STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

In re:	:	
CharterCARE Community Board,	:	
St. Joseph Health Services of Rhode Island,	:	PC-2019-11756
And	:	
Roger Williams Hospital	:	

LIQUIDATING RECEIVER AND PLAN RECEIVER'S RESPONSE TO ADLER POLLOCK & SHEEHAN P.C.'S AND PROSPECT ENTITIES' EPISTOLARY REPLY BRIEF

During the September 17, 2020 hearing on the Receivers' motion, the Court directed the parties to file post-hearing memoranda addressing the criteria applied by the Department of Health and the Attorney General in connection with the pending regulatory proceedings. The parties did so on Wednesday, September 23, 2020. The Court did not invite reply briefs.

Nevertheless, on September 24, 2020, APS attorney Patricia Rocha submitted a letter to the Court making legal arguments on behalf of APS and the Prospect entities in response and expressly referring to the Receivers' post-hearing memorandum. That letter was not filed in a manner that would make it available on the public portal for this case. That letter should be made part of the record.[1] By attaching it hereto as Exhibit A, we do so.

[1] While keeping Ms. Rocha's September 24, 2020 letter off the record, APS and Prospect chose to make a letter from the Attorney General to the Liquidating Receiver a matter of public record by attaching it as an exhibit to their post-hearing memorandum of September 23, 2020. Presumably, they believed it to be relevant. We wish to inform the Court that the Receivers are completing an extensive response to that letter pointing out various serious problems with the monitor's report referred to in the letter from the Office of the Attorney General. These problems include:

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Submitted: 9/28/2020 11:12 AM
Envelope: 2767689
Reviewer: Victoria H

The Receivers disagree with the arguments in Ms. Rocha's letter.

Ms. Rocha's letter contends that the Department of Health HCA review criteria set forth in R.I. Gen. Laws § 23-17.14-8(b) are inapplicable to the instant transaction inasmuch as she contends they only apply to transactions involving both a for-profit acquiror and a nonprofit acquiree. That is incorrect and, in any event, under the circumstances of this case, completely irrelevant. The Department of Health's regulations require the Department to consider the criteria in R.I. Gen. Laws § 23-17.14-8(b) whenever there is a for-profit acquiror, irrespective of the status of the acquiree:

> **40-10-23.6. Review of For-profit Conversions**
>
> A. Review process is pursuant to R.I. Gen. Laws § 23-17.14-7.
>
> B. **In reviewing an application for a conversion involving hospitals in which one (1) or more of the transacting parties is a for-profit corporation as the acquiror, the Department shall consider the criteria stated in R.I. Gen. Laws § 23-17.14-8** and:
>
> 1. Issues of market share especially as they affect quality, access, and affordability of services.
>
> [Emphasis supplied][2]

216 R.I. Code R. 40-10-23.6.

the failure of the monitor to deliver some 10 contractually required reports. They have provided a grand total of 2 such reports. (The most recent is dated March 20, 2020, but anomalously refers to data it did not obtain until May, 2020.) While the most recent report is still inconclusive, it bases even its tentative conclusions on an erroneous understanding of the meaning of "Long Term Capital" as required by the operative documents and conditions. Our first reaction was to include our response to the Attorney General as an exhibit to this memorandum. On reflection, however, we decided that this would take us further from the issues the Court asked us to brief. We are also reluctant to burden the Court with yet more documents to consider. We will send our reply to the regulators.

[2] The quoted portion is the regulation in its entirety. There is no subsection #2.

The "criteria stated in R.I. Gen. Laws § 23-17.14-8" incorporated by reference in that regulation are the criteria stated in R.I. Gen. Laws § 23-17.14-8(b), which apply to all transactions involving a for-profit acquiror, irrespective of the status of the acquiree:

> **(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:**
>
> > **(1) Whether the character, commitment, competence, and standing in the community, or any other communities served by the proposed transacting parties, are satisfactory;**
> >
> > (2) Whether sufficient safeguards are included to assure the affected community continued access to affordable care;
> >
> > (3) Whether the transacting parties have provided clear and convincing evidence that the new hospital will provide health care and appropriate access with respect to traditionally underserved populations in the affected community;
> >
> > (4) Whether procedures or safeguards are assured to insure that ownership interests will not be used as incentives for hospital employees or physicians to refer patients to the hospital;
> >
> > (5) Whether the transacting parties have made a commitment to assure the continuation of collective bargaining rights, if applicable, and retention of the workforce;
> >
> > (6) Whether the transacting parties have appropriately accounted for employment needs at the facility and addressed workforce retraining needed as a consequence of any proposed restructuring;
> >
> > (7) Whether the conversion demonstrates that the public interest will be served considering the essential medical services needed to provide safe and adequate treatment, appropriate access and balanced health care delivery to the residents of the state; and
> >
> > **(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.**

[Emphasis supplied]

R.I. Gen. Laws § 23-17.14-8.

