THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

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

INTERVENOR'S OBJECTION TO HEATHTRUST'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

The Intervenor communities hereby submit the within Objection to HealthTrust's Motion for Summary Judgment and incorporated Memorandum of Law.

I. SUMMARY JUDGMENT STANDARD.

In reviewing a motion for summary judgment, the pleadings, discovery, and affidavits presented in the record and "all inferences properly drawn therefrom, [are construed] in the light most favorable to the nonmoving party." MacLearn v. Commerce Insur. Co., 163 N.H. 241, 243-44 (2012); see Opinion of the Justices, 138 N.H. 445, 450 (1994). If "review of that evidence discloses no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law," then grant of summary judgment is proper. MacLearn, 163 N.H. at 244.

II. HEALTHTRUST IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE RECORD BEFORE THE HEARINGS OFFICER.

A. BRIEF STATEMENT AS TO CLAIMS NOT RELATING TO INTERVENORS

HealthTrust ("HT") makes several arguments, largely based on the doctrine of *res judicata,* arguing that BSR may not assert claims on behalf of current or former members of HealthTrust. The Intervenors are properly excepted from several of these claims, and as a result, the Intervenors will not address them. However, it has been the position of the Intervenors from their earliest involvement in this proceeding that the distribution of the $17.1 million in excess surplus funds should be returned to those communities that contributed to the surplus in proportion to their contribution.

Ultimately, the purpose of these proceedings is to do justice to the political subdivisions that make up the risk pool. The purpose is not to reward the party best able to make use of procedural arguments. Since some of the intervenor towns first attempted to intervene the appeal of this action in the New Hampshire Supreme Court, January 14, 2013. Otherwise, the remedy would have resulted in an outcome that "created windfalls for some, but inadequate recompense for others. That is, some members…received an arbitrarily larger share than their contribution, and some an arbitrarily smaller share." Id.

Intervenors agree generally with BSR's assertion that, "if surplus is generated it should be returned to those who participated in generating the surplus. Surplus is not a marketing technique to be used by risk pools to assure loyalty and renewals." BSR Motion in Limine To Exclude Evidence At Upcoming Evidentiary Hearing. Thus intervenors agree with BSR that funds should be returned to those communities whose taxpayers contributed to them.

B. HEALTHTRUST HAS NOT DEMONSTRATED THAT IT IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW AS TO CLAIMS RAISED BY THE INTERVENORS.

HealthTrust raises three arguments relating to the intervenors, which it casts as follows:

> (2) HealthTrust sought the guidance of the Presiding Officer and the BSR prior to distributing the $17.1 million.
>
> (4) Neither the Intervenors nor the BSR moved for a stay of HealthTrust's distribution of the $17.1 million;
>
> (5) All of the current and former HealthTrust members' agreements to voluntarily participate as HealthTrust members incorporated by laws that provide a member is not entitled to share in distributions of surplus that occur after the member has terminated its HealthTrust membership.

HealthTrust has presented no legal authority suggesting that it is entitled to summary judgment as a matter of law on any of these claims. Each of these arguments should be rejected as to the Intervenors.

HealthTrust has presented no legal authority for the proposition that seeking the "guidance" of the Presiding Officer establishes that it is entitled to summary judgment as a matter of law. Likewise, HealthTrust has presented no legal authority for the proposition that a prevailing party on appeal is required to move for a stay, in addition to preserving the legal issue and property perfecting an appeal. The lack of legal authority for these points should be sufficient to cause the Presiding Officer to deny the motion for summary judgment as to the Intervenors.

Even if the Presiding Officer's approval could offer safe harbor under some circumstances (a contention the Intervenors do not concede), the fact that the Presiding

Officer's interpretation of the scope of his own authority was eventually overturned by the Supreme Court could render any such safe harbor ineffective. See, Appeal of Town of Salem, 168 N.H. 572 (2016). The Supreme Court's reversal indicates that reliance on the Presiding Officer's determination, if it occurred at all, would have been misplaced.[1] The decision makes it perfectly clear that the Intervenors, as they argued at the July 21, 2014, hearing, are entitled to have the Presiding Officer make a determination concerning the distribution of excess surplus made by risk pool participants who were no longer members of the LGC/HealthTrust entities during the relevant time periods. That is what the Intervenors sought in July of 2014 and that is why they seek now. It is not a matter for summary judgment.

