STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

Docket No. C-2011000036

IN THE MATTER OF:

Local Government Center, Inc., et al.

BSR'S OBJECTION TO HEALTHTRUST'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO EXCLUDE EVIDENCE

NOW COMES the New Hampshire Bureau of Securities Regulation ("BSR"), by and through counsel, and objects to HealthTrust's Motion for Summary Judgment and Motion to Exclude Evidence. In support of this Objection, the BSR states as follows:

I. RELEVANT BACKGROUND FACTS

The Final Order In the Matter of Local Government Center, et al. (August 16, 2012) provided the following:

> Funds received by the Local Government Center Health Trust in repayment of the [$17.1 million] subsidy, to the extent they constitute amounts in excess of the earnings and surplus of the Local Government Center Health Trust risk pool management program as reasonably determined and expressed above in § 9, shall be returned to members consistent with RSA 5-B:5, I(c).

Final Order at 79, ¶ 14.

With regard to the return of other surplus funds HealthTrust improperly held, this Final Order stated:

> The Bureau of Securities Regulation and the Local Government Center shall confer and within 30 days from the date of this Order shall submit to the undersigned hearings officer an agreed upon plan for the return of this $33,200,000.00 excess amount in cash to members who participated in the Local Government Center's Health Trust risk pool management program at any time after June 14, 2010. A negotiated plan may include prospective returns of cash or its equivalent. Failing the submission of the agreement within 30 days from the date of this Order, the Local Government Center's Health Trust risk pool management program, in whatever form it may be organized, shall return the $33,200,000.00 excess amount in cash to members that participate in the Local Government Center's Health Trust risk pool management program on the date of this

> order, no later than September 1, 2013 in proportion to the premiums paid by said members.

Final Order at 75, ¶ 8.

At that time, the BSR believed that a negotiated methodology for returning the $33.2 million to HealthTrust members would also provide a methodology for return of the $17.1 million to those members, and therefore, attempted to negotiate such a methodology immediately upon the Final Order's issuance. HealthTrust refused to participate in negotiations because it believed that the Final Order was not "final" because of a pending appeal. After HealthTrust refused to participate in negotiations, the BSR submitted a report to the Presiding Officer on September 14, 2012, which stated the following:

> The parties have not negotiated these terms because the LGC, notwithstanding RSA 541: 18, considers the Final Order not to be final and, therefore, not operative until after a final appeal to the New Hampshire Supreme Court is fully concluded. Thus, the LGC refuses to implement any portion of the Order, with or without prejudice.

BSR's Report at 1. The BSR never assented to a particular methodology for the return of the $17.1 million because no such methodology was negotiated or even discussed between the parties prior to HealthTrust's appeal of the Final Order. HealthTrust's appeal of the Final Order included an appeal of provisions requiring the repayment from Property-Liability Trust ("PLT") to HealthTrust of the $17.1 million illegal subsidy. This appeal delayed the return of the $17.1 million in surplus funds to HealthTrust's members, and any determination of the appropriate methodology for doing so. On January 10, 2014, the New Hampshire Supreme Court upheld the requirement that PLT repay HealthTrust, and that HealthTrust repay its members the $17.1 million illegal subsidy as surplus. Simultaneous with this decision, HealthTrust and PLT revealed an agreement, made in October 2013, in which HealthTrust forgave PLT's obligation to

repay the $17.1 million. This agreement allowed HealthTrust to further delay the return of the $17.1 million to its members and any determination of the appropriate methodology for doing so.

In February 2014, the BSR filed a Motion, alleging that HealthTrust's and PLT's agreement violated RSA 5-B and the Court's decision because it avoided PLT's repayment of the $17.1 million to HealthTrust and its members. In July 2014, the BSR, HealthTrust, and PLT negotiated a Consent Decree, which resolved the issues raised in the BSR's February 2014 Motion. At the same time, counsel for the Intervenors argued before the Presiding Officer that the intervening towns should be entitled to a portion of the $17.1 million that had yet to be returned since they had participated in HealthTrust during the period when the illegal subsidization occurred. On August 4, 2014, the Presiding Officer issued an Omnibus Order that accepted the Consent Decree negotiated between the BSR, HealthTrust, and PLT but denied the Intervenors' Motion. This Order stated the following:

> A fair reading of the law of this case in its entirety could not reasonably be interpreted to include former or past or intermittent or periodic members to qualify as recipients of disbursements provided for in the August 16, 2012 final order. Any proportionality referenced in that order was to be made within a universe of participating political subdivisions.

