THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:	)	
Local Government Center, Inc;	)	
Local Government Center Real Estate, Inc;	)	**Case No:**
Local Government Center Health Trust, LLC;	)	
Local Government Center Property-Liability Trust, LLC;	)	**C-2011-0036**
HealthTrust, Inc; New Hampshire Municipal Association	)	
Property-Liability Trust, Inc.; LGC-HT, LLC;	)	
Local Government Center Workers' Compensation Trust, LLC	)	
And the following individuals: Maura Carroll, Keith R. Burke,	)	
Stephen A. Moltenbrey, Paul G. Beecher, Robert A. Berry,	)	
Roderick MacDonald, Peter J. Curro, April D. Whittaker,	)	
Timothy J. Ruehr, Julia N. Griffin, Paula Adriance,	)	
John P. Bohenko, and John Andrews	)	

RESPONDENT CURRO'S POST-HEARING MEMORANDUM REGARDING COUNT I – CORPORATE GOVERNANCE

NOW COMES Respondent Peter J. Curro, by and through his counsel Howard & Ruoff, PLLC, and submits the within Post-Hearing Memorandum Regarding Count I – Corporate Governance.[1]

The Bureau of Securities Regulation (BSR bears the burden of proving each of the counts contained in its amended petition by a preponderance of the evidence. RSA 421-B:26-a, XXI ("All decisions shall be reached upon the basis of a preponderance of the evidence.") In Count I, the BSR alleges that LGC's current corporate structure violates the express organizational requirements of RSA Chapter 5-B, the intent of the chapter as a whole, and basic concepts of

[1] Respondent Curro expressly adopts and incorporates herein the evidence and arguments set forth in the post-hearing memoranda submitted by Respondents LGC and Maura Carroll regarding counts II-V.

fiduciary duty and conflicts of interest. These allegations ignore the plain language of RSA 5-B, settled law on matters of statutory interpretation, and are refuted by the evidence adduced at the hearing. Accordingly, because the BSR has failed to meet its burden of proof as to Count I, it must be resolved in favor of the Respondents.

I. LGC IS GOVERNED BY A BOARD AND WRITTEN BY-LAWS AS REQUIRED BY RSA 5-B:5, I (b) and (e).

RSA Chapter 5-B sets forth certain "Standards of Organization and Operation" for pooled risk management programs and requires, among other things[2], that each such program "[b]e governed by *a board*," and "[b]e governed by *written bylaws*." RSA 5-B:5, I (b) and (e) (emphasis added) ; (Tr. 1578-79; 1933)[3]. RSA 5-B:5 plainly requires only "a" board and "written by-laws." LGC is currently governed by "a" board of directors, whose activities are governed by "written by-laws". (Tr.1579). Despite the plain language of the statute, and the uncontested facts adduced at trial regarding LGC's current governance, the BSR seeks a determination that LGC's corporate structure violates the letter of these provisions. In order to make such a determination, the Presiding Officer would have to engage in one of two endeavors, both of which are contrary to settled law regarding statutory interpretation: (1) impose language into these statutory provisions that the legislature did not see fit to include; or (2) fail to consider these provisions in the context of the statute as a whole. Moreover, the Presiding Officer would have to make a finding completely contrary to uncontested evidence adduced at the hearing.

When interpreting a statute, the starting point is an examination of the language contained therein. Carleton, LLC v. Balagur, 162 N.H. 501, 504 (2011). Where possible, the plain and ordinary meanings of the words used will be ascribed. Id. Further, consideration will not be

[2] RSA 5-B:5 contains five other requirements, only one of which (section (a)) is at issue in this matter and will be discussed below. The BSR has not alleged violations of any of the other sections of RSA 5-B:5.
[3] Transcript cites are to "Tr." and page. References to exhibits will be "Exh." followed by a number. All exhibits are LGC exhibits unless otherwise indicated.

given to what the legislature might have said, and language will not be added that the legislature did not see fit to include. Id.

The BSR alleges in its amended petition that LGC is in "direct violation" of RSA 5-B:5, I (b) and (e) because it currently operates "without *independent* boards of directors and without *independent* bylaws." (Am. Pet. at ¶ 86) (emphasis added). The term "independent," however, does not appear in either RSA 5-B:5, I (b) or (e). The statute's plain language requires precisely what LGC has: a board of directors and written by-laws that govern the activities of the board.

Should the Presiding Officer decline the BSR's offer to defy the basic, well-settled and straightforward rule that interpreting a statute does not involve injecting language that the legislature did not see fit to include, the BSR would next encourage failure to abide by yet another settled rule that a statute must be interpreted "in the context of the overall statutory scheme and not in isolation." Carleton, LLC, 162 N.H. at 504. RSA 5-B:3, III authorizes "pooled risk management programs established for the benefit of political subdivisions" to provide "any or all" of seven enumerated types of coverage set forth in subsections (a) through (g). Thus, the legislature has expressly stated that individual pooled risk management programs, such as LGC, may provide one or more of the enumerated lines of coverage. *Black's Law Dictionary* 74, 94 (6th ed. 1990) ("all" means "the whole of" and "any" means "some; one out of many"). See Local 1984 v. NH Div. of Personnel, 158 N.H. 338, 345 (2009) (it is an "elementary principle of statutory construction that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words").

