SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IN RE: ADVANCE HEALTH CARE DIRECTIVE OF SUMNER M. REDSTONE	CASE NUMBER: BP 168725 *TENTATIVE* RULING ON MOTIONS TO DISMISS PETITION, STRIKE SUPPLEMENTAL DECLARATIONS AND SEAL PORTIONS OF FILE Date: February 29, 2016 Time: 8:30 a.m. Dept.: 79

At the above-referenced date and time, the motions of Sumner M. Redstone ("Redstone") to dismiss the petition of Manuela Herzer ("Herzer") and to seal portions of the court file, and the motion of Herzer to strike the Supplemental Declarations filed in support of the dismissal motion, came on regularly for hearing before the undersigned. Greenberg, Glusker, et al., by Pierce O'Donnell, appeared on behalf of Herzer. Loeb & Loeb, by Gabrielle A. Vidal, appeared on behalf of Redstone.

The Court has reviewed the motions, the oppositions, the replies, the sur-reply and the objection thereto, the accompanying documents to each, including the requests for judicial notice and supplemental declarations, as well as ruled on the Evidentiary Objections. In addition, the

Court reviewed the pleadings submitted by the Los Angeles Times, the Hollywood Reporter and Variety (collectively, "the Press") on the motion to seal. Based upon all of the foregoing, and hearing oral argument of counsel, the Court rules as follows:

1. THE MOTION TO DISMISS

The motion to dismiss is filed on the basis that Herzer's petition is not "reasonably necessary to protect the interests of the patient" within the meaning of Probate Code sec. 4768. To decide this motion, it is important initially to note the precise allegations of the petition. Herzer's petition seeks a determination under two separate sub-sections of Probate Code sec. 4766: First, Herzer seeks a determination under (a) "whether or not the patient has capacity to make health care decisions." Second, she seeks a determination under (b) "whether an advance health care directive ("AHCD") is in effect or has terminated." As discussed below, the analysis for each sub-section of sec. 4766 differs.

The following discussion will first address the relevant legal principles and then outline the factual contentions.

a. Interpreting the scope of Probate Code sec. 4768

Herzer argues initially that the Court does not need to reach the merits of the petition: She contends that the statutory basis for this motion, sec. 4768, is premised solely on whether the petition was filed in an improper forum, as opposed to whether the petition is in the best interests

of the patient.[1] Herzer argues that the "interest of the patient" is coupled in the same sentence as dismissal for improper forum without a comma and hence should be read together with the forum concern. Herzer asserts that this section is ambiguous when taking into account the surrounding statutes.[2] In particular, she points to sec. 4763(c), which provides that venue is proper in the county that is "in the patient's best interests" (if not where the patient or agent resides), as a way to show that the concerns are coupled. Finally, she seeks to show that because the legislative history to sec. 4768 makes no mention as to what is meant by "the interests of the patient" independent of discussion of forum, the two must go hand in hand.

On the other hand, Herzer does not address the fact that there is a "may" and "shall" in the same sentence, that the first part of the sentence is discretionary and the latter part mandatory and therefore that presumably the petition might be dismissed solely based on the first part of the sentence. Otherwise, there would be no reason to have both "may" and "shall" in the same sentence. Based on the foregoing, a literal reading of the statute would indicate that the two concerns can be treated separately. There are no cases discussing the issue. In addition, Herzer's reference to other provisions in the Probate Code that have similar forum provisions is not as clear as she makes out.[3] Finally, the argument based on legislative history is misleading as there is no discussion of the meaning of "the interests of the patient" at all.

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[1] Probate Code sec. 4768 states: "The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient and shall stay or dismiss the proceeding in whole or in part when required by Section 410.30 of the Code of Civil Procedure."

[2] Herzer relies on the maxim of "noscitur a sociis" to construe the statute in this way. As discussed below, Redstone adopts the rule that a court may not "insert what has been omitted" or "omit what has been inserted" to analyze the statute. The Court does not rely on either concept.

