STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

**HEALTHTRUST'S OBJECTION TO BSR'S MOTION FOR SUMMARY JUDGMENT**

HealthTrust, Inc. ("HealthTrust"), hereby objects to the motion for summary judgment filed by the New Hampshire Bureau of Securities Regulation ("BSR"). HealthTrust has addressed the BSR's arguments concerning the Settlement Agreement ("Agreement") in its own summary judgment motion, and HealthTrust incorporates the facts and arguments from those papers here. See HealthTrust Memorandum in Support of Motion for Summary Judgment ("HT Mem."); HealthTrust Statement of Undisputed Facts ("Statement"). This Objection will respond to particular points made in the BSR's pleadings and will also address why the penalty requested by the BSR is both unauthorized and inappropriate, in the event the Presiding Officer were to find a violation had been present until recently. Certain additional facts are set forth in HealthTrust's Statement of Additional Undisputed Facts ("Additional Statement").

**RECENT DEVELOPMENT: THE TERMINATION AGREEMENT**

HealthTrust and Property-Liability Trust, Inc. ("PLT") have terminated the Settlement Agreement ("Agreement") that underlies the BSR's Motion for Entry of Default Judgment. As noted in HealthTrust's summary judgment papers, in February 2014 Towers Watson provided HealthTrust with estimates of PLT's coverage obligations as of January 10, 2014 that were materially lower than prior estimates. The results of the PLT coverage lines runoff have been

favorable. In light of these changed circumstances, the sole reason for the Agreement, PLT's insolvency, is no longer present. Accordingly, on May 30, 2014, the PLT Board of Directors voted to enter a Termination Agreement proposed by HealthTrust, and on June 3, 2014, the HealthTrust Board of Directors voted to enter the Termination Agreement. The Termination Agreement was fully executed on June 3, 2014. Additional Statement ¶ 11, Second Curro Aff. Ex. 17 (the Termination Agreement).

The Termination Agreement is effective as of June 6, 2014 at 5:00 p.m. Termination Agreement ¶ B1. The Agreement is terminated at that time. Id. ¶ B2. All PLT assets transferred to HealthTrust pursuant to the Agreement, net of claim payments and other expenses incurred thereunder, will be re-transferred from HealthTrust to PLT. Id. ¶ B3. All remaining PLT liabilities that were transferred to HealthTrust pursuant to the Agreement will be re-transferred from HealthTrust to PLT. Id. ¶ B4. The PLT employees who were transferred to HealthTrust pursuant to the Agreement, and all outstanding liabilities related to their employment, will be retransferred from HealthTrust to PLT. Id. ¶ B6.[1]

Contemporaneously with these transfers, PLT will pay HealthTrust $17.1 million in complete and full satisfaction of the payment directed by the Final Order. Termination Agreement ¶ B5. Subject to the Presiding Officer's and the BSR's approval, HealthTrust will distribute the $17.1 million to its current members or another identified combination of current and former HealthTrust members as soon as practicable.[2] Additional Statement ¶ 13.

[1] Additionally, any service or lease agreement between HealthTrust and PLT that was in effect on January 10, 2014 will be reinstated on the same terms and conditions that existed on that date. Termination Agreement ¶ B8.

[2] The current members' distribution will require calculations of contributions through June. Because some members prefer contribution holidays over refund checks, HealthTrust will provide advance notice to the members of their share of the distribution and the opportunity to notify HealthTrust if the individual member prefers a contribution holiday. HealthTrust anticipates that the logistics will be completed and checks distributed or contribution holidays commenced in September. Additional Statement ¶ 13 n. 2.

In its recently filed objection to HealthTrust's motion for summary judgment, the BSR represents that "the Termination Agreement, at section D, provides for HealthTrust to lend money or obtain a line of credit for the benefit of PLT." BSR's objection, p. 9. The BSR's representation is misleading. Section D expressly provides that HealthTrust can only provide a line of credit (1) if PLT's assets prove insufficient to cover PLT's liability for coverage to its existing members through June 30, 2016, and – more importantly – (2) "[s]ubject to BSR prior approval or non-objection." Termination Agreement, Section D (emphasis added). Thus, the BSR, not HealthTrust, controls whether HealthTrust can provide a line of credit to PLT.

