STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0548

MENTIS SCIENCES, INC.
Plaintiff/Appellant

v.

PITTSBURGH NETWORKS, LLC
Defendant/Appellee

ON APPEAL FROM A JUDGMENT OF THE
MERRIMACK SUPERIOR COURT

BRIEF OF THE DEFENDANT/APPELLEE PITTSBURGH NETWORKS, LLC

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STATEMENT OF THE ISSUE

Whether the Superior Court correctly ruled that: (1) the limitation-of-liability provision in the parties' Agreement barred the Plaintiff/Appellant from recovering consequential/incidental damages for an alleged breach of a service contract causing a loss of data; and (2) the complaint stated no negligence claim because the Plaintiff/Appellant sought economic damages for an alleged breach of contract?

INTRODUCTION

Following full briefing and oral argument, the Superior Court (McNamara, J.) issued a thoughtful decision holding that an unambiguous liability-limiting provision in the parties' agreement that said that the service provider was not liable for consequential/incidental damages such as lost data meant what it said and barred the recovery of such damages. The decision is well reasoned and grounded in controlling authority. Further, it represents an enlightened public policy statement that properly values the interests of small businesses in avoiding ruinous liability based on contractual undertakings of modest value, and that protects the reasonable

expectations of such small businesses that liability-limiting provisions of the sort that the parties bargained for here will be enforced. The Superior Court's judgment should be affirmed.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Plaintiff/Appellant Mentis Sciences, Inc. ("Mentis") filed suit against the Defendant/Appellee Pittsburgh Networks, LLC ("Pittsburgh") alleging a breach of the parties' Service Agreement ("Agreement"), and negligence. (JA 1, 8)[1] All alleged losses were economic. (JA 10-11) After the suit was transferred to the Business and Commercial Dispute Docket, Pittsburgh filed a motion to dismiss. It argued that a liability-limiting provision in the parties' Agreement (which Mentis attached to its Complaint [JA 9, 13]) barred all contract and negligence claims seeking consequential/incidental damages, and that the complaint stated no negligence claim. (JA 36)

On June 8, 2017, following briefing and a hearing, the Superior Court (McNamara, J.) issued an

[1] Citations to the parties' Joint Appendix appear as: (JA [page]). Citations to the Addendum to this brief appear as: (Add. [page]).

eleven-page memorandum order dismissing the contract claim in part, holding that Mentis was barred from recovering incidental/consequential damages for breach of contract, and dismissing the negligence claim in its entirety. (JA 176; Add. 1) In pertinent part, the Court reasoned as follows:

> The Limitation of Liability Clause in this case can only be construed to exclude incidental or consequential damages, such as lost profits [and data] resulting from the data breach. It cannot be construed to exclude damages for lost profits directly caused by Pittsburgh's breach. However, Mentis has not [pleaded] and could not plead such a claim, because it did not expect to profit from the contract; it expected to receive a service. Since Mentis waived all claim to consequential or incidental damages including lost profits and loss of data, its expectation interest is limited to . . . the fair market value of Pittsburgh's services, which is probably close to, if not actually, the contract price.
>
> *****
>
> The Court cannot find a waiver of consequential damages unconscionable where the party receiving less than $16,000 under a contract obtained a waiver of liability for potentially millions of dollars in consequential damages.
>
> *****
>
> In sum . . . Mentis has waived its claim for lost profits [and] loss of data, which are incidental or consequential damages . . . and its claims must be DISMISSED. . . . Pittsburgh's Motion to Dismiss Count II . . . which alleges negligence, must be GRANTED.

(JA 183, 184, 186; Add. 8, 9, 11)

Following a motion for reconsideration -- that the Court denied -- and other proceedings, the Court entered judgment in favor of Mentis for direct contract damages of $40,000. (JA 264) Mentis filed a timely notice of appeal. (JA 6)

II. PERTINENT ALLEGATIONS AND CONTRACT TERMS

1. The Plaintiff Mentis is a small engineering firm that provides material design and manufacturing services to Department of Defense customers. (JA 8)

2. The Defendant Pittsburgh is a small information-technology ("IT") services provider with two employees. It has provided IT services to Mentis since 2010. (JA 9)

3. On May 22, 2014, Mentis and Pittsburgh entered into their Agreement, pursuant to which Pittsburgh agreed to provide Mentis "Network maintenance, Workstation and/or Server support and Network Infrastructure management, as well as other such services as agreed to by the Customer [Mentis] and the Service Provider [Pittsburgh] as detailed in additional quotes or change orders." (JA 14-15) The agreed contract price was only $15,864.00. (JA 2, 22)[2]

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[2] Because Mentis attached the Agreement to its Complaint, the Superior Court was entitled to consider

4. The Agreement attaches a list of workstations and servers and other network facilities that Mentis owned and Pittsburgh agreed to maintain and service, including primary and backup domain controllers, but the agreement says nothing about any obligation on Pittsburgh's part to provide separate data-backup services. On that topic the Agreement is silent. (JA 2, 24-34)

5. The Agreement contains a "Limitation of Liability" clause that reads in full as follows:

> Limits of Liability:
>
> The Service Provider [Pittsburgh] shall not be liable for any indirect, special, incidental, punitive or consequential damages, including but not limited to loss of data, business interruption, or loss of profits, arising out of the work performed or equipment supplied by the Service Provider [Pittsburgh] under the terms of this Agreement.

