STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

BUREAU OF SECURITIES REGULATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS OBJECTION TO THE SUMMARY JUDGMENT SOUGHT BY RESPONDENTS

NOW COMES Petitioner, the New Hampshire Bureau of Securities Regulation (the "Bureau"), a part of the Corporations Division within the Department of State, by and through counsel, Bernstein, Shur, Sawyer & Nelson, P.A., and respectfully submits this memorandum of law in support of its Objection to Respondents' Motion for Summary Judgment.

I. Introduction

On May 9, 2014, the Respondent HealthTrust filed a motion for summary judgment in which the Respondent PLT joined. The short response to the Respondents' summary judgment effort is that none of the arguments justify summary judgment or justify a delay in granting the Bureau's motion for same. The Respondents' effort largely ignores material facts and is simply an attempt to place the best spin on matters that are not reasonably in dispute. The undisputed facts are contained in the Respondents' secret October 2013 agreement (the "Agreement"). The affidavits submitted now by Respondents only serve to prove that the Respondents carried out the terms of their agreement. Thus, the Presiding Officer need only contrast and compare the terms of the Agreement with the Final Order issued in this matter on August 16, 2012 (the "Final Order") to determine that Respondents have violated the Final Order. No additional fact finding

is necessary and judgment should issue for the Bureau and the Presiding Officer should find forthwith that Respondents have forfeited their respective statuses as RSA 5-B managed risk pools.

II. Background

The background of this matter has been well rehearsed in many orders and opinions. The Bureau foregoes specific factual citations to the following as these adjudicated facts may be readily gleaned from the Final Order and the opinion issued by the New Hampshire Supreme Court on January 10, 2014. Appeal of the Local Government Center, 85 A.3d 388 (2014). On September 2, 2011, the Secretary of State, William M. Gardner, issued an order to Cease and Desist, an Order to Show Cause, and a Hearing Order in response to a Staff Petition that accused Respondents of violating RSA chapter 5-B and RSA chapter 421-B.[1] Following a ten-day hearing on the Petition, a final administrative order was issued on August 16, 2012 in which Respondents were found in violation of certain aspects of RSA chapter 5-B. See generally id.

The Respondents sought reconsideration and rehearing and then timely filed a Rule 10 Appeal Petition with the New Hampshire Supreme Court on October 15, 2012, challenging portions of the Final Order pursuant to RSA 5-B:4-a. While the matter was pending before the Supreme Court, the Respondents filed a Motion of Appellant Property-Liability Trust, Inc. for Partial Stay of Final Order on October 7, 2013. HealthTrust, Inc. joined in the motion. The motion and supporting affidavits are attached as Exhibit A. On January 10, 2014, the New Hampshire Supreme Court issued a decision in Respondents' appeal of the above matter, upholding substantially all of the Final Order with the exception of those portions that concerned

[1] For ease of reference, this memorandum does not distinguish between the former LGC entities and the current HealthTrust and PLT entities because the latter are successors in interest of the former.

the prospective setting of reserve levels and the prospective purchase of reinsurance. Appeal of the Local Government Center, 85 A.3d at 404. The Court remanded the matter to the Presiding Officer for the purpose of re-determining the payment of Petitioner's fees by Respondents. Id. at 407. The January 10th decision did not become final until the expiration of the time for reconsideration. Sup. Ct. R. 22.

A. The Final Order and Respondents' Reorganization Efforts and the Duty to Repay $17.1 Million

The August 2012 Final Order required that "[n]o later than 90 days from the date of this Order, the Local Government Center shall organize its two pooled management programs into a form that provides each program with an independent board and its own set of written bylaws." Final Order at p. 73, ¶ 1. Additionally, the Final Order stated that:

> [f]ailing timely reorganization as ordered in §1, the LGC, is deemed to continue in violation of RSA 5-B, and this order, including the order to cease and desist, and shall, pursuant to the authority extended in RSA 5-B:4-a, I and II, be penalized by forfeiture of the statutory exemption from State's insurance laws and of the exemption from state taxation granted pursuant to RSA 5-B:6 as it, nor any existing insurance program as presently operated by LGC, Inc. shall be deemed to be a "pooled risk management program" as defined by RSA 5-B.

Id. at ¶ 2.[2] The Supreme Court adopted the governance related provisions of the Final Order as part of its decision in this matter. Appeal of the LGC, 85 A.3d at 395: id. at 401 ("RSA 5-B:3 does not sanction what the presiding officer found occurred here. Here, three pooled risk management programs shared a single board of directors, even though RSA 5-B:5, I(b) requires each program to have its own board.").

In addition to making findings and rulings regarding Respondents' organizational structure, the Final Order also directed PLT to repay an illegal subsidy to HealthTrust.

[2] Paragraphs 1 and 2 of the Final Order and the relief outlined therein were included within the Respondents' Notice of Appeal. The Respondents ultimately withdrew these issues from their appeal and confirmed their intentional decision not to appeal these issues during the oral argument conducted on November 14, 2013.

> The Local Government Center Property Liability Trust, LLC, however it may be organized in the future, shall re-pay the $17.1 million subsidy to the Local Government Center Health Trust risk pool management program, however it may be organized, no later than December 1, 2013. Said payment shall terminate and shall satisfy any obligation contained in a note of similar amount executed on June 2, 2011. The funds to make this re-payment may be borrowed from an independent entity at commercially reasonable terms in consultation with the Bureau of Securities Regulation in the exercise of its supervisory powers which shall be exercised in good faith.

Final Order at p. 78, ¶ 13.[3]

Additionally, the Final Order directed that:

> Funds received by the Local Government Center Health Trust in re-payment of the subsidy, to the extent they constitute amounts in excess of the earnings and surplus of the Local Government Center Health Trust risk pool management program as reasonably determined and expressed above in § 9, shall be returned to members consistent with RSA 5-B:5, I(c).

Final Order at p. 79, ¶ 14.

The Respondents challenged the Final Order's requirement that PLT, Inc. repay the $17.1 million illegal subsidy, but the Court denied this portion of the Respondents' appeal. Appeal of the LGC, 85 A.3d at 401-02.

1. Respondents' First Reorganization

On or around November 16, 2012, the "LGC approved the corporate reorganization of its HealthTrust and Property-Liability Trust risk pools . . . by action of the Executive Committee of the Local Government Center, Inc." LGC HealthTrust, LLC ("LGCHT, LLC") and LGC Property-Liability Trust, LLC ("LGCPLT, LLC"), subsidiaries of the LGC, Inc., reorganized by

[3] The final order expressly required the Property Liability Trust to consult with the Bureau in terms of any financing it may obtain. The Property Liability Trust did not consult with the Bureau. According to a supporting affidavit filed by Interim Executive Director George Bald, the Property Liability Trust made a completely undocumented "application" for financing with Citizens Bank and was declined. See Bald Affidavit at ¶10 which is part of Exhibit A. The declination letter from Citizens Bank is appended to Mr. Pavilcek's Affidavit to the instant motion at Exhibit 5. Other, similarly undocumented efforts to obtain financing were made to TD Bank and the New Hampshire Business Finance Authority. See Bald Affidavit at ¶¶ 11 and 12.

"approv[ing] separate limited liability company agreements and adopt[ing] separate Bylaws." See Resps.' Joint Summary of Relevant Facts at ¶ 2 ("The respondent entities complied with that aspect of the Final Order in November 2012 by having the two LLCs adopt separate bylaws and appoint separate governing boards."). The reorganization removed the LLCs from the LGC Board's governance.

According to the Notes to Financial Statements dated December 31, 2010 and 2009 for the Local Government Center Property-Liability Trust, LLC, "[t]he Local Government Center Board of Directors [also] voted to merge LGC HealthTrust and Property-Liability Trust into one single entity. The expectation [was] this merger will be accomplished with an effective date of January 1, 2012." Exhibit 1 to Affidavit of Dennis Pavilcek submitted in support of Summary Judgment by HealthTrust at 30.

2. Respondents' Second Reorganization

Shortly thereafter, pursuant to September 1, 2013 Asset Purchase Agreements, New Hampshire Municipal Association, Inc. (formally LGC, Inc.) and its subsidiaries LGCHT, LLC and LGCPLT, LLC, engaged in a second reorganization. Under the terms of one of the Asset Purchase Agreement, LGCHT, LLC and LGC, Inc. transferred to HT, Inc., all of the LGCHT, LLC's assets and all of the LGC's assets relating to or used in the HT Business. Similarly, pursuant to a second Asset Purchase Agreement, also dated September 1, 2013, PLT, Inc. acquired all of LGCPLT LLC's assets and all of LGC's assets relating to or used in the PLT Business.

3. Respondents' Third Reorganization: The Secret October Agreement

On or around October 28 and 29, 2013, well before the Supreme Court's decision regarding Respondents' appeal of the Final Order, Respondents engaged in yet a third

reorganization. In this third reorganization, HealthTrust, Inc. and PLT, Inc. entered into a secret agreement whereby, in the event the Supreme Court ruled against Respondents, the terms of the agreement would become operative. The Agreement is attached to Mr. Curro's affidavit in support of the instant summary judgment as Exhibit 5 and incorporated here by reference. Pursuant to the terms of the Agreement:

> 1. PLT hereby transfers all of its assets and liabilities to HealthTrust. Agreement at D.1;
>
> 2. HealthTrust accepts the assignment of all of PLT's assets and liabilities in full and complete satisfaction of PLT's obligations to it pursuant to the Final Order, including without limitation the Ordered Re-Payment…. *Id.* at D.2; and
>
> 3. HealthTrust will manage the runoff of PLT's coverage obligations…using the assets transferred from PLT and the existing administrative structure…. *Id. at D.3.*

After the Agreement became operative, all PLT operations were conducted by HealthTrust. No part of the Agreement provided for consultation with the Bureau or members of PLT or HealthTrust before the Agreement became operative. Even though the Agreement sought to modify the terms of the Final Order by transferring assets to HealthTrust in lieu of making the required $17.1 million repayment, no part of the Agreement provided for any effort to seek a modification of the Final Order or approval of the Presiding Officer.

B. Respondents' Motion for Partial Stay

The Respondents filed a motion for partial stay on October 7, 2013, about three weeks before the Agreement was approved. The motion requested that the Supreme Court stay the December 1, 2013 deadline for repayment of the $17.1 million illegal subsidy. The motion and the accompanying affidavits of George Bald and Wendy Parker are attached as Exhibit A in support of this objection.

The motion for partial stay and the accompanying affidavits acknowledged that the Respondents attempted to negotiate or mediate with the Bureau concerning the $17.1 million repayment. See e.g., Motion at 1 and Bald affidavit at ¶7. While legitimate reasons for including this information about failed preliminary settlement conversations in a pleading to the Supreme Court remain unclear, the references do clearly establish that the Respondents knew and appreciated the fact that the duty to repay the $17.1 million was a part of a final administrative order issued by a regulatory agency and that any modification of the order required approval of the regulators. This is in contrast with the private, somewhat fictitious, note executed between HealthTrust's and PLT's predecessors in June of 2011. The latter note was simply an agreement between two private parties and was, at least in theory, subject to a compromise agreeable to the two private parties. The note did not have the force and effect of a judicially enforceable order.

III. Argument

A. The Undisclosed October Agreement Violates the Governance Provisions of the Final Order and Respondents' Summary Judgment Motion Proves this Point.

The Final Order required that "[n]o later than 90 days from the date of this Order, the Local Government Center shall organize its two pooled management programs into a form that provides each program with an independent board and its own set of written bylaws." Final Order at 73, ¶ 1. Although Respondents initially took steps to comply with these governance related portions of the Final Order, the October Agreement and the transfers made thereunder directly violate Paragraph 1 of the Final Order as, once again, both the property-liability line and

the health trust line are now subject to a single conflicted Board of Directors and a single set of bylaws.[4]

As a result of the undisclosed October Agreement, HealthTrust, under the guidance of HealthTrust's Executive Director and HealthTrust's Board, now operates the property-liability and workers compensation lines of coverage, formerly run and managed by PLT's board and management. See The Agreement at ¶D.1-D.3. See also "Why the HealthTrust-PLT Settlement Agreement is a Responsible Action," p. 3 (February 18, 2014)

http://www.healthtrustnh.org/Resources/ViewDocument/827 (last visited May 8, 2014) (included herein as Exhibit B). The October Agreement, and the transfers made thereunder, directly violate provisions of the Final Order that: 1) required the LGC pooled risk management programs to be separate entities governed by independent boards that are operated under separate bylaws, Final Order at 73, ¶ 1, and 2) required PLT to return the $17.1 million illegal subsidy to HealthTrust, see Final Order at 78, ¶ 13. Thus, by its own admission, HealthTrust and PLT no longer have separate boards and separate bylaws. Rather, the October Agreement allows the successor entities to the LGC pooled risk management programs to replicate the organizational structure that was condemned in the Final Order. Indeed, in Recital A.3 of the Agreement, the Respondents appear to acknowledge the structural problem that led to the illegal subsidization of workers compensation programs with health insurance monies; that is, that the public, and in many instances the Board, treated these separate risk pools as one entity with commingled assets and liabilities.

