

**STATE OF NEW YORK
SUPREME COURT – COUNTY OF ALBANY**

In the Matter of the Application of

NEW YORK STATE WORKERS' COMPENSATION BOARD, in its capacity as the governmental entity charged with the administration of the Workers' Compensation Law and attendant regulations, and in its capacity as successor in interest to the HEALTH CARE PROVIDERS SELF-INSURANCE TRUST,

Petitioner,

for an order, pursuant to CPLR 7701, seeking approval of a proposed settlement and judicial apportionment of settlement proceeds.

**PETITIONER'S MEMORANDUM OF LAW IN
SUPPORT OF ITS PETITION**

Index No. 02398-14

RJI No. _____

Hon. _____

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TABLE OF CONTENTS

| | Page No. |
|---|----------|
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF FACTS | 2 |
| Group Self-Insurance Trusts | 3 |
| The Board's Oversight of GSITs | 4 |
| The Health Care Providers Self-Insurance Trust | 6 |
| Litigation Involving HCPSIT | 7 |
| The Nassau County Action..... | 7 |
| The WCB Action..... | 8 |
| The Member Action | 9 |
| Member Settlement Agreements | 9 |
| <i>Status of WCB Member Collection Actions</i> | 11 |
| The Hodes Settlement Agreement..... | 11 |
| ARGUMENT | 12 |
| ARTICLE 77 OVERVIEW | 12 |
| POINT I | 13 |
| THE COURT SHOULD APPROVE THE BOARD's PROPOSED NOTICE PROGRAM | 13 |
| POINT II | 16 |
| THE COURT SHOULD ISSUE AN ORDER APPROVING THE HODES SETTLEMENT AGREEMENT AND DECLARING IT FINAL AND BINDING ON ALL FORMER MEMBERS OF HCPSIT | 16 |
| A. The Hodes Settlement Agreement constitutes a reasonable exercise of discretion by the Board, and should be approved. | 16 |
| B. The Hodes Settlement Agreement should be approved. | 18 |
| C. The Court should issue an order declaring that the Hodes Settlement Agreement is final and binding on HCPSIT's former members..... | 19 |
| POINT III | 20 |
| THE PROVISIONS OF GENERAL OBLIGATIONS LAW § 15-108 APPLY TO ANY AND ALL TORT CLAIMS ADVANCED BY NON SETTLING PARTIES AGAINST THE SETTLING DEFENDANTS | 20 |
| POINT IV | 22 |
| THE BOARD'S PRO RATA ALLOCATION OF THE SETTLEMENT PROCEEDS IS FAIR AND REASONABLE | 22 |
| POINT V | 23 |
| THE COURT SHOULD ISSUE AN ORDER CONFIRMING THAT NO SURPLUS EXISTS ...23 | |
| CONCLUSION | 25 |

TABLE OF AUTHORITIES

Page No.

Cases

| | |
|---|--------|
| <u>Accredited Aides Plus, Inc. v Program Risk Mgt., Inc.</u> , 147 AD3d 122 (3d Dept 2017) | 4, 9 |
| <u>American Home Assur. Co. v Nausch, Hogan & Murray, Inc.</u> , 71 AD3d 550 (1st Dept 2010), <u>appeal withdrawn</u> 16 NY3d 856 (2011) | 21 |
| <u>Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley</u> , 71 NY2d 21 (1987) | 21 |
| <u>Haynes v Haynes</u> , 72 AD3d 535 (1st Dept 2010) | 17 |
| <u>Hytko v Hennessey</u> , 62 AD3d 1081 (3d Dept 2009) | 21 |
| <u>Masterwear Corp. v Bernard</u> , 3 AD3d 305 (1st Dept 2004) | 21 |
| <u>Matter of Bank of N.Y. Mellon</u> , 127 AD3d 120 (1st Dept 2015) | 17, 19 |
| <u>Matter of Bank of N.Y. Mellon</u> , 42 Misc 3d 1237(A), 2014 NY Slip Op 50384(U) (Sup Ct, NY County 2014), <u>affd as modified</u> 127 AD3d 120 (1st Dept 2015) | 15 |
| <u>Matter of Bank of N.Y. Mellon</u> , 42 Misc.3d 1237[A], 2014 NY Slip Op 50384[U] (Sup Ct, NY County 2014) | 20 |
| <u>Matter of De Sanchez</u> , 18 Misc 3d 1138(A), 2008 NY Slip Op 50342(U), (Sup Ct, NY County 2008) | 14 |
| <u>Matter of Edwards</u> , 142 NYS2d 169 (Sup. Ct., Monroe County 1955), <u>appeal dismissed</u> 1 AD2d 796 (4th Dept 1956), <u>lv dismissed</u> 1 NY2d 855 (1956) | 12 |
| <u>Matter of Greene v Finley, Kumble, Wagner, Heine & Underberg</u> , 88 AD2d 547 (1st Dept 1982) | 12 |
| <u>Matter of Holland</u> , 84 Misc.2d 922 (Sup Ct, Bronx County 1974) | 19 |
| <u>Matter of Hunter</u> , 4 NY3d 260 (2005) | 19, 20 |
| <u>Matter of IBJ Schroder Bank & Trust Co. (186 Trust)</u> , 271 AD2d 322 (1st Dept 2000) | 16 |
| <u>Matter of New York State Workers' Compensation Bd. v Murray Bresky Consultants, Ltd.</u> , 155 AD3d 1408 (3d Dept 2017) | 13, 16 |
| <u>New York State Workers' Compensation Bd. v Consolidated Risk Servs., Inc.</u> , 125 AD3d 1250 (3d Dept 2015) | 5 |
| <u>NYAHSa Servs., Inc., Self-Ins. Trust v Recco Home Care Servs., Inc.</u> , 45 Misc 3d 1225(A), 2014 NY Slip Op 51711(U) (Sup Ct, Albany County 2014), <u>affd in part</u> 141 AD3d 792 (3d Dept 2016) | 22 |
| <u>Rock v Reed-Prentice Div. of Package Mach. Co.</u> , 39 NY2d 34 (1976) | 21 |
| <u>Schwartz v Public Adm'r of County of Bronx</u> , 24 NY2d 65 (1969) | 19 |
| <u>State of N.Y. Workers' Compensation Bd. v Madden</u> , 119 A.D.3d 1022 (3d Dept. 2014) | 5 |
| <u>State of N.Y. Workers' Compensation Bd. v Wang</u> , 147 AD3d 104 (3d Dept 2017) | 9 |
| <u>Whalen v Kawasaki Motors Corp., U.S.A.</u> , 92 NY2d 288 (1998) | 21 |
| <u>Williams v Niske</u> , 81 NY2d 437 (1993) | 21 |

