GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF INSURANCE, SECURITIES AND BANKING

IN THE MATTER OF

Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.

D.C. APPLESEED'S OPPOSITION TO GHMSI'S PETITION FOR RECONSIDERATION AND MOTION TO STAY FURTHER PROCEEDINGS

D.C. Appleseed Center for Law and Justice, Inc. ("D.C. Appleseed") respectfully submits this opposition to Group Hospitalization and Medical Services, Inc.'s ("GHMSI") Petition for Reconsideration and Motion to Stay Further Proceedings ("Petition"). GHMSI asks the Commissioner to reconsider the Department of Insurance, Securities and Banking's ("DISB") August 30, 2016 Final Order on GHMSI's excess 2011 surplus, or stay implementation of the Final Order pending judicial review. *See* Pet. at 1–2. GHMSI's arguments for reconsideration or a stay ignore both the considerable administrative process that led to the Final Order, and the legal standards governing the extraordinary relief GHMSI seeks. The Commissioner should deny both requests.

The Final Order is the product of a nearly four-year administrative surplus review procedure that began in October 2012. That review of GHMSI's 2011 surplus was mandated by the District of Columbia's Medical Insurance Empowerment Amendment Act of 2008 ("MIEAA"), which announced a strong public policy in enforcing GHMSI's obligations to invest in community health in the District. *See, e.g.*, D.C. Code § 31-3505.01 (2009). As part of that exhaustive surplus review, among other things, the DISB: held a public hearing on GHMSI's surplus: considered extensive briefing on the surplus from GHMSI and D.C. Appleseed;

considered (and denied) GHMSI's and D.C. Appleseed's motions for reconsideration of the DISB's December 30, 2014 surplus determination; considered GHMSI's statement in support of its purported reinvestment plan in March 2015; and considered comments from GHMSI and the public on the appropriate reinvestment plan for GHMSI's excess surplus. The resulting Final Order furthers MIEAA's purposes by requiring GHMSI to reinvest a fraction of its excess surplus in community health through subscriber rebates. *See* Aug. 30 DISB Final Order. Having already heard the concerns raised by GHMSI during the lengthy administrative process—including the vast majority of arguments GHMSI now raises in support of reconsideration and a stay—the Commissioner has no cause for further delay in implementing the clear policies voiced by the D.C. Council in MIEAA.

I. The Commissioner Should Deny GHMSI's Petition For Reconsideration.

GHMSI first asks the Commissioner to reconsider the DISB's decisions made during this multi-year administrative process "so that the Commissioner can give full and appropriate weight to GHMSI's arguments." Pet. at 1. But, as GHMSI concedes, GHMSI made these same arguments in previous filings before the Commissioner. *Id*. *See also, e.g., id*. at 4; GHMSI Public Comment Letter at 1–14 (July 14, 2016); GHMSI Motion to Stay Further Proceedings at 1–5 (Jan. 22, 2015). The Commissioner has already considered and rejected these arguments. GHMSI offers no new explanation as to how the Commissioner erred in rejecting GHMSI's arguments, and presents no new evidence or intervening events to support reconsideration. *See, e.g.*, *Sierra Club v. Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (noting agency's inherent authority, *inter alia*, "to consider new evidence that became available after the agency's original decision" or other "intervening event"). GHMSI's mere restatement of its prior arguments in summary form, *see* Pet. at 1, 4, falls well short of justifying reconsideration of the Commissioner's years-long administrative process.

GHMSI's Petition claims to raise "technical questions" not presented to the Commissioner during the four years of this administrative proceeding, but those arguments now come too late. *See* DISB Order 14-MIE-014 at 2 (Jan. 28, 2015) (denying request for reconsideration because "the issues GHMSI identifies are arguments it could have raised, but did not, during the multi-year surplus review"). *Cf. Smith v. Lynch*, 115 F. Supp. 3d 5, 11 (D.D.C. 2015) (explaining that post-decision motions to alter or amend the judgment under the Federal Rules of Civil Procedure "are aimed at reconsideration, not initial consideration, and arguments raised for the first time on . . . [such] motion may be deemed waived"). For example, GHMSI's assertion that the Commissioner "may wish" to consider the tax consequences of subscriber rebates and address allocation for federal employees, *see* Pet. at 4–5, ignores that GHMSI's public comment on the DISB's plan for reinvestment of the excess surplus addressed "distribution of funds to policyholders" without any mention of such consequences, *see* GHMSI Public Comment Letter at 5 (July 14, 2016).[1] Indeed, GHMSI has previously indicated that any reductions in excess surplus should involve rebates to subscribers. *See* Plan of GHMSI Filed Pursuant to December 30, 2014 Order No. 14-MIE-012 at 8 (Mar. 16, 2015).

