

**STATE OF CONNECTICUT  
OFFICE OF HEALTH STRATEGY**

IN RE: ACQUISITION OF 51% OF	)	
SOUTHWEST CONNECTICUT	)	DOCKET NO. 20-32411-CON
SURGERY CENTER, LLC	)	
	)	
	)	
	)	AUGUST 1, 2022

**OBJECTION TO PETITION FOR INTERVENOR STATUS**  
**OF THE WILTON SURGERY CENTER, LLC**  
**& MOTION TO STRIKE TESTIMONY AND ARGUMENTS**

Southwest Connecticut Surgery Center, LLC (“SCSC”) and HHC Surgery Center Holdings, LLC (“HHC Surgery”) (collectively the “Applicants”), Applicants in the above-referenced Certificate of Need (“CON”) proceeding under Docket No. 20-32411-CON (the “CON Proceeding”), hereby object to the Wilton Surgery Center, LLC’s (“WSC” or the “Petitioner”) Petition for Intervenor Status, dated July 29, 2022 (the “Petition”). Applicants alternatively move to strike certain testimony and arguments presented by WSC, to the extent that the Office of Health Strategy (“OHS”) allows WSC to participate in the CON Proceeding over Applicants’ objection.

SCSC owns and operates a licensed outpatient surgical facility known as Southwest Surgery Center of Connecticut, located at 60 Danbury Road in Wilton (the “Center”). The CON Proceeding concerns the Applicants’ request for permission to transfer a single seat on the SCSC Board of Managers to HHC Surgery, giving HHC Surgery equal governance control of the Center with Southwest Connecticut Surgery Center Holdings, LLC (“SCSC Holdings”), an entity jointly owned by Constitution Surgery Alliance, LLC (“CSA”) and various physician and physician practice investors. WSC claims that it has interests affected by this proposal, that it

can assist OHS in assessing the CON Application, and that its participation in the public hearing on this matter is in the interest of justice and will not impact the orderly conduct of these proceedings (Petition, p. 2). On the contrary, the basis for WSC's Petition and its lead argument is the lack of clear public need for the Center itself, something OHS has no authority to consider, let alone determine in a CON Application for a change in governance control of a legally authorized, duly licensed existing healthcare facility. OHS should not allow WSC, whose Petition is replete with irrelevant information, factual omissions, and specious legal arguments, to waste the agency's time and resources by using the CON Proceeding to advance its own agenda, while offering nothing of substance on the issues that are actually before the agency for resolution.

### ***I. Relevant Background***

The Applicants filed a CON Application on November 19, 2020, under Section 19a-638(a)(2) of the Connecticut General Statutes, requesting permission to transfer ownership of SCSC. Specifically, the proposal involved the transfer of 51% of the equity interests in SCSC to HHC Surgery. Along with the transfer of equity interests, the Applicants' proposal included giving HHC Surgery equal governance control with SCSC Holdings of both SCSC and the Center. The CON Application was deemed complete by OHS on February 17, 2021. It will have taken the agency 533 days (nearly 18 months) to hold a public hearing on this matter.

In September of 2019, OHS issued a CON Determination (Docket No. 19-32325-DTR) authorizing the reorganization of Plastic Surgery of Southern Connecticut, LLC ("PSSC") to allow for a syndication of ownership (the "2019 CON Determination"). The 2019 CON Determination separately authorized relocation of the Center from its existing location at 208 Post Road in Westport to a new location in Westport or in the surrounding towns of Wilton or

