

STATE OF RHODE ISLAND  
PROVIDENCE, SC.

SUPERIOR COURT

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

vs. :

C.A. No: PC-2017-3856

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

**Hearing: May 2, 2019**  
**@ 10:30 a.m.**

**THE RECEIVER'S SUR-REPLY TO PROSPECT MEDICAL HOLDINGS, INC.,  
PROSPECT EAST HOLDINGS, INC., AND PROSPECT CHARTERCARE, LLC'S  
NOTICE OF INTENT TO SUE CHARTERCARE COMMUNITY BOARD OR IN THE  
ALTERNATIVE MOTION FOR RELIEF FROM THE INJUNCTIVE PROVISIONS OF  
THE PERMANENT RECEIVERSHIP ORDER**

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May 1, 2019

**TABLE OF CONTENTS**

Introduction ..... 1

Facts ..... 2

    I. CCCB v. Prospect ..... 2

    II. Prospect Medical Holdings, Inc.’s and Prospect East Holdings, Inc.’s Proposed Delaware Complaint ..... 5

    III. The Production and Standstill Agreement ..... 6

    IV. Stay of Preliminary Settlement Approval in the Federal Court Action ..... 7

Argument ..... 8

    I. The Prospect Entities should not be granted leave to file suit in Delaware because their purported claims against CCCB are compulsory counterclaims that should be filed, if at all, in CCCB v. Prospect ..... 8

        A. The Super. R. Civ. P. 13(a) standard for compulsory counterclaims ..... 8

        B. Prospect’s claims against CCCB are compulsory counterclaims in CCCB v. Prospect ..... 10

        C. Whether the Prospect Entities’ proposed claims are compulsory counterclaims in CCCB v. Prospect is an issue the Court should properly consider on this motion for relief from the Receivership Stay ..... 11

        D. Even in the absence of a receivership stay, the Superior Court would properly enjoin any Delaware suit asserting compulsory counterclaims ..... 12

        E. Even if the Prospect Entities’ claims were a permissive counterclaim, they should be pursued if at all in CCCB v. Prospect ..... 14

    II. Other considerations ..... 14

        A. The Receiver is not using the stay as a sword ..... 14

        B. The filing of CCCB v. Prospect was necessitated by Prospect’s refusal to provide necessary information and the imminence of the put option ..... 15

        C. The Prospect Entities’ proposed suit in Delaware would unnecessarily interfere with the Receivership ..... 16

        D. Prospect’s proposed suit in Delaware improperly attempts to bypass the Federal Court Action ..... 17

        E. Prospect’s agreement to stay and/or dismiss its suit in Delaware renders this motion a waste of time and resources ..... 17

        F. Venue in CCCB v. Prospect is properly laid in Providence ..... 18

        G. Prospect Medical Holdings, Inc.’s proposed claims against CCCB for breach of the LLC Agreement fail to state a claim ..... 19

Conclusion ..... 19

## INTRODUCTION

The Receiver submits this sur-reply memorandum to address five developments that have arisen since the Prospect Entities (Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., and Prospect Chartercare, LLC) filed their motion,<sup>1</sup> all of which present further cause for denying the motion:

- 1) CharterCARE Community Board (“CCCB”) has commenced a Rhode Island Superior Court action No. PC-2019-3654 (“CCCB v. Prospect”) against the instant movants (Prospect Chartercare, LLC, Prospect East Holdings, Inc., Prospect Medical Holdings, Inc.), as well as against Prospect Chartercare, LLC’s directors, Prospect East Hospital Advisory Services, LLC, and additional John Doe/Jane Doe/ABC Corp. defendants;
- 2) Two<sup>2</sup> of the Prospect Entities (Prospect Medical Holdings, Inc. and Prospect East Holdings, Inc.) have finally (and belatedly) submitted a proposed complaint setting forth the claims they seek leave to pursue in Delaware, which substantially mirror the claims asserted by CCCB in CCCB v. Prospect, and accordingly are compulsory counterclaims in CCCB v. Prospect;
- 3) The parties to CCCB v. Prospect have entered into an agreement (the “Production and Standstill Agreement”) which:

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<sup>1</sup> Per the Court’s direction, this sur-reply memorandum is limited to addressing post-filing events, and does not otherwise address Prospect’s arguments in its reply memorandum. The Receiver will respond to those arguments at the hearing on the motion.

<sup>2</sup> Although Prospect Chartercare, LLC is one of the instant movants, it is not a party to their proposed Delaware complaint, for reasons the movants do not explain.

- a. provides CCCB with partial relief by requiring that the defendants provide CCCB (*and the Receiver*) with documents necessary to evaluate the put option, and
  - b. stays CCCB v. Prospect until at least December 20, 2019; and
  - c. allows the Prospect Entities to proceed with the motion *sub judice* (which the Receiver and CCCB still oppose), but obligates them to stay any litigation even if they succeed in obtaining permission to commence litigation in Delaware pursuant to the motion, or dismiss it without prejudice if a stay is not obtained.
- 4) The parties to the Federal Court Litigation and CCCB v. Prospect are participating in mediation to attempt to achieve a global settlement; and
  - 5) Chief Judge Smith has postponed any preliminary approval of Plaintiffs' settlement with CCCB, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital until after May 31, 2019 to allow such global mediation.

Prospect's motion for leave to commence suit now in Delaware is especially meritless in light of these developments, and it should be denied.

## FACTS

### **I. CCCB v. Prospect**

On March 11, 2019, CCCB<sup>3</sup> filed suit against the various Prospect Entities and their directors, alleging eleven counts, for specific performance of Prospect Chartercare, LLC's and Prospect East Holdings, Inc.'s contractual obligations under the LLC Agreement, and for other relief. Those counts are:

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<sup>3</sup> Individually and derivatively, as member of Prospect Chartercare, LLC, and as trustee (for the Receivership Estate, i.e. the St. Josephs Health Services of Rhode Island Retirement Plan) of the beneficial interest of CCCB's membership interest in Prospect Chartercare, LLC.

