

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HEARTLAND PLYMOUTH COURT	)	
MI, LLC, d/b/a HEARTLAND HEALTH CARE	)	
CENTER – PLYMOUTH COURT,	)	
	)	
Petitioner/Cross-Respondent,	)	Nos. 15-1034 and 15-
	)	1045
vs.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent/Cross-Petitioner.	)	
	)	
	)	
	)	

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**NATIONAL LABOR RELATIONS BOARD’S OPPOSITION TO  
MOTION FOR ATTORNEY FEES**

The National Labor Relations Board (“the Board”) responds to the Motion for Attorney Fees Under the Equal Access to Justice Act, 28 U.S.C. § 2412 (“EAJA Application”), filed by Heartland Plymouth Court MI, LLC (“Heartland”), in the above-captioned case. Heartland’s EAJA Application should be denied. Heartland is not an eligible party to receive fees. Moreover, the Board’s position as a whole was both “substantially justified” within the meaning of EAJA and advanced in good faith. In the alternative, Heartland’s requested fees should be reduced to reflect only fees reasonably expended.

## FACTS

Like many cases impacted by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the procedural history of this case is somewhat convoluted. The underlying matter began in December 2011, when SEIU Healthcare Michigan, Service Employees International Union, CTW ("the Union"), filed an unfair labor practice charge with the Board's Regional Office in Detroit ("Region 7") alleging that Heartland had unlawfully reduced certain employees' work hours unilaterally, without bargaining with the Union. (JA 8.)<sup>1</sup>

Because the charge overlapped in part with a contractual grievance filed by the Union, it spent some months in abeyance under the General Counsel's pre-arbitral deferral policy. *Collyer Insulated Wire*, 192 NLRB 837 (1971). An arbitrator held that Heartland had been legally authorized to make the challenged unilateral change. (JA 443-47.) However, the arbitrator failed to address the question whether Heartland had been obligated to bargain with the Union about the *effects* of that change. Accordingly, on November 27, 2012, the Regional Director of Region 7, on behalf of the Board's Acting General Counsel, issued an unfair labor practice complaint alleging that Heartland had violated Section 8(a)(1) and

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<sup>1</sup> References to the Joint Appendix are designated as "JA" followed by the appropriate page number(s).

(5) of the National Labor Relations Act (“the NLRA”), 29 U.S.C. § 158(a)(1) and (5), by failing to engage in effects bargaining. (JA 9-13.)

The case then went to hearing before a Board administrative law judge (“the ALJ”). Because the facts of the case were subject to only limited dispute, the hearing lasted less than four hours. (JA 26 (opening at 9:50 a.m.), 102 (closing at 1:42 p.m.)). Once it concluded, the parties filed post-hearing briefs. The Acting General Counsel contended that Heartland had been obligated to bargain with the Union about the effects of its decision to change employee work hours because the Union had not “clearly and unmistakably waived” its right to do so. Heartland made several counterarguments: first, it argued that the “clear and unmistakable waiver” standard was legally erroneous; second, it claimed that the Union had clearly and unmistakably waived its right to bargain over the effects of Heartland’s work-hours reductions; third, it contended that the General Counsel had failed to establish any failure to bargain; and finally, it argued that the Board should defer to the arbitrator’s award and refuse to find a violation of the NLRA on that basis. (JA 527-28.) The ALJ issued his Decision and Recommended Order on March 12, 2013, finding in favor of the Acting General Counsel on the merits, but rejecting his position as to the remedy. (JA 524-30.)<sup>2</sup>

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<sup>2</sup> The General Counsel had sought a remedy requiring Heartland to undo its unilateral change to employee hours and make employees whole. (JA 529.) The

Heartland filed exceptions to the ALJ's decision, triggering review by the full Board. (JA 515-22.) Its exceptions addressed three of the arguments raised to the ALJ: it objected to the ALJ's finding that a failure to bargain occurred (Exceptions 1-2, 8-11), to the ALJ's legal reasoning in finding that the Union's waiver of the right to bargain over the decision to cut hours did not also waive its effects-bargaining obligation (Exceptions 3-7, 20), and to the ALJ's application of the Board's deferral policy (Exceptions 12-15, 20). Heartland also added a challenge to the remedy (Exceptions 17-19).

