DISTRICT OF COLUMBIA COURT OF APPEALS

GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC., Petitioner, v. D.C. DEPARTMENT OF INSURANCE, SECURITIES AND BANKING, Respondent.	No. 16-AA-967 Agency Decision No. 14-MIE-19 **Consolidated with** No. 16-AA-895, *D.C. Appleseed Center for Law and Justice, Inc. v. D.C. Department of Insurance, Securities and Banking*

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

Petitioner/Intervenor D.C. Appleseed Center for Law and Justice, Inc. ("Appleseed") has filed an Opposition ("Opp.") to the Emergency Motion for a Stay Pending Appeal ("Stay Motion") filed by Group Hospitalization and Medical Services, Inc. ("GHMSI") on June 22, 2017.[1] The Stay Motion seeks a stay pending appeal of the "Rebate Order" issued by the D.C. Department of Insurance, Securities and Banking ("DISB") on August 30, 2016 (DISB Order 14-MIE-19) under the Medical Insurance Empowerment Amendment Act of 2008 ("MIEAA").[2] The Rebate Order directs GHMSI to distribute more than $51 million to certain of its health-

[1] As of the date of this filing, and pursuant to this Court's order of June 23, 2017, the Stay Motion remains held in abeyance and an administrative stay is in effect. *See* Exhibit 1.

[2] Contrary to Appleseed's assertions (Opp. at 5), GHMSI did not move this Court for a stay of the Rebate Order before it filed the Stay Motion. As the Court's rules require, however, GHMSI moved DISB for a stay pending appeal in its "Petition for Reconsideration and Motion to Stay Further Proceedings" filed on September 22, 2016 (Exhibit 2). *See* D.C. App. R. 18(a)(1) ("A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order."). On February 20, 2018, DISB denied that request for reconsideration and a stay. *See* Exhibit 3 (DISB Order 14-MIE-27). On February 21, 2018, GHMSI filed a petition for review of that DISB Order and also requested consolidation of that new case (18-AA-0178) with the above-captioned petitions for review. *See* Exhibit 4 (w/o encl.).

insurance subscribers, based on GHMSI's subscriber enrollment as of August 30, 2016. Once distributed to these subscribers, the rebate funds cannot be recovered. Moreover, as explained in the Stay Motion, GHMSI's co-regulators in Maryland and Virginia have prohibited GHMSI from reducing or distributing its current surplus (the only surplus it has at any given time) to comply with the Rebate Order, and the legislatures in those jurisdictions have enacted laws to that effect. These conflicting laws and regulatory orders are also the subject of a federal lawsuit pending before the Honorable Catherine C. Blake in the United States District Court for the District of Maryland.[3]

Against this backdrop, Appleseed asks the Court to deny a stay of the Rebate Order. Appleseed does not address any of the conflicting orders and laws to which GHMSI is subject or suggest how GHMSI could comply with the Rebate Order without being subject to adverse legal action by authorities in Maryland and Virginia.[4] Appleseed does not even contend that the

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[3] The case is *CareFirst, Inc., et al. v. The Hon. Stephen C. Taylor, et al.*, Case 1:16-cv-02656-CCB (D. Md.). Among the motions pending before Judge Blake is CareFirst's Motion for Temporary Restraining Order and/or Preliminary Injunction which, like the Stay Motion, seeks to stay the Rebate Order pending the outcome of that litigation. *See* Exhibit 5 (w/o exhibits). On June 23, 2017, Judge Blake was informed of the administrative stay of the Rebate Order issued by this Court. *See* Exhibit 6. As a result, Judge Blake vacated the TRO hearing she had previously scheduled for June 27, 2017.

[4] Rather than address these essential issues, Appleseed frontloads its pleading with groundless claims that GHMSI has "taken steps that have delayed [ ] implementation" of the Rebate Order, citing the proposed Consent Order that GHMSI negotiated with DISB staff (Opp. at 5-7). As negotiated, that Consent Order would have resolved GHMSI's appeals and provided substantial community reinvestment immediately and over a ten-year period, although further appeals by Appleseed could have delayed its implementation. Unfortunately, Commissioner Taylor rejected the Consent Order that had been negotiated between GHMSI (the only party to the proceedings) and DISB staff, and replaced it with his own proposed settlement that GHMSI was unable to accept and that Appleseed itself opposed. GHMSI's good faith efforts to resolve this matter through negotiations with DISB staff were hardly an effort at delay. Moreover, Appleseed is similarly incorrect when it asserts (Opp. at 15-16 n.7) that the proposed Consent Order somehow contradicts or undermines the positions taken by Maryland and Virginia, which have forbidden GHMSI from distributing surplus without their agreement. Throughout discussions regarding