Other Authorities

| | |
|-----------------------|---|
| 12 NYCRR 317.1 | 3 |
| 12 NYCRR 317.19 | 3 |
| 12 NYCRR 317.20 | 5 |

| | |
|--|--------|
| 12 NYCRR 317.9 | 4 |
| CPLR 1401 | 21 |
| CPLR 7701 | 12 |
| General Obligations Law § 15-108 | 20, 21 |
| Weinstein-Korn-Miller, NY Civ Prac ¶ 7701.5 (2d ed 2004) | 13 |
| Workers' Compensation Law § 10..... | 2 |
| Workers' Compensation Law § 50..... | 2, 5 |

PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of Petitioner New York State Workers' Compensation Board (the "Board" or the "WCB") in support of its Petition, brought pursuant to Article 77 of the CPLR. The Board respectfully requests that the Court enter an order: (i) declaring that the Health Care Providers Self-Insurance Trust ("HCPSIT" or the "Trust"), a former group self-insurance trust ("GSIT"), is an express trust within the meaning of CPLR 7701; (ii) determining and judicially approving a settlement agreement (the "Hodes Settlement Agreement") reached in two lawsuits commenced behalf of and with relevance to HCPSIT, insofar against Joel Hodes, Esq., in his capacity as counsel to HCPSIT ("Hodes")(the "Actions"); (iii) declaring that the Hodes Settlement Agreement is binding on all former HCPSIT members and their heirs, successors, and assigns (collectively, the "Notice Parties"); (iv) declaring that all claims that have been asserted by the Notice Parties against Hodes relative to his involvement in the Trust, shall be dismissed with prejudice and be deemed fully and finally extinguished and satisfied; (v) permanently enjoining and forever prohibiting the Notice Parties from asserting any future lawsuits, claims, legal proceedings, and/or causes of action against Hodes and/or Whiteman Osterman & Hanna, LLP, its attorneys, employees, and insurers, and/or The Hodes Law Firm PLLC (collectively, the "Hodes Released Parties") relative to their respective involvement in the Trust; (vi) declaring that the provisions of General Obligations Law § 15-108 will apply to any and all tort claims advanced by non-settling parties in the Actions against Hodes and declaring that claims for contribution advanced by non-settling defendants in the Actions against Hodes are barred by the provisions of CPLR article 14; (vii) declaring that the WCB's proposed pro rata allocation of the settlement proceeds referenced in (ii) above is fair, reasonable and equitable; and (viii) declaring that the outstanding obligations of HCPSIT exceed

the proceeds emanating from the Hodes Settlement Agreement and, therefore, that no surplus monies exist for distribution to the former HCPSIT members.

STATEMENT OF FACTS

The Board is the governmental agency charged with administration of the Workers' Compensation Law ("WCL") and attendant regulations (the "Regulations") (see, Petition, ¶ 6). The mission of the Board is to equitably and fairly administer the provisions of the WCL and the Regulations, including workers' compensation benefits, disability benefits, volunteer firefighter benefits, volunteer ambulance workers' benefits, and volunteer civil defense workers' benefits on behalf of New York's injured workers and their employers (see, id., ¶ 7).

All employers in New York State are required to provide workers' compensation coverage for the benefit of their employees (see, WCL §§ 10, 50). Workers' compensation benefits provide weekly cash payments and the cost of full medical treatment, including rehabilitation, for employees who become disabled as a result of employment-related disease or injury (see, Petition, ¶ 8). Employers can secure the payment of workers' compensation in one of three ways: (i) by insuring and keeping insured the payment of such compensation from the State Insurance Fund (see, WCL § 50 [1]); (ii) by insuring and keeping insured the payment of such compensation with an insurance carrier authorized to transact such business in New York (see, WCL § 50 [2]); or (iii) by self-insuring (see, WCL §§ 50 [3], 50 [3-a]).

During the relevant time period, private employers that chose to self-insure could do so in one of two ways. First, if an employer could demonstrate that it has the financial wherewithal to pay its workers' compensation obligations on its own, the employer could apply for permission from the Board to administer and pay its own claims independent of any policy of insurance (see, Petition, ¶ 10). Second, if an employer was unable to independently self-insure, it could join a

GSIT to satisfy its workers' compensation obligations (see, id.).¹ It is one of these GSITs, HCPSIT, which is at issue in this proceeding.

Group Self-Insurance Trusts

A GSIT, in general terms, is a trust in which the employers, referred to in the statute as "members," pay contributions into the trust that are used to satisfy the workers' compensation obligations of the members' employees (id., ¶ 11). All employers that wished to join a GSIT had to be approved for membership by the Board; notably, Board approval was based upon information provided by the GSIT and the individuals and entities that managed and operated the GSIT (see id., ¶ 12).

The affairs of a GSIT are administered by a board of trustees with the assistance of various service providers and professionals that GSITs are required by law to retain (see id., ¶ 11). All GSITs are required to retain the services of a group administrator who is responsible to assist the GSIT to remain in compliance with the controlling provisions of the WCL and to coordinate required trust services to in order to help ensure that the GSIT remains financially solvent (see, 12 NYCRR part 317). Pursuant to the Regulations, GSITs are also required to submit annual audited financial statements to the WCB, prepared in accordance with generally accepted accounting principles and certified by an independent certified public accountant (see, 12 NYCRR 317.19). Finally, GSITs are required to submit annual actuarial reports to the WCB, which have been certified by an independent qualified actuary, verifying the claims and the method of calculating such claims, based on accepted actuarial standards of practice (see, id.).

¹ The ability of employers to join GSITs was limited, effective January 1, 2012, by reforms enacted by the Legislature (see, WCL § 50 [3-a] [2] [a]).

By virtue of the WCL and Regulations and the governing documents of a GSIT, members of a GSIT are jointly and severally liable for the liabilities of the GSIT attributable to the fiscal year(s), or portions thereof, during which the member participated in the GSIT (see, Accredited Aides Plus, Inc. v Program Risk Mgt., Inc., 147 AD3d 122, 132 [3d Dept 2017]). Employers participating in a GSIT are not relieved from their liability except through the payment of all obligations by the GSIT or by the employer (see, Petition, ¶ 10; WCL § 50 [3-a] [3]).