The Board, in its Decision and Order, affirmed the ALJ's decision on July 15, 2013, although it made slight additional modifications to the remedy. (JA 522-31.) Heartland then petitioned this Court for review of the Board's decision, but because the decision had been issued by a Board panel containing two members whose appointments were under challenge in *Noel Canning, supra*, it was held in abeyance until June 26, 2014, when those appointments were held unlawful by the Supreme Court. In response to *Noel Canning*, the Board set aside its decision in this case and moved to dismiss the petition for review. (JA 531-32.) On January 29, 2015, a panel of the reconstituted Board issued a new Decision and Order incorporating its earlier decision by reference. (JA 533-34.)

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ALJ instead ordered a limited backpay remedy as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

On February 18, 2015, Heartland filed in this Court a second petition for review of the Board's Decision and Order. The Board cross-petitioned this Court for enforcement of that Decision and Order. Again, Heartland lodged four challenges to the Board's decision. It argued that a "contract coverage" analysis (which, it contended, was the appropriate standard, rather than the "clear and unmistakable waiver" standard discussed above and applied by the Board) privileged it to make changes without bargaining over their effects. (Brief of Heartland Human Services ("Pet. Br.") 16-22.) It also argued that deferral to the arbitrator's decision was required (Pet. Br. 22-30); that the record lacked substantial evidence that it had refused to bargain (Pet. Br. 30-33); and that the Board's remedy was erroneous (Pet. Br. 33-34).

The Board's brief in opposition explicated its view that the "contract coverage" doctrine did not apply, because the parties' contract did not "cover" the question of effects bargaining. (Brief of the National Labor Relations Board ("Bd. Br.") 15-22.) The Board further contended that its decision was supported by the facts (Bd. Br. 22-24), that it had appropriately declined to defer to the arbitral award (Bd. Br. 24-29), and that the remedy was appropriate (Bd. Br. 29-33).

The matter was submitted for decision without argument on April 15, 2016. D.C. Cir. R. 34(j). This Court issued an unpublished judgment granting the Petition and denying the Board's cross-application for enforcement on the grounds that,

applying the “contract coverage” standard, the applicable collective bargaining agreement “covered” and permitted the change made by Heartland. *Heartland Plymouth Court MI, LLC v. NLRB*, No. 15-1034, \_\_ Fed Appx. \_\_, 2016 WL 3040451, at \*1-2 (D.C. Cir. May 3, 2016).

Heartland filed this EAJA Application on June 2, 2016.

### **ARGUMENT**

The Equal Access to Justice Act (EAJA) provides that:

[A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any . . . proceeding[] for judicial review of agency action, brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). EAJA further defines “party” as “any . . . corporation . . . the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed[.]” 28 U.S.C. § 2412(d)(2)(B).

An agency’s substantial justification “shall be determined on the basis of the record (including . . . action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.” 28 U.S.C. § 2412(d)(1)(B). The agency’s position will be deemed substantially justified if it is “justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person.” *LePage’s 2000, Inc. v. Postal*

*Regulatory Com'n*, 674 F.3d 862, 866 (D.C.Cir.2012) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Although “substantial justification” is essentially a “totality of the circumstances” analysis, factors that have been found relevant include (1) the state at which the litigation was resolved; (2) views expressed by other courts on the merits; (3) the legal merits of the government’s position; (4) the clarity of the governing law; (5) the foreseeable length and complexity of the litigation; and (6) the consistency of the government’s position. *Pierce*, 487 U.S. at 568-71 (factors 1-3); *Spencer v. NLRB*, 712 F.2d 539, 559-60 (D.C Cir. 1983) (factors 4-6).

Attorney fees may also be awarded under 28 U.S.C. § 2412(b), which preserves, as against the United States, common-law exceptions to the American Rule (under which parties are typically required to pay their own legal fees).<sup>3</sup> Heartland has claimed fees under a branch of this case law permitting the award of fees where a litigant has acted in bad faith. A finding of bad faith requires a determination that the government both (1) pursued claims that were “entirely without color,” and (2) was motivated by an “improper purpose,” such as harassment or delay, in making the claims. *Wells v. Bowen*, 855 F.2d 37, 46 (2d Cir. 1988).

