THE STATE OF NEW HAMPSHIRE
SUPREME COURT
2012 TERM

Case No. 2012-0729

In re: Local Government Center, Inc., *et al.*

BUREAU OF SECURITIES REGULATION'S
OBJECTION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

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NOW COMES the Appellee, the New Hampshire Bureau of Securities Regulation (the "Bureau"), through counsel the New Hampshire Attorney General and Bernstein, Shur, Sawyer & Nelson, P.A., and objects to the Motion for Stay Pending Appeal filed by the Appellant Local Government Center, Inc. and affiliated entities (collectively "LGC") on October 15, 2012 because the entry of the stay will permit the LGC to spend, encumber or alienate assets and further alter its organizational structure to render the relief ordered below by the Presiding Officer impossible to enforce when the August 16, 2012 Final Order is upheld on appeal.

I. Introduction

Having ignored the dictates of the Final Order – refusing to confer with its regulator, the Bureau, on a plan for the return of excess surplus funds to LGC's members and refusing to take any steps to prepare to implement the ordered relief – the LGC now moves this Court for equitable relief in the form of a stay, claiming that it will be "extraordinarily difficult" to comply with the Final Order in the time allotted. Yet it is the LGC's own course of conduct in failing to comply with R.S.A. 5-B and ignoring the requirements of the Final Order that has resulted in the alleged harm now claimed by LGC. See Cumberland Farms Northern, Inc. v. New Hampshire Milk Control Bd., 104 N.H. 364, 367 (1963) (finding justice did not warrant a stay pending appeal where the irreparable harm claimed by the plaintiff arose from its choice "to test the validity of the statute and the Board's orders thereunder by disregarding them").

The LGC offers a one-sided view of its alleged hardship if the Final Order goes into effect, and seeks an open-ended stay that would give LGC *carte blanche* to continue the very actions that the Presiding Officer found to be in violation of R.S.A. 5-B. The award of a stay also would permit LGC during the appeal to divest or encumber assets, and to re-organize all in

an effort to evade ultimate enforcement of the Final Order. A stay also disadvantages LGC members who must budget on an annual cycle.

The LGC summarily dismisses any possible harm to the participating political subdivisions or their taxpayers, despite the fact that a stay would enable the LGC to: 1) continue to overcharge towns and cities in a time of economic distress where every dollar counts in municipal budgets; 2) spend down the excess surplus funds that the Presiding Officer ordered returned to towns and cities as LGC did in 2009 just prior to the Bureau obtaining regulatory authority; 3) continue to use member funds to subsidize a failing workers compensation program without disclosing to, or obtaining the permission of, the members who foot the bill; 4) continue to encumber member funds in risky and long-term illiquid investment vehicles and contracts that are off limits to municipalities that will make it difficult and costly to return funds to towns and cities when the Final Order is upheld on appeal; 5) continue to manage approximately $400 million annually of taxpayer money through an inherently unaccountable and non-transparent process by a board structure fraught with irreconcilable conflicts of interest; 6) continue to require members to pay dues to the NHMA, the LGC's lobbying arm, in order to obtain insurance coverages; and 7) continue to spend hundreds of thousands of dollars of member funds to challenge a set of reasonable requirements already agreed to by New Hampshire's other two risk pools, PRIMEX and SchoolCare.

To justify the extraordinary relief sought, the LGC claims the Final Order will cause "enormous disruption and expense." Motion for Stay at 4. Yet, the LGC fails to explain how any "disruption and expense" would constitute irreparable harm. Indeed, LGC provides no analysis beyond its conclusory statements that irreparable harm would occur. Moreover, despite claiming its success on appeal is a certainty, LGC provides no explanation of how it will overcome the

presumption of reasonableness afforded to administrative decisions, Union Fidelity Life Ins. Co. v. Whaland, 114 N.H. 549 (1974), or the presumption that the Presiding Officer's findings of fact are *prima facie* lawful and reasonable. Appeal of Regenesis Corp., 937 A.2d 279, 284 (N.H. 2007). In fact, LGC presents no evidence, only argument, to support its claims of irreparable harm or likelihood of success on the merits.

In the absence of any evidence to demonstrate a substantial likelihood of success on the merits on appeal or that enforcement of the Final Order will cause any actual irreparable harm to LGC, there is nothing for this Court to balance against the substantial harm to the public and participating political subdivisions that would occur if the Final Order were stayed. There is also nothing to balance against the possibility that the LGC will take actions during the pendency of a stay that will make the Final Order unenforceable. Consequently, nothing in LGC's motion justifies the LGC's request for a free hand to continue the illegal and improper activities documented in the detailed 81-page Final Order during appeal. The Motion to Stay should be denied and the Final Order should be allowed to become effective immediately.

II. Legal Standard for Granting a Stay

Pursuant to R.S.A. 541:18, a timely appeal to this Court shall not suspend operation of an administrative order pending appeal. The Court may issue a stay suspending enforcement of an administrative order pending appeal only when, "in the opinion of the court, justice may require suspension." R.S.A. 541:18. This Court may grant a stay "subject to conditions, or may deny the request" altogether. New Hampshire Milk Dealers' Assoc. v. New Hampshire Milk Control Bd., 107 N.H. 150, 151 (1966).

The considerations for whether to grant a stay of an administrative order are generally similar to those applied to a preliminary injunction. See, e.g., Bangor Historic Track, Inc. v.

Dept. of Agriculture, 837 A.2d 129, 132 (Me. 2003) (applying test for injunctive relief to request for a motion to stay temporary restraining order); State *ex rel.* Director of Revenue v. Gabbert, 925 S.W.2d 838, 839 (Mo. 1996) ("The factors and analysis for granting a stay of an administrative order are substantially the same as those for issuing a preliminary injunction."). "To satisfy the standard for the issuance of a stay, the movant must establish that there is a strong likelihood of success on the merits of its appeal; that he will suffer irreparable harm if a stay is not granted; that the harm will outweigh any harm opposing parties will suffer if a stay is granted; and that the public interest would be furthered by the granting of a stay. Failure to meet even one of the criteria justifies denial." In re Power Recovery Systems, Inc., 950 F.2d 798, 804 n.31 (1st Cir. 1991) (citations omitted). See also 2 Am. Jur. 2d Administrative Law § 556 (same).

This Court adopted a somewhat more condensed test in Union Fidelity Life Ins. Co. v. Whaland, 114 N.H. 549 (1974), identifying the following conditions that must be satisfied by the party seeking a stay:

> First, there must be a showing that the plaintiff will suffer irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect. Second, it must be clear that the harm to the plaintiff outweighs the public interest in enforcing the order for the duration of the appeal.

114 N.H. at 549. In addition, the Union Fidelity Court recognized a "presumption of reasonableness [] accorded to administrative orders" and expressed a reluctance to grant stays of administrative orders. Id. The Court went on to caution that the "mere fact that an administrative decision may cause injury or inconvenience to the plaintiff is insufficient to warrant a suspension of order." Id.

