STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc. et al	)	**Case No.: C-2011000036**
RESPONDENTS	)	

FINAL ORDER ADDRESSING REMAND

At this stage of this protracted and highly contested matter, the remaining parties actively participating are: the Bureau of Securities Regulation ("BSR"), as the agency charged with enforcement of RSA chapter 5-B; HealthTrust, Inc. ("HT"), a successor in interest to the former Local Government Center, Inc.; and a group of eight municipalities[1] with intervenor status ("Intervenors") (on occasion all parties are collectively referred to in this order as the "parties"). A comprehensive factual and procedural history of the entirety of this matter does not follow, the recitation of which has been repeated many times over.[2] This Final Order Addressing Remand incorporates the complete record by reference. For purposes of context, certain historical facts have been highlighted, but in no way is intended to exclude some for the benefit of others.

[1] Town of Salem, Town of Bennington, Town of Meredith, Town of Northfield, Town of Peterborough, Town of Plainfield, Town of Temple, and Town of Auburn.
[2] A comprehensive history of the parties' voluminous filings and the numerous orders issued thereto can be viewed in detail at http://sos.nh.gov/ under the section heading entitled LGC Case.

This remand continues the administrative proceeding that began in 2011 with a staff petition filed by the BSR, to the Secretary of State, against the Local Government Center, Inc. and related entities. Relevant to this extension of the administrative proceeding, the presiding officer found HT in violation of RSA chapter 5-B by withholding from its members $17.1 million in surplus funds accumulated primarily from medical and dental lines of insurance to unlawfully subsidize a separate workers' compensation insurance program. Presiding Officer's Final Order (Aug. 16, 2012), *aff'd*, *Appeal of the Local Government Center, Inc., et al*, 165 N.H. 790 (2014). This administrative proceeding has firmly established that "RSA 5-B:5, I(c) has always required pooled risk management programs to return to their political subdivision members 'all earnings and surplus' in excess of expenditures for administration, claims, reserves, and the purchase of reinsurance . . ." and that HT does not have "any vested right in monies retained in violation of the plain language of the statute." *Appeal of the Local Government Center, Inc., et al*, 165 N.H. at 811.

The instant decision follows the New Hampshire Supreme Court's opinion in *Appeal of Town of Salem, et al*, 168 N.H. 572 (2016), which, in relevant part, held 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 Town of Salem, et al*, 168 N.H. 572, 581

(2016). "Accordingly, [it] vacat[ed] the presiding officer's decision and remand[ed] for further proceedings. [It] noted that [its] decision merely clarif[ied] the scope of the secretary's authority under RSA 5–B:4–a; [it] express[ed] no opinion as to what penalty should be ordered in this case." *Id.* at 581. It was left to the presiding officer to determine whether he committed an error of law.

Given the Court's interpretation, as the final arbiter of RSA chapter 5-B, and for the reasons stated below, the more limited interpretation of the statute, as applied by the presiding officer, in the administrative order of August 6, 2014 prevented a true proportionate restitution from being made to all political subdivisions which had contributed funds during the years 2003 through 2010 to HT for its illegal $17.1 million subsidy. The gravitas of the presiding officer's denial of the Intervenors' Motion Proposing Manner of Distributing Funds to Former Members of HT, dated July 17, 2014, and their subsequent Motion for Reconsideration, dated September 3, 2014, prevented all potential former members from receiving funds to which they were proportionately and properly owed.

