GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF INSURANCE, SECURITIES AND BANKING

IN THE MATTER OF	)	
Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.	)	Order No.: 14-MIE-012

MOTION TO STAY FURTHER PROCEEDINGS BY GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC.

Group Hospitalization and Medical Services, Inc. ("GHMSI") respectfully requests that the Department of Insurance, Securities and Banking ("DISB") stay all further proceedings in this matter, including the filing of a remedial plan, until the D.C. Court of Appeals has resolved the pending appeals, filed by both GHMSI and DC Appleseed, of the Commissioner's December 30, 2014 Order ("the December 30 Order"). We request that the Commissioner not consider remedies now, when numerous and substantial appeal issues have been raised, each of which by itself would change the outcome of the December 30 Order; when no remedial plan could be properly implemented until after the appeals had concluded; when the details of any remedial plan are time-sensitive and would be "stale" by the time the appeals have ended; and when Maryland and Virginia have announced their own reviews to determine the effects of the December 30 Order on their own jurisdictions. A stay is warranted both under the four-factor test articulated by the D.C. Court of Appeals and under the Commissioner's inherent authority to prevent duplicative and unnecessary proceedings.

BACKGROUND

On December 30, 2014, the DISB concluded that GHMSI's surplus was excessive to the extent that it exceeded 721% RBC-ACL. The DISB also determined that the District of Columbia was apportioned 21% of that surplus. The DISB ordered GHMSI to submit a remedial plan by March 16, 2015. *See* Order 14-MIE-014 (Jan. 28, 2015). Under the statute, the plan will address "dedication of the excess to community health reinvestment in a fair and equitable manner." D.C. Code § 31-3506(g). That plan, however, "may consist entirely of expenditures for the benefit of current subscribers," and "community health reinvestment" is specifically defined to include "premium rate reductions." D.C. Code § 31-3501(1A).

Since the December 30 Order, both Maryland and Virginia have begun proceedings to review the effect of the order and to determine what steps they will take in response to it. On January 28, 2015, the Virginia State Corporation Commission ordered the Virginia Insurance Commissioner to begin such an examination. *See* **Exhibit A hereto.** Maryland issued its own examination notice on February 10. *See* **Exhibit B hereto.** Maryland has expressly forbidden GHMSI from reducing or distributing surplus on account of the December 30 Order until Maryland's examination is complete. *Id.* There are significant timing issues with respect to any remedial plan. A plan that includes rate reduction or moderation will need to take account of the lengthy filing and approval cycle for individual and small group insurance contracts. Equally important, any plan considered by the Commissioner must address the ongoing need for GHMSI to remain financially sound. GHMSI's surplus has dropped significantly since 2011, from 998% risk-based capital-authorized control level ("RBC-ACL") in 2011 to an estimated 845% RBC-ACL at the end of 2014. It is expected to drop further still in 2015 and 2016. Any such plan will need to take account of these issues as of the time the plan is implemented.

ARGUMENT

I. A STAY IS WARRANTED UNDER THE FOUR PART TEST ARTICULATED BY THE D.C. COURT OF APPEALS.

The remedy proceedings should be stayed because (1) GHMSI has raised substantial legal issues that have never previously been addressed by the D.C. Court of Appeals; (2) proceeding now to a "remedy" based on the December 30 Order would require distribution or reduction of surplus that cannot be recouped, thereby causing irreparable harm and effectively denying GHMSI its appeal rights, (3) no other party would suffer harm from a stay; and (4) the public interest requires a stay to prevent an immediate and unnecessary conflict between the District, Maryland, and Virginia. *See Kuflom* v. *D.C. Bureau of Motor Vehicle Servs.*, 543 A.2d 340, 344 (D.C. 1988) (stating that a stay should be granted after weighing the four factors of (i) likelihood of success on the appeal, (ii) whether denial of a stay would cause movant irreparable injury, (iii) whether granting the stay would harm any other party, and (iv) the public interest).

A. GHMSI Has Raised Serious And Substantial Legal Issues On Appeal That Have Never Been Addressed By The D.C. Court of Appeals.

