STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

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

ORDER DISMISSING RESPONDENTS' MOTIONS TO DISMISS AND DISMISSING RESPONDENT CARROLL'S MOTION FOR SUMMARY JUDGEMENT

BACKGROUND

On February 17, 2012 the Bureau of Securities Regulation ("BSR") filed its Amended Petition consisting of six counts containing allegations against the several respondents that the BSR claim have violated the law and continue to do so. The six counts contained in the Amended Petition were entitled as follows:

Count I. Operation of a Pooled Risk Management Program in Violation of RSA 5-B:5, Improper Corporate Structure;

Count II. Operation of a Pooled Risk Management Program in Violation of RSA 5-B:5, Failure to Return Surplus Funds to Members;

Count III. Sale of Unregistered Securities by Unlicensed Broker-Dealers, Issuer-Dealers, and Agents in Violation of RSA 421-B:6 and 11;

Count IV. Knowing or Negligent Aid in the Sale of Unregistered Securities by Unlicensed Broker-Dealers, Issuer-Dealers, and Agents in Violation of RSA 421-B:26, III-a;

Count V. Fraud, Deceit and Material Omissions in Connection with the Offer or Sale of Securities in Violation of RSA 421-B:3; and

Count VI. Civil Conspiracy

The respondents thereafter filed their respective motions to dismiss several or all of the counts and filed notices of joining in other respondents' motions to dismiss. These pre-hearing dispositive motions requesting that allegations contained within the BSR petition be dismissed are as follows[1]:

(1) LGC's Motion to Dismiss Counts I & II of the Amended Petition to the Extent they Allege Conduct Which Occurred Prior to June 14, 2010;

(2) LGC's Motion to Dismiss Count I of the Amended Petition on the Ground that R.S.A. 5-B Does Not Prohibit the Conduct in Which LGC is Alleged to have Engaged;

(3) LGC's Motion to Dismiss Count II of the Amended Petition on the Grounds that the Bureau of Securities Regulation has Improperly Failed to Promulgate Rules Under R.S.A. 5-B, and the Statute Unconstitutionally Delegates Unlimited Legislative Authority to the Bureau and is Unconstitutionally Vague;

(4) LGC's Motion to Dismiss Counts III, IV, and V of the Amended Petition on the Ground that LGC's Risk Pool Contracts are not Securities of are Exempt under New Hampshire Law;

(5) Respondent John Andrews' Motion to Dismiss Him from Counts I and II for Failure to State a Cause of Action;

[1] Earlier motions for dismissal filed by respondent Andrews, dated December 3, 2011 and February 1, 2012, were withdrawn prior to the conduct of this hearing and therefore did not receive consideration as part of this order.

(6) Respondent John Andrews' Second Motion to Dismiss Counts I and II of the Amended Petition;

(7) Respondent John Andrews' Motion to Dismiss Counts III, IV, and V of the Amended Petition, Securities Claims;

(8) Respondent John Andrews' Motion to Dismiss Count VI of the Amended Petition, Civil Conspiracy;

(9) Respondent Maura Carroll's Motion to Dismiss All Counts of the Amended Petition;

(10) Respondent Maura Carroll's Motion for Summary Judgment as to Counts I, II, and VI, and Partial Summary Judgment as to Counts III, IV, and V;

(11) Motion to Dismiss Count IV of the BSR's Amended Staff Petition (filed by Peter Curro);

(12) Motion to Dismiss Count VI of the BSR's Amended Staff Petition (filed by Peter Curro).

(13) Notice of Joinder in Motions to Dismiss (filed by Peter Curro)

(14) Notice of Joining in Dispositive Motions Filed by Other Respondents (filed by LGC)

The hearing was conducted on March 26, 2012 in Concord, New Hampshire with all parties represented by legal counsel. Each had the opportunity to address the issues presented by their filings through offers of proof and exhibits and to present oral argument and legal support for their respective positions to challenge opposing factual assertions and undertake rebuttal. At the hearing Respondents Andrews, Carroll, Curro and LGC orally submitted notices of joinder in

the motions of dismissal submitted by the other respondents. These notices were received by the presiding officer, without objection from the BSR. At the outset of the hearing, counsel for the LGC entities indicated that the respondents' representatives had consulted prior to the hearing and suggested that the manner of argument proceed in a manner whereby each count would be addressed by all counsel in the order by which the counts were presented in the amended petition with allowance for rebuttal before progressing on to the next count. The suggestion was accepted and the hearing proceeded.

Following oral presentations and argument the hearing was terminated. As counsel for respondent Andrews had made reference to two legal cases in support of an argument made on behalf of Andrews that had not been submitted prior to the hearing, the presiding officer made a request that copies of those two cases be submitted after the close of the hearing and they were. The record was thereafter closed.

On March 29, 2012 prior to the issuance of this order, the BSR filed a Motion for Voluntary Dismissal of Count VI, only. The motion was granted on March 30, 2012 and that Count VI is not further considered in this instant order. All appropriate prior findings and determinations made in previous orders are incorporated into the findings and determinations appearing within this order as appropriate.

For ease of reference in the text of this decision, the petitioner, Bureau of Securities Regulation, is hereinafter referred to as the "BSR." The LGC, Inc., and its related entities who are all separately named as respondents are collectively referred to as "LGC", unless decisional context otherwise requires specific reference.

JURISDICTION

The secretary of state is responsible for and is granted the authority to conduct adjudicatory proceedings and hearings related to violations of RSA 5-B (the "Pooled Risk Management Programs") law and RSA 421-B (the "Securities" law). The secretary of state may delegate this responsibility to a presiding officer, and the authority and jurisdiction to conduct such proceedings is exclusive. (See RSA 5-B:4-a, I and RSA 421-B:26-a, I). The presiding officer has the authority to regulate and control the course of the administrative proceedings and dispose of procedural requests. (RSA 421-B:26-a, XIV). The presiding officer may rule upon a motion when made or may defer decision until a later time in the hearing, or until after the conclusion of the hearing. (RSA 421-B:26-a, XIX). The provisions of RSA 541-A do not apply to these proceedings. (RSA 421-B:26-a, I).

SUMMARY

This is a pre-hearing decision addressing issues raised by the respondents in thirteen motions for dismissal of all or some of the allegations against the respondents contained in Counts I-V of the amended petition filed by the Bureau of Securities Regulation. This decision also addresses respondent Carroll's motion for summary judgment as to Counts I and II, and partial summary judgment as to Counts III, IV, and V. Although no standard for dismissal or summary judgment is explicitly stated as such in RSA 421-B:26-a, the statute does provide broad authority for the presiding officer to make a determination as to whether a cause of action should be dismissed or whether he should find for summary judgment, and upon which grounds these rulings should be made.

A common New Hampshire standard utilized when determining whether a motion to

dismiss is proper is as follows: taking the factual allegations in the amended petition as true and all reasonable inferences in the light most favorable to the petitioner, an allegation in the amended petition is reasonably susceptible of a construction that would permit recovery. This standard consequently results in a heavy burden on the respondents to defeat the BSR's allegations through dismissal prior to a full evidentiary proceeding. Here, when utilizing the above standard, when the facts asserted by BSR are held as true and all reasonable inferences must be made in the light favorable to the BSR, the counts in the amended petition are found to be reasonably susceptible of a construction that would permit recovery with one exception. The respondents' motions to dismiss are denied as to all counts except to the extent in Counts III, IV, and V that NHMA, LLC agreements with its members are alleged by the BSR to be securities as defined in RSA 421-B:2, XX. (a) and to the extent that the characterization by BSR that they are securities forms the basis for any other related claim.