Ms. Rocha also contends that the Attorney General's review criteria set forth in R.I. Gen. Laws § 23-17.14-7(c) are inapplicable to the instant transaction inasmuch as they only apply to transactions involving both a for-profit acquiror and a non-profit acquiree. The Receivers already agreed that application of those criteria is not mandatory here, but nevertheless they may be applied. See Receivers' Post-Hearing Memo. at 2 n.3 ("Application of these criteria in the absence of a non-profit acquiree is within the discretion of the regulators.") (referring to the Attorney General's application of R.I. Gen. Laws Ann. § 23-17.14-7(c)(1) through (31)). Clearly the Attorney General *may* consider those criteria in conducting its completely open-ended review of for-profit HCA conversions. Application of those criteria (where pertinent) is certainly consistent with the HCA statute's broad statutory purposes articulated in R.I. Gen. Laws § 23-17.14-3, which Ms. Rocha contends are themselves the correct criteria. See Exhibit A (Ms. Rocha's letter) at 2 ("Likewise, the applicable criteria for RIAG review of the HCA Application are set forth at R.I. Gen. Laws § 23-17.14-3.").

The Receivers also note that Ms. Rocha's letter does not disagree with the Receivers as to which criteria apply to the CEC review. The CEC criteria, as discussed in the Receivers' Post-Hearing Memorandum, even standing alone, are sufficient to render the 2020 CEC proceedings (in which the Oldcos' interests are materially adverse to Prospect's) a matter that is substantially related to the 2013-2014 CEC proceedings.

The thrust of APS's arguments is that the regulators, in reviewing the HCA and CEC applications, cannot consider any of the following:

(1) Whether the applicants have satisfied the conditions imposed in connection with prior HCA and CEC approvals.

(2) Whether the applicants have made dishonest misrepresentations in the applications concerning their failures to satisfy those conditions.

(3) Whether the applicants are seeking to bless a fraudulent transfer to benefit two individuals (Messrs. Lee and Topper) at the expense of the Rhode Island hospitals.

Rhode Island statutes and regulations *require* the regulators to consider these matters and certainly do not require the regulators to turn a blind eye to them in evaluating the present applications. APS and Prospect contend the exact opposite. They urge this Court to believe that if these issues are to be considered at all by the regulators, it must be in a completely separate proceeding:

> THE COURT: Just so I'm clear, if the entity went in on this new application and said we know we agree to as far as this transaction that we make $50 million over a certain period of time. That time period has past. We just want to let you know we only ma.de 10 - and I'm making up a number - not 50, that that -wouldn't have any effect one way or another on the decision before the council in terms of whether they'll approve this new transaction.
>
> MR. TARANTINO: My understanding that would be a separate proceeding of whether there should be a change[3] to any of the conditions, and my understanding, your Honor, is that the hospital would have to petition to change that condition, but it has nothing to do with who owns it at the time.

September 17, 2020 Hearing Transcript at 76-77.

APS's argument to the Court is not only illogical but contrary to its own conduct before the regulators. If the regulators were prohibited from considering Prospect's past track record in connection with the 2013-2014 regulatory approvals, why has Prospect (through APS) made

[3] Mr. Tarantino's "understanding" is also wrong inasmuch as the regulators have no authority to modify CharterCARE Community Board's contractual rights to obtain Prospect's performance of the long-term capital commitment.

affirmative statements in the regulatory applications about Prospect's alleged past performance? APS and Prospect go so far as to make the following statement in the pending HCA application:

> The proposed transaction was subject to review by the Attorney General pursuant to the Hospital Conversions Act, R.I. Gen. Laws § 23-17.14-1, et seq.; and the Attorney General rendered a decision pursuant to such review on May 16, 2014. **Thereafter, Prospect has performed** with regard to the terms and conditions of approval of conversion and each projection, plan, or description submitted as part of the application for any conversion submitted pursuant to the Hospital Conversion Act and made a part of the approval for the conversion pursuant to R.I. Gen. Law §§ 23-17.14-7 or 23-17.14-8.
>
> [Emphasis supplied]

APS's Exhibit 4 (HCA applications) at 29.

