IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:15-cv-543-FL

AVX CORPORATION,

Plaintiff,

v.

CORNING INCORPORATED, *et al*.,

Defendants.

THE CORNING DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants Corning Incorporated ("Corning"); Components, Incorporated; Corning International Corporation; Corning SAS; Corning Limited; and Corning GmbH (collectively, the "Corning Defendants") submit this Memorandum of Law in Support of their Motion to Dismiss AVX's Third, Sixth Through Ninth, and Twelfth Through Fourteenth Causes of Action in its Third Amended Complaint.

I. INTRODUCTION

AVX's Third Amended Complaint ("Complaint") is an unwarranted attempt, after nearly three decades, to expand the contractual terms AVX bargained for when it purchased the property at 3900 Electronics Drive in Raleigh, NC (the "Property") in 1987. As the Complaint acknowledges, both AVX and the Corning Defendants knew at the time this sale closed that the Property was impacted by hazardous waste contamination. *See* Compl. ¶¶ 21-22. The parties' Purchase Agreement, and a follow-on Letter Agreement executed after AVX had conducted environmental testing at the Property, both contain terms that specifically allocate the responsibility for environmental liabilities at the Property. *See* Compl. ¶¶ 17-25; Groves Decl.

Ex. 1 ("Purchase Agreement") ¶¶ 3.1, 3.3, 10, 12.1, 12.3, Groves Decl. Ex. 2 ("Letter Agreement"). In short, the parties' contract acknowledges the presence of TCE contamination at the property, waives any claim that such contamination is itself a breach of contract, sets the level of remediation required of Corning (namely, those "remedial measures required by law or regulation"), and allocates liabilities arising out of environmental matters (with the Corning Defendants retaining liability for pre-existing contamination and AVX assuming liability for future contamination or adverse effects on past contamination caused by AVX's actions). *Id.*

Despite this contractual allocation of liabilities, AVX now seeks to recover *in tort* from the Corning Defendants both for the fact of pre-sale contamination and for an alleged failure to appropriately remediate contamination. *See* Compl. ¶¶ 140-68, 181-205. In so doing, AVX also seeks additional remedies that a contract claim could not achieve, asking this Court to award punitive and treble damages, diminution in property value, and lost profits. Compl. ¶¶ 144-47, 153-56, 160, 166-68, 185-86, 199-202, 205. This Court should reject AVX's attempt to plead around its contract with the Corning Defendants. North Carolina's economic loss doctrine provides that if the subject of a tort action is also the subject of a contractual agreement between the parties, the allocation of risks and liabilities in the contract—rather than tort law—governs the parties' rights as against each other. *See Severn Peanut Co. v. Indus. Fumigant Co.*, 807 F.3d 88, 94-95 (4th Cir. 2015). That is precisely the situation here. Moreover, even if AVX's tort claims survived the economic loss doctrine (and they do not), they are barred by their respective statutes of limitations. *See* N.C.G.S. §§ 1-52, 75-16.2; *CTS Corp. v. Mills Gap Rd. Assocs.*, No. 1:10CV156, 2011 WL 2118978, at *1 (W.D.N.C. Jan. 26, 2011).

AVX's breach of contract claim fares no better. While AVX pleads in conclusory fashion that Corning breached its contractual obligation to "effect all remedial measures required

by law or regulation" by failing "to pursue assessment and remediation of the hazardous substances and other constituents it disposed of and released at the property" (Compl. ¶¶ 131-32), AVX's own allegations show this is incorrect. Indeed, AVX is forced to acknowledge: (1) Corning began operating a State-approved pump and treat groundwater remediation system at the property in 1992 (and has been leasing property *from AVX* to operate and maintain that system since 1993) (*id.* ¶¶ 64-65, 68; Groves Decl. Ex. 3 (Lease Agreement)); (2) groundwater sampling results have been reported to the North Carolina Department of Environmental Quality ("NCDEQ"), or its predecessors, since at least 1989 (*e.g.*, Compl. ¶¶ 41, 47, 53, 56-57); (3) Corning has retained environmental consultants that have, from the beginning, conducted sampling and other environmental evaluations at the Property and continue to do so today (*e.g.*, *id.* ¶¶ 41, 47, 53, 56-57, 80); and (4) Corning and NCDEQ entered into an Administrative Agreement in 2015 (the "NCDEQ Agreement") that sets a timeline for additional assessment and remediation at the Property, and Corning has submitted a work plan to the State to conduct a remedial investigation consistent with that NCDEQ Agreement. Compl. ¶¶ 83, 85; Groves Decl. Ex. 4 (NCDEQ Agreement). Thus, while AVX may view Corning's remediation efforts as "inadequate," it has not alleged that Corning's remedial measures have failed to comply with law or regulation. To the contrary, Corning is currently operating under an administrative agreement *with the State itself*. The Court should therefore dismiss AVX's breach of contract claim as well, since it fails to plead that Corning has not remediated "as required by law and regulation."