Following the Court's opinion, issued February 18, 2016, the parties convened for a conference of counsel on April 29, 2016 during which the parties expressed contrasting views of the issues presented by the Court's mandate on remand. In furtherance of streamlining the proceedings, on May 16, 2016, the BSR filed a Motion to Establish Standing and Define Issues on Remand, to which the Intervenor's filed a Reply on May 24, 2016 and HT filed an Objection on May 25,

2016. The BSR then filed a Reply to HT's Objection on May 27, 2016. Subsequently, the presiding officer issued an interim order on June 3, 2016. In that order the presiding officer determined, that in light of the Court's more expansive interpretation of the authority granted to the presiding officer, that he had erred when he circumscribed the remedy within RSA chapter 5-B by improperly defining the universe of potential recipients of the $17.1 million surplus funds. As such, the presiding officer determined this remand proceeding must resolve the issues of both the universe of potential recipients and the proportional distribution of the $17.1 million surplus funds. He further determined that preclusion did not apply to claims of restitution to former members, because the Court vacated and remanded the presiding officer's determination on that specific issue.

On June 24, 2016, both the BSR and HT then filed their respective exhibit and witness lists and, on July 15, 2016 the BSR supplemented its list. The parties conferred, pursuant to the presiding officer's requests, and submitted a Statement of Stipulated Facts on June 24, 2016, followed by a Statement of Additional Facts on September 5, 2016. The former statement included the contingent facts and exhibits displaying particular mathematical calculations to be used by the presiding officer only in the event that additional restitution payments were to be paid by HT. In the interim period, on July 13, 2016, the BSR submitted a Statement of Specifications requested by the presiding officer, which clarified its position particularly in relation to the actual mathematical calculations necessary to

determine a proportionate share of the $17.1 million illegal subsidy in the event any additional payments in restitution were ordered.

The BSR and HT also submitted motions *in limine* to exclude evidence aligned with their respective positions on the scope of the remanded hearing and HT submitted a Motion for Summary Judgment on August 5, 2016 to which both the BSR and the Intervenors made timely objection. The intervenors also objected to HT's motion to exclude evidence. Thereafter, a second Interim Order dated August 18, 2016 was issued by the presiding officer, which found these pending filings, including their respective objections and responses, were inextricably intertwined with the merits of the matter on remand and were not cause to convene a hearing separate from the scheduled hearing on remand. Finally, the BSR submitted a Hearing Memorandum of Law and a Proposed Order, and HT filed a Proposed Order as well.[3]

On September 8, 2016, a hearing was conducted at which the parties were represented by counsel. Counsel for each indicated that there would be no further evidence offered, and the presiding officer indicated to the parties that in the event, following the conduct of the hearing and his consideration of the legal arguments advanced, that he believed additional evidence was necessary to complete the record and allow the purposes of the remand from the Court to be met, he may request the participants submit additional evidence.

[3] A listing of these filings by the parties may be found at www.nh.gov/sos

As mentioned, the parties submitted an agreed statement of stipulated facts with exhibits and, they submitted a statement of additional stipulated facts. These facts were agreed to contingent upon the presiding officer ruling on the parties' respective pending procedural motions, dispositive motions and objections thereto in a manner that would allow consideration of such evidence. The agreed submissions of facts not inconsistent with the findings and determinations incorporated in the discussion below are admitted into evidence and consideration of the facts therein contained become part of the record of these proceedings.

Before addressing the substance of this final order, the presiding officer dispenses with two initial matters: the parties' motions to exclude certain evidence and their motions for summary judgment. HT sought to exclude the parties' Statement of Stipulated facts. For the reasons contained in the discussion that follows, HT's motion is denied. Their request to exclude such evidence hinged on the presiding officer accepting HT's argument that this remand is limited to only the eight political subdivisions that filed for intervenor status. The presiding officer agrees with the BSR arguments that the Court's decision to vacate the presiding officer's error of law and remand for further proceedings necessitates corrective action to determine the pool of potential recipients who may receive a proportionate share of the $17.1 million surplus funds.

The BSR sought to exclude HT's Participation Agreements, By-Laws, and Authorizing Resolutions, anticipating HT's argument that any amount of returned

surplus would be contractually limited. This motion is granted. The affirmed payment of penalties for violations of RSA chapter 5-B, as restitution or disgorgement, are not bound by the terms of an agreement. *See* Restatement of Restitution § 107(1) ("A person of full capacity who, pursuant to a contract with another . . . or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain . . . unless the other has failed to perform his part of the bargain.") (emphasis added). No elaboration is required to state that, where HT having been found in violation of RSA chapter 5-B for unlawfully withholding $17.1 million in surplus funds, HT has "failed to perform [its] part of the bargain."