Given the authorization in RSA 5-B:3, III to run multiple lines of coverage, the absence of the term "independent" from RSA 5-B:5 (b) and (e) is even more significant. The legislature could have easily specified in RSA 5-B:5 that each line of coverage provided by a pooled risk

management program is required to have its own board of directors and its own set of written by-laws. Thus, again contrary to the law this Presiding Officer is bound to apply in interpreting RSA 5-B:5, the BSR would urge an interpretation of the statute that ignores the overall statutory scheme governing pooled risk management programs. Notably, the BSR has not offered any explanation as to why the very legislature that permits a program to provide multiple lines of coverage would not expressly require independent boards and by-laws if, in fact, that is what it intended.

Finally, the evidence at the hearing proved LGC's compliance with RSA 5-B. Attorney Mark McCue of Hinckley, Allen & Snyder has represented LGC since June 2005, when he took over representation of LGC from prior counsel, Attorney Robert Lloyd. (Tr. 1565-66). Since his admission to the bar in 1985, Attorney McCue has practiced as a corporate and transactional lawyer, and for the past ten years has represented health care organizations and quasi-governmental entities. (Tr. 1563). Attorney McCue's firm has specifically provided compliance advice LGC regarding its corporate structure and the operation of its risk pools under RSA 5-B. (Tr. 1566). In providing such advice, Attorney McCue testified that he has reviewed RSA Chapter 5-B, has read its legislative history, and has conducted his own research on industry standards about risk pools nationally. (Tr. 1572-73). Attorney McCue testified that in his opinion, "There is no question the current structure [of LGC] is valid and fully compliant with the requirements of RSA 5-B." (Tr. 1577).

Attorney McCue then explained the basis of his opinion in the context of RSA 5-B:5, I (b) and (e):

> the two pools have been housed in single member LLCs for purposes of insulating their liability, but because they are structured as member-managed LLCs [they] have a sole member which is Local Government Center, and Local Government Center is governed by a Board. That

> Board, therefore, manages and is obligated to manage each of the LLC's housing pools and, therefore, it manages those pools. … Those Board of Directors are obligated to follow by-laws, the written by-laws are those by-laws of Local Government Center, and I believe they explicitly state that they govern the activities of the Board of Directors not only in its management of Local Government Center but also in its role as acting on behalf of LGC in being the member-manager of the risk pools, HealthTrust and Property-Liability Trust.

(Tr. 1583-1584). The BSR attempted to challenge Attorney McCue's opinion by suggesting that LGC's current corporate structure involves multiple pooled risk management programs, as opposed to one program operating multiple pools. (Tr.1633-35) Attorney McCue's testimony was clear, however, that LGC is the pooled risk management program, and it operates two risk pools. (Id.) RSA 5-B:5's governance requirements are directed at "[e]ach pooled risk management program." RSA 5-B:5, I. Accordingly, because LGC – the pooled risk management program – has a board of directors, which is governed by written by-laws, the current corporate structure does not violate the letter of RSA 5-B.

Attorney McCue's opinion that LGC's current structure is fully compliant with the express requirements of RSA 5-B:5, I (b) and (e) went uncontroverted at trial. The BSR's attempt to call his opinion into question was clearly based on a faulty premise: that each pool run by LGC is a separate pooled risk management program. As Attorney McCue explained, that is not the case.

Attorney Richard Samuels, who has been a member of the New Hampshire bar for 32 years, also testified about the legality of LGC's current corporate structure. (Tr. 1920). His primary areas of practice are general corporate law, mergers and acquisitions, and securities law. (Tr. 1921). He was asked whether RSA 5-B requires HealthTrust and Property-Liability Trust to have their own board of directors, "separate and distinct from the LGC, Inc. Board of Directors," and whether they must have their own "separate and distinct by-laws apart from the by-laws that

are of LGC, Inc." (Tr. 1933-34). His opinion was that the statute did not require either. (Id.) He explained:

> I think that having read the [BSR's] amended petition, it strikes me that the bureau has read into the corporate structure requirements of RSA 5-B a requirement that each pool, entity, have its own distinct by-laws and its own distinct board of directors, which is not what the statute says.

(Tr. 1934). Attorney Samuels' opinion thus tracks the law regarding statutory interpretation: a statute must be understood based on what it says, not based on what someone chooses to read into it. The BSR did not offer any witness of its own who testified contrary to Attorneys McCue and Samuels on the issue of compliance with the requirements of RSA 5-B:5, I (b) and (e). (See generally Tr. 1-5).

The only evidence the BSR attempted to present was the testimony of Michael Coutu. However, the Presiding Officer ruled that Mr. Coutu was not qualified to render legal opinions. (Tr. 126-30). Nevertheless, and over the Respondents' multiple objections, the Presiding Officer accepted into evidence portions of Mr. Coutu's report about which he did not testify, including certain legal opinions. (E.g., Tr. 248-55, 379-83, 1085-88). The Presiding Officer indicated that the challenged portions of the report would be assigned "appropriate weight." (Tr. 255). Because it is unclear what "appropriate weight" means (Respondents continue to argue it should be "no weight"), the Respondents are forced to address the written statements about compliance with RSA 5-B contained in the report.

