UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

TOWN OF WOLFEBORO Plaintiff, v. WRIGHT-PIERCE, Defendant.	Civil No. 1:12-cv-00130-JD

THE DEFENDANT, WRIGHT-PIERCE'S OPPOSITION TO THE PLAINTIFF, TOWN OF WOLFEBORO'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

The Defendant, Wright-Pierce ("Wright-Pierce") respectfully submits this Memorandum in Opposition to the Plaintiff, Town of Wolfeboro's ("Wolfeboro") Motion For Leave To File An Amended Complaint. Wolfeboro's motion for leave to file an amended Complaint should be denied because Wolfeboro has not shown good cause for amendment and its proposed Amended Complaint and exhibits demonstrate conclusively the futility of the claims it seeks to assert.

I. FACTUAL BACKGROUND

On January 22, 2013, Wright-Pierce served Wolfeboro with a disc of electronically stored information ("ESI") that contained all of the bates-numbered "internal e-mails" and documents which Wolfeboro now relies upon in its motion for leave to amend the Complaint. See **Exh. 1** (letter of Patricia B. Gary, Esq.) (serving Wolfeboro with a disc of ESI).

Wolfeboro is attempting to mislead this Court by selectively "cherry picking" phrases and sentences from the various emails it attaches as Exhibits A through I to its

motion, and then adding its own speculative assertions. Instead of presenting any factual information, Wolfeboro attempts to convince the Court with pure surmise, conjecture, and innuendo that Wright-Pierce allegedly altered and/or "manipulated data" and allegedly misrepresented that "the model results indicate that the site can take up to 600,000 gpd." See Proposed Amended Complaint, ¶¶91-107. It is particularly troublesome (but illuminates Wolfeboro's bad faith in bringing this motion) that while Wolfeboro charges Wright-Pierce with fraudulently manipulating data, it conveniently ignores the subject lines of the very same "internal emails" it attaches as Exhibit B to its Memorandum of Law. The subject lines of each email in Exhibit B repeatedly identify a "Wolf-Elevation Survey Error" as the subject of the email. Indeed, while Exhibit A (an email written on February 4, 2007 from Jesse Schwalbaum to Gary Smith) attaches "base maps," and mentions an issue about a "small area indicating breakout" when "conservative K values" are used, the Exhibit B email chain explains that there was a very significant elevation survey error which initially caused the model to not work correctly and/or to run as expected because the elevation data was incorrect. Wolfeboro's own Exhibit B is an email chain which clearly shows that on February 7, 2007, Gary L. Smith wrote an email to Neil P. Cheseldine, Peter C. Atherton, and Peter J. Wilson with the subject-line "Wolf-Elevation Survey Error," and explained as follows:

> Neil,
>
> Attached is a site plan showing the location of B-9 MW 7 and the survey (top of pvc) elevation provided by the surveyor Don Voltz. The location of MW 7 indicates the ground elevation should be approximately 663 where Voltz's elevation puts the ground at approximately 642. The top checks out with the rest of the monitoring well surveyed elevations so I suspect Voltz's elevation survey is the problem for MW 7. I picked up earlier errors with his survey and had him correct the mistakes so it is not out of the question that there is another error.

> Neil, if you and Pete concur, would you have either Voltz or internal WP staff reshoot MW 7. I do not want to have this discrepancy picked up by reviewers and have it raise questions on the accuracy of the model and its results.

See Wolfeboro Exh. B**.** Thus, Wolfeboro intentionally fails to mention that a "typo" created a serious survey error in elevation, and also fails to mention that the elevation error was confirmed by the surveyor himself, Donald A. Voltz, in the same group of chronologically-organized, bates-numbered emails that Wright-Pierce provided to Wolfeboro on January 22, 2013. For example, on Friday, February 9, 2007, Donald Voltz of Lindon Design Associates wrote to Neil P. Cheseldine of Wright-Pierce:

> Neil..
>
> I just checked the field notes and Gary is right. The elevation was typed into the list wrong. It should have read elevation = 664.47.

See **Exh. 3.** Neil Cheseldine then wrote back that Wright-Pierce would correct the data:

> Don,
>
> Thanks for the quick response on this issue. We will adjust the base mapping info.
>
> Neil C.