The BSR's Motion for Entry of Default Order ("Motion") alleged that the Agreement violated the Final Order and RSA 5-B and requested a finding of violation and an order that respondents "shall cease and desist" operating in violation of the Final Order and RSA 5-B "or be deemed not entitled to operate as N.H. RSA 5-B pools, and to claim the protections of N.H RSA § 5-B." Motion, Prayer B. The Termination Agreement terminates the Agreement such that HealthTrust and PLT are no longer arguably operating in violation of the Final Order and RSA 5-B and there is no need for a cease and desist order. The issues that underlay the Motion thus "have become academic." In re O'Neil, 159 N.H. 615, 624 (2010). Since the unusual circumstances giving rise to the Agreement are unlikely to arise again, HealthTrust suggests this matter has become moot.

## ARGUMENT

### I. THE AGREEMENT DID NOT VIOLATE THE FINAL ORDER'S GOVERNANCE REQUIREMENTS.

The BSR first contends that HealthTrust and PLT violated the Final Order's directive to maintain independent boards and separate bylaws. This position rests on two erroneous premises: (1) that the Agreement constituted a "third reorganization" that somehow did away

with PLT's board and bylaws, and (2) that the Final Order somehow prohibited HealthTrust from administering property-liability lines of coverage. Neither premise is correct. First, the Agreement did not affect PLT's corporate governance. PLT continues to have an independent board and bylaws. Second, the Final Order concerned the propriety of a single board of directors governing two programs (corporations) as part of a conglomerate; it did not address any question concerning operation of multiple coverage lines by a single program (corporation).

### A. The Agreement Did Not Affect PLT's Corporate Governance, and PLT Continues to Have an Independent Board and Bylaws.

In its memorandum, the BSR recognizes that the "respondents" reorganized in compliance with the Final Order.[3] The BSR accepts that in November 2012, the respondent LLCs adopted separate bylaws and appointed separate governing boards, and that in September 2013, HealthTrust and PLT – each of which had its own bylaws and board of directors – accepted the transfer of the respective LLC's assets. BSR Mem. at 3-5, 7. Thus, there is no dispute that, prior to – and now subsequent to – the Agreement, HealthTrust and PLT were in compliance with the Final Order's requirement that the two programs be reorganized "into a form that provides each program with an independent board and its own set of written bylaws." Final Order p. 73, ¶ 1.

The BSR rests its case on the assertion that, as a result of the Agreement (which it inaccurately refers to as a "third reorganization"), "HealthTrust and PLT no longer maintained separate boards and separate bylaws." BSR Mem. at 6. The BSR's position rests solely on a citation to the Agreement, without any analysis or supporting facts. See id. at 7-8 (citing Exhibit E – the Agreement). The BSR misconstrues the Agreement. The Agreement was not a

[3] The parties here are HealthTrust and PLT, each of which has an independent board of directors. Other parts of the former Local Government Center, Inc. (now known as New Hampshire Municipal Association, Inc.) group are not parties against whom the BSR seeks relief and are not represented here.

corporate "reorganization," and PLT continues to have a separate board and its own bylaws. Statement ¶ 32.

"As a general rule, the proper interpretation of a contract is ultimately a question of law for [the courts], and [they] will determine the meaning of the contract based on the meaning that would be attached to it by reasonable persons." Lakes Region Gaming v. Miller, 164 N.H. 558, 562 (2013) (quoting Robbins v. Salem Radiology, 145 N.H. 415, 417 (2000)). "When interpreting a written agreement, [the courts] give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract." Audette v. Cummings, 82 A.3d 1269, 1273 (N.H. 2013) (quoting Czumak v. N.H. Div. of Developmental Servs., 155 N.H. 368, 373 (2007)).

As a matter of law, the Agreement did not have the effect asserted by the BSR. The Agreement did not do away with PLT's separate board of directors or separate bylaws. To maximize payment of the $17.1 million in light of PLT's then apparent insolvency, the Agreement provided for the transfer of all of PLT's assets and liabilities to HealthTrust and that HealthTrust would manage the runoff of PLT's coverage obligations using the transferred assets and the existing PLT staff. See Agreement ¶¶ D.1-D.5. It was silent as to PLT's corporate governance and structure. There was no language in the Agreement that would support the effect posited by the BSR.[4]

[4] The Gardner Affidavit does not create a factual issue. The affidavit does not present any facts concerning PLT's Board of Directors but only observations as to what the Agreement "appears to allow." Gardner Affidavit ¶ 6. The interpretation of a contract, however, is a matter of law. See Orr v. Goodwin, 157 N.H. 511, 518 (2008) (plaintiffs' assertion as to their interpretation of contract not "availing").

