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February 18, 2014
VIA EMAIL

Donald Mitchell, Esq., Presiding Officer
Office of the Secretary of State
107 North Main Street
State House, Room 204
Concord, NH 03301

In the Matter of: Local Government Center, Inc., et al
Case No. C-2011000036

Dear Presiding Officer Mitchell,

Enclosed please find HealthTrust's Objection to the BSR's Motion for Entry of Default Order.

Please do not hesitate to contact me if you have any questions regarding my letter.

Sincerely,

Michael D. Ramsdell

MDR/mer
Enclosures

CC: All counsel of record (via email)

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc., et al.	)	C-2011000036
RESPONDENTS	)	

HEALTHTRUST'S OBJECTION TO BSR'S MOTION FOR ENTRY OF DEFAULT ORDER

HealthTrust, Inc. ("HealthTrust"), hereby objects to the New Hampshire Bureau of Securities Regulation's ("BSR") Motion for Entry of Default Order ("Motion"). For the reasons set forth below, the Presiding Officer should dismiss the Motion for lack of jurisdiction and as procedurally improper or, in the event the merits are reached, deny the Motion in its entirety.

Introduction

The Motion attacks a Settlement Agreement (the "Agreement," Motion Exhibit A) between HealthTrust and Property-Liability Trust, Inc. ("PLT") that became operational on January 10, 2014, when the New Hampshire Supreme Court issued its decision affirming the provision of the August 16, 2012 Final Order ("Final Order") that PLT repay $17.1 million to HealthTrust. Appeal of the Local Government Center, Inc. & a., No. 2012-729, slip op. at 18-19 (N.H. January 10, 2014). The Motion should be dismissed because it concerns only the Agreement, which was entered long after the Final Order in this administrative proceeding. After the Supreme Court's decision, the only issue remaining from the Final Order is the question of attorneys' fees. The Presiding Officer lacks jurisdiction over the BSR's procedurally improper attack on the Agreement because it presents new facts and issues that are properly the subject of a new proceeding.

The BSR's challenges fail on the merits. The Agreement respects and enforces the requirement that PLT return $17.1 million to HealthTrust under the Final Order. That obligation, absent the Agreement, rendered PLT insolvent, so the Agreement provides HealthTrust with everything that PLT has. HealthTrust is better off than it would be in a PLT insolvency proceeding because, under the Agreement, HealthTrust is the manager of the runoff of PLT's coverage obligations and can control costs and determine when assets may be distributed to HealthTrust members. There is no requirement of member approval for such debt work-out agreements in RSA 5-B. Further, the statute expressly authorizes a program to offer "any or all" of many coverage lines. RSA 5-B:3, III. Finally, the Agreement does not violate the restructuring provisions of the Final Order, which concerned conflicts with respect to various entities in a conglomerate, not the combination of various coverage lines in a single program and single entity as permitted by statute.

Background

The BSR's motion arises from the Agreement entered by HealthTrust and PLT, after approval by their respective boards of directors, to address the consequences of a potential decision by the New Hampshire Supreme Court affirming the provision of the Final Order that PLT must repay $17.1 million to HealthTrust. Final Order ¶ 13. The HealthTrust and PLT boards, which are elected representatives of their members, had a responsibility to address that issue in advance of the Supreme Court's decision because the effect of such a decision would be to render PLT insolvent. PLT did not have the ability to pay $17.1 million to HealthTrust and meet its coverage obligations. If PLT became insolvent, the likely outcome would be a bankruptcy filing, with its attendant unpredictability, cost and delay.

After discussions with BSR broke down during the summer of 2013, the HealthTrust Board of Directors engaged independent outside counsel to advise it how to best maximize its recovery of PLT's potential $17.1 million obligation. HealthTrust and PLT then negotiated the Agreement, which allows HealthTrust members to benefit from the largest possible PLT payment under the circumstances. It transfers PLT's assets to HealthTrust and provides for HealthTrust to conduct PLT's runoff (which allows HealthTrust to control costs and to receive more rapid distributions than would otherwise have been possible), all while taking on little, if any, additional financial exposure.

The Agreement also protects HealthTrust from the reputational harm that would result from having PLT's payments to claimants interrupted by a bankruptcy attributable to an obligation to HealthTrust, and it has the collateral benefit (from HealthTrust's perspective) of avoiding the harm to PLT's members (who are in many instances also HealthTrust members) of having payments interrupted. The Agreement only became operational on January 10, 2014, when the Supreme Court issued its decision affirming the PLT $17.1 million payment obligation. HealthTrust and PLT did not release the Agreement before that date because it only addressed a contingency which they hoped would not occur.

1. The Agreement was necessary because PLT did not have $17.1 million to pay HealthTrust.

PLT could not pay $17.1 million to HealthTrust by December 1, 2013 as directed in the Final Order ¶ 13.[1] The December 31, 2010 PLT financial statements relied on in the Final Order (see Final Order at 27-28) reported "total net assets" (assets net of liabilities) of $10,401,808. Exhibit 1 at 14-15. That $10.4 million figure did not account for either the $3.1 million distribution to PLT members or the $17.1 million repayment obligation to HealthTrust directed

[1] The Supreme Court stayed this part of the Final Order pending its decision in the appeal. Appeal of the Local Government Center, Order entered October 23, 2013.

by paragraphs 11 and 13 of the Final Order. Absent appeal, the effect of the Final Order was to make PLT insolvent by approximately $9.8 million ($10,401,808 - $3,100,000 - $17,100,000 = ($9,798,192)). PLT's August 31, 2013 financial statements – which reflected PLT's August 2013 payment of the $3.1 million to PLT members but did not include the $17.1 million obligation which was on appeal – reported total net assets of $12.2 million. Exhibit 2 at 1.[2] Thus, as the deadline for payment approached, PLT could not pay HealthTrust and meet its coverage obligations to members and claimants. Payment of the $17.1 million obligation would make PLT insolvent by approximately $4.9 million. Id.[3]

2. The effect of a PLT insolvency would likely be a bankruptcy proceeding in which neither claimants nor HealthTrust would be paid in full and any payments would be delayed.