- Count I (specific performance of contractual obligations, derivatively), against Prospect East Holdings, Inc. and Prospect Medical Holdings, Inc. derivatively on behalf of Prospect Chartercare, LLC, for failure to fund the Long Term Capital Commitment pursuant to the Prospect Chartercare, LLC Agreement (“LLC Agreement”) and the Asset Purchase Agreement;<sup>4</sup>
- Count II (specific performance of contractual obligations, non-derivatively) encompassing the same relief as Count I but directly on behalf of CCCB rather than derivatively on behalf of Prospect Chartercare, LLC;
- Count III (breach of contract<sup>5</sup> and failure to provide financial information) against Prospect Chartercare, LLC, Prospect East Holdings, Inc., and Prospect Advisory Hospital Advisory Services, LLC for failure to provide contractually required information about Prospect Chartercare, LLC’s financial condition;
- Count IV (violation of statutory duty to provide requested information) against Prospect Chartercare, LLC, Prospect East Holdings, Inc., and Prospect Advisory Hospital Advisory Services, LLC, for failure to provide requested information about Prospect Chartercare, LLC’s financial condition as required by R.I. Gen. Laws § 7-16-22;

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<sup>4</sup> In connection with both the Asset Purchase Agreement and the LLC Agreement, Prospect East Holdings, Inc. agreed to fund \$50 million of long-term capital improvements for Prospect Chartercare, LLC’s subsidiaries’ hospitals by June 20, 2018, and Prospect Medical Holdings, Inc. guaranteed that funding. As alleged in CCCB v. Prospect, the Prospect Entities have failed to perform, and CCCB seeks specific performance of those obligations.

<sup>5</sup> Including breach of the LLC Agreement.

- Count V (breach of fiduciary duty, derivatively) against Prospect Chartercare, LLC's directors as well as Prospect East Holdings, Inc. and Prospect Advisory Hospital Advisory Services, LLC, for breach of their fiduciary duties to Prospect Chartercare, LLC;
- Count VI (breach of fiduciary duty, non-derivatively) against Prospect Chartercare, LLC's directors as well as Prospect East Holdings, Inc. and Prospect Advisory Hospital Advisory Services, LLC, for breach of their fiduciary duties to CCCB;
- Count VII (aiding and abetting breaches of fiduciary duty, derivatively) against Prospect Chartercare, LLC's directors, Prospect East Holdings, Inc., Prospect Advisory Hospital Advisory Services, LLC, and Prospect Medical Holdings, Inc. for aiding and abetting each other's breaches of fiduciary duties to Prospect Chartercare, LLC;
- Count VIII (aiding and abetting breaches of fiduciary duty, non-derivatively) against Prospect Chartercare, LLC's directors, Prospect East Holdings, Inc., Prospect Advisory Hospital Advisory Services, LLC, and Prospect Medical Holdings, Inc. for aiding and abetting each other's breaches of fiduciary duties to CCCB;
- Count IX and X (fraudulent transfers) against Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., and various pseudonymous defendants in connection with Prospect's paying of corporate dividends in 2018 at a time when the Long Term Capital Commitment was improperly not being funded; and

- Count XI (declaratory judgment) seeking declarations that CCCB's Settlement Agreement with the Receiver and the named Plan participants does not violate the LLC Agreement; and that all defendants except Prospect Chartercare, LLC are liable to indemnify CCCB for losses caused by their conduct.

At least six times, and without a shred of evidence, the Prospect Entities accuse the Receiver of having "directed" or "instructed" CCCB to file its lawsuit against them, as if CCCB had no interests of its own to protect from the Prospect Entities' malfeasance (not to mention CCCB's obligation to protect the rights and interests it is holding in trust for the Receivership Estate). These false accusations seem intended to insinuate that the Receiver has violated the Court's Order of November 16, 2018. Such insinuations are both improper and meritless, as CCCB's independent interests justify commencement of that action, since CCCB will need that information if the proposed settlement with the Receiver is not approved, or if the time to exercise the put option is likely to expire before Chief Judge Smith finally approves the settlement; likewise the Prospect Entities will have injured rights and interests currently held in trust for the Receiver, which will revert to CCCB in the event that settlement is ultimately disapproved.

## **II. Prospect Medical Holdings, Inc.'s and Prospect East Holdings, Inc.'s Proposed Delaware Complaint**

The Prospect Entities' proposed complaint that they seek to file in Delaware includes the following proposed claims:

- Count I: a claim for a declaratory judgment declaring that CCCB's settlement agreement with the Receiver violates the LLC Agreement;

- Count II: a claim for breach of contract, alleging that CCCB has breached the LLC Agreement by coordinating with the Receiver, by allegedly providing the Receiver with confidential financial information, and by allegedly assisting the Receiver in prosecuting the class action lawsuits; and
- Count III: a request for a permanent injunction enjoining CCCB from violating the LLC Agreement.

The Prospect Entities' proposed Count I is a mirror image of CCCB's own declaratory judgment claim (CCCB's Count XI) seeking a declaration that the Settlement Agreement and CCCB's and the Receiver's performance thereunder do not violate the LLC Agreement.

The Prospect Entities' proposed Count II is a mirror image of CCCB's Counts I through III, alleging that Prospect has breached *inter alia* the same LLC Agreement.

The Prospect Entities' proposed Count III encompasses the same injunctive relief that CCCB seeks in several of its Counts.

### **III. The Production and Standstill Agreement**

On April 25, 2019, the Production and Standstill Agreement was entered as a Stipulation and Consent Order of the Court in CCCB v. Prospect.<sup>6</sup> Pursuant thereto:

- Prospect Chartercare, LLC is required to provide CCCB with the documents necessary for CCCB *and the Receiver* to evaluate whether to exercise the put option;

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<sup>6</sup> That Order is attached hereto as Exhibit 1.



