STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

HEALTHTRUST'S MOTION FOR RECONSIDERATION OF THE FINAL ORDER ADDRESSING REMAND

Introduction

HealthTrust is entitled to reconsideration for four predominate reasons:

1. Waiver. Reconsideration is necessary when an order is unsupported by the evidence, unjust or unreasonable. The Hearing Officer found that the BSR did not waive a challenge to HealthTrust's distribution of the $17.1 million because HealthTrust failed to notify the BSR of its distribution plan. The record contains ten instances in which HealthTrust notified the BSR of its plan or requested guidance from the BSR. Therefore, the finding of lack of notice is not supported by the evidence, and is unjust and unreasonable.

2. New Statutory Right. Reconsideration is necessary when an order contains an error of law. The Supreme Court held that the Hearing Officer committed an error of law when he failed to realize that he could penalize a statutory violation by ordering repayment to former HealthTrust members as restitution or disgorgement. The Hearing Officer ruled that all political subdivisions that contributed to the $17.1 million had a statutory right to participate in the distribution. The Hearing Officer's creation of a new statutory right is an error of law.

3. Scope of the Remand. The Supreme Court remanded the matter for consideration of the Intervenors' claims under the correct standard of law. The Intervenors acknowledged the aggregate scope of their claims was $278,578, and that they were not pursuing claims on behalf of others. The Hearing Officer expanded the scope of the claimed amount on remand to $2,307,982.29 by including claims raised by the BSR on behalf of other former and current HealthTrust members that did not participate in the administrative proceeding or appeal. The expansion of the scope of the remand is an error of law.

4. Reasonable Regulation. HealthTrust distributed the $17.1 million consistent with the Hearing Officer's Orders, the BSR's approved method for distributing surplus, and the BSR's previously recommended distribution plan for the $17.1 million. The BSR took no position on the Intervenors' motion during the administrative proceeding or the Intervenors' appeal. It is unjust and unreasonable for the BSR to recommend a distribution plan, to take no position on the Intervenors' objection to the distribution plan, and later penalize its regulated entity for distributing the funds consistent with the regulator's previous recommendation and prior administrative orders.

Argument

I. The Hearing Officer's finding that HealthTrust failed to notify the BSR of its plan to distribute the $17.1 million and his resultant ruling that the BSR did not waive a challenge to HealthTrust's distribution of the funds are unsupported by the evidence, unjust, and unreasonable. The record contains ten instances in which HealthTrust notified the BSR of its plan or requested guidance from its regulator.

The Hearing Officer found that HealthTrust failed to advise the Bureau of Securities Regulation (BSR) of the manner in which it would distribute the $17.1 million it received from Property-Liability Trust (PLT). Based on that finding, the Hearing Officer ruled that the BSR did not waive the right to challenge the distribution on remand. The finding is unsupported by the evidence. The record contains ten instances in which HealthTrust advised the BSR of its distribution plan or sought guidance from the regulator. Consequently, the ruling is unsupported by the evidence, unjust, and unreasonable.

The Hearing Officer's reliance on the finding is obvious. The Final Order Addressing Remand (Remand Order) contains four references to the finding:

> 1. 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.[1]
>
> 2. 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.[2]
>
> 3. 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

[1] Remand Order at 19-20.

[2] *Id.* at 20-21.

modify the terms of the Final Order and before the Court could rule on the Intervenors' appeal.[3] [4]

4. 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 . . . 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.[5]

The evidence is overwhelming that HealthTrust advised the BSR of its plan to distribute the $17.1 million. Most importantly, on July 7, 2014, the BSR, HealthTrust, and PLT submitted Stipulated Facts to the Hearing Officer. Paragraph 49 stipulates:

> On June 3, 2014, the HealthTrust Board passed a motion to declare a $17.1 million surplus to be distributed on September 8, 2014, as a check or contribution holiday to the member groups 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 contributions received during Fiscal Year 2014 (September 1, 2013 – June 30, 2014) as provided for in the HealthTrust, Inc. Bylaws.