In these financial circumstances, payments by PLT to creditors – claimants or HealthTrust – would constitute preferences, and this would place PLT and its directors in an untenable situation. See Kapela v. Newman, 649 F.2d 887, 890 (1st Cir. 1981) ("The preference section of the Bankruptcy Act imposes obligations upon a debtor to treat its creditors fairly once the threat of impending bankruptcy becomes apparent."); In re Felt Mfg. Co., 371 B.R. 589, 611 (Bankr. D. N.H. 2007) ("Once a corporation is insolvent, its directors owe a fiduciary duty to the corporation's creditors and creditors have standing to maintain derivative claims for breaches of fiduciary duty."). Absent an agreement, the insolvency would require filing for protection under the Bankruptcy Code or, possibly, some form of equity receivership. PLT is not an insurance

[2] Those financial statements state: "Although not reflected on these financial statements due to the current lack of resources to fulfill the note, the Workers' Compensation program has a note payable to LGC HealthTrust in the amount of $17,111,804.35." Exhibit 2 at 1, n. 1.

[3] The Final Order suggested at ¶ 13 that PLT borrow the money to pay HealthTrust, but – unsurprisingly – when PLT reached out no lenders indicated a willingness to extend a loan to provide cash for PLT to pay HealthTrust. See Affidavit of George Bald ¶¶ 10-14 (Appeal of the Local Government Center, filed October 7, 2013) (Exhibit 3).

company, see RSA 5-B:6, so it would not be eligible for receivership under RSA 402-C. See RSA 402-C:3, III (defining "insurer"). There is no other statutory proceeding that would apply.

In a bankruptcy, PLT's payments to coverage claimants, as well as any payment to HealthTrust, would be interrupted. See 11 U.S.C. § 362 (Bankruptcy Code automatic stay). Unlike in an insurer receivership, (see RSA 402-C:44, II), there is no priority in bankruptcy for claimants under insurance policies issued by the debtor. See 11 U.S.C. § 507 (bankruptcy priorities). PLT's coverage claimants (other than workers' compensation claimants whose claims are secured by a special deposit at 120% of reserves), HealthTrust, and other general creditors would not receive full payment, and the payments would be delayed. Partial payment to HealthTrust would only follow the lengthy period of time – likely a year or more – necessary to obtain Bankruptcy Court approval.[4] A bankruptcy proceeding would entail significant expense, both for the proceeding and for administering coverage claims, which would reduce the assets available to pay PLT creditors. Further, PLT's failure to timely make payment on its coverage obligations to claimants against its members (who often are also HealthTrust members) would harm those members and inflict reputational damage on HealthTrust.

In sum, if HealthTrust and PLT did not anticipate and address the consequences of a potential Supreme Court decision affirming the PLT $17.1 million payment obligation under the Final Order, and such a decision issued, then PLT would be insolvent and forced into bankruptcy or other proceeding. In that case, (1) PLT would not be able to pay HealthTrust in full, (2) any PLT payment to HealthTrust would be significantly delayed, (3) PLT's assets would be depleted by the expenses of the bankruptcy proceeding, (4) PLT's payments to coverage claimants would

[4] The Bankruptcy Court would presumably encourage efforts to resume at least partial payments to claimants under PLT policies. PLT's workers' compensation obligations are fully secured (120% of estimated liabilities) by a deposit with the New Hampshire Department of Labor, which would presumably seek to promptly reestablish payments using that deposit. See Exhibit 8 (PLT December 31, 2012 financial statements), Independent Auditor's Report at 2.

be interrupted, (5) many of PLT's coverage obligations would not be paid in full, (6) HealthTrust would be competing with PLT claimants for recovery from PLT's bankruptcy estate, and (7) HealthTrust's members who are also members of PLT would be harmed along with HealthTrust's reputation.

3. The Agreement benefits HealthTrust and its members, as well as PLT and its members and claimants.

In these circumstances, HealthTrust and its outside counsel negotiated the Agreement with PLT to provide for the possibility that the Supreme Court might affirm the portion of the Final Order directing the $17.1 million PLT payment. The Agreement was expressly conditional, and it was only to become operational if the Supreme Court affirmed the payment provision or a modified obligation that remained in excess of PLT's ability to pay without precluding PLT from paying its coverage obligations in full. Agreement ¶ C.3.

The Agreement explains the circumstances from which it arose. Agreement ¶ A. In particular, it noted PLT's financial condition and that the PLT Board considered the $17.1 million repayment provision to present a solvency problem which, if the provision was affirmed, would result in insolvency proceedings and payment of only a part of PLT's coverage obligations. Agreement ¶ A.9(c), (e). The HealthTrust Board considered that forcing PLT to default in its coverage obligations and file for bankruptcy would not be in the interest of HealthTrust or its members because of the additional administration costs and delay in realizing on PLT's available assets that would result from bankruptcy. Agreement ¶ A.11(d). The Agreement also noted that the HealthTrust Board was concerned that the insolvency of PLT (and resulting hardship for PLT members) would cause reputational harm to HealthTrust due to the two entities' long association in the marketplace, and that – because the $17.1 million obligation to HealthTrust would be the cause of PLT's insolvency – HealthTrust might wrongfully be

viewed as being responsible for the hardships imposed on PLT members and claimants, which could substantially erode HealthTrust's goodwill and damage its business. Agreement ¶ A.10.

