Case Number: PC-2019-11756
Filed in Providence/Bristol County Superior Court
Submitted: 7/10/2020 1:46 PM
Envelope: 2658993
Reviewer: Rachel L.

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 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF AGAINST ADLER POLLOCK & SHEEHAN, PC**

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July 10, 2020

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## INTRODUCTION

This motion involves the application of the Rules of Professional Conduct to undisputed facts.

For decades, St. Joseph Health Services of Rhode Island ("SJHSRI") and Roger Williams Hospital ("RWH") owned and operated non-profit hospitals and other health care facilities in Providence and North Providence. In 2009, SJHSRI and RWH affiliated themselves under a new nonprofit corporation, CharterCARE Community Board ("CCCB"), then-known as CharterCARE Health Partners. Attorneys from Adler Pollock & Sheehan, PC ("APS"), including attorney Patricia Rocha,[1] represented SJHSRI in connection with this 2009 affiliation, including obtaining regulatory approvals for the transaction. Pursuant to those approvals, CCCB became the Class A member of SJHSRI and sole member of RWH. APS also represented SJHSRI and RWH in connection with obtaining judicial approval of certain 2009 *cy pres* petitions, which were a condition of the regulatory approvals of the 2009 affiliation.[2]

Following the 2009 affiliation, APS lawyers (including Ms. Rocha) continued to represent SJHSRI and CCCB in a host of matters, including as "general counsel". Those matters included representing CCCB, SJHSRI and RWH (collectively the "Oldcos"[3]) in connection with the 2013 – 2014 Change in Effective Control and Hospital Conversion Act proceedings, that the Oldcos pursued before the Rhode Island Department of Health and the Attorney General. In those proceedings, APS (on behalf of the Oldcos) obtained regulatory approval of the Oldcos'

[1] As discussed *infra*, and according to APS's firm website, Patricia Rocha is presently still an attorney at APS. See https://www.apslaw.com/attorney/patricia-k-rocha/.

[2] In 2011, APS attorneys (including Ms. Rocha) represented CharterCARE Foundation in connection with obtaining judicial approval of another *cy pres* petition to transfer the foundation's membership from SJHSRI to CCCB.

[3] For the sake of clarity, it is these "Oldcos" that are in liquidating receivership in this matter, and for which Thomas Hemmendinger is the Liquidating Receiver.

sale of operating assets to the for-profit subsidiaries of Prospect Medical Holdings, Inc. (the "Prospect Entities"), and CCCB received a membership interest of at least 15% in the hospitals' new for-profit holding company, Prospect Chartercare, LLC. Following the asset sale, attorneys at APS (including Ms. Rocha) represented CCCB, SJHSRI, and RWH in connection with obtaining judicial approval by this Court of a 2015 *cy pres* petition transferring approximately $8.2 million in funds from SJHSRI and RWH to CharterCARE Foundation, an entity of which CCCB was sole member.

In August 2017, SJHSRI petitioned the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") into receivership in this Court. The Court appointed Stephen Del Sesto (the "Plan Receiver") as receiver of the Plan, and appointed Wistow Sheehan & Loveley, PC ("WSL") as special counsel to conduct an investigation and bring claims relating to the Plan. These investigations included issuing subpoenas to various persons, including a January 2018 subpoena to APS for its documents relating to (*inter alia*) the 2013 – 2014 regulatory proceedings and the 2014 Asset Sale.

In June 2018, the Receiver of the St. Joseph Health Services of Rhode Island Retirement Plan ("Plan Receiver"), together with Plan participants (collectively the "Plan Plaintiffs"), brought suits against the Oldcos and other defendants. In September 2018, the Oldcos entered into a settlement with the Plan Plaintiffs, which was ultimately approved by both this Court and the federal court. Pursuant to that settlement, the Oldcos paid the Plan Receiver approximately $12.5 million, agreed to hold the "Hospital Interests" (including CCCB's minority membership interest in Prospect Chartercare, LLC) in trust for the Plan Receiver, assigned CCCB's

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membership interest in CharterCARE Foundation to the Plan Receiver,[4] and (*inter alia*) agreed to petition themselves into this judicially supervised liquidating receivership.

In March 2019, CCCB (acting both for itself and as trustee of the Hospital Interests) brought a Superior Court derivative action captioned CharterCARE Community Board v. Samuel Lee, et al. PC-2019-3654, to vindicate CCCB's interest in Prospect Chartercare, LLC and compel the Prospect Entities to fulfill their obligations (*inter alia*) with respect to funding $50 million in long-term capital improvements at the hospitals (among other relief). CCCB contends that the Prospect Entities made misrepresentations to the state regulators and certain municipalities in connection with the 2014 Asset Sale and have failed to fulfill their obligations pursuant to the terms and regulatory conditions of that sale, for which APS obtained regulatory approval on behalf of the Oldcos. By definition, APS's pending regulatory submissions deny the allegations of this Complaint on behalf of its present clients, the Prospect Entities.

In December 2019, Thomas Hemmendinger (the "Liquidating Receiver") was appointed by this Court as the liquidating receiver of the Oldcos, and was charged with (*inter alia*) performing the Oldcos obligations under the August 2018 settlement agreement, including with respect to holding the Hospital Interests in trust. In fulfilling those obligations, the Liquidating Receiver is marshalling the assets and property of the Oldcos and prosecuting CCCB v. Lee against the Prospect Entities.

Now, APS and Ms. Rocha represent the Prospect Entities in the new Change in Effective Control and Hospital Conversion Act proceedings, pending before the same administrative

[4] As noted, APS was counsel to the Oldcos in obtaining judicial approval of the 2015 *cy pres* petition. Subsequently the Plan Plaintiffs entered into a second approved settlement, with CharterCARE Foundation and the Oldcos, whereby CharterCARE Foundation agreed to re-transfer $4.5 million to the Plan Receiver (of the approximately $8.2 million that had been transferred pursuant to the 2015 *cy pres*, for which APS was counsel). That settlement was approved by the federal court and was twice approved by this Court.

agencies, in which the Prospect Entities seek regulatory blessing for a modification of the corporate structure approved by those regulators in 2014. The current regulatory proceedings include APS's attempts to persuade regulators that the Prospect Entities have complied with conditions imposed by regulators in 2014 which, the Oldcos contend, the Prospect Entities failed to comply with (and with respect to which the Oldcos have filed objections with the regulators). Thus, APS is advocating for the Prospect Entities concerning conditions that have not been fulfilled and concerning events that occurred during APS's representation of the Oldcos, and in the process are taking positions directly contrary to the factual contentions and financial and legal interests of Oldcos. Moreover, APS now advocates for a change of the control that APS was instrumental in obtaining approval for in 2014. APS's former clients vehemently oppose this change in control.

It is hard to imagine a clearer conflict of interest.

The Liquidating Receiver has reviewed many of the Oldcos' business records and has obtained detailed invoices from APS during the period from 2012 through 2018 that document both the nature and extent of APS's activity on behalf of the Oldcos.

The Liquidating Receiver brings this motion to prevent APS from interfering with the collection of assets and property of the receivership estate, and to prevent APS from aiding the Prospect Entities in obtaining the Change in Effective Control that its former clients oppose. The Plan Receiver joins this 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.[5]

[5] See December 18, 2019 Order Appointing Temporary Liquidating Receiver ¶ 7; January 17, 2020 Order Appointing Permanent Liquidating Receiver ¶ 7.

## FACTS

### I. APS's representation of, and involvement with, the Oldcos

As noted, APS's (and Ms. Rocha's) representation of the Oldcos dates back many years, until sometime prior to the 2009 hospital conversion proceedings by which SJHSRI and RWH affiliated themselves under the aegis of CCCB.