The BSR's position is belied by the undisputed facts concerning PLT and its board while the Agreement was operational. PLT continued to have a Board of Directors and separate bylaws. See Statement ¶ 32; Additional Statement ¶¶ 1-2. The six directors of PLT were elected or re-elected by the PLT members at the PLT annual meeting in December 2013. Additional Statement ¶ 1. PLT's Board monitored HealthTrust's compliance with the Agreement, and the Board met to discuss the status of the runoff on March 4 and May 30, 2014. Statement ¶¶ 33-34; Additional Statement ¶ 1. The Chair of PLT's Board and PLT's counsel were among those who met with the BSR on February 4, 2014. Additional Statement ¶ 6. PLT sought a meeting with the New Hampshire Department of Labor by letter dated February 19, 2014. Additional Statement ¶ 8. PLT requested quarterly updates of HealthTrust's runoff of the PLT coverage lines by letter dated April 23, 2014. Additional Statement ¶ 2.

HealthTrust's runoff of the PLT coverage line obligations did not resemble the corporate governance structure (a single parent entity and board over two subsidiary pooled risk management programs) prohibited by the Final Order. The Presiding Officer should reject the BSR's contention that HealthTrust and PLT violated the corporate governance directive of the Final Order that each program have its own independent board and separate bylaws.

### B. The Final Order Concerned Programs, Not Lines of Coverage, and It Did Not Prohibit HealthTrust from Running-off Property-Liability Coverages.

The BSR contends that HealthTrust's "operat[ion] [of] the property-liability and workers' compensation lines of coverage" violated the Final Order. See BSR Mem. at 7-8. It is not clear if the BSR is asserting some alleged violation beyond its erroneous assertion that PLT no longer has a separate board and bylaws. It is clear, however, that the Final Order did not contain directives about the operation of lines of coverage. It required that separate programs – which

RSA 5-B:5, I(a) requires "[e]xist as a legal entity" – have separate boards and bylaws. Final Order p. 73, ¶ 1. As set forth in HealthTrust's memorandum, the Final Order's governance analysis concerned programs, not lines of coverage. See HT Mem. at 23-26. The Final Order does not address the lines of coverage administration issue apparently presented by the BSR.

In applying the Final Order, the Presiding Officer must look to its plain meaning. The rules of interpretation of a prior order are well-established. "In construing a court order, we look to the plain meaning of the words used in the document." In re Salesky, 157 N.H. 698, 703 (2008). "Neither what the parties thought the judge meant nor what the judge thought he or she meant, after the time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant." Edwards v. RAL Automotive Group, Inc., 156 N.H. 700, 705 (2008) (quoting Universal Assurors Life v. Hohnstein, 500 N.W.2d 811, 814 (Neb. 1993)).

The BSR does not identify any Final Order language that prohibited HealthTrust from administering runoff of the PLT coverage lines.[5] It is not surprising that the Final Order does not contain language prohibiting administration of multiple coverage lines because the 2012 administrative hearing did not concern such an issue. See Salesky, 157 N.H. at 703 ("As a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide."). Instead, the hearing concerned the governance of the two separate programs that were at that time part of a "conglomerate" and had no boards or bylaws of their own. See Final Order at 8-24. The Presiding Officer's rulings in the Final Order were directed to the absence of separate boards and bylaws governing the separate programs and the conflicts the

[5] The assertions concerning the meaning of the Supreme Court's decision, the Final Order, and statutes and what the Agreement "appears to allow" or "may also be used to facilitate" in the Gardner Affidavit ¶¶ 5-6 constitute "legal conclusions and 'expression[s] of purely personal opinion'" that are insufficient to support or defeat summary judgment. See Granite State Management & Resources v. City of Concord, 165 N.H. 277, 290 (2013) (quoting Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 490-91 (1989)).

"parent/subsidiary" structure presented for the single LGC, Inc. board responsible for all the various subsidiary legal entities in the "conglomerate." See Final Order at 6, 15.

The Supreme Court recognized that this was the basis for the Final Order. The Court summarized the Presiding Officer's organizational findings as follows:

> The presiding officer first found that the respondents violated RSA 5-B:5, I(b) and (e). He construed those provisions to require that each pooled risk management program be governed by its own board of directors and by its own bylaws. See RSA 5-B:5, I(b), (e). Accordingly, he found that the 2003 reorganization, which resulted in LGC transferring the assets of its pooled risk management programs to itself and abolishing the separate boards that had previously governed such programs, violated those provisions.

Appeal of Local Government Center, slip op. at 6. The Court then summarized the Presiding Officer's rationale, which focused exclusively on the implications of LGC's failure to respect the RSA 5-B mandated governance for each program:

> The presiding officer explained that "by abolishing each program's respective board and substituting the LGC . . . board of directors, the political subdivision members of each pooled risk management program were deprived of the governance previously maintained for their benefit," as required by statute. The post-2003 reorganization "result[ed] in a conglomerate imbued with conflicts of interest adverse to the required standards for operation of each pooled risk management program." "The influences and interest that would be limited to considerations of a single program and its members [became] subject to other influences and interests within the LGC . . . conglomerate related to other subsidiary business entities all governed by one board."