In the Agreement, PLT and HealthTrust agreed that if the Agreement became operational, PLT would transfer all of its assets and liabilities to HealthTrust (Agreement ¶ D.1); HealthTrust would accept the assignment of all PLT's assets and liabilities in full satisfaction of PLT's obligations under the Final Order, including the repayment provision (¶ D.2); HealthTrust would manage the runoff of PLT's coverage obligations, using the assets transferred from PLT and the existing administrative structure (¶ D.3); and any transferred assets remaining after the satisfaction of PLT's coverage obligations would be the sole property of HealthTrust (¶ D.5).[5] The Agreement contains provisions concerning the runoff of PLT's coverage obligations. HealthTrust agreed to initially hire the PLT employees until it determined the best staffing option for on-going operations. Agreement ¶ E.1. It expressly provides that HealthTrust would track and report (in its financial statements) the operating and financial results for its health coverages and the PLT run-off separately; that the provisions of the Final Order would apply separately to the health coverage pool and the PLT runoff; and that claim payments for the PLT runoff would not be included in any calculations of surplus to be retained by HealthTrust. Agreement ¶ E.2.

The Agreement became operational on January 10, 2014, when the Supreme Court issued its decision that, among other things, affirmed the $17.1 million repayment obligations. Appeal of the Local Government Center, slip op. at 18-19. The effect of the Agreement is that PLT has transferred all of its assets (subject to its liabilities) to HealthTrust in satisfaction of the $17.1

[5] The Agreement notes that PLT has the right to assess members respecting their workers' compensation coverage to address any shortfall with respect to the payment of workers' compensation coverage obligations, and it assigns those rights to HealthTrust. Agreement ¶ D.4. Consistent with the limited nature of those rights, HealthTrust confirmed that it would not attempt to assess such PLT workers' compensation members with respect to the shortfall relating to the $17.1 million repayment. Id. Since workers' compensation obligations are secured on a 120% of estimated liabilities basis, there should be no "shortfall" with respect to the payment of workers' compensation obligations.

million obligation. PLT's financial statements as of August 31, 2013, reported PLT net assets of $12.2 million. Accordingly, subject to the costs of administering the runoff of PLT's coverage obligations at a level equal to or less than the reserves established for that purpose, HealthTrust should ultimately realize that amount.

Because HealthTrust will administer the runoff of PLT's coverage obligations, it will be able to monitor the administration expense and see that the runoff is handled effectively and efficiently. It also could choose to fix such obligations and their administrative costs through reinsurance. A bankruptcy would entail greater administration costs that would not be subject to HealthTrust's control. The adequacy of PLT's reserves has been reviewed by its independent actuaries, and its workers' compensation reserves are secured by a special deposit. The Final Order implicitly accepted the adequacy of those reserves in finding that PLT had $3.1 million of excess assets (the assets over liabilities before the new $17.1 million obligation to HealthTrust). See Final Order ¶ 11.

By obtaining all of PLT's assets and the ability to administer the runoff, the Agreement maximizes HealthTrust's recovery on the $17.1 million obligation. BSR's characterization of the Agreement as a "compromise or forgiveness" of that obligation (Motion ¶ 18) is inaccurate. PLT gave HealthTrust everything it had in satisfaction of the obligation. HealthTrust agreed to give priority to the coverage claims of PLT members, which places PLT claimants in a better position than they would have had in bankruptcy. HealthTrust concluded this was warranted in light of the benefit to it of administering the runoff and the danger to HealthTrust's own business of causing a default in the payment of PLT claims.

The Agreement provides HealthTrust with the ability to closely monitor the status of the runoff of PLT's coverage obligations and to determine the availability of the transferred PLT

assets for distribution to HealthTrust members. The Agreement provides for the results of HealthTrust's health coverage lines and the PLT runoff to be tracked and reported separately. This allows for the transparent analysis of HealthTrust's own excess net assets, unaffected by the PLT runoff. It will therefore be readily possible to follow the results achieved by HealthTrust in realizing the residual value of the assets to be transferred to HealthTrust's members.

ARGUMENT

I. BECAUSE THE PRESIDING OFFICER LACKS JURISDICTION OVER THE BSR'S MOTION AND BSR'S CLAIM THAT THE SETTLEMENT AGREEMENT VIOLATES RSA 5-B AND THE FINAL ORDER, THE MATTER IS PROPERLY THE SUBJECT OF A NEW ADMINISTRATIVE PROCEEDING.

The BSR's "Motion for Entry of Default Order" is procedurally improper because it is a challenge to the recent Agreement between HealthTrust and PLT. While the BSR seeks to frame the issue as one of a failure to act in response to the Final Order, HealthTrust's and PLT's actions to comply with the restructuring aspects of the Final Order were taken long ago. PLT and HealthTrust have also respected the validity of the $17.1 million payment obligation affirmed by the Supreme Court. BSR is now attacking the acts of HealthTrust to collect and PLT to pay that recognized obligation. Such claims for new alleged violations of RSA 5-B and the Final Order issued under RSA 5-B are properly the subject of separate proceedings commenced by petition or cease and desist order. RSA 5-B:4-a, I(a), VI.