There is no evidence that the Oldcos ever agreed that APS's representation would be limited. Moreover, APS's invoices dating from the period 2012 – 2014 state that APS billed CCCB and SJHSRI for services as "general counsel," which by definition entails a general representation.

In addition, Joseph DiStefano, who was (and remains) an attorney at APS, was a director of CCCB for the period from 2010 – 2014,[6] and thereby had (and has) the fiduciary duty to act exclusively in support of CCCB's interests and preserve CCCB's confidences. As director, DiStefano was intimately involved in all of the evaluations and decision-making processes concerning going forward with the 2014 Asset Sale. In addition, DiStefano's direct participation as an attorney in these matters is reflected in APS's billing records.

### II. APS's services during 2012 – 2014 relating to Prospect, the asset sale, and regulatory proceedings

In June 2020, after learning of APS's filing of the pending regulatory proceedings on behalf of the Prospect Entities, the Liquidating Receiver obtained the 2010 – 2014 invoices from APS concerning its prior representation of the Oldcos.[7]

[6] Mr. DiStefano was also a director of SJHSRI for at least the period 2007 – 2009.

[7] The Liquidating Receiver believes the prior copies of the invoices, originally sent to the Oldcos during 2010 – 2014, are in the possession of the Prospect Entities, who acquired substantially all the business records of the Oldcos pursuant to the 2014 Asset Sale. Many of those business records (other than the APS invoices) were obtained by the Plan Receiver and turned over to the Liquidating Receiver.

Two sets of invoices expressly state that APS acted as general counsel for both[8] SJHSRI and CCCB:

> **001 - General Counsel-St. Joseph Health Services of R.I.**
>
> 001 General - CharterCARE

Exhibit 1 (APS billing entries) at 1 & *passim*; id. at 31 & *passim*.[9] APS billed at least $41,281.75 for its services as SJHSRI's general counsel from the beginning of 2012 until the asset sale to Prospect in June of 2014, and billed at least $31,847.50 for its services as CCCB's general counsel from 2012 through the end of 2014 (in addition to other amounts Adler Pollock billed on various matters for the Oldcos). These invoices document extensive activity by APS concerning (a) the transactions between the Oldcos, on the one hand, and the Prospect Entities on the other hand, and (b) concerning regulatory proceedings in which SJHSRI, CCCB, and the Prospect Entities made extensive factual representations and undertakings concerning the proposed transactions.

In 2012, APS attorneys Hans Lundsten and Joseph DiStefano[10] were already discussing and researching the structuring of the Oldcos' entering into a joint venture with a for-profit entity to own and operate the Rhode Island hospitals:

| | | | | |
|---|---|---|---|---|
| 06/25/12 | Lundsten, E H | Research on structuring joint venture with for profit; Discuss with firm attorney (J. DiStefano). | 2.25 | $ 956.25 |
| 06/26/12 | Lundsten, E H | Review and discuss with firm attorney (J. DiStefano) for profit joint venture. | 0.50 | 212.50 |

[8] Although APS represented all three of the Oldcos, APS has not produced any invoices for RWH.

[9] So as not to overburden the Court, Exhibit 1 only contains the time entries from APS's invoices, arranged chronologically. It is being filed under seal.

[10] According to APS's firm website, Hans Lundsten and Joseph DiStefano are presently still attorneys at APS. See https://www.apslaw.com/attorney/e-hans-lundsten/; https://www.apslaw.com/attorney/joseph-r-distefano/.

| | | | | |
|---|---|---|---|---|
| 06/27/12 | Lundsten, E H | Review and discuss with firm attorney (J. DiStefano) Rules for Joint Venture with for profit. | 0.50 | 212.50 |

[Emphasis supplied]

Exhibit 1 at 21.

At this time (June 2012), Mr. DiStefano was also a director of CCCB, and so Mr. Lundsten's discussions with DiStefano about structuring issues constituted communications with a member of the client's board of directors in addition to being discussions among APS's attorneys about the work they were performing for the Oldcos.

On August 27, 2012, APS attorney Richard Beretta[11] met for an hour and a half with then-CCCB CEO Kenneth Belcher regarding Prospect, which at that time was merely a prospective joint-venturer:

| | | | | |
|---|---|---|---|---|
| 08/27/12 | Beretta, R R | Meeting with K. Belcher re Prospect; Follow-up telephone call re same. | 1.50 | 562.50 |

Exhibit 1 at 28. Thus, by August 27, 2012, APS was directly involved in advising the Oldcos regarding the prospective Prospect transactions.

In December 2012, APS attorney Hans Lundsten was researching how to structure a sale of the hospitals at least with respect to the SJHSRI Retirement Plan (a matter of overwhelming significance in the litigations before this Court and the federal court):

| | | | | |
|---|---|---|---|---|
| 12/20/12 | Lundsten, E H | Discuss with firm attorney (J. DiStefano) and research issues on underfunded plan. | 1.00 | $ 425.00 |
| 12/21/12 | Lundsten, E H | Discuss with firm attorney (J. DiStefano) proposed transfer; Review outline. | 0.75 | 318.75 |
| 12/31/12 | Lundsten, E H | Review structuring issues on sale; Call from Peter Karlson. | 1.75 | 743.75 |

[Emphasis supplied]

[11] According to APS's firm website, Richard Beretta is presently still an attorney at APS. See https://www.apslaw.com/attorney/richard-r-beretta-jr/.

Exhibit 1 at 39. Peter Karlson was (and is) an attorney at The Angell Pension Group, Inc., which was the plan actuary for the SJHSRI Retirement Plan during this time and which is presently a defendant in the 2018 federal suit brought by the Plan Plaintiffs.

Thus, starting at least by August 27, 2012, the Oldcos were involved in discussions with Prospect that ultimately resulted in the consummation of the 2014 Asset Sale. The Oldcos allege the Prospect Entities breached their agreements with the Oldcos, including specifically the asset purchase agreement and the joint venture agreement. Both agreements obligated Prospect Entities to contribute $50 million to the joint venture (in addition to $10 million in routine annual capital expenditures), and they have failed to establish that they made these contributions. These undertakings are also the subject of the current regulatory proceedings in which APS represents Prospect.

Putting it simply, APS is now telling the regulators that Prospect performed, while APS's former clients (the Oldcos) are saying Prospect did not. For example, paragraphs 41, 42, and 102 of the complaint in CCCB v. Lee state:

> 41. Prospect East has failed and refused to provide financial information demonstrating that it has satisfied, in whole or in part, any of the required Long Term Capital Commitment.
>
> 42. Prospect Medical Holdings has guaranteed Prospect East's obligation to fund inter alia the long term capital commitment, in a Guaranty dated May 23, 2014 executed by Samuel Lee on behalf of Prospect Medical Holdings (the "Guaranty"). Prospect Medical holdings has nevertheless failed to honor the Guaranty.
>
> * * *
>
> 102. On February 19, 2020, four Change in Effective Control applications ("CECAs") were filed with the Rhode Island Department of Health, purportedly on behalf four subsidiaries of Prospect Chartercare. The CECAs seek permission to spend $11,940,992 plus an unknown and perhaps additional sum (which has not been disclosed to the Rhode Island Department of Health

> and is presently unknown to Plaintiffs) of Defendant Prospect Medical Holdings's funds to buyout the shareholder interests of Defendants Green Equity, Green Side, and others in Defendant Ivy Holdings, for the benefit of Defendants Lee, Topper, and Topper Trust. The proposed transaction described in the CECAs confers no benefit upon Prospect Medical Holdings, and is a fraud upon Prospect Medical Holdings's creditors, including Plaintiffs pursuant to the Guaranty of May 23, 2014. Upon information and belief, the CECAs were filed with the approval or acquiescence of the board of directors of Prospect Chartercare, in breach of fiduciary duties owed to Plaintiffs, and in furtherance of the fraudulent transfers described herein.

