UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO WRIGHT-PIERCE'S OBJECTION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND

Wolfeboro hereby submits this reply memorandum in response to Wright Pierce's ("WP") Objection to Plaintiff's Motion for Leave to File an Amended Complaint.

I. Wolfeboro's Motion Satisfies the Applicable Standard

Wolfeboro's Motion to Amend clearly establishes that "good cause" exists for this Court to found a decision permitting Wolfeboro to amend its Complaint. Wolfeboro does not dispute the soundness of the reasoning of the applicable standard: "*to assure that at some point…the pleadings will be fixed," O'Connell v. Hyatt Hotels of P.R.*, 357 F.3d. 152, 154, however, given the chronology of events which precede this Motion to Amend and given the status of discovery in the case, it is submitted that it would both be premature and intrinsically unjust for the Court to determine that the pleadings in the present case must be "fixed" absent an opportunity to amend after the discovery of new evidence which dramatically alters the nature of this case. This is not a case of a disregard of the scheduling order, of protracted delay nor is it one which would require any re-opening of discovery. *Id.* at 155; *see also Somascan, Inc. v. Philips Med. Sys. Nederland, B.V.*, 2013 U.S. App. LEXIS 7969 (1st Cir. P.R. Apr. 22, 2013); *Trans-Spec Truck Serv.*, 524 F.3d 315, 327 (1st Cir. 2008). Indeed, it is noted that WP's Objection fails to cite a single case with analogous facts where a Motion for Leave to Amend was denied six

months before the close of discovery and prior to a single deposition being taken[1]. Further, at no point in its voluminous Objection does WP argue that it will be unfairly prejudiced in the slightest by the granting of this Motion.

A. Wolfeboro was Diligent in Bringing the Motion

Wolfeboro could not have brought its Motion to Amend prior to the deadline for the Amendment of Pleadings established in the agreed upon Discovery Plan for the simple reason that it, unlike WP, did not know of the existence of the evidence to support the additional claims identified in the proposed Amended Complaint until WP had produced the electronic documents requested by Wolfeboro, which it did almost two months after the deadline to amend had passed. Once the additional documents were in Wolfeboro's possession, Wolfeboro's counsel worked diligently to review the mass of additional information and filed the Motion to Amend a mere four months after the Defendant produced over 100,000 documents. Unlike the *Trans-Spec* case cited by WP, this is not a situation where Wolfeboro had the pertinent information from the beginning of the case and has now moved to amend its Compliant to embark upon a new litigation strategy. *Trans-Spec Truck Serv.*, 524 F.3d at 327 (motion brought 11 months after deadline denied because alleged new information was or should have been known to plaintiff from the outset of the case).

B. The Proposed Amended Complaint Does Not "Repackage Facts"

The proposed Amended Complaint contains 17 new paragraphs of factual allegations and 4 new causes of action. The new evidence obtained by Wolfeboro as a result of WP's January 22, 2013 document production changed the character of the case from one involving an almost common garden variety mixture of breach of contract, breach of warranty, and professional

[1] On May 13, 2013, the Court granted the Parties' joint motion to extend the deadline for the completion of discovery to November 1, 2013.

negligence claims into a more complex and darker case of breach of contract, breach of warranty and professional negligence coupled with intentional data manipulation, fraudulent misrepresentation and active malfeasance predicated upon fraud. *See* Amended Complaint, ¶ 90-107. Simply put, the new evidence changed the entire fabric of the case and WP's herculean efforts to oppose the Motion lies barren WP's assertion that Wolfeboro's proposed Amended Complaint is in any way a simple "repackaging of facts." *See* Amended Complaint, ¶ 90-107.