As a last initial matter, HT filed a motion for summary judgment with an accompanying memorandum of law. RSA 421-B:6-613 (n)(10) authorizes the presiding officer to dispose of procedural motions. Briefly, summary judgment will be granted when "the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the nonmoving party . . ." demonstrate there is no "genuine issue of material fact" and that "the moving party is entitled to judgment as a matter of law. . . ." *Lacasse v. Spaulding Youth Center*, 154 N.H. 246, 248 (2006). At this stage of these administrative proceedings the parties now do not disagree as to a material fact and have contingently agreed to the relevant facts believed necessary to address the purpose of this remand pending the presiding officer's determinations of their respective legal arguments regarding

scope of the remand and evidentiary exclusions. Based on the presiding officer's reasoning below, HT is not entitled to judgment as a matter of law and its motion for summary judgment is denied

DECISION SUMMARY

This decision concludes additional administrative proceedings undertaken on remand from the Court. The interpretation of RSA chapter 5-B made by the Court following appeal results in an expansion of the number of political subdivisions eligible to receive restitution from HT. Payments in restitution must be made not only to current members of a risk pool management program participating at the time of a distribution of unlawfully accumulated surplus, but also to former members that participated in the pooled risk management program between 2003 and 2010 during which the unlawful surplus was retained and not returned to such members in accordance with the provisions of the statute. Accordingly, upon evidence now presented, an accurate calculation can be made of the proper amounts owed in restitution to all political subdivisions which contributed funds that were illegally used by HT to subsidize a sister entity.

Rulings on motions to exclude certain evidence from consideration by the presiding officer result in the exclusion of documents offered by HT related to contractual obligations between it and its former and current members on the basis of the exclusive jurisdiction of RSA chapter 5-B and the Court's decision in a

companion case between the parties appealed from in a separate superior court action. *See Appeal of Town of Salem*, 168 N.H. 572, 578-79 (2016). Additional rulings result in the admission of evidence of a sequence of events that relate to HT's previous payment of restitution and relate to the amount of contributions made by all political subdivisions during the subject period.

The scope of the remand from the Court is general in nature. It allows the presiding officer to use the Court's interpretation of one provision of RSA chapter 5-B to make restitution payments to former members of the pooled risk management program operated by HT if he had applied another provision of the same statute in his order to limit restitution payments only to current members of HT. The presiding officer did apply the statute in a manner that prevented payments to former members. In determining which former members are, under the Court's interpretation, now entitled to payments in restitution, the presiding officer finds that the arguments advanced by HT to limit eligibility only to the Intervenors are too restrictive. And he finds, instead, that the Court's decision gives breath to all political subdivisions now determined to have a statutory right to receive a proportionate share of the illegal amount of subsidy made by HT to support a failing sister entity, namely the Property Liability Trust, Inc. (PLT).

DISCUSSION

Instructive to this remanded proceeding is the Court's examination of the procedure on remand in *Auger v. Town of Strafford*, 158 N.H. 609 (2009):

> As a general proposition, the trial court is bound by the mandate of an appellate court on remand. After all, "the mandate is the official notice of action of the appellate court, directed to the court below, and directing the lower court to have the appellate court's judgment duly recognized, obeyed, and executed." Thus, "a trial court is barred from acting beyond the scope of the mandate, or varying it, or judicially examining it for any other purpose than execution."
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> In implementing the mandate, "the trial court need not read the mandate in a vacuum, but rather has the opinion of this court to aid it. In this way, the trial court may examine the rationale of an appellate opinion in order to discern the meaning of language in the court's mandate." Indeed, the proceedings on remand must be in accordance with both the mandate of this court and the result contemplated in the opinion.
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> Generally, a trial court is free upon remand to "take such action as law and justice may require under the circumstances as long as it is not inconsistent with the mandate and judgment of [this] court." Because appellate judgments are not self-executing, trial courts have some degree of flexibility in their implementation. Therefore, insofar as our opinion in a case does not conclusively decide the parties' rights in the subject matter of the suit, the trial court has some discretion in implementing the mandate. Where, however, our opinion conclusively determines the parties' rights, the trial court has no discretion in implementing the mandate.

