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

POST-HEARING BRIEF OF RESPONDENT MAURA CARROLL

Respondent Maura Carroll, by and through counsel, submits this post-hearing brief.

INTRODUCTION

After ten days of testimony and the introduction of reams of exhibits, the BSR failed to meet its burden of proof that Ms. Carroll violated the law. Claims against her must be dismissed.

For decades the Bureau of Securities Regulation ("BSR") has had jurisdiction over the sale of securities, and for 25 years pooled risk management programs have successfully provided insurance coverage unavailable elsewhere to hundreds of thousands of New Hampshire citizens and the political subdivisions in which they reside. Only in August 2011—after a 20 month review—did the BSR first assert that Local Government Center's ("LGC") participation agreements, utilized by 90% of New Hampshire political subdivisions to purchase insurance, were securities.[1] Before that point, Ms. Carroll "had no inkling" that she should even have inquired as to whether they were securities. Transcript of Administrative Hearing, 1836:7-21 (hereinafter "Tr."). It is no wonder. As Attorney Martin Murphy, a seasoned securities lawyer and former securities regulator, testified, "I don't think it would have occurred to me to think that there was a question about whether [LGC] ought to be registered as broker-dealers . . . ." Tr. 2150:14-18. Attorney Peter Loughlin, a seasoned municipal lawyer, testified that his clients

[1] In order to raise this claim, it was not necessary for the SOS to proceed against the individual respondents.

thought of arrangements with LGC as purchasing insurance, not an investment. Tr. 2040:12-2041:4. If it would not have occurred to experienced securities or municipal lawyers to seek determinations of whether participation agreements were securities, how can Ms. Carroll, inexperienced in securities law matters, be found negligent for not doing so? Not surprisingly, no participating member testified that it purchased insurance from LGC with investment intent, or that it expected a "profit," two pre-requisites for finding that participation agreements were securities.

The BSR failed to articulate the evidence that supports its charges against Ms. Carroll. On at least three occasions in this proceeding, the BSR had the opportunity to present the underlying evidence in a precise and cogent manner. In each instance it failed to do so.

The first opportunity arose during the BSR's case in chief. Despite accusing her of fraud and deceit, the BSR mentioned Ms. Carroll only fleetingly in its opening statement. Tr. 22:1-5. By the close of the BSR's case, Ms. Carroll's name had been mentioned only once during direct testimony, and her alleged misconduct never. Tr. 565:10-15. The BSR argued in response to Ms. Carroll's Motion to Dismiss that she was "general counsel to the enterprise." Tr. 1151:2-12. In so claiming, the BSR recklessly and falsely implied that Ms. Carroll provided improper or unlawful advice to LGC or the risk pools, without offering any evidence to that effect.[2]

The BSR's clearest opportunity arose during Ms. Carroll's testimony. Nevertheless, the BSR failed to ask her about her allegedly wrongful conduct, leaving her statements un-refuted.

Finally, during its response to Ms. Carroll's renewed Motion to Dismiss, the BSR suggested that testimony offered by Respondents could simply be ignored because "many of the points of testimony have been refuted by their own documents." Tr. 2423:20-2424:3. An

[2] Exhibits cited by the BSR do not show that Ms. Carroll provided such legal advice. *See* LGC Exs. 191, 194, 48, and 68. The LGC Board did not look to Ms. Carroll for legal advice. Tr. 1694:22-1695:3; 1756:11-1757:2.

example then cited—presumably among the BSR's strongest evidence—involved an exchange at a Board meeting where Ms. Carroll sought to improve engagement by asking Directors to refrain from cellphone and computer usage during meetings, an issue hardly unique to LGC. Tr. 2424:10-21. Such evidence can hardly meet the BSR's burden of proof. *See* RSA 421-B:26-a, XXI ("All decisions shall be reached upon the basis of a preponderance of the evidence.").

A finding of "no liability" must be entered against Ms. Carroll.

ARGUMENT

I. Respondents Did Not Violate RSA 5-B, RSA 32, or RSA 35.

A. The Evidence Presented Does Not Support a Finding of Liability on Counts I and II, and a Finding of "No Liability" is Warranted.

Respondent Carroll incorporates arguments raised by other Respondents as to why a finding of "no liability" is warranted on Counts I and II. There has been no statutory violation.

B. The Evidence Presented Does Not Support a Finding of Liability for Violations of the Municipal Budget Act, RSA 32 and 35.

The BSR's suggestion that LGC somehow causes its members to violate the Municipal Budget Act should be rejected. The Presiding Officer does not have jurisdiction over violations of RSA 32 and 35. *Compare* RSA 32:12 (requiring petition before superior court); RSA 35:14 (not referencing any administrative process), *with* RSA 5-B:4-a, I (providing jurisdiction for administrative actions); RSA 421-B:26-a (setting forth administrative hearing procedures).

Attorney Peter J. Loughlin, one of New Hampshire's preeminent municipal lawyers and author of the definitive treatise on the subject, *New Hampshire Practice Series: Local Government Law*, succinctly testified that New Hampshire's Municipal Budget laws do not apply to LGC or its risk pools. *See* Tr. 2017:4-2018:1; 2027:13-2028:16. The BSR failed to

present any evidence contradicting this testimony.[3] The net assets or capital on the books of LGC and its risk pools are, quite simply, not municipal funds subject to the budgeting requirements of RSA 32 and 35 or the investment requirements of RSA 35:9. Tr. 2028:2-2030:6; 2037:6-11; 1070:2-1071:11. Although the funds originated with municipalities, once contributed to LGC, they cease to be municipal funds. Tr. 2028:2-2029:9. Nor, Loughlin testified, has the LGC facilitated or caused violations of RSA 32 or RSA 35 by any of its members. Tr. 2020:21-2022:1 (municipalities may transfer funds between line items); 2030:22-2032:1 (no violations have occurred as a result of LGC's actions), 2033:18-2035:17, 2037:12-2038:2 (GMR process does not cause violations); 2038:3-2039:4 (same for rate stabilization). Only when LGC declares a dividend and actually returns monies to a political subdivision do they become monies subject to the Municipal Budget Law. Tr. 413:20-414:4, 2050:19-2052:20.

II. Respondent Maura Carroll Did Not Violate RSA 5-B or Breach Any Duties Owed.

A. Prior to September 4, 2009, Ms. Carroll Served as General Counsel to NHMA, and Had No Responsibilities Related to Risk Pools.