(JA 20)

6. On August 18, 2014, Pittsburgh notified Mentis that a drive in one of Mentis's servers had failed and needed to be replaced. (JA 9) Over the next several days, Pittsburgh replaced the failed drive and analyzed and assessed the data on the affected servers. (JA 9) Pittsburgh determined that

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it in deciding the motion to dismiss. Ojo v. Lorenzo, 164 N.H. 717, 721 (2013).

the so-called RAID controller on a server had malfunctioned, and that the data on that server was corrupted. (JA 9)

7. Mentis alleged that, due to this server problem, it lost approximately 548 gigabytes of data, including some old intellectual property that it had compiled and stored for a number of years. (JA 10)

8. Mentis further alleged that it suffered consequential/incidental damages in the form of "the cost of recreating the data and the additional time and expense now required on existing and future work," and the ability "to bid or participate in various projects worth potentially millions of dollars." (JA 10)

9. The Complaint does not allege that: (1) Mentis lost profits because of the alleged loss of data; (2) the Agreement was unconscionable; (3) the Agreement was the product of overreaching; (4) the parties were of unequal bargaining power; (5) Mentis had no choice but to accept the Agreement's terms; or (6) that Mentis was surprised by the Agreement's terms. (JA 8-12)

SUMMARY OF THE ARGUMENT

I. The Superior Court correctly granted Pittsburgh's motion to dismiss Mentis's breach of contract/consequential damages claim. The very premise of the claim -- that Pittsburgh promised continuously to backup Mentis's data -- is false. The parties' Agreement says no such thing. The Agreement includes a limitation-of-liability clause that applies here. Such clauses are generally enforceable in New Hampshire, and there are no allegations by Mentis that the clause was unconscionable; nor is there any basis for such a finding. The specific liability-limiting clause here unambiguously bars Mentis's consequential damages claim, and the Superior Court's interpretation of the Agreement and its decision on this issue are grounded in caselaw decided on comparable facts. (pp.12-28)

II. The Superior Court correctly dismissed the negligence count. The Agreement's liability-limiting provision bars Mentis's purported consequential damages claim as a matter of law, and Mentis cannot avoid that result by restyling its claim as one for negligence and seeking the same damages. Moreover, the economic loss rule applies and precludes recovery

of alleged economic losses on a negligence theory.(pp. 28-30)

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW

Mentis seeks an order of this Court reversing the decision of the Superior Court that dismissed Mentis's suit in part. Therefore, like the Superior Court, this Court must assess "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, 148 N.H. 101, 104 (2002). The Court must analyze both the facts alleged in the complaint and the documents attached to it to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995); Ojo, 164 N.H. at 721. A dismissal order should be affirmed where the allegations and materials do not provide a basis for relief. Graves v. Estabrook, 149 N.H. 202, 203 (2003).

In accordance with this standard, Mentis's appeal is meritless. The Superior Court correctly applied the governing principles, correctly ruled that the unambiguous Agreement language barred the disputed consequential/incidental damages and negligence

claims, and therefore properly ordered those claims dismissed. For the reasons detailed below, the judgment of the Superior Court should be affirmed.

II. THE PREMISE OF MENTIS'S CONSEQUENTIAL DAMAGES CLAIM -- THAT PITTSBURGH WAS REQUIRED CONTINUOUSLY TO BACKUP MENTIS'S DATA -- IS FALSE.

The premise of Mentis's claim for lost-data-related damages is that Pittsburgh had a duty under the Agreement to provide continuous backup services, and that there was a breach of this duty causing a loss of data and giving rise to a damages claim. But this is a false premise. The Agreement says no such thing and creates no such obligation on the part of Pittsburgh.

Note that the Agreement in its "Engagement" paragraph says nothing about providing backup services, speaking only about maintenance and support of specified network facilities and infrastructure. (JA 15, 22-34) There is a reference to "such other services as agreed to" in other quotes or change orders (JA 15), but Mentis does not allege any other such agreed-to services, whether as to backing up data or otherwise. The Agreement includes a multi-page inventory of the facilities and equipment that

Pittsburgh was agreeing to maintain (JA 24-34), but this list created no separate continuous-backup obligation.

Indeed, the word "backup" only appears once in the entire Agreement, and that is in the equipment inventory in the reference to the "backup domain controller," which is a controller meant to provide redundancy/backup for the "primary backup controller." (JA 25) Of course, the mere identification of a facility identified as a backup device on the inventory list did not create a contractual undertaking on Pittsburgh's part to back up and store all data continuously. Rather, it simply listed the property that Pittsburgh was agreeing to service. (Moreover, in any event, the backup domain controller is not even alleged to have failed here -- it was a server that malfunctioned. [JA 9])

In its brief in this Court, Mentis argues that Pittsburgh had a continuous-backup obligation, but it cites only its own complaint and arguments by its lawyer during the Superior Court motion hearing. (Mentis brief at pp. 4, 11, citing JA 9 and Tr. 9) It does not even cite the Agreement. In effect, Mentis is trying to paint a gloss on the Agreement that fits

its litigation position, but that is not based in the Agreement's language. This Court will search the Agreement in vain for any reference or language that refers to or even implies a requirement of continuous backup by Pittsburgh. In fact, Mentis bargained only for maintenance and support services, nothing more. (JA 15, 22, 183; Add. 8) The premise of Mentis's claim that a duty of continuous backup exists in the Agreement is false.

