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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

PASKENTA ENTERPRISES CORPORATION, a federally chartered corporation, Plaintiff, v. ALAN COTTLE, an individual; and KNEE CENTERS MANAGEMENT, LLC, a Utah limited liability company, Defendants.	**DEFENDANTS' MOTION TO DISMISS** Case No. 1:17-CV-00033-EJF Magistrate Judge Evelyn J. Furse

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Alan Cottle ("**Cottle**") and Knee Centers Management, LLC ("**Knee Centers**") (collectively, "**Defendants**") hereby submit this Motion to Dismiss the claims asserted against them in Plaintiff Paskenta Enterprises Corporation's ("**PEC**") Complaint.

PRECISE RELIEF SOUGHT AND SPECIFIC GROUNDS FOR THE MOTION

Defendants respectfully request that the Court enter an order dismissing PEC's Complaint with prejudice. Each of PEC's claims is based on alleged representations made by Defendants in connection with the execution of the negotiated and fully integrated Agreement for Release of Funds (the "**Funds Settlement Agreement**"). However, PEC expressly agreed in the Funds Settlement Agreement that it *was not* relying on any statement or representation not specified in the agreement as an inducement or basis for entering into the agreement and releasing the funds at issue. The Funds Settlement Agreement controls the relationship of the Parties with respect to the disbursement of funds, and the Funds Settlement Agreement is an absolute bar to all of PEC's claims. Furthermore, PEC has failed to allege facts that would support its claims even if the claims were not barred by the Funds Settlement Agreement, which they are. Accordingly, Defendants respectfully request that the Court dismiss this case with prejudice.

BACKGROUND

Plaintiff PEC is a sophisticated corporation wholly-owned by the Paskenta Band of Nomlaki Indians (the **"Tribe"**). In July of 2012, PEC Board President John Crosby and his mother, Board Member Ines Crosby, entered into an Operating Agreement with Knee Centers (n/k/a Emere Healthcare) for and on behalf of PEC seeking to diversify PEC's funds, which were primarily derived from the Tribe's successful casino and gaming industry. The Crosbys were introduced to Cottle and Knee Centers by their nephew, John Aylworth (**"Aylworth"**), a part-owner in Knee Centers, and sales representative for a well-known orthopedic supply company. Knee Centers was an expansion of Cottle's former health care business, OsteoArthritis Centers of America – Southern California, LLC, a group of clinics in California that focused on treating osteoarthritis. Knee Centers focused on various devices and programs that offered health care services that were not limited to the treatment of osteoarthritis. Ossur International – one of the world's largest durable medical equipment providers – expressed interest in investing in Knee Centers. Although Ossur courted Knee Centers for several months, Cottle ultimately selected PEC as Knee Centers' business partner, in part, because of his relationship with Aylworth, minority owner of Knee Centers. Additionally, PEC had opened and operated medical clinics in the past, and Cottle believed PEC would be uniquely qualified as a business partner to understand the various challenges of growing a medical clinic company.

The initial business plan for Knee Centers called for $6.8 million in capital investment, as shown by the Parties' Term Sheet. Pursuant to the Term Sheet and Operating Agreement, in July 2012, PEC invested $5 million of PEC's money in Knee Centers and acquired an ownership interest of 25%. In December 2013, PEC agreed to invest an additional $3 million of PEC's money into the business – $2 million to be funded immediately for an additional 6% ownership interest, totaling an ownership interest of 31%. While PEC did invest the initial $5 million, it essentially refused to pay the remaining $2 million. PEC even wrongfully instructed Cornerstone Bank – where the funds had been placed by PEC in Knee Centers' account – to wrongly remove over $1.2 million, without authorization from Knee Centers. As PEC was well-aware, these funds were absolutely critical to the success of Knee Centers. PEC's failure to pay the funds it had promised was understandably devastating to Knee Centers' business.

After hotly contesting the issues regarding Knee Centers and having engaged counsel, PEC ultimately entered into a formal settlement agreement with Defendants on May 30, 2014.

The Parties executed the Funds Settlement Agreement – a settlement agreement wherein PEC agreed to release approximately $1 million of the invested funds, among other things. (A copy of the Funds Settlement Agreement is attached hereto as Exhibit A.) PEC owed Knee Centers an additional $1 million, which it ultimately refused to pay. Because of PEC's failure to abide by its agreement, Knee Centers did not have sufficient funds to cover critical start-up costs for two clinics that were underway, corporate operations, clinic rents, supplies, equipment, pharmaceuticals and payrolls. After repeatedly informing PEC of the dire consequences of its withholding the promised money, and despite Defendants having contributed a substantial amount of their own funds in an attempt to keep Knee Centers operating (including Mr. Cottle taking out a second mortgage on his home), Knee Centers was ultimately forced to close its doors.

Despite the negotiation and ultimate execution of the Funds Settlement Agreement, and PEC's full audit of Knee Centers conducted by a private accounting firm – resulting in a finding of absolutely no corporate misconduct, improper transfer of funds, or improper activity of any kind – PEC has now filed a lawsuit against Defendants. In its Complaint, PEC alleges causes of action against Defendants for fraudulent inducement and negligent misrepresentation. PEC also alleges that Knee Centers breached its fiduciary duty to PEC and that Cottle aided and abetted Knee Centers' alleged breach of fiduciary duty. The primary "facts" supporting these claims are four alleged statements by Defendants made in connection with the execution of the Funds Settlement Agreement. Defendants vigorously deny these claims and could mount a full factual and legal defense if necessary.

However, all four of PEC's claims must be dismissed with prejudice for at least two reasons. First, the Funds Settlement Agreement operates as a complete bar to all of PEC's claims as the Parties expressly negotiated the terms of the release of the funds at issue in this case and PEC expressly stated that it was not relying on any statements or representations in entering the Funds Settlement Agreement that were not specifically addressed in the agreement. Second, even if the Funds Settlement Agreement did not bar PEC's claims, the Complaint should still be dismissed in its entirety as PEC has failed to alleged facts supporting essential elements of each of its claims. Finally, PEC's negligent misrepresentation claim is barred by the economic loss doctrine.

ARGUMENT

Under Federal Rule of Civil Procedure 12(b)(6), a party may assert by motion the defense of "failure to state a claim upon which relief can be granted." Utah R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) requires the court to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, . . . that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As stated by the United States Supreme Court, a "complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In determining facial plausibility, courts "disregard conclusory statements," *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012), and need not accept as true legal conclusions, *see Iqbal,* 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 678 (*quoting Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (quotation and brackets omitted). Under this standard, PEC's claims fail and should be dismissed.

I. THE EXPRESS TERMS OF THE FUNDS SETTLEMENT AGREEMENT BARS ALL OF PEC'S CLAIMS.

Not surprisingly, Utah law favors the settlement of disputes. *John Deere Co. v. A&H Equip., Inc.*, 876 P.2d 880, 883 (Utah Ct. App. 1994); *see also Zions First Nat'l Bank v. Barbara Jensen Interiors*, 781 P.2d 478, 479 (Utah Ct. App. 1989). "Settlement agreements are favored by law and may be summarily enforced if there is a binding settlement agreement and the excuse for nonperformance is comparatively insubstantial." *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995); *see also Goodmansen v. Liberty Vending Sys., Inc.*, 866 P.2d 581, 584, n.2 (Utah Ct. App. 1993) ("Settlement agreements may be summarily enforced without an evidentiary hearing."). "The law favors the amicable, good faith settlement of claims and the encouragement and preservation of such settlements constitute strong arguments for enforcing releases." *Horgan v. Indus. Design Corp.*, 657 P.2d 751, 753 (Utah 1982) (internal citations and quotations omitted). "A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993). Moreover, "[i]ssues involving the formation, construction and enforceability of a settlement agreement are resolved by applying state contract law." *Black*

Pearl Techs., LLC v. 3502031 Canada Inc., 2:06CV285DAK, 2007 WL 840103 (D. Utah March 15, 2007).

In this case, the Parties settled their dispute concerning the funds at issue in this litigation by entering into a binding and enforceable agreement. The Funds Settlement Agreement "is the product of negotiation and preparation by and among the Parties and their respective counsel," and the "language used in [the] Agreement was and will be deemed to be language chosen by the Parties to express their mutual intent." Funds Settlement Agreement ¶ 17. The Parties agreed that the Funds Settlement Agreement "shall be interpreted and construed neutrally as to all Parties to this Agreement, without any party deemed to be the drafter of this Agreement." *Id.* The Funds Settlement Agreement addresses the precise funds at issue in PEC's Complaint, specifically outlining the actions, terms, and conditions associated with unfreezing the account and restoring the funds to Defendants. *See generally id.*[1] Significantly, paragraph 14 of the Funds Settlement Agreement provided that the "Agreement constitutes the full and entire agreement and understanding between the Parties as to the matters described or set forth herein. No party is relying upon any statement or representation not specified in this Agreement as an inducement or basis for entering into this Agreement." *Id.* ¶ 14.

All four of PEC's claims are based on the allegation that Defendants made misrepresentations to PEC in a letter on May 23, 2014, in connection with the negotiation and

[1] The Funds Settlement Agreement also provided that after the approximately $1 million at issue in this litigation was transferred to Defendants, PEC had no obligation to make additional capital contributions to Defendants, notwithstanding any prior agreement or provisions to the contrary. *Id.* ¶ 8. In other words, as part of the Parties' settlement, Defendants agreed that if PEC transferred to them the approximately $1 million currently in the bank account, PEC would not be obligated to contribute the *additional* $1 million contemplated under the Addendum to Operating Agreement.

execution of the Funds Settlement Agreement. *See* Compl. ¶¶ 48-74, 77, 85, 93, 99. Specifically, PEC alleges that Defendants misrepresented that Emere would grow to 40-50 clinics over a 48 month period with an estimated $400-$500 million valuation, that two new clinics would be opening in July 2014,[2] that Emere was on track and on budget to achieve its forecasted growth, and that Emere and its affiliates had not paid one dollar to the Crosbys. *See id.* However, any of PEC's claims based on these statements (which are all of them) is barred by paragraph 14 of the Funds Settlement Agreement, which expressly provides that PEC was *not* relying on any such statements in connection with the disbursement of the funds. The Funds Settlement Agreement defines and controls the subject matter of PEC's Complaint, and the Funds Settlement Agreement expressly bars PEC's claims. Defendants complied with any and all of their obligations under the Funds Settlement Agreement. And PEC's attempt to now circumvent its negotiated and integrated agreement is wholly improper. PEC's claims should be dismissed with prejudice.

II. PLAINTIFF FAILS TO ALLEGE FACTS SUPPORTING ESSENTIAL ELEMENTS OF EACH OF ITS CLAIMS.

A. Plaintiff Has Failed to Allege Facts Demonstrating Essential Elements of its Claims for Fraudulent Inducement and Negligent Misrepresentation.

Under Utah law, a party asserting a claim of fraudulent inducement must establish the following:

> (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance

[2] Indeed, two new clinics did open, one in Murray, Utah, which opened on July 7, 2014, and another in Boca Raton, Florida, which opened on August 8, 2014.

> of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

Daines v. Vincent, 2008 UT 51, ¶ 38, 190 P.3d 1269 (internal quotations omitted). "The elements of negligent misrepresentation are similar to those of fraud except that negligent misrepresentation 'does not require the intentional mental state necessary to establish fraud.'" *Shah v. Intermountain Healthcare, Inc.*, 2013 UT App 261, ¶ 11, 314 P.3d 1079 (*quoting Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55, 59 n.2 (Utah 1986)). Instead, negligent misrepresentation may be established where the false representation is made carelessly or negligently. *Smith v. Frandsen*, 2004 UT 55, ¶ 9, 94 P.3d 919. PEC's fraudulent inducement and negligent misrepresentation claims must be dismissed because (1) PEC failed to allege facts supporting its allegation that it relied on the alleged misrepresentations; and (2) two of the alleged misrepresentations are not statements of presently existing fact.

1. PEC has failed to allege facts supporting reliance.

To prevail on its claims for fraudulent inducement and negligent misrepresentation, PEC must establish that it relied on the alleged misrepresentations and was thereby induced to enter into the Funds Settlement Agreement. *See Daines*, 2008 UT 51, ¶ 38 (stating elements for fraudulent inducement); *DeBry v. Valley Mortg. Co.*, 835 P.2d 1000, 1008 (Utah Ct. App. 1992) (stating elements for negligent misrepresentation). These claims fail, however, because PEC expressly admitted that it did not rely on any statements or representations in entering the Funds Settlement Agreement that were not specifically addressed in the agreement. Indeed, as noted above, the Funds Settlement Agreement provides that "[t]his Agreement constitutes the full and entire agreement and understanding between the Parties as to the matters described or set forth herein. No party is relying upon any statement or representation not specified in this Agreement as an inducement or basis for entering into this Agreement." Funds Settlement Agreement, ¶ 14. Courts hold that "it is simply unreasonable to continue to rely on representations after stating in writing that you are not so relying." *Steak n Shake Enterprises, Inc. v. Globex Co., LLC*, 110 F. Supp. 3d 1057, 1083 (D. Colo. 2015), aff'd, 659 F. App'x 506 (10th Cir. 2016) (holding fraudulent inducement claim was barred "as a matter of law" where party acknowledged in the contract that it was the entire agreement and that the party was not entering into the contract as a result of any representations by the other party).

PEC cannot agree in writing that it is not relying on Defendants' prior statements and then turn around and sue Defendants because PEC claims it actually was relying on Defendants' alleged prior statements. Because PEC plainly admitted that it was not relying on any prior representations made by Defendants when it entered into the Funds Settlement Agreement and agreed to release the funds to Defendants, PEC's fraudulent inducement and negligent misrepresentation claims must be dismissed.

2. At least two of the representations do not concern presently existing facts.

Two of the four alleged misrepresentations do not concern a presently existing material fact, and therefore cannot support PEC's fraudulent inducement and negligent misrepresentation claims. As noted above, an essential element of both fraudulent inducement and negligent misrepresentation is that the alleged statement concerns a presently existing fact. *See Daines*, 2008 UT 51, ¶ 38. Generally, opinions about future values or future events are not statements of presently existing fact and cannot form the basis of a claim for fraud or negligent misrepresentation. *See Canfield v. Rapp & Son, Inc.*, 654 F.2d 459, 467 (7th Cir. 1981) (applying Indiana law for fraud and the "rule that only misrepresentation of existing facts, not predictions of future events, can form the basis of an action for fraud"). Indeed, unfulfilled predictions or erroneous conjectures as to future events cannot support fraud. *See e.g., Palmer v. U.S. West Communications, Inc.*, 36 Fed. Appx. 664, 647 (10th Cir. 2002) ("As a general rule, actionable fraud cannot consist of unfulfilled predictions or erroneous conjectures as to future events. Merely expressing an opinion in the nature of a prophecy as to the happening of a future event is not actionable."); *Layton Construction Co., Inc. v. Wrapid Specialty, Inc.*, 2015 WL 7312896, at *11 (D. Utah Nov. 19, 2015) (dismissing negligent misrepresentation claim because a "statement of future event cannot form the basis for a negligent misrepresentation claim"); *Walker v. Micron Technology, Inc.*, No. 960400324, 1998 WL 1769732, at *8 (Utah Dist. Ct. May 13, 1998) (holding fraudulent and negligent misrepresentations claims failed because the "representations regard future events and fraudulent misrepresentations must concern presently existing facts"); *Phillips v. Ford Motor Co.*, 240 F.3d 1073 (5th Cir. 2000) (stating representation that dealership would continue to be successful was not actionable because fraud and negligent misrepresentation claims cannot be "based on [a] failure to accurately predict future events"); *Canfield*, 654 F.2d at 467 ("[O]nly misrepresentation of existing facts, not predictions of future events, can form the basis of an action for fraud.").

PEC claims Defendants represented that (1) Emere would grow to 40-50 clinics over a 48 month period with an estimated $400-$500 million valuation and (2) two new clinics would be opening in July 2014. These unfulfilled predictions and opinions about what will happen in the future are not statements of presently existing fact and cannot support PEC's claims as a matter of law.

B. Plaintiff Has Failed to Allege Facts Supporting its Fiduciary Duty Claims.

PEC has likewise failed to allege facts supporting its claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. "A claim for breach of fiduciary duty requires proof of four elements: (1) a fiduciary relationship; (2) breach of the fiduciary's duty; (3) causation, both actual and proximate; and (4) damages." *Old Republican Nat. Title Ins. Co. v. Home Abstract and Title Co., Inc.*, 2014 WL 2918551, at *15 (D. Utah June 27, 2014); *see also Giles v. Mineral Resources Intern., Inc.*, 2014 UT App 259, ¶¶ 6, 10, 338 P.3d 825 (affirming grant of summary judgment on breach of fiduciary duty claim because party could not establish causation). To prevail on its aiding and abetting claim, PEC must go one step further and show that Cottle knowingly participated in the breach of fiduciary duty. *Real Estate School of Nevada v. Kapp*, 2015 WL 4729132, at *3 (D. Utah Aug. 10, 2015) (stating elements for aiding and abetting claim); *see also Coroles v. Sabey*, 2003 UT App 339, ¶ 36, 79 P.3d 974 (stating that "secondary" aiding and abetting claims "require, as one of their essential elements, an underlying tort").

PEC claims Knee Centers breached its fiduciary duty by making the alleged misrepresentations to PEC. Even assuming Defendants made the alleged misrepresentations to PEC, PEC cannot establish a claim for breach of fiduciary duty because the misrepresentations did not cause PEC damages. As set forth above, PEC acknowledged when it entered into the Funds Settlement Agreement and agreed to release the funds to Defendants that it was not relying on Defendants' alleged misrepresentations. Therefore, PEC cannot establish the required causation element.

In addition, PEC claims Knee Centers breached its fiduciary duty because it did not provide PEC "with any notice, distribution, or accounting, associated with the dissolution of" Emere.[3] Utah Code Annotated § 48-3a-409 provides the standard of conduct for managers of a limited liability company and enumerates the specific duties owed by managers to members. Importantly, however, the conduct alleged by PEC—even if true, which it is not—does not violate any of the duties listed in the statute. Accordingly, PEC's breach of fiduciary duty claim must be dismissed. And, because PEC cannot establish the underlying claim for breach of fiduciary duty, the secondary claim for aiding and abetting the alleged breach likewise fails.

III. PEC'S NEGLIGENT MISREPRESENTATION CLAIM IS BARRED BY THE ECONOMIC LOSS RULE.

The economic loss rule precludes PEC's claim for negligent misrepresentation. The economic loss rule "marks the fundamental boundary between contract law, which protects expectancy interests created through agreement between the parties, and tort law, which protects individuals and their property from physical harm by imposing a duty of reasonable care." *Reighard v. Yates*, 2012 UT 45, ¶ 19, 285 P.3d 1168 (*quoting Davencourt at Pilgrims Landing Homeowners Ass'n. v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 55, 221 P.3d 234) (internal quotations omitted). The Utah Supreme Court recently reiterated the preclusive effect

[3] Defendants note that these allegations are patently untrue. If PEC is allowed to move forward with this claim, Defendants will show that, among other things, it sent a letter to PEC on December 12, 2014 in which Knee Centers attached "the most recent set of financials for Emere" and "notif[ied PEC] of the . . . decision to either sell all of Emere's assets or liquidate and dissolve Emere." Knee Centers stated that "[a]s a result of a lack of funding, we have been forced to close the California clinics, and to cease operations of the Gobibot venture. . . . Emere cannot continue to operate in its current form." In the letter, Knee Centers offers to sell the company to PEC and then says that if PEC is not interested in purchasing the company, Cottle would set up another company to purchase the assets and liabilities and then would "file Articles of Dissolution and prepare the final partnership tax return . . . ."

of the economic loss rule and stated that a party to a contract is barred from asserting tort claims that are based on the subject matter of the contract between the parties. *Id.* "When a conflict arises between parties to a contract regarding the subject matter of that contract, the contractual relationship controls, and parties are not permitted to assert actions in tort in an attempt to circumvent the bargain they agreed upon." *Id.* ¶ 20.

"Utah courts apply the economic loss rule to negligent misrepresentation claims. Negligent misrepresentation falls outside the economic loss rule only when the party making the misrepresentation owes an independent duty of care." *Southeast Directional Drilling, LLC v. Kern River Gas Transmission Co.*, Case No. 2:11-cv-1035, 2013 WL 209492, at *2 (D. Utah Jan. 17, 2013) (internal citation omitted) (dismissing negligent representation claim based on the economic loss rule). For a tort duty to exist independent of the contract, the duty must be separate from and not overlap with the duties contemplated in the contract. *Reighard*, 2012 UT 45, ¶ 21. Because Defendants did not owe PEC an independent duty as a matter of law, PEC's negligent misrepresentation claim is barred.

PEC alleges that Defendants made four misrepresentations, all of which were made while the Parties were negotiating the Funds Settlement Agreement: (1) Emere would grow to 40-50 clinics over a 48 month period with an estimated $400-$500 million valuation; (2) two new clinics would be opening in July 2014; (3) Emere was on track and on budget to achieve its forecasted growth; and (4) Emere and its affiliates had not paid one dollar to John or Ines Crosby or to any entity that was affiliated with them. (Compl. ¶¶ 48-55, 77, 85.) These alleged representations cover the same subject matter as the Funds Settlement Agreement, *i.e.*, PEC's investment in Knee Centers. This Court has previously held that where two commercial parties are negotiating a deal at arm's length, the parties do not owe each other a duty "with respect to negligent misrepresentations, [but] only intentional misrepresentations." *Hafen v. Strebeck*, 338 F. Supp. 2d 1257, 1266 (D. Utah 2004).

In *Hafen*, the plaintiffs, who are two individuals, asserted a claim for negligent misrepresentation based on representations that the defendant, also an individual, made during the negotiation of a contract between the parties. *Id.* at 1258-59. The defendant moved to dismiss the plaintiffs' negligent misrepresentation claim as a matter of law based on the economic loss rule. *Id.* at 1259. The Court stated that "[t]his case presents the issue of whether one commercial entity has a duty to refrain from making negligent misrepresentations to another in the negotiation of a contract." *Id.* at 1265. After stating that it was unaware of a Utah case addressing this issue, the court cited and discussed several cases from other jurisdictions that have addressed the issue. *Id.* In particular, the court discussed a Minnesota Court of Appeals case,[4] which held that "'where adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent representations. In these situations, the injured party's remedy is to sue for intentional misrepresentation.'" *Id.* (*quoting Safeco Insurance Co. v. Dain Bosworth, Inc.*, 531 N.W.2d 867, 870 (Minn. Ct. App. 2000)). The Minnesota court "concluded that the defendant did not owe Plaintiff a duty beyond the duty of honesty. Therefore, although there is an inherent duty to be honest and not state intentional misrepresentations, there is no similar duty with respect to negligent misrepresentations when the parties are dealing at arm's length." *Id.* (citing *Safeco Insurance Co.*, 531 N.W.2d at 870).

[4] The court noted that the Minnesota Court of Appeals "relied on cases from the states of Iowa, Oregon, and Illinois" in making its ruling. *Id.* at 1265.

After analyzing the Minnesota case, as well as others from different jurisdictions, the *Hafen* court held that "Utah courts would adopt a similar approach. Therefore, the court concludes that because the parties were both commercial entities negotiating a deal at arm's length, [defendant] did not have a duty to Plaintiffs with respect to negligent misrepresentations, only intentional misrepresentations." *Id.* at 1266. Because the court concluded that the defendant did not have a duty concerning negligent misrepresentations during the negotiation of a contract, the court held that the plaintiffs' negligent misrepresentation claim was barred by the economic loss rule. *Id.*

The court's reasoning and holding in *Hafen* is directly on point here. Similar to the parties in *Hafen,* PEC and Defendants are commercial entities[5] that negotiated a contract at arm's length to further their own economic interests. Indeed, all Parties were represented by counsel during the negotiation and execution of the Funds Settlement Agreement. Because PEC and Defendants were negotiating at arm's length, Defendants did not owe PEC an independent duty with respect to negligent misrepresentations made during the negotiation of the Funds Settlement Agreement. Accordingly, the economic loss rule bars PEC's negligent misrepresentation claim.

[5] The term "commercial entities" refers to parties engaged in "commercial transactions . . . at arm's length" and "adversarial parties negotiating at arm's length to further their own economic interests." *Id.* at 1265 (*quoting Safeco Insurance Co.*, 531 N.W.2d at 870-72). Further, the *Hafen* case makes it clear that an individual negotiating a contract at arm's length is considered a "commercial entity." *Id.* at 1266 (holding that individuals were "commercial entities" and did not owe each other a duty with respect to negligent misrepresentations).

CONCLUSION

For the foregoing reasons, the Court should dismiss all of PEC's claims against Defendants with prejudice.

DATED this 14th day of April 2017.

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