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-015

ORDER ON GHMSI'S MOTION TO STAY FURTHER PROCEEDINGS AND APPLESEED'S REQUEST FOR BRIEFING SCHEDULE

By motion submitted on February 10, 2015, Group Hospitalization and Medical Services, Inc. ("GHMSI") requested that the Commissioner of the Department of Insurance, Securities and Banking (the "Commissioner") stay all further proceedings in this matter, including the submission of the plan currently due on March 16, 2015, until the D.C. Court of Appeals has resolved the appeals by GHMSI and the D.C. Appleseed Center for Law and Justice, Inc. ("Appleseed") of the Commissioner's December 30, 2014 Decision and Order (the "Decision").

In brief, GHMSI argues that it should not be required to submit a plan for the dedication of its excess surplus attributable to the District to community health reinvestment in a fair and equitable manner (a "Plan") until the issues raised on appeal have been resolved. GHMSI contends that a stay is warranted both under the "Commissioner's inherent authority to prevent duplicative and unnecessary proceedings" and under the four-factor test articulated by the D.C. Court of Appeals (the "Court") for granting a stay.

On February 13, 2015, Appleseed requested a briefing schedule and an opportunity to be heard on the stay issue *if* the Commissioner did not summarily deny GHMSI's motion. GHMSI opposed Appleseed's request, asserting that Appleseed is not a party entitled to respond to

GHMSI's procedural motions and that GHMSI would be prejudiced by Appleseed's proposed briefing schedule.

After reviewing the submissions to date, the Commissioner concludes that a stay of further proceedings in this matter is not warranted because further proceedings are neither wasteful nor inefficient, there is no risk of irreparable injury to GHMSI at this stage and GHMSI has not otherwise shown that a stay is appropriate. To be clear, the "further proceedings" at issue here include: (1) GHMSI's preparation of a Plan; (2) GHMSI's submission of the Plan to the Commissioner for review in accordance with D.C. Official Code § 31-3506(g)(1) (2012 Repl.); (3) the Commissioner's review of the plan, including its timetable for implementation, to determine if it is "fair and equitable" and otherwise accords with statutory mandates, and (4) the implementation of the Plan.

Further Proceedings are Not Wasteful and Inefficient

The Commissioner finds unconvincing GHMSI's argument that any further proceedings would be "wasteful and inefficient." The premise of GHMSI's argument is that to continue the remedy phase of the surplus review proceedings would be neither productive nor worthwhile because the Court may reverse the Decision. The Commissioner disagrees with this premise because he believes that the Court will affirm his Decision and will likely do so on an expedited basis. Further, the benefits of advancing the important legislative goals embodied in the statute at issue here, D.C. Official Code § 31-3501 *et seq.* (2012 Repl.), outweigh any purported administrative inefficiencies.

The Four Factor Test Does Not Support a Stay

Nor do the present circumstances justify a stay under the alternative four-part test proffered by GHMSI. Under this test, GHMSI has the burden of showing that: (1) it is likely to

succeed on the merits with its appeal, (2) irreparable injury will result if the stay is denied, (3) any opposing parties will not be harmed by a stay, and (4) the public interest favors the granting of a stay. *See, e.g., Salvattera v. Ramirez*, 105 A.3d 1003, 1005 (D.C. 2014).

With regard to the first factor, as stated above, the Commissioner believes GHMSI is unlikely to succeed on the merits. GHMSI asserts that a stay is appropriate even if the movant's likelihood of success is less than substantial so long as a serious legal question is presented and the other factors of the four-part test weigh in the movant's favor. Motion at 3.[1] In this case, none of the factors of the test weigh in GHMSI's favor.

Looking at the second factor, there is no evidence that GHMSI will suffer irreparable injury absent a stay. The only action currently required by the Decision is that GHMSI must "submit to the Commissioner a plan for dedication of the excess surplus attributable to the District to community health reinvestment in a fair and equitable manner, in accordance with D.C. Official Code § 31-3506(g) and 26A DCMR § 4603." Unsurprisingly, GHMSI does not identify any irreparable injury that will result from preparation and submission of a Plan. Preparation and submission of a Plan will not cause any injury, let alone irreparable injury, to GHMSI. Nor will the Commissioner's review of a Plan to determine whether it meets statutory standards cause any injury to GHMSI.

