STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

Docket No. C-2011000036

IN THE MATTER OF:

Local Government Center, Inc., et al.

Bureau of Securities Regulation's Hearing Memorandum of Law

The New Hampshire Bureau of Securities Regulation ("BSR"), by and through counsel, hereby submits this Hearing Memorandum of Law setting forth legal arguments regarding the determination on remand of the appropriate penalty for HealthTrust's violation of RSA 5-B:5, I(c).

I. FACTS AND PROCEDURAL HISTORY

On August 16, 2012, the Presiding Officer found that HealthTrust[1] violated RSA 5-B:5, I(c) by "improperly accru[ing] and retain[ing] unnecessary surplus funds, improperly transferr[ing] assets, and improperly expend[ing] funds for purposes beyond those permitted in the statute, and fail[ing] to return excess funds to political subdivisions who are members of each individual pooled risk management program." Final Order at 6, and 39. RSA 5-B:5, I(c) requires HealthTrust to "[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions." The Presiding Officer further found that HealthTrust acted wrongfully by engaging in "the continuous practice of taking funds from the health and property liability programs to subsidize the operation of a workers compensation pooled risk management program that was financially deficient, i.e. insufficient premiums were paid to cover all claims

[1] This Order refers to "LGC, Inc. and its entities," of which HealthTrust is a part. Final Order at 24.

and administration of claims costs." Final Order at 40. These illegal subsidies, made during the years of 2003-2010 amounted to a total of $17,111,804.35. Final Order at 40-1. Under RSA 5-B:5, I(c), these funds could have been returned to the members of the health trust and the property liability programs during the years in which they were transferred. Final Order at 41.

The Presiding Officer concluded that LGC held $33,200,000.00 in excess earnings and surplus and ordered the BSR and the LGC to "confer and within 30 days, submit 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." Final Order at 75-6, ¶ 6, 8. The Presiding Officer also ordered that if the parties did not submit an agreement, the "Local Government Center's Health Trust risk pool management program 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 76, ¶ 8. The $17.1 million subsidy also had to be repaid to the Local Government Center's Health Trust risk pool management program by December 1, 2013, and the Presiding Officer ordered that those funds "be returned to members consistent with RSA 5-B:5, I (c). Final Order at 78-9, ¶ 13-4.

At that time, the BSR believed that a negotiated methodology for returning the $33.2 million to HealthTrust's members would also provide a methodology for return of the $17.1 million to those members, and therefore, the BSR attempted to negotiate such methodologies immediately upon the Final Order's issuance. However, HealthTrust refused to participate in negotiations because it believed that the Final Order was not "final" because of its 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.

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 caused HealthTrust to further delay the return of the $17.1 million to its members.

Beginning in 2014, the underlying events leading to the instant Hearing unfolded as follows:

- On February 7, 2014, the BSR filed a Motion for Entry of Default Order alleging that HealthTrust's and PLT's agreement violated RSA 5-B and the Court's decision because it voided PLT's obligation to repay the $17.1 million to HealthTrust and its members.

- On June 3, 2014, HealthTrust filed a "Notice of Termination Agreement Terminating Settlement Agreement" (the "Notice"), which stated the following:

> "Although not stated in the Termination Agreement because it is a unilateral determination made by the HealthTrust Board of directors, subject to the Presiding Officer's and the BSR's approval, HealthTrust will distribute $17.1 million to its current members or another identified combination of current and former HealthTrust members."

- On the same day, June 3, 2014, the HealthTrust Board unanimously approved a Motion "to authorize staff that subject to the receipt of payment of the $17.1 million debt from PLT HealthTrust declares a $17.1 million surplus to be distributed on September 8, 2014, as a check or contribution holiday to the member groups as ordered by the BSR or the Hearing Officer to receive such distribution, or if no such order is issued, to HealthTrust's Medical and Dental Members proportionally to contribution received during Fiscal Year 2014 (September 1, 2013 -June 30, 2014) as provided for in the HealthTrust, Inc. Bylaws." This approval was not disclosed to the BSR or to the Hearings Officer.

