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

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

MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF GREGORY S. FRYER, ESQUIRE

NOW COMES Respondent Peter J. Curro, by and through his counsel, Howard & Ruoff, PLLC, and seeks an order excluding the testimony of Gregory S. Fryer, Esq. from trial in this matter. In support of this motion, the following is stated:

BACKROUND

1. On September 2, 2011, the BSR filed a staff petition alleging violations of RSA Chapters 5-B and 421-B by the LGC and several individually named respondents, including Mr. Curro. In its amended petition, filed on or about February 17, 2012, the BSR again alleged violations of RSA 5-B (Counts I and II) and RSA 421-B (Counts III, IV and V), and added a claim of Civil Conspiracy (Count VI). On or about March 29, 2012, the BSR filed a motion

seeking voluntary dismissal of Count VI and, by way of order dated March 30, the Department granted that request.

2. An evidentiary hearing on counts I through V is scheduled to begin on April 30, 2012. In preparation for trial, the parties have retained various experts and conducted numerous depositions.

3. The BSR retained Gregory S. Fryer, Esquire, an attorney from Maine, for the purpose of ostensibly rendering an opinion as to whether the risk pool participation agreements between members and the LGC are securities under RSA Chapter 421-B, New Hampshire's Securities Act. He generated a report dated February 17, 2012, and on March 22, 2012, the respondents took his deposition, led by Attorney Ramsdell for John Andrews. Based on his report and deposition testimony, as further explained below, Attorney Fryer should not be permitted to testify at the hearing on the issue of whether the risk pool participation agreements in this case are securities under RSA Chapter 421-B.

ARGUMENT

4. As a preliminary matter, it is understood that administrative agencies are not strictly bound by the rules of evidence. See N.H. R. Evid. 1101(a). However, the rules are instructive as to the scope of evidence an agency should consider, and for what purpose. The Securities statute, which controls the hearing process in this matter, supports the assertion that while the rules of evidence may not strictly apply, the hearing is to be conducted in a manner more akin to a trial. The definition of "hearing" under RSA 421-B:2,VII-a, is "the receipt and consideration by the department of evidence . . . in accordance with these rules and applicable law, and includes: (a) Conducting trial-type evidentiary hearings[.]" In addition, RSA 421-B:26-a,XX, states that, while the common law and statutory rules of evidence do not apply, the

evidence must nevertheless be "relevant, material and reliable" in order to be admissible at the hearing. The evidentiary hearing in the instant matter must, therefore, be conducted in a "trial-type" manner, the hallmark of which must be a disciplined and structured view of what constitutes relevant, material and reliable evidence.

5. In the context of this case, rules relating to relevancy and expert testimony are of particular assistance in understanding why Attorney Fryer's anticipated testimony is not admissible.

6. Rule 401 of the New Hampshire Rules of Evidence provides a basic definition of what constitutes relevant evidence: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. Evid. 401. Given that the point of a trial, whether before a jury, a judge or an administrative hearings examiner, is to render a decision on the merits of a specific allegation, it follows that the limits of relevancy should apply regardless of the forum. Stated differently, there is no reason why an administrative agency, simply as a result of not being bound by the rules of evidence, should condone wasting resources on the presentation of evidence that has no tendency to establish the existence of a fact that is consequential to the decision at hand.

7. In his report, Attorney Fryer explains that he was asked by the BSR to express an opinion "on whether risk pool participation interests offered through Local Government Center, Inc. constitute securities within the meaning of the New Hampshire Uniform Securities Act." (Rpt. at 1.) After summarizing a set of facts supplied to him by the BSR, Attorney Fryer opined that the issue is"best analyzed in terms of whether those participation interests constitute or include 'investment contracts.'" (Rpt. at 2.) He then stated: "I believe that the Bureau has a

reasonable basis to conclude that the sale of these participation interests involves the sale of investments under the NH Securities Act." (Rpt. at 2.) After several pages of analysis, Attorney Fryer restated his ultimate opinion as follows: "Although a court might reasonably draw the line here based on the principal function served by these interests, the Bureau has reasonable and justifiable grounds to look at the manner in which this function is being performed and to conclude that interests in this common enterprise constitute securities." (Rpt. at 5, ¶13.)

8. At his deposition, Attorney Fryer was asked questions about the foregoing quoted excerpts from his report. The following exchanges ensued:

> Q. Apart from whether a court could find one way and whether it is reasonable for the Bureau to have the opinion that these are securities, do you have an opinion on whether these participation interests are securities?
>
> A. My opinion is that it's not a slam dunk either way. Since the question was formulated as a matter of New Hampshire law, I would say that I come out believing that as a matter of New Hampshire law, they likely are securities.
>
> ….
>
> Q. But would you also find it reasonable if the Bureau took the position that these were not securities?
>
> A. Yes.

(Depo. at 25, 28.)

9. Attorney Fryer's opinion is not relevant because it does not tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. Evid. 401. The "fact" the BSR is seeking to establish is that LGC's risk pool participation agreements are investment contracts – and thus securities – under New Hampshire law. That "fact" is not made more or less probable by a witness whose testimony can only be

summarized as opining that the agreements are "likely" securities, and that while it is reasonable to conclude that they are, it would also be equally reasonable to conclude that they are not. In essence, such testimony leaves the trier of fact right where he started: in a neutral posture, not having sufficient evidence from which to determine one way or the other whether the agreements are securities. As such, the opinion is not relevant and therefore must not be admitted at the hearing.

10. In addition to lacking relevancy, Attorney Fryer's anticipated testimony does not meet basic standards of admissibility for expert opinions. In particular, rule 702 provides in pertinent part, "If … other specialized knowledge will assist the trier of fact to understand the evidence … a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

11. For the same reason that the so-called opinion is not relevant, it also will not assist the hearing officer in understanding the issue of whether the participation agreements are securities. In short, Attorney Fryer does not have an opinion that the agreements are securities; he merely asserts that the BSR could reasonably think that they are. He also believes that the hearing officer could reasonably conclude that they are not. Such equivocal evidence is of no assistance to the hearing officer in deciding the issue. Accordingly, it must be excluded from the hearing.

CONCLUSION

12. The rules of evidence pertaining to relevance and expert testimony provide reasonable, useful, guidelines for admissibility. That agencies are not bound by the rules does not mean the rules cannot or should not be consulted in the context of administrative hearings

when doing so would ensure that only pertinent, helpful, evidence is presented. Concerns of efficiency, proper use of resources, and the ultimate goals of fairly and accurately resolving an issue demand nothing less. Accordingly, because the testimony of Attorney Fryer is irrelevant, and fails to satisfy the rudimentary test for admissibility for expert opinions, it should be excluded from trial.

Respectfully Submitted,

Peter J. Curro,

By His Attorneys,
HOWARD & RUOFF, PLLC

Dated: April 13, 2012

By: /s/ Mark E. Howard
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Certificate of Service

I hereby certify that I have this 13th day of April 2012, forwarded copies of the within Notice via electronic transmission to all counsel of record.

Dated: April 13, 2012

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