III. IN ANY EVENT, THE AGREEMENT BARS RECOVERY BY MENTIS OF CONSEQUENTIAL DAMAGES DUE TO LOST DATA.

A. The Agreement's Limitation-of-Liability Clause is Enforceable.

As a threshold matter, and as the Superior Court recognized, limitation-of-liability clauses like the clause in the Agreement here are enforceable in New Hampshire. See Colonial Life Ins. Co. of Am. v. Electronic Data Sys. Corp., 817 F. Supp. 235, 239 (D.N.H. 1993) (citing PK's Landscaping, Inc. v. New England Tel. & Tel. Co., 128 N.H. 753, 755 (1986)); Hydraform Prod. Corp. v. Am. Steel, 127 N.H. 187, 194 (1985). This is particularly true in the commercial setting where sophisticated business entities negotiate at arm's length. Courts recognize that commercial entities are free to make their own

agreements in the absence of fraud or overreaching. See Xerox Corp. v. Hawks, 124 N.H. 610, 617 (1984); See also Hydroform Prod., 127 N.H. at 195.

Limitation-of-liability clauses are enforceable unless shown to be unconscionable. See Colonial Life, 817 F. Supp. at 241. Unconscionability requires allegations and proof that the subject provision was the product of oppression or unfair surprise. Id. at 242. Unconscionability is grounded in one-sidedness, oppression, and unfairness. Unconscionability is not just the "disturbance of allocation of risks because of [relative] bargaining power." Id. at 241 (citing Hydraform Prod., 127 N.H. at 194). The fact that a party must accept some risk in a final agreement does not thereby make that agreement unconscionable. See id.

In the commercial setting, limitation-of-liability clauses are almost universally accepted and enforced. See Hydraform Prod., 127 N.H. at 194. Outside of manifest fraud or overreaching, the only situation in which limitation-of-liability clauses are deemed unconscionable in the commercial context is where "the bargaining power is so disparate that the

weaker party is left without any genuine choice." Id. at 195.

Here, Mentis and Pittsburgh are both small but sophisticated businesses. They are familiar with each other and their work; they had been doing business together for years when they entered into the subject Agreement in 2014. (JA 9) They were of equal bargaining strength, and there was nothing fraudulent, unfair, oppressive, or unconscionable in the Agreement or the discussions leading up to it. Consistent with this reality, there are no such allegations in the Complaint. Indeed, the word "unconscionable" does not appear there. There is no allegation that the Agreement was the result of "oppression, unfair surprise, or . . . bargaining power between the parties [that was] so one-sided and disparate" that Mentis had no choice but to accept the terms of the Agreement. See Colonial Life, 817 F. Supp. at 242.

Further, Mentis does not allege that it was "left without a genuine choice in negotiating the agreement." Hydraform, 127 N.H. at 195. There is no allegation to the effect that Mentis refused to accept a limitation-of-liability clause, or that it was trapped and unable to walk away from Pittsburgh's

terms. Moreover, Mentis had an entirely adequate remedy in its claim for direct damages. In sum, as the Superior Court recognized (JA 180, 184; Add. 5, 9), there are no allegations or circumstances suggestive of unconscionability in this case.

The allegations and Agreement confirm that Mentis with eyes wide open willingly accepted the risk that it could not recover all consequential damages that might conceivably result from some theoretical data loss. This was an entirely reasonable decision on Mentis's part. After all, the full Agreement price was barely $15,000. (JA 22; Add. 9) This is why the Superior Court in effect found that no rational business in Pittsburgh's position would undertake and accept multi-million dollar exposure and liability in such a deal, and no rational business in Mentis' position would expect such an undertaking from its business partner. (JA 184; Add. 9) The Agreement was not unconscionable, so it is enforceable under the general rule. See generally Colonial Life, 817 F. Supp. at 241-242 (and cases cited).

In its brief in this Court, Mentis makes no serious argument that the liability-limiting clause is unenforceable. See Mentis brief at 17-19. For

example, as noted above, Mentis does not argue that the Agreement was a contract of adhesion or unconscionable. Nor does it claim that it was victim of oppression, unfairness, or surprise. See id. Instead, Mentis cites some Massachusetts decisions that do not state New Hampshire law. Contrast Colonial Life, 817 F. Supp at 241-242. It also cites a Florida decision in which the Court refused to dismiss a claim for lost-data damages against an IT provider, but that case involves dispositive distinctions. In Orthopedic Center of South Florida, P.A. v. Stryker Corp., 2008 WL 11331981 (S.D. Fla. 2008), the parties' contact was focused on and specifically required off-site archiving of the plaintiff's data. Id. at *1. There is no such requirement in the Agreement here. Moreover, the liability-limiting clause there was ambiguous, and therefore unenforceable under Florida law. Id. at *2-*4. Here the Agreement's limitation-of-liability clause is unambiguous, and Mentis does not argue otherwise. Stryker is irrelevant. Mentis has no real response to the point that the limit-of-liability clause here is enforceable.

B. The Limitation-of-Liability Clause Bars Recovery of Consequential Damages Such as the Value of Lost Data.

Beyond the fact that the liability-limiting clause is enforceable, the clause unequivocally excludes from recovery the very alleged consequential loss due to lost data that Mentis seeks to recover. The parties agreed that:

> Limits of Liability:
>
> Pittsburgh "shall not be liable for any indirect . . . incidental . . . or consequential damages, including . . . loss of data, business interruption, or loss of profits. . . ."

(JA 20) This language clarifies that Pittsburgh's liability for these types of damages has been waived, and that the particular loss of data alleged here is not recoverable.

