**DISTRICT OF COLUMBIA COURT OF APPEALS**



No. 16-AA-895

D.C. APPLESEED CENTER FOR LAW AND JUSTICE, INC.,

*Petitioner/Intervenor*,

No. 16-AA-967

GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC.,

*Petitioner/Intervenor,*

*v.*

DISTRICT OF COLUMBIA DEPARTMENT OF INSURANCE, SECURITIES AND BANKING,

*Respondent*,

and

DEPARTMENT OF LAW FOR THE COMMONWEALTH OF VIRGINIA,

*Intervenor.*

Nos. 16-AA-895 & 16-AA-967
(consolidated)

Agency Order No. 14-MIE-019

**OPPOSITION OF D.C. APPLESEED CENTER FOR LAW AND JUSTICE, INC. TO GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC.'S EMERGENCY MOTION FOR A STAY PENDING APPEAL**

## INTRODUCTION

Congress chartered Group Hospitalization and Medical Services, Inc. ("GHMSI") in 1939 as a nonprofit "charitable and benevolent institution," Pub. L. No. 76-395 § 8, 53 Stat. 1412, 1414 (1939), to provide "health care services and medical insurance," *D.C. Appleseed Ctr. for Law & Justice, Inc. D.C. Dep't of Insurance, Securities & Banking*, 54 A.3d 1188, 1192 (D.C. 2012). To

ensure GHMSI's adherence to its charitable mission, "on January 23, 2009, the Council of the District of Columbia passed the Medical Insurance Empowerment Amendment Act of 2008 (MIEAA), D.C. Law 17-369," authorizing the Commissioner of the Department of Insurance, Securities, and Banking ("DISB") to determine whether GHMSI's "surplus is 'excessive' and to order that any excess surplus be reinvested in the community." *D.C. Appleseed*, 54 A.3d at 1194. Nine years have now passed without any community health reinvestment by GHMSI under MIEAA.

There have been two lengthy administrative proceedings assessing GHMSI's surplus; a prior appeal to, and remand from, this Court; an August 2016 Final Order determining that GHMSI held an excess surplus of $51 million attributable to the District; and a further eighteen-month delay—ended only by this Court's January 3, 2018 Order—in implementing that Final Order due to GHMSI's filing an administrative motion for reconsideration after the instant petitions for review were filed. GHMSI now is finally subject to an order that within 120 days it engage in community health reinvestment in accordance with its charter and MIEAA. And the Commissioner has denied GHMSI's request that its compliance with this order be stayed. But GHMSI now asks this Court to delay fulfillment of MIEAA's public purpose yet again, and stay implementation of the August 2016 Final Order pending this Court's review of that order. *See* GHMSI Emergency Motion for a Stay Pending Appeal ("Mot.") at 20.

D.C. Appleseed Center for Law and Justice, Inc. ("D.C. Appleseed") respectfully submits this opposition to GHMSI's request for a stay. Faced with the demanding standards for issuance of its requested extraordinary relief of a stay, GHMSI misstates, and ignores aspects of, both the applicable legal standards and the lengthy record developed before the DISB. Indeed, the Commissioner's February 20, 2018 order concluding the administrative process by denying

GHMSI's administrative motion for reconsideration and a stay, *see In re Surplus Review and Determination for GHMSI*, Order No. 14-MIE-27, Decision and Order on GHMSI's Petition for Reconsideration and Motion to Stay (Feb. 20, 2018) (hereinafter, the "Reconsideration Order") (annexed hereto as **Exhibit A**), expressly considered and rejected the merits challenges to the August 2016 Final Order that constitute the bulk of GHMSI's stay request.

Because GHMSI falls well short of demonstrating a clear entitlement to the extraordinary relief of a stay in view of the lengthy and detailed administrative record and MIEAA's clear purpose to require community health reinvestment "to the maximum feasible extent consistent with financial soundness and efficiency," D.C. Code, § 31-3505.01, this Court should deny GHMSI's motion.

## BACKGROUND

MIEAA announced and reinforced the District's strong public policy interest in enforcing GHMSI's obligations to invest in community health in the District. *See*, *e.g.*, D.C. Code, § 31-3505.01. On September 13, 2012, this Court first reviewed GHMSI's and the DISB's compliance with MIEAA with regard to GHMSI's surplus as of 2008. *See D.C. Appleseed*, 54 A.3d 1188. Upon a petition for review filed by D.C. Appleseed, the Court held that the DISB failed properly to apply MIEAA's requirements in determining whether GHMSI had excessive surplus, and also failed to explain its decision finding that GHMSI's surplus was not excessive under MIEAA. *Id.*

The Court therefore remanded the case to the DISB with instructions to follow MIEAA's requirements and to explain its determination concerning whether GHMSI's surplus met those requirements. The Court also indicated that, in light of MIEAA's requirement that the DISB issue a review of GHMSI's surplus no less often than once every three years, the new review on remand should be completed by October 29, 2013—three years after completion of the review the Court was setting aside. *D.C. Appleseed*, 54 A.3d at 1220.

