

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>CRC HEALTH GROUP, INC., et al.,</b>	)	
	)	
<i>Plaintiffs</i>	)	
	)	
v.	)	<b>No. 2:11-cv-196-DBH</b>
	)	
<b>TOWN OF WARREN,</b>	)	
	)	
<i>Defendant</i>	)	

**RECOMMENDED DECISION ON MOTIONS  
FOR PARTIAL SUMMARY JUDGMENT AND  
MEMORANDUM DECISION ON MOTION TO EXCLUDE**

Plaintiffs CRC Health Group, Inc. (“CRC Health”) and CRC Recovery, Inc. (“CRC Recovery”) (together, “CRC” or “plaintiffs”) seek summary judgment as to their claims that the defendant Town of Warren (“Town”) engaged in intentional discrimination in violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, when it enacted a moratorium on methadone clinics and failed to offer a reasonable accommodation to CRC. *See* Plaintiffs’ Motion for Partial Summary Judgment Based Upon Intentional Facial Discrimination (“Plaintiffs’ S/J Motion”) (ECF No. 107) at 1, 17; Third Amended Complaint (ECF No. 27) ¶¶ 46-56.

The Town moves for summary judgment as to CRC’s claim for lost profits, partly on the basis of a separate motion to exclude the lost profits opinion testimony of expert Allan M. Feldman, Ph.D., and as to any claims by CRC Health. *See* Defendant’s Motion for Partial Summary Judgment (“Defendant’s S/J Motion”) (ECF No. 110) at 1-2, 16; Motion In Limine To Exclude Lost Profits Testimony by Dr. Allan M. Feldman (“Motion To Exclude”) (ECF No. 112) at 1, 17.

For the reasons that follow, I deny the Motion To Exclude, recommend that the court grant the Plaintiffs' S/J Motion as to intentional, facial discrimination but otherwise deny it, and recommend that the court grant the Defendant's S/J Motion as to CRC Health but otherwise deny it.

## **I. Applicable Legal Standards**

### **A. Federal Rule of Civil Procedure 56**

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.” *Rodríguez-Rivera v. Federico Trilla Reg'l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). “A fact is material if it has the potential of determining the outcome of the litigation.” *Id.* (quoting *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(c). “As to any essential factual element of its claim on which the nonmovant

would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted). When, as here, the parties stipulate to facts for purposes of summary judgment, the court gives the nonmoving party the benefit of inferences from the stipulated facts. *See, e.g., Albedyll v. Wisconsin Porcelain Co. Revised Ret. Plan*, 947 F.2d 246, 254 (7th Cir. 1991).

### **B. Local Rule 56**

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the local rules of this district. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts

contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(f). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of fact.” *Id.*; *see also, e.g., Sánchez-Figueroa v. Banco Popular de P.R.*, 527 F.3d 209, 213-14 (1st Cir. 2008); Fed. R. Civ. P. 56(e)(2) (“If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]”).

## **II. Stipulated Facts (All Motions)**

Through wholly owned subsidiaries, CRC Health operates 134 treatment facilities in 26 states and treats approximately 30,000 patients per day, making it the largest and most geographically diversified for-profit provider of substance abuse treatment. The Parties’ Joint Stipulations of Facts (“Factual Stip.”) (ECF No. 106) ¶ 1. CRC Health has many subsidiaries, including CRC Corporation. *Id.* ¶ 2. CRC Corporation has many subsidiaries, including CRC Recovery, a Delaware corporation. *Id.* ¶ 3. CRC Corporation wholly owns and operates CRC Recovery. *Id.* The Town of Warren is a Maine municipal corporation. *Id.* ¶ 4. Its population as reported by the 2010 census is 4,750. *Id.* ¶ 5. It has 2,546 registered voters. *Id.* The Town consists of a 46.6 square mile area. *Id.* ¶ 6. CRC Health, CRC Corporation, and CRC Recovery are all for-profit corporations. *Id.* ¶ 7.

In October 2010, CRC Recovery was qualified to do business in Maine under the assumed name of “MidCoast Treatment Center” for the purpose of operating a methadone clinic in Maine. *Id.* ¶ 8. In October 2010, CRC Recovery filed for a license from the State of Maine

Department of Health and Human Services as an outpatient methadone treatment facility. *Id.* ¶ 9.

On October 7, 2010, CRC Recovery’s prospective landlord, Vixen Land Holdings, LLC (“Vixen”), applied to the Warren Planning Board for a permit for “business and professional offices” at 44 School Street in Warren, Maine. *Id.* ¶ 10. The 44 School Street property consists of a former elementary school building and 5.37 acres of land located in the village area of Warren, between Route 90 and Main Street. *Id.* ¶ 11. Vixen did not own 44 School Street, but had a contract to buy that property from the Town. *Id.* ¶ 12. The Town later terminated the contract, purportedly for Vixen’s failure to meet a financing contingency. *Id.*

On October 15, 2010, Vixen and CRC Health entered into a letter of intent for a lease of the 44 School Street property. *Id.* ¶ 13. On November 4, 2010, after a short hearing, the Planning Board granted Vixen a land use permit for “business and professional offices” at 44 School Street. *Id.* ¶ 14. At that time, there was no moratorium, nor were methadone clinics listed as a prohibited use under the Town’s Land Use Ordinance or Site Plan Review Ordinance. *Id.* ¶ 15.

On November 19, 2010, the Planning Board Chair wrote to the Board of Selectmen requesting approval to rescind Vixen’s November 4, 2010, approval. *Id.* ¶ 16. The Board Chair raised three issues: (1) the Sanitary District rescinded its approval; (2) the applicant provided “incomplete or misleading information when he came before the Planning Board on November 4, 2010;” and (3) the Planning Board reviewed the application under the Land Use Ordinance rather than the Site Plan Review Ordinance. *Id.* ¶ 17. At the December 2, 2010, Planning Board meeting, the Board voted to rescind Vixen’s permit. *Id.* ¶ 18.

At the December 13, 2010, Town Meeting, the voters approved a 180–day moratorium on methadone clinics. *Id.* ¶ 19. On May 12, 2011, CRC filed this suit. *Id.* ¶ 20. On June 1, 2011, the voters approved an extension of the moratorium through August 2, 2011. *Id.* ¶ 21. On August 2, 2011, the voters approved a warrant lifting the moratorium and enacting a Large Facilities Ordinance. *Id.* ¶ 22. The moratorium was in effect for 232 days (December 13, 2010 – August 2, 2011). *Id.* ¶ 23.

On August 31, 2011, the parties participated in a mediation and entered into a settlement, which included, among other terms, that approval would be sought from the Planning Board for a methadone clinic under the Town’s recently adopted Large Facilities Ordinance. *Id.* ¶ 24. The court later denied the Town’s motion to enforce the settlement. *Id.*

On October 12, 2011, CRC Recovery filed with the Planning Board applications for site plan approval of a methadone clinic under the Large Facilities Ordinance for alternative locations at 1642 Atlantic Highway and 1767 Atlantic Highway. *Id.* ¶ 25. CRC Recovery later withdrew the application for 1642 Atlantic Highway and proceeded with the application for 1767 Atlantic Highway. *Id.* ¶ 26.

On December 15, 2012, the Planning Board determined that CRC Recovery’s application was substantially complete. *Id.* ¶ 27. The Board had a number of additional meetings, and ultimately voted to approve CRC Recovery’s application on June 5, 2012. *Id.* ¶ 28. On July 12, 2012, the Board issued written findings of fact approving CRC Recovery’s permit under the Large Facility Ordinance. *Id.* ¶ 29.

On June 19, 2012, a group of CRC Recovery’s neighbors filed an appeal of CRC Recovery’s approval to the Warren Zoning Board of Appeals. *Id.* ¶ 30. The Zoning Board met on August 16, 2012, and September 11, 2012. *Id.* ¶ 31. Before the Zoning Board could vote on

the appeal, on October 1, 2012, CRC Recovery notified the Board that it would withdraw its application. *Id.* ¶ 32. The Zoning Board voted on October 4, 2012, to remand the matter to the Planning Board. *Id.* ¶ 33. On November 1, 2012, the Planning Board voted to allow CRC Recovery to withdraw its application. *Id.* ¶ 34.

