UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPHIRE

Town of Wolfeboro, Plaintiff, v. Wright-Pierce Defendant.	)	Case No. 12-cv-130-JD

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Wright-Pierce, by and through its attorneys, Sheehan Phinney Bass + Green PA, submits the following memorandum of law in support of its motion to dismiss for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(h)(3).

FACTUAL BACKGROUND

Wright-Pierce is a civil engineering firm that was founded by Frank V. Wright, Jr. and William B. Pierce in 1947 in Topsham, Maine. Affidavit of William E. Brown ("Brown Aff."), attached hereto as **Exhibit A**, at ¶5. The company decided in the late 1990s to expand beyond Maine. Id. at ¶6. Wright-Pierce later opened a series of offices throughout New England, specifically: Rochester, New Hampshire in 1999 (relocating that office to Portsmouth, New Hampshire in 2001); Middletown, Connecticut (2000); Portland, Maine (2001); Andover, Massachusetts (2004); Providence, Rhode Island (2007); and Manchester, New Hampshire (2013). Id.

In 2002, Bill Brown was named Wright-Pierce's new CEO, President, and Chairman of the Board. Id. at ¶7. At that time, Wright-Pierce had made insufficient progress toward the goal of becoming a regional, rather than a Maine-based, firm. Affidavit of John R. Nelson ("Nelson

Aff."), attached hereto as **Exhibit B**, at ¶5. Brown believed that, in order to successfully grow the company, Wright-Pierce needed to do more than simply open offices throughout New England and, as such, he led the effort to shift the company's corporate resources and decision-making south. Brown Aff. (Ex. A) at ¶7. In 2007, Brown relocated from Wright-Pierce's Topsham office to its Portsmouth office. Id. at ¶4. This move enabled him to run the company from essentially the geographic center of its business, putting him physically closer to its offices throughout the region, as well as to its clients. Id. at ¶9. Working from Portsmouth rather than Topsham was symbolic to both employees and clients of Brown's commitment to transform the company to a New England firm. Id.; Nelson Aff. (Ex. B) at ¶10. His relocation to Portsmouth proved to be a significant advantage in running Wright-Pierce. Id.

In the four years following Brown's relocation to Portsmouth, Wright-Pierce's corporate leadership migrated from Topsham to Portsmouth. Brown Aff. (Ex. A) at ¶10. By April 2012, the company's CEO, President, and Chairman of the Board (Brown); its Director of Marketing (Daphna Anderson); its Director of Human Resources (Denyse Anderson until her retirement in May 2012; Connie Taggart thereafter); and one of its Vice-President/ Directors (who is also a Practice Group Leader) (Richard Davee) were all located in the Portsmouth office. Id. at ¶¶4, 14; Affidavit of Daphna Anderson ("Daphna Anderson Aff."), attached hereto as **Exhibit C**, at ¶3; Affidavit of Denyse M. Anderson ("Denyse Anderson Aff."), attached hereto as **Exhibit D**, at ¶3; Affidavit of Connie Taggart ("Taggart Aff."), attached hereto as **Exhibit E**, at ¶2; Affidavit of Richard N. Davee ("Davee Aff."), attached hereto as **Exhibit F**, at ¶3. Of the seven remaining members of the company's management team, four were located in Topsham, two in Portland, and one in Connecticut. Brown Aff. (Ex. A) at ¶15. All reported to Brown in Portsmouth. Id.