[3] Herzer points out that the language in sec. 4768 is almost identical to the language in sec. 4543 (pertaining to powers of attorney) and that both provisions contain a clause requiring dismissal where dismissal is required by Code of Civil Procedure ("CCP") sec. 410.30. She also points out

The Court, however, does not need to decide this novel issue. Even assuming the meaning of sec. 4768 is as the motion asserts, the Court cannot, at least now, hold that that this proceeding is not reasonably necessary to protect Redstone's interests as a patient. As set forth below, there are numerous factual disputes, taking into account the principles to be followed, which if one or more is determined in favor of Herzer at trial would have made the petition necessary to protect that interest.

b. What rules govern a decision under Probate Code sec. 4768

This motion to dismiss is similar to a motion for summary judgment where it would have the effect of disposing of the case before trial. A motion for summary judgment cannot be granted if there is a triable issue of material fact. (CCP sec. 437c(c)) (By contrast, this motion is not like a demurrer where it depends on facts as opposed to allegations in the pleadings.) Therefore, the Court takes the summary judgment rules as at least a starting reference point in the absence of any statutory or case law guidance. However, the Court does not have to just rely on the rationale behind summary judgment to determine how to rule on this motion. Other

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that the Law Revision Commission comments following secs. 4768 and 4543 both provide that the court has authority to dismiss or stay a proceeding if, in the interest of substantial justice, the proceeding should be heard in a forum outside the state. However, the language "may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of [x]" is present in two additional Probate Code provisions. Sec. 17202 provides: "The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary." Sec. 19026 provides: "The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or any beneficiary of the trust." Neither sec. 17202 nor sec. 19026, however, contain any references to forum, to venue, or to CCP sec. 410.30.

applicable law still requires that where there are disputed factual issues that the Court cannot decide based only on declarations, a trial is necessary is necessary to decide the petition:

Initially, Probate Code sec. 1000 provides generally that rules applicable to civil actions apply only insofar as the Probate Code does *not* provide applicable rules. Sec. 1000 further provides: "All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions."

However, the Probate Code does have applicable provisions: First, sec. 1022 provides: "An affidavit or verified petition shall be received as evidence when offered in an *uncontested* proceeding under this code." (Emphasis added) Second, sec. 1046 provides: "The court shall hear and determine any matter at issue and any response or objection presented, consider evidence presented, and make appropriate orders."

In *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309, the Court applied these sections to hold that that it was reversible error for a probate court *not* to have held an evidentiary hearing on a motion that was filed where one side had requested an evidentiary hearing and the declarations offered irreconcilable contentions needing a trial. The Court further held that affidavits and verified petitions may *not* be considered as evidence in contested probate hearings unless the parties do not object to the use of affidavits and both parties adopt that means of supporting their respective positions. That is the situation here in this contested proceeding. Though Herzer relies on declarations, as required to oppose the motion, she also makes clear her position that the motion turns on disputed facts requiring a trial.[4]

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[4] See *Estate of Lensch* (2009) 177 Cal.App.4th 667, 676 (failure to request evidentiary before motion in probate court, which is not required under Rules of Court, Rule 3.1103(b), does not amount to waiver of right to evidentiary hearing)

Furthermore, both parties assume that a motion under sec. 4768 would necessarily be decided *before* trial. Though admittedly an inference can be drawn that this is likely what the Legislature intended, sec. 4768 does not itself state when during the proceeding that the motion would be heard. This is not to say that the Court is finding that the motion may not be brought before trial. However, by the same token, there is also nothing to indicate that as in this case where there are disputed facts that it should not be decided *at* trial. On a motion based on improper forum, for example, where that issue may not be based on contested facts, it would make sense that a motion might be heard at the outset. Hence, the Legislature uses the word "shall" in the statute for a dismissal based on grounds of forum. On the other hand, where here the *discretionary* part of sec. 4768 is in question, there is nothing in this division of the Code related to advance health care directives to suggest that the Court should not apply otherwise applicable rules in the Probate Code, recited above, under its broad power to control the proceedings under CCP sec. 128.[5]

Therefore, the rule to be followed below will essentially be whether there are disputed material facts which depend for decision on hearing testimony.