To enter a stay here, the Commissioner need not conclude that he erred or that the December 30 Order is likely to be reversed. A stay is appropriate even if the movant's likelihood of success on appeal is less than "substantial," so long as "a serious legal question is presented," the movant "will otherwise suffer irreparable injury," and "there is little risk of harm to the other parties or to the public interest." *Walter E. Lynch & Co.* v. *Fuisz*, 862 A.2d 929, 932-33 (D.C. 2004). If these criteria are met – as they are here – the Commissioner should grant a stay "even though [his] own approach may be contrary to [GHMSI's] view of the merits." *Washington Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977).

GHMSI expects to base its appeal on the issues raised in its Motion for Reconsideration, each of which presented significant and serious legal questions regarding application of the Medical Insurance Empowerment Amendment Act ("MIEAA"):

1. DISB did not coordinate with Maryland and Virginia, as required by D.C. Code § 31-3506(e). The D.C. Court of Appeals will be required to address the level of activity required to constitute "coordination," the extent to which the Maryland and Virginia regulators must be involved in the determinations, and the effect of Maryland's conflicting order. The D.C. Court of Appeals also will be required to address whether the existing inter-jurisdictional conflict and the conflicting D.C. and Maryland Orders violate GHMSI's rights under the Due Process and Commerce Clauses of the U.S. Constitution and the D.C. Administrative Procedure Act.

2. The December 30 Order fails to examine specifically the surplus attributable to the District, as the MIEAA requires. Under D.C. Code § 31-3506(e)-(g), the DISB must find *the portion of the surplus attributable to the District* to be excessive before it may order any reduction of surplus. *See* D.C. Code § 31-3506(e)-(g). The December 30 Order does not conduct such an analysis, but instead examines GHMSI's surplus as a whole, based solely on factors attributable to GHMSI's entire business. The D.C. Court of Appeals will be required to address this fundamental disagreement regarding how the statute is to be applied.

3. The method of attribution used in the December 30 Order is incorrect as a matter of law. Surplus is built over time from profits generated from the sale of insurance, which are not necessarily proportional to the premium dollars charged. The December 30 Order relies almost exclusively on a single premium filing for a single year, and thus violates the MIEAA's requirement that the DISB determine the portion of surplus "attributable" to the District.

GHMSI believes that D.C. Appleseed is also likely to challenge the December 30 Order's method of attribution on appeal, and the D.C. Court of Appeals will be required to address attribution for the first time.

4. The December 30 Order's use of a 95% confidence level and a single target point for surplus, rather than a range, were arbitrary and capricious, inadequately explained, and against the weight of the evidence. These issues have never previously been addressed by the D.C. Court of Appeals.

GHMSI believes that it will prevail on appeal, for the reasons set forth in its motion for reconsideration. *See id.* at 7-19. At a minimum, however, these issues raise "serious legal question[s]" for which a stay is warranted. *Fuisz*, 862 A.2d at 932-33.

B. GHMSI Will Suffer Irreparable Harm Without A Stay.

Requiring GHMSI to distribute or reduce surplus while its appeal is pending would clearly constitute irreparable harm. Financial harm is irreparable where it cannot be recouped through legal proceedings. *See, e.g.*, *Texas Children's Hosp.* v. *Burwell*, No. CV 14-2060 (EGS), 2014 WL 7373218, at *14 (D.D.C. Dec. 29, 2014) (where a harm is "economic in nature" but is "certain, imminent, and unrecoverable," it satisfies the "irreparable harm" standard); *see also Tucker Anthony Realty Corp.* v. *Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). To effectuate any remedial plan, GHMSI must either distribute funds, which could never be collected back from the recipients, or offer insurance at reduced or moderated rates, which could not be retroactively raised once the insurance is purchased. Regardless of the means used, requiring GHMSI to implement a remedial plan now would cause irreparable financial harm and effectively deprive GHMSI of its right to appeal. This harm would not be limited to GHMSI,

because undercutting GHMSI's financial soundness has real adverse impacts for its subscribers in D.C. and elsewhere. *See* Pre-Hearing Br. at 7, 15-17; Post-Hearing Br. at 5.