II. The Commissioner Should Deny GHMSI's Motion To Stay Further Proceedings.

GHMSI's separate request to stay the August 30, 2016 Final Order fares no better. *See* Pet. at 5–11. GHSMI bears the burden to show it is entitled to such "extraordinary relief." *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[1] In addition to coming too late, GHMSI's argument regarding federal employee allocation raises a question properly addressed by the United States Office of Personnel Management and federal employers distributing and allocating the rebates, not the Commissioner. *Compare* DISB Order 14-MIE-014 at 2 (Jan. 28, 2015) (denying GHMSI's prior motion for reconsideration because, among other things, "the issues GHMSI raises regarding conflicts among jurisdictions are matters that lie beyond the Commissioner's authority to address" because the "Commissioner is bound to follow the District of Columbia statutes and regulations governing this surplus review.").

And GHMSI must satisfy four factors mirroring—and relying upon—the test for similarly extraordinary injunctive relief. *See, e.g.*, *Kuflom v. D.C. Bur. of Motor Vehicle Servs.*, 543 A.2d 340, 344 (D.C. 1988) (citing *Virginia Petroleum*, 259 F.2d at 925)), Accordingly, GHMSI "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that . . . [extraordinary relief] is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). GHMSI has not met its burden.

A. GHMSI Failed To Show That It Is Likely To Succeed On The Merits.

GHMSI fails even to allege that it is likely to succeed on the merits of its challenge to the Final Order. GHMSI also ignores that, in denying GHMSI's previous stay request, the Commissioner found, among other things, that "GHMSI is unlikely to succeed on the merits." DISB Order 14-MIE-015 at 3 (Mar. 2, 2015). Rather, GHMSI contends that it has raised "significant legal questions," Pet. at 6, and that this lesser showing is sufficient because the other three factors are allegedly satisfied, *see id*. at 5. Neither premise is correct. GHMSI's showing on the other three factors cannot, as a matter of law, excuse GHMSI's failure to show a likelihood of success on the merits, and GHMSI has not, in any event, adequately demonstrated that the other factors support extraordinary relief, *see infra* Sections II.B, II.C.

GHMSI's plea for a lesser standard on the merits rests upon the "sliding scale" approach to injunctive relief that has now been called into question. *See* Pet. at 5. "The Supreme Court's decision in *Winter* . . . called [the sliding scale] approach into doubt and sparked disagreement over whether the 'sliding scale' framework continues to apply, or whether a movant must make a positive showing on all four factors without discounting the importance of a factor simply because one or more other factors have been convincingly established." *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv*. No. 15-cv-1582, 2016 WL 420470, at *7 (D.D.C. Jan.

22, 2016). *See also* DISB Order 14-MIE-015 at 3 n.1 (Mar. 2, 2015).[2] Indeed, GHMSI's Petition cites only pre-*Winter* D.C. Circuit decisions or D.C. Court of Appeals cases relying on the pre-*Winter* D.C. Circuit decisions. *See* Pet. at 5–6.[3]

In addition to *Winter*, the Supreme Court has repeatedly suggested in recent years that likelihood of success on the merits is a requirement for extraordinary relief independent of any showing on the other factors. Indeed, "[a] stay is not a matter of right, ***even if*** irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433, 435 (2009) (requiring movant for a stay to "satisf[y]" first two factors of likelihood of success and irreparable harm) (emphasis added). *See also Perry v. Perez*, 132 S. Ct. 934, 942 (2012) ("Plaintiffs seeking a preliminary injunction of a statute must normally demonstrate that they are likely to succeed on the merits of their challenge to that law."); *Winter*, 555 U.S. at 21–22 (rejecting Ninth Circuit test allowing a lesser showing of irreparable harm where movant establishes "a strong likelihood of prevailing on the merits"); *Munaf v. Geren*, 553 U.S. 674, 690 (2008) ("[A] party seeking a preliminary