As Chairman, Brown led Wright-Pierce's Board meetings, with the Directors giving great deference to him. Id. at ¶30; Davee Aff. (Ex. F) at ¶¶4-5; Nelson Aff. (Ex. B) at ¶6. Specifically, as explained by Davee, "I cannot recall a single recommendation pursued by Mr. Brown that was not approved by our Board. This is not to say we did not ask questions or that some did not present counter-arguments. But at the end of the day, when Bill Brown wanted something and explained to the Board how it was good for Wright-Pierce, we always approved what he recommended. We have consistently given him a great deal of deference and with Wright-Pierce's success under Bill's leadership that deference increased over time and was certainly the case in 2012 and the years leading up to it. So while a lot of decisions made involved Board approval, it is fair to say that Bill Brown 'called the shots'." Davee Aff. (Ex. F) at ¶5; see also Nelson Aff. (Ex. B) at ¶6 ("To my observation, although Board votes were taken and in some times technically required for certain actions, Mr. Brown always drove the agenda and developed Board consensus on key strategic and business initiatives."); Brown Aff. (Ex. A) at ¶39 ("[T]he Board has allowed me great latitude in running Wright-Pierce."). Although the company conducted its Board meetings, which take place roughly monthly, almost exclusively in Topsham through the end of 2010, that practice changed significantly starting in 2011. Nelson Aff. (Ex. B) at ¶14. Specifically, other than one meeting in 2011 and one in 2012, the company's Board meetings have been conducted in Portland since the beginning of 2011. Id. Similarly, although Brown led Shareholders' meetings from Topsham through 2009, he chaired them by video from Portsmouth in 2010, 2011, and 2012, including on April 2, 2012, the same day this lawsuit was filed. Id.; Brown Aff. (Ex. A) at ¶31.

By April 2012, from his office in Portsmouth, Brown was managing and/or directing the following decisions, objectives, and policies for Wright-Pierce: substantially all hiring, firing,

and compensation decisions, as well as other Human Resources and recruitment functions; all major business decisions, including budget decisions; all strategic business development and marketing decisions, objectives, and policies; all employee communications; and all employee and management incentive programs. Brown Aff. (Ex. A) at ¶¶16, 18; Nelson Aff. (Ex. B) at ¶12; Daphna Anderson Aff. (Ex. C) at ¶5; Denyse Anderson Aff. (Ex. D) at ¶¶4-7; Taggart Aff. (Ex. E) at ¶¶4-8. Among many other things, by 2012, Brown was responsible for setting, and did set, Wright-Pierce's long-range goals, strategies, plans, and policies. Of paramount importance are the six core principles of Wright-Pierce's business philosophy, which Brown established and used as the "bedrock" foundation of the company's business philosophy, and which, in April 2012, drove all aspects of the company's functions and policies. Brown Aff. (Ex. A) at ¶¶17, 18. These six principles are (1) Client Focus/Client Satisfaction, (2) Quality Work/Culture of Excellence, (3) Managing for Financial Success, (4) Staff Development/Growth, (5) Sustainable Revenue/Business Development, and (6) Balance/Employee Satisfaction. Id. at ¶18. These principles have informed and guided all aspects of Brown's leadership of Wright-Pierce from Portsmouth, including in April 2012. Id. at ¶¶16-18.

In April 2012, from Portsmouth, Brown managed and directed all important functions and policies of Wright-Pierce. Nelson Aff. (Ex. B) at ¶12. This included extensive efforts to promote a client-focused culture at the company, including directing the use of a client satisfaction survey he had developed, and conducting in-person client interviews, which provided him with valuable information to inform his decision-making for the company. Brown Aff. (Ex. A) at ¶18(a). Brown developed quality control and project execution policies, a system of standards, and a collaboration policy. Id. at ¶18(b). He approved all major financial decisions; established goals and targets; set approaches to pricing, monitored project budgets,

chargeable ratios, workload forecasts, and accounts receivable; and directed and guided Practice Group Leaders. Id. at ¶18(c). Brown played a central role in Human Resources, recruiting, and retention functions, including the approval of all hiring and termination decisions, providing direction and monitoring of recruitment strategies, and central involvement in salary and benefit decisions. Id. at ¶¶18(f); 25-26, 28; Taggart Aff. (Ex. E) at ¶¶4-8; see also Denyse Anderson Aff. (Ex. D) at ¶4 ("[N]o new hires or terminations of employees occurred without Bill Brown's approval. The same was true with changes in compensation…."). Further, Brown directed and controlled the company's business development and marketing functions by approving branding and public relations strategies; establishing and approving content; directing the setting of targets, initiatives, and proposals; and exercising the final decision making role with regard to the pursuit of individual projects. Brown Aff. (Ex. A) at ¶¶22, 23; see also Daphna Anderson Aff. (Ex. C) at ¶5 ("I take direction and advice from Mr. Brown on how best to achieve Wright-Pierce's marketing and business development objectives. Since I began in 2007, those objectives have been set by Mr. Brown."). Brown also controlled and managed the Shareholder nomination process, directed and implemented the strategic planning process, and managed succession planning initiatives. Brown Aff. (Ex. A) at ¶¶33, 34, 36, 37.

