

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPHIRE**

Town of Wolfeboro,)
)
 Plaintiff,)
)
 v.)
)
 Wright-Pierce)
)
 Defendant.)
 _____)

Case No. 12-cv-130-JD

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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

1. Wright-Pierce moves to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(h)(3), which commands: “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Diversity jurisdiction, which was the sole basis on which Plaintiff invoked subject matter jurisdiction, must be determined on the facts as they exist at the start of a case. There is no dispute that at one time Topsham, Maine was Wright-Pierce’s principal place of business. The evidence is equally clear, however, that by April 2012, Wright-Pierce’s “nerve center” had shifted to Portsmouth, New Hampshire. See Hertz v. Friend, 559 U.S. 77 (2010). Review of the accompanying affidavits makes that fact unmistakably clear. Application of the Hertz nerve center test shows that Wright-Pierce was a citizen of New Hampshire in April 2012. Accordingly, diversity jurisdiction did not exist, and this case must be dismissed.

2. The fact that Wright-Pierce admitted the facts supporting Plaintiff's claim of diversity jurisdiction in its answer does not rescue Wolfeboro's case from dismissal. Federal courts are courts of limited jurisdiction. This principle is hard and fast and unyielding. See Díaz-Rodríguez v. Pep Boys Corp., 410 F.3d 56, 62 (1st Cir. 2005) (“[F]ederal courts are courts of limited jurisdiction. Consequently, such courts must monitor their jurisdictional boundaries vigilantly.”). A court's jurisdiction cannot be expanded by the parties' litigation conduct. The parties may not confer subject matter jurisdiction on the court through stipulation, inaction, negligence, acquiescence or active contrivance. In short, diversity jurisdiction either exists or it does not. The actual facts showing the actual location of the corporation's nerve center, not an answer to a complaint, determine the outcome, with any doubts resolved in favor of denying jurisdiction.

3. Dismissal may seem a harsh outcome, but the Supreme Court has made the policy judgment. Subject matter jurisdiction can never be waived or forfeited. The lack of subject matter jurisdiction can be raised at any stage of a case, including following a jury verdict or even by the Circuit Court or the Supreme Court *sua sponte*. The Court made this choice to preserve and protect the limited jurisdiction of federal courts. In so doing, the Supreme Court has commanded that protection of the limited jurisdiction of federal courts trumps all other considerations. The Court has not departed from this principle since it was first articulated in 1884. Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379 (1884).

4. The application of this unyielding principle – which leaves a court with no other choice but to dismiss – often produces seemingly unfair results. For example, as in this case, a winning plaintiff is forced to start again in a different court, while a losing defendant gets a second chance, all at taxpayer expense and with the waste of judicial resources. But this is the

policy judgment made by our Supreme Court. This principle would apply with equal force had Wright-Pierce prevailed and it was Wolfeboro invoking Rule 12(h)(3).

5. In practice, the realization that there is no subject matter jurisdiction does not always emerge at a convenient point. Sometimes the issue surfaces after years of litigation; or after discovery misconduct resulting in the issuance of a default; or, as here, after a lengthy trial and a jury verdict. As a consequence, District Courts, Circuit Courts, and even the Supreme Court are not infrequently confronted with the vexing and no doubt distasteful situation presented here. But the timing of the discovery does not affect the outcome required.

6. When confronted with the plaintiff's post-trial subject matter challenge following a defendant's jury verdict, Judge Hornby from the District of Maine felt compelled to quote Dickens' Mr. Bumble: "If the law supposes that, ... [it] is a ass – a idiot". Bissell v. Breakers By-The-Sea, 7 F. Supp. 2d 60, 61, (D. Me. 1998) (ellipsis in original). Judge Hornby followed up this quote with a thorough review of competing policy considerations. He candidly expressed both his disagreement with the policy and his dissatisfaction with the result, but in the end, conceded that dismissal was required. There was no choice to be made. Judge Hornby lacked the power to decide the case, and lacking that power, was forced to dismiss it. This case is the same.

7. If in 2012 this Court had been presented with the facts now brought to the Court's attention, the Court would not have hesitated to dismiss this case. The Court would have concluded, as Wright-Pierce argues now, that Portsmouth, New Hampshire is Wright-Pierce's "nerve center" and, therefore, diversity jurisdiction does not exist. The passage of over two years, the ensuing trial, and the associated expenditure of time, money, and resources do not alter this result. While there is no denying that it would have been far simpler had the lack of subject matter jurisdiction been called to the Court's attention at the outset of this case, it was not. But

there is no waiver. There is no balancing. Subject matter jurisdiction either exists or it does not, and here it does not. Dismissal is required.

8. While this Motion and the outcome it compels are no doubt greeted with frustration and distaste, this Motion is not based on some trivial technicality, nor is it a cheap legal trick. Rather, this Motion seeks to accomplish what the decisions of our Supreme Court have consistently required; namely, that the limited jurisdiction of the federal courts must be preserved and protected, at all costs. They must be even in the face of the waste of substantial judicial resources and taxpayer money. This may be an unsatisfactory outcome; it may even be bad policy, but it is what the law requires.

9. For the reasons stated herein and in the accompanying affidavits and Memorandum of Law (submitted pursuant to Local Rule 7.1(a)(2)), Wright-Pierce requests that the Court grant this Motion and dismiss the action.

10. Pursuant to Local Rule 7.1(c), Wright-Pierce advises that because this is a dispositive motion its counsel did not seek concurrence. However, its counsel did notify opposing counsel that this Motion was being filed.

11. Pursuant to Local Rule 7.1(d), Wright-Pierce requests oral argument on this Motion both because of the extraordinary stakes involved as well as the unusual posture of this dispute.

WHEREFORE, Wright-Pierce prays that this Court:

- A. Grant this Motion and dismiss this action for lack of subject matter jurisdiction;
- and,
- B. Grant Wright-Pierce such other and further relief as may be just and equitable.

Respectfully submitted,

WRIGHT-PIERCE

By Its Attorneys

SHEEHAN PHINNEY BASS + GREEN, PA

Dated: June 25, 2014

By: /s/ Peter S. Cowan

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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