Next, the standard to be utilized when determining whether a motion for summary judgment is proper is as follows: if review of the evidence discloses no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law, then a grant of summary judgment is proper. Here, when utilizing the above standard, and where facts asserted by respondent parties and BSR disclose genuine issues of material facts, a grant of summary judgment would be improper. Therefore, summary judgment against the BSR is denied.

All counts of the BSR amended petition, not hereafter withdrawn, shall remain at issue and be heard in the final administrative hearing at which time the parties shall present all relevant

evidence to establish or defeat the BSR allegations against all remaining respondents.

DECISION AND ORDER

Ruling on Motions to Dismiss Counts I-V

Count I. Operation of a Pooled Risk Management Program in Violation of RSA 5-B:5, Improper Corporate Structure

A. Failure to State a Claim of Action

The first basis for dismissal of Count I raised by respondents Andrews, Carroll, and Curro, relates to the failure to state a claim of action because the facts pled do not constitute a basis for relief, specifically, that Count I does not allege any conduct by Andrews, Carroll, or Curro in violation of RSA 5-B:5. In reviewing a motion to dismiss, the test is whether the allegations in the amended petition are reasonably susceptible of a construction that would permit recovery. *Ford v. New Hampshire Dept. of Transp.*, 2012 WL 592899, at *1 (N.H. 2012). It is assumed that the petitioners' factual allegations are true, as are all reasonable inferences to be drawn from them in the light most favorable to [BSR]. *Id.*; *see Opinion of the Justices*, 138 N.H. 445, 450 (1994). However, the truth of statements that are merely conclusions of law need not be assumed. *Ford*, 2012 WL 592899 at *1. The threshold inquiry tests the facts in the amended petition against the applicable law. *Id.* The motion [to dismiss] is denied if those facts and inferences so viewed would constitute a basis for legal relief. *Opinion of the Justices*, 138 N.H. at 450.

The petitioner, BSR, has alleged many facts in its amended petition among which several alleged facts are of particular note in the context of this count. The LGC's current structure utilizes one single board to govern the operations of three separate 5-B pools, all according to

one set of bylaws, in direct violation of RSA 5-B:5, I (b) and (e). (Amend. Pet. at 77,86). The LGC structure violates the intent and requirements of RSA 5-B, as well as basic concepts of fiduciary duty and conflicts of interest. (Amend. Pet. at 77). Referring to Andrews and Carroll, the LGC board relied on the direction of Andrews and Carroll when deciding how to manage member funds held in the 5-B pools. (Amend. Pet. at 84). The applicable law to test the facts against includes RSA 5-B:5, I (b) and (e), that each program shall be governed by a board and by written bylaws. Additionally, applicable law includes the fiduciary duty, which exists between two parties when one has gained the confidence of the other and purports to act or advise with the other's interest in mind, the law places the advantaged party in the role of a moral person and pressures him to behave in a selfless fashion. *Clark & Lavey Benefits, Inc. v. Educ. Dev. Ctr., Inc.*, 157 N.H. 220, 227 (2008).

From the facts, which must be taken as true under the dismissal standard, it can be reasonably inferred that the advisement of Andrews, as executive director of LGC until September 4, 2009, and Carroll, as interim executive director of LGC beginning September 5, 2009 and through her appointment as executive director on June 10, 2010, contributed to violations of 5-B:5, I (b) and (e), where their direction facilitated the implementation and continuation of the one board, one set of bylaws violations. It can also be reasonably inferred that Curro, through his participation and voting privilege as a member of the board of directors of LGC and former member of the board of directors of HealthTrust, approved the implementation and continuation of the one board and one set of bylaws protocol, thereby, contributed to violations of RSA 5-B:5, I (b) and (e). Moreover, it can be reasonably inferred that Andrews, as executive director of LGC until September 4, 2009, and Carroll, as interim executive director of LGC beginning September 5, 2009 and through her appointment as executive director on June 10, 2010, breached fiduciary duties in advising the LGC board on how to manage member funds

held in 5-B pools. Likewise, it can be reasonably inferred that Curro, as a member of the LGC board and former member of the board of directors of HealthTrust, breached fiduciary duties when participating in the board's policy discussions and voting on how to manage member funds held in 5-B pools.

B. BSR Has Failed to Identify a Breach of Fiduciary Duty or Conflict of Interest

The second basis for dismissal of Count I raised by respondent LGC relates to BSR's failure to identify a breach of fiduciary duty or conflict of interest, specifically, by failing to cite to case law or legal authority to support their claim. BSR has alleged that an inherent conflict of interest exists where funds are transferred from a 5-B pool to a non-5-B pool, where both pools are governed singularly by the LGC board in violation of 5-B. (Amend. Pet. at 78). Additionally, BSR has alleged that the LGC board must debate itself in order to fulfill its conflicting fiduciary duties to the 5-B and non-5-B pool entities as one board operating multiple pools in violation of 5-B, where the membership of all the LGC entities and pools are not identical. (Amend. Pet. at 78). Again, applicable law includes the fiduciary duty, which exists between two parties when one has gained the confidence of the other and purports to act or advise with the other's interest in mind, the law places the advantaged party in the role of a moral person and pressures him to behave in a selfless fashion. *Clark & Lavey Benefits, Inc. v. Educ. Dev. Ctr., Inc.*, 157 N.H. 220, 227 (2008).

From the facts, its can be reasonably inferred that a fiduciary duty exists between the LGC board and members of its subsidiary entities, such as HealthTrust, where the LGC board purports to act or advise with the specific pool members' interests in mind. It can also be reasonably inferred that where a single board, such as LGC, must make decisions and direct the flow of money for both 5-B and non-5-B pool entities, where the membership of all the LGC entities are not identical, it does so in breach of its fiduciary duties owed to these entities.

Though not well pleaded, it can be reasonably inferred that there is an inherent conflict of interest due to the responsibilities of the LGC board in deciding how to prioritize use of funds for both the 5-B and non-5-B pool entities, again, where the membership of all the LGC entities are not identical. A reasonable inference can be made that where money contributed by HealthTrust members is used for other purposes, such as the Workers' Comp pool, those who made that decision, have a conflict of interest in deciding which pool would benefit from what use of these funds.

C. RSA 5-B Fails to Provide for Personal Liability

The final basis for dismissal of Count I raised by respondent Carroll is based on the argument that 5-B fails to provide for personal liability, specifically, that 5-B does not regulate behavior of individual employees of risk pools or make employers liable for actions taken risk pools themselves. As stated above, the BSR has alleged that the LGC board relied on the direction of Carroll when deciding how to manage member funds held in the 5-B pools. (Amend. Pet. at 84). The applicable law includes RSA 5-B:4-a, V; VI; and VII (a), where there is repeated reference made to "any person," engaged in any act or practice constituting a violation of chapter 5-B, or knowingly or negligently, violating 5-B. Additionally, RSA 5-B:4-a, VII (b) finds that the secretary of state may enter an order of rescission, restitution, or disgorgement directed to "a person" in violation of 5-B. From the facts, it can be reasonably inferred that Carroll, as interim executive director of LGC beginning September 5, 2009 and through her appointment as executive director on June 10, 2010, satisfies the "any person" element, where she engaged in the act of supporting and maintaining practices in violation of 5-B, such as the one board and one set of bylaws violations.

