. In other words, the fact that the Plan Receiver has a financial interest he is seeking to protect did not deprive the Plan Receiver of his statutory or regulatory right to file these objections. Certainly, the Court never intended to require the Plan Receiver to provide advance notice before exercising a statutory or regulatory right that would exist even if the Plan Receiver had no financial interest in Prospect Chartercare.

As discussed above, the only rights in Prospect Chartercare that the Plan Receiver has "implemented" that are derived from CCCB's rights in Prospect Chartercare have been CCCB's rights to information as a minority shareholder and party to the LLC Agreement. The Plan Receiver has asserted those rights before this Court in CCCB v. Lee, et al., in order to obtain the information the Plan Receiver needs in order to make an informed decision whether or not to exercise the Put option. However, in those cases the Prospect Entities also were given an appropriate opportunity—in an appropriate setting—to oppose the Plan Receiver's efforts. Moreover, the Prospect Entities did not object that Plan Receiver's efforts violated the Order dated November 16, 2018 because the Receiver had not provided twenty-days' notice, such as before filing the amended complaint in which the Plan Receiver became a named Plaintiff. As discussed below, by failing to raise the defense then or on many other occasions when it should have been raised if the Prospect Entities were

preserving that defense, they thereby waived their right to rely upon that notice provision.

B. The Plan Receiver did not direct the Liquidating Receiver in connection with the appointment of directors to Prospect Chartercare

The Prospect Entities make the following assertion:

> In addition to inserting themselves into the CEC proceeding, on July 22, 2020, without providing the Prospect Entities with the 20-days' notice required by the November 16, 2018 Order, the Plan Receiver and Special Counsel also directed the Liquidating Receiver to replace four directors of PCC without providing the Prospect Entities with the requisite 20-days' notice. *See* ***Exhibit E****.*

Prospect Memo. at 7. However, Exhibit E is merely a copy of Attorney Hemmendinger's letter to the Prospect Entities. It provides no support whatsoever for the contention that the Plan Receiver directed Mr. Hemmendinger to send that letter. In fact, the Prospect Entities have provided no evidence whatsoever in support of that assertion.

The Prospect Entities' completely unsupported accusations are exceedingly reckless, to say the least. The Prospect Entities' burden is show a violation of the order by "clear and convincing evidence." Instead, they offer no evidence whatsoever. Indeed, all the evidence is to the contrary. Mr. Hemmendinger as court-appointed Liquidating Receiver is an officer of the Court and is required to act independently and in the best interests of the Receivership Estate. The Plan Receiver and the Liquidating Receiver have submitted affidavits denying that any such direction occurred. See Del Sesto Aff. ¶ 3; Hemmendinger Aff. ¶ 9.

C. The Prospect Entities' motion to adjudge in contempt interferes with the Plan Receiver's performance of his duties and violates the restraining order of this Court in both this proceeding and in the Liquidation Receivership

Without first having obtained the permission of this Court, the Prospect Entities seek to have the Plan Receiver adjudged in contempt for filing objections to the CEC and HCA Applications filed by the Prospect Entities, notwithstanding the Plan Receiver's clear right and obligation to do so to protect the assets of the Receivership Estate. The Prospect Entities thereby violated the restraining order and interfered with the Plan receiver's performance of his duties.

Moreover, the Prospect Entities seek to have the Plan Receiver adjudged in contempt for actions taken in conjunction with the Liquidating Receiver, notwithstanding the provisions in the Order appointing the Liquidating Receiver that directs the Liquidating Receiver to hold the Hospital Interests in trust for the Plan Receiver and which state that "the Plan Receiver and his attorneys and agents are authorized to take such steps as they deem appropriate to protect such Hospital Interests."

In short, the Prospect Entities' motion to adjudge the Plan Receiver in contempt is itself a violation of the orders in the two receivership proceedings, such that it is the Prospect Entities if anyone should be held in contempt.

D. The Prospect Entities motion to adjudge the Plan Receiver in contempt also violates Rule 11

Super. C. P. Rule 11 states in pertinent part as follows:

> The signature of an attorney, self-represented litigant, or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry the pleading, motion, or other paper is well grounded in fact and is warranted by existing law or a good faith

> argument for the extension, modification, or reversal of existing law, and that the pleading, motion, or other paper is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, unless signed promptly after the omission is called to the attention of the pleader or movant, or is signed with intent to defeat the purpose of this rule, the pleading, motion, or other paper shall be stricken. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed the pleading, motion, or other paper, a represented party, or both, any appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The Prosect Entities' motion to adjudge the Plan Receiver in contempt violated Rule 11 on multiple levels. It is not "well grounded in fact." It is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." It is "interposed for any improper purpose," specifically to stifle the Plan Receiver legitimate objections to the CEC and HCA Applications filed by the Prospect Entities, and to prevent the Liquidating Receiver from exercising his right to appoint four directors for Prospect Chartercare.