Notwithstanding this unambiguous provision, Mentis seeks "the cost of recreating the [lost] data and the additional time and expense now required on existing and future work [due to the loss of data]," plus the ability "to bid or participate in various projects worth potentially millions of dollars." (JA 10) All of these alleged consequential damages derive from the loss of data after one of Mentis's servers malfunctioned and lost some data. These allegations

also sound in business interruption and lost profits, particularly in the references to the time needed to recreate old data, and the loss of projects "worth potentially millions." (JA 10) But the parties specifically agreed that Pittsburgh would not be liable for that category of losses as well. (JA 20). As such, Mentis now seeks to recover the very damages that it expressly agreed were not recoverable. As the Superior Court ruled (JA 183-184, 186; Add. 8, 9 11), Mentis cannot do this; that result would contravene the Agreement, and would improperly "disturb the parties' agreed upon allocation of risk." Colonial Life Ins. Co., 817 F. Supp. at 242.

And because the limitation-of-liability clause excludes all "indirect, special, incidental, punitive or consequential damages," the only unexcluded damages that Mentis may collect are direct damages. Direct damages are those that "naturally flow" from a contract breach. See generally Colonial Life, 817 F. Supp. At 235. To assess whether an alleged loss is a "direct" loss that naturally flows from the alleged breach, it is necessary to bear in mind the primary purpose of the Agreement. Id. Accord Penncro, Assoc., Inc. v. Spirit Spectrum, 499 F. 3d 1151, 1155-1158

(10th Cir. 2007)(contract purpose and intent determine whether particular alleged losses are direct or consequential).

In this case, as described above in Section II, the primary purpose of the Agreement was not data backup. Not even close. Rather, the operative terms required Pittsburgh only to provide "Network maintenance, Workstation and/or Server support and Network Infrastructure management" in exchange for a modest payment of less than $16,000.(JA 15,22,24-34) Nothing in the Agreement states or implies that Pittsburgh will back up all data. The Agreement provides an inventory of workstations and other network facilities owned by Mentis that Pittsburgh agreed to service. (JA 25-34). That is all. Backing up data is not even mentioned.

Nor was the primary purpose of the Agreement to create profit-making or business-generating opportunities for Mentis. As discussed, the focus of the Agreement was Pittsburgh's commitment to service Mentis's IT equipment. The Superior Court correctly ruled in this regard that:

> Mentis . . . did not expect to profit from the contract; it expected to receive a service. . . . [Mentis's] expectation interest is limited to

> what it expected to receive, the fair market value of Pittsburgh's services, which is . . . close to, if not actually, the contract price.

(JA 183; Add. 8) Therefore, Mentis's alleged losses of data/profits/business-generation opportunities due to an alleged backup failure fall well outside the primary purpose of the Agreement, and as such are necessarily consequential and incidental losses.

Consistent with this view, the weight of authority holds that, in comparable circumstances, lost data are consequential and not direct damages, and liability-limiting provisions that bar claims like those of Mentis here are fully enforceable as a matter of law. E.g., Silverpop Sys., Inc. v. Leading Market Tech., Inc., 2014 WL 11164763 (N.D. Ga.), aff'd. 61 Fed. App'x. 849 (11th Cir. 2016) (loss of customer email list was only a consequential damage where primary purpose of contract was to provide email marketing service, not safeguarding of information); Liberty Fin'l Manage Corp. v. Beneficial Data Processing Corp., 670 S.W. 2d 40, 45-50, 56-58 (Mo. Ct. App. 1984) (loss of data a consequential damage excluded by limitation-of-liability clause; rejecting argument that clause was unconscionable); Solidfx, LLC

v. Jeppesen Sanderson, Inc., 841 F. 3d 827, 833-841 (10th Cir. 2017)(enforcing as a matter of law limitation-of-liability provision that barred consequential damages); Atlantech, Inc. v. American Panel Corp., 743 F. 3d 287, 289-293 (1st Cir. 2014) (enforcing contract's exclusion of consequential damages and vacating jury award); Alitalia Linee Aeree Italiane, S.P.A. v. Airline Tariff Publishing, Co, 580 F. Supp. 2d 285, 290-292 (S.D. N.Y. 2008)(upholding liability-limiting clause and granting defendant's summary judgment motion); Children's Surgical Found., Inc. v. National Data Corp., 121 F. Supp. 2d 1221, 1223-1227 (N.D. Ill. 2000)(same). Contrast Penncro Assoc., Inc., 499 F. 3d at 1151 (affirming award of lost profits notwithstanding clause excluding liability for consequential damages because the lost profits at issue were direct damages anticipated and called for by the contract).

The decisions that Mentis cites in support of its argument that it is entitled to lost-data damages (Mentis brief pp. 15-16) are off point and do not aid it. Consider the following:

- In Resnick v. Avmed, Inc., 693 F. 3d 1317 (11th Cir. 2012), the plaintiffs alleged that the

defendant health-care provider was liable for the loss of protected (private) health information following the theft of some laptops. Like the Superior Court here, the trial court dismissed the breach of contract claim, and the Circuit Court affirmed that part of the order. Id. at 1329-1330.

- In Weinberg v. Advanced Data Processing, Inc., 147 F. Supp. 3d 1359 (S.D. Fla. 2015), the plaintiffs alleged that the defendant data processing/billing company failed to safeguard personal health information. The plaintiffs had no contract with the defendant, and alleged negligence, breach of fiduciary duty, and unjust enrichment. Id. at 1363-1364. There was no breach of contract claim, and no parallels with the instant case.

- In In re Anthem, Inc. Data Breach Litigation, 162 F. Supp. 3d 953 (N.D. Cal. 2016), just as in Resnick, the defendant was not an IT provider, but a healthcare corporation whose store of personal information was compromised in a cyberattack. The plaintiffs purported to assert breach of contract and breach of implied

duty of good faith/fair dealing counts, but the Court dismissed them for failure to state a claim. Id. at 959-964. The Court did indicate that the plaintiffs might be entitled to benefit-of-the-bargain damages under one of their distinct statutory claims, but the decision did not even address the contract damages or limitation-of-liability issues involved here.