[5] Indeed, it is not uncommon at trials that a variety of motions might be made: Most commonly, motions in limine are brought to exclude evidence. Motions for judgment in a bench trial under CCP sec. 631.8 can be brought at the conclusion of the plaintiff's case and avoid a defendant having to put on its case. (Unlike a motion for nonsuit, a motion for judgment is *not* limited to the legal sufficiency of plaintiff's claims. Rather, relevant here, the judge can also *weigh* the *credibility* of the evidence. (*County of Ventura v. Marcus* (1983) 139 Cal.App.3d 612, 615)) Motions for judgment on the pleadings may also be brought at trial under certain circumstances. There are likely other examples.

c. How does Probate Code sec. 4658 impact the nature of this proceeding?

Prior to analyzing the facts, however, the Court needs to address Redstone's argument that the opinion of his primary physician, Dr. Richard Gold, that Redstone has capacity, is controlling here, under Probate Code sec. 4658, and obviates the need for this proceeding.

Probate Code sec. 4658 provides:

> "Unless otherwise specified in a written advance health care directive, for the purposes of this division, a determination that patient lacks or has recovered capacity, or that another condition exists that affects an individual health care instruction or the authority of an agent or surrogate, *shall be made by the primary physician.*" (Emphasis added)

While sec. 4658 contains mandatory "shall" language, it is not the final word on a patient's capacity: Sec. 4658 merely provides the authority in the usual instance for a primary physician to have the responsibility to determine whether a patient lacks capacity and whether an advanced health care directive is to take effect – without need for court involvement. No court intervention is required to give effect to a determination under sec. 4658. (See sec. 4750 ["ACHD effective and exercisable free of judicial intervention"].) Nothing in sec. 4658, however, states that parties are precluded from obtaining a court order as to a patient's capacity and whether or not an advanced health care directive is in effect -- as specifically provided for in sec. 4766.[6]

The language of sec. 4658 also does not state that a primary physician's capacity determination is *conclusive* in a judicial proceeding or that a court is bound by the primary physician's opinion concerning capacity at trial. To interpret sec. 4658 to mean that a court is

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[6] Indeed, even Redstone acknowledges that the court can have a role in a "very rare case" and quotes on page 10 of the reply a Law Revision Commission comment that states in part: "But if there is a question or dispute about capacity, the courts are empowered to make capacity determinations."

bound by the decision of a primary physician might lead to an unintended result; the court would be obligated to issue orders based solely upon the statements of a primary physician regardless of any other relevant evidence.

Moreover, sec. 4766(a), by its plain language, contemplates judicial review of capacity to make a health care decision. If the primary physician's opinion was conclusive, sec. 4766(a) would presumably have been limited to determinations related to capacity where there is no primary physician. However, there is no such limitation in the statute.

In addition, "[f]or every wrong there is a remedy." (Civil Code sec. 3523) If a patient, or here the person whom the patient had named as his agent, contends that the primary physician made a determination without adequate information, or by mistake or for improper reason, the patient (or agent) must have an avenue for relief and a potential remedy. The Law Revision Commission comments to sec. 4766 state: "A determination of capacity under subdivision (a) is subject to the Due Process in Competency Determinations Act. See Sections 810-813." Sec. 813(a) sets forth specific standards to be used for a "judicial" determination of whether "a person has the capacity to give informed consent to a proposed medical treatment." In short, it can be without question that the Legislature contemplated judicial review of a patient's capacity to give informed consent when it permitted individuals to petition for a judicial determination of capacity.