Norwalk. As OHS is aware, a CON Determination must be requested prior to the relocation of a healthcare facility and the facility must show that *the relocation itself* will not result in a substantial change in patient population or payer mix (*see* Conn. Gen. Stat. Sec. 19a-639c) (“... in such letter the health care facility shall demonstrate to the satisfaction of the unit that the population served by the health care facility and the payer mix will not substantially change *as a result of the facility’s proposed relocation.*”) (emphasis added). PSSC made such a showing and then-OHS Deputy Director/Chief of Staff Kimberly Martone issued a CON Determination concluding that no CON was required for the relocation. Note that the syndication of membership interests by PSSC *did not require the filing of a CON Determination request or any proof that said syndication would not impact patient population or payer mix.* PSSC included the syndication in its CON Determination request as a courtesy and in the interest of full transparency, but it was entitled by law to move forward with the proposed syndication without OHS’s review. Notably, OHS decided separately from the relocation determination that CON approval was not required for the transfer of ownership (“The Petitioner has satisfactorily demonstrated ... that *no CON is required* for the transfer of ownership of Plastic Surgery of Southern CT as described. OHS further concludes that *no CON is required* for the Petitioner’s subsequent relocation as the payer mix and the population served will not substantially change.”) (*see* 2019 CON Determination) (emphasis in original).

Similarly, the addition of surgical subspecialties to an ambulatory surgery center (“ASC”) does not require CON approval or the filing of a CON Determination request. WSC is well aware of the CON laws around syndication and the addition of surgical subspecialties given the authorization it received in 2014 to syndicate additional membership interests to physicians and add ENT services to that facility without CON-approval (*see* Docket No. 14-31967-CON). Note

also that WSC has made no attempt to challenge the 2019 CON Determination since it was issued three years ago.

In reliance on the 2019 CON Determination, PSSC undertook a syndication of ownership, transferring its interests to SCSC. SCSC leased space at 60 Danbury Road in Wilton and, with approval of the Department of Health (“DPH”) and at significant expense, undertook the construction/renovation of space to operate the relocated Center. Syndication of interests to individual physician investors and physician practices has been ongoing, and CSA acquired an interest in SCSC Holdings as well. All of these developments are consistent with the request for the 2019 CON Determination. Although WSC’s counsel is “unclear” about the current ownership structure of SCSC (Petition, p. 5), that ownership structure is laid out in detail in an organizational chart attached as an exhibit to the inquiry response that she cites in her request (Petition, pp. 6-7). It was also included in SCSC’s notification to DPH of the equity buy-in, as well as the licensure application.<sup>1</sup>

DPH approved a new license for SCSC at the 60 Danbury Road location and the Center reopened to patients on October 8, 2021. As more fully set forth in the Applicants’ counsel’s letter to OHS dated July 18, 2022, on September 24, 2021, prior to the reopening, HHC obtained a non-controlling 51% equity interests in SCSC. This equity-only buy-in was consistent with other equity-only buy-ins for which OHS determined that ***CON approval was not required***. It was undertaken for business reasons and in consideration of the extensive delays in resolving this CON Application. Incidentally, these delays were due in large part to WSC’s request for a

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<sup>1</sup> Of note, Dr. O’Connell retained approximately 2% of the interests in SCSC post-syndication. These interests were not redeemed until June of 2021. With the delays and changes caused by the COVID-19 pandemic, a decision was made that he would not continue as an investor in the facility. However, Dr. O’Connell remains free to join the Medical Staff and offer the Center as an option for his patients.

hearing and plan to submit an opposition that ignores the realities of the Center and the nature and scope of the actual proposal before OHS in this docket.

On July 29, 2022, WSC submitted the Petition requesting permission to intervene in the CON Proceeding. WSC has been in operation since approximately 2003 and was originally authorized as a pain management center (*see* Docket no. 02-554). In approximately 2004, WSC expanded its scope of services to include ophthalmic procedures (*see* Docket No. 04-30251-CON). In 2008, WSC obtained permission from the Office of Health Care Access (“OHCA”) to sell 62.5% of its membership interests to an entity owned 50% each by National Surgical Care, Inc. and Stamford Health Systems, Inc. (“Stamford Health”) (*see* Docket No. 07-30944-CON). WSC identified its services as pain management and ophthalmology in the 2007 CON Application. In 2014, WSC sought a CON Determination regarding its plans to syndicate ownership to additional physician investors and add ENT services to its surgical subspecialties (*see* Docket No. 14-31967-DTR). WSC states in the 2014 CON Determination request that it provides ophthalmology, pain management and gastroenterology services, meaning gastroenterology was added between 2007 and 2014 without need for CON approval. Currently, WSC lists its specialties as gastroenterology, interventional pain management, and oculoplastics/ophthalmology.<sup>2</sup> The only overlap in services between SCSC, which focuses on musculoskeletal conditions, and WSC is pain management.