Omnibus Order at 6. The Intervenors appealed this decision and during the pendency of this appeal, HealthTrust, solely at its own risk, distributed the $17.1 million to certain members without disclosing the full details of how each refund was calculated and exactly which current and former members, who were entitled to a portion of the $17.1 million, received a refund.

On February 18, 2016, the Court issued a decision on the Intervenors' appeal, finding in part that "to the extent the Presiding Officer concluded that he lacked authority to penalize a violation of RSA 5-B:5, I(c) by ordering payment to former members of a pooled risk management program as either restitution or disgorgement, he committed an error of law."

Appeal of Salem, 168 N.H. 572, 581 (2016). The Court remanded to the Presiding Officer the issue of what methodology should have been used with regard to the distribution $17.1 million in surplus funds. Id.

On June 3, 2016, the Presiding Officer issued an Interim Order Following Remand, in which he concluded the following:

- He committed an error of law when he wrongfully concluded that RSA 5-B:5, I(c) restricted distribution of the $17.1 million surplus funds to presently participating HealthTrust members;
- He circumscribed the remedy by improperly defining the universe of potential recipients of the $17.1 million in surplus funds;
- The scope of the remand is that the Presiding Officer can take further action to address the limited nature of the error or issue identified by the Court, and that this scope must accommodate the presentation of additional evidence to allow proper determination of which members may qualify for a proportionate disbursement;
- He did not previously make the basic findings of fact to define the universe of potential recipients and their proportionate share of the $17.1 million surplus funds;
- The universe of potential recipients, who may share in the distribution of the $17.1 million surplus funds, may change; and
- During this remanded administrative proceeding, he must determine whether former HealthTrust members are entitled to restitution or disgorgement - the universe of potential recipients - and, if so, the appropriate amount of such remedy - the proportionality of the $17.1 million surplus funds.

Interim Order at 2-4.

II. ARGUMENT

I. HEALTHTRUST IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE THERE IS NO GENUINE DISPUTE THAT THE PRESIDING OFFICER HAS AUTHORITY TO ORDER PAYMENTS TO A UNIVERSE OF RECIPIENTS AS RESTITUTION OR DISGORGEMENT, A PROPER PENALTY FOR HEALTHTRUST'S VIOLATION OF RSA 5-B:5, I(c).

A. The doctrine of *res judicata* does not bar the present action and the Presiding Officer's potential order of payments to former members of HealthTrust and to current members of HealthTrust that received less than their proportionate share as restitution or disgorgement in the reopened penalty determination for HealthTrust's violation of RSA 5-B:5, I(c).

The New Hampshire Supreme Court's Order in Appeal of Salem, 168 N.H at 581 clarified the law regarding the universe of recipients for payments and reopened this matter for a determination of the proper penalty to be imposed against HealthTrust for its violation of RSA 5-B:5, I(c) by illegally subsidizing its workers' compensation pool with $17.1 million. Because the Court remanded to the Presiding Officer the issue of the methodology to be used to determine how the $17.1 million illegal subsidy should be distributed as surplus funds, the Intervenors and the BSR are permitted to advance their claims that a proper penalty for HealthTrust's violation are payments to former members of HealthTrust who have not received any payments that they are entitled to and to current members of HealthTrust who received less than their proportionate share, who are all now affected by the Court's decision in Appeal of Salem, 168 N.H. at 581. As a matter of law, *res judicata* does not bar these claims[1] and the Presiding Officer's determination of whether former and other HealthTrust members should receive payments from the $17.1 million in surplus funds is proper. Accordingly, HealthTrust's Motion for Summary Judgment should be denied.

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[1] In his Interim Order Following Remand, the Presiding Officer already held that these claims are not precluded. Interim Order, p. 4-5.

