STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

CHARTERCARE COMMUNITY BOARD, *Plaintiff*,	:	
v.	:	C.A. No. PC-2019-3654
SAMUEL LEE, ET AL., *Defendants*.	:	

MEMORANUMD OF LAW IN SUPPORT OF THE PROSPECT ENTITIES' MOTION FOR PROTECTIVE ORDER

NOW COME the Prospect Entities[1] and hereby respectfully submit this memorandum of law in support of their Motion for Protective Order brought pursuant to Rule 26(c) of the Superior Court Rules of Civil Procedure. The Prospect Entities recently have made two document productions—and will be completing a third shortly—to Stephen Del Sesto ("Plan Receiver") and Thomas Hemmendinger ("Liquidating Receiver," together, the "Receivers"). A dispute has arisen, however, concerning the scope of the protective order the Court issued in this case on April 25, 2019, and to the ability of the Prospect Entities to designate certain financial documents that have been and will be produced as "confidential." As previously set forth in the Prospect Entities' Objection to the Receivers' Motion to Compel, and for the reasons set forth below, the Prospect Entities request that the Court grant this Motion and enter a protective order to protect the confidentiality of portions of the document productions.

[1] The Prospect Entities include Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Advisory Services, LLC, Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC.

FACTUAL BACKGROUND

Introduction

The Prospect Entities have made every discovery production to the Plan Receiver or his special counsel ("Special Counsel"), whether in the receivership proceeding, in the federal action, or in this matter, pursuant to confidentiality and protective orders. Pursuant to those orders, the marking of certain documents as "confidential" was a non-issue—until now.

Now, changing course, the Receiver and his Special Counsel have asserted that the Prospect Entities' September 18, 2020 production of documents, which was made pursuant to the Court's July 21, 2020 order, is not subject to any confidentiality or protective order. They also contend that any subsequent production of documents is also not subject to any confidentiality or protective order. That contention, however, is contrary to the express language of the consent order under which the Receivers sought discovery, and this Court should confirm that the Prospect Entities' productions are subject to protection where appropriate.

CCCB Seeks Information from the Prospect Entities; the Prospect Entities Comply

On March 1, 2019, Chartercare Community Board ("CCCB"), a member of Prospect Chartercare, LLC ("Prospect Chartercare"), filed a Verified Complaint seeking access to certain financial information and books and records. Several days later, CCCB filed a motion for mandatory injunctive relief ("Motion for Injunctive Relief") relative to its requests to access that same information. The Court did not rule on the request for injunctive relief; instead, the parties resolved the discovery dispute amicably, entering into a Stipulation and Consent Order ("Consent Order"). The Consent Order specifically provided that:

> On or before May 15, 2019, PCC will provide CCCB with financial information *in connection with CCCB's evaluation of the "put option" as requested by CCCB* in correspondence dated September 20, 2018, October 2, 2018, October 3, 2018, and November 6, 2018.

> *Thereafter, CCCB may by email request such additional information as CCCB reasonably requires in connection with the evaluation of the "put option" under the Prospect Chartercare, LLC Agreement (the "LLC Agreement"), and PCC will provide such information within fifteen (15) days of such email(s), provided the information is available. . . .*

(Emphasis added). The Consent Order further states that:

> *"[a]ll such information that PCC designates as "PCC-CONFIDENTIAL" will remain confidential pursuant to the provisions of Protective Order (attached)*, and such confidentiality shall continue unless CCCB and or the Receiver obtain court order in this case or in the federal court litigation filed by the Receiver lifting the confidentiality restriction."

(Emphasis added). On the same day, as contemplated by the Consent Order, the Court entered the Protective Order on the docket. Among other things, the Protective Order states that it applies to PCC and the Receiver. The Protective Order states the following:

> "Except as hereinafter provided under this Order or subsequent Court Order, no Confidential Material may be disclosed to any person except as provided in Paragraph 4 below. "Confidential Material" means any document produced by Prospect that bears the legend 'Prospect-CONFIDENTIAL' to signify that it contains information deemed to be confidential by the producing party. It shall not include documents that Special Counsel obtains from another source."

