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.

Order No. 14-MIE-012

DC APPLESEED'S REPLY IN SUPPORT OF ITS MOTION TO EXPEDITE PROCEEDINGS ON REMAND FROM THE D.C. COURT OF APPEALS

Following its earlier November 18, 2019 request for expedited proceedings, DC Appleseed filed a further motion with the Commissioner on May 14, 2020 urging that she expedite proceedings on remand from the August 29, 2019 decision of the D.C. Court of Appeals in this case.

On May 22, 2020, GHMSI responded to the motion, contending that "Appleseed's motion should be denied, and the Commissioner should proceed in a manner that gives appropriate respect to the statutory requirement that the jurisdictions must coordinate on this key issue that affects each of them." Group Hospitalization and Medical Services, Inc.'s Response to Motion of D.C. Appleseed Center for Law and Justice, Inc. to Expedite Remand Proceedings at 1–2, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, 14-MIE-012 (Dep't of Ins., Sec. & Banking, May 22, 2020) ("GHMSI Response"). GHMSI's contention, however, simply begs the question as to the form "coordination" should take. DC Appleseed's November 18, 2019 request sets forth such a procedure consistent with MIEAA and the Court of Appeals' decision. *See* DC Appleseed's Request for Expedited Remand Proceedings at 4–5, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, 14-MIE-

012 (Dep't of Ins., Sec. & Banking, Nov. 18, 2019) ("Appleseed Request for Expedited Remand Proceedings"). With respect to the Commissioner's substantive surplus determination under MIEAA, GHMSI makes essentially three arguments, none of which can square with the Court of Appeals' decision or MIEAA, and none of them justify still further delay in this much-delayed case.

First, GHMSI contends that it is still "an open question" whether the company had "*any* excess 2011 surplus." GHMSI Response at 1 (emphasis supplied). Under the Court's opinion, that is simply not so. The Court rejected all of GHMSI's challenges to the Commissioner's determination that a minimum of $51 million must now be spent, and the Court formally *affirmed the Commissioner's determination to that effect.*

Second, GHMSI contends that "the existence, amount, and distribution method" of any excess surplus must *all* be resolved "*in coordination with Maryland and Virginia*." *Id*. (emphasis in original). Under the Court's opinion, that is also not so. The Court made clear that the requisite coordination applies *only* to the issues remanded to the Commissioner and those issues concern only Appleseed's contentions that the amount due to be spent is more than $51 million and that the excess above $51 million must be spent on other than rebates.

Third, GHMSI contends that the Commissioner should "defer action until, at the very least, Mayor Bowser has declared an end to the COVID-19 public health emergency." GHMSI Response at 4. But GHMSI does not explain why the Commissioner should defer requiring the spend down of surplus at the very moment when it is most needed. In fact, precisely because of the public health emergency and GHMSI's ability and obligation to help address it, the Commissioner should move expeditiously to require GHMSI at long last to meet its obligations under MIEAA.

As further detailed below, DC Appleseed urges the Commissioner to reject each of GHMSI's arguments, move promptly to comply with the Court's remand decision, and require GHMSI as soon as possible to spend its excess surplus on pressing community health needs, particularly those presented by the pandemic.

I. The Court's August 29, 2019 Decision Rejected GHMSI's Arguments for an Excess Surplus Less Than $51 Million.

In its August 29, 2019 decision considering whether the Commissioner's excess surplus determinations complied with MIEAA, the Court of Appeals "affirm[ed] the Commissioner's orders in part, vacate[d] in part, and remand[ed] for further proceedings." *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec. & Banking*, 214 A.3d 978, 996 (D.C. 2019).

The Commissioner is necessarily bound by the Court's decision affirming part of the previous Commissioner's orders, and is not free to relitigate issues settled by that affirmance or to hear new arguments from GHMSI—which it could, and should, have raised in the prior administrative proceedings—why that affirmance should not be followed. Nor is the Commissioner free to address issues contrary to MIEAA or the Court's decision in its "remand for further proceedings." *See Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 136 (D.D.C. 2018) ("[W]here an administrative agency has been ordered to reconsider or explain an earlier decision on remand . . ., the agency has an affirmative duty to respond to the specific issues remanded . . . ." (quotation omitted)). *Cf. Dilley v. Alexander*, 627 F.2d 407, 412 n.7 (D.C. Cir. 1980) (agency, on remand, "is without power to do anything which is contrary to either the letter of spirit of the mandate construed in the light of the opinion of the court deciding the case") (quotation and alteration omitted)).

Specifically, the Court of Appeals affirmed the previous Commissioner's determination that the excess GHMSI surplus attributable to the District at the end of 2011 was $51,325,470.72.

Decision and Order at 27, *In re Surplus Review & Determination for Grp. Hospitalization & Med. Servs., Inc.*, No. 14-MIE-19 (D.C. Dep't of Ins., Sec. & Banking, Aug. 30, 2016). GHMSI moved the Commissioner to reconsider that determination, but the Commissioner rejected every ground raised by the company. *See* Decision and Order on Petition for Reconsideration and Motion to Stay Further Proceedings by Group Hospitalization and Medical Services, Inc., *In re Surplus Review & Determination for Grp. Hospitalization & Med. Servs., Inc.*, No. 14-MIE-27 (D.C. Dep't of Ins., Sec. & Banking, Feb. 20, 2018).

GHMSI then challenged the Commissioner's $51 million determination in the Court of Appeals on three grounds: that the Commissioner arbitrarily selected a 95% confidence level for use in the company's statistical model; that the Commissioner arbitrarily determined at the outset whether the company as a whole held excess surplus, rather than first determining how much surplus was attributable to the District; and that the Commissioner should have determined a range of permissible surplus rather than a single point. *See D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec. & Banking*, GHMSI Opening Brief at 37–50. Like the Commissioner's February 20, 2018 final administrative decision, the Court of Appeals *expressly rejected all these challenges*. *See Appleseed*, 214 A.3d at 990–94.

Moreover, rather than challenging the Commissioner's methodology for determining that 21% of GHMSI's excess surplus was attributable to the District, GHMSI supported this methodology in its Intervenor Brief. *See D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec. & Banking*, GHMSI Intervenor Brief at 20–24.

In short, the Court of Appeals rejected all of GHMSI's challenges to the Commissioner's determination that GHMSI holds $51 million in excess surplus attributable to the District under MIEAA. That rejection is final and binding. Accordingly, GHMSI is wrong to contend that there

is any longer an "open question" among the parties whether it had excess surplus at the end of 2011. For GHMSI now to contend otherwise is to ignore that the Court "affirm[ed] the Commissioner's orders in part."

While the Court also "vacate[d] in part" and "remand[ed] for further proceedings," the vacated issues are *all* matters in which Appleseed prevailed and that might on remand *increase* the amount of GHMSI's excess surplus above the $51 million or require that that amount be spent on community health in a form other than rebates. As a result, the $51 million is no longer subject to challenge from GHMSI and should be ordered spent.

In an effort to avoid the fact that the Court *expressly affirmed* the portions of the Commissioner's orders resulting in a minimum excess surplus of $51 million, GHMSI cites two phrases from the Court's opinion. Neither supports GHMSI's position.

First, in rejecting the Commissioner's explanation for finding only 21% of GHMSI's excess surplus attributable to the District, the Court described "One conceivable approach to analyzing what portion of GHMSI's excess surplus (if any) should be attributed to the District . . . ." GHMSI Response at 2 (quoting *Appleseed*, 214 A.3d at 995). GHMSI thus suggests that the Court's use of the words "if any" implies that perhaps none of the excess surplus would be attributable to the District. This ignores that the Court rejected each of GHMSI's challenges to the finding that it, in fact, held $51 million in excess surplus, and that the approach to attribution outlined by the Court is the one Appleseed proposed, which shows the appropriate attribution to be close to 60%.

GHMSI's second effort to sidestep the Court's affirmance of a $51 million minimum is to quote the Court's general statement that "it is not at present clear whether the Commissioner will ultimately determine that it is appropriate to order community-health investment and if so in what

form." GHMSI Response at 3 (*Appleseed*, 214 A.3d at 996). But this statement concerns "The ***Type*** of Community-Health Investment" to be ordered. *Appleseed*, 214 A.3d at 996 (emphasis added); it did not address the amount of that investment.

II. The Issues to Be Considered in Coordination with the Other Jurisdictions Are Only the Five Remand Issues Identified by the Court.

GHMSI next contends that "the existence, amount, and distribution of any excess 2011 surplus" must be "resolved on remand *in coordination with Maryland and Virginia*." GHMSI Response at 1 (emphasis in original). That is not correct.

The Court held that "any objection to the Commissioner's failure to adequately coordinate with Virginia and Maryland before the December 2014 order *was not properly presented*." *Appleseed*, 214 A.3d at 986 (emphasis added).[1] As a result, and directly contrary to GHMSI's current contention that the Commissioner must now start over to determine "the existence, amount, and distribution of any excess surplus," the Court stated: "We see no justification for requiring the Commissioner to begin this proceeding anew based on an objection that was not raised until two years into the proceeding and that could have been raised far earlier." *Id.* at 987. In other words, the Commissioner's prior determination that GHMSI holds excess surplus attributable to the District under MIEAA stands.

Instead, with respect to the coordination requirement, the Court explained that because GHMSI belatedly objected to the lack of coordination, and "because we are remanding on other issues, *the obligation to coordinate is relevant to proceedings on remand*." *Id.* (emphasis supplied). But the proceedings on remand relate solely to substantive objections raised by DC

[1] The December 2014 order was the culmination of the proceedings in which the Commissioner determined that GHMSI had excess surplus of $268 million and 21%—$51 million—was due to be reinvested in the District. The Commissioner initially determined thus amount to be $56 million, but later reduced it to the $51 million now due.

Appleseed that, as noted, can have the effect only of increasing GHMSI's obligation above the $51 million or requiring that the funds be invested other than in rebates.[2]

Accordingly, while the five issues remanded by the Court should be addressed in coordination with Maryland and Virginia, GHMSI is mistaken that the remand proceedings permit the Commissioner to start over and determine from scratch "the existence, amount and distribution of any excess 2011 surplus" and to do so "in coordination with Maryland and Virginia." GHMSI Response at 1.[3]

GHMSI is similarly mistaken in asserting that the coordination requirement applies to the question whether GHMSI's excess surplus is to be spent as rebates or as expenditures that protect and promote the public health. All of the $51 million of excess at issue before the Court of Appeals is attributable to the District. In choosing how to spend down the District's share of the excess, DISB must take into account the "interests and needs" of the other two jurisdictions, but it need not "coordinate" with them. The coordination requirement reads in relevant part as follows: "The Commissioner . . . shall review . . . the portion of the surplus of the corporation that is attributable to the District and may issue a determination as to whether the surplus is excessive. Any such

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[2] The five issues the Court directed the Commissioner to address on remand are (1) the failure to address Appleseed's objection to the accounting of equity portfolio risk on GHMSI's surplus, *Appleseed*, 214 A.3d at 992–93; (2) the failure to adequately address certain issues raised by Appleseed affecting attribution of GHMSI's excess surplus to the District, *id.* at 993–95; (3) the failure to address Appleseed's request for prejudgment interest, *id.* at 995–96; (4) the failure to address Appleseed's request for out-of-pocket actuarial fees, *id.*, as an expenditure separate from spenddown of excess surplus; and (5) the failure to address Appleseed's objection to committing the whole of the GHMSI's excess surplus to rebates, *id.* at 996.

[3] GHMSI states that "Appleseed urges the Acting Commissioner to steamroll Maryland and Virginia by ordering an 'immediate' spend down of GHMSI's surplus, during a global pandemic when interstate coordination is more vital than ever and when statutes of Maryland and Virginia continue to prohibit surplus distributions by GHMSI without approval by the coordinate insurance authorities." GHMSI Response at 3. GHMSI is here reasserting a position that, as the court noted, it disavowed at oral argument (as did Virginia), namely that "coordination" requires "unanimous agreement" among the three jurisdictions. *Appleseed*, 214 A.3d at 988. The court went on to hold that the agreement of the other two jurisdictions is not required. *See id.* at 989.

review shall be undertaken in coordination with the other jurisdictions . . . ." D.C. Code § 31-3506(e). Coordination thus is required with respect to the merits determination—the further amount of corporate excess and the attribution to the District. The remedial choice is subject only to the separate requirement that the interests and needs of the other two jurisdictions be taken into account. Finally, GHMSI had the opportunity to address how the excess was to be spent in the spenddown plan that it was ordered to submit after the Commissioner's determination in December, 2014 that its surplus was excessive. GHMSI failed to do so. *See* Decision and Order On Group Hospitalization And Medical Service, Inc. Plan at 5, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, 14-MIE-016 (Dep't of Ins., Sec. & Banking, June 14, 2015) ("Rather than presenting a plan for dedication of its excess surplus . . . GHMSI argues that it does not have excess surplus . . . and even if it did, it need not make any expenditures for community health reinvestment . . . .").

GHMSI's delay strategy becomes all the more apparent in the potpourri of issues that, GHMSI now contends, should lead the Commissioner to receive evidence not in the existing record. *See* GHMSI Response at 5. There comes a point at which administrative proceedings must end, and we are years past that point in this proceeding. There will never be a time when GHMSI cannot invoke some new circumstances and contend that those circumstances require further evidentiary proceedings. Least of all should its second thoughts about not attempting to rebut DC Appleseed expert Mark Shaw, *see id.*, now entitle it to further delay. And GHMSI's implication that the record should be reopened on the apportionment issue, *see id.* (the "apportionment of surplus" has "never been addressed at a hearing, but w[as] raised by Acting Commissioner McPherson only after the June 2014 hearing had ended"), is simply disingenuous. Commissioner McPherson's December 2014 decision devoted significant factual detail to the

apportionment issue; he found ample factual grounds in the hearing record, including from information and arguments presented by GHMSI. *See* Decision and Order at 50–58, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, No. 14-MIE-26 (Dep't of Ins., Sec. & Banking, Dec. 30, 2014). Indeed, both parties moved for reconsideration on the apportionment issue. Yet the Commissioner rejected GHMSI's motion on the ground that "all of the issues that GHMSI identifies are arguments it could have raised, but did not during the multi-year surplus review." Order on GHMSI's Motion for Reconsideration and Coordinated Proceedings with Maryland and Virginia, and on D.C. Appleseed's Request for Briefing Schedule at 2, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, No. 14-MIE-26 (Dep't of Ins., Sec. & Banking, Jan. 28, 2015).[4]

The existing record enables the Commissioner to reach reasonable dispositions of each of the five issues on remand. No more is required.

III. The Commissioner Should Move Forward Expeditiously in Light of the Current Public Health Emergency.

As indicated in DC Appleseed's motion and previous requests, Appleseed agrees with GHMSI that the Commissioner should institute a remand procedure and timetable in coordination with the other jurisdictions. GHMSI Response at 5.

But the record does not support GHMSI's assertion that "[i]t makes sense for the Acting Commissioner to defer action until, at the very least, Mayor Bowser has declared an end to the

[4] The Commissioner went on: "The Commissioner does not believe it is in the public interest, or an efficient use of public resources, to delay the filing of GHMSI's plan so that these proceedings may be reopened to hear new arguments that could have been briefed and argued previously." Order on GHMSI's Motion for Reconsideration and Coordinated Proceedings with Maryland and Virginia, and on D.C. Appleseed's Request for Briefing Schedule at 2, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, No. 14-MIE-26 (Dep't of Ins., Sec. & Banking, Jan. 28, 2015). Those words were written five and a half years ago.

COVID-19 public health emergency." GHMSI Response at 4. Not surprisingly, GHMSI does not explain why this would "make sense."

Indeed, present circumstances counsel the opposite conclusion. It is precisely because of the public health emergency that the Commissioner needs to act expeditiously: the purpose of MIEAA was to require GHMSI to use its excess surplus to address community health needs. Those needs are now overwhelming, and the District's independent ability to meet those needs has been undermined by revenue shortfalls brought on by the pandemic. At the same time, it is clear that GHMSI has significant excess funds that it can and should spend to address those needs and that it can do so without reducing its surplus below the levels determined by the Commissioner as the maximum permissible under MIEAA.

Delaying action until after the emergency is over is directly contrary to the public health purposes enshrined in MIEAA. GHMSI's suggestion that doing so makes sense is yet another unjustified effort to delay its compliance with the statute. The Commissioner should reject the suggestion.

The Commissioner should also reject the suggestion that GHMSI be given 60 days after suspension of the District's public health emergency to respond to Appleseed's briefing of the remand issues now before the Commissioner. GHMSI Response at 5. Those issues have already been briefed by GHMSI before the Court of Appeals (and, in some instances, previously before DISB). The issues are not new to GHMSI; most of them have been briefed over and over by the parties for several years, and by attaching its brief to the motion to expedite, DC Appleseed has provided GHMSI even more time to respond than usual in an adversarial setting.

As the Commissioner is acutely aware, we are in the midst of a pandemic *now*. In the 11 years since MIEAA was passed, the need to enforce that statute has never been more compelling.

The Commissioner should move as promptly as possible to resolve GHMSI's obligations under that statute and apply its excess surplus to the urgent health needs in the District of Columbia.

CONCLUSION

For the reasons stated, and those in the pending motion, DC Appleseed respectfully urges the Commissioner to issue an order establishing an expeditious process to (1) require a spend down of the $51 million excess surplus affirmed by the Court and (2) address the remand issues identified by the Court, in coordination with Maryland and Virginia.

Respectfully submitted,

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