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[2] *See also, e.g.*, *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) ("We note that that analysis in *Winter* could be read to create a more demanding burden, although the decision does not squarely discuss whether the four factors are to be balanced on a sliding scale."); *id*. at 1295–96 (Kavanaugh, J., concurring) (agreeing that "the old sliding scale approach to preliminary injunctions . . . is 'no longer controlling or even viable'" following *Winter* and "a movant cannot obtain a preliminary injunction without showing *both* a likelihood of success *and* a likelihood of irreparable harm") (quoting *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) ("Like our colleagues [in *Davis*], we read *Winter* at least to suggest if not hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction." (citation omitted)); *Reinhard v. Johnson*, No. 16-cv-1807, 2016 WL 5078957, at *6 (D.D.C. Sept. 16, 2016) ("Several judges on the . . . D.C. Circuit have read *Winter* to at least suggest if not hold that a likelihood of success is an independent, freestanding requirement for a preliminary injunction." (citation omitted)).

[3] *See Salvaterra v. Ramirez*, 105 A.3d 1003, 1005 (D.C. 2014) (quoting *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)). *See also In re Estate of Reilly*, 933 A.2d 830, 837 (D.C. 2007) (citing cases); *Akassy v. William Penn Apartments, LP*, 891 A.2d 291, 310 (D.C. 2006) (quoting *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)).

injunction must demonstrate, among other things, a likelihood of success on the merits."); *Davis*, 571 F.3d at 1295–96 (Kavanaugh, J., concurring) (citing *Winter*, *Munaf v. Geren*, and *Nken v. Holder* to conclude that the sliding scale is no longer viable). *Cf. Feaster v. Vance*, 832 A.2d 1277, 1287–88 (D.C. 2003) (noting movant must "clearly demonstrate[] . . . that there is a substantial likelihood that he or she will prevail on the merits") (citations omitted). Thus, "[w]hen considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other." *Nken*, 556 U.S. at 438 (Kennedy, J., concurring).

Here, GHMSI does not make the requisite showing on likelihood of success, but rather restates arguments the Commissioner has already rejected about the methodology underlying the DISB's December 30, 2014 order, GHMSI's alleged community reinvestment from 2012 to 2014, and the impact of Congress' 2016 amendment on GHMSI's charter. *Compare* Pet. at 6–8 *with* DISB Order 14-MIE-014 at 1–2 (Jan. 28, 2015), DISB Order 14-MIE-016 at 5–18 (June 14, 2016), *and* DISB Order 14-MIE-019 at 14–31 (Aug. 30, 2016).

Even if the sliding scale approach remains viable after *Winter*, GHMSI's request for a stay fails under that analysis. The sliding scale does not reduce GHMSI's burden on the merits in this case because the sliding scale is only triggered where a "movant makes an ***unusually strong*** showing on one of the factors . . . ." *Davis*, 571 F.3d at 1291–92 (emphasis added). *See also Am. Meat Inst. v. U.S. Dep't of Agriculture*, 746 F.3d 1065, 1074 (D.C. Cir. 2014) ("Even if the sliding scale approach . . . survived *Winter* . . ., a plaintiff with a weak showing on the first factor would have to show that ***all three of the other factors so much favor*** the plaintiffs that they need only have raised a serious legal question on the merits." (quoting *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)) (emphasis added), *vacated on other grounds*, 2014 WL

2619836, *judgment reinstated* 760 F.3d 18. GHMSI's showing on the other factors falls well short of the mark.[4]

B. GHMSI Failed To Show A Likelihood Of Irreparable Harm.

Although GHMSI contends that "[e]xecuting the Commissioner's plan while an appeal remains pending would cause irreparable harm to GHMSI" because the distributed funds "could *never* be retrieved . . .," Pet. at 8, "the fact that economic losses may be unrecoverable does not absolve the movant from its considerable burden of proving that those losses are *certain, great and actual . . .*," *Save Jobs USA v. U.S. Dep't of Homeland Security*, 105 F. Supp. 3d 108, 114 (D.D.C. 2015) (quoting *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52–53 (D.D.C. 2011)). "In other words, the mere fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm." *Id*. (quoting *Nat'l Mining Ass'n*, 768 F. Supp. 2d at 52–53).