- Finally, in In re Yahoo! Inc. Customer Data Sec. Lit., 2017 WL 3727318 (N.D. Cal. Aug. 30, 2017), the only decision that Mentis cites in this context that involved the defense that a limitation-of-liability provision applied, the Court granted the defendant's motion to dismiss the claim seeking alleged out-of-pocket losses, because they were unrecoverable consequential damages. The Court thus enforced the liability-limiting clause in the subject contract, just like the Superior Court did here. Id. at *46.

As this survey demonstrates, what are presumably the best decisions that Mentis can find on this issue are factually distinct and do not support its arguments. For example, none of these cases was brought against an IT provider for alleged breach of a

service agreement; none involved the loss of allegedly intrinsically valuable business data that allegedly would have lead to future profits or opportunities in unknown ventures; none addressed the applicability of a limitation-of-liability clause to a very small business-to-business IT service contract.

And there are other distinctions. Unlike here, the Resnick line of decisions all involve the disclosure of private health information, which is protected by various statutory schemes that give rise to private actions by consumers for damages. Nothing like the lost-data claim that is at issue in this case was involved in those decisions. And the defendants in Mentis's cases all made express commitments to secure the privacy of the disputed data. Pittsburgh made no such promise to Mentis. To the extent that the Resnick line of authority is pertinent to this appeal at all, it supports Pittsburgh's argument that it has no liability for consequential damages in these circumstances.

This appeal is truly straightforward. The parties explicitly negotiated and agreed to language providing that the precise damages that Mentis alleges now -- those stemming from data loss -- would not be

recoverable. They unambiguously agreed that data losses constituted unrecoverable consequential damages. The terms were in no way unconscionable. The Superior Court was required to read the Agreement as a whole, and to give effect to all of its provisions, including the subject liability-limiting provisions. Town of Pembroke v. Town of Allenstown, 171 N.H. 65, 70 (2018); Behrens v. S.P. Const'n. Co., 153 N.H. 498, 503 (2006). To do otherwise would be to improperly read those provisions out of the Agreement and render them a nullity. The Superior Court correctly refused to do that, and correctly construed and applied the Agreement's terms.

IV. THE AGREEMENT'S TERMS AND THE ECONOMIC LOSS DOCTRINE BAR THE NEGLIGENCE COUNT.

The Superior Court was correct in holding that the negligence claim is barred by both the Agreement's plain language and the economic-loss doctrine. (JA 184-186; Add 9-11) First, the limitation-of-liability clause excludes certain damages "arising out of the work performed or equipment supplied by [Pittsburgh] under the terms of this Agreement." (JA 20) This provision could not be more clear that the specified damages are excluded not just for a breach of the

parties' Agreement, but for any legal theory that arises out of the work performed by Pittsburgh.

This provision is controlling. Mentis's negligence allegations unavoidably arise from and are grounded in the contract services that Pittsburgh provided. Mentis alleged that "Pittsburgh had a duty to exercise a reasonable and appropriate standard of care in performing the above described work" It also asserted that "Pittsburgh was negligent in failing to exercise a reasonable standard of care in performing its work. . .")(JA 11) In other words, the stated premise of the negligence claim is that Pittsburgh was negligent because it allegedly violated contractual duties. The Agreement confirms that damages are not recoverable on this theory.

Second, moreover, New Hampshire does not recognize a separate cause of action in tort for the negligent performance of a contract. See, e.g., Wong v. Ekberg, 148 N.H. 369, 375-76 (2002); PK's Landscaping, Inc. v. New England Tel. and Tel. Co., 128 N.H. 753, 757-78 (1986); Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 613 (1978). Under the economic-loss doctrine, Mentis cannot recover on a negligence theory the same alleged economic losses

that it asserts on its contract claim. See Plourde Sand v. JGI Eastern, 154 N.H. 791, 794 (2007). See also Orthopedic Center of South Florida, 2008 WL 11331981 at *4 (tort claims based on alleged loss of data barred by economic loss rule; "Plaintiff may not circumvent the . . . contract by bringing an action for economic loss in tort."). And Mentis has not alleged any special relationship giving rise to some duty of care on Pittsburgh's part. Further, as the Superior Court noted, it could not do so, given the Agreement's liability-limiting language. (JA 186; Add. 10-11) The Superior Court correctly dismissed the negligence claim.

CONCLUSION

For all of the foregoing reasons the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF COMPLIANCE/SERVICE

I, John J. O'Connor, hereby certify that I caused a true copy of the within document to be filed through the court's electronic filing system, and two copies to be served via First-Class Mail on March 23, 2020 upon:

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/s/John J. O'Connor
John J. O'Connor

CERTIFICATION AS TO WORD COUNT

I, John J. O'Connor, hereby certify that the word count of this brief is 4672, exclusive of the Table of Contents and Authorities.

s/John J. O'Connor
John J. O'Connor

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ADDENDUM

The State of New Hampshire

MERRIMACK, SS SUPERIOR COURT

Mentis Sciences, Inc.

v.

Pittsburgh Networks, LLC

No. 2017-CV-00132

ORDER

Plaintiff, Mentis Sciences, Inc. ("Mentis"), has brought an action against Defendant, Pittsburgh Networks, LLC ("Pittsburgh"), seeking damages arising out of a contract (the "Agreement") between the parties in which Pittsburgh agreed to provide services including network maintenance, workstation aid and/or service support, and network infrastructure management. Mentis alleges that Pittsburgh failed to comply with the Agreement and, as a result, Mentis suffered damages including loss of data critical to its business. This loss has resulted in Mentis being forced to incur the cost of re-creating the data and caused it to lose profits because it was unable to bid on other work. Mentis makes two claims. In Count I, it seeks damages for breach of contract. In Count II, it seeks damages as a result of Pittsburgh's negligence in performing the agreement.