Mr. Coutu is (a) not an attorney (Exh. 68(B) at 1); (b) has not spent any part of his career as a corporate and transactional lawyer (id. at 1-2); and (c) has no other training, education or experience that would render him qualified to offer an opinion as to whether LGC's current corporate structure complies with the letter of RSA 5-B (id.). Nevertheless, he opined in a written report that "[a]s currently constituted, LGC's Board does not meet the requirements of

the aforementioned RSA," (id. at 10). He offered no explanation for this conclusion under RSA 5-B:5, I (b) and (e). Rather, Mr. Coutu simply recites the language of RSA 5-B:5, I (b) and opines that LGC is not in compliance with its terms. (Id.) Consequently, even if the Presiding Officer is inclined to consider Mr. Coutu's written opinion despite the lack of testimony about it at the hearing, it is no match for the opinion of Attorneys McCue and Samuels, who both have the education, training and experience necessary to offer legitimate opinions on this topic, and who were able to explain cogently the basis for their conclusion that LGC's current structure does not violate RSA 5-B:5, I (b) and (e).

Accordingly, in keeping with settled law regarding the rules of statutory interpretation and the unchallenged evidence at the hearing, the Presiding Officer must find that LGC's current corporate structure does not violate the requirements of RSA 5-B:5, I (b) and (e).

II. LGC IS A LEGAL NEW HAMPSHIRE ENTITY AS REQUIRED BY RSA 5-B:5, I (a).

In addition to the structural requirements of a board of directors and written by-laws that govern it, each pooled risk management program must "[e]xist as a legal entity organized under New Hampshire law." RSA 5-B:5, I (a); (Tr. 1578-79, 1933). A plain reading of the law as well as a review of evidence adduced at the hearing reveals LGC's full compliance with this standard.

Prior to 2003, LGC's corporate structure consisted of NHMA, Inc., plus two not-for-profit corporations that housed individual lines of insurance. (Tr. 401, 1607-08). In 2003, as a result of independent votes by each of the three boards (NHMA, NHMA HealthTrust and NHMA Property/Liability Trust), the three non-profits merged into the "parent entity" currently known as LGC, Inc. and the three boards became one. (Tr. 1607-08, 2342-44). To effectuate the vote to combine into one parent entity, an attempt was made to conduct a series of transactions involving the merger into and out of Delaware shell corporations, ultimately

resulting in the current New Hampshire structure. (Tr. 1609). The mechanics of that attempt, however, were not performed correctly. (Id.)

As a result of that error, as Attorney Mc Cue testified: "… it didn't ever happen. The [NH] RSA 292 corporations stayed in New Hampshire. The New Hampshire LLCs were validly created, and the assets of the corporation were managed and operated by the LLCs. Nothing ever left New Hampshire." (Tr. 1609). He then summarized his testimony on this issue by stating, "The bottom line is that [at] the end of the day you had New Hampshire corporations, the assets were in New Hampshire corporations and the error was corrected subsequently by a revival of the charters of the corporations. So messy but end result is everything is in compliance." (Tr. 1610). Attorney McCue confirmed that at no time was LGC, HealthTrust, or Property/Liability Trust a Delaware entity. (Tr. 1610-11). He stated that the foregoing situation does not affect his opinion that the current structure of LGC "is compliant fully with RSA 5-B." (Tr. 1611).

The Presiding Officer also heard testimony from Attorney Samuels on this issue. Attorney Samuels testified that he was contacted by LGC's in-house counsel in 2011 to undertake a review of LGC's corporate structure – presently and historically – in light of an investigative report that had recently been issued by the BSR. (Tr. 1923). He began his explanation of what he learned through the course of his own examination by stating that as of August 2011, when he was contacted by LGC's counsel, HealthTrust and Property/Liability were lawful entities: "duly formed New Hampshire limited liability companies that were in good standing with the Secretary of State." (Tr. 1925).

Attorney Samuels testified that because the entities were lawful as of 2011, he "didn't have to do anything to address that issue . . . ." (Tr. 1926). He explained that the not-for-profit corporations that were supposed to have been merged into and out of Delaware corporations

stopped filing their required reports with the Secretary of State and had, as a result, been administratively dissolved. (Tr. 1926-27). Accordingly, he revived the corporations consistent with RSA 292 (Exh. 39), and documented the transfer of assets that had already been completed based on a belief that the 2003 efforts had been successful at that time (Tr. 1928-29). Attorney Samuels testified that in light of the BSR's investigative report which had identified a potential issue with the 2003 reorganization he did the foregoing simply to "get the issue out of the way," and not because he believed anything needed to be done. (Tr. 1927). When asked whether the LGC's entities were lawful entities, operating lawfully from 2003 to 2011, Attorney Samuels responded, "Yes" and added that he did not have any reason to think otherwise. (Tr. 1931)