As noted, Joseph DiStefano was both an APS attorney and a director of CCCB, and a defendant in CCCB v. Lee. DiStefano participated in the board meetings in which the board met with principals of the Prospect Entities, discussed the letters of intent being negotiated with prospective for-profit hospital purchasers (including Prospect), discussed the due-diligence process being conducted by CCCB and Prospect after entering into a letter of intent, and authorizing the execution of the Asset Purchase Agreement and other transaction documents.

In the days immediately before and after the execution of the March 18, 2013 letter of intent between CCCB and the Prospect Entities, Mr. DiStefano again discussed the transaction structure with Mr. Lundsten, including how it related to the SJSHRI Retirement Plan:

| | | | | |
|---|---|---|---|---|
| 03/11/13 | Lundsten, E H | Discuss structure issues on sale with firm attorney (J. DiStefano). | 0.75 | $ 337.50 |
| 03/14/13 | Lundsten, E H | Research on plan issues in connection with possible sale. | 1.50 | 675.00 |
| 03/15/13 | Lundsten, E H | Research on defined benefit issues; Discuss with firm attorney (J. DiStefano). | 0.75 | 337.50 |
| 03/19/13 | Lundsten, E H | Discuss issues on church plans with firm attorney (J. DiStefano) and possible sale. | 0.25 | 112.50 |
| 04/22/13 | Lundsten, E H | Review and discuss issues on sale with firm attorney (J. DiStefano). | 0.50 | 225.00 |

Exhibit 1 at 47 (emphasis supplied).

On May 16, 2013, Ms. Rocha reviewed the letter of intent from Prospect and communicated[12] about it with Kimberly O'Connell, who was then an executive of CCCB:

| | | | | |
|---|---|---|---|---|
| 05/16/13 | Rocha, P K | Review letter of intent re proposed transaction terms; Research re status of St. Joseph's Foundation; Communication to Kim O'Connell re same. | 1.00 | 420.00 |

Exhibit 1 at 55.

On May 21, 2013, Ms. Rocha reviewed a draft of the Asset Purchase Agreement between the Oldcos as sellers and various Prospect Entities as buyers, at a time when the parties' interests were by definition adverse: seller versus buyer (at least if the transaction is at arms' length, which the transaction purported to be):

| | | | | |
|---|---|---|---|---|
| 05/21/13 | Rocha, P K | Review APA and management agreement. | 1.00 | 420.00 |

Exhibit 1 at 55.

Ms. Rocha's work on the regulatory applications also began, at latest, almost two months before the execution of the Asset Purchase Agreement on September 24, 2013. On August 1, 2013, Ms. Rocha participated in a conference with Moshe Berman (counsel for the Prospect Entities) and Ken Belcher (CEO of CCCB) concerning the "status of negotiations and execution of APA [Asset Purchase Agreement]":

| | | | | |
|---|---|---|---|---|
| 08/01/13 | Rocha, P K | Communication with Moshe Berman; Work on application; Conference with Ken Belcher re status of negotiations and execution of APA. | 1.50 | $ 630.00 |

Exhibit 1 at 77.

The October 18, 2013 Hospital Conversion Act Applications, which Ms. Rocha submitted to the Attorney General (and which listed her as a contact for CharterCARE

[12] As discussed, these communications relate to the *cy pres* proceeding subsequently handled by APS in 2015.

Community Board), in response to question 55, recited the terms of the March 18, 2013 term letter, including "PMH's commitment to capital expenditures of $50 million over four years, in addition to the commitment to fully fund depreciation expenses at spending levels consistent with CCHP's recent history" and "CCHP's right to appoint 50% of the members of the board of directors of Prospect CharterCARE, LLC" and stated that "Taken in the aggregate, these terms were the best available to CCHP among the proposals from the remaining interested parties . . .." Prospect's failure to fund the long-term capital commitment is one of the grounds on which the Oldcos object to the pending regulatory proceedings and is a central allegation in CCCB v. Lee.

Similarly, the January 2, 2014 Hospital Conversion Act Applications, which APS submitted to the Attorney General (and which listed Ms. Rocha as a contact for CharterCARE Community Board), in response to question 67, stated: "In this transaction, PMH has committed to $50M in capital expenditure over four (4) years, post-conversion. The specific uses of the capital expenditure funds will be determined post conversion after appropriate studies and analyses are undertaken."

APS represented the Oldcos in connection with both sides' performance of obligations and receipts of benefits under those agreements. Moreover, APS represented the Oldcos in obtaining regulatory approvals, in which the Prospect entities participated and with respect to which the Oldcos allege the Prospect entities committed fraud.

## III. The Plan Receiver's 2018 subpoena to APS

On January 24, 2018, counsel for the Plan Receiver, as part of the investigatory process discussed previously, issued a subpoena[13] to APS for its documents relating to its representation

[13] Exhibit 2 (January 24, 2018 subpoena).

of the Oldcos in matters involving the Prospect entities, including (*inter alia*) the 2014 Asset Sale and the 2013 – 2014 regulatory proceedings.

APS devoted substantial time and expense in responding. In fact, APS billed $295,147.45 in fees (plus $34,576.60 in expenses) to the Oldcos—and received payment in full—for researching APS's files and producing documents in response to the Plan Receiver's subpoena, concerning (*inter alia*) the Oldco matters involving the Prospect Entities. These subpoena-related services were performed by APS attorneys including Ms. Rocha. Indeed, APS produced a 229-page privilege log[14] in response to the Plan Receiver's subpoena in 2018, pursuant to a confidentiality Stipulation[15] that APS had negotiated with the Plan Receiver's counsel, describing and withholding the various client confidences it possessed concerning the Oldcos. In addition, APS produced many documents redacted of client confidences.[16] A sample of each will show that attorney-client and confidentiality issues were raised by APS in response to the subpoena.

In other words, APS itself represented to this Court during that critical investigatory phase that it was in possession of attorney-client and confidential information of the Oldcos.

## IV. CCCB's March 2019 lawsuit against the Prospect Entities

On March 11, 2019, in this Court, CCCB filed a Verified Complaint in the Superior Court lawsuit captioned CharterCARE Community Board v. Samuel Lee, et al., PC-2019-3654 ("CCCB v. Lee"), which is pending before this Court. At that time, the defendants included the various Prospect Entities (including Prospect CharterCARE, LLC), APS attorney Joseph

[14] Exhibit 3 (APS privilege log). APS later produced a supplemental privilege log *in addition* to these 229 pages.

[15] Exhibit 4 (February 9, 2018 Stipulation).

[16] See, e.g., Exhibit 5 (document bates stamped APS0201744 to -47) in which fully three out of its four pages are completely redacted.

DiStefano (who was a board member of Prospect CharterCARE, LLC), and Samuel Lee and David Topper (who were also board members).

Among its allegations, the complaint alleged (a) that the conditions imposed by the Attorney General in connection with his approval of the 2014 Asset Sale, especially pertaining to funding the $50 million long-term capital commitment, had been breached; (b) that the Prospect entities had misled the regulatory agencies and municipal officials in connection with obtaining approvals of the transaction and associated tax stabilization agreement; and (c) that because of the defendants' breaches, CCCB's true membership percentage in Prospect Chartercare, LLC was over 27%, instead of its nominal interest of 15%.