The Prospect Entities then produced a set of financial documents pursuant to the Consent Order. As provided in the Protective Order, the Prospect Entities designated some of those materials as "confidential." Neither CCCB nor the Receiver took any action relative to the production and never questioned the confidential designation of the documents produced.

CCCB and the Receiver Seek Additional Documents Under the Consent Order; the Prospect Entities Comply

CCCB and the Receiver engaged ECG Management Consultants ("ECG") to evaluate the put option. CCCB invoked the provisions of the Consent Order to seek additional information

from the Prospect Entities that it "reasonably require[d]" for purposes of evaluating the put option. In connection that request, CCCB filed an Expedited Motion to Compel Production ("Expedited Motion"). The parties again resolved their dispute amicably, without Court intervention, which culminated in an order entered into by agreement. Once again, the Prospect Entities complied with that order, producing the requested information and designating some information as "confidential" consistent with the terms of the Protective Order. Again, neither CCCB nor the Receiver took any action relative to the production and never questioned the confidential designation of the documents produced.

Liquidating Receiver and Plan Receiver Request Additional Documents Under Consent Order

In January, 2020, Thomas Hemmendinger, Esq., was appointed as liquidating receiver of CCCB. On January 21, 2020, the Receivers jointly submitted a request for information to the Prospect Entities. That request, according to an affidavit filed by the Receiver, sought "further documentation and information that [the Receivers] believed was required in connection with the appraisal and exercise of the Put option." The Receivers' request was again made pursuant to the Consent Order, stating: "[i]n accordance with paragraph 1 of the [Consent Order] in *CharterCARE Community Board v. Samuel Lee, et al.*, C.A. No. PC-2019-3654 we hereby request all of the documents and information described in the enclosed spreadsheet within fifteen (15) days, i.e. by Wednesday, February 5, 2020."

In connection with their request for additional information, the Receivers filed a Motion to Compel Production of Documents and Other Information from Prospect Chartercare, LLC ("Receivers' Motion to Compel"), which was made "pursuant to the [Consent Order] entered on April 25, 2019." It therefore expressly sought production of documents under the Consent Order,

which incorporates the Protective Order that allows the Prospect Entities the right to designate certain information as confidential.

In an order entered on July 21, 2020 ("MTC Order"), the Court granted in part and denied in part the Receivers' Motion to Compel. In the MTC Order, the Court noted that the Receivers' request for information was made *pursuant to the Consent Order* and also expressly implicates the provisions of the Consent Order, stating, in relevant part, that: "[i]n accordance with the [Consent Order], any information ordered to be produced pursuant hereto must be available to PCC and shall not include documents that are subject to the attorney-client privilege, joint defense privilege and/or attorney work product doctrine."

The Prospect Entities' Compliance with the MTC Order; the Prospect Entities' September 18, 2020 Production of Documents; the Ensuing Discovery Dispute; and Resolution of Discovery Dispute

On September 18, 2020, the Prospect Entities, in response to and consistent with the MTC Order, produced approximately 2900 pages of documents responsive to categories 1-7, and 12 of the MTC Order ("September Production"). As with every other production of documents in this matter, and under the clear and collective understanding that the provisions of the Consent Order—and the Protective Order—would continue to control, some documents were labeled as "PCC – CONFIDENTIAL – SEE STIPULATION AND CONSENT ORDER ENTERED APRIL 25, 2019." This time, the Receivers took issue with the September Production. They claimed that (1) the Prospect Entities did not fulfill their obligations under the MTC Order, as they read it, because they have not produced any and all responsive documents; and (2) the September Production is not subject to the Protective Order. In connection with those claims, the Receivers filed a Motion to Compel Production, to Allow Deposition, to Extend Time to Exercise Put Option, and for Sanctions, Including an Order Establishing Facts and an Award of Attorneys' Fees, Arising

Out of Prospect Chartercare's Failure to Comply with the Court's Order Entered July 21, 2020 ("Motion to Compel"), to which the Prospect Entities timely objected.