See **Exh. 3**. Wolfeboro also intentionally attempts to mislead this Court by alleging that Wright-Pierce's consultant, Jesse Schwalbaum, falsified data. In the Proposed Amended Complaint, Wolfeboro alleges:

> 94. . . . *In other words*, Mr. Schwalbaum proposed to WP that he could manipulate the input data to eliminate the problematic results of the computer model if WP and Mr. Schwalbaum decided this was the preferred course of action.

> 95. *Upon information and belief*, WP and Mr. Schwalbaum altered the computer model's input data in the manner described in Mr. Schwalbaum's February 4, 2007 email.

See Proposed Amended Complaint, ¶¶ 94-95 (emphasis supplied). The key choice of words by Wolfeboro's proposed amendment is "in other words" and "upon information and belief." See Proposed Amended Complaint, ¶¶ 94-95. Wolfeboro is playing fast and loose with this Court by using words of innuendo, conjecture and surmise instead of particularly pled facts to support its proposed amendment.

Additionally, Wolfeboro conveniently omits to mention that Jesse Schwalbaum's thoughts that the model was not working correctly were confirmed when the survey error in elevation was discovered three days later, on February 7, 2007. Chronologically-organized, bates-numbered emails provided to Wolfeboro by Wright-Pierce show that Mr. Schwalbaum sought and received an additional budget to correct the errors, and recalibrate the model. On February 13, 2007, Mr. Schwalbaum wrote to Pete Wilson of Wright-Pierce as follows:

> Pete:
>
> Attached is the draft report and figures for the Wolfeboro project. All of this work is based on the old survey data for MW-7. I estimate that it will take me at least a full day to recalibrate the model based on the new data and redo all the figures and change the text.
>
> It is really unfortunate that I was not made aware of the survey error before I had done all of this work. This represents a significant change and right now I am out of budget. I did not include in my estimate a contingency for doing everything all over again at the last minute and since this is a glitch on WP's end I would like to negotiate a budget amendment to deal with this extra work. I understand that Gary is away but maybe you can check with the project manager and get back to me. I will put the remodeling aside for the moment.

See **Exh. 4.** The same day, on February 13, 2007, Mr. Wilson wrote back to Mr. Schwalbaum and approved an additional budget of "one day" to make the corrections and recalibrate the model as follows:

> Jesse,
>
> Yes it is unfortunate that the surveyor made an error which was just confirmed by him. I have spoken with Peter Atherton and he has approved the additional days worth of effort that will be required to make this change to the model. Let me know if there is anything else you will need.
>
> Thanks,
> Pete

See **Exh. 4.** The same day, on February 13, 2007, in the same email chain, Mr. Schwalbaum wrote back, "Ok, I'll get to it." **Exh. 4**. Additionally, Mr. Wilson wrote to Neil Cheseldine at Wright-Pierce that the surveyor, Voltz, should be billed for the error. **Exh. 4** ("we should bill voltz for this"). The email chain ends as follows:

> The Raymond surveyor cost us plenty also with his 10-foot blunder . . . It would cost more to go after Voltz then we could recoup.
>
> Neil

Exh. 4 In sum, Wolfeboro's bold allegations that Wright-Pierce "engaged in a scheme to defraud Wolfeboro by manipulating data and information concerns [sic] the Site's capacity," see Proposed Amended Complaint, ¶ 139, are unsupported by facts. This Court should deny Wolfeboro leave to amend because its proposed new claims are based on pure speculation and innuendo.

II. ARGUMENT

A. The Applicable Standard

Wolfeboro's assertion that Fed. R. Civ. P. 15(a)(2) provides the standard for the Court to apply in determining whether leave to amend should be granted is incorrect. See Wolfeboro's Memorandum of Law, p. 10. Where, as here, a motion to amend comes after a scheduling order deadline has passed, the default standard for amendment of pleadings under Fed. R. Civ. P. 15(a)(2), which mandates that leave to amend is to be "freely given when justice so requires," does not apply. See Fed. R. Civ. P. 15(a). Instead, Rule 16 (b) (4) establishes that amendment may occur only "on a showing of good cause." See Trans-Spec Truck Serv. V. Caterpillar Inc., 524 F.3d 315, 327 (1st Cir. 2008); Steir v. Girl Scouts of the USA, 383 F.3d 7, 12 (1st Cir. 2004). "Once a scheduling order is in place, the liberal default rule is replaced by the more demanding 'good cause" standard of Fed. R. Civ. P. 16(b)." Id.; O'Connell v. Hyatt Hotels of P.R., 357 F.3d 152, 154-155 (1st Cir. 2004).