- The final date for exercise of the put option is extended from September 20, 2019 to December 20, 2019;
- Except for certain matters, such as motions to compel production of documents if CCCB and the Receiver conclude that Prospect has not made complete production, the CCCB v. Prospect suit is stayed until twenty (20) days after any party to that agreement provides written notice to all parties withdrawing agreement to the stay or until December 20, 2019, whichever is later;
- The Prospect Entities are free to proceed with the motion *sub judice* for leave to sue CCCB in connection with the LLC Agreement (which motion the Receiver and CCCB still oppose), but in the event that leave is granted, the Prospect Entities agree to stay such litigation until twenty (20) days after any party to the agreement provides written notice to all parties withdrawing agreement to the stay or until December 20, 2019, whichever is later.

#### **IV. Stay of Preliminary Settlement Approval in the Federal Court Action**

At the February 12, 2019 hearing on the pending settlement between Plaintiffs (the Receiver and named Plan participants) and CCCB, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital, Chief Judge Smith indicated he was inclined to grant preliminary approval of that settlement. At an April 1, 2019 joint conference in the Receivership Court, Chief Judge Smith advised the parties that he was staying any such approval for another sixty (60) days to enable the parties to seek a global settlement through mediation.

## ARGUMENT

### **I. The Prospect Entities should not be granted leave to file suit in Delaware because their purported claims against CCCB are compulsory counterclaims that should be filed, if at all, in CCCB v. Prospect**

Now that the Court has been belatedly<sup>7</sup> provided with the proposed Delaware complaint, it is clear that the claims which the proposed Prospect plaintiffs, Prospect Medical Holdings, Inc. and Prospect East Holdings, Inc., seek to assert in Delaware arise out of the same “transaction or occurrence” as CCCB’s claims in CCCB v. Prospect. Accordingly, Prospect Medical Holdings, Inc. and Prospect East Medical Holdings, Inc. can (indeed, must) pursue all of their proposed claims as compulsory counterclaims in CCCB’s action. Prospect’s motion for leave to bring suit in Delaware should be denied for that reason.

#### **A. The Super. R. Civ. P. 13(a) standard for compulsory counterclaims**

Super R. Civ. P. 13(a) provides:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action, or if the opposing party's claim is for damage arising out of the ownership, maintenance, operation, use, or control of a motor vehicle by the pleader

Super. R. Civ. P. 13(a). It is principally the same as Fed. R. Civ. P. 13(a).<sup>8</sup>

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<sup>7</sup> As noted, the Prospect Entities filed their proposed complaint only after the Receiver pointed out that their failure to do so constituted an independent ground to deny their motion.

<sup>8</sup> With one substantive difference that is not material here. See Kent, Simpson, Flanders, Wollin, Rhode Island Civil Procedure § 13:14 (“The principal difference between this rule and Federal Rule 13 lies in the

“A compulsory counterclaim is one that ‘arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim,’ Super. R. Civ. P. 13(a), and must be pleaded or the claim will be considered lost.” Hawkins v. Town of Foster, 708 A.2d 178, 183 n.1 (R.I. 1998).

A compulsory counterclaim arises from the same transaction or occurrence that is the subject matter of plaintiff’s complaint and does not require the presence of third parties over whom the court cannot acquire jurisdiction for its adjudication. If not pleaded, a defendant will be barred from further litigating the claim. Super. R. Civ. P. 13(a); *see also Serra v. Ford Motor Credit Co.*, 463 A.2d 142, 149 (R.I. 1983).

Faerber v. Cavanagh, 568 A.2d 326, 328 (R.I. 1990).

“The primary purpose of Rule 13 is to eliminate multiplicity of litigation by permitting defending parties the broadest latitude in introducing claims against their adversaries, and by requiring them to plead most claims which arise out of the transaction or occurrence on which the claimant’s case is based.” Kent, Simpson, Flanders, Wollin, Rhode Island Civil Procedure § 13:1. See Abedon v. Providence Redevelopment Agency, 348 A.2d 720, 721 (R.I. 1975) (“Rule 13 is designed to eliminate multiplicity in litigation. In order to achieve that purpose, it . . . makes it compulsory for a pleading to state as a counterclaim any claim which the pleader has against an opposing party which arises out of the transaction forming the basis for the opposing party’s claim.”). If a counterclaim falls within Super. R. Civ. P. 13(a), “it must be pleaded or it is lost **and cannot be made the subject of another action.**” Kent, Simpson, Flanders, Wollin, Rhode Island Civil Procedure § 13:2 (emphasis supplied).

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exception of motor vehicle tort cases from the provisions of Rule 13(a); Federal Rule 13(a) is applicable to such actions. Federal Rule 13(a) eliminates the compulsory feature of a counterclaim when the opposing party has brought suit by attachment or other process by which the court did not acquire personal jurisdiction, and the pleader is not stating any other counterclaim under Federal Rule 13.”)

See Rhode Island Economic Development Corp. v. Wells Fargo Securities, LLC, No. PB 12-5616, 2014 WL 3709683, at \*11 (R.I. Super. July 22, 2014) (dismissing a subsequent separate action for asserting claims that should have been filed as compulsory counterclaims in the original action).<sup>9</sup>

**B. Prospect's claims against CCCB are compulsory counterclaims in CCCB v. Prospect**

Accordingly, the Prospect Entities' claims against CCCB, set forth in the proposed pleading that they have belatedly attached to their reply, are compulsory counterclaims that should be filed (if at all) in CCCB v. Prospect or be lost. See also Romar Dev. Co. v. Gulf View Mgmt. Corp., 644 So. 2d 462, 467 (Ala. 1994) ("Where the claim and the counterclaim allege respective breaches of the same contract, the counterclaim is compulsory."); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863, 865 (S.C. App. 2002) ("Beach's complaint alleges Twillman is in breach of the lease agreement. Twillman's counterclaim alleges a breach of the same agreement by Beach. As we find these claims are logically related to each other, we agree Twillman's counterclaim is compulsory."); Grynberg v. Rocky Mountain Nat. Gas, a Div. of KN Energy, Inc., 809 P.2d 1091, 1093 (Colo. App. 1991) ("Thus, any claim regarding proper payment or monies due that defendants might have against plaintiff arises out of the

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<sup>9</sup> In Rhode Island Economic Development Corp. v. Wells Fargo Securities, LLC, the Rhode Island Economic Development Corporation brought suit against *inter alia* Defendants J. Michael Saul, Moses Afonso Ryan, Ltd, and Antonio Afonso, Jr., in response to which Moses Afonso Ryan, Ltd and Antonio Afonso, Jr. crossclaimed against J. Michael Saul for indemnity. J. Michael Saul later filed a separate action against Moses Afonso Ryan, Ltd and Antonio Afonso, Jr. for alleged attorney malpractice in the underlying events. The Superior Court (Silverstein, J.) consolidated the second action with the first and dismissed the attorney malpractice claims for having been compulsory counterclaims (to the crossclaim) that should have been filed in the first action.

same contract and is logically related to plaintiff's claims. It is, therefore, a compulsory counterclaim.”).

