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STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	
v.	C.A. No. PC-2017-3856
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN	

PROSPECT ENTITIES' REPLY TO THE RECEIVER'S OBJECTION TO NOTICE OF INTENT TO SUE CHARTERCARE COMMUNITY BOARD, OR IN THE ALTERNATIVE, MOTION FOR RELIEF FROM THE INJUNCTIVE PROVISIONS OF THE PERMANENT RECEIVERSHIP ORDER

NOW COME Prospect Medical Holdings, Inc. ("Prospect Medical"), Prospect East Holdings, Inc. ("Prospect East"), and Prospect Chartercare, LLC ("Prospect Chartercare") (collectively, the "Prospect Entities"), and hereby file this Joint Reply to Receiver Stephen Del Sesto's ("Receiver") objection to the Prospect Entities' Notice of Intent to Sue Chartercare Community Board ("CCCB") or in the alternative Motion for Relief from the Injunctive Provisions of the Permanent Receivership Order ("Motion for Relief") to sue CCCB in Delaware and to file administrative petitions with relevant regulatory agencies (collectively, "Lawsuits").

ARGUMENT

I. This Court, the Federal Court, and the Receiver Have Acknowledged That at Some Point the Prospect Entities Have the Right to Litigate Their Claims That CCCB Breached the Amended and Restated LLC Agreement of Prospect Chartercare ("LLC Agreement").

At the time the Court approved the Proposed Settlement Agreement ("PSA") between the Receiver and CCCB, the Court found that the Prospect Entities did not have standing to object to the terms of the settlement. *St. Joseph Health Servs. of R.I. v. St. Josephs Health Servs. of R.I. Ret. Plan*, 2018 R.I. Super. LEXIS 94, at *22 (R.I. Super. Oct. 29, 2018) (Stern, J.). In that same

decision, the Court also ruled that the Prospect Entities' claims of breach of the LLC Agreement were not ripe because "CCCB has not even attempted to exercise any rights in favor of the Receiver." *Id.* at *24. The Court anticipated, however, that at some point in the future, in a separate proceeding, the Prospect Entities would have the right to assert their claims that CCCB breached the terms of the LLC Agreement. The Court stated as follows:

> Moreover, even assuming *arguendo* the Prospect Entities could establish standing and ripeness, they are not parties in interest for *purposes* of this *receivership* proceeding. Like the investors in *Refco*, the Prospect Entities would have this Court consider PCC's LLC agreement and engage in contract interpretation to determine whether CCCB is authorized to exercise certain rights in favor of the Receiver. Here, as in *Refco*, there can be no doubt that this Court, presiding over a *receivership*, is not the appropriate proceeding to unwind the litany of objections the Prospect Entities lodge.
>
> [. . .]
>
> While admittedly tedious for the Prospect Entities to assert the same arguments again in a different proceeding, the minimal burden attendant thereto is 'outweighed by the unnecessary frustrations of the settlement process' that would result if this Court unwound the PSA and waded into conjectural injuries.

Id. at *25-27 (emphasis added) (internal citations omitted).

Similarly, in a colloquy between Chief Judge Smith and Attorney Wistow, both Chief Judge Smith and Attorney Wistow anticipated that the Prospect Entities' claims that CCCB breached the LLC Agreement would be litigated:

> THE COURT: -- And so at some point some judge is going to have to wrestle with the issues that Mr. Halperin has, I think, legitimately brought up. And this question of compliance with the Hospital Conversion Act and so forth is going to have to be examined. So you don't -- you're not going to be able to weave around it.
>
> MR. WISTOW: I'm not trying to. I'm willing to stipulate, your Honor, that all I'm asking for is an assignment of that claim. And I will be forced, as Mr. Halperin acknowledges, to get involved in litigation. This happens in bankruptcy very frequently in the settlement of cases. There may be an assignment by the debtor to a creditor of a claim that's going to be disputed. And that dispute is

> not resolved in the bankruptcy court. It's the person who gets the assignment goes off and he brings his suit wherever it is. And the fact that it was assigned does not indicate there's any merit. In fact, I remember we cited a case where there was a Texas district court approving a bankruptcy settlement of an assignment of a legal malpractice case. And the Texas district court judge said, you know, I think it's rather doubtful that this is even assignable. But he allowed the assignment as part of the settlement and off they went. It really is not relevant for our purposes which way it ended up.
>
> That's all -- I'm willing to stipulate on the record that if your Honor approves the transfer of that claim, you are not saying at all that we are legitimately entitled under the Hospital Conversion Act or the AHM to have this, nor am I saying that the transfer to us was not a breach. All I'm saying is that the court allowed us to transfer. Whether we pursue it, whether we don't pursue it, that's another issue and where we pursue it. I would respectfully submit that a pursuit of those claims would be a court of general jurisdiction, not actually the receivership court . . . .

Transcript of Hearing on Motion to Approve CCCB Settlement (Feb. 12, 2019) at 97:2-98:15 (emphasis added).[1] Thus, the issue is not *if* the Prospect Entities have the right to assert their breach of contract claims against CCCB, but *when*, in light of the status of the receivership proceeding, it is appropriate for them to do so.[2] Respectfully, the Prospect Entities assert that by causing CCCB to file suit against the Prospect Entities, the Receiver has decided that now is the time for those issues to be litigated.

II. Now that the Receiver Has Caused or Instructed CCCB to Sue the Prospect Entities, the Receivership Stay Does Not and Cannot Prevent the Prospect Entities From Asserting Claims Against CCCB in a Different Forum.

At the time the instant Motion for Relief was filed on January 2, 2019, CCCB had not yet filed its lawsuit against the Prospect Entities. The Receiver's objection, which notably was filed before he caused CCCB to sue the Prospect Entities ("CCCB Lawsuit"),[3] asserts a plethora of

[1] Relevant portions of such transcript are attached hereto as **Exhibit A**.
[2] As discussed *infra*, the time is ripe to allow the Prospect Entities to sue CCCB in Delaware as the Receiver has had adequate time to control and understand the assets of the receivership estate.
[3] *CharterCARE Community Board v. Samuel Lee et al.*, PC-2019-3654.

arguments as to why the Prospect Entities should not be granted relief from the receivership stay, including the argument that the status quo should be maintained and that a lawsuit against CCCB would diminish the assets of the receivership estate. While such arguments might have been worthy of consideration before initiation of the CCCB Lawsuit, once that lawsuit was filed with the Receiver's direction and support, those arguments became moot. As a matter of equity, now that the Receiver and CCCB have initiated the CCCB Lawsuit, the Prospect Entities should be free to assert whatever claims they have in whatever forum they deem appropriate. Respectfully, interpreting the LLC Agreement to determine whether Rhode Island, Delaware, or some other state is the appropriate venue for the claims asserted by or against CCCB, are among the issues that should not be decided by this Court presiding over a receivership. The court or courts hearing those claims should make determinations relating to venue, based on motions filed in those cases. From the perspective of this receivership proceeding, any justification for staying the litigation of a contract dispute between the Prospect Entities and CCCB no longer applies now that CCCB, with the support of the Receiver, has fired the first shot by initiating litigation.

A. *CCCB's Actions Justify Finding that the Stay Should No Longer Apply.*

Although there also are traditional grounds that justify granting the Prospect Entities' Motion for Relief, recent events have made it readily apparent that the stay cannot restrict the Prospect Entities' right to file the Lawsuits. *After* the Prospect Entities filed the instant motion, but before the motion could be heard, CCCB, at the direction of the Receiver, filed the CCCB Lawsuit. In an eleven-count complaint, CCCB has alleged a bevy of claims against the Prospect Entities, many of which are claims for specific performance of the LLC Agreement.