Accordingly, the Court should impose sanctions on the Prospect Entities, including an award of attorneys' fees to the Plan Receiver.

E. Rhode Island's Anti-SLAPP Statute

1. Summary of argument

The Prospect Entities' claim that the conduct of the Plan Receiver violated the Order dated November 16, 2018 is frivolous. Moreover, the Prospect Entities thereby seek to interfere with the Plan Receiver's exercise of his right to petition the government and to free speech in connection with a matter of public concern. Accordingly, the Plan Receiver is entitled to recover his reasonable attorneys' fees as a matter of right. In

addition, the Court may (and should) award the Plan receiver punitive damages to be paid into the Plan, to punish the Prospect Entities in an amount sufficient to make the punishment smart.

2. The Statute

Rhode Island's Anti-SLAPP Statute states as follows:

> (a) A party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose. The petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both:
>
> > (1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and
> >
> > (2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.
>
> (b) The court shall stay all discovery proceedings in the action upon the filing of a motion asserting the immunity established by this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion.

> (c) The immunity established by this section may be asserted by an appropriate motion or by other appropriate means under the applicable rules of civil procedure.
>
> (d) If the court grants the motion asserting the immunity established by this section, or if the party claiming lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern is, in fact, the eventual prevailing party at trial, the court shall award the prevailing party costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters. The court shall award compensatory damages and may award punitive damages upon a showing by the prevailing party that the responding party's claims, counterclaims, or cross-claims were frivolous or were brought with an intent to harass the party or otherwise inhibit the party's exercise of its right to petition or free speech under the United States or Rhode Island constitution. Nothing in this section shall affect or preclude the right of the party claiming lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions to any remedy otherwise authorized by law.
>
> (e) As used in this section, "a party's exercise of its right of petition or of free speech" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern.

R.I. Gen. Laws § 9-33-2.

3. The Motion to Adjudge in Contempt violates the Anti-SLAPP statute

This statute is a remedial statute which, therefore, should be liberally construed in accordance with its purposes. State v. Carter, 827 A.2d 636, 643 (R.I. 2003) ("'[T]o effectuate its salutary purpose a remedial statute should be liberally construed[.]'") (quoting State v. Simmons, 114 R.I. 16, 18, 327 A.2d 843, 845 (1974))).

Rhode Island's Anti-SLAPP statute clearly applies to the Prospect Entities motion to adjudge the Plan Receiver in contempt. That motion includes a motion to enjoin the Plan Receiver from pursuing his objections before the regulatory authorities. As such, it is essentially no different than the commencement of a lawsuit seeking injunctive relief. Accordingly, it constitutes a "civil claim" under R.I. Gen. Laws § 9-33-2(a).

Both the Office of the Attorney General and the Department of Health are "executive bodies," and even if that were unclear, there can be no dispute that their proceedings in connection with the CEC and HCA Applications submitted by the Prospect Entities are "governmental proceedings." It is equally clear under the statutory definition of "a party's exercise of its right of petition or of free speech" that the conduct of the Plan Receiver concerning the CEC and HCA Applications submitted by the Prospect Entities of which the Prospect Entities complain constitutes the Plan Receiver's exercise of his right of free speech and petition in connection with a matter of public concern.

The Prospect Entities do not even allege and certainly cannot prove that the objections asserted by the Plan Receiver are either subjectively or objectively baseless, much less that the objections are *both* objectively *and* subjectively baseless. Finally, the Prospect Entities' assertion that the Plan Receiver's conduct before the regulatory authorities exercises a right derivative of CCCB's rights in Prospect Chartercare is both frivolous and designed to block the Plan Receiver's exercise of his rights of petition and free speech.

4. The Prospect Entities must play the Plan Receiver's attorneys' fees and should be required to pay punitive damages

R.I. Gen. Laws § 9-33-2 provides that if the Court agrees that the Prospect Entities' motion to adjudge the Plan Receiver in contempt interferes with the Plan Receiver's right of petition or of free speech in connection with a matter of public concern, then "the court shall award the prevailing party costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters." R.I. Gen. Laws § 9-33-2(d). Thus, the Plan Receiver is entitled to an award of attorneys' fees and costs.

