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.

BRIEF FOR GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC. BEFORE THE DEPARTMENT OF INSURANCE, SECURITIES AND BANKING ON REMAND FROM THE AUGUST 29, 2019 DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

January 21, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. The Remand Proceedings Must Be Properly Coordinated with Maryland and Virginia. 3

II. Attribution of Surplus Should Be Based on the Residency of Individual Subscribers, and the Apportionment "Analysis" Presented by Appleseed and Mark Shaw Should Be Rejected in Its Entirety 4

A. GHMSI's Surplus Is Built from and Held for the Benefit of Individual Subscribers, and Attribution Should be Based Upon Where They Reside 5

B. At a Minimum, the Commissioner Should Adjust the Apportionment Formula Used by DISB to Give Equal Weight to the Residency of Subscribers 8

C. The Appleseed/Shaw Analysis is Invalid and Should Be Rejected, As It Was In 2015 10

1. The Appleseed/Shaw Analysis Significantly Overstates the Profitability of the District's Non-FEP Business 11

2. The Appleseed/Shaw Analysis Improperly Attributes All FEP Premium Revenue to the District 12

3. On Each of the Points Raised by the Court of Appeals, the Appleseed/Shaw Analysis Should be Rejected 16

4. A Corrected Appleseed/Shaw Analysis Attributes 18.9% of 2011 Surplus to the District, not the Astronomical Sum Claimed by Appleseed 17

III. There Is No Error in Milliman's and Rector's Equity Portfolio Asset Value Probability Distribution 18

A. The Milliman Model Properly Assesses the Surplus Impact of Returns in GHMSI's Corporate and Pension Equity Portfolios 19

B. There Was No "Foundational" Error in the EPAV Probability Distribution 23

C. There Were No "Calculation" Errors in the EPAV Probability Distribution 24

1. The Conversion of Potential Changes in Surplus into a Percentage of Non-FEP Insured Premium 24

2. The Projected Return to GHMSI's Investment Portfolio 25

IV. "Prejudgment Interest" is Unauthorized and Inappropriate 26

A. There is No Legal Basis for Prejudgment Interest 27

B. Prejudgment Interest is Incompatible with the Structure and Purpose of the MIEAA 29

V. Appleseed is not Entitled to Reimbursement of Fees Paid to its Rejected Expert 31

VI. Federal Law Limits the Commissioner's Power to Order a Distribution of GHMSI's Surplus to Non-Subscribers 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Braunstein v. Comm'r of Internal Revenue, 374 U.S. 65 (1963)..7

Butte County, California v. Chaudhuri, 887 F.3d 501 (D.C. Cir. 2018) 4

DC Appleseed Ctr. for Law and Justice, Inc. v. Dist. of Columbia Dep't of Ins., Sec. and Banking, 214 A.3d 978 (D.C. 2019) .... *passim*

Dist. of Columbia v. 17M Associates, LLC, 98 A.3d 954 (D.C. 2014)..32

Dist. of Columbia v. Pierce Assoc., Inc., 527 A.2d 306 (D.C. 1987) 30, 31

Dist. of Columbia Pub. Sch. v. Dist. of Columbia Dep't of Employment Servs., 123 A.3d 947 (D.C. 2015) 28

Fed. Deposit Ins. Corp. v. Rocket Oil Co., 865 F.2d 1158 (10th Cir. 1989) 31

Mazor v. Farrell, 186 A.3d 829 (D.C. 2018)..27

NEA-Coffeyville v. Unified School District No. 445, 996 P.2d 821 (Kan. 2000) 7

Nordi, et al. v. Highmark, Inc., No. GD 14-19917, Docket Entry 129 (Ct. Com. Pl. Allegheny County, Pa. Nov. 5, 2020), *appeal docketed*, No. 1357-WDA 2020 (Pa. Super. Ct. Dec. 23, 2020)...2

Office of People's Counsel v. Pub. Serv. Comm., 477 A.2d 1079 (D.C. 1984)............................32

Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf, 324 F. Supp. 3d 519 (M.D. Pa. 2018), *appeals docketed*, Nos. 18-2297 & 18-2323 (3d Cir. June 13 & 18, 2018)...34

Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf, 381 F. Supp. 3d 324 (M.D. Pa. 2018), *appeals docketed*, Nos. 19-1057 & 19-1058 (3d Cir. Jan. 11, 2019) 34

RadLAX Gateway Hotel LLC v. Amalgamated Bank, 566 U.S. 639 (2012).................................32

Riggs Nat'l Bank of Washington, D.C. v. Dist. of Columbia, 581 A.2d 1229 (D.C. 1990) 27, 29

Steuart Inv. Co. v. The Meyer Group, Ltd., 61 A.3d 1227 (D.C. 2013) 27

Constitutional Provisions

U.S. Const. amend. V 34

Statutes

D.C. Code § 15-108 27

D.C. Code § 15-109 27

D.C. Code § 31-3501(1A) 29, 31, 33

D.C. Code § 31-3506(e) 3, 7, 30

D.C. Code § 31-3506(f) 30

D.C. Code § 3506(g) 28, 30

D.C. Code § 31-3506(g)(2) 8, 31, 33

D.C. Code § 31-3506(h) 32

D.C. Code § 31-3506(i) 28, 32

Financial Services and General Government Appropriations Act, 2016,
Pub. L. No. 114-113, § 747(a) 129 Stat. 2242, 2486 (2015) 7

Legislative History

D.C. Council Bill 17-934 Committee Report (Oct. 17, 2008) 29

Administrative Regulations

26A D.C.M.R. § 4699.2 9

INTRODUCTION

Group Hospitalization and Medical Services, Inc. ("GHMSI") files this brief with the District of Columbia Department of Insurance, Securities and Banking ("DISB") to address issues raised by the District of Columbia Court of Appeals in *DC Appleseed Ctr. for Law and Justice, Inc. v. Dist. of Columbia Dep't of Ins., Sec. and Banking*, 214 A.3d 978 (D.C. 2019), and in response to the brief ("AS Br.") filed by the D.C. Appleseed Center for Law & Justice, Inc. ("Appleseed") in these remand proceedings. Each of Appleseed's positions lacks merit and should be rejected.

These proceedings arise from DISB's review of GHMSI's 2011 surplus under the Medical Insurance Empowerment Amendment Act ("MIEAA"). In its 2019 opinion, the Court of Appeals asked the Commissioner to coordinate with Maryland and Virginia, as specifically required by the MIEAA, and to provide further explanation of four issues related to Acting Commissioner McPherson's 2014 determination that GHMSI's 2011 surplus was "excessive" and that 21% of the "excess" surplus was attributable to the District of Columbia.[1]

With respect to coordination, and as more fully addressed in Section I below, GHMSI continues to be concerned that it not be subject to conflicting orders from its three governing jurisdictions, potentially leading to unresolvable conflict and continued litigation. The Court of Appeals held that Acting Commissioner McPherson "failed to adequately coordinate the review of GHMSI's surplus with Virginia and Maryland" and that "coordination requires more than simply soliciting and considering input from" those jurisdictions. *DC Appleseed*, 214 A.3d at 986-87. While GHMSI applauds the recent efforts by DISB to reach out to Maryland and Virginia, at

[1] Order Number 14-MIE-012, issued by Acting Commissioner McPherson on December 30, 2014, is referred to herein as the "December 2014 Order."

this time DISB has not gone beyond soliciting input. In addition, Maryland and Virginia have reaffirmed their view that GHMSI is prohibited by law from distributing any of its surplus without the approval of the Maryland Insurance Administration ("MIA") and the Virginia Bureau of Insurance ("VBOI"). A resolution of this matter that avoids the constitutional quandary of conflicting regulatory orders and the prospect of further federal litigation will require earnest, proactive, good-faith coordination among the jurisdictions.

In Sections II through V below, GHMSI addresses the four issues on which the Court of Appeals has requested further explanation from DISB (in shorthand, Surplus Attribution, Equity Portfolio Asset Value, Prejudgment Interest, and Actuarial Fees). With respect to surplus attribution, GHMSI respectfully asks the Commissioner to base apportionment of any "excess" surplus on the residential jurisdictions of its individual subscribers or, at a minimum, to give subscriber residency an equal weight with other factors in the apportionment analysis. Otherwise, DISB's prior positions on the four remand issues were correct. DISB previously rejected each of the arguments now presented by Appleseed as well as the testimony of Appleseed actuary Mark Shaw – *in its entirety* – on the ground that Mr. Shaw's analysis and conclusions were not credible.[2] Appleseed's recycled positions are as factually and analytically incorrect now as they were before and should be rejected again.