II. FACTUAL BACKGROUND

A. The Complaint's Allegations.[1]

Corning owned and operated a manufacturing facility at the Property from approximately 1962 to 1987 as part of its capacitor business. Compl. ¶ 12. In 1987, AVX purchased the Property, along with numerous other assets related to Corning's capacitor business, from the Corning Defendants. *Id.* ¶ 17; *see generally* Purchase Agreement.[2] This sale was governed by the Purchase Agreement, as supplemented by an Amendment and a Letter Agreement executed after AVX conducted an environmental investigation at the Property. Compl. ¶¶ 17-26.

At the time the sale closed, AVX was aware of contamination at the Property, including in the vicinity of a dry well near a chemical storage building on the Property. *Id.* ¶ 18; Letter Agreement, Schedule A. Under the terms of the Purchase Agreement, the Corning Defendants retained liability for "violations of environmental health and safety laws," but only to the extent that (1) such violations "existed, or are based on conditions that existed, prior to the Closing Date," and (2) "such violations are not attributable to or otherwise adversely affected by [AVX's] actions." Compl. ¶ 18; Purchase Agreement ¶ 3.3(d). In the Letter Agreement, prepared after AVX undertook an environmental audit of the Property, Corning also agreed to

[1] Consistent with the standard of review on a motion to dismiss under Rule 12(b)(6), the Corning Defendants treat the facts alleged in the Complaint as true for purposes of this motion. *See, e.g.*, *Barrett v. USA-Soc. Sec.*, No. 5:10-CV-469-BO, 2013 WL 12113183, at *1 (E.D.N.C. Feb. 20, 2013). The Corning Defendants do not admit the truth of those allegations. In some cases, the allegations are blatantly false and misleading, and Corning reserves the right to challenge them.

[2] The Complaint relies on and references the Purchase Agreement and Letter Agreement pursuant to which AVX purchased the Property from Corning, the 1993 Lease between Corning and AVX, and other documents. Accordingly, this Court may consider these documents without converting the Corning Defendants' motion to dismiss to a motion for summary judgment. *Staten v. Tekelec*, No. 5:09-cv-434-FL, 2010 WL 3835127, at *3 (E.D.N.C. Aug. 10, 2010); *In re FAC Realty Secs. Litig.*, 990 F. Supp. 416, 419-20 (E.D.N.C. 1997).

"effect all remedial measures required by law or regulation" in connection with the contamination in the vicinity of the dry well. Compl. ¶¶ 21-22, 25; Letter Agreement ¶ 2 & Schedule A. Beyond those remedial measures required by law, Corning agreed to effect "further remedial measures" only to the extent agreed with AVX, and neither AVX nor Corning was required to agree to such further remedial measures. Letter Agreement ¶ 2. AVX, on the other hand, assumed ***all liabilities*** arising out of any "occurrence relating to the Capacitor Business[3] on or after the Closing Date." Purchase Agreement ¶ 3.1(a).

To remediate impacts in the area in the vicinity the dry well, in the years following the sale, Corning's environmental consultant:

- began installing groundwater monitoring wells in January 1989 (Compl. ¶ 41);
- excavated more than five hundred tons of contaminated soil in May 1989 (*id.* ¶ 49);
- evaluated potential remedial technologies (*id.* ¶ 55);
- constructed and tested nine additional groundwater monitoring wells in April 1991, along with three additional wells that were used for an aquifer pumping and recovery test (*id.* ¶ 56 and Groves Decl. Ex. 5 (AVX004177 at '4184));
- tested surface water on the site in April 1991 (Compl. ¶ 56 and Groves Decl. Ex. 5 (AVX004177 at '4184));
- provided the State with ongoing reporting (Compl. ¶¶ 42, 47, 50, 53, 63, 66);
- designed a detailed Remedial Action Plan submitted to the State in September 1991 (*Id.* ¶ 63 and Groves Decl. Ex. 6 (AVX015051));
- received approval from the North Carolina Department of Environment, Health, and Natural Resources ("NCDEHNR") for a pump and treat groundwater system in January 1992 (Groves Decl. Ex. 7 (CorningDef-009538 (cited in Compl. ¶ 64) ("[NCDEQ's] Mr. Jay Zimmerman indicated that it was his understanding that verbal approval was granted on November 7, 1991 to initiate the development and

[3] The Purchase Agreement defined the term "Capacitor Business" to include operations at the Property. *See* Purchase Agreement ¶ 1.9.

implementation of the corrective action system. To avoid further confusion, however, *your system is considered acceptable* ….")); and

- constructed and began operating the pump and treat system in Fall 1992[4] (Compl. ¶¶ 65-66).

Beginning in 1993, Corning leased an 11-acre parcel on the Property from AVX to operate and maintain the State-approved pump-and-treat system. *Id.* ¶ 68. AVX does not, and cannot, allege that any regulatory body has ever asserted that this pump-and-treat system was inappropriate or ineffective. Nor has AVX alleged that it ever complained about Corning Incorporated's remediation efforts at the Property for more than two decades following the sale (although it now alleges—29 years after the sale—that Corning's remedial efforts have always been inadequate).

