STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

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

RESPONDENT MAURA CARROLL'S TRIAL BRIEF

Respondent Maura Carroll, by and through her counsel, submits this trial brief.

INTRODUCTION

The Amended Petition generally accuses Ms. Carroll of violations of the Pooled Risk Management Programs statute, RSA Ch. 5-B, and the New Hampshire Securities Act, RSA Ch. 421-B. Ms. Carroll has served as Executive Director of Respondent Local Government Center, Inc. (Respondent LGC business entities, collectively "LGC"), since September 4, 2009.

Ms. Carroll should not be found liable for a violation of RSA Ch. 5-B. First, Ms. Carroll neither violated nor caused LGC to violate any provision of RSA Ch. 5-B during her tenure as LGC's executive director. Second, while Ms. Carroll has served as LGC's executive director, the LGC Board of Directors has acted upon the advice, and with the consultation, of outside consultants and counsel, who appear at every board of directors' meeting.

Ms. Carroll should not be found liable for a violation of RSA Ch. 421-B. The participation agreements pursuant to which New Hampshire political subdivisions enroll in LGC's pooled risk management programs are not securities. The agreements are not securities because they are not investment contracts pursuant to the test established in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), the test BSR always has employed to determine whether an instrument is an investment contract. Even if the participation agreements could be deemed securities,

neither LGC's outside counsel, its professional consultants, the Secretary, nor BSR ever advised Ms. Carroll or LGC that the agreements could be considered securities. Ms. Carroll's conduct, therefore, was neither knowing nor negligent. Consequently, Ms. Carroll cannot be found liable for a violation of RSA Ch. 421-B.

Count I

In Count I, the New Hampshire Bureau of Securities Regulation ("BSR") alleges that LGC violated RSA Ch. 5-B because it operated its pooled risk management program pursuant to an improper corporate structure. BSR seeks to impose liability against Ms. Carroll based on the following two allegations:

> a. "In the summer of 2011, at the suggestion of Ms. Carroll, the LGC Board characterized just over $17 million of the $18.3 million in transfers as a 'loan' by HealthTrust, LLC to the Workers' Comp Trust." (paragraph 34); and
>
> b. "[T]he LGC Board members relied on the direction of Mr. Andrews, Ms. Carroll, legal counsel, and professional consultants when deciding how to manage Member funds held in the 5-B pools." (paragraph 84).

Effective June 2010, the New Hampshire General Court granted the Secretary regulatory authority over RSA Ch. 5-B pooled risk management programs, including the ability to impose liability against individuals, as follows:

> VII . The following fines and penalties may be imposed on any person who has violated this chapter.
>
> (a) Any person who, either knowingly or negligently, violates any provision of this chapter or any rule or order thereunder, may, upon hearing, and in addition to any other penalty provided for by law, be subject to an administrative fine not to exceed $2,500. Each of the acts specified shall constitute a separate violation.

Consequently, an individual must have acted knowingly or negligently to be found liable for a violation of RSA Ch. 5-B.

Liability for Count I should not be imposed against Ms. Carroll for the following four reasons:

1. RSA Ch. 5-B does not prohibit the corporate structure pursuant to which LGC has operated since its reorganization in 2003;
2. Since the corporate reorganization occurred in 2003, the conduct antedated the effective date of RSA 5-B:4-a, the statute pursuant to which liability could theoretically be imposed against Ms. Carroll;
3. Ms. Carroll was not a decision-maker in the decision to reorganize LGC; and
4. The corporate reorganization and structure was devised and implemented upon the advice of outside legal counsel, and therefore, even if the corporate structure now is deemed to violate RSA Ch. 5-B, Ms. Carroll's conduct cannot be deemed knowing or negligent.

Count II

In Count II, BSR alleges that LGC violated RSA Ch. 5-B by failing to return surplus funds to members of its pooled risk management program. BSR seeks to impose liability against Ms. Carroll based on the allegation in paragraph 34 that "In the summer of 2011, at the suggestion of Ms. Carroll, the LGC Board characterized just over $17 million of the $18.3 million in transfers as a 'loan' by HealthTrust, LLC to the Workers' Comp Trust," and the allegation in paragraph 84 that "the LGC Board members relied on the direction of Mr. Andrews, Ms. Carroll, legal counsel, and professional consultants when deciding how to manage Member funds held in the 5-B pools."