The DISB thereafter began to review GHMSI's surplus as of the end of 2011, which it did not complete until December 30, 2014. *See* DISB Order (Dec. 30, 2014) (annexed hereto as **Exhibit B**). In that review, the DISB determined that GHMSI's surplus as of the end of 2011 was excessive by $268 million and that $56 million of that excess was attributable to insurance contracts in the District of Columbia. *Id*. The DISB therefore ordered GHMSI, by March 16, 2015, to propose a plan for spending down the $56 million. *Id.* at 66. GHMSI failed to comply with that order, and instead submitted a document to the DISB contending that the company had already reinvested the $56 million of excess surplus. *See* Plan of Group Hosp. & Med. Servs., Inc. (Mar. 16, 2015) (annexed hereto as **Exhibit C**) at 4.

Fifteen months later, on June 14, 2016, the DISB determined that GHMSI had not in fact reinvested the excess surplus and had improperly "fail[ed] to set forth a plan as required by" MIEAA and as ordered by the Commissioner. *See* DISB Order (June 14, 2016) (annexed hereto as **Exhibit D**) at 5–6. The DISB therefore solicited public comment concerning an appropriate reinvestment plan, and on August 30, 2016, the DISB adopted a plan requiring that within 120 days GHMSI rebate $51 million—down from $56 million in the December 30, 2014 Order—in excess surplus to its current subscribers holding contracts issued in the District. *See* DISB Order 14-MIE-019 (Aug. 30, 2016) ("August 2016 Final Order") (annexed hereto as **Exhibit E**) at 25.

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 March 2015 reinvestment plan; and considered comments from GHMSI and the public on the appropriate reinvestment plan for GHMSI's excess surplus. The resulting

August 2016 Final Order from the DISB furthered MIEAA's purposes by requiring GHMSI to reinvest a percentage of its excess surplus in community health through subscriber rebates by December 28, 2016. *See* August 2016 Final Order at 31–33. Presumably the August 2016 Final Order's requirement that GHMSI comply within 120 days means that GHMSI must comply within 120 days from the DISB's recent February 20 order denying reconsideration—making the delayed compliance deadline June 20, 2018.

On September 6, 2016, D.C. Appleseed timely petitioned for review of the August 2016 Final Order. *See D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Securities & Banking*, No. 16-AA-0895. GHMSI then petitioned this Court for review of the August 2016 Final Order on September 27, 2016, and simultaneously moved for a stay of its reinvestment obligation pending review by this Court, and also requested a stay of the order pending appeal to this Court. *See Group Hosp. & Med. Servs., Inc. v. D.C. Dep't of Ins., Securities & Banking*, No. 16-AA-0967.[1] This Court *sua sponte* consolidated the two appeals. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Securities & Banking*, Consol. No. 16-AA-0895, Order, at 1 (Oct. 19, 2016).

Since the DISB issued the August 2016 Final Order more than 18 months ago, GHMSI has taken steps that have delayed its implementation. First, GHMSI petitioned the DISB for reconsideration and a stay of the August 2016 Final Order on September 22, 2016. *See* GHMSI Pet. for Reconsideration & Mot. to Stay, *In the Matter of: Surplus Review and Determination Regarding Group Hospitalization and Medical Services, Inc.*, (Sept. 22, 2016) (annexed hereto as

[1] On June 22, 2017, GHMSI renewed its initial request for a stay by filing the Emergency Motion for a Stay Pending Appeal now at issue. On June 23, 2017, the Court granted an administrative stay of the consolidated petitions for review, and held the Motion for a Stay in abeyance pending the DISB's resolution of GHMSI's administrative motion for reconsideration.