Id. (quoting the Final Order at 6, 19, 21).

The BSR's position confuses programs and lines of coverage. A "program" is not a line or group of lines of coverage but a legal entity, and the governance requirements apply to those legal entities. The statute expressly distinguishes between programs and coverages. See RSA 5-B:5, I(a) ("Each program shall . . . [e]xist as a legal entity organized under New Hampshire law."); RSA 5-B:3, III (Programs "may provide any or all of the following coverages . . . .").

In the Final Order, the Presiding Officer recognized that the requirements of a governing board and bylaws attach to the legal entity that is the program:

> The organizational violations . . . result from [LGC's] failure to meet and maintain standards required by this statute to operate each pooled risk management program at all times consistent with a governing board and governing by-laws of a legal entity organized under New Hampshire law.

Final Order at 6. See id. at 10, 11. Consistent with the statute, the Final Order applied the governance requirements to the legal entity programs. Indeed, the Presiding Officer recognized that the formerly separate property-liability and workers' compensation programs had been combined by a merger of LLCs in 2007 (Final Order at 13 & n. 14), and he applied the corporate governance requirements to that single "combined" program, not to the separate property-liability and workers compensation lines of coverage. Final Order at 23, 73. See Appeal of Local Government Center, slip op. at 4 (noting 2007 merger), 10 (noting remedy).

The Final Order provided for the proper governance of each corporate entity that constitutes a program, and it did not address any issues concerning the administration of the runoff of lines of coverage written by one program by another. The administration of the runoff of a program's coverage obligations pursuant to contract did not present a corporate governance issue. Corporate governance is distinct from such operational issues. Insurance companies and pooled risk management programs enter into contracts with third party administrators ("TPAs") to handle claims under their policies and otherwise administer their business, but that does not mean their boards of directors do not continue to exist or have responsibilities with respect to the administered business. (For example, HealthTrust has long engaged Anthem to administer its medical plan claims. Additional Statement ¶ 15). Similarly, insurance companies and programs reinsure their business or certain "blocks" of business with other insurers, but that does not render their boards of directors a nullity or constitute a corporate "reorganization."

The BSR's position ultimately is a policy view that property-liability lines of coverage should not be managed alongside health lines of coverage. However, RSA 5-B expressly permits programs to offer "any or all" of the enumerated coverage lines, including property, casualty and health lines. RSA 5-B:3, III. The BSR is attempting to establish a policy not found in the statute through the administrative process. The attempt is not proper because "[a]n agency may not add to, change, or modify the statute by regulation or through case-by-case adjudication." Appeal of Local Government Center, slip op. at 17 (quoting In re Jack O'Lantern, Inc., 118 N.H. 445, 448 (1978)).[6]

### C. The Agreement Did Not Require Member Consent.

The BSR asserts in passing that political subdivisions did not provide "the necessary resolution or consents" for the Agreement. BSR Mem. at 8-9. However, the BSR does not advance any basis for requiring individual member consent. The Agreement was, of course, approved by the boards who are the elected representatives of the HealthTrust and PLT members. Statement ¶¶ 18, 21. As set forth in HealthTrust's memorandum, RSA 5-B:3 does not require members consent. HT Mem. at 26-28. The BSR does not identify any language in the statute that could support a contrary conclusion.[7]

## II. THE AGREEMENT DID NOT "PRECLUDE" THE RETURN OF THE $17.1 MILLION TO HEALTHTRUST BUT FACILITATED IT.

The BSR asserts that the Agreement violated the Final Order because it allegedly allowed PLT to avoid paying the $17.1 million and deprived HealthTrust's members of any refundable

[6] The DOL appears not to share this view, as it issued an Administrative Order allowing HealthTrust to administer the runoff of PLT's workers' compensation coverages pursuant to the Agreement. See Curro Aff. Ex. 10.