There is no reason even to begin considering a remedial plan at this time. Any plan developed now will be "stale" by the time the appeals are decided, and the planning process would need to begin again. For example, rate reduction or moderation should be addressed in context with the specific rates that are to be affected. Any plan based on 2016 rate filings would plainly conflict with GHMSI's appeal. The 2016 individual and small market group rates will be filed on April 1, 2015, a full nine months before they are implemented. Once the rates are filed and approved, the DC Health Exchange will not permit them to be modified and, once open enrollment begins, GHMSI could not raise rates on the policies sold. Thus, even if GHMSI were to succeed on appeal, the filed 2016 rates would remain in effect. To the extent that any plan would rely on rate moderation or reduction in 2017 or later, there obviously is no harm in addressing such rates closer to their actual time of filing.

Further, any remedial plan also must recognize the significant and ongoing deterioration of GHMSI's financial position since 2011. GHMSI's surplus is now an estimated 845% RBC-ACL at year-end 2014, down from 1098% RBC-ACL four years before and 998% RBC-ACL at year-end 2011. Throughout this drop, GHMSI engaged in significant community reinvestment in the District while sustaining losses on its business in the District. GHMSI expects that its surplus will continue to fall, and any remedial plan must consider GHMSI's financial position at the time the plan is implemented, as well as GHMSI's ongoing District reinvestments and losses.

C. No Party Or Any Other Person Will Be Harmed By A Stay.

The balance of harms clearly favors entering a stay in this case. There is no other party to this case, and no one could legitimately claim to be harmed by allowing GHMSI to pursue its

appeal before proceeding further here. Certainly D.C. Appleseed, which is not a party and is pursuing its own appeal, will suffer no such harm. Nor would GHMSI's subscribers be harmed. They (or at least some of them, if Maryland and Virginia subscribers are ignored) would still benefit from any remedial plan once it is entered, and they have an equally strong interest in ensuring that GHMSI maintains sufficient surplus to remain financially sound.

D. A Stay Is In The Public Interest, And Is Needed To Avoid An Unnecessary Confrontation Between Maryland And Virginia.

The public interest also favors a stay because any other approach would exacerbate conflicts among the jurisdictions that regulate GHMSI. Maryland has expressly instructed GHMSI not to distribute or reduce its surplus until it has concluded its own examination of the December 30 Order. *See* **Exhibit B hereto.** Virginia is conducting an examination of its own, and likely would enter its own order prohibiting such a reduction or distribution if a D.C. remedial plan were implemented now. *See* **Exhibit A hereto.** Addressing remedies now, while GHMSI's appeal is pending, would cause an unnecessary and avoidable confrontation between the District, Maryland, and Virginia over a remedial plan, when the underlying substantive issues have not been resolved.

II. FURTHER PROCEEDINGS WOULD BE WASTEFUL AND INEFFICIENT WHILE THE APPEALS ARE PENDING.

Even setting aside the stay factors, the DISB should press pause on the remedial proceedings because doing so would promote administrative economy and efficiency.

Trial courts and administrative agencies like DISB have inherent power to stay a case to avoid inefficient and wasteful proceedings. *In re H.B.*, 855 A.2d 1091, 1097 (D.C. 2004); *see also Bradley v. Triplex Shoe Co.*, 66 A.2d 208, 209 (D.C.1949) (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936), for the proposition that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its

docket with economy of time and effort for itself, for counsel, and for litigants."); *1900 M Restaurant Associations, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 56 A.3d 486 (D.C. 2012) (administrative board stayed further proceedings pending appeal). For all of the reasons discussed in Section I, *supra*, it does not make sense to proceed further unless and until it is clear whether the Court of Appeals agrees with the DISB's analysis.

CONCLUSION

The Commissioner should stay all further proceedings in this matter until the conclusion of the appeals by GHMSI and D.C. Appleseed before the D.C. Court of Appeals.

Respectfully submitted,

/s/ E. Desmond Hogan
E. DESMOND HOGAN
DOMINIC F. PERELLA
KATHRYN L. MARSHALL
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004

Counsel for Group Hospitalization and Medical Services, Inc.

February 10, 2015