

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

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

vs. :

C.A. No: PC-2017-3856

ST. JOSEPHS HEALTH SERVICES OF :
RHODE ISLAND RETIREMENT PLAN, :
as amended :

**RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS OBJECTION TO THE
ATTORNEY GENERAL'S "EMERGENCY" MOTION AND IN SUPPORT OF ITS
CROSS MOTION TO SET SPECIFIC DATES FOR ROLLING PRODUCTION**

Special Counsel is diligently attempting to quickly investigate the facts to shape a litigation strategy to provide a source of funds from the more than 2,100 retired and soon-to-be retired nurses of St Joseph Hospital and Our Lady of Fatima Hospital, while at the same time hoping to obtain information that will assist the Receiver and the Court on the issue of whether cuts in pension benefits will be required at the hearing in February, a mere two months from now. Those efforts are being met, however, with foot-dragging and bad faith by the Attorney General, that both increase the legal fees chargeable to the Receivership Estate (to the possible ultimate detriment of the retirees), and divert Special Counsel from reviewing the thousands of pages of documents already obtained pursuant to subpoenae from other sources.

Indeed, document production by the Attorney General to date includes only one document that was not already publically available. That document is an email demonstrating that the Attorney General knew of the insolvency of the pension funds at least 10 days before this receivership proceeding was even commenced on August 19,

2017.¹ Despite this inside and advance knowledge from over four months ago, the Attorney General protests it does not have time to identify and produce the requested documents!

Special Counsel submits this memorandum in support of Respondent's objection to the Attorney General's "emergency" motion to establish a second claw-back procedure in contravention of the provisions contained in the Confidentiality Order to which Special Counsel and the Attorney General's office previously agreed and previously filed with the Court. Special Counsel also submits this memorandum in support of a motion to set specific dates for rolling production, pursuant to the allowance set forth in paragraph 7 of the Order compelling production entered on December 7, 2017,² for Special Counsel to seek "further relief" if "Special Counsel believes that there is a failure of good faith compliance with the rolling production."

Procedural Travel

Special Counsel on November 3, 2017 served a subpoena duces tecum on the Attorney General, seeking documents concerning the two hospital conversion reviews conducted by the Attorney General that involve the entities who sponsored and administered the pension plan. Special Counsel made the subpoena returnable on November 17, 2017, because a) the documents sought may well prove helpful to the Receiver and the Court in the decision regarding cutting benefits scheduled for February, b) the documents are already organized and aggregated since the Attorney General undoubtedly has them organized in files, and c) in light of the hardships of this

¹ The email sending the proposed receivership petition to the Attorney General on August 9, 2017 is attached as Exhibit 1.

² Attached as Exhibit 2.

case on the pension recipients. Rather than produce documents, however, the Attorney General filed an objection and sought an additional three months to February 15, 2017.

Special Counsel therefore was required to file a motion to compel production on November 17, 2017, which was heard on November 29, 2017, when the Court granted Respondent's motion to compel production of documents from the Attorney General's office, with certain documents previously designated as "confidential" in connection with Hospital Conversion Act proceedings to be produced subject to a confidentiality order, and ordered that production was to be completed by January 15, 2018 with rolling production to commence as soon as possible.

The next day, on November 30, 2017, Special Counsel circulated initial drafts of both orders (including the confidentiality order) to all counsel by e-mail.

On December 7, 2017, after more than a week of protracted, tedious, and time-consuming negotiations among Special Counsel, the Attorney General's office, and counsel for Prospect CharterCare, LLC, the parties agreed to and filed a Confidentiality Order³ governing the Attorney General's production of documents in response to Special Counsel's subpoena.

That Confidentiality Order already contains express provisions governing the treatment and disposition of (1) documents the Attorney General has inadvertently failed to claim are privileged; (2) documents the Attorney General has inadvertently failed to claim are confidential; and (3) documents the Attorney General has claimed are confidential. In particular, as to the Attorney General's inadvertent production of documents, the Confidentiality Order provides:

³ Attached hereto as Exhibit 3.

7. **No Waiver.**

(a) Review of Confidential Material by any persons identified in Paragraphs 3, 5 or 6 shall not waive the protections provided herein, or any objections to production of Confidential Material.

