

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF STATE

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

RESPONDENTS )  
\_\_\_\_\_)

**HEALTHTRUST’S REPLY MEMORANDUM TO BSR’S OBJECTION TO  
HEALTHTRUST’S MOTION FOR ORDER DIRECTING THE BSR TO PRODUCE  
CERTAIN BERNSTEIN SHUR ATTORNEYS AND PROFESSIONALS AND CERTAIN  
BSR ATTORNEYS AT HEARING ON REASONABLENESS OF ATTORNEYS’ FEES**

**I. THE BSR’S RELIANCE ON *HENSLEY V. ECKERHART* IS MISPLACED.**

The BSR accuses HealthTrust of filing its motion “for the purpose of harassment or out of a complete misunderstanding of the law concerning fee reimbursement.” BSR’s Objection, p. 3 (footnote omitted). The BSR urges the Presiding Officer to adopt the following approach for his consideration of its demand for attorneys’ fees and costs:

HT appears to believe that everything [other the claims upon which the BSR prevailed] is not subject to reimbursement. The HT position excludes those efforts that were related to the 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.

BSR’s Objection, p. 3.

It is plain that the BSR’s unfortunate accusation about HealthTrust’s motive or misunderstanding of the law related to its request for the Presiding Officer to compel the attendance of material witnesses is based on its assumption that *Hensley* controls the upcoming hearing. In fact, *Hensley* is the only case cited in the BSR’s objection. The BSR’s reliance on *Hensley* is misplaced. *Hensley* is inapplicable to the upcoming hearing.

In *Funtown USA, Inc. v. Town of Conway*, 129 N.H. 352 (1987), the New Hampshire Supreme Court declined to extend *Hensley* to a claim other than a civil rights action brought pursuant to 42 U.S.C. § 1983 and an award of attorney’s fees pursuant to 42 U.S.C. § 1988. 129 N.H. at 356. The Supreme Court acknowledged that the parties had urged it to adopt differing interpretations of *Hensley*. *Id.* at 355. However, the Court expressly rejected the application of *Hensley* in the case because it was not a civil rights case:

We note first that we deal here only with legal fees incurred by the plaintiff in the first appeal regarding the inverse condemnation issue, as that is the extent of the challenge made by the defendant. In addition, *Hensley* is not controlling authority because there is no § 1983 claim being made here.

*Id.* at 356.<sup>1</sup>

As recently as *Town of Barrington v. Townsend*, 164 N.H. 241 (2012), the New Hampshire Supreme Court reaffirmed that the *Hensley* analysis is inapplicable to any case other than civil rights cases. *Id.* at 249. Instead, if a statute provides for an award of attorneys’ fees to a prevailing party, the Supreme Court “appl[ies its] own law of fee shifting in such cases.” *Id.* (citing *Funtown USA, Inc.*, 129 N.H. at 356).

**II. THE WITNESSES FOR WHOM HEALTHTRUST SEEKS AN ORDER COMPELLING THEIR APPEARANCE POSSESS RELEVANT AND MATERIAL INFORMATION REGARDING THE BSR’S DEMAND FOR ATTORNEYS’ FEES AND COSTS.**

HealthTrust withdraws its request that the Presiding Officer compel the attendance of Eric Forcier, Adrian Larochelle, and Jeffrey Spill. HealthTrust has no intention of creating an issue related to attorney/client communications. With respect to Scot E. Dreger, if the BSR is

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<sup>1</sup> There are two additional matters of note regarding *Funtown USA, Inc.* One, the issue of the superior court’s authority to determine the amount of the attorney’s fees award from the first appeal was not presented to the Supreme Court. Two, the Supreme Court, not the superior court, determined that there was no award of attorney’s fees on the second appeal.

not seeking compensation for Attorney Dreger's time charge dated January 5, 2012, HealthTrust withdraws its request for an order compelling his appearance.

Regarding Christopher G. Aslin, the BSR's objection incorrectly states that Attorney Aslin "do[es] not have [an] appearance[] in the case, although [he] did at one time." BSR's objection, p. 7. Attorney Aslin's appearance had not been withdrawn at the time HealthTrust filed its motion to compel his appearance. Despite the BSR's representation otherwise, Attorney Aslin had not withdrawn his appearance when the BSR filed its objection. Instead, Attorney Aslin did not file a withdrawal until the day after HealthTrust filed its motion and almost eight hours after the BSR filed its objection.