---

[2] The Acting Commissioner rejected Mr. Shaw's entire analysis of GHMSI's 2011 surplus and questioned its "credibility and reasonableness." December 2014 Order at 47-49 & n.25. This is not the only forum in which Mr. Shaw's analyses have been rejected. On November 5, 2020, in litigation involving Highmark BlueCross BlueShield, Judge Philip Ignelzi of the Court of Common Pleas of Allegheny County, Pennsylvania, rejected a report by Mr. Shaw, finding that it was "rebuttable based upon the undisputed facts of record and applicable law," and "wholly rejected" one of Mr. Shaw's statistical conclusions as "a house of cards built on an illusory foundation[.]" *See Nordi, et al. v. Highmark, Inc.*, No. GD 14-19917, Docket Entry 129 at 55-56 (Ct. Com. Pl. Allegheny County, Pa. Nov. 5, 2020), *appeal docketed*, No. 1357-WDA 2020 (Pa. Super. Ct. Dec. 23, 2020). The Court of Common Pleas of Allegheny County civil case docket is available at: https://dcr.alleghenycounty.us/#.

As a final point, while the Court of Appeals did not address the issue, Appleseed again argues that DISB should order the distribution of GHMSI subscriber funds to third parties, as opposed to the subscriber rebates previously ordered by Commissioner Taylor. As GHMSI details in Section VI, there is no legal basis upon which DISB could compel the distribution of GHMSI subscriber funds to third parties.

ARGUMENT

I. The Remand Proceedings Must Be Properly Coordinated with Maryland and Virginia.

The MIEAA requires the Commissioner to undertake her review of GHMSI's surplus "in coordination with" Maryland and Virginia. D.C. Code § 31-3506(e). The remand proceedings must comply with this requirement, meaning that the Commissioner must "try to work together with Maryland and Virginia with an eye towards agreement if that is feasible and permissible under applicable law." *DC Appleseed*, 214 A.3d at 989. The obligation to coordinate applies to the Commissioner's "process of review" and to her "actual determinations as to whether GHMSI's surplus is excessive or what portion of the excess surplus is attributable to the District." *Id.* at 988.

The Commissioner recently received written statements from the MIA and the VBOI expressing their willingness to coordinate with DISB. The statements emphasize that a pivotal issue in the MIEAA proceedings – the determination that GHMSI's 2011 surplus was "excessive" under the MIEAA – was previously decided without adequate coordination. The MIA and the VBOI seek to coordinate with the Commissioner on this issue as a necessary prerequisite to meaningful coordination on related issues, such as the jurisdictional attribution of any "excess"

surplus.[3] The agencies also have reaffirmed that Maryland and Virginia laws prohibit GHMSI from distributing its surplus without their approval.

GHMSI continues to maintain that its 2011 surplus of 998% RBC was not excessive, as it was within the surplus range recommended by DISB's experts at Rector and Associates ("Rector") and below the range approved by the MIA. In the current procedural posture of these proceedings, however, it is the views of the MIA and the VBOI on this issue that are of paramount importance. To fulfill the coordination requirement, the Commissioner must "work together" with Maryland and Virginia "with an eye towards agreement[.]" *DC Appleseed*, 214 A.3d at 989. The absence of agreement predictably will lead to conflicting orders and the need for further federal litigation. GHMSI asks the Commissioner to pursue active coordination with Maryland and Virginia to avoid this difficult scenario.

II. Attribution of Surplus Should Be Based on the Residency of Individual Subscribers, and the Apportionment "Analysis" Presented by Appleseed and Mark Shaw Should Be Rejected in Its Entirety.

Acting Commissioner McPherson's determination that 21% of GHMSI's "excess" 2011 surplus was attributable to the District of Columbia relied on three factors assigned specific weights: reported premiums by jurisdiction (90% weight), number of policies by jurisdiction (5% weight), and number of network providers by jurisdiction (5% weight). December 2014 Order at 58. The Court of Appeals remanded for further explanation of DISB's attribution methods and

[3] While the Court of Appeals declined to "require" the Commissioner "to begin [the MIEAA] proceeding anew[,]" the Court did not prohibit the Commissioner from reconsidering any issue that was previously decided without adequate coordination with Maryland and Virginia. *DC Appleseed*, 214 A.3d at 987. *See Butte County, California v. Chaudhuri*, 887 F.3d 501, 505 (D.C. Cir. 2018) (agency is "generally free to determine in [its] discretion whether to accept additional evidence" on remand "in the absence of any specific command" to the contrary).

conclusions. *DC Appleseed*, 214 A.3d at 994-95. GHMSI proposes that DISB proceed on this issue in accordance with three key points:

- *First*, GHMSI renews its argument that any attribution of surplus should be based on the residential jurisdictions of its individual subscribers. GHMSI's Congressionally enacted Charter requires that GHMSI be operated for the benefit of those individuals. Attributing surplus based on other considerations is inconsistent with the purposes laid out by Congress when GHMSI was created.

- *Second*, even if other factors are considered, the residency of individual subscribers should receive at least equal weight because these individuals are the *only* constituents mentioned in GHMSI's federal Charter. Assuming that DISB affirms the three elements of its prior attribution analysis (reported premiums, policyholder jurisdiction, and provider location), GHMSI asks that subscriber residency be added as a fourth factor and that all factors receive equal weight. This analysis would result in attribution to the District of 16.75% of "excess" surplus – significantly more surplus than would be attributed to the District based on subscriber residency alone, while recognizing the importance of the constituency that GHMSI is obligated to serve under federal law.

- *Third*, the Commissioner should reject the attribution "analysis" of Appleseed and Mr. Shaw in its entirety, as Acting Commissioner McPherson did six years ago. GHMSI retained Aaron Songer, a Partner at PricewaterhouseCoopers LLP ("PwC"), to review and comment on the January 9, 2015 "Mark Shaw Statement," which sets forth the attribution analysis on which Appleseed now relies. As Mr. Songer details in the expert report attached as Exhibit 1 (the "Songer Report"), Mr. Shaw's analysis is permeated with false assumptions, conceptual flaws, mathematical errors, and inaccurate data. Mr. Songer concludes that Mr. Shaw's deeply flawed analysis "significantly overstate[s]" the portion of any "excess" surplus that can be attributed to the District. Ex. 1 at 7. The continued and pervasive errors in Mr. Shaw's analysis render it invalid and fundamentally unreliable. In fact, as Mr. Songer demonstrates, once the very largest errors are corrected, and if subscriber residency is given equal weight with other factors, even Mr. Shaw's analysis would apportion only 18.9% of GHMSI's surplus to the District, not the astronomical numbers that Appleseed proposes. Ex. 1 at 9.

A. GHMSI's Surplus is Built from and Held for the Benefit of Individual Subscribers, and Attribution Should be Based Upon Where They Reside.

GHMSI continues to believe that any attribution of surplus must be based on the residency of its individual "certificate holders," commonly called subscribers. Subscribers include (1) policy holders under individual insurance policies and (2) individual certificate holders under group coverage. GHMSI provided a full statement of its reasoning in its October 10, 2014 filing with

the DISB and incorporates that filing here. If subscriber residency is used as the basis for attribution, approximately 12% of GHMSI's surplus would be attributable to the District. This is true regardless of whether 2011 data is used alone (as in the December 2014 Order), or whether a broader timeframe is used. *See* Ex. 1 at 34 & App. C.[4] The firm link between GHMSI's individual subscribers and its surplus is rooted in GHMSI's foundational document and reaffirmed by the text of the MIEAA itself.

First, GHMSI's Congressional Charter makes clear that it is individual subscribers, not group policyholders, who are the real beneficiaries of GHMSI's services and for whom surplus is maintained.[5] Under the Charter, GHMSI is "authorized and empowered . . . to enter into contracts with *individuals or groups of individuals* to provide for hospitalization and medical care *of such individuals*, upon payment of specified rates or premiums, and to issue *to such individuals* appropriate certificates evidencing such contracts[.]" Charter Sec. 2 (emphases added). The Charter makes plain that GHMSI "shall not be conducted for profit, but shall be conducted for the benefit *of the aforesaid certificate holders*." Charter Sec. 3 (emphasis added). GHMSI's federal Charter thus draws a clear and direct link between individual subscribers and GHMSI's premium income and mandates that GHMSI be operated for the benefit of those individuals. GHMSI's surplus also should be attributable "*to such individuals*," where those individuals live, because any and all premiums and benefits are paid on behalf of those individuals.

---

[4] The Court of Appeals asked DISB for additional explanation regarding its use of 2011 data in its attribution analysis. *See DC Appleseed*, 214 A.3d at 995. Over the periods of time for which data is available, there have not been significant changes in subscriber residency, provider location, or similar data. The Songer Report sets forth data for GHMSI and CareFirst BlueChoice on subscriber residency as well as the three metrics on which the Acting Commissioner relied (premiums, policies, and providers by jurisdiction) for the nine-year period from 2003 to 2011. *See* Ex. 1 at App. C. None of the data varied significantly from year to year.

[5] GHMSI's Charter is attached at Exhibit 2.

The 2015 amendments to GHMSI's Charter confirmed and strengthened this previously existing link between GHMSI's surplus and its individual subscribers by reaffirming that "[t]he surplus of the corporation is *for the benefit and protection of all of its certificate holders* and shall be available for the satisfaction of all obligations of the corporation regardless of the jurisdiction in which such surplus originated or such obligations arise." Charter Sec. 11 (emphasis added); *see* Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, § 747(a), 129 Stat. 2242, 2486 (2015).