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

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

Confidentiality Order ¶¶ 7-8.

Rolling productions did not commence after the hearing on November 29, 2017, however. Instead, on Tuesday, December 12, 2017, the Attorney General's office informed Special Counsel that notwithstanding the agreed-upon Order compelling production of documents and notwithstanding the agreed-upon Confidentiality Order, the Attorney General refused to produce any documents until sometime after the parties could agree upon yet another order addressing the treatment of confidential and privileged documents, and proposed such an order.⁴ Special Counsel properly declined

⁴ Attached hereto as Exhibit 4.

to revisit those settled issues and erect new obstacles to the Attorney General's production of documents. Special Counsel also objected to particular provisions of the Attorney General's new proposal, which contradicted the Confidentiality Order and sought to impose unreasonable burdens on Special Counsel. Nevertheless, the Attorney General filed its status report with the Court⁵ stating that the parties were negotiating the terms of a claw back agreement, which the Attorney General "corrected"⁶ only after Special Counsel insisted, pointing to the inaccuracy of that statement.

On December 13, 2017, the Attorney General's office backed away from its refusal to produce any documents until such a new order could be entered, and delivered four boxes of non-confidential documents to Special Counsel. In addition, the Attorney General filed the instant motion, which seeks to impose a new and patently unreasonable procedure upon Special Counsel, concerning matters that were already addressed in the Confidentiality Order, and, indeed, contradicting the Confidentiality Order.

ARGUMENT

I. The Attorney General's request for additional claw back provisions is both untimely and dilatory

The time for the Attorney General to have requested the provisions it is now seeking was when the Confidentiality Order was negotiated, and before it was filed by agreement on December 7, 2017, especially since that order specifically dealt with the inadvertent production of privileged documents. It is unfair and bad faith for one side to

⁵ Attached as Exhibit 5.

⁶ Attached as Exhibit 6.

negotiate a confidentiality order and, upon securing opposing counsel's agreement to and entry of that order, to then file a motion asking the Court for more and contradictory provisions. The agreed terms of the Confidentiality Order were a product of give and take, weighing the Attorney General's interests in maintaining privilege and confidentiality against Special Counsel's desire for speedy and complete production of all relevant documents. Special Counsel never would have made the concessions necessary to obtain the Attorney General's agreement to the terms of the confidentiality order, which already contains provisions on inadvertent disclosure, if Special Counsel had known that the Attorney General was then going to turn around and ask the Court for more provisions. Accordingly, the request for such provisions now should be denied as untimely and in bad faith.

It also should also be denied as dilatory. Delaying proceedings to allow negotiation of a confidentiality order, and then delaying proceedings again to obtain further provisions concerning claw back of documents constitutes inexcusable delay.

II. The newly proposed "procedure" contradicts the agreed-upon Confidentiality Order and imposes unreasonable burdens on Special Counsel

The proposed claw back procedure imposes unreasonable burdens on Special Counsel. The Attorney General's "proposed procedure" would compel the Special Counsel to do the Attorney General's job, by obligating Special Counsel to notify the Attorney General in the event that "Special Counsel...discover[s] that a privileged or otherwise legally protected document or ESI may have been inadvertently disclosed." Proposed Procedure at 3 (¶2) (emphasis supplied). It would be reasonable to expect that the party producing privileged information inadvertently would have the obligation to

notify the recipient, since only the person claiming the privilege has both the knowledge and the motivation to do so. Only the producing party knows who prepared and received the document, whether the contents are confidential or, indeed, have already been publically disclosed, and whether the privilege should be asserted or waived.

Presumably the Attorney General is seeking to have its “proposed procedure” memorialized in a court order. That provision would subject Special Counsel to sanctions for violating a court order, insofar as Special Counsel fails to accurately read the Attorney General’s mind, both with respect to whether the Attorney General “may” consider that a particular document is privileged, and whether production of such a document was inadvertent, rather than intentional (privileges can and frequently are waived).

The burden which the “proposed procedure” places on Special Counsel to identify inadvertently produced documents also contradicts the Confidentiality Order, since the Confidentiality Order (not surprisingly) places obligations on Special Counsel only *after* the Attorney General notifies Special Counsel that a document has been produced inadvertently.

