

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:)
)
Local Government Center, Inc., et al.) C-2011000036
)
RESPONDENTS)
)

**HEALTHTRUST’S RESPONSE TO BSR’S MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE AT UPCOMING REMAND HEARING**

HealthTrust, Inc. (“HealthTrust”) responds to the New Hampshire Bureau of Securities Regulation’s (“BSR”) Motion *in Limine* to Exclude Evidence at Upcoming Remand Hearing as follows:

1. HealthTrust has objected to the admissibility and relevance of issues other than whether it should be required to make payments as restitution or disgorgement to the Intervenor as former HealthTrust members since the commencement of the remand. *See* HealthTrust’s Objection to BSR’s Motion to Establish Standing and Define Issues on Remand. In short, when it remanded the matter for the Presiding Officer to consider the Intervenor’s claim pursuant to the correct legal standard, the Supreme Court did not direct the Presiding Office to engage in additional fact-finding or to conduct an evidentiary hearing. *Appeal of Town of Salem*, 168 N.H. 572, 581 (2016). Instead, the Supreme Court mandate only requires the Presiding Officer to consider the Intervenor’s claim pursuant to the correct legal standard.

2. Accordingly, HealthTrust has moved to exclude the admission of any new evidence during the remanded proceeding. *See* HealthTrust’s Motion to Exclude Evidence. However, if the Presiding Officer is going to allow evidence or argument on whether HealthTrust should be required to make payments as restitution or disgorgement to entities other than the Intervenor, HealthTrust should be allowed to admit copies of the bylaws, applications

and participation agreements, and certificates authorizing resolutions between HealthTrust and those entities.

3. The BSR incorrectly surmises that HealthTrust intends to argue that its contracts with former and current HealthTrust members¹ preclude an administrative penalty for a violation of RSA 5-B. *See* BSR's Motion, ¶8. That is not HealthTrust's intent. Rather, the evidence would be relevant and admissible for a different reason.

4. If the Presiding Officer receives argument on claims broader than the Intervenors' claims as former HealthTrust members, the bylaws and agreements are relevant because of the nature of the BSR's additional claims. Under the circumstances, the Presiding Officer would be attempting to discern the appropriate penalty, if any penalty is appropriate, that would require HealthTrust to distribute more than the \$17.1 million that it received from Property-Liability Trust, Inc. ("PLT"). The touchstone for such a penalty is it must be just and reasonable. *See* Eighth Amendment to the United States Constitution; Part I, Article XVIII to the New Hampshire Constitution; *U.S. v. Emerson*, 107 F.3d 77, 80 (1st Cir. 1997); *see also* RSA 541:7; RSA 541:13.

5. The justness and reasonableness of a penalty, if any is imposed, requires consideration of all evidence that reflects on the reasons for the conduct that is penalized. Here, the relevant conduct is the manner in which HealthTrust distributed the \$17.1 million it received from PLT. Hence, it is relevant that: (a) HealthTrust sought the guidance of the Presiding Officer and the BSR prior to distributing the \$17.1 million; (b) after the BSR took no position on the proposed distribution, HealthTrust distributed the \$17.1 million consistent with the terms of

¹ "Current member" means an entity was a HealthTrust member in September 2014 when the \$17.1 million was distributed. Current HealthTrust members participated in the distribution of the \$17.1 million in proportion to their healthcare and dental contributions to HealthTrust during fiscal year 2014.

the Presiding Officer's Final Order dated August 16, 2012; and (c) the BSR previously advocated that HealthTrust distribute the \$17.1 million only to current HealthTrust members, consistent with the BSR's agreements with other pooled risk management programs. These three facts reflect on the reasonableness and justness of penalizing HealthTrust.

6. It also is relevant that all of the current and former members' agreements to voluntarily participate as HealthTrust members, including the Intervenor's agreements, incorporate bylaws that provide a member is not entitled to share in distributions of surplus that occur after the member has terminated its HealthTrust membership. Specifically, each agreement provides that the member, during any period of participation in one or more of the Trusts, agrees to be bound by the provisions of Local Government Center's ("LGC") bylaws and any and all amendments thereto which are or may be duly adopted by LGC from time to time. Throughout the relevant time period, 2003 to 2014, the applicable bylaws provided that a member that withdraws shall thereupon and at all times thereafter have no right to, or claim on, without limitation, any of the assets, income, distributions (whether past, present or future), reserves or property, whether or not then owned or after acquired. *See* LApp., pp. 61-113 (LGC Exhibits 222 and 223 to *LGC Appeal*). The agreements and bylaws are relevant to place into context HealthTrust's conduct at the time of the distribution of the \$17.1 million.

7. For the foregoing reasons, if the Presiding Officer allows argument on the penalty to be imposed against HealthTrust relative to entities other than the Intervenor, the bylaws, applications and participation agreements, and certificates of resolutions are relevant and admissible. Thus, if the Presiding Officer is going to allow argument on the penalty to be imposed against HealthTrust relative to entities other than the Intervenor, the BSR's motion to exclude the evidence should be denied.

WHEREFORE, HealthTrust respectfully requests that the Presiding Officer:

A. Grant both HealthTrust's Motion to Exclude Evidence and the BSR's Motion *in Limine* to Exclude Evidence at Upcoming Remand Hearing; or

B. Alternatively, if evidence or argument is going to be allowed regarding claims other than the Intervenors' claims, deny the BSR's Motion *in Limine* to Exclude Evidence at Upcoming Remand Hearing; and

C. Grant such additional relief as justice requires.

Respectfully submitted,
HEALTHTRUST, INC.
By Its Attorneys,

Dated: August 12, 2016

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CERTIFICATE OF SERVICE

I certify that I have forwarded copies of this pleading to counsel of record via email.

/s/ Michael D. Ramsdell
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