HealthTrust cannot meet its burden of showing that *res judicata*, or claim preclusion, applies as an affirmative defense in this matter because this is not a relitigation of an issue that was, or might have been, raised in respect to the subject matter of the prior litigation. See Gray v. Kelly, 161 N.H. 160, 164 (2010) (stating that "[t]he doctrine of *res judicata* prevents parties from relitigating matters actually litigated and matters that *could have* been litigated in the first action.") (internal citations omitted) (emphasis in original). As a procedural matter, the present stage of this proceeding is not a subsequent litigation involving the same cause of action; this is a re-determination of the penalty phase of the same, continuous litigation, a re-determination that has arisen from the Court's remand based on the Presiding Officer's error of law made earlier in this same penalty phase. See Appeal of Salem, 168 N.H. at 581 (stating "to the extent the presiding officer concluded that he lacked the authority to penalize a violation of RSA 5-B:5, I(c) by ordering payment to former members of a pooled risk pool management program as either restitution or disgorgement, he committed an error of law."); see also the Presiding Officer's June 3, 2016 Interim Order Following Remand at 2 (concluding that he "committed an error of law when he wrongfully concluded that the statute restricted distribution of the $17.1 million surplus funds to a universe comprised only of presently participating pooled risk members."). It is clear from the record and from the Court's decision in Appeal of Salem, 168 N.H. at 581 that the issues of what universe of HealthTrust members are entitled to restitution or disgorgement and the appropriate amount of such remedy for each potential recipient have not yet been litigated and have not yet reached finality. Therefore, HealthTrust's argument that *res judicata* bars the Intervenors' and the BSR's claims in the present stage of this matter is erroneous and should be denied.

Even if *res judicata* applies, despite the fact that the present stage of this proceeding is occurring within the same, continuous litigation, not a subsequent litigation, HealthTrust cannot meet its burden of showing that all of the elements of *res judicata* are met. The *res judicata* doctrine applies if three elements are met: 1. the parties are the same or in privity with one another; 2. the same cause of action was before the court in both instances; and 3. the first action ended with a final judgment on the merits. Gray, 161 N.H. at 164. Regarding the third element, for *res judicata* to apply to a finding or ruling, there must be "a final judgment by a court of competent jurisdiction [that] is conclusive upon the parties in a subsequent litigation involving the same cause of action." Petition of Donovan, 137 N.H. 78, 81 (1993). In this matter, the third element, regarding a final judgment on the merits, has not been met because there has been no final judgment as to the issues of what universe of HealthTrust members are entitled to payments of surplus funds through restitution or disgorgement and the appropriate amount of such remedy for each potential recipient. Support for this contention is evident in the Court's decision in Appeal of Salem, 168 N.H at 581, which vacated and remanded the Presiding Officer's decision regarding the universe of recipients of payments, and created a circumstance where finality has not yet occurred. See Morin v. J. H. Valliere Co., 113 N.H. 431, 434 (1973) (describing finality that would meet the elements of *res judicata* as existing where a decision has been rendered in the absence of an appeal).

Further, neither the Consent Decree, Omnibus Order, nor the Final Order on Remand ("Final Order") constitute final judgments on the merits that bar under the doctrine of *res judicata* the BSR's claims in the penalty determination phase that the Court has re-opened due to an error of law. First, the Consent Decree and the Final Order on Remand do not address the issues of what universe of HealthTrust members are entitled to a portion of the $17.1 million

surplus funds and how much of a portion to which each were entitled. *Res judicata* does not apply if the issue at stake was not specifically decided in the prior proceeding. Morin, 113 N.H. at 434. Thus, neither the Consent Decree nor the Final Order on Remand qualifies as a final judgment on the merits that satisfy the third element of the *res judicata* doctrine. Second, when the Presiding Officer issued the Omnibus Order, he erroneously concluded that RSA 5-B:5, I(c) restricted distribution of the $17.1 million surplus funds to presently participating HealthTrust members. Omnibus Order at 6. The Court in Appeal of Salem, 168 N.H. at 581, remanded this matter to the Presiding Officer, which invalidates any finality of the Final Order on these issues. While the Presiding Officer's Final Order prohibited further actions taken by a party, that Order did not prohibit, and could not have prohibited, the Court from reopening the penalty determination phase in this case on remand. Final Order at 2. In addition, it is clear that the present stage of this proceeding has not resulted from any further action of the BSR and the BSR has not violated the Final Order's prohibition on further actions. Therefore, the BSR's claims are not barred by the Final Order, as the Final Order does not constitute a final judgment on the merits that satisfies the third element of the *res judicata* doctrine. Accordingly, HealthTrust's arguments that the Consent Decree, Omnibus Order, and Final Order on Remand bar the Intervenors' and the BSR's claims, and that HealthTrust is entitled to summary judgment on all claims as a result, are erroneous and should be rejected.

