

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION**

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IN THE MATTER OF:)
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Local Government Center, Inc;)
Local Government Center Real Estate, Inc;)
Local Government Center Health Trust, LLC;)
Local Government Center Property-Liability Trust, LLC;)
HealthTrust, Inc; New Hampshire Municipal Association)
Property-Liability Trust, Inc.; LGC-HT, LLC;)
Local Government Center Workers' Compensation Trust, LLC)
and the following individuals: Maura Carroll, Keith R. Burke,)
Stephen A. Moltenbrey, Paul G. Beecher, Robert A. Berry,)
Roderick MacDonald, Peter J. Curro, April D. Whittaker,)
Timothy J. Ruehr, Julia N. Griffin, Paula Adriance,)
John P. Bohenko, and John Andrews)
_____)

Case No:
C-2011-0036

**MOTION TO DISMISS COUNT VI OF
THE BSR'S AMENDED STAFF PETITION**

NOW COMES Respondent, Peter J. Curro, by and through counsel, Howard & Ruoff, PLLC, and moves to dismiss count VI of the New Hampshire Bureau of Securities Regulation's (BSR) Staff Petition for Relief.

Factual Background

The Local Government Center (LGC) is a non-profit organization, governed by a Board of Directors that is comprised of local, municipal, school, and country representatives. On or about September 2, 2011, the BSR filed a lengthy petition alleging multiple infractions of various statutory laws relating to the administration of health and property-liability risk pools. In its petition, the BSR named several former members of the Board of Directors of LGC and one current member – Peter Curro – as individual respondents. The BSR filed an amended petition

on or about February 17, 2012, again naming several individual respondents, and again including Mr. Curro. In the amended petition, the BSR added a new claim in count VI: civil conspiracy. In count VI, the BSR alleges that Mr. Curro “conspired” with other individual respondents to commit the other acts complained of in the petition, in bad faith and in breach of his duties to LGC and the 5-B pools.¹ However, because the BSR has failed to state a claim for which relief may be granted as to the conspiracy claim, count VI must be dismissed.

Legal Standard Applicable to Motion to Dismiss

In ruling on Mr. Curro’s request for dismissal, a determination must be made as to “whether the facts as pled are sufficient under the law to constitute a cause of action.” Jay Edwards, Inc. v. Baker et al., 130 N.H. 41, 44 (1987). To that end, a complaint must be “rigorously scrutinize[d]” to ascertain whether, on its face, it states a cause of action. Id. In doing so, the facts in the complaint must be tested against the applicable law. Id. at 45.

Legal Argument

I. The Department of State lacks jurisdiction over the civil conspiracy claim.

Civil conspiracy is an action at common law. See id. at 47. While the BSR has pled other matters within the Department’s jurisdiction, see RSA 5-B:4-a, I; RSA 421-B:21, I-a(d) (both statutes expressly conferring exclusive enforcement authority to the Department), such is not the case for the civil conspiracy claim. Indeed, nothing in either RSA 5-B or RSA 421-B extends the Department’s authority to adjudicate common law claims allegedly related to statutory violations. Absent such statutory authority, the Department lacks jurisdiction over the civil conspiracy claim. See Appeal of Amalgamated Transit Union, 144 N.H. 325, 327 (1999)

¹ The other acts complained of consist of violations of the Pooled Risk Management Statute, RSA Chapter 5-B, and the New Hampshire Securities Statute, RSA Chapter 421-B.

(administrative agencies “are granted only limited and special subject matter jurisdiction”).

Consequently, the BSR’s civil conspiracy claim must be dismissed.

II. Even if the Department believes it has jurisdiction over a civil conspiracy claim, count VI must nevertheless be dismissed because it does not allege all of the essential facts necessary to state a cognizable legal claim.

In its amended petition, the BSR makes three claims against the individual respondents in its civil conspiracy count: (1) that the individual respondents “conspired together” to place each of the LGC 5-B risk pools under the control of a single board of directors so they could accomplish inappropriate transfers and subsidize the workers’ comp pool, while “obfuscating their actions through opaque record keeping” (Amend. Pet. at ¶130); (2) that the individual respondents “conspired” to accumulate and retain excessive funds that were required to be returned to Members and to invest such funds in long-term instruments in violation of municipal budget laws (Amend. Pet. at ¶131); and (3) that the individual respondents “conspired” to transfer funds from pool to pool and/or from pools to LGC and its subsidiaries for non-pool purposes, in violation of their fiduciary duties to members (Amend. Pet. at ¶132). The BSR asserts that the individual respondents “acted in furtherance of their conspiracies and in breach of their fiduciary duties to the 5-B pools and their Members. The Individual Respondents directed LGC and its subsidiaries over a course of years in furtherance of their conspiracies, and acted to disguise their efforts from the public and their Members.” (Amend. Pet. at ¶133.) The BSR alleges that “the fruit” of the supposed conspiracies “are ongoing and are the proximate causes of the current violations of RSA 5-B and RSA 421-B alleged against LGC and its subsidiaries in this Petition.” (Amend. Pet. at ¶134.)