It is undisputed that prior to September 4, 2009, when Ms. Carroll became interim Executive Director, she was not an LGC executive, nor a Board member, and had no decision-making authority over restructuring the corporate entity, setting reserve levels, returning surplus, strategic plan funding, or the issuance of participation agreements.

Prior to September 4, 2009, Ms. Carroll's responsibilities were as an employee of, and later the director of, the division of the New Hampshire Municipal Association ("NHMA") that

[3] The sole evidentiary basis for the claim arises from the report of Michael Coutu. BSR Ex. 68-B. The BSR did not elicit this testimony at the hearing; if the BSR had, the Presiding Officer would have found that Coutu was not qualified to render a legal opinion. *See, e.g.*, Tr. 129:7-130:8 (granting objection to rendering of legal opinion by Coutu). Moreover, the Amended Petition, at paragraphs 101-104, alleges that LGC's retention of surplus facilitates violation of the Municipal Budget laws, whereas Coutu, in his report, opined that a violation occurs when the actual premium paid by a municipality is less than the Guaranteed Maximum Rate originally quoted. BSR Ex. 68-B at 13-14. There is no evidence that supports the claims set forth in the Amended Petition.

provided legal advice to member municipalities and advocated on their behalf. Tr. 1753:6-18, 1755:20-1757:2. Ms. Carroll did not provide legal advice to LGC or the risk pools, and the Board did not look to her for legal advice. Tr. 1694:22-1695:3; Tr. 1753:6-18, 1755:20-1758:10, 1756:11-1757:2; Tr. 1894:6-1895:1. As Attorney Mark McCue ("McCue") testified, counsel from his firm was present at virtually all Board and committee meetings to provide legal advice. Tr. 1566:6-1567:3, 1567:12-1569:13, 1692:22-1693:23; *see also* Tr. 592:17-593:6. Following the 2003 merger, Ms. Carroll remained within NHMA and continued to have no involvement with the risk pools. Tr. 1771:21-1773:2. As Ms. Carroll testified, she operated under a job description, as well as an Opinion of the New Hampshire Bar Ethics Committee, that specifically prohibited her from giving legal advice to LGC or its risk pools. Tr. 1758:20-1762:10, 1764:23-1765:23, 1766:18-1767:10; LGC Ex. 408. While she attended some LGC Board meetings prior to 2009, she did so primarily in order to report on her department's activities. Tr. 1775:8-1776:5, 1777:22-1780:10; BSR Ex. 35-A, 35-B.

In oral argument on the Motion to Dismiss, counsel for the BSR highlighted four LGC exhibits, 191, 194, 48, and 68, as evidence that Ms. Carroll was "general counsel to the enterprise," was "involved as general counsel" and had "all of the responsibilities placed on attorneys." Tr. 1151:2-12. These exhibits do not support the BSR's claim. For example, LGC Ex. 68 indicates that Ms. Carroll attended the meeting as staff, identifying her as "legal counsel." The minutes do not reflect statements or advice given by Ms. Carroll. Although certain of these exhibits support a finding that Ms. Carroll's *title* was "General Counsel," none of them contain a scintilla of evidence that Ms. Carroll ever provided any legal advice to LGC or its risk pools.[4]

[4] Against an avalanche of testimonial and documentary evidence establishing that Ms. Carroll was not LGC's "General Counsel" and did not provide LGC with legal advice, the BSR claims that this evidence must be ignored because during an interview Ms. Carroll was erroneously listed as LGC general counsel. Tr. 1894:12-1895:3.

Accordingly, Ms. Carroll should not be held liable for actions taken before September 4, 2009. *See also* Respondent Carroll's Motion for Summary Judgment (Mar. 12, 2012), at 4-7.

B. There is No Evidence that Ms. Carroll Individually Violated RSA 5-B.

As she testified at the hearing, Ms. Carroll fully supports the fundamental and critical decisions that the Board historically made and upon which this matter has centered. Tr. 1822:9-1823:18. As Executive Director, she fully embraces her duties in "carrying out" these Board decisions, as she believes they fulfill LGC's mission and are in the best interests of its members. However, her profound belief in the correctness of these decisions neither creates a specific legal duty nor provides evidence of a breach of any legal duty.

First, as discussed above, Ms. Carroll had no responsibilities related to RSA 5-B compliance prior to September 4, 2009. She had no authority to vote for or against, advocate for or against, or provide legal advice with regard to the restructuring. Tr. 1768:10-1770:13. The Board decisions that underlie the BSR's claims were made prior to Ms. Carroll's appointment as interim Executive Director.[5] *See* Tr. 1792:21-1794:14 (2002 setting of 4.2 RBC); 1768:10-1770:12 (2003 merger); 1974:16-1795:13 (2004 strategic plan of 1% to support the workers compensation program); 1795:14-1796:11 (2007 decision on return of surplus).

Even after Ms. Carroll became interim Executive Director, it remained the Board's duty to determine LGC's corporate structure, reserve levels, rates, method of surplus return, strategic plan funding, and compliance with RSA 5-B, and Ms. Carroll had no legal duty to revisit decisions made prior to her tenure. LGC Ex. 222 ¶¶ 6.12, 7.1, 8.1-8.4; Tr. 1789:8-1791:18, 1792:21-1793:10, 1793:23-1797:10. Ms. Carroll is not a Board member and has no Board vote. LGC Ex. 222 ¶¶ 6.1-6.2, 6.12, 7.1, 8.1-8.4. As an Executive Director, Ms. Carroll owed the

[5] Not only do these claims predate Ms. Carroll's appointment as executive director, they also predate the legislative grant of enforcement authority to the BSR.

duties of an agent, generally summarized as duties of performance and duties of loyalty. *See* Restatement (3d) of Agency §§ 8.07-8.10. As a non-director, she did not owe fiduciary obligations of a director; her duties were to carry out policies and direction set by the Directors, and she had no authority to deviate from them. LGC Ex. 222 ¶¶ 8.3-8.4; Tr. 1785:15-1786:23, 1791:19-20. In particular, Ms. Carroll never "directed" the Board regarding corporate structure or how to manage member funds, including return of surplus. Tr. 1816:13-1817:2.