Paragraph 49 of the Stipulated Facts alone is sufficient to demonstrate error. It is not a mere passing reference or mention in an exhibit to a pleading. It is a stipulation by the BSR – presumably the product of considerable deliberation in hard-fought litigation – that specifically details the planned distribution of the $17.1 million, including the methodology used to determine the political subdivisions that would participate in the distribution and how the individual shares of the $17.1 million distribution would be calculated.

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[3] *Id.* at 22.

[4] In addition to the erroneous finding that HealthTrust expedited distribution of the $17.1 without providing notice of the distribution plan to the BSR, it is incorrect that HealthTrust or its predecessor previously delayed an ordered restitution payment. Despite the fact that the August 2012 Order remained pending on appeal, the ordered $33.2 million and $3.1 million distributions were timely made on or before September 1, 2013. The only payment obligation that was delayed was PLT's repayment of the $17.1 million to HealthTrust, which was delayed only after PLT, not HealthTrust or LGC, secured a stay of such payment from the Supreme Court.

[5] *Id.* at 23.

Additionally, HealthTrust did not merely make a "passing reference" to the distribution during a hearing. HealthTrust expressly requested guidance from the Hearing Officer:

> HealthTrust has pled affirmatively to you that it wants to distribute the $17.1 million dollars to its members or some other identifiable group, and the reason we put it that way quite frankly is because the final order with respect to the $33.3 million dollar payment disbursement to a group of members had a group identified. We followed the order. We then got sued and that suit still remains by ten municipalities who claim that it shouldn't have been ordered that way, that it should have been distributed to members, former members, who contributed to that surplus, and quite frankly HealthTrust at this point has no desire to engage in a fight with the Bureau. It certainly doesn't want to do anything that the Hearing Officer is not in favor of regarding disbursement of that $17.1 million and frankly would like to do its best to either avoid another lawsuit or an amendment to the ongoing lawsuit simply over the issue of where does the $17.1 million get distributed.[6]

The BSR's stipulation of fact and the specific oral request for guidance at the hearing do not stand alone. HealthTrust provided notice of its proposed methodology for, or requested guidance regarding, the distribution of the $17.1 million in all of the following documents:

a. By letter dated April 8, 2014, HealthTrust advised the BSR that the HealthTrust Board of Directors had voted to distribute the funds it received from PLT to HealthTrust members.[7] The letter stated that "[t]he distribution would be made as soon as possible after June 30, 2014, the close of the current fiscal year, proportionally to the then existing HealthTrust members with medical and dental coverage based on their share of contributions made to each of the medical and dental lines during the current fiscal year." The letter requested approval or non-objection to the proposed distribution plan because the Board had conditioned the distribution on the Secretary of State's advance approval or express non-objection. The letter also stated that the proposed distribution employed "the same methodology as with the $33.2 million distribution in the summer of 2013, that is, proportionately based on the contributions of the members participating in the return." The letter added that "[w]hile HealthTrust proposes to make the distribution as described, it is fully prepared to consider using a different methodology if the Secretary wishes."[8]

b. On May 9, 2014, HealthTrust submitted HealthTrust's Statement of Undisputed Facts to the Hearing Officer. Paragraph 35 commences with: "At its meeting on April 1,

[6] Transcript of June 9, 2014 Hearing on Pending Motions, pp. 27–28.

[7] At the time, HealthTrust anticipated receiving only $13.9 million of the $17.1 million from PLT.

[8] The April 8, 2014 letter is in the administrative record as an exhibit to multiple pleadings. For the Hearing Officer's convenience, it is included as Exhibit 1 to this motion.