Here, Wolfeboro has missed the deadline to amend pleadings by over five months. This Court's order, dated August 17, 2012, see Dkt # 12, approved a Discovery Plan which identifies the deadline to amend pleadings as follows:

Amendment of Pleadings:

Plaintiffs: November 30, 2012 Defendants: November 30, 2012

See Dkt # 11 (Proposed Discovery Plan) (emphasis in original); see also **Exh. 2** (Proposed Discovery Plan). Since a scheduling order establishes a cut-off date for amendments, the good cause standard "focuses on the diligence (or lack thereof) of the moving party more than it does on any prejudice to the party-opponent." Steir v. Girl Scouts of the USA, 383 F.3d at 12. This Court should deny Wolfeboro leave to amend

the Complaint because Wolfeboro has not presented a persuasive argument to justify a finding that its delay was for "good cause" -- in fact, Wolfeboro has not discussed the good cause standard at all.

B. Good Cause For Amendment Does Not Exist Because Wolfeboro's Delay In Seeking Amendment Demonstrates A Lack Of Diligence

On January 22, 2013, Wright-Pierce served Wolfeboro with a disc of electronically stored information ("ESI") that contained all of the bates-numbered "internal e-mails" and documents which Wolfeboro now relies upon in its motion for leave to amend the Complaint. See **Exh. 2** The good cause standard focuses on the diligence of the party seeking to amend because the purpose of Rule 16(b)(1) and (3)(A) is "to assure 'that at some point . . . the pleadings will be fixed.'" O'Connell v. Hyatt Hotels of P.R., 357 F.3d at 154. Wolfeboro has had the so-called "internal emails" in its possession for over three months, yet delayed bringing its motion until the discovery deadline is set to expire in just three weeks, on June 1, 2013. See **Exh. 2**. "It is black-letter law that '[r]egardless of the context, the longer a plaintiff delays, the more likely [a] motion to amend will be denied, as protracted delay with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend." ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 57 (1st Cir. 2008) (quoting Steir v. Girl Scouts of the USA, 383 F.3d at 12). Accordingly, Wolfeboro's motion to amend should be denied because of undue delay. Wright-Pierce provided Wolfeboro with a CD of chronologically-organized, bates-numbered emails over three months ago. Additionally, the email chains in Wolfeboro Exhibits A through I (stripped of Wolfeboro's own speculation and surmise) provide no "misrepresentations" or new factual information that is not already alleged in the original Complaint, and therefore,

Wolfeboro fails to show good cause for its proposed belated amendments to add claims for gross negligence, fraud and/or violation of RSA 358-A. The original Complaint already alleges a myriad of times that "WP did not collect enough data to accurately and more completely characterize the subsurface conditions . . ." and that Wright-Pierce nevertheless prepared three engineering reports, including the Phase 3 Hydrogeologic Report, to recommend the "Site for the disposal of an annual average of 600,000 gallons per day." See Complaint, ¶¶ 45-71. Wolfeboro's proposed amendment repeats these same allegations and offers only speculation that Wright-Pierce purportedly "manipulated data." Accordingly, this Court should deny leave to amend the Complaint because good cause has not been shown. See Flores-Silva v. McClintock-Hernandez, No. 11-2495, slip op. at 5 (1st Cir. Mar. 11, 2013) (citing O'Connell v. Hyatt Hotels, 357 F.3d 152, 155 (1st Cir. 2004)) (the First Circuit reviews the existence or absence of good cause . . . for abuse of discretion and will "affirm if any adequate reason for the denial is apparent from the record").

The so- called new "facts" gleaned from emails are nothing more than surmise and innuendo, and fail to meet the pleading requirements of Fed. R. Civ. P. 9(b) and/or Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). As such, the proposed amendments would serve no legitimate purpose, and should be denied for the additional reason that they are futile.

C. Good Cause Does Not Exist Because Wolfeboro's Proposed New Claims Are Futile

This Court should deny Wolfeboro leave to add new claims for violation of RSA 358-A, gross negligence, fraud, and fraudulent misrepresentation, because the proposed new claims fail for futility under the more liberal standard of Rule 15(a)(2). "In assessing

futility, the . . . court must apply the standard which applies to motions to dismiss under Fed. R. Civ. P 12(b)(6). See Adorno v. Crowley Towing & Transp. Co., 443 F.3d 122, 126 (1st Cir. 2006). To survive a Rule 12(b)(6) motion, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'". Ashcroft v. Iqbal, 556 U.S. at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 570).