The Board's Oversight of GSITs

When accurately submitted, the audited financial statements and actuarial reports, which are required to be filed by every GSIT on an annual basis, allow the Board to evaluate the financial strength of a GSIT, thereby minimizing the risk of an interruption in the flow of benefits to injured workers (see Petition, ¶ 14). If a GSIT's annual audited financial statements and/or actuarial reports indicate that the GSIT's liabilities are greater than its assets, then the GSIT is deemed to be "underfunded" and the GSIT becomes subject to the remediation procedures set forth in 12 NYCRR 317.9. Depending upon the severity of the underfunding, the WCB may take one or more of the actions designated in 12 NYCRR 317.9 (b), which are designed to restore the GSIT to a funded status in a timely manner (see Petition, ¶ 15).

If a GSIT's underfunded status is so severe that it cannot be restored to a financially stable position in a timely manner, the GSIT will be terminated by order of the Board. When this occurs, the GSIT no longer provides coverage to its members. A terminated GSIT is, however, still required to meet all of the GSIT's workers' compensation obligations that accrued with respect to the period of coverage, including the payment of benefits to the injured employees of its member employers (see id., ¶ 16). In the event the Board determines that a GSIT cannot

properly administer its liabilities, the Board may assume the administration and final distribution of the GSIT's assets and liabilities pursuant to 12 NYCRR 317.20.

After assuming the administration of an insolvent GSIT, the WCB becomes the successor-in-interest to the GSIT (see 12 NYCRR 317.20; State of N.Y. Workers' Compensation Bd. v Madden, 119 A.D.3d 1022, 1024 [3d Dept 2014]; see generally New York State Workers' Compensation Bd. v Consolidated Risk Servs., Inc., 125 AD3d 1250 [3d Dept 2015]).

Thereafter, the Board takes the necessary actions designed to ensure that the statutorily mandated benefits to injured workers are not interrupted (see Petition, ¶ 18). Accordingly, the WCB will use the security deposit and other assets of the GSIT to pay and administer the GSIT's liabilities (see id.). If the GSIT's remaining assets and securities on hand are insufficient to fully satisfy the GSIT's remaining obligations, including the benefit payments to the GSIT's injured claimants, then the WCB is statutorily required to satisfy those obligations from the Board's own administrative funds pursuant to WCL § 50 (5) (f).²

The Board will also commission the completion of a forensic accounting review of the GSIT to calculate the GSIT's true liabilities (i.e., the GSIT's overall cumulative deficit) and allocate those liabilities to the GSIT's employer-members on a pro rata basis based upon the period(s) of time that the employer-members belonged to the GSIT, and to independently assess both the financial and operational aspects of the GSIT, including those responsible for oversight and management of the GSIT (see Petition, ¶ 20). Thereafter, the Board invoices each former member of the insolvent GSIT for their respective pro rata share of the GSIT's deficit as determined by the forensic accountant (see id., ¶ 22).

² In addition to the WCB's own funds, funds are borrowed from, inter alia, other self-insured employers, pursuant to WCL § 50 (5) (g), to ensure the continuity of benefits to injured workers of former self-insured employers (see Petition, ¶ 19 n 2).

Finally, to the extent that the forensic analysis by the forensic accountant reveals that actions or inactions of the persons that managed and operated the GSIT damaged the Trust, the Board will initiate lawsuits against those third parties, and seek to recoup, among other things, the total deficit of the GSIT (see id., ¶ 23).

The Health Care Providers Self-Insurance Trust

HCPSIT was established in 1992 for the benefit of employers in home health care industry who were members of the New York State Association of Health Care Providers, Inc. (the “Association”), a trade association (see id., ¶¶ 24-25). Approximately three hundred forty (340) members participated in HCPSIT over the GSIT’s existence (see Petition, Ex. A).

Several years after formation of the Trust, the Trust’s audited financial statements and actuarial reports demonstrated that HCPSIT had a regulatory deficit, i.e., the Trust was underfunded (see Petition, ¶ 29). By letter dated October 8, 2009, the WCB informed the trustees of the Trust that the Trust had failed to demonstrate its ability to properly administer its liabilities and, accordingly, that the WCB would terminate the Trust and assume the administration and final distribution of the Trust’s assets (see id., ¶ 32). Upon assumption of the administration of HCPSIT, the Board became the successor-in-interest to the Trust, and commissioned the accounting firm of Bollam, Sheedy, Torani & Co., LLP (“BST”) to perform a forensic analysis of HCPSIT (see id., ¶¶ 34-36).

After BST’s initial work was completed, it issued a forensic analysis of HCPSIT dated September 21, 2010 (see id., ¶ 37). The forensic analysis outlined the reasons why HCPSIT became insolvent, identified the parties responsible for the insolvency, and BST also prepared a report that determined the cumulative deficit of the Trust for each active year of operations (see id.). The Trust’s deficit was initially calculated to be \$188 million but, due to changes to the

WCL, the resolution of claims by the WCB's third-party administrator, and the execution of an Assumption of Liability Policy ("ALP") for the Trust by the WCB, was later estimated to be approximately \$135 million (see id., ¶¶ 39-40).

Hodes was among the parties alleged by the WCB to be responsible, for the Trust's deficit (see id., ¶ 30). Hodes served as the legal counsel to the Trust and the Association from approximately 1994-2009 (see id., ¶¶ 26-27).³ The WCB ultimately commenced litigation against Hodes, and other parties who advised or administered the Trust, which is described further in the next section of this memorandum.

Separately from litigation against those responsible to the Trust and the Board for the deficit based upon allegedly wrongful acts, the Board sought contributions from HCPSIT's former members (see id., ¶ 38). The Board gave each member-employer an opportunity to repay their respective pro rata share of the deficit, rather than bearing joint and several liability for the entire \$135 million deficit, in exchange for a release. In order to do so, however, the member was required to enter into a settlement agreement with the WCB. With respect to those members who did not settle, the Board commenced litigation seeking to recover the deficit of HCPSIT on a joint and several basis (see id., ¶¶ 38-50).

