

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. ) C-2011000036  
)  
RESPONDENTS )  
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**HEALTHTRUST’S MEMORANDUM OF LAW IN SUPPORT OF 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**

**INTRODUCTION**

On August 4, 2014, the Presiding Officer issued an Omnibus Order in which he approved the Consent Decree executed by the New Hampshire Bureau of Securities Regulation (“BSR”), HealthTrust, Inc. (“HealthTrust”) and Property-Liability Trust, Inc. that resolved all pending disputes between the parties except the BSR’s claim for attorneys’ fees and costs. The BSR seeks an award of more than \$900,000 in attorneys’ fees and costs. An evidentiary hearing on the merits of the BSR’s demand for attorneys’ fees is scheduled to commence on November 17, 2014. Scheduling Order and Notice of Hearing dated October 8, 2014 (“Scheduling Order”).

During a preliminary hearing held on October 6, 2014, HealthTrust advised the Presiding Officer that it intends to contest the BSR’s ability to recover some of the attorneys’ fees and costs described in Bernstein Shur’s billing records for various reasons, including that: (a) fees are sought for work that appears to have been performed on claims upon which the BSR did not prevail;<sup>1</sup> (b) many time charges include entries for which only some activities appear compensable because the efforts involve both claims upon which the BSR prevailed and claims

<sup>1</sup> The Presiding Officer already has found that “[a]s the allegations of the BSR were not sufficiently proven against any individual respondent named in the individual petition, as amended, it cannot be stated that the Secretary of State prevailed upon any of these individual respondents.” Scheduling Order, p. 3.

upon which the BSR did not prevail; (c) other time charges are insufficiently clear to determine which claims were the subject of the work; and (d) time charges are included for matters that were not part of this proceeding, including: (i) the BSR's negotiation of agreements with other risk pools; (ii) the September 1, 2013 re-organization that the BSR did not challenge; and (iii) preparing for and conversing with the media. Some of the same issues are present regarding the descriptions of the costs that the BSR seeks to recover.

On November 4, 2014, HealthTrust requested that the BSR agree to produce certain attorneys and other professionals for whose work the BSR seeks compensation and certain BSR attorneys who were present during some of the questioned activities for which the BSR seeks compensation during the hearing on the merits of the BSR's demand. The BSR, through counsel, refused HealthTrust's request. Because the individuals are necessary witnesses for an adjudication of the BSR's demand for attorneys' fees, and because HealthTrust cannot adequately defend against the BSR's claim without calling the individuals as witnesses – they are the authors of the time charges, the professionals for whom the BSR seeks compensation, and the persons present for the activities – HealthTrust requests that the Presiding Officer issue an Order pursuant to RSA 421-B:26-a, XIV directing the BSR to produce the individuals listed on page 3 of this memorandum of law at the hearing scheduled to commence on November 17.

### **ARGUMENT**

The Presiding Officer has the authority to direct parties to appear at hearings. RSA 421-B:26-a, XIV(l). He also is authorized to compel the attendance of witnesses at hearings. RSA 421-B:26-a, XIV(c). Here, all 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,<sup>2</sup> for whom the BSR seeks compensation, or attorneys employed by the BSR. The individuals are Christopher G. Aslin, Talesha L. Canyon, Scot E. Dreger, Eric Forcier, Steven R. Gerlach, Adrian Laroche, Dana A. Lukens, Mary Ellen McMahon, John M.R. Paterson, Patrick J. Scully, Joel T. Shaw, Jeffrey Spill, Roy W. Tilsley, Jr., and Andru H. Volinsky.

RSA 5-B:4-a, V states as follows:

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.

(Emphasis added). Thus, a prerequisite for an award of attorneys' fees is that the BSR must have prevailed at the final hearing. *Id.* "Where a party prevails on some claims and not others, and the successful and unsuccessful claims are analytically severable, 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). Similarly, where a party prevails on some, but not all, claims, the party is entitled to recover its costs only for the claims upon which it prevailed. *Van Der Stok*, 151 N.H. at 685; *Laramie v. Sears, Roebuck & Co.*, 142 N.H. 653, 661 (1998).

Here, the attorneys' fees for which the BSR seeks compensation include time charges for work on claims upon which the BSR did not prevail. Three such entries are as follows:

1/23/12	AHV	Meet w J Rancourt and her clients,	3.00	1,050.00
		memo re same		

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<sup>2</sup> HealthTrust understands that one of the attorneys for whom the BSR seeks compensation, Christopher Aslin, is no longer employed by Bernstein Shur. Attorney Aslin, however, has appeared in the case and has not withdrawn his appearance. Consequently, he remains subject to the Presiding Officer's jurisdiction.

2/4/12	CGA	Research and draft Objection to Andrews' motion to dismiss	2.00	320.00
3/30/12	RWT	Phone conference with Greg Fryer	.20	47.00

The first charge is believed to represent a cost of \$1,050 for three hours of Attorney Volinsky's time for meeting with the attorney for individual respondents who subsequently were released from the case, and thereafter, writing a memorandum about the meeting. The second charge appears to represent a cost of \$320 for two hours of Attorney Aslin's time for responding to a motion filed by an individual respondent who was released from the case. The third entry appears to represent a cost of \$47 for two-tenths of an hour for a telephone conference between Attorney Tilsley and Attorney Gregory Fryer, who was the BSR's expert witness on securities. The BSR did not prevail on any of the securities claims.

