THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2019-0548

MENTIS SCIENCES, INC.,

Appellant,

vs.

PITTSBURGH NETWORKS, LLC,

Appellee.

On Mandatory Appeal from the Merrimack County Superior Court

BRIEF OF APPELLANT MENTIS SCIENCES, INC.

Peter G. Shaheen, Esquire
New Hampshire Bar No. 2305
Shaheen Guerrera & O'Leary, LLC
820A Turnpike Street
North Andover, Massachusetts 01845
Telephone: (978) 689-0880
Email: Pshaheen@sgolaw.com

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENTS 5

ARGUMENT 7

I THE TRIAL COURT ERRED IN RULING THAT MENTIS DID NOT INCUR DIRECT DAMAGES FROM LOST DATA CAUSED BY PITTSBURGH'S BREACH OF CONTRACT 7

A. Mentis's Complaint Seeks Only Direct Expectancy Damages for Breach of Contract as Allowed Under New Hampshire Law 7

B. The Trial Court Erred in Concluding That Mentis Was Seeking Lost Profits or Other Consequential Damages for Pittsburgh's Breach of Contract 12

C. Mentis Should Be Awarded the Full Amount of Direct Damages for Lost Data Proximately Caused by Pittsburgh's Breach of Contract 14

II. THE TRIAL COURT ERRED IN RULING THAT THE LIMITATION OF LIABILITY CLAUSE WAS APPLICABLE AND THAT IT PROVIDED A MINIMUM ADEQUATE REMEDY 17

III. THE TRIAL COURT ERRED IN DISMISSING MENTIS'S CLAIM FOR NEGLIGENCE UNDER THE ECONOMIC LOSS DOCTRINE 20

CONCLUSION 21

REQUEST FOR ORAL ARGUMENT 21

CERTIFICATE OF COMPLIANCE 23

ADDENDUM 24

TABLE OF AUTHORITIES

Cases **Page**

Audette v. Cummings, 165 N.H. 763, 770, 82 A.3d 1269 (2013) 10, 11

Bohan v. Ritzo, 141 N.H. 210, 679 A.2d 597 (1996) 8

Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 548 N.E.2d 182 (1990) 17

In re Anthem, Inc. Data Breach Litigation, 162 F. Supp. 3d 953 (N.D. Cal. 2016) 15, 16

In re Yahoo! Inc. Customer Data Security Breach Litigation, No. 16-MD-02752-LHK, 2017 WL 3727318 (N.D. Cal. Aug. 30, 2017) 15, 16

Marchesseault v. Jackson, 611 A.2d 95 (Me. 1992) 9, 10

Minassian v. Ogden Suffolk Downs, Inc., 400 Mass. 490, 509 N.E.2d 1190 (1987) 17

N.H. Mun. Ass'n. v. N.H. Dep't of State, No. 204-0596, 2015 WL 11071548 (N.H. June 22, 2015) 8

Ojo v. Lorenzo, 164 N.H. 717, 64 A.3d 974 (2013) 8

Orthopaedic Center of South Florida, P.A. v. Stryker Corp., No. 08-60742-civ-DIMITROULEAS, 2008 WL 11331981 (S.D. Fla. 2008) 18

Patch v. Arsenault, 139 N.H. 313, 653 A.2d 1079 (1995) 20

Penncro Associates v. Sprint Spectrum, L.P., 499 F.3d 1151 (10th Cir. 2007) 13

Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012) 15

Riblet Tramway Co., Inc. v. Stickney, 129 N.H. 140, 523 A.2d 107 (1987) 9

Simpson v. Calivas, 139 N.H. 1, 650 A.2d 318 (1994) 9

Snierson v. Scruton, 145 N.H. 73, 761 A.2d 1046 (2000) 20

Weinberg v. Advanced Data Processing, Inc., 147 F. Supp. 3d 1359 (S.D. Fla. 2015) 15

Wyle v. Lees, 162 N.H. 406, 410, 33 A.3d 1187 (2011) 20

Statutes

RSA 382-A:2-719 17

Rule

N.H. R. Civ. P. 12(b) 8

Other Authorities

Restatement (Second) of Contracts § 347 9

Restatement (Second) of Contracts § 347, cmt. b. 9

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court erred in ruling that the Limitation of Liability clause contained in the Service Agreement between Mentis Sciences, Inc. and Pittsburgh Networks, LLC precluded Mentis Sciences, Inc. from recovering as direct damages the full value of the lost data caused by Defendant Pittsburgh Networks, LLC's breach of contract.