Instead, GHMSI must make "a strong showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits, or demonstrate[] that the loss would cause extreme hardship to the business . . . ." *Id*. at 115 (citation omitted). *See also Air Transp. Ass'n of Am., Inc. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012) (even "irretrievable" "economic harm [must] be significant"). In fact, GHMSI "bears the burden of substantiating, with evidence, that the injury is certain, imminent, great, and beyond remediation." *Nat'l Parks Conservation Ass'n*, 2016 WL 420470, at *8 (citing *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). *See also FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 126 (D.D.C. 2015). "For economic harm to constitute irreparable injury . . . [the

[4] In other words, like the cases before the D.C. Circuit noting the tension between the sliding scale and *Winter*, determining the continued viability of the sliding scale is not necessary in this case because GHMSI's request for a stay "fail[s] even under the 'sliding scale' analysis . . . ." *Davis*, 571 F.3d at 1292.

movant] must adequately describe and quantify the level of harm . . . ." *Save Jobs USA*, 105 F. Supp. 3d at 115 (citation omitted).

Here, GHMSI has made no "no effort to quantify or even speculate," *id*., about the extent of the alleged damage to its business from implementing the DISB's Final Order. While GHMSI has failed to meet its burden to substantiate its alleged irreparable harm, the Final Order requires GHMSI to distribute $51 million to its own subscribers, an amount that is only roughly 5% of GHMSI's current $982 million ***surplus***, "which is above its level of $964 million on December 31, 2011." *See* DISB Order 14-MIE-019 at 25 (Aug. 30, 2016). *Compare Nat'l Parks Conservation Ass'n*, 2016 WL 420470, at *10 (holding that "permanent eight-foot drop to the mined land" was not a "great" injury to the environment as required for irreparable injury where mined land was only a fraction of the protected land). Far from "an unusually strong showing," on irreparable harm, *Davis*, 571 F.3d at 1291–92, GHMSI again fails to even meet its standard burden to show a likelihood of irreparable harm.

C. GHMSI Failed To Show That The Balance Of Equities Tips In Its Favor.

With respect to the final two factors, GHMSI similarly offers only speculation that neither other interested persons or the public interest would be harmed by staying enforcement of the DISB's Final Order. *See* Pet. at 10–11. The Commissioner, however, previously concluded that a stay would harm both (1) "GHMSI's District subscribers . . . who stand to benefit from a Plan for community health reinvestment by delaying . . . implementation," and (2) the public interest because MIEAA "manifests the District of Columbia's strong public interest in ensuring that GHMSI fulfills its obligation to 'engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency.'" DISB Order No. 14-MIE--015 at 4–5 (March 2, 2015) (quoting D.C. Code § 31-3505.01). After an extensive four-year

administrative process, further delay in implementing MIEAA is not in the interest of the public or other interested parties.

At the very least, GHMSI's unsubstantiated harm cannot offset these competing interests supporting implementation of the Final Order. *E.g.*, *Virginia Petroleum*, 259 F.2d at 925 ("The interests of private litigants must give way to the realization of public purposes."); *id*. ("In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes critical."). Indeed, these competing interests underline that GHMSI must—but did not—show a likelihood of success on the merits. *See Salvaterra*, 105 A.3d at 1005 (explaining that where "balancing of the second and third factors . . . more or less cancel each other out" "resolution of . . . . turns on the likelihood the [movant] will succeed on the merits").

CONCLUSION

For the foregoing reasons, the Commissioner should deny GHMSI's petition for reconsideration, and GHMSI's request to stay all further proceedings.

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CERTIFICATE OF SERVICE

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