In addition, there is no overlap in the physicians who have invested in and/or are on the Medical Staffs of WSC and SCSC.<sup>3</sup> To the best of SCSC’s knowledge, none of the physicians who have invested in and are on the Medical Staff of the Center have ever owned an interest in or performed procedures at WSC.

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<sup>2</sup> <https://wiltonsurgerycenter.com/specialties/>

<sup>3</sup> <https://wiltonsurgerycenter.com/physicians/>; <https://swcetsurgery.com/medical-staff/>

WSC has submitted the proposed testimony of Alan Hale in connection with the Petition (the “Hale Testimony”). Mr. Hale is a Vice President of AMSURG Corporation (“AMSURG”), which upon information and belief has an indirect 50% ownership interests in Stamford/NSC Management, LLC (“Stamford/NSC”), the majority equity owner of WSC (*see* Docket Nos. 14-31967-DTR and 07-30944-CON). The only reference to AMSURG in WSC’s submission is in the introductory paragraph of the Hale Testimony. Interestingly, there is not a single reference in WSC’s narrative submission to Stamford Health, which upon information and belief also owns 50% of Stamford/NSC. Stamford Health is a healthcare system that includes an acute care general hospital, an ambulatory health network comprised of advanced imaging, outpatient rehabilitation, physical therapy, ambulatory surgery, and other clinical services, as well as the “region’s largest” physician-led medical group offering primary and specialty care.<sup>4</sup> Stamford Health also advertises partnerships with “renowned institutions” including Dana-Farber Cancer Institute, Hospital for Special Surgery, and Columbia University.<sup>5</sup>

In its Petition, WSC claims that it will provide OHS with assistance in evaluating the proposal before the agency in accordance with the statutory guidelines and principles concerning CONs (Petition, p. 3). However, it is clear from WSC’s submission that it either does not understand the nature of the proposal before OHS or is intentionally trying to recast the proposal as something it is not in order to adversely impact a legally authorized existing ambulatory surgery provider in its community. For example, WSC proposes to offer testimony regarding such issues as its existing capacity to accommodate pain management cases from the Center’s Medical Staff physicians and Applicants’ supposed inability to meet their volume projections, neither of which is relevant to a CON Application for an existing facility to transfer governance

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<sup>4</sup> <https://www.stamfordhealth.org/about/>

<sup>5</sup> <https://www.stamfordhealth.org/about/>

control to an equity partner. WSC's lead argument is a lack of clear public need for the Center itself, a matter that is not at issue in the case, as this is a CON Application for a change in governance control of a legally authorized, duly licensed existing healthcare facility. Regardless of WSC's motivation, OHS should not allow WSC to use the CON Proceeding to advance its own irrelevant agenda, while offering nothing of substance on the issues that are actually before the agency for resolution.

## ***II. Legal Argument***

Section 4-177a(b) of the General Statutes and Section 19a-9-27 of the Regulations of Connecticut State Agencies require, among other things, that an entity requesting intervenor status show it has an interest affected by the proceeding; that it will furnish assistance to the agency in resolving issues in the proceeding; and that its participation is in the interest of justice and will not impair the orderly conduct of the proceeding. WSC's Petition is deficient on all points.

