DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA APPLESEED CENTER FOR LAW AND JUSTICE, INC., Petitioner, GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC., Petitioner, v. DEPARTMENT OF INSURANCE, SECURITIES AND BANKING, Respondent.	Nos. 15-AA-108 and 15-AA-109 Agency Decision Nos. 14-MIE-012, 14-MIE-014

GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC.'S
RESPONSE TO COURT'S ORDER TO SHOW CAUSE

Group Hospitalization and Medical Services, Inc. ("GHMSI") respectfully submits the following response to the Court's Order to Show Cause of March 16, 2015. GHMSI seeks review of the decision of the District of Columbia Department of Insurance, Securities and Banking ("DISB") issued on December 30, 2014 (the "Order" or the "December 30 Order") and the Department's order dated January 28, 2015 denying GHMSI's Motion for Reconsideration. *See* Order Nos. 14-MIE-012, 14-MIE-014.[1] The December 30 Order represents DISB's final determination of GHMSI's rights and responsibilities under the Medical Insurance Empowerment Amendment Act, D.C. Code § 31-3501, *et seq.* (MIEAA), and therefore this Court has jurisdiction over the pending appeals. At the same time, however, the Court need not

[1] GHMSI filed its appeal within 30 days of the December 30 Order.

reach such jurisdictional questions at this time. Under its regulations, DISB must issue an order approving or disapproving the plan filed by GHMSI on March 16, 2015, and that order will also be subject to appeal. It will be most efficient for the Court to stay these proceedings and hear all appeals relating to this case at the same time. GHMSI therefore asks the Court to enter a temporary stay until any additional appeals are filed.

BACKGROUND

GHMSI is a health insurance company operating in the District of Columbia, Maryland, and portions of Northern Virginia. Under the MIEAA, DISB must determine at least once every three years whether "the portion of the surplus of [GHMSI] that is attributable to the District" is "excessive." D.C. Code § 31-3506(e). If the Commissioner determines that the surplus attributable to the District is excessive, GHMSI is required to file a plan to address any excess surplus. *Id.* DISB's regulations require the Commissioner to approve or disapprove that plan. 26A DCMR § 4603.

DISB first reviewed GHMSI's surplus under the MIEAA in 2009 and concluded that it was not excessive. This Court vacated that ruling and remanded. *See D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1216 (D.C. 2012). On remand, DISB incorporated the Court's decision into its review of GHMSI's year-end 2011 surplus, rather than returning to the 2009 analysis. In an order issued on December 30, 2014, DISB concluded that GHMSI's surplus was excessive, based upon the errors of law and unsupported factual conclusions that are the subject of this appeal. DISB ordered GHMSI to submit a remedial plan by March 16, 2015. DISB denied GHMSI's Motion for Reconsideration, and this appeal followed.

ARGUMENT

I. DISB's December 30 Order Was A Final Order.

This Court has juridiction over orders that are the "final disposition" of a matter before DISB. *See Warner v. D.C. Dep't of Employment Servs.*, 587 A.2d 1091, 1093 (D.C. 1991) (citing D.C. Code § 2-502) (emphasis and internal quotation marks omitted). Final agency orders "impose an obligation, deny a right or fix some legal relationship." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *e.g., Levy v. D.C. Bd. of Zoning Adjustment*, 570 A.2d 739, 749 (D.C. 1990) (zoning board order was final because it set the legal standard by which future zoning applications would be measured). A reviewable order need not mark the end of an agency proceeding; "a 'final' order may be issued and reviewed at any point during [an agency] proceeding." *Potomac Elec. Power Co. v. Pub. Serv. Comm'n of D.C.*, 455 A.2d 374, 378 (D.C. 1982). Final order determinations are "essentially practical." *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). That "pragmatic approach" requires consideration of the "indicia of finality" in the order itself, and "the character of the decree still to be entered," including the harm delay would cause to the parties and the public. *Id.* at 306, 308-309. Courts also consider "whether judicial review will unduly disrupt the orderly process of the underlying administrative proceeding." *Potomac Elec. Power Co.*, 455 A.2d at 378.

The December 30 Order is final for appellate purposes, and GHMSI's appeal raises fundamental, legal questions of first impression regarding the interpretation and application of the MIEAA. These issues include:

- DISB failed to make a finding that the portion of the surplus *attributable to the District* is excessive, which the statute requires before DISB may order any reduction of surplus. D.C. Code § 31-3506(e)-(g). While the MIEAA only permits the Commissioner to

review the portion of GHMSI's surplus that is attributable to the District, the Commissioner reviewed GHMSI's surplus as a whole, even though the majority of that surplus was generated in Maryland and Virginia. Unless and until DISB makes the finding the statute requires, DISB lacks the statutory authority to order any remedial plan. *See* D.C. Code § 31-3506(g)(1).