**Exhibit F**). GHMSI argued, among other things, that the DISB's excessive surplus determination violates MIEAA because the agency failed to coordinate properly with Maryland and Virginia regulators, and that the Commissioner erroneously used a 95% confidence level to determine the excessive amount of GHMSI's surplus despite evidence in the record purportedly supporting a higher confidence level. *See id*. at 6–7. D.C. Appleseed opposed the petition because both the reconsideration request and the stay request raised arguments the Commissioner had already considered and rejected.[2]

Nearly six months later, the DISB had not acted on GHMSI's petition, and GHMSI had not complied with the August 2016 Final Order. D.C. Appleseed moved this Court on March 14, 2017 to resume and expedite this appeal. The Court ruled on April 20, 2017, denying D.C. Appleseed's motion but ordering the DISB "to resolve the [motion for reconsideration] ***without further delay***." *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Securities & Banking*, Consol. No. 16-AA-0895, Order, at 2 (Apr. 20, 2017) (emphasis added).

In the interim, GHMSI (and the DISB staff) entered into a proposed "consent order" without the consent or input of D.C. Appleseed. *See* GHMSI Proposed Consent Order (April 17, 2017) (annexed hereto as **Exhibit G**). D.C. Appleseed submitted comments on the proposal, leading the Commissioner to order all parties (including D.C. Appleseed) to engage in settlement negotiations; the Commissioner then entered an amended Proposed Consent Order. *See* DISB

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[2] This Court held the consolidated appeal in abeyance pending the DISB's resolution of GHMSI's reconsideration motion, and ordered GHMSI to submit a status statement regarding the administrative proceeding on November 21, 2016. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Securities & Banking*, Consol. No. 16-AA-0895, Order, at 1 (Oct. 19, 2016). The Court later ordered GHMSI to file a status statement every 60 days. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Securities & Banking*, Consol. No. 16-AA-0895, Order, at 2 (Dec. 30, 2016).

Proposed Amended Consent Order (annexed hereto as **Exhibit H**). GHMSI rejected the Commissioner's amended proposal on September 1, 2017, stating that "GHMSI is unable to accept the terms outlined and will continue to pursue its legal remedies regarding its 2011 surplus." GHMSI Letter to Stephen C. Taylor (Sept. 1, 2017) (annexed hereto as **Exhibit I**).

More than two months later, the Commissioner *still* had not acted on the more-than-one-year-old motion for reconsideration. D.C. Appleseed accordingly moved this Court to order the DISB to conclude the administrative review and resolve the outstanding reconsideration motion. *See* Mot. of D.C. Appleseed for an Order Requiring DISB to Conclude the Administrative Review (Nov. 21, 2017). The Court converted the motion into a Petition for Writ of Mandamus, *see In re D.C. Appleseed Ctr. for Law & Justice, Inc*., 17-OA-27, Order (Dec. 15, 2017), and granted the Petition on January 3, 2018, ordering the Commissioner to resolve GHMSI's motion for reconsideration and for a stay by February 20, 2018, *see id*., Order (Jan. 3, 2018).

As ordered, the Commissioner entered the Reconsideration Order on February 20, 2018, denying GHMSI's administrative requests for reconsideration and a stay. GHMSI then informed this Court of the Reconsideration Order, and requested that the Court resume GHMSI's and D.C. Appleseed's petitions for review and take up GHMSI's pending motion for stay pending appeal. *See* GHMSI Status Statement (Feb. 21, 2018).

## ARGUMENT

### I. The Court Should Deny GHMSI's Motion To Stay Its Compliance With The Commissioner's Order.

GHMSI's request for a stay of its community health reinvestment obligations under the August 2016 Final Order seeks "extraordinary relief" from this Court. *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). GHMSI must demonstrate its clear entitlement to a stay through 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). Here, GHMSI does not make the requisite showing to entitle it to the extraordinary relief of a stay, and instead relies on misstatements of both the governing legal standards and the record.

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

On the merits, GHMSI argues that: (1) the DISB entered the August 2016 Final Order without "coordination" with Maryland and Virginia regulators as required by MIEAA, and (2) the DISB's finding that GHMSI's 2011 surplus was "excessive" under MIEAA was arbitrary and capricious. *See* Mot. at 13–19. The Commissioner rejected both arguments—among others—in denying GHMSI's administrative motion for reconsideration and a stay. *See* Reconsideration Order at 9–17, 19–26. GHMSI has not shown that this Court is likely to reverse the Commissioner on these issues.[3]

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[3] GHMSI's plea for a lesser burden than demonstrating a likelihood of success on the merits rests upon the "sliding scale" approach to injunctive relief that has now been called into question. *See* Mot. at 13. "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) (annexed hereto as **Exhibit J**). Indeed, GHMSI's Motion cites only pre-*Winter* cases relying on pre-*Winter* D.C. Circuit decisions. *See* Mot. at 13. In addition to *Winter*, the Supreme Court has repeatedly suggested in recent years that likelihood of success on the merits is a requirement for

