STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

CHARTERCARE COMMUNITY BOARD, *Plaintiff,*	:	
v.	:	C.A. No. PC-2019-3654
SAMUEL LEE, ET AL., *Defendants.*	:	

REPLY OF THE PROSPECT ENTITIES

The Prospect Entities[1] hereby submit this reply memorandum in response to the objection and opposition to the Prospect Entities' Motion for Protective Order submitted by Plaintiffs, CharterCARE Community Board, through Thomas Hemmendinger, Liquidating Receiver of CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital; and Stephen Del Sesto, as Receiver for the St. Joseph Health Services of Rhode Island Retirement Plan (collectively "Receivers").

ARGUMENT

A. The Prospect Entities Do Not Seek a Retroactive Protective Order.

The Prospect Entities' production of documents and confidentiality designations have been in conformance with this Court's July 21, 2020 Order, which is subject to the Stipulation and Consent Order dated April 25, 2019. Despite the Court's applicable orders and the long prior course of conduct between the parties, the Prospect Entities are now forced to seek this Court's intervention because the Receivers have decided to disregard the discovery framework that has guided these proceedings since their inception. The Receivers' argument that the Prospect Entities

[1] The Prospect Entities include Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Advisory Services, LLC, Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC.

are seeking a "retroactive" Protective Order for documents already produced assumes, incorrectly, that the prior orders of this Court did not apply to such productions, overlooks the fact that the Prospect Entities have been operating consistently throughout, and obscures the fact that it is the Receivers, not Prospect, who seek to change the rules mid-game.

B. The Prospect Entities Have Demonstrated Good Cause for the Issuance of a Protective Order That Allows for the Designation of Documents as Confidential.

The Receivers contend that the Prospect Entities have not demonstrated good cause to justify the issuance of a protective order permitting the designation of documents as confidential, because the Prospect Entities are required to make *separate and individualized showings for every single document* that it seeks to designate as confidential. With such a rule, no protective order could ever be issued, and the Court would be mired in endless, document-by-document fighting over the propriety of confidentiality designations. To require a party producing discovery to carry this heavy burden at the outset of production, for each document, is inefficient, a waste of judicial resources, and defeats the purpose of a protective order, especially in this case where the September Production alone consists of approximately 2,900 pages of documents, many competitively sensitive financial and performance documents. The Receivers have not objected to the use of a protective order to date, and upending the rules as they suggest would wreak havoc in this case and in every business case. This Motion merely seeks to ensure that the Prospect Entities are permitted, in good faith, to designate confidential financial information as confidential and to leave the fighting over the propriety of designation to a later date.

The "good cause" requirement does not impose the insurmountable burden that the Receivers urge. The Receivers' version of good cause would nullify blanket protective orders that have long been permitted by courts and allow for the production of documents subject to confidentiality protection while preserving a potential subsequent challenge. *See Poliquin v.*

Garden Way, Inc., 989 F.2d 527 (1st Cir. 1993) (noting that for "good cause shown," protective orders can range from true blanket orders to more narrow orders). The support for the good cause shown here is gleaned directly from Rhode Island law: Rule 26(c) "has been held to include 'a wide variety of business information,' including, but not limited to, patent agreements, *financial records and statements*, license fees and oral contracts with customers, customer and supplier lists, and profit and gross income data." *Brokaw v. Davol Inc.*, 2009 R.I. Super. LEXIS 85, *10-11 (R.I. Super. Ct. July 21 2009) (Gibney, P.J.) (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F. Supp. 866, 890, n.42 (E.D. Pa. 1981)) (emphasis added).

The Receivers have not cited any legal support for their contention that, at the outset, the Prospect Entities are required to make a specific evidentiary showing as to each individual document contained therein for purposes of labeling the documents as confidential. Such an approach is wholly at odds with the normal protective order approach. Notably, they have offered no legal support within this jurisdiction for their contention that specific findings must be made prior to the marking of each individual document as confidential but, instead, cite to inapplicable case law that does not even support their arguments.

For example, the Receivers first cite an unpublished, out-of-state district court opinion, *United States v. Mitchell*, 2016 WL 7076991, at *2 (D. Me. Dec. 5, 2016), a case that undercuts their position. In that case, the court granted a motion for a blanket protective order without the need for a specific showing as to each document. *Id.* (finding that "[t]he potential need for a blanket protection order is apparent in this case"). Next, the Receivers cite another out-of-state unpublished decision, *Flom v. Theraldson Prop. Mgmt*, 2003 WL 23696040, at *2 (Bankr. D. Del. Aug 29, 2003), which notes that good cause exists to warrant a protective order for confidentiality purposes when "specific documents or ***types of documents***" are identified. (Emphasis added).

While this opinion has no precedential, and little persuasive, value, the Prospect Entities have met this standard, as they have identified the types of documents they seek to mark as confidential – financial documents and those pursuant to R.I. Gen. Laws § 23-17-14-32(a). Therefore, the concern identified in *Flom*—that the "proposed protective order would protect any document or piece of information" as confidential—is alleviated as the Prospect Entities have clearly delineated the categories of information they deem as confidential and subject to the appropriate protections. *See* 2003 WL 23696040, at *1. The Receivers even cite to *Reed v. Bennett*, which, similarly, holds that the good cause standard is met when "specific documents or ***types of documents*** to be protected within the proposed protective order" are identified. 193 F.R.D. 69, 691 (D. Kan. 2000) (emphasis added). Again, the Prospect Entities have met this burden, and this case provides no legal basis for the Receivers' argument.