Auger v. Town of Strafford, 158 N.H. 609, 612–13 (2009) (quotations, citations, brackets, and ellipses omitted); *see also* 5 C.J.S. Appeal and Error § 1136 (stating where there is a remand with general directions, as opposed to direct and unequivocal directions, the lower court may take such action "as in its judgment

law and justice require," and at other times, it can be said "that a cause remanded without specific directions stands in the lower court as if no judgment or decree had been rendered").

In this case the Court's decision directs further administrative action in light of its determination that, to the extent that the presiding officer interpreted RSA chapter 5-B to prohibit distribution of funds unlawfully withheld from former members by HT and used by it as an illegal subsidy to a sister entity, he committed an error of law. The bedrock of the Court's decision was that funds could be distributed to former members of HT on the authority found in RSA 5-B:4-a, I, that provides the disgorgement of funds from HT, and restitution of those funds to its members as a penalty for its conduct previously determined to be in violation of RSA chapter 5-B. Presiding Officer's Final Order (Aug. 16, 2012), *aff'd*, *Appeal of the Local Government Center, Inc., et al*, 165 N.H. 790 (2014). The presiding officer had erred by limiting the rationale for his order upon a prohibition found in a different subsection of RSA chapter 5-B. *See* RSA 5-B:5, I(c) (stating each program shall "[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").

At an earlier stage in these proceedings, and prior to the Court's recent holding in *Appeal of Town of Salem, et al*, the presiding officer had previously ordered that HT make restitution in accordance with terms to be agreed upon

between HT and the BSR, and if the parties failed to reach an agreement, then restitution would be made to the political subdivisions which were current members of HT as of August 16, 2012 in proportion to each member's contribution. Presiding Officer's Final Order ¶ 14 (Aug. 16, 2012), *aff'd*, *Appeal of the Local Government Center, Inc., et al*, 165 N.H. 790 (2014) (upholding on appeal the presiding officer's determination that HT was required to return to its members the funds that were withheld as an illegal subsidy)[4]. HT and the BSR did not reach agreement on a computation and distribution of proportionate restitution in furtherance of that original order nor as a result of the August 4, 2014 Omnibus Order taken on appeal by the Intervenors.[5]

As part of this remand proceeding related to the restitution of the $17.1 million illegal subsidy, these parties have provided a contingent calculation of an agreed upon amount of restitution, in an aggregate amount of $2,307,982.29, and a method of proportionate distribution, in the event HT's Motion for Summary Judgment is denied and HT does not prevail on the merits at issue in this proceeding on the remand. (Statement of Stip. Facts ¶ 13, Ex. B & C).

In a case such as this one — the failure to return funds previously having been found to constitute an illegal subsidy obtained from illegally accumulated

[4] However, at that time, the Court was not asked on appeal to interpret the term "participating political subdivisions" in its role as the final arbiter of the intent of the legislature as expressed in the words of a statute.