### 1. GHMSI is not likely to succeed on its coordination claim.

GHMSI first contends that it is likely to succeed on its claim that the August 2016 Final Order violates MIEAA because the DISB allegedly failed to undertake the surplus review "in coordination with" Virginia and Maryland. *See* Mot. at 13–17. In GHMSI's view, by providing that the DISB's surplus "review shall be undertaken in coordination with the other jurisdictions in which [GHMSI] conducts business," D.C. Code § 31-3506(e), MIEAA requires Virginia and Maryland to consent to any surplus determination by the DISB. Mot. at 13–14. The Commissioner rightly and reasonably determined that this reading is contrary to MIEAA, and GHMSI accordingly has not demonstrated (and cannot demonstrate) that it is likely to succeed on this ground.

Contrary to GHMSI's interpretation, D.C. Code § 31-3506(e) requires the agency to coordinate by "carefully consider[ing] and tak[ing] into account" statements and information provided by Maryland and Virginia regulators in assessing GHMSI's surplus. *See* Reconsideration Order at 20. The DISB did just that. *See id*. As the Commissioner determined, MIEAA "does not require that any final determination regarding GHMSI's surplus be approved by other jurisdictions" because "[t]hat authority is reserved to the Commissioner and requires the application of standards under MIEAA that are unique to the District." *Id*. Indeed, the DISB's determination of GHMSI's surplus turns not simply upon the Commissioner's "coordination" with "the other jurisdictions in which the corporation conducts business," but also upon an assessment of GHMSI's surplus against criteria of "excessive" and "attributable" set forth in District law.

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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).

D.C. Code § 31-3506(e). The D.C. Council charged the DISB, not Maryland or Virginia, with administering these standards, as GHMSI's charter states that it "shall be licensed and regulated by the District of Columbia in accordance with the laws of the District of Columbia." District of Columbia Appropriations Act, 1994, Pub. L. No. 103-127, § 138, 107 Stat. 1336, 1349 (Oct. 29, 1993). Accordingly, the DISB's interpretation of the statutory terms "excessive," "attributable," and "coordination" governs so long as it is reasonable. *See*, *e.g.*, *Rivera v. Lew*, 99 A.3d 269, 271 (D.C. 2014) (recognizing that a reviewing court "defer[s] to the agency's interpretation of the statute and regulations it is charged by the legislature to administer" (quotation omitted)).[4]

As the Commissioner explained in rejecting GHMSI's request for reconsideration:

> It would be unreasonable for the Council of the District of Columbia to make the Commissioner's authority to enforce MIEAA conditioned upon discretionary actions by government officials in other states. On the contrary, MIEAA vests sole responsibility in the Commissioner to make the determinations required to enforce the law's standards. *See* D.C. Code § 31-3506(f), (h). The Commissioner may not abdicate this responsibility by making a final determination only if all other jurisdictions agree or by substituting standards adopted by other jurisdictions for those required by MIEAA so as to reach agreement. Rather than requiring agreement among the jurisdictions, MIEAA requires the Commissioner to coordinate with Maryland and Virginia in a reasonable manner and consider their interests and needs in conducting a surplus review, which is what the Acting Commissioner did.

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[4] GHMSI's sole cited authority—the California Court of Appeals decision in *California Native Plant Society v. City of Rancho Cordova*, 91 Cal. Rptr. 3d 571 (Cal. Ct. App. 2009)—involved no such deference, and is therefore inapt because deference can only be accorded to one regulatory agency. In addition, while GHMSI relies on the *California Native Plant Society* decision's assessment of the "plain meaning" of the term "coordination," *see* Mot. at 14–15, GHMSI ignores that the decision also depended upon "the context in which the word is used." 172 Cal. App. 4th at 641. In that case, the municipal government was required to act "in coordination with" a federal agency on developing a project because the same project later would be subject to approvals from that same federal agency. *See id.* at 641–42. Because the federal agency would necessarily participate at some point, the California legislature required that municipal governments involve the federal agency at the planning stage. *Id*. Here, by contrast, MIEAA does not contemplate any involvement by Maryland or Virginia in implementing the Commissioner's spend down plan. The reasoning of *California Native Plant Society* is therefore inapplicable.

