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 Objection to HealthTrust's Motion for Reconsideration and Response to HealthTrust's Motion to Stay

The New Hampshire Bureau of Securities Regulation ("BSR"), by and through counsel, hereby submits this Objection to HealthTrust's Motion for Reconsideration and Response to HealthTrust's Motion to Stay. In support thereof, the BSR states as follows:

ARGUMENT

I. HealthTrust's Motion for Reconsideration should be denied because HealthTrust has failed to meet its burden of showing that the Presiding Officer has made an error of law or reasoning, or an erroneous conclusion, in his Final Order Addressing Remand, which ordered HealthTrust to make additional payments to an expanded pool of recipients, as an appropriate penalty of restitution under RSA 5-B:4-a, I(b) for its violation of RSA 5-B:5, I(c).

The Presiding Officer properly ruled that the correct remedy for HealthTrust's violation of RSA 5-B:5, I(c) is an order for payments as restitution under RSA 5-B:4-a, I(b) to all political subdivisions who contributed funds during the time period of 2003-2010, which HealthTrust used to illegally subsidize its financially deficient workers compensation pooled risk management program in the amount of $17,111,804.35. Accordingly, an additional 74 political subdivisions were entitled to proportionate shares of these additional payments, which total $2,307,982.29. Because HealthTrust has failed to meet its burden of showing under RSA 421-B:26-a, XXVI(1) that the Presiding Officer has made an error of law or reasoning, or an erroneous conclusion in his Final Order that warrant reconsideration or any other post-decision relief, HealthTrust's Motion for Reconsideration should be denied.

A. The Presiding Officer properly determined the scope of the Court's remand, as articulated in Appeal of Salem, 168 N.H. 572, 581 (2016), and acted within that scope in rendering his decision in the Final Order.

The Court's Order in Appeal of Salem clarified the law regarding the universe of recipients for payments and reopened and remanded 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. 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."). 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 in funds, the amount of the illegal subsidy, should be distributed as restitution or disgorgement, the Presiding Officer's rulings as to the universe of potential recipients of any remedy, and the amounts of any such remedies, were consistent with the Court's scope of remand.

HealthTrust argues that the Presiding Officer erred as a matter of law when he expanded the scope of the Intervenors' claimed amount by including claims raised by the BSR on behalf of other former and current HealthTrust members who did not participate in the administrative proceeding or appeal. HealthTrust's argument is erroneous and should be denied. The Presiding Officer did not make an error of law or reasoning, or an erroneous conclusion, when he concluded that the Court's decision in Appeal of Salem did not limit the universe of potential

recipients, and certainly not to just the eight Intervenors or just former HealthTrust members, and that he had the authority to determine the pool of potential recipients to receive proportionate distributions of the $17.1 million. HealthTrust's allegation that the Court's decision in the Appeal of Salem case was limited to just the Intervenors' claims, as former members, is without merit as shown by the plain language of the Court's own words. The Court did not "unambiguously set for a 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," as HealthTrust contends. Rather, in Appeal of Salem, the Court specifically left to the Presiding Officer the authority to determine what universe of members are entitled to relief through rescission, restitution, or disgorgement, and the appropriate amount of any such relief. 168 N.H. at 581. 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 Auger v. Town of Strafford, 158 N.H. 609, 613 (2009) (citing In re Sanford Fork & Tool Co., 160 U.S. 247, 258–59 (1895) for the holding that discretion exists when a prior appellate decision reversed the lower court but ordered no final judgment) (stating 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). 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 deliberately chose not to impose any 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). 168 N.H. at 581. At

no point did the Court in Appeal of Salem 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. Therefore, the Presiding Officer's determination that the issues on remand affected all members of HealthTrust who have not received the payments that they are entitled to from the $17.1 million was proper.