Liability for Count II should not be imposed against Ms. Carroll for the following two reasons:

1. LGC did not fail to return surplus funds or misappropriate assets. Instead, it returned surplus funds consistent with RSA Ch. 5-B and utilized assets consistent with the pooled risk management program's administrative needs;
2. Decisions regarding the return of surplus and the appropriation of assets were made following consultation with outside legal counsel and retained professional consultants, and therefore, even if a decision regarding either now is found to have violated RSA Ch. 5-B, Ms. Carroll's conduct cannot be deemed knowing or negligent.

Counts III-V

Counts III-V allege various violations of RSA Ch. 421-B, the New Hampshire Securities Act. Persons who knowingly or negligently violate RSA Ch. 421-B may be subject to an administrative fine not to exceed $2,500.00 per violation. RSA 421-B:26, III. Additionally, a "principal executive officer or director [of an entity dealing in securities] who materially aids in the act or transaction constituting [a] violation [of RSA 421-B] either knowingly or negligently" may be subject to an administrative fine not to exceed $2,500.00 per violation. RSA 421-B:26, III-a.

The underlying premise common to all of the allegations in Counts III-V is that LGC's RSA Ch. 5-B pooled risk management program participation agreements are investment contracts and thus securities regulated by RSA Chapter 421-B. BSR seeks to hold LGC liable as a broker-dealer or an issue-dealer, and impose liability against Ms. Carroll as an agent of a broker-dealer or an issuer-dealer.

BSR always has employed the *Howey* test, named after *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), to determine whether an instrument is an investment contract, and therefore, a

security. The *Howey* test provides that an instrument is an investment contract if it possesses the following four elements: (1) an investment of money; (2) in a common enterprise; (3) with the expectation of profit; and (4) derived solely from the efforts of the promoter or a third party. *Id.* at 298-299.

LGC's RSA Ch. 5-B pooled risk management program participation agreements are not investment contracts, and therefore, not securities regulated by RSA Chapter 421-B. The agreements are not "investments" entered into with the expectation of profit; rather, political subdivisions make contributions to LGC's pooled risk management programs to aggregate their self-insurance reserves, risks, claims, losses, administrative services, and expenses. Moreover, when funds are returned to members, the returns are based on the members' own claims history. Accordingly, returns not only are not "profits," but they also are not derived solely from LGC's or a third party's efforts.

RSA Ch. 5-B was enacted in 1987. Accordingly, LGC submitted annual filings to the Secretary for twenty-four years before issuance of the Staff Petition. During that entire span of time, neither the Secretary, BSR, LGC's outside counsel, nor its professional consultants, ever advised or even suggest to Ms. Carroll or LGC that the pooled risk management program participation agreements could be considered securities. Ms. Carroll's conduct, therefore, was neither knowing nor negligent. Consequently, Ms. Carroll cannot be found liable for a violation of RSA Ch. 421-B.

CONCLUSION

Ms. Carroll has competently and successfully served LGC as Executive Director since September 4, 2009, and as an employee charged with the provision of legal services to NHMA member municipalities prior to that time. During her tenure, she has never failed to act in good

faith and in the best interests of the organization she serves and its members. At all times, she has acted consistent with the advice of LGC's outside attorneys and professional consultants.

For the reasons stated in this memorandum and the argument to be presented at the hearing, as well as in her Motion to Dismiss and Motion for Summary Judgment, which are incorporated herein by reference, neither Ms. Carroll nor LGC violated either RSA Ch. 5-B or RSA Ch. 421-B. However, in the event a violation of either statute is found, Ms. Carroll should not be held liable because her conduct regarding the violation was neither knowing nor negligent.

Dated: April 27, 2012

Respectfully submitted,

MAURA CARROLL

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 27th day of April 2012, forwarded copies of this pleading *via* E-mail to counsel of record.

/s/ Benjamin T. Siracusa Hillman