Second, the MIEAA itself demonstrates that surplus attribution should be based on the residency of GHMSI's individual subscribers. Under the MIEAA, only "the portion of the surplus . . . that is *attributable to* the District" may be considered excessive. D.C. Code § 31-3506(e) (emphasis added). The term "attributable to" connotes both ownership (*i.e.,* "belonging to") and causation (*i.e.,* "caused by"). *See Braunstein v. Comm'r of Internal Revenue*, 374 U.S. 65, 70 (1963) (ordinary meaning of "attributable to" refers to what is "caused or generated by"). GHMSI's surplus is "owned" by individual subscribers in the sense that GHMSI holds the surplus for those subscribers' benefit, to pay future medical claims for those subscribers and their dependents. The surplus was "caused by" the individual subscribers because it consists of premium dollars paid by or on behalf of those subscribers. All of the non-Federal Employees Health Benefits Program ("FEP") premiums received by GHMSI or CareFirst BlueChoice are (1) paid by subscribers directly for individual insurance, (2) paid by individual subscribers through their own contributions to an employer plan, or (3) paid by employers on behalf of individual subscribers, and provided as compensation to those subscribers as part of their employment. *See NEA-Coffeyville v. Unified School District No. 445*, 996 P.2d 821, 832 (Kan. 2000) (holding that health insurer surplus was "wholly a product of" the actions of individual subscribers).

The MIEAA further recognizes the indissoluble bond between individual subscribers and surplus through its provision that, if GHMSI's surplus were deemed excessive, GHMSI could draw down the excess "*entirely* [by] expenditures for the benefit of [its] current subscribers[.]" D.C. Code § 31-3506(g)(2) (emphasis added). Given that GHMSI's subscribers are its individual certificate holders, *see* Charter Sec. 2, the MIEAA plainly acknowledges and endorses the direct link between GHMSI's surplus and premium payments made to GHMSI by and for its individual subscribers.

Third, individual subscribers utilize medical services primarily within their jurisdiction of residence. Thus, the fundamental economic activity upon which GHMSI's operations are based takes place where subscribers live. In short, all roads that contribute to GHMSI's surplus originate from individual subscribers. Therefore, the most reasonable method of attributing "excess" surplus among the three jurisdictions is to look to subscriber residency.

Significantly, surplus attribution based on subscriber residency also could significantly advance DISB's obligation and efforts to coordinate with Maryland and Virginia. The VBOI indicated in its statement to DISB that Virginia law requires that attribution be based on residency. Giving due consideration to the surplus contributions of the thousands of GHMSI subscribers who reside in Maryland and Northern Virginia is required by the federal Charter, envisioned by the MIEAA, and essential to fulfilling the Commissioner's obligation to "try to work together with Maryland and Virginia with an eye towards agreement[.]" *DC Appleseed*, 214 A.3d at 989.

B. At a Minimum, the Commissioner Should Adjust the Apportionment Formula Used by DISB to Give Equal Weight to the Residency of Subscribers.

Section II.A describes the importance of GHMSI's individual subscribers to the mission stated in its federal Charter. Maryland and Virginia, with whom the District must coordinate, also have asserted interests in managing GHMSI's surplus on account of the large number of

subscribers who reside in their territories. For all of the reasons discussed above, the Commissioner should apportion surplus based on the residency of GHMSI's subscribers. Even if the Commissioner concludes that subscriber residency should not be *dispositive*, however, it should at least be a significant part of the analysis. Therefore, if the Commissioner continues to use the multi-factor approach set forth in the December 2014 Order, GHMSI asks that the methodology be adjusted to (1) include an additional factor for subscriber residency and (2) give all four factors equal weight.

DISB's regulation on attribution of surplus states that the Commissioner will consider the number of policies by geographic area, the number of health care providers under contract by geographic area, and any other factor that the Commissioner deems to be relevant. 26A D.C.M.R. § 4699.2. In the December 2014 Order, Acting Commissioner McPherson gave 90% weight to reported premiums (which is not an enumerated factor), and only 5% each to policyholder jurisdiction and the location of providers. This formula effectively eliminated any consideration of the residential jurisdictions of individual subscribers. The Commissioner can significantly improve the balance and comprehensiveness of DISB's attribution formula by including subscriber residency with the other factors and giving subscriber residency at least equal weight.

GHMSI therefore proposes that DISB modify Table 7 of the December 2014 Order to include a factor for subscriber residency and to weigh each of the factors equally. GHMSI submitted the attribution data used by Rector and DISB in its *Response to Supplemental Information Request 1(d) in DISB Order No. 14-MIE-08*, filed on October 31, 2014. That filing shows that approximately 12% of GHMSI's individual subscribers (including 50% of BlueChoice) resided in the District of Columbia. At a minimum, therefore, GHMSI asks DISB to modify its conclusions in Table 7 of the December 2014 Order as follows:

Table 7. Allocation Factors and Weight

Factor	% Allocated to District	Weight
Reported Premiums (Table 4)	21%	25%
Policies by Policyholder Jurisdiction (Table 5)	19%	25%
Providers (Table 6)	15%	25%
Subscriber Residency	12%	25%
Weighted Average	**16.75%**	

C. The Appleseed/Shaw Analysis is Invalid and Should Be Rejected, As It Was In 2015.

The attribution analysis advanced by Appleseed dates back six years to the "Mark Shaw Statement," which Appleseed filed with its January 2015 Motion for Reconsideration. Acting Commissioner McPherson rejected Mr. Shaw's outlandish position that 58.3% of "excess" surplus should be attributed to the District of Columbia. Nothing has changed. The Commissioner should again reject Mr. Shaw's attribution analysis. In his expert report, Mr. Songer sets forth in detail the significant flaws in Mr. Shaw's analysis:

- Mr. Shaw's analysis "suffers from numerous conceptual flaws" and "is replete with mathematical errors and inconsistencies" that collectively result in attribution of a "significantly overstated" percentage of GHMSI's 2011 surplus to the District. Ex. 1 at 7.

- Mr. Shaw's analysis hinges on his inaccurate calculation of a so-called "profit weight" for non-FEP premium revenue in the District. Mr. Shaw's "profit weight" calculation incorporates false assumptions about reinsurance premiums, claims, and expenses that result in an overstatement of alleged relative profits in the District by a factor of more than three. Ex. 1 at 24-29.

- Mr. Shaw incorrectly attributes 100% of FEP revenue to the District. Ex. 1 at 20-24. Acting Commissioner McPherson rejected this irrational approach and correctly attributed FEP revenue according to certificate-holder residency.

- Mr. Shaw's analysis contains pervasive elementary errors that include math mistakes, inaccurate data, and reliance on non-existent data sources. Ex. 1 at 16-20, 37-38.

In short, the pervasive errors and analytical flaws in Mr. Shaw's attribution analysis render it invalid and fundamentally unreliable.

1. *The Appleseed/Shaw Analysis Significantly Overstates the Profitability of the District's Non-FEP Business.*

As the Songer Report explains, a "primary driver" of the Appleseed/Shaw attribution analysis is its computation of a supposed "profit weight" for GHMSI's non-FEP premium revenue in the District versus that in Maryland and Northern Virginia. Ex. 1 at 19; *see* AS Br. 13. In layman's terms, Mr. Shaw is attempting to show that business in the District was more profitable than in Maryland or Northern Virginia. His analysis, however, collapses under scrutiny.

Mr. Shaw presents his "profit weight" analysis through a chart ("Shaw Chart 1") that purports to summarize "the historical record" of GHMSI's non-FEP operations between 2003 and 2011. Ex. 1 at 15-16. As Mr. Songer demonstrates, Shaw Chart 1 contains numerous errors. The chart cites to nonexistent exhibits to GHMSI's Annual Statements. Ex. 1 at 16. The chart does not accurately reflect data in the sources upon which Mr. Shaw presumably relied. Ex. 1 at 16-17. The chart makes an inaccurate assumption regarding the attribution of ceded and assumed reinsurance premiums and claims that Mr. Shaw does not acknowledge or explain. Ex. 1 at 17. The chart then ignores data regarding ceded reinsurance expenses that directly counter Mr. Shaw's unexplained assumption. Ex. 1 at 26-27. And the chart makes numerous mathematical errors. Ex. 1 at 37-38.

The Songer Report describes these errors in detail. The bottom line is that the "profit weight" that Mr. Shaw assigns to GHMSI's non-FEP premium revenue in the District (versus that in Maryland and Northern Virginia) is another "house of cards built on an illusory foundation." See *supra* note 2. Correcting the primary errors and omissions in Mr. Shaw's simple execution of his "profit weight" methodology reduces the District's so-called "profit weight" from 4.2 to 1.3. Ex. 1 at 27.