There is no question that, as the regulator and as a party to these proceedings, which have been re-opened by the Court's decision in Appeal of Salem, the BSR is entitled to participate in this remand and in the determination of the issues on remand, regardless of whether or not the BSR actively participated in the Intervenors' appeal and/or requested a stay of the distribution of the $17.1 million in surplus funds. At all times relevant, the BSR has been a party to these

proceedings, including the Intervenors' appeal. See New Hampshire Civil Practice Series, Deleting Parties in Supreme Court § 60.24 (stating that "[a]ll parties to the lower court or agency proceeding are automatically made parties to the review in the Supreme Court."). At no point has a final judgment been entered against the BSR in this matter, and the fact that the BSR did not appeal any of the underlying Orders or take a position in the Intervenors' appeal does not support HealthTrust's argument that the Court's decision in Appeal of Salem does not apply to the BSR, a party in this matter. The Court's decision is effective for all parties in this matter, even those who did not actively participate in the appellate process. In addition, HealthTrust's argument that the Consent Decree, Omnibus Order, and Final Order have resolved all of the BSR's claims, and therefore, that its claims in the present stage of this matter are barred, fails because those agreements were based on an error of law. When the Final Order was entered, HealthTrust had already appealed the Omnibus Order. The plain, unambiguous language of the Final Order shows that it is subject to the Omnibus Order, which has, in part, been reversed and remanded. Therefore, this reversal and the subsequent re-opening of the penalty determination on remand permits the BSR, who is still a party in this proceeding, to advance claims regarding the determination of the issues on remand.

For all of these reasons, the doctrine of *res judicata* does not bar the Intervenors' and the BSR's claims in this remand proceedings and HealthTrust's Motion for Summary Judgment should be denied.

B. The Presiding Officer's determination of the scope of this remand, which includes a determination of the claims raised by the Intervenors and the BSR, is consistent with the scope of the Court's remand in Appeal of Salem, which did not limit the universe of potential recipients to just the eight Intervenors.

The Court has remanded not only the issue of whether former HealthTrust members were entitled to restitution or disgorgement, but also the issue of what penalty should be ordered in this matter. Therefore, the Presiding Officer's description of the scope of his determinations on remand in his June 3, 2016 Interim Order Following Remand, which is that he will determine the universe of HealthTrust members that are entitled to restitution or disgorgement and the amount of restitution or disgorgement they are entitled, is consistent with the Court's Order. See Appeal of Salem, 168 N.H. at 581 (concluding that "to the extent the Presiding Officer concluded that he lacked authority to penalize a violation of RSA 5-B:5, I(c) by ordering payment to former members of a pooled risk management program as either restitution or disgorgement, he committed an error of law" and stating that it was "express[ing] no opinion as to what penalty should be ordered in this case.")

The issues that the Court remanded are specific, but broad and are not limited to just the eight intervening political subdivisions. A review of the Court's plain, unambiguous language of its decision in Appeal of Salem shows that at no point did the Court find that on remand, the Presiding Officer's determination was constrained by a definition of the universe of recipients that was limited to just the eight Intervenors. 168 N.H. at 581. Rather, while the Intervenors ultimately sought the portion of the $17.1 million in surplus funds to which they allege they alone were entitled, the determination of the issues on remand affect all former members of HealthTrust who have not received any payments that they are entitled to and all current members of HealthTrust who received less than their proportionate share. Current members of

HealthTrust who received less than their proper proportionate share are entitled to be included in the universe of recipients for payments because while they were current members of HealthTrust at the time HealthTrust distributed the $17.1 million in surplus funds to a class of current members in 2014, they received less than they should have for one or more of these reasons: 1. they participated in fewer plans in 2014 than they did prior to 2014, when their member contributions funded the illegal subsidy; and/or 2. they were only members of a third program, not the health or dental insurance programs, and did not receive any surplus funds as a result.