2014, the HealthTrust Board voted to approve a distribution . . . by HealthTrust from the assets transferred by PLT as soon as possible after June 30, 2014, proportionally to the then existing HealthTrust members with medical and dental coverage, based on their share of contributions made to each of the medical and dental lines during the current fiscal year, subject to the advance approval or expressed non-objection of the Secretary." Paragraph 36 reiterates that HealthTrust had requested the Secretary's consent or non-objection, and had not received a reply as of the filing of the pleading.

c. The Affidavit of Peter Curro was submitted with HealthTrust's Statement of Undisputed Facts. It reiterated verbatim the information included in paragraphs 35 and 36 of the Statement of Undisputed Facts. HealthTrust's April 8, 2014 letter to the BSR was submitted as an exhibit to the Curro affidavit.

d. Also on May 9, 2014, HealthTrust filed its Memorandum in Support of Motion for Summary Judgment on BSR's Motion for Entry of Default Order. The memorandum states that "it now appears that HealthTrust will collect the entire $17.1 million, and HealthTrust's Board of Directors has already approved an initial distribution of $13.9 million from the PLT assets to HealthTrust members subject to Secretary of State approval."[9] It states that "[f]avorable loss development indicates that HealthTrust may be able to receive the entire $17.1 million, and the HealthTrust Board has voted to approve an initial distribution of $13.9 million from the assets transferred to PLT by HealthTrust members subject to the Secretary of State's approval."[10] The memorandum repeats paragraph 35 of the Statement of Undisputed Facts: "At its meeting on April 1, 2014, the HealthTrust Board voted to approve a distribution of $13.9 million by HealthTrust from the assets transferred by PLT as soon as possible after June 30, 2014, proportionally to the then existing HealthTrust members with medical and dental coverage, based on their share of contributions made to each of the medical and dental lines during the current fiscal year, subject to the advance approval or expressed non-objection of the Secretary." It also adds the information from paragraph 36 - HealthTrust had requested the Secretary's consent or non-objection, and had not received a reply as of the filing of the pleading.[11]

e. On May 20, 2014, the HealthTrust Board of Directors sent a letter to BSR Director Glennon. The Board members conveyed their "deep desire to resolve this matter on a mutually acceptable basis without further uncertainty, disruption and unnecessary public expense." The letter offered settlement terms to the BSR, including PLT paying HealthTrust the $17.1 million and HealthTrust "distribut[ing] the $17.1 million to its members promptly after June 30, 2014 pursuant to a distribution methodology approved by the BSR."[12]

[9] Memorandum, p. 2.

[10] *Id.* at 3.

[11] *Id.* at 11.

[12] The May 20, 2014 letter is in the administrative record as Exhibit 16 to the Second Affidavit of Peter Curro.

f. On June 4, 2014, HealthTrust filed its Objection to BSR's Motion for Summary Judgment. After reiterating paragraphs 35 and 36 of the Statement of Undisputed Facts, the objection states: "Given the Termination Agreement, it is anticipated that the full $17.1 million will be distributed to HealthTrust members as soon as practicable, subject to the approval of the BSR and the Hearing Officer."[13]

g. HealthTrust filed the Second Affidavit of Peter J. Curro with its objection to the BSR's summary judgment motion. The second Curro affidavit discussed and had attached to it as exhibits, the May 20, 2014 letter from the HealthTrust Board to Director Glennon and the Termination Agreement. The affidavit states, "[s]ubject to the Hearing Officer's and the BSR's approval, HealthTrust will distribute the $17.1 million to its current members or another identified combination of current and former HealthTrust members as soon as practicable."[14]

h. A few days before HealthTrust requested guidance during the June 2014 motions hearing, HealthTrust filed its Notice of Termination Agreement Terminating Settlement Agreement (Termination Notice). The Termination Notice informed the Hearing Officer and the BSR that HealthTrust and PLT had terminated the Settlement Agreement that had prompted the BSR's Default Motion. It stated that PLT would repay HealthTrust the $17.1 million on June 6, 2014, and that: "[s]ubject to the Hearing Officer's and the BSR's approval, HealthTrust will distribute the $17.1 million to its current members or another identified combination of current and former Health Trust members. Assuming the Hearing Officer's and the BSR's approval, HealthTrust will complete the distribution as soon as practicable."[15]

These ten instances in which HealthTrust advised the BSR of its distribution plan, or sought guidance from the BSR or the Hearing Officer about a distribution plan, render the evidence overwhelming that the finding that HealthTrust failed to notify the BSR of its plan to distribute the $17.1 million is erroneous. Paragraph 49 of the Stipulated Facts alone is sufficient to demonstrate error because it is a stipulated fact submitted to the Hearing Officer by the parties, including the BSR. The fact that there are nine additional instances that raise the issue to

[13] Objection, p. 13.