There is likely considerable error remaining in Mr. Shaw's calculation of "profit weight," even after the most significant deficiencies are corrected. Mr. Shaw is attempting to divine numbers about business costs, revenues, and results across jurisdictional lines that simply are not reported in the financial forms on which he relies. Even if Mr. Shaw were to correct his numerous mathematical errors, garbled data, and incorrect assumptions, his calculation of "profit weight" still would be based upon unreliable guesswork.

2. *The Appleseed/Shaw Analysis Improperly Attributes All FEP Premium Revenue to the District.*

A second fundamental error in the Appleseed/Shaw methodology lies in its continued effort to attribute 100 percent of GHMSI's FEP revenue to the District of Columbia. AS Br. 13-14. Acting Commissioner McPherson correctly rejected this argument in 2014.

FEP is managed by the federal Office of Personnel Management ("OPM"), acting on behalf of agencies headquartered throughout the United States, and covers federal employees throughout the country and around the world. FEP operates under the terms of a contract between OPM and the BlueCross BlueShield Association ("BCBSA"). GHMSI participates in FEP only through an offering coordinated by the BCBSA on behalf of more than 35 BlueCross BlueShield plans.[6] The BCBSA, which is based in Chicago, Illinois, requires all Blue plans to participate in FEP and contracts with OPM on behalf of the plans. Each Blue plan serves FEP members within its service territory under the terms of a contract between the plan and BCBSA. The BCBSA manages and directs the FEP offering. The FEP is not insurance business regulated by any state or the District of Columbia.

---

[6] There are presently 36 Blue plans across the United States, all of which participate in FEP through the BCBSA.

Appleseed argues that all FEP premium should be attributed to the District because the District is the "situs" of the contract between OPM and BCBSA. AS Br. 13-14. This argument is absurd on its face. That contract involves the BCBSA, based in Illinois, and 35 other Blue plans with headquarters across the United States, none of which manages any FEP business in the District of Columbia. The contract between OPM and BCBSA is for services to be coordinated and managed in Illinois and provided throughout the United States by 36 different Blue plans. There is no credible basis to assert that the presence of OPM in the District of Columbia means that all business under that contract should be attributed to the District.

GHMSI's role under the FEP contract is specified in an agreement between GHMSI and BCBSA, and GHMSI's tasks are not uniquely tied to the District but instead are related to where its individual certificate holders reside. The administrative services provided by GHMSI consist of, *inter alia*, issuing certificates to individual FEP subscribers who reside in Maryland, Northern Virginia, and the District and managing claims filed by those individuals and their dependents. Under Appleseed's reasoning, every other Blue plan also would have significant FEP business attributable to the District – even though they contracted through the BCBSA in Illinois to service members in their own service territories across the United States, serve no FEP subscribers located in the District, are not licensed to operate in the District, and may otherwise have utterly no connection to the District of Columbia.

A true "situs of the contract" test would attribute 100% of GHMSI's FEP premium revenue to *Illinois* – the only location that connects all of the Blue plans participating in this program. As the Songer Report explains, "[i]f the Shaw Statement's premise that the entity entering into the contract is determinative of the situs is to be taken literally, then <u>0%</u> of FEP underwriting results are attributable to D.C." Ex. 1 at 21 (emphasis in original). The same 100% attribution of FEP

premium revenue to Illinois would apply to every other Blue plan that administers the FEP for the BCBSA in service territories throughout the country. This arbitrary attribution of all FEP revenue to a single jurisdiction, just like the one that Appleseed proposes, makes no sense.

Acting Commissioner McPherson was right when he determined that FEP revenue should be attributed according to the residential jurisdictions of certificate holders. The FEP serves current and retired federal employees and their dependents who work, live, and use medical providers throughout the United States. Each Blue plan administrator of the program serves a subset of federal employees/dependents within its service territory, which can include areas within a single or multiple state(s). Given the widespread geographical distribution of FEP certificate holders, "[t]he most reasonable approach to determine the attribution of FEP results is to consider where the certificate holders reside." Ex. 1 at 23.[7] Based on data from 2003 to 2011, this approach would result in attribution of approximately 20% of GHMSI's FEP premium revenue to the District. Ex. 1 at 21.

Regarding the Court of Appeals' observation that GHMSI's "manner of reporting [FEP] activity has varied over time," 214 A.3d at 995, that reporting history reinforces the unique nature of FEP and the reasons why the Acting Commissioner correctly rejected Appleseed's position. Before 2010, the principal reason that an insurer would report premiums by jurisdiction was to allow for the calculation of state premium taxes. *See* Ex. 1 at 21. But the FEP is not state-regulated insurance business and is not subject to state premium taxes. As the Songer Report explains, "Since FEP is a federal program and not underwritten in a specific state, it is not subject to

[7] FEP results also could reasonably be excluded from Mr. Shaw's surplus attribution analysis altogether, "because FEP results are not conventional underwriting income." Ex. 1 at 23. As the Songer Report explains, the FEP is an "experience-rated contract" that "generates fee income and provides a process for the return of any unused funds upon termination of the contract after the runoff of claims and reimbursement of allowable administrative expenses." *Id*.

premium tax – rendering its jurisdictional reporting irrelevant prior to the enactment of the [Affordable Care Act]" ("ACA"). *Id.*

Before 2010, GHMSI allocated FEP premiums to the District in its Schedule T filings for simplicity because the reporting carried no practical significance. Ex. 1 at 21. This was a reasonable but not universal approach. As Acting Commissioner McPherson noted, different carriers in the FEP allocated premiums in different ways on Schedule T, with no practical consequence. One national carrier, Kaiser, allocated all FEP premiums to the District in its Schedule T, while another, Aetna, allocated FEP premiums across different states. *See* December 2014 Order at 54 n.31. And the many other Blue plans who participate in FEP but have no members in the District were not filing a Schedule T in the District to report FEP business. The bottom line is that Schedule T reporting of FEP premiums before 2010 was neither meaningful to the reporting entities nor particularly relevant to determining how surplus should be attributed under the MIEAA.

The 2010 enactment of the ACA and its Medical Loss Ratio provisions gave new significance to jurisdictional reporting of FEP premiums. Ex. 1 at 21. In 2010, GHMSI adjusted its Schedule T reporting of FEP premium revenue to reflect the residential jurisdictions of its FEP certificate holders as part of ACA implementation. *Id.* While GHMSI's now decade-long practice of reporting FEP premiums according to certificate-holder residency should weigh in favor of attributing FEP premiums the same way, Schedule T was not created for that purpose and is not dispositive. For purposes of apportioning GHMSI's surplus to Maryland, Northern Virginia, and the District, FEP premium revenue should be attributed based on the jurisdictions in which the federal employees reside and are served, because those individuals are the sole basis for GHMSI's involvement in FEP at all. *See* Ex. 1 at 23.

3. *On Each of the Points Raised by the Court of Appeals, the Appleseed/Shaw Analysis Should be Rejected.*

The Court of Appeals stated that "[t]here may [be] a number of reasonable approaches to allocating excess surplus among jurisdictions" and that it "would be inclined to give the Commissioner substantial latitude in determining how best to approach that issue." *DC Appleseed*, 214 A.3d at 995. The Court did not instruct DISB to adopt a new model or approach, as Appleseed asserts, but rather remanded for DISB to consider and provide further explanation regarding (1) the Acting Commissioner's reliance on 2011 data alone, (2) alleged jurisdictional differences in the riskiness and profitability of GHMSI's activities, and (3) the proper attribution of FEP premiums. *Id.* The Appleseed/Shaw analysis should be rejected on each of these points.

The Shaw analysis cherry-picks data from a limited period of years and then manipulates that data through an error-riddled analysis that Mr. Songer shows to be fundamentally unreasonable and unreliable. *See* Ex. 1 at 7. It provides no reason for the Commissioner to depart from DISB's original methodology. As to the issues identified by the Court of Appeals:

- Appleseed provides no showing that 2003 to 2011 is the "correct" period of time, as opposed to any other period over GHMSI's long history. The consistency between the 2011 data on which the Acting Commissioner relied and the 2003 to 2011 data reflected in the Songer Report illustrates that DISB's prior focus on "a snapshot of 2011" did not meaningfully affect the elements relied upon by DISB in its analysis.

- The "profit weight" calculations by Mr. Shaw are based upon significant guesswork and assumptions about profitability not addressed in the financial statements upon which Mr. Shaw relies. The Songer Report's corrections to Mr. Shaw's grossly overstated District "profit weight" calculation support a finding that the record lacks reliable evidence of meaningful jurisdictional differences in profitability as of 2011.

- The Songer Report explains and confirms why the Acting Commissioner correctly attributed FEP premiums to the jurisdictions of certificate holders. *See* Ex. 1 at 20-24.

In short, GHMSI submits that surplus attribution should be based on individual subscriber residency. But the Acting Commissioner's analysis, supplemented with further explanations and

the modification requested by GHMSI, is far superior to the invalid and fundamentally unreliable analysis offered by Appleseed and Mr. Shaw.