In New Hampshire, a civil conspiracy is defined as “a combination of two or more persons by a concerted action to accomplish an unlawful purpose, or to accomplish some

purpose not in itself unlawful by unlawful means.” Jay Edwards, Inc., 130 N.H. at 47. There are five essential elements to a civil conspiracy:

- (1) two or more persons (including corporations);
- (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means);
- (3) an *agreement* on the object or course of action;
- (4) one or more unlawful overt acts; and
- (5) damages as the proximate result thereof.

Id. (emphasis in original). “There is no such thing in New Hampshire ... as a civil action based on conspiracy alone. For a civil conspiracy to exist, there must be an underlying tort which the alleged conspirators agreed to commit.” USNH v. Gypsum, 756 F.Supp. 640, 652 (D.N.H. 1991). Thus, a claim of civil conspiracy is a means by which “vicarious liability for the underlying tort may be imposed on all who commonly plan, take part in, further by cooperation, lend aid to, or encourage the wrongdoers’ acts.” Id.

In this case, the BSR has not satisfied the first essential element of a conspiracy claim because although several individual respondents are named in its amended petition, they are all characterized by the BSR as being (or having been) directors, officers, agents or employees of the LGC. “Under the intracorporate conspiracy doctrine, a corporation’s employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation.” Dickerson v. Alachua County Comm’n., 200 F.3d 761, 767 (11th Cir. 2000). Because the BSR’s allegations against the individual respondents in this case can only be construed as pertaining to conduct in their official positions with respect to the LGC, the intracorporate conspiracy doctrine is applicable in this matter.

The New Hampshire Supreme Court has not addressed the intracorporate conspiracy doctrine. However, it has recognized that the acts of an agent are the acts of a corporation. See Sutton Mut. Ins. Co. v. Notre Dame Arena, Inc., 108 N.H. 437 (1968) (“... a corporation can act

only through its officers, agents and employees ...”). As such, it is a fair probability that if asked to squarely address the issue of whether the intracorporate doctrine would apply in a case like this, where agents, officers and directors of the LGC are being charged with conspiring with one another while acting in those official capacities, the Court would respond in the affirmative. Consequently, the BSR has not satisfied the first necessary element of a conspiracy claim, that two or more persons were involved.

Even if the intracorporate conspiracy doctrine is rejected as a basis for dismissal of count VI, it still fails to set forth a cognizable claim because the BSR has done nothing more than make specific allegations against LGC and then assert the legal conclusion that Mr. Curro “conspired” to commit the acts complained of. A motion to dismiss is appropriate where a petition contains legal assertions that are not supported by “factual content.” See Jay Edwards, Inc., 130 N.H. at 47. Here, there is no “factual content” to support the BSR’s legal conclusion that Mr. Curro “conspired” with others because there are no facts pled in the amended petition as to what Mr. Curro’s *agreement* was with the other individual respondents (or anyone else for that matter) on the object or course of action complained of. See Moss v. Camp Pemigewassett, Inc., 312 F.3d 503, 512 (1st Cir. 2002) (affirming dismissal of civil conspiracy count for failing to allege sufficient facts because “[a] central element of a civil conspiracy is agreement among the actors”).²

² To the extent anything resembling an “agreement” can be gleaned from the amended petition, it is nothing more than voting as a member of the Board of Directors of the LGC. However, voting does not equate to an “agreement” for purposes of a civil conspiracy claim in New Hampshire. Consider, for example, the “agreement” element of a civil conspiracy claim in the State of North Dakota. That state uses the phrase “meeting of the minds,” rather than the term “agreement.” In Re N.D. Asbestos Litig., 737 F.Supp. 1087, 1096 (D. N.D. 1990). “Meeting of the minds” is construed as requiring only a “tacit understanding,” rather than an express agreement. Id. at 1097. New Hampshire does not use the phrase “meeting of the minds” or “tacit understanding” to define the “agreement” element of a conspiracy claim; it uses “agreement,” which requires more than voting in common with other board members or consistent with a proposal advanced by someone providing advice or consultation to the board. The BSR cannot, therefore, simply rely on Mr. Curro’s status as a voting board member to survive a motion to dismiss the conspiracy claim.

Accordingly, and for all of the foregoing reasons, it is respectfully requested that count VI of the BSR's amended petition be dismissed.

Respectfully Submitted,
Peter J. Curro,
By His Attorneys,
HOWARD & RUOFF, PLLC

Dated: March 12, 2012

By: /s/ Mark E. Howard
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Certificate of Service

I hereby certify that I have this 12th day of March 2012, forwarded copies of the within Motion to Dismiss the BSR's Amended Staff Petition via electronic transmission to all counsel of record.

Dated: March 12, 2012

/s/ Mark E. Howard
Mark E. Howard (NH Bar #4077)