Litigation Involving HCPSIT

The Nassau County Action

On May 4, 2010, Health Acquisition Corp d/b/a Allen Home Health Care, Bestcare, Inc., and Aides at Home, Inc., as former employer-members of HCPSIT, commenced an action in the Supreme Court of Nassau County (Index No. 008714-10) (hereinafter the "Health Acquisition

³ Hodes also served as a trustee of the Trust from approximately 1994-2003 (see Petition, ¶ 28). Claims against Hodes arising from his service as a trustee were settled separately, and that settlement was approved by the Court in 2018 (see id., ¶ 62).

Action”) against certain of HCPSIT’s former service providers, not including Hodes (see id., ¶ 51). Shortly thereafter, two other employer-members of the HCPSIT—Personal-Touch Home Care, Inc. and Community Home Care Referral Service, Inc.—commenced a similar action against the same defendants under Index No. 017065-10 (hereinafter the “Personal-Touch Action”) (see id., ¶ 52). The Health Acquisition Action and the Personal-Touch Action were thereafter consolidated under Index No. 008714-10 (hereinafter the “Nassau County Action”) (see id., ¶ 53). Hodes was not a party to the Nassau County Action (see id.).

The WCB Action

On July 8, 2011, the WCB and HCPSIT commenced an action (the “Albany County WCB Action”) seeking to offset the Trust’s deficit and recover fees paid by the Trust, and other costs, from a number of defendants (see id., ¶ 54). Hodes, as counsel to the Trust, was added to the Albany County WCB Action in an amended summons and first amended verified complaint filed on January 23, 2012 (see id., ¶ 55).

In 2013, the Albany County WCB Action was placed on hold to give the parties time to pursue mediation (see id., ¶ 56). The WCB was also granted default judgments against two defendants who had not answered or entered into standstill agreements (see id.).

Subsequently, the Albany County WCB Action and the Nassau County Action were consolidated and transferred to Albany County (Index No. 4616-11) (the “Consolidated HCPSIT Action”) (see id., ¶ 57). Thereafter, certain defendants, including Hodes, moved to dismiss the Consolidated HCPSIT Action, and the WCB moved for leave to file an amended complaint (see id., ¶ 58). The motions were granted in part and denied in part by Supreme Court (McNamara, J.) (see id.). The Appellate Division, Third Department, resolved appeals from that order by restoring certain of the WCB’s causes of action and denying leave to amend the complaint to add

certain causes of action (see State of N.Y. Workers' Compensation Bd. v Wang, 147 AD3d 104, 121 [3d Dept 2017]).

The Member Action

Shortly before the WCB filed the Albany County WCB Action, a group of former Trust members (the "Member Action plaintiffs") commenced an action against many of the same defendants in the Consolidated HCPSIT Action, including Hodes (the "Member Action") (see Petition, ¶ 59). Certain defendants served pre-answer motions to dismiss, and the Member Action plaintiffs sought leave to amend their complaint (see id.). The motions were granted in part, and denied in part, by Supreme Court (see id.). The Appellate Division modified Supreme Court's order to reinstate or limit certain causes of action, and affirmed the order as modified (see Accredited Aides Plus, Inc., 147 AD3d at 138). Thereafter, the Member Action plaintiffs assigned their claims, insofar as against Hodes, to the WCB (see Petition, ¶ 61).

Member Settlement Agreements

The WCB and many of the former HCPSIT members (the "Settling Members") entered into settlement agreements (the "Member Settlements") (see id., ¶¶ 42, 44). In the Member Settlements, the WCB, in exchange for the payments by the settling members, agreed to release each Settling Member from joint and several liability for HCPSIT's obligations (see id., ¶ 45). As stated above, each HCPSIT member was jointly and severally liable for all of HCPSIT's obligations for the fiscal year(s), or portions thereof, that the employer was a member of HCPSIT (see id.).

The Member Settlements memorialized the terms of the parties' settlement and set forth each party's obligations relative to the payment of each Settling Member's settlement amount and the manner in which the WCB would distribute monies to the Settling Members should it

recover from the defendants in the Consolidated HCPSIT Action, among other things (see id., ¶

46). Accordingly, each Member Settlement contained the following provision:

“The Board has already accounted for recovery from third parties, including but not limited to various former key agents of HCPSIT including the PRM companies, DeChants Fuglein, & Johnson, SGRisk, Inc., et al., in determining the Member’s FPRA. To the extent that actual recoveries allocable to HCPSIT exceed the \$4.0 million dollars already accounted for, any surplus of funds after all the trust’s obligations have been satisfied, including but not limited to (i) repayment of prior statutory assessments relative to the Trust levied upon other self-insured employers in New York and (ii) other administrative costs relative to the Trust (the “Surplus”), will be distributed to former trust members that executed an Agreement and paid the amount of their FRPA, plus interest, if applicable (“Eligible Participants”), provided however, that the board does not hereby promise, represent, or commit that any acts or actions it takes, directly or through agents, employees and/or professionals, will create, generate, produce, or recover any Surplus.

The Surplus, if any, will be distributed to the Eligible Participants on a pro rata basis, in the same proportion as the FPRA paid by each Eligible Participant”

(id.).

As such, any proceeds resulting from a settlement with a defendant in the Consolidated HCPSIT Action—including the Hodes Settlement Agreement—are to be used first to satisfy any outstanding obligations of HCPSIT (see id., ¶ 47). Pursuant to the Member Settlements, the Settling Members who were not in default in an action commenced by the WCB at the time of settlement are entitled to a pro rata distribution of the settlement proceeds only if there is a surplus after such outstanding obligations are satisfied, and even then only if the Settling Members paid their respective Final Pro Rata Allocation amount (“FPRA”) set forth in their settlement agreements (see id.).

The Member Settlements generally contained identical language, save for certain identifying and payment information which is unique to each Settling Member (see id., ¶ 48). Each Settling Member was permitted to elect to pay their settlement amount in a lump sum or over a period of time (see id.). Additionally, the WCB credited the Settling Members a portion

of anticipated returns from the Consolidated HCPSIT Action by reducing their collective liability by \$4 million, distributed according to FPRA, in exchange for assigning their right to bring actions against the defendants in the Actions (see id., ¶ 49). As of the date of the commencement of this proceeding, many of the former participants of HCPSIT have executed Member Settlements, whereby these members have assigned any claims they have against defendants in the Consolidated HCPSIT Action and the Member Action to the WCB (see id., ¶ 50).