4. *A Corrected Appleseed/Shaw Analysis Attributes 18.9% of 2011 Surplus to the District, not the Astronomical Sum Claimed by Appleseed.*

As discussed above, the Shaw analysis contains significant guesswork, undisclosed assumptions, and numerous errors. As a model, it is no more reliable than the approach taken by the Acting Commissioner in the December 2014 Order. To demonstrate this, the Songer Report shows that if the most significant errors in the Shaw analysis were corrected, 2003 to 2011 data were more uniformly incorporated, and subscriber residency were included as a factor, even the Shaw model would attribute only 18.9% of GHMSI's 2011 surplus to the District. Ex. 1 at 8-9.

Consistent Use of Multi-Year Data: The Court of Appeals requested further explanation of "why the focus [of the attribution analysis] was on a snapshot of 2011 rather than an effort to analyze GHMSI's surplus history and to determine the District's contributions to that surplus over time[.]" *DC Appleseed*, 214 A.3d at 995. Mr. Shaw responds by purporting to incorporate data from 2003 to 2011 *for only one* of the three factors (reported premiums) on which Acting Commissioner McPherson relied. For consistency, Mr. Songer has incorporated data from the 2003 to 2011 timeframe for all factors in the Appleseed/Shaw analysis. *See* Ex. 1 at 30-33.[8]

Consideration of Subscriber Residency: Mr. Songer also supplements the Appleseed/Shaw framework with a factor for subscriber residency to recognize the centrality of individual subscribers to GHMSI's Charter, operations, premium revenue, and, by extension, its surplus. Ex. 1 at 33-34; see *supra* pp. 5-8.

---

[8] As already noted, however, there is no adequate data to trace surplus attribution over GHMSI's entire history, and the 2003 to 2011 period selected by Mr. Shaw is unsupported "cherry picking." Appleseed presents no evidence that this period is more reliable than looking at 2011 alone, particularly given the general consistency of GHMSI's relevant data over time. *See* Ex. 1 at App. C.

Balanced Weighting of Factors: Mr. Songer assigns equal weight to all four factors (the quasi-premium factor, number of policies, number of providers, and subscriber residency) for a balanced analysis that does not distort any one metric. Ex. 1 at 35-36. As a result, even under the Appleseed/Shaw approach and using the remainder of Mr. Shaw's assumptions, no more than 18.9% of GHMSI's "excess" 2011 surplus is attributable to the District of Columbia, before adjustment for the community health reinvestment credits previously awarded by Commissioner Taylor. Ex. 1 at 9.

III. There Is No Error in Milliman's and Rector's Equity Portfolio Asset Value Probability Distribution.

Appleseed repeats Mr. Shaw's six-year-old claims that one component of the Milliman/Rector surplus model – the probability distribution used to forecast a range of possible future changes in GHMSI's equity portfolio asset value ("EPAV") – contained "foundational" and "calculation" errors. AS Br. 8-12. There is nothing new here. In 2014, Milliman demonstrated that Mr. Shaw's EPAV analysis was "completely wrong based on a number of analytical errors." Ex. 3 at 15.[9] Rector, the DISB's own retained expert who reviewed and relied upon Milliman's work, found no such error. And the Acting Commissioner rejected these claims when he rejected Mr. Shaw's entire surplus analysis. December 2014 Order at 47-49 & n.25.

On this issue, nothing has changed since 2014. Mr. Shaw's EPAV arguments are still wrong for all the same reasons:

- Mr. Shaw's analysis rests on his misinterpretation of a single chart, in which he misunderstands how a positive rate of return on equities held by GHMSI's pension plan still could reduce GHMSI's surplus if the actual rate of return is lower than the expected long-term rate of return on pension plan investments set by the pension actuaries in their annual filings.

[9] Exhibit 3 is Milliman's November 6, 2014, Response to Mr. Shaw's Report of June 10, 2014.

- Mr. Shaw ignores the fact that GHMSI's pension plan was valued by pension actuaries on the basis of a 10% rate of return, as set forth in GHMSI's financial statements. Thus, any actual equity returns below 10% must account for the reduced value of the pension plan, which would reduce GHMSI's surplus. This effect is separate from the impact of the returns themselves on the size of GHMSI's equity portfolios, and the EPAV probability distribution correctly reflected the potential for overall surplus losses or gains based on both of these factors.

- Mr. Shaw mischaracterizes the mathematical conversion, accomplished by simple division, that he claims resulted in a "calculation error."

- Mr. Shaw misreads three out of the four numerical values that form the basis of the second "calculation error" that he claims to find.

Each of these points is addressed in the 2014 analysis prepared by Milliman that is already in the record. *See* Ex. 3. The Commissioner can reject Appleseed's EPAV claims on the same record that was before Acting Commissioner McPherson.

A. The Milliman Model Properly Assesses the Surplus Impact of Returns in GHMSI's Corporate and Pension Equity Portfolios.

Mr. Shaw's challenge to the EPAV probability distribution rests principally on his misinterpretation of a chart. The chart, numbered B-1 in Milliman's November 6, 2014, Response, is entitled "Milliman and Rector Risk and Contingency Category: Equity Portfolio Asset Values." *See* Ex. 3 at 16. The fundamental purpose of Chart B-1 was to (a) set forth the range of probabilities for expected returns in GHMSI's two equity portfolios and (b) calculate the impact upon GHMSI's surplus that would result from equity returns in the specified ranges.

As was thoroughly explained at the prior hearing in this matter, the Milliman model, assessed by Rector, first develops a *pro forma* of GHMSI's likely results over a three-year period. Milliman then projects how GHMSI's surplus would be impacted (positively or negatively) if there are changes from those likely results and assigns probabilities regarding the likelihood of such deviations. Finally, Milliman runs 500,000 simulations, determining in the results how much surplus GHMSI would have needed in order to remain above a particular target level, such as

200% RBC. Chart B-1 pertains to one piece of this model, *i.e.*, potential returns on GHMSI's equity investments.

Chart B-1 has two columns. The left column is labeled "Probability" and lists a series of six percentage values that add up to 100 percent (10, 12, 25, 29, 14, and 10). The right column is labeled "3-Year Surplus Change as % of Non-FEP Insured Premium" and lists a series of six positive and negative percentage values (11.5, 3.8, 0.9, -3.0, -6.9, -10.7), each corresponding to one of the six Probability values. The text below Chart B-1 states that the surplus change values in the right column are derived from two separate components: (1) "The impact of variations in the rate of return on corporate assets, from the assumed 7% average rate of return on equities assumed in our pro forma model[,]" and (2) "With respect to the equity portfolio of the pension plan, the impact of variations in the future rate of return from the rate of return assumed in the pension valuation." Ex. 3 at 16 (footnote omitted).

As these notes explicitly state, the EPAV probability distribution developed by Milliman, approved by Rector, and adopted by Acting Commissioner McPherson accounts for the impact on surplus from returns on two different equity portfolios – equities held by GHMSI as corporate assets and equities held as assets of GHMSI's pension plan. The notes are also explicit that there are differences in how each portfolio will impact GHMSI's surplus at any given rate of return. For equities held as corporate assets, if the expected annual rate of return is 7% (*i.e*., 22.5% over a three-year period), positive deviations in returns would add to surplus compared to the surplus that would result from a 7% return, while negative deviations would reduce surplus. Ex. 3 at 16.

It is not so simple, however, to calculate the impact on GHMSI's surplus of returns on pension plan equities. As Milliman explained in Footnote 19 of the November 6, 2014, Response, pensions are valued with an "assumed" rate of return:

> The "assumed" rate of return is reflected in the calculations underlying the pension valuation as reported in the statutory statement. To the extent that actual returns do not conform to the assumed rate of return, a below-the-line adjustment to surplus is required, consistent with Statutory Accounting Principles (SAP).

Ex. 3 at 16 n.19. In other words, GHMSI's current pension liabilities depend upon both (1) how much it likely will need to pay in the future and (2) the potential returns that the pension portfolio can earn before those liabilities come due. The pension actuaries therefore assign an assumed rate of equity returns in calculating the value of GHMSI's pension assets. If the actual rate of return on equities is lower than the assumed rate of return, GHMSI's pension assets are worth less than expected and GHMSI's surplus is reduced, *even if the actual rate of return on pension plan equities is positive*.

Note 12 to GHMSI's 2010 financial statement filed with DISB showed that the average rate of return for equity assets assumed in GHMSI's pension valuation was a range of 8% to 12%, with a midpoint of 10%.[10] Thus, in any given year, even though a 7% return on pension equities would add to the actual value of the pension equity portfolio, it would not add *enough* to maintain the value of the pension assets as determined by the pension actuaries. When actual returns are below the assumed rate of return in the pension plan, GHMSI may be required to devote additional funding to the pension plan, which would reduce surplus.

