

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:)

Local Government Center, Inc.;)
Local Government Center Real Estate, Inc.;)
Local Government Center Health Trust, LLC;)
Local Government Center Property-Liability Trust,)
LLC;)
Health Trust, Inc.;)
New Hampshire Municipal Association Property-Liability)
Trust, Inc.;)
LGC – HT, LLC;)
Local Government Center Workers’ Compensation)
Trust, LLC;)
And the following individuals:)
Maura Carroll; Keith R. Burke; Stephen A. Moltenbrey;)
Paul G. Beecher; Robert A. Berry; Roderick MacDonald;)
Peter J. Curro; April D. Whittaker; Timothy J. Ruehr;)
Julia A. Griffin; and John Andrews)

Case No: C2011000036

RESPONDENTS)

**BUREAU OF SECURITIES REGULATION OBJECTION TO JOHN ANDREWS’
MOTION TO DISMISS**

NOW COMES Petitioner, the Bureau of Securities Regulation (the BSR), a part of the Corporations Division within the Department of State, and submits this Objection to John Andrews’ Motion to Dismiss, stating in support thereof the following:

I. Background

1. On September 2, 2011, the BSR filed a Staff Petition for Relief with the New Hampshire Secretary of State’s Office, accusing Respondents of violating N.H. RSA § 5-B and N.H. RSA § 421-B.
2. On September 2, 2011, the Secretary of State, William M. Gardner, issued an order to Cease and Desist, an Order to Show Cause, and a Hearing Order in response to the Staff Petition.
3. On November 18, 2011, Mr. Andrews moved for a more definite statement or for clarification of the Staff Petition (the Petition) alleging that the Petition does not comport

with due process and provide adequate notice as required by the Fourteenth Amendment and Part I, Article 15. Mr. Andrews requested the BSR clarify the statutory violations alleged that implicate Mr. Andrews.

4. Subsequent to the November 21, 2011 hearing on discovery and a subsequent “meet and confer,” the BSR provided to all parties a grid of charges identifying the statutory violations alleged and the parties implicated in each violation.
5. As a result of the BSR’s production of this grid, Mr. Andrews withdrew his Motion for More Definite Statement or for Clarification and filed his Motion to Dismiss Him From Counts 1, 2, and 4, and Sections A, C and D of Count 3 for Failure to State a Cause of Action.
6. On December 14, 2011, the Presiding Officer issued a Scheduling Order, which limited the BSR’s time to amend the original Staff Petition to within 30 days of the completion of the BSR’s on-site examination of LGC’s book and records. Considering this time frame and the Bureau’s intention to amend the original Staff Petition within this time frame, John Andrews’ Motion to Dismiss and any ruling on such a motion is premature. Despite this fact, the Bureau’s objection to John Andrews’ Motion to Dismiss Him From Counts 1, 2, and 4, and Sections A, C and D of Count 3 for Failure to State a Cause of Action is as follows.

II. Legal Standard for Dismissal for Failure to State a Cause of Action

7. The standard for review for a motion to dismiss for failure to state a cause of action is two-fold. In reviewing such a motion, a court, “assum[ing] the truth of the facts as alleged in the [non-moving party’s] pleadings and constru[ing] all reasonable inferences in the light most favorable to the [non-moving party],” must determine whether the non-moving party’s allegations are “reasonably susceptible of a construction that would permit recovery.” *Beane v. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (citation omitted).

III. The Staff Petition, Its Causes of Action and the BSR’s Grid

8. The Staff Petition makes numerous allegations of statutory violations of both N.H. RSA § 5-B and N.H. RSA § 421-B. The allegations span a period of approximately 1998 through 2011. As the former Executive Director of LGC, retiring in 2009, Mr. Andrews was directly involved in the management and operation of LGC during the period in which the alleged violations occurred. Further, as former Fund Administrator of LGC, Mr. Andrews was

partially responsible for LGC's financial dealings and thus compliance with applicable state laws, primarily N.H. RSA § 5-B and N.H. RSA § 421-B, both of which are alleged to have been broken.