Further, in Appeal of Salem, the Court explicitly found that the Presiding Officer has the authority to order restitution or disgorgement, which are equitable remedies. 168 N.H. at 581. Even if the Court in Appeal of Salem limited the universe of potential recipients to just the eight Intervenors, the record in this case clearly shows that the Intervenors fall into each of the following two groups: 1. former members listed in Exhibit B (Intervenors Plainfield, Salem, and Temple); and 2. 2014 members who ceased medical or dental coverage lines listed on Exhibit C (Intervenors Auburn, Bennington, Meredith, Northfield, and Peterborough). Accordingly, 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, all of the members in these two groups must equitably be included in the universe of recipients, as the Intervenors are included in both of those groups. Thus, the Presiding Officer's order of payments to these two groups of political subdivisions is appropriate, even under HealthTrust's erroneous argument that Court in Appeal of Salem limited the scope of the remand to just the eight Intervenors.

For all of these reasons, because the Presiding Officer has the power to impose rescission, restitution, or disgorgement as a penalty and because the Court opened up the potential universe of recipients of distributions from the $17.1 million in funds, through the language of its decision in Appeal of Salem, 168 N.H. at 581, HealthTrust's argument that the Presiding Officer erred by expanding the scope of the remand beyond the eight Intervenors, fails and should be rejected.

B. The Presiding Officer correctly found that the claims of the BSR, as the agency with exclusive enforcement jurisdiction, were not waived.

The Presiding Officer also did not make an error of law or reasoning, or an erroneous conclusion, when he ruled that the BSR's claims were not waived, and that additional evidence could be introduced on remand that related to the claims that were before the Presiding Officer. Therefore, HealthTrust's arguments to the contrary are erroneous and should be denied.

HealthTrust argues that the evidence in the record contradicts the Presiding Officer's finding that HealthTrust failed to advise the BSR as to the manner of its distribution of the $17.1 million and that as a result, the Presiding Officer's ruling that the BSR did not waive the right to challenge the distribution on remand is erroneous. However, HealthTrust's characterization of the record regarding its disclosure of the methodology that HealthTrust employed in distributing the $17.1 million in funds is misleading.

The record shows that on or about September 8, 2014, HealthTrust, solely at its own risk due to a pending appeal on the issue of who was entitled to distributions, distributed the $17.1 million 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), and claimed that it did so in accordance with its Bylaws. See Statement of Stipulated Facts, ¶¶ 2-3 and Exhibit A. But, as the Presiding Officer correctly determined, prior to September 8, 2014, HealthTrust failed to disclose to the BSR and to the Presiding Officer the precise and full details of how each distribution was calculated and exactly which members, who were entitled to a portion of the $17.1 million, received a distribution. The record shows two instances where HealthTrust discussed the distributions. The first occurred on June 3, 2014, when 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.**

(emphasis added). As the plain language of this Notice shows, it was unclear to say the least 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, especially since this Notice also mentioned that HealthTrust could distribute portions of these funds to former members. See Stipulation of Facts, ¶ 2. As the Presiding Officer properly recognized, it was not until the parties discussed and ultimately stipulated to the facts in the current stage of this matter that the BSR learned exactly how HealthTrust distributed the $17.1 million in funds in September 2014. Due to the non-specific and non-illuminating language of this Notice, the Presiding Officer correctly ruled that the BSR did not have sufficient notice of HealthTrust's plan for distribution and therefore, did not waive its claims on remand because it did not object or otherwise respond to this Notice.

HealthTrust argues that there were ten instances where it allegedly either informed the BSR as to how it planned to distribute the $17.1 million or requested guidance from the BSR as to how it should distribute the $17.1 million, and that the BSR's lack of a response is a waiver of its claims on remand. However, tellingly, in the pleadings it submitted to the Presiding Officer during the remand, and during the remand hearing on September 8, 2016, HealthTrust only referred to the June 3, 2014 Notice, a following comment that HealthTrust made during a hearing on June 9, 2014, and paragraph 49 of a July 7, 2014 Stipulated Facts. If evidence of these other alleged instances were not part of the record, the Presiding Officer could not have made an error of law or reason, or an erroneous conclusion, regarding this evidence that warrants reconsideration.