On October 8, 2015, before this lawsuit commenced, Corning and the Division of Waste Management of NCDEQ finalized and entered into the NCDEQ Agreement under the Registered Environmental Consultant Program ("REC Program"), pursuant to which Corning agreed to assess and remediate contamination emanating from the vicinity of the dry well within a defined timeline.[5] *Id.* ¶ 83. The NCDEQ Agreement includes a timeline for completion of remedial

[4] The Complaint fails to mention the state regulatory authorities approved this pump-and-treat system as part of a Corrective Action Plan, but it is evident in documents the Complaint relies upon and cites. *See* Groves Decl. Exs. 3 (March 8, 1993 Lease Agreement between AVX and Corning, acknowledging "Corning has received approval from the State of North Carolina of a corrective action plan relating to the remediation of certain environmental matter predating Corning's sale of the Raleigh Plant to AVX"), 7 (CorningDef-009538 (cited in Compl. ¶ 64) ("To avoid further confusion, however, *your system is considered acceptable* ….")).

[5] AVX complains the NCDEQ Agreement does not cover the entirety of the Property (Compl. ¶ 83), however the agreement is clear Corning must assess and remediate not only contamination in the 11-acre outparcel, but also "any other area or property to which the contamination from [the vicinity of the dry well] has come to be located." Groves Decl. Ex. 4 (NCDEQ Agreement) (cited in Compl. ¶ 83) ¶ 1. Moreover, the parties' agreement requires only those remedial measures "required by law or regulation," and AVX does not and cannot allege NCDEQ or any other regulatory body has ever issued any notice of violation or instituted any enforcement action

investigation, the initiation of responsive groundwater remedial action, and the completion of a remedial action consistent with regulatory standards for wastes, soils, surface water and sediments. NCDEQ Agreement ¶ III. It further provides that Corning will submit quarterly status reports to NCDEQ and comply with certain other monitoring and reporting obligations. *Id.* ¶¶ III-IV. Under the terms of the NCDEQ Agreement, this remedial investigation is to be completed by October 2018; groundwater remedial action is to be commenced no later than October 2020; and remedial actions consistent with regulatory standards for wastes, soils, surface water, and sediments are to be completed by October 2022. *Id.* ¶ III. AVX does not, and cannot, allege Corning is failing to comply with the NCDEQ Agreement.

AVX instituted this lawsuit on October 15, 2015, after AVX's attempt to sell the Property for use as the location of a new public high school failed. *See* Compl. ¶ 81. AVX alleges the NCDEQ Agreement is "wholly inadequate"; complains that the timeline in the NCDEQ Agreement is too long (*Id.* ¶ 83); and brings claims under CERCLA, for declaratory and injunctive relief, and for breach of contract. Moreover, despite the contractual agreement between the Corning Defendants and AVX specifically allocating liabilities for environmental issues at the Property, AVX also asserts that it is entitled to recover under various tort theories, including negligence, negligence per se, negligent misrepresentation, unfair trade practices, trespass, and nuisance.

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against Corning regarding any area of the Property outside of that covered by the NCDEQ Agreement.

III. APPLICABLE LEGAL STANDARDS

A. Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal when the complaint fails to set forth sufficient factual allegations that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This requires that the complaint make "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). To survive a motion to dismiss, the complaint must offer more than "labels and conclusions," "formulaic recitation[s] of the elements of a cause of action," and "naked assertion[s] devoid of further factual enhancement." *Id*. (quoting *Twombly*, 550 U.S. at 555, 557). Rather, the complaint must demonstrate a "plausible"—not merely "conceivable"—right to relief. *See Twombly*, 550 U.S. at 570. A court may grant a motion to dismiss premised on an affirmative defense, such as the statute of limitations, "if the face of the complaint includes all necessary facts for the defense to prevail." *Leichling v. Honeywell Int'l, Inc.*, 842 F.3d 848, 850-51 (4th Cir. 2016).

IV. ARGUMENT

A. The Economic Loss Rule Bars AVX's Tort Claims.

North Carolina law has long recognized an "economic loss rule that limits a contracting party's ability to recover in tort." *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07-CV-274-D, 2011 WL 1134453, at *4 (E.D.N.C. Jan. 25, 2011). This rule "provides that, in general, a breach of contract claim will not support the assertion of tort claims as well." *Id.* (collecting cases); *see also Severn Peanut*, 807 F.3d at 94 ("More specifically, it 'prohibits recovery for purely economic loss in tort when a contract … operates to allocate risk.'") (quoting *Kelly v. Ga.-Pac. LLC*, 671 F. Supp. 2d 785, 791 (E.D.N.C. 2009)). The economic loss rule thus "encourages

contracting parties to allocate risks for economic loss themselves," recognizing that contracting parties have the "best opportunity to bargain for coverage of that risk." *Severn Peanut*, 807 F.3d at 94-95 (quoting *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639, 643 S.E.2d 28, 30 (2007)); *see also FDIC v. Mingo Tribal Pres. Trust*, 2015 WL 1646751, at *2 (W.D.N.C. Apr. 14, 2015) ("The very purpose of a contract is to allow parties to determine, allocate, and mitigate perceived risks. Where the parties do so, it is inappropriate to inject the uncertainty of punitive damage awards.") (citations omitted).