This interpretation of sec. 4658 is consistent with other Probate Code sections pertaining to advanced healthcare directives: Sec. 4752 states that the ability to petition the court for judicial intervention "is not subject to limitation in an advance health care directive." Sec. 4760 specifies: "The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise

provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by Section 128 of the Code of Civil Procedure."

In sum, while sec. 4658 provides that a primary physician is generally empowered to decide issues of capacity without the need for judicial intervention, this does not also mean that various persons, including here a patient's agent,[7] cannot come to court for a judicial determination related to capacity if there is some question related to the primary physician's determination.

Redstone also argues, however, that the courts should not second guess the trained opinions of physicians concerning medical issues and that the Legislature has stated in sec. 4650(c) that: "in the absence of controversy, a court is normally *not* the proper forum in which to make health care decisions...." (Emphasis added) Further, the same Law Revision Commission comment cited before, notes: "This should be done only as a last resort in the highly unusual case. Courts do not have the financial resources or necessary expertise to get involved in routine capacity determinations."

The Court agrees that though the law allows persons to seek judicial intervention, for the reasons stated above, "in the absence of controversy," the primary physician is the one who determines if the patient has capacity. Here, in regard to the allegation in sec. 4766(a), as to whether Redstone has capacity to make a health care decision, Redstone is correct that Herzer would have to show that there is a "controversy" for the Court to not follow Dr. Gold's determination as Redstone's primary physician.

This would hold true even as to the decision to change his health care agent – which is itself a health care decision. Indeed, sec. 4609, in broadly defining capacity – which the primary

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[7] Sec. 4765(d) provides that the patient's agent is entitled to file a petition under sec. 4766. Sec. 4765(i) also allows it to be filed by "[a]ny other interested person or friend of the patient."

physician would determine – the Legislature intended that this include revoking an AHCD.[8] As the Law Revision Commission Comments to the 2001 Amendment state:

> "Section 4609 is amended to generalize the capacity definition to avoid the implication that the definition would only apply in situations where there is proposed health care. Thus, the definition applies to an individual's capacity to make or revoke an advance health care directive, as well as to the making of a health care decision."

For these reasons, the Court rejects Herzer's argument that sec. 4658 relates only to the primary physician's determination whether the AHCD is "activated."[9]

As set forth below, however, there is substantial "controversy" in this unusual case where Redstone's capacity is in dispute.

Moreover, the even if the Court were in error concerning sec. 4766(a), for sake of argument, the allegation of the petition in sec. 4766(b); namely, that the AHCD naming Herzer remains in effect and was not revoked or terminated, this is not an issue that is necessarily based upon the judgment of a physician or equivalent to a health care decision. This determination is rather a legal issue that is within the routine work of the Court – determining the validity or legal effect of a document. For this reason, Herzer is not limited on this issue to necessarily relying on medical expertise and presumably may argue, as she does, that the AHCD was revoked as a result of undue influence. Therefore, sec. 4658 does not preclude Herzer from pursuing this petition.

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[8] Sec. 4609 states: "'Capacity' means a person's ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives."

[9] Herzer's reliance on the language in the AHCD for when the directive is activated is misplaced. The issue is not activation but the role of the primary physician to determine capacity under the statute.

d. How are the interests of the patient protected here?

The opposition raises a plethora of disputed factual issues establishing a "controversy" relating to Redstone's capacity and the medical care he is receiving which *if* proven would show that this proceeding was reasonably necessary to protect his interests as a patient.[10]

First and foremost, notwithstanding that a person is presumed competent, under Probate Code sec. 4657, and the testimony of Dr. Gold, Redstone's primary physician, stating Redstone has capacity, Herzer has filed a thirty seven page opinion of Dr. Stephen Read, who after a personal evaluation of Redstone, found that Redstone lacked mental capacity when he allegedly revoked the AHCD. This report provides considerable factual details, which are part of the record and which the Court will not now repeat, sufficient to raise a reasonable question about whether Redstone lacks capacity. Suffice it to say, though not conclusive as to capacity, that those details are difficult to read in describing how this man is hanging on to life. Significantly, Redstone does not now seek to question the factual foundation for Dr. Read's opinion – which is what creates the factual issue necessitating a trial.