In sum, as Brown describes it, "Under my leadership, Wright-Pierce has achieved most of its business objectives. These objectives have typically been defined by me and recommended to the Board. While I have sought and obtained Board approval, the Board has allowed me great latitude in running Wright-Pierce. I have set and defined the agenda for Wright-Pierce. And since 2007, I have run Wright-Pierce from Portsmouth." Id. at ¶39. Nelson, the company's CFO, concurs, explaining, "From Portsmouth, [Brown] has established, reaffirmed and led Wright-Pierce in active pursuit of the core business policies and objectives first identified by him

in 2002 as well as the specific business objectives identified by him from year to year as our business and the market have evolved. … Ultimately, and primarily from Portsmouth, Mr. Brown has successfully executed Wright-Pierce's longstanding business plan/policy to establish Wright-Pierce as a New England-wide firm that is driven by the six core business principles first outlined by him in 2002 and on many occasions since his move to Portsmouth." Nelson Aff. (Ex. B) at ¶13.

ARGUMENT

Plaintiff's Complaint, which was filed on April 2, 2012, invoked this Court's subject matter jurisdiction relying exclusively on an assertion of diversity of citizenship. Complaint (Doc. No. 1) at ¶3. Plaintiff, which is unquestionably a citizen of New Hampshire, contends that diversity exists because Wright-Pierce is a Maine corporation with a principal place of business at Topsham, Maine. Id. at ¶2. A corporation, such as Wright-Pierce, is a citizen of both the state where it is incorporated and also the state "where it has its principal place of business…." 28 U.S.C. § 1332(c)(1). There is no dispute that Wright-Pierce is incorporated in Maine. However, in April 2012, when this lawsuit was filed, Wright-Pierce's principal place of business – its "nerve center" – was actually in Portsmouth, New Hampshire, and not in Topsham, Maine. As a result, both parties are citizens of New Hampshire and diversity of citizenship does not exist. Accordingly, this Court lacks subject matter jurisdiction and this case must be dismissed. See, e.g., DropFire, Inc. v. Carson, Civil Action No. 12-10281, 2013 WL 3457179 at *3 (D. Mass. July 8, 2013) (explaining that, when a company's principal place of business is in the same state as the opposing party's state of incorporation, diversity jurisdiction is lacking).

1. The Lack of Subject Matter Jurisdiction Cannot Be Waived and Motions to Dismiss Can Be Made At Any Time

Federal courts are courts of limited jurisdiction. This principle is hard, fast, and unyielding. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts … possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." (citations omitted)); Jackson-Platts v. Gen. Elec. Capital Corp., 727 F.3d 1127, 1134 (11th Cir. 2013) ("Federal courts are courts of limited jurisdiction, and therefore we are obliged to scrupulously confine our own jurisdiction to the precise limits which the statute has defined." (quotation marks, brackets, and citations omitted)). As the First Circuit has explained, "litigants cannot confer subject-matter jurisdiction, otherwise lacking, by indolence, oversight, acquiescence, or consent. Moreover, federal courts have an omnipresent duty to take notice of jurisdictional defects, on their own initiative if necessary." Whitfield v. Municipality Of Fajardo, 564 F.3d 40, 44 (1st Cir. 2009) (quotation marks and citations omitted).