APS has urged the regulators to consider that issue even as APS contends, in its arguments to the Court, that the regulators cannot consider the issue. But the applicants have opened the proverbial door, by making the affirmative representations. The regulators may evaluate the truth or falsity of these representations. And unless the regulators are somehow enjoined from considering the issue, they should consider it.

In any event, the CEC criteria include past performance. APS does not dispute that the CEC criteria include: "1. The character, commitment, competence and standing in the community of the proposed owners, operators or directors of the hospital as evidenced by: . . . c. The applicant's proposed and **demonstrated financial commitment** to the health care facility." 216 R.I. Code R. 40-10-4.43(E)(1)(c) (emphasis supplied).

Obviously, Prospect's past performance *is* directly relevant to the pending HCA and CEC proceedings. That fact (even standing alone) makes the pending proceedings substantially related to the 2013-2014 proceedings.

We now know from Ms. Rocha's representations to the Court that APS and Prospect have been supplementing their applications with non-public responses to at least 140 non-public supplemental questions (and more than 5,000 pages of additional non-public submissions):

> We spent enumerable time on this matter preparing the application, responding to the deficiency questions, responding to three sets of supplemental questions from the Attorney General, some 140 questions, producing 7,700 pages of documents. Before Covid we had meetings with the regulators on this matter. After Covid we have had numerous meetings, phone conferences with the regulators and experts. We will have interviews of the parties and Mr. Wistow keeps on saying these are ex parte. They are not ex parte. Oldco is not a party to the review matters. Its only position is a member of the public. They will also be a public informational meeting and there will be two more Health Services Council meetings.

September 17, 2020 Hearing Transcript at 94-95.

We do not know what the 140 supplemental questions were. Neither the Oldcos nor the Receivers have any knowledge of the inquiries that prompted the submission of an additional over 5,000 pages[4] of non-public documents. Compare this state of affairs with APS and Prospect's representations to the Court:

> I would invite the Court to look at everything that was submitted. It's in the record. Everything is in the record. Where is there an ounce of confidential information, an ounce of confidential information in any of that presentation where they're saying you should enjoin them from disclosing confidential information? There is no basis for such an injunction. The record is in. It's there. That's it. And the matters before the Attorney General, again, have to do with those matters that are either public record or matters that were the 2013 application.

September 17, 2020 hearing transcript at 81-82.

Finally, APS and Prospect's ultimate goal necessarily includes an implicit demand that this Court rule as a matter of law that the regulators are limited to inquire into certain areas and

[4] The regulators have publicly posted approximately 2,300 pages of materials from APS and Prospect. It is unclear whether the 7,700 pages to which Ms. Rocha refers include those 2,300 pages or re in addition to them.

are prohibited from inquiring into others. As the regulators attempt to fulfill their statutory responsibilities, are they to be bound by such a ruling? The question answers itself. The regulators must decide for themselves, at least in the first instance, how to fulfill their obligations.

Even on the issues covered by this memorandum, it is obvious that the Receivers do and will argue to the regulators (at least as members of the public) that the regulators should consider such issues as relevant. Prospect and its counsel argue and will argue that such issues should not be considered. This is adversity enough in the CEC and HCA applications process.

Even the potential that the regulators will consider the issues makes the matters substantially related and APS's representation of the Prospect entities violative of the rules of professional conduct.

Respectfully submitted,

Stephen Del Sesto as Receiver of the St. Joseph Health Services of Rhode Island Retirement Plan,
By his Attorney,

/s/ Max Wistow
Max Wistow, Esq. (#0330)
Stephen P. Sheehan, Esq. (#4030)
Benjamin Ledsham, Esq. (#7956)
WISTOW, SHEEHAN & LOVELEY, PC
61 Weybosset Street
Providence, RI 02903
401-831-2700 (tel.)
mwistow@wistbar.com
spsheehan@wistbar.com
bledsham@wistbar.com

and

Thomas S. Hemmendinger, as Liquidating Receiver
of CharterCARE Community Board,
St. Joseph Health Services of Rhode Island, and
Roger Williams Hospital