[4] One example of how the single HealthTrust Board has acted with a conflict is its promise to keep all PLT employees at existing rates of pay and benefits even though the plan is to runoff PLT's business with the remaining assets to be distributed to HealthTrust members in satisfaction of PLT's duty to repay the $17.1 million. Presumably, an insurer, such as PLT, that no longer plans to remain in business can cut its staff and should adjust its payroll. If HealthTrust were trying to maximize return for its members, it would have cut staff and payroll.

> From the 1980s through the entry of the Final Order, the predecessors in interest of HealthTrust and PLT operated as related entities, shared offices and staff, from July 1, 2003 shared a board of directors, and presented themselves in the marketplace as offering complementary products and services. Market participants may therefore view the Parties as a consolidated entity and may not distinguish between the financial health of one corporation and the financial health of the other corporation.

Agreement at A.3. This perception of being one entity through shared governance, personnel, physical location, and programming is exactly the problem that concerns the Bureau. It is not a justification for the Agreement.[5] Further, the Notice of Termination filed this date by the Respondents must be viewed with some suspicion as long as the two enterprises continue to share staff, services, programs, and a physical location. Indeed, the Termination Agreement, at section D, provides for HealthTrust to lend money or obtain a line of credit for the benefit of PLT. No aspect of RSA 5-B provides for risk pools to lend money or act as guarantors. The financing facility appears to be a repeat of the improper $17.1 million note executed in June 2011. Although the two risk pools will now appear to be separate, little has been learned from the four years of litigation that has finally led to the repayment of the illegal subsidy and the correction of the LGC's illegal governance structure.

The Agreement, in addition to failing to provide each risk pool with an independent board, also violates RSA 5-B:3. The enabling statute for pooled risk management groups allows for the pooling of risks by political subdivisions, as "insurance and risk management is essential to the proper functioning of political subdivisions . . . ." RSA 5-B:1. RSA 5-B:3, I, allows for this pooling, but requires that operative agreements be entered into by "[a] political subdivision, by resolution of its governing body . . . ." Additionally, RSA 5-B:3, I, states, "2 or more political

[5] The proposal for a merger of HealthTrust and Property-Liability Trust referenced in the 2010 notes to Financial statements is another example of how the common boards of these entities, mostly populated by the same board members who governed the LGC, continually try to return to the now condemned LGC model of operations.

subdivisions may form an association under the laws of this state or affirm an existing association so formed to develop and administer a risk management program . . . ."

As noted, *supra*, and confirmed by the Respondents' motion for summary judgment, the October Agreement between HealthTrust and PLT was not disclosed to any political subdivision until after the property-liability and workers compensation lines had been transferred to HealthTrust. As such, political subdivisions who had agreed to pool risks for workers compensation and/or property liability coverage with other political subdivisions, now find they are exposed to risks associated with healthcare. Similarly, HealthTrust risk pool members were not provided with notice or given an opportunity to approve the acquisition of PLT's lines of coverage and associated risks. Since political subdivisions were not provided with notice of this change, they were unable to provide the necessary resolutions or consents. Thus, for the reasons stated herein, judgment for the Bureau is appropriate and the Respondents' motion must be denied.

Although Respondents attempt to attach some significance to the continued meeting of the PLT board, it is clear the entity that was once the PLT risk pool no longer functions as a risk pool. RSA 5-B:2, IV defines "'Risk management' [as] the defense of claims and indemnification for losses arising out of the ownership, maintenance, and operation of real or personal property and the acts or omissions of officials, employees, and agents; the provision of loss prevention services including, but not limited to, inspections of property and the training of personnel; and the investigation, evaluation, and settlement of claims by and against political subdivisions." PLT no longer provides any of these services because it transferred all of its operations to HealthTrust. A risk pool may either self-insure or purchase insurance. RSA 5:B-3. As HealthTrust, at least for now, is not an insurance company, whatever it provides to PLT cannot

be characterized as insurance. Thus, as PLT neither provides a program of self-insurance nor purchases insurance for the benefit of its members, it is not a 5-B risk pool. Whatever function it purports to accomplish by monitoring HealthTrust's compliance with the Agreement, see HealthTrust Memo in Support of Summary Judgment at 2[6], that function does not deserve protection as a 5-B risk pool and PLT cannot claim that it is an independent risk pool.

Finally, it should be noted that the sale of assets and the transfer of liabilities described in the Agreement were complete and irrevocable once the Agreement became operational upon the Supreme Court's ruling that upheld the $17.1 million payment. See Agreement at D.1. The duty to manage the runoff, by the express terms of the Agreement, is assigned to HealthTrust. Agreement at D.2 ("HealthTrust will manage the runoff of PLT's coverage obligations…."). No aspect of the Agreement contains any provision that allows PLT to monitor any of the runoff conducted by HealthTrust. As explained above, PLT is no longer a 5-B risk pool. It no longer has members and its purpose for meeting and expending monies on counsel fees is thus highly uncertain.