[5] At this stage of the proceedings, the parties have contingently agreed to use a date of June 30, 2014 in calculating the figures appearing in Exhibits B, C, and D of the parties Statement of Stipulated Facts filed on June 24, 2016. The presiding officer accepts this modification from the initial final order as it is a distinction without a substantial difference in light of the instant order expanding eligibility to both current and former members as of June 30, 2014. Any mathematical difference that may occur is deemed *de minimis.*

surplus in violation of RSA 5-B:5, I(c) — the BSR is the agency with exclusive enforcement jurisdiction. *Appeal of Town of Salem*, 168 N.H. at 578-79 (concluding the statutory scheme of RSA chapter 5-B "clearly expresses the intention to supplant any common law claim within that realm and provide instead an administrative enforcement mechanism . . ." and a claim such as the one here is "within the ambit of the secretary of state's exclusive jurisdiction and is remediable solely through RSA chapter 5-B"). A private right of action, outside the administrative process of RSA chapter 5-B, seeking the same claim as mentioned above, is not available. Had the presiding officer interpreted the statute according to the now Court-clarified authority of the secretary of state, there would have been no need for the Intervenors, or any former member for that matter, to search for a mechanism to independently assert and vindicate their separate interest.

The scope of the remand is set by the Court's determination that the presiding officer erred regarding his interpretation of the statute's intent as to the universe of potential recipients. The presiding officer finds sufficient guidance under New Hampshire case law to determine the scope of the remand. In *Scarborough v. R.T.P. Enterprises*, the Court concluded "[a]lthough perfection of an appeal may divest the agency of jurisdiction with respect to issues on appeal, when a case is remanded by this court it means that the case is returned to the administrative agency to take further action in accordance with the opinion of the court." *Scarborough v. R.T.P. Enterprises*, 120 N.H. 707, 709 (1980) (citation

omitted) (stating the Court's mandate was limited to the basis of a damage award and not the amount of damages). In a subsequent case, the Court concluded "[t]he scope of the remand is limited by the nature of the error or issue identified." *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307, 312 (2007); *see also Application of Plainfield-Union Water Co.*, 102 A.2d 1, 4 (1954) (expressing "[t]he appellate judgment becomes the law of the case; and the mandate is the direction for conforming judicial action").

Although *Kalil* was addressing a remand to the Zoning Board of Adjustment, the principle applies with equal force. Both cases can easily be read together to provide a working framework for a remand. That is, the tribunal, in this case the presiding officer, can take further action to address the limited nature of the error or issue identified by the Court. The scope of the remand must accommodate the presentation of additional evidence to allow proper determination of which former members may qualify for a proportionate disbursement.

With that framework in mind, the Court "vacate[d] the presiding officer's decision and remand[ed] for further proceedings." The Court "note[d] that [their] decision merely clarifie[d] the scope of the secretary's authority under RSA 5-B:4-a; [they] express[ed] no opinion as to what penalty should be ordered in this case."

The presiding officer acknowledges the impact of the Court's clarification of the law as having an effect not only on the Intervenors but also other potentially

eligible former members. The depth of the now Court-clarified position on the presiding officer's delegated authority to also award former members is made no clearer than in the passage recited below from the Omnibus Order. Because of how this enforcement action had been previously litigated and orders made thereto, the presiding officer was compelled to engage in statutory interpretation to support what was, up to February 18, 2016, the administrative tribunal's rationale as to the pool of potential recipients of the restitution funds:

> There appears to be little foundation in law for the intervenors' position that they are entitled to some proportionate share because they are alleged to have been past members of HT or its predecessor. Their reliance on the "rationale" of the final administrative order, as previously authored by the undersigned, is in error. Relevant references in that order are to "members," "member political subdivisions," and "participating political subdivisions." Specifically, the previous administrative order as affirmed by the Supreme Court directed that these "re-payment" funds shall be returned to members consistent with RSA 5-B:5,I(c). (Final Administrative Order ¶ 14). 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.

Omnibus Order (Aug. 4, 2014).