Rebate Order should or will be affirmed by this Court, as the entire purpose of its own petition for review is to challenge that Order and the DISB proceedings that produced it. In other words, Appleseed urges this Court to require GHMSI's immediate and irreversible compliance with an agency order *that even it asserts should be overturned on appeal.* The Court should reject that incongruous position. As shown below, GHMSI has satisfied the standard for a stay pending appeal. Moreover, the complex posture of this case – involving agencies and courts from multiple jurisdictions and $51 million of a critical regional health-insurance provider's surplus that is, under federal law, "for the benefit and protection of all its certificate holders"[5] – makes orderly resolution of utmost importance to the public interest. Orderly resolution will be achieved by staying the Rebate Order pending this Court's review of the MIEAA proceedings. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (ability to grant a stay pending review is "a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process").

ARGUMENT

ALL FOUR STAY FACTORS SUPPORT A STAY OF THE REBATE ORDER PENDING APPEAL

As a preliminary matter, Appleseed is wrong when it asserts that this Court's "sliding scale" approach to evaluating the four factors relevant to a stay pending appeal has been "called into question" by *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), and claims that GHMSI has cited no post-*Winter* case to support the continued viability of that approach. Opp. at 8 n.3. On the very page of the Stay Motion to which Appleseed directs the Court, *id.*, GHMSI cites *Salvaterra v. Ramirez*, 105 A.3d 1003 (D.C. 2014), in which, *six years after Winter*, this Court restated its longstanding holding that the four stay factors "interrelate on a sliding scale

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potential settlement, GHMSI made plain to DISB that GHMSI would have to receive approval from the other jurisdictions before it could execute the Consent Order.

[5] *Charter: Group Hospitalization and Medical Services, Inc.*, 53 Stat. 1412, as amended.

and must be balanced against each other." *Id.* at 1005 (quoting *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)). The "sliding scale" approach is alive and well in this jurisdiction and, regardless, GHMSI has made strong showings on all four stay factors.

A. GHMSI Is Likely To Succeed on the Merits of Its Appeal

1. *DISB's Failure to Coordinate With Maryland and Virginia*

As to GHMSI's argument, supported by the Attorney General of Virginia,[6] that DISB failed to comply with the MIEAA's command that its surplus review "*shall be undertaken in coordination with* the other jurisdictions in which [GHMSI] conducts business," D.C. Code § 31-3506(e) (emphasis added), Appleseed skips over the first – and GHMSI contends the *only* – step of statutory analysis that this Court will be required to undertake. Jumping straight to the perceived cover of "deference" to an agency's statutory interpretation (Opp. at 9-10), Appleseed ignores that "the reviewing court [first] must determine whether the meaning of the statute is clear" and, "[i]f it is, 'that is the end of the matter.'" *Pannell-Pringle v. D.C. Dep't of Empl. Serv.*, 806 A.2d 209, 211 (D.C. 2002) (citations omitted).

Appleseed's claim that "coordination" does not require DISB to forge consensus with its co-regulators on the review and distribution of GHMSI's unitary surplus (Opp. at 9-11) contains no analysis whatsoever of the plain meaning of that statutory term. Appleseed offers no response to GHMSI's demonstration, based on multiple dictionary definitions, that, in fact, "coordinate" means "harmonize," or "*to bring into agreement.*" *See Tippett v. Daly*, 10 A.3d 1123, 1127 (D.C. 2010) (*en banc*) (where statute and regulations do not define a term, "it is

[6] The Attorney General of Virginia is an intervenor in GHMSI's petition for review. As stated in his Motion to Intervene, intervention "is necessary to ensure that GHMSI's insureds in Virginia are adequately represented and to make clear to the Court that the required coordination [with the other jurisdictions in which GHMSI conducts business under the MIEAA] did not take place." *See* Exhibit 7.

appropriate for us to look to dictionary definitions to determine the ordinary meaning" of statutory language). Appleseed is similarly silent on the legislative history of the "coordination" mandate, which was added to the MIEAA one year after the original enactment. As explained in the Stay Motion, the "undertake in coordination" mandate *cannot* require merely that DISB "carefully consider and take into account" the views of Maryland and Virginia as Appleseed and DISB contend (Opp. at 9), because the MIEAA contained a requirement to "consider the interests and needs" of those jurisdictions *before* the D.C. Council added the distinct "coordination" mandate and made it specifically applicable to the surplus review process. *See* D.C. Code § 31-3506.01(b).[7] By ignoring the plain language of the statute, the legislative history, the canon against surplusage, and the very idea of engaging in textual analysis of statutory language, Appleseed implicitly concedes the merits of GHMSI's statutory construction arguments.[8] Standing alone, those arguments establish GHMSI's likelihood of success on