- On June 6, 2014, the Intervenors[2] filed a Motion to Intervene for Limited Purpose on Being Heard on Question of Repayment of Funds. The Intervenors argued that they were 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 July 25, 2014, the BSR, HealthTrust, and PLT executed a Consent Decree, which resolved the issues raised in the BSR's February 2014 Motion. While the Consent Decree addressed the return of the unlawful $17.1 million workers compensation subsidy from PLT to HT, it did not address the mechanism for returning the subsidy to HT's members.

- 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' request to receive their proportionate shares of the $17.1 million in funds. This Order stated the following:

> "There is no provision that these re-payment funds, or any funds under consideration by that order, were to be paid to past members or former members. The "pooled Risk Management Program" statute does not make any provision for any past or former member of a pooled risk management program. RSA 5-B:5, I(c) provides only for returns to "participating political subdivisions," not any past or former political subdivisions.
> . . .

[2] Salem, Peterborough, Meredith, Plainfield, Bennington, Temple, Auburn, and Northfield.

> 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 5-6.

- On September 3, 2014, the Intervenors filed a Motion for Reconsideration of the Omnibus Order.

- On or about September 8, 2014, HealthTrust, solely at its own risk, distributed the $17.1 million to certain members without disclosing at that time the details as to how each re-payment was calculated and exactly which members received a re-payment. This distribution was made to 352 of HealthTrust's then-current members based on each member's proportional payments to HealthTrust's medical and dental coverage lines during the 2014 fiscal year (September 1, 2013 -June 30, 2014), as provided for by HealthTrust's by-laws. See Statement of Stipulated Facts, ¶¶ 2-3 and Exhibit A.

- On September 8, 2014, this Hearings Officer denied the Intervenors' Motion for Reconsideration.

- On or about October 8, 2014, the Intervenors appealed the provisions of the Omnibus Order to the New Hampshire Supreme Court.

- On November 17, 2014, this Hearings Officer issued a Final Order on Remand addressing the payment of fees and costs to the BSR. This Order concluded the matter subject to the provisions of the Omnibus Order.

On February 18, 2016, the New Hampshire Supreme Court issued a decision on the Intervenors' appeal, finding in part that:

> RSA 5-B:5, I(c) is the provision the LGC defendants violated; it does not circumscribe the remedy. RSA 5-B:4-a authorizes the secretary of state to impose penalties for violations of the statute's provisions - here violation of RSA 5-B:5, I(c) - by means including 'recission, restitution, or disgorgement.' RSA 5-B:4-a, I(b)(2).
> . . .
> Either of the remedies purportedly used could involve repayment of the wrongfully held funds to the parties from whom the defendants obtained those funds.
> . . .
> Thus, 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) (internal citations omitted). The Court vacated the Presiding Officer's decision and remanded the matter to the Presiding Officer for further proceedings. Id. The Court expressed "no opinion as to what penalty should be ordered." 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 allowed the Presiding Officer to 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;.

- 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.

In a subsequent Notice, the Presiding Officer stated that this proceeding requires "a factual determination of which former members may qualify to receive a distribution from HT due to its violation of RSA 5-B and what amount, if any, should be ordered by the presiding officer to be paid. The Supreme Court has determined that former members *could* be reimbursed under the penalty provision provided in RSA 5-B:4-a, I." Notice of Hearing Dates and Order Requiring Submission of Proposed Orders at 1 (emphasis in original).

II. ARGUMENT

A. The Presiding Officer has authority under RSA 5-B:4-a, I(b)(2) to order payments to a universe of recipients as restitution, the proper and equitable penalty for HealthTrust's violation of RSA 5-B:5, I(c).

1. The doctrine of *res judicata* does not bar the present action and the Presiding Officer's order of payments to classes of HealthTrust's members who have either received no proportionate shares of the $17.1 million, or received less than their proportionate share than they should have, as restitution for HealthTrust's violation of RSA 5-B:5, I(c), is permitted.

The 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) for illegally subsidizing its workers' compensation pool. Since the Court remanded to the Presiding Officer the issue of the penalty to be imposed, which logically includes a determination of the methodology to be used to determine how and to whom the $17.1 million illegal subsidy should be distributed as re-payments, it is proper for the BSR to advance its claims that a proper penalty for HealthTrust's violation is restitution, wherein payments are made to two classes of HealthTrust members: 1. former HealthTrust members who have not received any re-payments that they are entitled to from the $17.1 million; and 2. current HealthTrust members who received less than their proper proportionate share of the $17.1 million. As a matter of law, *res judicata* does not bar the BSR's claims[3] nor the Presiding Officer's determination of what universe of HealthTrust members should receive distributions.