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<sup>3</sup> The EAJA’s definition of “party” does not apply to claims under 28 U.S.C. § 2412(b).

Where a fee award is appropriate, the court must nevertheless reduce the amount awarded to account only for hours reasonably expended. “The number of hours reasonably expended on behalf of the prevailing party is determined by evaluating the total number of hours expended and disallowing unproductive time or time spent on unsuccessful claims; hours that are ‘excessive, redundant, or otherwise unnecessary’ must be excluded[.]” *Murray v. Weinberger*, 741 F.2d 1423, 1427 (D.C. Cir. 1984) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

**I. Heartland’s request for fees under 28 U.S.C. § 2412(d) should be denied.**

A. Heartland has not shown that it “incurred” any fees.

Heartland bears the burden of proving that it “incurred” the legal fees it is requesting. *See* 28 U.S.C. § 2412(d)(1)(B) (requiring party seeking award of costs to submit, within thirty days of judgment, “an itemized statement . . . stating the actual time expended and the rate at which fees and other expenses were computed”). The “real party in interest,” i.e. the person that would actually be responsible for paying the costs of litigation in the absence of an award of attorney fees, “incurs” the fees; it is that person whose status as an EAJA-qualifying “party” must be tested. *Unification Church v. INS*, 762 F.2d 1077, 1081-83 (D.C. Cir. 1985).

In support of its motion, Heartland has provided the affidavits of administrator Jon Stepanovich (Mot. Att. A), and attorney Clifford H. Nelson (Mot. Att. B), but neither of these affidavits includes a statement attesting that Heartland actually incurred the costs of its defense before the Board and before this Court. To the contrary, Heartland has attached 38 pages of billing invoices in support of its motion (Mot. Att. B), which upon closer examination indicate that the entity responsible for actually *paying* the attorney fees in this case is not Heartland at all, but instead HCR Manor Care, a nationwide corporation that operates several hundred facilities employing tens of thousands of employees.<sup>4</sup> The invoices are all addressed to HCR Manor Care, P.O. Box 10086, Toledo, OH 43699, to the attention of Beth Kaczor, who is listed as vice president and director of human resources for HCR Manor Care. (Mot. Att. B.) Whereas Heartland is a limited liability corporation located in Michigan (Mot. Att. A), the address on the

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<sup>4</sup> Excerpts of the last SEC 10-K filing for Manor Care, Inc., also known as HCR Manor Care, before reprivatization, are attached as NLRB Attachment 1. *See also Creely v. HCR ManorCare, Inc.*, 789 F. Supp. 2d 819, 829 (N.D. Ohio 2011) (“[HCR Manor Care] is a nationwide provider of short- and long-term medical and rehabilitation care . . . [operating] more than three hundred facilities under several trade names, employing roughly 44,000 non-exempt hourly employees.”); About HCR Manor Care, <http://www.hcr-manorcare.com/about-hcr-manorcare/> (last visited June 28, 2016) (noting that HCR Manor Care operates “a network of more than 500 [facilities]”). HCR Manor Care’s full 10-K filing is over 100 pages, and its inclusion would unnecessarily burden the record; the full report is available at <https://www.sec.gov/Archives/edgar/data/878736/000095015207001325/124264ae10vk.htm>.

invoices belongs to the corporate headquarters of HCR Manor Care in Ohio.

(NLRB Att. 1.) Meanwhile, the Company has provided no evidence demonstrating that Heartland ever paid or was liable for a bill of attorney fees in connection with this case. The real party in interest responsible for paying the attorney fees in this case thus appears to be HCR Manor Care, a national corporation of considerable size that is clearly ineligible for an award of costs under EAJA. For this reason alone, Heartland's request for fees under 28 U.S.C. § 2412(b) should be denied.<sup>5</sup>

B. Even if Heartland were an eligible party, the Board's adherence to its long-held "clear and unmistakable waiver" standard, which has obtained support from a circuit court of appeals, was substantially justified.

In finding a violation of the NLRA in this case, the Board applied a doctrine—the requirement that any waiver of a union's statutory right to bargain over changes in terms and conditions of employment must be stated in "clear and unmistakable" terms—which has been approved by the Supreme Court and by the Court of Appeals for the Second Circuit. Applying the factors described above, the Board's position was substantially justified.