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[7] Contemporaneously with the enactment of this amendment in late 2009, former DISB Acting Commissioner Gennet Purcell was in the process of reviewing GHMSI's 2008 surplus under the MIEAA. Commissioner Purcell expressed concerns at that time about the potential that "conflicting surplus findings" and "competing orders" could emerge from DISB and the Maryland Insurance Administration ("MIA") in the course of their sequential reviews of GHMSI's surplus. *See* DISB Order 09-MIE-001 (Exhibit 8) at 3; DISB Order 09-MIE-004 (Exhibit 9) at 3. Commissioner Purcell therefore explicitly expressed her intent to "work with MIA *to coordinate both surplus reviews*" and "*to coordinate each regulator's final determinations* regarding GHMSI's surplus." *Id.* The reasonable inference from this legislative backdrop is that the D.C. Council codified into law the "coordination" of surplus reviews and final determinations that was occurring at the agency level at that time, in order to avoid the exact result that DISB permitted in the 2011 surplus review – conflicting surplus orders directed at GHMSI by its co-regulators.

[8] The only affirmative argument that Appleseed makes in support of its vague notion of "coordination" is that because DISB is GHMSI's primary regulator, it would be "unreasonable" for the D.C. Council to require DISB to work toward agreement with GHMSI's other regulators. Opp. at 10-11. That argument not only ignores the statutory language, but also fails on its own logic. GHMSI is a critical insurance provider in three jurisdictions, and even DISB now recognizes that "[t]here is no segregation of surplus by jurisdiction." Ex. 3 at 13. One need look no further than the current circumstances – in which GHMSI faces conflicting regulatory mandates and a federal court must rule upon the constitutional issues created by that

appeal. *See Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that [the legislature] had an intention on the precise question at issue, that intention is the law and must be given effect.").

2. *DISB's Arbitrary and Capricious Excessiveness Finding*

Appleseed's response to GHMSI's arguments about DISB's erroneous "order of operations" under the MIEAA (*i.e.*, DISB failed to determine the portion of GHMSI's surplus that was "attributable to the District" before reviewing the excessiveness of that portion alone) is similarly unpersuasive. Here again, Appleseed ignores the most critical evidence of legislative intent – the statutory language as written. The MIEAA could not be more clear on this point. It states that 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." D.C. Code § 31-3506(e). Appleseed asserts that DISB could reasonably interpret this language to authorize its review of the "entire surplus of the corporation" for excessiveness, rather than just a specific "portion" of it as the D.C. Council wrote, because "absurd results" otherwise would follow. Opp. at 12. But an agency may not *rewrite* a statute in the guise of *interpreting* it. If, as Appleseed and DISB contend, the MIEAA required a flawed analytical framework, the solution was to amend the legislative mandate, not substitute a new framework of the agency's invention.

On GHMSI's separate argument that DISB acted arbitrarily and capriciously by materially modifying the confidence levels utilized in the actuarial surplus analysis it received

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interjurisdictional stalemate – to understand why the D.C. Council would, *and did*, see fit to require DISB to "coordinate" its surplus reviews with its co-regulators to avoid this very situation.

from Rector without adequate explanation, Appleseed defends DISB's ability to exercise independent judgment in this area but does not meaningfully address GHMSI's central point: the reasoning behind the agency's independent judgment must be adequately explained. Moreover, "[t]he more technical and complex the subject matter, the more explanation the agency ought to provide for its decision." *D.C. Appleseed Ctr. for Law and Justice, Inc. v. D.C. Dep't of Ins., Sec., and Banking*, 54 A.3d 1188, 1217 (D.C. 2012). Even as expanded upon in DISB's Order on GHMSI's Petition for Reconsideration, DISB's explanation of why it reduced the 98% confidence level for avoiding the financially dire consequence of falling to a 200% RBC-ACL is inadequate. Moreover, the closely related argument made by GHMSI in the Stay Motion – that DISB compounded the arbitrariness of its analysis by eliminating the surplus target "range" that Rector explained was essential to any rational gauge of surplus – is left completely unaddressed by Appleseed.

B. GHMSI Has Established a Likelihood of Irreparable Harm

Quoting *Save Jobs USA v. U.S. Dep't of Homeland Security*, 105 F. Supp. 3d 108 (D.D.C. 2015), Appleseed claims that GHMSI "has made no effort to quantify or even speculate" about the business damages it would incur from compliance with the Rebate Order. Opp. at 14. The affidavit of GHMSI Chief Executive Officer Chet Burrell ("Affid."), attached as Exhibit 27 to the Stay Motion, belies Appleseed's claim by quantifying and specifying those damages, without speculation, as follows: (1) $51 million would be distributed to eligible subscribers by way of check and could not be recovered from those recipients if this Court reverses the Rebate Order (Affid. ¶ 6), and (2) GHMSI would incur $2 to $3 million in implementation costs to identify the precise set of subscribers to whom the rebates must be provided and the appropriate amount of each rebate (Affid. ¶ 7). That makes $53 to $54 million in "quantified" business

harms that are, by any measure, "*certain, great and actual.*" *Save Jobs*, 105 F. Supp. 3d at 112 (emphasis in original).[9] Appleseed cites no case like this one, in which an immediate and unrecoverable payout of substantial sums from a corporate entity would be required in the absence of a stay; it instead relies on inapposite cases involving efforts to delay implementation of agency rules that would affect only indirectly, if at all, the moving party and, in one instance, an effort by one group of U.S. airlines to prevent a foreign airline from receiving a loan.[10]