Before the hearing on the Motion to Compel and the Prospect Entities' objection thereto, the Receivers and the Prospect Entities amicably resolved their discovery dispute. Pursuant to the parties' agreement, the Prospect Entities agreed to produce to the Receivers, (1) all documents to or from the Rhode Island Attorney General ("AG") or AMI, the monitoring company employed by the AG, concerning the Prospect Entities' capital contribution obligations; and (2) communications between the Prospect Entities and the AG or AMI concerning the Prospect Entities' capital contribution obligations.

While the Receivers did not agree to treat the September Production, or any subsequent production as confidential, they did agree to allow the Prospect Entities until November 27, 2020 to seek a protective order relative to those productions, and they agreed, in the meantime, to maintain the confidentiality of any documents produced as "confidential" until the Court ruled on the Prospect Entities' request for a protective order. The agreement between the Receivers and the Prospect Entities was memorialized in a Stipulation and Consent Order, as subsequently revised ("Stipulation"), that was filed with the Court.

STANDARD OF REVIEW

"[I]n granting or denying discovery motions, a Superior Court justice has broad discretion . . . ." *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1172 (R.I. 2019) (quoting *State v. Lead Industries Association, Inc.*, 64 A.3d 1183, 1191 (R.I. 2013)).

ARGUMENT

A. The Court Should Enter a Protective Order that Allows the Prospect Entities to Designate Information Produced under the MTC Order as Confidential.

As explained above, for over eighteen months, the Prospect Entities have produced documents and information to the Receivers pursuant to the Consent Order and the Protective Order. The MTC Order is bottomed on the same discovery foundation, and there is no justification to suddenly alter the long-standing practice that has continued, with the Prospect Entities' reliance, until today. Pursuant to the Consent Order, the Protective Order, and the parties' longstanding course of conduct, the Prospect Entities were permitted to designate documents as confidential and it expected and understood that to be the underlying premise for produced in the September Production and the documents produced thereafter. That should not change now. The Court should enter a new protective order that expressly covers the production of documents pursuant to the Court's July 21, 2020 Order, and any documents subsequently produced pursuant to the Stipulation, and permits the Prospect Entities to designate such documents and information as confidential. Otherwise, Prospect will be forced to seek a claw-back of these documents or to litigate the proper confidentiality treatment of materials that plainly fall within the scope of any confidentiality protection as sensitive financial information concerning the operation of its business.

"Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993) (noting that "great deference is shown to the district judge in framing and administering [protective] orders"). Rule 26(c) permits the granting of such an order for good cause shown. As the Rhode Island Supreme Court has explained, "[a] finding of good cause must be based on a particular

factual demonstration of potential harm, not on conclusory statements." *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1173 (R.I. 2019) (quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986)).

As is relevant here, in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," this Court may grant a protective order so that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." *See* Super R. Civ. P. 26(c)(7). In addition to protecting trade secrets from disclosure, Rule 26(c) "has been held to include 'a wide variety of business information,' including, but not limited to, patent agreements, *financial records and statements*, license fees and oral contracts with customers, customer and supplier lists, and profit and gross income data." *Brokaw v. Davol Inc.*, 2009 R.I. Super. LEXIS 85, *10-11 (R.I. Super. Ct. July 21 2009) (Gibney, P.J.) (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F. Supp. 866, 890, n.42 (E.D. Pa. 1981)) (emphasis added).

Here, there are two sets of documents that the Prospect Entities seeks to protect: (1) the documents labeled as confidential in the September Production; and (2) the documents labeled as confidential and produced pursuant to the Stipulation. As to the first set of documents, the September Production contained financial records, which, given their nature, are inherently confidential. That is precisely why the Prospect Entities designated certain documents as confidential. Otherwise competing businesses will have full access to sensitive financial information. *See Zenith Radio Corp.*, 528 F. Supp. at 890 ("Competitive disadvantage is a type of harm cognizable under Rule 26"); *see also Multi-Core, Inc. v. Southern Water Treatment Co.*, 139 F. R.D. 262, 264 (D. Mass. 1991) (granting protective order restricting disclosure of sensitive competitive information when public disclosure would result in harm to producing party's

business); *Miles v. Boeing Corp.*, 154 F.R.D. 112, 114 (E.D. Pa. 1994) ("Competitive disadvantage is a type of harm cognizable under Rule 26, and it is clear that a court may issue a protective order restricting disclosure of discovery materials to protect a party from being put at a competitive disadvantage.").[2] The purpose of the disclosure of the documents to the Receiver was for them to evaluate the capital contribution obligations of the Prospect Entities, not to put the Prospect Entities at a competitive disadvantage in the marketplace. Therefore, the documents designated as confidential in the September Production should remain confidential.