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<sup>5</sup> In the alternative, the Board requests that the Court require Heartland to come forward with affirmative documentary evidence demonstrating that it is, in fact, the real party in interest. Moreover, because eligibility under EAJA is determined at the commencement of the relevant litigation, see 28 U.S.C. § 2412(d)(2)(B), the Board requests that any such showing prove that—contrary to the explicit terms of the billing invoices—it was determined *prior* to the issuance of a decision in the Company's favor that Heartland and not HCR Manor Care would be liable for the costs of litigation.

The Board's clear and unmistakable waiver standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."<sup>6</sup> The Second Circuit, while couching its approach in a somewhat more elaborate two-step analysis, applies essentially the same standard, requiring a party asserting waiver to advance "clear and unmistakable" evidence.<sup>7</sup>

This Court, however, applies a different standard when an employer invokes a contractual privilege to make its unilateral change without bargaining. Under this Court's "contract coverage" theory, as enunciated in *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836-37 (D.C. Cir. 1993), an employer is permitted to make a unilateral change in a mandatory subject of bargaining if two conditions are met: (1) the parties' collective-bargaining agreement reveals that the union has already

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<sup>6</sup> *Olean Gen. Hosp.*, 363 NLRB No. 62 (Dec. 11, 2015) (quoting *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007), and further citing *King Soopers*, 340 NLRB 628, 635 (2003), and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)); see also *NLRB v. C & C Plywood*, 385 U.S. 421, 430 (1967) (stating, in case where Board had found no clear and unmistakable waiver of a union's bargaining rights, that "we cannot disapprove of the Board's approach").

<sup>7</sup> *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73, 83-84 (2d Cir. 2013) ("*Rochester Gas & Elec.*") (holding that the first issue is whether a particular issue is "clearly and unmistakably resolved" by the contract, and the second is whether a party has "clearly and unmistakably waived" its right to bargain over that issue).

exercised its right to bargain over the matter, and (2) the result of the union's having exercised its right to bargain over the matter is agreed-upon language that gives the employer the prerogative to make the disputed change to the matter unilaterally. Ultimately, this Court, like the Board, engages in basic contract interpretation, but asks only whether the employer's actions were "embraced by the literal language" of the contractual clause relied upon. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 313 (D.C. Cir. 2003).

This difference in approaches impacts the law in a number of areas, but a recurring one is the question of whether a union has waived the right to bargain over the *effects* of a change that an employer is otherwise privileged to make. The Board has repeatedly held that where a contract is silent on the subject of effects bargaining, *a fortiori*, there can be no "clear and unmistakable" waiver of the right to bargain over those effects. In *Enloe Medical Center v. NLRB*, this Court rejected the Board's analysis, stating that "[i]t would be rather unusual . . . to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects of that decision." 433 F.3d 834, 838-39 (D.C. Cir. 2005). But *Enloe* was, in turn, rejected by the Second Circuit in *Rochester Gas & Electric*, 706 F.3d at 84-85 (finding *Enloe* to be "inconsistent with the Supreme Court's holdings in *Metropolitan Edison*, 460 U.S.

at 708, and *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283, 287 (1956)”)

(parallel citations omitted).

This split of authority places the Board in an awkward position. The Board’s own jurisdiction is uniform and nationwide, but review of nearly all Board cases may be obtained in multiple circuits.<sup>8</sup> Largely for this reason, the Board does not (indeed, cannot) treat circuit court decisions as binding precedent (this practice is known as “nonacquiescence”).<sup>9</sup> Where, as here, two circuits have disagreed on a matter of substantive labor law, the Board must adhere to the position of one or the other (or stake out its own position contrary to both); it cannot remain agnostic.