The motion argues, instead, that this petition should not rest on a paid expert witness.[11] However, even Dr. James Spar, Redstone's own expert on capacity (who like Dr. Gold found Redstone had capacity), acknowledges that his colleague, Dr. Read, also a geriatric psychiatrist, is well qualified to provide a report on Redstone. This is not a case where the petition is

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[10] It may be that at trial Herzer does not establish facts necessary to prove this point and therefore why the Court denies this motion, without prejudice.

[11] By way of analogy, however, a declaration of an expert, based on sufficient facts related to the professional duty at issue, as here, will be sufficient to defeat a summary judgment motion. See e.g., *Hanson v. Grode* (1999) 76 Cal.App.4th 601

supported merely by lay testimony seeking to refute a primary physician. Further, all the doctors here are presumably paid for their services and the motion itself was based in part on Redstone's expert witness, Dr. Spar, and therefore this argument has little weight.

The motion argues further that Dr. Gold's opinion should suffice and that no geriatric psychiatrist's testimony is needed. However, this argument is belied by the motion which again relies on Dr. Spar, not just Dr. Gold. Until his deposition, it was not clear to Dr. Gold when the AHCD should be activated or that he was responsible for doing so. Further, the fact that Dr. Gold himself consulted with Dr. Hart Cohen, a neurologist, to advise him about Redstone's mental status shows that Redstone's mental status is not as clear as it could be. While the primary physician does not have to be a psychiatrist, where the psychiatrists themselves cannot agree, it raises a question whether someone who is *not* a psychiatrist would have a more informed opinion than a psychiatrist. Presumably, for this reason, Dr. Gold rightfully consulted Dr. Cohen. However, Dr. Cohen also had concerns about Redstone's mental status.

Hence, the factual issue here is evidently one of *degree*; i.e., whether the subcortical neurological disorder from which Redstone suffers is causing mild or moderate cognitive impairment; not the simpler question of whether there is or is not impairment.

It will therefore be the Court's primary task at trial to determine which of these physicians most accurately states Redstone's mental status. Depending on which one the Court concludes is closest to describing his situation, the "interest of the patient" will be impacted: If Redstone lacked capacity, then arguably Herzer should have remained in charge of his health care, as she had been. If Redstone had and has capacity, then arguably Redstone remains in charge of his own healthcare and was able to choose others to look after him if necessary.

Second, the motion and Shari Redstone ("Shari"), Redstone's daughter,[12] argue that Herzer has no interest in Redstone's medical care and that her only interest is that on the same date as Redstone allegedly revoked the AHCD, Redstone also allegedly revoked a very significant gift to Herzer. If Redstone did not have the capacity to revoke the AHCD, so Herzer's argument will go, he might not have had the capacity to revoke the gift.[13] Herzer, by contrast, argues that she does care for Redstone's health, independent of her financial interests, and has done so for many years -- without any help from Redstone's family. Herzer contends, furthermore, that the reason Redstone allegedly revoked the AHCD was Shari's continuing financial interest in obtaining more of her father's estate than he had already given her – which it is without dispute she and Redstone had been in disagreement over for many years – and specifically was seeking to avoid an obligation to pay Redstone's estate taxes by Redstone giving money to charity rather than Herzer. Herzer supports her declaration with considerable factual detail, including a letter from Redstone attached thereto as Ex. A, which makes it hard to simply disregard what Herzer contends -- as the motion would have the Court do.