Implicit in a showing of irreparable harm from the enforcement of an administrative order pending appeal is a showing of a substantial likelihood of success on the merits of the appeal. Otherwise, there would be no harm to the moving party in the immediate enforcement of

the administrative order. With this in mind, the balancing test in Union Fidelity is substantially similar to the 4-part test set forth in Power Recovery Systems. Consequently, to justify the extraordinary relief of a stay, LGC must demonstrate that it will "suffer irreparable harm" that "outweighs the public interest," and that there is a substantial likelihood of success on appeal.

III. Argument

A. LGC Relies on an Incorrect Standard for Irreparable Harm

Fundamental to LGC's misperception of the standard for a stay is its improper reliance on the First Circuit's Providence Journal case for the proposition that "[j]ustice requires a stay in this case because '[m]eaningful [appellate] review entails having the reviewing court take a fresh look at the decision of the [Presiding Officer] before it becomes irrevocable.'" Motion for Stay at 3 (quoting Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979)). Providence Journal is inapposite.

The Providence Journal case concerned the threatened public release of private information while a matter was on appeal.[1] Once the information was released, of course, the "cat was out of the bag" and the harm resulting from the public release of the illegally acquired information was irreparable. See Providence Journal, 595 F.2d at 889-90. By contrast, and as set forth in more detail below, LGC's harm if a stay is denied is ***not*** irreparable. Unlike public disclosure of private information, reserves can be recouped, corporate transactions can be reversed, and actuarial calculations can be revised.

In addition, LGC's suggestion of "enormous disruption and expense" and a "great expense of time and money," Motion for Stay at 4, 5, does not constitute irreparable harm. Not only do the facts not support these assertions, the legal premise is contrary to settled law.

[1] A Rhode Island newspaper sought to publish the results of an illegal FBI wiretap of the Patriarca crime family before the appeal was final. Providence Journal, 595 F.2d at 889-90.

Irreparable harm is an injury that is "beyond remediation." Sterling Commercial Credit—Michigan, LLC v. Phoenix Industries I, LLC, 762 F.Supp.2d 8, 15 (D.D.C. 2011). "Thus, the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." Id. (citations and internal quotations omitted). Moreover, "it has long been held that traditional economic damages can be remedied by compensatory awards, and thus do not rise to the level of being irreparable." Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464 (1st Cir. 2009); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291 (D.C.Cir. 2009) (stating that the "general rule [is] that economic harm does not constitute irreparable injury"). The United States Supreme Court succinctly outlined the limits of irreparable harm in Sampson v. Murray:

> Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974). Contrary to the LGC's arguments, irreparable harm is more than monetary loss, "injury or inconvenience." Union Fidelity, 114 N.H. at 549. LGC has failed to demonstrate any actual irreparable harm that will arise from enforcement of the Final Order, even if LGC is successful on appeal.

B. Enforcement of the Final Order Will Not Result in Irreparable Harm to LGC

Despite repeated claims that compliance with the Final Order will cause irreparable harm, LGC fails to explain how any of the requirements of the Final Order will be irreparable. The Final Order imposes a series of required actions to bring LGC into compliance with R.S.A. 5-B, including:

1) Reorganization of LGC to provide independent boards for the HealthTrust and Property-Liability Trust ("PLT") pools, with independent bylaws for each pool,

R.S.A. 5-B:5, I(b) & (e) ("Each pooled risk management program shall . . . (b) Be governed by a board . . . (e) Be governed by written bylaws.");

2) Return approximately $53.4 million of Member funds held as ***excess*** earnings and surplus to the member towns, cities and counties, R.S.A. 5-B:5, I(c) ("Each pooled risk management program shall . . . (c) 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.");

3) Adopt a new actuarial calculation to prevent accumulation of ***excess*** earnings and surplus going forward, and return any ***excess*** earnings and surplus to members annually;

4) Purchase of reinsurance against catastrophic losses;

5) Transfer ownership of the LGC real property back to the HealthTrust and Property-Liability Trust pools who owned the property before it was transferred to another LGC subsidiary without compensation to the transferring entity;

6) Pay the Bureau's cost of investigation and reasonable attorneys' fees.[2]

Final Order at 73-80.[3] LGC does not explain how imposition of any of these requirements would constitute irreparable harm to LGC, as opposed to inconvenience or the expenditure of money.

1. Corporate restructuring is not "beyond remediation"

The LGC first argues that reorganizing its corporate structure will require a "great expense of time and money." Motion for Stay at 5. As set forth above, however, the mere expenditure of money, time and energy" does not constitute irreparable harm. Sampson v. Murray, 415 U.S. at 90. Indeed, while complaining that the process is neither simple nor quick, LGC does not claim that the required corporate reorganization cannot be reversed. Moreover, LGC's complaint that the process will be complicated and time consuming is overblown.

LGC's constituent risk pools were governed by separate boards with independent bylaws for 15 years before LGC disbanded the HealthTrust and PLT boards in favor of the single,

[2] The Bureau does not object to awaiting the conclusion of this appeal for completion of the fees and costs portion of this dispute as explained by the Presiding Officer in his order of October 17, 2012.

[3] A copy of the Final Order was included in the Appendix to LGC's Appeal by Petition at Appx. 1-82.

combined LGC Board in 2003. Final Order at 8-9; Hearing Transcript, Vol. 3 at 401-02, 404 (Andrews).[4] In order to comply with the Final Order, LGC will simply need to return to its former corporate structure, reinstating separate boards for HealthTrust and PLT and adopting new bylaws for each pool. While this process will necessarily require some expenditure of time and resources, LGC has a model to follow in its own past practice, and nothing about the process is irreparable. Furthermore, LGC has already proven that reversing the process is possible. This is precisely what the LGC voluntarily did in 2003, with no disruption to the operation of its risk pools as LGC now claims will occur if forced to comply with the Final Order.

Finally, the LGC complains that 90 days is an unreasonable timeframe in which to accomplish restructuring despite refusing to take any preparatory action during the 60 days that have elapsed between the Final Order and LGC's current request for a stay. The LGC's arguments ring hollow and fall far short of the required showing of ***irreparable*** harm needed to justify a stay of the Final Order. Moreover, the potential that LGC will lose its exemptions from taxation and regulation by the Insurance Department arises from LGC's own course of conduct in failing to operate within the dictates of R.S.A. 5-B or to comply with the August 16th Order, and, therefore, do not constitute irreparable harm. Cumberland Farms, 104 N.H. at 367.

2. The return of illegal subsidies of the Workers Compensation pool by the Property Liability Trust will not cause irreparable harm.