Issue raised (Transcript of May 25, 2017 Hearing ["Tr."] 11-13; Objection (Tr. 6).

II. Whether the trial court erred in ruling that the Limitation of Liability clause contained in the parties' Service Agreement afforded Mentis Sciences, Inc. a minimum adequate remedy for Pittsburgh Networks, LLC's breach of contract.

Issue raised (Tr. 14-15); Objection (Tr. 21).

III Whether the trial court erred in dismissing Mentis Sciences, Inc.'s claim of negligence against Pittsburgh Networks, LLC on the ground that the claim was barred by the economic loss doctrine, where Plaintiff alleged in the Complaint that Defendant's negligence, independent of its contract duties, caused the corruption and loss of Plaintiff's electronically stored data.

Issue raised (Joint Appendix ["JA"] 11); Objection (JA 45).

STATEMENT OF THE CASE

Plaintiff/Appellant Mentis Sciences, Inc. ("Mentis") is a New Hampshire engineering firm that specializes in providing advanced material design and manufacturing capabilities to the United States Department of Defense contractors. (JA 8) It entered into a Service Agreement with Defendant/Appellee Pittsburgh Networks, LLC ("Pittsburgh") on May 22, 2014. (JA 9, 14) Pittsburgh is an information technology ("IT") services company. (JA 9)

Mentis filed a Complaint against Pittsburgh on February 14, 2017, after Pittsburgh breached the terms of the Service Agreement and failed to back up Mentis's data while replacing a failed drive on the Mentis computer systems. (JA 7) Pittsburgh's actions and inactions caused a total loss of Mentis's data on the failed server. (JA 9-10) The Complaint sought direct damages for breach of contract and damages proximately caused by Pittsburgh's negligence. (*Id.*) On April 11, 2017, the Complaint was transferred to the Business and Commercial Dispute Docket pursuant to the parties' Joint Motion to Transfer. (JA 35)

On April 14, 2017, Pittsburgh filed a Motion to Dismiss Mentis's Complaint. (JA 36) Mentis filed its Plaintiff's Opposition to the Defendant's Motion to Dismiss on May 2, 2017. (JA 76) A hearing was held on the Motion to Dismiss before the trial court on May 25, 2017. (Tr. 1) On June 8, 2017, the trial court entered its Order denying Pittsburgh's motion to dismiss Count I of the Complaint for breach of contract but granted the motion to dismiss Count II for negligence. (JA 197) The Order also held that the loss data damages were incidental or consequential damages and that Pittsburgh was

not liable for those damages under the Limitation of Liability clause in the parties' Service Agreement. (*Id.*)

On June 16, 2017, Mentis moved for reconsideration of the June 8, 2017 Order. (JA 198) That motion was denied.

On August 22, 2019, the Final Judgment was entered by the trial court consistent with the trial court's June 8, 2017 Order. (JA 263) The Final Judgment further ordered an award for direct contract damages in favor of Plaintiff in the amount of $40,000, without costs or fees. (*Id.*)

Mentis filed its Notice of Mandatory Appeal on September 16, 2019.

STATEMENT OF THE FACTS

Mentis has been engaged in the business of the design, development, and testing of advanced composite materials for different applications in the United States defense systems and, specifically, is responsible for the nose cone development for missiles used by the United States military. (JA 8) Mentis has extensive experience as a prime contractor to the federal government and has performed on Small Business Innovation Research ("SBIR") Phases I, II, and III. (*Id.*) Having been successfully engaged in the defense business for decades, Mentis accumulated vast amounts of valuable data which it relied on its operations. (*Id.*)

Since 2010, Pittsburgh was Mentis's information technology services provider. (JA 9) Pittsburgh offers a full range of information technology and computer maintenance services which it advertises are customized to its client's needs. On May 22,

2014, after servicing Mentis's computer systems for many years, and being familiar with Mentis's operations and data storage needs, Pittsburgh and Mentis entered into a written Service Agreement. (JA 14) Under the terms of the Service Agreement, Pittsburgh agreed to specific services that reflected Mentis's sophisticated operations. (JA 14-34) Specifically, Pittsburgh agreed to monitor the company computers and network; data backup; network services; antivirus services; and on-going comprehensive company maintenance and support for services, PCs, and the network. (JA 15) The Service Agreement included an itemization of the broad range of services provided. (JA 22, 34) These agreed-to services specifically included Pittsburgh continuously running a data backup program. (JA 9)