[3] 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 issue of the determination of the penalty for HealthTrust's violation of RSA 5-B:5, I(c), such as restitution, has not yet reached finality. Therefore, HealthTrust's argument that *res judicata* bars 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 issue of penalty should be imposed, including within that issue the questions of what universe of HealthTrust members are entitled to payments of funds through restitution and the appropriate amount of each such payment for each 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 penalty to be imposed, and to whom the re-payments can be made under that penalty, 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 this 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 penalty should be imposed, namely what universe of HealthTrust members are entitled to a portion of the $17.1 million in 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 on Remand 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. The present stage of this proceeding results from the appeal that was pending at the time of the Final Order on an issue which the Final Order was specifically subject to. 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 BSR's claims 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 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 funds. At all times relevant, the BSR has been a party to these proceedings, including the Intervenors' appeal. See New Hampshire Practice, Wiebusch on New Hampshire Civil Practice and Procedure § 60.24, Deleting Parties in Supreme Court (4th Ed., Vol. 5, Matthew Bender & Co. 2014) (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 BSR's claims in this remand proceedings as to the proper penalty to be imposed against HealthTrust for its violation of RSA 5-B:5, I(c) and the universe of HealthTrust members who should receive distributions from the $17.1 million in funds.

2. The Presiding Officer's determination of the scope of this remand, which includes a determination of the claims raised by 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 in any way, and certainly not to just the eight Intervenors or just former HealthTrust members.

The Court has remanded the issue of what penalty should be ordered in this matter and logically within that, what universe of HealthTrust members are entitled to distributions from the $17.1 million in funds. 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 "either of the remedies purportedly used could involve repayment of the wrongfully held funds to the parties from whom the defendants obtained those funds" and that it was "express[ing] no opinion as to what penalty should be ordered in this case."). 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 proper penalty to be applied, the universe of HealthTrust members that are entitled to re-payment, and the amount of re-payment they are entitled, is consistent with the Court's Order.

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 relief through recission, 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.

The issues that the Court remanded are specific, 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 or limited to any other specific type of recipients. 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 members of HealthTrust who have not received the payments that they are entitled to from the $17.1 million.

Further, in Appeal of Salem, the Court concluded 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." 168 N.H. at 581. This language, "former members of a pooled risk management program," does not dictate that the Presiding Officer may

only award relief to a certain class of HealthTrust members. Rather, the terms "former members of a pooled risk management program" reasonably mean members who formerly belonged to a coverage line, such as a medical or dental coverage line. As explained below, all of the HealthTrust members who the BSR has identified as members who are properly entitled to received re-payments from the $17.1 million through the imposition of restitution as a penalty, qualify as "former members of a pooled risk management program" in one manner or another and are not excluded from the universe of potential recipients of distributions from the $17.1 million in funds.

In addition, while the Court did not express its opinion as to what is the proper penalty to be imposed, the Court did envision one that involved "repayment of the wrongfully held funds to the parties from whom the defendants obtained those funds" regardless of their status as a "current" or "former" member. Id. (emphasis added). In this case, the parties from whom HealthTrust improperly obtained funds, through their premium contributions, to generate the $17.1 million illegal subsidy, are the following two groups of HealthTrust members:

a. 26 HealthTrust members who made contributions to HealthTrust during the years of 2003-2010, but who did not receive distributions of the $17.1 million in surplus funds because they were not current HealthTrust members in 2014; and

b. 48 HealthTrust members who were current members in 2014 and who made contributions to HealthTrust during the years of 2003-2010 but who either received no distributions of the $17.1 million in surplus funds or received less distributions of the $17.1 million in surplus funds than they are entitled to receive because they either:

i. participated in either medical or dental coverage in 2014, but less coverage than they previously participated in; or

ii. participated only in non-medical or non-dental coverage in 2014, such as in disability and/or life coverage lines.