In Appeal of Salem, 168 N.H. at 581, the Court specifically refrained from imposing specific restrictions on the methodology for determining the issues on remand and therefore, the Presiding Officer has the authority to determine such methodology in the present stage of this matter, including what universe of members are entitled to restitution or disgorgement and the appropriate amount of any such relief. Where the remanding court does not provide specific restrictions on the methodology for determining the issues on remand, the lower court to which the case is remanded has discretion to determine whether the record before it is sufficient or whether additional evidence should be taken. de Jesus-Mangual v. Rodriguez, 383 F.3d 1, 6 (1st Cir. 2004); see also Parker v. Elam, 829 P.2d 677, 681 (Okla. 1992) (stating that "[a] judgment, reversed and remanded, stands as if no trial has been held."); In re Marriage of Becker, 842 P.2d 332, 334-35 (Mont. 1992). The First Circuit has similarly held that "on remand, courts are often confronted with issues that were never considered by the remanding court" and "[b]roadly speaking, mandates require respect for what the higher court decided, not for what it did not decide." Biggins v. Hazen Paper Co., 111 F.3d 205, 209 (1st Cir. 1997). HealthTrust relies on Auger v. Town of Strafford, 158 N.H. 609, 613 (2009) as support for its argument that the Presiding Officer's receipt of evidence and argument on issues raised by the BSR is precluded

because such receipt would be inconsistent with the Court's mandate in Appeal of Salem, 168 N.H. at 581. However, HealthTrust's reliance on Auger for this proposition is erroneous because the Court in Auger specifically found that when an appellate court "does not conclusively decide the parties' rights in the subject matter of the suit, the trial court has some discretion in implementing the mandate. See Auger, 158 N.H. at 613 (citing In re Sanford Fork & Tool Co., 160 U.S. 247, 258–59 (1895) for the holding that discretion exists when prior appellate decision reversed lower court but ordered no final judgment). Here, the Court's reasoning in Auger supports the conclusion that when it stated that it was "express[ing] no opinion as to what penalty should be ordered in this case" the Court in Appeal of Salem did not make a conclusive determination as to the parties' rights in this matter and therefore, the Presiding Officer has properly determined within his discretion how the Court's mandate for remand should be implemented. Accordingly, because the Court in Appeal of Salem imposed no specific limitations on the introduction of new evidence and the determination of the methodology the Presiding Officer should use in penalizing HealthTrust for its violation of RSA 5-B:5, I(c), the Presiding Officer's stated scope of the remand is consistent the nature of the Court's remand in Appeal of Salem. Therefore, HealthTrust's request for summary judgment on all claims, on the basis that the Presiding Officer's stated scope of the remand was outside of the Court's stated scope in Appeal of Salem, should be denied.

In addition, in Appeal of Salem, the Court explicitly found that the Presiding Officer has the authority to order restitution or disgorgement. 168 N.H. at 581. If the Court intended its decision to apply to only the eight Intervenors, it would not have opened up the determination of what amount of restitution or disgorgement may and should be imposed against HealthTrust, which as equitable remedies, allow the Presiding Officer to order payments to be made to other

recipients in addition to the eight Intervenors. Therefore, because the Court opened up the potential universe of recipients of payments from the $17.1 million in surplus funds, through the language of its decision in Appeal of Salem, 168 N.H. at 581, HealthTrust's arguments that the scope of the remand is only limited to the eight Intervenors, and that all claims related to current HealthTrust members, are erroneous and should be rejected.

C. Potential unfairness is neither a matter of law on which HealthTrust is entitled to summary judgment on all claims nor a genuine issue of material fact, and HealthTrust's Motion should be denied because it has not met the standard for granting summary judgment.

1. HealthTrust made payments to current HealthTrust members, as of 2014 date, solely at its own risk while it knew of a pending appeal on this issue.

HealthTrust's distribution of the $17.1 million in surplus funds to a class of certain current members when it knew that the Intervenors had appealed the Presiding Officer's interpretation that he lacked authority to order payments to former HealthTrust members as restitution or disgorgement, and that accordingly, there was a disputed claim as to the appropriate universe of potential recipients of the surplus funds, undercuts its argument that the order of additional payments would be unfair and unreasonable. The fact that HealthTrust distributed the $17.1 million in surplus before the Court ruled on the Intervenors' appeal while also knowing that it may be liable for any additional payments if, as has occurred here, the Court reversed and remanded the Presiding Officer's conclusion from the Final Order, also further undercuts HealthTrust's argument regarding fairness and reasonableness. In addition, HealthTrust could have worked with the Intervenors to resolve their claims after they filed their appeal, but before the Court ruled on it, and yet, it chose not to. Such a settlement would have precluded the Court from ruling on this appeal in the manner that it did, reversing and remanding the Presiding Officer's conclusion from the Final Order. As a result of HealthTrust's actions, former and other

current members who are entitled to distributions of the $17.1 million in surplus funds have been wrongfully denied their portions without recourse. The principles of fairness and reasonableness, with which HealthTrust is concerned despite its violation of RSA 5-B:5, I(c), dictate that these former and other current members be included in the universe of recipients and receive their proportionate share of the $17.1 million in surplus funds through restitution or disgorgement.