Several months after entering into the Service Agreement, Pittsburgh informed Mentis that a drive in one of the Mentis computer servers had failed. (JA 9) Between August 19, 2014, and August 22, 2014, Pittsburgh worked to replace the failed drive, pursuant to its agreement with Mentis. (*Id.*) Pursuant to its contractual obligations, Pittsburgh reported to Mentis that it initiated data backup operations and assessed the data vulnerability on the affected server. (*Id.*)

On August 23, 2014, Pittsburgh provided Mentis with an assessment of the server problem, stating that the RAID controller malfunctioned, which caused a corruption of data in Mentis's system. (*Id.*) Pittsburgh further reported that the corrupted data became useless because of the RAID controller malfunction. (*Id.*) Most egregiously, Pittsburgh admitted that it was unable to recover the corrupted data because it failed to back up the data, notwithstanding its obligation to do so under the terms of the Service Agreement.

(JA 9-10) If Pittsburgh had backed up the data, Mentis's valuable data would not have been lost. (JA 10)

As a result of Pittsburgh's incompetency and failure to perform its obligations under the Service Agreement, Mentis suffered a loss of approximately 548GBs of professional and highly sophisticated data which it had accumulated over years of operation. That lost data remains unrecoverable. (JA 10) The lost and irretrievable data includes valuable intellectual property compiled through Mentis's operations in the defense field over a period of multiple years. The lost data was used daily in Mentis's business, including data compiled from the United States Department of Defense rocket and missile testing. (JA 10)

It is impossible to reconstruct all of the lost data caused by Pittsburgh's actions. The data that could possibly be reconstructed can only be reconstructed through extraordinary and costly effort. (JA 10) The Department of Defense missile and rocket testing is too costly to replicate at this time. (*Id.*) The data lost by Pittsburgh also precludes Mentis from being able to bid on recent project or to participate in projects, further damaging Mentis. (*Id.*)

SUMMARY OF THE ARGUMENTS

The trial court's June 8, 2017 Order erred in concluding that direct damages arising from Pittsburgh's breach of contract, under which Pittsburgh agreed to back up data and provide an array of services to the Mentis computer systems, did not include the lost data, arising directly from Pittsburgh's breach of contract. This loss flows from the

natural course of events under the plain meaning of the contract terms, including Pittsburgh's promises under the contract. The lost data damages are direct damages suffered by Mentis and caused by Pittsburgh's breach and actions. Because the trial court erred in mistaking Mentis's lost data damages as incidental or consequential damages barred under the Limitation of Liability clause in the Service Agreement, the trial court's June 8, 2018 Order should be reversed and remanded.

The trial court also erred in concluding from its expansive interpretation of the Service Agreement's Limitation of Liability clause that the clause is enforceable. The court's erroneous interpretation of the limitation of liability cause could not and did not provide Plaintiff with a minimum adequate remedy in the light of the unequivocal evidence that Mentis was economically shattered by the enormous cost arising from the data loss caused by Pittsburgh in its servicing of the Mentis IT systems.

The trial court further erred in holding that the New Hampshire economic loss doctrine barred Mentis from proceeding with its negligence claim because the Complaint's negligence claim arises independently from the terms of the Service Agreement between Mentis and Pittsburgh.

ARGUMENT

I THE TRIAL COURT ERRED IN RULING THAT MENTIS DID NOT INCUR DIRECT DAMAGES FROM LOST DATA CAUSED BY PITTSBURGH'S BREACH OF CONTACT

A. Mentis's Complaint Seeks Only Direct Expectancy Damages for Breach of Contract as Allowed Under New Hampshire Law

The trial court properly denied Pittsburg's motion to dismiss Count I of Mentis's Complaint against Pittsburgh for breach of contract, but erred in barring Mentis from recovering the total amount owed to it in direct damages arising from the loss of Mentis's valuable data directly caused by Pittsburgh's breach of the Service Agreement. In its Motion to Dismiss, Pittsburgh concedes that Mentis's Complaint states a viable claim for breach of contract.

Pittsburgh's sole allegation to reduce the amount of damages arising from its breach of contract is that the Limitation of Liability clause in the Service Contract bars Mentis from any consequential lost profit damages. The trial court agreed. Yet, Count I for Breach of Contract seeks only direct damages, and not consequential or incidental damages arising from a catastrophic data loss and other losses which were directly and proximately caused by Pittsburgh's actions and inactions in breach of its contractual duties. Importantly, all parties and the trial court agree that the Limitation of Liability clause does not bar direct damages.

Mentis's Complaint states that "Pittsburgh failed to properly back up Mentis' data which it was required to do pursuant to the terms of the Agreement, despite continual representations to Mentis that the data was being backed up." (JA 10 [Complaint ¶ 12]). Also, that "Pittsburgh breached the Agreement by failing to perform its obligations pursuant thereto, including backing up Mentis' data." (JA 10 [Complaint ¶ 13]). "Pittsburgh's [breach] caused Mentis to suffer damages, including man hours spent trying to recreate some of the data . . . actual damages incurred by Mentis as a result of Pittsburgh's actions are estimated to be in the millions of dollars." (JA 10-11 [Complaint 14.])

In reviewing Mentis's breach of contract damages, the trial court properly recognizes that, under N.H. R. Civ. P. 12(b), the court must assume the truth of all well-pleaded facts in the Complaint and must construe all inferences in a light most favorable to the Plaintiff. *N.H. Mun. Ass'n v. N.H. Dep't of State*, No. 2014-0596, 2015 WL 11071548 (N.H. June 22, 2015). If the Complaint allegations can reasonably be construed to permit recovery and constitute a cause of action, the motion to dismiss must be denied. *Id.*; *Bohan v. Ritzo*, 141 N.H. 210, 679 A.2d 597 (1996). Further, as in the present case, where the plaintiff includes a copy of the contract between the parties, the court may consider the contract terms. *Ojo v. Lorenzo*, 164 N.H. 717, 64 A.3d 974 (2013). Applying these elements of a motion to dismiss, the well-pleaded claims in the Mentis Complaint state a breach of contract claim and seek full recovery in the form of direct damages caused by Pittsburgh's loss of the Mentis data, which Pittsburgh explicitly promised to back up and protect.

The measure of direct damages for breach of contract is well known. Under the *Restatement (Second) of Contracts* § 347, which New Hampshire courts have consistently followed,[1] the party injured by a breach of contract action is entitled to recover damages based on the injured party's expectation interest which is measured by the loss in value to him caused by the other party's failures and deficiencies in performance. *Riblet Tramway Co., Inc. v. Stickney*, 129 N.H. 140, 523 A.2d 107 (1987) (contractor had adequate remedy at law in the nature of breach of contract damages to put contractor in as good a position as he would have been in had the contract at issue been fully performed and not breached) (citing *Restatement (Second) of Contracts* § 347).

Further, the injured party's direct damages are based on the injured party's expectation of interest which "must be estimated in attempting to fix a sum that will fairly represent the expectation interest in the loss in value to the injured party of the other party's performance that is caused by the failure or deficiency in that performance." *Riblet Tramway Co.*, 129 N.H. at 149, 523 A.2d at 112; *Restatement (Second) of Contracts* § 347, cmt. b.

The basic expectancy damages for breach of contract are intended to make the breached party whole. This includes the amount a breached party is forced to expend to remedy the defects caused by the breaching party's breach. In *Marchesseault v. Jackson*, 611 A.2d 95 (Me. 1992), a homeowner hired a contractor to build a foundation for his home. The homeowner terminated the contractor before completion of the work due to

---

[1] *See Simpson v. Calivas*, 139 N.H. 1, 650 A.2d 318 (1994); *Riblet Tramway Co., Inc. v. Stickney*, 129 N.H. 140, 523 A.2d 107 (1987).

obvious defects with the foundation construction and hired a different contractor to complete the job. The homeowner then sued the original contractor for breach of contract. The court determined that a breach occurred and that the homeowner was entitled to damages equal to both the cost of repairs and to the diminution in the value of his home caused by the contractor's breach. Specifically, the court stated "The overriding purpose of an award of compensatory damages for a breach of contract is to place the plaintiff in the same position as that enjoyed had there been no breach . . . an injured party is entitled to recover for all loss actually suffered as a result of the breach." *Marchesseault*, 611 A.2d at 98. *See also Audette v. Cummings*, 165 N.H. 763, 770, 82 A.3d 1269, 1275 (2013) ("The goal of damages in actions for breach of contract is to put the non-breaching party in the same position it would have been in if the contract had been fully performed.").

Likewise, here, the trial court erred in not applying the basic expectancy calculation for the direct damages owed to Mentis for Pittsburgh's uncontested breach of contract. Importantly, again, the Complaint only seeks direct damages arising from Pittsburgh's breach, and those damages are *not* impacted, in any way, by the Limitation of Liability clause in the contract. The direct damages to put Mentis back into the same position it would have been in had Pittsburgh not breached the Service Agreement include the loss incurred by Mentis from Pittsburgh's breach of its obligation to back up and protect Mentis's data and the cost to Mentis to repair this loss through its data recovery processes.

At the hearing on Pittsburgh's Motion to Dismiss, Pittsburgh argued that direct damages are those damages which arise from actual performance of the contract and from "what is actually called for by the contract." (Tr. 4) Pittsburgh also argued that direct damages in this case include "the network maintenance itself." (Tr 5) Further, Pittsburgh's attorney stated that "[d]irect damages are for the actual performance of the contract payments if the relationship had been continued, but they are not some other costs." (Tr. 5)

At the hearing, Mentis discussed the extensive services Pittsburgh agreed to perform for Mentis, including maintenance, as discussed by Pittsburgh, as well as data backup and data safe keeping services. (Tr. 9) Further, to emphasize the importance of this part of the Service Agreement, Mentis explained that "[t]he whole point of having a back-up system is so that if there's an accident, like this one, that you can go back and re-create your data [and] reinstall it. . . . If you can have your data backed up, you can go back to the day before you got hit with that virus and simply reinstall." (Tr. 9-10)

When Pittsburgh breached its obligations to both backup Mentis's data and its data safe keeping duties, the direct damages for the breach were the loss in value of the lost data to Mentis and to put Mentis in as good a position as it was prior to the contract breach. *See Audette v. Cummings*, 82 A.3d at 1275. This is basic contract damages law. The trial court erred in mistaking these basic direct damages as incidental or consequential damages pursuant to the Limitation of Liability clause.

For each of the reasons discussed, the trial court erred in finding that the Limitation of Liability clause was applicable to Mentis's breach of contract damages. It

was not. Once the trial court concluded that Pittsburgh breached its agreement with Mentis, the trial court should have awarded the full amount of direct damages to Mentis, including damages directly arising from lost data caused by Pittsburgh's breach of one of its basic obligations under the Service Contract.

B. The Trial Court Erred in Concluding That Mentis Was Seeking Lost Profits or Other Consequential Damages for Pittsburgh's Breach of Contract

Mentis's Complaint does not seek consequential or incidental damages. Pittsburgh's Motion to Dismiss raises and attempts to impose the Limitation of Liability clause in the Service Agreement to avoid or reduce its exposure to damages arising from its breach, but its attempts to apply the Limitation of Liability clause are erroneous and inconsistent with the Complaint allegations. The Limitation of Liability clause in the Service Agreement is one commonly used in service contracts to protect the service providers from exposure to incidental and consequential damages. It states as follows:

Limits of Liability:

> The Service Provider 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 under the terms of this Agreement.

(JA 20)

The trial court erred in concluding that the Limitation of Liability clause applied to Mentis's claim for damages arising from Pittsburgh's uncontested breach of contract. As

it specifically states, the limitation clause only applies to preclude an award of incidental, punitive, or consequential damages against Pittsburgh's breach. It does not apply in any way to limit Pittsburgh's exposure to direct damages suffered by Mentis for the data loss arising from Pittsburgh's breach of contract.

The trial court also erred in somehow thinking that Mentis is seeking "lost profit" damages, which it is not, based on Mentis's reliance on *Penncro Associates v. Sprint Spectrum, L.P.*, 499 F.3d 1151 (10th Cir. 2007), in its memorandum of law in opposition to Pittsburgh's Motion to Dismiss. To the contrary, Mentis cites *Penncro Associates* only for the purpose of distinguishing the Service Agreement's Limitation of Liability clause from Mentis's direct damages claim. (JP 84-86) The trial court erroneously focused solely on the discussion in *Penncro* regarding "lost profits," and improperly concluded that Mentis was seeking lost profit damages, which it is not. (JA 187) The Complaint states that Mentis is only seeking the full amount of direct damages owed to it. (JA 10-11) Yet, the trial court misunderstood and erroneously concluded that because Mentis and Pittsburgh were parties to a service contract, "it could not expect to profit from the contract," and then essentially rejected Mentis's damages claims.

A proper reading of the Complaint, and Mentis's opposition to Pittsburgh's Motion to Dismiss, shows that *Penncro* was cited for the legal premise that limitation of liability clauses do not and cannot limit a party's claim to direct damages, including damages for lost profits or data loss or data breaches which arise as direct damages, as in the present case. Again, contrary to the trial court's Order, Mentis does not seek lost profit damages as indirect or consequential damages. Instead, Mentis only seeks direct

damages which are equal in value to the loss Mentis incurred arising from Pittsburgh's breach of contract and which would have put it back to the position it was in before the breach of contract occurred.

Importantly, the trial court properly recognized during the hearing on the Motion to Dismiss, as well as in its Order, that the Limitation of Liability clause in the parties' Service Agreement cannot be construed to exclude any damages directly caused by Pittsburgh's breach. (Tr. 11) The loss or damages suffered by Mentis directly arising from the data which was not backed up by Pittsburgh, as it promised, and was corrupted and lost by Pittsburgh's actions, constitute direct damages and fall outside the Limitation of Liability clause in the Service Agreement.

C. Mentis Should Be Awarded the Full Amount of Direct Damages for Lost Data Proximately Caused by Pittsburgh's Breach of Contract

In this age of complex computer technology, because of companies' need to store and secure data for easy retrieval and access, as well as their need to continually protect stored data from being stolen by unauthorized users, companies generally have an expectation that service providers will protect data and will routinely back up data as a predominant aspect of the agreement. Again, in the Mentis and Pittsburgh Service Agreement, this expectation was put into writing, and Pittsburgh agreed to monitor Mentis's computers and information network systems; and agreed to back up Mentis's data and routinely monitor the anti-virus services to protect the data.

These data backup and monitoring services are the primary objectives of the Service Agreement and are not simply a by-product or "consequence" of other services provided for in the service contract. For this reason, courts now routinely hold that lost or stolen data gives rise to direct breach of contract damages. In *Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012), the court held that plaintiffs, health care plan members, were entitled to benefit of the bargain damages in a data breach case against the health care plan operator. Likewise, in *Weinberg v. Advanced Data Processing, Inc.*, 147 F. Supp. 3d 1359 (S.D. Fla. 2015), the court awarded benefit of the bargain damages to the plaintiff ambulance service patient who brought a class action against medical billing companies in a data breach case.

In *In re Yahoo! Inc. Customer Data Security Breach Litigation*, No. 16-MD-02752-LHK, 2017 WL 3727318 (N.D. Cal. Aug. 30, 2017), the court awarded benefit of the bargain damages in a lost data case. In that case, the plaintiff class, users of Yahoo's email services and other offerings, filed a complaint against defendant Aabaco Small Business, LLC and Yahoo for security breaches and lost data in the form of their personal identification and other data. Yahoo moved to dismiss. The court found that the plaintiffs sufficiently alleged in the complaint injury in fact arising from Yahoo's security breach, as well as direct damages arising from the corruption and loss of plaintiffs' personal data resulting from Yahoo's breach of its agreement to keep the data secure. Plaintiffs were also held to be entitled to benefit of the bargain damages by showing that Yahoo's breach of service agreement resulted in lost and stolen data. Similarly, in *In re Anthem, Inc. Data Breach Litigation*, 162 F. Supp. 3d 953 (N.D. Cal. 2016), the court

found that the plaintiffs properly alleged direct benefit of the bargain damages by alleging that Anthem, Inc. promised plaintiffs certain services, which it did not provide, resulting in the loss of personal data.

Here, it is uncontested that Pittsburgh breached the terms of the parties' Service Agreement and, in fact, breached the essential element of the Service Agreement which was to monitor Mentis's IT system and to back up data and protect data. As in *In re Yahoo! Inc. Customer Data Security Breach* and *In re Anthem, Inc. Data Breach*, where specific security terms of a service agreement were breached, the loss directly resulting from the breach, including loss of data, plainly constitutes benefit of the bargain or direct damages. The losses were also reasonably within the contemplation of the parties at the time they entered into the Service Agreement. That is, the parties anticipated that a breach of the promise to keep data backed up would result in substantial loss. Further, Pittsburgh's important obligation under the Service Agreement to back up Mentis's data was particularly critical when any component of the Mentis IT system is malfunctioning and in the process of repair.

The trial court erred by failing to find that the loss of data that occurred as a direct result of Pittsburg's breach of the Service Agreement are direct damages, or benefit of the bargain damages, and not consequential damages. The trial court's June 8, 2017 Order with respect to damages due and owing to Mentis for Pittsburgh's breach should be reversed and remanded for further review in accordance with this Court's order.

II THE TRIAL COURT ERRED IN RULING THAT THE LIMITATION OF LIABILITY CLAUSE WAS APPLICABLE AND THAT IT PROVIDED A MINIMUM ADEQUATE REMEDY

For the reasons stated, Mentis objects to Pittsburgh's claim that the Limitation of Liability clause in the Service Agreement has an application to its claims against Pittsburgh for breach of contract and/or negligence. Even if the Limitation of Liability clause was applicable in any way, the trial court erred in enforcing it in a way that failed to provide even a minimum adequate remedy for Mentis's extraordinary loss from the data loss caused by Pittsburgh's actions.

To apply the Limitation of Liability clause to Mentis's extraordinary loss from Pittsburgh's failure to back up Mentis's data could not possibly reflect a reasonable allocation of risk or a reasonable accommodation between Mentis and Pittsburgh. Here, the trial court ordered direct damages in the amount of approximately $40,000 notwithstanding the actual loss to Mentis arising directly from Pittsburgh's breach which is estimated to be in the millions. (JA 264) A limitation of liability clause cannot be enforced unless it can be demonstrated that the agreement to impose the limitation of liability on consequential damages is not contrary to public policy. *Minassian v. Ogden Suffolk Downs, Inc.*, 400 Mass. 490, 509 N.E.2d 1190 (1987). A consequential damages disclaimer must reflect a "reasonable accommodation between two commercially sophisticated parties." *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 548 N.E.2d 182 (1990). This includes the availability of a minimum adequate remedy, similar to that provided in the sales context pursuant to RSA 382-A:2-719.

Mentis and Pittsburgh never agreed to the lopsided allocation of risk imposed on Mentis by the trial court through its erroneous interpretation of the limitation of liability. The result of the court's erroneous interpretation bars Mentis from nearly all of its actual damages resulting from Pittsburgh's extraordinary loss of data directly caused by Pittsburgh's breach of contract. The egregiousness of the damages award cannot be sustained. To do so would bar Mentis from its fundamental expectation of a minimum adequate remedy for any possible breach of the Service Agreement by Pittsburgh, including Pittsburgh's failure to back up and secure Mentis's data.

In a factually similar case, *Orthopaedic Center of South Florida, P.A. v. Stryker Corp.*, No. 08-60742-civ-DIMITROULEAS, 2008 WL 11331981 (S.D. Fla. 2008), the plaintiff medical center entered into a service contract with the predecessor to Stryker to provide the medical center with IT services, including medical imaging software, and the on-site and off-site archiving data storage and recovery services. The service agreement also contained a limitation of liability clause under which, like in the present case, protected Stryker from liability for incidental or consequential damages, including lost profits, lost data, or the cost of recovering data. On March 19, 2007, the medical center's entire computer system went down because four out of the eight hard drives crashed. Prior to the crash, starting in July 1, 2006, Stryker failed to provide the contractually required off-site archiving of the medical center's data. As a result, the medical center lost substantial data, and all of the medical center's data from July 1, 2006, until the March 19, 2007 computer failure was lost completely because it had not been backed up and archived by Stryker.

The medical center sued Stryker for breach of contract and sought damages arising from the lost data caused by Stryker's breach. As in the present case, Stryker moved to dismiss the complaint on the grounds that the limitation of liability clause barred plaintiff's claim for recovery of lost data. The court disagreed. It held that a limitation of liability clause can only be enforced if its terms are clear and unambiguous such that the ordinary and knowledgeable person would know what he or she was contracting away. The court held that Stryker's interpretation of the limitation of liability clause rendered the service agreement meaningless because it essentially permitted Stryker to not perform under the contract with no consequences. Such an interpretation of the limitation of liability clause serves to negate the specific contractual understanding of the parties.

Similarly, in the present case, Pittsburgh agreed to monitor the Mentis computers and network and agreed to back up data as part of this on-going comprehensive computer service support. The lost data Mentis experienced arose directly from Pittsburgh's failure to perform the basic service needs which both parties agreed to at the time the Service Agreement was executed. The trial court's enforcement of the terms of liability clause in the Service Agreement essentially renders Pittsburgh immune from liability. As the court in *Orthopaedic Center of South Florida* recognizes, no reasonable person would agree to not being compensated for breach of contract damages. The trial court's erroneous damages ruling results in a grossly unequal allocation of risk which was not within the contemplation of the parties at time the service contract was executed and consequently negates the understanding of the parties to the service contract and allows Pittsburgh to not perform with no consequences.