Finally, there is no evidence that Ms. Carroll breached a duty. She may suggest actions to the Board, but cannot compel it to adopt her recommendations.[6] For example, acting at the suggestion of members, Ms. Carroll recommended that the Board transfer funds from Workers' Compensation to HealthTrust, over time and including interest payments. The Board ultimately decided, in partial acceptance and partial rejection of her recommendation, to execute a note evidencing a loan between the programs without interest. Consistent with her duties, Ms. Carroll carried out the Board's direction, ensuring that a promissory note was executed and that the transaction was appropriately reported in financial statements. Tr. 1797:11-1808:16; LGC Exs. 138, 139, 281, 279, 159, 169. No liability should attach to Ms. Carroll's actions in bringing the members' suggestion to the Board, and in carrying out the Board's duly made decision.

Nor may Ms. Carroll be held liable for failing to recommend in 2009 that the Board make changes to reduce net assets, return a certain amount of surplus, or utilize a different method of return, as the BSR seeks. *See* Tr. 1842:1-1843:14. These are Board responsibilities about which the Board deliberated in a substantial, engaged manner on a regular basis, taking into account

[6] The BSR acknowledged the relevance of this distinction in arguing against Respondents' Motions to Dismiss, contending that, "I do not need to ask Mr. Curro his opinion on whether participation in a risk pool is an investment because . . . he is not the decision maker . . . . So although he may have an opinion, he is no more than a recommender." Tr. 2423:5-15. The same may be said for Ms. Carroll: regardless of her stated recommendations or opinions, she was not the "decision maker," and her opinions and recommendations are not legally dispositive.

conflicting concerns and its duty to comply with RSA 5-B. Ms. Carroll, as she testified, has no quarrel with the actions the Board undertook and believes that the Board exercised its best business judgment. Tr. 1842:6-22, 1822:15-1823:18. Regardless, however, no liability should attach to Ms. Carroll's actions because, in the role of executive director, she had no power to override the Board's decision-making or to direct the Board to reach a different result.

III. Respondents Are Not Liable Under Counts III, IV, and V.

A. The BSR Failed to Establish That Participation Agreements Are Securities.

The BSR failed to establish that "participation agreements" in LGC's risk pools constitute "investment contracts" under the Supreme Court's four-part test, first articulated in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 93 (1946). Under *Howey*, a contract, transaction, or scheme is an "investment contract," and therefore a "security," if a person or entity: 1) makes an investment; 2) in a common enterprise; 3) with the expectation of profits; 4) to be generated solely from the efforts of the promoter or a third party. *Id.* at 298-299. The BSR must satisfy all four elements. *SEC v. Life Partners, Inc.*, 87 F.3d 536, 548 (D.C. Cir. 1996). After ten days of testimony and countless exhibits, the BSR manifestly failed to meet its burden.

1. LGC Members Join Risk Pools to Get Insurance, Not for "Investment."

Howey essentially boils down to one question: what is "the purpose of the underlying economic arrangement?" Tr. 2087:16-19. Here, the arrangement is a legislatively authorized "insurance program," not one in which municipalities pool resources "to try to make money like they would if they were going to make investments in the stock market." Tr. 2104:15-20.[7]

A studied reading of the participation agreements and the enabling language of RSA 5-B

[7] Participation agreements cannot be sold, transferred, or used as collateral. Tr. 2080:15-21. The BSR previously held that instruments which cannot be transferred or hypothecated are not securities. *See* October 28, 2002 BSR No-Action Letter issued to Associated Pharmacies, Inc. (produced with Ms. Carroll's Motion to Dismiss).

reinforce the simple, inescapable truth that political subdivisions join LGC's risk pools for one reason: to manage risk through the collective purchase of health, liability, property, and workers' compensation coverage. The legislative purpose and scope of RSA 5-B "is really risk management." Tr. 2076:6-7; *see also* Tr. 2103:20-2104:20. As explained by Attorney Loughlin, municipalities "have a need to buy health insurance for their employees . . . and that's what they go into the marketplace to get." Tr. 2040:19-23; *see also* Tr. 1942:21-1943:22.

LGC's bylaws, incorporated into every participation agreement, similarly and unequivocally reinforce that members understand that the pools exist for insurance and risk management, not investment. Tr. 2077:18-2078:17. Article II of the Bylaws "spells out that the purpose of the organization is, in essence, to provide an insurance program . . . so as to permit political subdivisions to be allowed to manage their risks." Tr. 2078:6-17; *see also* LGC Ex. 222. Premiums depend on a member's employee population and medical claims experience, exactly "the kind of factors that typically drive insurance programs," but not "the kind of factors that drive investment decisions." Tr. 2079:20-2080:7.

A large body of S.E.C. no-action letters concerning membership interests in specialized insurance cooperatives supports the conclusion that participation agreements are not investment contracts. Tr. 2108:10-2109:22; Tr.1943:4-9. The letters, none of which resulted in a finding of security status, "present[] situations quite similar to" LGC's risk pools. Tr. 2108:19. While all involved a payment of money, the S.E.C. agreed that the purpose of the payment "was to purchase something, namely insurance, and not to use . . . money to try to make more money, which is really what an investment is classically under" Supreme Court precedent. Tr. 2108:18-

2109:5.[8]

The BSR's singular argument for why LGC and its pools should not be compared to insurance companies for securities purposes is that they are not regulated by the New Hampshire Insurance Department. The BSR has yet to cite a single case suggesting, let alone holding, that this factor impacts the *Howey* analysis.[9] The New Hampshire Legislature previously determined that insurance regulation was unnecessary due to the pool's quasi-public nature and LGC's self-governance by public officials. Tr. 2141:23-2142:17.[10] The Legislature also declined to designate participation agreements "securities" when it tasked the SOS with regulatory oversight. Even the BSR's expert, Attorney Gregory Fryer ("Fryer"), characterized LGC's risk pools as "small little specialty insurance companies." Tr. 897:22.[11] Other BSR witnesses reinforced the proposition that LGC's operations and pricing mirrored those of an insurance company. Tr. 131:6-132:8; Tr. 774:4-5.

Because it cannot escape the obvious insurance rationale for joining a risk pool, the BSR focuses on LGC's investment of unused member premiums and its statutorily mandated surplus return. The theory is that if the pools invest unused premiums, and the statute uses words associated with investments, like "dividends" and "earnings," then members must join with investment intent. This myopic approach lacks any factual support. Not a single member

[8] The BSR's securities expert, Attorney Gregory Fryer, did not bother reading the dozens of S.E.C. no-action letters concerning substantially similar facts, because he did not consider them relevant. Tr. 976:8-14.

[9] Murphy, a former regulator, testified that the absence of regulation is irrelevant to the inquiry. Tr. 2140:9-2143:21.