a. The Lack of Diversity Jurisdiction Can Be Raised at Any Time

The defense of lack of diversity jurisdiction is not waivable and can be raised at any stage of a case, including following a jury verdict, on appeal, or even by the appellate court or the Supreme Court *sua sponte*. See Driessen v. United States, 13-323C, 2014 WL 1668829, at *4 (Fed. Cl. Apr. 25, 2014) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." (quotation marks omitted) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006))). The First Circuit reaffirmed the principle that subject matter jurisdiction is an issue that can be raised at any stage of a proceeding as recently as last week. See CE Design Ltd. v. Am. Econ. Ins. Co., 13-1080, 2014 WL 2781818, ___ F.3d ___, at *2 (1st Cir. June 19, 2014). The lack of diversity jurisdiction may even be raised by a losing plaintiff who invoked the Court's jurisdiction in the first place. See, e.g., Bissell v. Breakers By-

The-Sea, 7 F. Supp. 2d 60 (D. Me. 1998). The waste of judicial resources is simply not a factor, with the First Circuit explaining that "the interests of judicial economy and minimizing litigation costs…, important as they are, [do] not override those discussed above [regarding the limited jurisdiction of the federal courts], [and] federal courts are not at liberty to overlook limitations on their subject matter jurisdiction." Francis v. Goodman, 81 F.3d 5, 8 (1st Cir. 1996). Without subject matter jurisdiction, this Court has no power to hear or decide this case. This is because "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. 506, 514 (1868).

It has been settled law for over a century that a court examining its own subject matter jurisdiction should ignore the potential waste of judicial resources. In 1884, considering a case that had resulted in a plaintiff's verdict after removal to federal court, the Supreme Court found on appeal that subject matter jurisdiction was lacking and, as a result, it was "constrained to reverse the judgment …." Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 381 (1884). The Court explained:

> It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it, and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

Id. at 382.

This motion is brought pursuant to Federal Rule of Civil Procedure 12(h)(3), which provides, "[i]f the court determines ***at any time*** that it lacks subject-matter jurisdiction, the court

must dismiss the action." (emphasis supplied). Courts universally hold that they must dismiss cases over which they lack subject matter jurisdiction even when those cases have proceeded to very advanced stages. For example, in Díaz-Rodríguez v. Pep Boys Corp., 410 F.3d 56 (1st Cir. 2005), the First Circuit was presented with a case appealed from a summary judgment order. The Court, *sua sponte*, raised for the first time the issue of whether the parties were diverse. Finding that they were not diverse, more than three years after the case had been initiated, the First Circuit ordered the matter to be remanded to state court for lack of subject matter jurisdiction. The Court noted that, although the issue had never been raised by the parties, "federal courts are courts of limited jurisdiction. Consequently, such courts must monitor their jurisdictional boundaries vigilantly. It follows that parties cannot confer subject matter jurisdiction on a federal court by acquiescence or oversight." Id. at 62 (quotation marks and citations omitted). Dismissal is required even when a case has proceeded to the terminal stages of litigation such as trial or appeal. Thus, in a case in which the lack of diversity was not raised until after roughly three years of discovery, pretrial motions, and a jury trial, the Supreme Court explained "the established principle … that a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct. A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 576 (2004) (quotation marks and citations omitted).

b. The Absence of Diversity Jurisdiction is Not Waived by Wright-Pierce's Answer

It is true that Wright-Pierce's Answer admitted subject matter jurisdiction as alleged in paragraph 2 of the Complaint, but that admission is of no moment. See Sebelius v. Auburn Reg'l Med. Ctr., ___ U.S. ___, 133 S. Ct. 817, 824 (2013) ("Objections to a tribunal's jurisdiction can

be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy."); see also Wells Real Estate, Inc. v. Greater Lowell Bd. Of Realtors, 850 F.2d 803, 813 (1st Cir. 1988) ("[T]he absence of subject matter jurisdiction can be raised at any time in the litigation, regardless of waiver or stipulation" (emphasis omitted)); Fitzgerald v. Seaboard System R.R., Inc., 647 F.Supp. 205, 206-07 (S.D. Ga. 1985) ("[N]o action of the parties [including, in that case, admitting in a pleading that the facts supported diversity jurisdiction] can be used to create federal jurisdiction where it does not exist"). In Eisler v. Stritzler, 535 F.2d 148, 150-51 (1st Cir. 1976), the defendant admitted diversity jurisdiction in his answer and did not file his Rule 12(h)(3) motion to dismiss until "six weeks after the order of default and almost four years after the action was instituted, [when] defendant for the first time challenged the existence of diversity jurisdiction." Nevertheless, the First Circuit held that the case must be dismissed if subject matter jurisdiction was indeed lacking, observing:

> Although it offends both fairness and judicial economy to allow a defendant, who best knows his own citizenship, to admit diversity jurisdiction in his answer, hamstring the process of litigation for several years by failing to cooperate during discovery, invite the imposition of a default order, and finally raise the absence of diversity jurisdiction after the default order was entered, we conclude that the district court was in error [when it denied the motion without considering the allegations]. The well established rule in the federal courts is that subject matter jurisdiction may be litigated at any time before the case is finally decided.

Id. at 151; see also Gonzalez v. Thaler, ___ U.S. ___, 132 S. Ct. 641, 648 (2012) ("Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety.").

Judge Hornby, in the District of Maine, confronted with this issue, dismissed a case on the plaintiffs' own motion for lack of subject matter jurisdiction when it became evident, after a

defendants' verdict, that the parties were not diverse. In doing so, he engaged in a lengthy analysis of why, despite his strong disagreement with the policy underlying the rule and his belief that fundamental fairness favored a denial of the motion to dismiss, he was obligated to dismiss:

> The plaintiffs … alleged in their Complaint … that the court therefore had jurisdiction by virtue of diversity of citizenship. ... The various defendants admitted their own [] citizenship and either admitted the plaintiffs' citizenship or claimed no knowledge. Thereafter, the parties engaged in full discovery about the merits of the lawsuit and vigorous motion practice that required judicial rulings. They conducted a hotly contested four day trial on the merits before a jury …. [T]he jury awarded the defendants a complete verdict. Although there was bitter post-trial motion practice followed by written judicial opinions, the defendants' verdict ultimately survived. The plaintiffs then appealed to the First Circuit Court of Appeals. Only then, while writing their briefs to upset the defendants' verdict, did the plaintiffs' lawyers discover that the plaintiffs actually did not live in St. Thomas after all. …
>
> If the plaintiffs' actual domicile … had been known at the outset, diversity jurisdiction could never have been claimed successfully. … But at this late date in the lawsuit the defendants complain bitterly that it is unfair to take away their winning verdict.
>
> Nevertheless, according to the First Circuit, "[t]he well established rule in the federal courts is that subject matter jurisdiction may be litigated at any time before the case is finally decided." *Eisler v. Stritzler*, 535 F.2d 148, 151 (1st Cir.1976).
>
> …
>
> [C]ourts in real life can deal only with assertions and admissions or denials of facts, not some elusive "ultimate" truth or reality, even for jurisdiction. If a fact is undisputed, a judge accepts it, and does not become an inquisitor to conduct his or her own investigation. It is easy to agree that parties should not be allowed to connive or collude to create federal jurisdiction. But when all participants proceed on good faith erroneous factual beliefs that affect jurisdiction and the *merits* of a dispute are decided …, it is absurd to say, after a full trial and jury verdict, that all has been pointless because the parties entered the wrong courthouse. ... Jurisdictional rules are gatekeeping rules. They should be easy to understand and sensibly enforced so that parties (the important participants in the justice system) can have a final

> decision without unnecessary expense. As one academic commentator has observed, the rule that I would have to apply here on remand "is morally wrong. It is unfair to the winning party.... Further, it is bad administration of justice; it is inefficient as well as unfair, and it quite properly raises grave public doubts about the judicial system." Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject–Matter Jurisdiction Before Final Judgment*, 51 Minn.L.Rev. 491, 492 (1967). But under the governing law, on remand I would grant the Rule 60(b) motion and dismiss the lawsuit without prejudice for lack of subject matter jurisdiction.

Bissell v. Breakers By-The-Sea, 7 F. Supp. 2d 60, 61-64 (D. Me. 1998) (emphasis in original).