[14] Second Affidavit of Peter Curro, ¶ 10 (footnote omitted).

[15] Termination Notice, Section 5.

varying degrees further demonstrates that the finding is unsupported by the evidence, unlawful, and unreasonable.[16]

The fallacious finding that HealthTrust failed to notify the BSR of its distribution plan pervades the Remand Order. For example, the erroneous finding improperly framed the scope of the remand proceeding:

> Because of the Court's interpretation,[17] the universe of potential recipients, who may share in the distribution of the $17.1 million 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.[18]

An evidentiary hearing would not have produced more specific data – the methodology for the distribution was provided to the BSR on multiple occasions before the Consent Decree. Moreover, the identity of all former members is irrelevant to the manner of distribution. The ruling that an evidentiary hearing or the receipt of additional evidence was necessary during the remand is erroneous because it is dependent on the fallacious finding that HealthTrust had not disclosed its distribution plan for the $17.1 million.[19] [20]

[16] The Hearing Officer's findings upon all questions of fact are deemed to be prima facie lawful and reasonable. RSA 541:13.

[17] The Hearing Officer's misinterpretation of the Supreme Court decision is addressed in succeeding sections of this motion.

[18] Remand Order at 15-16.

[19] The Hearing Officer erred when he denied HealthTrust's motion to exclude additional evidence, including the Stipulated Facts upon which the findings and rulings in the Remand Order are based, during the remand hearing.

[20] The errors of law in misinterpreting the Supreme Court decision as creating a new statutory right and expanding the remand beyond consideration of the Intervenors' claims under the correct legal standard are addressed in the succeeding sections of this motion.

Most importantly, the erroneous finding is critical to the ruling that the BSR did not waive its arguments on behalf of former HealthTrust members other than the Intervenors. The explanation for the ruling demonstrates its reliance on the unsupported finding:

> 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. 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.[21]

The evidence overwhelmingly supports a finding and ruling that the BSR, with full knowledge of HealthTrust's distribution plan, waived any challenge to the distribution. On July 25, 2014, the BSR, HealthTrust and PLT entered into a Consent Decree regarding the BSR's Default Motion. All issues presented in the BSR's Default Motion were resolved by the Consent Decree and the succeeding Omnibus Order.[22] In the Consent Decree, the BSR and HealthTrust also waived all appeals from the enforcement proceeding.[23] On November 17, 2014, the Hearing Officer issued the Final Order on Remand, the final paragraph of which states:

> All pending motions and objections of the parties are deemed withdrawn and the above captioned matter deemed concluded and no further proceedings are required subject to the provisions of the Omnibus Order dated August 4, 2014, that incorporated an agreement between the parties which, by its terms, shall continue in effect until July 24, 2015. No further action by any party to these administrative proceedings shall be pursued as to all issues contained within the initial amended BSR petition dated September 2, 2011.

It is beyond dispute that the claims advanced by the BSR on remand on behalf of current and former HealthTrust members regarding HealthTrust's distribution of the $17.1 million were

[21] Remand Order, pp. 19-20 (citation omitted).

[22] Omnibus Order, p. 4. The only issue that remained pending after the Consent Decree and the Omnibus Motion was the amount of legal fees and costs to be paid the BSR pursuant to RSA 5-B:4-a, which later was resolved.

[23] Consent Decree, p. 5.

included in the Amended Petition. Count II of the BSR's Amended Petition alleges the improper subsidization of PLT's workers compensation pool. The prayer for relief in the Amended Petition seeks an order for "the Respondents to pay restitution to current and past members of the 5-B Pools in the amount of all earnings and surplus funds and property interests illegally transferred by Respondents to LGC Parent and/or for subsidies improperly paid to the Workers Comp Pool."[24] Consequently, the BSR waived its challenge to the distribution in the Consent Decree and the Hearing Officer approved the BSR's waiver in the November 17, 2014 Final Order on Remand, which the BSR did not appeal.