Moreover, the Court "may award punitive damages upon a showing by the prevailing party that the responding party's claims, counterclaims, or cross-claims were frivolous or were brought with an intent to harass the party or otherwise inhibit the party's exercise of its right to petition or free speech under the United States or Rhode Island constitution." Id.

The record amply establishes that the Prospect Entities' claims are both frivolous and intended to stifle the Plan Receiver's exercise of his right of petition and free speech. Indeed, the Prospect Entities expressly ask the Court to order the Plan Receiver (and the Liquidating Receiver) to withdraw their objections before the DOH and the Attorney General! It is difficult to conceive of a clearer statement of intent to stifle the right of petition and free speech in a matter of public concern.

As discussed above, the filing by the Prospect Entities is already inhibiting the Plan Receiver's exercise of his right to petition and of free speech, in that because of the Prospect Entities' initiation of those contempt proceedings, the Plan Receiver and the Liquidating Receiver are concerned about attending the informational meeting

scheduled for October 13, 2020 at DOH in connection with the CEC Applications filed by the Prospect Entities.

Accordingly, the Plan Receiver requests that the Court order the Prospect Entities to pay for deposit into the Plan punitive damages an amount sufficient to punish them for their conduct. The Plan Receiver submits that the conduct of the Prospect Entities is so egregious, and the assets of the Prospect Entities are so substantial, that no less than an award of five hundred thousand dollars ($500,000) is necessary to punish the Prospect Entities, and for the punishment to "smart."

F. The Prospect Entities are guilty of laches

1. Laches as a bar or defense to civil contempt

"[T]he elements of the defense of laches in a civil contempt proceedings are: (1) A delay between the moving party knowing, or having reason to know, of the act or omission alleged to be contempt and the moving party's commencement of non-summary contempt proceedings; (2) the alleged contemnor's lack of knowledge that the moving party would commence non-summary contempt proceedings; and (3) injury or prejudice to the alleged contemnor in the event civil contempt sanctions are imposed." State v. Garcia, 355 P.3d 635, 63 (Idaho 2015). See also Adcor Indus., Inc. v. Bevcorp, LLC, 411 F. Supp. 2d 778, 803 (N.D. Ohio. 2005) ("While there is no statute of limitations on the commencement of civil contempt claims, the equitable defense of laches may apply and is left to the sound discretion of the trial judge. In order to establish laches, the Defendants must show that Adcor unreasonably delayed in bringing its contempt claim against the Connelly Defendants and that they were prejudiced by the delay."); Seal Shield, LLC Otter Prod., LLC Treefrog Developments,

Inc. v. Seal Shield, LLC, No. 13-CV-2736-CAB (NLS), 2015 WL 11237464, at *4 (S.D. Cal. July 31, 2015) ("'To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself.'") (quoting Couveau v. Am. Airlines, Inc., 218 F.3d 1078, 1083 (9th Cir. 2000)).

2. The Prospect Entities are guilty of laches

The Prospect Entities contend that the Plan Receiver violated the notice provisions of the order dated November 16, 2018, "beginning in April of 2020 [when] the Plan Receiver, the Liquidating Receiver and Special Counsel sought to use CCCB's 15% interest in PCC to intervene and object to the Change in Effective Control Application of Prospect Chartercare RWMC, LLC et al…" Prospect Memo. at 2.

The Plan Receiver's actions did not violate the order dated November 16, 2018. However, even assuming (*arguendo*) that there was a violation beginning in April of 2020 when the Plan Receiver filed his objection to the Prospect Entities' CEC Applications (which there was not), the Prospect Entities are not entitled to have the Plan Receiver adjudged in contempt, because the Prospect Entities unreasonably delayed in making that claim to the Plan Receiver's prejudice. In other words, the Prospect Entities are guilty of laches.

The Plan Receiver began asserting rights derived from CCCB's interest in Prospect Chartercare at least by April 25, 2019, when the Plan Receiver was given the right to obtain those documents by Stipulation and Order signed by the Plan receiver, CCCB, and the Prospect Entities. The Prospect Entities affirmatively consented to the Plan Receiver exercising those rights, both then and in the subsequent Stipulations and orders. The Prospect Entities answered the Plan Receiver's complaint in CCCB v. Lee,

in which the Plan Receiver's rights were entirely derivative of CCCB's rights in Prospect Chartercare, but they did not assert as an affirmative defense any violation of the Order dated November 16, 2018.