The economic loss rule, developed in the context of product liability actions, is "based upon broad principles." *Severn Peanut*, 807 F.3d at 94. The Fourth Circuit has repeatedly applied the economic loss rule outside the products liability context when the underlying dispute is the subject of a contract between the parties. For example, in *Severn Peanut*, where the parties had entered into a contract for pest control services, the Fourth Circuit applied the doctrine to bar the plaintiff's claim that defendant negligently breached its duty to apply pesticides consistent with their labeling. *Id.* Similarly, in *Strum v. Exxon Co.*, the Fourth Circuit held that the doctrine barred plaintiff's gross negligence claim based on Exxon's alleged failure to comply with state environmental regulations since the parties had contracted for the removal of gasoline storage tanks on the plaintiff's property and the gross negligence claim "ar[ose] out of Exxon's performance on the contract." *Strum v. Exxon Co.*, 15 F.3d 327, 332-33 (4th Cir. 1994); *see also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998) (barring various tort claims arising out of a dispute regarding franchising agreements).

One would be hard-pressed to find a case more apt for application of the economic loss rule than this case. When AVX purchased the Property, it executed a contract that acknowledges the presence of contaminants at the Property; expressly waives any contention that contamination

at the Property constitutes a breach of the Corning Defendants' contractual representations; disclaims any representation by Corning regarding the value, condition, or merchantability of the Property; allocates liability for environmental issues; and requires remedial measures consistent with law and regulation. Compl. ¶¶ 17-26; Purchase Agreement ¶¶ 3.1(d), 3.3(d), 7.22, 7.23, 12.1, 12.3; Letter Agreement ¶¶ 1-3.

Yet AVX now seeks, in each of its *tort* claims, to recover from the Corning Defendants for contaminating the Property (the very contamination AVX acknowledged in the Letter Agreement) and for failing to "adequately" remediate that contamination (the remediation that the contract governs). Compl. ¶¶ 142, 152-53, 158, 162-65, 182, 189-94. That is, each of AVX's tort claims is based on the very same subject matter as AVX's contract with the Corning Defendants. Moreover, AVX seeks to recover damages under its tort theories—including punitive damages, treble damages, and lost profits from the failed sale (despite the Purchase Agreement's express warranty disclaimer regarding the Property)—that it did not bargain for in its contract. *See, e.g.*, Compl. ¶¶ 185-86. This is utterly inconsistent with the economic loss rule, which is intended to allow parties to contract for a defined allocation of risks and liabilities without the uncertainties inherent in tort remedies. As the Fourth Circuit has noted, "[i]f [a defendant] has failed to fulfill its contractual obligations, the remedy is contract damages, not the blank check afforded to juries when they are authorized to return a punitive award." *Broussard*, 155 F.3d at 347; *see also PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 224 (2009) ("North Carolina law … does not permit a party to transmute a breach of contract claim into a tort or UDTPA claim for extraordinary damages because awarding punitive or treble damages would destroy the parties' bargain and force the defendant to bear a risk it never took on."); *Mecklenburg Cty. v. Nortel Gov't Sols. Inc.*, 2008 WL 906319, at *5 (W.D.N.C. Apr. 1, 2008)

("The introduction of punitive damages into this contract centered litigation would only undermine the ability of parties to minimize future risk.").

This is not a case in which the "independent tort" exception to the economic loss rule could apply. Any supposed "independent tort" must be "identifiable and must have some aggravating element such as malice or recklessness before any punitive damages may be recovered." *Deltacom, Inc. v. Budget Telecom, Inc.*, No. 5:10-CV-38-FL, 2011 WL 2036676, at *3 (E.D.N.C. May 22, 2011) (Flanagan, J.) (citation omitted). An alleged tort is not "separately identifiable" where it arises out of "performance of the contract, not out of distinct circumstances." *Id.*; *see also Broussard*, 155 F.3d at 347 (it is "unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations") (quoting *Strum*, 15 F.3d at 333).

Notably, even an intentional breach of contract will not support the "substantial aggravating circumstances" required for an independent tort. *Forest2Market, Inc. v. Arcogent, Inc.*, 2016 WL 56279, at *3 (N.C. Sup. Ct., Meck. Cty. Bus. Ct. 2016) ("[A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract."); *Di Sciullo v. Griggs & Co. Homes, Inc.*, No. 2:14-CV-18-FL, 2015 WL 6393813, at *9 (E.D.N.C. Oct. 22, 2015) (Flanagan, J.) (plaintiffs' allegations of actual fraud did not constitute "substantial aggravating circumstances" when based on the subject of the parties' contract); *see also Strum*, 15 F.3d at 331 (noting the independent tort exception "has been carefully circumscribed by state law").

Similarly, a party cannot plead around the economic loss rule by alleging the defendant made fraudulent misrepresentations during or regarding its contractual performance. For example, in *Nortel*, the court rejected the argument that plaintiff's UDTPA, fraud, and negligent misrepresentation claims could survive the economic loss rule because—although the plaintiff alleged fraud and misrepresentations by the defendant—the alleged misrepresentations related to the defendant's performance of the contract. *Nortel*, 2008 WL 906319, at *5. Similarly, in *Di Sciullo*, this Court applied the economic loss rule to bar fraud and unfair trade practices claims even though the plaintiff alleged that the defendants made fraudulent misrepresentations about its procedures for paying subcontractors and its retention of a deposit, since both arose out of the defendants' performance under the parties' contract. *Di Sciullo*, 2015 WL 6393813, at *10.

Here, each of AVX's tort claims is premised entirely on the very contamination the parties' contract addressed, alleged deficiencies in Corning's remedial efforts pursuant to the contract, and—in the case of the UDTPA and negligent misrepresentation claims—alleged misrepresentations Corning made during and regarding its performance of the remediation under the contract. Therefore, the economic loss rule bars each of these claims.

Even a cursory review of AVX's negligence, negligence *per se*, trespass, and nuisance claims shows that they are based on the same contamination and remediation that are the subject of the parties' contract. Specifically, AVX's negligence claim is based on the Corning Defendants' alleged failure of "assessment and remediation of environmental conditions at the property" (Compl. ¶¶ 141-42); its negligence *per se* claim is based on the Corning Defendants allegedly "releasing TCE and other constituents into the environment" and failing to remediate environmental impacts at the Property (Compl. ¶¶ 152-53); its nuisance claim is based the Corning Defendants' alleged "releases of TCE and other constituents" at the Property and

"failure to assess and remediate" (Compl. ¶¶ 158); and its trespass claim is based on the Corning Defendants allegedly "releas[ing] hazardous substances and other constituents" at the Property and "fail[ing] to pursue adequate assessment and remediation" (Compl. ¶¶ 162, 165). These allegations are not in any way "independent" of the parties' contract. They are based on the very environmental contamination and remediation the contract addresses. Accordingly, these tort claims are barred by the economic loss rule, and should be dismissed with prejudice.

AVX's new tort claims for negligent misrepresentation and violation of the UDTPA also rely on allegations regarding the contamination and alleged deficiencies in Corning's remediation, but seek to avoid the economic loss rule by manufacturing alleged falsehoods and misrepresentations by Corning. These alleged misrepresentations, however, also relate entirely to the subject of the parties' contract and Corning's performance thereunder. The negligent misrepresentation claim alleges Corning "misrepresented" it "would clean up the contamination immediately," misrepresented it was "diligently pursuing the cleanup," ran its remediation system "only at a very minimal level to give the outward appearance" the system was still working "while Corning sought eligibility under the REC Program," and misrepresented "that Corning was eligible for the REC Program." Compl. ¶¶ 189-92. All of these alleged misrepresentations relate entirely to the contamination at the Property or Corning's remediation thereof. Thus, even accepting as true that such misrepresentations were made (and they were not), they were made in the course of Corning's performance under the contract, and are therefore not independent of AVX's breach of contract claim. *See Nortel*, 2008 WL 906319, at *5 ("Although the County argues Nortel was negligent and fraudulent in its statements regarding this performance, this position does not change the fact that these statements were directly related to Nortel's performance of essential portions of the contract.").

The same is true of AVX's new UDTPA claim. It relies on Corning's receipt of a notice of violation relating to the same contamination addressed in the contract, alleged failure to delineate contamination as required by state law, alleged delays in remediation, alleged misrepresentations regarding REC Program eligibility, periods of ceased operation of the remediation system at the property, and failure to pursue certain remedial measures recommended by its consultant. Compl. ¶ 182. Again, each of these allegations relates to the contamination acknowledged in the contract or alleged failures in Corning's remedial measures. Indeed, the only basis AVX alleges for its conclusion that Corning's actions affected commerce (as required for a UDTPA claim) is that Corning "agreed by contract to cleanup contamination and has failed to do so." *Id.* ¶ 184. Thus, like all of AVX's other tort claims, its UDTPA claim is barred by the economic loss rule.

AVX raised several arguments in prior briefing in an attempt to avoid the economic loss rule. Each is without merit. First, AVX may not avoid the economic loss rule through allegations that Corning's performance under the parties' contract was tortious or in bad faith, or by asserting it has alleged "identifiable and distinct" facts showing aggravating and intentional misconduct. As shown above, these allegations all pertain to the Corning Defendants' alleged contamination and remediation—the subject of the parties' contract. These are not "identifiable and distinct" facts and, even if they allege intentional conduct or fraudulent misstatements in the course of Corning's performance under the contract, these allegations do not take AVX's claims outside of the economic loss rule. *Nortel*, 2008 WL 906319, at *5; *Di Sciullo*, 2015 WL 6393813, at *10.

Second, AVX may not appropriately rely on *N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345, 350-51 (1978) to suggest the "other property"

exception to the economic loss rule applies because the conduct it has alleged relates to "property other than the property that is the subject of the contract." That exception simply does not apply in this case. The subject of the contract is the sale of the *entire* Property, and the contract allocated risks and liabilities for contamination on the *entire* Property. AVX may contend Corning's present remedial efforts under the NCDEQ Agreement are inconsistent with their contractual obligations—a position with which Corning disagrees—but that is still a question of what the *contract* requires. AVX's tort claims thus cannot be saved by the "other property" exception and must be dismissed pursuant to the economic loss rule.

Finally, AVX's policy arguments that the economic loss rule should not be applied to "environmental" cases are meritless. AVX has argued that the Corning Defendants should not be allowed to bargain away their tort liability for environmental contamination. This is a red herring. The economic loss rule does not extinguish either party's environmental liabilities to the State or third parties—it only enforces the parties' bargained-for agreement *as against each other*. In any event, Defendants are not moving to dismiss the CERCLA claims under the economic loss rule; thus, any liability for remediation costs will be addressed by those claims. The Court should stop AVX's attempt to bring additional tort claims against Defendants based on the Property AVX willingly purchased from Defendants knowing it was contaminated and further entered into a contract with Defendants allocating liability and remediation responsibilities among the parties. It is *precisely* the policy of the economic loss rule that parties should be free to bargain for allocation of liabilities for known risks without the threat of uncertain tort liability. *Broussard*, 155 F.3d at 347; *PCS Phosphate*, 559 F.3d at 224. That policy applies here in spades.

B. The Statute of Limitations Bars AVX's Tort Claims.

AVX's tort claims are also barred by North Carolina's statute of limitations. Under North Carolina law, AVX's claims for negligence, negligence per se, trespass, nuisance, and negligent misrepresentation are each subject to the three-year statute of limitations in N.C.G.S. § 1-52. *E.g., CTS Corp. v. Mills Gap Rd. Assocs.*, No. 1:10cv156, 2011 WL 2118978, at *1 (W.D.N.C. Jan. 26, 2011) (nuisance and trespass claims arising from alleged groundwater contamination governed by § 1-52); *Driggers v. Sofamor, S.N.C.*, 44 F. Supp. 2d 760, 766 (M.D.N.C. 1998) ("The statute of limitations for a negligence per se claim is also three years …."); *James v. Clark*, 118 N.C. App. 178, 182-83, 454 S.E.2d 826, 829-30 (1995) (claims for negligence, nuisance, and trespass arising from alleged groundwater contamination governed by § 1-52); *Carlisle v. Keith*, 169 N.C. App. 674, 684-85, 614 S.E.2d 542, 549-50 (2005) (negligent misrepresentation claim governed by § 1-52). The three-year limitations period begins to run as soon as "bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C.G.S. § 1-52(16). AVX's UDTPA claim has a four year statute of limitations. N.C.G.S. § 75-16.2.

Where, as in this case, a plaintiff's claims are premised on the defendant's alleged contamination of the plaintiff's property, the statute of limitations begins to run as soon as the plaintiff knows that its property is contaminated. *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 512, 398 S.E.2d 586, 596 (1990) ("[Plaintiff's] negligence claim is likewise barred by the statute of limitations found in § 1-52(5). Once again, she waited more than three years after discovering the contamination to file an action for negligence …."). Here, there can be no dispute that AVX has had knowledge of environmental contamination at the Property since before it even

purchased the Property; it admits as much in the Complaint. Compl. ¶ 22.[6] Since AVX knew of contamination at the time it purchased the Property, the statute of limitations on its claims began running in 1987. *See CTS Corp.*, 2011 WL 2118978, at *3; *Minn. ex. rel. N. Pac. Ctr., Inc. v. BNSF Ry. Co.*, 723 F. Supp. 2d 1123, 1129 (D. Minn. 2010). AVX did not file suit until 2015, 28 years later. Its claims are thus time-barred.

AVX cannot avoid dismissal under the statute of limitations by arguing that, although it has been aware of contamination for many years, it has suffered continuing injury as a result of this contamination. That is not the law. Rather, when a plaintiff knows that it has been damaged by the defendant's allegedly tortious conduct and fails to sue within the statute of limitations, "the fact that further damage is caused does not bring about a new cause of action." *CTS Corp.*, 2011 WL 2118978, at *6 (quoting *DePalma v. Roman Catholic Diocese of Raleigh*, No. COA04-206, 2004 WL 279337, at *4 (N.C. Ct. App. Dec. 7, 2004)); *see also BNSF Ry. Co.*, 723 F. Supp. 2d at 1129 ("Certainly, BNSF once deposited contaminants on the land, but it has not done so for over 30 years. Contamination is a permanent condition until remediated, rather than a continuing tort, and the continuing presence of contaminants 'is insufficient to constitute a recurring damage.' The contamination continues as an issue, but this is not at all the same as a recurring behavior, each event of which begins a new limitations period.") (citation omitted).

AVX's has previously argued it can avoid the statute of limitations for two reasons, but neither has any merit. First, AVX has argued it can rely on *James v. Clark*, 118 N.C. App. 178,

[6] Even if AVX could somehow argue that it did not know of contamination at the Property before the sale, the Complaint also alleges that the NCDEQ issued an NOV in connection with the dry well located on the property in 1991 and that AVX leased a parcel on the property to Corning to operate a pump-and-treat remediation system beginning in 1993. Compl. ¶¶ 22-24. It is simply beyond dispute that AVX knew of contamination at the Property more than three years before instituting this case.