[10] The BSR undermined its lack of regulation argument when it explained that in 1997, the New Hampshire Insurance Department did, in fact, intervene when HealthTrust's capital level dropped, but has not intervened since that time because LGC's capital level has remained at a safe level. Tr. 1520:2-1523:20. As the BSR explained, that was "an example of how [insurance regulation is] supposed to work," and "in the case of HealthTrust in the mid '90s, that's exactly the way it worked." Tr. 1523:9-20.

[11] Fryer was even more explicit in his report: "Regarding these risk pool participation interests, it certainly can be argued that the predominant purpose of these instruments is to obtain a cap on liability, i.e. to shift to others the risk that a given member's costs from future uncertainties will exceed an accepted level of cost. **This is a classic insurance function**." BSR Ex. 68C, ¶ 8 (emphasis added).

testified that it purchased LGC coverage as an investment, that is, to make money.

The BSR's approach is also legally untenable, as *Howey* and its progeny instruct lower courts to look past terminology and examine the underlying economic realities. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality.") (citing *Howey*); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975) ("Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto.").

LGC's investment of unused member premiums reinforces that it is the functional equivalent of an insurance company, which, the BSR's securities expert testified, also invest unused premiums. Tr. 918:16-21. As Murphy, Respondents' expert, explained, such investment has no bearing on the investment contract analysis. Tr. 2116:16-2117:7. The Supreme Court's *Forman* decision, 421 U.S. 837 (1975), which involved the sale of subsidized apartments in a New York housing development, and *Dryden v. Sun Life Assurance Company of Canada*, 737 F. Supp. 1058 (S.D. Ind. 1989), concerning owners of whole life insurance policies, refute the BSR's theory. In both cases, management put the participants' money (rental payments in *Forman*, premiums in *Dryden*), to other uses (parking lots and laundromats in *Forman*, stock market investments in *Dryden*) that generated financial benefits (rent reduction in *Forman*, dividends in *Dryden*). Tr. 2116:2-2117:23. Despite these benefits, each court examined the "overall arrangement," asked the fundamental *Howey* question—"What's really going on here?"—and concluded that despite the investment income, neither arrangement constituted a

security. Tr. 2116:2-2117:23.[12]

LGC's practice of distributing excess surplus through rate credits does not convert the participation agreements into investment contracts. The BSR argued that this switch, initiated by member request, was a "game-changer" that "makes this a more security-like participation agreement." Tr. 1160:18-19. The BSR never explains how this change impacts the *Howey* analysis, instead just repeating the words "dividend," "money," and "investing." Tr. 1160:11-19. The Amended Petition does not distinguish between premium offsets, dividend checks, and rate credits in the *Howey* analysis, see Am. Pet. ¶ 109, and Respondents introduced evidence showing that the practice of risk pool managers returning surplus via rate credits began as early as 1988. Tr. 588:12-15; LGC Ex. 323, at 15682, LGC Ex. 324, at 15687. *See also* Tr. 817:4-16; BSR Ex. 67, at 152. Fryer states in his report that the form of surplus return is irrelevant to the definition of "profit" as used by *Howey*. BSR Ex. 68C, ¶ 6(e).[13] Finally, the BSR recently adopted the official position that an instrument's security status must be determined at inception. Tr. 992:11-16.

When challenged to point to specific evidence showing that members join LGC's risk pool for investment, rather than insurance, the BSR responded that a simple transfer of money satisfied the first *Howey* prong. Tr. 1154:21-22 ("We've established that members pay money to participate in the pools"). This is manifestly wrong. As countless cases following *Howey* and *Forman* hold, nearly every commercial transaction involves the exchange of money, and this factor alone does not satisfy the first criterion of the investment contract analysis. *See, e.g.*,

[12] The BSR's only attempt to distinguish *Dryden* was to repeat the common refrain that the defendant was regulated by "the Insurance Department." Tr. 2124:19. At no point did the BSR explain the significance of this fact, nor does the *Dryden* court consider the presence of an insurance regulator in the *Howey* analysis.

[13] Murphy also testified that using surplus to reduce premium payments "wouldn't in any way turn this into a security." Tr. 2138:19-22.

S.E.C. v. Energy Group of America, Inc., 459 F. Supp. 1234, 1239 (S.D.N.Y. 1978) ("It strains the ordinary meaning of words to consider the payment" of a mere "fee" to be an "investment" within the meaning of *Howey*). The BSR failed to introduce any evidence showing that members join LGC risk pools with investment intent, and therefore *Howey's* first prong fails.

2. LGC Members Do Not Have a Reasonable Expectation of "Profit"

The BSR also failed to satisfy *Howey's* third criterion, expectation of profit. Despite the fact that a vast majority of New Hampshire political subdivisions belong to at least one LGC risk pool, the BSR did not provide a single piece of evidence that any of them reasonably expected to reap "profit," as defined by *Howey*, from such membership. On this point, the BSR called no witnesses and pointed to only three of the hundreds of exhibits, none of which supported their argument. As Fryer testified, a member's expected benefit from joining a risk pool is "a factual question," yet the BSR presented no facts on this critical issue. Tr. 967:15-16. Of the three witnesses who at one time belonged to or represented municipal members, two testified that they did *not* expect to earn a profit by joining risk pools, and the third was silent on the issue:

- Respondent Peter Curro, the former Finance Director for the Town of Londonderry, testified that Londonderry joined the risk pools to acquire insurance, not to generate a profit. Tr. 2378:11-20. The BSR did not challenge this testimony on cross examination.[14]

- Peter Loughlin, an experienced municipal attorney who has represented dozens of LGC members, testified that his clients do not consider joining risk pools for investment purposes, rather "they think about buying insurance, that they . . . have a need to buy health insurance for their employees, property insurance, and that's what they go into the marketplace to get." 2040:19-23. The BSR did not challenge this testimony.

- Michael Coutu, the BSR's expert witness, also testified that it was the cost of health insurance, not the prospect of investment returns, that motivated North Hampton to join HealthTrust. Tr. 112:5-11. He said nothing about any expectation of profit, and the BSR did not ask him about such an expectation over his two days of testimony.

[14] In attempting to explain this omission, the BSR characterized Mr. Curro as "no more than a recommender" as opposed to a final decision-maker. Tr. 2423:15. This response begs the question: if Mr. Curro is not qualified to opine on whether members expected to earn an investment profit, why did the BSR not call anyone who could?