When utilizing the dismissal standard for the above arguments, where the facts asserted by BSR are held as true and all reasonable inferences made in the light favorable to the BSR, the amended petition sufficiently states a cause of action. Accordingly, based upon determinations made regarding each basis for dismissal of Count I, I deny all requests for dismissal by the objecting respondents to this Count, including those who joined in writing or by oral notice.

Count II. Operation of a Pooled Risk Management Program in Violation of RSA 5-B:5, Failure to Return Surplus Funds to Members

A. BSR has Promulgated an Ad Hoc Set of Standards

The first basis for dismissal of Count II raised by the respondents Andrews, LGC, and Carroll, is based upon the assertion that is BSR promulgating an *ad hoc* set of standards concerning corporate structure, required reserves, administrative expenditures, and restrictions on the LGC's board of directors' discretion to determine the structure and operation of the pooled risk programs. BSR, as the petitioner, has alleged that since 2002, the LGC board has used an inappropriate actuarial method for calculating reserves for the 5-B pools that inflates the capital needs of its pools and compromises the return of surplus. (Amend. Pet. at 92). In addition, BSR has alleged that the LGC has failed to return surplus funds, utilized an inappropriate actuarial method to calculate required capital, improperly inflated administrative costs, misappropriated pool assets for non-pool management purposes, and transferred assets between pools without appropriate safeguards. (Amend. Pet. at 93, 95). BSR has also alleged that LGC has utilized an illegal rate stabilization program, which is an impermissible means of return of surplus funds. (Amend. Pet. at 99). The applicable law includes RSA 5-B:5, I (c), that each program shall return all earnings and surplus in excess of any amounts required for

administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions.

From the facts, which must be taken as true under the dismissal standard, it can be reasonably inferred that BSR has not promulgated an *ad hoc* set of standards, rather, BSR attempts to enforce the standard expressed in RSA 5-B:5, I (c), namely, that a pooled risk management program shall return all earnings and surplus in excess of any reasonable amounts required for administration, claims, reserves, and purchase f excess insurance. Further, it can be reasonably inferred that by employing an inappropriate method for calculating reserves and capital, the funds that would have been deemed "surplus" were re-distributed to other pools, were used for non-pool management purposes, or were re-directed to carry out the rate stabilization program, rather than being categorized as surplus funds and returned to the members, all in violation of the standards set out in RSA 5-B:5, I (c).

B. RSA 5-B:4-a Cannot Be Applied Retroactively

The second basis for dismissal of Count II raised by respondents Andrews, LGC, and Carroll, relates to the argument that RSA 5-B:4-a cannot be applied retroactively. Specifically, the respondents assert that BSR's attempt to impose fines or penalties for conduct prior to June 14, 2010, the effective date of RSA 5-B:4-a, is an unconstitutional retrospective application of the statute in violation of part I, article 23 of the New Hampshire constitution. Most significantly, BSR has alleged that since 2002, the LGC board has used an inappropriate actuarial method for calculating reserves for the 5-B pools that inflates the capital needs of its Pools and compromises the return of surplus, as addressed in the argument above. (Amend. Pet. at 92).

The applicable law regarding retroactive laws is as follows, part I, article 23 of the New Hampshire constitution provides that retrospective laws are highly injurious, oppressive and

unjust. *In re Goldman*, 151 N.H. 770, 772 (2005). No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses. *Id.* Article 23 has been interpreted to mean that every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective. *Id.*; *North Am. Mfg., Inc., v. Crown Intern., Inc.*, 115 N.H. 114, 116 (1975). Additionally, legislative enactments apply alike to persons, subjects and businesses within their general purview and scope existent at the time of the enactments and to those coming into existence subsequent to their passage. *Cecere v. Loon Mountain Recreation Corp.*, 155 N.H. 289, 294 (2007). The purpose of the constitutional ban of retrospective legislation, like the ban on *ex post* facto laws, is to prevent the unfairness that results from changing the legal consequences of an act after the act has occurred. *Fischer v. N.H. State Bldg. Code Review Board*, 154 N.H. 585, 587 (2006).

In testing legislation against part I, article 23, a two-part analysis is conducted to determine if it is unconstitutionally retrospective, first, whether the legislation intended the law to apply retroactively. *Tuttle v. N.H. Medical Malpractice Joint Underwriting Association*, 159 N.H. 627, 661 (2010). When the legislature is silent as to whether a statute should apply prospectively or retrospectively, the interpretation turns on whether the statute affects the parties' substantive rights or the parties' procedural rights. *Id.* There is a presumption of prospectivity when a statute affects substantive rights. *Id.* Where the statute is remedial or procedural in nature, however, the presumption is reversed, and the statute is usually deemed to apply retroactively to those pending cases which on the effective date of the statute have not yet gone beyond the procedural stage to which the statute pertains. *Id.* In the final analysis, however, the question of retrospective application rests on a determination of fundamental fairness, because the underlying purpose of all legislation is to promote justice. *Id.*

If the statute applies retroactively, then the inquiry is whether such retroactive application is constitutionally permissible. *Tuttle*, 159 N.H. at 661. This second inquiry concerns whether the legislation at issue impairs vested rights. *Id.* Unless otherwise inhibited by either the state or federal constitutions, the legislature may change existing laws, both statutory or common, but in so doing, it may not deprive a person of a property right theretofore acquired under existing law. *Goldman*, 151 N.H. 774. Those rights are designated as vested rights, and to be vested, a right must be more than a mere expectation based on an anticipation of the continuance of existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from the demand of another. *Id.* If, before a right becomes vested in a person, the law upon which it is based is repealed, that particular person no longer has a remedy to enforce his claim, and if final relief has not been granted to him on the enforcement of a demand before such repeal, then no relief can be granted on his demand after the effective date of the repeal. *Id.*

Here, the applicable statute concerns RSA 5-B:4-a, that grants the secretary of state the exclusive authority and jurisdiction to bring administrative actions to enforce 5-B and to investigate and impose penalties for violations of 5-B. In conducting the two-part analysis to determine whether 5-B:4-a is unconstitutionally retrospective, it can be stated that the legislature was silent as whether they intended the statute to apply prospectively or retrospectively, as this is not addressed in the language of 5-B:4-a. Looking to the second part of the test, determining whether the statute affects the respondents' substantive or procedural rights, it can be reasonably inferred that RSA 5-B:4-a did not create new obligations or requirements for the operation of a pooled risk management program because the reasonable standards to be followed did not change, rather, the enforcement procedure of the state changed, thereby, not resulting in additional obligations or requirements on the pooled risk management programs. A reasonable

inference can be made that RSA 5-B:4-a is procedural in nature, rather than substantive, because the statute facilitates enforcement of violations of RSA 5-B that have been in effect since 1987.

C. RSA 5-B:5 Lacks Sufficient Detail on its Face and because BSR has Improperly Failed to Promulgate Rules under RSA 5-B:5, LGC has Suffered Harm

The third basis for dismissal of Count II raised by the respondents LGC and Carroll, actually concerns three similar bases: first, that RSA 5-B:5 lacks sufficient detail on its face, second, that BSR has improperly failed to promulgate rules under RSA 5-B:5, because 5-B does not establish a required method for calculating reserves, returning surplus, or determining what administrative costs are impermissible, thereby, failing to shed light on how these statutory requirements are to be interpreted, and third, due to BSR's failure to promulgate rules, LGC has suffered harm. These three arguments are grouped together, as they are essentially the same argument, where the same set of facts, held favorable to BSR, are tested against the same applicable law. Again, BSR has alleged that since 2002, the LGC board has used an inappropriate actuarial method for calculating reserves for the 5-B Pools that inflates the capital needs of its Pools and compromises the return of surplus. (Amend. Pet. at 92). The applicable law includes RSA 5-B:5, I (c), that each program shall return all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions. Additionally, an agency's choice of proceeding in an adjudicatory rather than a rule making context is irrelevant where the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. *New Hampshire-Vermont Physician Service v. Durkin*, 113 N.H. 717, 722-23 (1973); *citing SEC v. Chenery Corp.*, 332 US 194 (1947). Moreover, the decision to proceed in this fashion lies with the agency's administrative discretion. *Id.* at 723.