In addition, even if these other instances were part of the record before the Presiding Officer, a review of the language of all of these alleged instances shows that at no point did HealthTrust disclose to the BSR in any of these other instances specific information regarding how HealthTrust would distribute the $17.1 million, such as the precise and full details of how each distribution would be calculated and exactly which members, who were entitled to a portion of the $17.1 million, would receive a distribution. Further, HealthTrust points to a stipulation of fact from July 7, 2014 as evidence of its notice to the BSR. This stipulation states that the $17.1 million will be distributed in the following manner:

> . . . 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.

(HealthTrust's Mot. for Recons. at 3.) This language was repeated almost verbatim in the majority of the other instances that HealthTrust references in its Motion for Reconsideration as examples of its notice to the BSR.

As evident from the plain language above, HealthTrust previously indicated that it would distribute the $17.1 million in funds consistent with its Bylaws. Yet, on remand, HealthTrust has provided no evidence that it actually distributed the $17.1 million consistent with its Bylaws. HealthTrust's Bylaws limit distributions to current members who were also members on the last day of the year in which the surplus was generated. In fact, HealthTrust did not follow its Bylaws when it distributed the $17.1 million in September 2014. As the BSR learned during the pendency of the remand proceeding while working on the Stipulation of Facts and the formulations with HealthTrust, HealthTrust instead, distributed the entire $17.1 million to current 2014 members regardless of whether their contributions generated the surplus. For example, HealthTrust distributed to Strafford County $234,274.54 from the $17.1 million even

though Strafford County was not a HealthTrust member during the time period of 2003-2010, when the illegal subsidy was generated. See Ex. A to the Stipulation of Facts; HT 0017. Because the manner of HealthTrust's distribution of the $17.1 million in September 2014 was inconsistent with HealthTrust's Bylaws, to the extent HealthTrust provided the BSR with "notice" as to how it would distribute the $17.1 million, to which the BSR did not object, such "notice" was insufficient as it did not accurately describe how HealthTrust distributed the $17.1 million in September 2014. Thus, this "notice" cannot bar the BSR's claims on remand and HealthTrust's argument that the BSR waived its claims because it failed to object to HealthTrust's distribution of the $17.1 million with "full knowledge of HealthTrust's distribution plan" should be denied.

C. The Presiding Officer correctly ruled that the appropriate remedy under RSA 5-B:4-a, I(b)(2) for HealthTrust's violation of RSA 5-B:5, I(c) is restitution payments to all of the political subdivisions whose member contributions between 2003 and 2010 generated the illegal $17.1 million subsidy.

While the Court in Appeal of Salem 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. 168 N.H. at 581 (emphasis added). In accordance with the Court in Appeal of Salem, in the Final Order, the Presiding Officer properly exercised his authority under RSA 5-B:4-a, I(b)(2) to order payments as restitution to an expanded universe of recipients, those political subdivisions whose member contributions between 2003 and 2010 generated the illegal $17.1 million subsidy. These include the following 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.

(Ex. B and C of the Statement of Stipulated Facts.) The Presiding Officer did not make an error of law or reasoning, or an erroneous conclusion, in determining that 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."). HealthTrust's arguments to the contrary are erroneous and should be rejected.

HealthTrust argues that the Presiding Officer erred in misconstruing the Court's decision in Appeal of Salem and creating a "new statutory right" for former members to share in a distribution of surplus. HealthTrust bases its argument on two sentences from the Final Order, which state the following:

> And he finds, instead, 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 a failing sister entity, namely the Property Liability Trust, Inc. (PLT). *Final Order Addressing Remand* (Oct. 7, 2016) at 9.
>
> 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. *Final Order Addressing Remand* (Oct. 7, 2016) at 17.