A. Count I

9. Count I of the Petition—"Corporate Governance"—details numerous violations of state law in the area of corporate formation, merger, and maintenance. These allegations tie directly into violations of N.H. RSA § 5-B:5 considering that in preparing for the failed merger (now admitted as such by LGC), the respective boards of HealthTrust, Inc. and NHMA Property-Liability Trust, Inc. approved a very specific set of acts that would be performed to effectuate the merger.
10. Specifically, the boards, jointly, authorized that 1) HealthTrust, Inc. and NHMA Property-Liability Trust, Inc. be merged into and with separate New Hampshire LLCs with the sole member being LGC, Inc., and 2) Mr. Andrews *as Fund Administrator or Executive Director* of Health Trust, Inc. and NHMA Property-Liability Trust, Inc. be authorized and directed to execute any and all documents and take any action necessary to actions authorized, regarding the above-authorized "merger."
11. Subsequent to this resolution, the Certificates of Formation for both LGC HealthTrust, LLC and LGC Property-Liability Trust, LLC (intended to act as the surviving entities in the now failed merger), were signed by John B. Andrews, as "Member." As Mr. Andrews did not sign these Certificates of Formation in his representative capacity as Executive Director of LGC, as authorized by the above-mentioned resolution, Mr. Andrews acted without proper authorization. In addition, as a result of these filings, Mr. Andrews was the sole managing-member of two N.H. RSA § 5-B Pools, an act prohibited by N.H. RSA § 5-B and, again, not authorized by resolution of the HealthTrust, Inc. or NHMA Property-Liability Trust, Inc. boards.
12. Further, the use of Delaware LLCs to effectuate the merger contemplated in the resolution, although perhaps "necessary" to accomplish the resolved merger, was a direct violation of N.H. RSA § 5-B. These acts of Mr. Andrews, as well as other acts that occurred during the reformation process were never authorized by resolution or by statute as well as violations of N.H. RSA § 5-B:3 and N.H. RSA § 5-B:5.

13. Despite the fact that John Andrews' implementation of an unlawful reformation is a direct violation of N.H. RSA § 5-B, the above-mentioned acts were also not properly authorized, both under the joint resolution and under N.H. RSA § 5-B. Thus, these acts cannot be ratified by the original resolving corporations, HealthTrust, Inc. and NHMA Property-Liability Trust, Inc., as was attempted in October of this year. Further, because these acts of Mr. Andrews were not properly authorized, Mr. Andrews maybe held personally liable for the acts and the resulting N.H. RSA § 5-B violations.
14. Assuming the truth of the BSR's allegations and construing all reasonable inferences in the light most favorable to the non-moving party, the BSR, it is clear the allegations outlined in the Petition regarding corporate governance, as they pertain to Mr. Andrews, are "reasonably susceptible of a construction that would permit recovery," considering that N.H. RSA § 5-B:4-a, VII imposes fines and penalties on "*any person*" who has violated N.H. RSA § 5-B. *Beane v. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (citation omitted) (emphasis added). Thus, there exists a factual dispute as to whether Mr. Andrews violated N.H. RSA § 5-B by his actions as Fund Administrator and Executive Director of LGC with regards to corporate formation, merger, and maintenance.

B. Count II

15. Count II of the Petition—"Financial Mismanagement"—details numerous violations of state law pertaining to the impropriety of certain financial dealings. Again, as Mr. Andrews was Executive Director of LGC during the period implicated within the allegations of the Petition, the approval and implementation of financial dealings was squarely within the authority and thus responsibility of Mr. Andrews.
16. It is important to note that during Mr. Andrews' tenure as Executive Director and Fund Administrator of the N.H. RSA § 5-B Pools named in the above-referenced action, Mr. Andrews signed and thus authorized many of the Member Agreements entered into between political subdivisions and the N.H. RSA § 5-B Pools.
17. These Member Agreements as well as numerous other distributions of N.H. RSA § 5-B Pool money authorized by Mr. Andrews, are alleged to have been improper considering the limitations outlined in N.H. RSA § 5-B. Specifically, N.H. RSA § 5-B:5, I(c) requires that "earnings and surplus in excess of any amounts *required* for administration, claims, reserves,

and purchase of excess insurance” shall be returned to the political subdivisions participating in the N.H. RSA § 5-B Pool. (emphasis added). Any monies kept by the N.H. RSA § 5-B Pools implicated in this action, for purposes other than those enumerated in N.H. RSA § 5-B:5, I(c), were improperly and unlawfully kept. Further, considering the corporate governance implications outlined above, any monies kept by the two N.H. RSA § 5-B Pools of which Mr. Andrews was the sole managing-member, for purposes other than those enumerated in N.H. RSA § 5-B:5, I(c), were improperly held thus implicating Mr. Andrews personally in a direct violation of N.H. RSA § 5-B.