The LGC next complains that it is unfair to compel the Property Liability Trust ("PLT") to repay $17.1 million in illegal subsidies currently held by PLT. Motion for Stay at 6. While it is no surprise that LGC feels the Final Order is unfair, the LGC's concept of fairness is not part of the irreparable harm analysis. LGC's further complaint that repayment of the $17.1 million

[4] The Bureau has submitted to the Court a copy of the transcript of the ten-day administrative hearing held from April 30, 2012 through May 11, 2012. The transcript is paginated consecutively, with each day of the proceedings produced in a separately numbered volume. The hearing transcript is referred to herein as "Tr. Vol. X at #### (witness)."

subsidy by PLT "likely will result in destabilization of the Property-Liability risk pool" has no factual support in the record. The Final Order specifically states that the "funds to make this re-payment may be borrowed from an independent entity at commercially reasonable terms." Final Order at 78. Further, this is a debt that LGC concedes it owes because its Board adopted a note in precisely this amount on June 2, 2011. Appendix to Bureau's Objection to LGC's Motion for Stay Pending Appeal ("BSR Appx") at 1-2 (LGC Exh. 279).[5] The note, however, contained neither payment terms nor interest. *Id.* Thus, there is no true likelihood of destabilization of the PLT risk pool.

3. Transfer of LGC's real estate is reversible

LGC briefly complains that the required transfer of its real estate holdings back to the HealthTrust and PLT entities will result in transfer taxes. Motion for Stay at 6. Whether or not transfer taxes would be due, the LGC wrongly equates irreparable harm with the mere expenditure of money. Where the LGC was apparently unconcerned with possible transfer taxes when it transferred the real estate from HealthTrust and PLT to LGC in 2003, it strains credibility to now claim irreparable harm from the same reversible transfer of real estate.

4. Return of $53 million in excess surplus to town, cities, counties and school districts will not cause irreparable harm

The return of excess surplus funds[6] to the members who were overcharged by LGC poses neither economic, nor irreparable, harm to the LGC. The LGC's argument to the contrary is flawed on several levels.

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[5] Exhibits and other documents referenced in this objection are included in the Bureau's contemporaneously submitted Appendix to the Bureau's Objection to LGC's Motion for Stay Pending Appeal, and referenced by page number with the designation "BSR Appx. ##."

[6] Pursuant to the Final Order, HealthTrust is ordered to return $33.2 million in excess surplus to its members, plus an additional $17.1 million after that sum is repaid to HealthTrust by PLT. PLT is separately ordered to return to its members $3.1 million in excess surplus. Final Order at 75-79.

First it is important to recognize, as the LGC did below, that the funds in question are member funds held in trust by the LGC. Tr. Vol. 6 at 1337-38 (Reimers). To the extent return of member funds to the members could create any harm to LGC, it would arise only if the LGC is unable to satisfy its obligations to members to pay for claims. LGC suggests just this outcome, claiming, without citation or support, that in the event of some highly unlikely catastrophic event, LGC may not be able to cover all the claims for which it is responsible.[7] Motion for Stay at 7. This unfounded claim simply ignores the facts, as found by the Presiding Officer and presumed to be *prima facie* reasonable.

The funds ordered to be returned to members represent only ***a portion*** of LGC's acknowledged net assets,[8] which are surplus funds held above and beyond funds required to pay current claims (i.e., claims that are due), cover incurred but not reported claims ("IBNR") (i.e., claims in the system, but not currently due), and prudent administration costs, including reinsurance if adopted. For example, the HealthTrust reported net assets (*i.e.* funds in excess of those needed for operations) of $92,687,000.00 in 2008, $79,481,000.00 in 2009, and $86,782,000.00 in 2010.[9] Final Order at 27. These funds comfortably exceed the $33 million in surplus due to be returned by HealthTrust pursuant to the Final Order. Order at 74-75.

As excess funds legally belonging to the members, their return to members will have no significant effect on the operations of LGC, and, therefore, will cause no harm to LGC. The unfounded worry over an unspecified, future catastrophic event does not establish actual

[7] The LGC board chair claimed the LGC had to maintain its extreme level of surplus to protect, *inter alia*, against a failure of the concrete at Seabrook or a World War I type "mutated flu virus that killed 700,000 people across the world." Tr. Vol. 6 at 1199-1201 (Enright); Final Order at 48.

[8] For a description of the difference between "reserves" and "surplus" or "net assets", please see Tr., Vol. 1 at 163-65 (Coutu).

[9] According to LGC's financial statements, it also had $54 million in cash on hand in 2010. BSR Appx. at 3 (BSR Exh. 7).

irreparable harm, and is belied by LGC's own actuary, who testified that a level of net assets equal to just 10% of claims would not "be a grave situation" for LGC. Tr. Vol. 6 at 1350 (Reimers). The Presiding Officer was more generous, and ordered LGC to adopt a target of 15% of claims as the appropriate level of net assets. Final Order at 74-75. Thus, after returning the excess surplus funds ordered by the Presiding Officer, LGC will still retain a surplus that is 50% larger than levels its own actuary testified would be sufficient to protect LGC's members. LGC's suggestion that compliance with the Final Order will cause irreparable danger is simply not accurate.[10]

LGC's second argument is that if LGC were to prevail on appeal it would be impossible to recapture the funds returned to towns, cities, counties and school districts. Again, LGC misconstrues the meaning of irreparable harm. The alleged harm to LGC is the inability to build adequate net assets to satisfy the LGC Board's inflated estimation of what is a reasonable reserve level. Because the net assets legally belong to the member towns, cities, counties and school districts, in the event that LGC prevails on appeal, it need not recover the same member funds returned to its members. Rather, the LGC would be entitled to rebuild its net assets to its desired level through changes in premium levels. LGC has demonstrated time and again the ability to quickly build net assets through charging premiums to its members.[11] See Final Order at 34-36 and Table 2. Indeed, LGC recently announced that it had accrued an excess of $22.5 million in net assets ***in 2011 alone*** and declared plans to return these excess funds to members. See BSR

[10] In 1997, LGC's net assets fell to a level of just 7.6% of claims, yet LGC's Chief Financial Officer testified that this was an adequate level of net assets. Tr. Vol. 7 at 1526-27 (Keeffe); Final Order at 34, Table 1.

[11] Following the 2003 restructuring, it took just 3 years for LGC to increase its net assets from approximately $25 million to approximately $77 million - an increase of $52 million - with no disruption to services or complaints from Members. See Final Order at 35, Table 2.

Appx. at 4 (LGC Press Statement dated October 12, 2012).[12] Thus, LGC's threat of drastically increased premiums is overblown - its premiums are already inflated to the point that it admits it overcharged members and built a surplus of $22.5 million in 2011.

In light of the fact that premiums have already been paid by members for 2012, and for the majority of members through June 2013, there is little threat to drastic premium swings before a decision is issued in this appeal. If LGC succeeds on appeal, it can simply return premiums to their already inflated rates to replace any surplus that was returned pursuant to the Final Order. This does not in any way represent an irreparable injury.

5. Purchase of reinsurance is not an irreparable harm

Finally, LGC argues that it will be irreparably harmed if forced to purchase reinsurance because "it will have to pay hundreds of thousands of dollars in premiums." As stated above, the payment of money does not constitute irreparable harm. Sampson, 415 U.S. at 90. In addition, LGC ignores the value it will obtain for the premiums paid. After complaining that some unexpected future catastrophe could spell ruin for LGC if it is forced to decrease its excess net assets, LGC now complains that purchasing the very reinsurance that would protect it in the event of such an unexpected catastrophe is a waste of money. The Court should reject this inconsistent and self-serving claim.