In addition to hearing both Attorney McCue and Attorney Samuels opine that the LGC entities are, and have at all relevant times been, lawful New Hampshire entities, certificates of good standing issued by the Secretary of State were admitted into evidence. (Tr. 1580-1583; Exh. 442, 446, and 445). The certificate issued for HealthTrust states that the LLC was formed on June 26, 2003, it exists as a New Hampshire LLC, and having paid its required fees and made its requisite filings over the years, has maintained its good standing in this state. (Tr. 1580-81, Exh. 442). The same information is contained in the certificate pertaining to Property/Liability. (Tr. 1582-83, Exh. 445). Finally, as to LGC, Inc., the certificate provides that LGC is a New Hampshire non-profit corporation formed in 1941 that has paid its dues and made its filings and thus maintained its good standing. (Tr. 1581-82, Exh. 446). Notably, all of the foregoing certificates were issued on November 8, 2011, after the BSR had filed its original petition in this matter, and before the BSR filed its amended petition in February 2012. The BSR conveniently ignored these certificates in filing its amended petition which mentions –but does not appear

actually to make a claim of illegality – the error that occurred regarding the use of Delaware shell corporations.

The import of the testimony from Attorneys McCue and Samuels should not be lost among the intricacies of what was attempted and what did not occur. The BSR focuses on the technical error; elevating form over substance. Testimony from two experienced and respected corporate attorneys, as well as certificates of good standing issued by the Secretary of State, demonstrates that LGC's current entities are – and have been – legal entities under New Hampshire law prior to and since 2003. Notably, the BSR did not call any witness to contradict the testimony of Attorneys McCue and Samuels on the issue of LGC's compliance with RSA 5-B:5, I (a). Nor did it offer any explanation as to why the Presiding Officer should not rely on the certificates of good standing issued by the Secretary of State, all of which indicate that the LGC entities have been, and are lawful.

Accordingly, in keeping with the unchallenged evidence, the Presiding Officer must find that LGC's current corporate structure does not violate the requirements of RSA 5-B:5, I (a).

III. LGC'S CURRENT STRUCTURE DOES NOT VIOLATE EITHER THE INTENT OF RSA 5-B, OR "BASIC CONCEPTS OF FIDUCIARY DUTY AND CONFLICTS OF INTEREST"

In paragraph 77 of its amended petition, the BSR alleges that LGC's "holding company structure violates the intent … of RSA 5-B, as well as basic concepts of fiduciary duty and conflicts of interest." The BSR failed to prove any breach of fiduciary duty or a conflict of interest. Indeed, the BSR's only attempt to offer any evidence in support of this allegation during its case-in-chief was through Mr. Coutu. (Tr. 125). That attempt, however, ultimately resulted only in the BSR eliciting from Mr. Coutu his understanding, as a "practitioner and businessman in the field," (Tr. 128), that "[t]he fiduciary duty of the board serves at the local

government level," (Tr. 130). To be clear, Mr. Coutu's experience as a "practitioner" is limited to runoff management for troubled insurance companies. (Tr. 283-84). Indeed, his entire career has not involved any direct work with risk pool management programs. (Exh. 68B, attach. at Exh. A).

Mr. Coutu's experience was limited to dealing with fiduciary duties as a business person (Tr. 96). He said during his career he had obtained memoranda on fiduciary duties from two large firms so he could understand that with which he needed to be concerned. (Tr. 96-97). He characterized himself as "someone who is a student of fiduciary duties, who spent a lot of time understanding it." (Tr. 97-98). Thereafter, when asked about the flow of fiduciary duties in a corporate parent/subsidiary model, LGC objected that he was not qualified to render such an opinion. "[H]e has [not] been sufficiently qualified to be offering legal opinions with regards to the fiduciary duties and how they run up and down in this particular structure, or indeed, how they would work with regards to anything under 5-B." (Tr. 126-27). The objection was denied based upon the BSR's representation that it was offering Mr. Coutu's testimony "as a practitioner, not as a lawyer." (Tr. 128). Consequently, Mr. Coutu was not allowed to testify as an expert or to offer expert opinions regarding fiduciary duties. Instead, his testimony was limited to fiduciary duties in the capacity of a practitioner with no experience working with risk pool management programs. Thereafter, the only testimony elicited was the previously quoted statement from Mr. Coutu that the fiduciary duty of the board "serves at the local government level." (Tr. 130). Thus, Mr. Coutu's opinion as to the flow of fiduciary duties in a parent/subsidiary model was not that of an expert in matters regarding either risk pool management programs or fiduciary duties generally, and he offered no opinions specific to the duties of board members.

The fact that an "expert" report authored by Mr. Coutu was admitted into evidence does not alter this conclusion. As discussed above, the Presiding Officer, over several objections from the Respondents,[4] ruled that reports authored by BSR witnesses but not testified to on the stand could be admitted into evidence and would be given appropriate weight. (Tr. 255). Mr. Coutu's report contains approximately a page and one-half of "findings" relating to fiduciary duties and conflicts of interest. (Exh. 68B at 10-11). In the "conclusions and recommendations" section of his report, Mr. Coutu also addresses matters relating to fiduciary duties and conflicts of interest. (Id. at 16-17). These sections of Mr. Coutu's report cannot be considered as to whether LGC's current structure violates the intent of RSA 5-B or basic concepts of fiduciary duty and conflicts of interest, because Mr. Coutu was not a qualified expert in the area and therefore the report is unreliable. RSA 421-B:26-a,XX (to be admissible, evidence must be "relevant, material and reliable").