[7] The BSR suggests that HealthTrust members were exposed to risks "associated" with the property-liability coverage lines. BSR Mem. at 8. However, there was no realistic exposure. At the time the Agreement was executed, PLT had approximately $12.2 million of net assets above its reserves for coverage obligations to act as a buffer before HealthTrust would have absorbed any PLT liabilities. See Statement ¶ 24. Based on the April 30, 2014 pro forma financial statements, it now appears that there will be $18.6 million after runoff of the PLT coverage obligations. Additional Statement ¶ 9.

excess. BSR Mem. at 9. This ignores both the situation at the time the Agreement was entered and the operation of the Agreement. Any shortfall would have been a consequence of PLT's insolvency, not the Agreement. As more fully set forth in HealthTrust's summary judgment papers, it appeared in the fall of 2013 that PLT would be insolvent if the $17.1 million repayment obligation was affirmed. That fact and the consequent inability of PLT to pay all its creditors meant that PLT could not pay HealthTrust but instead would need to make a bankruptcy filing, which would both delay the partial payment and reduce it due to the costs of bankruptcy proceedings. HT Mem. at 4-6, 13; Statement ¶¶ 5-16.[8] The Agreement addressed this situation by providing for PLT to transfer all its assets and liabilities (that is, everything it had) to HealthTrust, Agreement ¶ D.1, and further provided for HealthTrust to administer the runoff of PLT's coverage obligations, which would minimize the costs of the runoff (and thus increase the amount realized by HealthTrust compared to a bankruptcy) and would have allowed HealthTrust to determine when it may appropriately collect and distribute PLT assets (as opposed to having the payment governed by the bankruptcy court). Agreement ¶ D.3.

The BSR's position relies on disregard of these realities. While the Final Order required that PLT pay $17.1 million to HealthTrust for ultimate distribution to its members, that assumed that PLT had the means to do so. Based on the then opinions of its independent actuaries and its financial statements, it did not. In the circumstances, PLT complied with the Final Order by paying – transferring – everything it had to HealthTrust, and HealthTrust complied by accepting the transfer on conditions that maximized its return and gave it control over the timing of the distribution of PLT assets to HealthTrust members. The logic of BSR's position is that the Final

[8] In addition to the authorities cited in the HealthTrust memorandum concerning directors' duties to treat creditors fairly, see: 3A Fletcher Cyclopedia of the Law of Corporations § 1035.60 at 35-36 (2011 rev. vol.) ("In most jurisdictions, when a corporation becomes insolvent, officers and directors of a corporation owe a fiduciary duty to the corporation's creditors."); Peterson v. John J. Reilly, Inc., 105 N.H. 340, 346 (1964) (assets of an insolvent corporation are a "trust fund" for its creditors).

Order required PLT to file for bankruptcy. However, that was not the intent of the Final Order, which directed the distribution of PLT "excess surplus" and the repayment of $17.1 million to HealthTrust. Among other things, it would have unnecessarily harmed the members of PLT (as PLT's coverage obligations to claimants and members would not be paid in full) and the members of HealthTrust (who would receive less in distributions from PLT assets at later dates as determined by the bankruptcy court). Statement ¶¶ 15-16. Entering a workout agreement to maximize payment of the $17.1 million and avoid the "collateral damage" of a PLT bankruptcy did not violate the Final Order.

The BSR incorrectly asserts that the purpose of the Agreement was "to extinguish" the debt for less than $17.1 million. BSR Mem. at 9, 10. The Agreement accepted the transfer of PLT's assets and liabilities in complete satisfaction of PLT's obligation because of PLT's apparent insolvency, Agreement ¶ D.2, but that transfer was of everything that PLT had. It did not "extinguish," "compromise" or "forgive" the obligation, nor did it "subsidize" PLT. HealthTrust's collection of less than the full amount would have only been a result of PLT's insolvency, not the Agreement. If it turned out that PLT had more than the $12.2 million anticipated in the fall of 2013 (see Statement ¶ 24), then HealthTrust would have collected more. In fact, it now appears that PLT's assets are sufficient for HealthTrust to collect the full $17.1 million, which HealthTrust would have been able to do under the Agreement. See Statement ¶ 30. Instead, HealthTrust will collect the full amount under the Termination Agreement. Additional Statement ¶ 13. Thus, the BSR's claim that the Agreement "extinguished" the debt is factually incorrect.

The BSR's assertion that the Agreement would have delayed distribution from PLT assets to HealthTrust members is similarly flawed. Any delay would have resulted from PLT's

insolvency, not the Agreement. The Agreement allowed HealthTrust – and not a PLT bankruptcy court – to determine when to make a distribution from the PLT assets, and HealthTrust need not have awaited the conclusion of the PLT runoff. In fact, the HealthTrust Board, on April 1, 2014, approved a distribution of $13.9 million from those assets to HealthTrust members, subject to the Secretary's consent or express non-objection. Statement ¶ 35. HealthTrust requested consent on April 8, 2014, but the Secretary has to date declined to consent or non-object. Id. ¶ 36. Given the Termination Agreement, it is anticipated that the full $17.1 million will be distributed to HealthTrust members as soon as practicable, subject to approval by the BSR and the Presiding Officer. Additional Statement ¶ 13.

