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STATE OF RHODE ISLAND PROVIDENCE, S.C.		SUPERIOR COURT
IN RE: CHARTERCARE COMMUNITY BOARD, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, and ROGER WILLIAMS HOSPITAL.	: : : :	P.C. 2019-11756

SUPPLEMENTAL MEMORANDUM OF LAW OF ADLER POLLOCK & SHEEHAN P.C. AND PROSPECT MEDICAL HOLDINGS, INC. (AND ITS AFFILIATED ENTITIES) IN FURTHER SUPPORT OF OBJECTION TO MOTION FOR INJUNCTIVE RELIEF

Adler Pollock & Sheehan P.C. ("AP&S") and Prospect Medical Holdings, Inc. ("PMH") (and its affiliated entities)[1] submit this Supplemental Memorandum of Law in support of their Objection to the Liquidating Receiver and Plan Receiver's Motion for Injunctive Relief Against Adler Pollock & Sheehan P.C. (the "Motion") and in response to the Liquidating Receiver and Plan Receiver's (collectively, the "Receivers") First, Second, and Third Supplements to Their Memorandum of Law in Support of Motion for Injunctive Relief Against Adler Pollock & Sheehan P.C. (collectively, the "Receivers' Supplemental Memoranda").

The Receivers' Supplemental Memoranda confirm that the Receivers have not met and cannot meet their high burden in showing the facts required for disqualification. Totaling 1,318 pages, the Receivers' Supplemental Memoranda and their exhibits,[2] instead, show that the

[1] Prospect Medical Holdings, Inc.'s affiliated entities include Chamber Inc., Ivy Holdings Inc., Ivy Intermediate Holding Inc., Prospect East Holdings, Inc., Prospect East Hospital Advisory Services, LLC, Prospect CharterCARE, LLC, Prospect CharterCARE SJHSRI, LLC ("SJHSRI"), Prospect CharterCARE RWMC, LLC ("RWMC"), Prospect Blackstone Valley Surgicare, LLC, and Prospect CharterCARE Home Health and Hospice, LLC (collectively, the "Applicants")

[2] The Receivers filed these voluminous exhibits without any explanation of their relevancy. In those voluminous filings, without explanation of relevancy, the Receivers filed 2019 financial statements for PMH and PCC. These financial statements are not relevant to the pertinent

Receivers are submitting these documents in a frenzied effort to create by paper volume what does not exist in weighted evidence and law – a disqualifying conflict. The Receivers' Supplemental Memoranda also continue their constantly moving target of purported conflict.[3] The disjointed filings make this clear: the Receivers have failed to meet their high burden in demonstrating that the alleged relationship between the two matters is *patently clear* as is required for disqualification and that the interests of the Oldco Entities and Applicants are *materially adverse* with respect to the CEC and HCA applications at issue.

ARGUMENT

The Receivers have not met and cannot satisfy their heavy burden of proving actual *facts* requiring disqualification. As this Court has noted, "[a] party seeking disqualification of an opposing party's counsel bears a heavy burden of *proving facts* required for disqualification." *Quinn v. Yip*, No. KC-2015-0272, 2018 WL 3613145, at *3 (R.I. Super. Ct. July 20, 2018)

question regarding a conflict of interest. Nonetheless, for clarity of the record, on August 11, 2020, the Applications submitted revised statements to the Rhode Island Department of Health and Rhode Island Office of Attorney General in connection with the 2019 Regulatory Review. Those revised financial records clarified that neither PCC, RWMC, SJHSRI, or any of their respective subsidiaries, are (a) parties to any agreement with MPT, (b) guarantors of the obligations of PMH, or any of its other subsidiaries, owed to MPT or otherwise under the various agreements with MPT, or (c) have pledged any of their assets as collateral for any obligations owed to MPT or otherwise pursuant to any agreement with MPT. It further clarified that the cross collaterization and cross default in the MPT agreements are among the parties and the assets included therein, which do not include any of the hospital operating entities, properties or assets in Rhode Island, Texas or New Jersey. Accordingly, the Rhode Island entities, properties and assets are not subject to any cross collaterization and cross default provisions in the MPT agreements. The TRS Note under which MPT has advanced to PMH $112,937,000 is not related to the value of the properties in Rhode Island. The maturity date of the TRS Note is the earlier of July 20, 2022 or, if it occurs, a sale lease-back of the properties in Rhode Island. Any sale lease-back must be pursuant to the agreement of the parties and is subject to receipt of all regulatory approvals from the State of Rhode Island necessary for the consummation of the transaction.

