STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc., et al.	)	C-2011000036
RESPONDENTS	)	

BUREAU OF SECURITIES REGULATIONS'S OBJECTION TO HEALTH TRUST'S MOTION TO ORDER PRODUCTION OF 13 LAWYERS AND ONE PARALEGAL

NOW COMES Petitioner, the New Hampshire Bureau of Securities Regulation (the "Bureau" or the "Petitioner"), through counsel, Bernstein, Shur, Sawyer & Nelson, P.A., and objects to the motion submitted by HealthTrust ("HT") in which HT seeks an order requiring the Bureau to produce 13 lawyers and one paralegal for the upcoming hearing because the HT request is intended to be abusive and drive up the costs of the proceedings and because the requested relief is not within the hearing officer's power under the cited authority of RSA 421-B:26-a, XIV(c) and (l).[1]

The Bureau does not seek Compensation for Four of the Lawyers and Seeks Less than $5000 in Total for Another Six Lawyers who Live and Work in Maine, Yet HT Seeks to Compel Their Attendance for the Upcoming Hearing

The HT motion seeks an order requiring the production of the following individuals. For ease of reference, the Bureau includes the amount of compensation it seeks for the work of the named individuals. Also, for ease of reference, the Bureau includes the individual's position,

[1] RSA 421-B:26-a, XIV(c) provides for the issuance of subpoenas. HT has not asked for the issuance of a single subpoena. Further, a number of the attorneys cited by HT live and work in Maine and are not subject to this Hearing Officer's subpoena power. RSA 421-B:26-a, XIV(l) allows the hearing officer to compel the attendance of "parties." The Bureau is a party in this matter and will appear through its director, Mr. Glennon. None of the identified individuals are parties to this matter.

work location and the area of practice of the individual sought to be compelled to attend the hearing.[2] Regardless of HT's motion, the Bureau intends to have Messrs. Glennon, Tilsley, Larochelle, and Volinsky present for most if not all of the hearing.

Name	Amt Compensation Sought	Area of Expertise or Position
1. Chris Aslin	$87,808.00	Formerly Bernstein associate, NH, now, Assistant Attorney General in the Environmental Bureau
2. Talesha Caynon	$9,648.00	Bernstein associate, NH
3. Scot E. Draeger	NONE	Bernstein shareholder and head of Securities Law Practice Group, ME
4. Eric Forcier	NONE	Employee, Bureau of Securities
5. Steven Gerlach	$32.00	Bernstein Shur, ERISA practice, ME
6. Adrian Larochelle	NONE	Employee, Bureau of Securities
7. Dana Lukens	$3,540.00	Bernstein shareholder in Securities Law Practice Group, but used for corporate negotiations experience, ME
8. Mary Ellen McMahon	$22,290.50	Bernstein Shur paralegal, NH
9. John Paterson	$201.00	Retired Bernstein shareholder, ME
10. Pat Scully	$118.00	Bernstein CEO, energy and municipal practices, ME
11. Joel Shaw	$512.50	Bernstein shareholder, Business Law Practice, ME
12. Jeffrey Spill	NONE	Employee, Bureau of Securities
13. Roy Tilsley	$118,357.25	Bernstein Shur shareholder, Real Estate Practice Group, NH
14. Andru Volinsky	$367,897.00	Bernstein Shur shareholder, Business Law Practice Group, NH

[2] In its email to counsel on this topic, HT also sought the attendance of Earl Wingate. He has been dropped from the list contained in HT's memo, perhaps by accident.

The Bureau objects to the HT motion because it appears to be done for the purpose of harassment or out of a complete misunderstanding of the law concerning fee reimbursement[3]. As is evident from the orders, opinions and the governing statutes in this case, the Bureau is entitled to be reimbursed for work related to the causes of action on which it succeeded. HT appears to believe that everything else is not subject to reimbursement. The HT position excludes those efforts that were related both to a matter that was successful and one that was not. It is well established, however, in an analogous setting, that a civil rights plaintiff "is entitled to fees for hours worked not only on the successful civil rights claims, but also on other claims involving a common core of facts or related legal theories." *Hensley v. Eckerhart,* 461 U.S 414, 435 (1983). The Bureau assumes a similar approach applies here.