LGC has failed to demonstrate that compliance with any portion of the Final Order will result in irreparable harm. Having failed to establish irreparable harm, LGC's motion for a stay should be denied. Sterling, 762 F.Supp.2d at 17-18 ("[A] failure to show ***any*** irreparable harm constitutes grounds for denying plaintiff's motion, even if the other three factors entering the calculus merit such relief.") (emphasis in original) (internal quotations omitted).

[12] The Court may take judicial notice of the LGC's public statements. A copy of the Oct. 12, 2012 press release is also available on the LGC's website at: http://www.nhlgc.org/attachments/aboutlgc/newsroom/PR2012_LGC_Surplus_Return_101212.pdf.

C. The Harm to Towns, Cities, Counties and School Districts if the Final Order Is Not Enforced Significantly Outweighs Any Harm to LGC

The LGC seeks a stay of the Final Order so that it may continue to conduct business as usual during the pendency of its appeal. Yet it is precisely LGC's 'business as usual' that the Presiding Officer found to be in violation of R.S.A. 5-B and to have caused significant harm to participating towns, cities, counties and school districts. It goes without saying that allowing LGC's improper behavior to continue would simply exacerbate the significant harm done to political subdivisions that have been taken advantage of by LGC.

In particular, given LGC's history, there is a serious concern that LGC will spend, encumber or alienate assets and further manipulate its organizational structure to render the Final Order impossible to enforce when it is upheld on appeal. The Final Order identified years of opaque and questionable transfers of member funds for purposes other than the administration and payment of claims, creation of an inherently conflicted and unaccountable corporate structure, unexplained depletions of member funds, and loss of records.[13] Final Order at 14-15, 18-22, 39-45.

One example of the LGC's willingness to manipulate its corporate form even while the instant litigation is pending is illustrative of the need for the current enforcement of the Final Order and the denial of a stay. During the pendency of the Bureau's investigation and administrative proceedings below, LGC attempted to correct its failed and improper attempt in 2003 to merge its predecessor charitable corporations into Delaware-based limited liability corporations by reviving those predecessor organizations, the Health Trust, Inc. and the Property

[13] The now admittedly improper subsidization of the Workers Compensation Program by the HealthTrust was referred to as "strategic planning contributions" to the parent entity in all LGC documents issued to members or the public. See Tr. Vol. 7 at 1535-37 (Keeffe). See also Final Order at 40-41.

Liability Trust, Inc., and then ratifying the 2003 transfer of assets to the Local Government Center, Inc. Final Order at 13-15, n. 15.

On October 20, 2011, the newly populated boards of the predecessor organizations held interlocking meetings where the board members of each board are listed as "others present" in each board's meeting minutes.[14] BSR Appx. at 5-18 (Oct. 20, 2011 Meeting Minutes).[15] As shown in the minutes, these purportedly independent boards first met "independently" with the same lawyer to determine if either board had a conflict with the LGC and whether a conflict of interest precluded having the same law firm represent Health Trust, PLT and the LGC in the pending litigation. Id. at 7, 13-14. The two boards resolved that there was not a conflict in having the LGC's lawyers representing all entities. Id. at 8, 15.

The two boards then resolved, after "independently" receiving advice from the same lawyer, to ratify the 2003 transfer of all assets from the Health Trust, Inc. and the Property Liability Trust, Inc. to the identically named New Hampshire limited liability corporations and to transfer complete authority and control over these assets to the single entity, Local Government Center, Inc. Id. This decision was made without reference in the minutes to the fact that the Corporation Division of the New Hampshire Department of State, after consultation with the Office of the Attorney General, had advised such a transfer would not be permissible under New Hampshire law prior to LGC's original attempt to transfer the assets in 2003. Final Order at 13. See also Tr. Vol. 7 at 1637-41; BSR Appx. at 19-22 (BSR Exh. 40). Nor do the minutes indicate any discussion or concern about the fact that LGC board members sat on all sides of the

[14] The Bureau does not have documentation of a membership vote electing new board members after the trusts were revived as required by R.S.A. 292:30 VI, VII, although it is clear from the minutes that the prior board members of Health Trust, Inc. and Property Liability Trust, Inc. were generally replaced.

[15] The meeting minutes were disclosed to the Bureau during discovery, but were not made exhibits at the administrative hearing. The Court may take notice of the meeting minutes as executed business records of the respective organizations and as public documents available through R.S.A. 91-A.

transactions, purportedly simultaneously exercising independent judgment on behalf of the Health Trust, Inc., the Property Liability Trust, Inc. and the Local Government Center, Inc. See also Part III.D.3, *infra.*

LGC's past practice is also indicative of a risk that the approximately $53 million of excess surplus funds ordered to be returned to towns, cities, counties and school districts may not be available by the time final judgment is rendered after appeal. In 2008, the LGC maintained an account known as "Undesignated" Assets. Final Order at 34. The account had $25,723,000 in it in 2008. Final Order at 35, Table II. By 2009, when the Bureau first began to exercise regulatory authority over risk pools in New Hampshire, the Undesignated Assets account had a negative balance of ($757,000). Id. The account was sometimes referred to as "free excess" and clearly represented surplus that should have been returned to members and not dissipated. Final Order at 37, 50-51. The LGC will be able to engage in a similar effort to squander assets if a stay of the Final Order is granted.

Table I of the Final Order indicates how readily the LGC manipulates the level of its net assets to build or deplete those assets. Final Order at 34. In addition, the LGC's recent announcement of a plan to return $22.5 million in net assets to its members,[16] BSR Appx. at 4, without consultation with, or even prior notice to, the Bureau or the Presiding Officer, exemplifies the present danger that LGC will dissipate funds in order to later claim an inability to comply with the Final Order. This return was made without any oversight as to its effect on LGC's ability to comply with the Final Order.

[16] It must be noted that while the return of $22.5 million to members appears to benefit the members, the return is structured to take place through future premium holidays, thus in effect holding current members hostage to continued membership with LGC while waiting to receive the return of surplus. BSR Appx. at 4. In addition, LGC members who are entitled to a portion of the $53 million return mandated by the Final Order, but who have subsequently withdrawn from the LGC will receive no part of the $22.5 million. Id. The LGC's unilateral and unregulated return of $22.5 million may result in an inability of LGC to comply with the Final Order to the detriment of these former members.

There is similarly no protection of the approximately $10 million real estate held by the LGC through a subsidiary, which is currently unencumbered. If not returned as required by the Final Order, there is nothing to prevent a recalcitrant LGC board during the pendency of an appeal from encumbering or otherwise alienating the realty through means including agreement to commercially unreasonable long term leases favorable to lessees with relations to the current board. See Final Order at 42-43.

In addition, the Final Order concluded that the LGC maintained non-cash investments resulting from health premiums in the amount of over $45 million dollars and that over 80% of these investments were of more than five years duration. *See* Final Order at 53. Not only are these long term investments an indication of a failure to return surplus, it also presents the potential for an obstinate board to further increase their long term investments and then claim calamity as a means to fight off the divestment that will be necessary to comply with the Final Order.