In summary, if the motion is correct, Herzer has no business looking after Redstone. If the motion is wrong, Redstone will be free of the alleged undue influence of his daughter.[14]

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[12] The Court uses her first name herein only to easily differentiate her from her father and without intending any disrespect.

[13] This Court, however, is not addressing, as Dr. Read seeks to do, the validity of other documents signed that day. Whether capacity for purposes of naming an agent for an AHCD is the same as capacity to revoke a gift is an issue for another day.

[14] By the same token, this argument may work both ways: Redstone might also be or has been under undue influence from Herzer.

Necessarily, the Court cannot determine the validity of these competing claims of motive without seeing the witnesses and hearing testimony.

Third, the motion argues that Herzer does not have Redstone's best interests in mind where her attorneys have revealed in this case compromising personal information about Redstone. In response, Herzer argues that in September 2014 she saved Redstone's life, over Redstone family objection, by putting Redstone on a feeding tube when he then needed one – thereby seeking to prove she cares about him more than his daughter.[15] Dr. Gold is apparently also in agreement that Herzer saved Redstone's life.

As in many cases, there may be elements of truth to what both sides say. Human nature is complicated. This is why courts hold trials: to weigh competing claims, to evaluate credibility of witnesses testifying in front of the Court and to allow for cross-examination that may bring up issues not otherwise disclosed. In this way, the adversarial process can allow for *all* the truth to come out. To these ends, "[o]ne of the elements of a fair trial is the right to offer relevant and competent evidence on a material issue." (3 Witkin, *Cal. Evid.* 5th (2012) Presentation, § 3, p. 29.) "[P]arties in civil proceedings have a due process right to cross-examine and confront witnesses." (*In re James Q.* (2000) 81 Cal.App.4th 255, 263.) "[P]arties have the right to testify in their own behalf [citation], and a party's opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court. [Citations.]" *(Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357.) "Denying a party the

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[15] The Court recognizes that if there was any "objection" here it was likely a complicated decision about Redstone's future quality of life, after consideration of the medical risks involved and was doubtless not a situation where the family did not have Redstone's best interests in mind; however, at the same time, the Court does not know how if at all this factors into why Redstone did not make Shari his AHCD agent.

right to testify or to offer evidence is reversible per se. [Citations.]" (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677.)

The foregoing authorities therefore entail that making necessarily difficult judgment calls about people's motives and whether they are acting only in their own self-interests requires a trial. This case has already proven through discovery that often self-serving declarations, prepared with the assistance of or by counsel, do not always tell the whole truth.

Relatedly, Redstone argues that putting Herzer back into the position she seeks would be contrary to Redstone's purported wishes.[16] This in any event asks the Court to assume too much: If the AHCD naming Herzer was effectively revoked, the Court will not need to reach this issue. If the AHCD naming Herzer is still effective, what role she would have, if any, will be an issue the Court will have to address at trial. Though it would not necessarily entail Herzer returns to Redstone's home, the Court recognizes that the situation here is not simple.

Fourth, the opposition puts forth sufficient evidence to raise a concern over who, if anyone, is now in charge of caring for Redstone. The papers do not appear in dispute that Redstone is in need of care to look after him physically, and in particular with respect to his difficulty swallowing - even assuming he has capacity. On the one hand, Shari tells the Court that she is available at a proverbial moment's notice, but nonetheless she still lives in Massachusetts – not around the corner -- even with the ability to come here quickly. Shari also states she has patched things up with her father since Herzer was removed; however, leaving

[16] This claim is without sufficient evidentiary support. There is no declaration from Redstone himself filed in this case.

aside the questioned motives discussed above, her declaration itself raises more questions than it answers:

The Court finds it perplexing that Redstone still puts Phillipe Dauman, and for that matter, Thomas Dooley, the COO of Viacom, ahead of his own daughter as his agent in case of his incapacity. The very detailed, seemingly negotiated, letter of December 18, 2015 that allows Shari merely input into their decisions, together with the difficult history between father and daughter (that Shari herself acknowledges), does not give the Court confidence that things are all as "patched up" as claimed – even if improved since Herzer's departure. It has to be an unusual situation where a parent still at this late date puts his East Coast business colleagues ahead of an adult child, or for that matter adult grandchildren, in terms of his care.