II Wolfeboro's Motion is Brought in Good Faith

A. Wolfeboro Has Shown Good Faith By Bringing the New Counts After the Discovery of WP's Malfeasance.

At the time Wolfeboro filed its original Complaint, it had substantial evidence that WP had both breached it obligations under the numerous contracts between the parties and had also breached the applicable professional standard of care. For these reasons, Wolfeboro's original Complaint sounded in various breaches of contract, breach of warranty and professional negligence claims. At that time, Wolfeboro did not have evidence of fraud, fraudulent misrepresentation, violations of RSA 358-A, or gross negligence; therefore, Wolfeboro did not include such counts. It was only after WP produced its internal emails revealing WP's scheme to manipulate the computer model, WP's misrepresentation of modeling results to Wolfeboro, WP's ignoring of data which clearly showed that the RIB Site would fail, WP's fraudulent statements made for the purpose of convincing Wolfeboro that there was no basis to the concerns raised by an independent engineer and WP's fraudulent representations that it had engineered a "fix" for the failing RIB system that Wolfeboro brought the current Motion to Amend its Complaint to include gross negligence, fraud, fraudulent misrepresentation, and 358-A claims. The very fact that Wolfeboro did not include these claims in the original Complaint demonstrates that Wolfeboro acted in good faith by moving to amend the Complaint only after it discovered

evidence that supported such claims.

B. WP's Argument That Wolfeboro "Overloaded" the Site Is Made in Bad Faith.

WP's position that Wolfeboro is responsible for "overloading" the RIB system after startup is extraordinarily disingenuous, misleading, factually erroneous, and made in bad faith. WP inexplicably fails to bring the following two internal WP emails to the Court's attention:

> "…**The decision to overload the site was a joint W-P and Dave Ford decision**…" April 23, 2009 email from Gary Smith of WP to Peter Atherton of WP, attached hereto as Exhibit A (emphasis added).

> "We cannot bring up 'spring' or 'loading site at 800,000 gpd' again as related to issue at hand. He [Dave Ford] knows and understands and is not pointing any fingers. Right or wrong, **W-P and the Town collectively decided to load what and when**." April 24, 2009 email from Peter Atherton of WP to Melissa Hamkins, Gary Smith, and Neil Cheseldine of WP, attached hereto as *Exhibit B* (emphasis added).

The above emails present clear, unmistakable, and undisputable evidence (taken from WP's own internal email communications) which directly refutes WP's current position. Aside from WP's disingenuous allegations, the "joint decision" between Wolfeboro and WP to load the RIB at a daily rate above the permitted daily average is immaterial because the Site is permitted for an "average" of 600,000 gallons per day (gpd), meaning that on some days the Site could be loaded above 600,000 gpd and some days the flow will be under 600,000 gpd. WP had represented to Wolfeboro (and to NHDES) that it's model showed that the RIB Site had the capacity to dispose of 600,000 gpd when the model was run at a steady state (that is twenty four hours per day/three hundred and sixty five days per year). WP further represented that its model showed that the RIB Site could dispose of 18,000,000 million gallons in a thirty day period (219,000,000 gallons per year). On April 20, 2009, the day on which failures at the RIB Site were first observed, Wolfeboro had discharged a total of 23,677,750 gallons to the Site, for a daily average of 493,286 gpd, clearly well below WP's represented average daily capacity for the

Site[2]. The evidence shows multiple emails between the parties during the initial start up of the RIB system, with Wolfeboro keeping WP fully appraised of its plans and seeking WP's advice and assistance during the start-up period. Everyone involved in the project was aware that Wolfeboro's initial proposed discharge to the RIB Site was based upon a monthly average flow of 600,000 gpd. This fact is confirmed by an internal email that WP once again fails to bring to this Court's attention: "My take was this was average monthly flow on an annual basis in that individual monthly averages would be calc'd as total gallons sent per month divided by days of month....and that some months of the year would be greater than 600k…"). See February 17, 2009 email from Peter Atherton to Melissa Hamkins, attached hereto as *Exhibit C.* This email also lays waste to WP's current representation to this Court that the 600,000 gpd design capacity was in some way the maximum daily flow which could be discharged to the RIB Site. In presenting this current version of events, WP conveniently omits that as part of the RIB system, WP designed a force main and pump to convey the treated effluent from the storage pond to the RIB Site. The force main and pumps designed by WP have a capacity of over 2,000,000 gpd; clearly, far greater than the 600,000 gpd which WP is now alleging is the maximum daily flow capacity of the RIB Site. The true history of the design and start-up of the RIB system, as will be shown as trial, includes no warning by WP to Wolfeboro that the RIB Site could only dispose of a maximum of 600,000 gpd. Indeed, it is clear from WP's February 17, 2009 email (noted above) that despite the wealth of evidence in its possession at the time, WP anticipated that Wolfeboro would run the RIB system at a daily flow above 600,000 gpd, provided that the