As was addressed in the earlier "promulgation of *ad hoc* set of standards" argument, a reasonable inference can be made that RSA 5-B:5, I (c) does not lack sufficient detail on its face

because it details a standards to be reasonably followed by pooled risk management programs, which the BSR is attempting to enforce. Applying the above facts to the applicable law, it can be reasonably inferred that it is within the BSR's administrative discretion to decide whether to address violations of RSA 5-B:5, I (c) through adjudication rather than through the rule-making process, especially where the BSR has only gained experience in enforcing their regulatory power concerning 5-B violations since the grant of that authority on June 29, 2009.

D. BSR Impermissibly Usurps Legislative Authority in its Enforcement of 5-B:5

The fourth basis for dismissal of Count II raised by respondents, Andrews and LGC, relates to the argument that the BSR impermissibly usurps legislative authority in its enforcement of 5-B:5, specifically, that RSA 5-B:4-a, II, if interpreted as alleged by the BSR in Count II, violates part I, article 37 of the New Hampshire constitution. BSR has alleged that since 2002, the LGC board has used an inappropriate actuarial method for calculating reserves for the 5-B Pools that inflates the capital needs of its Pools and compromises the return of surplus. (Amend. Pet. at 92). The applicable law includes RSA 5-B:5, I (c), that each program shall return all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions.

Additionally, the applicable law includes RSA 5-B:4-a, II, that the secretary of state shall have all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by 5-B. Under the separation of powers article of the New Hampshire constitution, the general court may not create and delegate duties to an administrative agency if its commands are in such broad terms as to leave the agency with unguided and unrestricted discretion in the assigned field of its activity. *New Hampshire Dept. of Environmental Servs. v. Marino*, 155 N.H. 709, 715 (2007). However, to avoid the charge of unlawfully delegated

legislative power, a statute must lay down basic standards and a reasonably definite policy for the administration of the law. *Id.*

From the facts, it can be reasonably inferred that RSA 5-B:1 lays down a reasonably definite policy, that the authorization of the establishment of pooled risk management programs is for the benefit of political subdivisions of the state, which provide for accrual of interest and dividend earnings, which may be returned to the public benefit. Additionally, it can be reasonably inferred that RSA 5-B:5 also lays down basic standards for the operation of pooled risk management programs, such as: existing as a legal entity organized under New Hampshire law; governance by a board of directors; return of surplus funds in excess of amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions; annual audits; governance by written bylaws; annual actuarial evaluations; and providing for public hearings. As was addressed in the earlier "promulgation of *ad hoc* standards" argument made by the respondents, it can be reasonably inferred that RSA 5-B:5, I (c) does lay out basic standards, namely, that a pooled risk management program shall return all earnings and surplus in excess of any reasonable amounts required for administration, claims, reserves, and purchase f excess insurance.

E. BSR's Attempt to Enforce 5-B:5 Renders it Unconstitutionally Vague

The fifth basis for dismissal of Count II raised by respondents Andrews and LGC, is that RSA 5-B:5 is unconstitutionally vague, thereby violating Andrews' due process protection pursuant to part I, article 15 of the New Hampshire constitution and the fifth amendment of the US Constitution. BSR has alleged that since 2002, the LGC Board has used an inappropriate actuarial method for calculating reserves for the 5-B Pools that inflates the capital needs of its Pools and compromises the return of surplus, as addressed above. (Amend. Pet. at 92). The applicable law includes RSA 5-B:5, I (c), that each program shall return all earnings and surplus

in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions. Additionally, applicable law includes the following:

> Vagueness may invalidate a statute either because it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or because it authorizes or even encourages arbitrary and discriminatory enforcement. A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality. The specificity required by due process need not be contained in the statute itself, but rather, the statute in question may be read in the context of related statutes, prior decisions, or generally accepted usage.

Marino, 155 N.H. at 716. As was discussed above in the "impermissible usurping of legislative authority" argument, it can be reasonably inferred that RSA 5-B:5 lays down seven basic standards for the operation of pooled risk management programs. In addition, it can be reasonably inferred that the statute provides people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, such as, maintaining unreasonable excess reserves and/or amounts for administration, and failing to return surplus to members. Moreover, it can be reasonably inferred that 5-B:5 sets out the basic standards to be applied to pooled risk management programs and authorizes the BSR to enforce those provisions, it does not encourage arbitrary and discriminatory enforcement by the BSR. Furthermore, as stated in the law above, there is a strong presumption favoring the constitutionality of RSA 5-B:5, which respondents must overcome in order to find that the statute is unconstitutionally vague; and they have not done so at this stage in the proceedings and by the high threshold applied in dismissal actions.

F. Failure to State a Claim of Action

Lastly, the final basis for dismissal of Count II raised by respondents Andrews, Carroll, and Curro, relates to whether the facts pled constitute a basis for relief, specifically, that Count II does not allege any conduct by Andrews, Carroll or Curro. BSR has alleged that that since 2002,

the LGC board has used an inappropriate actuarial method for calculating reserves for the 5-B pools that inflates the capital needs of its pools and compromises the return of surplus. (Amend. Pet. at 92). In addition, BSR has alleged that LGC has failed to return surplus funds, utilized an inappropriate actuarial method to calculate required capital, improperly inflated administrative costs, misappropriated pool assets for non-pool management purposes, and transferred assets between pools without appropriate safeguards. (Amend. Pet. at 93, 95). Moreover, BSR has alleged that LGC has utilized an illegal rate stabilization program, which is an impermissible means of return of surplus funds. (Amend. Pet. at 99).

The applicable law includes RSA 5-B:5, I (c), that each program shall return all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions. From the facts, it can be reasonably inferred that the advisement of Andrews, as executive director of LGC until September 4, 2009, and Carroll, as interim executive director of LGC beginning September 5, 2009 and through her appointment as executive director on June 10, 2010, contributed to violations of 5-B:5, I (c), where their direction facilitated the failure to return surplus funds to members. It can also be reasonably inferred that Curro, through his vote as a member of the board of directors of LGC, approved the re-distribution of surplus funds to other pools or for non-pool management purposes or to carry out the rate stabilization program, in violation of RSA 5-B:5, I (c).

When utilizing the dismissal standard for the above arguments, where the facts asserted by BSR are held as true and all reasonable inferences made in the light favorable to the BSR, the amended petition sufficiently states a cause of action. Accordingly, based upon determinations made regarding each basis for dismissal of Count II, I deny all requests for dismissal by the objecting respondents to this Count, including those who joined in writing or by oral notice.

Count III. Sale of Unregistered Securities by Unlicensed Broker-Dealers, Issuer-Dealers, and Agents in Violation of RSA 421-B:6 and 11;

Count IV. Knowing or Negligent Aid in the Sale of Unregistered Securities by Unlicensed Broker-Dealers, Issuer-Dealers, and Agents by the Individual Respondents in Violation of RSA 421-B:26, III-a; and

Count V. Fraud, Deceit and Material Omissions in Connection with the Offer or Sale of Securities in Violation of RSA 421-B:3.