Fifth, the *current* person in charge of Redstone's care, if needed, is Dauman – whom the Court understands to be in New York City. The motion does not attach any declaration relating to what care or supervision he is or could provide under the circumstances. Without that information, or his agreement to the taking of his deposition (which a New York court had to order), the Court does not know how available he is to care for this ninety two year old man in Los Angeles. The Court does not see how a person in charge of a public company in New York has the time or ability to look after Redstone even assuming his best of intentions.

The foregoing is significant where the opposition presents some evidence to show there is an ongoing feud between the nurses related to the care Redstone is receiving: One nurse, Benjamin Ferrer, contends in a letter dated October 26, 2015, that the other nurse, Jeremy Jagiello, had told Redstone that Herzer had lied to and stolen from him, and hence the reason for her forced departure, and further is exercising an undue amount of control over Redstone's care.

On the other hand, it is unclear if Ferrer is merely a disgruntled employee, who according to Dr. Gold may be "jealous" of the hours worked by Jagiello, and is making these claims as way to work additional hours and secure better pay. Which of these stories is true the Court cannot now determine from declarations alone.

What is more apparent is that nobody is sufficiently in charge of the ongoing care Redstone needs – again whether he does or does not have capacity. It is at least alleged that Dr. Gold has not been enough in command of Redstone's daily medical care that it could be delegated to him. Moreover, Dr. Gold is in any event not under any of the AHCD's Redstone's agent. Herzer says these conflicts were not the situation when she was still living at Redstone's home. Who is in charge of his care is critical to Redstone's interests "as a patient." The medical care itself is not the issue. If a person does not ask for medical help, a doctor may not know to provide it. Moreover, even in the provision of medical care, patient input is critical to ensuring that the correct treatment is provided. Further, the nurses need to be able to report to someone. Where it is without dispute that Redstone has difficulty communicating, and has need of a speech therapist, Ann Lefton, having a person speak for him who can articulate his medical needs is essential.

Finally, Herzer has submitted media accounts of a public disagreement between Dauman and Shari related to business issues, including Shari not wanting Dauman to be in charge of one of the businesses that Redstone had previously run. To the extent those accounts have any truth

to them,[17] the Court does not know if with those seemingly strained relations, they can or do work together on the pressing issue of Redstone's present medical needs.

In summary, where the very broad concern of being "reasonably necessary to protect the interests of the patient" is the issue on this motion, this Court cannot rule that this is not now "in controversy." (Probate Code sec. 4650(c)) Whether Redstone has the person who he wants in charge of his care is highly controverted.

2. THE MOTION TO STRIKE

The issue here is one of whether Supplemental Declarations that Redstone filed after the motion was filed can properly be considered. The parties agree that this issue turns on whether there is any prejudice to Herzer.

Herzer has been able to again take the deposition of Dr. Gold. Hence, there appears to have been no prejudice to the filing of his supplemental declaration before the opposition was due.

Though the reason why Shari's deposition was not taken is disputed, ultimately it does not matter that Herzer could not take her deposition to oppose the motion. She is not prejudiced: Herzer has been able, through her own declaration and the attachments, to put what Shari stated in perspective.[18] Further, by submitting her own rebuttal declaration, Herzer has effectively

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[17] The Court relies on these out of court statements only for purposes of showing the state of mind of the declarants; not as to the truth of the underlying statements.

[18] Though Shari indicates, understandably, that her father wants this matter resolved promptly, Herzer's declaration in support of the opposition shows that the event in question here is part of a series of long held related disputes that it should not come as a surprise to those involved would land in court and need a trial to resolve.

waived any objection. The Court cannot consider Herzer's responding declaration without having read Shari's.