### ***a. WSC Has Not Stated an Interest Affected by the CON Proposal Before OHS***

19a-9-27 of the Regulations of Connecticut State Agencies requires a potential intervenor to state the "interest affected" by the proceeding in which it seeks to intervene. Here, WSC states that "[g]iven that pain management services comprise two-thirds of the projected volume at SCSC, and given the incredibly close proximity of the two centers, Wilton Surgery's interests are greatly impacted by the Applicants' proposal" (Petition, p. 2). WSC is stating an interest that might be relevant if this was a CON to establish a new ASC in Wilton or if SCSC was requesting permission to add operating room ("OR") capacity to its facility. But that is not the case. The Center is a legally authorized, duly licensed outpatient surgical facility. SCSC has every right to operate the Center in Wilton per the 2019 CON Determination and the license issued by DPH. It

also has every right to syndicate non-controlling interests to any physicians who desire to buy into the facility, and it can add (or remove) surgical subspecialties as it sees fit.<sup>6</sup> The same, of course, is true of WSC.

WSC has not stated an interest affected by the *actual proposal before OHS*, which is for a change in governance control following a non-controlling equity buy-in. WSC is required by law to state in the Petition why HHC Surgery's participation in the Center, as a controlling equity owner, affects WSC. All that WSC offers in this regard are conclusory statements about how HHC Surgery's participation in the Center will not materially increase quality, access, or cost-effectiveness and unsupported allegations that it may adversely impact healthcare costs. While HHC Surgery strongly disagrees with these unsubstantiated claims made by WSC, they speak to the public's interest in the proposal, not WSC's interest.

Based on the foregoing, WSC has not articulated a specific "interest affected" *by the actual proposal before OHS*. It therefore does not have standing to participate as an intervenor.

**b. *WSC's Participation Will Not Furnish Assistance to OHS in Resolving Issues***

WSC has provided no evidence to support the claim that its full participation in these proceedings, including cross-examination of the Applicants' witnesses, will furnish assistance to OHS in resolving the issues before the agency, as required by Section 19a-9-27 of the Regulations of Connecticut State Agencies. As previously noted, WSC's focus is on the "clear public need" for the Center to operate as an ASC in Wilton, an issue that is not before the agency in a proceeding to change governance control of the Center's owner (following a non-controlling

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<sup>6</sup> Applicants' reserve all of their substantive and procedural rights with respect to the scope of this proposal, the jurisdiction under which OHS is authorized to review this proposal, its relationship to other matters reviewed or currently under review by OHS, as well as their right to present additional evidence and arguments in support of this proposal and related matters based upon any rulings by OHS in connection with this or related dockets.



equity buy-in). The “need” for this proposal is measured in terms of the “need” for HHC Surgery’s participation in the Center and the positive impact that such participation will have on quality of care, access for all patients, and clinical integration and care coordination. In fact, these are the very things that OHCA looked at in evaluating WSC’s CON Application to partner with Stamford Health (*see* Docket No. 07-30944-CON). On issues that are actually relevant, WSC does not bring a perspective to the CON Proceeding that OHS has not already considered or information that is not already accessible to the agency.

Applicants have provided ample evidence in their CON and hearing submissions to establish that this proposal will enhance quality of care and care coordination at the Center in a way that only an affiliation with a clinically integrated healthcare delivery system such as Hartford HealthCare Corporation (“HHC”) can accomplish. Applicants have also provided ample evidence regarding access to care for all patient populations and the benefits, from a cost perspective, of ensuring that patient can obtain this clinically integrated care in a lower-cost setting such as an ASC. During the hearing, the Applicants’ witnesses will testify under oath about these issues and respond to any questions asked by OHS. The Hearing Officer and agency staff are in the best position to ask those questions relevant to their analysis and obtain any testimony and evidence needed to complete the record and make an informed decision on the CON Application.