The “proposed procedure” also exceeds the requirements of the Rules of Civil Procedure by applying the rules concerning inadvertent production of electronically stored data to the production of paper documents. Rule 45(c)(3)(C) states as follows:

If electronically stored information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, **the person making the claim may notify any party that received the information** of the claim and the basis for the claim. After being notified of a claim or of protection, a party shall immediately sequester the specified information, including any copies, and:

- (i) Return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or

(ii) Present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.

If a party that received notice of a claim of privilege or of protection disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

(emphasis supplied). Notably, this rule imposes no burden on the recipient to initiate an inquiry as to whether the document is privileged and whether the party producing it did so intentionally (parties frequently waive privilege for tactical reasons) or inadvertently.

The Attorney General's "proposed procedure" quotes this language and then states that "[t]he provisions of Superior Court Rules of Civil Procedure set forth above apply to both document and ESI production in connection with the Attorney General's response to the Subpoena." The problem with that statement is twofold: a) the Attorney General's "proposed procedure" contradicts the rules concerning ESI production by placing the burden on the recipient, and b) the rules concerning production of paper documents do not contain any provisions placing any obligations whatsoever on a party who receives a document inadvertently produced

The "proposed procedure" is also unreasonable and contradicts the rules on ESI production in that it obligates Special Counsel to return documents immediately upon any claim of privilege or confidentiality by the Attorney General, no matter how unfounded. Moreover, there is no provision in this "proposed procedure" for what happens if the Attorney General fails to list the document in a privilege log. Assume Special Counsel returns the documents to the Attorney General and destroys all copies, but the Attorney General fails to list them, what then? If Special Counsel wants to ask the Court to compel production, Special Counsel will have no copy to even identify the document.

III. The Attorney General is evidently delaying its production of documents

It is now nearly six weeks since the subpoena duces tecum was served. The Attorney General is continuing to stall document production. Moreover, the status reports the Attorney General has provided to the Court are vague and in the most recent report false. Although the Attorney General has produced four (mostly half full) boxes of documents, those documents have been arranged out of bates stamp order, divider sheets have been inserted that do not correspond to the underlying documents, and not even one of the “confidential” documents that the Attorney General is required to produce are included. Indeed, it appears that all of the materials that were produced were already publically available, with the exception of the email indicating that the Attorney General was provided with the receivership petition ten days before it was filed with the Court.

Accordingly, the Court should consider revising the procedure established in the original order compelling production, which requires rolling production with no dates except the date for completion of production on January 15, 2018. Special Counsel requests that the Court order that the Attorney General produce substantial quantities of documents at intervals, beginning Wednesday December 20, 2017 and again on Friday December 22, 2017, Wednesday December 27, 2017, Friday December 29, 2017, Wednesday January 3, 2018, Friday January 5, 2018, and Wednesday January 10, 2018, culminating with any remaining production on January 15, 2018.

IV. The Attorney General should reimburse the Receivership Estate for attorney’s fees necessitated by the Attorney General’s bad faith

The *raison d’etre* of this receivership proceeding is to preserve assets for the retirees and provide a speedy and fair outcome. The Attorney General’s response to

the Special Counsel's subpoena strikes at the heart of this purpose by delaying and imposing additional costs on this proceeding. It is only just to require that the Attorney General pay Special Counsel's fees in connection with these discovery disputes. That will also give notice to other parties from whom Special Counsel seeks documents that such activities will not be countenanced by the Court.

CONCLUSION

The Attorney General's motion should be denied, and the Attorney General should be directed to comply with the Order compelling him to produce documents on regular intervals leading up to January 15, 2018, and the Attorney general should be order to pay Special counsel's fees for these unnecessary discovery disputes.