**C. Whether the Prospect Entities’ proposed claims are compulsory counterclaims in CCCB v. Prospect is an issue the Court should properly consider on this motion for relief from the Receivership Stay**

The Prospect Entities contend, without any authority, that “the questions of compulsory or permissive counterclaims and venue are not properly before this receivership Court.” Prospect’s Reply at 14. Not so. Those issues are directly relevant to the first of the Wencke factors<sup>10</sup>, i.e. “whether refusing the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed.” S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984). The Prospect Entities suffer no cognizable injury, much less a “substantial” one, by asserting their proposed claims as counterclaims in CCCB v. Prospect instead of in a new action. The issue is also directly relevant to the third of the Wencke factors, i.e. “the merit of the moving party’s underlying claim,” id., inasmuch as claims that the movants are barred from asserting in the proposed new action are inherently meritless. See, e.g., S.E.C. v. Copeland, 645 F. App’x 596, 597 (9th Cir. 2016) (“The district court did not abuse its discretion in denying Tri Tool’s motion to modify the stay because at least two of the three Wencke factors favored denial of the motion.”) (some of movant’s claims were time-barred, and remaining claims could be asserted in a pending proceeding).

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<sup>10</sup> Which the Prospect Entities contend constitute the applicable standard on this motion.

**D. Even in the absence of a receivership stay, the Superior Court would properly enjoin any Delaware suit asserting compulsory counterclaims**

Indeed, even in the absence of a receivership stay, the Superior Court would properly enjoin the Prospect Entities from filing suit in Delaware (or anywhere else) asserting claims that are compulsory counterclaims in CCCB v. Prospect. In order to further Rule 13(a)'s policy of eliminating multiplicity of litigation, the first court to acquire jurisdiction routinely enjoins subsequent actions that assert claims that could or should have been asserted as counterclaims in the first action. See Butte Min. PLC v. Smith, 15 F. Supp. 2d 965, 967 (D. Mont. 1992) ("To achieve the goal of judicial economy underlying Rule 13(a), a federal district court may utilize its equitable power to enjoin a party from instituting subsequent proceedings on a claim that should have been pleaded as a compulsory counterclaim in an action pending before the federal district court.") (enjoining prosecution of suit in England); Rohm & Haas Co. v. Brotech Corp., 770 F. Supp. 928, 935 (D. Del. 1991) ("Under the first-in-time rule, when two actions involve the same parties and issues, the Court hearing the earlier filed action may enjoin proceedings in the second action.") (granting injunction ordering defendant to dismiss Pennsylvania action); Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 588–89 (E.D. Pa. 1976) ("[T]he Puerto Rican action, which raises the identical legal and factual issues as this lawsuit, could have, and indeed should have, been brought as a compulsory counterclaim under Rule 13(a). Restraining the parties from proceeding with the action in Puerto Rico will therefore foster the policy of judicial economy enunciated in Rule 13(a) of the Federal Rules of Civil Procedure.") (enjoining prosecution of Puerto Rican action).

This principle applies equally to state court actions. See, e.g., Rain CII Carbon LLC v. M.H. Detrick Co., 49 So.3d 923 (La. App. 2010), in which the court stated:

Louisiana jurisprudence clearly supports a trial court, under appropriate circumstances, enjoining the prosecution of a suit subsequently filed in another state involving the same controversy. The jurisprudence reflects that courts abhor a multiplicity of lawsuits to settle a single issue, as such actions are expensive for the litigants and result in an unnecessary duplication of judicial time. Because multiple lawsuits are reprobated by jurisprudential rule, it is not necessary to allege or prove irreparable injury when seeking an injunction to enjoin a declaratory judgment action filed subsequent to the initial lawsuit to clarify an issue involved in the original lawsuit.

Rain CII Carbon LLC, 49 So.3d at 926 (citations omitted). See also First State Ins. Co. v. Minnesota Min. and Mfg. Co., 535 N.W.2d 684 (Minn. App. 1995), in which the court affirmed the trial court's order prohibiting a litigant from proceeding with a later-filed substantially similar case in another jurisdiction, and stated:

It has long been the law in Minnesota that a court may enjoin a party over whom it has in personam jurisdiction from pursuing similar litigation in another court. . . .

In analyzing the propriety of anti-suit injunctions, we have applied a three-part test of substantial similarity by assessing the similarity of the parties and issues and the capacity of the first action to dispose of the action to be enjoined.

First State Ins. Co., 535 N.W.2d at 687 (citation omitted). The court in First State also noted that "Minnesota courts have not applied the traditional injunction factors to decisions on anti-suit injunctions..." 535 N.W.2d at 688 (citation omitted).

Thus the Superior Court would properly enjoin the filing or prosecution of the Delaware suit even in the absence of an existing receivership stay, and regardless of whether the Receiver would suffer irreparable injury as a result of such filing or prosecution. The instant case, where a receivership stay must first be lifted if the Prospect Entities are to prosecute their Delaware suit, is therefore an *a fortiori* case.

**E. Even if the Prospect Entities' claims were a permissive counterclaim, they should be pursued if at all in CCCB v. Prospect**

For the reasons previously discussed, including the availability of witnesses and conservation of judicial resources, even if (*arguendo*) the Prospect Entities' proposed claims are permissive counterclaims rather than compulsory counterclaims, they should be filed as counterclaims in CCCB v. Prospect.