Given the above, Heartland’s EAJA Application cannot prevail. If courts were to hold that agency nonacquiescence in the face of a circuit split lacks “substantial justification,” such rulings would place the Board (and any other

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<sup>8</sup> Section 10(f) of the NLRA permits petitions to review Board decisions to be filed “in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein [any aggrieved] person resides or transacts business, or in the United States Court of Appeals for the District of Columbia[.]” 29 U.S.C. § 160(f). Thus, the only scenario in which the Board could know in advance that venue will be located in this Court is one in which (1) the conduct at issue occurred within Washington, D.C., (2) all parties reside there, and (3) all parties transact business solely within the district limits. These conditions will hardly ever be met, and they certainly are not met in this case, in which the conduct at issue took place in Michigan.

<sup>9</sup> *Arvin Indus.*, 285 NLRB 753, 757 (1987) (explaining that the Board “operate[s] under a statute that simply does not contemplate that the law of a single circuit would exclusively apply in any given case”).

agency subject to a similar judicial-review provision) on the horns of an impossible dilemma. In any case implicating the circuit split, no matter which way the Board decided, a petition for review might end up before a circuit which would deem the Board's position contrary to *its* law and therefore not "substantially justified." We very much doubt that the Congress that enacted EAJA intended to turn the defense of Board decisions before the circuit courts into a real-life version of *Catch-22*.<sup>10</sup>

And indeed, the case law firmly rejects Heartland's theory; courts have repeatedly held that an agency which adheres to one side of a circuit split is "substantially justified." In *Wyandotte Savings Bank v. NLRB*, the Sixth Circuit denied a motion for fees under EAJA, even though it had rejected the Board's position as contrary to the law of the circuit, in large part because it acknowledged its position to be contrary to decisions of the Ninth and First Circuits. 682 F.2d 119, 119-20 (6th Cir. 1982). Similarly, in *United States v. Winchester Municipal Utilities*, the Sixth Circuit declined to rule "that a considered legal interpretation adopted by one of our sister circuits is so far beyond the pale that it cannot even be considered 'substantially justified[.]'" 944 F.2d 301, 306 (6th Cir. 1991). At least three other circuit courts have issued rulings in accord.<sup>11</sup>

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<sup>10</sup> Joseph Heller, *Catch-22*, at 46 (paperback ed. 2004).

<sup>11</sup> *Koch v. U.S. Dep't of Interior*, 47 F.3d 1015, 1021 (10th Cir. 1995); *Kolman v. Shalala*, 39 F.3d 173, 177 (7th Cir. 1994); *Cummings v. Sullivan*, 950 F.2d 492, 499-500 (7th Cir. 1991); *Devine v. Sutermeister*, 733 F.2d 892, 898 (Fed. Cir.

The reasonableness of the Board's position in this case is further confirmed by examining the remaining *Pierce/Spencer* factors not already addressed. *Pierce*, 487 U.S. at 568-71; *Spencer*, 712 F.2d at 559-60. For one thing, the costs of litigating this case were far from onerous. The hearing transcript ran a mere 83 pages. This is not a case where Heartland was effectively required to gamble its business upon the success of this EAJA Application. Nor has the Board asserted inconsistent positions or otherwise singled out Heartland for shabby treatment. On the contrary, the Board has been requiring evidence of "clear and unmistakable" waiver to find that a party is privileged to take unilateral action for at least 67 years. *Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098 (1949) (rejecting contention that contractual "management functions" clause privileged employer's unilateral changes in pension plan). It has consistently adhered to that standard ever since. *Provena*, 350 NLRB at 812 & n.19.

Finally, and in any event, the Board was justified in viewing this case differently than *Enloe*, because the waiver clause in this contract was considerably different than the management-rights clause at issue in that case. Here, the clause in question waived bargaining only over "subjects or matters referred to in this Agreement," and the ALJ reasonably concluded that effects-bargaining obligations

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984); see generally Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 La. L. Rev. 1, 69 (1995).

were not “referred to” in the parties’ agreement and accordingly fell outside of the zipper clause’s coverage. (JA 527.) Although this Court, interpreting the contract *de novo*, disagreed, it is well settled that the mere fact that an agency did not prevail on a particular argument does not demonstrate that the agency’s position lacked substantial justification. *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (“a loss on the merits does not mean that legal arguments advanced in the context of our adversary system were unreasonable”).

Thus, because the Board was “substantially justified” in declining to acquiesce in this Court’s “contract coverage” doctrine, the application for EAJA fees under 28 U.S.C. § 2412(d)(1)(A) should be denied.