[3] *See* AP&S Mem. Supp. Obj at 10-13.

(emphasis added) (quoting *Haffenreffer v. Coleman*, No. 06-299T, 2007 WL 2972575, at *2 (D.R.I. 2007)); *see also Fregeau v. Deo*, No. C.A. PC 03-4179, 2005 WL 1837011, at *3 (R.I. Super. Ct. Aug. 2, 2005); *Jacobs v. E. Wire Prods. Co.*, No. Civ. A. PB-03-1402, 2003 WL 21297120, at *2 (R.I. Super. Ct. May 7, 2003). Here, the Receivers have filed over 1,300 pages of various documents, but have failed specifically to allege, let alone prove, any facts warranting disqualification. Instead, they have engaged in inappropriate tactical measures apparently to gain leverage in their other pending cases. *See Fregeau*, 2005 WL 1837011, at *3 (stating that a motion for disqualification "should be used with caution . . . for it can be misused as a technique of harassment" and that they are "often made only for tactical reasons").

Recognizing that they cannot meet their high burden, each of the Receivers' Supplemental Memoranda ignore Rule 1.9 of the Rhode Island Rules of Professional Conduct. Under Rule 1.9, "[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." R.I. R. Prof. Conduct 1.9(a) (emphasis added). The Receivers have failed to show any facts demonstrating that the 2013 Application and 2019 Regulatory review are substantially related and involve materially adverse interests between Oldco and the Applicants.[4]

[4] At the July 21, 2020 Health Services Council meeting, Attorney Wistow, as a member of the public, conceded that he was not advocating that the CEC Application be denied:

> By the way, at the end of this presentation, I am not going to ask you to turn down the application. I'm going to ask you please, please, please do not just accept representations made by anybody, including Pat Rocha, who I know you have a high regard for. Get to the bottom of this.
> …

First, the Receivers' filings are devoid of any facts demonstrating that the 2013 Application and the 2019 Regulatory Review is the same or substantially related. Matters are "substantially related" when "[i] they involve *the same transaction* or *legal dispute* or [ii] if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." R.I. R. Prof. Conduct 1.9, cmt. 3 (emphasis added). To show that the matters are "substantially related," the Receivers are required to show *actual facts* demonstrating 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.*'" *See Brito v. Capone*, 819 A.2d 663, 665 (R.I. 2003) (internal citations omitted); *see also Quinn*, 2018 WL 3613145, at *4 (same); *Fregeau*, 2005 WL 1837011, at *2 (same); *Jacobs*, 2003 WL 21297120, at *2 (same).

The 2013 Applications are *not* the "same transaction" or "legal dispute" as the 2019 Regulatory Review. The 2013 Applications involved the transfer of ownership of the Rhode Island not-for-profit hospitals and medical facilities to Prospect CharterCARE, LLC ("PCC"), a for-profit entity.[5] In contrast, the 2019 Regulatory Review involves a buy-out of the private

> I'm not asking you now to turn this down. That would be like asking you to believe everything I said. I'm not asking you to do that. I'm asking you to use your intelligence and use your integrity, and if before you sign off on this, make sure that you know what is going on.

Ex. 6 to AP&S Mem. Supp. Obj. (July 21, 2020 Tr.) at 104, 127-28.

[5] As this Court is aware, the not-for-profit hospitals that PCC acquired under the 2013 APA were beneficiaries under various charitable instruments and as PCC was a for-profit entity, a *cy pres* approval was required. With the exception of the *cy pres* proceeding, AP&S' representation of the Oldco Entities ceased in approximately November 2014 when Richard Land, Esq. assumed representation of those entities. After the transfer of representation to Attorney Land and at his direction, AP&S had limited representation of the Oldco Entities as follows: tax related advice regarding the St. Joseph Health Services of Rhode Island Retirement Plan and the status of the St. Joseph Health Services of Rhode Island as a publicly supported

equity investors and minority shareholders at the top of the national PMH corporate structure (five entities removed from the licensed Rhode Island hospitals). None of the Receivers' voluminous pile of documents can transform the relationship between these two matters to become "patently clear" or the issues to be identical or essentially the same.