Reconsideration Order at 21. The Commissioner's understanding is reasonable, and consistent with the D.C. Council's ultimate charge that "[i]n implementing the provisions of [MIEAA] . . . , the Commissioner shall ***consider*** the interests and needs of the jurisdictions in [GHMSI's] service area." D.C. Code § 31-3506.01 (emphasis added).

Moreover, requiring the "consensus" among the District, Maryland, and Virginia that GHMSI demands is contrary to Congress's 1993 amendment of GHMSI's charter to make the "District of Columbia . . . the legal domicile of the corporation." Pub. L. No. 103-127 § 138(a), 107 Stat. 1336 (1993). That amendment aimed to give the District "primary oversight" of GHMSI, and preclude GHMSI's prior practice of using its cross-jurisdictional business structure to "adeptly play[] Maryland, Virginia, and D.C. insurance regulators against one another" to "evad[e] and stav[e] off appropriate regulatory efforts." *See* S. Rep. No. 104-92, *Fourth Interim Report on U.S. Gov't Efforts to Combat Fraud and Abuse in the Insurance Industry*, at 53–54 (June 1995).[5] The Commissioner's reading is a reasonable effort to close the regulatory gap identified by Congress in the mid-1990s and filled by MIEAA in 2008.

**2. GHMSI is not likely to succeed on its claim that the August 2016 Final Order is arbitrary and capricious.**

GHMSI's argument that the August 2016 Final Order was arbitrary, capricious, and an abuse of discretion, *see* Mot. at 17–19, fares no better. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43

[5] That Congress subsequently amended GHMSI's charter in 2015 to require "approval" of Maryland and Virginia for *future* surplus years, *see* Consolidated Appropriations Act, 2016 Pub. L. No. 114-113, § 747, 129 Stat. 2242 (Dec. 18, 2015), further confirms the reasonableness of the Commissioner's reading of MIEAA for the 2014 surplus review. *CareFirst, Inc. v. Taylor*, 235 F. Supp. 3d 724, 744 (D. Md. 2017) (holding that 2015 amendment to GHMSI charter does not affect review of GHMSI's 2011 surplus).

(1983). Instead, "[c]ourt[s] consider[] whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995). Because the record before the DISB belies GHMSI's claims, GHMSI has not cleared the high bar of demonstrating that it is likely to succeed in overcoming the deference owed to the DISB.

GHMSI argues that the Commissioner's decision finding GHMSI's 2011 surplus "excessive" is arbitrary and capricious because the Commissioner should have *first* ascertained the portion of GHMSI's surplus attributable to the District *and only afterwards* determined whether that portion was excessive. Mot. at 17–18. The Commissioner considered and correctly rejected this very argument. He found that analyzing for excessiveness only a portion of GHMSI's surplus—the portion attributable to the District—would be "inconsistent with the stated terms and purposes of MIEAA," and concluded that "it would lead to patently absurd results." *See* Reconsideration Order at 9. The Commissioner observed that all risks to GHMSI's financial condition affect the surplus in its entirety; accordingly, MIEAA required him "to evaluate GHMSI's surplus *as a whole* to determine whether it is excessive." *Id.* at 12–13 (emphasis added). And, as the Commissioner noted, GHMSI itself took this same position prior to the DISB's finding of excess surplus. *See id.* at 14–16.

GHMSI's separate contention that the DISB's "excessiveness finding was the product of arbitrary and capricious modifications to the analysis it received from" the DISB's outside consultant, Rector & Associates, Inc. ("Rector"), Mot. at 18–19, likewise cannot be squared with the record. Although GHMSI takes issue with the DISB using a 95% confidence level for GHMSI's surplus falling below 200% RBC-ACL despite Rector using a 98% confidence interval

for the same contingency, *see id.*, the Commissioner clearly and correctly explained the flaws in GHMSI's argument. *See* Reconsideration Order at 21–26.[6] As the Commissioner pointed out, Rector testified that "selection of a confidence level is a 'matter of judgment,'" and even "one of GHMSI's expert consultants [selected] a 95% confidence level" for this benchmark. *Id*. at 24–25.

This Court has previously held that an appropriate confidence level under MIEAA must be "calibrat[ed]" pursuant to MIEAA's particular statutory requirement for the maximum feasible community health reinvestment that is consistent with financial soundness and efficiency. *See D.C. Appleseed*, 54 A.3d at 1119. That GHMSI can point to some purported "expert" opinion in the record—even of a consultant paid by the DISB—is of no moment. The determination must be driven by a proper application of MIEAA's fundamental requirements. *See* D.C. Code, § 31-3505.01. Within the statutory criteria, discretion is lodged in the agency. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). Given that GHMSI has not and cannot show that its preferred confidence level of 98% is required by MIEAA's statutory requirement, GHMSI has again failed to show a likelihood of success in challenging the DISB's implementation of MIEAA's command that GHMSI engage in the maximum feasible community reinvestment. Reconsideration Order at 23–26.