The LLC Agreement plainly states that the appropriate venue for substantive disputes arising out of the LLC Agreement "shall rest with the state courts of the State of Delaware[.]" Section 17.4(b)(i) of the LLC Agreement. The one exception, however, to the Delaware venue

provision is where a party to the agreement requires *immediate* injunctive relief "to prevent breaches or threatened breaches" of the agreement. Only in that situation does Section 17.5 of the LLC Agreement permit the non-breaching party to seek relief from the Rhode Island courts. In carefully drafting many of its counts as claims for specific performance, CCCB is blatantly attempting to avoid the Delaware venue clause, despite the fact that it is neither seeing to "prevent" a breach or a threatened breach of the LLC Agreement. Although the enforceability of the venue provision of the LLC Agreement is for another court to adjudicate, in deciding whether the receivership stay should be applied, this Court should reject the Receiver's effort to employ the stay to gain a tactical advantage in the CCCB Lawsuit, rather than for the legitimate purpose of the stay—to give the Receiver time and opportunity to marshal the assets, and control and understand the receivership estate.

This case is analogous to a bankruptcy case, where a debtor who initiates ligation attempts to shield itself from counterclaims using the court's automatic stay. Where, as here, a party converts the stay from a shield into a sword, intense scrutiny is required. As one court has explained,

> Where a debtor seeks affirmative relief as a plaintiff in a lawsuit and then invokes the protection of the automatic stay on a counterclaim, the situation warrants very careful scrutiny. In such instance, a court must be cautious to avoid a decision which would convert [a stay] from a shield into a weapon.

In re Overmyer, 32 B.R. 597, 601 (Bankr. S.D.N.Y 1983); *see also Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1168 (2d Cir. 1979). And, the court continued: "[a] debtor should not be permitted to reap the benefits of litigation in one court, but circumvent the burdens in another forum." *Id.* The same reasoning ought to apply here.

Here, while the Receiver contends that the Prospect Entities will be able to counterclaim without violating the stay, he also contends that the Prospect Entities should nevertheless be denied

their rights under the very same agreement under which CCCB has sued. Certainly, that does not comport with the purpose of the receivership stay. Just as courts scrutinize a debtor who initiates a lawsuit and then attempts to invokes the protection of a stay, so too should this Court reject CCCB's attempt to tie the Prospect Entities' hands in their efforts to adjudicate their contract claims in accordance with the venue provisions of the LLC Agreement. *See In re Overmyer*, 32 B.R. at 601. Indeed, as is the case here, "[t]he purpose of the automatic stay is to afford protection to a debtor in bankruptcy, 'but when the debtor is in the position of assailant rather than victim, the potential for abuse of that purpose is manifest.'" *Carlton Co. v. Jenkins (In re Jenkins)*, 2004 Bankr. LEXIS 1035, at *10 (Bankr. S.D. Ga. Mar. 30, 2004) (quoting *Bohack Corp.*, 599 F.2d at 1168).

Simply put, the Receiver cannot have it both ways with respect to the stay—he cannot be allowed to use the stay as a shield when he pleases, but use it as a sword when he determines that it is tactically advantageous to do so. It would be grossly inequitable for CCCB, at the direction of the Receiver, to be permitted to go on the offensive and seek to adjudicate its contractual rights under the LLC Agreement in Rhode Island, but at the same time assume a defensive crouch behind the stay when the Prospect Entities seek to vindicate their contractual rights under the *very same* LLC Agreement in a different forum. Stays are meant to protect debtors and ensure the orderly distribution of their assets, not to authorize clever pleading and litigation tactics. As courts have explained, in the bankruptcy context, "[t]he stay is a shield, not a sword." *Sternberg v. Johnston*, 582 F.3d 1114, 1124 (9th Cir. 2009); *In re Scarborough St. James Corp.*, 535 B.R. 60, 67 (Bankr. Del. 2015) (explaining that "the stay is a shield, not a sword that should help the debtor deal with his bankruptcy for the benefit of himself and his creditors"). Accordingly, the Court should hold that, based on the circumstances set forth above, the stay does not and cannot prevent the Prospect Entities from filing the Lawsuits—lawsuits which are based on the same LLC Agreement that

CCCB has already invoked. Allowing CCCB to weaponize the stay would not accomplish the goal of the stay, it would vitiate it.

B. *The Purpose of the Receivership Stay No Longer Exists.*

In deciding whether to lift a receivership stay, "[t]he issue under the test is not *if* but *when* during the course of a receivership should the stay be lifted and claims allowed to proceed because 'at some point, persons with claims against the receivership should have their day in court.'" *SEC v. Provident Royalties, L.L.C.*, 2011 U.S. Dist. LEXIS 74304, *8-9 (N.D. Tx. Jul. 7, 2011) (quoting *SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984)). While there is no "clear cut-off date after which a stay should be presumptively lifted," *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 450 (3d Cir. 2005), "the receivership cannot be protected from suit forever," *Wencke*, 742 F.2d at 1231.

Although the Receiver contends that the stay should remain in place because the federal court action initiated by the Receiver[4] is "in its infancy" and the receivership is only one and a half years old, courts have nonetheless lifted stays so long as the Receiver has had sufficient opportunity to collect and marshal the receivership estate's assets. *See, e.g., Provident Royalties, L.L.C.*, 2011 U.S. Dist. LEXIS 74304, at *12-15 (timing factor weighed heavily in favor of lifting stay where receivership was almost two years old, receiver had marshaled almost all receivership assets and had proposed a plan of distribution); *SEC v. Stanford Int'l Bank, Ltd., Inc*., 2011 U.S. Dist. LEXIS 80293, at *20 (N.D. Tex. May 6, 2011) (lifting a stay when the receivership was "just over two years old" and "relatively young"); *SEC v. Private Equity Mgmt. Grp., LLC*, 2010 U.S. Dist. LEXIS 126337, at *6-7 (C.D. Cal. Nov. 18, 2010) (second factor cut against receiver where receivership was well over one year old and receiver had progressed sufficiently in the effort to

[4] *Stephen Del Sesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, et al. v. Prospect Chartercare, LLC et al.*, 1:18-CV-00328-WES-LDA.

organize and understand the entities under his control, as evidenced by regular status reports to the court).

Here, as in *Private Equity Management Group, LLC*, the receivership has been in place for over a year, and the Receiver has, through regular status reports, kept the Court appraised of the Receiver's efforts to "organize and understand" the property and entities under his control. *See* 2011 U.S. Dist. LEXIS 74304, at *12-15. For instance, the Receiver has so organized and understood the nature of his claims and the property under his control that he has (1) initiated a lawsuit against numerous entities; (2) entered into two settlement agreements; and (3) instructed another entity to file suit against the Prospect Entities. Accordingly, the Receiver has sufficiently taken control of the receivership estate, and has understood it sufficiently to initiate lawsuits and settle claims. Therefore, now is an appropriate time for the Receiver to no longer be protected by the stay, and that the Prospect Entities be able to assert their rights under the LLC Agreement and the Asset Purchase Agreement, as amended ("APA").

III. There Is No Requirement That the Prospect Entities Submit a Proposed Complaint.

The Receiver contends that the Prospect Entities are required to file—or at least should have filed—a proposed complaint contemporaneously with the Motion for Relief. *See* Memo. at 5. The Receiver contends that a proposed pleading is necessary to "properly evaluate" the Motion for Relief. *Id.* However, such contention is belied by the fact that the Prospect Entities have on several occasions—in open court, in a written notice to CCCB and in detailed pleadings—plainly indicated the subject matter of their claims. The proposed complaint is not necessary; the Receiver knows the substantive claim. Nevertheless, while the Prospect Entities do not concede that the filing of a proposed complaint is a prerequisite to the Motion for Relief, or that is necessary for the Court to consider the Motion for Relief, the Prospect Entities nonetheless submit a proposed complaint herewith as **Exhibit B** ("Proposed Complaint").

IV. The Receiver's Contention That the Lawsuits Are Not in the Best Interest of the Receivership Estate Are Irrelevant and Contradictory To the Position That the Receiver Has Previously Taken and Should Thus Be Disregarded.

It goes without saying that defending litigation involving property of the receivership estate is undesirable from the Receiver's perspective. However, where a stay is no longer needed for its legitimate purpose, the fact that litigation might adversely impact the receivership estate is irrelevant. In arguing that the Lawsuits will not be in the best interest of the Receivership estate, the Receiver maintains that the costs of the Lawsuits will lead to a diminution of CCCB's assets. This assertion is at best disingenuous given the fact that the PSA engineered by the Receiver is the precise cause of the Lawsuits and the fact that the Receiver's has stated in federal court that there will be no legal fees incurred by the receivership estate. Moreover, litigation of the LLC Agreement is exactly what the Prospect Entities warned of during the hearing on the Receiver's Petition for Settlement Instruction relative to the PSA. The Prospect Entities argued that the PSA was not in the best interest of the receivership estate because it would serve as an impetus for future lawsuits:

> The question for the Court is do you, your Honor, want to set in motion all of these lawsuits without regard to whether or not they are likely to succeed, whether or not on their face they present problems that the Receivership should not be involved in simply giving the Receiver's counsel carte blanche to just launch these proceedings. *There is a domino effect here. It's not just about putting money into the pension plan, which we understand and support. It's about what will happen next*.

Transcript of Receiver's Petition for Instructions (October 10, 2018) ("Tr.") at 86:23-87:7 (emphasis added).[5]

The Prospect Entities also warned of the costs affiliated with lawsuits that would follow from provisions of the PSA that breached the LLC Agreement:

[5] Relevant portions of such transcript are attached hereto as **Exhibit C**.

> . . . but I say don't give the Receiver carte blanche to start reeking [(sic.)] havoc on the rights of third parties and diminish the assets of this receivership estate by keeping the Receiver involved in running up expenses that don't need to be run up at this point in time from the point of view of this receivership. Embroiling the receivership in litigation which you know is going to happen may not be in the best interest of the receivership estate.

Tr. 91:22-92:5.

Nevertheless, in forging ahead with the PSA, the Receiver represented to this Court that any litigation arising out of the PSA would have a minimal effect on the estate. In fact, specific to costs, counsel for the Receiver, after being warned of potential litigation against CCCB in Delaware, stated:

> So I still suggest probably the simplest straightforward thing is—*this is for the benefit of the estate*. You know, my brother says and I really thank him for his consideration that he wants to save the [e]state money. I'm sure that is one of his principle concerns. First of all, there are no legal fees that we're charging. We're on a straight contingency. So far it's starting to look like I'm getting something like the federal minimal wage for the number of hours we're putting in to this thing. *Yes, there will be some expenses but those will be minimum. There are no significant attorney fees. Mr. Halperin need not lose sleep over the loss of money to the estate*.

Tr. 99:25-100:10 (emphasis added).

Therefore, to the extent that there are costs affiliated with the Lawsuits that would reduce the value of CCCB's assets, such risk was assumed by the Receiver, who in his business judgment, proceeded with the PSA anyway and has now supported and/or directed CCCB to file the CCCB Lawsuit. It would be patently inequitable for the Receiver to argue on one hand that the PSA is in the best interest of the receivership estate, despite knowing that the PSA will spawn litigation, and on the other argue that the litigation by the Prospect Entities, which is a direct result of the PSA, is not in the best interest of the receivership estate. The Receiver should be estopped from arguing that those risks and costs bar the Prospect Entities from exercising their contractual rights. The possibility that the Receiver's beneficial interest might be diminished is a risk that the Receiver

knowingly accepted when taking CCCB's beneficial interest in Prospect Chartercare in violation of the LLC Agreement.

III. Assuming That the Receivership Stay Applies, the Court Should Nonetheless Grant the Prospect Entities Relief from the Stay to File the Lawsuits.

The Receiver argues that the factors set forth in *SEC v. Wencke*, 742 F.3d, 1230, 1231 (9th Cir. 1984) militate against lifting the receivership stay. *See* Memo. at 14-20. Specifically, the Receiver argues that the status quo will be affected, because the Prospect Entities seek to have CCCB's transfer to the Receiver invalidated, *see id.* at 16; that the timing of the Motion for Relief is premature because the receivership and the pending federal court action are in their infancy, *id.* at 17-19; and that the Prospect Entities' claims are not "colorable," *id.* at 19-20.

a. *The status quo will be maintained*.

The Receiver contends that the status quo will not be maintained if the Motion for Relief is granted because the Lawsuits will adversely affect the Receiver's interests. *See* Memo. at 16. However, whether the Receiver's interests will be adversely affected is not the operative inquiry. The appropriate test requires a *balancing* of the Receiver's interest with the Prospect Entities' interests, including the injuries that they are incurring as a result of the stay. *United States v. JHW Greentree Capital, L.P.*, 2014 U.S. Dist. LEXIS 60891, at *6 (D. Conn. Feb. 10, 2014). Moreover, the status quo has changed since the Receiver filed his initial objection. Not only has the CCCB Lawsuit been filed, but the parties have agreed to stay that litigation at least until December 20, 2019; and significantly, have agreed that any lawsuit filed by the Prospect Entities for breach of the LLC Agreement will also be stayed for the same time period. Thus, relief from the receivership stay will have no impact on the receivership at least until December 20, 2019.

Furthermore, the Receiver's claimed interest of preserving the receivership estate is outweighed by the continuing injury to the Prospect Entities under the LLC Agreement. The Receiver has taken a beneficial interest in CCCB, (1) constituting a breach of the LLC Agreement,

which has caused the Prospect Entities to incur substantial, continuing damages in the form of defending additional lawsuits, such as the CCCB Lawsuit; and (2) spurring possible regulatory ramifications. As to their claims against CCCB under the APA, the Prospect Entities continue to suffer extensive damages, namely costly discovery and litigation in the state and federal courts that CCCB is contractually obligated to indemnify under the APA. The Receiver's desire to preserve assets of the receivership estate cannot obliterate the Prospect Entities' contractual rights with CCCB.

b. *The timing is appropriate to lift the stay.*

As explained *supra*, "[t]he issue under the test is not *if* but *when* during the course of a receivership should the stay be lifted and claims allowed to proceed because 'at some point, persons with claims against the receivership should have their day in court.'" *Provident Royalties, L.L.C.*, 2011 U.S. Dist. LEXIS 74304, at *8-9 (quoting *Wencke*, 742 F.2d at 1231). Here, as explained *supra*, the Receiver has sufficiently taken control of the receivership estate, and he has understood it sufficiently to initiate lawsuits and settle claims. Therefore, the timing is ripe for the Court to find that the Receiver no longer need be protected by the stay, and that the affected parties be allowed to assert their legal rights.

c. *The merits of the Prospect Entities' claims are colorable.*

The Receiver appears to contend that the Prospect Entities have not sufficiently proven the merits of their claims so as to warrant the stay being lifted. *See* Memo. at 19-20 ("Rather than ever grappling with this fact, Prospect simply 'put[s] that issue aside.' By putting aside the merit of its claims, Prospect fails to meet it [(sic.)] burden under the third *Wencke* factor") (internal citations omitted).[6] However, the Court need not wade into the merits of the Prospect Entities'

[6] The Receiver contends that the Prospect Entities' claim for breach of the LLC Agreement is not colorable on its face. That claim is borderline disingenuous inasmuch as the LLC Agreement is a

claims. In *Wencke*, the Ninth Circuit explained that under the third factor, the moving party is not required to show that it is likely to prevail on the merits, only that it has "colorable" claims that justify lifting the stay. 742 F.2d at 1232. The Third Circuit has further explained that:

> We note that when it is asked to lift a stay it would usually be improper for a district court to attempt to actually judge the merits of the moving party's claims at such an early point in the proceedings. A district court need only determine whether the party has colorable claims to assert which justify lifting the receivership stay. If it appears that a claim has no merit on its face, that of course may end the matter. But, if a claim may have merit—and factual development may be necessary to assess this—the district court will have to address the other *Wencke* factors.

Acorn Tech. Fund, L.P., 429 F.3d at 444 (internal citations omitted); *see also Private Equity Mgmt. Group, LLC*, 2010 U.S. Dist. LEXIS 126337, at *7-8 (third factor satisfied even though it was "not clear" that the movant would prevail on the merits of its claims, and movant's claims were "speculative").

Here, despite the Receiver's contentions that a heightened standard applies, the Prospect Entities have satisfied the third *Wencke* factor inasmuch as they have sufficiently presented the Court with facts that sustain a "colorable" cause of action against CCCB; specifically, that CCCB breached the LLC Agreement. While the Receiver has asserted that CCCB's transfer to him is permitted under the LLC Agreement, the Court need not address the merits of whether the transfer was permissible. *Acorn Tech. Fund, L.P.*, 429 F.3d at 444. Furthermore, the Prospect Entities have established that the APA is a valid contract, which requires CCCB to indemnify them against any liability related to the Plan. The Receiver offers no defense to this claim. Accordingly, as the Prospect Entities have established a colorable claim, the stay should be lifted.

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valid contract, which the Prospect Entities claim was breached when CCCB transferred its interest in Prospect Chartercare to the Receiver, causing the Prospect Entities damages. The merits of whether the transfer was a breach, as discussed *infra*, in inappropriate to be considered at this stage.

IV. The Receiver has used the Receivership Stay to Leverage a Tactical Advantage Over the Prospect Entities; Therefore, any Argument That the Prospect Entities Should Bring Suit in the Form of a Counterclaim in Rhode Island Should be Disregarded.

Finally, the Receiver argues that any claims that the Prospect Entities have against CCCB should be asserted as counterclaims in the CCCB Lawsuit. *See* Memo. at 9. However, as stated above, the questions of compulsory or permissive counterclaims and venue are not properly before this receivership Court. Moreover, if this Court wades into the merits of those issues, any argument by the Receiver that the Prospect Entities should be required to assert counterclaims in the CCCB Lawsuit are contrary to the LLC Agreement's explicit venue selection provision, which requires that substantive claims be brought exclusively in Delaware with the limited exception of the need to seek immediate injunctive relief in Rhode Island to prevent a breach or threatened breach of the LLC Agreement.

Furthermore, under the circumstances, the Court should not reward CCCB and the Receiver's tactic of filing suit in Rhode Island before the Prospect Entities were able to have this Court hear the instant Motion for Relief to sue in Delaware. The Prospect Entities filed their Motion for Relief on January 2, 2019, with a scheduled hearing date of January 18, 2019 ("Hearing"). Following several continuances, the motion was set for hearing on March 14, 2019.[7] Three days before the rescheduled hearing, on March 11, 2019, CCCB filed the CCCB Lawsuit. As this Court is aware, the Prospect Entities charged the Receiver with violating this Court's order of December 27, 2018, in which the Court ordered the Receiver to "refrain from exercising any rights under the PSA prior to the federal court's determination of whether to approve the PSA," *and* prohibited the Receiver from "implementing, or directing that CCCB implement any rights, whatsoever in favor of the Receiver (or the Plan) derivative of CCCB's rights in CCF or PCC"

[7] Ultimately, however, the Court continued the Hearing until April 26, 2019, and the Hearing was again continued by request of the parties to May 2, 2019.

until after the Receiver provided all parties with twenty (20) days' written notice. Instead of refraining from doing so until after federal court approval of the PSA or giving twenty (20) days' notice, the Receiver directed CCCB to file the CCCB Lawsuit before the Prospect Entities were able to have their motion heard by this Court. The Receiver did so in an effort to gain a tactical litigation advantage over the Prospect Entities by being the "first to file." As noted *supra*, the purpose of the stay is to permit the Receiver to collect and maintain the receivership estate unhindered; its purpose is not to be used as a sword.

As such, because the Receiver disregarded this Court's Order and used the anti-litigation stay provision in the Order to gain a tactical advantage and precluded the Prospect Entities from pursuing their claims in Delaware, any argument that the Prospect Entities' claims should be asserted as counterclaims in the CCCB Lawsuit should be disregarded. Moreover, as a result of the Receiver's flagrant disregard of this Court's Order, this Court should reject the Receiver's arguments for continued enforcement of the receivership based on the doctrine of "unclean hands." Just as this Court ruled when the Prospect Entities filed administrative proceedings without first seeking leave, the Court has the discretion to once again "close[] the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . . ." *St. Joseph Health Servs. of R.I. v. St. Josephs Health Servs. of R.I. Ret. Plan*, 2018 R.I. Super. LEXIS 100, at *16 (R.I. Super. Nov. 14, 2018) (Stern, J.) (quoting *Precision Instrument Mfg. Co v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945)). However, this time, the door should be closed on the Receiver and the stay should no longer be enforced.

CONCLUSION

For all of the foregoing reasons, in the event that the Court determines that the receivership stay prevents the Prospect Entities from seeking to vindicate their contract rights against CCCB

under the LLC Agreement and APA, the Prospect Entities urge the Court to grant the Prospect Entities' Motion for Relief and allow them to file the Lawsuits.

Respectfully Submitted,

PROSPECT MEDICAL HOLDINGS, INC. AND
PROSPECT EAST HOLDINGS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2019, the within document was electronically filed through the Rhode Island Superior Court Case Management System by means of the EFS and is available for downloading by all counsel of record.

/s/ *Preston Halperin*

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PROSPECT MEDICAL HOLDINGS, INC.; PROSPECT EAST HOLDINGS, INC.;	)	
Plaintiffs,	)	C.A. No. _____
v.	)	
CHARTERCARE COMMUNITY BOARD	)	
Defendant,	)	

COMPLAINT FOR DECLARATORY JUDGMENT, BREACH OF LLC AGREEMENT, PERMANENT INJUNCTIVE RELIEF

Plaintiffs Prospect Medical Holdings, Inc., and Prospect East Holdings, Inc. (collectively, "Prospect"), by and through their undersigned counsel, for their Complaint, allege upon knowledge with respects to their acts and upon information and belief as to other matters, as follows:

1. This is an action to enforce the terms of the Amended & Restated Limited Liability Company Agreement of Prospect Chartercare ("LLC Agreement") between Prospect and Defendant Chartercare Community Board ("CCCB").

2. In the LLC Agreement, CCCB agreed that they would not sell, assign, transfer, pledge or hypothecate any part of their interest in Prospect Chartercare, LLC ("Prospect Chartercare").

3. Notwithstanding this obligation, CCCB has transferred their interest in Prospect Chartercare to Stephen Del Sesto ("Del Sesto"), a party adverse to Prospect in ongoing class action litigation in his capacity as receiver and administrator of the St. Joseph Health Services of Rhode Island Retirement Plan.

4. CCCB has rebuffed approaches by Prospect to amicably resolve the dispute caused by their breach of the LLC Agreement. To the contrary, CCCB and Del Sesto have acted in concert in an effort to deter Prospect from vindicating their rights under the LLC Agreement, threatening to deadlock the operations of Prospect Chartercare, and the two hospitals that it owns and operates.

5. Accordingly, Prospect now brings this action to enforce the terms of the LLC Agreement. Prospect respectfully requests that the Court order CCCB to abide by Section 13.1 of the LLC Agreement, declare that all prior agreements between CCCB and Del Sesto in breach of the LLC Agreement are null and void, permanently enjoin any attempt to effectuate an invalid transfer of their interest in Prospect Chartercare, and award Prospect damages caused by CCCB's breach of the LLC Agreement.

THE PARTIES

6. Plaintiff Prospect Medical Holdings, Inc. is a corporation organized under the laws of the State of Delaware with its principal office and place of business in Los Angeles, California. Prospect is a healthcare service provider

which owns and operates a nationwide network of hospitals and affiliated medical groups.

7. Plaintiff Prospect East Holdings, Inc. ("Prospect East") is a corporation organized under the laws of the State of Delaware with its principal office and place of business in Los Angeles, California. Prospect East is a wholly owned subsidiary of Prospect.

8. Defendant Chartercare Community Board ("CCCB") is a non-profit corporation organized under the laws of the State of Rhode Island, with its principal office in Providence, Rhode Island. Prior to 2014, CCCB was known as Chartercare Health Partners ("CCHP.")

9. Together, Prospect East and CCCB are the two members of Prospect Chartercare, a limited liability company organized under the laws of the State of Rhode Island, with its principal office in Providence, Rhode Island. Prospect East holds an 85% interest in Prospect Chartercare, with the remaining 15% held by CCCB.

10. Through its subsidiaries, Prospect Chartercare owns and operates two hospitals in Rhode Island: Our Lady of Fatima Hospital and Roger Williams Medical Center (collectively, the "Hospitals.")

JURISDICTION AND VENUE

11. The LLC Agreement provides, in pertinent part, that "venue for any and all claims associated with a Dispute between the parties shall rest with the state courts of the State of Delaware; provided, however, that such court shall construe and apply the Laws of the State of Rhode Island[.]"

12. This Court has personal jurisdiction over CCCB because CCCB has submitted to its jurisdiction by contractual consent.

13. This Court has subject matter jurisdiction over this dispute pursuant to 10 *Del. C.* § 341, and 6 *Del. C.* § 18-111.

FACTS

The LLC Agreement

14. On or around March 2013, Prospect and CCHP signed a letter of intent under which Prospect East would acquire substantially all of the assets of CCHP, including the Hospitals (the "Acquisition").

15. In connection with the Acquisition, on or around September 24, 2013, Prospect, CCHP, and other related entities entered into an Asset Purchase Agreement ("APA"), a true and accurate copy of which is attached hereto as Exhibit A.

16. The APA formed a new entity, Prospect Chartercare, which would own and operate the Hospitals through its subsidiaries. Pursuant to the terms of the

APA, CCHP acquired a 15% interest in Prospect Chartercare, while Prospect held the remaining 85%.

17. On or around June 20, 2014, Prospect and CCHP executed the LLC Agreement, a true and accurate copy of which is attached hereto as Exhibit B.

18. Section 13.1 of the LLC Agreement prevents members from transferring their interest in Prospect Chartercare without authorization of Prospect, subject to certain enumerated exceptions. The text of this provision, in pertinent part, is as follows:

> …[A] member may not sell, assign (by operation of Law or otherwise), transfer, pledge or hypothecate ("Transfer") all or any part of its interest in the Company (either directly or indirectly through the transfer of the power to control, or to direct or cause the direction of the management and policies, of, such Member.)
>
> (Ex. B, § 13.1)

19. Section 13.6 of the LLC Agreement, in turn, provides that "[n]o Transfer of an interest in [Prospect Chartercare] that is in violation of this Article XIII shall be valid or effective, and [Prospect Chartercare] shall not recognize any improper transfer[,]" and that Prospect Chartercare may "enforce the provisions of this article . . . by entering an appropriate stop transfer order on its books or otherwise refusing to register or transfer or permit the registration or transfer on its books of any proposed transfers[.]" (Ex. B, § 13.6)

The Retirement Plan Class Actions

20. Prior to the Acquisition, through its subsidiary St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI"), CCHP operated a defined benefit pension plan (the "Retirement Plan") for certain employees of the Hospitals. Pursuant to the APA, Prospect Chartercare did not acquire SJHSRI or the Retirement Plan as part of the Acquisition.

21. On or around August 18, 2017, SJHSRI filed a Petition for the Appointment of a Receiver in Rhode Island Superior Court (the "Receivership Court"), representing that the Retirement Plan was severely underfunded, and requesting that a receiver be appointed to oversee a winding-down.

22. On or around August 18, 2017, the Receivership Court appointed Del Sesto as temporary receiver for the Plan. On or around October 11, 2017, the Receivership Court appointed Del Sesto as permanent receiver.

23. On or around June 18, 2018, Del Sesto filed a class action alleging, *inter alia*, fraud claims relating to the Plan in Rhode Island Superior Court, Case No. PC-2018-4386, against Prospect, CCHP (now known as CCCB), and other defendants, seeking to hold them liable for the Plan's insolvency (the "State Class Action.") On the same day, Del Sesto also filed a class action alleging similar claims in the United States District Court for the District of Rhode Island, Case

No. 1:18-cv-00328, against Prospect, CCCB, and other defendants (the "Federal Class Action," and collectively with the State Class Action, the "Class Actions.")

24. On or around July 11, 2018, the State Class Action was stayed by joint stipulation, leaving the shared claims to be litigated in the Federal Class Action.

The Invalid Transfer

25. On or around August 31, 2018, CCCB, Del Sesto, and other related parties entered into an agreement to settle the Class Actions with respect to CCCB and its subsidiaries (the "Settlement Agreement"), a true and accurate copy of which is attached hereto as Exhibit C.

26. The Settlement Agreement provides, in pertinent part, as follows:

a. that CCCB will hold its 15% membership in Prospect Chartercare in trust for the receiver of the Retirement Plan, and that the receiver will have the full beneficial interests therein. (Ex. C, ¶17),

b. that the receiver will have the right to sue in the name of CCCB to collect or otherwise obtain the value of the beneficial interest in Prospect Chartercare(Ex. C, ¶19),

c. That CCCB will grant the receiver a security interest in its assets, investment property and general intangibles, which would include its membership in Prospect Chartercare (Ex. C, ¶29).

27. The above-referenced provisions of the Settlement Agreement include a hypothecation of CCCB's interest in Prospect Chartercare, by granting Del Sesto a beneficial interest and security interest in CCCB's membership, as well as the authority to control and direct CCCB.

28. On or around September 4, 2018, Del Sesto filed a Petition for Settlement Instructions in the Receivership Court, asking for approval to proceed with the settlement.

29. On or around September 7, 2018, in plain violation of the LLC Agreement, CCCB granted a security interest in all of its assets to Del Sesto, pursuant to the Settlement Agreement. Del Sesto subsequently filed a UCC-1 financing statement with the Rhode Island Secretary of State in connection with this purported security interest.

Prospect Seeks a Resolution, CCCB Doubles Down

30. The LLC Agreement provides that "[i]n the event that any dispute, controversy or claim arises among the parties, including any dispute, controversy or claim arising out of this Agreement . . . the parties shall attempt in good faith to resolve such Dispute promptly by negotiation (including at least one in-person meeting) over a period of not less than thirty (30) days, commencing upon one party's delivery of a written notice of Dispute to the other parties." (Ex. B, §17.4)

31. On or around September 13, 2018, Prospect East, through counsel, provided a written notice of dispute to CCCB, a true and accurate copy of which is attached hereto as Exhibit D. The notice asserted that the Settlement Agreement between CCCB and Del Sesto was in violation of Section 13.1 of the LLC Agreement, and expressed Prospect's willingness to meet with CCCB in order to negotiate a resolution.

32. CCCB however, has shown no intention of seeking an amicable resolution. Instead, it has acted in concert with Del Sesto in an attempt to effectuate the Invalid Transfer by threatening Prospect and deterring them from vindicating their rights under the LLC Agreement.

33. On or around September 24, 2018, counsel for Prospect East participated in an in-person meeting with counsel for CCCB and its subsidiaries, who appeared alongside counsel for Del Sesto. Counsel for CCCB and Del Sesto jointly stated their belief the settlement was legally binding immediately, even without approval from the Receivership Court. Based on this belief, counsel for CCCB and Del Sesto jointly threatened that they had the authority to instruct directors appointed by CCCB to Prospect Chartercare's board to deadlock Prospect Chartercare's day-to-day operations – which in turn, would disrupt the operation of the Hospitals.

34. On or around September 27, 2018, Prospect took action to vindicate its rights under the LLC Agreement. Prospect, Prospect Chartercare, and its subsidiaries filed an opposition to the Petition for Settlement Instructions in the Receivership Court. On the same day, Prospect, Prospect Chartercare, and its subsidiaries also filed a Petition under R.I. Gen. Laws §42-35-8 with the Rhode Island Attorney General, seeking a declaratory order that the Invalid Transfer contemplated by CCCB and Del Sesto would require approval by the Rhode Island Department of Health and/or the Rhode Island Attorney General in addition to the Receivership Court.

35. On or around October 1, 2018, counsel for CCCB contacted Prospect Chartercare, demanding confidential financial information. Prospect Chartercare requested that prior to providing the information, CCCB should (1) identify their purpose of their demand; and (2) execute a confidentiality agreement. CCCB refused to comply with these requests.