On April 21, 2020, CCCB and the Liquidating Receiver filed an Amended Complaint, adding the Plan Receiver as a co-plaintiff and adding additional defendants, including additional applicants in the pending regulatory proceedings, as well as additional claims.

During the very recent June 23, 2020 hearing in the CCCB v. Lee suit, concerning CCCB's entitlement to obtain information from the Prospect Entities, counsel for the Plan Receiver made reference to certain financial statements produced by the Prospect Entities. In response, counsel for the Prospect Entities informed the Court about information that he had recently received from Ms. Rocha concerning sale-leaseback transactions that the Prospect Entities had entered into in 2019.[17] Rocha's statements were offered to the Court to contradict the position of CCCB. Again, adversity could not be clearer.

[17] The transcript of this hearing has been ordered from the stenographer but is not yet available.

## V. The Prospect Entities' pending regulatory proceedings

In March 2020, the Department of Health's website revealed that APS (through Ms. Rocha) had filed applications for a change in effective control of the hospitals and other health care facilities that Prospect Chartercare, LLC owns through its subsidiaries. These applications propose to modify the corporate structure approved by the regulators in 2014 and bless Prospect Medical Holdings, Inc. proposed payment of $11,940,992 (plus an undisclosed additional sum) to buy out certain investors in its ultimate parent entity, for the benefit of the other shareholders in that entity, Samuel Lee and David Topper (through his family trust).

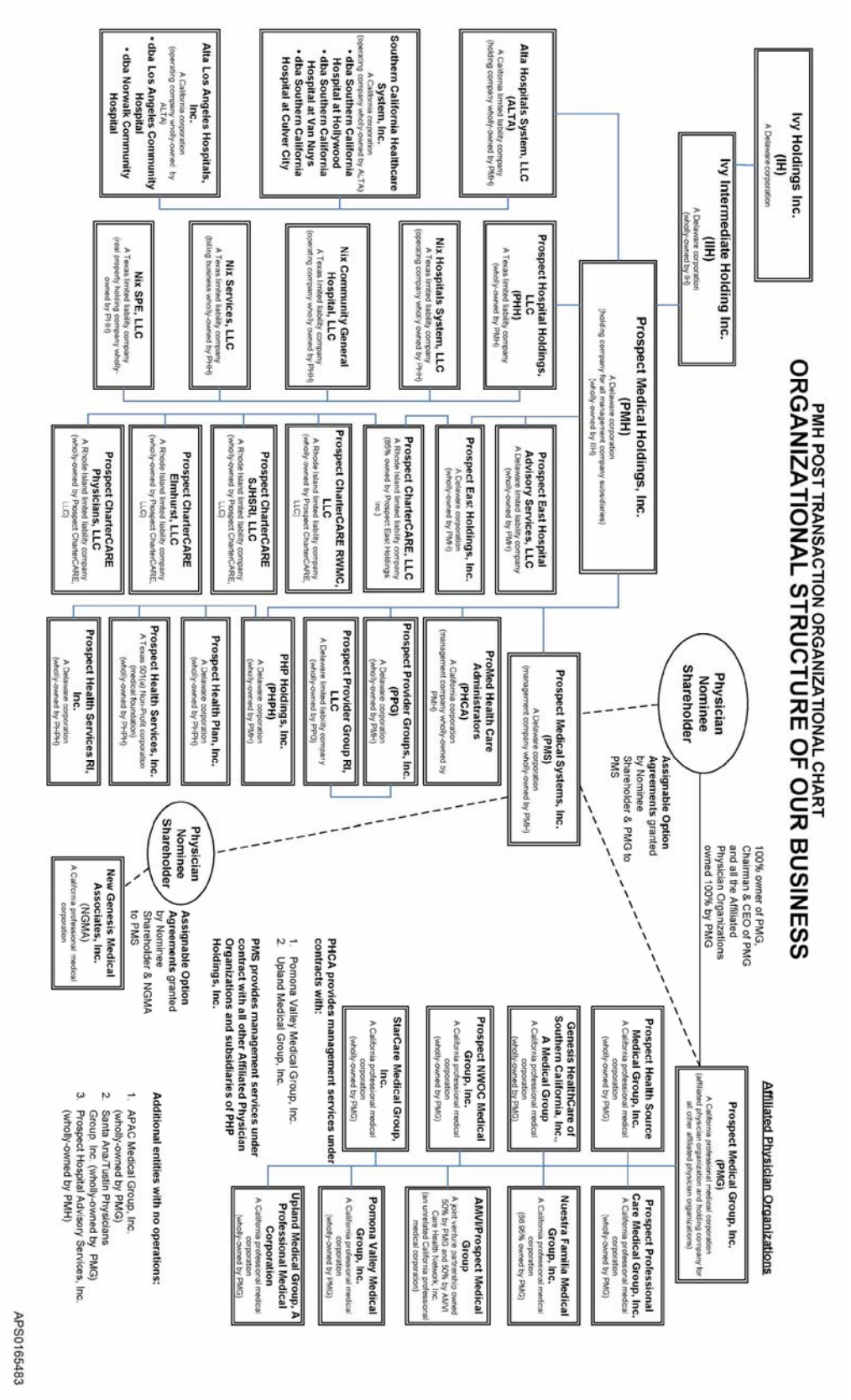
Neither the Liquidating Receiver nor the Plan Receiver was informed of the change in effective control applications in advance of their filing. After having fortuitously learned of the applications, the Liquidating Receiver and the Plan Receiver filed a timely objection[18] with the Department of Health on April 9, 2020. In addition to objecting to the transaction on the merits, the Receivers cited the impermissible conflict of APS, who had neither sought nor obtained a waiver of that conflict from the Oldcos.

On May 23, 2020, the Attorney General's website revealed that APS had also filed applications for the Prospect Entities under the Hospital Conversions Act to modify the corporate structure approved in 2014, again for the benefit of Messrs. Lee and Topper, and again without notice to or the consent of the Oldcos. The time to file objections to those applications has not yet elapsed.

