

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

**WRIGHT-PIERCE’S OBJECTIONS TO
WOLFEBORO’S PROPOSED TRIAL EXHIBITS**

NOW COMES the defendant, Wright-Pierce (“Wright-Pierce”), by and through counsel, Donovan Hatem LLP, and hereby submits the following Objections to the Town of Wolfeboro’s (“Town”) Proposed Trial Exhibits:

A. Plaintiff’s Exhibits 1(ID), 4(ID), 6(ID), 7(ID), 12(ID) & 13(ID): NHDES Correspondence

1. Background.

In 2007, Wright-Pierce designed a rapid infiltration basin system (“System”) to handle the Town’s wastewater effluent. The System was substantially completed and put into operation by the Town in March 2009. Approximately six weeks after the rapid infiltration basins (“RIBS”) were put into operation, the site upon which they are constructed experienced some erosion issues, including a sinkhole and sand piping. The Town subsequently initiated the instant litigation against Wright-Pierce.

In August of 2013, the parties requested an opportunity to meet with NH DES to discuss the remediability of the RIB site and whether a remediation plan could be permitted. The NH DES agreed to the meeting, on the following conditions: (1) that since the discussion was within the context of settlement of the contested issues it would therefore be confidential; and, (2) that

NH DES would not comment on the permitability of the site, but would provide advice as to what issues must be addressed satisfactorily in order to obtain a permit. The parties met with NH DES on October 7, 2013, and subsequently exchanged numerous items of correspondence further discussing Wright-Pierce's proposed remediation plan and the NH DES' opinion on the permitability of the plan.

During this same general timeframe, Wright-Pierce noticed the deposition of Mitchell Locker, an employee of NH DES, to testify to the following topic: "[t]he Town of Wolfeboro, New Hampshire's Waste Water Treatment Facility." Upon receipt of the deposition subpoena, the NH DES moved to quash the Subpoena. See Docket No. 58. In its motion to quash, the NH DES argued, in part, that Mr. Locker's opinions regarding the site and its continued viability is expert testimony and he should not be compelled to provide such testimony. Id. A hearing was conducted on December 11, 2013 before the Honorable Landya B. McCafferty. See Docket No. 61. Following the hearing, Judge McCafferty ordered that the deposition was limited to ninety (90) minutes to be divided by the parties, and that Mr. Locker was to be deposed only as a fact witness and not as an expert witness. Id.

Thereafter, in its Pretrial Statement filed on March 18, 2014, the Town identified Mr. Locker and several other employees of NH DES as potential witnesses. See Docket No. 8. Wright-Pierce filed an objection to the Town's Pretrial Statement, objecting to the Town calling employees of NH DES to testify at trial as expert witnesses. See Docket No. 116. At the April 3, 2014 Pretrial Conference, the Court ordered that NH DES employees may testify only as fact witnesses and may not provide expert opinions. See Docket No. 144. The Court further ordered the Town to file "bullet proffers" of the testimony to be given by each NH DES witness, with the citations to specific documents, if appropriate, for each proffer. Id. On April 9, 2014, the Town

filed its “bullet proffers.” See Docket No. 146. Much of the proffered testimony are quotations taken from correspondence between the NH DES employees the Town intends to call as witnesses and counsel for the parties regarding NH DES’s opinion on the current condition of the site and whether it can be remediated and permitted. Wright-Pierce filed objections to the proffered testimony on April 11, 2014. The Court has yet to rule on the proffered testimony.

2. The Proposed Trial Exhibits Are Confidential.

Many of the proposed exhibits are correspondence exchanged between the NH DES and counsel for the parties following the October 2013 meeting with NH DES and the parties, memorializing the discussion at the meeting and continuing the discussion. Prior to meeting the NH DES, the Town accepted the NH DES’s condition that the discussions were designed to assist the parties in settling the case and would remain confidential. The Town now seeks to breach that agreement by introducing these confidential communications. The Town should not be permitted to do so and, accordingly, these exhibits should be precluded from trial.

3. The Proposed Trial Exhibits Contain Inadmissible Hearsay.

Many of the proposed exhibits contain summaries of discussions held at NH DES meetings, and not direct statements of any single declarant. Accordingly, these exhibits contain several layers of inadmissible hearsay, each of which cannot be cured by any of the hearsay exceptions.