Finally, it must be recalled that the money at issue in terms of refunds of excess surplus is money that rightly belongs to member towns, cities, counties and school districts. The Presiding Officer found this money to be overpayments made by LGC members. In addition, municipal entities budget on an annual basis, and paid extra interest on bonds that were larger than necessary because LGC's premiums were overpriced. These monies could have been used by towns, cities, counties and school districts to retain or hire needed teachers, fire fighters and police officers during a time of economic hardship. The harm suffered by the LGC's members through overpayments to LGC has both been accumulating for years and is re-experienced in each budget cycle. Each day enforcement of the Final Order is delayed is another day that towns, cities, counties and school districts are harmed.

As set out above, the standard for granting a stay of an administrative order requires a balancing of the irreparable harm caused to LGC against the public interest in enforcing the administrative order. LGC's entire analysis of the harm to its members and the public is the dubious assertion that the "public has no interest in enforcing a potentially flawed Order before [] uncertainty [in the meaning of R.S.A. 5-B] has been resolved." Motion for Stay at 8. This statement exemplifies LGC's disconnect from its fiduciary duty to act in the best interests of its members. It goes without saying that the public has a significant interest in the return of millions of dollars of taxpayer funds that were improperly charged to towns, cities, counties and school districts during a time of economic hardship.

The absence of actual irreparable harm to LGC, when balanced against the public's interest in returning illegally accrued funds to political subdivisions and in preventing the LGC from continuing similar activities or making itself judgment proof, weighs strongly against granting LGC the extraordinary relief of a stay of the Final Order pending appeal.

D. LGC has failed to demonstrate a substantial likelihood of success on the merits

The Court need not consider the merits of LGC's case, because LGC has failed to demonstrate the required irreparable harm to warrant a stay. Union Fidelity, 114 N.H. 549. In any event, the LGC's Appeal by Petition, incorporated by reference into its Motion for Stay, falls well short of the required showing of a substantial likelihood of success on the merits.

Importantly, facts have now been found adverse to the LGC. The administrative process is entitled to a presumption of correctness and the Presiding Officer's findings of fact are deemed *prima facie* reasonable. Union Fidelity, 114 N.H. at 549; Appeal of Regenesis Corp., 937 A.2d at 284. LGC has not shown these presumptions will be likely overcome. In fact, the LGC failed to include the hearing transcript or any of the record below in support of its motion, thereby giving

this Court very little from which to surmise the merits of LGC's arguments.

The LGC's arguments on reconsideration are substantially a recapitulation of arguments already soundly rejected by the Presiding Officer, and do not demonstrate any likelihood of success on the merits. The Bureau addresses each of the LGC's arguments on appeal.

1. The LGC received a fair and unbiased hearing

One of the LGC's central arguments on the merits is that the LGC was denied a fair and unbiased hearing because the Presiding Officer should have recused himself. Appeal by Petition at 11-12. LGC argues that the Presiding Officer's contract gave him a pecuniary interest in the outcome of the proceeding because the Presiding Officer would increase his compensation if the hearing went beyond May 31, 2012 and his contract were renewed again. Tr. Vol. 10 at 2305-17. This claim, which Respondents raised on the tenth day of a ten-day hearing, despite obtaining the factual basis for the claim at the dawn of the litigation, is waived, procedurally barred, and legally deficient.[17] LGC, therefore, is not likely to succeed on the merits of this claim.

a. Respondents have waived the argument that the Presiding Officer should have recused himself.

The Presiding Officer disclosed the nature of his contract – a term contract under which he earned $5,000.00 every two weeks – to counsel for the LGC on October 4, ***2011***, and further told them that he expected that his contract would be extended if the parties could not conclude their proceeding within its initial term. See BSR Appx. at 95-97 (Bureau's Recusal Memo). The Presiding Officer's contract was extended in December 2011, and again in May 2012. Tr. Vol. 10 at 2313-2316. Despite having the relevant information in October of 2011, the LGC waited

[17] The Bureau briefed this issue below in depth, and provides here only a summary of the flaws in LGC's arguments. For additional detail, please see the Bureau's Memorandum of Law in Support of Its Objection to Respondents' Motion for Rehearing of Motion for Recusal of Presiding Officer, reproduced in the Bureau's Appendix at 93-127.

until May 11, 2012, the final day of the parties' two week adjudicatory hearing and more than seven months after the Presiding Officer disclosed his compensation arrangement, before orally moving for the Presiding Officer's recusal. Tr. Vol. 10 at 2305. The Presiding Officer denied the motion that same day, Tr. Vol. 10 at 2317, and the parties concluded their proceeding.

The LGC's failure to raise the recusal issue when they initially learned about it is a waiver of any claim on this basis. See Stearns Adm'r v. Wright Adm'r, 51 N.H. 600, 1872 WL 4342, at *8 (1872) ("[W]hen any cause of recusation or exception to a judge exists" it may be waived "by a defendant who, knowing the existence of just grounds of recusation, appears, and, without objecting, makes defense"). Cf. In re Abijoe Realty Corp., 943 F.2d 121, 126 (1st Cir. 1991) (appellant who questioned a bankruptcy judge's impartiality in a motion to vacate a judgment unfavorable to the appellant found untimely because not raised "at the *earliest* moment after [acquiring] knowledge of the [relevant] facts") (emphasis in original).

The policy rationale for these decisions is simple: it is unfair to allow a litigant to sit on information during litigation, and then raise the specter of impartiality at the eleventh hour with the benefit of knowing how the proceeding unfolded. See In re Cargill, Inc., 66 F.3d 1256, 1263 (1st Cir. 1995). Given LGC's unwarranted delay, the issue should be considered waived.[18]

[18] There is an additional basis for the Court to find that the recusal issue is not properly before it. Counsel for LGC raised the recusal issue in an oral motion on May 11, 2012, the final day of the parties' adjudicatory proceeding. Tr. Vol. 10 at 2305. The Presiding Officer denied it on the same day. Id. at 2317. On May 30, 2012, when the LGC filed a memorandum in further support of its motion, LGC's motion had already been denied, and no further order on recusal was issued. Thus, as a technical matter, the recusal issue is not squarely before this Court because it was not addressed in the order LGC now appeals. Accordingly, even if LGC were successful in overturning the Final Order, it would not have prevailed on the separate recusal issue.

b. LGC's request to continue the adjudicatory proceeding made it necessary for the Presiding Officer to extend his contract another term.

Based on the LGC's arguments below, it sees no due process issue if Mr. Mitchell had completed the proceedings prior to May 31, 2012. See BSR Appx. at 23-92 (Respondents' Mem. Supp. Oral Mot. for Withdrawal of Presiding Officer). However, a review of the procedural history of the administrative proceedings demonstrates that extension of the proceedings beyond May 31, 2012 was the result of the LGC's own actions, and not any alleged pecuniary interest of the Presiding Officer.