As noted above, the DISB can reject Appleseed's argument based solely on the existing record. However, for purposes of clarity, Milliman also has provided an expanded version of Chart B-1, attached as Exhibit 4, to illustrate the notes in Milliman's November 6, 2014 filing. The expansion shows the surplus change for the corporate and pension portfolios separately, before

---

[10] The pension plan valuation is conducted by a pension plan actuary who sets assumptions for interest rates, equity market rates of return, and other factors based on a variety of considerations, including the inherent long-term nature of plan payments.

they are blended into a single "impact" number. As expanded Chart B-1 demonstrates, for the corporate equity portfolio, a deviation in the equity return translates directly to a change in expected surplus, while the impact of a deviation in the equity returns on the pension portfolio is also impacted by the "assumed rate of return" built into the pension valuation by the pension actuaries.

Appleseed uses line 4 of Chart B-1 as an illustration in its brief, AS Br. 11, and GHMSI will use that same line to demonstrate Mr. Shaw's errors. In reading expanded Chart B-1, it is important to continue to apply the other elements of Milliman's model. As noted above, Milliman first builds a *pro forma* for GHMSI's expected results in the next three-year period, and then assesses the potential deviations from those expected results and their potential impact on surplus. In this instance, Milliman's *pro forma* model assumes an average 7% annual equity return, and expanded Chart B-1 measures the impact on GHMSI's surplus of *deviations* from that average – *i.e.*, it does not show absolute returns.

Line 4 on expanded Chart B-1 assumes that equity returns over the measured three-year period are lower than anticipated by 10% (*i.e.,* total returns over the three years are 12.5% rather than 22.5%). This is shown in column (b). As shown in column (a), Milliman assigned a 29% probability to this outcome, based on the historical S&P 500 data. Rector reviewed and adopted that probability as reasonable. Column (c) shows that, if only a 12.5% return is achieved over the three years, the corporate equity portfolio will make a smaller contribution to GHMSI's surplus than expected in the *pro forma*, in an amount equivalent to 0.7% of GHMSI's non-FEP insured premium. Column (d) shows that, if the same returns are achieved in the pension portfolio, GHMSI's surplus would be lower than the *pro forma* model in the amount of 2.3% of GHMSI's non-FEP insured premium. Column (d) includes both the impact of lower returns on pension assets

and the fact that the pension valuation must be adjusted on account of those lower returns. Adding these two separate impacts together, achieving only 12.5% returns on equities over the three-year period would reduce surplus below Milliman's *pro forma* model in the amount of 3% of non-FEP insured premium.

B. There Was No "Foundational" Error in the EPAV Probability Distribution.

It is not necessary for the Commissioner to become an expert on the intricacies of the Milliman model, Chart B-1, or the expanded version of Chart B-1. Rector reviewed the Milliman model extensively; it reviewed the probability distribution; it reviewed the pension assumptions; it reviewed the financial statements; and it reviewed all the calculations. There is no error – Mr. Shaw is simply misreading a table.

Appleseed claims that the Milliman/Rector EPAV probability distribution contained a "foundational" error because it was not a "reasonable 'middle-of-the-fairway' projection[]" consistent with the MIEAA. AS Br. 10-12. The only explanation Appleseed offers for this claim is Mr. Shaw's assertion that "the deviation with the largest probability was a 29% shortfall totaling $91.4 million; in other words, the most likely deviation from the $97 million expected gain on the equity portfolio was a shortfall equivalent to -3% 'of NonFEP Insured Premium.'" AS Br. 11. Mr. Shaw misinterprets Chart B-1 because, among other things, he is ignoring the impact of the pension valuation.

As discussed above and shown on the expanded Chart B-1, Milliman's model assumes that there is a 29% chance that total returns would only be 12.5% over a three-year period (*i.e.* the expected rate of return of 22.5% minus 10%), based on the historical performance of the S&P 500. In that instance, the corporate equity portfolio produces fewer returns than expected in Milliman's *pro forma*, causing surplus to be lower than expected in the *pro forma* in the amount of 0.7% of non-FEP insured premium. The pension equity portfolio also produces fewer returns than

expected and since it is a larger portfolio, a lower absolute value. *But in addition*, the pension valuation was based on assumed returns that did not materialize – and GHMSI would need to adjust its pension valuation accordingly, which would by itself reduce surplus when GHMSI needs to devote more money to its pension obligations. Mr. Shaw does not mention or address the valuation of the pension plan and the impact of various levels of equity return upon that valuation, and therefore his claim of a "foundational" error should be rejected.[11]

C. There Were No "Calculation" Errors in the EPAV Probability Distribution.

1. *The Conversion of Potential Changes in Surplus into a Percentage of Non-FEP Insured Premium*

Appleseed also claims to have identified two "calculation" errors in the EPAV probability distribution. Appleseed first complains because each projected change in surplus that may result from different equity portfolio gains and losses is expressed as a percentage of non-FEP insured premium. AS Br. 9-10. This is not a substantive matter – it is merely a unit of measure used within the Milliman model. In essence, if non-FEP insured premium is $1,000 and a $10 surplus reduction is expected, that surplus reduction can be expressed as "1% of non-FEP insured premium." This is no different than a teaspoon of sugar being expressed as 2.08333% of a cup of sugar. *See* AS Br. 9. While this may seem awkward, Milliman needed to use a common unit of

[11] On the expanded version of Chart B-1, both the positive 0.9% 3-year surplus change reflected in line 3 and the negative 3.0% 3-year surplus change reflected in line 4 incorporate a surplus loss of approximately 1% specifically attributable to the pension plan – *i.e.*, to the difference between the 10% equity rate of return *assumed* in the pension plan's valuation and the lower *expected* 7% equity rate of return. If one were to excise this 1% loss attributable purely to the pension plan's valuation, the values in line 3 and line 4 would be virtual mirror images of each other – *i.e.*, approximately positive 1.9% and negative 2.0%. In other words, the probability distribution in Chart B-1 reflected an approximately equal chance of about a 2% gain or a 2% loss in surplus as a result of equity price variability.

measure to combine all of the various probability distributions to achieve the overall result of its model.

Using our example from line 4, discussed above, Milliman assumed a 29% probability that returns would fall short of the projected 22.5% three-year return in the amount of 10% of the equity portfolio. Because the reported equity assets held by the corporation in 2010 (including 50% of BlueChoice) were valued at $157 million, 10% of the equity portfolio is $15.7 million. Thus, if returns are only 12.5% rather than 22.5%, surplus would be lower than expected in the *pro forma* by $15.7 million. To facilitate the combining of this probability distribution with the distributions for other risk categories, the Milliman/Rector model took that exact figure – a potential $15.7 million surplus reduction – and divided it by the value of non-FEP insured premium used in the *pro forma* model, so that the results could be expressed in the units "percent of non-FEP insured premium." A $15.7 million surplus reduction is equivalent to a reduction amounting to .7% of non-FEP insured premium.

Appleseed is wrong when it claims that the Milliman/Rector model "multipl[ied] the percentage impact on the equity portfolio by the size of the nonFEP premium revenue[.]" AS Br. 9. The model instead calculated the potential reduction in the equity portfolio (as compared to expected returns) by applying the percentage impact *to the value of the equity portfolio itself*. The model then converted the dollar value of that potential surplus change into an equivalent numerical expression – a percentage of non-FEP insured premium. There was no calculation error.

2. *The Projected Return to GHMSI's Investment Portfolio*

Appleseed also incorrectly claims that the overall blended rate of return for the corporate investment portfolio should have been 4.06% rather than the 3.75% assumed in the Milliman/Rector model. AS Br. 10. Appleseed purports to derive the raw data for its calculation

from Milliman's November 6, 2014 Response to Mr. Shaw (attached as Exhibit 3). Appleseed claims that Milliman made the following assumptions: (1) "that equities would return an average of 7% annually for the three-year period from 2012 to 2014 and that GHMSI's remaining assets would return 3.5%" and (2) "that equities represented 16% of the portfolio; accordingly, other assets represented 84%." AS Br. 10. In these assumptions, Appleseed got only one thing right: Milliman did assume that equities would return an average of 7% annually. As to all the other metrics, Appleseed is wrong.

First, Appleseed erroneously claims that Milliman assumed a 3.5% return on all "remaining assets" – *i.e.*, all assets other than equities. Instead, Milliman assumed an average rate of return of "3.5% *for the bond portfolio*." *See* Ex. 3 at 15 (emphasis added). Second, Appleseed erroneously claims that Milliman assumed that equities represent 16% of GHMSI's entire investment portfolio. Instead, Milliman's Response states that 16% is "*the ratio of equity assets to non-FEP premium*." Ex. 3 at 17 (emphasis added). Appleseed's errors nullify three out of the four numeric values in the equation that it presents as its "corrected" calculation of the overall investment return. AS Br. 10.[12] Therefore, Appleseed's argument that the overall expected rate of return should have been 4.06% is erroneous. The 3.75% average rate of return used in the Milliman/Rector analysis is the proper assumption, in that it reflects expected returns for equities, bonds, and other classes of assets, including cash.