## **II. The Board did not litigate against Heartland in bad faith.**

Heartland also contends that the Board’s litigation against it was in “bad faith.” Mot. 5-7. Because a finding of bad faith requires that the government’s position be not merely unjustified, but “entirely without color,” *see FTC v. Kuykendall*, 466 F.3d 1149, 1152 (10th Cir. 2006), this claim should be rejected for the reasons stated in Section I-B.

Moreover, even if this Court were to find that the Board lacked a colorable claim, Heartland’s bad-faith claim would still founder upon the second requirement: improper purpose. “[N]either meritlessness alone nor improper purpose alone will suffice.” *Wells*, 855 F.2d at 46; *cf. Nepera Chemical, Inc. v.*

*Sea-Land Service, Inc.*, 794 F.2d 688, 702 (D.C. Cir. 1986) (purpose of bad-faith exception to American Rule is to punish wrongdoing, not compensate a party). The EAJA Application does not even attempt to identify any “improper purpose” of the Board to harass Heartland or single it out (nor could it—as noted in the preceding section, the Board’s “clear and unmistakable waiver” doctrine is longstanding and generally applied). Any belated effort to do so in its reply to this opposition must be deemed waived. Accordingly, its request for enhanced “bad faith” attorney fees should be denied.

### **III. Heartland’s fee request must be reduced.**

In the event that this Court disagrees with the above and determines that a fee award is appropriate, Heartland’s request for \$48,392.10 in fees must nevertheless be reduced.

As an initial matter, Heartland’s motion appears to contain clerical errors. The correct hourly totals, by reference to the billing records submitted in support of the motion, are 27.2 hours for 2012, 164.2 hours (actually 4.8 *more* than stated) for 2013, 1.7 hours for 2014, 48.5 hours (11.5 hours less than stated) for 2015, and 4.4 hours for 2016.

Moreover, taking into account the unusually brief hearing record, a close examination of Heartland’s billed hours reveals several categories of billings (all in 2013) that are excessive and/or redundant:

- A combined 55.2 hours to draft, review and revise Heartland’s brief to the administrative law judge (Mot. 28-31);
- A combined 55.5 *additional* hours to draft Heartland’s exceptions and brief to the Board, notwithstanding that those arguments substantially overlapped with those raised to the ALJ (Mot. 32-36); and
- A combined 3.9 hours to draft and file Heartland’s first Petition for Review (a two-page document with two exhibits) to this court, including 1.5 hours for “Reviewing corporate structure of company” (Mot. 38-39).

Heartland’s own arguments weigh in favor of a finding that these billings were excessive. If this case was as plainly controlled by D.C. Circuit precedent as Heartland claims, the time spent on the case could have been substantially curtailed. While the amount of any reduction is of course within this Court’s discretion, the Board submits that no more than 40 hours total should have been billed for these tasks, reducing Heartland’s 2013 billings to 89.6 hours.

Certain other items are meritless or inexplicable, and should be excluded entirely:

- 2.0 hours in 2012 for “Reviewing Administrative Procedures Act for information relating to precedential value of D.C. Circuit decisions on NLRB and other issues for hearing” (Mot. 25);<sup>12</sup>

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<sup>12</sup> In light of the Board’s practice of nonacquiescence in circuit court decisions, discussed in Section I-B, it is settled that NLRB administrative law judges may not disregard Board precedent based upon such decisions. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 n.1 (2004). *Pathmark Stores* has been cited some 161 times by the Board in the 12 years since its issuance; lawyers of the skill and experience of Heartland’s (see Mot. Att. B, at ¶¶ 1, 3) can and reasonably should be expected to be familiar with its holding.

- 1.0 hour in 2015 for “legal review and analysis of NLRB brief to D.C. Circuit,” dated February 10, 2015 (Mot. 44);<sup>13</sup> and
- 1.6 hours in 2015 for review of this Court’s decision in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015) (a decision which, by its own terms, had no bearing on this case, *id.* at 82-83) (Mot. 52).