Regarding Talesha L. Canyon, Steven R. Gerlach, Dana A. Lukens, Mary Ellen McMahon, John M.R. Paterson, Patrick J. Scully, Joel T. Shaw, Roy W. Tilsley, Jr., and Andru H. Volinsky, they are the authors of the time charges to which HealthTrust objects to the BSR's demand for attorneys' fees and costs. They are the only individuals who can explain the nature of the tasks for which compensation is sought. If the BSR was correct that *Hensley* established a standard of "common core of facts or related legal theories," see *Hensley*, 461 U.S. at 435, that controlled in this case, it might be that the witnesses' appearances would be less important.<sup>2</sup> As explained above, however, *Hensley* is inapplicable to this case.

The proper legal standard is whether the "successful and unsuccessful claims are analytically severable, [and if so,] any fee award should be reduced to exclude time spent on unsuccessful claims." *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 261 (2006); *Van Der Stok v. Van Vorhees*, 151 N.H. 679, 685 (2005). Where claims are not analytically severable, the Supreme Court has recognized the following eight factors for consideration of the reasonableness

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<sup>2</sup> The United States Supreme Court used the phrase "common core of facts or related legal theories" to describe a group of civil rights cases. *Hensley*, 461 U.S. at 435. It was not the standard established by the Court. See *id.* at 440.

of a demand for attorneys' fees: "the amount involved, the nature, novelty, and difficulty of the litigation, the attorney's standing and the skill employed, the time devoted, the customary fees in the area, the extent to which the attorney prevailed, and the benefit thereby bestowed on his clients." *Townsend*, 164 N.H. at 250.

Here, it hardly can be argued that the securities claims, the civil conspiracy claim, and the claims against the individual respondents, which included only the securities and civil conspiracy claims, are not analytically severable from the BSR's claims related to RSA 5-B. The causes of action are separate, distinct, and not dependent on one another. Additionally, the original Staff Petition contained separate sections for both the facts and the law related to the securities counts. *See* Staff Petition for Relief, pp. 25-38, 47-53. Despite a section entitled, "Facts Common to All Claims," the Amended Petition blended all of the facts and law necessary for the securities and civil conspiracy claims into those counts. *See* Amended Petition, pp. 28-36. The Final Order analyzed the causes of action related to violations of RSA 5-B distinctly from the securities counts.<sup>3</sup> *See* Final Order, pp. 60-73.

The BSR is entitled to recover its attorneys' fees and costs for those claims upon which it prevailed. Because the causes of action are analytically severable, the BSR is not entitled to recover its attorneys' fees and costs for those claims upon which it did not prevail or for matters that were not part of the administrative proceeding. As explained in HealthTrust's motion seeking an Order compelling the attendance of the individuals who authored the time charges for which the BSR seeks compensation, many of the time charges are not sufficiently detailed for HealthTrust of the Presiding Officer to discern whether the effort involved a claim upon which the BSR prevailed. Examples of such time charges include:

12/14/11	RWT Review file	1.00	235.00
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<sup>3</sup> The civil conspiracy claim was dismissed before the final hearing.

1/22/12	CGA	Revising and drafting amended petition	4.80	768.00
1/25/12	AHV	Long update meeting with Staff at BSR re all issues	3.00	1,050.00
1/28/12	RWT	Phone conference with Atty. Spill Conference with Atty. Volinsky	1.00	235.00
3/19/12	CGA	Drafting omnibus objection to dispositive motions	3.6	576.00
4/25/12	RWT	Prepare for trial Phone conference with Greg Fryer Review Bannon depo	2.50	587.50
4/26/12	RWT	Work on Exhibits Emails and phone calls with Attys. Pantesco and Ramsdell	2.50	587.50
4/26/12	AHV	Trial prep	8.00	2,800.00
4/30/12	MEM	Further work on depo summaries	6.50	994.50
5/1/12	MEM	Further work on deposition summaries	5.50	841.50

It is impossible to tell from any of these time charges whether the work was performed on claims upon which the BSR prevailed or on claims upon which it did not prevail. Only the authors of the time charges, the individuals for whom the BSR seeks reimbursement of its attorneys' fees and costs, can explain whether any or all of the time was spent working on claims upon which the BSR prevailed.