Moreover, the Prospect Entities were promptly aware of the Plan Receiver's actions in filing an objection to their CEC Applications. They made no objection in April 2020. They also made no objection in May 2020 that the Plan Receiver had violated the order dated November 16, 2020 by seeking disqualification of APS. The Prospect Entities made no such objection on July 17, 2020 during the informational meeting concerning their CEC Applications. They made no such objection in response to the Plan Receiver's report to the Superior Court which was served on their counsel on August 19, 2020 outlining the Plan Receiver's objections to the Prospect Entities' CEC and HCA Applications. Nor did the Prospect Entities object when the Court ratified the Plan Receiver's acts and deeds in connection with making those objections to the regulators.

The Prospect Entities' delay in making that argument is unreasonable. Moreover, that delay has prejudiced the Plan Receiver. Had the Prospect Entities raised the notice provision in April of 2019, when the Plan Receiver directly asserted his rights to documents from them in order to make an informed decision whether or not to exercise the Put option, the Plan Receiver would have been forewarned to give twenty-days' notice before objecting to the CECAs and the HCAs. Similarly, if the Prospect Entities had informed the Plan Receiver when they filed their CEC and HCA Applications, the Plan Receiver would have had plenty of time to provide them with advance notice of his objections. Even if the Prospect Entities raised the notice

provision on April 7, 2020, when the Plan Receiver filed his objections to their CEC Applications, the Plan Receiver could have asked the Court to waive the notice provision before the date for filing the objections to the Prospect Entity's CEC Applications expired. There is no reason to conclude that the Court would have denied such relief, especially since the filing with the DOH gave the Prospect Entities "an appropriate opportunity—in an appropriate proceeding—to contest objectionable terms prior to their implementation by the Receiver," which was the reason why the Court imposed the notice provision.

The Prospect Entities claim that the Plan Receiver had actual knowledge that he was violating the Order dated November 16, 2018 when he filed the objection to the Prospect Entities' CEC Applications, because the Plan Receiver had filed a motion for clarification of that Order on December 19, 2019. In that motion the Plan Receiver asked the Court to clarify that the notice provisions in the Order dated November 16, 2018 did not apply to the Plan Receiver's direction to the Liquidating Receiver to exercise CCCB's Put option. However, that motion is irrelevant here for several reasons.

It is irrelevant because in the motion for clarification, all the Plan Receiver sought was clarification that the Order dated November 16, 2018 did not apply to the Plan Receiver's exercise of the Put option. There was no issue raised concerning whether the Order dated November 16, 2018 applied to any other conduct, especially conduct which did not involve the exercise of "objectionable terms" derived from CCCB's rights in Prospect Chartercare. Moreover, the Plan Receiver's contention was that notice provision in the Order dated November 16, 2018 did not apply to the Plan Receiver's

exercise of the Put option. The Plan Receiver sought clarification to that effect because the Prospect Entities had already shown their willingness to use any possible argument as an obstacle to the Plan Receiver's exercise of the Put option.

There is a world of difference between the conduct of the Plan Receiver in connection with the CEC and HCA Applications submitted by the Prospect Entities and the Plan Receiver's exercise of the Put option. Indeed, the motion for clarification illustrates that difference, on multiple levels.

First, the ability of the Plan Receiver to exercise the Put option derived entirely from CCCB having the contractual right to exercise the Put option. In contrast, the Plan Receiver's right to comment on the applications the Prospect Entities filed with the regulators derives from statute and the Plan Receiver's right to petition and or free speech, not from CCCB's rights.

Second, the Plan Receiver's exercise of CCCB's contractual right to trigger the Put option would be immediately effective upon its exercise, leaving the Prospect Entities with no opportunity "to contest objectionable terms prior to their implementation by the Plan Receiver," whereas the Plan Receiver's objections to DOH and the Attorney General had no immediate effect. Instead, whatever effect it would have would depend on what the Prospect Entities did next. The Prospect Entities had the right to respond, in which event they would be heard before the Plan Receiver's objections were adopted.

G. The Prospect Entities have unclean hands

1. Unclean hands is a bar or defense to civil contempt

"The failure of the accusing party to come into court with 'clean hands' is one of several defenses to a civil contempt action." Banks v. Banks, 648 So.2d 1116, 1126 (Miss. 1994) (citing Cooley v. Cooley, 574 So.2d 694, 698 (Miss.1991) and Smith v. Smith, 545 So.2d 725, 727 (Miss.1989)). That is because civil contempt is an equitable remedy, and, therefore, subject to equitable defenses including unclean hands. Trustees of the Buffalo Laborers' Pension Fund v. Accent Stripe, Inc., No. 01-CV-76C(SC), 2007 WL 1540267, at *5 (W.D.N.Y. May 24, 2007) ("[A] finding of contempt is an equitable remedy under Second Circuit law, and 'subject to equitable defenses....' The 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'") (quoting *Brennan v. Nassau County*, 352 F.3d 60, 63 (2d Cir. 2003) and *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945)).