Status of WCB Member Collection Actions

Although a large number of HCPSIT members executed settlement agreements with the WCB as noted above, others did not (the “Non Settling Members”). The WCB commenced two actions in Albany County Supreme Court (Albany County Index Nos. 5063-13 and 0588-14) against the Non Settling Members, on a joint and several liability basis, for the remaining liabilities of the Trust, after application of the recoveries received and to be received from the Settling Members (the “WCB Member Collection Actions”) (see id., ¶ 43). As of the date of this Memorandum, there are approximately 16 Non Settling Members that are the subject of ongoing litigation with the WCB in the WCB Member Collection Actions (see id., ¶ 50).

The Hodes Settlement Agreement

After the Appellate Division issued its decisions in the Actions, Hodes answered and the Actions proceeded to discovery, wherein the WCB and Hodes exchanged written discovery, and conducted a number of depositions (see id., ¶¶ 63; 66). The WCB retained liability and damages experts to testify against Hodes, and exchanged expert disclosures with Hodes (see id., ¶ 65-66). On December 21, 2018, prior to the deadline for the parties to move for summary judgment, the WCB and Hodes participated in a mediated settlement conference (see id., ¶ 67). At the mediated settlement conference, the WCB agreed, in exchange for a payment of \$2,375,000, to release the Hodes Released Parties from liability for HCPSIT’s deficit and to discontinue the

Actions insofar as against Hodes (see id., ¶ 69; Hodes Settlement Agreement, Petition, Exh. E). Pursuant to the Hodes Settlement Agreement, the \$2.375 million is not payable until after “Court Approval” (Petition, ¶ 70). Further, the Hodes Settlement Agreement authorizes counsel for the WCB and Hodes to execute and file Stipulations of Dismissal with Prejudice and Without Costs upon resolution of the Article 77 proceeding (see id., ¶ 73). As such, the terms of the Hodes Settlement Agreement are conditioned upon the resolution of this Article 77 proceeding and the Board now seeks Court Approval of the agreement in the context of this proceeding (see id., ¶ 74).

As discussed above, proceeds resulting from a settlement with a defendant in the Consolidated HCPSIT Action (including the Hodes Settlement Agreement that is the subject of this Article 77 proceeding) are to be used first to satisfy any outstanding obligations of HCPSIT. If there was a surplus – there is not – it would be distributed by the Board to the non-defaulting Settling Members according to the FPRA set forth in their settlement agreements.

ARGUMENT

ARTICLE 77 OVERVIEW

Under Article 77 of the CPLR, a special proceeding may be brought to determine any “matter relating to an express trust” (CPLR 7701). The scope of Article 77 is broad and has been used to address a range of issues that relate to trusts (see Matter of Greene v Finley, Kumble, Wagner, Heine & Underberg, 88 AD2d 547, 548 [1st Dept 1982] (noting that Article 77 “should be broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust.”); Matter of Edwards, 142 NYS2d 169, 171 [Sup. Ct., Monroe County 1955], appeal dismissed 1 AD2d 796 [4th Dept 1956], lv dismissed 1 NY2d 855 [1956] [referring to former Article 79 of the Civil Practice Act, which is virtually identical to CPLR

article 77, as “very broad in its application to express trusts” and intended “to simplify the practice in relation to express trusts and eliminate cumbersome and expensive procedures.”]; Weinstein-Korn-Miller, NY Civ Prac ¶ 7701.5 [2d ed 2004] [“The phrase ‘matter relating to a trust’ is to be broadly construed to cover any matter of interest to the trustees, beneficiaries or adverse claimants concerning the trust”]). Inasmuch as HCPSIT was an express trust, Article 77 of the CPLR is the proper procedural vehicle to address issues such as those raised in this proceeding (see Petition, ¶ 2; see generally Matter of New York State Workers’ Compensation Bd. v Murray Bresky Consultants, Ltd., 155 AD3d 1408 [3d Dept 2017]).

POINT I

THE COURT SHOULD APPROVE THE BOARD’S PROPOSED NOTICE PROGRAM

Section 7703 of the CPLR provides that “[t]he provisions as to joinder and representation of persons interested in estates as provided in the surrogate’s court procedure act shall govern joinder and representation of persons interested in express trusts.” Therefore, joinder and representation in this proceeding are governed by Surrogate’s Court Procedure Act (“SCPA”) § 315. SCPA 315 governs service of process on interested persons. Under SCPA 315, the phrase “an interest in the estate” is defined to include both interest in income and interest in principal. Any person having an interest in the estate is entitled to notice and an opportunity to be heard (see SCPA 304).

The Board does not anticipate any opposition to Court approval of the Hodes Settlement Agreement or to the relief requested in the accompanying Petition, from any of the former members of HCPSIT. However, because the instant petition seeks judicial confirmation that the Trust’s liabilities exceed the settlement proceeds and, as such, no surplus exists from which the former members would be entitled to a distribution, the former members of HCPSIT have an

interest in this proceeding and are entitled to notice and an opportunity to be heard. In addition, because this proceeding seeks a judicial declaration that the Hodes Settlement Agreement is final and binding as to HCPSIT's former members, said former members are entitled to notice and an opportunity to be heard.

As set forth in Exhibit A of the Petition, there are approximately 340 former members of HCPSIT who are entitled to notice of this proceeding. Given this rather large number, service of process pursuant to CPLR 308 (1), (2), or (4) would be impractical and significantly add to the Trust's deficit, and therefore is not in the best interests of the Trust's former members.

As such, the Board is proposing a notice program by alternative means, as outlined below. Service by alternative means, such as mail or publication, is permissible if a petition is brought on by order to show cause. CPLR 403 (d) allows the court to "grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein" (see also Matter of De Sanchez, 18 Misc 3d 1138[A], 2008 NY Slip Op 50342[U], *3 [Sup Ct, NY County 2008] [upholding service in an Article 77 proceeding pursuant to an OTSC directing service on interested persons by registered mail]).

First, with respect to the parties to the Actions, the Board proposes mailing a copy of the Order to Show Cause, supporting Verified Petition, Verified Accounting Affidavit, and accompanying Memorandum of Law by first-class mail to (1) Hodes; and (2) the remaining defendants in the Actions (or their counsel).

Second, with respect to the former members of HCPSIT, the Board proposes using an existing, dedicated website, which was established by the Board shortly after assuming administration and final distribution of the Trust's assets, to provide notice to the Trust's former members. The Board has previously used this website to post relevant information about

HCPSIT for the Trust's former members, including prior CPLR article 77 proceedings (see Petition, ¶ 21). Accordingly, the Trust's former members are familiar with this website and accustomed to receiving Trust-related documentation via this website (see id.).