Pittsburgh moves to dismiss, alleging that the damages sought in Count I, the contract claim, is barred by a Limitation of Liability Clause which prohibits recovery for consequential and incidental damages such as lost profits, and that the negligence claim, Count II, is barred by controlling New Hampshire law. For the reasons stated in this Order, the Motion is DENIED with respect to Count I, the Contract Claim. However, Mentis' claim for incidental and consequential damages resulting from loss of data,

including lost profits, is DISMISSED. The Motion to Dismiss is GRANTED with respect to Count II, the negligence claim.

I

In ruling on a Motion to Dismiss, the Court must determine whether a plaintiff's allegations are "reasonably susceptible of a construction that would permit recovery." Bohan v. Ritzo, 141 N.H. 210, 212 (1996) (quotation omitted). This determination requires the Court to test the facts contained in the complaint against applicable law. Tessier v. Rockefeller, 162 N.H. 324, 330 (2011). In rendering such a determination, the Court "assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences in the light most favorable to the plaintiff." Bohan, 141 N.H. at 213 (quotation omitted). "The plaintiff must, however, plead sufficient facts to form a basis for the cause of action asserted." Mt. Springs Water Co. v. Mt. Lakes Vill. Dist., 126 N.H. 199, 201 (1985). A Court "need not accept statements in the complaint which are merely conclusions of law." Id. Plaintiff has appended a copy of the contract between the parties and the Court may therefore consider the terms of the contract in ruling on the Motion to Dismiss. Beane v. Beane & Co., 160 N.H. 708, 711 (2010).

According to the Complaint, on or about May 22, 2014, Mentis and Pittsburgh entered into an Agreement pursuant to which Pittsburgh agreed to provide Mentis with IT services. (Compl. ¶ 5.) Pittsburgh agreed to provide "Network Maintenance, Workstation and/or Server support and Network Infrastructure management, as well as other services agreed to by the Customer [Mentis] and the Service Provider [Pittsburgh] as detailed in additional quotes or change orders." (Compl., Ex. A "Agreement," p. 2.) The contract price was $15,864.00 annually. (Compl., Ex. A "Agreement," attach.) On or

about August 18, 2014 Pittsburgh notified Mentis that one of Mentis' servers had failed and needed to be replaced. (Compl. ¶ 6.) Between August 18 and August 25, 2014, Pittsburgh worked to repair Mentis' IT system. (See Compl. ¶¶ 7–8.) On August 25, 2014, Pittsburgh advised Mentis that piece of equipment called a RAID controller had malfunctioned which caused corruption of data. (Compl. ¶ 8.) The data that was corrupted and rendered useless due to the malfunctioning controller was supposed to have been backed up by Pittsburgh. (Compl. ¶ 8.) However, when Pittsburgh attempted to recover the data it discovered it had failed to properly back up the data, and the data was permanently lost. (Compl. ¶ 8.)

"The data that was lost represents valuable intellectual property compiled over many years and is of daily critical use in Mentis' business." (Compl. ¶ 9.) "This is especially true for unique data obtained from United States Department of Defense testing." (Compl. ¶ 9.) Mentis alleges that as a result of this loss of data it "has incurred substantial damages, including but not limited to the cost of re-creating the data and the additional time and expense now required on existing and future work." (Compl. ¶ 10.) Mentis claims that some of the data which was lost "can only be obtained through . . . testing which is massively expensive to conduct." (Compl. ¶ 10.) Mentis alleges that as a result of the loss of data it is "unable to bid or participate in various projects worth potentially millions of dollars." (Compl. ¶ 10.) According to the Complaint "the actual damages incurred by Mentis as a result of Pittsburgh's actions are estimated to be in the millions of dollars." (Compl. ¶ 14.)

Pittsburgh moves to dismiss both counts of the Complaint. Pittsburgh alleges that the damages sought in Count I, the breach of contract count, are consequential damages

which are barred by the terms of the Agreement. It also alleges that Count II, the negligence count, does not state a cause of action. The Court deals with the issues *seriatim*.

II

The purpose of a damages award in a breach of contract action is to put the non-breaching party in the same position it would have been in if the contract had been fully performed. Robert E. Tardiff, Inc. v. Twin Oaks Realty Trust, 130 N.H. 673, 677 (1988). Recoverable damages may be direct or indirect damages. Direct damages constitute "the loss in the value of the other party's performance caused by its failure or deficiency." Restatement (2d) Contracts § 347(a). In addition to the loss in value to of the other person's performance, an injured party may recover "any other loss, including incidental or consequential loss, caused by the breach." Restatement (2d) Contracts § 347(b). Such indirect or consequential damages are those "that could have been reasonably anticipated by the parties as likely to be caused by the defendant's breach." George v. Al Hoyt & Sons, Inc, 162 N.H. 123, 134 (2011).

The Agreement between the parties contains a "Limitation of Liability Clause" which Pittsburgh alleges bars Mentis' claim for consequential lost profit damages. The Clause provides:

> The Service Provider [Pittsburgh] shall not be liable for any indirect, special, incidental, punitive or consequential damages, including but not limited to loss of data, business interruption, or loss of profits, arising out of the work performed or equipment supplied by the Service Provider [Pittsburgh] under the terms of this Agreement.

(Compl., Ex. A "Agreement," p. 7.)