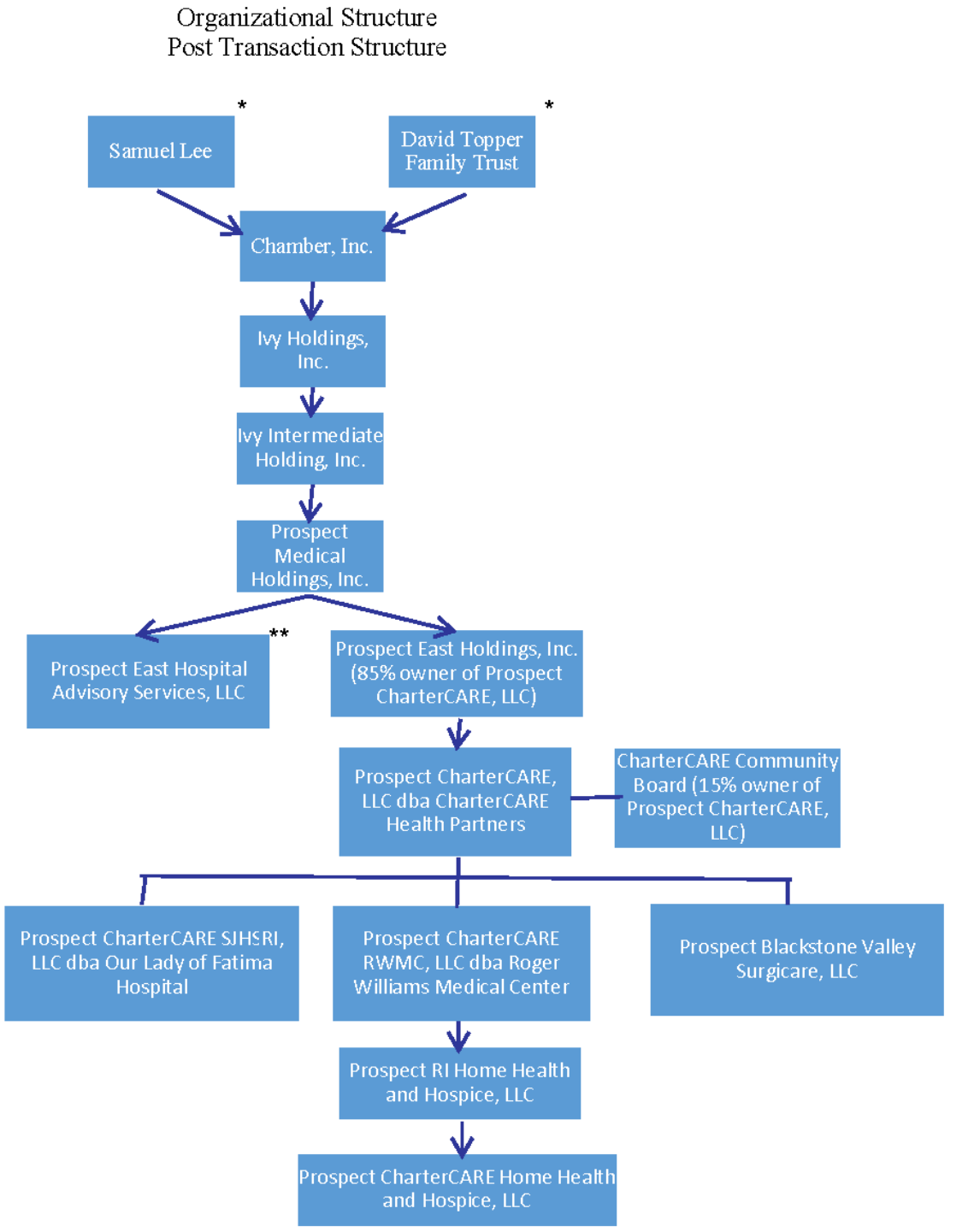
In both of the pending regulatory proceedings, the Prospect Entities propose to change the hospital system corporate structure for which APS gained regulatory approval for the Oldcos in 2014. The structure would go from this approved structure (attached to the 2013 –2014

[18] Exhibit 6.

regulatory applications):



. . . to this structure (attached to the pending regulatory applications, and for which APS is now seeking regulatory approval on behalf of the Prospect Entities):




As previously noted, the Receivers vehemently dispute the "15% owner[ship]" figure.

### VI. The Oldcos' requests that APS desist from its conflicted representation of the Prospect Entities have been met with outright refusal

The Oldcos have not consented to APS's conflicted representation of the Prospect Entities; nor would it be possible to do so if asked. Following the Receivers' filing[19] with the Department of Health, the Liquidating Receiver and Ms. Rocha had discussions concerning the Oldcos' demand that APS desist from representing the Prospect Entities in connection with the pending regulatory proceedings.[20] APS subsequently provided the Liquidating Receiver with copies of APS's billing records from 2012 – 2014, whereupon the Liquidating Receiver and Ms. Rocha had further communications, including an exchange of correspondence on the conflict issue.[21] The Liquidating Receiver's demands have been refused.

## ARGUMENT

### I. APS and its attorneys (including Ms. Rocha) are disqualified from representing the Prospect Entities in connection with the pending regulatory proceedings

#### A. Supreme Court Rules of Professional Conduct 1.9 and 1.10

##### 1. Rule 1.9 requires disqualification of an attorney who formerly represented a client in a "substantially related matter"

Supreme Court Rules of Professional Conduct R. 1.9(a) provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

[19] See Exhibit 6.

[20] See Exhibit 7 (email string containing April 28, May 1, May 5, May 11, and May 18, May 19, May 23, and May 26, 2020 emails between the Liquidating Receiver and Ms. Rocha).

[21] See Exhibit 8 (the Liquidating Receiver's June 11, 2020 letter to Ms. Rocha); Exhibit 9 (Ms. Rocha's June 17, 2020 letter to the Liquidating Receiver).

Supreme Court Rules of Professional Conduct R. 1.9(a). "Matters are 'substantially related' for purposes of this Rule if they **involve the same transaction** or legal dispute." Supreme Court Rules of Professional Conduct R. 1.9 cmt. (emphasis supplied).

It is the duty of the court to enforce this ethics rule. See Kevlik v. Goldstein, 724 F.2d 844, 847 (1st Cir. 1984); Parker Waichman LLP v. Salas LC, No. CV 16-1333 (FAB), 2017 WL 2984133, at *7 (D.P.R. July 13, 2017).

In addition, this motion seeks to assert rights on behalf of the receiverships and the property interests being held in trust by the Liquidating Receiver, and to prevent those rights and interests from interference by APS (on behalf of Prospect). By order entered January 17, 2020, this Court appointed the movant as Permanent Liquidating Receiver, pursuant to R.I. Gen. Laws § 7-6-61, of (*inter alia*) the intangible property of the Oldcos, which includes the rights being asserted here to protect the Oldcos' property rights from improper interference by APS. Accordingly, this Court's jurisdiction over those rights is exclusive. R.I. Gen. Laws § 7-6-61(e) ("The court appointing the receiver has exclusive jurisdiction of the corporation and its property, wherever situated.").

**2. Rule 1.10(a) requires disqualification of a firm whose attorneys formerly represented a client in a "substantially related matter"**

Supreme Court Rules of Professional Conduct R. 1.10(a) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Supreme Court Rules of Professional Conduct R. 1.10(a).

Because Ms. Rocha (among other APS attorneys) is disqualified from representing the Prospect Defendants under Rule 1.9(a), the entire APS law firm is disqualified under Rule 1.10(a). See Quinn v. Yip, No. KC-2015-0272, 2018 WL 3613145, at *9 (R.I. Super. July 20, 2018) (Stern, J.) ("[I]n disqualifying the current lawyers at PS&H who formerly represented the Movants, this Court also finds that the entire law firm is also disqualified under Rule 1.10(a).").

**B. APS, Rocha, and other APS attorneys formerly represented the Oldcos**

It is beyond dispute that the Oldcos are former clients of APS. Likewise, there can be no dispute that the pending regulatory proceedings, to which the Oldcos have objected, are a matter materially adverse to the interests of APS's former clients (the Oldcos). The only question therefore is whether the matters are substantially related. See Grosser-Samuels v. Jacquelin Designs Enterprises, Inc., 448 F. Supp. 2d 772, 779 (N.D. Tex. 2006) ("When a former client moves to disqualify an attorney who appears on behalf of its adversary, . . . the movant need only to show that the matters embraced within the pending suit are substantially related to the matters or cause of action wherein the attorney previously represented it.").