4. The Proposed Trial Exhibits Contain Expert Testimony Which the Court Has Ruled Is Not Admissible.

These proposed trial exhibits are not admissible because they contain inadmissible opinions of lay witnesses from NH DES. The Town is attempting to impermissibly admit inadmissible expert opinion testimony into evidence through fact witnesses. The Town has not disclosed anyone from NH DES as an expert witness. In fact, the Town conceded at the April 3,

2014 Final Pretrial Conference that the NH DES witnesses are fact witnesses. The Town contends, unconvincingly, that its proposed exhibits will elicit fact testimony.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determine a fact in issue; and, (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Federal Rule of Evidence 702 (2000). The intent of Rule 702 is to prevent the Town from doing exactly what it is trying to do here- to "proffer[] an expert in lay witness clothing." *Id.* at Advisory Committee Notes, fn. 1 (2000). A witness's testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. See Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995). Rule 702 ensures that a party will not evade the expert witness disclosures requirements set forth in Fed. R. Civ. P. 26 by simply calling an expert witness in the guise of a lay person. Federal Rule of Evidence 702, at Advisory Committee Notes, fn. 1 (2000).

In the instant matter, the Town seeks to introduce exhibits through representatives of NH DES in support of its claim that the Town cannot obtain a permit to remediate the site and therefore the site is a total loss and must be abandoned. Whether the site is permissible is "based on scientific, technical, or other specialized knowledge," and is therefore an inadmissible lay opinion under Rule 702. The NH DES has stated that the continued viability of the site is a matter of expert opinion that NH DES witnesses should not be compelled to provide. See Docket No. 58. The Town has twice been told, by Orders of the Court dated December 11, 2013 and April 4, 2014, that it cannot elicit expert opinions from NH DES witnesses. See Docket Nos.

61 and 144. Nevertheless, the Town willfully ignores both Orders and seeks to introduce correspondence authored by representatives of NH DES which contain expert opinions. Though the Town may argue the information contained within the documents are facts, it is clearly expert opinion which the Court has already deemed inadmissible at trial.

B. Plaintiff's Exhibits 2(ID) & 3(ID): Fuss and O'Neill Letters dated 2/14/14 and 4/1/14

Wright-Pierce objects to Plaintiff's Exhibits 2(ID) and 3(ID) on the grounds that they contain inadmissible hearsay. *See* Federal Rule of Evidence 801, et seq. These two exhibits are supplemental reports of the Plaintiff's expert, Fuss and O'Neill ("F&O"). Expert reports are hearsay and are not admissible absent agreement of the parties.

Wright-Pierce further objects to Plaintiff's 2(ID) and 3(ID) on the grounds that they were produced after the deadline for supplementation of expert reports had passed. By order of the Court, the Plaintiff's supplemental expert reports were to be produced no later than February 8, 2013. Plaintiff's 2(ID) and 3(ID) expressly state that they are supplemental expert reports. Plaintiff's 2(ID) and 3(ID) are dated February, 14, 2014 and April 1, 2014, respectfully, and were prepared, and produced, more than a year beyond the supplemental disclosure deadline. The Town did not disclose their intent to rely on these reports at trial until it provided Wright-Pierce with its proposed list of exhibits on or about April 4, 2014. This despite the fact that Wright-Pierce asked counsel for Town, upon receipt of the February 2014 report on February 16, 2014, whether it intended to rely on the report at trial. Plaintiff's counsel ignored the inquiry. Now, one week before trial, the Plaintiff attempts to introduce these reports at trial. Even after taking the position that late reports are not admissible. In one of its motions *in limine*, the Town objected to Wright-Pierce's experts relying on reports produced after the February 2013 deadline. Then, in scrutinizing Wright-Pierce's proposed exhibits, the Town objected to expert

reports prepared by Wright-Pierce's expert. Wright-Pierce removed the reports from their list. The Town did not. The Town now takes the opposite approach, arguing that late reports are admissible. Though the Court had ruled that F&O may testify to the opinions set forth in these reports, it made no decision with respect to the admissibility of the actual reports. Accordingly, because the reports contain hearsay they should be precluded from trial.