Each former member (or their attorneys if so designated by the member) of HCPSIT (i.e., the Notice Parties) would be sent a copy of the Order to Show Cause and Notice of Settlement (see Petition, Ex. F), by first-class mail, at the official address of the member or their counsel on file with the Board, which will provide details about the Hodes Settlement Agreement, the WCB's proposed allocation methodology of said settlement proceeds in the event of a surplus, and the WCB's notice of no surplus, along with a link to the Board's dedicated website for HCPSIT members where a complete copy of the Order to Show Cause, Verified Petition, Verified Accounting Affidavit, and accompanying Memorandum of Law will be posted. It is respectfully offered that, in addition to its approval in other Albany County CPLR article 77 proceedings involving HCPSIT, the use of a website created to post relevant documents and information has been approved in other Article 77 proceedings (see Matter of Bank of N.Y. Mellon, 42 Misc 3d 1237[A], 2014 NY Slip Op 50384[U], *12 n 9 [Sup Ct, NY County 2014], affd as modified 127 AD3d 120 [1st Dept 2015]).

Given that many of the former members of the Trust are familiar with this web-based process in light of its use in connection with the prior settlement agreements, the substantial cost of service of process (which would only add to the already significant Trust deficit), and the fact that all Settling Members' liability for the Trust deficit has been capped regardless of the Board's settlements with defendants in the Actions, this proposed notice program is fair and reasonable, comports with due process, and should be approved by the Court.

POINT II

THE COURT SHOULD ISSUE AN ORDER APPROVING THE HODES SETTLEMENT AGREEMENT AND DECLARING IT FINAL AND BINDING ON ALL FORMER MEMBERS OF HCPSIT

The Board in its Petition seeks Court approval of the Hodes Settlement Agreement as a reasonable exercise of the Board's discretion in administering HCPSIT and resolving the claims against Hodes in the Actions, and for a declaration that the Hodes Settlement Agreement is binding on the former members of the Trust. For the reasons discussed below, the Board's Petition should be granted.

A. The Hodes Settlement Agreement constitutes a reasonable exercise of discretion by the Board, and should be approved.

Article 77 has specifically been used as a mechanism to seek judicial approval of a settlement by the WCB (see Murray Bresky Consultants, 155 AD3d at 1411-1412). Indeed, this Court approved of settlements submitted by the WCB, post-Murray Bresky Consultants, in an related proceeding involving this GSIT (see Petition, ¶ 82). This proceeding arises from similar facts, and the requested relief is also proper here.

In Matter of IBJ Schroder Bank & Trust Co. (186 Trust), a trustee sought declaratory relief and approval of a proposed settlement of an action related to a trust (see 271 AD2d 322, 322 [1st Dept 2000]). Specifically, the trustee sought a determination that it had the authority to enter into the settlement agreement, and that each of the beneficiaries was barred from asserting any of the causes of action alleged in that action (see id.). The Court determined that the trustee, based upon its authority to commence litigation, necessarily had "the power to settle that action" (id.).

The Appellate Division has articulated the standard in an Article 77 proceeding for reviewing a decision to settle trust-related litigation as follows:

“The ultimate issue for determination here is whether the trustee's discretionary power was exercised reasonably and in good faith. It is not the task of the court to decide whether we agree with the trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his [or her] conduct constituted an abuse of discretion”

(Matter of Bank of N.Y. Mellon, 127 AD3d 120, 125 [1st Dept 2015]). Under this standard, the terms of the settlement “should not be the subject of judicial interference, as long as [the trustee’s discretion was] exercised reasonably and in good faith” (Haynes v Haynes, 72 AD3d 535, 536 [1st Dept 2010]).

In Matter of Bank of N.Y. Mellon, the First Department approved of a settlement because “[t]he Trustee acted within its authority throughout the process, and there [wa]s no indication that it was acting in self-interest or in the interests of [a defendant] rather than those of the [trust’s] certificateholders” (127 AD3d at 126). The Court explained a trustee’s reliance on “plausible advice on a matter within [outside] counsel’s expertise . . . is significantly probative of prudence” (id. [internal quotation marks and citation omitted]). In addition to considering the strength of legal arguments and “the money value of the claims,” the trustee may also consider “assessments of [the defendants’] ability to pay” when “evaluating the elements of the settlement” (id. at 127).

As more fully discussed in the Petition, in this case, the Hodes Settlement Agreement was the result of lengthy negotiations, careful consideration of the merits of the case against Hodes, and consideration of the maximum potential recovery on HCPSIT’s claims. This included a comprehensive assessment of the risks and costs associated with litigating the claims against Hodes, the nature and extent of available insurance coverage, and the potential for a monetary offset under General Obligations Law § 15-108 that might reduce the Board’s damages even if it prevailed at trial (see Petition, ¶¶ 86-95). By entering into the Settlement Agreement on behalf

of the Trust (and its former members), the Board has made an independent, good faith judgment that the Hodes Settlement Agreement is advantageous to HCPSIT, and in the best interest of the Trust and its members (see id., ¶ 96).

B. The Hodes Settlement Agreement should be approved.

Hodes served as the Trust's counsel from 1994-2009 (see id., ¶ 27). The Board alleged that his failure to provide legal services to Trust in accordance with applicable professional standards materially contributed to the inadequate funding of the Trust (see id., ¶ 30). The Board alleged causes of action against Hodes sounding in, among other things, legal malpractice (see id., ¶ 90).

The Board reached a settlement with Hodes whereby the claims against him would be dismissed in exchange for \$2,375,000, the largest amount any defendant or related group of defendants has paid specifically to HCPSIT (see id., ¶ 93). This settlement was based upon the WCB's good faith assessment of the amount of damages it could recover from Hodes in the Actions in light of potential statute of limitations defenses and offsets granted under General Obligations Law § 15-108 (see id., ¶¶ 89-91). The Board ultimately determined that the risk of significantly diminished recovery on its claims as a result of (i) motion practice related to the statute of limitations, and/or (ii) the offset under General Obligations Law §15-108, and/or (iii) significant additional costs and attorneys' fees that HCPSIT would incur through dispositive motions and a trial, outweighed any potential benefit from continued litigation. Notably, Hodes's settlement payment is over \$1 million more than the amount of the Trust's damages, as calculated by the WCB's expert, that were specifically attributable to the period of time within the statute of limitations for legal malpractice (see id., ¶ 93).