These reductions would result in the following final totals:

2012: 25.2 hours\*\$187.50=\$4,725

2013: 89.6 hours\*\$191.25=\$17,136

2014: 1.7 hours\*\$193.75=\$329.37

2015: 45.9 hours\*\$193.75=\$8,893.13

2016: 4.4 hours\*\$193.75=\$852.50

Total: \$31,936

### **CONCLUSION**

The Board respectfully requests that this Court deny the instant motion.

Alternatively, the Board requests that this Court reduce Heartland’s claimed attorney fees to the amount of \$31,936.

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<sup>13</sup> As the Board’s brief to this court was not filed until August 2015, we are at a loss to ascertain what this entry is referring to.

Respectfully submitted,

DAWN L. GOLDSTEIN  
*Deputy Assistant General Counsel*

DAVID H. MORI  
*Supervisory Attorney*

/s/ Paul A. Thomas  
PAUL A. THOMAS  
*Trial Attorney*

Contempt, Compliance, and Special  
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Dated: June 29, 2016  
Washington, DC

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HEARTLAND PLYMOUTH COURT	)	
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	)	
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Paul A. Thomas  
PAUL A. THOMAS  
*Trial Attorney*

Dated: June 29, 2016  
Washington, DC

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**UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 10-K**

(Mark One)

**Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

For the fiscal year ended December 31, 2006

OR

**Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

Commission file number: 1-10858

**Manor Care, Inc.**

(Exact name of registrant as specified in its charter)

**Delaware**  
(State or other jurisdiction of  
incorporation or organization)

**34-1687107**  
(IRS Employer  
Identification No.)

**333 N. Summit Street, Toledo, Ohio**  
(Address of principal executive offices)

**43604-2617**  
(Zip Code)

Registrant's telephone number, including area code: **(419) 252-5500**

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
<b>Common Stock, \$.01 par value</b>	<b>New York Stock Exchange</b>

Securities registered pursuant to Section 12(g) of the Act: **None**

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes  No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes  No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes  No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of the registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.

Large accelerated filer  Accelerated filer  Non-accelerated filer

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes  No

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Based on the closing price of \$46.92 per share on June 30, 2006, the aggregate market value of the registrant's voting and non-voting common equity held by non-affiliates was \$3,351,889,587. Solely for purposes of this computation, the registrant's directors and executive officers have been deemed to be affiliates. Such treatment is not intended to be, and should not be construed to be, an admission by the registrant or such directors and officers that all of such persons are "affiliates," as that term is defined under the Securities Exchange Act of 1934.

The number of shares of Common Stock, \$.01 par value, of Manor Care, Inc. outstanding as of January 31, 2007 was 72,875,542.

#### **Documents Incorporated By Reference**

The following document is incorporated by reference in the Part indicated:

We incorporate by reference specific portions of the registrant's Proxy Statement for the Annual Meeting of Stockholders to be held May 8, 2007 in Part III.

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**Manor Care, Inc.**  
**Form 10-K**  
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Manor Care, Inc., which we also refer to as Manor Care and HCR Manor Care, provides a range of health care services, including skilled nursing care, assisted living, post-acute medical and rehabilitation care, hospice care, home health care and rehabilitation therapy. The most significant portion of our business relates to long-term care, including skilled nursing care and assisted living. Our other segment is hospice and home health care. We provide greater detail about the revenues of certain health care services and other segment information in Notes 4 and 16 to the consolidated financial statements.

***Corporate Headquarters***

Manor Care, Inc.  
333 N. Summit Street  
Toledo, Ohio 43604-2617

Mailing address:

P.O. Box 10086  
Toledo, Ohio 43699-0086

Phone: (419) 252-5500

Internet Website: [www.hcr-manorcare.com](http://www.hcr-manorcare.com)

E-mail: [info@hcr-manorcare.com](mailto:info@hcr-manorcare.com)

***Securities and Exchange Commission***

Our filings with the Securities and Exchange Commission, or SEC, are available free of charge through our website with a hyperlink to the SEC's website as soon as reasonably practicable after such material is electronically filed with or furnished to the SEC.

***Certifications***

The certifications of the Chief Executive Officer and Chief Financial Officer of Manor Care, Inc. required by Section 302 of the Sarbanes-Oxley Act of 2002 have been filed as Exhibits 31.1 and 31.2, respectively, to this Form 10-K for the year ended December 31, 2006.