36. Upon information and belief, CCCB has attempted to contact board members of Prospect Chartercare in order to demand that they put pressure on Prospect to countenance the Invalid Transfer by deadlocking operations of Prospect Chartercare and the Hospitals, and to threaten the removal of any board member who does not comply with these demands.

37. Upon information and belief, CCCB has, through counsel, contacted the Chairman of the Board of Prospect Chartercare in order to obtain contact information for other board members, so that it may threaten their removal if they do not comply with CCCB's demands, made on behalf of Del Sesto.

38. On or around October 19, 2018, David Hirsch, purportedly as Chairman of the Board of CCCB, sent a letter to Prospect Chartercare board members appointed by CCCB demanding that they "support the Settlement Agreement and . . . cause Prospect CharterCare[] not to continue in its efforts to object thereto[,]" and threatening to terminate any board member who did not confirm that they would support the Invalid Transfer "by 5:00PM on Tuesday, October 23[.]" A true and accurate copy of this correspondence is attached hereto as Exhibit E.

39. On or around October 29, 2018, the Receivership Court issued a decision approving the Petition for Settlement Instructions on two conditions: (1) that "the Receiver [refrain] from exercising any rights under the [Settlement Agreement]" prior to approval from the federal court presiding over the Federal Class Action; and (2) to offer all objectors to the Settlement Agreement twenty days written notice prior to "implementing, or directing that CCCB implement, any rights, whatsoever, in favor of the Receiver . . . derivative of CCCB's rights[.]" A true and accurate copy of this decision is attached hereto as Exhibit F.

40. In their decision, the Receivership Court explained that these conditions were "designed to ensure the Objectors have an appropriate opportunity – in an appropriate proceeding – to contest objectionable terms prior to their implementation by the Receiver." (Ex. F, p. 31)

41. In particular, the Receivership Court noted that Prospect should "assert the same arguments again in a different proceeding" with regards to CCCB's violation of the LLC Agreement. (Ex. F, p. 20)

COUNT I

(Declaratory Judgment Pursuant to 6 *Del. C.* § 18-111)

42. Plaintiffs reallege and incorporate by reference all of the preceding paragraphs as though fully set forth herein.

43. The LLC Agreement is a valid, enforceable contract between Plaintiffs and Defendant CCCB.

44. A dispute exists between the parties as to the obligations of CCCB under the LLC Agreement. As a result of that dispute, Plaintiffs have made a formal demand upon Defendants to cure their breach of the LLC Agreement and continue to perform thereunder. Defendants have refused this demand.

45. Defendant CCCB has breached its obligations under the LLC Agreement by:

a. Entering into a Settlement Agreement which includes a hypothecation of CCCB's interest in Prospect Chartercare, by granting to Del Sesto a beneficial interest and security interest in CCCB's membership of Prospect Chartercare, as well as the authority to control and direct CCCB.

b. Granting a security interest in all of CCCB's assets to Del Sesto pursuant to the Settlement Agreement.

c. Acting in concert with Del Sesto in an attempt to effectuate the Invalid Transfer by threatening Prospect and deterring them from vindicating their rights under the LLC Agreement.

46. To rectify these impermissible actions, Plaintiffs request an order from the court declaring null and void (i) any hypothecation of CCCB's membership in Prospect Chartercare; (ii) any granting to Del Sesto of a beneficial interest and security interest in CCCB's membership of Prospect Chartercare; and (iii) any authorization by CCCB to Del Sesto to control and direct CCCB's membership in Prospect Chartercare.

COUNT II

(Breach of LLC Agreement)

47. Plaintiffs reallege and incorporate by reference all of the preceding paragraphs as though fully set forth herein.

48. Prospect has expended, and continues to expend, considerable resources in attempting to vindicate its rights under the LLC Agreement by opposing the Invalid Transfer in all available forums.

49. Prospect has expended, and continues to expend, considerable resources in resisting CCCB's attempts to deadlock the operations of Prospect Chartercare and the Hospitals on behalf of Del Sesto.

50. Plaintiffs and Prospect Chartercare are currently adverse to Del Sesto in the Class Actions.

51. Based on the close coordination between CCCB and Del Sesto, as well as CCCB's attempts to make improper requests for financial information of Prospect Chartercare on behalf of Del Sesto, Plaintiffs have reason to believe that CCCB has provided confidential information regarding Prospect Chartercare in its possession to Del Sesto, and is otherwise assisting Del Sesto in his litigation of the Class Actions.

52. As a direct and proximate result of CCCB's breach of Section 13.1 of the LLC Agreement, Plaintiffs have suffered damages in excess of $1,000,000.

COUNT III

(Permanent Injunction)

53. Plaintiffs reallege and incorporate by reference all of the preceding paragraphs as though fully set forth herein.

54. The LLC Agreement provides, in pertinent part, that "each party acknowledges and agrees that the non-breaching parties would be irreparably damaged if any of the provisions of this Agreement are not performed in accordance with their specific terms and that any breach of this Agreement by a party could not be adequately compensated in all cases by monetary damages alone."

55. Plaintiffs therefore respectfully request that the Court issue an Order permanently enjoining Defendants as follows:

a. Defendants shall make no further attempt to deadlock or otherwise disrupt the operations of Prospect Chartercare and the Hospitals.

b. Defendants shall make no further attempt to contact Prospect Chartercare board members for any improper purpose.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in favor of Plaintiffs and against Defendants, and prays the Court as follows:

a. For an Order awarding Plaintiffs declaratory relief requiring Defendants to abide by Section 13.1 of the LLC Agreement and declaring that all prior agreements granting any portion of or

interest in CCCB's membership in Prospect Chartercare to Del Sesto are null and void.

b. For an Order awarding Plaintiffs monetary damages caused by CCCB's breach of the LLC Agreement, and Del Sesto's inducement of such breach, together with pre-and post-judgment interest thereon at the maximum legal rate.

c. Enjoining Defendants from any further attempt to deadlock or otherwise disrupt the operations of Prospect Chartercare and the Hospitals, and from any further attempt to contact Prospect Chartercare board members for any improper purpose.

d. For an award of Plaintiffs' attorneys' fees and costs incurred as a result of this action, as such may be allowed by contract, law or statute.

e. That the costs of this action be taxed against Defendants; and

f. that the Court grant Plaintiffs such other and further relief as the Court deems just and proper.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Stephen Del Sesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, et al., Plaintiffs,	:	18-CV-00328(WES)
	:	United States Courthouse Providence, Rhode Island
vs.	:	
Prospect CharterCARE,LLC, et al., Defendants.	:	Tuesday, February 12, 2019 10:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES CHIEF DISTRICT COURT JUDGE

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MR. WISTOW: Of course not.

THE COURT: -- address it. And so at some point some judge is going to have to wrestle with the issues that Mr. Halperin has, I think, legitimately brought up. And this question of compliance with the Hospital Conversion Act and so forth is going to have to be examined. So you don't -- you're not going to be able to weave around it.

MR. WISTOW: I'm not trying to. I'm willing to stipulate, your Honor, that all I'm asking for is an assignment of that claim. And I will be forced, as Mr. Halperin acknowledges, to get involved in litigation. This happens in bankruptcy very frequently in the settlement of cases. There may be an assignment by the debtor to a creditor of a claim that's going to be disputed. And that dispute is not resolved in the bankruptcy court. It's the person who gets the assignment goes off and he brings his suit wherever it is. And the fact that it was assigned does not indicate there's any merit.

In fact, I remember we cited a case where there was a Texas district court approving a bankruptcy settlement of an assignment of a legal malpractice case. And the Texas district court judge said, you know, I think it's rather doubtful that this is even

assignable. But he allowed the assignment as part of the settlement and off they went. It really is not relevant for our purposes which way it ended up.

That's all -- I'm willing to stipulate on the record that if your Honor approves the transfer of that claim, you are not saying at all that we are legitimately entitled under the Hospital Conversion Act or the AHM to have this, nor am I saying that the transfer to us was not a breach. All I'm saying is that the court allowed us to transfer. Whether we pursue it, whether we don't pursue it, that's another issue and where we pursue it.