III THE TRIAL COURT ERRED IN DISMISSING MENTIS'S CLAIM FOR NEGLIGENCE UNDER THE ECONOMIC LOSS DOCTRINE

Mentis's negligence claim survives the New Hampshire economic loss rule and should not have been dismissed. "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." *Wyle v. Lees*, 162 N.H. 406, 410, 33 A.3d 1187, 1190 (2011).

Importantly, New Hampshire recognizes several exceptions to the economic loss doctrine. These include negligent misrepresentation claims where the misrepresentation of fact served as an inducement to enter into the contract. *Wyle*, 162 N.H. 406, 33 A.3d 1187. The economic loss doctrine also does not apply when the tortious conduct alleged in the complaint arises independently from the defendant's contractual obligations. *Wyle*, 33 A.3d at 1192.

Under New Hampshire law, negligent misrepresentation arises when (1) a negligent misrepresentation of a material fact is made by the defendant to the plaintiff; and (2) the plaintiff justifiably relies on the misrepresentation by the defendant. *Snierson v. Scruton*, 145 N.H. 73, 761 A.2d 1046 (2000). The policy behind the tort is that "it is the duty of one who volunteers information to another not having equal knowledge, with the intention that he will act upon it, to exercise reasonable care to verify the truth of his statements before making them." *Patch v. Arsenault*, 139 N.H. 313, 653 A.2d 1079 (1995).

In the present case, Mentis's Complaint alleges that, independent of the contract terms, Pittsburgh negligently misrepresented to Mentis that it was routinely backing up Mentis data after the Mentis computer drives initially failed. (JA 10-11) In fact, this crucial service was not taking place. If Pittsburgh had not engaged in this negligent misconduct, Mentis could have taken steps on its own to ensure that its data was properly stored and safe from harm.

The trial court erred in dismissing Mentis's claim for negligent misrepresentation. A simple review of the Complaint demonstrates that Mentis properly alleged a cause of action for tort arising independent of the breach of contract claims which is not barred under the economic loss doctrine as erroneously alleged by Pittsburgh.

CONCLUSION

For each of the reasons stated herein, Plaintiff Mentis Sciences, Inc. respectfully requests this Court to reverse the trial court's August 22, 2019 Final Judgment, which is based on the trial court's June 13, 2017 Order denying any damages to Mentis arising from the extraordinary lost data caused by Pittsburgh's breach of contract, and reverse the trial court's dismissal of Count II of the Complaint for negligence, and for whatever further relief this Court deems just and proper at this time.

ORAL ARGUMENT

Appellant requests oral argument before a 3JX panel to address any questions this Court may have. This case is important because the trial court's error in applying the

Limitation of Liability clause to Plaintiff's direct damages must be corrected, or the mistake could have adverse consequences to commercial activity in the State of New Hampshire.

Dated: February 21, 2020

Respectfully submitted,

SHAHEEN GUERRERA & O'LEARY, LLC

By */s/Peter G. Shaheen*

Peter G. Shaheen, Esquire
820A Turnpike Street
North Andover, Massachusetts 01845
Telephone: (978) 689-0880
Email: Pshaheen@sgolaw.com

Attorneys for Appellant Mentis Sciences, Inc.

Appellant, through its attorney, hereby certifies that the trial court's June 8, 2017 Order, in writing, is being submitted as an addendum to this brief

CERTIFICATE OF COMPLIANCE

Pursuant to New Hampshire Supreme Court Rule 26(7), I served the foregoing document upon Robert McCall, Esquire, and Jack O'Connor, Esquire, Peabody & Arnold, LLP, 600 Atlantic Ave., Boston, Massachusetts 02210 the attorneys of record by electronically filing the foregoing document with the Clerk of Court using the Court's electronic filing system, which will automatically send email notification of such filing to registered attorneys of record.

/s/Peter G. Shaheen
Peter G. Shaheen, Esquire

February 21, 2020

CERTIFICATION AS TO WORD COUNT

The undersigned certifies that the above brief consists of 5594 words, exclusive of the Table of Contents and Table of Authorities.

/s/Peter G. Shaheen
Peter G. Shaheen, Esquire

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

---

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

---

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