STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, SC

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

PROSPECT ENTITIES' OBJECTION TO THE RECEIVERS' MOTION TO COMPEL AND REQUEST FOR A PROTECTIVE ORDER

NOW COME the Prospect Entities[1] and hereby file this memorandum in support of their objection to Stephen Del Sesto ("Plan Receiver") and Thomas Hemmendinger's ("Liquidating Receiver," or together with the Plan Receiver, "Receivers") 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"). As explained below, this Court should deny the Motion to Compel and grant the Prospect Entities' alternative request for a protective order.

FACTUAL BACKGROUND

Introduction

Every discovery production from the Prospect Entities to the Plan Receiver or his special counsel ("Special Counsel"), whether it was made in the receivership proceeding, the federal

[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.

action, or this matter, has been made 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, which was made pursuant to the Court's July 21, 2020 order, is not subject to any confidentiality or protective order. That unprecedented and unanticipated contention, among other things, was the impetus to the discovery dispute precipitating this Motion to Compel, which, as of this filing, the Prospect Entities have repeatedly attempted to resolve without court intervention.

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 financial information and books and records. The injunctive relief request was not ruled upon; instead, the parties resolved the discovery dispute amicably, entering into a Stipulation and Consent Order ("Consent Order"). Specifically, the Consent Order 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 Protective Order entered on the docket. Among other things, the Protective Order states that it applied to Prospect Chartercare 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 complied with the Consent Order by producing a set of financial documents. As provided in the Protective Order, the Prospect Entities designated some of those materials as "confidential." Presumably, CCCB and the Receiver deemed that production to be complete as 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; Prospect Entities Comply

During the course of this litigation, and with the previously produced documents in hand, CCCB and the Receiver then engaged ECG Management Consultants ("ECG") to evaluate the put option. In connection with that evaluation, 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. Ultimately, 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, CCCB and the Receiver presumably deemed that production to be complete as 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 Receiver Request Additional Documents Under Consent Order

In January, 2020, Thomas Hemmendinger, Esq., was appointed as liquidating receiver of CCCB ("Liquidating Receiver," or collectively with the Receiver, "the Receivers"). 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 that: "[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 along with the Prospect Entities' 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 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; and the Ensuing 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." Once again, the Prospect Entities complied with the its obligations under the MTC Order. This time, though, the Receivers took issue with the September Production. They claimed that (1) the Prospect Entities have not fulfilled their obligations under the MTC Order, as the Receivers read it, because they have not produced any and all responsive documents; and (2) the September Production is not subject to the Protective Order.

Even though the Prospect Entities believed that they fulfilled their obligations under the MTC Order, because the September Production included documents responsive to all categories set forth in the MTC Order, the Prospect Entities offered to produce even *more* information to the Receivers so long as the Receivers agreed that the September Production and the additional

production would be designated as confidential under the Protective Order. That offer, although reasonable given the financial nature of the documentation, has yet to be accepted. Instead, the Receivers have opted to press forward with their request for Court intervention.

While there is undoubtedly a discovery dispute before the Court, the Receiver's contentions and implications that the Prospect Entities have stonewalled the progress of any discovery, or that this discovery dispute has continued indefinitely since the inception of this case, is an overstatement. Indeed, the opposite is, in fact, true. The Prospect Entities—which have been brought into litigation concerning a pension plan that they expressly and contractually disclaimed any liability for—have complied with every Court order preceding the September Production, including the MTC Order. Such compliance is evidenced by the fact that each production made prior to the September Production was *unchallenged* by CCCB and the Receivers, and the designation of information as "confidential" under the protective order was, until now, *never disputed*. Nevertheless, the Receivers now claim that the September Production—which includes inherently confidential financial information—cannot be designated as confidential under the Protective Order, even though it was sought under the Consent Order (which incorporates the Protective Order).

The gravamen of the discovery dispute before the Court is not, as the Receivers claim, that the Prospect Entities have deliberately violated the MTC Order. Nor is it based upon a wholesale stonewalling of document production. Instead, this dispute centers on whether the September Production fulfills all of the Prospect Entities' obligations under the MTC Order. It is a genuine, good faith discovery dispute rooted in the parties' conflicting interpretations of the scope of the MTC Order. For instance, the MTC Order requires the Prospect Entities to produce "documents identifying all of the long-term capital contributions . . . ," and the Prospect Entities did that in the

September Production. The Receivers contend that the September Production should have included "detailed correspondence with AMI" or "summaries it provided to AMI explaining the significance of . . . invoices and contract."[2] Conversely, the Prospect Entities have argued that such information is outside the scope of the MTC Order. It is not, as the Receivers imply, a willful violation of the MTC Order.