Respondent,
The Receivership Estate
By its Attorneys,

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Dated: December 15, 2017

CERTIFICATE OF SERVICE

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

/s/ Stephen P. Sheehan

EXHIBIT

1

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

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

vs. :

C.A. No: PC-2017-3856

ST. JOSEPHS HEALTH SERVICES OF :
RHODE ISLAND RETIREMENT PLAN, :
as amended :

ORDER

Special Counsel having issued a subpoena to the Attorney General dated November 3, 2017, and Attorney General having served a partial objection to the subpoena, and Special Counsel having filed a motion to overrule the partial objection, and the Attorney General having objected to the motion, and Special Counsel having replied to the objection, and the Court having conducted a hearing on November 29, 2017, and for the reasons stated at the hearing, it is hereby:

ORDERED:

1. The objection to producing publicly available documents having been withdrawn, the Attorney General shall produce documents in their possession, custody or control, responsive to the subpoena regardless of whether they are publicly available.
2. Document Request #2 having been withdrawn without prejudice, the Attorney General need not produce documents that are only responsive to Document Request #2.
3. The Attorney General shall produce all documents responsive to Document Request #1.

4. The Attorney General shall produce documents in their possession, custody, or control responsive to Document Request #3.

5. Documents previously designated as confidential pursuant to R.I. Gen. Laws § 23-17.14-32 during those proceedings shall be produced subject to a separate confidentiality order to be entered by the Court.

6. Special Counsel and counsel for the Attorney General shall meet and confer and attempt to develop and memorialize a plan governing discovery of electronically stored information, as described in the recent amendments to Super. R. Civ. P. 26(a)(2). The parties shall submit such plan to the Court by December 7, 2017 at 4:30 p.m. or, if they cannot agree on the entire plan, shall submit any agreed-upon portions of the plan to the Court, as well as each parties' final proposal of the plan, and the Court will thereafter address any disagreements by subsequent order.

7. The Attorney General shall provide documents on a rolling basis, and shall complete production by the final compliance date of January 15, 2018. The parties are to agree on a plan for production of documents, specifically, Special Counsel's priorities in terms of production. The Attorney General shall provide the agreed upon plan, as well as a weekly status update to Special Counsel and the Court on the status of the Attorney General's efforts to comply with the subpoena, with the first such status update to be provided on December 5, 2017 and subsequent status updates to be provided every seven days thereafter. Special Counsel may apply to the Court for further relief if Special Counsel believes that there is a failure of good faith compliance with the rolling production. The Court may also grant further relief if it believes there is a failure of good faith compliance with the rolling production.

8. The Attorney General shall produce an appropriate privilege log, by January 15, 2018, for any documents withheld because of privilege.

ORDERED:


Brian P. Stern
Associate Justice

Stern, J.

Dated: December 14, 2017

ENTERED:

/s/ Carin Miley

Dep. Clerk

Dated: December 14, 2017

Presented by:

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Dated: December 7, 2017

CERTIFICATE OF SERVICE

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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

2

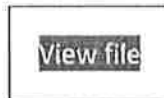
Kathryn Enright

From: Richard Land (via Dropbox) <no-reply@dropbox.com>
Sent: Wednesday, August 09, 2017 12:30 PM
To: Kathryn Enright
Subject: Richard Land shared "Petition for Receiver 8-8-17 (draft).pdf" with you



Hi there,

Richard Land (rland@crflp.com) invited you to view the file "**Petition for Receiver 8-8-17 (draft).pdf**" on Dropbox.



Enjoy!
The Dropbox team

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EXHIBIT

3

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

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

vs. :

C.A. No: PC-2017-3856

ST. JOSEPHS HEALTH SERVICES OF :
RHODE ISLAND RETIREMENT PLAN, :
as amended :

ORDER

The Receiver, Special Counsel, and the Attorney General having agreed to the entry of an order on the terms set forth below, and the Court having reviewed and considered the proposed order, and good cause appearing therefore, it is hereby:

ORDERED:

1. **Scope.** This Order shall apply to documents produced in connection with the subpoena issued by Special Counsel to the Attorney General, dated November 3, 2017, which were deemed confidential by the Attorney General pursuant to R.I. Gen. Laws § 23-17.14-32.

2. **Non-Disclosure of Confidential Material.** Except as hereinafter provided under this Order or subsequent Court Order, no Confidential Material may be disclosed to any person except as provided in Paragraph 4 below. "Confidential Material" means any document that bears the legend "AG-CONFIDENTIAL" to signify that it contains information deemed to be confidential pursuant to R.I. Gen. Laws § 23-17.14-32.