Exhibits B and C of the Statement of Stipulated Facts describe who these members are, the amount of each member's cumulative payments during the years of 2003-2010, the amount each

member received from HealthTrust in 2014, and the amount of funds each member will receive, pursuant to a reallocation methodology initially developed by the Intervenors but that now all parties have stipulated to as the proper calculation to be applied (hereinafter "the agreed to reallocation methodology"), if the Presiding Officer orders funds to be returned to this group of members in proportion to their contributions in 2003-2010. Exhibit C also lists for each member the amount which the reallocation exceeds the 2014 distribution that each member received.

These members are the "rightful owners" of the $17.1 million in funds because: 1. they were the members who contributed the funds that comprised the $17.1 million illegal subsidy; and 2. they are the parties who were damaged by HealthTrust's wrongful acts that violated RSA 5-B:5, I(c). Appeal of Salem, 168 N.H. at 581; see also Pools by Murphy v. Dept. of Consumer Pro., 841 A.2d 292, 299 (Conn. Super. Ct. 2003) (cited by the Court in Appeal of Salem in support of the notion that restitution should benefit the "rightful owner."); see also Frank Shop v. Crown Cent. Petroleum Corp., 564 S.E.2d 134, 140 (Va. 2002) (cited by the Court in Appeal of Salem for the proposition that a remedy such as disgorgement should be awarded to the "party damaged by the illegal act.").

Even if HealthTrust argues that the Court in Appeal of Salem limited the universe of potential recipients to just the Intervenors, the facts clearly show that the Intervenors fall into each of the two groups described above: Intervenors Plainfield, Salem, and Temple are former members (Exhibit B) and Intervenors Auburn, Bennington, Meredith, Northfield, and Peterborough are 2014 members who ceased medical or dental coverage lines (listed on Exhibit C). Therefore, even if the Court's opinion in Appeal of Salem is read as limiting the relief to be afforded to just the types of members the Intervenors are, the members in the two groups listed

above must be included in the universe of recipients, as the Intervenors are included in both of those groups.

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, for all of these reasons, because the Presiding Officer has the power to impose recission, restitution, or disgorgement as a penalty and because Court opened up the potential universe of recipients of re-payments from the $17.1 million in 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 should be denied, are erroneous and should be rejected.

B. The appropriate penalty for HealthTrust's improper retention of $17.1 million for an illegal subsidy from members who contributed those funds in the first instance, a violation of RSA 5-B:5, I(c), is restitution and an order for re-payment to the HealthTrust members who during the years of 2003-2010 contributed funds that compiled the $17.1 million illegal subsidy.

On remand, the focus of this proceeding is for the Presiding Officer to determine the appropriate penalty, under the exclusive enforcement jurisdiction of RSA 5-B:4-a, I(b), for HealthTrust's violation of RSA 5-B:5, I(c). Accordingly, the relevant conduct at issue is HealthTrust's violation of RSA 5-B:5, I(c) based on the illegal $17.1 million subsidy, not HealthTrust's distribution of $17.1 million in funds in 2014. Appeal of Salem, 168 N.H. 572, 581 (2016). See id. (stating that "RSA 5-B:5, I(c) is the provision the LGC defendants violated;

it does not circumscribe the remedy. RSA 5-B:4-a authorizes the secretary of state to impose penalties for violations of the statute's provisions- here violation of RSA 5-B:5, I(c)- by means including 'recission, restitution, or disgorgement.' RSA 5-B:4-a, I(b)(2)."). This proceeding is not to determine how to distribute a typical surplus to HealthTrust's members, but how to penalize HealthTrust for its wrongful conduct that adversely impacted certain classes of its members and how to provide relief for those members. Because the act for which HealthTrust is to be penalized is the illegal $17.1 million subsidy, the appropriate penalty for that act is an order for HealthTrust to repay to the members who contributed the funds that comprised that illegal subsidy their proportionate shares of the $17.1 million in funds. Simply put, the appropriate penalty for HealthTrust's violation of RSA 5-B:5, I(c) is restitution and the repayment of funds that belong to the members who contributed them in the first instance, in 2003-2010, regardless of their status in 2014. See Appeal of Salem, 168 N.H. at 581 (stating that "either of the remedies purportedly used could involve repayment of the wrongfully held funds to parties from whom the defendants obtained those funds.") (emphasis added, internal citations omitted).

The two groups of HealthTrust members who contributed these funds are described above, and payments to these members should be made in proportion to their contributions in 2003-2010, as set out in Exhibits B and C to the parties' Statement of Stipulated Facts based on the agreed to reallocation methodology. Based on the Court's ruling in Appeal of Salem, the Presiding Officer has the authority to order payments to these classes of members and such an order for payment to be made to these classes of members is proper because these members are the "rightful owners" of the funds and are the parties who were damaged by HealthTrust's wrongful acts that violated RSA 5-B:5, I(c) because they were the members who contributed the funds that comprised the $17.1 million illegal subsidy. Appeal of Salem, 168 N.H. at 581; see

also Pools by Murphy v. Dept. of Consumer Pro., 841 A.2d 292, 299 (Conn. Super. Ct. 2003) (cited by the Court in Appeal of Salem in support of the notion that restitution should benefit the "rightful owner."); see also Frank Shop v. Crown Cent. Petroleum Corp., 564 S.E.2d 134, 140 (Va. 2002) (cited by the Court in Appeal of Salem for the proposition that a remedy such as disgorgement should be awarded to the "party damaged by the illegal act.").

1. The distribution of $17.1 million in funds as a normal surplus is not a penalty and does not provide relief to the HealthTrust members whose contributions generated the $17.1 million illegal subsidy and who have been wrongfully denied relief from HealthTrust to date.

The HealthTrust members listed on Exhibits B and C of the Statement of Stipulated Facts are the members whose contributions during the years of 2003-2010 funded the $17.1 illegal subsidy, a subsidy that violated RSA 5-B:5, I(c) and for which HealthTrust now should be penalized. As a result of HealthTrust's actions, these members have paid more in contributions than they should have. The funds that they did pay were unlawfully used to subsidize coverage lines and risk management programs that they were not participating in. Restitution and an order for re-payment to the HealthTrust members who, during the years of 2003-2010, contributed funds that compiled the $17.1 million illegal subsidy is the only equitable way to ensure that a penalty has truly been imposed on HealthTrust for its violation of RSA5-B:5, I(c) and that proper universe of damaged parties have been afforded the full relief that they are entitled to.

The facts of this matter show that in 2014, HealthTrust on its own volition distributed the $17.1 million only to its current members in 2014 because it treated the distribution of the $17.1 million in 2014 as a normal surplus that was generated in 2014. However, this manner of distribution is not the same as distributing funds as a penalty under RSA 5-B:4-a, I(b), a penalty that would need to equitably ensure that the distribution of the $17.1 million in funds is made to all of the members who contributed to the illegal subsidy, in proportion to their contributions. A

penalty that fails to provide a remedy to all of the parties who were adversely affected by HealthTrust's wrongful conduct is no remedy at all, let alone a proper one. HealthTrust's treatment of the $17.1 million in funds as an ordinary surplus generated in 2014, and the distribution of these funds only to HealthTrust members who were current in 2014, resulted in new members who had not participated in funding the $17.1 million illegal subsidy receiving a windfall and members, who had either left HealthTrust by 2014 or participated at a lower level[4], being denied a refund, or receiving a refund that was not proportionate to their contribution to the $17.1 million illegal subsidy. Such a result must be corrected herein on remand, and all of the members who contributed to the $17.1 million illegal subsidy in the years of 2003-2010 should receive their proportionate share of the $17.1 million in funds.

HealthTrust erroneously relies on the language of RSA 5-B:5, I(c) to support its argument that the $17.1 million in funds is a 2014 surplus and payment of these funds should only be made to HealthTrust's 2014 members. RSA 5-B:5, I(c) states that each pooled risk management program shall "return all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating subdivisions." However, the term "participating subdivisions" is not exclusively defined as only those subdivisions participating in the year the distribution of excess funds are made, 2014 in this case. Rather, this term is not defined at all and a reasonable interpretation of it, in the context of a penalty determination for a violation of RSA 5-B:5, I(c) and based on the Court's ruling in Appeal of Salem, 168 N.H. at 581, is that "participating subdivisions" includes those members who participated in the act that led to the excess funds. In the penalty context, a reasonable

[4] See the explanation *supra* regarding the classes of HealthTrust members who are entitled to distributions from the $17.1 million in funds. Some members who had participated in both the health and dental coverage line from 2003-2010 participated in only the dental coverage in 2014 and therefore had a much lower percentage of contributions to HealthTrust in 2014.

interpretation of this term is that "participating subdivisions" includes the members whose contributions compiled the $17.1 million illegal subsidy, which is now being returned as a penalty. Here, those "participating members" include the classes of members listed above, and those members are the ones who should proportionately receive distributions from the $17.1 million in funds.

In addition, HealthTrust cannot now rely on the Presiding Officer's language in the August 16, 2012 Final Order, stating that the $17.1 million "should be returned to members consistent with RSA 5-B:5, I(c)," as a blessing for its improper distribution of the $17.1 million in funds as surplus to only its current members in 2014. Final Order at 79, ¶ 14. This portion of the Final Order has been reversed by the Court's decision in Appeal of Salem, which stated that the Presiding Officer erred when he "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 . . . ." 168 N.H. at 581. Therefore, this portion of the Final Order was erroneous, reversed by the Court in Appeal of Salem, and accordingly, HealthTrust cannot rely on it herein on remand since the Presiding Officer has the power to order "recission, restitution, or disgorgement" as a penalty under RSA 5-B:4-a, I(b).

2. It is not unreasonable or unfair for payments to be made to the HealthTrust members whose contributions comprised the $17.1 million illegal subsidy but who have not received the full re-payments they are entitled to, even if HealthTrust is required to expend funds in addition to the $17.1 million it has already disbursed.

This proceeding, a determination of the appropriate penalty for HealthTrust, arose because HealthTrust violated RSA 5-B:5, I(c), a violation that harmed its members whose contributions compiled a $17.1 million illegal subsidy. As stated, a proper penalty is one that ensures that the members who are properly entitled to receive repayments of their proportionate

shares of the $17.1 million actually receive those repayments, regardless of the fact that HealthTrust has already distributed the $17.1 million in funds to other members as windfalls under an improperly methodology that it adopted.

An order for additional payments to HealthTrust members who are entitled to receive their full proportionate shares of the $17.1 million in funds, but who have not, is not unreasonable or unfair because in 2014, HealthTrust distributed the $17.1 million only to current HealthTrust members, based on their 2014 contributions, solely at its own risk while it knew of the Intervenors' pending appeal of the Presiding Officer's August 4, 2014 Omnibus Order.

HealthTrust made this distribution without disclosing the full details of how each refund was calculated and exactly which members, who were entitled to a portion of the $17.1 million, received a refund. As stated, on June 3, 2014, HealthTrust filed a "Notice of Termination Agreement Terminating Settlement Agreement" (the "Notice"), which stated the following:

> Although not stated in the Termination Agreement because it is a unilateral determination made by the HealthTrust Board of directors, subject to the Presiding Officer's and the BSR's approval, HealthTrust will distribute $17.1 million to its current members or another identified combination of current and former HealthTrust members.

Notice. At the time this Notice was filed, it was wholly unclear from the language of the Notice that HealthTrust was going to distribute the $17.1 million in funds only to its 2014 members based on each member's percentage share of contributions in 2014. See Stipulation of Facts, ¶ 2. In fact, this Notice specifically mentioned that HealthTrust could distribute portions of these funds to former members. It was not until the parties discussed and ultimately stipulated to the facts in this matter that the BSR learned exactly how HealthTrust distributed the $17.1 million in funds. Such a manner of distribution cannot stand now on remand, because the members who contributed funds in 2014 are not the same members who in 2003-2010 contributed funds that compiled the $17.1 illegal subsidy and who now are entitled to be made whole for their damage.

In addition, HealthTrust cannot now use this Notice to support its argument that because the BSR did not object or otherwise respond to this Notice, that it has somehow waived its claims on remand. Due to the Intervenors' pending appeal on the issue of what universe of potential recipients are entitled to share in the $17.1 million in funds and the lack of a final judgment on this issue, the BSR was able to, without waiving its claims and rights, wait for the Court's decision in Appeal of Salem.