**II. Other considerations**

**A. The Receiver is not using the stay as a sword**

The Prospect Entities analogize the Receiver's actions in this case to those of a debtor in bankruptcy who initiates litigation and seeks to use the automatic stay to prevent the defendant from asserting counterclaims. Prospect Reply Memo. at 5 ("This case is analogous to a bankruptcy case, where a debtor who initiates litigation 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.").

However, this is not a case in which the Receiver seeks to shield itself (or CCCB for that matter) from counterclaims. To the contrary, the Receiver (and CCCB) have no objection to the Prospect Entities' properly asserting their proposed claims as counterclaims in CCCB v. Prospect.

Thus, none of the cases that the Prospect Entities cite for their argument support the proposition that it is improper for any plaintiff (be it a debtor in bankruptcy, a Receiver, or anyone else) to oppose a defendant's commencing a separate action to assert claims that are compulsory counterclaims in the plaintiff's case. The Prospect Entities cite In re Overmyer, 32 B.R. 597 (Bankr. S.D.N.Y. 1983), Bohack Corp. v.



Borden, Inc., 599 F.2d 1160, 1168 (2d Cir. 1979), and In re Jenkins, No. 03-60548, 2004 WL 768574, at \*4 (Bankr. S.D. Ga. Mar. 30, 2004). Although these cases indeed criticize using a stay as a sword and not a shield, they all involved a debtor in bankruptcy's attempt to preclude a defendant from asserting counterclaims in the case in which the debtor was the plaintiff. Accordingly, they have no application here.

**B. The filing of CCCB v. Prospect was necessitated by Prospect's refusal to provide necessary information and the imminence of the put option**

In their reply memorandum, the Prospect Entities suggest that the purpose for the filing of CCCB v. Prospect was to obtain precedence over the suit they propose to file in Delaware. In fact, as the complaint in CCCB v. Prospect expressly alleges, that suit was necessitated by Prospect's repeated refusal to comply with CCCB's repeated entreaties for financial information necessary to evaluate the merits of exercising the put option and Prospect East Holdings, Inc's and Prospect Medical Holdings, Inc's performance of their obligation to make \$50,000,000 in long term capital investment in the hospitals. Those requests for financial information included requests made in writing on September 20, 2018, October 2, 2018, October 3, 2018, and November 6, 2018. CCCB Complaint ¶ 45. The complaint in CCCB v. Prospect was filed to obtain an injunction compelling turnover of this information.

Indeed, if anyone is guilty of commencing lawsuits for purely tactical reasons, it is the Prospect Entities who are seeking to bring suit in Delaware notwithstanding that they have yet to suffer any real injury from the provisions in the Settlement Agreement which transfer CCCB's 15% interest in the hospitals to the Receiver. That transfer has not even yet occurred. On the other hand, CCCB was suffering an immediate injury

from the withholding of the information it needed to evaluate whether to exercise the put option.<sup>11</sup>

**C. The Prospect Entities' proposed suit in Delaware would unnecessarily interfere with the Receivership**

Now that Prospect has finally belatedly provided the complaint it proposes to file in Delaware, it is clear that the Receiver and the named Plan participants (who are parties to the Settlement Agreement that the Prospect Entities seek to invalidate) would be indispensable parties to that litigation, which would impose very real costs on the Receivership—including not least because CCCB would need to find and engage new Delaware counsel, and every dollar being spent by CCCB reduces the settlement payments to the Retirement Plan. See Receiver's Opposition Memo. at 7-9 (quoting the Court's decision approving the settlement petition). In their reply, Prospect Entities selectively quote and mischaracterize oral arguments by the Receiver's counsel for the purported proposition that the Receivership will not incur any litigation costs in Delaware. See Prospect's Reply at 9-10. In fact, as is completely obvious from the transcript, the Receiver's counsel was addressing *the Receiver's* decision whether to prosecute any assigned claims, not the defense of Prospect's claims in Delaware.

The Prospect Entities' proposed Delaware complaint also contains allegations about this Court's Decision of October 29, 2018 which they insinuate the Receiver has violated. See Proposed Complaint ¶¶ 39-41. In addition, Prospect therein alleges the Receiver has engaged in improper "threats" against Prospect, see *id.* ¶¶ 32-33, 37-38,

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<sup>11</sup> It was only after CCCB filed its complaint in CCCB v. Prospect that the Prospect Entities signed the Production and Standstill Agreement extending the time for exercise of the put option.

45(c), for which alleged threats the Prospect Entities wish to seek redress from the Delaware courts rather than make any properly supported application for relief before this Court which is supervising the Receiver. These are false but serious accusations and should be addressed by this Court, not a court in Delaware. The Prospect Entities' proposed complaint accordingly seeks to interfere with this Court's supervision of the Receiver.

**D. Prospect's proposed suit in Delaware improperly attempts to bypass the Federal Court Action**

Now that the Prospect Entities have finally provided the complaint they propose to file in Delaware, it is also clear that the Prospect Entities could assert those claims against CCCB in the Federal Court Action as permissive cross-claims pursuant to Fed. R. Civ. P. 13(g). For strategic reasons, the Prospect Entities have moved to dismiss the Federal Court Action rather than answer it and file such cross-claims. The desire to pursue that strategy, however, does not justify obtaining relief from the receivership stay in order to assert claims they could assert in due course in the Federal Court Action.

**E. Prospect's agreement to stay and/or dismiss its suit in Delaware renders this motion a waste of time and resources**

The second of the Wencke factors (which Prospect invites the Court to apply) concerns the timing of Prospect's motion. See S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984) (“(2) the time in the course of the receivership at which the motion for relief from the stay is made;”). As noted above, in connection with the April 25, 2019 Stipulation and Consent Order entered in CCCB v. Prospect, the Prospect Entities agreed to stay any Delaware litigation until December 20, 2019 at the earliest. If they

are concerned that delay in asserting these claims may cause a statute of limitations to expire, they can completely alleviate that concern by filing those claims as counterclaims in CCCB v. Prospect. Accordingly, no proper purpose is served by pressing this motion now.<sup>12</sup>

**F. Venue in CCCB v. Prospect is properly laid in Providence**

The Prospect Entities contend:

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.