No CRC entity currently has right, title, or interest in any property in Warren. *Id.* ¶ 35. No CRC entity currently has plans to operate a clinic in Warren. *Id.* ¶ 36. The only remedy CRC now seeks is damages. *Id.* ¶ 37.

### **III. Plaintiffs' S/J Motion**

#### **A. Factual Background**

The parties' statements of material facts, credited to the extent that they are either admitted or supported by record citations in accordance with Local Rule 56, with disputes resolved in favor of the Town as nonmovant, reveal the following.<sup>1</sup>

CRC worked with Vixen to locate an appropriate site for a comprehensive treatment clinic (a methadone clinic under the Town's later-adopted moratorium ordinance) in the mid-coast area of Maine after the only one in the region, located in Rockland, closed. Plaintiffs' Statement of Material Facts Not in Dispute Pursuant to Local Rule 56(b) ("Plaintiffs' SMF") (ECF No. 108) ¶ 1; Deposition of Joseph Pritchard ("Pritchard Dep.") (ECF No. 104-9), attached to Joint Summary Judgment Record ("Joint Record") (ECF No. 104). at 30-32, 76-77, 90-91.<sup>2</sup>

Eventually, Vixen located a site for CRC's clinic in the Town of Warren at the "Brick

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<sup>1</sup> Statements that are qualified are assumed to be admitted subject to that qualification, unless a qualification indicates otherwise. To the extent that I have incorporated one side's qualification into the statement of the other, I have determined that the qualification is supported by the record citation(s) given. I have omitted qualifications that are unsupported by the citation(s) given or redundant. I have also attempted to omit statements that merely track those to which the parties have stipulated, which are set forth above.

<sup>2</sup> I have substituted the phrase "worked with Vixen" for "engaged Vixen" in response to the Town's assertion that the only formal agreement between CRC and Vixen was a letter of intent to lease space. Defendant's Opposing Statement of Material Facts and Additional Facts ("Defendant's Opposing SMF") (ECF No. 117) ¶ 1.

School House” site at 44 School Street, which was owned by the Town. Plaintiffs’ SMF ¶ 2; Defendant’s Opposing SMF ¶ 2. On September 30, 2010, Town Manager Grant Watmough signed the contract to sell the site to Vixen. *Id.* On October 15, 2010, CRC signed a letter of intent with Vixen to lease 5,000 square feet of the Brick School House site. *Id.*<sup>3</sup> CRC proposed to treat recovering alcoholics or substance abusers. Plaintiffs’ SMF ¶ 6; Affidavit of Philip L. Herschman, Ph.D. (“Herschman Aff.”) (ECF No. 11-4), attached to Motion for Preliminary Injunction (ECF No. 11), ¶ 4.<sup>4</sup>

On October 7, 2010, Vixen through its principal Bob Emery applied to the Town for a site plan review for Business and Professional Offices – deemed complete by the Town – as permitted by section 16(S), Land Use Standards, Town of Warren Land Use Ordinance, which is defined in section 18(C) to include the “place of business for doctors, . . . psychiatrists, psychologists, counsellors, but not including financial institutions or personal services.” Plaintiffs’ SMF ¶ 7; Defendant’s Opposing SMF ¶ 7.

The Fire Department, Road Commissioner, Code Enforcement Officer, and Sanitary District all signed off on the site plan review. *Id.* ¶ 11.<sup>5</sup> On November 5, 2010, the Town’s Code Enforcement Officer, Bill O’Donnell, signed Planning Board Permit No. 1975TB. *Id.* ¶ 12.

Shortly thereafter, on December 2, 2010, on extremely short notice, a warrant for a

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<sup>3</sup> I overrule the Town’s objection and request to strike paragraph 2 on the basis that it is not sufficiently short and concise to pass muster pursuant to Local Rule 56. Defendant’s Opposing SMF ¶ 2. I omit the final three sentences of paragraph 2, Plaintiffs’ SMF ¶ 2, which the Town denies, Defendant’s Opposing SMF ¶ 2, viewing the evidence in the light most favorable to the Town as nonmovant.

<sup>4</sup> I omit the remainder of paragraph 6, Plaintiffs’ SMF ¶ 6, sustaining the Town’s objection that it contains legal conclusions rather than statements of fact, Defendant’s Opposing SMF ¶ 6, and concluding that the remaining facts set forth therein are neither admitted nor supported by the citation given. I overrule the Town’s objection as to the portion of the statement set forth above that Dr. Herschman’s testimony is inadmissible because he is an undesignated expert. As the Chief Clinical Officer of CRC Health, Herschman Aff. ¶ 1, Dr. Herschman need not have been designated as an expert to testify as to the population the Warren clinic was intended to serve.

<sup>5</sup> I omit paragraphs 9 and 10, Plaintiffs’ SMF ¶¶ 9-10, sustaining the Town’s objections that they are legal conclusions rather than statements of fact, Defendant’s Opposing SMF ¶¶ 9-10.

Special Town Meeting was issued for the purpose of enacting an ordinance titled “an ordinance to enact a moratorium on methadone clinics” (“Moratorium Ordinance”). *Id.* ¶ 13.<sup>6</sup> Community comments both during and outside of the meeting included: “you are bringing addicts in to our town,” “go back to Rockland[,]” and “[w]e don’t want them here.” Plaintiffs’ SMF ¶ 14; Pritchard Dep. at 133.<sup>7</sup> Members of the audience at the Special Town Meeting wore “Methadon’t” buttons. Plaintiffs’ SMF ¶ 14; Pritchard Dep. at 207-08; Deposition of Grant Watmough (“Watmough Dep.”) (ECF No. 104-6), attached to Joint Record, at 35, 109, 111. There was also a petition with a “signature page to get the selectmen thrown out for doing this to them[,]” Plaintiffs’ SMF ¶ 15; Pritchard Dep. at 133, and to “cancel and rescind the purchase and sale agreement with Vixen LLC relative to ‘The Brick School House,’” Plaintiffs’ SMF ¶ 14; Defendant’s Opposing SMF ¶ 14.

The minutes of the December 13, 2010, Special Town Meeting during which the moratorium was enacted do not reflect that any evidence was presented to the Board to justify the moratorium. *Id.* ¶ 16.<sup>8</sup> The Moratorium Ordinance singled out methadone clinics from all other types of lawful medical uses and referenced methadone 14 to 15 times. *Id.* ¶ 17.<sup>9</sup> Nowhere did the ordinance reference “high intensity use,” the justification later asserted by the Town for

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<sup>6</sup> I omit the remainder of paragraph 13, Plaintiffs’ SMF ¶ 13, which the Town denies, Defendant’s Opposing SMF ¶ 13, viewing the evidence in the light most favorable to the Town as nonmovant.

<sup>7</sup> The Town objects to, and requests to strike, paragraph 14 on several bases: that (i) it violates the Local Rule 56(b) requirement that a movant set forth a “separate, short, and concise statement of material facts, each set forth in a separately numbered paragraph(s),” (ii) it “contains numerous statements that are inadmissible hearsay or not supported by admissible evidence, such as an internet link to a newspaper website[,]” and (iii) the final sentence lacks a citation to record evidence. Defendant’s Opposing SMF ¶ 14. While the paragraph is not a model of a separate, short, and concise statement of material facts, I decline to strike it on that basis. I sustain the hearsay objection with respect to CRC’s reliance on the internet link to a newspaper website, and otherwise deny it for failure to identify other specific hearsay. I sustain the objection to the final sentence of the paragraph on the basis that it is unsupported by any record citation.