The import of this analysis for time expended developing common core facts or related legal theories applies to the Securities Count and the claims that the Bureau dismissed against individual respondents. In the former instance, the Bureau had to learn and understand the corporate maneuverings of the LGC and its individual corporate predecessors so that it could litigate the Securities Count, but the Securities Count also had a core of facts in common with other successful claims about the LGC's improper corporate re-organization. Thus, some of the factual development overlapped between the two claims. Despite this, the Bureau has attempted to remove all of its time devoted to the Securities Count. However, if some time has slipped through, or some time was spent at a meeting that was not specifically identified as directly and solely related to the Securities Count and which could not, therefore, be removed, the time is justified under the "common core" factual development analysis.

[3] The Bureau uses the term "fee reimbursement" as a shorthand for all of the fees and costs sought in this proceeding.

The second area of overlap is between the counts tried against the LGC and the matters dismissed against the individual defendants. The factual development and legal analysis of these issues clearly overlap, virtually one hundred percent. For example, John Andrews was an individual defendant. The claims against him were negotiated and dismissed, but he was a prominent witness at trial who testified for days. He had a common core of facts that needed to be understood and digested to litigate against the LGC. Thus, the work done by the Bureau with respect to John Andrews was fully relevant to the claims on which the Bureau was successful. This time is compensable even though the case against Mr. Andrews was dismissed.

For similar reasons, the work done with respect to the other individual defendants is compensable. HT complains of billing for a meeting at which Mr. Volinsky met with Jae Rancourt and her clients for three hours on January 23, 2012. Memorandum at 3. The cases against these individuals were voluntarily dismissed. However, the three hour meeting was a lengthy factual interview of these former LGC board members about what happened during their years of service and sitting for the interview was a prerequisite to the dismissals of the claims against these individuals. That is, although the cases against these individuals were dismissed, they were interviewed as part of the investigation that led to the successful prosecution of the case against the LGC. The time is fully compensable as a direct cost of the LGC prosecution.

The Bureau brought cases against Ms. Maura Carroll, the former LGC executive director and general counsel, and against Mr. Peter Curro, a former LGC board member and current HT chairman. The Bureau did not succeed on either of these claims, but the claims were dismissed because Ms. Carroll and Mr. Curro did not act outside of their official capacities. Thus, all that the Bureau learned in order to proceed against Curro and Carroll was by definition relevant to the case against the LGC.

Further, the LGC now complains about expenditures of time for which the Bureau seeks reimbursement that were the direct product of the LGC's insistence that the Bureau engage in the conduct at issue. The challenged conduct of meeting with Primex is just such an instance. See Memorandum at 6. When Mr. Volinsky became involved in this matter, he met with experts and learned enough factual information to assess the case. He then immediately tried to open settlement discussions with the LGC. The LGC, however, complained that it was being "selectively prosecuted" and would not participate in settlement discussions unless the two other risk pools became involved. The Bureau accommodated this demand and asked Primex and SchoolCare to voluntarily join settlement discussions. Primex and SchoolCare accepted the Bureau's invitation and directly participated in multiple settlement meetings at which the LGC was also present. Unlike the LGC, Primex and SchoolCare negotiated settlement agreements and the LGC later introduced these settlement agreements into evidence at the hearing on the merits of this matter. The agreements are called, "Risk Pool Practices Agreements." HT complains of a meeting with counsel for Primex and with its CEO on March 8, 2012. See Memorandum at 6. Yet, this meeting only occurred because the LGC insisted upon any negotiation including Primex and SchoolCare. The LGC is wrong on its legal theory of compensable time, but the LGC should here also be estopped from complaining about legal efforts that it expressly required the Bureau to undertake.