**C. APS's representation of the Prospect Entities involves issues substantially related to APS's prior representation of the Oldcos**

"Substantiality is present if the factual contexts of the former and present representations are similar or related." Otaka, Inc. v. Klein, 791 P.2d 713, 719 (Haw. 1990). Substantiality "is measured by the allegations in the complaint and by the nature of the evidence that would be helpful in establishing those allegations." Id. See, e.g., Prod. Credit Ass'n of Mankato v. Buckentin, 410 N.W.2d 820, 824-25 (Minn. 1987) ("Even though Corum had not represented the St. Paul FICB in either the Harberts or Buckentin loan transactions, he had regularly, as part of his duties, represented the bank in matters substantially related to issues in each of these pending

cases-to wit, supervision of PCA loan administration and formulation of interest rates on PCA loans.") (disqualifying counsel). As a Georgia appellate court has stated:

> An attorney is also disqualified from representing "a client against a former client in an action that is of the same general subject matter, and **grows out of an event that occurred during the time of such representation**." Disqualification in that situation is limited to cases where "the lawyer was actively representing the party when the events giving rise to the case in question occurred."
>
> [Emphasis supplied]

Befekadu v. Addis Int'l Money Transfer, LLC, 772 S.E.2d 785, 788-89 (Ga. App. 2015) (applying Georgia's Rule 1.9(a)) (citations omitted). See also Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 440 (9th Cir. 1983) ("[a] substantial relationship is present 'if the factual contexts of the two representations are similar or related,' regardless of "whether confidences were in fact imparted[22] to the lawyer by the client" in the prior representation."); Forest Park Assocs. Ltd. P'ship v. Kraus, 572 N.Y.S.2d 317, 318 (N.Y. App. 1991) ("Where the lawyer, or the firm, has represented the former client in matters related to the subject matter of the current proceeding, that alone would be sufficient to warrant disqualification irrespective of whether or not the lawyer in fact obtained any confidential information in the course of the prior employment.") (law firm, who previously represented defendant in conversion of apartment building to cooperative apartments, was disqualified from representing 25%-owner of conversion's sponsor in suit against defendant).

Disqualification is required under even the stringent "patently clear" standard mentioned by our Supreme Court in its *per curiam* decision in Brito v. Capone, 819 A.2d 663 (R.I. 2003). See id. at 665 (citing Am. Heritage Agency, Inc. v. Gelinas, 774 A.2d 220, 230 (Conn. App.

[22] As noted above, in the instant case, confidences were in fact imparted by the Oldcos to APS. Indeed, APS has claimed confidentiality on thousands of documents referenced in its 229-page privilege log, which it generated after billing the Oldcos $295,147.45 in fees (plus $34,576.60 in expenses) for researching APS's files.

2001) as "holding that the test for determining whether matters are substantially related has been honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is 'patently clear' or when the issues are 'identical' or 'essentially the same'"); Quinn v. Yip, No. KC-2015-0272, 2018 WL 3613145, at *4 (R.I. Super. July 20, 2018) (Stern, J.) (quoting Brito v. Capone).

There is a patently clear relationship between APS's prior continuous representation of the Oldcos concerning the 2013-2014 regulatory proceedings and corporate matters, on the one hand, and Prospect's pending regulatory proceedings concerning the same hospitals, on the other. APS, on behalf of the Prospect Entities, is seeking to change the very same effective control for which APS obtained regulatory approval on behalf of the Oldcos in 2014. APS is attempting to do so in the face of outright objections to this change by its former clients.

Now, APS has switched sides. It has done so notwithstanding the objections filed with the regulators by its former clients, the Oldcos. APS is seeking to modify the approved structure on behalf of the Prospect Entities, notwithstanding the Oldcos' objections (which themselves relate to APS's prior representation). The pending regulatory proceedings not only arise out of the prior regulatory proceedings but concern ownership interests that the applicants acquired in connection with the prior proceedings, *i.e.* a conversion of and change in effective control of the very same hospitals.

The pending regulatory proceedings also necessarily entail applying the very same regulatory and statutory criteria that were applied in the prior proceedings. See R.I. Gen. Laws § 23-17.14-7; 216-RICR-40-10-4.4.

In addition, APS's review of its files concerning the 2013 – 2014 regulatory proceedings, in response to the Plan Receiver's 2018 subpoena to APS, which it billed as professional services

to the Oldcos, inevitably related to the pending regulatory proceedings. After all, one of the steps that APS took in 2012 was to review the prior 2009 regulatory approvals:

| | | | | |
|---|---|---|---|---|
| 08/30/12 | Rocha, P K | Analysis of prior approvals. | 1.00 | 400.00 |

The applicants in the pending regulatory proceedings, through APS, are affirmatively taking positions on issues that arise out of the prior regulatory approvals and are disputed by the Liquidating Receiver. For example:

- The pending HCA applications affirmatively state that "Prospect has performed with regard to the terms and conditions of approval" of the 2014 HCA conversion.

  Of course, the Oldcos contend to the complete contrary, and assert that the Prospect Entities are in breach of those terms and conditions.

- Both the pending CECA applications and the pending HCA applications affirmatively state that "PCC is owned 85% by Prospect East Holdings, Inc., ('PEH') and 15% by CharterCARE Community Board ('CCCB')."

  Of course, the Oldcos contend to the complete contrary, and assert that CCCB's true ownership percentage exceeds 15% (upwards of 27%).[23]

- The pending HCA applications affirmatively state that "There will be no impact as a result of the Transaction on . . . pending litigation."

  Of course, the Oldcos contend to the complete contrary, and contend that the proposed transaction would have an obvious impact on the pending CCCB v. Lee suit as well as an impact on the federal pension lawsuit.

The Court need not decide at this time whose position is correct, *i.e.* the position asserted by APS on behalf of its present clients or the contrary position by APS's former clients. It is enough that these discrepancies between CCCB's positions and the Prospect Entities' positions not only

[23] Even Rocha's June 17, 2020 letter to the Liquidating Receiver twice rejects the Liquidating Receiver's positions and twice adopts the Prospect Entities' position on the percentage ownership issue. See Exhibit 9 at 2 n.3 ("CharterCARE is owned 85% by Prospect East Holdings, Inc., a subsidiary of Prospect Medical Holdings, Inc. ('PMH') and 15% by CCCB."); id. at 5 (disclaiming its obligations to "CCCB, which is a 15% minority member in CharterCARE").

demonstrate the adversity of APS's present representation but also demonstrate that APS's present representation of the Prospect Entities and former representation of the Oldcos constitute substantially related matters.

### D. APS's arguments set forth in its correspondence refusing to desist are meritless

#### 1. APS's claimed distinction between "transaction counsel" and "regulatory" counsel here is a distinction without a difference. APS represented the Oldcos in connection with the 2014 Asset Sale.

In correspondence with the Liquidating Receiver concerning APS's conflict, Ms. Rocha has contended that while APS was handling the 2013 – 2014 regulatory approvals for the Oldcos, a different firm (Drinker Biddle & Reath) was engaged as transaction counsel.

As noted *supra*, APS's own invoices show that APS acted as general counsel for CCCB and SJHSRI, in addition to representing the Oldcos in matters directly involving Prospect. Furthermore, the purported distinction between "transaction" counsel and "regulatory" counsel is not borne out by APS's billing records, which indicate that Ms. Rocha was reviewing drafts of the transactional documents throughout their negotiation process, and Mr. DiStefano was participating (as an APS lawyer *and* as a CCCB board member) in their approval.

In any event, the Oldcos' disputes with the Prospect Entities concern the implementation of the transaction, perhaps even more than its design. APS and Ms. Rocha (on behalf of the Oldcos) described the transaction to the regulators through a series of regulatory applications and answers to supplemental questions posed by the regulators. This task, of interpreting and explaining the transaction documents to the regulators, was not only a prerequisite to obtaining its approval, but necessarily required APS and Rocha to take positions on the meaning and significance of transactional terms.

Moreover, when the Attorney General's office ultimately approved the 2014 Asset Sale, it did so with thirty conditions. Condition #9 required:

> 9. That the transaction be implemented as outlined in the Initial Application, including all Exhibits and Supplemental Responses.