Nevertheless, this discovery dispute turns on (1) whether the September Production was sufficient; and (2) whether the September Production and any subsequent production fall under the reach of the Consent Order, which incorporates the Protective Order. Now, in a manner inconsistent with the prior discovery practice in this litigation, the Receivers attempt to use the Consent Order as a sword—continuing to request information under its provisions—while claiming that the Prospect Entities cannot utilize its confidentiality provision as a shield—designating portions of its discovery productions as "confidential" under the Protective Order.

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 Prospect Entities Have Not Violated the MTC Order.

The Receivers have claimed that the Prospect Entities violated the MTC Order in five ways: (1) the Prospect Entities have not allowed an inspection of Prospect Chartercare's books

[2] In addition to citing that information in their October 1, 2020 letter, the Receivers also assert in the Motion to Compel that the Prospect Entities did not comply with the MTC Order because they did not produce communications with AMI or any spreadsheets. They do *not* assert that such information would be responsive to any other category of documents compelled to be produced by the MTC Order.

and records; (2) the Prospect Entities did not produce a privilege log in connection with the September Production; (3) the Prospect Entities improperly redacted documents; (4) the Prospect Entities' September Production designated documents as "confidential" under the Protective Order; and (5) the Prospect Entities did not produce *all* documents concerning long-term capital contributions.

a. *Inspection of Prospect Chartercare's Books and Records*.

The Receivers first claim that they have not been provided with access to Prospect Chartercare's books and records. However, they have yet to fulfill the prerequisite to that access as provided in the MTC Order—specifying which books and records they seek to review. The Receivers apparently claim that they have fulfilled that requirement in their October 1, 2020 letter, requesting essentially all documents relating to the long-term capital commitment obligations. However, that extremely broad and unlimited identification of documents runs afoul of the intent of the MTC Order, which requires the Receivers to "make a more specific request regarding what books and records [they] [] seek[] so as to allow PCC to search for and produce the appropriate documents." Their blanket, all-encompassing request does not come close to the specification intended in the MTC Order. Nevertheless, even without that specification, the Prospect Entities' counsel is coordinating with the Receivers' counsel to schedule access to Prospect Chartercare's books and records.

b. *The Privilege Log and the Redaction of Documents.*

The Receivers next argue that redactions for privilege should be waived because no privilege log was produced. While it is true that a privilege log was not produced contemporaneously with the September Production, one was produced soon thereafter. As a result, the Receivers are well-aware of the basis for the redactions.

The Receivers claim that the Prospect Entities improperly redacted documents without a corresponding privilege log. As noted above, however, a privilege log was subsequently produced. Furthermore, that privilege log identified the substance of the redactions in detail. *Cf. In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001) ("Privilege logs do not need to be precise to the point of pedantry."). These facts undermine the Receivers' contention that they do not know the substance or content of the redactions.

In any event, the Court "should avoid hair-trigger findings of waiver" in analyzing the adequacy of the Prospect Entities' privilege log or the corresponding redactions. *State v. Lead Industries Ass'n Inc.*, 64 A.3d 1183, 1197 (R.I. 2013). As our Supreme Court has explained, "[m]inor procedural violations, good-faith attempts at compliance, and other such mitigating circumstances militate against finding waiver." *Id.* Here, the Prospect Entities, as detailed above, have made a good faith effort to comply with the MTC Order, including the production of a privilege log. Where, as here, a party makes a good faith effort to comply with discovery, it would "unfairly penalize" that party to find that it waived its privilege because some information was or was not included in a privilege log. *Id.* at 1200; *see also* 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2016.1 (3d ed. 2009) ("Unless there has been a bad-faith failure to comply with a reasonable identification effort, automatically finding a waiver of the privilege would be unduly harsh.").

c. *Designation of Some Documents in September Production as "Confidential" under Protective Order.*

The Receivers then aver that the September Production wrongly included documents designated as "confidential" under the Protective Order. As noted above, that position is contrary to the discovery practice in this case and the express terms of the Consent Order.