As demonstrated in the Prospect Entities' memorandum of law in support of their Protective Order, which is replete with support demonstrating particularized good cause, the Prospect Entities have demonstrated a sufficient showing to warrant the need for a Protective Order for the ability to mark certain types of documents as confidential. The Prospect Entities have not merely provided a blanket designation of "Confidential" to any and all documents without any context to the contents of the documents contained therein. For example, with respect to the September Production, the marking of "Confidential" is imperative as it contains financial records that, if made public, would prejudice the Prospect Entities' competitive position in the marketplace. The second set of documents, those labeled confidential and produced pursuant to the Stipulation, consist of financial records that are by statute, R.I. Gen. Laws § 23-17-14-32(a), deemed to be confidential. The Prospect Entities have provided "specific examples of articulated reasoning" to satisfy Rule 26(c). *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1174 (R.I. 2019).

The Receivers have offered no support for their contention that the Prospect Entities should be precluded from designating documents that they, in good faith, believe should be deemed confidential or to override the parties' prior course of conduct and Court orders.

Finally, granting this Protective Order and leaving the Prospect Entities with the ability to produce documents subject to the Court's prior protective orders does not leave the Receivers without any recourse. If the Receivers disagree with any confidentiality designation, they have the right to assert the appropriate objection to the Court. This is true with any protective order – the producing party designates, and the receiving party always has the right to challenge the designation. So too here. If the Receivers seek to challenge the confidentiality designation of any specific document or documents, they can do so through an evidentiary hearing before this Court. All that is necessary to resolve this Motion is a finding that the Prospect Entities are permitted to designate confidential financial documents as "Confidential"—as they have been permitted to do as has been the case throughout these proceedings. To switch the rules mid-game would be grossly unfair to the Prospect Entities, require a claw-back of the documents previously produced, and embroil this Court in a protracted, document-by-document examination.

C. The Prospect Entities' Motion for Protective Order is Timely.

The Receivers next contend that Prospect Entities' Motion for a Protective Order is untimely. This argument is wholly unsupported by Rhode Island law, which does not impose a deadline for when a party may seek a protective order. Rule 26(c) provides, in pertinent part, that this Court has the authority to make "***any order*** which justices requires to protect a party," without subject to a time limitation. (Emphasis added). The creation of the Receivers' proposed time limitation would rewrite Rule 26(c), in direct contravention of the liberal application of the rule and this Court's "broad discretion to regulate how and when discovery occurs." *Martin v. Howard*,

784 A.2d 291, 296 (R.I. 2005). Furthermore, despite there being no applicable timeliness requirement for filing the instant motion, the Prospect Entities' motion was filed within an appropriate and reasonable time—after having discovered that the Receivers took issue with the September Production and unilaterally decided to attempt to alter the course of long-standing practice pertaining to discovery between the parties.

The Receivers, clearly reaching for support, cite to federal district court case law in New Mexico, *Velasquez v. Frontier Medic Inc.*, 229 F.R.D. 197, 200 (D.N.M. 2005), in an attempt to create a time requirement. Despite reliance on *Velasquez*, that case provides no legal basis for the Receivers' argument on this issue, as, there, the court held that a motion for protective order filed *after* the date documents were to be produced was timely filed and that the court was not prohibited from considering the motion. 229 F.R.D. at 200. Plaintiffs also cite *to In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 669 F.2d 620, 622 n. 2 (10th Cir. 1982), which is equally unhelpful, as it pertains to responding to a subpoena, and not to a request for production of documents pursuant to Rule 34, and otherwise does not make a finding as to timeliness. Neither Rule 26(c) nor Rhode Island law imposes a deadline on the seeking of a protective order, and the Receivers have offered nothing to change that here.

CONCLUSION

The Prospect Entities respectfully request that this Court grant their Motion for Protective Order, clarifying that the Prospect Entities are permitted to designate certain information as confidential and that such information may not be disclosed absent a prior Order from the Court.

Respectfully Submitted,

PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., AND PROSPECT EAST HOSPITAL ADVISORY SERVICES, LLC,

By their Attorneys,

/s/ *Christopher J. Fragomeni*
Christopher J. Fragomeni, Esq. (#9476)
Shechtman Halperin Savage LLP
1080 Main Street, Pawtucket, RI 02860
T: (401) 272-1400 | F: 401-272-1403
cfragomeni@shslawfirm.com

PROSPECT CHARTERCARE, LLC,

/s/ *W. Mark Russo*
W. Mark Russo (#3937)
Ferrucci Russo P.C.
55 Pine Street, 3rd Floor, Providence, RI 02903
T: (401) 455-1000
mrusso@frlawri.com

CERTIFICATE OF SERVICE

I certify that on the 15th day of December, 2020, the within document was electronically filed and electronically served through the Rhode Island Judiciary Electronic Filing System, on all counsel of record and those parties registered to receive electronic service in this matter. The document is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ *Christopher Fragomeni*