/s/ Thomas S. Hemmendinger
Thomas S. Hemmendinger, Esq. (#3122)
Brennan, Recupero, Cascione,
Scungio & McAllister, LLP
362 Broadway
Providence, RI 02909
Tel. (401) 453-2300
Fax (401) 453-2345
themmendinger@brcsm.com

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Reviewer: Victoria H

CERTIFICATE OF SERVICE

I hereby certify that, on the 28th day of September, 2020, the foregoing document was filed and served through the electronic filing system on the following users of record:

Thomas S. Hemmendinger, Esq.
Sean J. Clough, Esq.
Lisa M. Kresge, Esq.
Ronald F. Cascione, Esq.
Brennan, Recupero, Cascione, Scungio & McAllister, LLP
362 Broadway
Providence, RI 02909
themmendinger@brscm.com
sclough@brcsm.com
lkresge@brcsm.com
rcascione@brcsm.com

Steven J. Boyajian, Esq.
Robinson & Cole LLP
One Financial Plaza, Suite 1430
Providence, RI 02903
sboyajian@rc.com

Jessica Rider, Esq.
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
jrider@riag.ri.gov

Preston Halperin, Esq.
Christopher J. Fragomeni, Esq.
Douglas A. Giron, Esq.
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860
phalperin@shslawfirm.com
cfragomeni@shslawfirm.com
dag@shslawfirm.com

John A. Tarantino, Esq.
Patricia K. Rocha, Esq.
Joseph Avanzato, Esq.
Leslie D. Parker, Esq.
Adler Pollock & Sheehan PC
One Citizens Plaza, 8th Floor
Providence, RI 02903
jtarantino@apslaw.com
procha@apslaw.com
javanzato@apslaw.com
lparker@apslaw.com

Giovanna La Terra Bellina, Esq.
144 Wayland Square
Providence, RI 02906
jlaterra@orsonandbrusini.com

Patricia Antonelli, Esq.
Salter McGowan Sylvia & Leonard, Ir
56 Exchange Street, Suite 500
Providence, RI 02903
pantonelli@smsllaw.com

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Max Wistow

Exhibit A

ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

www.apslaw.com

September 24, 2020

VIA EMAIL

The Honorable Brian P. Stern
Providence County Superior Court
250 Benefit Street
Providence, RI 02903

Re: In re: CharterCARE Community Board et al.
C. A. No. PC-2019-11756

Dear Judge Stern:

We write to inform the Court of incorrect criteria listed in the Liquidating Receiver and Plan Receiver's (collectively, the "Receivers") Post-Hearing Memorandum of Law in Support of Motion for Injunctive Relief Against Adler Pollock & Sheehan P.C. ("AP&S") (the "Memorandum"). On page 2 of the Memorandum, the Receivers state that R.I. Gen. Laws § 23-17.14-8(b)(1) through (8) and R.I. Gen. Laws § 23-17.14-7(c)(1) through (31) provide the criteria for the Rhode Island Department of Health ("RIDOH") and the Office of the Rhode Island Attorney General ("RIAG") review of the Hospital Conversions Act Application ("HCA"), respectively. Neither statute is applicable here because the transacting parties in the HCA review, namely, the acquiror and acquiree are for-profit corporations. The first statutory provision, R.I. Gen. Laws § 23-17.14-8(b)(1) through (8) applies to a for-profit corporation as the acquiror *and a not-for-profit corporation as the acquiree. See* R.I. Gen. Laws § 23-17.14-8(a) (emphasis added). Likewise, R.I. Gen. Laws § 23-17.14-7(c) applies to review of "all conversions involving a hospital in which one or more of the transacting parties involves a for-profit corporation as the acquiror *and a not-for-profit corporation as the acquiree.*" R.I. Gen. Laws § 23-17.14-7(a) (emphasis added).

As cited by AP&S in its Second Supplemental Memorandum, the applicable criteria for RIDOH review of the HCA Application are set forth in R.I. Gen. Laws § 23-17.14-12, which provides the criteria involving a for-profit hospital as the acquiree and a for-profit corporation as the

acquiror (the circumstances in this proposed transaction). Likewise, the applicable criteria for RIAG review of the HCA Application are set forth at R.I. Gen. Laws § 23-17.14-3.[1]

Very truly yours,

/s/ Patricia K. Rocha

PATRICIA K. ROCHA
procha@apslaw.com

cc: Counsel of Record

[1] Even if the Receivers' citations were correct – which they are not – no legal conflict of interest would exist for the reasons set forth in AP&S's Second Supplemental Memorandum.