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

4. **Declassification.** In the event that Special Counsel seeks to disclose Confidential Material in a manner outside of what is provided in Paragraph 3, Special Counsel may file a motion with the Court for a ruling that the document designated as Confidential Material is not or should not be entitled to such status and protection. Such motion may be heard upon no less than fourteen (14) days' notice to the Attorney General, Saint Joseph's Health Services of Rhode Island, Inc. ("SJHSRI"), Prospect CharterCARE, LLC ("Prospect"), and to any applicable Third Party. The Attorney

General, SJHSRI, Prospect and Third Party shall have ten (10) days from the date such petition is filed to file an opposition to the petition defending the designation as Confidential Material. The person challenging the designation shall have five (5) days in which to file a reply.

5. **Filing of Confidential Material with the Court.** Confidential Material shall not be filed with the Court except under seal, when required in connection with motions as provided for in Paragraph 4 or any other reason or in connection with other matters pending before the Court for which such materials may be relevant. Any pleadings, motions, or other papers filed under seal shall be filed in accordance with the Rhode Island Superior Court Rules of Civil Procedure and any other applicable court rules or standing orders.

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

7. **No Waiver.**

(a) Review of Confidential Material by any persons identified in Paragraphs 3, 5 or 6 shall not waive the protections provided herein, or any objections to production of Confidential Material.

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

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

9. **Survival.** The terms of this Order shall survive the conclusion of this matter. Special Counsel, the Attorney General, SJHSRI, Prospect or any other applicable Third Party may move the Court for an order addressing the post-conclusion treatment of Confidential Material.

10. **Amendment or Modification of Order.** This Order may be amended or modified by the Court upon notice to the Receiver, Special Counsel, the Attorney General, SJHSRI, and Prospect.

ORDERED:

ENTERED:

Stern, J.

Dep. Clerk

Dated:

Dated:

Presented by:

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Dated: December 7, 2017

EXHIBIT 1

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

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

vs. :

C.A. No: PC-2017-3856

ST. JOSEPHS HEALTH SERVICES OF :
RHODE ISLAND RETIREMENT PLAN, :
as amended :

ACKNOWLEDGEMENT

The undersigned declares and states as follows:

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

2. I agree to use Confidential Material only for purposes of assisting in the matters for which I have been retained, and for no other purpose.

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

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

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

I declare under the penalties of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____
Name: _____ (print or type)

Signature: _____

CERTIFICATE OF SERVICE

I hereby certify that, on the 7th day of December, 2017, I filed and served the foregoing document through the electronic filing system on the following users of record:

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/s/ Max Wistow

EXHIBIT

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- (i) Return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or
 - (ii) Present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.
- (C) If a party that received notice under paragraph (B) disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

Rule 45(c)(3)(C): If electronically stored information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for the claim. After being notified of a claim or of protection, a party shall immediately sequester the specified information, including any copies, and:

- (i) Return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or
- (ii) Present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.

If a party that received notice of a claim of privilege or of protection disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

Special Counsel and the Attorney General agree that, the provisions of Superior Court Rules of Civil Procedure set forth above will apply to both document and ESI production in connection with the Attorney General's response to the Subpoena.

In addition to complying with the above Rules, the following more specifically clarifies the process by which Special Counsel and the Attorney General will manage the inadvertent disclosure of such privileged or legally protected materials.

- 1) With regard to any document inadvertently disclosed in the course of the production, inclusive of any ESI, which the Attorney General contends may be privileged or legally protected, such disclosure does not operate as a waiver of any privilege or protection.