The Board's settlement with Hodes was negotiated by sophisticated parties in good faith, and recognizes the seriousness of the claims asserted by the Board, while taking into consideration the costs and risks of continued litigation and the likelihood of recovery (see id., ¶¶ 86-95). As such, the Board has properly exercised its discretion in entering into the Hodes Settlement Agreement, and it should be approved by this Court (see Matter of Bank of N.Y. Mellon, 127 AD3d at 125).

C. The Court should issue an order declaring that the Hodes Settlement Agreement is final and binding on HCPSIT's former members.

Under well-established principles of *res judicata*, a judgment in a special proceeding is binding on all persons who are provided with notice and an opportunity to be heard, and over whom jurisdiction is obtained (see Matter of Hunter, 4 NY3d 260, 269-270 [2005] [explaining that the doctrine of *res judicata* “is designed to provide finality in the resolution of disputes, recognizing that considerations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation” (internal quotation marks, brackets, and citation omitted)]; Matter of Holland, 84 Misc 2d 922, 924-926 [Sup Ct, Bronx County 1974] [holding that decree settling executor's account was *res judicata* as to infant who was virtually represented pursuant to SCPA 315]; see also Schwartz v Public Adm'r of County of Bronx, 24 NY2d 65, 71 [1969] [“New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.”]). For example, in Matter of Hunter, the Court of Appeals held that where a fiduciary voluntarily seeks a formal judicial settlement of an account, and provides the

beneficiaries of the trust account with notice of that proceeding, the beneficiaries are barred by principals of *res judicata* from later challenging the fiduciary's actions (see 4 NY3d at 270).

Under the same rationale, the former members of the Trust that receive notice of this proceeding and an opportunity to be heard should be bound by the Hodes Settlement Agreement, to the extent that it is approved by the Court as a final resolution of any claims arising out of the Hodes Released Parties' involvement with the Trust. Indeed, in Matter of Bank of N.Y. Mellon, Supreme Court explained that an Article 77 proceeding is a vehicle that provides potentially interested persons a "full and fair opportunity . . . to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon" (Matter of Bank of N.Y. Mellon, 42 Misc.3d 1237[A], 2014 NY Slip Op 50384[U], *13 [Sup Ct, NY County 2014]).

By the notice program contained in the Order to Show Cause signed by this Court, all former members of HCPSIT will have been noticed of this proceeding and be afforded a full and fair opportunity to be heard on the relief sought in this petition. As such, the Hodes Settlement Agreement, which was a valid exercise of the Board's discretion, subject to Court approval, should be held to provide an appropriate mechanism to facilitate a final and binding resolution of the Actions, including any claims that the former members have or may have had in connection with their participation in the Trust against the Hodes Released Parties.

POINT III

THE PROVISIONS OF GENERAL OBLIGATIONS LAW §15-108 APPLY TO ANY AND ALL TORT CLAIMS ADVANCED BY NON-SETTLING PARTIES AGAINST THE HODES RELEASED PARTIES

Under General Obligations Law § 15-108, "[a] release given in good faith by the injured person to one tortfeasor . . . relieves him of liability to any other person for contribution as

provided in article 14 of the civil practice law and rules.” In other words, the released party becomes “immune from liability” for contribution (Hytko v Hennessey, 62 AD3d 1081, 1087 [3d Dept 2009]). Notably, liability for contribution under CPLR 1401 extends to tortious acts such as conversion and misrepresentation, inasmuch as those torts involve injury to property (see Masterwear Corp. v Bernard, 3 AD3d 305, 307 [1st Dept 2004]; American Home Assur. Co. v Nausch, Hogan & Murray, Inc., 71 AD3d 550, 552 [1st Dept 2010], appeal withdrawn 16 NY3d 856 [2011]).

General Obligations Law § 15-108 was enacted “to encourage settlements” where there are multiple tortfeasors and end the practice of one tortfeasor effectively preventing a settlement by a co-tortfeasor by raising the specter of potential contribution liability (Williams v Niske, 81 N.Y.2d 437, 442 [1993]; see Whalen v Kawasaki Motors Corp., U.S.A., 92 NY2d 288, 292 [1998]). Specifically, “[s]ubdivision (b) permits a defendant to settle with plaintiff without fear of being brought back into the action by another defendant seeking contribution” (Rock v Reed-Prentice Div. of Package Mach. Co., 39 NY2d 34, 41 [1976]).

Here, the Board and Hodes executed a settlement in good faith which will release the Hodes Released Parties from future liability, if approved. Accordingly, the Board respectfully requests that the protections of General Obligations Law § 15-108 apply to any and all tort claims advanced by any non-settling former parties to the Actions insofar as against the Hodes Released Parties. The requested declaration advances “equity” and furthers the purposes of the statute (Whalen, 92 NY2d at 292). For the avoidance of doubt, the requested declaration pertains only to tort claims because, to the extent that any non-settling defendant has advanced a non-tort claim, such as breach of contract, no right of contribution exists (see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 24 [1987]; NYAHS

Servs., Inc., Self-Ins. Trust v Recco Home Care Servs., Inc., 45 Misc 3d 1225[A], 2014 NY Slip Op 51711[U], *14 [Sup Ct, Albany County 2014], affd in part 141 AD3d 792 [3d Dept 2016]).

POINT IV

THE BOARD'S PRO RATA ALLOCATION OF THE SETTLEMENT PROCEEDS IS FAIR AND REASONABLE

The Board commenced the Albany County WCB Action in an effort to reduce or eliminate the Trust deficit that existed when the Board took over HCPSIT, and for which all former members are jointly and severally liable. The Settling Members have agreed to pay their pro-rata share of the Trust deficit, as determined by the Board, with the understanding that the Board would be commencing or prosecuting the Actions to hold those alleged to be responsible for the HCPSIT deficit accountable, and to reduce the Trust deficit for which the members would otherwise be liable.

The Albany County WCB Action was commenced on behalf of all former members of the Trust because all former members were harmed by the alleged acts and omissions of the defendants in that case, including Hodes. Accordingly, fundamental fairness dictates that any recovery from Hodes should inure to the benefit of all former members of HCPSIT. Although certain former HCPSIT members have, in the past, received direct allocations of settlement proceeds because they had commenced litigation against a settling defendant, the only members who did so have already agreed not to seek a direct allocation from the proceeds of the Hodes Settlement Agreement.