Without a qualified expert on fiduciary duties and conflicts of interest, the BSR has failed to prove any violations. "The party bearing the burden of proof must introduce expert testimony 'if the subject matter in dispute is beyond the general understanding of a jury.'" Schneider v. Plymouth State, 144 N.H. 458, 464 (1999). Specifically, "[e]xpert testimony is required where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average lay-person." Estate of Sicotte v. Lubin & Meyer, P.C., 157 N.H. 670, 673-74 (2008); Schneider, 144 N.H. at 464 (adding "business" to the list set forth in Estate of Sicotte). Risk pool management programs are unique entities. They are like insurance companies but they operate on a much broader level, helping their members "bend the cost curve: operate more safely, be healthier, save taxpayer dollars." (Tr. 2166). Indeed, according

[4] The Respondents stress their continued objection to portions of reports not testified to at trial being considered by the Presiding Officer.

to Jenny Emery, who retired from Towers-Watson after working with risk pools for 25-30 years, "very few people who aren't part of that movement [public entity pooling] understand it, [or] know much about what it does." (Tr. 2159, 2169). To understand their operation and the intricacies of a board member's duties, particularly in light of RSA 5-B, requires specialized knowledge, training or experience.

Accordingly, while expert testimony may not be needed in every case involving a claim pertaining to fiduciary duties, cf. Schneider, 144 N.H. at 464, such testimony is needed in a case like this, where the fiduciary duty at issue exists in the context of a unique and particularized type of business and is being challenged based on the specific structure of that business as compared to statutory requirements. Thus, having failed to proffer an expert on this issue, or to offer into evidence a report authored by an expert that addresses this issue, the BSR could not, and did not, meet its burden of proving that LGC's current structure violates basic concepts of fiduciary duty and conflict of interest.

The statute itself compels the same result. RSA 5-B:1 provides:

> The purpose of this chapter is to provide for the establishment of pooled risk management programs and to affirm the status of such programs established for the benefit of political subdivisions of the state. The legislature finds and determines that insurance and risk management is essential to the proper functioning of political subdivisions; that risk management can be achieved through purchase of traditional insurance or by participation in pooled risk management programs established for the benefit of political subdivisions; that pooled risk management is an essential governmental function by providing focused public sector loss prevention programs, accrual of interest and dividend earnings which may be returned to the public benefit and establishment of costs predicated solely on the actual experience of political subdivisions within the state; that the resources of political subdivisions are presently burdened by the securing of insurance protection through standard carriers; and that pooled risk management programs which meet the standards established by this chapter should not be subject to insurance regulation and taxation by the state.

There can be no dispute that this provision makes clear that the over-arching purpose of Chapter 5-B is to benefit municipalities and other political subdivisions. Thus, every provision within the chapter must be filtered through that lens. Chatman v. Strafford Co. et. al., 163 N.H. 320, 322 (2012).

The BSR believes that LGC's current structure renders the board incapable of effectuating the purpose of RSA 5-B because it cannot properly exercise its fiduciary duties, and the decisions it makes are fraught with conflict of interest that the board has no mechanism by which to resolve. The BSR's belief is premised on its misperception of the flow of duties within LGC's current corporate structure, and its failure to acknowledge the realities of how LGC's board operates within that structure. As the BSR stated in an objection to the Respondents' motions to dismiss this claim, "in a parent-subsidiary model, the parent does not owe a fiduciary duty to its subsidiaries; it is the subsidiaries that owe a fiduciary duty to the parent." (BSR Omn. Obj. at 3).

At the hearing, however, Attorney McCue, who has comprehensively reviewed RSA 5-B, its history, and information regarding risk pools nationally, explained the nature of duties under LGC's current corporate structure. He testified that while the parent does not have a fiduciary duty to a subsidiary, "it has a management obligation under the structure of a single-member LLC and in exercising that power it has obligations." (Tr. 1630-31). He then explained that a board at the level of an individual line, such as HealthTrust, "would have the same responsibilities to that program as the member parent does, identical type of responsibilities." (Tr. 1631).

Attorney Samuels, another experienced corporate attorney, testified that LGC's board owes a fiduciary duty – specifically the duty of care and loyalty – to members of the risk pools,

which requires that they "in good faith … make a determination that any action is in the best interest of whichever parties they are governing." (Tr.1995-97). He explained that in the context of transactions involving all three pools, the single governing board would fulfill its duties by determining either (a) that the transaction is in the best interest of all three; or (b) that it is in the best interest of some and "neutral" as to the other. (Tr. 1997-98).