<sup>8</sup> My recitation includes a portion of the Town’s qualification of this statement. Defendant’s Opposing SMF ¶ 16. The Town further qualifies the statement by noting that, although the minutes may not refer to evidence, the Moratorium Ordinance itself contained findings of fact. *Id.*

<sup>9</sup> My recitation includes the relevant portion of the Town’s qualification of this statement. Defendant’s Opposing SMF ¶ 17.

the moratorium. *Id.*<sup>10</sup>

On December 27, 2010, CRC sent the Town a letter requesting a reasonable accommodation under the ADA, stating that: (1) the Town's enactment of a blanket moratorium on methadone clinics throughout the Town, while allowing comparable medical uses, constituted facial discrimination under the ADA, (2) the Town's actions in first approving the requested use and then withdrawing the approval in the face of community prejudice constituted intentional discrimination under the ADA, and, (3) alternatively, CRC requested a reasonable accommodation under the ADA. Plaintiffs' SMF ¶ 19; Exh. 56, filed on Exhibit CD.<sup>11</sup>

On December 30, 2010, the Town's attorney responded, stating that CRC lacked standing to claim discrimination under the ADA. Plaintiffs' SMF ¶ 20; Defendant's Opposing SMF ¶ 20. On January 13, 2011, CRC responded, citing caselaw supporting its claim for provider and organizational standing. *Id.* ¶ 21.<sup>12</sup> The only thing that the Town did in response to the reasonable accommodation request was to draft and later redraft an ordinance proposing to regulate methadone clinics. *Id.* ¶ 23.<sup>13</sup>

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<sup>10</sup> The Town qualifies this statement, asserting that, although the ordinance did not use the words "high intensity use," it contained findings of fact that the nature of the use required study to evaluate compatibility with neighboring uses. Defendant's Opposing SMF ¶ 17; Exh. 43, filed on compact disc per ECF No. 104-10 ("Exhibit CD"), attached to Joint Record, at [3]. The Town adds that the purpose of the moratorium was for the Town to be able to manage an expanded use or high intensity use, the scope of which had not previously been addressed. Defendant's Opposing SMF ¶ 17; Deposition of Patrick Mellor, Esq. ("Mellor Dep.") (ECF No. 104-7), attached to Joint Record, at 55, 57-58.

<sup>11</sup> I overrule the Town's objections that this statement sets forth legal conclusions, not facts, and that testimony by CRC's own counsel is inadmissible unless counsel intends to testify as a witness at trial. Defendant's Opposing SMF ¶ 19. The statement is provided not for the truth of its assertions, but to indicate the position taken by CRC following the enactment of the moratorium.

<sup>12</sup> The Town asserts the same objections interposed in response to paragraph 19, Defendant's Opposing SMF ¶ 21, which I overrule for the same reason.

<sup>13</sup> I omit paragraph 22, Plaintiffs' SMF ¶ 22, which the Town denies, Defendant's Opposing SMF ¶ 22, viewing the evidence in the light most favorable to the Town as nonmovant. The Town qualifies paragraph 23, asserting that it drafted and redrafted an ordinance after the moratorium went into effect and engaged with CRC's counsel in extensive discussions concerning the content of what became the Large Facilities Ordinance. Defendant's Opposing SMF ¶ 23; Mellor Dep. at 38-39, 145-46. I omit paragraphs 24 through 31, 34, and 35, Plaintiffs' SMF ¶¶ 24-31, 34-35, sustaining the Town's objection and request to strike those paragraphs on the basis that CRC relies on expert testimony by undesignated experts, which is inadmissible for purposes of summary judgment, Defendant's  
(continued on next page)

On March 1, 2011, the Town rescinded Vixen's contract to purchase the "Old Brick School" site, purportedly because Vixen failed to show proof of financing, notwithstanding Vixen's letter dated January 24, 2011, stating that it had funds to close. Plaintiffs' SMF ¶ 18; Exhs. 4, 77, filed on Exhibit CD.<sup>14</sup>

Vixen had no assets at the time it issued a letter claiming to have the funds available to fund the purchase of 44 School Street or for a roughly six-year period prior to that time. Additional Facts ("Defendant's Additional SMF"), commencing on page 15 of Defendant's Opposing SMF, ¶ 1; Intervenor's Interrog. Ans. ¶¶ 17-18.<sup>15</sup> The closing date listed in paragraph 4 of the purchase and sale agreement between Vixen and the Town was May 6, 2011. Defendant's Additional SMF ¶ 2; Exh. 36, filed on Exhibit CD. The renovations needed to prepare the 44 School Street location for opening as a clinic would have required seven to 12 months. Defendant's Additional SMF ¶ 3; Deposition of Robert N. Emery, Jr. ("Emery Dep.") (ECF No. 109-1), attached to Plaintiffs' Record, at 66-67.

A Planning Board applicant has an obligation to be honest about the scope and intensity of a proposed use. Defendant's Additional SMF ¶ 4; Mellor Dep. at 66-67. CRC and Emery met with the Town of Warren Selectmen in executive session to discuss CRC's interest in operating a

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Opposing SMF ¶¶ 24-31, 34-35; *Harriman v. Hancock Cnty.*, 627 F.3d 22, 33 (1st Cir. 2010). While in certain narrow circumstances lay opinion testimony is admissible, *see, e.g., Harriman*, 627 F.3d at 33, CRC did not respond to the request to strike or otherwise indicate that any of the challenged testimony, most if not all of which appears to be in the nature of expert testimony, would be admissible. *See* Loc. R. 56(e) (permitting responses to requests to strike statements of fact). I also omit paragraph 31, Plaintiffs' SMF ¶ 32, sustaining the Town's objection that it is a conclusory statement of government policy, Defendant's Opposing SMF ¶ 32, paragraph 33, Plaintiffs' SMF ¶ 33, sustaining the Town's objection that it relies on citation to inadmissible evidence in the form of website links that appear to be inactive, Defendant's Opposing SMF ¶ 33, and paragraph 36, Plaintiffs' SMF ¶ 36, sustaining the Town's objection that it is unsupported by the citation given, Defendant's Opposing SMF ¶ 36.

<sup>14</sup> The Town qualifies this statement, asserting that it acted because Vixen did not supply a lender's commitment for financing. Defendant's Opposing SMF ¶ 18; Watmough Dep. at 116; Exh. 77, filed on Exhibit CD. The Town adds that Vixen had no assets of any kind. Defendant's Opposing SMF ¶ 18; Intervenor's Answers to Defendant's First Set of Interrogatories ("Intervenor's Interrog. Ans.") (ECF No. 109-2), attached to Plaintiffs' Summary Judgment Record ("Plaintiffs' Record") (ECF No. 109), ¶18.

<sup>15</sup> CRC filed no reply to the Town's statement of additional facts. ECF Docket. Thus, the Town's additional facts are deemed admitted to the extent supported by record citations as required by Local Rule 56. Loc. R. 56(f).

methadone clinic in Warren. Defendant's Additional SMF ¶ 5; Mellor Dep. at 111, 148. Emery, who presented Vixen's application to the Planning Board on November 4, 2011, for approval for business and professional offices, never told the Board that CRC was involved. Defendant's Additional SMF ¶ 6; Mellor Dep. at 30, 34. Emery led the Planning Board to believe that he did not yet have any tenants. Defendant's Additional SMF ¶ 7; Mellor Dep. at 64-65. In fact, CRC and Vixen had entered into a letter of intent to lease the space. Defendant's Additional SMF ¶ 8; Pritchard Dep. at 115; Burke Dep. at 86; Exh. 2, filed on Exhibit CD. Emery led the Planning Board to believe that the proposed use would be like a lawyer's, accountant's, or real estate agent's professional office. Defendant's Additional SMF ¶ 9; Mellor Dep. at 68, 70. The Planning Board did not know that CRC was interested in a high-intensity use. Defendant's Additional SMF ¶ 10; Mellor Dep. at 70-71. Because the Planning Board did not have accurate and complete information concerning the nature of the proposed use, it did not use all of the ordinance tools at its disposal to regulate that use. Defendant's Additional SMF ¶ 11; Mellor Dep. at 63.

The Moratorium Ordinance contains findings of fact that (i) "a Methadone Clinic presents the potential for new and unknown impacts, including public safety concerns and concerns about compatibility with surrounding uses[.]" (ii) "the application of the Town's existing Comprehensive Plan, Land Use Ordinance, and Site Plan Review Ordinance and other land use ordinances and regulations is inadequate to prevent the possibility of serious public harm from an inappropriately located Methadone Clinic[.]" and (iii) "the Town needs a reasonable amount of time to study the land use implications of Methadone Clinics and to develop reasonable regulations governing their location and operation[.]" Defendant's Additional SMF ¶¶ 13-15; Moratorium Ordinance (ECF No. 104-2), attached to Joint Record, at

[1].