The BSR's only attempt to elicit testimony on the third *Howey* prong was a single question to John Andrews ("Andrews"), the initial answer to which they will likely seize upon as "proof" that members joined LGC with a reasonable expectation of profit. Tr. 555:7. While Andrews initially answered a solitary "yes" to a string of leading questions when asked if, because the "the way that the risk pools are set up, members are led to believe that if the common enterprise produces profits or gains they will get the benefit of those profits or gains," he clarified that response with his next answer, in which the BSR asked if LGC "advertised that there could be a return on investment":

> No, because . . . I don't think that we ever held out . . . that . . . this was some kind of an investment vehicle . . . they [members] were purchasing insurance coverage, indemnity, and . . . they understood that if the whole pool's experience was good, and their experience . . . contributed to that . . . they would benefit from that. But . . . I didn't think that we held it out as an investment vehicle, it was held out as an insurance vehicle.

Tr. 555:13-23.[15]

Testimony from the BSR's securities expert is equally unavailing. Fryer repeatedly asserted that the only "profit" members can reasonably expect is the cost saved from not insuring through a competing product. Tr. 915:12-13, 921:12-14, 965:3-968:13. Fryer did not, and cannot, cite to any case law supporting this simplistic definition of "profit" as used in the investment contract inquiry. He attempts to distinguish LGC members from the *Forman* tenants, whose sole motivation was "residential," "not financial." Tr. 917:6-7. LGC members, he argues, join with "mixed motives: a desire to obtain insurance . . . but to do so through participation in a venture that offers the promise of reduced costs." Tr. 917:22-918:4. The distinction does not hold. The *Forman* tenants were also motivated by cost considerations, in

[15] While arguing against dismissal on Day 5, the BSR ignored Andrews' clarifying testimony, citing only his initial answer as evidence that the BSR had shown "an expectation of profits." Tr. 1155:11-19.

their case the prospect of lower, subsidized rent. 421 U.S. at 855. Simply saving money is not "profit" under *Howey*, as *Forman* makes clear. *Id.*; *see also* Tr. 1950:20-1951:10.

The return of excess surplus, whether in the form of dividends or rate credits, also fails to prove that members join risk pools with an expectation of profit. While the BSR emphasizes the word "dividends" at every opportunity, Murphy testified that in the insurance industry, it is firmly established that such "dividends" are nothing more than unused member premiums. Tr. 2103:8-13; *see also Collins v. Baylor*, 302 F.Supp. 408, 411 (N.D. Ill. 1969) ("Such so-called dividends are, in reality, not dividends, but in a mutual insurance company are merely a return to policyholders of the unearned, that is, unused, portion of the premiums paid in."); *see also* Tr. 767:8-15 (testimony of H. Atkinson, equating "return [of] surplus" with "return of premiums").

Not surprisingly, then, the strongest opinion the BSR's securities expert could offer on whether premium returns constitute "profit" under *Howey* is that it is "a close call." Tr. 924:1. This tepid conclusion contrasts with Attorney Richard Samuels' unequivocal testimony that nothing in the participation agreements "should suggest or would suggest to a participant that they are going to profit from their participation," and that "it would be unreasonable for a participant to expect profit based on reading 5.1 and 5.2 [of the LGC Bylaws] along with the participation agreement." Tr. 1946:4-7, 1950:2-5. Focusing on the "fundamental nature of the arrangements," as *Howey* instructs, Murphy testified it was "fairly clear" that because participants "are paying their money mainly for the purpose of buying insurance, something that they're essentially going to use and consume . . . the municipalities were not led to make these payments with the expectation of profits as the Supreme Court uses that terminology." Tr. 2106:5-2107:8.

The BSR also failed to introduce any exhibits showing an expectation of profit, citing, at

the close of its case in chief, only three exhibits as "evidence" of *Howey's* third criterion:

- LGC Exhibit 209, a March 2010 article from "New Hampshire Town and City," which the BSR noted "on the first page indicates that the pools take premiums, invest them, and profits are used to reduce rates and offer services." Tr. 1156:9-11. As the article, numerous cases, and the BSRs' experts acknowledge, private insurance companies also invest member premiums, yet courts and the S.E.C. unanimously and repeatedly hold that this practice has no impact on the investment contract analysis. While LGC Exhibit 209 uses the term "profits," it does so within quotations, to emphasize that the "profits" generated by risk pools are not "profits" in the traditional sense.

- BSR Exhibit 58, a 2001 PLT circular, which the BSR refers to as a "marketing piece." Tr. 1156:12-14. Again, the BSR focuses solely on the word "dividends," Tr. 1156:15, ignoring common industry knowledge and their experts' testimony, which acknowledge that "dividends" in the insurance context are unused member premiums, not investment earnings. Tr. 767:8-15, 918:16-21.

- BSR Exhibit 51, the 2011 "LGC Fact Book," which "indicates that HealthTrust members prefer that funds be returned to them in the form of rate decreases." Tr. 156:17-19. The BSR does not explain how this evinces an expectation of profit.

It is the BSR's burden to prove all four *Howey* elements. When their best "evidence" is testimony from their securities expert concluding, based upon faulty analysis, that the presence of the third element is a "close call," they fail to carry that burden. Tr. 924:1.

3. Any "Profits" Do Not Arise Solely From the Efforts of Others.

Even if the Presiding Officer accepts the novel theory that an insurance provider's return of unused member premiums constitutes "profit" under *Howey*, the BSR failed to establish that such profit arises "solely from the efforts of others." Multiple witnesses testified that the overriding factor that determines whether a pool generates excess surplus in any given year is the cost of claims, a factor over which Respondents have little control, never mind sole control:

- LGC Chairman Thomas Enright testified that a single flu outbreak, which could result in a "multimillion-dollar" hit "to our bottom line," could determine whether LGC lost money or generated surplus. Tr. 1199:9-19.

- Actuary Peter Reimer explained that "the primary overwhelming risk in HealthTrust and any health insurer is the claims risk or the underwriting risk." Tr. 1270:14-16.

- Wendy Lee Parker ("Parker"), LGC's Deputy Director for Risk Pool Operations, testified that "actual claims cost in any unit or any pool" drives rate increases, "[s]o about 85 percent of every rate on average is based purely on claims experience." Tr. 1392:18-21.

While the BSR attempted to negate this testimony by suggesting that LGC can control surplus and loss by setting rates, there is a fundamental difference between incorporating medical trend into rates, on the one hand, and controlling medical trend, on the other. As Andrews and the testifying actuaries stated, HealthTrust had no control over the latter. Tr. 417:18-20 (Andrews); Tr. 723:18-26 (Atkinson); Tr. 1264:14-23 (Reimer). Even in a population as large as HealthTrust's, "inherent volatility in a system as unpredictable as healthcare" often results in "an adverse result." Tr. 1266:7-8, 1267:7.[16] LGC's renowned wellness and preventive programs only go so far.