18. Assuming the truth of the BSR’s allegations and construing all reasonable inferences in the light most favorable to the non-moving party, the BSR, it is clear the allegations outlined in the Petition regarding financial mismanagement, as they pertain to Mr. Andrews, are “reasonably susceptible of a construction that would permit recovery,” considering that N.H. RSA § 5-B:4-a, VII imposes fines and penalties on “*any person*” who has violated N.H. RSA § 5-B. *Beane v. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (citation omitted) (emphasis added). Thus, with regards to improper holding, use, and mismanagement of N.H. RSA § 5-B Pool monies, there exists a factual dispute as to whether Mr. Andrews violated N.H. RSA § 5-B in his capacity as Fund Administrator and Executive Director of LGC as well as in his capacity as sole managing-member of a N.H. RSA §5-B Pool.

C. Count III

19. Count III of the Petition—“Violations of the New Hampshire Securities Act”—details numerous violations of state law pertaining to the offer and sale of securities. The BSR has specifically alleged that the Member Agreements entered into between participating political subdivisions and LGC on behalf of LGC HealthTrust, LLC and Property-Liability Trust, LLC (or their predecessors) are investment contracts under both the *Howey* test and the Risk Capital test, and are thus securities under New Hampshire law and subject to New Hampshire securities regulation.
20. Again, Mr. Andrews was Executive Director of LGC during the period implicated within the allegations of the Petition, as they relate to the offer and sale of unregistered securities by an unlicensed broker-dealer or issuer dealer and to material representations in the offer and sale of securities, all of which are violations of N.H. RSA §421-B.

21. N.H. RSA § 421-B:6, I states “[i]t is unlawful for any person to transact business in this state as a broker-dealer, issuer-dealer, investment adviser, or agent unless such person is licensed under this chapter.” An “agent” under N.H. RSA § 421-B:2, II is defined as “any individual, other than a broker-dealer, issuer or issuer-dealer, who represents a broker-dealer, issuer or issuer-dealer in effecting or attempting to effect purchases or sales of securities or an individual other than an investment adviser who represents an investment adviser by providing investment advice or who is an investment adviser representative.” As Mr. Andrews was clearly an agent of LGC and its affiliates, and it has been alleged that LGC and its affiliates were unlicensed broker-dealers or issuer-dealers, Mr. Andrews may be liable. The fact that Mr. Andrews signed many of the Member Agreements in question on behalf of LGC and its affiliates further supports Mr. Andrews’ involvement as an “agent” under N.H. RSA § 421-B:6, I.
22. N.H. RSA § 421-B:11 states “[i]t is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter, the security or transaction is exempted under RSA 421-B:17, or it is a federal covered security for which the fee has been paid and documents have been filed as required by paragraph I-a of this section.” As it has been alleged the Member Agreements entered into between LGC and participating political subdivisions are unregistered securities, the offer and sale of those securities is a violation of N.H. RSA § 421-B:11. As Mr. Andrews signed many of the Member Agreements in question, he is a “person” under N.H. RSA §421-B:11 and has thus violated N.H. RSA § 421-B:11.
23. Further, if the allegation that the above-mentioned Member Agreements are securities is true, Mr. Andrews, in his various capacities, would have been a control person as defined by N.H. RSA § 421-B:26, III-a and thus subject to fines and penalties for material misrepresentations or omission in the offer and sale of securities. N.H. RSA § 421-B:26, III-a states,

Every person who directly or indirectly controls a person liable under paragraph I, II, or III every partner, principal executive officer, or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the acts or transactions constituting the violation, either knowingly or negligently, may, upon hearing, and in addition to any other penalty provided for by law, be subject to such suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or an administrative fine not to exceed \$2,500, or

both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal penalties imposed pursuant to RSA 421-B:24 or civil liabilities imposed pursuant to RSA 421-B:25. No person shall be liable under this paragraph who shall sustain the burden of proof that such person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist.

24. "Person" is defined within the New Hampshire Securities Act, N.H. RSA § 421-B:2, XVI. A "person" under the Act "means an individual, corporation, partnership, association, joint stock company, trust where the interests of the beneficiaries are evidenced by a security, unincorporated organization, a government, political subdivision of a government, or any other entity."
25. As a control person under N.H. RSA § 421-B:26, III-a, Mr. Andrews would be liable for violations of N.H. RSA § 421-B:3(b) and (c), as alleged, and would be subject to the fines and penalties applicable to securities violations as a control person regarding material misrepresentations and omissions in the offer and sale of securities.
26. Assuming the truth of the BSR's allegations and construing all reasonable inferences in the light most favorable to the non-moving party, the BSR, it is clear the allegations outlined in the Petition regarding violations of New Hampshire securities law, as they pertain to Mr. Andrews, are "reasonably susceptible of a construction that would permit recovery," considering that N.H. RSA § 5-B:4-a, VII imposes fines and penalties on control persons pursuant to N.H. RSA § 421-B:26, III-a. *Beane v. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (citation omitted). Thus, with regards to the alleged violations of N.H. RSA § 421-B, in conjunction with the improper use and mismanagement of N.H. RSA § 5-B Pool monies, there exists a factual dispute as to whether Mr. Andrews violated N.H. RSA § 421-B in his capacity as Fund Administrator and Executive Director of LGC as well as in his capacity as sole managing-member of a N.H. RSA §5-B Pool.