The Applicable Procedures Do Not Require the Presence of Each Billing Attorney Or Paraprofessional to Prove the Bureau's Right to Compensation

HT does not cite any authority that requires the Bureau to produce each billing attorney or paraprofessional. The Rules of Evidence do not apply to these proceedings. Hearsay is admissible. Thus, the witnesses that the Bureau calls will be able to testify about their

conversations with others, to the extent a privilege is not implicated. There is no showing that the Bureau's witnesses, all lawyers and officers of the Court, are inherently unreliable such that numerous impeaching witnesses are necessary. The testimony is also, of necessity, tethered to the billing records which were contemporaneously entered. "A request for attorney's fees should not result in a second major litigation," *Hensley,* 461 U.S. at 437.

Review of the disputed instances cited in the HT Memorandum establishes that the production of 14 witnesses is unnecessary and overkill. The Primex entry on page 6 of the HT memorandum is a good example. HT knows the meeting was with the Primex officers because the billing entry discloses this fact. Either this meeting with Primex is compensable or it is not. Calling Jeff Spill or Adrian Larochelle as witnesses does not change any fact about the meeting and can only be interpreted as a disgruntled party looking for a chance to put its regulator through the wringer. This interpretation is underscored by the fact that the Bureau has not sought compensation for any of its employed attorneys.[4] Further, the six Maine based Bernstein lawyers that HT seeks to compel to come to Concord to sit out a multi-day hearing billed less than $4500 in total, altogether. This includes Scot Draeger, for whom no fee reimbursement is sought, Steve Gerlach for whom $32 is sought and Pat Scully, the CEO of Bernstein, who billed a total of $118.

RSA 421-B:26-a Does Not Grant the Hearing Officer the Authority to Order Attorneys to Attend the Fee Hearing.

The only authority for HT's request is RSA 421-B:26-a, XIV, (c) and (l). Neither provision gives the Hearing Officer authority to do as HT requests. Under proper circumstances, administrative judges may issue subpoenas. They must then be served. The

[4] The Bureau's cost submissions concern reimbursement for the hearing officers fees and compensation paid to the law clerks, not for Earl Wingate, Jeff Spill, Eric Forcier, Adrian Larochelle, or Director Barry Glennon.

subpoena power of a New Hampshire administrative judge does not extend beyond New Hampshire. The six Bernstein lawyers who live and work in Maine are beyond this Court's jurisdiction. This Court should not issue a subpoena for their attendance because they cannot be duly served and compelled to attend.

Nor, does the power to compel the attendance of a "party" extend to a lawyer who had passing reference to the dispute and who has not entered an appearance in the case. The six Bernstein lawyers from Maine have not entered appearances in the case.

Further, Messrs. Volinsky and Tilsley intend to attend the hearing. Ms. Caynon is an associate of the firm, as was Mr. Aslin. Ms. McMahon is a paralegal. Caynon, Aslin and McMahon do not have appearances in the case, although Mr. Aslin did at one time. While the hearing officer does, in theory, have the power to issue a subpoena for these three, he should not do so. None of these three were decision makers in the case. All worked at the direction of Mr. Volinsky or Mr. Tilsley. The time for which compensation is sought for these three is reflected in the billing records. If there are specific record entries that are unclear, rather than demand production of witnesses, HT may wish to consider asking for an explanation prior to the hearing. Within reason, the Bureau is prepared to respond.

The Bureau has not received HT's bills. The Bureau thus reserves the right to supplement this objection upon review of HT's bills.

For all of the foregoing reasons, the request to compel attendance of 14 witnesses should be denied.

Respectfully submitted,
Bureau of Securities Regulation
By its attorneys,
Bernstein Shur

/s/ Andru Volinsky
Andru H. Volinsky, No 2634

Certificate

I certify that this objection was served upon the counsel who receive electronic filings in this matter this 7th day of November, 2014.

/s/ Andru Volinsky
Andru H. Volinsky