The motion is denied.

3. THE MOTION TO SEAL

A stipulated protective order, filed January 9, 2016, already provides for the *conditional* sealing of sensitive documents in connection with ongoing discovery. Where there may be limited additional discovery before trial, this order can stay in place at least at this time. The same order should apply to all discovery. For solely discovery purposes, the rules for sealing of records are not applicable. (California Rules of Court ("CRC"), Rule 2.550(a)(3))

However, when it comes to the use of discovery "for adjudication of matters other than discovery motions or proceedings" under the same above-referenced rule, the rules related to sealing of records *do* come into play – such as this motion to dismiss. In view of the concerns stated in those rules, the Court cannot now make the requested final order sealing discovery where the motion to dismiss makes reference to those records and the trial will undoubtedly also. The Court also does not want any sealing of records to interfere with what evidence may be received at trial that is by its nature public. Indeed, the protective order provides: "The parties shall meet and confer regarding a proposal to the Court regarding the procedures for use of Confidential Materials at trial. Issues involving the protection of Confidential Materials during trial will be presented to the Court prior to or during the trial." (¶ 18.) Here, the parties have not advised the Court of what meet and confer there has been in connection with use of any confidential matters at trial nor offered a proposal to the Court. The Court orders the parties in

that proposal to specify **each document** sought to be sealed and for what reason, as opposed to proposed sealing of broad categories of documents. Hence, the motion to seal needs to address these concerns prior to the Court being able to decide it.

In addition, the Press submitted briefs on February 26, 2016 seeking to intervene on this motion and have asserted various positions that the Court cannot decide, if they are allowed to intervene, without also obtaining the parties' input - which the Court does not yet have - including unsealing already conditionally sealed records.

In connection with the briefing outlined below, Parties and the Press shall address at least the following issues:

1. Is the "public figure" standard relevant in this unique type of proceeding that Redstone did not initiate?
2. What confidentiality should be accorded traditionally private medical information of a patient in light of the public nature of court proceedings?
3. Do the sealing rules apply if medical information is confidential where CRC, Rule 2.550(a)(2) provides: "These rules do not apply to records that are required to be kept confidential by law."
4. How should the Court balance the competing interests as a practical matter in terms of the particular documents at issue? Do the rules differ depending on the document?

CONCLUSION

Nothing herein should be construed to mean this Court has made any finding as to Redstone's mental capacity – which issue is reserved for decision after trial – or for that matter

any of the factual contentions raised in support of or in opposition to the motion. The Court is merely finding that in view of the several relevant issues raised, for which conflicting declarations have been offered in support, that the Court may not permissibly dismiss the case short of a trial.

The Court denies the motion to dismiss, *without prejudice*, and denies the motion to strike the Supplemental Declarations.

The Court files herewith its rulings on Redstone's 127 Evidentiary Objections. These rulings are not filed under seal – as Redstone proposed. The Court finds no good cause to do so.

The Court continues this motion to seal to March 18, 2016 at 8:30 a.m., to which date the Court also continues the hearing on the *second* motion to seal filed by Redstone. In addition, the Court advances the hearing on a *third* motion to seal now set for March 30, 2016 to March 18. In connection with that hearing, the Court orders the parties to submit the above-referenced proposal for use of any confidential records at trial. At that time, the Court will also decide whether the Press may intervene in this case, and if so, whether the current order related to conditional designation of confidential records should be modified to allow any unsealing of conditionally sealed records. The parties shall file by March 9, 2016 their positions related to the Press' requests, as well as the above-referenced issues and Herzer, any opposition to the second and third motions. Any reply briefs shall be filed by March 14, 2016.

The Court intends to now schedule a prompt trial after conferring with counsel as to what further discovery may be taken to prepare for trial.

DATED: February 29, 2016

DAVID J. COWAN
Judge of the Superior Court