This testimony reveals that, directly contrary to the BSR's allegations, there is no inherent violation of concepts of fiduciary duty in LGC's current structure. On the contrary, the board of LGC parent has the same responsibilities with respect to each pool through the parent as it would as a board for one of the individual pools (which is, to benefit members). Consequently the structure itself does not change the duty to the pools and members who participate in them.

Moreover, the attorneys' testimony contradicts the BSR's allegation that the current structure creates inherent conflict within the board concerning any transactions including more than one pool. Rather than putting the board in a position of debating itself, it creates a situation where the board can decide whether a potential transaction would benefit all pools, none of them, some to the detriment of others, or some without being either contrary to, or in, the interest of the other. A structure within which such options are available to a governing board cannot be said to inherently create a conflict for the board.

The BSR believes the duties cannot be served, and conflicts exist, because members do not necessarily participate in all coverage pools offered by LGC. In essence the BSR's contention is based on its assumption that members in each pool have separate interests such that they cannot be served by one board acting within the scope of its fiduciary duties. As with all of the other arguments advanced by the BSR relative to this count, this assumption is directly contrary to evidence adduced at the hearing.

Attorney McCue described the nature of 5-B programs as follows: "It's like a cooperative. It's member driven, it's member managed, it's member run. It's for the members. So it's the Board of Directors which is a representative body. The members act through a representative Board of Directors." (Tr. 1613). When responding to questions about reserves and surplus, Attorney McCue further explained:

> These Board members are on the front lines with the Selectmen and with their towns in presenting budgets. They have a keen interest in keeping reserves as low as possible.
> …
> I looked at how 5-B is structured, and it puts great weight on the Board of Directors and the fact they have all the incentive in the world to keep reserves as low as possible because, again, they go back to the front lines, that's why they're not regulated by Insurance Departments.
> …
> They have to go back to the Selectmen, to the town meetings, and they have to live with the decisions that they make on behalf of the entity. Those decisions that get turned into rates for their particular town or School District, and they're right on the front line answering to the Board of Selectmen and to their taxpayers in their town why this was done.

(Tr. 1616, 1618-19). Although Attorney McCue's comments were made during a dialogue about reserves and surplus, the point he made is one which applies generally to the board, with respect to all issues it is tasked with addressing, and which is critical to an assessment of the BSR's allegations in Count I.

The board not only has the fiduciary duties described above, as explained by Attorneys McCue and Samuels, but as Attorney McCue testified, it is a board comprised of representatives and officials of the very members it has the duty to serve. There is, consequently, an added layer of accountability inherent in every decision the board makes. Given this characteristic of programs organized under 5-B, it is ironic and confounding that the BSR would allege the board does anything short of put its members' interests first and foremost when considering any proposed course of action.

Indeed, time and again throughout the hearing, evidence indicating an overriding concern for whether an act by the board would best serve its members was presented. For instance, the 2003 decision to merge three boards into one, and to re-organize into the current corporate structure, was driven primarily by a desire to provide better services to members. As Peter Curro testified, when he was on the board of NHMA HealthTrust he voted in favor of the merger for four reasons: (1) to streamline services so LGC would "then have representatives going out to members, schools and towns, with a plethora of knowledge of all the coverage, not just one;" (2) to "have one pool managed by a single board that could – that had the ability to use assets or the flexibility of using assets to meet either current member needs or future member needs;" (3) because PRIMEX was looking into creating a healthcare pool that would be in direct competition with NHMA HealthTrust; and (4) to look "down the road later on does the workers' comp. plan fit into the whole mix[.]" (Tr. 2344-46). And, as Thomas Enright said about "being under one roof with all of our risk management programs," that structure is "an excellent business model in terms of giving the best price. And it's the best way to manage all of the risks[.]" (Tr. 1194-95).

Rather than attempting to find a past or current board member to testify that members' interests were not the driving force behind decisions about merging, funding a worker's compensation program, and setting RBC levels, the BSR's strategy at trial was to cherry-pick excerpts from board meeting minutes where competition with PRIMEX was being discussed – at times, heatedly so. What the BSR ignored is that competition drove the board to be better; and for the board that meant providing more comprehensive, cost-effective services for its members. (Tr. 861-62; 1099-1100; Exh. 46).

Throughout the hearing the BSR attempted to characterize concerns about competition as being evil, in violation of duties to members, or somehow otherwise unscrupulous. This is yet

another example of the BSR narrowly focusing on one factor that the board considered, demonizing it, and failing to acknowledge the big picture. If the BSR truly believes, as it argues, that the purpose of 5-B is to benefit members, it is nonsensical to believe that using competition to strive to be better is somehow contrary to that purpose. The decision to fund a worker's compensation program, for instance, was based on the fact it was LGC's weakest program and "the idea was to create a one-stop … shopping … an entity that could give [members] a package price on all of – on all of its programs." (Tr. 493). Additionally, it was believed that strengthening the worker's compensation program would lead to reduced rates. (Id.; see also Tr. 2352-53.) It is the BSR's failure to understand what truly drove the board's decisions that has led it to make the troubling and unfounded accusations it has launched against LGC and the individuals who have duly served its members through their thoughtful, responsible and informed decisions.

In sum, LGC's corporate structure comports with RSA 5-B, and the BSR has failed to prove any breach of fiduciary duty or conflict of interest.

IV. THE BSR FAILED TO PROVE ANY LIABILITY AS TO MR. CURRO

As the Presiding Officer is aware, Mr. Curro has sought dismissal of the claims against him on numerous occasions, including by pretrial dispositive motions and during the evidentiary hearing. Mr. Curro's oral motions to dismiss were taken under consideration, (P. 2429-30), and to date no ruling has been made. The arguments made in support of dismissal are all incorporated herein by reference and will not be repeated in detail in this memorandum. Even if the Presiding Officer declines to dismiss the charges against Mr. Curro, it is clear that Mr. Curro cannot be found liable for any violations of RSA 5-B or the securities laws.

Mr. Curro has served as a board member for LGC, and prior to that, NHMA HealthTrust, for approximately 15 years. (Tr. 2326). He has always been a member of the Finance Committee. (Tr. 2332). Mr. Curro was on the board of NHMA Health Trust when it voted to merge with NHMA and NHMA Property/Liability in 2003, (Tr. 2343); he was on the NHMA HealthTrust board when it voted to contribute funds to establish a worker's compensation program a few years before the merger, (Tr. 2355); he was on the LGC board when it voted to continue to provide strategic support to the worker's compensation program, (Tr. 2354-56); he was on the LGC board when it voted to adopt RBC as its method for calculating members' balance (or capital reserves), (Tr. 2329-34); and he was on the LGC board when it voted to set its RBC level at 4.2, (Tr.2336-40). Mr. Curro testified about these votes at the hearing, including his reasons for voting as he did. Before proceeding to address the BSR's amended petition as it pertains to all of the foregoing votes, two significant points must be understood.

First, as has been argued time and again throughout the pendency of this case, the capacity in which Mr. Curro must defend himself has never been made clear by the BSR. At the hearing on pending motions in late March of this year, the BSR for the first time stated that Mr. Curro is in this case in a "representative" capacity. The BSR has never offered any support for a "representative" theory of liability. Moreover, in response to a motion to dismiss made at the hearing, the BSR claimed that Mr. Curro could not rely on advice of counsel as a defense to his actions on the board because counsel for the board was not representing Mr. Curro individually, which of course suggests that the BSR is actually proceeding against Mr. Curro in an individual, rather than "representative," capacity. (Tr. 1736-37). It is axiomatic that an individual has the right to understand what he is being asked to defend himself against. Morency v. Plourde, 96 N.H. 344 (1950) (setting forth standard for amount of detail necessary in a pleading: a

respondent is "entitled to be informed of the theory on which the plaintiffs are proceeding"). In this case, that right has not been afforded to Mr. Curro; indeed even now, following a ten-day hearing, it is unclear whether Mr. Curro should be filing this memorandum to defend himself as an individual or a "representative."

Second, the BSR simply has not met its burden of proof as to any of its putative claims. Under RSA 421-B:26-a, XXI, the BSR must prove its claims by a preponderance of the evidence. If Mr. Curro is here individually, the BSR has not (because it cannot) provided one piece of evidence showing that Mr. Curro's vote on any of the challenged issues was determinative or causative, or that he exerted such influence over the decisions of others that the collective vote of the board can somehow be attributed to him. If Mr. Curro is here as a "representative" of the board, the evidence produced at the hearing shows that at all times the board acted (1) with advice from counsel; (2) with its best business judgment; and (3) consistent with its fiduciary duties and thus the BSR has not met its burden of proof as to Mr. Curro in a so-called "representative" capacity.

The uncontroverted evidence at the hearing was that outside corporate counsel was present, and relied upon, at all board meetings and committee meetings. (Tr. 1566-67; 1692-93). Counsel's presence at those meetings was to advise the board on issues of corporate governance, which includes both issues of structural compliance with RSA 5-B and the actual operation of the risk pools. (Tr. 1566-67). While in attendance at board and committee meetings, counsel would "weigh in when I saw something that I felt needed some legal advice," and he would answer direct questions from board and committee members. (Tr. at 1693). Attorney McCue testified that he could not think of a single instance where the Board did not, or refused, to follow his legal advice. (Tr. 1702).

The evidence presented at the hearing further demonstrates that, without exception, the board acted not only with the advice of counsel, but also with the advice of industry consultants who were versed in the subject areas the board was required to consider. (E.g., Tr. at 1251-52; 2171-72). The business judgment rule "is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." Benihana of Tokyo, Inc. v. Benihana, Inc., 906 A.2d 114, 120 (D.E. 2006); Baldwin v. Bader, 585 F.3d 18, 22 (2009).

Finally, the evidence adduced at the hearing reveals that the board honored and upheld its fiduciary duties in making all decisions challenged by the BSR. At the hearing, Attorney McCue testified, "I have never dealt with a Board that has taken [their fiduciary duty] any more seriously than LGC so yes, they have taken their, they understand and take [their fiduciary responsibility] seriously at every meeting." (Tr. at 1702). The voluminous board minutes are saturated with discussion focused entirely on the best interests of the members and the LGC entities.

LGC's current corporate structure is the product of the boards' thorough investigation, thoughtful consideration, and robust debate by and among all board members. A joint committee studied the idea comprehensively. The boards worked with an outside facilitator and had the full advice of legal counsel. And, the boards fully vetted the several options (including maintaining the structure that was already in place) that would best serve members' interests. (Tr. 624-636; 823- 866; 2340-44; LGC Exhs.20, 30, 32, 35, 37, 38, 40, 41, 42, 368, 370, 45, 46, 47, and 48). Mr. Curro voted in favor of reorganizing into the current corporate structure. (Tr. 2343). However, he was one board member on one of three boards, and each of the boards voted independently to adopt the proposed reorganization. (Id.) There is no doubt on the evidence

that the board acted on advice of counsel, exercised its best business judgment, and fulfilled its fiduciary duties to its members. Therefore, the BSR has failed to prove any alleged illegality pertaining to corporate structure.

As with the decision to restructure the organization into the current parent/subsidiary model, the decision to provide start-up funds for a workers' compensation program was initially made by two separate boards: NHMA HealthTrust and NHMA Property/Liability. (Tr. 2355). Subsequent to that, and after the restructuring had occurred, the board voted to fund LGC's strategic plan with one percent (1%) of employer premiums. A portion of the strategic plan funding was used to continue to fund the workers' compensation program. (Tr. at 2355-57). Mr. Curro testified that the purpose of the strategic plan funding was to "grow the program to get a stable rate, to get the program to be able to be self-supporting." (Tr. 2357).

The board determined that the workers' compensation program was important to establish and stabilize because: (1) there was no competition in the market place and a viable worker's compensation program would induce competition, resulting in lower prices for member premiums, (Tr. 2352-53); and (2) a competitor in the market place would promote a more appropriate treatment of worker's compensation claim, which in theory would lead to reduced claims being paid out by HealthTrust, (Tr. 2350-52; 2393-94). In short, the motivating factor behind the decision to establish and strengthen the worker's compensation program was based on a general desire to benefit members, whether that benefit inured to members of HealthTrust whose premiums stabilized because fewer claims that should have been covered by worker's compensation were being paid out; or to members of LGC who wanted to obtain worker's compensation coverage with LGC instead of having to go elsewhere; or to political subdivisions

who experienced better rates in the market due to having more competition among providers. (Tr. 868-883; 1091-93; 2352-57; 2393-94).

There is no evidence from which a conclusion can be drawn that Mr. Curro had a determinative vote on any of these matters or that he influenced the votes of other board members. Nor is there any evidence from which a conclusion can be drawn that Mr. Curro voted in any manner other than with advice of counsel, being fully informed and guided through the process by outside professionals, and consistent with the paramount concern for members' interests. Thus, based on the evidence that was presented at the hearing, the BSR did not meet its burden of proof as to any allegation that Mr. Curro engaged in unlawful acts.

Prior to adopting RBC (risk-based capital) as the method for calculating members' balance, or capital reserves, the board had been using a simple percentage of claims formula (Tr. 2331-32). In approximately 2001, the board asked its consulting actuary, Peter Reimer, to determine whether there was a standard that the board should be using "that would better calculate a true number or the true value of what a members' balance for [the] organization should be." (Tr. 2330). Mr. Reimer recommended, and the board adopted, RBC as the method that should be used, based on Mr. Reimer's assessment of the attributes of using that particular method given the characteristics of LGC's health program. (Tr. 2333-35). The specific number – 4.2 RBC – was based on Mr. Reimer's description of what the relative RBC levels represented. According to Mr. Curro, 4.2 was a mid-point between 3.0, a number that was the minimum he would ever desire, and 5.0, a number he believed was too high. (Tr. 2335-39). Accordingly, the evidence demonstrates that the board's choices to seek a better standard by which to calculate reserves; to adopt a standard based on advice from a consulting actuary; and to set a target level of reserves that would ensure the viability of the organization, were responsible and informed

decisions. As with all other votes pertinent to the BSR's claims in this matter, Mr. Curro did not have a determinative or causative vote.

Finally, with regard to the securities counts, Mr. Curro relies on the post-hearing brief submitted by Respondent Carroll. The BSR utterly failed to proffer any evidence that Mr. Curro acted as an agent in the sale of securities (Count III) or participated in any material way in the sale of securities as a director (Count IV). Moreover, the BSR completely failed to present any evidence at the hearing that Mr. Curro engaged in any fraudulent or deceitful statement or omission with respect to securities.

In sum and for all of the foregoing reasons, as well as those previously set forth orally and in writing in all motions to dismiss made and/or joined by Mr. Curro, the Presiding Officer must find no liability against Mr. Curro as to all counts.

Respectfully Submitted,
Peter J. Curro,

By His Attorneys,
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Dated: June 4, 2012

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Certificate of Service

I hereby certify that I have this 4th day of June 2012, forwarded copies of the within trial memorandum via electronic transmission to all counsel of record.

Dated: June 4, 2012

/s/ Mark E. Howard
Mark E. Howard (NH Bar #4077)