Even if the claims were not analytically severable, the testimony of the authors of the time charges would be material. Among the factors for the Presiding Officer's consideration would be the extent to which the BSR prevailed and the time devoted to the claims upon which it prevailed. *See Townsend*, 164 N.H. at 250. In *Townsend*, where an attorney prevailed on two

zoning code violations and took a voluntary nonsuit on two other code violations on behalf of the Town of Barrington, *id.* at 244, the Supreme Court described the evidence submitted by the attorney in support of the claim of attorney's fees as follows:

Jeffrey Belanger, the Town's counsel, submitted an affidavit of attorney's fees with appended copies of invoices. He acknowledged that "[t]hose invoices are not recorded in a manner that distinguishes among the four claims of zoning violations for which the Town sought relief" but was nevertheless "confident that well over 50 percent of the time that [he] spent on this case was devoted to the two claims on which the Town won on summary judgment." He therefore suggested that the court award only half of the fees the Town actually incurred in the matter. The court awarded fees in that amount.

*Id.* at 250. The Supreme Court found that it was within the trial court's discretion to approve the attorney's "conservative estimate." *Id.* at 251.

Because the BSR's demand for attorneys' fees involves claims that are analytically severable, it is entitled to an award that includes only those efforts that were devoted to claims upon which it prevailed. *LaMontagne Builders, Inc.* 154 N.H. at 261; *Van Der Stok*, 151 N.H. at 685. However, even if the claims were not analytically severable, the authors of the time charges would be material witnesses to this administrative proceeding because, unlike in *Townsend*, no single attorney can reasonably estimate the amount of time spent on claims upon which the BSR prevailed.

**III. THE PRESIDING OFFICER HAS THE AUTHORITY TO COMPEL THE BSR TO PRODUCE THE WITNESSES OR, ALTERNATIVELY, TO PRECLUDE THE RECOVERY OF ATTORNEYS' FEES FOR CHALLENGED TIME CHARGES AUTHORED BY THE NON-APPEARING WITNESSES.**

The Presiding Officer has the authority to direct parties to appear at hearings. RSA 421-B:26-a, XIV(1). He also is authorized to compel the attendance of witnesses at hearings. RSA 421-B:26-a, XIV(c). All but one of the individuals for whom HealthTrust seeks an Order directing the BSR to produce them at the hearing on the merits of the BSR's demand for

attorneys' fees and costs are attorneys or other professionals employed by the BSR's retained law firm, Bernstein Shur. As such, they are the attorneys who have appeared in the matter or are the agents of the party. In either instance, the Presiding Officer has the authority to Order the BSR to produce the witness or, alternatively, to preclude recovery of attorneys' fees for time charges authored by attorneys and other professionals who the BSR fails to produce.

Regarding Attorney Aslin, he remained an attorney of record at the time HealthTrust moved for an Order compelling his appearance at the hearing. He cannot escape the Presiding Officer's authority merely by filing a withdrawal while the matter was pending. If that was the case, any attorney who is the subject of a motion seeking sanctions or to "show cause" for challenged conduct could avoid any potential of an adverse consequence by withdrawing from the matter.

### CONCLUSION

HealthTrust amends its motion to eliminate the request for an Order that the Presiding Officer compel the attendance of BSR Attorneys Eric Forcier, Adrian Larochelle, and Jeffrey Spill. With respect to Scot E. Dreger, if the BSR is not seeking compensation for Attorney Dreger's time charge dated January 5, 2012, HealthTrust withdraws its request for an order compelling his appearance.

HealthTrust requests that the Presiding Officer issue an Order directing the BSR to produce the other individuals who are listed on page 3 of this reply memorandum, all of whom are attorneys and other professionals for whom the BSR seeks compensation in its demand for attorneys' fees and costs or BSR attorneys who were present during some of the activities for which the BSR seeks compensation, during the hearing on the merits of the BSR's demand. The witnesses are material to the BSR's demand for attorneys' fees and HealthTrust's defense to the

BSR's demand, and necessary for the Presiding Officer to determine the reasonableness of the BSR's demand.

Respectfully submitted,  
HEALTHTRUST, INC.

By Its Attorneys,

Dated: November 10, 2014

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**CERTIFICATE OF SERVICE**

I certify that I have forwarded copies of this pleading to counsel of record via email.

/s/ Michael D. Ramsdell  
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