The Agreement thus did not "preclude" collection of the $17.1 million but facilitated it. Today, HealthTrust and its members stand to receive the full amount, and a substantial distribution already had been approved under the Agreement.

## III. THE RELIEF SOUGHT BY THE BSR IS NOT AUTHORIZED AND IN ANY EVENT IS UNWARRANTED AND DISPROPORTIONATE.

In the Motion, the BSR requested that the Presiding Officer order HealthTrust and PLT to cease and desist operating in violation of the Final Order or be deemed not entitled to the protections of RSA 5-B:6. Motion, Prayer B. Now, the BSR in its summary judgment motion requests only that the Presiding Officer issue an order finding the Respondents may no longer claim the protections of RSA 5-B:6. BSR Motion for Summary Judgment, Prayer D. The BSR thus seeks to disestablish HealthTrust as a pooled risk management program by depriving it of the tax and regulatory exemption intended to allow such programs to benefit political subdivisions. See RSA 5-B:1; RSA 5-B:6, I.[9] This corporate "death knell" penalty sought by the BSR is not authorized. While

[9] RSA 5-B:6, I, provides: "Any pooled risk management program meeting the standards required under this chapter is not an insurance company, reciprocal insurer, or insurer under the laws of this state, and administration of any activities of the plan shall not constitute doing an insurance business for purposes of regulation or taxation."

it never was warranted, it is particularly unjustified because HealthTrust and PLT have terminated the Agreement. In other words, as sought by the BSR in the Motion, HealthTrust and PLT have "ceased and desisted."

### A. The Statute Does Not Authorize the Secretary to Terminate a Program's Statutory Exemption from State Taxation and Insurance Regulation.

RSA 5-B does not contain language granting the Secretary or Presiding Officer the power to deprive programs of the statutory exemptions from state insurance laws and state taxation. The absence of such language indicates that the Legislature did not see fit to confer such power. "Administrative tribunals . . . have only the authority that is 'expressly granted or fairly implied by statute.'" In re Chase Home for Children, 155 N.H. 528, 533 (2007) (quoting Appeal of Public Serv. Co. of N.H., 130 N.H. 285, 291 (1988)). The courts "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include." Id. at 534.

The authority of the Secretary – and thus of the Presiding Officer – to impose penalties is set forth in RSA 5-B:4-a. That section contains three subsections concerning penalties.[10] First, it authorizes the Secretary to impose "penalties for violations of this chapter, including but not limited to: (1) Fines. (2) Rescission, restitution, or disgorgement." RSA 5-B:4-a, I(b). Second, it authorizes the Secretary to recover "the costs of the investigation, and any related proceedings, including reasonable attorney's fees, in addition to any other penalty under this chapter." RSA 5-B:4-a, V. Third, it provides that "[t]he following fines and penalties may be imposed" and specifies "an administrative fine not to exceed $2,500" and "an order for rescission, restitution or disgorgement." RSA5-B:4-a, VII.

[10] The Secretary also has the power to issue an order requiring a person "to cease and desist from violations of this chapter." RSA 5-B:4-a, VI.

There are thus a number of penalties potentially available to the Presiding Officer in the event he finds a violation. RSA 5-B does not, however, authorize the Secretary or a Presiding Officer to abolish the status and the statutory exemption from insurance regulation and state taxation provided by RSA 5-B:6, I.

The BSR might contend that the phrases "penalties . . . including but not limited to" in RSA 5-B:4-a, I(b) and "any other penalty provided for under this chapter" or "any other penalty provided for by law" in RSA 5-B:4-a, V and VII support its claimed authority. However, the references to other penalties "provided for under this chapter" or "by law" do not grant the Presiding Officer power to order the extraordinary sanction sought by the BSR because the abolition of status and statutory exemption is not found in RSA 5-B or elsewhere. The phrase "including but not limited to" is similarly insufficient. "The principle of *ejusdem generis* provides that, where specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words." State v. Beauchemin, 161 N.H. 654, 658 (2011) (quoting State v. Breed, 159 N.H. 61, 65 (2009)). The penalties authorized by RSA 5-B:4-a, therefore, must be similar to the listed penalties of fines, rescission, restitution or disgorgement. The "death knell" sanction sought by the BSR is quite unlike the enumerated penalties. It does not remedy a specific transaction or impose a monetary loss but instead destroys the ability of the program to operate by removing statutory exemptions. It is thus not authorized.