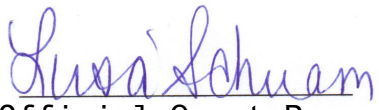
I would respectfully submit that a pursuit of those claims would be a court of general jurisdiction, not actually the receivership court. Just the way it wouldn't be a bankruptcy court that decided what was the malpractice case; was it a good case or a bad case?

Now, I want to go on to say, your Honor, that this issue about not getting the information from the directors -- bear with me for one moment if you would. That would really -- if I may backtrack.

The purpose of a good-faith settlement, the purpose of a decision for a good-faith settlement, is under the new statute, 23-17.14-35 and a couple of things have to be shown to get around a good-faith

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Official Court Reporter March 11, 2019

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC. SUPERIOR COURT

ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND	)	
VS.	)	C.A. NO. PC-2017-3856
ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN	)	

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON OCTOBER 10, 2018

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE	THE RECEIVER
MAX WISTOW, ESQUIRE	SPECIAL COUNSEL
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BENJAMIN LEDSHAM, ESQUIRE	FOR THE RECEIVER
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ROBERT SENVILLE, ESQUIRE	FOR THE PENSIONERS
CHRISTOPHER CALLACI, ESQUIRE	FOR U.N.A.P.
STEVEN BOYAJIAN, ESQUIRE	FOR ANGELL PENSION

GINA GIANFRANCESCO GOMES
COURT REPORTER

CERTIFICATION

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 108, inclusive, are a true and accurate transcript of my stenographic notes.

GINA GIANFRANCESCO GOMES
COURT REPORTER

and the opinion of counsel. Clearly we don't have those things. Clearly that agreement has not been complied with.

Now, the question has come up how can this go forward and what should happen. I would suggest to the Court that if the Receiver were to come to the Court with an independent petition to go ahead and take the assignment of the interest of CCCB and to attempt to step into the shoes as a voting member of CharterCare LLC, the Court would look at that independently and would decide whether or not based on the provision of the LLC, based upon the impact of that, that would be an appropriate direction for the Receiver to have the Court's permission. And I think if that were an isolated transaction, I think the Court would say the agreement is what it is. There are provisions for resolving it. Venue in that agreement is Delaware and if, in fact, there is going to be a dispute as to whether or not the CCCB can transfer its interest, that is between CCCB whether it's the Receiver in its shoes or CCCB and Prospect and that is something that can be litigated under the terms of that agreement in Delaware.

The question for the Court is do you, your Honor, want to set in motion all of these lawsuits without regard to whether or not they are likely to succeed,

whether or not on their face they present problems that the Receivership should not be involved in simply giving the Receiver's counsel carte blanche to just launch these proceedings. There is a domino affect here. It's not just about putting money into the pension plan, which we understand and support. It's about what will happen next.

And if this settlement is permitted to go forward, what will happen is that the board of the Prospect CharterCare, LLC is now 50 percent comprised of the CCCB members will be essentially controlled by the Receiver and those directors will create havoc. There would be a deadlock. There will be effective change of control issues that need to go in front of our regulators. This will put in motion problems that will affect the operations of the hospital.

That is a very significant concern and one that I don't think the Court should simply take the approach of we will kick that can down the road. We know that is what their game plan is. They want to create that deadlock or that impasse. They want to use that court authority, that power, which would come solely from the settlement in order to leverage a settlement that is the subject of litigation. That is the reason why the Court should not approve this because these are questions that

need to be litigated before they happen, not after they happen, and it isn't in my view something that the Court should support to give that sort of unfettered authority to a Receiver as opposed to a private litigant who has the right to file papers and then you have an adversary proceeding.

In previous receiverships all the parties had worked in a collaborative way as possible to achieve a result, and I can remember cases from the A.G. and the Department of Health were regularly at the table. There is a way to achieve the result that is being sought here and there is a process to get to that result. But giving the Receiver the authority to implement the settlement that the A.G. says has issues, the Foundation says has issues, that the Prospect entities say has issues that can be read by looking at the LLC agreement, I would suggest is not the appropriate way for this receivership to proceed. There are evidentiary issues that have to be heard. We can't resolve any of those here.

I would ask that the Court take this a step at a time and if the Court is inclined to go ahead and approve the settlement, I have no doubt that the CCB parties will agree to virtually any settlement that the Receiver approves as evidenced by what they have already agreed to. I think the suggestion that the Court deny the

settlement or doesn't approve it, you're going to not have a settlement is really disingenuous at best. The settlement in my view as presently prepared is in excess of the authority of the Receiver.

And I point out the fact that when the Court entered the permanent order appointing the Receiver, it specifically said on October 27, 2017, "Wistow Sheehan & Lovely have the authority to litigate and settle claims against third parties 'related to the prior management administration and oversight of the retirement plan.'" I don't know that the Court envisioned that authority extending to invading charitable assets of the Foundation or taking on provisions of an LLC agreement or any of the assignments that are in place that affects the rights of these third parties. They go well beyond management, oversight, and administration of the plan.

The Receiver says there is a provision in the agreement that if the settlement is not approved, the parties are going to return to the respective provisions. As I said earlier, your Honor, that is essentially like saying we are going to unring this bell. There's already been assignment. There has already been surety interest. We're going to go ahead and we're going to undo that. That is not the way the Receivership should be proceeding. I think it's bad precedent as well as bad

policy.

I am definitely not going to address any of the substantive issues that the Attorney General raised although I understand their point and I agree with it. Your Honor, regarding the question of the applicability of the special statute, I'd like to address that. We don't have the litigation before the Court that is being settled. We don't have the complaints. There is another civil action that's been stayed, but in this Receivership action we don't have those pleadings. So I do feel that the ultimate decision on whether or not that is collusive or whether or not it's in good faith should lie with Judge Smith when he approves or doesn't approve the settlement.

However, I do think it is extremely appropriate for the Court to be aware of and to look at that statute because the Court would not want to knowingly approve or direct his Receiver to enter into an agreement that on its face appears to the Court to include collusive statements, and Mr. Wistow says there is nothing collusive about it. Well, it's certainly unique for a party settling a case to admit that the damages are $125 million and to be part of the group that actually was the employer in this case and had the responsibility for multiple years of dealing with this retirement plan to

make a statement in the settlement agreement that they have a small part of the liability. To me that shouts out for some sort of attempt to gain an advantage for collusion. If the Court agrees with that, the Court should perhaps consider directing the Receiver to remove those provisions because the Court has the ultimate decision making control, not the Receiver and not the Receiver's counsel.

I think this is a settlement that should go through and can go through, but I think it should go through in a way that respects the various rights of all of the parties and at this juncture I think that personally that should be limited to dealing with the financial consideration. Anything else that the Receiver wants to do, the Receiver should come back to court with a petition and allow the parties to be heard and by that time there may already be a lawsuit pending in Delaware to deal with the LLC agreement, and the Court will see that get litigated in Delaware and await the outcome of that where there may be an administrative proceeding.

So it's premature to know exactly how this all unfolds, but I say don't give the Receiver carte blanche to start reeking havoc on the rights of third parties and diminishing the assets of this receivership estate by keeping the Receiver involved in running up expenses that

don't need to be run up at this point in time from the point of view of this receivership. Embroiling the receivership in litigation which you know is going to happen may not be in the best interest of the receivership estate.

The last thing I want to say, your Honor, and this has a place in my view, is that the Court is obviously concerned with the receivership estate, with the interest of the pension holders, and rightfully so, but there is also precedent for the Court taking into consideration the public interest when a hospital is involved. And, here, I'm sure your Honor is familiar when Judge Silverstein wrote in May, 2010, in the Landmark Hospital case you have to balance the interest of the parties. In that case he was dealing with competing bids for the hospital.

Here, you have a hospital that is operating and serving the community and have a Receiver who is attempting to interfere with the voting operation of that hospital in order to gain a tactical advantage. There is no telling what that may do but the public interest will be harmed should that happen. I would ask the Court no matter what happens here to really keep very, very close reigns on something that could impact the control of the operating hospitals here in Rhode Island.