D. Count IV

27. Count IV of the Petition—"Additional Issues Regarding Limited Liability Company Formation and Management"—details numerous additional violations of state law pertaining to corporate and company formation, merger, and maintenance. These allegations are tied directly to violations of N.H. RSA § 5-B:5 as Mr. Andrews, as mentioned above,

masterminded and implemented a scheme for reorganization that was not authorized by board resolution or by N.H. RSA § 5-B.

28. Specifically, the boards, in union, authorized that 1) HealthTrust, Inc. and NHMA Property-Liability Trust, Inc. be merged into and with separate New Hampshire LLCs with the sole member being LGC, Inc., and 2) Mr. Andrews *as Fund Administrator or Executive Director* of Health Trust, Inc. and NHMA Property-Liability Trust, Inc. be authorized and directed to execute any and all documents and take any action necessary to effectuate the above-authorized “merger.”
29. Subsequent to this resolution, the Certificates of Formation for both LGC HealthTrust, LLC and LGC Property-Liability Trust, LLC (intended to act as the surviving entities in the now failed merger), were signed by John B. Andrews, as “Member.” As Mr. Andrews did not sign these Certificates of Formation in his representative capacity as Executive Director of LGC, as authorized by the above-mentioned resolution, he acted without proper authorization. Further, the use of Delaware LLCs to effectuate the merger contemplated in the resolution, although perhaps “necessary” to accomplish the resolved merger, was a direct violation of N.H. RSA § 5-B. These acts of Mr. Andrews, as well as other acts that occurred during the reformation process were never authorized by resolution or statute and were violations of N.H. RSA § 5-B:3 and N.H. RSA § 5-B:5.
30. In addition, as there were no resolutions permitting the of HealthTrust, Inc. or NHMA Property-Liability Trust, Inc. monies by LGC HealthTrust, LLC or LGC Property-Liability Trust, LLC respectively, both entities attempted to function as N.H. RSA § 5-B Pools by using monies unlawfully obtained from other N.H. RSA § 5-B Pools. As Mr. Andrews was, according to the relevant Certificates of Formation, the sole-member of LGC HealthTrust, LLC and LGC Property-Liability Trust, LLC (an unauthorized act of its own), Mr. Andrews directly violated N.H. RSA § 5-B as he not only ran a N.H. RSA § 5-B Pool individually, but also misappropriated funds that did not belong to him or the entities he alone controlled.
31. Despite the fact that John Andrews’ implementation of an unlawful reformation is a direct violation of N.H. RSA § 5-B, the above-mentioned acts were also not properly authorized under joint resolution and under N.H. RSA § 5-B. Thus, these acts cannot be ratified by the original resolving corporations, HealthTrust, Inc. and NHMA Property-Liability Trust, Inc. Further, because these acts of Mr. Andrews were not properly authorized, Mr. Andrews

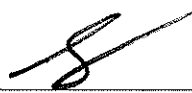
maybe held personally liable for the acts and the resulting N.H. RSA § 5-B violations.

32. Assuming the truth of the BSR's allegations and construing all reasonable inferences in the light most favorable to the non-moving party, the BSR, it is clear the allegations outlined in the Petition regarding additional issues of limited liability company formation and management, as they pertain to Mr. Andrews, are "reasonably susceptible of a construction that would permit recovery," considering that N.H. RSA § 5-B:4-a, VII imposes fines and penalties on "*any person*" who has violated N.H. RSA § 5-B. *Beane v. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010) (citation omitted) (emphasis added). Thus, there exists a factual dispute as to whether Mr. Andrews violated N.H. RSA § 5-B in his actions as Fund Administrator and Executive Director of LGC with regards to limited liability company formation and management.

Prayer for Relief

Petitioner, the Bureau of Securities Regulation, a part of the Corporations Division within the Department of State, requests an Order denying John Andrews' Motion to Dismiss Him From Counts 1, 2 and 4, and Sections A, C and D of Count 3 of the Staff Petition for failure to state a cause of action.

Dated this 23rd day of December, 2011



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