2. The Prospect Entities have unclean hands

The Prospect Entities filed the CEC and HCA Applications with no notice to CCCB (or to the Liquidating Receiver or the Plan Receiver). Moreover, they did so after CCCB had brought suit in CCCB v. Lee asserting that transfers from Prospect Medical to shareholders in Ivy Holdings were fraudulent transfers. The Prospect Entities' CEC and HCA Applications seek regulatory approval for exactly such a transfer. Accordingly, the Prospect Entities knew that CCCB would object if CCCB learned of the Prospect Entities's CEC and HCA Applications. In addition, the transaction for which the

Prospect Entities seek approval from the regulatory authorities favors the interests of one shareholder in Prospect CharterCARE, i.e., Prospect East, over the interests of the other shareholder, CCCB. Under these circumstances, both Prospect East and Prospect CharterCARE owed a fiduciary duty of disclosure to CCCB, and their failure to make disclosure breached that duty.

Similarly, the Prospect Entities' counsel and agent APS owed a fiduciary duty to their former clients CCCB, SJHSRI and RWH, to disclose that they were now representing the Prospect Entities in a related matter in which their former clients' interests were adverse to their new clients. Instead, no disclosure was made, and CCCB learned of the pending CECAs and HCAs from a third party and only by chance.

The Prospect Entities have unclean hands concerning the notice provision in the Order dated November 16, 2018, and, therefore, they are precluded from relying on that notice requirement.

H. The Prospect Entities waived the notice provision in the Order dated November 16, 2018

1. Waiver of notice requirements

A party must affirmatively plead breach of notice provisions or such a defense is waived. See Cadillac Bar West End Real Estate v. Landry's Restaurants, Inc., 399 S.W.3d 703, 707 (Texas App. 2013) ("Courts have consistently held that lack of notice is an affirmative defense…As a general rule, an affirmative defense is waived if it is not pleaded.") (citations omitted) (guarantor's failure during trial to object to primary obligor's settlement on grounds guarantor was not given fifteen days' notice as required under terms of guaranty is a waiver of that right); Jones v. Bowman, 694 F. Supp. 538,

552 (N.D. Ind. 1988) ("Accordingly, because the moving defendants failed to plead the Indiana Tort Claims Act's notice provision as an affirmative defense in their answer to Ms. Jones' amended complaint, they are foreclosed from asserting it now in their motion for summary judgment. The defendants' motion for summary judgment on this issue is denied.").

2. Prospect waived the notice provisions in the Order

Prospect waived the notice requirements in the Order dated November 16, 2018. The Prospect Entities filed an answer to the Plan Receiver's complaint in CCCB v. Lee, which asserted various affirmative defense but not that the commencement of the suit violated the notice provisions of the Order dated November 16, 2018. As discussed above, the Prospect Entities failed to assert its notice defense in many other occasions when it had the opportunity.

I. The Court has already ratified the Plan Receiver's filing of the CEC objection

As quoted *supra* at 27-28, the Court has already ratified the Plan Receiver's filing of the CEC objection, in connection with the Court's approval of the Plan Receiver's Fourteenth Interim Report. The latest the Prospect Entities could have lodged their instant claims, if at all, was prior to the August 25, 2020 hearing on that interim report. The salutary purpose of the Court's periodic ratification of its Receivers' reported acts and deeds would be thwarted if, as here, objectors could ignore the Court's ratification and assert claims against the Plan Receiver based on acts that the Court has already ratified.

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CONCLUSION

The Court should deny the Prospect Entities' motion to adjudge the Plan Receiver in contempt, and should find that the Prospect Entities have violated the restraining orders contained in the orders appointing the two Receivers, as well as Rule 11 and Rhode Island's Anti-SLAPP statute, and award the Plan Receiver his costs and attorneys' fees, as well as punitive damages in an amount not less than five hundred thousand dollars ($500,000).

Respectfully submitted,

Stephen Del Sesto, in his Capacity as Permanent Receiver for the St. Joseph Health Services of Rhode Island Retirement Plan,
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