Limitation of Liability clauses are generally enforceable between business entities

dealing at arm's length in New Hampshire. See, e.g., Hydraform Prods. Corp. v. American Steel & Aluminum Corp., 127 N.H. 187, 194 (1985). Mentis does not allege overreaching by Pittsburgh. Pittsburgh asserts that Count I, alleging breach of contract, must be dismissed because the language of the Agreement plainly excludes incidental or consequential damages resulting from loss of data including lost profits.

Mentis objects and makes two arguments. First, Mentis relies upon the decision of the 10th Circuit in Penncro Assocs. v. Sprint Spectrum, L.P., 499 F.3d 1151 (10th Cir. 2007)[1] which held that a Limitation of Liability Clause, virtually identical to the Limitation of Liability clause in the Agreement here, did not bar the plaintiff's claim for lost profit damages. Second, it argues that if the Limitation of Liability Clause were considered to bar its claim for lost profits, then it would be unenforceable because Mentis would be left with no "minimum adequate remedy for breach of the contract where the breach was total and fundamental." (Pl.'s Mem. in Support of Obj. to Mot. to Dismiss, p. 15, citing Colonial Life Ins. Co. of Am., v. Electronic Data Systems Corporation, 817 F. Supp. 235, 242-43 (D.N.H. 1993).)

Pittsburgh argues that Penncro is either distinguishable or inconsistent with New Hampshire law, and that under New Hampshire law it is well settled that all lost profits are consequential damages and are therefore barred by the Limitation of Liability clause. (Def.'s Reply to Pl.'s Obj. to Mot. to Dismiss, p. 2.) It does not dispute that the Limitation of Liability clause allows Mentis to recover its direct damages but argues Mentis has not pled any such direct damages. (Def.'s Reply to Pl.'s Obj. to Mot. to Dismiss, p. 5.)

[1] Decided by Judge Gorsuch while on the United States Court of Appeals for the 10th Circuit.

A

Both parties treat Penncro as setting forth a novel approach to contract damages. The Court disagrees. Penncro is essentially based upon the Restatement (2d) Contracts and is consistent with New Hampshire law.[2]

An understanding of Penncro's facts is critical to understanding the decision. Penncro was a bill collector, which was hired by the defendant, Sprint, to collect overdue bills from Sprint's cell customers. Under the contract between the parties, customers with overdue Sprint accounts trying to make outgoing calls were automatically routed to call centers staffed by Penncro. Penncro employees introduced themselves as Sprint agents, informed callers that their accounts were past due and attempted to collect money. Penncro agreed maintain its staffing levels to provide Sprint with 80,625 productive hours per month. Sprint agreed to pay for those hours at the rate of $22 an hour. Penncro, 499 F.3d at 1153. Penncro sued Sprint for termination of the contract and recovered damages for lost profits. The contract between the parties contained a Limitation of Liability clause which was similar to the limitation of liability clause in this case, and which barred the award of consequential damages defined as "including, but . . . not limited to lost profits, lost revenues and lost business opportunity." Id. at 1155. Sprint argued this language prohibited Penncro from recovering any lost profits. The Court rejected Sprint's argument and, applying Kansas law, held that that "direct damages refer to those which the party loss from the contract itself—in other words the benefit of the bargain– while consequential damages referred to economic harm beyond the immediate scope of the document." Id. at 1156, citing Restatement (2d) Contracts §

[2] The New Hampshire Supreme Court routinely cites Restatement(2d) Contracts as authority. See, e.g.

347.[3] The Court explained:

> Lost profits, under appropriate circumstances, can be recoverable as a component of either (and both) direct and consequential damages. Thus, for example, if a services contract is breached and the plaintiff anticipated a profit under the contract, those profits would be recoverable as a component of direct, benefit of the bargain damages. If that same breach had the knock-on effect of causing the plaintiff to close its doors, precluding it from performing other work for which it had contracted and from which it expected to make a profit, those lost profits might be recovered as "consequential" to the breach.

Penncro, 499 F.3d at 1156, *quoted with approval by* Atl. City Associates, LLC v. Carter & Burgess Consultants, Inc., 453 F.Appx. 174, 179–80 (3rd Cir. 2011) and Atlantech Inc. v. American Panel Corporation, 740 F.3d 287, 293–294 (1st Cir. 2014).

Penncro's expectation interest was the profit it intended to make as a provider of services to Sprint. The court's unremarkable conclusion was that Penncro was entitled to its expectation interest, the lost profits it did not make as a result of the breach by Sprint. See Jay Jala, LLC v. DDG Construction, Inc., 2016 WL 6442074, *6 (E.D. Pa. Nov. 1, 2016). As the First Circuit explained in Atlantech, Inc., (decided under Georgia law), there are 2 types of lost profits: (1) lost profits which are direct damages and represent the benefit of the bargain (such as a general contractor suing for the remainder of the contract price less his saved expenses) and (2) lost profits which are indirect or consequential damages such as what the user of the a defective machine would lose if the machine were not working and he was unable to perform work for other clients. Items of loss other than loss in value of the other party's performance are

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Brooks v. Trustees of Dartmouth College, 161 N.H. 685, 698 (2011).

[3] The Restatement provides in relevant part that the injured party has a right to damages based on his expectation interest measured by (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other laws, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform. Restatement (2d) Contracts § 347

characterized as incidental or consequential damages. Restatement (2d) Contracts § 347, *comment c*.