The Supreme Court's acknowledgment that the issues raised by the BSR in the administrative proceeding "were resolved by a consent decree incorporated into the Hearing officer's order[,]"[25] is final and binding regarding all issues raised by the BSR and all issues that could have been raised by the BSR.[26] Issues not presented during the Intervenors' appeal were waived and are untimely upon remand.[27] Additionally, res judicata bars consideration of the BSR's claims on behalf of current and former HealthTrust members other than the Intervenors upon remand.[28]

The finding that HealthTrust failed to disclose the manner in which it would distribute the $17.1 million is unsupported by the evidence and erroneous. The ruling that the BSR did not waive its challenge to the distribution is based on the fallacious finding, and therefore

[24] Amended Petition, p. 36.

[25] *Appeal of Town of Salem*, 168 N.H. 572, 575-76 (2016).

[26] *See In re C.M.*, 166 N.H. 764, 781 (2014).

[27] *In re Nyhan*, 151 N.H. 739, 743 (2005); *Warren v. Town of East Kingston*, 145 N.H. 249, 252 (2000).

[28] *See Kalil v. Town of Dummer ZBA*, 159 N.H. 725, 730 (2010).

unsupported by the evidence, unjust and unreasonable. HealthTrust is entitled to reconsideration of the Remand Order because of the erroneous, unjust, and unreasonable ruling.

II. The Hearing Officer's ruling that all political subdivisions that contributed to the $17.1 million have a statutory right to share in the distribution is an error of law. The Supreme Court did not create a new statutory right. The Court held only that it was an error of law for the Hearing Officer to fail to realize that he could penalize a statutory violation by ordering repayment to former HealthTrust members as restitution or disgorgement.

In *Appeal of Town of Salem*, the Supreme Court described the Hearing Officer's error of law in the administrative proceeding:

> 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 "[r]escission, restitution, or disgorgement." RSA 5–B:4–a, I(b)(2). The August 16 Order states that "[t]o the extent that this order requires the return of funds or property in the alternative, this order requires compliance with these provisions as restitution or disgorgement pursuant to RSA 5–B:4–a, VII."
>
> 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 the 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. Accordingly, we vacate the presiding officer's decision and remand for further proceedings. We note that our decision merely clarifies the scope of the secretary's authority under RSA 5–B:4–a; we express no opinion as to what penalty should be ordered in this case.[29]

Thus, the Supreme Court found that the Hearing Officer's error of law was failing to realize that he possessed the authority to exercise a power bestowed on the Secretary of State (Secretary): "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 . . . ."

On remand, the Hearing Officer committed an error of law when he misconstrued the Supreme Court's clarification of the Secretary's statutory enforcement authority as creating a

[29] *Appeal of Salem*, 168 N.H. at 580-81.

statutory right for former risk pool members to share in a distribution of surplus. Based on this misinterpretation of the Supreme Court's decision, the Hearing Officer ruled that all former HealthTrust members "must" share in a distribution of surplus accumulated while they were members.[30] Rather than basing his decision on the Secretary's authority to penalize a statutory violation by ordering restitution or disgorgement to former HealthTrust members, the Hearing Officer erroneously found "that the Court's decision gives breadth 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 . . . Property-Liability Trust, Inc. (PLT)."[31]

The ruling misunderstands the Supreme Court decision as creating for former HealthTrust members "express rights to restitution provided for in RSA chapter 5-B."[32] The misinterpretation is evident from the Remand Order's ruling that by its use of the term "former members" instead of "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."[33] The Supreme Court did not declare the distribution of the $17.1 million disproportionate, discriminatory or unjust. When the Court corrected the Hearing Officer's error of law, it expressly refrained from directing the imposition of a penalty.[34]

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[30] Remand Order, p. 8 ("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.").

[31] *Id.* at 9.

[32] *Id.* at 17.

[33] *Id.*

[34] *Appeal of Salem*, 168 N.H. at 581 ("We note that our decision merely clarifies the scope of the secretary's authority under RSA 5–B:4–a; we express no opinion as to what penalty should be ordered in this case.")

The error of law in creating a new statutory right was exacerbated when it was combined with the erroneous finding and ruling that HealthTrust did not provide notice of its intended distribution methodology to the BSR: "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."[35] The Supreme Court remanded the proceeding for a determination whether the Intervenors, as former HealthTrust members, were entitled to a remedy in the form of restitution or disgorgement based on the Secretary's authority to impose a penalty for a statutory violation. However, the Remand Order did not impose the full amount of restitution sought by the Intervenors, $278,578, as a penalty. Instead, the Remand Order awarded the Intervenors, other former HealthTrust members, and then-current HealthTrust members the aggregate amount of $2,307,982.29, based on the creation of a new statutory right.

The misinterpretation of the Supreme Court's decision as creating a new statutory right for pooled risk management members is an error of law. It renders the decision unjust and unreasonable. HealthTrust is entitled to reconsideration based on the error of law.

III. The Hearing Officer committed an error of law when he impermissibly expanded the scope of the remand from consideration of the eight Intervenors' aggregate claims of $278,587 against the correct legal standard to also include the BSR's claims on behalf of another sixty-six entities for an aggregate amount of $2,307,982.29.

By the plain language of its decision, the Supreme Court recognized that the issues raised by the BSR in the administrative proceeding "were resolved by a consent decree incorporated into the Hearing officer's order."[36] The Court stated that the only issue before it regarding the administrative appeal was the Intervenors' "proposal to participate, as former members of Health

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[35] *Id.* at 20 (The preceding section of this motion identifies eleven instances in which HealthTrust notified the BSR of its distribution plan or requested guidance from the BSR and the Hearing Officer about a distribution plan.).

[36] *Id.* at 575-76.

Trust, in the further distribution of approximately $17.1 million in excess funds."[37] Accordingly, the error of law found by the Supreme Court was limited to the Intervenors' claims, as former HealthTrust members.[38]

The Hearing Officer committed an error of law when he misconstrued the scope of the remand. In addition to those reasons identified in the preceding sections of this motion, the Hearing Officer did not merely adjudicate the Intervenors' $278,578 claim under the correct statement of the law. Instead, he erroneously ruled 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."[39] The Hearing Officer incorrectly concluded that he "must resolve the issues of both the universe of potential recipients and the proportional distribution of the $17.1 million surplus funds."[40]

The broad expansion of the Supreme Court's remand is an error of law. An agency "is bound by the mandate of an appellate court on remand."[41] It "is barred from acting beyond the scope of the mandate, or varying it, or [quasi-]judicially examining it for any other purpose other than execution."[42] In the first *Kalil v. Town of Dummer ZBA case*, the Supreme Court set forth the scope of its mandate when a matter is remanded because of an error of law:

> The scope of the remand is limited by the nature of the error or issue identified. For example, where the superior court determined that a local zoning board applied an

[37] *Id.* at 576.

[38] *Id.* at 581 ("Thus, to the extent the Hearing 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 management program as either restitution or disgorgement, he committed an error of law.").

[39] *Id.* at 6.

[40] Remand Order at 4.

[41] *Auger v. Town of Strafford*, 158 N.H. 609, 612 (2009).

[42] *Id.* at 613 (quotation omitted).

> incorrect legal standard, we held that the court "was obliged to remand to the ZBA to reconsider the evidence against the correct legal standard," unless it "could find, as a matter of law, that the correct legal standard was met." . . . Here, however, the superior court ruled that the decision was unclear. The scope of a remand for that issue is for the ZBA to be given an opportunity to clarify its decision based upon the pre-existing record. The remand is not an opportunity for the Town, the abutters or any other party to enlarge the record or to introduce new evidence or testimony.[43]

Remand is not an opportunity for parties to present new evidence or to advance new claims.[44] Here, the plain language of the Supreme Court's decision unambiguously set forth the single issue on remand: whether HealthTrust should be penalized for its statutory violation by ordering it to make payments to the Intervenors, as former HealthTrust members, as disgorgement or restitution.[45] The Hearing Officer committed an error of law when he allowed the BSR to enlarge the record and to introduce new claims and evidence. The Hearing Officer should have limited the scope of the remand to consideration of Intervenors' claim pursuant to the correct legal standard and based on the pre-existing record.[46]

Consistent with its error of law in impermissibly expanding the scope of the remand, the Remand Order fails to appreciate the substantial difference between then-current HealthTrust members and former HealthTrust members. Current HealthTrust members were eligible to participate in the $17.1 million distribution. The claim advanced by the BSR on behalf of current HealthTrust members, that they should have received a greater share of the $17.1 distribution, is distinct from the issue of whether HealthTrust could have been penalized for a statutory violation

[43] 155 N.H. 307, 312 (2007) (citations omitted).

[44] *Id*.

[45] *Appeal of Town of Salem*, 168 N.H. at 581("to the extent the Hearing 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 management program as either restitution or disgorgement, he committed an error of law.").

[46] As noted above, the Hearing Officer erroneously denied HealthTrust's motion to exclude additional evidence, including the Stipulated Facts upon which the findings and rulings in the Remand Order are based, during the remand hearing.

by ordering it to make disgorgement or restitution payments to the Intervenors, as former HealthTrust members. The BSR raised potential claims of current HealthTrust members during the administrative proceeding and they were resolved by the Omnibus Order and the Final Order on Remand. The Intervenors' raised their claims, and the Supreme Court considered the Intervenors' claims, solely as former HealthTrust members. Additionally, there was no claim before the Supreme Court that current HealthTrust members' share of the $17.1 million should have been calculated using a different methodology.

The Remand Order's expansion of the scope of the remand beyond adjudicating the Intervenors' claims under the correct legal standard and based on the pre-existing record, and to include the BSR's previously waived claims, was an error of law.[47] It also renders the Remand Order unjust and unreasonable.

IV. It is unjust and unreasonable to penalize HealthTrust in an amount more than $2 million greater than the $278,578 sought by the Intervenors for distributing funds consistent with the Hearing Officer's Orders, the BSR's previously approved method for distributing surplus, and the BSR's previous recommendation to the Hearing Officer for the distribution of the $17.1 million.

After the BSR and HealthTrust resolved all claims raised in the BSR's Amended Petition, the Hearing Officer denied the Intervenors' motion to participate in the distribution of the $17.1 million that PLT repaid to HealthTrust. The Intervenors affirmed that their claim was in the aggregate amount of $278,578, and that they were not asserting claims on behalf of other entities. The Intervenors' claim was the only claim raised or pursued before the Supreme Court. The preceding sections of this motion identify errors of law, and unsupported, unjust, and unreasonable findings and rulings in the Remand Order. In addition to those errors, the Remand Order is unreasonable and unjust because it orders HealthTrust to pay more than eight times the

[47] *See Kalil.* 155 N.H. at 312; *Scarborough v. R.T.P. Enterprises, Inc.*, 120 N.H. 707, 709 (1980).

amount of the Intervenors' aggregate claim for $278,578 based on conduct in which HealthTrust was complying with the BSR's and the Hearing Officer's direction.

HealthTrust did not distribute the $17.1 million until after it informed the BSR and the Hearing Officer of its distribution plan, and sought guidance from the Hearing Officer and the BSR. Before HealthTrust made the distribution, the BSR's claims were resolved by the Consent Decree and Omnibus Order. The BSR already had taken no position on the Intervenors' motion to participate in the proposed distribution.

When HealthTrust distributed the $17.1 million, it did so consistent with the terms of the August 16, 2012 Order. Importantly, the distribution was made in a manner consistent with the BSR's recommendation to the Hearing Officer that HealthTrust distribute the $17.1 million only to current HealthTrust members.[48] HealthTrust's distribution of the funds also was consistent with the BSR's Risk Pool Practices Agreement(s) with Primex and SchoolCare, which provide that Primex and SchoolCare would distribute excess surplus to their current members while excluding former members that contributed to that surplus.[49]

The distribution also was made consistent with the expectations of the former HealthTrust members. All of the current and former HealthTrust members' agreements to

[48] *See* Bureau of Securities Regulation's Report Pursuant to Order of August 16, 2012, pp. 2-3 ("Consistent with the Risk Pool Management Agreements that the Bureau entered into with Primex and SchoolCare, the LCG shall return the sum of $47,800,000.00 to Members who participated in the Health rust Risk Pool after June 14, 2010 through the date of the Final Order.") (footnotes omitted).

[49] The BSR agreement with SchoolCare acknowledged that SchoolCare had $22 million in excess surplus as of the date of the agreement, April 25, 2012, but allowed SchoolCare to return that surplus over a three year period and only to members who continued to be current members as of the date of each those distributions in 2012, 2013 and 2014. Former SchoolCare members did not participate in the return, even if they were members as of the date of the agreement. Similarly, the BSR agreement with Primex acknowledged that Primex had between $16 to $21 million in excess surplus as of the date of the agreement, March 23, 2012, but allowed Primex to return that surplus over a three year period and only to members who continued to be current members as of the date of each of those distributions in 2012, 2013 and 2014. Former Primex members did not participate in the return, even if they were members as of the date of the agreement.

voluntarily participate as HealthTrust members incorporate bylaws that provide a member is not entitled to share in distributions of surplus that occurs after the member has terminated its HealthTrust membership.[50] Thus, a former HealthTrust member has no expectation to share in a distribution that occurs after the member has ceased its membership.

HealthTrust distributed the $17.1 million pursuant to a disclosed plan that was consistent with the Hearing Officer's Orders, the BSR's recommendation to the Hearing Officer, and the BSR's agreements with other risk pools. It is unjust and unreasonable to penalize HealthTrust for its conduct, particularly in an amount more than two million dollars greater than the amount at issue in the Intervenors' appeal, and to order that the additional penalty be paid to sixty-six entities on whose behalf there was no claim before the Hearing Officer or the Supreme Court.

CONCLUSION

HealthTrust is entitled to reconsideration pursuant to RSA 541:3. The Final Order Addressing Remand contains errors of law. The ruling that the BSR did not waive a challenge to HealthTrust's distribution of the $17.1 million is premised on a finding that is not merely unsupported by the evidence, but also is overwhelmingly erroneous. The creation of a new statutory right to impose a repayment obligation on HealthTrust when the Supreme Court only clarified the Secretary of State's authority to impose remedies for a statutory violation is an error of law. The expansion of the scope of the remand beyond consideration of the Intervenors' claims under the correct statement of the law to include claims in excess of $2 million greater than the Intervenors' claims, on behalf of entities that did not participate in the administrative proceeding or the Intervenors' appeal, and which require new evidence, is an error of law.

[50] The Hearing Officer erred when he granted the BSR's motion to exclude evidence of the participation agreements, by-laws, and authorizing resolutions, "anticipating HT's argument that any amount of returned surplus would be contractually limited." Remand Order at 6-7. HealthTrust sought to admit the documents to demonstrate the former HealthTrust members' expectations. HealthTrust did not argue that payment of a penalty to the Intervenors as former HealthTrust members was prohibited by contract.

Finally, the Final Order Addressing Remand is unjust an unreasonable. It is well outside the parameters of justice and reason for its regulator to order HealthTrust to pay an additional $2.3 million when HealthTrust provided advance notice of its distribution plan for the $17.1 million to the BSR and the Hearing Officer. The injustice and unreasonableness are exacerbated by the fact that the distribution methodology was consistent with the Hearing Officer's Orders, the BSR's recommendation to the Hearing Officer, and the BSR's agreements with other risk pools. It is unimaginable that just and reasonable regulation could include the regulator expressing a preference for the method of distribution, taking no position on other entities' objections to the distribution plan, and later penalizing its regulated entity for distributing the funds consistent with the regulator's preference and prior administrative orders.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

Dated: November 6, 2016

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CERTIFICATE OF SERVICE

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

_/s/ Michael D. Ramsdell_____
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