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[1] This argument assumes that the use of a "sliding scale" is permissible in applying the four-part test, allowing a decision-maker to use a strong showing on one factor to "balance out" a weaker one. Indeed, the D.C. Court of Appeals has recently asserted that the stay "factors interrelate on a sliding scale and must be balanced against each other." *Salvattera,* 105 A.3d at 1005. However, *Salvattera* and similar decisions are premised on, and indeed quote from, pre-2008 D.C. Circuit cases. These D.C. Circuit cases have been called into question by a 2008 U.S. Supreme Court decision. *See, e.g., Texas Children's Hosp. v. Burwell*, __ F.3d __, No. 14-2060, 2014 WL 7373218 at *8 (D.D.C. Dec. 29, 2014) ("In the wake of the Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), 'the D.C. Circuit has suggested that a positive showing on all four preliminary injunction factors may be required.'"). Nevertheless, regardless of which approach to the four-factor test is taken, GHMSI has failed to show that a stay is appropriate.

Because it is unable to show actual harm, GHMSI speculates that implementation of the as yet unspecified Plan may cause irreparable injury and/or become moot. But to support a stay, "the injury must be both certain and grave; it must be actual and not theoretical." *Washington Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Speculative loss will not support a stay. *See, e.g.*, *Wieck v. Sterenbuch*, 350 A.2d 384, 388 (D.C. 1976) (finding that "[s]peculation as to a fall in the property's value, with no proof at all . . . is insufficient to demonstrate a need for immediate equitable relief.").

Notably, while GHMSI has outlined some possible elements of a Plan in its motion, it has not yet submitted a Plan. The Commissioner cannot judge the potential harm of implementing a Plan that does not yet exist, or whether it might become moot. *See* D.C. Official Code § 31-3506(g) (2012 Repl.). Accordingly, any assertion of irreparable harm by GHMSI at this stage is premature and merely speculative. Should a Plan be submitted and approved in the future, arguably the effect on GHMSI of implementing the Plan would be more predictable and therefore a motion for stay more appropriate for consideration.

Regarding the third factor – harm to other parties – GHMSI is correct that there are no other formal parties to this proceeding. Nevertheless, a stay will cause harm to GHMSI's District subscribers and other persons who stand to benefit from a Plan for community health reinvestment by delaying development and, ultimately, implementation of the Plan.

The last factor – the public interest – also weighs against a stay. The statute at issue here manifests the District of Columbia's strong public interest in ensuring that GHMSI fulfills its obligation to "engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency." D.C. Official Code § 31-3505.01 (2012 Repl.). After a lengthy fact-finding and deliberative process, the Commissioner concluded that

GHMSI has not satisfied that obligation with respect to the surplus attributable to the District. Accordingly, the District has a strong public interest in working with GHMSI to develop a fair and equitable Plan to dedicate to community health reinvestment the excess surplus attributable to the District. A stay would not serve that public interest.

Finally, the purported jurisdictional conflicts cited by GHMSI do not support a stay. First, the Commissioner has ordered GHMSI to submit a Plan for community health reinvestment only with respect to excess surplus *attributable to the District of Columbia.* Second, to the extent that any conflicts between jurisdictions may arise, GHMSI's federal charter, which provides that GHMSI "shall be licensed and regulated by the District of Columbia in accordance with the laws and regulations of the District of Columbia," Pub. L. No. 103-127, § 138(b), 107 Stat. 1336, 1349 (1993), provides the Commissioner with primary authority and oversight over GHMSI. Thus, the District's laws and regulations in this matter control.

Accordingly, the Commissioner ORDERS:

1. GHMSI's Motion to Stay Further Proceedings is denied.
2. D.C. Appleseed's Request for Briefing Schedule on GHMSI's Motion to Stay Further Proceedings is denied as moot.
3. Except as modified by Order No. 14-MIE-14 which extended the deadline for the plan's submission to Monday, March 16, 2015, the December 30, 2014 Decision and Order remains in full force and effect.

Dated: March 2, 2015

Chester A. McPherson, Acting Commissioner

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