2. The settlement agreements that the BSR entered into with other pooled risk management entities are irrelevant and HealthTrust is not entitled to summary judgment on all claims on this basis.

The fact that the BSR entered into settlement agreements, called Risk Pool Practices Agreements, with SchoolCare and Primex, two other pooled risk management entities, does not entitle HealthTrust to summary judgment on all claims in this case. Several key differences exist between HealthTrust, SchoolCare, and Primex that prohibit the analogies that HealthTrust attempts to draw in its Motion. SchoolCare and Primex are distinct from HealthTrust, in that both SchoolCare and Primex were not the subject of enforcement actions brought by the BSR because they negotiated a resolution with the BSR before any actions were brought, and as a result, there is no basis for imposing a penalty on either entity. LGC/HealthTrust, on the other hand, refused to negotiate a resolution to the enforcement action the BSR brought against it and is now subject to a penalty for its violation of RSA 5-B:5, I(c).[2] If LGC/HealthTrust had negotiated with the BSR in 2012, as SchoolCare and Primex did, it would have been offered the same or similar settlement terms as the BSR offered SchoolCare and Primex, and most likely, years of additional litigation, significant expense, and the present situation would have been

[2] Despite insisting that BSR engage in settlement negotiations with SchoolCare, Primex, and LGC/HealthTrust all at the same time, LGC/HealthTrust then refused to actually negotiate with the BSR. The BSR then entered into settlement agreements with SchoolCare and Primex separately.

avoided. The Risk Pool Practices Agreements, and the recommended terms for payout of the $17.1 million in surplus funds, were based on the state of the law at that time regarding the universe of recipients of payments from surplus funds as a penalty for a RSA 5-B:5, I(c) violation, before the Court's Order in Appeal of Salem. When Risk Pool Practices Agreements were made, it was unclear whether or not the BSR could have insisted that payments be made to former HealthTrust members, and whether or not the Presiding Officer could have ordered such payments. Now the Court's decision in Appeal of Salem has changed the legal landscape and it is clear that the Presiding Officer has the authority to impose a penalty on HealthTrust for its violation of RSA 5-B:5, I(c) that can include payments from the $17.1 million surplus funds to former and other current HealthTrust members as restitution or disgorgement. Because the Presiding Officer has the authority to impose as a penalty an order for payments from the $17.1 million surplus funds to former and other current HealthTrust members as restitution or disgorgement, and as HealthTrust never negotiated a settlement with the BSR that controls, the Risk Pool Practices Agreements that the BSR entered into with SchoolCare and Primex, two entities wholly distinct from LGC/HealthTrust, and irrelevant to the remand analysis that the Presiding Officer will undertake in this stage of the case, and therefore, HealthTrust is not entitled to summary judgment as a result of these Risk Pool Practices Agreements.

3. HealthTrust is not entitled to summary judgment on all claims because its contractual agreements with its members are unenforceable in this matter and contrary to New Hampshire law in this case.

HealthTrust's participation agreements with its members, authorizing resolutions, and the provisions of its by-laws, do not foreclose the Intervenors' and the BSR's claims, and HealthTrust's request for summary judgment on this basis should be denied. In 2014, HealthTrust, at its own risk due to a pending appeal on this issue, distributed the $17.1 million in

surplus funds to its 2014 members based on each member's percentage share of contributions in 2014, in accordance with its by-laws, authorizing resolutions, and participation agreements. However, as a result of its actions, new members, who had not participated in funding the unlawful $17.1 million subsidy, received a windfall. In addition, members who had either left HealthTrust by 2014 or participated at a lower level[3] did not receive any refund, or did not receive a refund that was proportionate with their contribution to the unlawful $17.1 million subsidy. On remand, the Presiding Officer will not determine the proper way to return the $17.1 million to a universe of recipients pursuant to HealthTrust's contractual agreements with its members, but rather, he will determine the appropriate statutory remedy for HealthTrust's violations of RSA 5-B:5, I(c), as found in the Presiding Officer's August 16, 2012 Final Order. Final Order at 78-9. As established by the Court in Appeal of Salem, 168 N.H. at 580-81, this statutory remedy can involve imposing penalties for violations including rescission, restitution, or disgorgement under RSA 5-B:4-a, I(b)(2). In determining the proper statutory remedy or penalty for HealthTrust's unlawful actions, HealthTrust's contractual agreements with its members are irrelevant, and certainly do not warrant summary judgment on all claims in HealthTrust's favor.