Prospect’s Reply at 4-5. This contention is patently false. While the Prospect Entities, despite the Receiver’s objection, still do not provide the Court with a copy of the LLC Agreement, section 17.5 of that LLC Agreement in no way confines the jurisdiction of Rhode Island courts to disputes requiring “immediate” injunctive relief:

17.5 Specific Performance. Notwithstanding anything to the contrary contained herein, 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. **Accordingly, in addition to any other right or remedy to which the non-breaching parties may be entitled, at law or in equity, they shall be entitled to enforce any provision of this Agreement by seeking, from a court of competent jurisdiction in the State of Rhode Island, a decree of specific performance and temporary, preliminary and permanent injunctive relief to prevent breaches** or threatened breaches of any of

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<sup>12</sup> In any event, Prospect’s proposed breach of contract claims presumably have a ten-year statute of limitations under R.I. Gen. Laws § 9-1-13 and are therefore not presently at risk of becoming time-barred.

the provisions of this Agreement, without posting any bond or other undertaking.

LLC Agreement (emphasis supplied).<sup>13</sup> Enforcing the provisions of the LLC Agreement by specific performance and injunctive relief is exactly what CCCB's complaint in CCCB v. Prospect seeks to do.

**G. Prospect Medical Holdings, Inc.'s proposed claims against CCCB for breach of the LLC Agreement fail to state a claim**

Prospect Medical Holdings, Inc. is not a party to the LLC Agreement and so its proposed counts against CCCB for breach of contract obviously fail to state a claim. It would therefore not only be a waste of judicial resources to permit those claims to be brought in Delaware, but such claims are not even "colorable" under Prospect's own formulation of the Wencke factors.

**CONCLUSION**

For all of the foregoing reasons, the Prospect Entities' motion should be denied.

Respondent,  
Stephen F. Del Sesto, Esq., Solely in  
His Capacity as Permanent Receiver of  
the Receivership Estate,  
By his Attorneys,

/s/ Max Wistow  
Max Wistow, Esq. (#0330)  
Stephen P. Sheehan, Esq. (#4030)  
Benjamin Ledsham, Esq. (#7956)  
Wistow, Sheehan & Loveley, PC  
61 Weybosset Street  
Providence, RI 02903

---

<sup>13</sup> A copy of the applicable page of the LLC Agreement is attached hereto as Exhibit 2.

(401) 831-2700  
(401) 272-9752 (fax)  
mwistow@wistbar.com  
spsheehan@wistbar.com  
bledsham@wistbar.com

Dated: May 1, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 1st day of May, 2019, I filed and served the foregoing document through the electronic filing system on the following users of record:

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[mrusso@frlawri.com](mailto:mrusso@frlawri.com)

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

/s/ Max Wistow



# Exhibit 1

STATE OF RHODE ISLAND  
PROVIDENCE, SC

SUPERIOR COURT

CHARTERCARE COMMUNITY BOARD

:  
:  
:  
:  
:  
:

v.

C.A. No.: PC-2019-3654

SAMUEL LEE, ET AL

**STIPULATION AND CONSENT ORDER**

Prospect Chartercare, LLC ("PCC"), Prospect Chartercare SJHSRI, LLC, Prospect Chartercare RWMC, LLC, Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., and Prospect East Hospital Advisory Services, LLC (all collectively the "Prospect Entities"), and CharterCARE Community Board ("CCCB"), having stipulated and consented to the entry of this Order, it is hereby:

**ORDERED:**

1. 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. PCC shall not be required pursuant to this Stipulation and Consent Order to produce documents that are subject to the attorney-client privilege, joint defense privilege and/or attorney work product doctrine, provided that any objections to production of documents pursuant to this Order on the basis of attorney-client privilege, joint defense privilege and/or attorney work product doctrine are noted at the time for production, and any documents withheld from production based on such objections are identified in a privilege log in accordance with the requirements of Super. R. Civ. P. 26(b)(5)&(7). If the parties disagree over whether any information that CCCB requests is relevant for the valuation process, or that claims of attorney-client privilege, joint defense privilege and/or attorney work product doctrine should be overruled and production of documents should be compelled, the parties may seek a resolution of such dispute on an expedited basis from Judge Stern.

2. CCCB shall be authorized to share information produced by PCC with Stephen Del Sesto, the Receiver for St. Joseph's Health Services of Rhode Island Retirement Plan ("the Receiver"), and each of their respective attorneys, accountants and experts solely for the purpose of evaluating the "put option" so that the Receiver may participate fully and without restriction in the valuation and exercise of the "put option". All such information that PCC designates as "PCC-CONFIDENTIAL" will remain confidential

Filed in PSC Court  
Date 4/25/19  
Carin Miley *Deputy* Clerk

pursuant to the provisions of a Protective Order (attached), and such confidentiality shall continue unless CCCB and /or the Receiver obtain a court order in this case or in the federal court litigation filed by the Receiver lifting the confidentiality restriction.

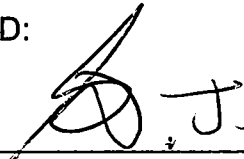
3. The parties to the LLC Agreement agree to modify the ninety (90) day period within which the put option created in Section 14.5 of the LLC Agreement can be exercised to the ninety (90) day period commencing September 21, 2019 and ending on December 20, 2019. If in the judgment of CCCB and the Receiver (or solely the Receiver if the settlement is approved by the Federal Court prior to such date) the option cannot in good faith be appraised and exercised by December 20, 2019 based on the information received, then, prior to the expiration of the period, CCCB (or solely the Receiver if the settlement is approved by the Federal Court prior to such date) reserves the right to seek a hearing on the already pending injunctive relief motion (filed on March 18, 2019) heard by the Court as soon as reasonably practical; and to ensure the exercise period does not expire while that motion is pending, the option exercise period shall be extended for an additional period extending for twenty (20) business days following the entry of an order by the Court on the request for a further extension of the option exercise period, provided, however that the extension during the pendency of the motion shall not exceed thirty (30) days from the date of the hearing on the request. The provisions of Section 14.6 of the LLC Agreement regarding the valuation process are not affected by this agreement except as expressly provided herein.