The respondents' oral presentations and argument at hearing addressed Counts III, IV, and V collectively and those positions are likewise collectively addressed in this decision. The analysis below is organized to reflect the respondents' several grounds to dismiss all or a portion of Counts III, IV, and V.

A. Failure to State a Claim

The first basis for dismissal of Counts III, IV, and V, raised by the respondents Andrews, LGC, Carroll, and Curro, regards BSR's failure to state a claim for which relief may be granted as to the sale of unregistered securities. In reviewing a motion to dismiss, the test is whether the allegations in the amended petition are reasonably susceptible of a construction that would permit recovery. *Ford v. New Hampshire Dept. of Transp.*, 2012 WL 592899, at *1 (N.H. 2012). It is assumed that the petitioners' factual allegations are true, as are all reasonable inferences to be drawn from them in the light most favorable to [BSR]. *Id.*; *see Opinion of the Justices*, 138 N.H. 445, 450 (1994). However, the truth of statements that are merely conclusions of law need not be assumed. *Ford*, 2012 WL 592899 at *1. The threshold inquiry tests the facts in the amended petition against the applicable law. *Id.* The motion is denied if those facts and inferences so viewed would constitute a basis for legal relief. *Opinion of the Justices*, 138 N.H. at 450.

First, BSR has alleged that risk pool contracts are securities that must be registered with the BSR, because pursuant to RSA 421-B, members invest their money (member contributions), in common enterprises (5-B Pools), and have an expectation of a profit in the form of a return of earnings. (Amend. Pet. at 109). Additionally, BSR has alleged that LGC advertises a return on investments to members, previously, as checks paid to members and currently, in the form of rate stabilization. (Amend. Pet. at 109). BSR has further alleged the following: to achieve the advertised returns on investment, the LGC board directs the investment of member contributions and achieves substantial investment income above and beyond the operating expenses of the 5-B pools; once Members make their annual contributions in the 5-B pools, LGC and its professional agents unilaterally manage the investment of the member funds to achieve a return on investment; and members have no input or control over the investment and management of their funds once transferred to the 5-B pools. (Amend. Pet. at 109). BSR has also alleged that neither LGC and its subsidiaries nor HealthTrust, Inc. or NHMA Prop. Liab. Trust, Inc. have registered their risk pool contracts as securities with the BSR. (Amend. Pet. at 112). Moreover, BSR has alleged that LGC is a broker-dealer that must be licensed by the BSR, LGC HealthTrust, LLC, LGC Prop. Liab. Trust, LLC, and LGC Workers' Comp Trust, LLC are each issuer-dealers and must be licensed, and finally, LGC's officers and employees, including Andrews and Carroll, are agents that are required to be licensed by the BSR. (Amend. Pet. at 114-16).

Secondly, BSR has alleged that Andrews, Carroll, and each member of the LGC board either knowingly or negligently aided LGC in selling unregistered securities. (Amend. Pet. at 120). BSR has also alleged that individual respondents participated in, or approved, the marketing of risk pool contracts to members and potential members with a purpose of inducing investment in the 5-B Pools by members by creating an expectation of value and/or a return on investment. (Amend. Pet. at 121). Moreover, BSR has alleged that the individual respondents

knew, or should have known through the exercise of reasonable care, that broker-dealers, issuer-dealers, and agents must be licensed in order to offer securities for sale in New Hampshire. (Amend. Pet. at 122).

Lastly, BSR has alleged facts from which reasonable inferences can be taken that all respondents have failed to disclose material facts, in connection with the offer or sale of securities in the form of both NHMA membership contracts and risk pool contracts. (Amend. Pet. at 125). BSR has not sufficiently shown that NHMA membership contracts are securities and actions alleged to have been undertaken by respondents based upon that characterization are not therefore given any weight in this argument. BSR has alleged that all respondents have failed to disclose material facts to members and potential members including, but not limited to: risk pool contracts are unregistered securities; LGC and its subsidiaries are not licensed as broker-dealers or issuer-dealers as required by law to offer or sell securities; and LGC's officers and employees are not licensed agents as required by law to offer or sell securities. (Amend. Pet. at 125). Moreover, BSR has alleged that respondents have used member funds held in trust in the 5-B pools for non-pool purposes without the knowledge or written authorization of members, including, but not limited to: diverting member funds from the HealthTrust and Prop. Liab. Trust pools to LGC for use to subsidize the Workers Comp Pool and diverting member funds from the HealthTrust and Prop. Liab. Trust pools to LGC for the benefit of LGC's non-pool administrative activities. (Amend. Pet. at 127).

The applicable law includes RSA 421-B:11, that it is unlawful for any person to offer or sell any security in this state unless it is registered under 421-B, as well as 421-B:6, that requires all broker-dealers, issuer-dealers, and agents to be licensed with the BSR. Additionally, RSA 421-B:26, III-a applies, where every broker-dealer or agent who materially aids in the acts or transaction constituting the violation, either knowingly or negligently, may be subject to an

administrative fine not to exceed $2,500. Lastly, RSA 421-B:3, I (b) and (c) are applicable, where it is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; and to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

From the detailed facts above, which must be taken as true under the dismissal standard, it can be reasonably inferred that LGC, HealthTrust, Inc. and NHMA Prop. Liab. Trust, Inc. are in violation of 421-B:11 by not registering the risk pool contract securities. Additionally, from the facts it can be reasonably inferred that: LGC, by offering and selling the securities, is a broker-dealer; by issuing the securities, LGC HealthTrust, LLC, LGC Prop. Liab. Trust, LLC, and LGC Workers' Comp Trust, LLC are issuer-dealers; and Andrews and Carroll, as facilitators of the offering and selling of securities, are agents, all of whom are not licensed, in violation of 421-B:6. Also, it can be reasonably inferred that the advisement of Andrews, as executive director of LGC until September 4, 2009, and Carroll, as interim executive director of LGC beginning September 5, 2009 and through her appointment as executive director on June 10, 2010, contributed in effecting or attempting to effect purchases or sales of securities by participating in or approving the marketing of risk pool contracts to members and potential members with a purpose of inducing investment in the 5-B pools. Likewise, it can also be reasonably inferred that Curro, through his participation and voting privilege as a member of the board of directors of LGC, contributed in effecting or attempting to effect purchases or sales of securities. Also, it can be reasonably inferred that Andrews, Carroll, and Curro violated RSA 421-B:26, III-a, as agents who knowingly or negligently aided LGC in the sale of unregistered

securities because of their contributions to effecting or attempting to effect purchases or sales of securities.

Additionally, it can be reasonably inferred from the facts alleged that the advisement of Andrews, as executive director, and Carroll, as first, interim executive director, and then, executive director, contributed to the failure to disclose material facts, in connection with the offer or sale of securities in the form of risk pool contracts, through failing to disclose that risk pool contracts are securities and that as an agent of LGC, they were not licensed as required by law to offer or sell securities. Likewise, it can also be reasonably inferred that Curro, through his participation and voting privilege as a member of the board of directors of LGC, contributed to the failure to disclose material facts, in connection with the offer or sale of securities in the form of risk pool contracts. Lastly, it can be reasonably inferred that Andrews, as executive director, and Carroll, as interim executive director and later, executive director, contributed to directing or approving the diverting of member funds from the HealthTrust and Prop. Liab. Trust pools to LGC to then subsidize the Workers' Comp Pool, and diverting member funds from the HealthTrust and Prop. Liab. Trust pools to LGC for the benefit of LGC's non-pool administrative activities. Likewise, it can also be reasonably inferred that Curro, through his participation and voting privilege as a member of the board of directors of LGC, contributed to the directing or approving of the diversion of funds from HealthTrust and Prop. Liab. Trust to LGC to then subsidize the Workers' Comp Pool, and diverting member funds from the HealthTrust and Prop Liab. Trust pools to LGC for the benefit of non-pool activities.