THE COURT: If this does not take place and there was no settlement agreement, wouldn't everything you're talking about be done by the current 15 percent owner?

MR. HALPERIN: The current 15 percent owner could make changes, but there are fiduciary duties that govern directors and the director is to the Prospect CharterCare entity. Should they or even the Receiver's appointees take action that would be inconsistent, such as trying to enforce a deadlock in order to create a dissolution or whatever the case may be, they may be in a position to potentially violate the fiduciary duty in order to benefit the pension plan.

THE COURT: Didn't you just answer your own question?

MR. HALPERIN: That it could happen, but it hasn't happened because they have a fiduciary duty. They are trying to step away and get into it by the Court authorizing the Receiver to essentially go at it and I don't think that's what the Court should do under the circumstances. They haven't done that for good reason because it would be a breach of their duty if they did that, your Honor.

THE COURT: Thank you very much.

MR. HALPERIN: Thank you.

MR. WISTOW: I have known Mr. Halperin for many

years and I know he would never intentionally misstate any facts to the Court. He has unintentionally done so. The transfer we are talking about now do not require the approval of the 900 or the majority of the board. If your Honor reads very simply what we have put forward, generally speaking, he's right. By the way, that is part of the -- we are going to get into this once we have the trial, but this 15 percent ownership is so illusory. In most cases the 15 percent owner, who is supposed to have 15 percent voting, can't do anything he would like in most instances. This particular situation is a permitted transfer. If you read 13.1 and 13.1 says -- it's in all our papers. It says, "Unless otherwise provided you can't make the transfer." But 13.2 allows permitted transfers and it says, "Not withstanding the restrictions in 13.1 the following transfers are permitted and shall not be deemed to violate the restrictions in Section 13.1."

Now, that transfers by a member to one or more of its affiliates, et cetera, and we've made extensive arguments and I'm not going to rehearse why we are technically an affiliate. By the way, your Honor, as to whether or not we're an affiliate, I really want to hand something up to your Honor. This was attached, your Honor, as part of CharterCare's objection to the

settlement and it's the petition for declaratory order that they filed with the Attorney General on September 27th. It is in this case because they filed it as an exhibit. I would like to hand it up to your Honor.

(Document handed to the Court and counsel.)

And I would just like to add this question of are we an affiliate to whom the transfer is permitted. Paragraph 23, what I have done, your Honor, is I haven't given you the entire file.

THE COURT: This is Exhibit B on Prospect's objection.

MR. WISTOW: That's right. Thank you. Paragraph 23. This is what Prospect has said some days ago, "It is beyond dispute that the receivership estate is SJHSRI in its role as plan administrator. Therefore, the plan administrator is by plan definition SJHSRI. Under Rhode Island law, the receivership estate stands in the shoes of SJHSRI." Now, I tell you there is no question that CCB is an affiliate of St. Joseph's Hospital and this just amplifies the argument that we made.

Paragraph 71 of that same petition, these are the statements of Prospect CharterCare. "It is beyond dispute that there is an identity of parties between the conversion and CEC proceedings and the Federal Court litigation in that the Acquiror, which is Prospect

CharterCare, and the receivership estate were both transacting parties in the conversion and CEC proceedings."

If that doesn't clinch you at least to what they think an affiliate is, I don't know what it is. I'm not going to go through the convoluted argument as to why we are affiliates. I will rely on what was said.

Now, a couple of things, your Honor. We had the temerity to sign a binding settlement agreement. I have two justifications for that. The first is the order that your Honor entered paragraph five, "The said Receiver B is hereby authorized, empowered, and directed to take control, possession, and charge of said respondent and his assets wherever located and manage and continue the administration and oversee the respondent and to reasonably preserve the same and is hereby vested with title to the same, to collect and receive the debts, property, and other assets of said respondent" -- here it is -- "with full power to prosecute, defend, adjust, and compromise all claims and suits of, by, against, or on behalf of said respondent and to appear, intervene, and become a party," et cetera.

He had express authority to do what he did. We all said this is not a run-of-the-mill settlement. We owe it to the Court to come in and say, here is what we have

done. If you want to undo it Judge Stern, it's up to you to undo it. It's not unlike -- in fact, it's exactly like the purchaser or seller of real estate entering into a binding contract saying it's subject to the zoning board of review. If the zoning board says no, provided everybody acts in good faith to attempt to get the approval, then you have the continuation of the binding contract. If the zoning board says no, there is no longer any contract. That's what our agreement provides. I feel, and I hope your Honor agrees, we did not overstep our bounds. We could theoretically have done this without coming to you and gone straight to the Federal Court. We didn't think it was prudent in this complex situation to do that.

The whole business about the 15 percent, this is very, very important to us. We have filed a motion to adjudge in contempt. By the way, my brother just signaled his thinking about bringing a lawsuit in Delaware. You know, our motion to adjudge in contempt, I actually wrote him a letter telling him ahead of time if you want to sue us, if you want to do something to impair the contract, which he acknowledges is a binding contract.

THE COURT: I understand that. I also understand that counsel has not had opportunity to respond to that

motion.

MR. WISTOW: I just want to emphasize I really think it would be outrageous to not ask permission of this Court to invalidate a contract in Delaware as he is planning to do.

By the way, he says he has been a Receiver for many years and this is absolutely unique to agree to damages. I don't think I have ever been a Receiver, to be honest with you. So I'm not going to talk about what is common or uncommon in receiverships, but I have been involved in I will say hundreds of settlements of contested cases and it absolutely is common for a Defendant to agree to the damages in a case so that it can be used by the plaintiffs against non-settling Defendants or more particularly against an insurance company. So maybe it's unique in his experience. It's common in mine.

And, by the way, nobody is suggesting that that admission by them is somehow binding on the other Defendants. The fact of the matter is, Judge, I'm not going to get into -- your Honor, has amply shown over the time that I have been before you that you read the papers carefully, and justifiably get a little short if I start going over them in too much detail.

I do want to add this one point. This 13 percent -- 15 percent is a huge deal because I can tell you as part

of the settlement process that we have been trying to get through the 15 percent holder, CCB, an accounting of the promised $50 million that was supposed to have been put in by Prospect CharterCare. That was part of the original consideration. It was flaunted. It was publicized. We had every reason to believe, because we have been so frustrated about getting information about what they put in, that we actually are going to file another motion to adjudge Prospect CharterCare in contempt because they have not responded to the subpoenas which you had authorized us to settle in giving this information. They have actually affirmatively said they would not give the information to Mr. Fine because they were afraid he was going to share it with us. That was the information we were entitled to.

So all I ask is this, your Honor: There is nothing final about any of this. This whole issue of can they transfer this to us, can they not, if your Honor wants to sit down and read through the papers and make an adjudication of whether or not it's legal, then I would suggest that that probably should be res judicata when we get to the Federal Court on that issue.

So I still suggest probably the simplest straightforward thing is -- this is for the benefit of the estate. You know, my brother says and I really thank

him for his consideration that he wants to save the state money. I'm sure that is one of his principle concerns. First of all, there are no legal fees that we're charging. We're on a straight contingency. So far it's starting to look like I'm getting something like the federal minimal wage for the number of hours we're putting in to this thing. Yes, there will be some expenses but those will be minimum. There are no significant attorney fees. Mr. Halperin need not lose sleep over the loss of money to the estate.

THE COURT: Counsel, what about the issue of by filing the UCC and taking the assignment that now Prospect entities can say there has been an injury?

MR. WISTOW: My answer to that is very simple. That is a prohibition on hypothecate. Absolutely. We acknowledge that. Our justification is two fold.

THE COURT: I'm asking a different question. With respect to the standing, the position was that the objecting parties, especially CharterCare Foundation and Prospect, don't have standing. By now the security interest being filed, do you agree or not with counsel?

MR. WISTOW: I guess what we're talking about is -- I don't know the answer. I'm not the legal scholar Mr. Sheehan is. But I will say this: I don't see how Prospect CharterCare is injured in any way, shape or form