Thus, when the Prospect Entities failed to fund the $50 million long term capital commitment (as it had been outlined in the Supplemental Responses) and failed to have a Prospect Chartercare, LLC board of directors with true 50/50 control by CCCB with real veto power (as outlined in the Supplemental Responses), those issues were as much within the scope of purported "regulatory" counsel's responsibilities as purported "transactional" counsel's.

**2. Ms. Rocha (and other APS attorneys) will be fact witnesses in the regulatory proceedings, regardless of whether the regulatory agencies' hearing procedures expressly provide for calling of witnesses as a matter of right**

In response to correspondence concerning the conflict, the Liquidating Receiver informed Ms. Rocha that she and other APS attorneys will likely be witnesses in both the regulatory proceedings and CCCB v. Lee. In response, Ms. Rocha stated: "the CEC and HCA reviews do not involve presentation of any witnesses and you do not have the right to call witnesses."[24]

This response ignores that the regulatory approvals do involve public hearings, in which members of the public participate.[25] The Liquidating Receiver (as well as the Plan Receiver) intend to attend those hearings and call upon the regulators to call witnesses, including Ms. Rocha. APS's letter to the Liquidating Receiver has made it clear that APS will oppose (on

[24] See Exhibit 10 (cover pages from the transcripts of public hearings held on February 11, April 8, April 28, May 6, and May 13, 2014). Ms. Rocha attended each of these hearings except April 28, 2014.

[25] For example, attorney Rocha attended hearings by the Department of Health's Project Review Committee on February 11, 2014 and April 8, 2014, at which she represented CCCB.

behalf of the Prospect Entities) the Liquidating Receiver's calling of witnesses. APS's opposition to the Liquidating Receiver's calling of witnesses is yet another instance of adversity here.

### 3. The motion is not improperly motivated

APS, in its June 17, 2020 letter to the Liquidating Receiver, took the position that the Liquidating Receiver's objection to APS's representation of the Prospect Entities "is solely litigation strategy." Exhibit 9 at 4. This assertion is both nonsense and beside the point.

First, there is no "litigation strategy" exception to these ethics rules or the case law applying them.[26] Rules 1.9 and 1.10 of the Supreme Court Rules of Professional Conduct provide clients with rights that are unqualified.[27] There is no basis for inquiry into the subjective motives of the clients for exercising those rights.

Second, the evidence that APS cites for its contention that the Oldcos are guilty of committing "litigation strategy" consists of the very reasons why APS's present representation of the Prospect Entities is *adverse* to the Oldcos. See Exhibit 9 at 4 (reciting the ways that the Prospect Entities, through APS, are seeking to injure the Oldcos' interests).

Even the remedy of attorney disqualification is not limited to situations of client indifference, empty formalism, and hypothetical academic interest. Almost by definition, any disqualification motion will have been brought by a client with a stake in its outcome; any other client likely would have consented to the conflict. After all, a client would not incur the expense

[26] Indeed, a client's "litigation strategy" is one of the confidential matters protected by Rules 1.9 and 1.10. See, e.g., Carreno v. City of Newark, 834 F. Supp. 2d 217, 228 (D.N.J. 2011) (client's litigation strategies were "confidential within the meaning of RPC 1.6 and 1.9(a)") (disqualifying attorney).

[27] See Rule 1.9, cmt ("The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b).).

and effort of disqualifying prior counsel unless there were some real detriment to having former counsel switch sides.

Movants' request for injunctive relief has required them to invest substantial time (and obviously will require further such investment) to obtain the relief they seek. They would not do so but for their well-grounded belief in the harm that would follow from the continued representation of their adversaries by APS.

**4. There is an irrebuttable presumption that APS obtained client confidences from the Oldcos, and it is irrelevant whether that information is relevant to the regulatory proceedings**

APS in its correspondence contends: "AP&S obtained no confidential information from the Oldco Entities during the 2014 CEC and HCA review, or otherwise, that is included in, or relevant to, the pending CEC and HCA reviews. . . ." Exhibit 9 at 2. This carefully worded response is a mere distraction from the relevant principles.

First, APS's contention contains a negative pregnant: APS has in effect admitted (as it must) that it did receive confidential information from the Oldcos relating to their client representation. Now APS is simply quibbling about whether that information is relevant to the pending regulatory proceedings. The Court need not even engage in analysis of such relevance. Indeed, APS produced a 229-page privilege log in response to the Plan Receiver's subpoena in 2018, describing and withholding the various client confidences it possessed concerning the Oldcos. That privilege log, for example, lists hundreds of attorney-client communications in 2013 – 2014 that APS withheld regarding the "CharterCARE/Prospect transaction."[28] Other documents were produced but in utterly redacted form. See, e.g., Exhibit 5.

[28] Incredibly, the privilege log lists and withholds "CharterCARE/Prospect transaction" communications dating all the way back to July 21, 2008. See Exhibit 3 at 1.

Second, it would be futile to contend that APS received no confidential information, since Rhode Island law recognizes an irrebuttable presumption that client confidences were received. See Quinn v. Yip, No. KC-2015-0272, 2018 WL 3613145, at *8 (R.I. Super. July 20, 2018) (Stern, J.) ("[S]ince this Court has found that the prior representation and the current representation are substantially related, there is an irrebuttable presumption that PS&H also obtained client confidences of the Movants in the prior representation.").

Third, where the two matters are substantially related and the same attorney is involved in both, it is simply irrelevant whether the previous clients' confidences relate to the new matter. Knowledge of confidences is simply not an element for disqualification of an attorney under Rule 1.9(a).[29] Nor is knowledge of confidences an element disqualification of her present firm under Rule 1.10(a).[30]

Since Ms. Rocha (and other attorneys who have never left APS) previously represented the Oldcos, Ms. Rocha (and those other attorneys) "shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of" the Oldcos regardless of her actual or imputed knowledge. See Rule 1.9. Likewise, since at least one of the attorneys of APS (Rocha) is disqualified under Rule 1.9, none of the attorneys at APS may undertake that representation. See Rule 1.10.

[29] See Rhode Island Supreme Court Rules of Professional Conduct R. 1.9(a) ("(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

[30] See Rhode Island Supreme Court Rules of Professional Conduct R. 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.").

It is unnecessary to inquire into the actual existence of confidential information, since there is a conclusive presumption of such existence. *A fortiori* it is unnecessary to inquire into the relevancy of confidential information that may not—apart from the conclusive presumption—even exist.

**5. APS was obligated to inform the Liquidating Receiver of the regulatory proceedings prior to bringing them**

APS contends that it had no obligation to inform its former clients, the Oldcos, of the pending regulatory proceedings prior to bringing them or, indeed, ever. That is incorrect. Inasmuch as APS's prior representation and present representation are substantially related and adverse, APS and its attorneys had a duty under Supreme Court Rules of Professional Conduct R. 1.9(a) and 1.10(d) to obtain the Oldcos' informed consent to the conflict. Seeking that informed consent, at minimum, would have entailed providing the Liquidating Receiver with notice. See Supreme Court Rules of Professional Conduct R. 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

**6. The motion is not untimely**

The Liquidating Receiver anticipates that APS may seek to argue that the instant motion should be denied as untimely. The motion is plainly not untimely, however. The Liquidating Receiver raised objections with Ms. Rocha shortly after becoming aware of the regulatory proceedings brought by APS for the Prospect Entities. Since then, the Liquidating Receiver acted diligently to obtain the relevant billing records from APS, which were not among the records previously turned over to the Liquidating Receiver, inasmuch as the Prospect Entities had retained custody of most of the pre-June-2014 business records of the Oldcos following the

2014 Asset Sale. And having obtained the relevant billing records from APS, the Liquidating Receiver appropriately engaged in further communications with APS to attempt to obtain its voluntary compliance and withdrawal.