The above rationale was vacated. *See* Restatement of Judgments § 41 comment d (1942) (if "a judgment has been . . . reversed by an appellate court, it is no longer conclusive between the parties . . . . [if] the original judgment has been . . . reversed and further proceedings are directed . . . the rules of res judicata are not applicable until a new judgment is rendered"). Because of the Court's interpretation, the universe of potential recipients, who may share in the

distribution of the $17.1 million surplus funds, may change. This determination, in part, necessitates further limited proceedings in accordance with the Court's order on remand because the BSR and HT did not previously proceed with an evidentiary hearing as scheduled on or about June 2014 in which evidence would have provided more specific data related to the identity of all former members and more specific data related to a determination of how proportionality was to be computed; instead, the BSR and HT submitted a consent agreement. During that time, the presiding officer therefore, aside from his ruling related to the Intervenors, was not called upon to rule on evidence to define the universe of potential recipients and their proportionate share of the $17.1 million surplus funds.

The presiding officer agrees with the BSR's argument; during this remanded administrative proceeding, he had to determine whether former HT members were entitled to restitution or disgorgement, *i.e.*, the universe of potential recipients, and, if so, the appropriate amount of such remedy, *i.e.*, the proportionality of the $17.1 million surplus funds. *See Kalil*, 155 N.H. at 312; *Scarborough*, 120 N.H. at 709; Restatement of Judgments § 41 (1942) (comment a: "a judgment at law is not a final judgment if further judicial action by the court rendering the judgment is required to determine the matter litigated;" comment c: a "judgment may be final as to some matters in litigation, although the litigation continues as to other matters").

HT's arguments against a scope of remand that includes former members other than the Intervenors does not persuade the presiding officer. While the Court's mandate focused the remand as to an error of law that may have been committed, there was no limiting instruction specifying that if such an error was committed by the presiding officer, any application of the now Court-clarified scope of the secretary of state's authority should be restricted to only the Intervenors. Rather, the Court generally remanded for further proceedings.

HT's arguments, that the effect of the Court's decision must be limited to only the Intervenors are overly restrictive and misplaced; therefore, they fail. In light of the Court's use of the term "former members" when delineating the authority of the secretary of state bestowed by the statute, when it clearly could have opted for the specific term "intervenors," the Court acknowledged the disproportionate, discriminatory, and unjust result of restitution being paid only to current members, or to current members plus only eight former members when all political subdivision members between 2003 and 2010 contributed funds used by HT as an illegal subsidy. The action of the eight political subdivisions to file for intervenor status, while it can be said raised the issue of eligibility for restitution payments directly, cannot deprive other former members of express rights of restitution provided for in RSA chapter 5-B.

In HT's summary judgment motion, and at oral argument during the hearing on remand, HT pointed to the Court's opinion in *Appeal of Town of Salem, et al*

where it stated certain issues alleged by the BSR "were resolved by a consent decree incorporated into the presiding officer's order" for the proposition that, if any restitution is awarded, this remand must be limited to the Intervenors. *Appeal of Town of Salem, et al*, 168 N.H. 572, 576 (2016). HT appears to imply that the presiding officer's Omnibus Order, incorporating the parties' Consent Decree, finally extinguished all of the BSR's claims. Contrary to HT's position, the Court was referencing its authority for the limited purpose of appellate review of a final agency action, not for purposes of preclusion governing a final judgment. *Konefal v. Hollis/Brookline Co-op. School Dist.*, 143 N.H. 256, 258 (1998) (stating "[p]rimary jurisdiction [similar to exclusive jurisdiction] in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review"); *see Nelson v. Public Service Co.*, 119 N.H. 327, 329 (1979) (finding that the district court had permissive jurisdiction because the statute at issue did not contain either exclusive or primary jurisdiction); *State ex rel. Brennan v. R.D. Realty Corp.*, 349 A.2d 201, 206-07 (explaining "an agency has the primary authority to make certain decisions deemed relevant to the determination of the controversy" and a court "will generally not decide an issue concerning which an administrative agency has decision capacity until after the agency has considered the issue"). This is buttressed by the fact the Court went on to explain that the Intervenors' motion proposing distribution, stemming from the BSR's motion for entry of default, was

denied. Thus, the Court had before it a final agency action, and not an interim, tentative order that would not be subject to judicial review.