IV. "Prejudgment Interest" Is Unauthorized and Inappropriate.

DISB properly rejected Appleseed's contention that GHMSI should be obligated to pay "prejudgment interest" dating back to 2012. AS Br. 15. Appleseed's request for prejudgment

[12] Appleseed's equation reads: (**0.16** x 7%) + (**0.84** x **3.5%**) = 4.06%. AS Br. 10. All three figures in red type are wrong.

interest rests on no statutory authority, but is based solely on a bare-bones analysis of two cases with no relevance to these proceedings. The Commissioner lacks legal authority to impose prejudgment interest and, even as a discretionary matter, prejudgment interest would be inappropriate and nonsensical in the context of the MIEAA.

A. There is No Legal Basis for Prejudgment Interest.

This is not the type of proceeding to which "prejudgment interest" applies. District of Columbia law (1) mandates prejudgment interest in a court judgment for a plaintiff on "a liquidated debt on which interest is payable by contract or by law or usage" (D.C. Code § 15-108) and (2) allows (but does not require) prejudgment interest in a court judgment for breach-of-contract damages "if necessary to fully compensate the plaintiff" (D.C. Code § 15-109). Neither of these provisions applies to MIEAA proceedings, which involve no court judgment for a plaintiff, no liquidated debt,[13] and no breach-of-contract damages. Appleseed erroneously relies (AS Br. 15) on *Riggs Nat'l Bank of Washington, D.C. v. Dist. of Columbia*, 581 A.2d 1229 (D.C. 1990), which was a direct application of D.C. Code § 15-108. *See* 581 A.2d at 1254-55 (holding that Unclaimed Property Act ("UPA") granted District an "immediate" statutory right to possession of an "easily ascertainable" sum of abandoned property and thus created a "liquidated debt" for which prejudgment interest was mandatory under D.C. Code § 15-108 in Superior Court action brought to enforce UPA).

Unlike the Superior Court action for a liquidated debt in *Riggs Bank*, neither D.C. Code § 15-108 nor any other District of Columbia statute authorizes the addition of prejudgment interest

[13] "A liquidated debt is one which at the time it arose was an easily ascertainable sum certain." *Mazor v. Farrell*, 186 A.3d 829, 832 (D.C. 2018) (quoting *Steuart Inv. Co. v. The Meyer Group, Ltd.*, 61 A.3d 1227, 1240 (D.C. 2013)).

to a community-health reinvestment plan required under the MIEAA.[14] Moreover, given the nature of a proceeding under the MIEAA, which involves no liquidated debt owed to any party to the case, the D.C. Council's omission of prejudgment interest from the statute means that DISB has no legal authority to effectively amend the statute by imposing prejudgment interest.

Appleseed cites only one case in which the D.C. Court of Appeals upheld an award of prejudgment interest without specific statutory authority, but that case involved a traditional compensatory award in favor of an individual claimant, for which prejudgment interest is customary. *See Dist. of Columbia Pub. Sch. v. Dist. of Columbia Dep't of Employment Servs.*, 123 A.3d 947, 952-53 (D.C. 2015) (upholding prejudgment interest on retroactive disability benefits awarded under Compensation Merit Personnel Act; interest "afford[ed] the worker the full value of benefits due for her injuries under the statute" and was consistent with how private workers' compensation statutes were administered).

Community health reinvestment under the MIEAA is nothing like the traditional compensatory award of disability benefits to an individual claimant in *D.C. Public Schools*. No individual has a right to make a "claim" under the MIEAA for compensation – the MIEAA is a non-compensatory, *sui generis* statutory scheme that prescribes a novel procedure for evaluating GHMSI's surplus and for potentially ordering a reduction in surplus through additional community

---

[14] Appleseed erroneously suggests that D.C. Code § 31-3506(i) grants the Commissioner "broad authority to issue orders effectuating MIEAA's purpose," including an order imposing prejudgment interest. AS Br. 15 & n.10. By its terms, § 3506(i) has a narrow application. It identifies measures available *"[i]f the Commissioner determines that the corporation failed to submit a plan*" in compliance with D.C. Code § 31-3506(g). D.C. Code § 31-3506(i) (emphasis added). GHMSI submitted its "plan" on March 16, 2015. On June 14, 2016, Commissioner Taylor rejected the plan. At that time, pursuant to D.C. Code § 31-3506(i), Commissioner Taylor denied premium rate increases for subscriber policies written by GHMSI in the District for 12 months. Order No. 14-MIE-016 at 19. These proceedings have progressed more than five years beyond GHMSI's submission of a "plan" under § 31-3506(g). The remedies identified in § 31-3506(i) are no longer in play.

health reinvestment. Community health reinvestment is specifically defined to include items that are not even expenditures, let alone compensation, such as premium rate reductions that "benefit current or future subscribers," and which are wholly dissimilar from a liquidated award of compensation to which prejudgment interest could be applied. *See* D.C. Code § 31-3501(1A).

The nature of the process prescribed by the MIEAA means that the question whether reinvestment is required and, if so, which of various forms it is to take necessarily must remain unresolved until the end of the MIEAA process. Prejudgment interest, by contrast, envisions a specific past point in time at which a defined, known sum should have been paid to a specific person or entity. If the D.C. Council had intended for prejudgment interest to apply in the specialized context of the MIEAA, it would have said so. The Council's silence is conclusive, and DISB lacks legal authority to impose prejudgment interest in this matter.

B. Prejudgment Interest is Incompatible with the Structure and Purpose of the MIEAA.

Even if prejudgment interest were not legally precluded, it would be inappropriate and nonsensical in light of the structure and purpose of the MIEAA. The MIEAA did not create a GHMSI "debt" at year-end 2011, as Appleseed's argument and its reliance on *Riggs Bank* presumes. *See* AS Br. 15 (claiming that "money was owed at an earlier date but not paid"); *Riggs Bank*, 581 A.2d at 1254 (noting that UPA granted an "immediate" statutory right to possession of abandoned property). The MIEAA instead sets forth a *process* – which the legislative history characterizes as a "*thorough review*" – for assessing the level of community health reinvestment engaged in by GHMSI and the surplus requirements of the company to maintain financial soundness. D.C. Council Bill 17-934 Committee Report (Oct. 17, 2008) at 11 (emphasis added). In other words, the MIEAA specifically contemplates that any obligation on the part of GHMSI to engage in additional community health reinvestment would ripen only at some point after 2011,

when the "thorough review" of the year-end surplus has been completed and a "plan" for dedication of any "excess" surplus has been developed and approved. *See* D.C. Code §§ 31-3506(e)-(g).

Further, the MIEAA recognizes that GHMSI's surplus changes from year to year and is not a static amount, such as a sum of compensatory damages. The MIEAA requires the Commissioner to review GHMSI's surplus at least every three years. D.C. Code § 31-3506(e). Events subsequent to a review in one year may significantly impact GHMSI's surplus in following years – including significant reductions in surplus as market and other conditions change. Appleseed's effort to treat 2011 surplus as a single liquidated award, subject to prejudgment interest, is wholly inconsistent with DISB's ongoing obligation to monitor and review GHMSI's surplus to ensure that GHMSI maintains financial soundness.

Nor can prejudgment interest be imposed as some sort of "penalty" on GHMSI. GHMSI has fully participated in these proceedings on the timetables set by DISB and the Courts. Any additional community health reinvestment by GHMSI is determined only at the completion of this statutory process, not at the beginning of it, and only in the form of a plan based on specific factual findings. D.C. Code §§ 31-3506(e)-(g). GHMSI, and by extension its subscribers, cannot be penalized for failing to divest "excess" surplus attributable to the District of Columbia that it did not believe it possessed to an as-yet unidentified party to whom GHMSI would not have known any funds were owed.[15] *Cf. Dist. of Columbia v. Pierce Assoc., Inc.*, 527 A.2d 306, 311 (D.C.

[15] As GHMSI demonstrated in the Court of Appeals and as discussed *infra*, an order directing community health reinvestment in the form of donations to unspecified outside organizations or a private trust would violate its federal Charter and the Takings Clause of the United States Constitution. The fact that Appleseed seeks to compel such donations, however, by itself demonstrates that the MIEAA is not a compensation scheme to which prejudgment interest could apply. Such as-yet-unidentified outside organizations have no liquidated claim against GHMSI and were not deprived of any money that could be subject to prejudgment interest.

1987) (common-law "penalty" theory of prejudgment interest recognized that it would be "unfair to penalize one who failed to tender payment when he could not know the amount of the debt"); *Fed. Deposit Ins. Corp. v. Rocket Oil Co*., 865 F.2d 1158, 1161 (10th Cir. 1989) (affirming denial of prejudgment interest under statute providing for equitable distribution of assets of insolvent bank; obligation to repay funds was "not created by [a] voluntary act in either forming a contract or committing a tort" and was not "a compensatory remedy").