- 2) Both Special Counsel and the Attorney General maintain a duty to promptly notify each other in the event that it is discovered that a document or ESI may have been inadvertently disclosed.
- 3) If Special Counsel receives a document or ESI produced pursuant to the Subpoena, which Special Counsel believes may be privileged or otherwise legally protected, Special Counsel must promptly return the document or ESI to the Attorney General. Special Counsel must also destroy any and all copies of the document or ESI. Once the Attorney General receives such a returned document or ESI, the Attorney General must then identify the document or ESI on a privilege log or confidentiality log within ten (10) business days to allow for any challenge to the privilege or confidentiality asserted; or
- 4) If the Attorney General sends a document or ESI, which the Attorney General subsequently identifies as privileged or legally protected, the Attorney General must notify the Special Counsel as soon as such privilege/protection is identified and request that the document or ESI be returned. Special Counsel must then return the document or ESI to the Attorney General and destroy any and all copies of the same. Once the Attorney General receives such a document or ESI, it must then identify the document or ESI on a privilege log or confidentiality log within ten (10) business days to allow for any challenge to the asserted privilege or confidentiality.
- 5) Documents and ESI produced in relation to the subpoena are also subject to the agreed upon Proposed Confidentiality Order and the agreed upon Proposed Case Management Plan Regarding Electronically Stored Information.

Respectfully submitted,

Special Counsel

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STATE OF RHODE ISLAND
By Its Attorney,

PETER F. KILMARTIN
ATTORNEY GENERAL

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CERTIFICATION

I, the undersigned, hereby certify that on this ___ day of December 2017, I filed the within Stipulated Agreement via the Superior Court electronic filing system to all on record. A copy is available for viewing and downloading from the Rhode Island Judiciary's Electronic Filing System.

EXHIBIT

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Attorney General is prepared to produce four (4) boxes of documents forthwith to Special Counsel, as further outlined below.

4. On Friday, December 8, 2017, WarRoom delivered five (5) boxes of documents after the close of business. Rolling production of boxes from WarRoom will continue this week with an additional five (5) boxes estimated for delivery to the Attorney General's office on Wednesday, December 13, 2017.
5. As of December 12, 2017, the Attorney General is prepared to deliver to Special Counsel the following four (4) boxes of documents with logs identifying privileged and confidential documents as necessary.
 - a. Box 1 - Bates Stamped: AG14-1-000001-001459
 - b. Box 2 - Bates Stamped: AG14-1-000001-003136
 - c. Box 3 - Bates Stamped: AG14-1-000001-001047
 - d. Box 4 - Bates Stamped AG14-1-000001-003333 (Privilege Log)
6. As of December 12, 2017, the Attorney General is prepared to deliver to Special Counsel its response to Request No. 5 of the Subpoena, with a Privilege Log.
7. As of December 12, 2017, the Attorney General is prepared to deliver to Special Counsel the affidavit of Joseph Desmarais, former employee, stating that he has no documents in his possession.
8. The Attorney General continues to make efforts to obtain affidavits from other former employees.
9. Pursuant to Paragraph 3 of the Proposed Case Management Plan Regarding Electronically Stored Information, the Attorney General is attempting to identify custodians and the scope of data contained on the file server and in our Outlook

365 email database in anticipation of the December 21, 2017 reporting date to
Special Counsel.

Respectfully submitted,

STATE OF RHODE ISLAND
BY ITS ATTORNEY,

PETER F. KILMARTIN
ATTORNEY GENERAL

/s/ Kathryn Enright
/s/ Jessica D. Rider

Kathryn Enright #7208
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 12th day of December 2017, I electronically filed and served this document through the electronic filing system to all on record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Diane Milia

EXHIBIT

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to reach agreement on such a process. The Attorney General will be submitting a motion to establish a clawback process for inadvertently disclosed legally protected or privileged documents.

4. On Friday, December 8, 2017, WarRoom delivered five (5) boxes of documents after the close of business. Rolling production of boxes from WarRoom will continue this week with an additional five (5) boxes estimated for delivery today, December 13, 2017.
5. As of December 13, 2017, the Attorney General will have delivered to Special Counsel the following four (4) boxes of documents with logs identifying privileged and confidential documents as necessary.
 - a. Box 1 - Bates Stamped: AG14-1-000001-001459
 - b. Box 2 - Bates Stamped: AG14-1-000001-003136
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Respectfully submitted,

STATE OF RHODE ISLAND
BY ITS ATTORNEY,

PETER F. KILMARTIN
ATTORNEY GENERAL

/s/ Kathryn Enright
/s/ Jessica D. Rider

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 13th day of December 2017, I electronically filed and served this document through the electronic filing system to all on record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Pamela Lopes