The presiding officer finds HT confuses issues preserved for appeal with the Court's mandate to address an issue in this matter that has been vacated in part and currently remains undeveloped, and therefore, lacks finality to give preclusive effect. On the other hand, the BSR's position is consistent with its enabling statutes which grant it regulatory authority over pooled risk management programs and complies with the Court's mandate on remand.

HT argues that its payment of restitution in the aggregate amount of $17.1 million to the universe of recipients pursuant to terms of the 2012 Final Order, although knowing that the universe of recipients could be expanded as a result of the Intervenors' appeal, limits HT's obligation for any additional payment following the Court's decision.

Further, HT alleges passivity or non-action by the BSR in not expressly alerting either the administrative tribunal or the Court to the manner of payment and the method of calculation initially used by HT as tantamount to a waiver of the BSR's rights to raise the issue now. *But see Therrien v. Maryland Cas. Co.*, 97 N.H. 180, 181 (1951) (distinguishing waiver from estoppel, the Court stated "waiver is the voluntary or intentional abandonment or relinquishment of a known right . . ."). HT did not inform the BSR of that specific information at any time prior to HT's 2014 distribution, or when HT was before the Court in 2015, and

indeed, not until August 2016 in connection with this proceeding. This unavailability of the method of proportional calculations used by HT cannot serve to deprive "former" members as referred to by the Court, of their respective statutory rights under the statute.

As determined above, the Court clarified that all former members of a pooled risk management program could receive a proportionate share of payments made in restitution pursuant to an order under RSA 5-B:4-a, I(b)(2). HT argues that it would be unreasonable and unjust for it to be ordered to make any additional payments as restitution to the expanded pool of eligible recipients created by the Court's decision. Aside from a reasonable assumption that the court was aware of this potential consequence of its decision, HT is fully aware that it had unilaterally paid out restitution to the smaller, more restrictive pool of members described in an administrative order that it knew could be, and eventually was, directly affected by the appellate decision.

HT alternatively argues that if additional restitution is ordered to be paid as a result of the instant remand proceeding, the Court's decision extends the eligibility for a proportionate payment of restitution solely to the eight political subdivisions granted intervenor status. HT would like to continue to exclude all other political subdivisions that either were not members on August 16, 2012 or were not enrolled in all programs offered by HT because it paid out proportionate shares of the ordered restitution according to a unilaterally determined, and only now revealed,

formulaic calculation. This logic can not stand in light of the Court's analysis of eligibility of former members to receive proportionate restitution. Inherent in that analysis is the principle that proportionality mandates that those who gave are those who should receive.

When HT distributed the $17.1 million surplus funds, it acted under the threat of continued litigation, through means of an appellate review, that the presiding officer's order limiting payments in restitution to "participating political subdivisions," meaning only current members, would be vacated or modified as later prescribed by the Court. The principle is well established in this State that a judgment is conclusive unless it is vacated or reversed. *See*, *e.g.*, *Trinity EMS, Inc. v. Coombs*, 166 N.H. 523, 528 (2014) (concluding a "judgment, unless reversed or vacated, remains conclusive as to the parties and may not be attacked either 'collaterally, or by a direct suit between them upon the judgment'"); *Hollister v. Abbott*, 31 N.H. 442, 447-48 (1855) (establishing that "the judgment of a court of record having jurisdiction of the cause and of the parties, is binding and conclusive upon parties and privies in every other court, until it is regularly reversed by some court having jurisdiction for that purpose. . . ." and, as such, "between the parties the judgment must stand until regularly vacated or reversed"). Thus, the payment of a judgment pending appeal carries the risk that the subsequent appellate decision will modify the judgment. This risk is particularly heightened in a case such as this

one, where the determination of law as to the correct pool of recipients who were to receive a proportionate share of the judgment was a question raised on appeal.