Fryer described such programs as "incidental," Tr. 967:19, but argued that the participation agreements satisfy *Howey's* final element because LGC members rely on "professional management." Tr. 913:21.[17] Fryer, however, also premises his conclusion on the erroneous assumption that LGC returns surplus on a pro rata basis. *See* Tr. 969:20-975:16. Even after reviewing dividend letters showing that surplus returns depend on a member's claim history, Fryer clung to his pro rata stance, but provided no basis for this belief and eventually conceded that he did not "know that" with any degree of certainty. Tr. 974:7-12. Fortunately, three other witnesses did:

- Parker testified that with respect to HealthTrust, the return of member premiums is a function of its "current claims," and that it is in no "way, shape, or form" based "on how much premium a member group pays." Tr. 1413:9-15.

[16] *See also* Tr. 427:5-10 (Andrews): "As I said, some years we might lose $7 million, and other years we might make $7 million . . . . [W]e were hemorrhaging . . . red ink, even though we were a large program."

[17] While he frequently invokes the case, Fryer apparently overlooks the fact that the Supreme Court ruled that the stock certificates in *Forman* were not investment contracts even though the tenants/purchasers also delegated the day-to-day running of Co-Op City to professional management. 421 U.S. at 841.

- Sandal Keefe, LGC's Chief Financial Officer, explained that PLT only establishes a dividend if the pool generates excess surplus. Tr. 1504:4-7. If PLT declares a dividend, only members whose claims do not exceed a certain level may participate. Tr. 1506:10-17. The amount of that dividend further depends on the member's claim experience relative to the overall pool, not the member's contributions. Tr. 1507:13-20.

- Murphy, who unlike Fryer carefully reviewed sample participation agreements and the LGC Bylaws, testified that a member's individual experience determines "how much money is going to go back to them." 2103:14-19. Under *Howey*, the premium return "wasn't solely on the basis of the efforts of the managers," and Murphy concluded that participation agreements failed this investment contract criterion. Tr. 2107:18-2108-6.

Finally, each member enjoys at least some control over its claims experience, and thus its surplus return, by deciding, for example, in which LGC wellness programs to participate. Tr. 1952:14-19. Such control defeats any claim that profits arise solely, or even predominantly, "from the efforts of others," and the BSR cannot satisfy the final *Howey* requirement. Tr. 1953:2-10.[18]

B. The Presiding Officer Should Afford Little or No Weight to Gregory Fryer's Report and Testimony.

The BSR retained Fryer to proffer an opinion on whether participation agreements constitute "securities" under the New Hampshire Uniform Securities Act. Fryer's Report does not answer that question. See BSR Ex. 68C. Instead, he offers an opinion of the BSR's opinion, finding that the BSR "has reasonable and justifiable grounds . . . to conclude" that participation agreements constitute securities. *Id.* at 2. His equivocal testimony was as follows:

- It was his "opinion that reasonable practitioners in this area can differ on whether it is or not" a security. Tr. 925:4-5;

- Whether a participation agreement constitutes an investment contract is a "close call," a

[18] As Samuels testified, there is no statutory or case law suggesting that New Hampshire deviates from *Howey's* requirement that "profits" arise "solely" from the efforts of others. Tr. 1952:1. Even if the Presiding Officer uses a more relaxed standard, such as "undeniably significant" efforts, as Fryer states in his report, the BSR failed to satisfy the fourth *Howey* prong. BSR Ex. 68C at n.1.

finding with which one could reasonably disagree "as a matter of federal law." Tr. 943:3-7;[19]

- He would expect "a split of opinions were the question presented," and "[g]iven the uncertainties in the case law a court could rule the other way." Tr. 945:9-11, 22-23;

- "If the Bureau came out with a pronouncement that these were not securities, I would not be inclined to challenge that," the BSR "could reasonably conclude that," and it would be "reasonable for the court to agree" with that position. Tr. 948:10-13, Tr. 949:12-14.

While conceding that "reasonable practitioners" can come out one way or the other, what breaks the tie for Fryer is agency deference, a flimsy reed of support that the Presiding Officer rightfully snapped. Tr. 925:5-926:9, 941:1-6. Stripped of that argument, Fryer's opinion on whether participation agreements are securities is meaningless.[20] Even worse, and in stark contrast to Samuels and Murphy, Fryer could not recall whether he reviewed a participation agreement, the very document upon which the BSR retained him to proffer an opinion, an omission made all the more glaring by the "fact specific analysis" required by *Howey*. Tr. 951:11-953:13, 2129:9-18.

To Fryer's testimony that the language of RSA 5-B "would put a securities practitioner on very fair notice" that the participation agreements might be securities, Tr. 1003:21-1004:1, Murphy, an experienced securities lawyer and former regulator, responded that in light of the statute's purpose, "it would be very surprising that anyone would think that" risk pool operators "would need to register as broker-dealers under the securities law[s]." Tr. 2119:7-23. Murphy characterized Fryer's notice theory as an unnatural interpretation of RSA 5-B. Tr. 2120:6-7.

[19] Fryer described the security status of the participation agreements as a "close call" on four occasions. See Tr. 924:1, 943:5, 946:16, and 948:3.

[20] Despite his belief in agency deference, Fryer testified that the only two prior BSR "positions" he reviewed contained little to no analysis (*In re Viatical Investments, Status As Securities*, Into4-003 (Oct. 10, 2004)), or "unusual" analysis "outside the mainstream" with which he disagreed (Nov. 2010 SOP). Tr. 987:12-992:20.

C. The BSR Cannot Explain Its Decades of Regulatory Silence.

Nothing underscores the invalidity of Fryer's notice theory more than the BSR's prolonged silence. The state's official "securities practitioners" did not declare that participation agreements constitute investment contracts until August 2011, one month before filing their original Petition, twenty months after they received the alleged "security," two-plus years after beginning their investigation of LGC, and twenty-five years after the Legislature passed RSA 5-B, the statute their expert claims should have put LGC on notice of possible securities ramifications. Tr. 937:8-10; Tr. 1817:8-15. This regulatory silence persisted despite the fact that: a) LGC and its predecessors have made annual regulatory filings with the SOS, which oversees the BSR, for decades; b) LGC has been involved in several high-profile lawsuits; and c) its risk pools have an enormous, statewide presence, providing coverage to nearly 77,000 New Hampshire residents. In fact, the BSR *still* has not, despite its mission of investor protection, advised any risk pool members that they purchased unregistered securities. The BSR also recently announced that it will allow the state's other risk pool operators, Primex and SchoolCare, to continue offering such participation agreements without complying with the registration and licensing requirements of RSA 421-B, and to return surplus through premium holidays. Tr. 985:3-6.[21]

While the BSR argues that such regulatory inaction is irrelevant, Tr. 1160:15-19, it recently adopted the official position that its regulatory silence regarding whether or not an instrument constitutes a security is not only relevant, but determinative. See Nov. 16, 2010 BSR Statement of Policy ("SOP"), at 17-26 (stating that the lack of an enforcement action, lack of

[21] While not familiar with the SchoolCare and Primex agreements, Fryer agreed that "a regulator can't tell one entity that they can go ahead and do something that would violate the law and hold another entity responsible for doing the same thing." Tr. 984:17-21.

registration history, and the BSR's failure to adopt an official position on the security status of secured promissory notes required a finding that such notes were not securities under RSA 421-B).[22] Murphy, a former regulator, also found the BSR's silence significant. Tr. 2096:8-2099:4. Given the publicity surrounding LGC's litigation with PFFNH and the involvement of public funds, he would have expected, before 2009, "some enforcement action" if the BSR genuinely believed participation agreements constituted securities. Tr. 2096:11-2098:10. Murphy also cited the BSR's Nov. 2010 SOP, finding it "worthwhile . . . that the [BSR] believed that its own enforcement history with respect to an issue was relevant. I thought that that made it relevant as well." Tr. 2098:23-2099:4.

D. Even if the Presiding Officer Finds that the Participation Agreements Are Securities, the BSR Failed to Show that Ms. Carroll Acted Negligently.

No one, not even the agency charged with administering the securities statutes, expressed—for twenty-five years—any inkling that the participation agreements might constitute securities. Yet the BSR persists in contending that Ms. Carroll acted negligently by failing to comply with the licensing and registration requirements of RSA 421-B and committed acts of fraud and deceit. As she, McCue, and others testified, Ms. Carroll had the benefit of numerous lawyers, none of whom ever raised the possibility that LGC was issuing anything remotely resembling securities. There are approximately 600 risk pools operating in the United States. Tr. 505:10-11. Not one has registered their participation agreements, or similar instruments, as securities with any regulator. As Murphy testified, the notion that a risk pool operator would do so defies commonsense, and it would not even have occurred to him to ask whether LGC should

[22] Either the BSR must disavow the SOP that justified its failure to regulate certain securities in the FRM matter because it had not regulated them in the past, or it must stand by it, and admit that its failure to determine that risk pool participation agreements were securities means that it cannot hold Respondents liable for Counts III, IV, and V. It cannot do both. As discussed above, the BSR's argument that LGC's 2007 Bylaw Amendments, by allowing for surplus return through rate credits, newly make the participation agreements a security, is legally untenable.

register under RSA 421-B. Tr. 2145:3-7; 2150:5-22. If the question would not have occurred to an experienced securities lawyer and former regulator, how can Ms. Carroll, inexperienced in securities law matters, be found liable for failing to ask?

Not surprisingly, the BSR presented no evidence that Ms. Carroll acted negligently, and the "evidence" it presented purporting to show her culpability on Counts III, IV, and V only highlights the weakness of its case:

- Prior to August 2011, Ms. Carroll never asked an attorney whether such agreements raised any issues with state securities laws. Tr. 1836:18-21. In light of Murphy's testimony that he, as a securities lawyer, would not have "spotted" such an issue, this is hardly evidence of negligence. Tr. 2121:11-16.

- Ms. Carroll did not register with the BSR, even though she signed the participation agreements when she became Executive Director. Tr. 1157:13-18. This allegation relies on the faulty premise that participation agreements are securities.

After nearly three years of investigation, months of discovery, and a ten-day hearing, this is what the BSR claims establishes Ms. Carroll's guilt. It failed to connect her with a single misleading, let alone fraudulent, act, as required under Count V. It failed to show that she acted negligently, as required under Count V. It presented no direct evidence that she "materially aided" in the sale of unregistered securities, or that she did so "knowingly or negligently," as required under Count IV.

With respect to Count V, the evidence showed that LGC disclosed all of the allegedly material facts the BSR claims they did not:[23]

- While the BSR accuses Respondents of failing to disclose that they used member funds designated for HealthTrust and PLT to "subsidize the Workers [sic] Comp Pool," Am. Pet. ¶ 127(a), Respondents introduced no fewer than six exhibits showing that, in fact, LGC and its related entities disclosed in numerous annual reports and regulatory filings

[23] The three omissions specified in Count V simply rehash the registration and licensing violations alleged in Count III. Am. Pet. at ¶ 125. Andrews provided the only testimony regarding these omissions. Tr. 567:10-568:7. When asked if any of his subordinates were licensed to sell securities, Andrews responded: "No, because we never dreamed we were selling securities." Tr. 568:6-7.

that it used HealthTrust and PLT assets to capitalize the Workers' Comp Pool.[24] Tr. 616:16-619:21, 1496:3-1503:22, and 1507:23-1510:6. When faced with unambiguous evidence disproving their first failure to disclose allegation, the BSR's only response was to infer that the disclosure was incomplete because Respondents did not explain that competition with Primex was the reason for the financial support of Worker's Comp., a theory devoid of any legal support. Tr. 1529:12-15, 1529:21-1530:4.

- The BSR also wrongfully alleged that Respondents failed to disclose that it used member funds designated for HealthTrust and PLT "for the benefit of LGC Parent's non-pool administration activities." Am. Pet. ¶ 127(b). Respondents introduced HealthTrust's annual 2006 5-B filing, which disclosed that LGC's Board designated over $7 million "for future administrative needs." LGC Ex. 296, at 13900; Tr. 1511:2-19.