APS was already fully aware of CCCB's interests in Prospect Chartercare, LLC when APS undertook to represent the Prospect Entities. As noted *supra*, APS failed to provide notice of the regulatory proceedings to the Liquidating Receiver, notwithstanding that APS was obligated to seek informed consent from the Oldcos before even undertaking the conflicted representation.

## II. An injunction should issue

### A. The preliminary injunction standard

The "decision to grant or deny a preliminary injunction rests within the sound discretion of the hearing justice." Town of Coventry v. Baird Properties, LLC, 13 A.3d 614, 620 (R.I. 2011). The hearing justice applies the following factors: "whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." Gianfrancesco v. A.R. Bilodeau, Inc., 112 A.3d 703, 708 (R.I. 2015) (quoting Vasquez v. Sportsman's Inn, Inc., 57 A.3d 313, 318 (R.I. 2012)).

"In determining whether to grant a preliminary injunction, a hearing justice should consider and resolve each of the appropriate preliminary-injunction factors without abusing his or her discretion in doing so." DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003). The "principal prerequisite to obtaining injunctive relief is the moving party's ability to prove that it

is being threatened with some immediate irreparable injury for which no adequate remedy at law lies." In re State Employees' Unions, 587 A.2d 919, 925 (R.I. 1991).

### B. The Oldcos satisfy the standard for obtaining a preliminary injunction

#### 1. Reasonable likelihood of success on the merits

Demonstrating likelihood of success on the merits "require[s] only that the moving party make out a *prima facie* case." Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997). Obtaining an injunction against an attorney from disclosing client confidences does not require demonstrating that the attorney has already disclosed confidences. See Fundamental Admin. Servs., LLC v. Anderson, 18 F. Supp. 3d 680, 683 (D. Md. 2014), (granting injunction) ("Of course, if the defendant has already engaged in conduct for which the plaintiff is seeking an injunction, then the plaintiff's burden is considerably eased when asserting a likelihood of success on the merits."), *vacated on other grounds*, No. JKB-13-1708, 2015 WL 9162282 (D. Md. Nov. 17, 2015).

The discussion *supra* at 17 – 29 is more than sufficient to establish a *prima facie* case that APS's present representation of the Prospect Entities violates its ethical obligations to the Oldcos.

#### 2. Irreparable harm

The Oldcos are suffering an irreparable harm, both through APS's efforts to obtain approval of the pending regulatory applications and through the risk that APS is using or sharing the Oldcos' client confidences.

The "nagging suspicion" that an attorney will disclose the former client's confidences is itself an "ongoing harm". See MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712, 727 (D. Conn. 1991) ("Even if, as defendant maintains, no confidential information

was actually disclosed, Forstadt's alliance with Willett creates a 'nagging suspicion' that Thames' preparation and presentation has already been unfairly benefitted.").

Ironically, there is a case in this jurisdiction directly on point, in which APS successfully argued the very issue that the Oldcos raise here. See Calise v. Brady Sullivan Harris Mills, LLC, No. CV 18-100WES, 2019 WL 1397245 (D.R.I. Mar. 28, 2019). In that case, APS described the "nagging suspicion" that their client Brady Sullivan Harris Mills, LLC's adversaries' had access to confidential information:

> The injury to Brady Sullivan is reasonably likely to perpetually recur throughout the instant case despite Attorney Coloian's and Calabro's withdrawal as counsel absent further action by the Court. To the extent that Attorneys Coloian and Calabro have used any of Brady Sullivan's Litigation Information and Confidential Information at any time in their prosecution of Plaintiffs' case, Plaintiffs have benefitted and will continue to benefit from such improper conduct. To the extent that Attorneys Coloian and Calabro have shared – in whatever form – any of Brady Sullivan's Confidential Information or Litigation Information with Plaintiffs and/or successor counsel, Plaintiffs will be free to utilize that wrongfully-obtained information to the continued detriment and prejudice of Brady Sullivan.
>
> Without further action by the Court, Brady Sullivan has no assurance that the wrongful dissemination and use of its protected information will not recur. Attorneys Coloian and Calabro continue to have knowledge based upon possession of Brady Sullivan Confidential Information and Litigation Information.
>
> * * *
>
> An order limiting both the attorneys' and the Plaintiffs' contact with and disclosures to successor counsel is therefore essential to prevent the sharing of Brady Sullivan's Confidential Information and Litigation Information. Such sharing would only exacerbate the harm that Brady Sullivan has already suffered and likely taint successor counsel, drawing them into an additional ethical morass.

Exhibit 11 (Defendants' Memorandum of Law in Support of Their Motion for Protective Order and Other Relief[31]) at 6, 12. The Calise case is an *a fortiori* case, because there (unlike here) the conflicted attorneys had already withdrawn, and the defendant (through Adler Pollock) was requesting *additional and permanent* injunctive relief against the conflicted attorneys notwithstanding that withdrawal.[32]

This harm is irreparable. A remedy at law, *i.e.* the "right to later seek damages, would be difficult if not impossible to sustain because of difficult problems of proof, particularly problems related to piercing what would later become a confidential relationship" between the adversaries and their counsel. Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1287 (Pa. 1992).

**3. Balance of the equities**

Here, the equities favor the Oldcos. APS should never have undertaken this representation of the Prospect Entities in the first place, without first inquiring of the Oldcos as to whether they were willing to consent to the conflict. Certainly, the Oldcos cannot be faulted for APS's and the Prospect Entities' own efforts to steal a march.

As to any possible detriment to the Prospect Entities: they have been aware of the attorney-client relationship between APS and the Oldcos since 2012 at the latest. The Prospect Entities engaged APS notwithstanding this knowledge, or perhaps because of it.

[31] Calise v. Brady Sullivan Harris Mill, LLC, C.A. No. 1:18-cv-00099-WES-PAS, ECF No. 66-1.

[32] See *infra* at 33 (requesting such further injunctive relief).

#### 4. Preserving the status quo

"The purpose of a preliminary injunction is to preserve the status quo as it exists or *previously existed before the acts complained of*, thereby preventing irreparable injury or gross injustice." Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1286 (Pa. 1992) (emphasis in original) (affirming grant of preliminary injunction against law firm representing former client's competitors).

Here, preservation of the status quo as it existed before APS undertook its conflicted representation would be advanced by granting the injunctive relief.

### C. Appropriate injunctive relief includes an injunction against APS's sharing its work-product with successor counsel

Liquidating Receiver is also entitled to injunctive relief to prevent APS's compounding its violations by sharing its knowledge and work product with successor counsel. See Calise v. Brady Sullivan Harris Mills, LLC, No. CV 18-100WES, 2019 WL 1397245 (D.R.I. Mar. 28, 2019). That was the precise relief that APS sought and obtained on behalf of Brady Sullivan Harris Mills, LLC in that case. See id. at *13 (granting permanent injunctive relief).

## CONCLUSION

For all these reasons, Adler Pollock & Sheehan PC's representation of the Prospect Entities in connection with the pending regulatory proceedings should be enjoined, and Adler Pollock & Sheehan PC should be further enjoined from sharing its knowledge or work product with the Prospect Entities or successor counsel.

Respectfully submitted,

Thomas S. Hemmendinger, as Liquidating Receiver
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Dated: July 10, 2020

Case Number: PC-2019-11756
Filed in Providence/Bristol County Superior Court
Submitted: 7/10/2020 1:46 PM
Envelope: 2658993
Reviewer: Rachel L.

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