On December 14, 2011, Mr. Mitchell set the evidentiary hearing in this matter to begin on April 9, 2012. BSR Appx. at 128-31 (Dec. 14, 2011 Scheduling Order). Had this remained the date for the hearing (or had the LGC raised their concerns and obtained an earlier hearing date), the parties could have completed their two week proceeding by April 23, 2012, and presumably completed all proceedings by May 31, 2012. LGC, by contrast, had originally asked for an October 2012 hearing date. BSR Appx. at 132-35 (Oct. 3, 2011 LGC's [Proposed] Structuring Conference Order). Shortly after Mr. Mitchell set an April 9, 2012 hearing date, the LGC asked him to postpone the hearing in order to accommodate Mr. Saturley's schedule, and on December 30, 2012, Mr. Mitchell rescheduled the hearing to begin on April 30, 2012, and in the same order extended the due date for witness and exhibit lists to March 29, 2012. BSR Appx. at 136-37 and 138-40 (Dec. 23, 2011 LGC's Formal Notice of Potential Scheduling Conflict and Dec. 30, 2012 Revised Scheduling Order). The LGC did not object to the April 30th start date or raise any question about Mr. Mitchell's retention. Finally, although the parties waived oral closing arguments and agreed to submit memoranda, the LGC's attorneys specifically requested a briefing schedule that ran through June 4, 2012 in order to accommodate

other demands on their time. See Tr. Vol. 10 at 2309-10. Of course, this briefing schedule went beyond the May 31, 2012 date in Mr. Mitchell's contract.

c. The authority upon which LGC relies for its recusal argument is distinguishable.

The LGC produces no evidence of actual bias on the part of the Presiding Officer beyond the fact that he ruled against them on some but not all of the counts charged, misstates the law by claiming there is a *per se* rule requiring recusal in the event of any pecuniary interest, and does not address the presumption of impartiality to which the Presiding Office is entitled. See Appeal of Maddox a/k/a Cookish, 133 N.H. 180, 182 (1990).

The chief case that LGC relies upon involved a serialized administrative proceeding where the state's prosecutors were permitted to pick the judges and then choose them again for future cases after learning how they ruled. See Haas v. County of San Bernardino, 45 P.3d 280, 283-85 (Cal. 2002). Thus, even if this Court were to look past the LGC's waiver of their recusal claim and lack of factual support for its merits, it would find that the legal foundation upon which LGC relies does not support the claim either.[19] LGC therefore fails to establish a likelihood of success on the merits of their recusal claim.

2. The Final Order does not create new substantive standards beyond the scope of R.S.A. 5-B

The LGC argues that it was denied fair notice and due process because R.S.A. 5-B does not establish the specific requirements imposed by the Final Order. Appeal by Petition at 9. Specifically, the LGC argues that the Bureau should have undergone formal rulemaking to clarify the meaning of R.S.A. 5-B rather than initiate an adjudicatory action against LGC. However, the Bureau has clear authority to interpret the meaning of R.S.A. 5-B and to develop new policy on a case-by-case basis through adjudicatory actions. *See* New Hampshire-Vermont

[19] See BSR Appx. at 93-127 (Bureau's Recusal Memo), incorporated herein by reference.

Physician Service v. Durkin, 113 N.H. 717, 722-23 (1973) ("The fact that [the Insurance Commissioner] proceeded in an adjudicatory rather than rule making context is irrelevant to the validity of the order in that the Supreme Court has endorsed an agency's choice of the former ad hoc approach under circumstances where it 'may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.") (*quoting* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947)). Indeed, the U.S. Supreme Court has stated that in "performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity." SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). Here, the Bureau appropriately took action to remedy an immediate and ongoing violation of the clear meaning and intent of R.S.A. 5-B.

Moreover, LGC has failed to demonstrate any harm from the allegedly improper failure to promulgate rules. LGC claims harm from LGC's reliance that it was in compliance with R.S.A. 5-B. Yet, LGC's reliance was based on an unreasonable and self-serving interpretation of the statute that allows LGC unfettered discretion to build massive, unnecessary surpluses and use member funds for any purpose that suited LGC. Importantly, the Final Order is not punitive in any respect. LGC is merely required to conform to the Bureau's reasonable interpretation of R.S.A. 5-B. The Bureau has asserted its legislatively granted power to interpret and enforce R.S.A. 5-B. LGC has no due process right or reasonable expectation to the continuance of the statute without regulatory oversight, and has suffered no harm by being required to come into compliance with the statute going forward.

3. The Business Judgment Rule does not apply to LGC's inherently interested actions

LCG further attempts to hide behind the business judgment rule as a basis for its actions. Appeal by Petition at 14-16. The LGC simply asserts that the business judgment rule applies to decisions of the boards of 5-B risk pools, without any analysis or legal authority. LGC does not explain how or why the business judgment rule, which was developed in the context of for-profit corporations, applies to non-profit corporations in New Hampshire, let alone specially authorized 5-B risk pools. In fact, the business judgment rule has never been expressly extended to non-profit corporations in New Hampshire, and the applicability of R.S.A. 293-A over non-profit entities created under R.S.A. 292 is questionable at best.

Even assuming that the business judgment rule might apply in this context, LGC derives no protection from the rule. First, it does not serve as a defense to non-discretionary actions or statutory violations. Violating a statute is, by definition, a decision lacking in business judgment. See Fletcher's Cyclopedia of the Law of Corporations, § 1040 ("There are a number of other situations where the business judgment rule will not be applied," including "where the directors committed . . . an illegal act . . . ."). Where LGC's corporate structure or failure to return excess surplus violates R.S.A. 5-B, no amount of "business judgment" by the board can remedy the statutory violation. Only compliance with the statute can remedy a statutory violation.

Moreover, the business judgment rule does not apply where the directors are "interested" in the transaction. R.S.A. 293-A:8.31 ("A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest."). Here, all of the members of the LGC Board have an indirect interest in any transaction involving two or more of the LGC entities governed by the board because they each sit on a combination of multiple LGC/HealthTrust/PLT boards. Id. ("[A] director of the corporation has an indirect

interest in a transaction if . . . (2) another entity of which he is a director . . . is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation."). Where directors are interested in a transaction, the business judgment rule is rebutted and "the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the 'entire fairness' of the transaction to the shareholder plaintiff." Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). The business judgment rule, therefore, does not apply to decisions of the inherently conflicted LGC Board.

4. The Final Order does not impose a retroactive penalty

The LGC next misconstrues the Final Order and argues that the requirement to repay the $17.1 million Workers' Compensation pool subsidy constitutes an unconstitutional retrospective enforcement of R.S.A 5-B because the bulk of the transfers that make up the $17.1 million subsidy occurred before the Bureau was given full enforcement powers in 2010. The PLT/Workers Compensation program, however, continues to benefit from the illegal subsidy. Its combined coffers remain $17.1 million fuller today than they would have been absent the prior subsidy payments. The obligation to repay the illegal subsidy is a current obligation of the combined PLT/Workers' Compensation entity, as specifically acknowledged by the LGC Board in 2011 when it executed a promissory note for the debt. Final Order at 40, n. 27; BSR Appx. at 1-2 (LGC Exh. 279). The LGC's failure to repay the subsidy is a current violation of R.S.A. 5-B, and the Presiding Officer properly ordered its immediate disgorgement and reimbursement to HealthTrust. There is, therefore, no retroactive application of the statute.

