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 JOHN ANDREWS' FINAL PRE-HEARING MEMORANDUM

Respondent John Andrews, by and through his counsel, submits the following final pre-hearing memorandum:

Respondent Andrews' Introductory Summary

The Amended Petition generally accuses Mr. Andrews of violations of the Pooled Risk Management Programs statute, RSA Ch. 5-B, and the New Hampshire Securities Act, RSA Ch. 421-B. Mr. Andrews is the former Executive Director of Respondent Local Government Center, Inc. (Respondent LGC business entities collectively "LGC"). He retired from that position in September 2009.

Mr. Andrews should not be found liable for a violation of RSA Ch. 5-B. First, Mr. Andrews neither violated nor caused LGC to violate any provision of RSA Ch. 5-B during his tenure as LGC's executive director. Second, Mr. Andrews retired prior to the effective date of RSA 5-B:4-a, the statute that provides the New Hampshire Secretary of State (the "Secretary") with regulatory authority to impose sanctions for violations of RSA Ch. 5-B. Third, while Mr. Andrews served as LGC's executive director, the LGC Board of Directors acted upon the advice, and with the consultation, of outside consultants and counsel, who appeared at every board of directors' meeting.

Mr. Andrews 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 Mr. Andrews or LGC that the agreements could be considered securities. Mr. Andrews' conduct, therefore, was neither knowing nor negligent. Consequently, Mr. Andrews 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 Mr. Andrews based on the following two allegations:

a. "Mr. Andrews and the boards of HealthTrust, Inc., NHMA Prop. Liab. Trust, Inc., and NHMA, Inc. devised a plan to restructure the entities through a convoluted process requiring the creation of Delaware shell companies . . . ." (paragraph 39); 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 Mr. Andrews for the following three reasons:

1. RSA Ch. 5-B does not prohibit the parent and subsidiaries 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 be imposed against Mr. Andrews; and
3. 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, Mr. Andrews' 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 Mr. Andrews based on 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 Mr. Andrews for the following three 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. Since Mr. Andrews retired in September 2009, if a failure to return surplus funds or a misappropriation of assets occurred while he was executive director of LGC, the conduct antedated the effective date of RSA 5-B:4-a, the statute pursuant to which liability could be imposed against Mr. Andrews; and
3. Decisions regarding the return of surplus and the appropriation of assets were vetted by 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, Mr. Andrews' 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 Mr. Andrews 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 Mr. Andrews or LGC that the pooled risk management program participation agreements could be considered securities. Mr. Andrews' conduct, therefore, was neither knowing nor negligent. Consequently, Mr. Andrews cannot be found liable for a violation of RSA Ch. 421-B.

Conclusion

From February 5, 1975 until September 4, 2009, Mr. Andrews was Executive Director of LGC or its predecessor entity. In 1987, he played a significant role in drafting RSA Ch. 5-B. During his tenure, he never failed to act in good faith and in the best interests of the organization he served and its members. At all times, he acted consistent with the advice of LGC's outside attorneys and professional consultants.

Neither Mr. Andrews nor LGC violated either RSA Ch. 5-B or RSA Ch. 421-B, particularly during his tenure as its executive director. However, in the event a violation of either statute is found, Mr. Andrews should not be held liable because his conduct regarding the violation was neither knowing nor negligent.

Respectfully Submitted,

JOHN ANDREWS

Date: April 27, 2012 By: /s/ Michael D. Ramsdell

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded this day via electronic mail to all counsel of record.

/s/ Michael D. Ramsdell
Michael D. Ramsdell, Esq.