While it may leave a sour taste to have to do so at this stage of the proceedings, with the compelling evidence showing that Wright-Pierce's actual "nerve center" is in Portsmouth, New Hampshire, this Court, like so many courts before it, has no choice but to dismiss.

2. Plaintiff Bears the Burden of Establishing Subject Matter Jurisdiction

Because "statutes conferring diversity jurisdiction are to be strictly construed", the Plaintiff bears the burden of persuasion to establish by a preponderance of the evidence that diversity of citizenship existed between it and Wright-Pierce in April 2012. Hawes v. Club Ecuestre El Comandante, 598 F.2d 698, 702 (1st Cir. 1979); Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc., 551 F.3d 587, 590 (7th Cir. 2008). Where the Court is required to "presume[] that [the] cause lies outside [its] limited jurisdiction …," Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), any doubts must be resolved in favor of a finding of no jurisdiction. See McGrath v. Home Depot USA, Inc., 14CV0071-GPC-JMA, 2014 WL 1404741, ___ F.R.D. ___, at *3 (S.D. Cal. Apr. 10, 2014) ("As federal courts have limited jurisdiction, they are presumed to lack jurisdiction unless the contrary is established. The removal statute is therefore strictly construed, and any doubt about the right of removal requires resolution in favor of remand." (citations omitted)); Univ. of S. Alabama v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) ("Indeed, all doubts about jurisdiction should be resolved in

favor of remand to state court. A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts." (citations omitted)).

3. In April 2012, Wright-Pierce's Principal Place of Business Was in Portsmouth, New Hampshire

a. A Corporation's Principal Place of Business Is Where Its "Nerve Center" Was Located at the Time Suit Was Filed

The Court's diversity analysis must focus on where Wright-Pierce's principal place of business was in April 2012, when the Complaint was originally filed. This is because "[c]itizenship is determined as of the date of commencement of an action and, therefore, in cases premised on diversity, jurisdiction depends upon the state of things at the time of the action brought." ConnectU LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) (quotation marks and citation omitted). It is undisputed that Plaintiff was a New Hampshire municipal corporation and that Wright-Pierce was incorporated in Maine. Because the law provides that, "if either the corporation's place of incorporation or principal place of business destroys diversity, then the courts will not have diversity jurisdiction", Sty-Lite Co. v. Eminent Sportswear Inc., 115 F. Supp. 2d 394, 398 (S.D.N.Y. 2000), Plaintiff's burden is to establish that Wright-Pierce's principal place of business was at a specific location in a state other than New Hampshire.

In 2010, the Supreme Court resolved a split among the Circuits as to how to determine the location of a corporation's principal place of business, concluding:

> "principal place of business" is best read as referring to the place ***where a corporation's officers direct, control, and coordinate the corporation's activities***. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its

> headquarters—provided that the headquarters is the actual center of direction, control, and coordination ….

Hertz Corp. v. Friend, 559 U.S. 77, 92-93 (2010) (emphasis supplied). In so doing, the Hertz Court adopted the "nerve center" test that had been previously applied by the Seventh Circuit, among other courts. Id. at 93. In applying the "nerve center" test, a court needs to "identify ***the place where overall corporate policy originates or the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objectives***." Jedrejcic v. Croatian Olympic Comm., 190 F.R.D. 60, 70 (E.D.N.Y. 1999) (emphasis supplied) (quotation marks and citations omitted).[1] Commentators have labeled the Hertz "nerve center" test as directing courts to use a clear and inflexible rule, rather than the more flexible standards permitted under the other tests the Court rejected. *Leading Cases – Diversity Jurisdiction: Corporate Citizenship*, 124 HARV. L. REV. 309, 315-16 (2010) ("The tradeoff here is clear: rules sacrifice the promise of absolute fairness for uniformity. … Locking in a set of discrete requirements effectively eliminates judicial discretion in the vast majority of cases in which it applies."). The Hertz Court made clear that a party's identification of its "principal" office on a form such as a Securities and Exchange Commission Form 10-K is not determinative in a federal court's analysis of the company's nerve center. 559 U.S. at 97 ("Such possibilities would readily permit jurisdictional manipulation, thereby subverting a major reason for the insertion of the 'principal place of business' language in the diversity statute.").