Even when considering the merits outside of the summary judgment context, the fact that HealthTrust sought the guidance of the presiding officer and the BSR prior to distribution the $17.1 million should be given no weight as to the Intervenors. The Intervenors perfected their appeal and filed a timely Notice of Appeal prior to the distribution of the funds. This was a matter of record of which HealthTrust was fully aware. The Intervenors appealed to the Supreme Court on October 8, 2014. The Final Order in this case was not issued until November 17, 2014. During that period, HealthTrust was aware of the Intervenor's appeal and of the potential that a successful appeal could result in it being forced to either: (a) make adjustments to its distribution

[1] The Intervenors recognize that this litigation had been ongoing for long before they were permitted to intervene for the purpose of proposing a distribution. Further, the intervenors recognize that neither of the main litigants brought the intervenors' concerns to the attention of the Presiding Officer. Regardless, the Intervenors did bring those arguments forward and are entitled to have a determination made consistent with the law as they argued it previously.

by recalling or requiring repayment of funds sent to its members; or (b) paying more than the $17.1 million identified in the Presiding Officer's Order. HealthTrust could have filed a motion to stay or proposed a partial distribution and withholding of some portion of funds to satisfy any judgment in the event of an appellate ruling in favor of the Intervenors. It chose not to do so and thus proceeded at its peril.

Finally, the fact that HealthTrust (and its LGC predecessors) had adopted by-laws and entered into contracts requiring political subdivisions to remain as members of HealthTrust in order to receive any refund of surplus does not entitle HealthTrust to summary judgment as a matter of law. Indeed, the enforceability of those by-laws and contract provisions countermanding RSA 5-B was implicitly rejected by the Supreme Court in the appeal.

HealthTrust is a voluntary corporation organized under RSA 292. Pursuant to RSA 292:6, the bylaws of a corporation organized under RSA 292, "may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with the laws of the state or the articles of agreement...." (emphasis added). Courts "will not enforce a contract or contract term that contravenes public policy." Harper v. Healthsource, 140 N.H. 770, 775 (1996) (citing Audley v. Melton, 138 N.H. 416, 418 (1994); Technical Aid Corp. v. Allen, 134 N.H. 1, 8, 17 (1991)). "An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with the morals of the

time." Id. (citing 17A Am.Jur.2d Contracts § 263, at 267-68 (1991) (footnotes omitted)). "The public policy to which a court may refer may be statutory or nonstatutory in origin." Id. (citing Cloutier v. Great A&P Tea Company, 121 N.H. 915, 922 (1981).

It is clear that the contract provision had the effect of being a marketing technique to be used by HealthTrust to assure loyalty and renewals in the hope of obtaining a refund at some point. The Supreme Court has twice strongly indicated that it is not inclined to enforce that provision. First, in Appeal of Local Government Center, 165 N.H. 790 (2014), the court flatly rejected LGC's claim that its members prefer rate stabilization to refunds. The Court found that the claim of LGC's member's preferences "do not affect the plain meaning of RSA 5-B:5, I(c)." Id. at 808. The clear import of this case is that contract provision allowing HealthTrust to retain excess surplus and return it in the form of rate stabilization, which benefits only the current members, is at odds with the plain language of the statute requiring refunds of excess surplus.

In Appeal of Town of Salem, the Supreme Court removed all doubt as to the proper construction of RSA 5-B. The Court held that the Secretary of State's authority to impose penalties for violation of RSA 5-B:5, I(c), includes authority to impose "rescission, restitution or disgorgement." Id. at 580. The Court continued, finding that "[e]ither of the remedies purportedly used could involve repayment of the wrongfully held funds to the parties from whom the defendants obtained those funds." Id. at 581. This includes parties that are no longer members of HealthTrust/LGC. Thus, implicit in the Supreme Court's ruling is a finding that the contract provisions and by-laws prohibiting return of excess premium to former members contravenes New Hampshire

law and public policy. HealthTrust is therefore not entitled to summary judgment on that ground.

III. CONCLUSION

For the foregoing reasons, HealthTrust's motion for summary judgment should be denied.

RESPECTFULLY SUBMITTED
The Towns of Auburn, Bennington, Meredith, Northfield, Peterborough, Plainfield, Salem, and Temple,

By their attorneys,
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CERTIFICATION

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

August 15, 2016

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