- Attorney Loughlin offered uncontroverted opinion testimony that neither RSA 32 nor RSA 35 applies to LGC or its risk pools, and Respondents did not facilitate violations of those statutes. Tr. 2017:21-2018:1, 2027:13-2028:1, 2029:18-20, 2030:22-2031:2, 2038:17-2039:4. Loughlin's unchallenged testimony, along with Mr. Curro's testimony that LGC is not subject to statutory investment restrictions imposed on municipalities, negates the BSR's claim that Respondents failed to disclose that it invested member funds in "investment vehicles not authorized by Municipal Budget laws." Am. Pet. ¶ 127(c); Tr. 2374:2-5.[25]

The BSR also failed to offer any evidence showing that the alleged omissions were material. See 421-B:3, I(b) (making it unlawful to "to omit to state a material fact"). The BSR presented no evidence that any LGC members withdrew upon learning of the alleged omissions. The "investors" the BSR purports to protect not only remain, but LGC membership has *increased* since the BSR filed its original Petition, defeating any argument that the participating political subdivisions considered the alleged omissions material. Tr. 50:16-17.

E. A Ruling that Participation Agreements Constitute Securities Would Defeat the Legislative Purpose of RSA 5-B.

Respondents urge the Presiding Officer to consider the consequences of ruling that the participation agreements constitute securities. HealthTrust alone provides insurance to nearly

[24] See LGC Ex. 188, at 16051; LGC Ex. 190, at 16238; LGC Ex. 286, at 13723; LGC Ex. 289, at 14662; LGC Ex. 290, at 14233; and LGC Ex. 293, at 14684 and 14687.

[25] Perhaps this uncontroverted evidence defeating the 421-B:3, I(c) claims caused the BSR on Day 8 of the hearing to state that "it is really [the] material omission prong" of 421-B:3 "that [the BSR is] pursuing here." Tr. 1737:9-10.

77,000 New Hampshire residents, and LGC provides some form of coverage to nearly 90% of the state's eligible political subdivisions. Tr. 50:17-21. As Jenny Emery testified, a finding that participation agreements constitute securities "would be devastating to pools in New Hampshire" and would cost taxpayers dearly. Tr. 2170:17-19. The cost of complying with onerous state, and perhaps federal, securities regulations would result in skyrocketing insurance costs, which would defeat the express purpose of RSA 5-B. Such consequences could extend nationwide, where approximately 600 risk pools provide some form of insurance to 80% of the country's public agencies and entities. Tr. 2292:16-21. Finally, as Samuels testified, a holding that participation agreements are securities will legally prevent the towns, cities, and school districts for which the pools were established from "investing" in them. Tr. 2007:6-12; *see also* RSA 41:29, 48:16, 52:8, 197:23-a, and 29:3. In other words, such a finding would eviscerate RSA 5-B's goal of providing affordable "insurance and risk management," an "essential governmental function," at a time when the "resources of political subdivisions are . . . burdened" even more than they were in 1987, when the Legislature enacted 5-B to remedy that problem. RSA 5-B:1.

IV. Ms. Carroll Relied on Advice of Counsel and Acted Prudently After Becoming Interim Executive Director, and Should Not Be Found Liable on any Count.

At Board and committee meetings, legal counsel and other experts were present to ensure that Ms. Carroll and the Board exercised their duties in compliance with their legal responsibilities. Even if this tribunal finds that Ms. Carroll somehow violated RSA 5-B or 421-B, no legal liability should attach because at all times, she discharged her duties in reliance on the advice of counsel and other experts. Tr. 1809:18-1810:9, 1812:3-10, 1819:10-1820:9, 1822:19-1823:7; 1836:7-21, 1838:21-1840:19. As McCue testified, outside legal counsel from his firm was present at virtually all Board and committee meetings to provide legal advice. Tr. 1566:6-1567:3, 1567:12-1569:13, 1692:22-1693:23; *see also* Tr. 592:17-593:6.

The BSR suggested that Ms. Carroll cannot rely on counsel hired to represent LGC. This is simply not accurate.[26] The attorney-client privilege attaches to communications between employees and corporate counsel. *See Upjohn Co. v. United States*, 449 U.S. 383, 390-94 (1981). Courts routinely consider the merits of advice of counsel defenses when employees rely on corporate counsel's advice. *See, e.g.*, *United States v. Skilling*, 554 F.3d 529, 556-57 & n.35-36 (5th Cir. 2009), *aff'd in relevant part*, 130 S. Ct. 2896 (2010) (endorsing jury instruction that individual defendant's "[r]eliance on the advice of an accountant or an attorney may constitute good faith," where defendant introduced evidence that he had relied upon the legal advice of corporate counsel); *United States v. Lindo*, 18 F.3d 353, 355-56 (6th Cir. 1994); *Moskowitz v. Lopp*, 128 F.R.D. 624, 637-38 (E.D. Pa. 1989); *Schaefer v. Ulinski*, 644 N.W.2d 293 (Table), at *4, ¶ 16 (Wis. App. 2002) ("To the extent that [defendant] relied on the advice of corporate legal counsel . . . and regardless of whether that advice was a correct or incorrect interpretation of the corporate documents, reliance on the corporation's attorney was reasonable . . . .").

Lastly, Ms. Carroll became interim Executive Director after the investigation began. Tr. 1809:3-1809:17. As any prudent executive would do, she relied upon the advice of attorneys in determining how to address the investigation and whether she should advise the Board to undertake changes while the investigation was pending. Tr. 1809:18-1810:9, 1812:3-10.

Accordingly, Ms. Carroll may not be held liable on any Count of the Amended Petition.

CONCLUSION

For the foregoing reasons, the reasons stated in the post-hearing memoranda of LGC and Mr. Curro, and based upon the testimonial and documentary evidence presented in this matter, the Presiding Officer should enter a finding of "no liability" on all Counts as to all Respondents.

[26] It is also not accurate that the Preti firm never represented Ms. Carroll. Tr. 1840:9-12. William Saturley represented Ms. Carroll, alongside the LGC entities, until her present attorney was retained in December 2011.

Dated: June 4, 2012

Respectfully submitted,

MAURA CARROLL

By Her Attorneys:
SHAHEEN & GORDON, P.A.

/s/ Steven M. Gordon
Steven M. Gordon (NH Bar #964)
Benjamin T. Siracusa Hillman (*pro hac vice*)
Dustin Lee (NH Bar # 20891)
107 Storrs Street, PO Box 2703
Concord, NH 03302-2703
Tel: (603) 225-7262
Fax: (603) 225-5112
sgordon@shaheengordon.com
bsiracusahillman@shaheengordon.com
dlee@shaheengordon.com

CERTIFICATE OF SERVICE

I hereby certify that I have, this 4th day of June 2012, forwarded copies of this pleading *via* E-mail to the Presiding Officer and counsel of record.

/s/ Steven M. Gordon