- To the extent that DISB did attempt to attribute the surplus, it failed to do so in a manner that complies with the MIEAA. The December 30 Order recognizes that surplus is built over time from operating margins generated from the sale of insurance, which are not necessarily proportional to the premium dollars charged. *See* December 30 Order at 56-57. DISB's own regulations concede that surplus attribution requires an analysis of the funds generated by the business operations within the District. 26A DCMR § 4699.2. The Order, however, relies almost exclusively on a *single* premium filing for a *single* year, and it violates, as a matter of law, the MIEAA's requirement that DISB determine the portion of surplus "attributable" to the District.

- DISB failed to comply with the MIEAA's requirement that DISB's review "be undertaken in coordination with the other jurisdictions in which the corporation conducts business." D.C. Code § 31-3506(e). Maryland has already issued a surplus order that is in direct conflict with DISB's findings, but DISB has made no effort to reconcile that conflict. DISB did nothing more than accept testimony from Maryland and Virginia, and made no effort to coordinate with those jurisdictions. GHMSI's appeal requires the Court to determine: (1) what actions satisfy the statutory requirement of "coordination" among jurisdictions with shared regulatory authority over GHMSI; and (2) whether DISB's order, which is in direct conflict with Maryland's prior order, violates D.C. administrative

procedure and GHMSI's constitutional rights.

None of these matters are still before the Commissioner, and none of them are addressed in GHMSI's remedial plan. The December 30 Order represents DISB's final interpretation of the MIEAA's requirements on each issue, and each is properly the subject of appeal.

The remaining, remedial proceedings do not deprive the December 30 Order of its finality. In *Brown Shoe*, the Supreme Court concluded that a district court decision requiring divestiture in an antitrust case was final, even though that order required "appellant to propose in the immediate future a plan for carrying into effect the court's order." 370 U.S. at 308. Like the Court's order of a remedial plan in *Brown Shoe*, DISB's Order here "impose[s] an obligation" on GHMSI to address the reduction of excess surplus. *Chicago & Southern Air Lines, Inc.*, 333 U.S. at 113. The approval of GHMSI's plan is "independent of, and subordinate to," to DISB's excess surplus determination—it does not present an opportunity for the agency to revisit the Order's legal conclusions. *Brown Shoe Co.*, 370 U.S. at 309. There is accordingly no risk of "[r]epetitive judicial consideration" of these legal questions, *id.* at 309, and review of the Order will not interfere with the underlying administrative proceeding. *See Potomac Elec. Power Co.*, 455 A.2d at 378.

II. This Court Should Stay This Appeal And Consolidate It With Any Appeals Relating To GHMSI's Remedial Plan.

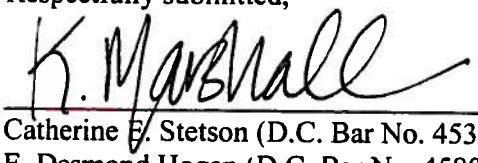
While DISB's December 30 Order plainly is final, it makes sense for the Court to address the issues raised in these appeals at the same time that it addresses any appeals that result from GHMSI's remedial plan. D.C. Appleseed already has challenged GHMSI's remedial plan before the Commissioner, and an appeal is likely regardless of DISB's ruling on that plan. The Court need not address jurisdictional issues at this time, because it would make the most sense to stay these proceedings and consolidate them with any appeal from the Commissioner's anticipated

order approving or disapproving GHMSI's plan.

CONCLUSION

For the foregoing reasons, the December 30 Order is final and properly subject to appeal. The Court, however, should stay further proceedings pending DISB's order on GHMSI's remedial plan, in the interest of judicial efficiency.

Respectfully submitted,



Catherine E. Stetson (D.C. Bar No. 453221)
E. Desmond Hogan (D.C. Bar No. 458044)
Kathryn L. Marshall (D.C. Bar No. 994633)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Dated: April 6, 2015

Attorneys for Petitioner Group Hospitalization and Medical Services, Inc.

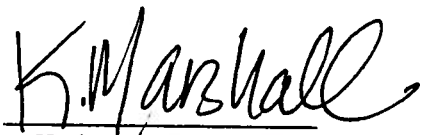
CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April 2015, I caused a copy of the foregoing Petition for Review to be served by first-class, postage prepaid U.S. mail on the following:

Adam Levi, Assistant General Counsel
D.C. Department of Insurance, Securities and Banking
810 First Street, N.E., Suite 701
Washington, D.C. 20002

Office of the Attorney General
Government of the District of Columbia
One Judiciary Square
441 4th Street, N.W., Suite 11458
Washington, D.C. 20001

Marialuisa Gallozzi
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001



Kathryn L. Marshall