185, 454 S.E.2d 826, 831 (1995) to avoid the statute of limitations by claiming a "recurring" trespass due to "continuing migration of the contamination on and from the Eleven-Acre Outparcel." This argument is meritless in fact and law. AVX purchased the entire 33-acre parcel from Corning in 1987, knowing that it was contaminated, and has owned it continuously since then. Corning did not retain any adjacent property. Therefore, AVX cannot possibly claim that Corning's alleged contamination has leaked onto their 33-acre parcel from any adjacent property after AVX purchased the Property, knowing it was contaminated. *See CTS Corp. v. Mills Gap Rd. Assocs.*, No. 1:10CV156, 2011 WL 2118978, at *2-3 (W.D.N.C. Jan. 26, 2011), *report and recommendation adopted*, No. 1:10-CV-156, 2011 WL 2115815 (W.D.N.C. May 27, 2011). This is not a neighboring property, "recurring trespass" case like *James*. Because the contamination at issue allegedly emanated from the property solely owned by AVX, there can be no "recurring" trespass—or, for that matter, any "trespass" at all. *CTS Corp.*, 2011 WL 2118978, at *2-3.

Second, AVX has previously argued it can avoid the statute of limitations by invoking the doctrine of equitable estoppel. Not so. Equitable estoppel requires that a plaintiff have been "induced to delay filing of the action by the misrepresentations of the defendant." *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E,2d 735, 739 (1997). Here, although AVX alleges that Corning made unspecified misrepresentations that it was "diligently pursuing the cleanup," AVX's own Complaint alleges that the supposed deficiencies in Corning's remediation efforts were apparent from publicly-filed reports as early as 1989. *E.g.*, Compl. ¶¶ 50, 57, 60, 66. Corning's supposedly "secret" 2012 report could not have delayed AVX from filing its complaint within the applicable statute of limitations, because that period began to run as soon as AVX knew the property was contaminated—*i.e.*, in 1987. *McLeod Oil*, 327 N.C. at 512, 398

S.E.2d at 596. A report authored in 2012 (which by AVX's own admission it never even saw until 2016—*after* it had filed this case) could not possibly have affected the timely filing of this case.

Moreover, if AVX wishes to rely on equitable estoppel, it must plead the facts supporting that claim with particularity under Rule 9(b). *Petruzzo v. HealthExtras, Inc.*, 2014 WL 12546371, at *10 (E.D.N.C. Sept. 8, 2014). Here, although AVX alleges that Corning made representations that it was "diligently pursuing the cleanup" (Compl. ¶¶ 189-90, 193), AVX does not plead *when* these alleged misstatements were made, by *whom*, *what* precisely those persons supposedly said, or *why* those statements were false. Indeed, the only alleged misstatements AVX pleads with particularity are alleged misstatements made by Corning's consultant in a 2013 questionnaire submitted to NCDEQ—which AVX does not even allege it ever *received* prior to the institution of this lawsuit.

C. AVX Fails to State a Claim for Breach of Contract.

AVX premises its breach of contract action on its allegation that Corning has "knowingly and willfully failed to pursue assessment and remediation of the hazardous substances and other constituents" that Corning allegedly disposed of at the Property prior to sale. Compl. ¶ 132. However, AVX's own allegations establish that, in fact, Corning *has* undertaken environmental assessment and remediation at the Property (*see, e.g.*, Compl. ¶¶ 41, 47, 49-50, 53-59, 63-67, 80). AVX's real complaint, therefore, is not that Corning has failed to effect any remedial measures, but rather that Corning has allegedly "delayed," has "failed to delineate fully" the environmental impacts at the Property, and has used remediation techniques that AVX finds "inadequate." Compl. ¶ 142.

But Corning's contractual obligation to remediate at the Property is not defined by what sort of remedial efforts AVX deems "adequate" nor by AVX's preferred timeline. Instead, the contract provides only, as the Complaint acknowledges, that Corning will effect those remedial measures "required by law or regulation." Compl. ¶ 130; Letter Agreement ¶ 2. Thus, to plead a breach of contract claim premised on any supposed inadequacy in Corning's remediation efforts, AVX must plead facts showing that Corning's remedial efforts have been less than required by law. *See Houk v. Lifestore Bank*, No. 5:13-CV-66-DSC, 2014 WL 197902, at *3 (W.D.N.C. Jan. 15, 2014) ("Bald assertions that [defendant's behavior] was 'improper' are insufficient.").

The Complaint simply does not plead any facts showing that Corning's remediation efforts at the Property have been less than required by law or regulation. The only regulatory censure of any kind referenced in the Complaint is a July 1991 NOV from NCDHENR (NCDEQ's predecessor) relating not to Corning's remediation efforts, but to the release of contaminants before AVX purchased the Property. Compl. ¶ 60. As the Complaint acknowledges, Corning sent the State a plan for a remedial pump-and-treat groundwater system only two months after this NOV was issued. Compl. ¶ 63. After the State explicitly approved the design of the pump and treat system, it was constructed and began operation in fall of 1992. Compl. ¶ 64; Groves Decl. Ex. 7 at '539 ("[Y]our system is considered acceptable …."); Lease Agreement ¶ 4. In addition, Corning is presently undertaking remedial action under the NCDEQ Agreement, which NCDEQ also explicitly approved. Compl. ¶ 80; Groves Decl. Ex. 4. Thus, far from identifying some manner in which Corning's remedial efforts have been less than "required by law or regulation," the Complaint identifies Corning's remedial efforts that State regulatory authorities have approved. Since the Complaint does not—and cannot—plead any

facts showing that Corning has not remediated "as required by law or regulation," its breach of contract claim should be dismissed.