Furthermore, the Receivers have failed to allege any actual facts demonstrating that there "is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." None of the thousands of pages submitted by the Receivers contain any facts demonstrating any risk that confidential factual information concerning the 2013 Applications would materially advance the Prospect Entities' position in this matter. In addition, review of the July 21, 2020 transcript (Exhibit 6 to AP&S's Memorandum) shows the absence of the use of any confidential factual information. Moreover, the Receivers have *never* even alleged that AP&S obtained confidential information from the Oldco Entities that is included in, or is relevant to, the 2019 Regulatory Review. *See GEO Spec. Chems., Inc. v. Husisian*, 951 F. Supp. 2d 32, 43-44 (D.D.C. 2013) (denying relief based on a purported Rule 1.9 conflict of interest because, *inter alia*, the matters are not "substantially related" as the plaintiff "never even hints at how the information learned in the [previous representation] might be useful to" the new client in the new matter). Even if the Receivers were able to allege that AP&S has confidential information from the 2013 Applications that was somehow relevant to the 2019 Regulatory Review, such information would have been public or accessible to PMH due to the Common Interest and Joint Defense Agreement between PMH and the Oldco Entities. Accordingly, such

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charity under Section 509(a)(2) of the Internal Revenue Code of 1986, as amended, as well as responding to the Subpoena served on AP&S by Stephen P. Sheehan dated January 24, 2018, none of which is the same or substantially related to the 2019 Regulatory Review.

information cannot serve as the basis for disqualification. *See* Rule 1.9 cmt. 3 ("Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.").

Second, the Receivers have failed to show any actual facts demonstrating that the interests of the Oldco Entities and the Applicants are *materially adverse* in the 2019 Regulatory Review. With respect to the requirement of materially adverse interests, the "underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a *changing of sides in the matter in question*." R.I. R. Prof. Conduct 1.9, cmt. 2 (emphasis added); *see also State ex rel. Verizon W. Virginia, Inc. v. Matish*, 740 S.E.2d 84, 94 (W. Va. 2013) ("Thus, to constitute 'materially adverse' interests under Rule 1.9(a), the interests of an attorney's former and current clients must be so diametrically opposed as to require the attorney to adopt adversarial or opposite positions in the two representations." (internal citations omitted)).

The Receivers have done nothing more than assume that there is material adversity between the Oldco Entities and the Applicants. That assumption is patently wrong. None of the Receivers' thousands of pages of disjointed submissions demonstrate any actual facts showing material adversity of interests. The Oldco Entities are *not* a party to the 2019 Regulatory Review. Nor will Oldco Entities be affected by the 2019 Regulatory Review. The Receivers, instead, have inserted themselves into the 2019 Regulatory Review solely as members of the public and are limited to making public comment. The approval or denial of the applications will have no effect on the approval of the 2013 Applications authorizing PCC to own the Rhode Island hospitals or on the Oldco Entities and, specifically, the Oldco Entities' *ownership interest in PCC*. Similarly, any alleged economic injury of the Oldco Entities related to the 2019

Regulatory Review – even if one existed – would not create a conflict of interest. *See* Supreme Court Ethics Advisory Panel Opinion No. 2012-01 (attorney did not have conflict of interest because cases of former client and current client were not substantially related, even though current client's case could adversely affect property interest of former client); *see als*o Simon's NY Rules of Prof. Conduct § 1.9:7 (quoting N.Y. ethics opinion that "competing economic interests . . . do not create a 'materially adverse' interest within the meaning of Rule 1.9(a)") (quoting N.Y. State 1103 (2016)). Here, there is *no factual basis* to conclude that the interests of the Applicants and the Oldco Entities are materially adverse.

CONCLUSION

For all of the above-referenced reasons and those in AP&S's Memorandum in Support of its Objection to Motion for Injunctive Relief, the Receivers have not met and cannot satisfy their heavy burden of proving that AP&S has a conflict of interest in representing the Applicants in connection with the 2019 Regulatory Review. Those deficiencies, coupled with the prejudice to the Applicants if they had to change counsel at this late stage of the administrative proceedings, make clear that the Court should deny the Receivers' Motion in its entirety.

Respectfully submitted,

ADLER POLLOCK & SHEEHAN P.C.,
PROSPECT MEDICAL HOLDINGS, INC. AND ITS AFFILIATED ENTITIES[6]

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[6] Prospect Medical Holdings, Inc.'s affiliated entities include Chamber Inc., Ivy Holdings Inc., Ivy Intermediate Holding Inc., Prospect East Holdings, Inc., Prospect East Hospital Advisory Services, LLC, Prospect CharterCARE, LLC, Prospect CharterCARE SJHSRI, LLC, Prospect CharterCARE RWMC, LLC, Prospect Blackstone Valley Surgicare, LLC, and Prospect CharterCARE Home Health and Hospice, LLC.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2020:

☑ I electronically served this document through the electronic filing system on the following parties:

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