[1] The analyses of pre-Hertz courts that applied the nerve center test remain good law after Hertz. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § (3d ed.) ("Obviously, the Hertz decision rendered much of the discussion in the Main Volume [the pre-Hertz treatise] moot, at least with respect to the federal courts' decision of which test to use. However, the factors and processes by which the courts are to apply the 'nerve center' test remained unchanged.").

When applying the nerve center test, a court may not aggregate a corporation's activities at multiple locations within a single state to conclude that the principal place of business is in that state. Rather, the court must identify the specific location that is the corporation's nerve center. Once it has done so, the state in which that location is found will be the "State … where [the corporation] has its principal place of business…." 28 U.S.C. § 1332(c)(1). Thus, in this case, Wright-Pierce's Portland and Topsham, Maine, contacts cannot be aggregated in an effort to find that Wright-Pierce is a citizen of Maine. Rather, its Portland contacts are irrelevant, except to the extent that they serve to show that Topsham was no longer its principal place of business in April 2012. Courts must identify a single location *within* a state as the principal place of business, because "[a] corporation can have but a single principal place of business for the purposes of diversity jurisdiction[] (a corporation is a citizen of the State where it has its principal place of business)…." Caribbean Mushroom Co., Inc. v. Gov't Dev. Bank, 980 F. Supp. 620, 622 (D.P.R. 1997); see also Hertz, 559 U.S. at 93 ("[T]he [principal] 'place' is a place *within* a State. It is not the State itself." (emphasis in original)); id. at 95 ("The metaphor of a corporate 'brain,' while not precise, suggests a single location."); id. at 96 ("[O]ur test nonetheless points courts in a single direction, towards the center of overall direction, control, and coordination.").

b. Wright-Pierce's "Nerve Center" in April 2012 Was Portsmouth, New Hampshire

By April 2012, Wright-Pierce's "nerve center" was in Portsmouth, New Hampshire. Keeping in mind the differences between the two businesses (i.e., manufacturing versus consulting engineering), the facts concerning Wright-Pierce's nerve center bear many similarities to the nerve center facts recently found to be determinative by Judge Bartle in the Eastern District of Pennsylvania in Robertson-Armstrong v. Robinson Helicopter Co., Inc., CIV.A. 13-

2810, 2014 WL 1632182, ___ F.Supp.2d ___ (E.D. Pa. Apr. 22, 2014). In that case, the court was tasked with identifying the principal place of business of a corporation named Avco. There, as here, the corporation's active CEO, Ellen Lord, was central to the company's efforts in setting and implementing policies and activities. The court explained, "The record is replete with evidence that Lord, the president and CEO of Avco, who is located in Rhode Island, directed and controlled Avco's operations and finances even while she delegated some authority to other officers of the company. … Lord, in her position as head of Avco, directed and controlled the activities of that company. Accordingly, her location is the location of the 'nerve center.'" Id. at *7. Specifically, that court noted:

> All major decisions involving the business are made or approved [in Providence, Rhode Island]. From her office in Rhode Island Lord reviews and approves Lycoming's [Lycoming is Avco's operating unit at issue in the Robertson-Armstrong case] monthly financial reports and strategic plans, reviews and approves Lycoming's annual strategic assessments and objectives, and reviews and approves Lycoming's annual personnel plans. Lord prepares performance evaluations for high level employees of Lycoming, and interviews candidates for senior management positions at Lycoming. Her approval is expressly required for all cooperative business arrangements, all capital expenditures, any business operations restructuring, any acquisition or divestiture of business, all engagements of consultants, all appointments of sales agents and representatives, all press releases and communications, all collective bargaining agreements, and all reductions in force.

Id. at *6.

