UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

WRIGHT-PIERCE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW

NOW COMES the defendant, Wright-Pierce ("Wright-Pierce"), by and through counsel, Donovan Hatem LLP, and respectfully submits this Memorandum Of Law In Support Of Its Motion For Judgment As A Matter Of Law.[1] Pursuant to Fed. R. Civ. P. 50(a), Wright-Pierce moves for judgment as a matter of law because the plaintiff, Town of Wolfeboro (the "Town"), has not presented a legally sufficient evidentiary basis to find against Wright-Pierce on any of the Counts in its Amended Complaint, including Count I (Professional Negligence); Count III (Breach of Contract); Count IV (Negligent Misrepresentation); Count VI (Violation of RSA 358-A); Count VII (Fraudulent Misrepresentation).[2] Specifically regarding its professional negligence claim, the Town has failed to provide expert evidence as to the standard of care for a prime wastewater engineer, has provided only expert opinion testimony for which the experts were not properly qualified, has failed to establish a sufficient basis for the expert opinions introduced, failed to provide expert opinions to a reasonable degree of scientific certainty, and failed to establish, through expert opinion or otherwise, a causal connection between any alleged misconduct and its damages. Additionally, Wright-Pierce moves for a directed verdict on its defenses that the Town has failed to mitigate its damages, and that the Town's

[1] The Court orally granted Wright-Pierce leave to file a Memorandum in excess of the 25-page limit. *See* Local Rule 7.1(a)(3).
[2] The Town voluntarily dismissed Count II (Gross Negligence") and Count V (Breach of Warranty) prior to trial.

methodology of computing damages, together with its evidence of damages, is uncertain and speculative, precluding the recovery of damages as a matter of law.

STANDARD OF REVIEW

A motion for judgment as a matter of law must be granted if, after examining the evidence and making all permissible inferences in favor of the non-moving party, the Court finds that a reasonable jury could not render a verdict in that party's favor. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.,* 546 U.S. 394, 405 (2006). Fed. R. Civ. P. 50(a) provides as follows:

> **(a) Judgment as a Matter of Law**
>
> **(1)** ***In General***: If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) Resolve the issue against the party; and
>
> (B) Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue
>
> **(2)** ***Motion***. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

See Fed. R. Civ. P. 50(a). Thus, "a district court 'is permitted' to grant a Rule 50(a) motion, before the case goes to the jury, when 'it concludes the evidence is legally insufficient.'" *Energynorth Natural Gas, Inc.*, 452 F.3d 44, 50 (1st Cir. 2006) (citing *Unitherm Food Sys., Inc.*, 546 U.S. at 405). The court considers "'[a]ll of the evidence and reasonable inference drawn from the evidence . . . in the light most favorable to the non-moving party,' and may not evaluate the credibility of the witnesses or the weight of the evidence." *Cham v. Station Operators, Inc.*, 685 F.3d 87, 93 (1st Cir. 2012). However, "the plaintiff is not entitled to inferences based on speculation and conjecture." *Id.*

ARGUMENT

I. Count IV (Negligent Misrepresentation) Should Be Dismissed As A Matter Of Law

A. The Evidence Is Insufficient To Prove The Elements Of Negligent Misrepresentation As A Matter Of Law

As discussed below, Count IV (Negligent Misrepresentation) should be dismissed because the evidence at trial was insufficient to prove the elements of a negligent misrepresentation claim. "To prevail, [the Town] was required to prove that [Wright-Pierce] made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause [the Town] to rely upon it and that [the Town] justifiably relied upon it." *See Akwa Vista, LLC v. NRT, Inc.,* 160 N.H. 594, 601 (2010) (citing *Snierson v. Scruton,* 145 N.H. 73, 77 (2000)); *Wyle v. Lees*, 162 N.H. 406, 413 (2011) ("the elements of such a claim are a negligent misrepresentation of a material fact by the defendant and justifiable reliance by the plaintiff").

In Count IV, the Town alleges that Wright-Pierce made three negligent misrepresentations:

- "WP negligently misrepresented that the Wolf 1A Site was suitable to meet the NHDES requirements and negligently misrepresented that the Wolf 1 A could handle the effluent load that would be required when in fact WP had no basis to make this recommendation and when in fact WP had not fully and adequately investigated the Site to confirm this representation." Amended Complaint, ¶ 124.

- "WP negligently misrepresented that the design and construction of an RIB system was the best alternative to address Wolfeboro's disposal of treated effluent without fully, adequately, and completely investigating and vetting other potential options available to Wolfeboro." Amended Complaint, ¶ 125.

As a preliminary matter, "even taken in a light favorable to the [Town] those allegations do not contain a representation at all, let alone a misrepresentation." *Mudge v. Bank of America, N.A.*, 2013 WL 6095561, *4 (D.N.H. Nov. 20, 2013). It is impossible to understand what is meant by the vague and conclusory allegations "was suitable to meet the NHDES requirements,"[3] or "could handle the

[3] The phrase "meet the NHDES requirements," appears to refer to the Town's standard contracts:

1. Services to be performed by the ENGINEER

effluent load that would be required," or "was the best alternative," because the Town fails to quote any specific language or identify a specific representation made by Wright-Pierce. *See Akwa Vista*, 160 N.H. at 601 (to prevail on a claim for negligent misrepresentation a plaintiff must first show "that the defendants made a representation"). Significantly, Count IV does not point to any allegedly false information in Wright-Pierce's reports; e.g., the Wastewater Effluent Disposal System Alternative Evalaution Report ("Alternative Evaluation Report"), Preliminary Design Report, or Phase Three Hydrgeologic Report ("Phase Three Report"), and there was no evidence at trial that these or any other reports or writings contained false statements. *Mudge v. Bank of America*, 2013 WL 6095561, *4. To the extent that Wright-Pierce made these alleged statements, they are too vague to be actionable as a matter of law. Further, the Town failed to produce any evidence at trial that Wright-Pierce made a specific false representation regarding any particular wastewater disposal alternative "with knowledge of its falsity or with conscious indifference to its truth." *Akwa Vista, LLC,* 160 N.H. at 601. Under longstanding New Hampshire law, a representation which merely amounts to an opinion "or is vague and indefinite in its terms, or is merely a loose, conjectural [statement]" is not actionable. *Private Jet Serv. Group, Inc. v. Sky King, Inc.*, 2006 WL 2864057, * 5 (D.N.H. Oct. 4, 2006).

Additionally, no evidence was introduced at trial that Wright-Pierce was contractually required to determine that Wolf 1A was capable of any specific "effluent load." Even if the vague assertion "could handle the effluent load that would be required" can be considered a representation, the Town failed to introduce any evidence that Wright-Pierce made this statement. Instead, there was evidence that several sections of the Phase Three Report, including Section 9 (Numerical Modeling) and Appendix O, warned that the model simulations showed breakout at loading rates of 800,000 gallons per day ("gpd") and higher:

A. The ENGINEER agrees to produce a complete and definitive Engineering Report to meet current division requirements and to perform any and all engineering incidental thereto. The detailed scope of the work is as outlined in the attached Plan of Study.

See **Exhbit 2** (Trial Exhibit 12)(Contract #3) and **Exhibit 3** (Trial Exhibit 11) (Contract #2).

> "The final model simulations indicate at a sustained flow of **600,000 gpd** no breakout would occur at non-existing groundwater discharge areas. At the higher sustained flow conditions simulations of **800,000 gpd and 1,000,000 gpd** the model results indicate the potential for breakout."

See **Exhibit 1** (**Trial Exhibit 5**) (Phase Three Report, p. 9-5, 9-6, Appendix O, p. 6, 8). Additionally, the evidence showed that Wright-Pierce repeatedly advised David Ford, the Town's Director of Public Works ("Mr. Ford"), in writing, to start-up the RIBs at a steady rate of 600,000 gpd, but that he did not rely upon this advice and, in fact ignored the advice, by starting up operation of the RIBs at 800,000 gpd and loading in excess of 900,000 gpd in April 2007. Additionally, the evidence showed that Mr. Ford later admitted that "*the Town under my direction overloaded the RIB's during the time period from 3-4 to 3-25*." Accordingly, the evidence was insufficient to prove any of the elements of negligent misrepresentation, as a matter of law.

B. Count IV (Negligent Misrepresentation) Is Precluded By The Economic Loss Doctrine As A Matter Of Law

The Town's negligent misrepresentation claim is barred on yet another basis. The Town is seeking recovery for economic damages in Count IV. Given the existence of privity between the Town and Wright-Pierce, a claim for negligent misrepresentation seeking economic damages is barred by the economic loss doctrine. While New Hampshire law recognizes a limited exception to that doctrine, it does not apply in the context of the Town's claim. The New Hampshire Supreme Court recognizes an exception for those negligent misrepresentation claims that center upon an alleged inducement to enter into a contract, but not for claims that focus upon performance of the contract. Count IV (Negligent Misrepresentation) should be dismissed as a matter of law because the relief sought in Count IV is compensation for economic or commercial losses. See Amended Complaint, ¶ 127 (identifying extra costs and expenses).[4] Alternatively, even if there is some evidence of non-

[4] In Count IV (Negligent Misrepresentation), the Town seeks compensation for the following economic losses: (A) "lack of compliance with NHDES permits and mandates;" (B) "additional and extra costs and expenses associated with monitoring and reporting RIB system activities;" (C) "additional and extra costs and expenses associated with operating alternative effluent disposal systems to account for operating deficiencies in the RIB system;" (D) "costs and expenses

economic damages to property other than the RIB site, the damage is *de minimus*, as a matter of law in relation to the Town's $7.6 million plus damages claim, and barred by the economic loss doctrine.

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." *Plourde Sand & Gravel Co. v. JGI Eastern, Inc.*, 154 N.H. 791, 794 (2007). The First Circuit recently addressed the economic loss doctrine in New Hampshire: "As the New Hampshire Supreme Court has stated, '[i]n 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.'" *Schaefer v. Indymac Mortgage Services*, 731 F.3d 98, 103 (1st Cir. 2013) (quoting *Plourde*, 154 N.H. at 795); *see Border Brook Terrace Condo. Ass'n v. Gladstone*, 137 N.H. 11, 18 (1993).

In *Plourde Sand & Gravel*, the New Hampshire Supreme Court recognized a "negligent misrepresentation" exception to the economic loss rule when a plaintiff is not in privity with the defendant, and a negligent misrepresentation is made by a defendant who is in the business of supplying information. *Plourde*, 154 N.H. at 794. Where the parties are in privity of contract, however, the negligent misrepresentation exception is much narrower, and does not apply if the alleged misrepresentations "concern the quality or characteristics of the subject matter of the contract or otherwise relate to the offending party's expected performance." *Wyle v. Lees*, 162 N.H. 406, 411 (2011). In *Wyle*, the New Hampshire Supreme Court addressed for the first time whether the economic loss doctrine bars a claim for negligent misrepresentation "between two contracting parties." *Id.* at 410 ("we have never addressed the issue presently before us"). The Court carefully distinguished "negligent misrepresentation claims that center upon an alleged inducement to enter into

associated with the purchase of land and construction of an RIB system that does not perform as intended, designed, recommended, or represented;"(E) "remediation costs associated with removing, replacing, or repairing the RIB system;" and (F) "other costs, expenses, and damages to be proven at trial." *See* Amended Complaint, ¶ 127.

a contract from those that focus upon performance of the contract," and ruled that the negligent misrepresentation exception does not apply to claims that "focus on performance of the contract." *Id.* (emphasis supplied).

As noted above, in Count IV, the Town alleges that Wright-Pierce made three negligent misrepresentations:

- "WP negligently misrepresented that the Wolf 1A Site was suitable to meet the NHDES requirements and negligently misrepresented that the Wolf 1 A could handle the effluent load that would be required when in fact WP had no basis to make this recommendation and when in fact WP had not fully and adequately investigated the Site to confirm this representation." Amended Complaint, ¶ 124.

- "WP negligently misrepresented that the design and construction of an RIB system was the best alternative to address Wolfeboro's disposal of treated effluent without fully, adequately, and completely investigating and vetting other potential options available to Wolfeboro." Amended Complaint, ¶ 125.

These alleged negligent misrepresentations relate directly to Wright-Pierce's performance of its contractual duties under a contract.

In the Amended Complaint, ¶¶ 27-70, the Town describes the tasks and scope of services for Contract #1, Contract #2, Contract #3 and Amendment No. 1 to Contract #3 ("Amendment No. 1"). *See* Amended Complaint, ¶¶ 27-70. The allegation in Count IV that "*Wright Pierce negligently misrepresented that the Wolf 1 A Site was suitable to meet the NHDES requirements and negligently misrepresented that the Wolf 1A could handle the effluent load*" is an allegation related to Wright-Pierce's performance of its services under Contract #3, and Amendment No. 1. Contract #3 and Amendment No. 1 were introduced into evidence as Trial Exhibit 12, and indicate that Wright-Pierce's scope of services was to perform Phase I, Phase II, and Phase III hydrogeologic site investigations, including "Analysis and Modeling" and a "Project Final Report" regarding Wolf-1. *See* **Exhibit 2** (**Trial Exhibit 12**) (Contract #3, Plan of Study, p. 1-6, Amendment No. 1, Plan of Study, p. 1-6). The allegation in Count IV that "*WP negligently misrepresented that the design and construction of an RIB system was the best alternative to address Wolfeboro's disposal of treated effluent*," is an allegation

related to Wright-Pierce's performance of its services under Contract #2. Contract #2 was introduced into evidence as Trial Exhibit 11, and clearly shows Wright-Pierce's scope of services to evaluate alternatives for effluent disposal and develop an Alternative Evaluation Report. *See* **Exhibit 3 (Trial Exhibit 11)** (Contract #2, Plan of Study, p. 1-5). *See Schaefer v. Indymac Mortgage Serv.*, 2012 WL 6113973, * 2 (D.N.H. Dec. 10, 2012) (negligent misrepresentation exception does not apply to information related to performance of the contract); *L'Esperance v. HSBC Consumer Lending, Inc.*, 2012 WL 2122164, *15-16 (D.N.H. June 12, 2012) (same).

In *Wyle v. Lees*, the New Hampshire Supreme Court clarified that when parties are in privity of contract, as they are here, the negligent misrepresentation exception to the economic loss doctrine does not apply unless the plaintiff's claims allege "'independent, affirmative misrepresentations unrelated' to the performance of the contract." *Wyle v. Lees*, 162 N.H. at 412; *Schaefer v. Indymac Mortgage Serv.*, 2012 WL 6113973, * 2 (D.N.H. Dec. 10, 2012). Here, privity of contract exists between the Town and Wright-Pierce, and all of the alleged negligent misrepresentations in Count IV are directly related to performance of a contract, and concern the "quality or characteristics of the subject matter of the contract or otherwise relate to [Wright-Pierce's] expected performance." *Id*. Therefore, the negligent misrepresentation claim is barred by the economic loss doctrine because the allegations "pertain to performance of the contract." *See Johnson v. Capital Offset Co., Inc.*, 2013 WL 5406613 (D.N.H. Sept. 25, 2013); *Marcil v. John Deere Indus. Equip. Co.,* 9 Mass. App. Ct. 625, 629–630 (1980) (directed verdicts proper on negligence counts because of plaintiff's failure to prove any personal injury or property damages beyond pure economic loss).

Although Paragraph 80 of the Amended Complaint alleges that a "sink hole" developed on the RIB site, and that "fine sands had migrated from the hillside downslope," *see* Amended Complaint, ¶ 80, the Town does not mention anything about a "sink hole" or "fine sands" in its claim for negligent misrepresentation in Count IV, and is not seeking damages in Count IV to remediate the "sink hole" or "fine sands." Moreover, for purposes of the economic loss doctrine this type of deterioration to the

RIBs is "damage to the inferior product itself" [5] and is not characterized as property damage. *Lockheed Martin Corp. v. RFI Supply, Inc.*, 440 F.3d 549, 553 (1st Cir. 2006) (discussing New Hampshire's economic loss doctrine). In *Ellis v. Robert C. Morris, Inc.*, 128 N.H. 358, 363 (1986), the New Hampshire Supreme Court explained the concept that defects which cause a diminution in value are not considered property damage for purposes of the economic loss doctrine: "When a defective product accidentally causes harm to persons or property, the resulting harm is treated as personal injury or property damage. But when damage occurs to the inferior product itself, through deterioration or non-accidental causes, the harm is characterized as economic loss." *Ellis v. Robert C. Morris, Inc.*, 128 N.H. at 363 (quoting Note, *Economic Loss in Products Liability Jurisprudence,* 66 Colum.L.Rev. 917, 918 (1966)). "In general, persons must refrain from causing personal injury and property damage to third parties, but no corresponding tort duty exists with respect to economic loss." *Id.* at 944; *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 835 (2006) ("in this context, economic losses encompass both damage to the defective product itself and the diminution in value of the product because it is inferior in quality").

Additionally, under the economic loss doctrine, a plaintiff may not seek to redress economic loss in tort on account of "minimal" of "de minimus" property damage or personal injury. *See Travelers Prop. Cas. Co. v. Rapid Power Group*, 2013 WL 1898833, * 4 (W.D. Ky May 3, 2013); *Gannett v. Pettegrow*, 2005 WL 217036 * (D. Me. Jan. 28, 2005); *W.R. Constr. & Consulting, Inc. v. Jeld-wen, Inc.,* 2002 WL 31194870, *8 (D. Mass. Sept. 20, 2002); *Giddings & Lewis,* 348 S.W.3d at

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[5] In *Lockheed Martin Corp. v. RFI Supply, Inc.*, 440 F.3d 549, 553 (1st Cir. 2006), the First Circuit noted:

> "New Hampshire cases are clear that when a product harms only itself, the loss is economic and may not be recovered in tort. For example, in a recent New Hampshire Supreme Court case, the court stated that " '[w]hen a defective product accidentally causes harm to persons or property [*other than the defective product itself*], the resulting harm is treated as personal injury or property damage.'" *Kelleher v. Lumber,* 891 A.2d 477, 494 (2005) (quoting *Ellis,* 513 A.2d at 954)(alteration in original)(emphasis added). The court went out of its way to add the phrase "other than the defective product itself," which was not present in *Ellis.* The implication of this statement is that, when a defective product accidentally causes harm to itself, that harm is *not* treated as personal injury or property damage but is instead treated as economic loss, which is not recoverable in tort.

744 n. 10 (citing *Delmarva Power & Light v. Meter–Treater, Inc.,* 218 F.Supp.2d 564, 570–71 (D. Del. 2002) (collecting cases where minimal damage to other property does not trigger the exception to the economic loss rule)).[6] Here, the fallen tree, sink hole, and migration of sand, which occurred cannot be characterized as property damage because it was "damage occur[ing] to the inferior product itself, through deterioration or non-accidental causes, *see Ellis v. Robert C. Morris, Inc.*, 128 N.H. at 363, but even if it was property damage, it is minimal property damage as a matter of law.

Moreover, even if this Court determines that the Town has provided evidence of property damage which somehow avoids the economic loss doctrine, the New Hampshire Supreme Court's decision in *Border Brook Terrace Condo. Ass'n* clarifies that the Town is permitted to recover only "[t]o the extent that the plaintiffs allege damage other than purely 'economic loss.'" *See Border Brook*, 137 N.H. at 19. In *Border Brook* the New Hampshire Supreme Court reversed a jury verdict awarding damages to the plaintiff, due to an improper closing argument. *Id.* at 13. For the sake of "judicial economy," the Court addressed other issues that were "likely to arise again on remand," including whether the plaintiffs' negligence claim failed because "it allege[d] purely 'economic loss,' rather than property damage or personal injury." *Id.* at 18. The New Hampshire Supreme Court noted that the allegations of water damage to the interior and exterior of buildings and units is a claim that "defendants' defective product accidentally caused harm to the condominium property," and for that reason "it is not a claim for purely economic loss." *Id.* at 19. Significantly, however, the Court ruled that the trial court must make the determination about which allegations assert purely economic loss, as follows:

> We leave it to the court on remand to determine which particular allegations assert purely 'economic loss,' and which do not. Those that do assert purely 'economic loss' cannot be maintained as a negligence claim.

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[6] "Incidental property damage ... will not take a commercial dispute outside the economic loss doctrine; **the tail will not be allowed to wag the dog**." *Miller v. U.S. Steel Corp.,* 902 F.2d 573, 576 (7th Cir.1990) (Posner, J.) (emphasis supplied); *see McCracken Cnty. Sch. Bd. v. Hoover Universal, Inc.,* No. CIV.A. 93–0164–P(J), 1994 WL 1248581 (W.D. Ky. Sept. 28, 1994).; *Florida Power & Light Co. v. McGraw Edison Co.,* 696 F.Supp. 617, 620 (S.D. Fl. 1988) ("[T]o permit recovery in tort where the only property damages has been minimal damage to surrounding structures and components necessary for proper operation of the machine would be unjustified.").

Id. at 19.

Here, Wright-Pierce is entitled to judgment as a matter of law on the negligent misrepresentation claim because in Count IV, the Town has only alleged economic losses. Alternatively, if this Court determines that there is some minimal evidence of property damage which avoids the economic loss doctrine, the New Hampshire Supreme Court's directive in *Border Brook* requires this Court "to determine which particular allegations assert purely 'economic loss,' and which do not," and "[t]hose that do assert purely 'economic loss' cannot be maintained." *Id.* (emphasis supplied).

II. Count VII (Fraudulent Misrepresentation) Should Be Dismissed As A Matter Of Law

A. Count VII (Fraudulent Misrepresentation) Is Precluded By The Economic Loss Doctrine As A Matter Of Law

For similar reasons, Count VII (Fraudulent Misrepresentation) is a tort claim which is barred by the economic loss doctrine as a matter of law. *See Johnson v. Capital Offset Co., Inc.*, 2013 WL 5406613 (D.N.H. Sept. 25, 2013) ("[t]he economic loss doctrine 'precludes contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship"). Unlike a claim for "negligent misrepresentation" which under certain circumstances provides a narrow exception to the economic loss doctrine when parties are in privity of contract, *see Wyle v. Lees*, 162 N.H. at 412, there is no such recognized exception for "fraudulent misrepresentation." The New Hampshire Supreme Court has not yet had occasion to explicitly determine whether a fraudulent misrepresentation claim is barred by the economic loss doctrine when parties are in privity of contract, but in *Wyle v. Lees*, the New Hampshire Supreme Court cited with approval the Seventh Circuit's decision, *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 964-65 (7th Cir. 2000), which it described as "barring a plaintiff's fraud claim where parties entered into a contract for the sale of real property with an agreed upon closing date and the defendant subsequently backed out of the sale." *Wyle v. Lees*, 162 N.H. at 412 (citing *Home Valu*, 213 F.3d at 964-965). In *Home Valu,*

Inc., a Wisconsin district court dismissed the plaintiff's intentional misrepresentation claims on the grounds that they were barred by the economic loss doctrine. *Home Valu,* 213 F.3d at 964-965.[7] On appeal, the Seventh Circuit affirmed, based upon its prior decision in *Cooper Power Systems, Inc. v. Union Carbide Chems. & Plastics Co., Inc.*, 123 F.3d 675, 682 (7th Cir. 1997), reasoning that "this court 'has already predicted that Wisconsin would not allow a negligence or strict [responsibility] misrepresentation claim seeking to recover economic damages. We perceive no basis for treating . . . [an] intentional misrepresentation claim any differently." *Home Valu, Inc.*, 213 F.3d at 964 (quoting *Cooper Power*, 123 F.3d at 682). Accordingly, while the New Hampshire Supreme Court has not yet explicitly decided the issue, the *Wyle* decision can be read as predicting that New Hampshire will follow the reasoning of *Home Valu* that when parties are in privity, the economic loss doctrine bars claims for fraudulent misrepresentations.

Alternatively, even if this Court determines that the New Hampshire Supreme Court would recognize a distinction between claims for fraudulent misrepresentations that serve "as an inducement for the contract" (as it has done for claims of negligent misrepresentation when parties are in privity) and would hold that claims alleging fraudulent inducement are not barred by the economic loss doctrine, *see Wyle v. Lees*, 162 N.H. at 411, the Town's only proposed fraudulent inducement claim was struck by this Court's August 20, 2013 Order for "failing to allege all elements of a fraud claim."

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[7] In *Home Valu,* the Seventh Circuit noted that the plaintiff alleged two different groups of intentional misrepresentation claims. The first group concerned allegedly false statements "for the sole **purpose of inducing** Home Valu" into executing an Amendment to an Agreement of Sale (the "Amendment") which extended a closing date. *Home Valu, Inc.*, 213 F.3d at 962 (emphasis added). The second group related to allegedly false statements that were made "after the parties executed the Amendment," and alleged that defendant "told Home Valu on several occasions that it would in fact purchase the property on or before the closing date." *Id.* The Seventh Circuit did not have clear Wisconsin law to follow, as the Wisconsin Supreme Court had recently issued a *per curiam* statement in another case that "the court is equally divided" on the question "whether a claim the economic loss doctrine prohibits a plaintiff from recovering tort damages when an intentional misrepresentation fraudulently induces a plaintiff to enter a contract." *Id. at 965.* The "evenly divided" Wisconsin Supreme Court" resulted in an affirmance of the Wisconsin Appeals Court's decision that the 'the economic loss doctrine does not bar claims for intentional misrepresentation when the misrepresentation fraudulently induces a party to enter a contract." *Id.* at 964. But since an affirmance by an equally divided court is "not entitled to precedential weight," *id. at 965,* the Seventh Circuit took a restrictive approach and ruled that the economic loss doctrine barred both groups of intentional misrepresentation claims. *Id*. The New Hampshire Supreme Court's decision in *Wyle v. Lees* appears to clearly approve of *Home Valu's* conclusion that the second group of intentional misrepresentations, which concerned performance under an executed contract, were barred by the economic loss doctrine. *See Wyle v. Lees*, 162 N.H. at 412.

See Town of Wolfeboro v. Wright-Pierce, 2013 WL 4500676, * 7 (D.N.H. August 20, 2013). It is important to recognize that Count VI (Fraud) of the Town's proposed Amended Complaint alleged that Wright-Pierce intentionally made "false and misleading statements . . . for the purposes of inducing Wolfeboro to continue with the process of purchasing the property, permitting, engineering the RIB system, and ultimately constructing the RIB system," s*ee* Dkt. No. 28 (Proposed Amended Complaint). But this Court's Order of August 20, 2013 determined that "Count VI, Fraud, is futile as alleged," and the Town was not permitted to include a claim for fraudulent inducement in the Amended Complaint. *Town of Wolfeboro v. Wright-Pierce*, 2013 WL 4500676, * 7.

Thus, even if this Court determines that New Hampshire would adopt a narrow exception to the economic loss doctrine for fraudulent inducement claims, it does not apply here because this Court previously struck the Town's fraudulent inducement claim. *Id.*[8] Here, Count VI (Fraudulent Misrepresentation) does not allege fraudulent inducement, but instead alleges misrepresentations relating directly to Wright-Pierce's performance of groundwater modeling obligations under Contract #3. Specifically, the Town alleges that Wright-Pierce made the following three misrepresentations concerning the results of the modeling:

- "WP fraudulently misrepresented that 'The model results indicate that the site can take up to 600,000 gpd . . .'" Amended Complaint, ¶ 139.
- "WP fraudulently misrepresented that 'the modeling results continue to look pretty good.'" Amended Complaint, ¶ 140.
- "WP fraudulently misrepresented that 'The groundwater flow modeling is complete and still looks good in terms of site capacity accommodating future annual average design flow of 600,000 gpd.'" Amended Complaint, ¶ 141.

All three of these alleged fraudulent misrepresentations go directly to Wright-Pierce's performance under Contract #3. For example, the Amended Complaint alleges that groundwater flow

[8] Under Delaware law, for example, "the economic loss doctrine generally prohibits recovery in tort for solely economic harm," but "[f]raudulent inducement is, however, a recognized exception to this doctrine." *Kuhn Constr. Co. v. Ocean & Coastal Consultants*, 844 F. Supp.2d 519, 529 (D. Del. 2012). In *Kuhn Constr.*, the Court explained, "[s]o long as the fraud claim relates to the inducement of the contractual relationship, and not performance under the contract, an exception exists." *Id.*

modeling was required by Contract #3, as follows: "Contract #3 was amended to include an addition [sic] scope of services for the performance by WP of the Phase III Site Investigations . . . the Phase III Site Investigations required WP to perform modeling" and "prepare and submit a groundwater discharge permit application on Wolfeboro's behalf." *See* Amended Complaint, ¶ 42. Contract #3 was introduced into evidence as Trial Exhibit 12, and indicates that the scope of work would include a "workplan for Phase III site investigation," approved by NHDES, including a "predictive groundwater model." *See* **Exhibit 2** (**Trial Exhibit 12**, Contract #3, Plan of Study, p. 5-6). Amendment No. 1 provides that it is "to complete Phase III of the Hydrogeological Investigation to evaluate the suitability of the Proposed Site for groundwater discharge of Wastewater Treatment Facility Effluent and prepare and submit a groundwater discharge permit application, as described in the attached Exhibit A, Plan of Study" ("Plan of Study"). *See* **Exhibit 2** (**Trial Exhibit 12**, Amendment No. 1). The Plan of Study required a "Phase 3 Site Investigation," including "Analysis And Modeling," and "Conceptual Model Development." *See Id.* (Amendment No. 1, Plan of Study, p. 3). Since all three alleged misrepresentations concern the groundwater modeling required under Amendment No. 1 and the Plan of Study, these alleged fraudulent misrepresentations go directly to Wright-Pierce's performance of its modeling obligations under Contract #3, and this Court should rule that they are barred by the economic loss doctrine, as a matter of law.

B. The Evidence Is Insufficient To Prove The Elements Of Fraudulent Misrepresentation As A Matter Of Law

Alternatively, this Court should grant judgment as a matter of law on Count VII because the Town's evidence is insufficient to establish the elements of fraud, as a matter of law. "[O]ne who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." *Tessier v. Rockefeller*, 162 N.H. 324, 332 (2011) (emphasis added). "Fraud requires proof 'that the representation was made with knowledge of

its falsity or with conscious indifference to its truth and with the intention of causing another person to rely on the representation.'" *Johnson v. Capital Offset Co.*, 2013 WL 5406613, *4 (D.N.H. Sept. 25, 2013) (quoting *Tessier v. Rockefeller*, 162 N.H. at 332). "Fraud must be proved by clear and convincing evidence." *Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363, 369 (2009).

"[I]n general, only factual misstatements, not statements of opinion, constitute actionable misrepresentations." *Private Jet Serv. Group, Inc. v. Sky King, Inc.*, 2006 WL 2864057, * 5 (D.N.H. Oct. 4, 2006). As noted by this Court, "[a] representation which merely amounts to a statement of opinion, judgment, probability, or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural, or exaggerated statement, goes for nothing." *Id*. (quoting *Messer v. Smyth*, 59 N.H. 41, 43 (1879)); *see Kalik v. Abacus Exchange, Inc.*, 2001 WL 1326581, * 7-8 (D.N.H. Oct. 19, 2001) (quoting *Syracuse Knitting Co. v. Blanchard*, 69 N.H. 447, 449 (1899). Accordingly, "[t]here is an important threshold determination for any misrepresentation claim, be it for deceit or for negligent misrepresentation: only statements of fact are actionable; statements or opinion cannot give rise to a deceit action or to a negligent misrepresentation action." *Id.* (quoting *Cummings v. HPG Int'l, Inc., Inc.*, 244 F.3d 16, 21 (1st Cir. 2001)).

As noted above, Count VII (Fraudulent Misrepresentation) alleges that three specific statements contained in emails constitute fraudulent misrepresentations:

- 'The model results indicate that the site can take up to 600,000 gpd . . .'" Amended Complaint, ¶ 139 (**Exhibit C,** quoting email dated February 8, 2007)[9]

- "modeling results continue to look pretty good.' Amended Complaint, ¶ 140 (**Exhibit D,** quoting email dated February 14, 2007).[10]

- "The groundwater flow modeling is complete and still looks good in terms of site capacity accommodating future annual average design flow of 600,000 gpd.'" Amended Complaint, ¶ 141 (**Exhibit E,** quoting email dated February 20, 2007). [11]

[9] The Amended Complaint incorrectly identifies this email as Exhibit "D," but it is **Exhibit C**.
[10] The Amended Complaint incorrectly identifies this email as Exhibit "E," but it is **Exhibit D.**
[11] The Amended Complaint incorrectly identifies this email as Exhibit "F," but it is **Exhibit E**.

When these three statements about the groundwater modeling results are read in the context of the full emails they were extracted from, it is clear the statements amount to non-actionable opinions. And even if the statements about the model results are not opinions, the elements of fraudulent intent and justifiable reliance, which are necessary to prove fraudulent misrepresentation, are absent as a matter of law.

The first email, **Exhibit C** of the Amended Complaint, provides as follows:

From: Peter C. Atherton [pca@wright-perice.com]
Sent: Thursday, February 08, 2007 2:50 PM
To: 'David Ford'
Subject: RE: Disposal status report

Hi Dave – The model results indicate that the site can take up to 600,000 gpd. The actual site rating will need to be approved by DES as part of their review of the Phase III report and model results, etc. The Phase III report will be completed over the next 1 to 2 weeks. We would like to set up a meeting with you to discuss your review of the Draft report the week of February 26th. We would also like to review the preliminary design results for the disposal facilities that day. Are there any days the week of the 26th that are better for you than others? Pete

Peter C. Atherton, P.E.
Wright-Pierce

The second email, **Exhibit D** of the Amended Complaint, provides as follows:

From: Neil P. Cheseldine [mailto:npc@wright-pierce.com]
Sent: Wednesday, February 14, 2007 4:34 PM
To: 'Peter C. Atherton'
Cc: 'Peter J. Wilson'
Subject: FW: WW Disposal – Laura Ames Call - Confidential

Pete,

Pete Wilson has uploaded a number of Appendices (i.e figures, boring/well logs, etc.) that are complete and ready for Dave Ford consumption. I have not reviewed them yet, but I would not be concerned about Dave looking them over at this point in time if you would like to let him know that he can access this info on the FTP site

Pete also said he is working through text portions and hopes to mostly complete tomorrow. He also expects final model results tomorrow, which he will also write in. Jesse has verbally indicated that the site capacity is . . . . .(drum role) at or above 1 mgd. There is no dramatic failure mode – instead the existing wetland "drains" have more flow out. I would hold off on telling Dave any specifics until we have written info from Jesse, but you can tell him that modeling results continue to look pretty good**.**

> I am in Claremont tomorrow. Available to review report progress on Friday and formulate a game plan for next week and also consider releasing available report text sections to Dave.
>
> Neil
>
> Neil Cheseldine, P.E.
> Wright-Pierce

The third email, **Exhibit E** of the Amended Complaint, provides as follows:

> From: Neil P. Cheseldine [npc@wright-perice.com]
> Sent: Tuesday, February 20, 2007 10:34 PM
> To: 'David Ford'
> Cc: 'Peter C. Atherton', 'Peter J. Wilson'; 'Melissa Hamkins'; 'Gary L. Smith'; 'Richard N. Davee'
> Subject: Wolfeboro – Phase 3 Hydrogeo report status
>
> Dave,
>
> The groundwater flow modeling is complete and still looks good in terms of site capacity accommodating the future annual average design flow of 600,000 gpd. We are assembling the draft Phase 3 hydrogeo report. There is some uncertainty regarding the schedule to complete the Phase 3 report because Gary Smith had a snowmobiling mishap on Sunday. I am not sure of all the details except that he was involved in some kind of collision and is presently in the hospital hoping to be released later today – preliminary report is broken ribs and other assorted cuts and bruises (not how I would choose to follow up a vacation in the tropics . . .). As our lead hydrogeologist, we need to get Gary's input on the Phase 3 report and hopefully he will be feeling better soon – we will keep you posted. We will be prepared to discuss the hydrogeo issues at the meeting on Thursday. Please feel free to contact us with any questions you may have prior to meeting on Thursday.
>
> Neil
> Neil Cheseldine, P.E.
> Wright-Pierce

See Amended Complaint, ¶¶ 139-141, and **Exhibits C, D**, and **E**.

All three of these emails clarify that the Phase Three Report was not completed yet and more work still needed to be done on it by Wright-Pierce. In the February 8, 2007 email, Peter Atherton ("Mr. Atherton") of Wright-Pierce advised Mr. Ford that the groundwater modeling was not yet completed; that the Phase III Report would not be finalized for another few weeks; that a meeting

would not be scheduled until the end of February 2007 to discuss a "draft Phase III report;" that the site rating would "need to be approved by DES as part of their review of the Phase III report and model results," and that Mr. Atherton needed dates when Mr. Ford was available for a meeting during "the week of February 26th." There is no evidence the Town was aware of the statement in the internal Wright-Pierce email of February 14, 2007, that the "*modeling results continue to look pretty good.*" Additionally, "*look pretty good*," is the type of statement which the New Hampshire Supreme Court characterizes as an opinion because it is "vague and indefinite in its terms, or is merely a loose, conjectural" statement. *Private Jet Serv. Group, Inc. v. Sky King, Inc.*, 2006 WL 2864057, * 5 (quoting *Messer v. Smyth*, 59 N.H. 41, 43 (1879)). In the February 20, 2007 email, Mr. Cheseldine informed Mr. Ford that "there is some uncertainty regarding the schedule to complete the Phase 3 report" because the lead hydrogeologist, "Gary Smith had a snowmobiling mishap" and was "in the hospital," and his "input" was necessary to complete the Phase Three Report. Mr. Cheseldine asked Mr. Ford to wait until the "meeting on Thursday" for a discussion of the hydrogeologic issues. Under these circumstances, where each email advised Mr. Ford that the draft Phase Three Report was not yet finalized and a meeting would be held to discuss the report, the Town cannot prove fraudulent misrepresentation based upon the statements because the element of justifiable reliance is absent as a matter of law.

As noted above, Amendment No. 1 was for a Phase Three "Plan of Study," which required a "Project Final Report," which in turn required meetings with the Town and the New Hampshire Department of Environmental Services ("NHDES") before the report was finalized. Specifically, the requirement for a report and meeting with the Town was set forth in the contract as follows:

> **PROJECT FINAL REPORT**
>
> All work performed in previous tasks will be documented in a project final report
>
> Report Preparation

> This task includes meetings with the Town and NHDES to discuss any proposed report modifications before the final report is produced

See **Exhibit 2** (**Trial Exhibit 12**, Contract #3, Amendment No. 1, Plan of Study, p. 5).

In Count VII (Fraudulent Misrepresentation), the Town alleges in a conclusory fashion that "Wolfeboro relied on WP's fraudulent misrepresentations to its detriment," *see* Paragraph 142, but fails to provide any further explanation about how the Town changed its position in "reliance" upon the above-quoted statements in these three emails, prior to completion of the draft Phase Three Report required by Amendment No. 1. At trial, the Town has also failed to introduce any testimony from Mr. Ford, nor has it introduced any evidence of any kind, that the Town took specific actions during the month of February 2007, in reliance upon the above-quoted statements, prior to completion of the Phase Three Report and/or prior to the meeting that was scheduled with Wright-Pierce at the end of February 2007 to discuss the hydrogeologic issues involved in the Phase Three Report.

If the Town did suffer pecuniary loss in reliance upon the above-quoted statements in the three emails dated February 8, February 14, and February 20, 2007, respectively, without waiting for completion of the Phase Three Report, and despite Wright-Pierce's clear requests to Mr. Ford in the emails that he wait for a finalized draft of the Phase Three Report, then its reliance was unjustified as a matter of law. *See Kennedy v. Josephthal & Co., Inc*., 814 F.2d 798, 805 (1st Cir. 1987). "Taken together, these factors can lead to but one conclusion, that of the complete absence of justifiable reliance. No judge, no jury, in the faithful exercise of its fact-finding duty, could come to any other decision." *Id.* (reckless conduct is unjustifiable reliance as a matter of law). *See Page v. Frazier*, 388 Mass. 55, 64-68 (1983) (absence of reasonable reliance by plaintiffs precludes misrepresentation claim as a matter of law). Since the elements of fraud cannot be proved with clear and convincing evidence, this Court should grant judgment as a matter of law on Count VII.

III. Count III (Breach Of Contract) Must Be Dismissed Because There Is No Evidence That Wright-Pierce Failed To Perform A Contractual Obligation

Count III (Breach of Contract) should be dismissed as a matter of law because the Town has introduced no evidence that Wright-Pierce failed to perform a contractual obligation. Count III alleges in a single conclusory sentence that "*WP breached the express terms of Contracts 1, 2, 3, 4 and 5 by failing to perform all of the engineering necessary to fulfill its obligations under these Contracts*." *See* Amended Complaint, ¶ 120 (emphasis added). Significantly, however, no evidence has been introduced at trial that Wright-Pierce failed to perform a task required by the scope of work for Contracts 1, 2, 3, 4, and 5. Each contract explicitly provides that a "detailed scope of the work is outlined in the attached Plan of Study." [12] Although the Plan of Study attached to each these contracts includes a detailed multi-page Scope of Services, the Town has not produced any evidence of a failure by Wright-Pierce to perform a single task identified under the Plan of Study and/or Scope of Services for Contracts 1, 2, 3, 4, and 5. Thus, the Town does not contend that Wright-Pierce failed to perform any of its specific undertakings under the contracts. The Town's contention, rather, is that Wright-Pierce did so negligently. This is a claim of negligence, not breach of contract. *See Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.* , 439 Mass. 395, 396 (2003) (claim of negligence in the manner of performance of contract, as opposed to failure to perform, is a claim of negligence, not breach of contract). The New Hampshire Supreme Court explained this distinction in *J. Dunn & Sons, Inc. v. Paragon Homes of New England, Inc.*, 110 N.H. 215, 217- 218 (1970) as follows:

> The determination of whether an action is on a contract or in tort is not controlled by the form of the action but by its substance . . . The fact that the duty alleged to have been

[12] A standard provision of each contract provides:

> **2. Services to be performed by the ENGINEER**
>
> B. The ENGINEER agrees to produce a complete and definitive Engineering Report to meet current division requirements and to perform any and all engineering incidental thereto. The detailed scope of the work is as outlined in the attached Plan of Study.

See, e.g., **Exhibit 2** (Trial Exhibit #12, Contract #3); **Exhibit 3** (Trial Exhibit 11, Contract #2)

> violated is related to obligations growing out of or coincidental with a contract will not prevent the action from being one in tort [citations omitted]. The purpose of the contract duty is to secure the receipt of the thing bargained for, while the tort duty which results from the contract relationship of the parties is that a party must refrain from conducting itself so as to cause a particular harm to the other party.

Id. In *J. Dunn & Sons*, the New Hampshire Supreme Court noted that "[t]he thrust of the counts in question is not defendant's failure to perform the agreement of distributorship between the parties but, rather, as previously stated, its violation of a duty imposed by law . . ." *Id*.

In *695 Atlantic Ave. Co., LLC v. Commercial Constr. Consulting, Inc.*, 64 Mass. App. Ct. 1109, *2 (2005), a case involving a contract for professional engineering services, the Massachusetts Appeals Court affirmed the trial court's dismissal of a breach of contract claim on the grounds that "negligent performance of contractual obligations sounds in negligence" rather than breach of contract. *Id.* (affirming dismissal of contract claim, on facts similar to these, based on rule of *Herbert A. Sullivan* case). The Massachusetts Appeals Court explained:

> a. *Breach of contract*. The plaintiffs' contract claim asserts that they or their agent hired the defendants to perform a structural inspection of the building and that the defendants failed to exercise the degree of skill promised or the degree of skill required by the applicable professional standard of care. The judge correctly dismissed the contract claim pursuant to Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. at 395-397. There, the plaintiff claimed it was error to enter judgment on its breach of contract claim where it alleged it was deprived of its contractual benefits because the defense provided by the defendant insurance company was negligent. Id. at 395. The Supreme Judicial Court opined that "[w]hen a party binds himself by contract to . . . perform a service, he agrees by implication to do a workmanlike job and to use reasonable and appropriate care and skill in doing it. *Id*. at 395-396, quoting from Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 143 (1937). "Although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished from mere failure to perform it, causing damage, is a tort." *Id.* at 396.

*Id. at *2. *See also, Cafferty v. Stillman*, 79 Conn. App. 192, 197-198, 829 A.2d 881 (2003) ("Just as [p]utting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender . . . putting a contract tag on a tort claim will not change its essential character").

Therefore, since the Town has not introduced any evidence that Wright-Pierce failed to perform a contractual obligation, Wright-Pierce is entitled to judgment as a matter of law on Count III for breach of contract. Additionally, the Town voluntarily withdrew Count V (Breach of Warranty) in which it had alleged that "WP . . . warranted that the Wolf-1A site could dispose of an annual average of 600,000 gallons per day." *See* Amended Complaint, ¶ 130. The Town's withdrawal of its claim that Wright-Pierce "expressly warranted" a disposal average of "600,000 gpd" highlights why its breach of contract claim also fails as a matter of law.

The Massachusetts Appeals Court's decision in *Coca-Cola Bottling Co. v. Weston & Sampson Engineers, Inc.*, 45 Mass. App. Ct. 120 (1998), involving a wastewater treatment plant, is instructive. In *Coca-Cola*, the plaintiff, Coca-Cola Bottling Co. ("Coca-Cola") amended its complaint to allege claims for breach of implied warranty and breach of express warranty, and argued that these claims were not time-barred by the statute of repose for actions in tort (M.G.L. c. 260, §2B) because they are contract claims to which the statue of repose for torts cannot apply. *Id*. at 123. The express warranty claim was based on Coca-Cola's allegations that "the defendant expressly warranted that the wastewater treatment facility would ultimately treat wastewater within the permit requirements." *Id.* The trial judge correctly recognized that the claim for breach of an implied warranty "is, in substance, a claim of professional malpractice-a negligence claim," but both claims were tried to a jury which returned a verdict for Coca-Cola. On appeal, the Appeals Court reversed and remanded. *Id* at 130. [13]

The Appeals Court held that the trial court correctly ruled that the "breach of implied warranty" claim sounded in negligence and, as such, further held that the claim was time-barred and should not have gone to the jury. *See Id*. at 126-128. More importantly, since "the professional malpractice theory should not have been presented to the jury," the Appeals Court could "not ascertain on which

[13] The Appeals Court explained: "[A]n **express** warranty promises that a specific result will be achieved-in contrast to a **promise implied by law**-namely, that the work of the professional conforms to the standards of his or her profession." *Id.* at 128.

theory the jury relied," and ruled that "the verdict cannot stand." *Id*. at 129. The Appeals Court ruled that on retrial, the trial judge must instruct the jury as follows:

> At retrial, the judge must make it plain to the jury, that in the event that they determine that the statements were made, they must choose whether: (i) the plaintiff's reasonable understanding of the defendant's statements was that the defendant promised that its postconstruction work would bring the discharge water within permit limitations, or whether (ii) the plaintiff's reasonable understanding of the defendant's statements was that the defendant's work conformed to professional standards and therefore, in the opinion of the defendant, such work should bring about the desired result, in which event there would be no recovery.

Id. at 129-130 (emphasis added). Applying the *Coca-Cola* court's reasoning here, the Town has already withdrawn its claim for breach of an express warranty that the Site could dispose of an annual average of 600,000 gallons per day; thus, it would be erroneous for the jury to deliberate as to choice "(i)" and the jury's "choice" would necessarily be limited to "(ii)." Accordingly, this Court should rule as a matter of law that the Town's breach of contract claim must be dismissed because it sounds in negligence, as a matter of law.

IV. Count I (Professional Negligence) Should Be Dismissed As A Matter Of law

Count I (Professional Negligence) should be dismissed as a matter of law because the Town has failed to produce any evidence that Wright-Pierce breached a professional standard of care. As a preliminary matter, there was no competent evidence that Wright-Pierce breached the applicable professional standard of care for a prime wastewater engineer, because all of the Town's experts admitted that they have no experience as a prime wastewater engineer, and also have no experience working on a RIB project. Specifically, the Town failed to provide expert evidence sufficient to establish the standard of care required of a wastewater engineer, failed to provide expert opinion testimony from experts qualified in the field of wastewater engineering, failed to establish a sufficient basis for its experts' opinions, failed to establish its experts' opinions within a reasonable degree of scientific and engineering certainty, and failed to establish, through expert opinion or otherwise, the causal connection between any alleged misconduct and its damages. Accordingly, the Town's

negligence claim should be dismissed as a matter of law because there is no competent evidence that Wright-Pierce breached the applicable standard of care.

Further, although the Town's experts are geotechnical engineers, and opined that a slope stability analysis should have been performed, and would have identified issues about slope stability, the evidence showed that the Town hired an independent engineering firm, Weston & Sampson ("W&S") to perform a peer review of Wright-Pierce's engineering work for the very purpose of identifying whether the work met the level of care that was required, and for providing additional guidance. W&S did not recommend a slope stability analysis, or mention the absence of a geotechnical study. Moreover, the evidence showed that W&S employs geotechnical engineers and could have performed a slope stability analysis itself, if it believed a geotechnical analysis was prudent and/or sound engineering practice under the circumstances. Therefore, the evidence is insufficient as a matter of law to establish that Wright-Pierce failed to meet the appropriate level of care.

Finally, even if there was some evidence of negligence, the evidence showed that the Town's fault was greater than 50% and bars the negligence claim as a matter of law under RSA 507:7-d (contributory fault bars recovery by the plaintiff if its fault was greater than the defendants). The Town's negligence in failing to heed Wright-Pierce's advice, and loading the RIBS far in excess of 600,000 gpd, outweighs any negligence by Wright-Pierce.

V. Count VI (Violation of RSA 358-A) Should Be Dismissed As A Matter Of Law

Count VI (Violation of RSA 358-A) should be dismissed because the evidence was insufficient as a matter of law to prove a violation of RSA 358-A. The Act provides that "[i]t shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." *See* RSA 358-A. The New Hampshire Supreme Court has "previously recognized that, although this provision is broadly worded, not all conduct in the course of trade or commerce falls within its scope." *Axenics, Inc. v. Turner Constr. Co.*, 164 N.H. 659, 675 (2012). In "determining which commercial actions not specifically delineated are covered by the

CPA," the Court employs a "rascality" test: "The objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce." *Id.* (quoting *Becksted v. Nadeau*, 155 N.H. 615, 619 (2007). [14] "Additional guidance for determining whether a non-enumerated claim is actionable is found in the federal courts' review of the Federal Trade Commission Act." *Lamont v. Furniture North, LLC*, 2014 WL 1453750, * 5 (D.N.H. April 15, 2015); *see Milford Lumber Co. v. RCB Realty, Inc.*, 147 N.H. 15, 19 (2001). The Federal Trade Commission considers an act unfair or deceptive if it "is within at least the penumbra of some established concept of unfairness[,]" is "immoral, unethical, oppressive, or unscrupulous[,]" or causes "substantial injury to consumers." *Id.*

"An ordinary breach of contract claim, for example, is not a violation of the CPA." *Id.* Additionally, "[a] negligent act standing by itself does not give rise to a claim under . . . [the CPA]." *Squeri v. McCarrick*, 32 Mass. App. Ct. 203, 207 (1992); *SMS Fin. V, LLC v. Conti,* 68 Mass. App. Ct. 738, 748 (1999) ("negligence without more does not constitute an unfair and deceptive practice"); *McNeal v. Lebel*, 157 N.H. 458, 469-470 (2008) (affirming trial court's ruling that "routine contract and negligence issues" not within ambit of CPA). Rather, there must be in addition, "evidence that the negligence was or resulted in an unfair or deceptive act or practice." *Id.* In answering this query, "[c]ourts must consider whether the nature, purpose, and effect of the challenged conduct is coercive or extortionate." *Diamond Crystal Brands, Inc. v. Blackleaf, LLC*, 60 Mass. App. Ct. 502, 507 (2004); *ACAS Acquisitions Inc. v. Hobert*, 155 N.H. 381, 402 (2007).

Here, the gist of the Town's action sounds in negligence. There was simply no evidence introduced at trial that any conduct by Wright-Pierce was of the same type as that proscribed by the CPA and/or so egregious as to satisfy the rascality test. The Town's experts have opined that Wright-

[14] In the past, the New Hampshire Supreme Court has "looked to the Massachusetts courts for guidance" in determining "which commercial actions are covered by the Act." *Milford Lumber Co., Inc. v. RCB Realty, Inc.*, 147 N.H. 15, 17 (2001). New Hampshire adopted the "rascality" test from Massachusetts where it was well established, but the Massachusetts Supreme Judicial Court later criticized the test as not particularly helpful. *See Massachusetts Employers Ins. Exchange v. Propac-Mass, Inc.,* 420 Mass. 39, 42-43, 648 N.E.2d 435 (1995) ("We view as uninstructive phrases such as 'level of rascality'").

Pierce should have performed a geotechnical analysis, and this would have identified slope stability concerns. However, Wright-Pierce's work was peer reviewed by W&S, an independent engineering firm with geotechnical engineers on staff, and the peer review raised no issues about the absence of a geotechnical study and/or any other material deficiencies. Although the Amended Complaint contains allegations of misrepresentations, not all misrepresentations amount to the type of conduct proscribed by the CPA, and there was no evidence at trial to indicate that the purpose of any alleged misrepresentations/omissions was coercive or extortionate. *See Hair Excitement, Inc. v. L'Oreal*, 158 N.H. at 370 (defendants misrepresentations did not violate CPA because conduct was not immoral, unethical or offensive to public policy). Accordingly, the Town's evidence was insufficient to establish a CPA violation and this Court should grant judgment as a matter of law on Count VI.

VI. The Town's Evidence Of Damages Is Uncertain And Speculative And Its Failure To Mitigate Damages Bars Recovery

Finally, this Court should grant judgment in favor of Wright-Pierce because the Town's evidence of damages is speculative and uncertain as a matter of law. "[D]amages are not recoverable for loss beyond an amount that the evidence permits to be established with *reasonable certainty*." *Clipper Affiliates, Inc. v. Checovich*, 138 N.H. 271, 274 (1994) (citing Restatement (Second) of Contracts § 912 (1982)) (emphasis in original). Although New Hampshire law does not "require absolute certainty in the award of damages, [the courts] do require an indicia of reasonableness." *Bailey v. Sommovigo*, 137 N.H. 526, 531 (1993).

The Town's damages theory is that the Site is a "total loss" and that it is entitled to recover all amounts itemized on a Spreadsheet captioned "Wolfeboro Damages To Date" (hereinafter, "Spreadsheet").[15] At trial, Mr. Ford calculated "total loss" damages to include the following amounts on the Spreadsheet: (1) "Site Investigations/Evaluations of Disposal Alternatives" totaling $688,915.00; (2) Land Purchase/Evaluation of Disposal Alternatives totaling $1,216,163.69; (3)

[15] The Spreadsheet is **Plaintiff's Trial Exhibit 14**.

Design & Permitting & Construction/Engineering Costs totaling $1,274,339.00; (4) Construction Costs of $2,687,205.00; (5) Expenses to Remediate and Address Site Failures totaling $274,062.97;[16] (6) Additional Operating Expenses totaling $699,000.00; and (7) Interest On Loans of totaling $855,847.60, for a grand total of **$7,698,532.42**.

The Town's "total loss" theory fails to account for the fact that, nor has the Town produced any evidence to quantify, the significant value the Town has received from disposing of wastewater at the RIBs for over five years. The evidence at trial was undisputed that S.W. Cole Engineering, Inc. ("S.W. Cole") performed an independent hydrogeological and geotechnical engineering study which estimated that the present site capacity is 340,000 gpd, and on September 21, 2012, the NHDES granted a new 5-year permit which allows the Town to discharge "an annual daily average of up to 340,000 gpd," thus proving the site has significant capacity, even in its unremediated state. Although the RIBs are not performing as well as the Town would like, the Town's operator, Russell Howe of Woodard & Curran, testified that since 2009, the RIBs have disposed of a majority of the Town's wastewater.[17]

"The law is clear that damages cannot be awarded on the speculation, passion, or guess of the jury." *Laramie v. Stone*, 160 N.H. 419, 429 (2010). "'In tort, one to whom another has tortuously caused harm is entitled to compensatory damages for the harm, if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.'" *Clipper Affiliates v. Checovich*, 138 N.H. 271, 274 (1994) (quoting Restatement (Second) of Torts § 912 (1983)) (emphasis added). Here, the Town provided no expert evidence on damages having previously withdrawn its damages expert, and has failed to account for either the value it has received from the RIBs for five years, or the

[16] The Spreadsheet calculations under this category are particularly unclear and include **$99,587.00** paid to Wright-Pierce with no description of the services; **$106,423.22** paid to Woodard & Curran, the Town's operator for unclear reasons, and other sums paid to a variety of engineering firms, with no description of the work performed.

[17] Mr. Ford's testimony that the Town has received no value from the RIBs is also undercut by his own admission that the Town recently received a grant in the sum of $2.3 million to pay for the RIB system.

continued capacity of the site. Due to the absence of any competent, rational, method of calculating damages, the jury will be left to speculate and guess.

Further, even if there was evidence of a breach of contract (which there is not), the Town has utterly failed to provide the jury with a rational method of calculating damages. "In the context of a construction contract, the usual measure of damages" is the cost of restoration, but if restoration will cause "'unreasonable economic waste by destruction of usable property or otherwise,'" then a diminution in value method may be utilized. *See Emery v. Caledonia Sand & Gravel Co., Inc.*, 117 N.H. 441, 446 (1977) (quoting J. Calamari and J. Perillo, Contracts § 230, at 363 (1970)); *see Danforth v. Freeman*, 69 N.H. 466, 43 A. 621 (1898). *See also Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C.,* 91 N.Y.2d 256, 261-62, 692 N.E.2d 551 (1998) (generally damages in engineering or architectural malpractice claims are measured by the cost to repair the defect, but if irreparable, the difference in value between a properly constructed structure, and the structure as it was built). New Hampshire Supreme Court decisions require that "one of two measures of damages," must be utilized "depending upon the circumstances of each case." *M. W. Goodell W. Constr. Co., Inc. v. Monadnock Skating Club, Inc.*, 121 N.H. 320, 322-323 (1981) (citing *Emery v. Caledonia Sand & Gravel Co*., 117 N.H. at 446). "The ordinary measure of damages is the cost of remedying the defective work," but if restoration is impracticable, the injured party "may be awarded the difference between the value the building would have had if constructed as promised and its value as actually constructed." *Id.; see also, Moulton v. Groveton Papers Co*., 114 N.H. 505, 513 (1974) ("the above statements correctly express the law of damages applicable to the real property").

Here, Wright-Pierce is entitled to judgment as a matter of law because the undisputed evidence shows that the Site has been used by the Town for five years, and thus the harm has not amounted to a "total destruction in value" as a matter of law. Additionally, it is the Town's burden to prove its damages with reasonable certainty, but the Town has failed to utilize either one of the two recognized measures of damages under New Hampshire law; *i.e*., the Town has failed to provide any evidence of

the cost of restoration, and "[i]f restoration is impracticable," *see Emery v. Caledonia Sand & Gravel*, 117 N.H. at 446, the Town has also failed to provide any evidence of the diminution in value of the Site. *See M.W. Goodell Constr. Co., Inc. v. Monadnock Skating Club, Inc.*, 121 N.H. at 323 (appropriate measure of damages was cost of restoration rather than diminution in value). [18] The Town has failed to provide any evidence of the cost of restoration, despite the undisputed evidence that the Town and Wright-Pierce retained S.W. Cole to independently evaluate the hydrogeological and geotechnical conditions at the RIBs, and S.W. Cole issued two separate reports, dated August 24, 2011 ("S.W. Cole Report I") and November 30, 2011 ("S.W. Cole Report II")[19] which each specifically recommend that remedial solutions be studied and implemented at the Site. *See* **Exhibit 4** (**Trial Exhibit 8**) (S.W. Cole Report I, p. E-5, 23-24) (concluding that "preliminary design options be evaluated in more detail and cost estimates for implementation be prepared") *See* **Exhibit 5** (**Trial Exhibit 36**) (S.W. Cole Report II, p. 26-27) (listing conceptual models for mitigation in "our preferred order of implementation").

Moreover, the Town is incapable of producing any evidence – nor has it attempted to do so at trial – in support of any diminished value of the Site in terms of any reduced discharge capacity measured relative to any contractual expectation that it may have had, nor as to the objective reasonableness of any such expectation. The Town's evidentiary failures are entirely consistent with

[18] Moreover, despite the complete absence of evidence that Wright-Pierce breached any contractual provision, the Town is impermissibly seeking consequential damages, such as operating expenses, and interest on loans, that was not in the contemplation of the parties, and not reasonably anticipated or foreseeable, as a matter of law. *See* **Plaintiff's Trial Exhibit 14** (Damages Spreadsheet). Only "consequential damages that could have been reasonably anticipated by the parties as likely to be caused by the defendant's breach are properly awarded to the non-breaching party in a contract action." *George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123, 134 (2011) (quoting *Robert E. Tardiff, Inc. v. Twin Oaks Realty Trust,* 130 N.H. 673, 677 (1988)). "The requirement of reasonable foreseeability may be satisfied in either of two ways: (1) as a matter of law if the damages follow the breach in the ordinary course of events; or (2) by the claimant specifically proving that the breaching party had reason to know the facts and to foresee injury." *Id.* (citing *Petrie–Clemons v. Butterfield,* 122 N.H. 120, 124, (1982)). As a preliminary matter, the Town's alleged losses were not reasonably foreseeable because Wright-Pierce could not predict that Mr. Ford would ignore its advice to startup operations at a steady rate 600,000 gpd, and would overload the RIBs at rates of up to $900,000 gpd in April 2009, leading to breakout. Additionally, when the W&S peer review expressed a concern about possible erosion from increased groundwater flows, Wright-Pierce responded with a Memorandum, dated September 5, 2007, that the "areas will be monitored and mitigation measures can be undertaken if necessary." *See* **Trial Exhibit 63**.

[19] Both of the S.W. Cole Reports are entitled "Report, Hydrogeological and Geotechnical Engineering Services."

its voluntary dismissal of its ill-conceived and baseless breach of express warranty claim. Succinctly stated, the Town had no reasonable right to expect any specific discharge rate (or other performance characteristic) of the RIB system, no promises or warranties whatsoever were made in that regard, and therefore any damages model that depends upon a comparative measurement of (a) value based on performance expectation as promised or warranted by contract and (b) value based on actual performance is inapplicable, both as a matter of law and based on the evidentiary record. The Town has pointed to no such specific breaches of contractual promises, has prudently withdrawn its breach of express warranty claim, and has introduced no evidence – expert or otherwise – to support any such comparative measurement of value.

Further, any notion of a fixed value of the Site based on expectations as to discharge rate or other performance characteristics contemplated at the point of contract formation would be unreasonable as a matter of law since the evidence at trial has established that the Site would need to be successively reevaluated and permitted for discharge rates and other performance characteristics at 5 year intervals over the anticipated operational life-span of the Site. The permitting process is entirely within the regulatory authority of NHDES and the results of that process are not within the control of either the Town or Wright-Pierce and, certainly not with in their ability to predict, warrant or otherwise establish a defined term or expectation at the point of contract formation. Thus, it should reasonably have been expected that discharge rates and other performance characteristics could change over the operational life span of the Site and, therefore, applying a comparative value (contractual expectation v. actual performance) damages model could not be applied in this context.

Additionally, the Town's failure to satisfy its burden of proving the cost of implementing remedial measures to address the Site issues is directly attributable to the fact that, as established by the evidence at trial, it has thwarted every effort initiated by Wright-Pierce to meet with NHDES to present and come to agreement on a conceptual approach to address those issues which, in turn, has precluded the ability to develop a reliable cost estimate for implementing such an approach. Finally,

New Hampshire law is clear that a plaintiff must take all reasonable steps to mitigate damages. *Smith v. Cote*, 128 N.H. 231, 243 (1986) (discussing "avoidable consequences rule"). New Hampshire law establishes that a "plaintiff cannot shift to the defendant any loss resulting from his own failure to make the most productive possible use of the property," s*ee Zareas v. Smith*, 119 N.H. 534, 538 (1979), as follows:

> "'The law requires reasonable efforts by a plaintiff to curtail his loss. Recovery will not be permitted of damages which could have been 'avoided by reasonable effort without undue risk, expense, or humiliation.' Restatement (of) Contracts § 336(1) (1932)."

Id. The evidence shows that the Town prevented Wright-Pierce from working with NHDES to develop a remedial plan and/or establish the cost of such a plan. Accordingly, the Town's damages are also barred as a matter of law because it has failed to take reasonable efforts to mitigate its damages. *Millimet v. First Fed. Savings & Loan Ass'n*, 129 N.H. 526, 527 (1987) (affirming trial court's granting of JNOV and new trial for failure to mitigate damages). *See also Audette v. Cummings*, 82 A.2d 1269, 1274 (2013) ("[a] party seeking damages occasioned by the fault of another must take reasonable steps to lessen his or her resultant loss"); *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 836 (2006) (discussing "doctrine of avoidable consequences"); *Zareas v. Smith*, 119 N.H. 534, 538 (1979) ("The law requires reasonable efforts by a plaintiff to curtail his loss"); *see also Sanders v. Flanders*, 2014 WL 1588808, *2 (5th Cir. 2014) (Fifth Circuit affirmed that district court "correctly granted judgment as a matter of law" because plaintiff's "damages testimony was too speculative . . . to be recoverable"). In sum, this Court should rule that the Town's damages are speculative because it has failed apply an appropriate measure of damages, and the Town has also unreasonably refused to explore any remedial solutions for the RIBs and, therefore, has failed to mitigate its damages, precluding recovery as a matter of law.

CONCLUSION

For all of the above reasons, Wright-Pierce respectfully requests that this Honorable Court grant judgment as a matter of law pursuant to Rule 50(a) on all claims asserted against it in the Amended Complaint, and direct a verdict in favor of Wright-Pierce.

Respectfully submitted,

WRIGHT PIERCE,
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Dated: May 1, 2014

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.4(b), I hereby certify that this document filed through the ECF system on May 1, 2014 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ *Kelly Martin Malone*