The same reasons support the confidentiality of the second set of documents produced and designated as confidential by the Prospect Entities. But these documents are confidential for an additional reason: they were submitted as such to the AG in connection with the AG's and AMI's ongoing monitoring of the Prospect Entities' capital contribution obligations, and the AG has not disagreed with that determination. Pursuant to R.I. Gen. Laws § 23-17.14-32(a), the AG

> has the power to decide whether any information required by [The Hospital Conversions Act] of an applicant is confidential and/or proprietary. The decisions by the attorney general shall be made prior to any public notice of an initial application or any public review of any information and shall be binding on the attorney general, the department of health, and all experts or consultants engaged by the attorney general or the department of health.

The Prospect Entities have submitted certain financial information to the AG and AMI regarding their obligations for capital contributions in connection with the 2014 asset sale—a sale that was approved by the AG under the Hospital Conversion Act. As a result, the information that the Prospect Entities produced to the AG and designated as "confidential" remains confidential, unless

[2] As the Rhode Island Supreme Court has held, "where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule." *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1173 (R.I. 2019) (quoting *Sandy Point Farms, Inc. v. Sandy Point Village, LLC*, 200 A.3d 659, 664 n.5 (R.I. 2019)).

and until the AG disagrees with that designation under § 23-17.14-32(a). Here, the Prospect Entities did designate that information as confidential, and the AG has yet to disagree with that designation. The Receivers should not have the power to override the discretionary judgment of the AG. Therefore, the Court should also, for purposes of consistency, find that the second set of documents—documents that were produced to the AG and labeled as confidential and produced pursuant to the Stipulation—are confidential.

The Protective Order was entered with the idea that it would allow the Prospect Entities to share confidential and sensitive information with the Receivers in connection with the litigation and evaluation of the put option without fear that it would be made public and impair the Prospect Entities' competitive position in the marketplace. The Protective Order also gives the Receivers the ability to challenge the propriety of any confidentiality designation. Over the course of eighteen months, they have not elected to challenge any such designation. Rather than do that, they are now taking the position, after the fact, that the most recent production, and those going forward, are not subject to the same rule. Not only does this position ignore the framework that has been in place and functioning well throughout this case, but any such change cannot be affected retroactively. The Court should confirm that productions pursuant to the MTC Order, as with prior productions, permit the Prospect Entities to designate documents and information as confidential, subject to challenge by the Receivers before this Court.

CONCLUSION

For the foregoing reasons, and consistent with the prior practices in this case, the Court should grant this Motion for Protective Order, clarifying that the Prospect Entities are permitted to designate certain information as confidential and that such information may not be disclosed absent a prior Order from this Court.

PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., AND PROSPECT EAST HOSPITAL ADVISORY SERVICES, LLC

By their attorneys,

/s/ *Christopher J. Fragomeni*
Christopher J. Fragomeni, Esq. (#9476)
SHECHTMAN HALPERIN SAVAGE LLP
1080 Main Street, Pawtucket, RI 02860
T: (401) 272-1400 | F: (401) 272-1400
cfragomeni@shslawfirm.com

PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC, PROSPECT CHARTERCARE RWMC, LLC,

By their attorneys,

/s/ *W. Mark Russo*
W. Mark Russo, Esq. (#3937)
FERRUCCI RUSSO P.C
55 Pine Street, 3rd Fl., Providence, RI 02903
T: (401) 455-1000
mrusso@frlawri.com

CERTIFICATE OF SERVICE

I certify that on the 27th day of November 2020, the within document was electronically filed and electronically served through the Rhode Island Judiciary Electronic Filing System, on all counsel of record and those parties registered to receive electronic service in this matter. The document is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ *Christopher J. Fragomeni*