4. Except as to the motion for injunctive relief addressed above, a motion for relief from the confidentiality provision of the protective order, or a motion to enforce this Stipulation and Consent Order, the pending litigation commenced by CCCB will be stayed until twenty (20) days after any party to this agreement provides written notice to all parties withdrawing agreement to the stay or until December 20, 2019, whichever is later. Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., and PCC shall be free to proceed with their motion for leave to sue CCCB in connection with the LLC Agreement, but in the event that leave is granted, the Prospect Entities agree to stay that litigation until twenty (20) days after any party to this agreement provides written notice to all parties withdrawing agreement to the stay or until December 20, 2019, whichever is later. In the event that the Court denies the stay or does not grant the stay within the period for the defendants to respond to the case, the Prospect Entities agree to dismiss the case without prejudice, all defendants agree not to object to such dismissal without prejudice, and the parties to this agreement agree that the statute of limitations with respect to any claim that in plaintiffs' judgment may be impacted by the dismissal is tolled until twenty (20) days after any party to this agreement gives written notice to all parties withdrawing agreement to the stay or until December 20, 2019, whichever is later. CCCB, Roger Williams Hospital, St. Joseph Health Services of Rhode Island, and the Receiver agree that plaintiffs will not be prejudiced as a result of such voluntary dismissal.

5. The Prospect Entities, CCCB, Roger Williams Hospital and St. Joseph Health Services of Rhode Island agree not to bring any other proceeding against each other, or any of their officers, directors, agents, or attorneys until twenty (20) days after any party to this agreement provides written notice to all parties or until December 20, 2019, whichever is later. Notwithstanding the foregoing, the parties shall be free to assert

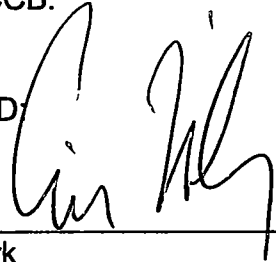
claims against each other arising out of future conduct or events that may hereafter arise. In addition, the Prospect Entities shall (a) be free to assert any claims, cross-claims and third-party claims in the pending federal court litigation and in the pending Rhode Island state court litigation filed by the Receiver in the event that the stay of the Superior Court case is lifted and (b) upon leave of the Court in the Receivership action, be free to file and pursue administrative proceedings relating to the hospitals arising out of federal court approval of the Receiver's settlement agreement with CCCB.

ORDERED:

  
\_\_\_\_\_  
Stern, J.

Dated: 4/25/19

ENTERED:

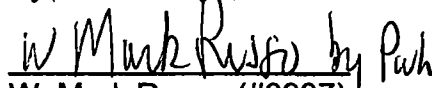
  
\_\_\_\_\_  
Dep. Clerk

Dated: 4/25/19

Stipulated to and presented by:


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

By its Attorneys,

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

By its Attorneys,

  
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[dwagner@shslawfirm.com](mailto:dwagner@shslawfirm.com)  
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CHARTERCARE COMMUNITY BOARD  
By its Attorneys,



---

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[rfine@crfillp.com](mailto:rfine@crfillp.com)

STEPHEN DEL SESTO,  
RECEIVER FOR THE ST. JOSEPH HEALTH  
SERVICES RETIREMENT PLAN

By his Attorneys,



---

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Benjamin Ledsham (#7956)  
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STATE OF RHODE ISLAND  
PROVIDENCE, SC

SUPERIOR COURT

CHARTERCARE COMMUNITY BOARD :

:

v. :

C.A. No.: PC-2019-3654

:

SAMUEL LEE, ET AL :

**STIPULATED PROTECTIVE ORDER**  
**REGARDING PROSPECT CHARTERCARE LLC**

Upon agreement of Plaintiff Chartercare Community Board (“CCCB”), Defendant, Prospect Chartercare LLC. (“PCC”) and third-party Stephen Del Sesto, Receiver (“Receiver”) for the St. Joseph Health Services of Rhode Island Retirement Plan (collectively the “Parties”) for Entry of a Stipulated Protective Order regarding the production of confidential and/or proprietary information, and the Court having reviewed and considered the proposed order, and good cause appearing therefor, it is hereby:

**ORDERED:**

1. **Scope.** This Order shall apply to documents produced by PCC pursuant to a Stipulation and Consent Order between the Parties relating to PCC’s production of certain financial information in connection with CCCB’s and/or the Receiver’s evaluation of the “put option” set forth in the Amended & Restated Limited Liability Company Agreement of Prospect Chartercare, LLC (the “PCC Operating Agreement”).

2. **Non-Disclosure of Confidential Material.** Except as hereinafter provided under this Order or subsequent Court Order, no Confidential Material may be

disclosed to any person except as provided in Paragraph 4 below. "Confidential Material" means any document produced by PCC that bears the legend "PCC-CONFIDENTIAL" to signify that it contains information deemed to be confidential by the producing party. It shall not include documents that CCCB or the Receiver obtains from another source.

3. **Duty of PCC in designating Confidential Material.** Documents shall not be designated as Confidential Material unless the documents are not publicly available, or contain personal identifying information (meaning social security numbers or other information of a non-public nature) of third parties.

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

read a copy of this Order and shall execute an Acknowledgment in the form of Exhibit 1 hereto, which copy shall promptly be provided to counsel for PCC.

5. **Confidential Information subpoenaed or requested by a court, administrative or legislative body.** If Confidential Information in the possession of a party or its counsel is subpoenaed or otherwise requested by any court, administrative or legislative body, or any other person purporting to have authority to subpoena or request such information, the party receiving the subpoena shall give written notice of the subpoena or request to counsel for PCC five (5) business days prior to the time when production of the information is required. In the event that the subpoena/request purports to require production of such Confidential Information on less than five (5) business days' notice, the party receiving the subpoena shall give immediate telephonic notice of the receipt of such subpoena or request, and forthwith deliver by hand, email, or facsimile a copy thereof, to counsel for PCC. Absent a further court order to the contrary, the party receiving the subpoena may comply with the subpoena or request.

6. **Declassification.** In the event that CCCB or the Receiver seeks to disclose Confidential Material in a manner outside of what is provided in Paragraph 4 or 5, CCCB or the Receiver may file a motion with the Court for a ruling that the document designated as Confidential Material is not or should not be entitled to such status and protection. Such motion may be heard upon no less than fourteen (14) days' notice to counsel for PCC. PCC shall have ten (10) days from the date such petition is filed to file an opposition to the petition defending the designation as Confidential Material. PCC shall have five (5) days in which to file a reply. Alternatively, CCCB and /or the Receiver may seek to obtain a court order in the federal court litigation filed by the Receiver against PCC lifting the confidentiality restriction.



7. **Filing of Confidential Material with the Court.** Confidential Material shall not be filed with the Court except under seal, when required in connection with motions as provided for in Paragraph 4 or 6, or any other reason or in connection with other matters pending before the Court for which such materials may be relevant. Any pleadings, motions, or other papers filed under seal shall be filed in accordance with the Rhode Island Superior Court Rules of Civil Procedure and any other applicable court rules or standing orders.

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

9. **No Waiver.**

- (a) Review of Confidential Material by any persons identified in Paragraph 4, 6 or 7 shall not waive the protections provided herein, or any objections to production of Confidential Material.
- (b) The inadvertent, unintentional, or in camera disclosure of Confidential Material shall not, under any circumstances, be deemed a waiver, in whole or in part, of claims of confidentiality. If

PCC inadvertently or unintentionally produces any Confidential Material without marking or designating it as such in accordance with the provisions of this Order, PCC may, promptly on discovery, furnish a substitute copy properly marked, along with written notice to the other persons that such document is deemed confidential and should be treated as such in accordance with the provisions of this Order. Each receiving person must treat such document as Confidential Material from the date such notice is received.

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

11. **Privilege Log.** PCC shall not be required pursuant to this Order to produce documents that are subject to the attorney-client privilege, joint defense privilege and/or attorney work product doctrine, provided that any objections to production of documents on the basis of attorney-client privilege, joint defense privilege and/or attorney work product doctrine are noted at the time for production, and any documents withheld from production based on such objections are identified in a privilege log in accordance with the requirements of Super. R. Civ. P. 26(b)(5)&(7).

12. **Survival.** The terms of this Order shall survive the conclusion of this matter. Counsel to CCCB and/or to the Receiver and/or to PCC may move the Court for an order addressing the post-conclusion treatment of Confidential Material.

13. **Amendment or Modification of Order.** This Order may be amended or modified by this Court upon notice to CCCB, the Receiver, and PCC.

ORDERED:

ENTERED:

\_\_\_\_\_

\_\_\_\_\_

Stern, J.

Dep. Clerk

Dated:

Dated:

EXHIBIT 1

STATE OF RHODE ISLAND  
PROVIDENCE, SC

SUPERIOR COURT

CHARTERCARE COMMUNITY BOARD :

v. :

C.A. No.: PC-2019-3654

SAMUEL LEE, ET AL :

**ACKNOWLEDGEMENT**

The undersigned declares and states as follows:

1. I have read the attached Order, dated April \_\_, 2019 ("Order"), understand its contents and hereby agree to comply therewith and to be bound thereby. In addition, I consent to the jurisdiction of the Rhode Island Superior Court for the purposes of enforcement of the Order.

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

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

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

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

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

Executed on \_\_\_\_\_.

Name: \_\_\_\_\_ (print or type)

Signature: \_\_\_\_\_

# Exhibit 2

arbitrator's final rulings, and to pursue injunctive relief, in a court of competent jurisdiction in the State of Rhode Island.

(c) Waiver of Trial by Jury or Judge. EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHTS IT MAY HAVE TO DEMAND THAT ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR, IN ANY WAY RELATED TO THIS AGREEMENT OR THE RELATIONSHIPS OF THE PARTIES HERETO BE TRIED BY JURY OR A JUDGE. THIS WAIVER EXTENDS TO ANY AND ALL RIGHTS TO DEMAND A TRIAL BY JURY OR JUDGE ARISING FROM ANY SOURCE INCLUDING, BUT NOT LIMITED TO, THE CONSTITUTION OF THE UNITED STATES OR ANY STATE THEREIN, COMMON LAW OR ANY APPLICABLE STATUTE OR REGULATIONS. EACH PARTY HERETO ACKNOWLEDGES THAT IT IS KNOWINGLY AND VOLUNTARILY WAIVING ITS RIGHT TO DEMAND TRIAL BY JURY OR JUDGE.

17.5 Specific Performance. Notwithstanding anything to the contrary contained herein, 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. Accordingly, in addition to any other right or remedy to which the non-breaching parties may be entitled, at law or in equity, they shall be entitled to enforce any provision of this Agreement by seeking, from a court of competent jurisdiction in the State of Rhode Island, a decree of specific performance and temporary, preliminary and permanent injunctive relief to prevent breaches or threatened breaches of any of the provisions of this Agreement, without posting any bond or other undertaking.

17.6 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Members, and their respective heirs, legal representatives, successors and permitted assigns; provided, however, that nothing contained herein shall negate or diminish the restrictions set forth in Articles XIII or XIV hereof.

17.7 Construction. Every covenant, term, and provision of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any Member. The failure by any party to specifically enforce any term or provision hereof or any rights of such party hereunder shall not be construed as the waiver by that party of its rights hereunder. The waiver by any party of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof.

17.8 Time. Time is of the essence with respect to this Agreement.

17.9 Waiver of Partition. Notwithstanding any statute or principle of Law to the contrary, each Member hereby agrees that, during the term of the Company, it shall have no right (and hereby waives any right that it might otherwise have had) to cause any Company property to be partitioned and/or distributed in kind.