

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION**

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IN THE MATTER OF:)

Local Government Center, Inc;)
Local Government Center Real Estate, Inc;)
Local Government Center Heal Trust, LLC;)
Local Government Center Property-Liability Trust, LLC;)
HealthTrust, Inc; New Hampshire Municipal Association)
Property-Liability Trust, Inc.; LGC-HT, LLC;)
Local Government Center Workers' Compensation Trust, LLC)
And the following individuals: Maura Carroll, Keith R. Burke,)
Stephen A. Moltenbrey, Paul G. Beecher, Robert A. Berry,)
Roderick MacDonald, Peter J. Curro, April D. Whittaker,)
Timothy J. Ruehr, Julia N. Griffin, Paula Adriance,)
John P. Bohenko, and John Andrews)
_____)

Case No:

C-2011-0036

RESPONDENT CURRO'S TRIAL MEMORANDUM

NOW COMES Respondent Peter J. Curro, by and through his counsel, Howard & Ruoff, PLLC, and submits the within Trial Memorandum in connection with the evidentiary hearing in the above matter scheduled to commence on Monday April 30, 2012. The purpose of the memorandum is to focus the Hearing Officer on the significant issues relating to Respondent Curro. The memorandum is not intended to be a comprehensive recitation of the law and facts.

Brief Introduction

Peter J. Curro is the business administrator for the Londonderry School District, a position he has held since 2000. He previously was the finance director for the Town of Londonderry from 1992 to 2000, and prior to that position he held various positions in finance at Boston University, including the position of director of finance and personnel for the BU School

of Management. He holds a bachelor's degree from the University of Lowell and a Masters in Business Administration from Boston University.

Mr. Curro originally became a member of the NHMA Health Trust Board of Trustees approximately 18 years ago, and he currently sits as a member of the Board of Directors of LGC Parent. He has been a member of the Finance sub-committee during that entire period of time, and has been the chair for the past several years. He has engaged in countless robust discussions, debated numerous issues affecting the organization, and voted on proposals (both in favor and in opposition) along-side scores of other individuals who have served on the various LGC-related boards over the years. Despite the active participation and voting of numerous other board and sub-committee members in the decisions and ongoing business activities that the BSR now alleges amount to violations of RSA Chapter 5-B and RSA Chapter 421-B, Mr. Curro is the only respondent board member in this action.¹

Basis for Claimed Liability Against Mr. Curro

Mr. Curro has complained since the onset of this matter that the BSR, despite naming him as an individual respondent, and despite having several opportunities to do so throughout the course of this litigation, has not made any allegations against Mr. Curro. As the hearing begins on Monday April 30, 2012, and in blatant disregard of Mr. Curro's due process rights to notice and an opportunity to be heard, the BSR still has not made any allegations of wrongdoing against Mr. Curro. The BSR has not identified one single action that he took or proposal upon which he registered the determinative vote; nor has it identified anything that Mr. Curro said or did differently than any other board member to substantiate the claims made in this case. As a matter of constitutional law, fairness and logic, in the absence of any specific allegations

¹ The BSR originally named only the members of the NHMA Health Trust board who decided in 2003 to approve the reorganization. No other board members have been named, despite there being 31 members of the LGC board involved in every decision that the BSR claims is unlawful.

concerning conduct by Mr. Curro, his mere membership on a board and his participation in votes as a board member is wholly inadequate to impose liability against him.

During the March 26, 2012, hearing on dispositive motions, Mr. Curro pointed out the troubling lack of fairness -- indeed the arbitrary and capricious administrative action taken by the BSR -- in selecting him out of a 31-member board and naming him as a respondent without setting forth any allegation of conduct in which he allegedly engaged. In response, the BSR stated, without citing any legal authority, that Mr. Curro is being sued in this action, not on the basis of any conduct he engaged in, but as a “representative defendant” of the board of directors. The BSR has not pointed to any support in the law for suing a single member of a board of directors in a “representative” capacity, and holding that board member individually liable for the myriad actions of the board.

“For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.” Petition of Kilton, 156 N.H. 632, 638 (2007). Notice is sufficient under the Due Process Clause of the New Hampshire Constitution when it “apprise[s] the affected individual of, and permit[s] adequate preparation for, an impending hearing.” Id.

Here, there are no specific allegations of conduct attributable to Mr. Curro individually. And, in addition to what appears to be the absence of a legitimate logical or legal theory under which the BSR intends to prosecute him in a representative capacity, there has been no notice other than a passing reference to this theory during oral argument at a motions hearing. Cf. id. at 639 (to satisfy constitutional guarantees, notice “must be more than a ‘mere gesture’”). These circumstances have left Mr. Curro without sufficient basis upon which to properly respond to the BSR’s allegations, and have put him in the position of proceeding to trial where he must defend

himself without knowing what the BSR believes his misconduct to have been or why it has selected him as a respondent.

Corporate Governance Issue

The patent unfairness in this matter is particularly apparent in the context of Count I of the BSR's amended petition. In Count I, the BSR alleges that the LGC's current structure, consisting of one board and one set of by-laws, violates the intent and requirements in RSA 5-B. When Mr. Curro became a trustee on the Health Trust Board, a different structure was in place. Specifically, Health Trust had its own Board of Trustees, as did Property/Liability Trust and NHMA. To effectuate the consolidation into the current one board, one by-law model, all three separate boards voted in favor of the change. Despite the fact that Mr. Curro was a trustee of Health Trust only, and never participated on the boards of either PLT or NHMA, the BSR seeks to hold him liable for the corporate structure that resulted from those votes. Mr. Curro cannot be held personally liable for the corporate structure resulting from the vote of three separate boards, nor can he be held liable in a representative capacity for a decision made by three boards, two of which he was never a member and had no voting power.