5. The Final Order's reserve requirements are reasonable and appropriate

LGC next argues that the Final Order improperly imposes a particular reserve level when R.S.A. 5-B does not contain a specific reserve requirement. Appeal by Petition at 12-13. LGC

misrepresents the import of the Final Order. The Final Order does not assert that R.S.A. 5-B requires a specific level of reserves as repeatedly, and erroneously stated by LGC. Rather, the Presiding Officer found that the "reserve amounts must be reasonable in light of . . . the statute's stated purpose to lower costs and provide anticipated returns to the health trust's members." Final Order at 56. The Final Order established a surplus threshold of 15% of claims or an RBC of 3.0 above which excess surplus amounts become unreasonable; it did not create a new requirement not already incorporated in the structure, meaning and intent of R.S.A. 5-B. In addition, LGC fails to account for the bedrock principle that "[f]indings of fact made by a hearings examiner are *prima facie* lawful and reasonable," and that LGC has the burden to "prove that the decision was clearly unreasonable or unlawful." In re Mooney, 160 N.H. 607, 611 (2010).

Nor does LGC's reference to agreements entered into between the Bureau and the two other 5-B risk pools in the state, PRIMEX and SchoolCare, demonstrate reversible error by the Presiding Officer. LGC ignores the differences in corporate structure and lines of coverage between the LGC and the two other 5-B pools. Moreover, as set forth above, the reserve threshold of RBC 3.0 established by the Final Order is not a target imposed by the statute, but a determination, based on the facts particular to LGC and its health coverage, of when the reserve level becomes unreasonable and contrary to the intent and meaning of R.S.A. 5-B's requirement to return excess surplus to the members.

6. Return of excess surplus as cash or cash equivalents is appropriate under the circumstances

LGC next argues that the Presiding Officer erred by requiring return of excess surplus as cash rather than through LGC's convoluted and opaque rate stabilization method. Appeal by Petition at 14. LGC supports its argument by stating that its members "wanted surplus returned

by rate stabilization." The desires of LGC's members are not more relevant than LGC's desires when interpreting the intent of the controlling statute. The statute unequivocally requires the return of excess earnings and surplus to members. LGC's rate stabilization system is discretionary and the proof elicited at the merits hearing from the LGC's actuary established that the LGC raises other risk factors to offset its returns of surplus effecting a built-in recapture mechanism such that excess earnings and surplus are not actually returned to members. LGC's past practices demonstrate that it cannot be trusted to scrupulously return all excess earnings and surplus to members. Therefore, the Presiding Officer's requirement that excess earnings and surplus be returned annually is both reasonable and prudent, and forms no basis for reversal of the Final Order.

7. LGC waived any claim to exclude its alleged capital assets from excess surplus

LGC briefly argues that approximately $2.2 million of the $33.2 million in excess surplus ordered to be returned to members of the HealthTrust should be exempt because they are capital assets such as furniture and computers. The LGC waived this argument by failing to raise it at the hearing, and, therefore cannot demonstrate a likelihood of success on the merits.

8. The Presiding Officer properly ruled that LGC's corporate structure violates R.S.A. 5-B

Again reviving stale arguments already raised and rejected by the Presiding Officer, the LGC argues next that LGC's consolidated, single-board structure is permissible under R.S.A. 5-B. Appeal by Petition at 15. LGC offers nothing new to establish a substantial likelihood of success on the merits. The Presiding Officer's decision was based on a reasonable interpretation of the statutory language and the purpose of the statute. *See* Final Order at 17-18 ("A fair reading of the full statute orients the governance anticipated by the statute to meet the needs of each pooled risk management program and its member political subdivisions; it does not orient

the governance to meet the needs of a controlling third party conglomerate."). The Presiding Officer's findings are *prima facie* lawful and LGC has failed to raise a likelihood of success on the merits.

9. LGC's subsidization of the Workers' Compensation pool was properly found to violate R.S.A. 5-B

Once again, LGC's argument retreads familiar ground. LGC contends that the decision that it was in the best interest of its members to siphon one percent of member contributions from the HealthTrust and PLT pools in order to subsidize a new and struggling workers' compensation pool is protected by the business judgment rule. Appeal by Petition at 15-16. The LGC offers nothing further to support its argument, nor does it explain its assertion that R.S.A. 5-B "provides that a pooled risk management program may administer itself" as it sees fit, when no such assertion exists in the statute. LGC must do more than simply present conclusory interpretations of what the statute does or does not mean in order to demonstrate a likelihood of success on the merits.

10. The Presiding Officer did not err in requiring the merged PLT/Workers' Compensation pool to repay the illegal subsidy to HealthTrust

The LGC suggests that it was improper for the Presiding Officer to order PLT to re-pay the illegal $17.1 million subsidy to HealthTrust, because PLT was not the entity that received the improper subsidy. Appeal by Petition at 16. Yet, LGC fails to mention that the workers' compensation trust was merged with PLT in 2007. Accordingly, PLT is the corporate entity holding all of the assets and liabilities of the workers' compensation trust. As such, there is no other entity that could repay the illegal subsidy. LGC should not be permitted to evade judgment by creative accounting. Moreover, as set forth above, if PLT does not have the funds on hand

the Presiding Officer expressly ordered that PLT may obtain a commercially reasonable loan to repay the subsidy, thus obviating the suggestion of harm to PLT's members.

11. The Presiding Officer properly prohibited LGC from requiring members to join NHMA

The LGC also argues that its authority to set forth the terms of eligibility in its bylaws allows LGC to require members to join NHMA, Inc. (and pay the associated annual membership fee) in order to obtain coverage from the risk pools. Appeal by Petition at 16-17. The fees total approximately $900,000 each year. Tr. Vol.8 at 1846 (Carroll). The LGC fails to account for R.S.A. 5-B's requirement that risk pools return excess surplus to the members. Requiring payment of an additional membership fee to NHMA is the equivalent of adding to premium payments, and, since these payments do not go toward the administration of the risk pool or payment of claims, they constitute excess surplus which must be returned to the members. The tying requirement is also not expressly authorized in R.S.A. 5-B and no other risk pool engages in this practice. Accordingly, the Presiding Officer correctly ruled that such requirements are violative of R.S.A. 5-B. Moreover, the Presiding Officer has not ordered the return of past payments for membership in NHMA, but has only required that LGC may not continue to require membership in NHMA or any other non-risk pool entity as a condition of participation in the risk pools.