While the Motion makes a number of complaints, at bottom it alleges three violations. See Motion ¶¶ 23-24. The BSR contends that:

(1) The "purpose" of the Settlement Agreement – allegedly "to extinguish the $17.1 million debt owed by PLT to HT" – violates the requirements of Paragraphs 13 and 14 of the Final Order "requiring the return of the $17.1 million unlawful subsidy" (Motion ¶ 24);

(2) The Settlement Agreement was entered without "resolution[s] or consents" by the PLT and HT members that the BSR alleges were "required under RSA 5-B:3" (Motion ¶ 23); and

(3) The Settlement Agreement and the transfers pursuant to it allegedly violate Paragraph 1 of the Final Order as "both the property-liability lines and the health trust lines are now subject to a single [allegedly] conflicted board of directors and a single set of bylaws" (Motion ¶ 23).

The BSR frames its motion as a request that the Respondents be ordered to cease and desist from allegedly violating the Final Order and RSA 5-B. Motion ¶ 25.[6] Such a request for a determination that subsequent activity not before the Presiding Officer at the hearing – here, the Agreement – violates the Final Order and RSA 5-B is not properly asserted by a motion in this proceeding. Neither RSA 5-B nor RSA 421-B:26-a affords the Presiding Officer jurisdiction to hear such a request as part of a concluded proceeding remanded only for purposes of determining attorneys' fees. Instead, such a request should be the subject of a new administrative proceeding, as the BSR implicitly recognized by requesting that the Final Order be enforced pursuant to RSA 5-B:4-a, I and II. Motion ¶ 25.

The Supreme Court recently noted the limited jurisdiction of administrative agencies:

> Administrative agencies are granted only limited and special subject matter jurisdiction. That jurisdiction is dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself. Furthermore, a tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.

In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011) (citations, quotations, and brackets omitted). See In re Chase Home for Children, 155 N.H. 528, 533 (2007) ("Administrative tribunals . . . have only the authority that is expressly granted or fairly implied by statute.") (quotation omitted).

[6] The Motion requests that the Hearings Officer issue an order (1) finding the Respondents "in violation of the August 16, 2012 Order and N.H. RSA § 5-B," and (2) finding that Respondents "shall cease and desist operating in violation of the August 16, 2012 Order and N.H. RSA § 5-B." Motion, Prayer ¶¶ A, B.

The Secretary is authorized "[t]o bring administrative actions to enforce this chapter." RSA 5-B:4-a, I(a). The Secretary can issue a cease and desist order for a violation of RSA 5-B or of an order issued pursuant to RSA 5-B. RSA 5-B:4-a, VI. Adjudicatory proceedings over administrative actions and cease and desist orders are commenced by a petition for relief and issuance of a notice of hearing. RSA 421-B:26-a, V(c), VI-VII; RSA 5-B:4-a, VI. A presiding officer in a case is authorized to take action to "complete the case" through "final decision" and "final action." RSA 421-B:26-a, XIV(p), XXVI, XXVII. RSA 5-B and RSA 421-B do not authorize the BSR or the Presiding Officer to reopen a proceeding to bring in new alleged violations based on conduct occurring only after the administrative proceeding ended.

In this case, the adjudicatory proceeding concerned events between 2003 and 2010, and after days of hearings it resulted in the Final Order, which was affirmed in part, vacated in part, and remanded by the Supreme Court. The remand was only for the limited purpose of allowing the parties "an opportunity to litigate the extent to which, if any, [the Supreme Court's] decision has affected the amount of fees to which the Bureau is entitled." Appeal of the Local Government Center, slip op. at 22. That proceeding is otherwise over. The limited remand does not permit the BSR to reopen the proceeding to seek relief concerning a Settlement Agreement that only became operative upon the Supreme Court's decision and that sought to address the obligation imposed by the Final Order as affirmed by the Supreme Court's decision.

The BSR has captioned its motion as seeking a "default order," and it asserts that PLT and HealthTrust are "in default of the requirements of the [Final Order], and in particular those portions that required Respondents to re-organize with separate boards and bylaws and to repay $17.1 million." Motion ¶ 25. As the BSR acknowledges, however, the Respondent entities took steps to comply with Paragraph 1 of the Final Order, first by having the two LLCs adopt separate

bylaws, and then by assigning their respective assets and liabilities to HealthTrust and PLT, each of which had its own set of bylaws and its own board of directors. See Motion ¶ 11. The propriety of those steps, which is contested by the BSR, is being litigated before the Superior Court in New Hampshire Municipal Ass'n, Inc., et al. v. State of New Hampshire Department of State et al., No. 217-2013-CV-00511 (Merrimack Superior Court) (Exhibit 9). But it is undisputed that the Respondents took steps to comply with the Final Order. Similarly, PLT and HealthTrust have now taken steps, consistent with the economic facts, to address the $17.1 million obligation affirmed by the Supreme Court. HealthTrust sought to collect that obligation, which led to the Settlement Agreement under which HealthTrust acquires all of PLT's assets and liabilities: that is, everything PLT had to give.

There is no "default" under the Final Order. The Respondents did not ignore it. See RSA 421-B:26-a, XXII (a party "who fails to appear shall have a default judgment rendered against him"). There is simply disagreement over what HealthTrust and PLT did to enforce and honor the $17.1 million PLT obligation. BSR's claim that the Agreement does not comply with RSA 5-B or the Final Order is a matter over which the Presiding Officer lacks jurisdiction and that must properly be the subject of a new proceeding. See RSA 5-B:4-a, I and VI.