RSA 5-B and RSA 421-B Claims

Finally, even if there is somehow a determination that Mr. Curro can be prosecuted either individually or as a "representative" in this matter, the evidence in this case points only to the conclusion that Mr. Curro cannot be held liable for the claimed violations of RSA 5-B and 421-B. RSA 5-B:4-a, VII, sets out penalties that may be imposed on anyone who violates the chapter "knowingly" or "negligently." RSA 421-B:26, III-a also provides for penalties against those who "knowingly" or "negligently" violate New Hampshire's securities laws. All respondents generally deny that there were any violations of RSA 5-B or 412-B. In addition, Mr. Curro and

other board members consistently relied on the advice of counsel and other professional consultants to ensure that they made informed decisions, consistent with the law and their best business judgment, and cast thoughtful votes in keeping with their fiduciary duties. By way of example:

- On April 7, 2003, an All Boards Meeting was held during which the issue of consolidating Health Trust, PLT and NHMA into one program with one board and one set of by-laws was discussed. Counsel was present at that meeting and presented three options to the group of board members to consider with their respective boards. In making his presentation of those options, including the option to reorganize that the board ultimately chose, counsel not only considered it a viable option, but expressly stated to the group of board members that he had spoken with the Attorney General's Office about the potential consolidation and there would not be an issue from that office's perspective.

- The decision to calculate reserves via the RBC method was made after the issue was fully vetted by the board with the assistance and professional advice of their actuary, Peter Reimer.

- On May 4, 2004, at an Executive Session of the Board of Directors, a presentation and discussion occurred regarding the continued financial viability of the Worker's Compensation line. Legal counsel was present, as was Jenny Emery from Towers Perrin Reinsurance who made a presentation to the board members to facilitate a discussion about the board's options with respect to maintaining that line of coverage. A vote ultimately ensued on July 15, 2004, wherein it was decided that 1% of member contributions would be allocated to the Worker's Compensation line. Legal counsel and Ms. Emery were present. At a subsequent Board meeting on April 30, 2007, a vote passed to change the funding formula from 1% of

member contributions to cap the set aside amount above 1% at \$2 million. Counsel was present at that meeting.

- In April 2007, the Finance Committee² requested and received an opinion letter from legal counsel, in which legal counsel advised that returning additional funds to members through rate adjustments, and spreading that return over several years, was not contrary to the requirements of RSA 5-B.

- Materials from counsel that were presented at annual retreats of the Board of Directors consistently focus on informing and advising members of the board how to fulfill their fiduciary duties as board members.

- Throughout Mr. Curro's 18-year tenure with LGC-related boards, legal counsel was routinely present and provided advice to the boards. At no time did legal counsel ever suggest that the member participation agreements constituted securities under State law.

The foregoing does not even scratch the surface of the voluminous record that will be established at trial in this case, which overflows with meeting minutes that evidence the presence of legal counsel and other professionals at board and sub-committee meetings. The minutes memorialize the advice rendered to the board and sub-committee members, and illustrate the depth of discussion and consideration the board and sub-committee members engaged in before voting on issues presented to them. Such reasonable actions performed in good faith reliance on advice of legal counsel and other professionals cannot result in a finding of either "knowing" or "negligent" violations of RSA 5-B or 421-B. See RSA 293-A:8.30 (director who discharges duties in good faith, with care of ordinarily prudent person in like position under similar

² As stated previously, Mr. Curro is a member of the Finance Committee. That committee is tasked with making recommendations to the full board on matters such as setting rates for particular programs, reinsurance levels, and the overall operating budget of LGC. The LGC Board then determines by vote whether to accept those recommendations.

circumstances, in manner reasonably believed to be in best interests of corporation, not liable for any action taken or any failure to take action); Baldwin v. Bader, 585 F.3d 18, 22 (1st Cir. 2009) (applying Delaware law³ and business judgment rule, which “provides substantial latitude for directors’ judgment”); Notinger v. Black, 2010 B.N.H. 4 (Bankr. D.N.H. 2010) (business judgment rule under Delaware law both procedural and substantive, and provides that decisions of directors will be respected by courts unless directors are interested or lack independence, do not act in good faith, act in manner that cannot be linked to rational business purpose or use grossly negligent process to make decision).⁴

Possible Remedies Against Mr. Curro

The Amended Petition seeks only injunctive relief, none of which can be ordered against Mr. Curro. Moreover, although RSA 5-B and RSA 421-B allow for penalties of \$2500 per violation, the Amended Petition does not seek the imposition of such financial penalties. In addition, at the March 26, 2012 hearing, the BSR represented to the Hearing Officer that it was not seeking financial penalties against Mr. Curro.

In sum, and for all of the foregoing reasons, constitutional due process, fairness, logic and the evidence all lead to the conclusion that Mr. Curro, either individually or in a so-called representative capacity, is not liable for any of the violations alleged by the BSR in this matter.

³ Delaware corporate case law is relied on by courts throughout the country in interpreting the scope of duties attributable to directors.

⁴ See also memo of law on Fiduciary Duty of Care and Business Judgment Rule, which Mr. Curro incorporates herein by reference.

Respectfully Submitted,
Peter J. Curro,

By His Attorneys,
HOWARD & RUOFF, PLLC

Dated: April 27, 2012

By: /s/ Mark E. Howard
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Certificate of Service

I hereby certify that I have this 27th day of April 2012, forwarded copies of the within trial memorandum via electronic transmission to all counsel of record.

Dated: April 27, 2012

/s/ Mark E. Howard
Mark E. Howard (NH Bar #4077)