Here, as described above, the MTC Order entered as a result of a motion to compel that was made "pursuant to the [Consent Order] entered on April 25, 2019." That motion to compel therefore expressly sought production of documents under the Consent Order, which, again, incorporates the Protective Order along with the Prospect Entities' right to designate certain information as confidential. It is difficult to follow how, on one hand, a party could seek document production pursuant to the Consent Order, which, in turn, incorporates the Protective Order and allows the Prospect Entities to designate information as confidential, but then, on the other hand, take the steadfast position that the terms of the Consent and Protective Orders no longer apply.

d. *The Prospect Entities Complied with the MTC Order.*

The Receivers allege two ways that the Prospect Entities purportedly failed to comply with the MTC Order: (1) by "shuffling" the documents; and (2) by not producing communications with AMI, including summaries and spreadsheets. Neither of those allegations amount to intentional violations of the MTC Order.

i. <u>The Prospect Entities did not "shuffle" the September Production.</u>

The Receivers contend that the September Production is "shuffled" and incomprehensible. However, while the Receivers may not, as they complain, understand the substance of the document production,[3] the Prospect Entities nevertheless met their obligations under Rule 34 of the Superior Court Rules of Civil Procedure, which imposes no organizational obligations upon the Prospect Entities. *See generally* Super. Ct. R. 34. In this situation, too, the Prospect Entities did not violate the MTC Order.

[3] The Receivers may, in the ordinary course of litigation, notice a deposition to the extent that they need an explanation of the documents produced. That is the appropriate course of discovery, not couching their inability to understand a document production as a violation of the MTC Order.

Even if the Court were to view federal jurisprudence as instructive as to the Prospect Entities' obligations in making the September Production, the Prospect Entities have cleared that hurdle as well. As one federal district court has explained, Fed. R. Civ. P. 34 requires a party to produce documents "as they are kept in the usual course of business *or* must organize and label them to correspond to the categories in the request; . . . ." *Pass & Seymour, Inc. v. Hubbell Inc*., 255 F.R.D. 331, 333 (N.D.N.Y. 2008) (quoting Fed. R. Civ. P. 34(b)(2)(E)(i)). That court explained that under Rule 34, two forms of production of documents are acceptable:

> "while the rule contemplates that a party may make the requested production in traditional format, organized to associate the documents with the party's requests to which they respond, at the responding party's option it alternatively permits the production of responding documents within the parties' possession, custody or control as they are customarily maintained, without providing further guidance regarding this alternative protocol."

Id. The second form of production provided under that rule—producing documents as they are customarily maintained without any organization—was, the district court explained, "disfavored" because it encouraged "the dumping of massive quantities of documents, with no indexing or readily apparent organization, in response to a document request from an adversary," and did not "prevent parties from deliberately . . . mix[ing] critical documents with others in the hope of obscuring significance." *Id.* (internal citations and quotations omitted).

Here, the Prospect Entities submitted the September Production consistent with the first document production approach—the production of documents in batches, labeled and organized into the categories of the request for documents. The September Production was not, as the Receivers claim, a document dump; it was bates labeled, and organized into batches of documents that corresponded to the category of documents compelled for production. Even the Receivers, in their Motion to Compel, acknowledge that the September Production was sorted into categories of

documents. *See*, *e.g.*, Mem. at 25 ("Prospect on September 18, 2020 produced 1,810 pages of documents, bates-numbered 964 to 2774, which Prospect designated as responsive to Category 2"). The Receiver's inability to comprehend the substance of the September Production is not a violation of the MTC order, and to the extent that they seek an explanation of such documents, they can, as with any other litigant, notice a deposition in the ordinary course of litigation. Contrary to the Receivers' assertions otherwise, the obligation to produce documents under the rules of civil procedure—state or federal—does not extend to assisting opposing counsel with understanding each page of each document produced.

ii. <u>The Prospect Entities did not violate the MTC Order because it does not apply to communications with AMI or any spreadsheets sent to AMI, and even if it does, the Prospect Entities have acted in good faith.</u>

The Receivers claim that the Prospect Entities violated the MTC Order because they did not produce communications, including letters and emails, with AMI in response and internal notes and memoranda of Prospect Entities of employees. The Receivers assert that such documents are responsive to category 2 of the MTC Order ("Documents identifying all of the long-term capital contributions").

Here, however, the scope of category 2 of the MTC Order is not as expansive as the Receivers assert. It compels the production of "[d]ocuments identifying all of the long-term capital contributions." It does not, contrary to the Receivers implied contentions, compel the production of "any" or "all" or "every" document that identifies all the long term-capital contributions. It also does not, anywhere, indicate that any "correspondence" or "communications" fall within its scope. The MTC Order is limited in scope and does not provide the Receivers with forensic audit rights. Instead, it orders the production of documents that *evidence* all the long term-capital contributions,

and that is what exactly what the Prospect Entities produced in their September Production—1,810 pages of documents relative to category 2. *See* Mem. at 25.