Further, under the federal rules claims of fraud are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b) which provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." See Fed. R. Civ. P. 9(b). Under Rule 9(b), a plaintiff's averments of fraud must specify the time, place, and content of the alleged false or fraudulent misrepresentation. United States v. Melrose-Wakefield Hosp., 360 F.3d 220, 226 (1st Cir. 2004). In the proposed Amended Complaint, Wolfeboro utterly fails to identify the time, place and more importantly, the content of any material misstatements of fact upon which it allegedly relied to its detriment. Accordingly, this Court should rule that Wolfeboro has failed to support with particularity the allegations in its Memorandum of Law that "the internal WP emails further indicate that . . . WP misrepresented the results [of the computer model] and altered the input data in the computer model to eliminate problematic results." See Memorandum of Law, p. 3. Nothing in the emails provides any basis for this allegation or the general and unsupported allegations of fraud in the proposed amendment, and accordingly, Wolfeboro has failed to satisfy Rule 9(b)'s heightened pleading standard. What is glaringly absent is the specific time, place, and content of any false or fraudulent misrepresentation. There is no question that Mr. Smith

of W-P wrote an email discussing the survey error as follows:

> Neil,
>
> Attached is a site plan showing the location of B-9 MW 7 and the survey (top of pvc) elevation provided by the surveyor Don Voltz. The location of MW 7 indicates the ground elevation should be approximately 663 where Voltz's elevation puts the ground at approximately 642. The top checks out with the rest of the monitoring well surveyed elevations so I suspect Voltz's elevation survey is the problem for MW 7. I picked up earlier errors with his survey and had him correct the mistakes so it is not out of the question that there is another error.
>
> Neil, if you and Pete concur, would you have either Voltz or internal WP staff reshoot MW 7. I do not want to have this discrepancy picked up by reviewers and have it raise questions on the accuracy of the model and its results.

See Wolfeboro Exh. B**.** However, nothing in this email demonstrates that Wolfeboro misrepresented anything -- in fact it demonstrates just the opposite – i.e., that an elevation data error was detected by Wright-Pierce and Wright-Pierce immediately took steps to correct the error.

Finally, the original Complaint already alleges a claim for breach of contract, and in New Hampshire it is well established that the New Hampshire Consumer Protection Act ("CPA"), chapter 358-A of the New Hampshire Revised Statutes Annotated ("RSA") does not provide a remedy for an ordinary breach of contract claim. See Beer v. Bennett, 160 N.H. 166, 171 (2010) ("[t]he CPA does not provide a remedy for 'an ordinary breach of contract claim'"). This is so because "[a]n ordinary breach of contract claim . . . is not a violation of the CPA." George v. Al Hoyt & Sons, Inc., 162 N.H. 123, 129 (2011). As noted above, the proposed new allegations add nothing of substance to the original Complaint and should therefore be denied because Wolfeboro has failed to demonstrate good cause within the meaning of Rule 16, and because the proposed new claims are

futile.

III. CONCLUSION

For all of the above reasons, this Court should deny Wolfeboro leave to amend its Complaint because the good cause standard has not been met. The purpose of Rule 16 is to "assure that at some point . . . the pleadings will be fixed." O'Connell , 357 F.3d at 154. Although Wolfeboro has cherry-picked phrases of emails and quoted them out of context, Wolfeboro has failed to satisfy the heightened pleading standard and particularity requirements under Rule 9(b). Specifically, Wolfeboro has not specified the time, place, and content of an alleged false or fraudulent misrepresentation, and, therefore, has only demonstrated the futility of the claims it seeks to assert which amount to "nothing more than '[a] Hail Mary pass.'" See eClipse Enterprise Solutions, LLC v. Endoceutics, Inc. , 2012 WL 1449695, *3 (D.N.H. 2012).

Respectfully submitted,

WRIGHT PIERCE

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Dated: May 7, 2013

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.4(b), I hereby certify that this document filed through the ECF system on May 7, 2013, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non registered participants.

/s/Patricia B. Gary
Patricia B. Gary

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