HealthTrust's argument is without merit. First, these sentences must be read in the context of the entire paragraphs in which they are contained and in the context of the entire Final Order. A review of the plain language of the Final Order shows that the Presiding Officer discussed the scope of the Court's remand in Appeal of Salem and stated that in Appeal of Salem, the Court determined that RSA 5-B:4-a, I(b)(2) expressly gave the Presiding Officer the authority to impose rescission, restitution, or disgorgement as a penalty. 168 N.H. at 581. While the words "statutory" and "right" are contained in the same sentence in the first portion above, it is clear from the entirety of the Final Order, read as a whole document, that the Presiding Officer did not hold that the Court in Appeal of Salem created or decreed any new statutory right. Second, the Presiding Officer, in ordering distributions from the $17.1 million to be made to political subdivisions whose member contributions between 2003 and 2010 generated the illegal $17.1 million subsidy, did not improperly create a new "statutory right." In reality, the Presiding Officer was properly exercising the authority granted to him under RSA 5-B:4-a, I(b)(2), as clarified by the Court in Appeal of Salem, to order a complete and proper penalty for HealthTrust's violation of RSA 5-B:5, I(c). In doing so, the Presiding Officer did not make an error of law or reasoning, or an erroneous conclusion, and thus, HealthTrust's argument should be denied.

D. The Presiding Officer properly concluded that it was not unjust or unreasonable to order restitution payments to all of the political subdivisions whose member contributions between 2003 and 2010 generated the illegal $17.1 million subsidy.

Contrary to HealthTrust's allegation, 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 restitution that they are entitled to, even if HealthTrust is required to expend funds in addition to the $17.1 million it has already disbursed. The Presiding Officer did not make an error of law or reasoning, or an erroneous conclusion, in finding that the penalty was not unreasonable or unfair, in large part because the Presiding Officer properly found that HealthTrust distributed the $17.1 million when an appeal on the issue of what universe of potential recipients are entitled to share in the $17.1 million in funds was pending and "to a 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." *Final Order Addressing Remand* (Oct. 7, 2016) at 20. The Presiding Officer also did not make an error of law or reasoning, or an erroneous conclusion, in finding that "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 . . . Thus, the payment of a judgment pending appeal carries the risk that the subsequent appellate decision will modify the judgment." *Final Order Addressing Remand* (Oct. 7, 2016) at 21. Therefore, HealthTrust's arguments that the Presiding Officer's Order is unreasonable or unjust are erroneous and should be denied.

II. The BSR requests that if the Final Order is stayed, that the approximately $2.3 million be escrowed in an interest-bearing account, for which the BSR is a signatory.

HealthTrust also moves for a stay of the Presiding Officer's Final Order, arguing that a stay is necessary to avoid harm to it and its member political subdivisions if HealthTrust abides by the Final Order, but that Order is later vacated upon reconsideration or on appeal. While the BSR submits that HealthTrust has failed to allege irreparable harm if the Final Order is not stayed, and cannot show that irreparable harm will result if the Final Order is not stayed, the BSR submits that it would not object to a stay if HealthTrust is required to place the funds in an interest generating escrow account with the BSR as a signatory. See Union Fid. Life Ins. Co. v. Whaland, 114 N.H. 549, 550 (1974) (stating that for a stay to be ordered "[f]irst, there must be a showing that the plaintiff will suffer irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect. Second, it must be clear that the harm to the plaintiff outweighs the public interest in enforcing the order for the duration of the appeal.").

CONCLUSION

For all of the foregoing reasons, because HealthTrust has failed to meet its burden of showing that the Presiding Officer has made an error of law or reasoning, or an erroneous conclusion in his Final Order, which properly ordered HealthTrust to make additional payments to an expanded pool of recipients, as an appropriate penalty of restitution under RSA 5-B:4-a, I(b) for its violation of RSA 5-B:5, I(c), HealthTrust's Motion for Reconsideration should be denied. In addition, HealthTrust's Motion for a Stay should only be granted if HealthTrust is required to place the funds in an interest generating escrow account with the BSR as a signatory.

Respectfully submitted,

The Bureau of Securities Regulation,
By its attorneys,

Bernstein Shur, P.A.

November 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Objection and Response upon counsel for the parties of record through the electronic filing system in place in this matter this 14th day of November, 2016.

/s/ Roy W. Tilsley, Jr.
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