In addition to being irrelevant to the Presiding Officer's determinations on remand, HealthTrust's contractual agreements with its members, requiring continuing participation in HealthTrust's programs to receive any surplus funds, violate RSA 5-B:5, I(c). As with rate stabilization, HealthTrust's practice of contractually limiting the return of surplus funds to a subset of members, i.e. current members who renew in the year after the surplus is generated,

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[3] For example some members who had participated in both the health and dental programs from 2003-2010 participated in only the dental program in 2014 and therefore had a much lower percentage of contributions to HealthTrust in 2014.

improperly incentivizes members to renew with HealthTrust so that they can take advantage of their share of any surplus. In rejecting the practice of rate stabilization by LGC and HealthTrust, the Court cited approvingly to then-Senator Hassan's testimony at a public hearing on the legislation that vested the Secretary of State with enforcement authority under RSA 5-B:

> The issue here is not whether [rate reduction] is a good way to run an insurance pool or not, or what shared risk, the concept of shared risk within an insurance pool. The issue is the plain language of the statute says that, if you have a surplus, it is supposed to go back to the political subdivisions. It doesn't say you can reduce rates over time, and some members win and some members lose, or some subdivisions win and some subdivisions lose . . . .

Appeal of the Local Government Center, Inc., 165 N.H. 790, 808-9 (2014). The contractual practice to limit those eligible to receive surplus funds to those members who renew in the following year creates a similar situation to rate stabilization, where those members who renew win by receiving surplus and those members who do not renew lose by being excluded from any return of surplus. Implied in the Court's 2014 decision is the concept that RSA 5-B requires that surplus funds be returned to those political subdivisions that contributed to generating the surplus so that winners and losers are not determined based on continued participation in HealthTrust's programs. This implication is even stronger in Appeal of Salem, 168 N.H. at 578, where the Court rejected the argument that the reference to returning surplus to "participating political subdivisions" in RSA 5-B:5(I)(c) requires that political subdivisions be current participants in the program at the time that surplus is returned. Id. at 580-81. The Court clearly held that violations of RSA 5-B can result in statutory penalties including rescission, restitution, and disgorgement to or from current or former members and therefore, HealthTrust's contractual agreements that state otherwise violate this clarified state of the law and are irrelevant to the Presiding Officer's determination on remand. Therefore, HealthTrust's argument that it is

entitled to summary judgment on all claims due to the contractual agreements it has with its members is erroneous and should be denied.

II. HEALTHTRUST'S MOTION TO EXCLUDE EVIDENCE SHOULD BE DENIED BECAUSE THE PRESIDING OFFICER HAS THE AUTHORITY TO CONSIDER ADDITIONAL EVIDENCE TO PROPERLY DETERMINE THE UNIVERSE OF HEALTHTRUST MEMBERS WHO MAY QUALIFY FOR A PROPORTIONATE DISBURSEMENT THROUGH RESTITUTION OR DISGORGEMENT, AND TO GIVE THAT EVIDENCE THE WEIGHT HE DEEMS APPROPRIATE.

For the reasons stated *supra*, the consideration of additional evidence regarding the universe of HealthTrust members who may qualify for a proportionate disbursement from the $17.1 million subsidy funds through restitution or disgorgement is properly within the scope of the Court's remand in Appeal of Salem, 168 N.H. at 581, and within the Presiding Officer's authority. Therefore, HealthTrust's argument that such evidence should be excluded from this matter is erroneous and should be denied.

III. CONCLUSION

For the reasons stated herein, HealthTrust is not entitled to summary judgment and its Motion should be denied. In addition, for reasons stated herein, HealthTrust's Motion to Exclude Evidence should be denied.

Respectfully submitted,

The Bureau of Securities Regulation,
By its attorneys,

Bernstein Shur, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of Objection upon counsel of record through the electronic filing system in place in this matter this 15th day of August, 2016.

Christina A. Ferrari, Esquire