12. Return of approximately $3.1 million in excess surplus from the Property-Liability Trust is appropriate

LGC argues that the Presiding Officer erred by requiring that PLT return $3.1 million in excess surplus funds to the members who originally paid the money as excess premiums. Appeal by Petition at 23. Contrary to LGC's allegations, the $3.1 million figure is based on LGC's own actuarial calculation of its net assets needs in its Property Liability program at the level that the

LGC board established (*i.e.*, the $3.1 million represents surplus as admitted in the LGC's own documents). BSR Appx. at 152 (LGC Exh. 305 at 12). Accordingly, there was no "clear error" by the Presiding Officer and LGC has not demonstrated a substantial likelihood of success on this point.

13. The Final Order properly requires LGC to purchase reinsurance

LGC next argues that it was error for the Presiding Officer to order LGC to purchase reinsurance because the purchase of reinsurance is optional under R.S.A. 5-B. Appeal by Petition at 17-18. There is no dispute that the statute contemplates the purchase of reinsurance as a reasonable and prudent administrative cost of operating a 5-B pool. LGC, however, chose to amass excessive net assets in order to "self-insure" for catastrophic claims. The Presiding Officer reasonably found this decision to be a violation of R.S.A. 5-B in that it resulted in the retention of excess surplus that should have been returned to members pursuant to R.S.A. 5-B:5, I(c). Final Order at 48-49. The expense of reinsurance is more than offset by the tens of millions of dollars in excess net assets retained by LGC in the misguided attempt to self-insure for catastrophic events, and the Presiding Officer's findings are reasonable and lawful interpretations of the statute.

14. The Presiding Officer properly ordered the return of real estate to HealthTrust and PLT

The LGC offers only a cursory argument that the Final Order does not specify which section of R.S.A. 5-B was violated by the transfer of LGC's real estate in 2003. Appeal by Petition at 18. However, the Final Order clearly states that the transfer "represents a diminishment of earnings that could have been available for return to program members." Obviously this refers to the LGC's obligation pursuant to R.S.A. 5-B:5, I(c) to return all excess earnings and surplus to members, and LGC's improper diminishment of excess surplus is a

violation of this section of the statute. Moreover, there is no retrospective enforcement in requiring LGC to disgorge real estate that it ***currently*** holds in violation of R.S.A. 5-B.

15. LGC's defined benefits retirement plan and no-work consulting agreement with Mr. Andrews were not reasonable or necessary expenditures

The LGC next argues that the Presiding Officer erred in finding LGC's defined benefits retirement program and no-work consulting agreement with Mr. Andrews unreasonable expenditures in violation of R.S.A. 5-B. Appeal by Petition at 18. LGC cites to its statutory authority to enter into contracts, but fails to explain how these so-called administrative expenses were necessary to the administration of the risk pools. The Presiding Officer properly determined that these unnecessary expenses are not reasonable administrative costs, and, therefore, must be considered excess surplus that should have been returned to LGC's members. Final Order at 43-44. In any case, these improper expenses were identified by the Presiding Officer as indicative of the LGC's failure to fulfill its fiduciary duties to act in the best interests of its members, but were not ordered to be returned as a separate instance of illegally retained excess surplus. Thus, there is no prejudice to LGC in the Presiding Officer's factual findings, which are presumed to be reasonable and lawful.

16. The Final Order's award of the Bureau's reasonable costs and attorneys' fees was proper.

After refusing to even acknowledge the Bureau's good faith effort to comply with the Final Order's requirement that the Bureau and LGC confer to reach agreement on the amount of fees and costs due to the Bureau, LGC now attempts to find fault in an aspect of the Final Order that does not even exist. LGC claims that the Final Order requires LGC to repay "all of the Bureau's costs," Appeal by Petition at 19, yet the costs submitted by the Bureau did not include fees for those claims on which the Bureau did not prevail. In any case, even if LGC's claims

were true, they would at most constitute grounds for a reduction in the fee award; they do not justify reversal of the substance of the Final Order.

17. The Presiding Officer acted within his authority

The LGC's final argument on appeal is that the Presiding Officer lacked authority to impose certain aspects of the relief set forth in the Final Order. LGC complains about two categories of relief: first, authorization for the Bureau to retain direct supervisory authority over how LGC complies with R.S.A. 5-B; and second, the default outcome of losing its 5-B status if LGC refuses to come into compliance with the requirements of R.S.A. 5-B. Neither form of relief is objectionable. It is inherent in the grant of regulatory authority in R.S.A. 5-B that the Bureau is empowered to regulate risk pools operating under R.S.A. 5-B, and to interpret and implement the requirements of the statute. Far from exceeding his authority as Presiding Officer, the acknowledgment of the Bureau's ongoing role as regulator and enforcer of 5-B is simple fact. It arises from 5-B itself and not by virtue of inclusion in the Final Order.

Similarly, the Final Order's admonition that if LGC refuses to comply with the relief ordered it will cease to be eligible for the protections of R.S.A. 5-B is a statement of operative law. The Presiding Officer has not ordered that LGC lose its exemptions from regulation as an insurance company or from taxation. Rather, this is the legal consequence of failing to qualify as a 5-B pool. The result was ordained by the Legislature when it adopted R.S.A. 5-B. It is a fundamental principle of law that if an entity does not satisfy statutory requirements, it is not entitled to the benefits afforded by that statute. By stating the obvious, the Presiding Officer did not act beyond his statutory authority, and there was no error.

18. LGC has failed to establish a substantial likelihood of success on the merits

Having addressed each of the arguments raised by LGC on appeal, as incorporated into its Motion for Stay Pending Appeal, and shown that none of them are persuasive, there is little doubt that the LGC has failed to establish a substantial likelihood of success on the merits of its appeal. Many of LGC's arguments deal with minor points, which, even if valid, would not result in reversal of the Final Order. LGC's more substantive arguments have been addressed repeatedly and rejected soundly by the Presiding Officer. It is unlikely that these arguments will fare any better on appeal. Even those claims that present valid differences of opinion fall well short of the required showing of a substantial likelihood of success to warrant the imposition of a stay where there is no irreparable harm.

IV. Conclusion

As set forth above, the LGC has failed to identify any irreparable harm that it will suffer if the Final Order is made effective during the pendency of LGC's appeal. Moreover, the LGC fails to acknowledge or address the considerable harms that would be suffered by the participating towns, cities, counties and school districts if an unrestrained stay is granted. Nor has LGC argued or demonstrated a substantial likelihood of success on the merits. Accordingly, the LGC has failed to meet the required showing to justify imposition of the extraordinary relief of a stay. LGC's motion for stay pending appeal should, therefore, be denied and the Final Order should be made effective against LGC immediately.

WHEREFORE, the Bureau of Securities Regulation respectfully requests that this Honorable Court deny LGC's Motion for Stay Pending Appeal and grant such additional relief as is fair and just.

Dated this 25th day of October, 2012

Respectfully submitted,

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Certificate

I hereby certify that the foregoing Objection to Motion for Stay and the accompanying Appendix was provided to counsel of record for the Local Government Center, Inc. and its affiliates, Preti, Flaherty and Ramsdell Law Office by U.S. Mail, postage prepaid, this 25th day of October, 2012.

Andru H. Volinsky, Esq.