AVX has attempted to avoid this result by relying on its allegations that the *contaminants* at the Property (as opposed to Corning's remedial measures) are not consistent with state law. But the contract does not say that contamination at the site is a breach of contract—it says the opposite. Letter Agreement ¶ 3 ("AVX hereby waives any claim that the Raleigh Situation is a breach of Section 7.22(a) of the Agreement."). Indeed, it would be absurd to read the contract as treating contamination itself as a breach, since AVX knew when it purchased the property that the contaminant levels exceeded state law allowances. AVX bargained away any claim that the contamination itself was a breach. The bargained-for agreement did not set a timeline for the cleanup, nor require any specific remedial action. Instead, the agreement was that Corning would effect all remedial measures "required by law or regulation." AVX has not alleged (and cannot) that Corning's remedial measures—as opposed to the contamination—were inconsistent with law or regulation.

D. AVX Fails to State a Claim for Negligent Misrepresentation.

AVX's negligent misrepresentation claim also fails to meet Rule 9(b)'s pleading requirements. Negligent misrepresentation claims under North Carolina law sound in fraud, and are therefore governed by Rule 9(b). *Topshelf Mgmt., Inc. v. Campbell-Ewald Co.*, 117 F. Supp. 3d 722, 728 (M.D.N.C. 2015) ("Federal courts have repeatedly found that the North Carolina tort of negligent misrepresentation sounds in fraud and have applied Rule 9(b) to it.") (collecting cases). Thus, AVX must plead "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *U.S. ex rel. Wilson v. Kellog Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008).

Here, AVX alleges Corning made "numerous material misrepresentations to the AVX and the State that Corning was diligently pursuing cleanup of the contamination at the Property." Compl. ¶ 189. The Complaint, however, does not identify when those alleged misstatements were made, where, what precisely was said, by whom, and what the speaker gained as a result. The Corning Defendants genuinely do not know what alleged misstatements AVX is referring to. For example, is AVX referring to one of the many reports Corning or its consultants submitted to the State? If so, which report(s), what statements therein were false or misleading, and when did AVX actually review that report such that it could have relied upon its contents? Is AVX referring to some email conversation between the parties? When? Which Corning employee said what? Despite the hundreds of paragraphs in the Complaint, these facts are not pleaded, and that means any negligent misrepresentation claims based on these supposed "numerous material misrepresentations" fail as a matter of law.

AVX may argue it has particularly identified one source of alleged misrepresentations, namely the September 2013 Site Questionnaire. Compl. ¶ 192. Even so, AVX has not pleaded a cognizable negligent misrepresentation claim based on this document for two reasons. First, the tort of negligent misrepresentation requires the plaintiff to plead that it reasonably relied on the alleged misrepresentation. *Songwooyarn Trading Co v. Sox Eleven, Inc.*, 213 N.C. App. 49, 54, 714 S.E.2d 162, 166 (2011). Here, AVX has not even alleged that it ever received or read the Site Questionnaire prior to this lawsuit, or if so, what actions it took in reliance thereon. Second, even if AVX did receive, read, and somehow rely on the questionnaire, if it "could have discovered the truth upon inquiry, the complaint must allege that [it] was denied the opportunity to investigate or that [it] could not have learned the true facts by exercise of reasonable diligence." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 59, 554 S.E.2d 840, 846-47

(2001). Here, AVX makes no such allegation. To the contrary, it alleges that the alleged falsity of the questionnaire responses was apparent from publicly-filed "Corning reports dating back to Corning's June 14, 1989 report." Compl. ¶ 75.

E. There is No Cause of Action for "Injunction" or "Punitive Damages."

North Carolina does not recognize any cause of action for "injunction" or "punitive damages." Under North Carolina law, punitive damages "do not and cannot exist as an independent cause of action." *Baldwin v. Duke Energy Corp.*, No. 3:12cv212, 2012 WL 3562402, at *1 (W.D.N.C. Aug. 17, 2012) (quotation marks and citation omitted). Similarly, it is "well settled that a request for injunctive relief is not a cause of action but rather a type of remedy." *Kearney v. Blue Cross & Blue Shield*, 233 F. Supp. 3d 496, 508 (M.D.N.C. 2017) (citations omitted). Thus, AVX's tenth and fourteenth causes of action for "injunction" and "punitive damages," respectively, must be dismissed.

V. CONCLUSION

For the reasons stated herein, this Court should dismiss each of AVX's tort claims as barred by the economic loss doctrine or the statute of limitations. In addition, this Court should dismiss the negligent misrepresentation claim, the breach of contract claim, and the "injunction" and "punitive damages" claims for failure to state a claim.

Dated: October 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing was filed via the Court's CM/ECF system on October 27, 2017. Notice of this filing will be provided to all counsel of record via the Court's CM/ECF system.

/s/ Amanda L. Groves
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