The certification of the Chief Executive Officer required by the New York Stock Exchange Listed Company Manual, Section 303A.12(a), relating to Manor Care, Inc.'s compliance with the New York Stock Exchange corporate governance listing standards, was submitted to the New York Stock Exchange on June 7, 2006, without qualification.

[Table of Contents](#)**Narrative Description of Business*****Long-Term Care Services***

We are a leading owner and operator of long-term care centers in the United States, with the majority of our facilities operating under the respected Heartland, ManorCare Health Services and Arden Courts names. On December 31, 2006, we operated 278 skilled nursing facilities and 65 assisted living facilities in 30 states, with 62 percent of our facilities located in Florida, Illinois, Michigan, Ohio and Pennsylvania.

*Skilled Nursing Centers.* Our facilities use interdisciplinary teams of experienced medical professionals to provide services prescribed by physicians. These teams include registered nurses, licensed practical nurses and certified nursing assistants, who provide comprehensive, individualized nursing care around the clock. We design “Quality of Life” programs to give the highest practicable level of functional independence to patients. Licensed therapists provide physical, speech, respiratory and occupational therapy for patients recovering from strokes, heart attacks, orthopedic conditions, or other illnesses, injuries or disabilities. In addition, the centers provide quality nutrition services, social services, activities, and housekeeping and laundry services.

*Assisted Living Services.* We have a number of stand-alone assisted living centers as well as units within some of our skilled nursing centers dedicated to providing personal care services and assistance with general activities of daily living such as dressing, bathing, meal preparation and medication management. We use a comprehensive resident assessment to help determine the appropriate package of services desired or required by each resident. Our assisted living staff encourages residents to socialize and participate in a broad spectrum of activities.

*Post-Acute Medical and Rehabilitation Care.* Our leadership in post-acute programs designed to shorten or eliminate hospital stays exemplifies our commitment to reducing the cost of quality health care. Working closely with patients, families and insurers, interdisciplinary teams of experienced medical professionals develop comprehensive, individualized patient care plans that target the essential medical, functional and discharge planning objectives. With a primary goal of a return to home or a similar environment, we provide medical and rehabilitation programs for patients recovering from major surgery; severe injury; or serious cardiovascular, respiratory, infectious, endocrine or neurological illnesses.

*Alzheimer’s Care.* As an industry leader in Alzheimer’s care, we provide innovative services and facilities to care for Alzheimer’s patients in early, middle and advanced stages of the disease. Trained staffs provide specialized care and programming for persons with Alzheimer’s or related disorders in freestanding Arden Courts facilities and in dedicated units within many of our skilled nursing centers.

[Table of Contents](#)***Hospice and Home Health Care***

Our hospice and home health business specializes in all levels of hospice care, home health and rehabilitation therapy, through 116 offices in 25 states. In addition, we operated nine inpatient hospice facilities at December 31, 2006. Our hospice services focus on the physical, spiritual and psychosocial needs of individuals facing a life-limiting illness. Palliative and clinical care, education, counseling and other resources take into consideration not only the needs of patients, but the needs of family members, as well. Our home health care is designed to assist those who wish to stay at home or in assisted living residences but still require some degree of medical care or assistance with daily activities. For skilled care, our registered and licensed practical nurses and therapy professionals can provide services such as wound care and dressing changes; infusion therapy; cardiac rehabilitation; and physical, occupational and speech therapies. In addition, our home health aides can assist with daily activities such as personal hygiene, assistance with walking and getting in and out of bed, medication management, light housekeeping and generally maintaining a safe environment.

***Other Health Care Services***

In addition to the rehabilitation provided in each of our skilled nursing centers, we provide rehabilitation therapy in our 92 outpatient therapy clinics and at work sites, schools, hospitals and other health care settings. Our outpatient rehabilitation therapy business primarily performs services in Midwestern and Mid-Atlantic states, Texas and Florida.

***Other Services***

In the fourth quarter of 2006, we sold our medical transcription company, whose business was converting medical dictation into electronically formatted patient records. Health care providers use the records in connection with patient care and other administrative purposes.

***Customers***

No individual customer or related group of customers accounts for a significant portion of our revenues. We do not expect that the loss of a single customer or group of related customers would have a material adverse effect.