Other time charges describe activities for which only some of the legal fees appear compensable. Five such entries are as follows:

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
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

The first time charge appears to represent a cost of \$768 for 4.8 hours of Attorney Aslin's time for revising and drafting the BSR's amended petition, which included securities and civil

conspiracy causes of action upon which the BSR did not prevail, as well as claims against eight individual respondents upon which the BSR did not prevail. The second time charge is believed to represent a cost of \$1,050 for three hours of Attorney Volinsky's time for meeting with the BSR staff regarding all issues in the case, which included the securities, civil conspiracy and individual respondents' causes of action.

The third time charge appears to represent 3.6 hours of Attorney Aslin's time at a cost of \$576 for drafting the BSR's omnibus response to twelve separate dispositive motions. These dispositive motions included eight that were filed by individual respondents, five dealt with the securities claims and three dealt with the civil conspiracy claim – all claims upon which the BSR did not ultimately prevail upon. However, the time charge does not explain which claims were the subject of the work. The fourth charge a cost of \$587.50 for 2.5 hours of Attorney Tilsley's time for trial preparation, a telephone conference with Attorney Fryer, and a review of another deposition. The time charge does not indicate whether the trial preparation related to causes of action upon which the BSR prevailed and the call to Attorney Fryer almost certainly related to the securities counts. The fifth time charge appears to represent a cost of \$587.50 for 2.5 hours of Attorney Tilsley's time for working on exhibits and telephone calls with the attorneys who represented an individual respondent. The time charge does not indicate whether the exhibits related to causes of action upon which the BSR prevailed and the BSR did not prevail on its causes of action against the individual respondent.

Other time charges are insufficiently clear to determine which claims were the subject of the work. Five such entries are as follows:

12/14/11	RWT	Review file	1.00	235.00
1/28/12	RWT	Phone conference with Atty. Spill Conference with Atty. Volinsky	1.00	235.00

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.

Additional time charges appear to involve matters that were not part of this proceeding, including: (i) the BSR's negotiation of agreements with other risk pools; (ii) the September 1, 2013 re-organization that the BSR did not challenge; and (iii) preparing for and conversing with the media. These time charges include the following entries:

3/8/12	AHV	Meet with Primex counsel and CEO w/ Jeff and Adrian	3.00	1,050.00
5/29/13	AHV	Long conversation with B Gardner re corp re-org of LGC	1.00	355.00
2/7/14	RWT	Phone conferences with Fosters Daily Democrat and Concord Monitor	.40	94.00
2/19/14	AHV	Long interview by Amanda Loder	.50	182.50

The first time charge is believed to represent a cost of \$1,050 for three hours of Attorney Volinsky's time for meeting with Primex. The second entry appears to represent a cost of \$355 for an hour of Attorney Volinsky's time speaking with the Secretary of State about a corporate re-organization that the BSR did not challenge and that was not part of this administrative proceeding. . The third time charge is believed to represent a cost of \$94 for four-tenths of an hour of Attorney Tilsley's time speaking with two newspaper reporters. The fourth time charge is believed to represent a cost of \$182.50 for half an hour of Attorney Volinsky's time speaking with a reporter.

There are more than one hundred entries that fall into at least one of groups described above. There are other time charges that cannot be understood as compensable at face value.

For example, the following time charges appear on one day, September 10, 2013:<sup>3</sup>

AHV	TF Bill Gardner re pension issues	.40	142.00
DSA	Reviewed e-mails and e-mailed C. Nale concerning issues with authorization to file (.1); conference with C. Nale concerning issues with authority to file . . . research (.2); reviewed e-mails related to eligibility for filing (.1)	.40	116.00
RWT	Conference with Attorney Volinsky	.50	117.50
RWT	Conference with Attorney Volinsky	.50	117.50
CTN	Conference with S. Anderson re: research for new matter involving . . .	.20	33.00
CTN	Research re: . . . ; draft memo to S. Anderson re: same	6.30	1,039.50

The factual basis for the BSR’s claim to attorneys’ fees is not readily apparent from any of these time entries.

The BSR’s demand for costs contains similar issues. There are entries that appear to seek compensation for parking tickets paid to the Concord Police Department. There are entries for transcription services that read simply, “Transcription Cost – Paid to: Avicore Reporting \$1257.30.” The description lacks any information from which HealthTrust or the Presiding Officer can discern whether the subject of the transcription was related to claims upon which the BSR prevailed of claims upon which it did not prevail. The same is true of certain entries for copying costs, like: “Outside Photocopy – Paid to: The Copy Room LLC \$956.20.”

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<sup>3</sup> HealthTrust does not challenge other time entries for September 10, 2013.

## CONCLUSION

HealthTrust represented at the preliminary conference that it does not dispute hundreds of thousands of dollars of the BSR's claim to attorneys' fees and costs. However, HealthTrust objects to the BSR's demand for attorneys' fees and costs for each group of time entries and the costs described above.<sup>4</sup> HealthTrust has a due process right to challenge the BSR's evidence pursuant to U.S. Const. Amend. XIV and N.H. Const. part I, article 35.

The BSR has refused HealthTrust's request to produce the attorneys and other professionals for whom the BSR seeks compensation as witnesses. Consequently, HealthTrust seeks an Order directing the BSR to produce the individuals listed on page 3 of this memorandum of law at the hearing on the merits of the BSR's demand for attorneys' fees and costs. The individuals are attorneys and other professionals employed by Bernstein Shur, attorneys employed by the BSR, and an attorney who has appeared in the matter. The Presiding Officer has the authority to direct parties to appear at hearings and to compel the attendance of witnesses at hearings. RSA 421-B:26-a, XIV(l), (c).

HealthTrust requests that the Presiding Officer issue an Order directing the BSR to produce the individuals who are listed on page 3 of this memorandum of law, 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.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

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<sup>4</sup> HealthTrust disputes the BSR's demand for attorneys' fees and costs for reasons in addition to those stated in this memorandum of law.



Dated: November 6, 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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