Appleseed also asserts that GHMSI's imminent quantifiable harm is not "irreparable" because those amounts "may be recouped through rates." Opp. at 15. Appleseed misapprehends the rate-setting process and ignores the inequities of its own suggestion. First, GHMSI cannot simply raise its rates to recover funds that it paid out but wants back, because federal Medical Loss Ratio rules prohibit raising rates to a level that exceeds a specified percentage of actual medical costs. *See, e.g.,* 42 U.S.C. § 300gg-18. Second, even if Appleseed's rate solution were tenable as a practical matter, it would inequitably require GHMSI's *current* subscribers to bear the cost of rebates distributed to GHMSI's *previous* subscribers (as of 2016). Third, recall that Appleseed's objective is to achieve reversal of the Rebate Order and then persuade DISB, presumably in a remand, to order distribution of an even greater amount of money to an entirely

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[9] In addition, GHMSI has presented evidence of business harms it would sustain in the areas of financial recording and reporting obligations, customer relations, agency relations, and potential regulatory fines and other penalties, if the Rebate Order is not stayed. Aff. ¶¶ 6, 8, 9.

[10] *See Air Transport Ass'n of America, Inc. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327 (D.D.C. 2012) (group of U.S. airlines seeking to enjoin Export-Import Bank from completing loans to Air India); *Save Jobs USA v. U.S. Dep't of Homeland Security*, 105 F. Supp. 3d 108 (D.D.C. 2015) (organization of former technology workers seeking to enjoin agency rule that would allow H-4 visa holders to apply for employment authorization); *FBME Bank, Ltd. v. Lew, et al.*, 125 F. Supp. 3d 109 (D.D.C. 2015) (Tanzanian-chartered bank seeking to enjoin agency rule that would prevent U.S. banks from maintaining correspondent bank accounts with it based on money laundering concerns); *National Parks Conservation Ass'n v. U.S. Forest Service, et al.*, 2016 WL 420470 (D.D.C. 2016) (conservation group seeking to enjoin gravel mining in North Dakota).

different group of recipients.[11] The reality of Appleseed's "no irreparable harm" theory, then, is that GHMSI's current subscribers should incur the cost of a $53 or $54 million payout that Appleseed itself contends is an improper amount directed to the wrong recipients. The Court should reject Appleseed's tortured and illogical arguments. Requiring immediate compliance with the Rebate Order clearly would cause GHMSI certain, great, actual, and quantifiable irreparable harm and would effectively strip GHMSI of its appellate rights.

C. The Effect of a Stay On Opposing Parties and the Public Interest

As already noted, the dominant public interest in this case is to achieve an orderly resolution of the pending legal issues so that (1) GHMSI and the subscribers in three States who rely on it are not irreparably harmed, and (2) the interjurisdictional agency stalemate that has subjected GHMSI to contradictory orders that it both reduce and increase its current surplus is resolved in a rational manner. The first step toward achieving these objectives is for this Court to decide, on the merits after full briefing, whether DISB's proceedings were conducted in compliance with the MIEAA's "coordination" and other requirements. Staying the Rebate Order pending the appellate process is essential to achieving the strong public interest in an orderly resolution of these matters. Moreover, DISB and Appleseed will not be harmed by a stay for the remaining duration of these appellate proceedings, considering the length of the 2011 surplus review proceedings to date. Appleseed offers no specific arguments to the contrary, even though this Court's administrative stay has already been in place for more than eight months.

[11] Appleseed's position in the 2011 surplus review proceedings was that GHMSI's "excess surplus" was $370 million, 63.5 percent of which was allocable to the District of Columbia, and that foundations should distribute the funds through grants to local organizations.

CONCLUSION

GHMSI therefore respectfully requests that the Court grant a stay of the Rebate Order pending appeal.

Respectfully submitted,

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DATED: March 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2018, I caused a copy of the foregoing Reply to Opposition to Emergency Motion for a Stay Pending Appeal Filed by D.C. Appleseed Center for Law and Justice, Inc., to be filed through the District of Columbia Court of Appeals Electronic Filing System, and to be served electronically on the following:

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