The BSR might also contend that the sanction is a power "reasonably implied in order to perform the substantive responsibilities imposed by this chapter." RSA 5-B:4-a, II. However, the Secretary has no substantive responsibilities as to the exemption of programs from insurance regulation or taxation. The exemptions are legislatively declared benefits intended to benefit the

political subdivisions who are members of pooled risk management programs. See RSA 5-B:1, :6, I. The Legislature charged the Insurance Commissioner with the "rights, powers, and duties pertaining to the enforcement and execution of the insurance laws of this state." RSA 400-A:3. Thus, only the Insurance Commissioner is empowered to determine who is subject to the insurance laws, including the premium tax. See RSA 400-A:32.

The BSR essentially assumes that the Secretary has the power of a licensing agency to revoke a regulated entity's authority to do business (here, by revoking the application of statutory exemptions that allow the program to do business). However, the Legislature has not provided the Secretary with such powers over pooled risk management programs in RSA 5-B. The BSR is attempting to add words to the statute that the Legislature did not see fit to include, contrary to the established principles of statutory construction. See Appeal of Local Government Center, slip op. at 12.

The Legislature knows how to grant the authority to issue and revoke licenses. It has provided that broker-dealers, issuer-dealers, agents and investment advisers may not do business without a license from the Secretary, RSA 421-B:6, :7, and authorized the Secretary to revoke such licenses in certain circumstances. RSA 421-B:10. Similarly, it has required that insurance companies obtain licenses from the Insurance Commissioner, RSA 402:10, and authorized the Commissioner to suspend or revoke those licenses for specified reasons. See, e.g., RSA 400-B:12; RSA 417:13. However, the legislature did not grant the authority to create RSA 5-B pooled risk management programs or to approve or revoke the related exemptions to the Secretary. Accordingly, the Presiding Officer may not lawfully issue such an order. See Appeal of Somersworth School Dist., 142 N.H. 837, 841 (1998) ("Although the PELRB may issue cease and desist orders, the statute does not give it the power to grant all equitable remedies.")

(citations omitted); Appeal of Land Acquisition, LLC, 145 N.H. 492, 498 (2001). In the absence of legislation, the agency "cannot confer jurisdiction upon itself." In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011) (quoting Fullerton v. Administrator, 911 A.2d 736, 742 (Conn. 2006) (brackets omitted)).

### B. The Sanction Sought by the Secretary Is Disproportionate and Excessive.

Even if there had been a violation of the Final Order and the sanction requested by the BSR were permissible, the Presiding Officer should not deprive HealthTrust of its exemptions from state taxation and insurance regulation. In the Final Order, the Presiding Officer provided respondents with prior opportunity to cure the violations found, Final Order p. 73, ¶ 2, and the same type of measured approach would be warranted here. The proposed sanction would sound a death knell for HealthTrust. It is grossly disproportionate and excessive to any violation. See In re AlphaDirections, Inc., 152 N.H. 477, 486 (2005) (administrative penalty may be set aside "if it is so harsh or excessive as to be unreasonable"). "All penalties ought to be proportioned to the nature of the offense." N.H. Const., pt. 1, art. 18. Especially now that the Agreement has been terminated, the sanction is plainly unwarranted.

Removing the exemptions would effectively disable HealthTrust's business to the detriment of its member political subdivisions by (1) preventing HealthTrust from offering coverage to its members, (2) creating uncertainty about the validity of HealthTrust's in-force coverages and its ability to legally handle claims and runoff its past business, and (3) causing HealthTrust to increase its rates – if it eventually could write coverage as an insurer – to account for potential premium and other state taxes applicable to insurance. HealthTrust potentially would have to stop writing coverage and might not even be able to conduct a runoff. Even if it could eventually resume business, its prices would be higher. As a practical matter, the program

that has benefitted political subdivisions for over thirty years would be disabled to the detriment of the very political subdivisions HealthTrust serves. Additional Statement ¶ 14.

Even if the Agreement had violated the Final Order or RSA 5-B, such a sanction is not a necessary or appropriate remedial measure. The penalty of rescission would have been available, RSA 5-B:4-a, I(b)(2), but even that is now unnecessary. Since HealthTrust and PLT have already terminated the Agreement, no penalty is appropriate. The death knell sanction is so extreme that it could only be warranted if a program repeatedly committed serious, unmistakable and continuous violations and was clearly uninterested in working with regulators to achieve compliance. That is simply not the case here.