B. The October Agreement Precludes the Return of the $17.1 Million Subsidy to HealthTrust, in Violation of the Final Order.

The purpose of the October Agreement was to extinguish the $17.1 million debt owed by PLT to HealthTrust and instead to limit HealthTrust to any PLT assets that remain after an "orderly runoff" of PLT's business. Agreement at D.2. This, the Respondents claim, is justified in their respective business judgments. Business judgment, however, as the parties learned from the Supreme Court decision in this matter is not "unfettered discretion" and may be

[6] The HealthTrust Memo claims, " PLT continues to exist with its own board of directors monitoring the runoff of the PLT coverage lines in the interest of PLT members." HealthTrust Memo at 2.

"circumscribed" by statute in the context of risk pools. Local Government Center, 85 A.3d 400-01.

The Final Order clearly directed PLT to "re-pay the $17.1 million subsidy to [HealthTrust], however it may be organized, no later than December 1, 2013." Final Order at p. 78, ¶ 13. The deadline for this provision of the Final Order was stayed until the Court issued its opinion on January 10, 2014. Yet, as a result of the undisclosed October Agreement, PLT has avoided repayment and HealthTrust has deprived its members of any refundable excess.

Implicit in the October Agreement is the fact that PLT's $17.1 million obligation will not be repaid in full. Also the return of any of the repaid monies to HealthTrust members, as required by Paragraph 14 of the Final Order, will be significantly delayed by the lengthy run off of the property-liability and workers compensation lines. By this agreement, HealthTrust waived any further legal effort to pursue a deficiency in repaying the illegal subsidy. As stated in the October Agreement:

> HealthTrust accepts the assignment of all PLT assets and liabilities in full and complete satisfaction of PLT's obligations to it pursuant to the Final Order, including without limitation, the Ordered Re-Payment or a Similar Order, and PLT shall have no further obligation to HealthTrust under the terms of the Final Order or Similar Order.

Agreement at D.2.

The $17.1 million debt owed by PLT to HealthTrust is not a debt incurred in the ordinary course of business but rather results from the Bureau's enforcement efforts and the Final Order entered by this Presiding Officer. A primary purpose of this enforcement action and the Final Order was to protect the rights of member political subdivisions and individuals and retirees to their portion of pool surplus. The Agreement, by contrast, provides that it "does not and is not

intended to confer any rights or remedies upon any person other than the Parties [to the Agreement]." Agreement at ¶G.9. Compromise or forgiveness of the $17.1 million debt for the benefit of PLT and to the detriment of third parties, cannot be accomplished simply by private agreement between HealthTrust and PLT. Rather, the Final Order is subject to the jurisdiction of the Bureau and oversight by the Presiding Officer to assure that any compromise or forgiveness complies with the Final Order and adequately protects the interest of third parties such as HealthTrust members who may receive a portion of the $17.1 million.

IV. Conclusion

The Final Order required the Respondents to take certain actions in order to comply with RSA chapter 5-B. No part of the Final Order was temporary or time-limited. The Respondents are not *now* in compliance with same. Therefore, Respondents have failed to comply with the requirements of the Final Order, and in particular, those portions that required them to re-organize with separate boards and separate bylaws and to repay $17.1 million in illegal subsidy payments. Because the Respondents failed to satisfy the requirements of the Final Order, they are not entitled to the statutory exemptions provided for in RSA chapter 5-B. Accordingly, pursuant to the authority extended in RSA 5-B:4-a, I and II, the Final Order should be directly enforced and Respondents deemed not entitled to the statutory exemptions from the state's insurance laws and from state taxation granted pursuant to RSA 5-B:6. The portions of the October Agreement that purport to eliminate or obviate the $17.1 million payment should be declared void.

Respectfully submitted,

The Bureau of Securities Regulations
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By its attorneys,
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Dated this 3rd day of June, 2014

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Certificate of Service

I hereby certify that I have served a copy of this motion upon counsel for the LGC successor entities by U.S. Mail and electronically this 3rd day of June, 2014, those counsel being Bruce Felmly, Esq., Michael D. Ramsdell, Esq., David I. Frydman, Esq., Patrick Closson, Esq., Peter Baylor, Esq., J. David Leslie, Esq., and Joel Emlen, Esq.

/s/ Andru H. Volinsky