[2] WP's assertion that Wolfeboro discharged "up to 2,020,000 gpd until breakout" is more than simply incorrect, it is intentionally misleading. What WP fails to bring to this Court's attention is that WP was actually on Site on the days it is referencing, performing start-up tests of the RIB System. With WP's knowledge, flow was discharged to the RIB system at 2,020,000 for a short period of time. As WP is aware, at no time was 2,020,000 gpd discharged to the RIB Site for an entire 24 hour period. Rather, again as WP is fully aware, on April 3, 2009, the actual daily flow to the RIB system was 322,250 gpd not the 2,020,000 gpd as alleged by WP. Once again, the only conclusion to be drawn from WP's Opposition is that it is intentionally seeking to mislead this Court.

monthly average flow to the RIB Site was below the average daily design allowance.

C. WP's Position That the Model Was Recalibrated Due to A Survey Error Actually Supports Wolfeboro's Fraudulent Misrepresentation Claims.

WP's objection states that "in early February 2007, the model was not working correctly due to a survey error that Wright-Pierce discovered on or about February 7, 2007." See Objection at Pages 8-11. This fact actually supports Wolfeboro's fraudulent misrepresentation claims because WP sent internal emails the same day stating that the model results were not ready, but then sent Wolfeboro an email the next day stating the model results *"indicate that the site can take up to 600,000 gpd."* See Amended Complaint at ¶ 99-101. WP's misrepresentations in February of 2007 that the model results *"indicate that the site can take up to 600,000 gpd,"* and *"continue to look pretty good"* and *"still looks good in terms of site capacity accommodating future annual average design flow"* were all during the time period where WP now admits that the model contained at least one "error," was incomplete, and was being "corrected." Id. WP's decision to highlight in its Objection the fact that it was aware that the model was "not working correctly due to a survey error" and that it was attempting to "correct" and "recalibrate" the model during the time period when WP was making numerous representations to Wolfeboro that the model was complete and yielding acceptable results is simply puzzling and does not provide a basis to deny the motion to amend.

C. Wolfeboro's New Claims Are Not Futile and Are Factually Supported

In assessing whether an amended complaint is "futile," the Court applies the 12(b)(6) motion to dismiss standard: whether the complaint "contains sufficient factual matter accepted as true to state a claim to relief that is plausible on its face." *See Adorno v. Crowley Towing & Transp. Co.*, 443 F.3d 122, 126 (1st Cir. 2006); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility standard is a two-step analysis: (1) "the court must separate the complaint's factual

allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)," *Morales-Cruz v. Univ. of P. R.*, 676 F.3d 220, 224 (1st Cir. 2012), and (2) the court must determine if the factual content permits "the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see Sepúlveda-Villarini v. Dep't of Educ. of P. R.*, 628 F.3d 25, 29 (1st Cir. 2010) ("The make-or-break standard...is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief").

A. Fraud is Pled with Particularity

WP alleges that the fraud and fraudulent misrepresentation counts (only two of the four new counts) are not plead with sufficient particularity. It is well established that Rule 9 requires specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred. *See McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980) (noting the purpose of Rule 9 is to provide adequate notice of plaintiff's fraud or fraudulent misrepresentation claims). Wolfeboro's fraud and fraudulent misrepresentation claims meet this requirement because Wolfeboro identifies the specific emails that include the misstatements of material fact which form the basis for the fraud and fraudulent misrepresentation claims. WP's objection attempts to impose an even higher standard beyond Rule 9's notice requirements: suggesting that Wolfeboro needs to actually cite specific evidence that Mr. Schwalbaum's manipulated the model. WP's position is simply beyond the pleading standards of Rule 9.