The Prospect Entities' limited interpretation of the scope of category 2 is supported not only by the plain language of the MTC Order, but also by the heavy burden, which will far outweigh any probative value, of the production of documents if category 2 is interpreted as widely as the Receivers argue. If the Court were to adopt the Receivers' interpretation of the scope of category 2, the realm of documents, which would include all communications, would exponentially increase. The costs and burden associated with that production would far outweigh any probative value, especially given that the Receivers already are in possession of about 1,800 pages of documents that evidence the same information relative to the long-term capital contributions. Given the limiting nature of the MTC Order, it does not appear that such an expansive interpretation of category 2 is consistent with the Court's intent.

Furthermore, even if the Court agrees that the scope of category 2 is as expansive as the Receiver's contend, it should nevertheless not sanction the Prospect Entities for any violation of the MTC Order because they acted in good faith. The Prospect Entities have complied with the MTC Order, as they reasonably interpret it, by producing to the Receivers thousands of documents. The dispute over the scope of category 2 is genuine—it is not as if the Prospect Entities completely ignored the MTC Order or refused to produce *any* documents. Instead, they produced documents that they believed were responsive to the category of documents compelled for production under the MTC Order. That good faith effort cannot amount to the willful, intention actions that warrant sanctions of any kind.

B. The Put Option Period Should not Be Extended.

The Receivers ask the Court to extend the period in which the put option can be exercised until the Prospect Entities have complied with the MTC Order. That time, though, has already passed because the Prospect Entities have complied with the MTC Order by making the September Production. As a result, pursuant to the MTC Order, the extension of the put period is running.

C. Even if the Prospect Entities Inadvertently Violated the MTC Order, Sanctions are Unwarranted.

Even assuming, solely for the purpose of argument, that the Prospect Entities' September Production is found insufficient and the Prospect Entities are thus found to have violated the MTC Order, sanctions are not warranted. The Receivers seek three forms of "sanctions": an established admission that the Prospect Entities did not make the long-term capital contributions; the designation of a witness to submit to a deposition to explain the information in the September Production; and award of attorneys' fees. However, none of those sanctions are warranted because, as noted above, before the Court is a genuine, substantially justified, good faith dispute centered on the scope of the Prospect Entities obligations under the MTC Order and whether the September Production, and any subsequent production, is entitled to the benefits of confidentiality under the Protective Order.

a. The Court Should Not Enter an Admission that the Prospect Entities Failed to Make the Long-Term Capital Contributions.

Plaintiffs begin their request for sanctions with a request that the Court essentially deem as admitted that the Prospect Entities did not make any of the long-term capital contributions. *See* Plaintiffs' Mem. at 29. This is an extraordinary and unwarranted request in this circumstance.

It is true that Rule 37(b) provides, in pertinent part, that "[i]f a party . . . *refuses* to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . .

., the court may[,]" among other things make "[a]n order that the matters regarding which the order was made, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order[.]" Super. R. Civ. P. 37(b)(2)(A) (emphasis added). To impose such a sanction, and consistent with the text of Rule 37(b)(2), however, there are two factors which limit a court's discretion: "First, any sanction must be 'just'; second the sanction, must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

Here, the Prospect Entities did not *refuse* to obey an order—in fact, they complied with the MTC order by producing approximately 2900 pages of responsive documents. As noted above, the issue before the Court is a genuine discovery dispute, not a *refusal* to comply with a discovery order. Nevertheless, the sanction is unwarranted based upon the Prospect Entities good faith attempt to comply with the MTC Order.

The Receivers ask the Court to essentially impose a negative inference admission, one of the most punitive of sanctions available under Rule 37. But, to prevail on such an extraordinary require generally "requires a showing that (1) the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to timely produce the evidence had "a culpable state of mind"; and (3) that the missing evidence is 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Kortright Capital Partners LP v. Investcorp Inv. Advisers Ltd.*, 330 F.R.D. 134, 137 (S.D.N.Y. 2019) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). As set forth in detail above, this Motion to Compel arises out of a genuine, good faith dispute over the scope of the Protective Order. It is not the result a bad faith withholding of

evidence. In short, there is not basis here to impose such a harsh sanction; the Prospect Entities have complied with the MTC Order.

b. The Court Should Not Designate a Witness for Deposition.

Next, as an alternative remedy, the Receivers ask that the Court order the designation of a witness for deposition with respect to the long-term capital contribution. *See* Plaintiffs' Mem. at 33. Despite Plaintiffs' lack of legal support for this request, the mechanism to achieve this request is readily available to the Receivers through the normal course of discovery. This request should be denied as well.

c. An Award of Attorneys' Fees is Unwarranted.