Similarly, in April 2012, from his office in Portsmouth, Bill Brown, the President and CEO of Wright-Pierce, directed and controlled Wright-Pierce's operations and finances, even while he delegated some authority to others at the company. Specifically, Brown ran Wright-Pierce using the six core principles of his business model. Brown Aff. (Ex. A) at ¶¶17-18. This included overseeing budget development, reviewing data concerning actual performance to budget, and, where necessary, directing implementation of corrective plans. Id. at ¶18(c); see

also Nelson Aff. (Ex. B) at ¶4 ("Regarding the budget process, in my judgment, it is one of the most important financial and planning functions performed by Wright-Pierce and Mr. Brown plays the key role in that process that he describes in his affidavit."). He was also the driving force behind strategic planning. Brown Aff. (Ex. A) at ¶¶34-36.

Brown also directed and controlled Wright-Pierce's human resources functions, reviewing and approving substantially all of the actions carried out by the Director of Human Resources, whose office was also located in Portsmouth. Brown Aff. (Ex. A) at ¶26; Denyse Anderson Aff. (Ex. D) at ¶4; Taggart Aff. (Ex. E) at ¶4. This included establishing performance criteria and conducting performance reviews of the management team. Brown Aff. (Ex. A) at ¶27; Denyse Anderson Aff. (Ex. D) at ¶5; Taggart Aff. (Ex. E) at ¶8. His approval was required for all hiring and firing decisions. Brown Aff. (Ex. A) at ¶26; Denyse Anderson Aff. (Ex. D) at ¶4; Taggart Aff. (Ex. E) at ¶4. He was actively involved with the approval and implementation of Wright-Pierce's recruitment strategies. Denyse Anderson Aff. (Ex. D) at ¶7. He established credentialing criteria for and interviewed potential new engineers. Id.; Taggart Aff. (Ex. E) at ¶5. He also was actively involved in compensation decisions and managed Wright-Pierce's profit sharing and incentive compensation programs. Brown Aff. (Ex. A) at ¶¶26, 28, 29; Nelson Aff. (Ex. B) at ¶12; Denyse Anderson Aff. (Ex. D) at ¶5; Taggart Aff. (Ex. E) at ¶8.

Brown also directed Wright-Pierce's marketing strategies and other business development initiatives, with final say on much of the important work carried out by the Director of Marketing, who was also based in Portsmouth. Brown Aff. (Ex. A) at ¶22; Daphna Anderson Aff. (Ex. C) at ¶3, 5. He monitored business development metrics and established and approved branding and public relations strategies and content for marketing materials. Brown Aff. (Ex. A) at ¶22. Brown had final approval on which projects to pursue and had substantial involvement

with efficiency assessment and workload assessments. Id. at ¶¶18(c), 23. He also drove Wright-Pierce's succession planning, both at the CEO level and throughout the upper levels of the company. Id. at ¶37.

While not an exhaustive list, as the affidavits submitted unambiguously depict, by April 2012, substantially all of Wright-Pierce's important business decisions were being made in Portsmouth, primarily by Bill Brown. See Nelson Aff. (Ex. B) at ¶6 ("First from Topsham, and after 2007, from Portsmouth, Mr. Brown has consistently and actively led, managed and driven both the Board and the company to achieve Wright-Pierce's business objectives, most of them defined by him."); id. at ¶12 ("By 2012, the following decisions critical to Wright-Pierce's business were being managed and/or directed by Mr. Brown from our Portsmouth office: … all major business decisions …."); Denyse Anderson Aff. (Ex. D) at ¶9 ("By the time I moved to Wright-Pierce's Portsmouth office in 2011 through the time of my retirement in May 2012, … substantially all of the major business decisions affecting Wright-Pierce were being made in Portsmouth."). Coupled with Wright-Pierce's strategic expansion from Maine to the entire New England region, Brown's relocation to Wright-Pierce's Portsmouth office shifted Wright-Pierce's nerve center to Portsmouth, the place where, in April 2012, he "direct[ed], control[led], and coordinate[d] the corporation's activities." See Hertz, 559 U.S. at 92-93.

CONCLUSION

For the reasons outlined herein, this case must be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

WRIGHT-PIERCE

By Its Attorneys

SHEEHAN PHINNEY BASS + GREEN PA

Dated: June 25, 2014

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CERTIFICATION

I hereby certify that on June 25, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Peter S. Cowan
Peter S. Cowan