Notably, WP fails to inform the court that it also represents Mr. Schwalbaum in this litigation pursuant to a joint defense agreement with WP, and that it has failed to respond to a deposition subpoena duces tecum served upon Mr. Schwalbaum on February 20, 2013. Despite the undersigned counsel's numerous requests to WP to produced Mr. Schwalbaum's documents,

WP's counsel has produced nothing. Mr. Schwalbaum's documents are critical to the case because they will include the electronic versions of the computer model and all relevant documents concerning the input data. Wolfeboro and its experts anticipate that these documents will confirm Mr. Schwalbaum's attempt to manipulate the model to yield acceptable results. Wolfeboro cannot fully articulate the precise nature in which Mr. Schwalbaum perpetrated the fraudulent scheme that he suggested to WP (the "when, where, and how" he manipulated the model) until its experts are able to analyze Mr. Schwalbaum's documents. Notwithstanding this necessary discovery, the Amended Complaint pleads fraud and fraudulent misrepresentation with sufficient particularity as follows: (1) Mr. Schwalbaum suggested to WP that he was ready, willing, and able to manipulate the model to yield acceptable results, (2) before the model was finished, WP represented to Wolfeboro in a series of emails that the results looked good, (3) WP knew that the model contained errors, was not finished, and did not accurately model the Site, (4) the RIB Site failed after startup and has never and will never achieve WP's represented design capacity, (5) and WP has not presented Wolfeboro with a "fix" for the Site despite numerous representations that it could do so. All of these facts, as specifically articulated in the proposed Amended Complaint, state a plausible claim for fraud and fraudulent misrepresentation and meet the pleading requirements by identifying the time, place, and content of the material misstatements of fact which form the basis for such claims.

B. Reliance

WP's Objection alleges that Wolfeboro will not be able to show reliance for its fraud and fraudulent misrepresentation counts because "Wolfeboro overloaded the RIBs." *See Objection* at Page 18. As discussed above, WP's counsel misrepresents to this Court that it was Wolfeboro's decision to "overload" the Site when in fact the record clearly establishes that flows discharged

to the RIB Site during the first days of operation were the results of a joint decision by Wolfeboro and WP. Clearly, WP's argument is baseless and should be given no weight. *See Exhibit A and B* attached hereto. Further, Wolfeboro expressly relied on statements made by WP in response to comments from a third party engineer questioning WP's methods and findings. *See Exhibits D and E*. The newly discovered evidence starkly reveals that these statements were both fraudulent and WP's conduct, in the face of the evidence WP had before it, grossly negligent and a flagrant violation of RSA 358-A.

C. Wolfeboro's 358-A and Gross Negligence Claims Are Not Futile

Although RSA 358-A does not provide a remedy for an "ordinary breach of contract claim," *Beer v. Bennett*, 160 N.H. 166, 171, this case is not an ordinary breach of contract claim. As previously articulated, this is a darker case of breach of contract, breach of warranty and professional negligence coupled with intentional data manipulation, fraudulent misrepresentation and active malfeasance predicated upon fraud. Accepting Wolfeboro's factual allegations as true, Wolfeboro clearly states a claim for unfair and deceptive conduct that "would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Hair Excitement v. L'Oreal U.S.A.*, 158 N.H. 363, 370 (2009); *see Milford Lumber v. RCB Realty*, 147 N.H. 15, 19 (finding intentionally vague representation used to deceive defendant to be the type of "unethical and unscrupulous activity" that is harmful to commerce in New Hampshire).

Finally, Wolfeboro's gross negligence claim is not futile. The facts, as plead, clearly demonstrate that even if WP did not fraudulently misrepresent the model results, its representations to Wolfeboro that the model results "*continue to look pretty good*" and "*still looks good in terms of site capacity accommodating future annual average design flow*" absent any evidence to support such statements certainly rises to the level of gross professional

negligence.

WHEREFORE, Wolfeboro respectfully requests that the Court grant its Motion to File an Amended Verified Complaint.

Respectfully submitted,

The Town of Wolfeboro,

By its attorneys,

/s/ Seth M. Pasakarnis

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Date: June 12, 2013

CERTIFICATE OF SERVICE

I, Seth M. Pasakarnis, Esq., hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: June 12, 2013

/s/ Seth M. Pasakarnis
Seth M. Pasakarnis