

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

**BUREAU OF SECURITIES REGULATION’S OBJECTION TO
HEALTHTRUST’S MOTION TO DENY BSR’S REQUEST FOR ATTORNEYS’ FEES
AND COSTS RELATED TO APPEAL**

NOW COMES the Petitioner in this matter, the State of New Hampshire Bureau of Securities Regulation (“BSR”), by and through its attorneys, Bernstein, Shur, Sawyer, & Nelson, P.A., and objects to Healthtrust’s (“HT”) Motion to Deny BSR’s Request for Attorneys’ Fees and Costs Related to Appeal. The Petitioner offers the following:

1. HT’s Motion relies primarily on LaMontagne Builders, Inc. v. Brooks, 154 N.H. 252 (2006) and Supreme Court Rule 23 in support of its position that any request for Attorney’s Fees and Costs related to HT’s appeal to the Supreme Court must be determined by the Supreme Court.
2. Supreme Court Rule 23 provides that the Supreme Court in its sole discretion may award attorneys’ fees related to an appeal to a prevailing party if the appeal is deemed by the Court to be frivolous or in bad faith. Consistent with this Rule, the Court in LaMontagne Builders found that the Superior Court could not award a party attorney’s fees or costs incurred in the Supreme Court on a frivolous or bad faith standard.
3. The holding in LaMontagne makes sense in the context of a frivolous or bad faith appeal. To the extent that a Supreme Court appeal is claimed to have been filed frivolously or in

bad faith, the Supreme Court, as the body receiving the appeal, is uniquely situated to make the determination regarding worthiness of the appeal.

4. In the instant case, the BSR does not rely upon Supreme Court Rule 23 in requesting attorney's fees and costs related to the appeal to the Supreme Court in this matter.

Rather, the BSR relies on the fee-shifting language contained in RSA 5-B:4-a(V):

“In any investigation to determine whether any person has violated or is about to violate this chapter or any rule or order under this chapter, upon the secretary of state's prevailing at hearing, or the person charged with the violation being found in default, or pursuant to a consent order issued by the secretary of state, the secretary of state shall be entitled to recover the costs of the investigation, and any related proceedings, including reasonable attorney's fees, in addition to any other penalty provided for under this chapter.”

5. Pursuant to RSA 5-B:4-a(V), the BSR is entitled to recover the costs of investigation and any related proceedings, including reasonable attorney's fees upon prevailing at hearing. As such, the issue is not whether HT acted frivolously or in bad faith at the Supreme Court, but rather whether the BSR prevailed in the Supreme Court. The BSR prevailed in the appeal, as the Supreme Court upheld most of this Hearing Officer's original order.

6. As such, the issue in the present matter is not whether HT acted in bad faith or frivolously in appealing to the Supreme Court, but rather determining a reasonable attorney's fee under RSA 5-B:4-a(V). The BSR has submitted its request for fees to HT, which HT has refused to pay, and therefore this matter has proceeded to this Hearings Officer for a determination. The issues involved with determining the reasonableness of the requested fees, which is currently scheduled for a multi-day evidentiary hearing, are not of the type of issues generally presented to the Supreme Court. At the very least, as a matter of administrative law, a record needs to be created at

the administrative level prior to the issue being presented to the Supreme Court for review.

7. The BSR is entitled to attorney's fees as a cost of a successful investigation pursuant to RSA 5-B:4-a(V). In this case, attorney's fees are not an extraordinary remedy as provided for in Supreme Court Rule 23 or as provided for in case law. RSA 5-B:4-a(V) allows the BSR to recover fees so that it can successfully exercise its regulatory authority with regard to Pooled Risk Management Programs. If the BSR was unable to recover its costs for a successful investigation as a matter of practice it would be at a serious disadvantage against well-funded programs such as HT.

8. Johnson v. Wheeler, 146 N.H. 594 (2001) does not compel a different approach. In Johnson, the Supreme Court considered a request for attorney's fees related to an appeal pursuant to the statutory attorney's fees language of RSA 540-A:4(IX). The Supreme Court allowed the parties to submit affidavits regarding fees to the Supreme Court, rather than to remand the issue to the trial court. However, the Supreme Court did not say that the trial court did not have jurisdiction to consider this issue, the Supreme Court simply responded to a request made to it for fees under a statute. Johnson does not establish that the Supreme Court has exclusive jurisdiction over costs and fees incurred before the Supreme Court.

9. Since the BSR is entitled to attorney's fees as a cost of investigation, as opposed to requesting attorney's fees as a matter of discretion, the appropriate forum for the determination of fees is at the department level through the current administrative hearings process.

WHEREFORE, the BSR prays that the Hearings Officer:

a. Deny HT's Motion to Deny BSR's Request for Attorney's Fees and Costs Related to Appeal.

b. And for such other and further relief as may be just.

Respectfully submitted,

The Bureau of Securities Regulations
State of New Hampshire
By its attorneys,
Bernstein, Shur, Sawyer &
Nelson, P.A.

Dated this 10th day of November, 2014

/s/ Roy W. Tilsley, Jr.
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Certificate of Service

I certify that this objection was served upon the counsel who receive electronic filings in this matter this 10th day of November, 2014.

/s/ Roy W. Tilsley, Jr.