II. THE AGREEMENT BENEFITS HEALTHTRUST, RESOLVES DIFFICULT COLLECTION ISSUES, AND IS FULLY CONSISTENT WITH LAW.

The BSR's motion simply ignores the economic reality faced by PLT and HealthTrust now that the Supreme Court has affirmed the $17.1 million payment obligation: PLT cannot pay that amount and also meet its coverage obligations. The Agreement entered by HealthTrust and PLT is a responsible means to address the situation by maximizing HealthTrust's return on PLT's obligation while minimizing the harm that could result from PLT's sudden insolvency and

a resulting bankruptcy proceeding. If the Presiding Officer reaches the issues, he should find that the Agreement does not violate the Final Order or RSA 5-B.

A. The Agreement Does Not Violate But Respects The Requirement Of The Final Order That PLT Return $17.1 Million To HealthTrust.

BSR's principal contention is that the Agreement violated the requirement of Paragraph 13 of the Final Order, which provided that PLT "shall re-pay the $17.1 million subsidy" to HealthTrust "no later than December 1, 2013."[7] Motion ¶ 24. The BSR characterizes the Agreement as representing a "compromise or forgiveness" of the obligation by HealthTrust that somehow inappropriately "extinguishes" it. Motion ¶¶ 18, 24. The BSR's position disregards the fact of PLT's insolvency absent the Agreement. The Agreement actually maximizes HealthTrust's return in comparison to the alternatives.

The assumption underlying the BSR's position is that the order requiring that PLT pay $17.1 million means that PLT must pay it even if PLT lacks the means. This is erroneous. When a debtor has an obligation that renders it insolvent, the debtor must either reach an agreement with its creditor(s) or cease making payments and seek bankruptcy protection. It cannot simply pay one creditor (here, HealthTrust) to the detriment of others (the members and claimants with claims for coverage) without exposing its board and creating claims for preferential transfers. See Kapela, 649 F.2d at 890; Felt, 371 B.R. at 611; 11 U.S.C. § 547 (avoidable preference actions); 11 U.S.C. § 548 (fraudulent transfer actions); 11 U.S.C. § 544(b) (fraudulent transfer actions applying state law such as the New Hampshire Uniform Fraudulent Transfer Act, RSA 545-A). In a bankruptcy, general creditor claims such as PLT's obligations to HealthTrust and PLT's coverage obligations would share in PLT's assets pari passu (after payment of priority claims such as administrative expenses and taxes). See 11 U.S.C. § 507.

[7] The Supreme Court stayed this part of the Final Order pending its decision by Order entered October 23, 2013.

In this case, it was obvious that the repayment obligation, if upheld on appeal, would render PLT insolvent. HealthTrust recognized that PLT lacked the assets to make the payment during the summer of 2013. Acting to protect its then-contingent claim against PLT, HealthTrust demanded that PLT not make the $3.1 million distribution to members unless it previously made adequate provision to pay the $17.1 million. Exhibit 4. When PLT declined (see Exhibit 5), HealthTrust asked the Secretary of State to cause PLT to delay the distribution of the $3.1 million. Exhibit 6. The BSR refused: "This office will not instruct [PLT] to delay distribution of the funds as requested by the HealthTrust board." Exhibit 7.

Once PLT paid out the $3.1 million, it was clear to HealthTrust that PLT would be unable to pay the $17.1 million if it became due and that PLT's insolvency would potentially result in chaos. As described at pages 3-6 above, PLT would not be able to pay HealthTrust in full, any payment would be delayed due to a PLT bankruptcy or receivership proceeding, the costs of such a proceeding would reduce the assets ultimately available to pay creditors including HealthTrust, payments on PLT's coverage obligations would be interrupted and coverage obligations would not be met in full. All of these realities would harm HealthTrust members who were also members of PLT and would damage HealthTrust's reputation and business.

In these circumstances, HealthTrust negotiated the Agreement with PLT. Contrary to the BSR's suggestion that the Agreement disregards the $17.1 million obligation, the Agreement honors the obligation and seeks to collect on it to the greatest possible extent. The Agreement does not "compromise" or "forgive" the obligation. Instead, HealthTrust receives everything that PLT had (all of PLT's assets). Agreement ¶ D.1.

Furthermore, HealthTrust is to administer the runoff of PLT's coverage obligations, which allows it to see that the runoff is conducted efficiently to permit the maximum return to

HealthTrust on its claim and to determine when transferred assets should be distributed to HealthTrust members. Agreement ¶ D.3. Any other party that administered the runoff for PLT would charge more than cost, which would reduce the assets available to Health Trust. While HealthTrust acknowledges that the Agreement is in full satisfaction of the Final Order obligation (Agreement ¶¶ D.2, D.5), there is no forgiveness because PLT has nothing more to give.

The only respect in which the Agreement could arguably be viewed as giving up a potential right that HealthTrust might have had is the provision according priority to payment of PLT's coverage obligations from the transferred assets. Agreement ¶ D.3. However, insisting on a PLT bankruptcy so that PLT would not pay coverage obligations in full would have increased the costs of PLT's runoff and delayed payments to Health Trust.