Should the Court deem these reports admissible at trial, Wright-Pierce should be permitted to rebut them with reports prepared by its expert, Haley & Aldrich, Inc. ("H&A") in response to these F&O reports (dated March 13, 2014 and April 13, 2014), and for H&A to testify to the opinions contained in these reports.

C. Plaintiff's Exhibit 5(ID): Wolfeboro's Supplemental Answers to Interrogatories and attachments

Wright-Pierce objects to Plaintiff's Exhibit 5(ID) on the grounds that it contains inadmissible hearsay (Federal Rule of Evidence 801, et seq.), inadmissible opinions of lay witnesses (Federal Rule of Evidence 701), irrelevant information (Federal Rules of Evidence 401 and 402), and confusing or misleading information (Federal Rule of Evidence 403). The Town intends to introduce this document through a lay person, David Ford, in attempting to establish its damages. In doing so, the Town is attempting to introduce expert damages testimony through the guise of a lay person. Much of the information that the Town seeks to introduce in Plaintiff's 5(ID) involve scientific, technical and specialized information, which is subject to qualification under Federal Rule of Evidence 702. Here, however, the Town does not seek to introduce this information through an expert. Instead, the Town seeks to circumvent the requirements of Federal Rule of Evidence 702, which ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 by simply calling an expert witness in the guise of a lay person. Federal Rule of Evidence 702, at Advisory Committee Notes, fn. 1 (2000).

Wright-Pierce also objects to Plaintiff's 5(ID) on the grounds that it contains erroneous data, miscalculations, improper estimations, and speculative conclusions of damage, including but not limited to: (1) the Purchase Order Amounts and Total Amount Paid for several line items do not match up; (2) the Town seeks full compensation for the cost of the land and the facility without any reduction for present value; (3) there is no explanation for how loan interest is calculated; and, (4) the Town did not discount its alleged future economic damages to net present value. Based on these failures alone, Plaintiff's 5(ID) should be excluded from evidence.

D. Plaintiff's Exhibits 8(ID), 9(ID), 10(ID), & 11(ID): Federal & State Scientific Materials

Wright-Pierce objects to Plaintiff's 8(ID), 9(ID), 10(ID) and 11(ID) on the grounds that they are immaterial, contain inadmissible hearsay (Federal Rule of Evidence 801, et seq.) and inadmissible opinion of lay witnesses (Federal Rule of Evidence 701), irrelevant information (Federal Rule of Evidence 401 and 402), and is confusing or misleading information (Federal Rule of Evidence 403). Plaintiff's 8(ID) appears to be an Environmental Protection Agency article concerning an unrelated rapid-infiltration project, that contains inadmissible opinion that is scientific, technical and/or specialized that is subject to Federal Rule of Evidence 702. Moreover, Plaintiff's 8(ID), 9(ID) and 10(ID) contain immaterial, misleading, and speculative information from a federal agency, similar to NH DES, that may lead to confuse the jurors. Plaintiff's 11(ID) is a similar scientific document containing inadmissible opinions and conclusions from the NHDES. As such, Plaintiff's 8(ID), 9(ID), 10(ID) and 11(ID) should be excluded. Wright-Pierce also objects to Plaintiff's 9(ID), 10(ID) and 11(ID) on foundation and authentication grounds.

Moreover, Plaintiff's 9(ID) and 10(ID) appear to be out-dated land treatment manuals that also contain inadmissible opinion that is scientific, technical and/or specialized. Wright-

Pierce further objects to Plaintiff's 9(ID), 10(ID) and 11(ID) on the grounds that they are irrelevant, immaterial, and antiquated. Wright-Pierce also objects to Plaintiff's 9(ID), 10(ID) and 11(ID) on foundation and authentication grounds.

WHEREFORE, the defendant, Wright-Pierce, respectfully requests that this Honorable Court exclude the Town of Wolfeboro's proposed trial exhibits and preclude the Town from introducing evidence of its damages at trial.

Respectfully submitted,

WRIGHT PIERCE,

By its attorneys,

/s/ Kelly Martin Malone

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Dated: April 14, 2014

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.4(b), I hereby certify that this document filed through the ECF system on April 14, 2014 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/ Kelly Martin Malone

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