HealthTrust's distribution of the $17.1 million in funds to a class of certain current members, when it knew that there was a disputed claim as to the appropriate universe of potential recipients of the funds, undercuts its argument that the order of additional payments would be unfair and unreasonable. If HealthTrust wanted to limit its exposure to just the Intervenors' claims, HealthTrust could have worked with the Intervenors to resolve their claims after they filed their appeal, but before the Court ruled on it. Just as HealthTrust refused to negotiate a methodology for distribution when they were invited to by the BSR in 2012, it chose not to reach an agreement with the Intervenors. Such a settlement would have precluded the Court from ruling on this appeal in the manner that it did. HealthTrust also could have sought to stay its distribution of the $17.1 million in funds until after the Court ruled on the Intervenors' appeal. If HealthTrust wanted its manner of distribution of the $17.1 million to be approved by the Presiding Officer and/or the BSR, HealthTrust could have filed a motion formally asking for such relief. It is not the BSR's job, nor the Hearings Officer's job, to protect HealthTrust from the exposure associated with the repayment of the $17.1 million while an appeal was pending. 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, as described in the Statement of Stipulated Facts.

3. HealthTrust's contractual agreements with its members are irrelevant to the determination of the appropriate penalty for HealthTrust's violation of RSA 5-B:5, I(c) and even if they somehow were relevant, these contractual agreements should not control the determination of the appropriate penalty because they violate RSA 5-B:5, I(c) on their own.

HealthTrust also erroneously relies on its contractual agreements with its members, namely its participation agreements with its members, authorizing resolutions, and the provisions of its by-laws, as support for its argument that its distribution of the $17.1 million in funds only to its 2014 members based on each member's percentage share of contributions in 2014 was proper. However, contrary to its arguments, HealthTrust's contractual agreements with its members do not control the determination of the appropriate penalty at this stage of the matter, as the Presiding Officer is the sole determinant of the penalty on remand. See Appeal of Salem, 168 N.H. at 580-81 (stating that a statutory remedy can involve imposing penalties for violations including rescission, restitution, or disgorgement under RSA 5-B:4-a, I(b)(2)). A determination of the proper penalty for HealthTrust's violation of RSA 5-B:5, I(c) is not a matter of contract and therefore, these contractual agreements are irrelevant to the Presiding Officer's determination of the proper penalty in this matter.

In addition, 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, 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 the

contractual agreements it has with its members controls the distribution of the $17.1 million in funds is erroneous and should be denied.

III. CONCLUSION

For all of the foregoing reasons in this Hearing Memorandum, and for all of the reasons presented by the BSR during the evidentiary hearing in this matter, the BSR respectfully requests that the Presiding Officer order the following, as laid out in greater detail in the Proposed Order filed simultaneously with this Hearing Memorandum:

- HealthTrust shall pay to the 26 HealthTrust members identified in Exhibit B[5] of the Stipulation of Facts their proportionate share of the $17.1 million illegal surplus, for a total amount of $1,271,439.99;

- HealthTrust shall pay to the 48 HealthTrust members identified in Exhibit C[6] of the Stipulation of Facts their proportionate share of the $17.1 million illegal surplus, for a total amount of $1,036,542.30; and

- HealthTrust shall account for the $2.3 million payment as a liability in FY 2016 and shall pay the entirety of the liability on or before October 1, 2016.

[5] Three of the Intervenors are included on Exhibit B.
[6] Five of the Intervenors are included on Exhibit C.

Respectfully submitted,

The Bureau of Securities Regulation,
By its attorneys,

Bernstein Shur, P.A.

September 5, 2016

/s/ Roy W. Tilsley, Jr.

Andru H. Volinsky, Esq., No. 2634
Roy W. Tilsley, Jr., Esq., No. 9400
Christina A. Ferrari, Esq., No. 19836
P.O. Box 1120
Manchester, NH 03105-1120
(603) 623-8700
avolinsky@bernsteinshur.com
rtilsley@bernsteinshur.com
cferrari@bernsteinshur.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Hearing Memorandum of Law upon counsel for the parties of record through the electronic filing system in place in this matter this 5th day of September, 2016.

/s/ Roy W. Tilsley, Jr.
Roy W. Tilsley, Jr., Esq.