First, under the Agreement, HealthTrust will manage the runoff of PLT's coverage obligations. HealthTrust will only incur the actual cost of the runoff, which will increase the benefit of the $17.1 obligation to HealthTrust. In a bankruptcy, a third-party unfamiliar with the PLT coverage and claims would likely be engaged to conduct the runoff of claims, the cost of any such administrator would include a profit margin, and the bankruptcy proceeding itself would entail administrative expense. Having HealthTrust administer the runoff as set forth in the Agreement will avoid these increased costs and maximize the assets available to HealthTrust.

Second, as manager under the Agreement, HealthTrust can determine when during the runoff it is appropriate to release assets of PLT for distribution to HealthTrust members consistent with RSA 5-B:5, I(c). In a PLT bankruptcy, the Bankruptcy Court would determine when amounts can be paid out to creditors, including HealthTrust. Only at that time would amounts be available to be considered as part of the determination of HealthTrust member distributions. Thus, contrary to the BSR's assertion, the Agreement does not delay payments to

HealthTrust members in accordance with Paragraph 14 of the Final Order. Instead, it gives HealthTrust control over the timing of payments to HealthTrust and to HealthTrust members.

The Agreement thus favors HealthTrust and its members compared with a bankruptcy or receivership proceeding. Causing a PLT bankruptcy to prevent full payment of coverage obligations to PLT members and claimants would not be in the interest of HealthTrust or its members and would merely serve to harm PLT's members.

B. The Agreement Does Not Require A Resolution or Consent of HealthTrust Members.

The BSR next contends that some resolution or consent by HealthTrust members was required under RSA 5-B:3. Motion ¶¶ 20, 23. It also insinuates that there was some impropriety in not making the Agreement public until the Supreme Court issued its decision. See Motion ¶¶ 19, 20. However, the Agreement was a conditional agreement (Agreement ¶ C.3) to address the contingency that the Supreme Court would affirm the $17.1 million obligation that would render PLT insolvent. PLT and HealthTrust hoped that contingency would not occur, and that the Agreement would never become operational. HealthTrust and PLT reasonably did not disclose the Agreement until the appeal was decided.[8]

[8] There is no reason to think that the BSR would have been willing to discuss the issues presented by the Agreement. Negotiations during the summer of 2013 that included the impact of the $17.1 million had proved fruitless; the BSR had rebuffed HealthTrust's efforts to improve PLT's financial situation by having it retain the $3.1 million in late August, see Exhibit 7; and the BSR had disagreed with the appellants' request for a stay of the $17.1 million payment in October 2013, see BSR's Response to Appellants' Second Motion for Stay Pending Appeal (Appeal of the Local Government Center, filed October 17, 2013). In any event, HealthTrust provided the BSR with the Agreement and offered to discuss it on January 10, 2014 (the day that the Supreme Court decision came down), but the BSR was not available to meet until February 4, 2014. When HealthTrust, PLT and their respective counsel arrived to meet with BSR on February 4, they found that third parties were in attendance and were videotaping the meeting. The BSR asked few questions and did not voice any views on the Agreement at the meeting. At the meeting, HealthTrust repeatedly offered to respond to questions and expressed a willingness to discuss any BSR comments on the Agreement. The BSR did not contact either HealthTrust or PLT before filing the instant motion on February 7, 2014. The BSR did not ask for any information before arriving at the position asserted in the Motion that the Agreement violates the statute and the Final Order. The BSR only contacted HealthTrust and PLT to ask for information about the Agreement by letter on February 11, 2014 – four days after asserting that the Agreement was unlawful.

Turning to the asserted requirement of member "resolutions or consents," BSR can identify no language in RSA 5-B:3 that could require member approval of an agreement concerning collection of a debt, which is the purpose of the Agreement from HealthTrust's perspective. The Agreement was entered in the event that the Supreme Court affirmed that PLT must pay $17.1 million to HealthTrust in order to maximize the amount payable to HealthTrust by (1) obtaining all of PLT's assets above its coverage obligations and (2) obtaining the right to runoff PLT's coverage obligations so that the cost would be minimized and releases of assets would not be delayed. Nothing in RSA 5-B:3 requires member approval of such an agreement to work-out the payment of a substantial debt to Health Trust.[9]

The BSR apparently contends that resolutions or consents are required because, as part of its effort to maximize recovery, HealthTrust agreed to accept a transfer of the "assets, liabilities and operations of property, casualty and workers compensation lines." Motion ¶ 20. Even if the BSR's assertion that PLT's "coverage lines" had become HealthTrust "coverage lines" under RSA 5-B was correct (which it is not), nothing in the statute provides for member approval if the lines of coverage handled by a program are expanded. There is no language in RSA 5-B:3, I, that provides for member approval if a program changes its coverage lines. Moreover, RSA 5-B:3, III expressly authorizes a pooled risk management program to provide varied lines of coverage; such programs "may provide any or all" of a list of coverages, including property, casualty and health lines.

The principles of statutory interpretation applicable to RSA 5-B:3 are well established:

> [The courts] first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. [The courts] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [They] construe all parts of a statute together to effectuate its overall

[9] Similarly, nothing in the statute or Final Order requires prior approval of such an agreement by the BSR.

> purpose and avoid an absurd or unjust result. Moreover, [they] do not consider words and phrases in isolation, but rather within the context of the statute of a whole. This enables [the courts] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.

Appeal of the Local Government Center, slip op. at 12 (citing State Employees' Assoc. of N.H. v. State of N.H., 161 N.H. 730, 738-39 (2011)).