***c. WSC’s Participation Is Not in the Interest of Justice and Will Impair the Orderly Conduct of the Proceedings***

Section 4-177a(b) of the Connecticut General Statutes requires an intervenor to state facts demonstrating that its participation is in the interests of justice and will not impair the orderly conduct of the administrative proceedings. Everything about WSC’s approach to the Petition

and its opposition to this CON suggests that, if granted intervenor status, WSC's participation will impair the orderly conduct of the proceedings. This includes, without limitation, the following:

- This CON Application is for a change in governance control. It is not a request for permission to establish a *de novo* ambulatory surgery center or to add OR capacity to an existing center. Accordingly, WSC's arguments regarding matters such as need for the Center, available capacity, and projected volume are entirely irrelevant to the CON Proceeding. WSC knows this but has raised these issues, nonetheless.
- WSC downplays the substantial benefits of a surgical center partnering with a health system in addition to a management company, despite the fact that this is the very organizational structure that WSC adopted after extolling its benefits to OHCA in its 2007 CON Application. WSC has also intentionally omitted any reference to its partnership with Stamford Health in its Petition or Mr. Hale's testimony, likely because it is contrary to the position WSC is taking against HHC's participation in the Center.
- WSC is attempting to relitigate a CON Determination issued three years ago, upon which SCSC and its investors were allowed to rely, and in fact have relied, in establishing the Center. WSC has chosen to raise this issue in an unrelated CON Proceeding, despite the fact that it has made no attempt to challenge the 2019 CON Determination in the three years since it was issued.
- WSC is attempting to interject itself into an OHS inquiry to which Applicants provided a timely and thorough response. Counsel devotes pages of the Petition to her own analysis of the law without any actual knowledge of the underlying facts. She ignores precedent cited in Applicants' inquiry response that supports a good faith basis to proceed with the

equity buy-in while reserving the change in governance control pending CON approval. She mischaracterizes other precedent, again without knowing the underlying facts of a transaction or considering that CON Determinations are fact-specific rulings by their nature. She talks about HHC's involvement changing Board "dynamics" without acknowledging that any change in Board membership, including the turnover of members that happens on a routine basis, changes "dynamics" and none of it constitutes a change in governance *control*. Regardless, none of this is relevant to the CON Proceeding before OHS. Rather it is a procedural matter that should be determined via the separate process initiated by OHS.<sup>7</sup>

- Both the Petition (p. 10) and Mr. Hale's testimony (p. 7) refer to pending litigation involving HHC, St. Francis Hospital and Medical Center ("St. Francis") and others, suggesting that this should somehow influence OHS's decision to allow an HHC affiliate to assume shared governance control of an existing outpatient surgical facility. As an experienced litigator, WSC's counsel should know that filing a lawsuit requires nothing but bare, unproven, and unchallenged allegations. The complaints she references are at best irrelevant to the proceeding before OHS, and inflammatory. HHC believes that the recent lawsuit filed by St. Francis and the class-action lawsuit based on similar claims are both meritless, denies any allegations of wrongdoing contained in the complaints and will vigorously defend against them. It would be improper and unfair for OHS to allow an intervenor to raise these lawsuits, or for OHS to consider these lawsuits in any way in connection with the CON Proceeding, or for the allegations contained in the complaints to have any bearing on OHS's evaluation of the questions before it.

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<sup>7</sup> To the extent that OHS intends to consider any of the arguments raised by WSC's counsel concerning the inquiry, Applicants reserve their right to provide an additional response and evidence to OHS in connection therewith.

Based on the foregoing, it is clear that WSC's participation will in fact impair the orderly conduct of CON Proceeding, focusing testimony and questions on matters that are entirely irrelevant to the agency's review of the proposal and distracting from the matters actually at issue. The interests of justice do not require that WSC be given an opportunity to participate in a manner intended to disrupt the fair and focused adjudication of the Applicants' CON.

**d. *Request to Strike Arguments & Testimony***

WSC has not met the statutory and regulatory requirements for obtaining intervenor status in the CON Proceeding. If OHS allows WSC to participate as an intervenor notwithstanding the procedural and substantive deficiencies with its request, Applicants object and move to strike from the record the following information contained in the Petition and the Hale Testimony, for the reasons set forth herein and below:

- Applicants move to strike the Relevant History and Background section of the Petition from page 3 through page 5, as well as any exhibits related thereto. This section pertains to the 2019 CON Determination and subsequent relocation and syndication of the Center, both of which were approved by OHS. As noted above, SCSC relied on the 2019 CON Determination to its financial detriment when it moved forward with the relocation and syndication, and the Center is legally authorized to operate at its location in Wilton as it currently operates. The relocation and syndication of the Center are ***not*** the subject of this CON Proceeding. Accordingly, any reference to these matters in the Petition and/or the Hale Testimony should be stricken.
- Applicants move to strike the Relevant History and Background section of the Petition from page 6 through page 7, as well as any exhibits related thereto. This section pertains to OHS's inquiry regarding HHC Surgery's acquisition of a non-controlling equity

interests in SCSC in September of 2021. As noted above, WSC's arguments regarding the inquiry are misplaced and guided by an incomplete understanding of the facts and circumstances presented. WSC's opinions regarding an inquiry to which it is not a party are not appropriately included with in the record of the CON Proceeding. OHS counsel is capable of making determinations with respect to the legal and factual issues presented in the inquiry without WSC's involvement.

- Applicants move to strike the Utilization, Duplication of Services, Consolidation and Accessibility section of the Petition from page 9 through page 10 in as much as it references pending civil litigation against HHC. Similarly, Applicants move to strike reference to the pending civil litigation on page 7 of the Hale Testimony. As noted above, the complaints, which include only unproven allegations, are entirely irrelevant to the CON Proceeding. Accordingly, any reference to these matter in the Petition and/or the Hale Testimony should be stricken.
- Applicants move to strike Section A of the Hale Testimony (pp. 2-4) regarding the clear public need for the Center, as well as Section C of the Hale Testimony (pp. 5-7) regarding utilization and duplication of services, and any exhibits related thereto. As noted above, the CON Proceeding does not involve a request for permission to establish the Center, which is legally authorized to operate at its current location and with its current owners and complement of surgical subspecialties. Nor does the CON Application involve a request for additional OR capacity at the Center. Accordingly, evidence regarding capacity and utilization of other ASCs in the service area, the Center's volume projections, and industry trends in pain management procedures is irrelevant and should be stricken from the record.

**e. Conclusion**

WSC has not stated an interest affected by the proposed change in governance control of SCSC (or the HHC Surgery equity buy-in itself) and, as such, WSC has failed to meet the statutory and regulatory requirements for intervenor status (RCSA Sec.19a-9-27 requires a potential intervenor to state the “interest affected” by the proceeding in which it seeks to intervene). In addition, WSC has failed to show how it will furnish assistance to OHS in resolving the issues in the CON Proceeding, as it provides no information *relevant to the matters actually at issue* that is not otherwise available to the agency. Lastly, WSC’s approach in requesting a hearing and then status – causing delay and raising issues that it knows to be untimely, unwarranted, and irrelevant to the matters before the agency – shows that WSC’s proposed participation is disingenuous and *will* impair the orderly conduct of the CON Proceeding. While OHS tends to err on the side of allowing participation by other providers in CON hearings, this is an instance in which that participation is not justified and would adversely impact the Applicants’ right to a fair hearing.

Considering the foregoing, the Applicants respectfully request that WSC’s Petition be denied. If WSC is allowed to participate, the Applicants request that its participation be limited to oral and written testimony on relevant issues and that WSC be denied the right to cross-examine the Applicants’ witnesses. Written testimony is a sufficient avenue for WSC to present any evidence that is not already available to OHS through Applicants’ CON submission and testimony or otherwise in the public domain. Alternatively, if OHS grants WSC intervenor status over the Applicants’ objection, Applicants request that various sections of the Petition and the Hale Testimony be stricken, as articulated above.

Respectfully Submitted,

SOUTHWEST CONNECTICUT SURGERY  
CENTER, LLC & HHC SURGERY CENTER  
HOLDINGS, LLC

A handwritten signature in blue ink, appearing to read "Jennifer Groves Fusco", written over a horizontal line.

By:

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## **CERTIFICATION**

This is to certify that a copy of the foregoing was sent via electronic mail this 1<sup>st</sup> day of August, 2022 to the following parties:

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