Finally, the MIEAA makes clear that it is not a compensation scheme, because it contemplates that any community health reinvestment by GHMSI "may consist entirely of expenditures for the benefit of [GHMSI's] current subscribers," D.C. Code § 31-3506(g)(2), such as premium rate reductions, D.C. Code § 31-3501(1A). Prejudgment interest applied to premium rate reductions would be nonsensical. And prejudgment interest on rebates or other benefits to current GHMSI subscribers is equally illogical. Current subscribers were never "deprived" of the use of surplus and therefore did not lose the "time value" of money. *See Pierce Associates*, 527 A.2d at 311 ("unjust enrichment" theory of prejudgment interest asks "whether the plaintiff has been deprived of the use of the money withheld and should be compensated for the loss"). GHMSI obtained its surplus through rates approved by DISB, and the surplus continuously served subscribers' interests by guaranteeing GHMSI's ability to pay claims. The MIEAA may empower the Commissioner to *redirect* surplus to serve different interests of subscribers in limited circumstances, but such a redirection provides no basis for imposing prejudgment interest.

V. Appleseed is not Entitled to Reimbursement of Fees Paid to its Rejected Expert.

DISB was correct when it refused to grant Appleseed's first request for reimbursement of Mr. Shaw's actuarial fees. Appleseed concedes that "participants in litigation generally are responsible for their costs unless otherwise provided by statute, and that MIEAA does not

expressly provide for a participant to recover fees." AS Br. 16. In fact, the MIEAA directly addresses the subject of actuarial fees and authorizes their recovery from GHMSI *only* with respect to actuaries and other professionals *retained by the Commissioner*. D.C. Code § 31-3506(h). That is the end of the matter. "However inclusive the general language of a statutory provision, it will not apply to matters specifically dealt with in another part of the enactment." *Office of People's Counsel v. Pub. Serv. Comm.*, 477 A.2d 1079, 1084 (D.C. 1984) (citation omitted).

DISB should again reject Appleseed's confused efforts to get around this plain conclusion. Appleseed cannot rely on the Commissioner's authority to issue such "orders as are necessary to enforce the purposes of this subchapter" under D.C. Code § 31-3506(i), for two key reasons. *See* AS Br. 17 n.13. First, that subsection applies only to measures available to the Commissioner upon receipt of a remedial "plan," not to other issues such as whether GHMSI's surplus was excessive at all. See *supra* note 14. Second, the authority to issue "orders" cannot authorize reimbursement of actuarial fees beyond those expressly covered by § 31-3506(h), because that interpretation would impermissibly render § 3506(h) superfluous. *See RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 566 U.S. 639, 646 (2012) (when "a general authorization and a more limited, specific authorization exist side-by-side," canon that "the specific governs the general" avoids superfluity of the specific provision). The MIEAA does not authorize agency-ordered reimbursement of the actuarial fees that Appleseed voluntarily incurred; the Commissioner therefore cannot order it. *See Dist. of Columbia v. 17M Associates, LLC*, 98 A.3d 954, 959 (D.C. 2014) (administrative agency may not act in excess of statutory authority).

It is also worth noting that, even if there were some statutory basis that could support an award of "fees" to Appleseed (there is not), it would be wildly inappropriate to do so here. No opinion presented by Mr. Shaw has been adopted in this matter for any purpose. In 2014, Mr.

Shaw's testimony was found not credible and rejected in its entirety. GHMSI has incurred substantial expense in responding to and rebutting Mr. Shaw's erroneous, outcome-driven opinions, and Appleseed is not even a party to these proceedings. If anyone is entitled to fees in this matter, it is GHMSI that should be entitled to recover from Appleseed the costs that GHMSI has incurred in responding to Mr. Shaw's meritless claims.

VI. Federal Law Limits the Commissioner's Power to Order a Distribution of GHMSI's Surplus to Non-Subscribers.

Finally, while the Court of Appeals purposely did not address the issue, *DC Appleseed*, 214 A.3d at 996, Appleseed reasserts its argument that DISB should compel GHMSI to distribute its surplus to the "community," even though that surplus is generated from premiums paid by and for individual GHMSI subscribers pursuant to a federal Charter stating that GHMSI should be operated for their benefit. AS Br. 18-20. This argument by Appleseed also should be rejected, again.

The MIEAA defines community health reinvestment to include expenditures "that benefit current or future subscribers, including premium rate reductions[,]" and states that a community health reinvestment plan "may consist entirely of expenditures for the benefit of current subscribers of the corporation." D.C. Code §§ 31-3501(1A), -3506(g)(2). Consistent with these provisions, Commissioner Taylor ordered community health reinvestment in the form of rebates to certain current (as of 2016) GHMSI subscribers. As GHMSI showed in its Intervenor Brief in the Court of Appeals, which is incorporated here, Appleseed's request that the Commissioner revisit this approach and compel GHMSI to spend eligible "excess" 2011 surplus funds on community programs and initiatives is improper.

GHMSI's surplus consists of funds that past and current subscribers paid into the company through their premiums, along with investment income earned on some of those funds. As a matter

of federal law – specifically GHMSI's Charter – GHMSI must conduct its business "for the benefit of" its certificate holders (Charter Sec. 3) and hold surplus "for the benefit and protection" of those same certificate holders (Charter Sec. 11). Therefore, a DISB order directing GHMSI to redistribute surplus away from uses that benefit and protect its certificate holders would violate the terms of the federal Charter.

In addition, a DISB order requiring GHMSI to give surplus funds earned through subscriber premiums to outside entities would raise substantial constitutional questions under the Fifth Amendment Takings Clause, which prohibits governmental takings of private property for public use without just compensation. U.S. Const. amend. V. This issue has arisen in federal litigation involving a Pennsylvania statute that required transfer of a portion of the "excess" surplus of a state-created nonprofit medical malpractice insurance association to the Commonwealth's General Fund for the funding of medical assistance payments. *See Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf*, 324 F. Supp. 3d 519 (M.D. Pa. 2018). Like GHMSI, the association was supervised by the state Insurance Commissioner, "funded exclusively by policyholder premiums and investment income," and maintained surplus "as a 'backstop' to ensure that unforeseen events do not impede an insurer's ability to meet obligations to its insureds." *Id.* at 525-26. The district court reached the "inescapabl[e]" conclusion that the statute violated the Takings Clause. *Id.* at 539. The court found that the association's surplus was private property, the Pennsylvania statute "seeks to repurpose the Association's surplus for public use," and the statute "fails to provide *any* compensation whatsoever." *Id.* at 538-39 (emphasis in original).[16]

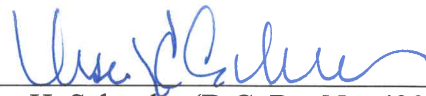
[16] The district court issued an additional Takings Clause ruling regarding a subsequent iteration of the Pennsylvania statute. *See Pennsylvania Professional Liability Joint Underwriting Ass'n v. Wolf*, 381 F. Supp. 3d 324, 341 (M.D. Pa. 2018). The rulings are on appeal to the United States Court of Appeals for the Third Circuit.

The same analysis would apply to an order under the MIEAA compelling GHMSI to spend a portion of its "excess" surplus – *i.e.*, private property – on contributions to outside entities to address community health needs in the District – *i.e.*, public uses – without compensation.

CONCLUSION

Appleseed's arguments regarding surplus attribution, the EPAV probability distribution, prejudgment interest, and actuarial fees were all rejected in the prior proceedings. They have no merit and should be rejected again. The statutory requirement that the remand proceedings be coordinated with Maryland and Virginia is vitally important. GHMSI cannot comply with conflicting regulatory orders and asks the Commissioner to work with the MIA and the VBOI toward a mutually agreeable resolution of this matter.

Respectfully submitted,



Lisa H. Schertler (D.C. Bar No. 430754)
David Schertler (D.C. Bar No. 367203)
Danny C. Onorato (D.C. Bar No. 480043)
Schertler Onorato Mead & Sears, LLP
901 New York Ave., N.W., Suite 500W
Washington, D.C. 20001
202-628-4199

January 21, 2021

Counsel for Group Hospitalization and Medical Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2021, I caused one copy of the foregoing Brief and the accompanying Exhibits to be sent by electronic mail to the following:

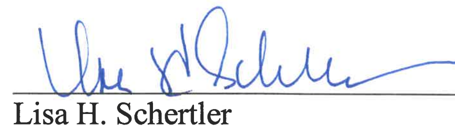
Adam Levi, Assistant General Counsel
D.C. Department of Insurance, Securities and Banking
810 First Street, N.E., Suite 801
Washington, D.C. 20002
adam.levi@dc.gov

James C. McKay, Jr.
Office of the Solicitor General
Office of the Attorney General for the District of Columbia
441 4th Street, N.W., Suite 630
Washington, D.C. 20001
james.mckay@dc.gov

Marialuisa S. Gallozzi
Covington & Burling LLP
One CityCenter, 850 Tenth Street, N.W.
Washington, D.C. 20001
mgallozzi@cov.com

Thomas Sandford
Virginia State Corporations Commissioner
Thomas.Sandford@scc.virginia.gov

J. Van Lear Dorsey
Maryland Insurance Administration
Van.dorsey@maryland.gov



Lisa H. Schertler