The plain meaning of RSA 5-B:3, I does not provide for any process of member approval (either by resolution or consent) for changes or additions to a program's coverage lines. RSA 5-B:3, I concerns the initial formation of risk management programs. The first two sentences authorize a political subdivision ("by resolution of its governing body") to enter into agreements to obtain insurance and authorizes such agreements to provide for pooling of risks and expenses.[10] The third sentence allows two or more political subdivisions to "form" an association or "affirm" an existing association.[11] The term "affirm" reflects the existence of such associations before the 1987 enactment of RSA 5-B by 1987 Laws 329:1. See Final Order at 7-9.

The BSR's interpretation of this provision to require member approval of program changes would "add language that the legislature did not see fit to include," contrary to the principles of statutory interpretation. Appeal of the Local Government Center, slip op. at 12. The Legislature could have conferred such an approval requirement, but it did not. Cf. Babiarz

[10] "A political subdivision, by resolution of its governing body, may establish and enter into agreements for obtaining or implementing insurance by self-insurance; for obtaining insurance from any insurer authorized to transact business in this state as an admitted or surplus lines carrier; or for obtaining insurance secured in accordance with any method provided by law; or for obtaining insurance by any combination of the provisions of this paragraph. Agreements made pursuant to this paragraph may provide for pooling of self-insurance reserves, risks, claims and losses, and of administrative services and expenses associated with them among political subdivisions." RSA 5-B:3, I, first two sentences.

[11] "To accomplish the purposes of this chapter, 2 or more political subdivisions may form an association under the laws of this state or affirm an existing association so formed to develop and administer a risk management program having as it purposes reducing the risk of its members; safety engineering; distributing, sharing and pooling risks; acquiring insurance, excess loss insurance, or reinsurance; and processing, paying and defending claims against the members of such association." RSA 5-B:3, I, third sentence.

v. Town of Grafton, 155 N.H. 757, 759 (2007) (The legislature "could easily have conferred" a right to challenge a recount on various groups but did not).

Most significantly, the statute expressly authorizes pooled risk management programs to provide multiple lines of coverage. "Pooled risk management programs established for the benefit of political subdivisions may provide any or all of the following coverages . . . ." RSA 5-B:3, III (emphasis added). The enumerated coverages include "Casualty" ("including general and professional liability [and] workers' compensation and employer's liability"); "Property;" and "Hospital, medical, surgical or dental benefits for employees and their dependents" (that is, health). RSA 5-B:3, III, (a), (b), (f). Thus, the plain meaning of the statute authorizes one pooled risk management program to provide multiple coverages. Any other reading would render the words "or all" superfluous, contrary to the established principles of statutory construction. See, e.g., Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-26 (2002) (Courts "must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words."). HealthTrust's determination that it could most effectively collect the obligation owed by PLT by accepting the transfer of PLT's property and casualty obligations is within the authority provided by the statute.

In this context, it is worth noting that the addition of PLT's property and casualty lines for runoff purposes did not affect HealthTrust's financial picture significantly. The PLT business is relatively small in comparison with the existing HealthTrust business. In 2012, PLT had total contributions for all property and casualty lines of $17.6 million, while HealthTrust's 2012 total contributions for all health lines was $420 million. Exhibit 8 (PLT 2012 financial statements) at 16; Exhibit 10 (HealthTrust 2012 financial statements) at 19. Most importantly, PLT's loss reserves as of August 31, 2013, were reviewed by its independent consulting

actuaries, Towers Watson. Exhibit 11.[12] PLT carried loss fund reserves as of August 31, 2013, $25,157,396, (see Exhibit 2 at 1), which were more than $6 million greater than the combined total of PLT's estimated property-liability unpaid losses, $9,359,000 (see Exhibit 11 at 4); estimated workers compensation unpaid liabilities, $8,904,000 (see Exhibit 11 at 7); and estimated unpaid losses for unemployment compensation, $380,000 (see Exhibit 11 at 12). Also, PLT's workers compensation obligations are secured by a deposit set at 120% of reported liabilities, so assets (with a 20% margin) exist to fund that obligation. (Exhibit 8, Independent Auditor's Report, at 2).

C. The Agreement Does Not Violate The Final Order Requirement That Local Government Center Reorganize The Two Pooled Management Programs.

The BSR finally contends that the Agreement and transfers under it violate Paragraph 1 of the Final Order. Motion ¶ 23. Paragraph 1 required that "[n]o later than 90 days from the date of this Order, the Local Government Center shall organize its two pooled risk management programs into a form that provides each program with an independent board and its own set of written bylaws." Final Order ¶ 1. Local Government Center complied with that requirement in November 2012, when the two pooled risk management programs (Local Government Center HealthTrust, LLC ("LGCHT") and Local Government Center Property-Liability Trust, LLC ("LGCPLT")) established separate governing boards and bylaws. See Motion ¶ 11(a). Subsequently, LGCHT and LGCPLT transferred all their respective assets and liabilities to HealthTrust and PLT, each of which had its own board and bylaws, effective September 1, 2013. See Motion ¶ 11(b), (c).

[12] The actuaries' October presentation is attached because it reflects the information available at the time the Agreement was entered by HealthTrust and PLT. Formal reports on unpaid PLT property liability and workers' compensation losses were issued by the actuaries on December 9, 2013. The estimated PLT coverage liabilities did not increase between the October draft and the December final reports.