The Limitation of Liability Clause in this case can only be construed to exclude incidental or consequential damages, such as lost profits, resulting from the data breach. It cannot be construed to exclude damages for lost profits directly caused by Pittsburgh's breach. However, Mentis has not and could not plead such a claim, because it did not expect to profit from the contract; it expected to receive a service. Since Mentis waived all claim to consequential or incidental damages including lost profits and loss of data, its expectation interest is limited to what it expected to receive, the fair market value of Pittsburgh's services, which is probably close to, if not actually, the contract price. Restatement (2d) Contracts, § 347, *comment a*.

B

While recognizing that this case does not involve the sale of goods, and therefore Article 2 of the Uniform Commercial Code ("UCC"), RSA 382-A:2-101 *et seq.* is inapplicable, Mentis cites a number of cases for the proposition that if the limitation of liability clause were interpreted to exclude its claim for lost profits from the data of breach, the contract would be unenforceable, because it would not be afforded a minimum adequate remedy. See generally RSA 382-A:2-719. However, the fact that under a correct interpretation of the contract Mentis is entitled to direct damages necessarily renders its claim that the Limitation of Liability Clause is unenforceable because it does not afford a "minimum adequate remedy" for breach nugatory. Compare Colonial Life, 817 F.Supp. 242--243. Under the UCC, limitations of remedies to repair or replacement between commercial parties are permissible. See generally, Xerox Corp. v.

Hawkes, 124 N.H. 610, 617–18 (1984); BAE Sys. Info. & Elecs. Sys. Integration, Inc. v. SpaceKey Components, Inc., 941 F. Supp.2d 197, 202 (D.N.H. 2013).

Mentis also argues that the UCC restates the common law of contracts and that if the Limitation of Liability Clause is construed to exclude incidental and consequential damages including lost profits, it would be unconscionable under Restatement (2d) Contracts § 346. (Pl.'s Memo. in Opp. to Def.'s Mot. to Dismiss, p. 14.) Mentis cites no authority for this proposition. Gross disparity of the values exchanged is an important factor in determining unconscionability of an agreement. Restatement (2d) Contracts § 208. The Court cannot find a waiver of consequential damages unconscionable where the party receiving less than $16,000 under a contract obtained a waiver of liability for potentially millions of dollars in consequential damages. Compare American Home Improvement Co. v. McIver, 105 N.H. 435, 438–39 (1965) (contract unenforceable under UCC 2-302 where defendants received "little or nothing of value under the transaction the entered into" and were paying $1609 for goods and services valued at approximately $800).[4]

III

Mentis has also brought a count alleging Negligence against Pittsburgh. In Count II, its negligence count, it incorporates the allegations in its contract count and alleges that "Pittsburgh had a duty to exercise a reasonable and appropriate standard of care in performing the above described work." (Compl. ¶ 17.) It further asserts that "Pittsburgh was negligent in failing to exercise reasonable standard of care in performing its work by, among other things, failing to confirm that Mentis's data was being backed up, as it

[4] It appears the drafters of the Restatement believe that the decision in McIver illustrates the common law

represented to Mentis was being done." (Compl. ¶ 18.)

"In New Hampshire, the general rule is that 'persons must refrain from causing personal injury and property damage to third parties, but no corresponding tort duty exists with respect to economic loss.'" Plourde Sand & Gravel Co., Inc. v. JGI Eastern, Inc., 154 N.H. 791, 794 (2007) (quoting Ellis v. Robert C. Morris, Inc., 128 N.H. 358, 364 (1986) *overruled on other grounds by* Lempke v. Dagenais, 130 N.H. 782, 792 (1988)). In Plourde, the Court stated:

> The [economic loss] doctrine is a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.
>
> The economic loss doctrine is based on an understanding that contract law and the law of warranty, in particular, is better suited than tort law for dealing with purely economic loss in the commercial arena. If a contracting party is permitted to sue in tort when a transaction does not work out as expected, that party is in effect rewriting the agreement to obtain a benefit that was not part of the bargain.

Plourde, 154 N.H. at 794 (quoting Tietsworth v. Harley-Davidson, Inc., 677 N.W.2d 233, 241–42 (Wis. 2004). Thus, while a plaintiff may recover damages for economic loss under a contract, generally a cause of action in negligence for purely economic loss will not lie. Plourde, 154 N.H. at 794.

Mentis argues that it may maintain its negligence action notwithstanding the economic loss doctrine, because negligent misrepresentation is an exception to the doctrine. (Pl.'s Memo. in Opp. to Def.'s Mot. to Dismiss, p. 17.) It is true that a narrow exception to the economic loss rule applies when there is a "special relationship" between the party to be charged and the plaintiff. But the New Hampshire Supreme

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standard for unconscionability. Restatement (2d) Contracts § 208, illustration 2

Court has likened the duty owed in such a relationship to that owed by a promisor to an intended third-party beneficiary: "[a] third-party beneficiary relationship exists if the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract." Plourde, 154 N.H. at 796, *quoting* Spherex, Inc. v. Alexander Grant & Co., 122 N.H. 898, 903 (1982). Mentis has alleged no such special relationship, and based upon the Agreement it could not do so. It follows that its claim for negligence must be DISMISSED.

III

In sum, under the Limitation of Liability Clause of the Agreement, Mentis has waived its claim for lost profits from loss of data, which are incidental or consequential damages in the circumstances of this case, and its claim for such damages must be DISMISSED. However, Pittsburgh's Motion to Dismiss Count I of the Complaint, alleging breach of contract, must be DENIED, as damages are not an element of a breach of contract claim. Restatement (2d) Contracts § 346(2). Pittsburgh's Motion to Dismiss Count II of the Complaint, which alleges negligence, must be GRANTED.

SO ORDERED

6/8/17
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice