

No. 20-OA-8

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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IN RE D.C. APPLESEED CENTER FOR LAW AND JUSTICE, INC.,  
PETITIONER.

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ON PETITION FOR A WRIT OF MANDAMUS

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**STATUS REPORT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF INSURANCE, SECURITIES AND BANKING  
PURSUANT TO THE COURT’S NOVEMBER 24, 2020 ORDER**

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Pursuant to this Court’s order of November 24, 2020, the Department of Insurance, Securities and Banking (“DISB”) submits the following statement concerning the comments it received from the Virginia Bureau of Insurance and the Maryland Insurance Administration.

**1. Response of the Virginia Bureau of Insurance.**

On December 17, 2020, the Virginia Bureau of Insurance responded to DISB’s request for comments related to this Court’s order in *D.C. Appleseed Center for Law & Justice, Inc. v. D.C. Department of Insurance, Securities & Banking*, 214 A.3d 978 (D.C. 2019). The Bureau contended that DISB’s 2014 Decision and Order was flawed and inconsistent with Virginia law. The Bureau noted that this Court identified six issues for DISB to address on remand: (1) coordination with Virginia and Maryland; (2) the proper attribution of the excess surplus of Group Hospitalization and Medical Services, Inc. (“GHMSI”) to the District; (3) the calculation of GHMSI’s earnings from its equity

investments; (4) whether GHMSI is subject to pre-judgment interest; (5) the request of Appleseed Center for Law and Justice (“Appleseed”) for the reimbursement of actuarial fees; and (6) the appropriateness of a rebate to subscribers rather than some other type of community-health reinvestment. The Bureau addressed the first five issues, but stated that it was premature to discuss the form of reinvestment before determining the amount of excess surplus, if any, attributable to the District. The Bureau’s positions were as follows:

(1) On coordination, the Bureau contended that DISB was mistaken regarding the scope of its obligation to coordinate with Virginia and Maryland, and that the obligation applied not only to the 2016 Rebate Order but also to the 2014 Decision and Order. The Bureau stated that Virginia law required GHMSI to obtain prior approval from the Bureau before making any distribution, and that the Bureau would first have to conduct an examination to determine whether the distribution would be harmful to Virginia residents. The Bureau stated that, unless Virginia and Maryland approve any distribution directed by DISB, GHMSI could not proceed with the distribution without violating Virginia and Maryland law.

(2) On the attribution of the surplus, the Bureau encouraged DISB to revisit the portion of GHMSI’s excess surplus attributable to the District. The Bureau stated that the factors under Virginia law for attribution of the surplus differed from those under District law and required that attribution be based on the number of residents in Virginia compared with the number of residents in other jurisdictions covered by the health

services plans. The Bureau asked DISB to consider each jurisdiction's contribution to the surplus over time and the comparative riskiness and profitability of GHMSI's activities in the District, Virginia, and Maryland. The Bureau stated that, in its view, the portion of GHMSI's excess surplus that DISB had attributed to the District was inflated.

(3) On the issue of GHMSI's earnings from equities, the Bureau stated that DISB's determination was adequately explained.

(4) On the issue of pre-judgment interest, the Bureau stated that GHMSI was not subject to such interest.

(5) On the issue of Appleseed's entitlement to actuarial fees, the Bureau stated that Appleseed was not entitled to such fees.

## **2. Response of the Maryland Insurance Administration.**

On December 18, 2020, the Maryland Insurance Administration responded to DISB's request for comments on this Court's order in *Appleseed*. It took the position that "coordination" should extend not only to the distribution of GHMSI's excess surplus, but also to the question of the existence and amount of any excess surplus in 2011. The Administration stated that it was premature to consider the method of distribution of the excess surplus because neither Maryland nor Virginia has determined that the surplus was excessive. The Administration explained that it had engaged in comprehensive reviews of GHMSI's surplus range and that, in 2012, it had submitted to DISB the analysis of consultants opining that GHMSI's surplus for 2011 was neither excessive nor unreasonably large.

The Administration noted that, under Maryland law, GHMSI may not distribute or reduce its surplus in response to the regulatory action of another jurisdiction unless approved by the Maryland Commissioner and that, since no such approval has been sought, GHMSI is presently prohibited from reducing or distributing its surplus.

The Administration stated that any review of GHMSI's surplus should consider the community contributions that GHMSI has made since 2016. It also noted that a reduction of GHMSI's 2011 surplus would impact the present surplus, and that the express agreement of Maryland and Virginia would be necessary for such reduction under the 2015 amendment to GHMSI's Charter.

**3. Statement of DISB on coordination.**

The Commissioner believes that DISB has made reasonable, good-faith efforts to coordinate as required by statute and the Court's guidance in *Appleseed*, as a part of her outreach to the Virginia and Maryland regulators on remand. The Commissioner will continue these efforts but believes that the positions taken by Virginia and Maryland will make reaching an agreement unlikely.

Respectfully submitted,

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December 2020

**CERTIFICATE OF SERVICE**

I certify that on December 22, 2020, this status report was served through this Court's electronic filing system to:

Marialuisa Gallozzi  
*Counsel for Petitioner*

Lisa Hertzler Schertler  
*Counsel for Intervenor Group Hospitalization and Medical Services, Inc.*

And sent by e-mail to:

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*Maryland Insurance Administration*

Thomas J. Sanford  
*Virginia Insurance Administration*

/s/ James C. McKay, Jr. \_\_\_\_\_  
JAMES C. MCKAY, JR.