The Final Order does not address the question of the ability of one program to administer the runoff of another's coverage obligations. Its directives concern corporate governance – the statutory requirements that a program be a legal entity with a board of directors and bylaws. If the Final Order were construed to address issues of administration, it would be inappropriate and disproportionate to penalize HealthTrust for conduct that has not previously been identified as a violation.[11] At this point, the issue need not be addressed as, in light of the Termination Agreement, PLT will administer its coverage lines.

The BSR has attempted to portray HealthTrust as violating paragraph 1 of the Final Order so as to bring the automatic sanction of paragraph 2 into play. However, the BSR now concedes that the respondents complied with paragraph 1 of the Final Order by reorganizing the programs into HealthTrust and PLT, each of which is a New Hampshire legal entity with a separate board

[11] Indeed, without an opportunity to cure, a penalty based on an application of the Final Order to prohibit HealthTrust from administering the runoff of property-liability coverage lines pursuant to contract would violate HealthTrust's right to due process under N.H. Const. Part 1, Arts. 12 and 15. Such a use of the Final Order would be improper because the order does not reasonably advise of a prohibition on administration. So construed, it would be impermissibly vague because it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." N.H. Dept. of Environmental Servs. v. Marino, 155 N.H. 709, 716 (2007) (quoting State v. Porelle, 149 N.H. 420, 423 (2003)).

of directors and bylaws. It is undisputed that HealthTrust and PLT are still New Hampshire legal entities with separate boards and bylaws. The boards of those two entities were faced with a possible PLT insolvency if the $17.1 million obligation were affirmed. They sought to address the significant problems that would follow insolvency in a reasonable way that would maximize value to HealthTrust and otherwise avoid adverse consequences to their respective members. HealthTrust did not give up the right to obtain the $17.1 million for its members. If the Agreement entailed a violation, it was a new violation resulting from sincere efforts to deal responsibly with an unprecedented situation. It would not warrant harsh punishment.

Importantly, HealthTrust and PLT have sought regulatory guidance. In 2013, PLT requested BSR approval of a 90% confidence level, but received no response. Additional Statement ¶ 3. HealthTrust requested the BSR to delay PLT's distribution of $3.1 million in light of PLT's potential insolvency, but was rebuffed. Statement ¶ 8. (The BSR sought to control HealthTrust's and PLT's implementation of the Final Order by a proposed Memorandum of Understanding calling for the Secretary's representative to control them to the exclusion of their boards for purposes of implementing the Final Order. Additional Statement ¶ 4; Second Curro Aff. Ex. 11, Arts. I, III.)

Since the Supreme Court upheld the $17.1 million repayment, HealthTrust and PLT have repeatedly sought the BSR's comments and offered to modify the Agreement, without substantive response from the BSR. The BSR was not able to meet to discuss the Agreement until February 4, 2014. When the meeting requested by HealthTrust took place, the BSR asked few questions and did not comment on the Agreement. Additional Statement ¶ 6. The BSR filed the Motion on February 7, 2014, before it asked for information on February 11, 2014. In its responses, HealthTrust reiterated its willingness to work with the BSR to address any concerns

and requested suggestions as to modifications to the Agreement and the runoff. The BSR made no substantive response. Additional Statement ¶ 7. (The BSR also declined requests for multi-party meetings with the Department of Labor, which is charged with supervising workers' compensation matters. See RSA 281-A:11. Additional Statement ¶ 8.)

HealthTrust proposed to PLT on March 4, 2014, that the Agreement should be terminated in light of the positive developments concerning the financial prospects for PLT's coverage lines runoff. Additional Statement ¶ 9. More recently, on May 20, 2014, the HealthTrust Board of Directors advised the BSR of its willingness to rescind the Agreement. The Board noted that the sole reason for the Agreement – the consequences to HealthTrust of a potential PLT insolvency – is no longer present in light of updated actuarial reports and the current financial statement for the PLT coverage lines runoff. The Board accordingly proposed to resolve the situation by rescinding the Agreement, with the $17.1 million being paid to HealthTrust for it to distribute to its members. Id. ¶ 10. HealthTrust and PLT agreed to terminate the Agreement in the Termination Agreement, and HealthTrust will distribute the $17.1 million subject to BSR and Presiding Officer approval. Id. ¶ 13.

In this context, if a violation were found, the Presiding Officer should decline to order any penalty.

## CONCLUSION

For the reasons set forth above and in its own summary judgment papers, HealthTrust requests that the Presiding Officer dismiss this matter as moot or deny the BSR's motion for summary judgment and grant summary judgment to HealthTrust denying the BSR's Motion for Entry of Default Order in its entirety.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

Dated: June 4, 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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