While all former HCPSIT members are jointly and severally liable for the Trust's deficit, the WCB sought to settle those liabilities from all former members of HCPSIT in a pro rata fashion by apportioning the liabilities faced by all members of the Trust equally based upon each former member's financial contribution to the Trust, the length of their respective periods of

membership in the Trust, and the former members' agreement to pay assessments to cover the Trust's deficit. Further, the Settling Members understood that the WCB would request that the proceeds of the Actions first be used to satisfy the outstanding obligations of HCPSIT and that any remaining surplus only be distributed to the Settling Members on a pro-rata basis if all Trust liabilities were fully satisfied.

Through this Petition, the Board requests an order declaring that the Board's proposed use of the proceeds of the Hodes Settlement Agreement to satisfy the outstanding obligations of HCPSIT is fair, reasonable, and equitable. This approach was agreed to by all Settling Members at the time that the Member Settlements were executed, in exchange for capping their liability at their pro rata share of the Trust deficit. As discussed above, the Member Settlements effectively contemplated that the Board would waive its right to pursue the former members under a theory of joint and several liability, and limit their obligation to their then calculated pro rata share, in exchange for the Board's right to use any settlement proceeds to eliminate or reduce the remaining deficit (for which the former members could otherwise have been held liable).

POINT V

THE COURT SHOULD ISSUE AN ORDER CONFIRMING THAT NO SURPLUS EXISTS

Pursuant to the Member Settlements, any proceeds from the Actions are to be applied first to the outstanding obligations of the Trust (see Petition, Ex. D). Only if a surplus exists after all of the Trust's liabilities have been satisfied is a distribution to the former members on a pro rata basis authorized. As set forth in the Petition and accompanying Verified Accounting Affidavit of Michael Papa, HCPSIT's remaining outstanding obligations exceed the \$2,375,000 in settlement proceeds sought to be collected pursuant to the Hodes Settlement Agreement.

When the Board assumed administration of HCPSIT, it collected all available assets of the Trust, including HCPSIT's security deposit, and used those assets to pay the established workers' compensation claims of HCPSIT's member-employers, among other related obligations (see Petition, ¶ 120). In addition, the Board collected funds from the Settling Members, pursuant to the Member Settlements, and expended those funds for the same purposes (see id., ¶¶ 120, 123). The Board expects to recover approximately an additional \$31 million from Settling Members, pursuant to the Member Settlements, after January 31, 2019 (see id., ¶ 123). The Board also holds approximately \$484,000 in funds as of January 31, 2019, relative to HCPSIT (see id.).⁴

The outstanding liabilities of HCPSIT as of January 31, 2019, however, exceed the HCPSIT funds on hand and the remaining funds to be paid by the Settling Members as of January 31, 2019, by substantially more than the \$2,375,000 settlement proceeds. Specifically, effective September 1, 2013, the Board purchased an ALP for the Trust for a total premium cost of \$92.3 million (see id., ¶ 121). An ALP is a policy which transfers the claims liability of a GSIT to a private insurance carrier, thereby relieving the GSIT (and the Board) from continuing to pay the active claims of the GSIT. This ALP was the result of a competitive procurement. The ALP was purchased by the Board by borrowing from statutory sources to pay HCPSIT's obligations (see id., ¶ 121). Although these liabilities have been partially repaid by funds received from the Settling Members before January 31, 2019, the outstanding amount owed exceeds \$66 million (see id., ¶ 122).

⁴ The Board also holds settlement agreements with certain of the Nassau County Action plaintiffs, which have a stated value of approximately \$6.1 million, in escrow pending certain conditions precedent to their execution (see id., ¶ 123 n 8).

Based on the foregoing, the remaining liabilities of HCPSIT outweigh the remaining assets of the Trust, even when the proceeds of the Hodes Settlement Agreement contemplated to be recovered by the WCB (\$2,375,000) are included.⁵ Accordingly, no surplus exists to distribute to the Settling Members, and the Court should issue an order declaring that the entire amount of the settlement proceeds from the Hodes Settlement Agreement be allocated to the Board to pay the outstanding obligations of HCPSIT, and that no former member of the Trust is entitled to any distribution or allocation of the subject settlement proceeds.

CONCLUSION

For the foregoing reasons, the Board's Petition should be granted in all respects. The Board's determination to enter into the Hodes Settlement Agreement was made in good faith, and this Court should issue an order: (i) declaring that the Trust is an express trust within the meaning of CPLR 7701; (ii) determining and judicially approving the Hodes Settlement Agreement; (iii) declaring that the Hodes Settlement Agreement is final and binding on the Notice Parties; (iv) declaring that all claims that have been asserted by the Notice Parties against the Hodes Released Parties relative to their respective involvement in the Trusts, shall be dismissed with prejudice and be deemed fully and finally extinguished and satisfied; (v) permanently enjoining and forever prohibiting the Notice Parties from asserting any future lawsuits, claims, legal proceedings, and/or causes of action against the Hodes Released Parties relative to their respective involvement in the Trust; (vi) declaring that the provisions of General Obligations Law § 15-108 will apply to any and all tort claims advanced by non-settling parties

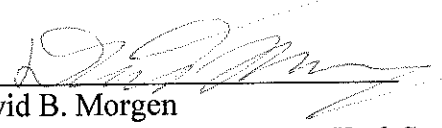
⁵ HCPSIT's remaining obligations exceed its anticipated revenues even when also considering the approximately \$4.6 million in net direct recoveries for the Trust obtained from settlements with the Trust's former administrator (Program Risk Management, Inc.); accountant (DeChants, Fuglein & Johnson LLP); actuary (SGRisk, LLC); trustees; and the Association.

in the Actions against Hodes and declaring that claims for contribution advanced by non-settling defendants in the Actions against Hodes are barred by the provisions of CPLR article 14; (vii) declaring that the WCB's proposed pro rata allocation of the settlement proceeds referenced in (ii) above is fair, reasonable and equitable; and (viii) declaring that the outstanding obligations of HCPSIT exceed the settlement proceeds emanating from the Hodes Settlement Agreement and, therefore, that no surplus monies exist for distribution to the former Trust members.

Dated: April 23, 2019
Albany, New York

Respectfully submitted,

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