The Secretary disagreed with that reorganization, asserting that the transactions were prohibited by RSA 292:7. Because of the uncertainty this created, HealthTrust, PLT and others brought a declaratory action against the Secretary and BSR to resolve that question. New Hampshire Municipal Ass'n, No. 217-2013-CV-00511.[13] It is, however, undisputed that HealthTrust and PLT each have their own separate board and bylaws. Motion ¶ 11(b), (c).

Nonetheless, the BSR now contends that the Agreement violates the Final Order because "both the property-liability lines and the health trust lines are now subject to a single conflicted board of directors and a single set of bylaws." Motion ¶ 23 (emphasis added). As described above, the Agreement was a work-out of a debt due. But in any event, BSR's argument ignores the statute and misconstrues the Final Order.

First, as described above, there is nothing wrong or suspect with combining property, casualty and health lines in the same pooled risk program. The statute expressly authorizes pooled risk management programs to provide "any or all" of the listed coverage lines, including property, casualty and health. RSA 5-B:3, III (emphasis added) and III (a), (b), and (f). Thus, HealthTrust may properly provide health, property and casualty lines.

Second, consistent with RSA 5-B:3, III, the Final Order did not prohibit having the property liability "lines" and health "lines" in the same program as the BSR contends. Paragraph 1 of the Final Order says nothing about coverage "lines." It requires that "each program" have its own independent board and written bylaws. The BSR is confusing coverage lines with risk pool programs. The two are statutorily distinct.

Third, the BSR's suggestion that the HealthTrust board is "conflicted" in the manner of the old LGC board when a program includes multiple lines of coverage misinterprets the Final

[13] The Merrimack County Superior Court denied the Secretary's and BSR's motion to dismiss the declaratory action by Order dated January 3, 2014. Exhibit 9.

Order. The Final Order unmistakably disapproved of boards with conflicted duties, but the conflicts at issue did not concern coverage lines. Indeed, the Final Order recognized that the property-liability program included multiple coverage lines. Final Order at 13 n. 14.

The conflicts at issue in the Final Order involved duties with respect to various entities that were part of a "conglomerate." The Presiding Officer found that:

> LGC, Inc. and its entities, decided that they were going to operate in a manner that would allow the LGC, Inc., board of directors to have complete control and dominion, by fiat, over what had been separately governed RSA 5-B pooled risk programs. . . . Unable to legally merge each corporation with a corresponding limited liability company the LGC, Inc. simply arranged to eliminate the board that had been separately governing each pooled risk program. . . .

Final Order at 15 (emphasis added). The Presiding Officer held that this "parent/subsidiary" approach under which there was no separate board for each program resulted in conflicting responsibilities:

> The single board of directors . . . thereafter would be charged with simultaneously fulfilling the varying attendant obligations due to the participating members of the of the health trust and property liability trust as a qualifying RSA 5-B governing board, with those participants of a separately created workers compensation trust; participating owners of real estate interests; and participating members with legislative or lobbying interests.

Final Order at 15 (footnote omitted). The Presiding Officer later reiterated the conflicting interests presented by centralizing governance in the parent's board:

> (1) the operation, maintenance, and control of real estate interests of LGC Real Estate, Inc., placing the board in the position of both landlord and tenant; (2) the operation, maintenance and implementation of legislative advocacy and lobbying efforts and the information, legal advice, training and general support programs of the NHMA, Inc. placing the board in the position of advocate for the approximately one third of the state's municipalities participating in the workers compensation trust or the approximately two thirds of the municipalities who do not participate; and (3) the operation, maintenance and financial success of not a single, but three competing pooled risk management programs absorbed as subsidiaries, placing the board in the position of both borrower and lender.

Final Order at 21-22 (emphasis added).

The Presiding Officer observed that "[t]he duty of care . . . that was previously exclusive to the trust members . . . faced competition with members of other LGC entities in existence and potentially additional LGC entities that may be added to the LGC conglomerate" and that duties of loyalty and fiduciary duties were "muddled," not least because LGC took the position that fiduciary duties "flowed 'up' to the parent." Final Order at 19. In sum, the conflicts that required the reorganization of the programs into a form that provided each program with an independent board and bylaws were conflicts among the entities within the conglomerate, in particular conflicts of having the parent's board running two separate pooled risk management programs. The Final Order did not address any conflicts among lines of coverage within a single program or single entity.

In this context, it should be noted that the Agreement provides that the operational and financial results for HealthTrust's health coverages and the PLT runoff will be separately tracked and reported. Agreement ¶ E.2. It also clarifies that claim payments for the PLT runoff will not be included in the calculations of surplus to be retained by HealthTrust, so those claims will not dilute any amounts properly distributable to HealthTrust members under RSA 5-B:5, I(c).

CONCLUSION

For the foregoing reasons, the BSR's Motion should be dismissed for lack of jurisdiction and as procedurally improper, or otherwise denied in its entirety.[14]

Respectfully submitted,

HEALTHTRUST, INC.

[14] HealthTrust notes that the BSR's requested cease and desist order would effectively work a rescission of the Agreement (a remedy also provided for in RSA 5-B:4-a), so that in no event would it be necessary to consider whether HealthTrust may operate as a RSA 5-B pool or claim the protections of RSA 5-B:6. See Motion ¶ 25. Such relief would be beyond any penalty "provided for under this chapter" (RSA 5-B:4-a, VII(b)) and in excess of jurisdiction.

By Its Attorneys,

Dated: February 18, 2014

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CERTIFICATE OF SERVICE

I certify that I have forwarded copies of this pleading to counsel of record via email.

/s/ Michael D. Ramsdell
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