Nor is there a basis to award Plaintiffs their attorneys' fees here. In support of their request for the payment of attorneys' fees, Plaintiffs cite to Rule 37(b)(2) of the Superior Court Rules of Civil Procedure for the proposition that the Court may require "the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure . . . ." Plaintiffs' Mem. at 33. What Plaintiffs tellingly omit, however, is what the rest of Rule 37(b)(2) states. In full context, that portion of the rule provides that:

> the court may require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, *unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.*

Super. R. Civ. P. 37(b)(2) (emphasis added). Thus, to impose such a sanction, the rule requires an initial finding that the opposition to producing the documents was not substantially justified.

The United States Supreme Court has observed that resistance in this context is "substantially justified" "if there is a 'genuine dispute,' or 'if reasonable people could differ as to [the appropriateness of the contested action].'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)

(internal citations omitted) (alteration in original). Therefore, as the Court held, the meaning "most naturally conveyed by the phrase [substantially justified]. . . is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Id.*

Moreover, when considering the breadth of a trial justice's discretion under Rule 37(b)(2), the Rhode Island Supreme Court has imposed a second prerequisite: that the opposition was outrageous or reflective of bad faith. *See Senn v. Surgidey Corp.*, 641 A.2d 1311, 1320 (R.I. 1994); *see also Russo v. Baxter Healthcare Corp.*, 51 F. Supp. 2d 70, 76 (D.R.I. 1999) (observing that "[a]lthough [Rule 37] does not specify 'bad faith' as a prerequisite to imposing the sanction, the [Rhode Island] Supreme Court has regularly required it") (collecting cases). The Reporter's Notes to a prior version of Rule 37, where the attorney's fees sanction was included in subdivision (a) of the rule and which used the same "substantially justified" language, support this. As the Rhode Island Supreme Court noted in *Senn*, 641 A.2d at 1320, "[t]he Reporter's Notes . . . state that the sanction of ordering the payment of expenses under" the then-effective version of "Rule 37(a) has in practice 'been reserved for outrageous conduct.'" *See also Limoges v. Eats Rest.*, 621 A.2d 188, 190 (R.I. 1993).

Accordingly, under Rhode Island law, for this Court to exercise its discretion and impose the sanction provided for in Rule 37(b)(2), it must conclude that the failure to comply (1) was not be substantially justified and (2) was done in bad faith. Neither element has been satisfied here.

Instead, as explained above, the parties are at an impasse, which is the result of a good faith, genuine, and substantially justified discovery dispute. Despite the Receivers' thirty-plus page memorandum, this is simply not a case of outrageous malfeasance. First, the dispute over the Protective Order is substantially justified. As is the case here, reasonable minds have differed

over whether the Protective Order, based on its language and the parties' course of conduct, applies to the September Production. Second, there has been no showing of bad faith—nor could there be. Since the September Production, the Prospect Entities have been engaged in continued efforts to resolve this dispute. The Prospect Entities have requested only that the documents and information they have produced be designated as confidential and that further production be treated the same way. There is no basis to award sanctions in this case.

D. The Court Should Find that the September 18, 2020 Production, or any Other Production of Documents by the Prospect Entities Pursuant to the MTC Order, is Subject to the Protective Order, Or, Alternatively, 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, pursuant to the MTC Order, the Consent Order, the Protective Order, and the parties' longstanding course of conduct, the Prospect Entities were permitted to designate as confidential the documents produced in the September Production. Should the Court disagree, however, the Prospect Entities formally request that the Court enter a new protective order that expressly covers the production of documents pursuant to the Court's July 21, 2020 Order and permits the Prospect Entities to designate such documents and information as confidential.

"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 disclose, 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)).

The Prospect Entities are not seeking to outright withhold documents. Instead, this relief is targeted and, consistent with the history of the proceedings, would simply permit the Prospect Entities to designate documents and information produced as confidential. Absent such relief, sensitive financial information, which the Prospect Entities treat as confidential, would be subject to disclosure, putting the Prospect Entities at a competitive disadvantage in the marketplace. "Competitive disadvantage is a type of harm cognizable under Rule 26." *Zenith Radio Corp.*, 528 F. Supp. at 890; *see also, e.g., 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.").[4]

Accordingly, based on the clear and cognizable competitive disadvantage that would flow from producing these documents, which contain financial records and statement, without a confidentiality designation, this Court should, as an alternative remedy, issue a protective order permitting the Prospect Entities to designate as confidential the documents and information at issue. This is consistent with Rule 26(c) and with the parties' course of conduct throughout these proceedings.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Compel. If the Court grants the Motion to Compel, it should nonetheless not sanction the Prospect Entities because they have acted in good faith. And, finally, the Court should, if necessary, grant this request for protective order.

Respectfully Submitted,

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[4] 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)).

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Certificate of Service

I certify that on the 13th 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.

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