**B. GHMSI Fails To Show A Likelihood Of Irreparable Harm.**

GHMSI fails clearly to demonstrate a likelihood of irreparable harm. While GHMSI contends that its obligation under the August 2016 Final Order to pay subscriber rebates will cause irreparable harm because "there is no reasonable path to recouping the funds" if the Court subsequently rules in GHMSI's favor on the merits, Mot. at 19, "the fact that economic losses may

[6] In fact, the DISB first rejected this position in December 2014. DISB Order (Dec. 30, 2014) at 27–28.

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) (emphasis in original) (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 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 effort to quantify or even speculate," *id*., about the extent of the alleged damage to its business from implementing the August 2016 Final Order. While GHMSI has failed to meet its burden to substantiate its alleged irreparable harm, the August 2016 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* August 2016 Final Order at 25. *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 fails to meet even the standard burden to show a likelihood of irreparable harm.

Moreover, GHMSI's assertion that it has no "reasonable path to recoup[]" the ordered rebates if this Court ultimately "finds GHMSI's appellate claims to be meritorious," Mot. at 19, ignores that any perceived losses may be recouped through rates. In short, if the rebates were to cause—which they will not—GHMSI's surplus to fall below the level necessary for financial soundness and efficiency within the meaning of MIEAA, D.C. Code § 31-3505.01, GHMSI could recoup them and rebuild the needed additional surplus through rate increases. The relevant rate statute expressly provides for "a reasonable margin for surplus needs." D.C. Code § 31-3508(e)(3). Indeed, GHMSI has stated that it has in the past increased its surplus when it began to approach the lower end of the range recommend by its expert adviser Milliman. *See* GHMSI, Report to the D.C. Department of Insurance, Securities and Banking Regarding GHMSI's Surplus at Year-End 2012 (July 1, 2013) (annexed hereto as **Exhibit K**), at 6 ("If, conversely, one of the Companies had a surplus too low in the range or below the range . . . the Company adds additional margin to its rates to generate revenues that would gradually build surplus toward the middle of the optimal range.").[7]

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[7] GHMSI's assertion of reputational harm, *see* Mot. at 19, likewise misses the mark. As detailed in D.C. Appleseed's Motion to Resume the Petitions for Review, GHMSI itself pressed Maryland and Virginia to pass the state laws allegedly conflicting with the August 2016 Final Order and purportedly threatening GHMSI's reputation. *See* D.C. Appleseed Mot. to Resume and Expedite

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

With respect to the final two factors that it must demonstrate to establish entitlement to the extraordinary relief of a stay, GHMSI offers only speculation that other interested persons and the public interest would not be harmed by staying enforcement of the August 2016 Final Order. *See* Mot. at 19–20. 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 (Mar. 2, 2015) (quoting D.C. Code § 31-3505.01). After an initial administrative process, appeal to this Court, remand from this Court, a second extensive four-year administrative process, and eighteen months of delay since the August 2016 Final Order in resolving GHMSI's administrative motions, further delay in implementing MIEAA is not in the interest of the public or other interested parties. The D.C. Council enacted MIEAA in 2008 in light of pressing community health needs and GHMSI's "charitable and benevolent" charter mandate to provide "health care services and medical insurance." *D.C. Appleseed Center,* 54 A. 3d at 1192. Now, a decade later, those interests are served by moving forward with implementation of the August 2016 Final Order.

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Petitions for Review, at 7–8 (Mar. 13, 2017). Moreover, GHMSI's prior proposal to consent to a distribution of excess surplus in the District despite the existence of the Maryland and Virginia laws belies its present claim of irreparable harm from such a payment. *See* GHMSI Proposed Consent Order (Apr. 17, 2017); GHMSI Status Statement (Apr. 20, 2017); GHMSI Status Statement (May 22, 2017).

At the very least, GHMSI's unsubstantiated harm cannot override the balance that the Commissioner has struck supporting implementation of the August 2016 Final Order. *See, 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.").

## CONCLUSION

For the foregoing reasons, the Court should deny GHMSI's request for the extraordinary relief of a stay pending conclusion of this appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 7th day of March, 2018, I caused one copy of the foregoing to be sent by electronic mail to the following:

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