Previously in these proceedings, HT and its parent and predecessor in interest delayed making a previously ordered restitution to members while an earlier administrative order was on appeal. In that instance it adopted the position that the administrative order lacked finality while the appeal was pending. In this instance, that also involved restitution payments, HT withheld its manner of calculating restitution payments from the enforcing agency, and expedited distribution of the $17.1 million illegal subsidy to its unilaterally selected political subdivisions without utilizing proper procedure to modify the terms of the Final Order and before the Court could rule on the Intervenors' appeal. Further, HT took its expedited action with knowledge of a specific and central issue to this enforcement action having been appealed to the Court — the issue of what pool of recipients would receive what proportionate amount of restitution.

The effect of HT's premature payment in restitution rewarded only those members who stayed with HT as of some arbitrary date in the fall of 2014 set by its Board of Directors. Over two dozen political subdivisions received windfalls and now, in light of the Court's decision and further factual revelation through this remand proceeding, 74 political subdivisions that actually contributed funds used for an illegal subsidy by HT would be deprived of their fair share if a penalty is not

now imposed pursuant to RSA 5-B:4-a,I(b) (Stip. Facts ¶¶ 7-13; Stip. Facts Ex. D). HT knew that a Court decision leading to the expansion of the number of members entitled to restitution would require it to make additional payments. Arguments to the contrary are strained and disingenuous. Arguments raised by HT that its inclusion in an exhibit document revealing the terms of a private "termination" agreement between HT and its sister entity, PLT, which was designed to avoid the consequences of a previous "secret agreement" between the same two entities apparently undertaken to defeat the effect of the Court's previous decision, *See Appeal of the Local Government Center, Inc., et al*, 165 N.H. 790 (2014), are strained and cannot assist HT in avoiding a consequence of its own design. Similar arguments raised by HT that a passing reference in a prior hearing on motions other than a direct and developed motion to the tribunal seeking permission to undertake an action that may, and did, alter the pool composition and payment proportionality are similarly strained and unsupported.

Therefore, in light of the Court's decision and the presiding officer's determination on remand, HT must make payments in restitution to the expanded pool of recipients that includes all former members and, as appropriate, current members in accordance with the agreed amounts appearing in the following exhibits of the parties' Statement of Stipulated Facts filed on June 24, 2016: Exhibit B under the column entitled "Return amount based on reallocation

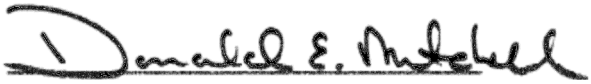
methodology" and Exhibit C under the column entitled "Amount reallocation exceeds 2014 distribution."

To the extent that funds in excess of the $17.1 million illegal subsidy initially ordered to be paid pursuant to the Final Order issued on August 16, 2012 are required to now be paid by HT, such additional payment shall be deemed an allowable penalty within the jurisdiction and discretion of this tribunal, pursuant to RSA 5-B:4-a, I(b) as decided by the Court on February 18, 2016. Said payments as are necessary to comply with this order shall be paid no later than sixty days from the date of this order.

The presiding officer makes no determination as to a specific fiscal or tax year the ordered payments are declared by HT, as to do so is beyond the scope of this remand.

Nothing in this order shall prohibit HT from seeking repayment from those members which received windfall-amounts through receipt of prior distributive payments in restitution. *See Little v. Bunce*, 7 N.H. 485, 491-92 (1835) (concluding if "a judgment is reversed . . . he against whom it was rendered is to be restored to all which he has lost by it"); *Pendergast v. Muns*, 238 N.W. 344, 347 (1931) (determining "upon the reversal of a judgment, the law raises an obligation on the part of the party who received benefits from its enforcement to restore those benefits to the adverse party").

So Ordered, this 7th day of October, 2016.



Donald E. Mitchell, Esq. NH Bar#1773
Presiding Officer

Attachments: Exhibits B, C, & D of the parties' Statement of Stipulated Facts filed on June 24, 2016.

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