B. Risk Pool Contracts Are Not Investment Contracts

The second basis for dismissal of Counts III, IV, and V, raised by the respondents Andrews, LGC, Carroll, and Curro, relates to the argument that the risk pool contracts (participation agreements) are not investment contracts under the *Howey* test. BSR has alleged

that risk pool contracts are securities that must be registered with the BSR because members invest their money (member contributions), in common enterprises (5-B pools), and have an expectation of a profit in the form of a return of earnings. (Amend. Pet. at 109). Additionally, BSR has alleged that LGC advertises a return on investments to members, previously, as checks paid to members and currently, in the form of rate stabilization. (Amend. Pet. at 109). BSR has further alleged the following: to achieve the advertised returns on investment, the LGC board directs the investment of member contributions and achieves substantial investment income above and beyond the operating expenses of the 5-B pools; once members make their annual contributions in the 5-B pools, LGC and its professional agents unilaterally manage the investment of the member funds to achieve a return on investment; and members have no input or control over the investment and management of their funds once transferred to the 5-B pools. (Amend. Pet. at 109).

The applicable law includes the *Howey* test, where an investment contract, for the purposes of the federal Securities Act, is defined as a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. *SEC v. W.J. Howey Co.*, 328 US 293, 298-99 (1946).

1. No Expectation of Profit

Respondents, Curro, LGC, Carroll, and Andrews argue that members who engage in risk pool contracts do not do so with an expectation of profit, rather, they enter into risk pool contracts to acquire and use insurance products or coverage, thereby failing to satisfy the *Howey* element of "expectation of profit." From the facts detailed above, it can be reasonably inferred

that member and potential members had an expectation of profit, either in the form of a check, as previously was custom, or in the form of rate stabilization.

2. No Investment of Money

Respondents, LGC, Carroll, and Andrews also argue that member contributions are not investments and do not satisfy the *Howey* element of "investment of money" because they do not contain the traditional attributes of an investment. Applicable law also includes, whether a person found to be an investor chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security, such as in *Howey*, where money was paid for the purchase, maintenance and harvesting of an orange grove. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 559-60 (1979). From the facts detailed above, it can be reasonably inferred that members chose to give up a specific consideration, cash contributions, to invest in a common enterprise, the 5-B pools. Similar to *Howey*, it can be reasonably inferred that members paid money to invest in risk pool contracts.

3.Outcome of Investment Does Not Depend Solely on Efforts of LGC

Respondents, LGC, Carroll, and Andrews next argue that the return of any funds does not satisfy the *Howey* element that funds "come solely through the efforts of the promoter or some third party," rather, the returns are based on members' own claims history and are within control of the member. Not withstanding that claims history may affect the amount of a members' contributions, from the facts detailed on page twenty of this decision, it can be reasonably inferred that once members make these annual contributions, the management of the investment is out of their hands, and is under the direction and control of the LGC board, thereby, any profit from the investment comes solely through the efforts of the LGC board.

4. Members are Motivated to Enter Risk Pool Contracts By the Desire to Consume the Item Purchased

Respondent LGC argues that the possibility of rate reduction from the return of surplus is not what motivates members to enter into risk pool contracts, rather, it is the desire to use or consume the item purchased. As addressed in the "expectation of profit" argument, referencing the same facts detailed on page twenty of this decision, it can be reasonably inferred that members and potential members had an expectation of profit, either in the form of a check, as previously was custom, or in the form of rate stabilization.

5. Speculative Possibility of Profits is Insufficient to Create a Security

Respondent LGC next argues that any speculative and insubstantial possibility of risk pool members realizing a profit is insufficient to create a security. Again, as addressed in the "expectation of profit" argument, including those facts relating to the historic record of disbursement of returns, it can be reasonably inferred that members and potential members had an expectation of profit beyond a speculative possibility, in the form of return on earnings as advertised by LGC, either in the form of a check, as previously was custom, or in the form of rate stabilization.

6. Treating Risk Pool Contracts as Investment Contracts Contradicts State and Federal Precedent

Respondent Carroll argues that the BSR's attempt to treat risk pool contracts as investment contradicts state and federal precedent because no other jurisdiction or regulatory agency has ever held risk pool contracts in pooled risk management programs to be investment contracts. As addressed in the above arguments regarding the *Howey* elements, it can be reasonably inferred that members chose to give up specific consideration, namely, cash contributions, to invest in a common enterprise, the 5-B pools, with an expectation of profit, in

the form of return on earnings, either in the form of a check, as previously was custom, or in the form of rate stabilization, and that once members make their annual contributions, the management of the investment is out of their hands, and is under the direction and control of the LGC board, thereby satisfying all elements of the *Howey* test. A reasonable inference can be made that risk pool contracts are investment contracts, because they satisfy the *Howey* test which is a federal case precedent and is law that is applicable to this case, at least as agreed by the respondents in their oral arguments.

7. Administrative Gloss

Respondent Carroll argues that the BSR's history of not treating membership interests in 5-B pools as securities satisfies the elements of administrative gloss. To qualify as administrative gloss a statutory clause must first be determined to be ambiguous. As stated above in addressing arguments put forward by respondents, neither RSA 5-B or RSA 421-B are found to be lacking in clarity necessary to a determination on these dispositive motions at this stage of the proceedings. A second element of the administrative gloss doctrine is that the informal *de facto* interpretation must actually exist and be of long standing. Here, by agreement of the parties we are faced with a case of first impression in this jurisdiction that arises from the passage of a statue that only recently placed the BSR in any position to make any relevant interpretation. Any reliance on "long-standing" is misplaced. Further, as addressed above in the "treating risk pool contracts as investment contracts contradicts state and federal precedent" argument, testing the above facts held favorable to the BSR, to the applicable law, specifically, the *Howey* test elements, the facts and the reasonable inferences to be drawn from them in the light most favorable to the BSR, sufficiently state a cause of action that risk pool contracts may be investment contracts, whether or not state and federal precedent has said otherwise. Likewise, it is reasonable to infer that risk pool contracts may satisfy the *Howey* elements and be considered

investment contracts, whether or not BSR has ever previously considered if membership interests in 5-B pools constitute securities.

C. BSR Fails to Adequately Allege NHMA Memberships are Securities

The third basis for dismissal of Counts III, IV, and V, raised by respondents Andrews, Carroll, and Curro, relates to the argument that the amended petition fails to make any allegations that membership interests in NHMA are investment contracts. BSR has alleged that membership interests in NHMA, LLC and participation contracts for participation in each of the 5-B pools (risk pool contracts) are investment contracts. (Amend. Pet. at 107). Additionally, BSR has alleged that NHMA membership contracts and risk pool contracts are unregistered securities. (Amend. Pet. at 125). The applicable law includes RSA 421-B:11, that it is unlawful for any person to offer or sell any security in this state unless it is registered under 421-B, as well as 421-B:6, that requires all broker-dealers, issuer-dealers, and agents be licensed with the BSR. Unlike the facts appearing on pages 20 and 21 of this decision ascribed to the risk pool contracts characterizing them as securities, the same cannot be said regarding the membership agreements between political subdivisions and the NHMA, LLC. Nor were any additional facts asserted at hearing that would require similar reasonable inferences, under the dismissal standards applicable here, to be granted to BSR's allegations that memberships in NHMA, LLC are securities. Nor, without additional facts describing the operation of NHMA, LLC, its management of investments and its products can it be reasonably inferred that membership interests in NHMA, LLC similarly satisfy the *Howey* elements, as the risk pool contracts appear to do so. Therefore, taking as true what little has been offered by BSR in its amended petition and its oral presentation concerning NHMA, LLC and considering any reasonable inferences from those scant facts viewed in a favorable light this aspect of Counts III, IV and V, i.e. the failure to register NHMA, LLC membership agreements as being violations of RSA 421-B:11

and the failure of individuals to register as broker-dealers, issuer-dealers, and agents solely of NHMA, LLC membership agreements under RSA 421-B:6 is dismissed.

D. Risk Pool Contracts Are Not Securities Under the Risk Capital Test

The fourth basis for dismissal of Counts III, IV, and V, raised by respondents LGC and Carroll, regards whether risk pool contracts are securities under the risk capital test. Since the risk capital test has been applied in other jurisdictions, we address it here, for purposes of the motions to dismiss and motion for summary judgment. BSR has alleged that member contributions paid as consideration for risk pool contracts are an investment that furnishes initial value to LGC in the form of control of member assets. (Amend. Pet. at 111). Additionally, BSR has alleged that because LGC invests member contributions, a portion of the initial value provided to LGC is subjected to the risks of the enterprise. (Amend. Pet. at 111). Furthermore, BSR has alleged that members purchase risk pool contracts in reliance on LGC's inducements of below market rates for coverage, which create an expectation of benefits over and above the initial value of member contributions, as a result of LGC's advertised efforts to manage the risk pools. (Amend. Pet. at 111).

The applicable law is the "Risk Capital" test, which has four elements: (1) an investment furnishing initial value to the offeror; (2) a portion of this initial value is subjected to the risks of the enterprise; (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise; and (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise. *State v. Hawaii Market Center, Inc.*, 52 Haw. 642, 649 (1971).

From the facts above, it can be reasonably inferred that the member contributions, paid as consideration for risk pool contracts, furnish initial value to LGC. It can also be reasonably inferred that because LGC invests member contributions, a portion of the initial value provided to LGC is subjected to the risks of the enterprise that LGC invests in. Additionally, it can be reasonably inferred that the member contributions are induced by LGC's below market rates for coverage and that the members do not have a right to exercise control over the managerial decisions of the enterprise because the risk pools are managed through LGC's efforts.

E. Risk Pool Contracts Are Exempt Under New Hampshire Securities Laws

The fifth basis for dismissal of Counts III, IV, and V, raised by respondents, relates to the exemption of risk pool contracts under New Hampshire Securities laws.

1. Risk Pool Contracts Are Agreements for Insurance

Respondent Carroll has moved for dismissal of Counts III, IV, and V, and respondent Curro has moved for dismissal of Count IV, on the basis that risk pool contracts and NHMA membership contracts are agreements for insurance, and exempt from the definition of a security under RSA 421-B:2, XX(a). BSR has alleged that members invest their money (member contributions), in common enterprises (5-B Pools), and have an expectation of a profit in the form of a return of earnings. (Amend. Pet. at 109). Additionally, BSR has alleged that LGC advertises a return on investments to members, previously in the form of checks, and currently in the form of rate stabilization. (Amend. Pet. at 109). The applicable law includes RSA 421-B:2, XX(a), where a security does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period. From the facts above, it can be reasonably inferred that the relevant LGC 5-B risk pool entity does not sell insurance policies because it does not

promise to pay money in a lump sum or periodically for life, rather, it advertises a return on investments to members. There is insufficient evidence to establish NHMA, LLC agreements are agreements for insurance.

2. Risk Pool Contracts are Exempted Because they Are Issued/Guaranteed by Subdivisions

Respondent LGC has moved for dismissal of Counts III, IV, and V on the basis that risk pool contracts are exempted from registration requirements because they are issued or guaranteed by the subdivisions of a state. BSR has alleged that the initial formation documents for all three entities, LGC, HealthTrust, Inc., and NHMA Prop. Liab. Trust, indicate that they were created by individuals and not by the state or one of its political subdivisions. (BSR Omnibus Obj. to Resp. Disp. Mtn. at Exhibit G). The applicable law includes RSA 421-B:17, I(a),where any security issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency, or corporate or other instrumentality, of one or more of the foregoing, is exempted from RSA 421-B:11. From the fact above, it can be reasonably inferred that LGC, HealthTrust, Inc., and NHMA Prop. Liab. Trust are not public corporations of the state or any of its political subdivisions, nor are they public instrumentalities of the state or any of its subdivisions because they were created by individuals and not the state or one of its political subdivisions.

F. BSR Fails to Allege Carroll's Role in Claimed Violations

Lastly, the final basis for dismissal of Counts III, IV, and V, raised by respondent Carroll, relates to BSR's failure to allege Carroll's role in the claimed violations.

1. Fails to Allege "Agent" and "Knowingly or Negligently"

Respondent Carroll has moved for dismissal of Counts III and IV on the basis that the BSR does not allege how Carroll is an agent of LGC under RSA 421-B:2, II and that BSR fails to allege how Carroll knowingly or negligently aided the LGC in the sale of unregistered securities. BSR has alleged that LGC's officers and employees, including Carroll, are agents and are required to have been licensed as agents with the BSR prior to offering or selling risk pool contracts in New Hampshire. (Amend. Pet. at 116). Additionally, BSR has alleged that Andrews, Carroll, and each member of the LGC Board, either knowingly or negligently aided LGC in selling unregistered securities. (Amend. Pet. at 120). BSR has also alleged that the individual respondents participated in, or approved, the marketing of risk pool contracts to members and potential members with a purpose of inducing investment in the 5-B Pools by members by creating an expectation of value and/or a return on investment. (Amend. Pet. at 121). Moreover, BSR has alleged that the individual respondents knew, or should have known through the exercise of reasonable care, that broker-dealers, issuer-dealers, and agents must be licensed in order to offer securities for sale in New Hampshire. (Amend. Pet. at 122).

The applicable law includes RSA 421-B:2, II, where an agent is defined as any individual who represents a broker-dealer, issuer or issuer-dealer in effecting or attempting to effect purchases or sales of securities. Additionally, applicable law also includes RSA 421-B:26, III-a, where every broker-dealer or agent who materially aids in the acts or transaction constituting the violation, either knowingly or negligently, may be subject to an administrative fine not to exceed $2,500. As addressed in the "failure to state a claim" argument and from the facts detailed above, it can be reasonably inferred that the advisement of Carroll, as interim executive director of LGC beginning September 5, 2009 and through her appointment as executive director on June 10, 2010, contributed in effecting or attempting to effect purchases or sales of securities by participating in or approving the marketing of risk pool contracts to members and potential

members with a purpose of inducing investment in the 5-B pools. Also, it can be reasonably inferred that Carroll violated RSA 421-B:26, III-a, as an agent who knowingly or negligently aided LGC in the sale of unregistered securities because of her contribution to effecting or attempting to effect purchases or sales of securities.

2. Fails to Plead Fraud with Particularity

Respondent Carroll has moved for dismissal of Count V on the basis that since Count V accuses her of fraud, it must be plead with particularity. BSR has alleged that the respondents have failed to disclose material facts, in connection with the offer or sale of securities in the form of both NHMA membership contracts and risk pool contracts. (Amend. Pet. at 125). For reasons stated above, NHMA membership agreements are not deemed to be securities and are not further considered in relation to this issue of fraud. Specifically, BSR has alleged that the respondents have failed to disclose material facts to members and potential members including, but not limited to: risk pool contracts are unregistered securities; LGC and its subsidiaries are not licensed as broker-dealers or issuer-dealers as required by law to offer or sell securities; and LGC's officers and employees are not licensed agents as required by law to offer or sell securities. (Amend. Pet. at 125). Moreover, BSR has alleged that the respondents have used member funds held in trust in the 5-B Pools for non-pool purposes without the knowledge or written authorization of members, including, but not limited to: diverting member funds from the HealthTrust and Prop. Liab. Trust pools to LGC to subsidize the Workers Comp Pool and diverting member funds from the HealthTrust and Prop. Liab. Trust pools to LGC for the benefit of LGC's non-pool administrative activities. (Amend. Pet. at 127).

The applicable law includes RSA 421-B:3, I (b) and (c), where it is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: to make any untrue statement of a material fact or to omit to state a material fact necessary in order

to make the statements made, in the light of the circumstances under which they are made, not misleading; and to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person. Additionally, applicable law includes RSA 421-B:26-a, XX, that states administrative hearings shall not be bound by common law or statutory rules of evidence, nor by technical or formal rules of procedure. Therefore, typical civil court pleading standards do not apply in the instant case.

Again, as addressed in the "failure to state a claim" argument and from the facts detailed above, it can be reasonably inferred that the advisement of Carroll, as an interim executive director, then, executive director, contributed to the failure to disclose material facts, in connection with the offer or sale of securities in the form of both risk pool contracts, through failing to disclose that risk pool contracts are securities and that as an agent of LGC, she was not licensed as required by law to offer or sell securities. Also, it can be reasonably inferred that Carroll, as interim executive director and later, executive director, contributed to directing or approving the diverting of member funds from the HealthTrust and Prop. Liab. Trust pools to LGC to then subsidize the Workers' Comp Pool, and diverting member funds from the HealthTrust and Prop. Liab. Trust pools to LGC for the benefit of LGC's non-pool administrative activities.

When utilizing the dismissal standard for the above arguments, where the facts asserted by BSR are held as true and all reasonable inferences made in the light favorable to the BSR, the amended petition sufficiently states a cause of action. Accordingly, for the determinations made regarding each basis for dismissal of Counts III, IV, and V, I deny all requests for dismissal by the objecting respondents to these Counts, including those who joined in writing or by oral notice.

Ruling on Motion for Summary Judgment as to Counts I and II, and Partial Summary Judgment as to Counts III, IV, and V

Respondent Carroll has moved for summary judgment on Counts I-V as to conduct predating September 4, 2009, on the basis that prior to becoming interim executive director, Carroll had no responsibility for any alleged misconduct, and therefore, cannot be held liable for it. Additionally, respondent Carroll has moved for summary judgment on Counts I and II as to conduct predating September 4, 2009, on the basis that as a executive director, Carroll acted under the discretion of the LGC Board and did not breach any duties. In reviewing a motion for summary judgment, the pleadings, discovery, and affidavits presented in the record and "all inferences properly drawn therefrom, [are construed] in the light most favorable to the non-moving party." *MacLearn v. Commerce Insur. Co.*, 2012 WL 246650, *2 (N.H. 2012); *see Opinion of the Justices*, 138 N.H. 445, 450 (1994). If "review of that evidence discloses no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law," then grant of summary judgment is proper. *MacLearn*, 2012 WL 246650 at *2.

First, Carroll claims she did not have responsibility for LGC or its risk pools prior to becoming the interim executive director on September 4, 2009. She argues that although she did provide status reports to the LGC board and participated in discussions in her staff role as counsel for NHMA, she was not a decision-maker for LGC. Moreover, she claims at no time as "general counsel" did she provide legal advice or exercise control over LGC, including risk pools. However, the BSR alleges that she was listed as legal counsel in the LGC board minutes, and is described as LGC's general counsel in an article in LGC's Town and City magazine. (BSR Omnibus Obj. to Resp. Disp. Mtn. at Exhibits C & D). Additionally, Carroll admits that she was the only attorney on the leadership team that advised the Executive Director. (BSR Omnibus Obj. to Resp. Disp. Mtn. at Exhibit A). Considering the disputed issues above, a

reasonable inference can be made that Carroll's responsibilities as "general counsel" for NHMA may have extended also to the LGC, in which she had some degree of influence over the board. Since there are disputed issues of material fact as to Carroll's responsibilities prior to September 4, 2009, summary judgment is improper at this time.

Second, Carroll claims that she has no impact on the LGC board as an executive director because she has no vote on the board or decision-making authority. She argues that although she may make recommendations to the board, she cannot compel the recommendations to be adopted. Moreover, she claims that under the LGC bylaws, an executive director is neither a director nor an officer of LGC, and therefore, she has no fiduciary duty of care to LGC. Yet, as executive director, Carroll's duties can be reasonably inferred to be similar, if not identical to those of Andrews', which included:

> conduct the daily affairs of the LGC, including all of its current and future component divisions and services, under the direction and supervision of the LGC Board of Directors; act as Treasurer of the LGC and be responsible for the disbursement of LGC funds; act as Secretary of the LGC; and render an annual account of the activities of the LGC to the President, the Board of Directors, and the membership and otherwise as may be required by the Board. Conduct of the daily affairs shall include, without limitation, recommending to and carrying out policies established by the Board of Directors; recruitment, retention, evaluation, discipline and discharge of all necessary staff; managing the physical facility and offices of the LGC; locating and recommending various contractors; supervising and reporting on contractors' performance; providing financial and accounting reports; and maintaining excess re-insurance or other insurance.

(BSR Omnibus Obj. to Resp. Disp. Mtn. at Exhibit E ¶ 2.1). Additionally, according to LGC's financial audit reports, LGC's management was responsible for the consolidated statements of financial position submitted for the annual Independent Auditor's Report. (BSR Omnibus Obj. to Resp. Disp. Mtn. at Exhibit F). It is a reasonable inference to believe that Carroll was part of that management. Considering the disputed issues above, a reasonable inference can be made that

Carroll did have active involvement in facilitating ongoing violations of RSA 5-B in her role as executive director, and may have also owed fiduciary duties to members in her role as executive director. Since there are disputed issues of material fact as to Carroll's involvement with and influence on the LGC board, as executive director, summary judgment is improper at this time.

Lastly, Carroll claims that the decisions to restructure and transfer funds were not made while she served as executive director. However, it is reasonable to infer that she has had sufficient influence via direct action or recommendation within the LGC and upon its board to affect compliance with the statute and avoid violations because she also has argued that a ratification theory would fail because under her tenure as executive director LGC remedied flaws, citing actions that resulted in: any subsidization of Workers' Comp by HealthTrust has ceased, Carroll solicited legal advice on how to remedy technical flaws regarding restructuring, and HealthTrust reserves have been reduced significantly. Considering the disputed issues above, a reasonable inference can be made that Carroll did have involvement in LGC's current corporate structuring and operation.

The parties allegations do present disputed issues of material fact as to Carroll's involvement with and influence on the LGC board, as executive director, and where such genuine issues of material facts exist, grant of summary judgment is not permissible. Therefore, I must deny the motion for summary judgment.

So ordered, this 4th day of April, 2012

/s/ Donald E. Mitchell, Esq.

Donald E. Mitchell, Esq., NH Bar #1773

Presiding Officer

cc: Jeffrey D. Spill, Esq.
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