There were various reasons why the Town adopted the Moratorium Ordinance that have nothing to do with the patrons of the proposed clinic. Defendant's Additional SMF ¶ 16; Mellor Dep. at 63-64, 149-51. These included that Vixen had applied to the Planning Board for approval but had been dishonest concerning the nature of the proposed use. Defendant's Additional SMF ¶ 17; Mellor Dep. at 63. The Town was concerned about the compatibility of an intense business use in a residential village area. Defendant's Additional SMF ¶ 18; Mellor Dep. at 63-64. The moratorium identified methadone clinics, but only because that was the specific high intensity use proposed at that time. Defendant's Additional SMF ¶ 19; Mellor Dep. at 75-76.

After the Moratorium Ordinance passed, a Town committee convened and repeatedly met for the purpose of drafting an ordinance to fill the identified gap in the Town's land use scheme. Defendant's Additional SMF ¶ 20; Mellor Dep. at 38-39. The Town's goal was to "ensure that uses in the village were compatible with the character of the village and the traffic patterns of the village and the residential nature of the village." Defendant's Additional SMF ¶ 21; Mellor Dep. at 76-77.

The Town repeatedly solicited and received input from CRC's representatives in an effort to accommodate CRC's needs but still allow the Town to appropriately regulate high intensity uses in the village district. Defendant's Additional SMF ¶ 22; Mellor Dep. at 157-58.

The Town extended the moratorium for a couple of additional months by enacting the Ordinance To Extend a Moratorium. Defendant's Additional SMF ¶ 23; An Ordinance To Extend a Moratorium Pursuant to 30-A MRS 4356 (ECF No. 104-3), attached to Joint Record. That ordinance contained findings of fact that (i) "the application of the Town's existing

Comprehensive Plan, Land Use Ordinance, Site Plan Review Ordinance and other land use ordinances and regulations is inadequate to prevent the possibility of serious public harm from an inappropriately located outpatient addiction treatment clinic[.]” (ii) “the problem giving rise to the need for the Moratorium still exists[.]” and (iii) “progress . . . is being made to alleviate the problem giving rise to the need for the Moratorium[.]” *Id.* ¶¶ 25-27.

Abutters appealed CRC’s approval at 1767 Atlantic Highway to the Zoning Board of Appeals. Defendant’s Additional SMF ¶ 28; Affidavit of Paul L. Gibbons (“Gibbons Aff.”) (ECF No. 117-1), attached to Defendant’s Opposing SMF, ¶ 7. A Zoning Board decision is appealable under Maine Rule of Civil Procedure 80B to Superior Court, and such an appeal would likely have been filed. Defendant’s Additional SMF ¶ 29; Gibbons Aff. ¶ 9. A Rule 80B appeal in Knox County would likely have taken two years. Defendant’s Additional SMF ¶ 30; Gibbons Aff. ¶ 10. A Law Court appeal would have taken about 18 additional months. Defendant’s SMF ¶ 31; Gibbons Aff. ¶ 11.

## **B. Discussion**

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. To prevail on a Title II ADA claim, a plaintiff must demonstrate:

(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity’s services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff’s disability.

*Buchanan v. Maine*, 469 F.3d 158, 170-71 (1st Cir. 2006) (citation and internal quotation marks omitted). A treatment provider such as CRC has standing to sue on its own behalf when “denied

a zoning permit because it cares for and/or associates with individuals who have disabilities.” *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 335 (6th Cir. 2002).

“Courts have construed [42 U.S.C. § 12132] to authorize several different types of ADA claims: (i) those brought under an intentional discrimination (or ‘disparate treatment’) theory; (ii) those brought under a disparate impact theory; and (iii) those brought under a ‘failure to accommodate’ theory.” *Grider v. City & Cnty. of Denver*, Civil Action No. 10-cv-00722-MSK-MJW, 2011 WL 721279, at \*3 (D. Colo. Feb. 23, 2011) (citations omitted).

“There are two types of disparate treatment cases: ones that involve a facially discriminatory policy, and ones that involve more typical individualized decision-making.” *Daveri Dev. Grp., LLC v. Village of Wheeling*, 934 F. Supp. 2d 987, 996 (N.D. Ill. 2013). *See also, e.g., Lapid Ventures, LLC v. Township of Piscataway*, Civ. No. 10-6219 (WJM), 2011 WL 2429314, at \*7 (D.N.J. June 13, 2011) (“To succeed on a claim of disparate treatment, Plaintiffs must show that either Ordinance 10-03 was passed with the desire to discriminate and that this discriminatory purpose was a ‘motivating factor’ behind the challenged action, or that the regulation uses a facially discriminatory classification.”).

“Disparate impact analysis focuses on facially neutral policies or practices that may have a discriminatory effect.” *Boykin v. Gray*, Civil Action No. 10-1790 (PLF), 2013 WL 5428780, at \*4 (D.D.C. Sept. 30, 2013) (citation and internal quotation marks omitted). “An ADA claim based on a disparate impact theory requires a plaintiff to allege: (i) the existence and application of a facially-neutral practice; and (ii) that the neutral application of that practice nevertheless has a significantly disproportionate adverse impact upon disabled persons.” *Grider*, 2011 WL 721279, at \*4.

CRC seeks summary judgment as to the Town's liability for violating Title II of the ADA on two theories, disparate treatment (through the enactment of a facially discriminatory moratorium or, alternatively, because discriminatory purpose was a motivating factor in the ordinance's enactment) and failure to accommodate. *See* Plaintiffs' S/J Motion at 11-17.<sup>16</sup>

The Town argues that summary judgment is unwarranted because (i) CRC fails to make the requisite threshold showing that its prospective clients were "disabled" within the meaning of the ADA, (ii) there are disputed issues of fact with respect to causation, including whether the Town enacted the moratorium for non-discriminatory reasons and whether the moratorium caused CRC's alleged lost profits, (iii) the Town did not fail to grant a reasonable accommodation to CRC, and (iv) the court's grant of the Town's motion for partial summary judgment on damages would render CRC's motion moot. *See* Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Defendant's S/J Opposition") (ECF No. 116) at 1-2.

For the reasons discussed below, I conclude that CRC demonstrates its entitlement to summary judgment as to the Town's liability for violation of Title II of the ADA on the basis of disparate treatment in the form of the Town's enactment of a facially discriminatory ordinance, but not on the basis of the Town's alleged failure to offer a reasonable accommodation. I need not, and do not, reach CRC's alternative disparate treatment argument (that, even if the ordinance was facially neutral, it was enacted with discriminatory purpose).<sup>17</sup>

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<sup>16</sup> CRC states, in passing, that it prevails on all three theories (disparate treatment, failure to accommodate, and disparate impact). *See* Plaintiffs' S/J Motion at 11. However, it offers reasoned argument only with respect to its disparate treatment and failure-to-accommodate theories. *See id.* at 11-17.

<sup>17</sup> In its operative third amended complaint, CRC seeks declaratory relief, preliminary and permanent injunctive relief, and damages based on the Town's enactment of the moratorium, replacement of the moratorium with the Large Facilities Ordinance, and failure to grant reasonable accommodations. *See* Third Amended Complaint (ECF No. 27) ¶¶ 1, 46-56. CRC since has narrowed its case, having withdrawn its motion for a preliminary injunction, see ECF No. 62 at 2, and any claims for permanent injunctive or declaratory relief, *see* ECF No. 102 at 1. It now seeks (*continued on next page*)

## 1. Threshold Showing of Disability

For purposes of the ADA, an individual is disabled if he or she (i) has “a physical or mental impairment that substantially limits one or more major life activities[.]” (ii) has “a record of such an impairment[.]” or (iii) is “regarded as having such an impairment[.]” 42 U.S.C. § 12102(1). “[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* § 12102(2)(A).

The Town argues that (i) drug addiction is not recognized for purposes of the ADA as disabling *per se*, and, thus, an individualized inquiry must be undertaken, and, (ii) absent proof that its prospective clients were disabled, CRC lacks standing to bring associational discrimination ADA claims. *See* Defendant’s S/J Opposition at 3-7. The Town observes that CRC offers no evidence respecting any individual who might have patronized its proposed clinic and failed to designate an expert on the subject of the characteristics of persons receiving methadone treatment. *See id.* at 9. It acknowledges that CRC’s chief clinical officer, Dr. Herschman, testified regarding the characteristics of its prospective clients. *See id.* at 11-13. However, it argues that this testimony is inadmissible because Dr. Herschman was not designated as an expert and, in any event, even if the testimony were admissible, it would not establish the disability of CRC’s prospective clients. *See id.* at 11-12.

CRC rejoins that, (i) in circumstances such as this, in which a municipality prevents a treatment provider from opening a facility, it defies reason to require it to establish that its

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only a damages remedy in connection with the Town’s enactment of the moratorium and is no longer pursuing any remedy related to the Large Facilities Ordinance, with the caveat that it may seek to introduce evidence concerning that ordinance in support of its claim that the moratorium violated the ADA. *See id.*

prospective clients would have been disabled, and, (ii) in any event, the Town relies on authorities that predate or ignore the ADA Amendments Act of 2008 (“ADAAA”). *See* Plaintiffs’ Reply to Defendant’s Opposition to Plaintiffs’ Motion for Partial Summary Judgment (“Plaintiffs’ S/J Reply”) (ECF No. 122) at 1-6. CRC observes that, with respect to the “regarded as” prong of the definition of disability, the ADAAA eliminated the need for proof that a defendant regards an individual as significantly limited in a major life activity, and with respect to the “actual disability” prong, the United States Department of Justice has construed drug addiction as a *per se* disabling impairment pursuant to the ADA – a construction that it asserts is entitled to deference. *See id.* at 3.

I need not determine whether drug addiction is disabling *per se* or whether, regardless, CRC’s evidence otherwise establishes that its prospective clients would have actually been disabled. Pursuant to the ADA as amended by the ADAAA, “[a]n individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A).

Drug addiction is an “impairment” for purposes of the ADA. *See, e.g.*, 28 C.F.R. § 35.104 (“The phrase physical or mental impairment includes, but is not limited to, . . . drug addiction, and alcoholism.”); *A Helping Hand, LLC v. Baltimore Cnty., Md.*, 515 F.3d 356, 367 (4th Cir. 2008) (“Unquestionably, drug addiction constitutes an impairment under the ADA.”).

“[I]t is well-established that community views may be attributed to government bodies when the government acts in response to those views.” *Helping Hand*, 515 F.3d at 366. The Town convened a Special Town Meeting on December 2, 2010, on extremely short notice for the

purpose of consideration of the enactment of a moratorium on methadone clinics. *See* Plaintiffs’ SMF ¶ 13; Defendant’s Opposing SMF ¶ 13. Community comments both during and outside of the meeting included: “you are bringing addicts in to our town,” “go back to Rockland[,]” and “[w]e don’t want them here.” Plaintiffs’ SMF ¶ 14; Pritchard Dep. at 133. Members of the audience at the Special Town Meeting wore “Methadon’t” buttons. Plaintiffs’ SMF ¶ 14; Pritchard Dep. at 207-08; Watmough Dep. at 35, 109, 111. The Town thereafter imposed a moratorium solely on methadone clinics. *See* Plaintiffs’ SMF ¶ 17; Defendant’s Opposing SMF ¶ 17.

I am mindful that the Moratorium Ordinance as ultimately enacted, and the Town’s attorney, identified concerns about methadone clinics other than the nature of their clientele. *See* Defendant’s Additional SMF ¶¶ 13-19; Moratorium Ordinance; Mellor Dep. at 63-64, 75-76, 149-51. Yet, this evidence does not undermine CRC’s evidence that there was vocal public opposition to the siting of a methadone clinic in the Town, that the opposition centered on the fact that CRC proposed to serve drug addicts, and that, on short notice, the Town convened a Special Town Meeting to consider the enactment of a moratorium on methadone clinics. *See* Plaintiffs’ SMF ¶¶ 13-15; Pritchard Dep. at 133; Watmough Dep. at 109, 111.

CRC, therefore, makes the requisite threshold showing that its prospective clients were disabled for purposes of the ADA.

## **2. Causation**

The Town next argues that CRC must be denied summary judgment because there are trialworthy issues as to whether the alleged disability of its prospective clients was the cause-in-fact of the moratorium and whether the moratorium was the cause of CRC’s alleged inability to open a clinic and resulting alleged lost profits. *See* Defendant’s S/J Opposition at 13-14.

### a. Liability

As CRC argues, *see* Plaintiffs' S/J Motion at 12-15, the moratorium was discriminatory on its face in that it expressly singled out methadone clinics for less favorable zoning treatment than other facilities, including other medical facilities, *see, e.g., MX Grp.*, 293 F.3d at 344 (“[T]he blanket prohibition of all methadone clinics from the entire city is discriminatory on its face.”); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 729, 735 (9th Cir. 1999) (zoning ordinance barring the operation of any new substance abuse clinics, including methadone clinics, within 500 feet of residential areas discriminatory on its face); *Habit Mgmt., Inc. v. City of Lynn*, 235 F. Supp.2d 28, 29 (D. Mass. 2002) (prohibition on methadone clinics within two miles of any school discriminatory on its face). Facial discrimination is “by its very terms” intentional discrimination. *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002).

Nonetheless, CRC acknowledges that “a defendant may justify a facially discriminatory law by showing ‘(1) that the restriction benefits the protected class or (2) that [the restriction] responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes.’” Plaintiffs' S/J Motion at 7-8 (quoting *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2006)).<sup>18</sup> The Town contends that, in this case, there is a triable issue as to its justification. *See* Defendant's S/J Opposition at 15-17. It elaborates that:

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<sup>18</sup> Insofar as appears from my research, the First Circuit has not had occasion to delineate a standard for determining the propriety or acceptability of justifications for facial discrimination under either the Fair Housing Act or the ADA insofar as it pertains to zoning actions. In *Community House*, the United States Court of Appeals for the Ninth Circuit followed the approach of the United States Courts of Appeals for the Sixth and Tenth Circuits and rejected that of the United States Court of Appeals for the Eighth Circuit. *See Community House*, 490 F.3d at 1050. In the absence of controlling First Circuit authority, and in view of both sides' reliance on the *Community House* standard, I follow that standard here.

1. “Common sense suggests that the Town and its residents may well have had legitimate safety concerns about the location of a methadone clinic serving recovering drug addicts in their community.” *Id.* at 15.

2. “Methadone clinics have in fact been associated with crime[,]” a proposition for which it cites a 2004 U.S. Government Accountability Office (“GAO”) study as well as four cases, *United States v. Moore*, 423 U.S. 122, 135 (1975), *United States v. Cap Quality Care, Inc.*, 486 F. Supp.2d 47 (D. Me. 2007), *United States v. Shinderman*, No. CRIM. 05-67-P-H, 2006 WL 522105 (D. Me. Mar. 2, 2006) (rec. dec., *aff’d as modified*, May 25, 2006), and *Jordan v. Cap Quality Care, Inc.*, Civil Action Docket No. CV-04-248, 2009 Me. Super. LEXIS 78 (Me. Super. Ct. Mar. 16, 2009). *See id.* at 16.

3. In extending the moratorium for a few additional months, the Town made findings of fact that “the application of the Town’s existing Comprehensive Plan, Land Use Ordinance, Site Review Ordinance and other land use ordinances and regulations is inadequate to prevent the possibility of serious public harm from an inappropriately located outpatient addiction treatment clinic[,]” “the problem giving rise to the need for the Moratorium still exists[,]” and “progress is being made to alleviate the problem giving rise to the need for the Moratorium[.]” *Id.* at 16-17 (citations and internal quotation marks omitted).

4. The moratorium was enacted to buy time to address concerns about high-intensity business uses in the Town’s residential village district and was also partly the result of Vixen’s dishonest presentation when it applied for a permit for property that it intended to acquire for CRC’s proposed clinic. *See id.* at 17. Vixen did not disclose to the Planning Board, when it applied for a permit, that the property would be used for a methadone clinic or that CRC was its intended tenant. *See id.* The controversy, thus, was to some degree of Vixen’s making. *See id.*

CRC rejoins that the Town (i) received no evidence and made no findings that methadone clinics in general would adversely impact the Town and (ii) did not respond to legitimate safety concerns. *See* Plaintiffs’ S/J Reply at 4 n.8 & 7. CRC adds that the authors of the 2004 GAO study were more concerned with the effect that surrounding neighborhoods would have on methadone clinic patients than the effect such patients would have on those neighborhoods. *See id.* at 4 n.8.

Pursuant to the *Community House* test, “[g]eneralized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.” *Montana Fair Hous., Inc. v. City of Bozeman*, 854 F. Supp.2d 832, 839 (D. Mont. 2012) (citation and internal quotation marks omitted). A municipality must “demonstrate an objectively legitimate basis for discrimination[.]” *Id.*

The Town offers no objectively legitimate basis for the enactment of the moratorium or for the findings of fact set forth in its Moratorium Ordinance or its resolution continuing the moratorium. The Town points to the 2004 GAO study and the above-cited caselaw as evidence that methadone clinics are associated with crime. However, there is no evidence that the Town considered these materials in enacting or continuing the moratorium. In any event, as CRC points out, the GAO study decried the negative impact of neighborhood crime on drug rehabilitation patients and clinic professionals rather than the clinics’ and patients’ negative impact on their neighborhoods. *See* U.S. Gov’t Accountability Office, GAO-04-946T, Drug Rehabilitation Clinics: Illegal Drug Activities Near Some District of Columbia Clinics Undermine Clinic Services and Patient Rehabilitation 4 (2004) (“Although these clinics are intended to help those in need of rehabilitation, patients who seek treatment must navigate their way to and from the clinics in an environment in which illegal sales of narcotics are daily

occurrences. The efforts of patients who are seeking rehabilitation, and clinic professionals who serve them, are significantly undermined by this criminal activity that surrounds them.”).<sup>19</sup>

The Town, thus, raises no genuine issue of fact as to whether it enacted and continued the moratorium in response to legitimate safety concerns raised by the individuals affected, rather than stereotypes.

#### **b. Damages**

The Town next resists summary judgment on the ground that CRC fails to show a causal connection between the alleged discriminatory conduct and its damages. *See* Defendant’s S/J Opposition at 18-19. However, CRC correctly points out that it seeks partial summary judgment solely as to liability, which does not entail a showing of proof of damages. *See* Plaintiffs’ S/J Reply at 6-7; *see also, e.g., Means v. St. Joseph Cnty. Bd. of Comm’rs*, No. 3:10-CV-00003 JD, 2011 WL 4361567, at \*6 (N.D. Ind. Sept. 16, 2011) (rejecting argument that plaintiff failed to state viable claims for violation of Title II of the ADA and section 504 of the Rehabilitation Act because he failed to allege entitlement to compensatory damages; noting, “Without allegation or proof of actual compensable harm, [the plaintiff] may only be entitled to no more than nominal damages, but his claim is sufficient to survive a motion to dismiss.”); *Azimi v. Jordan’s Meats*,

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<sup>19</sup> Nor does the Town explain how the cited caselaw supplies an objectively legitimate basis for its safety fears. The caselaw concerns (i) the prosecution of a physician in the District of Columbia for conducting an unauthorized methadone maintenance program inconsistent with all accepted methods of treating addicts, through which he effectively operated as a “pusher,” *Moore*, 423 U.S. at 124-26, (ii) the prosecution of the medical director of CAP Quality Care, Inc. (“CAP Quality”), a Maine corporation providing methadone maintenance treatment, for using a DEA registration belonging to another, aiding the acquisition of a controlled substance by deception, falsifying pharmacy records, and making false statements regarding health care matters, *see Shinderman*, 2006 WL 522105, at \*1, (iii) the government’s suit against CAP Quality to recover civil penalties for administering methadone in split doses, contrary to applicable regulations, *see CAP Quality*, 486 F. Supp.2d at 49, and (iv) a civil suit against CAP Quality and three of its employees arising from a man’s death from methadone poisoning after ingesting methadone supplied by a CAP Quality patient, *see Jordan*, 2009 Me. Super. LEXIS 78, at \*1-\*3. It is not apparent that these specific incidents reflect risks to the Town and its residents posed by methadone clinics generally.

*Inc.*, 382 F. Supp.2d 154, 156 (D. Me. 2005) *aff'd*, 456 F.3d 228 (1st Cir. 2006) (noting, in civil rights action, that “[c]ausation of damages cannot be assumed by the finding of liability”).

Lack of proof of damages, hence, does not doom CRC’s bid for summary judgment as to liability.

### **3. Reasonable Accommodation**

The Town next resists summary judgment as to CRC’s claim of failure to make reasonable accommodations, arguing that it reasonably accommodated CRC and, in any event, no accommodation was required. *See* Defendant’s S/J Opposition at 20. CRC counters that the Town ignored its requests and, thus, constructively denied them, violating the ADA. *See* Plaintiffs’ S/J Reply at 7.

As the Town notes, *see* Defendant’s S/J Opposition at 20, an accommodation need not be made when it would fundamentally alter a program or activity, *see, e.g.*, 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”).

CRC suggests that the Town denied it a reasonable accommodation by virtue of its unreasonable delay in offering any accommodation. *See* Plaintiffs’ S/J Motion at 16-17. This presumably refers to the initial enactment and continuation of the moratorium, which lasted a total of 232 days, culminating in the adoption of a Large Facilities Ordinance pursuant to which CRC applied for, and was granted, a permit to operate a methadone clinic. *See* Factual Stip. ¶¶ 19-23, 29. However, as the Town observes, *see* Defendant’s S/J Opposition at 20, an accommodation from the moratorium to allow methadone clinics would have fundamentally

altered the Moratorium Ordinance, *see, e.g., Bay Area Addiction*, 179 F.3d at 734-35 (concluding that reasonable modification provision of section 35.130(b)(7) “does not apply to facially discriminatory laws[;]” observing, “[T]he urgency ordinance could only be rendered facially neutral by expanding the class of entities that may not operate within 500 feet of a residential neighborhood to include all clinics at which medical services are provided, or by striking the reference to methadone clinics entirely. Either modification would fundamentally alter the zoning ordinance[.]”). Hence, CRC fails to make a persuasive case of entitlement to summary judgment on its failure-to-accommodate claim.

#### **4. Impact of Grant of Defendant’s S/J Motion**

The Town finally argues that the court’s grant of its motion for summary judgment on damages would obviate the need to address liability, mooting CRC’s motion, because the only remedy CRC seeks is damages. *See* Defendant’s S/J Opposition at 2. However, as CRC points out, *see* Plaintiffs’ S/J Reply at 1 n.1, the Town seeks summary judgment only as to CRC’s claim for lost profits, not its claims for frustration-of-mission and nominal damages, *see* Defendant’s S/J Motion at 1. Thus, the grant of the Town’s motion would not moot CRC’s motion.

For the foregoing reasons, I recommend that the court grant CRC’s motion for summary judgment as to the Town’s liability for violation of Title II of the ADA on CRC’s theory of intentional, facial discrimination, but deny the motion insofar as it is predicated on CRC’s theory of failure to accommodate.

## IV. Defendant's S/J Motion

### A. Factual Background

The parties' statements of material facts, credited to the extent that they are either admitted or supported by record citations in accordance with Local Rule 56, with disputes resolved in favor of CRC as nonmovant, reveal the following.<sup>20</sup>

Bain Capital Partners, LLC ("Bain Capital") owns CRC Health. Defendant's Statement of Material Facts ("Defendant's SMF") (ECF No. 111) ¶ 1; Plaintiffs' Opposing Statement of Material Facts Pursuant to Local Rule 56(C) and (G) in Opposition to Defendant's Motion for Partial Summary Judgment ("Plaintiffs' Opposing SMF") (ECF No. 115) ¶ 1.

CRC Recovery does not own or operate any treatment clinics and has no assets but does serve as general partner of Camp Recovery Centers, L.P., another entity. *Id.* ¶ 7. According to CRC, the reason it named CRC Health as a plaintiff is because, through CRC Health's wholly owned subsidiaries, it owns and operates drug and alcohol treatment programs. *Id.* ¶ 8. If CRC Recovery collected damages, the money likely would flow up to parent companies, CRC Corporation and then to CRC Health. *Id.* ¶ 9.

As of the time that the Town enacted the moratorium on methadone clinics, neither CRC Health nor CRC Recovery had applied for any permits from the Town. *Id.* ¶ 16. As of that time, the only interest that either CRC Health or CRC Recovery had was a letter of intent with Vixen. *Id.* ¶ 18.<sup>21</sup> At present, neither CRC Health nor CRC Recovery has any right, title, or interest in any property in Warren. *Id.* ¶ 19. Neither has any pending applications with the Town or any

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<sup>20</sup> Statements that are qualified are assumed to be admitted subject to that qualification, unless a qualification indicates otherwise. To the extent that I have incorporated one side's qualification into the statement of the other, I have determined that the qualification is supported by the record citation(s) given. I have omitted qualifications that are unsupported by the citation(s) given or redundant.

<sup>21</sup> My recitation includes CRC's qualification.

plans to locate any facility there. *Id.* ¶¶ 20-21. CRC Recovery would have operated the Warren clinic. *Id.* ¶ 22. Dr. Feldman has not done any evaluation of damages to CRC Health separate from damages to CRC Recovery. *Id.* ¶ 23. Dr. Feldman has not formed any separate opinion with respect to the losses attributable to CRC Health as compared with those attributable to CRC Recovery. *Id.* ¶ 24. He lumps the two together and offers one opinion. *Id.* There is no distinction between the damages claimed by CRC Health and CRC Recovery. *Id.* ¶ 25.<sup>22</sup>

### **B. Discussion**

The Town moves for summary judgment as to CRC's claim for lost profits on two alternative grounds: that (i) Title II of the ADA does not provide a lost-profits remedy to for-profit businesses proposing to serve disabled persons and, (ii) even if it does, the opinions of CRC's damages expert, Dr. Feldman, are inadmissible because they have no reliable basis and his methodology is unsound. *See* Defendant's S/J Motion at 1-2. With respect to Dr. Feldman, the Town incorporates by reference its separately filed motion to exclude his opinions. *See id.* at 2. The Town also seeks summary judgment as to CRC Health on the basis that it suffered no damages distinct from those suffered by its subsidiary CRC Recovery, the only CRC entity that actually took steps toward opening a methadone clinic in Warren. *See id.*

CRC counters that the authority on which the Town relies for the proposition that lost profits are not recoverable, *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277 (7th Cir. 2003), is not only non-binding on this court but also unpersuasive. *See* Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment ("Plaintiffs' S/J Opposition") (ECF No. 114) at 2-3. It incorporates by reference its opposition to the motion to exclude Dr.

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<sup>22</sup> I have omitted statements of fact that I deemed irrelevant to resolution of the Defendant's S/J Motion, including the entirety of CRC's statement of additional facts. *See* CRC's Opposing Statement of Material Facts in Opposition to Motion for Partial Summary Judgment, commencing on page 3 of Plaintiffs' Opposing SMF.

Feldman's testimony. *See id.* at 3 n.1. Finally, it argues that a parent corporation such as CRC Health has standing to bring suit on behalf of its wholly owned subsidiary and that proof that the financial gain from a subsidiary's profits would have flowed directly to the parent company also provides a basis for standing to sue for damages. *See id.* at 16-17.

For the reasons that follow, I deny the Motion To Exclude and recommend that the court grant Defendant's S/J Motion with respect to CRC Health and otherwise deny it.

### **1. Availability of Lost Profits as Damages Pursuant to Title II of the ADA**

In *Discovery House*, the United States Court of Appeals for the Seventh Circuit reversed a million-dollar judgment awarded to Discovery House, a for-profit corporation operating drug-addiction rehabilitation programs, as compensation for profits lost during the period between a zoning board's unlawful denial of a permit to open a methadone clinic in Indianapolis and a decision of the Indiana Appeals Court permitting the opening of the clinic. *See Discovery House*, 319 F.3d at 278-79. Discovery House had sought only compensatory damages, not equitable relief, because the Indiana Appeals Court had already determined that it could open the clinic. *See id.* at 280.

The Seventh Circuit held that Discovery House did not have standing to seek lost profits pursuant to the two statutes on which it had relied, the ADA and the Rehabilitation Act ("RA"). *See id.* at 281. It reasoned that (i) Discovery House sought relief "which perhaps indirectly will benefit its clients, but which primarily is designed to benefit its for-profit business[.]" (ii) "the nature of the relief sought is a relevant consideration in evaluating standing[.]" and, (iii) "[l]ooking . . . to the nature of the relief sought and the statutes under which standing is asserted, we see no way that either the ADA or the RA contemplates a recovery for lost profits for a business like that of the Discovery House." *Id.* at 280. The court acknowledged that,

pursuant to *Bell v. Hood*, 327 U.S. 678, 684 (1946), in cases such as this in which Congress does not expressly provide a remedy, “federal courts may use any available remedy to make good the wrong done.” *Id.* at 281 (citation and internal quotation marks omitted). Yet, it explained:

Discovery House has a claim to standing under the ADA and the RA only because it runs a business which provides services – like dispersing methadone – to persons presumably covered by those Acts. If it were running a plumbing business, it could hardly claim relief under either statute. It follows, in our view, that the remedies we may find (other than those specifically set out in the statute) must, at the very least, be those which directly benefit the disabled. It would stretch the principle of *Bell v. Hood* too far to find that Discovery House has standing to recover lost profits under these statutes.

*Id.*

The Town urges the court to adopt the Seventh Circuit’s reasoning, which it argues is consistent with the framework established by the Supreme Court for determining what remedies are available under statutes that do not provide express remedial schemes. *See* Defendant’s S/J Motion at 6-7. It notes that, in such circumstances, there is a “presumption in favor of appropriate relief[.]” *id.* at 7 (quoting *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992)), and that, in exercising “a measure of latitude to shape a sensible remedial scheme that best comports with the statute[.]” the “general rule that all appropriate relief is available . . . yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved[.]” *id.* at 7-8 (quoting *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 284 (1998)).

The Town reasons that the “appropriate” and “sensible” means to accomplish Title II’s objective of ensuring that discriminatory obstacles are not placed in the path of disabled people is injunctive relief, and that it is neither appropriate nor sensible “to provide a tort-like money damages remedy for theoretical lost profits claimed by an entity that no longer even intends to serve disabled persons.” *Id.* at 8. It adds that, unlike in the case of a nonprofit entity, in which a

damages award could be expected to flow back into an ADA-favored mission, an award of damages to a for-profit business would simply enrich its shareholders (in this case, Bain Capital), creating a disincentive for such entities to take the risks of opening and operating a clinic that would provide actual services to the disabled. *See id.* at 9-10. It concludes that the remedy pressed by CRC is even further out of alignment with the ADA's objectives than the remedy rejected in *Discovery House*, "which at least involved a clinic that did eventually open[.]" *Id.* at 11.

The Town acknowledges that, in *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399 (3d Cir. 2005), the United States Court of Appeals for the Third Circuit criticized *Discovery House*. *See id.* at 12-14. However, the Town contends that *Addiction Specialists* is distinguishable in that the plaintiff in that case, unlike CRC, had not abandoned its quest to open a methadone clinic and the defendant in that case, unlike the Town, had argued that no damages of any kind were available. *See id.* at 12.<sup>23</sup> The Town contends that, in any event, the Third Circuit misread *Discovery House* as standing for the proposition that "an entity bringing suit under the ADA and RA must necessarily assert the rights of its members rather than bringing suit 'in its own right.'" *Id.* at 12-13 (quoting *Addiction Specialists*, 411 F.3d at 407)).

CRC rejoins that *Discovery House* preceded and does not survive *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863 (2011), in which the Supreme Court applied a "zone of interests" test for purposes of standing to sue pursuant to Title VII of the Civil Rights Act. *See* Plaintiffs' S/J Opposition at 1-2. It adds that, even before *Thompson*, the Third Circuit in *Addiction Specialists* and other courts rightly criticized the Seventh Circuit's reasoning. *See id.* at 2-3

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<sup>23</sup> "[T]he Town's position is that any damages awarded to CRC should be limited to making it whole for its out-of-pocket expenses lost as a result of the moratorium imposed by Warren." Defendant's Reply to Plaintiff[s]' Opposition to Defendant's Motion for Partial Summary Judgment ("Defendant's S/J Reply") (ECF No. 120) at 3-4.

(citing, *inter alia*, *MX Grp.* and *START, Inc. v. Baltimore Cnty., Md.*, 295 F. Supp.2d 569, 581-82 (D. Md. 2003)).

*Discovery House* is framed as a decision regarding standing. The Seventh Circuit reasoned that (i) an association has standing to sue on behalf of its members when it seeks relief that, “if granted, will inure to the benefit of those members of the association actually injured[.]” (ii) the ADA and the RA do not expressly provide for lost profits, (iii) *Discovery House* has a claim to standing only because it provides services to disabled persons, and (iv) it follows that the only remedies available, apart from those expressly provided in the statutes, are those that “directly benefit the disabled.” *Discovery House*, 319 F.3d at 280-81.

Nonetheless, the Town argues that *Discovery House* fundamentally is not about standing, but about whether it is appropriate to imply a remedy of lost profits. *See* Defendant’s S/J Motion at 13-14. It argues that the Seventh Circuit drew on principles of associational standing merely to support the general proposition that remedies must be evaluated in terms of their relationship to the injuries an action seeks to redress. *See id.* at 13. It points out that the Seventh Circuit did not suggest that *Discovery House* itself was asserting associational standing and acknowledged that other circuit courts of appeals had held that a plaintiff such as *Discovery House* has standing to sue either to enforce the rights of others (*i.e.*, associational standing) or on its own behalf. *See id.*

Regardless of whether *Discovery House* concerns standing or the appropriate scope of implied remedies, I find it unpersuasive and recommend that the court decline to follow it.

To the extent that *Discovery House* held that a for-profit corporation has no standing to sue for lost profits in an ADA case, it erred in applying principles of associational standing to a plaintiff that sought redress for *its own* injuries. The plaintiff in *Thompson*, like CRC, was not

among the class of persons protected by the statute pursuant to which he filed suit: he had been fired not because *he* had made a charge under Title VII but because his fiancée had. *See Thompson*, 131 S. Ct. at 867. Nonetheless, the Court held, he had standing to sue because he fell within the zone of interests protected by the statute. *See id.* at 870. He was “not an accidental victim of the retaliation – collateral damage, so to speak, of the employer’s unlawful act[,]” but, rather, his firing was “the employer’s intended means of harming [his fiancée].” *Id.* The Court imposed no additional requirement that, to demonstrate standing, the plaintiff show that any relief awarded to him would inure to the benefit of the class of persons whom Title VII was designed to protect. *See id.* Plainly, it would not have.

There is no material distinction, for purposes of standing, between CRC, which claims that the moratorium was the Town’s intended means of harming its prospective disabled clients, and the plaintiff in *Thompson*. This court has assumed, without deciding, that the *Thompson* zone of interests test likely applies in ADA cases. *See Leavitt v. SW & B Constr. Co., LLC*, 766 F. Supp. 2d 263, 283 (D. Me. 2011). CRC, accordingly, has standing to sue, including standing to sue for lost profits.<sup>24</sup>

To the extent that *Discovery House* held that it is inappropriate to construe the ADA to afford a remedy of lost profits, its reasoning likewise is unpersuasive. The Seventh Circuit observed that “federal courts may use any available remedy to make good the wrong done.”

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<sup>24</sup> Even prior to *Thompson*, the Third Circuit in *Addiction Specialists* rejected the notion that a methadone clinic lacked standing pursuant to the ADA to sue for its own damages, including lost profits. *See Addiction Specialists*, 411 F.3d at 408. The court did not reach the question of whether the plaintiff’s lost profits “would be the correct measure of damages if and when this suit reaches the damages stage.” *Id.* However, it reasoned that, “Because the broad language of the ADA and RA enforcement provisions evidences a Congressional intent to extend standing to the full limits of Article III, we hold that the prudential limits imposed in pure associational standing cases do not apply to [the plaintiff’s] claims asserted on its own behalf.” *Id.* at 407. The Third Circuit reasoned that the Seventh Circuit in *Discovery House* ignored the fact that “the protections of the ADA and RA have been extended to shield entities *themselves* from discrimination”; noting, “[a]lthough [the plaintiff] is protected by these statutes only by virtue of its association with disabled individuals, [the plaintiff’s] standing to sue arises from its own alleged injuries, not those of its clients.” *Id.* (emphasis in original).

*Discovery House*, 319 F.3d at 281 (quoting *Bell*, 327 U.S. at 684). However, it concluded, “[i]t would stretch the principle of *Bell v. Hood* too far to find that Discovery House has standing to recover lost profits under these statutes.” *Id.* This was so, it reasoned, because Discovery House had a claim to standing under the ADA and RA only on the strength of its provision of services to the class of persons sought to be protected and, thus, any implied remedies should at the least directly benefit that class of persons. *See id.*

This is a crabbed reading of the principle of *Bell v. Hood*. Applying that principle in *Franklin*, the Supreme Court observed: “That a statute does not authorize the remedy at issue in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment.” *Franklin*, 503 U.S. at 68 (citation and internal quotation marks omitted). The Court added, “absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.” *Id.* at 70-71. The Court noted that it had “followed a common-law tradition and regarded the denial of a remedy as the exception rather than the rule[,]” and that “this has been the prevailing presumption in our federal courts since at least the early 19th century.” *Id.* at 71-72 (citation and internal punctuation omitted).

Beyond this, as CRC notes, *see* Plaintiffs’ S/J Opposition at 10, in *Barnes v. Gorman*, 536 U.S. 181 (2002), in holding punitive damages unavailable pursuant to Title VI of the Civil Rights Act of 1964, the Supreme Court analogized remedies available pursuant to Title VI to those typically available for breach of contract, which include compensatory but not punitive damages, *see Barnes*, 536 U.S. at 187.<sup>25</sup>

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<sup>25</sup> Lost profits are a form of compensatory damages that may be recoverable in a breach of contract action. *See, e.g., Days Inns Worldwide, Inc. v. Investment Props. of Brooklyn Ctr., LLC*, Civ. No. 10-609 (MJD/JJK), 2011 WL 4538076, at \*5 (D. Minn. Aug. 26, 2011) (rec. dec., *aff’d* Sept. 29, 2011). The parties disagree over which (continued on next page)

The Court observed that “Title VI invokes Congress’s power under the Spending Clause to place conditions on the grant of federal funds” and that it had “repeatedly characterized this statute and other Spending Clause legislation as much in the nature of a *contract*: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.” *Id.* at 185-86 (citations and internal quotation marks omitted) (emphasis in original). It applied the contract analogy to the question of the scope of damages remedies, reasoning:

A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract. Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages and injunction, forms of relief traditionally available in suits for breach of contract. Like Title IX, Title VI mentions no remedies – indeed, it fails to mention even a private right of action . . . . But punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.

*Id.* at 187 (citations omitted). In a footnote, the Court remarked:

Justice STEVENS believes that our analysis of Title VI does not carry over to the ADA because the latter is not Spending Clause legislation, and identifies ‘tortious conduct.’ Perhaps he thinks that it *should not* carry over, but that is a question for Congress, and Congress has unequivocally said otherwise. The ADA could not be clearer that the ‘remedies, procedures, and rights . . . this subchapter provides’ for violations of § 202 [Title II] are the same as the ‘remedies, procedures, and rights set forth in’ § 505(a)(2) of the Rehabilitation Act, which *is* Spending Clause legislation.

*Id.* at 189 n.3 (citations omitted) (emphasis in original). As CRC notes, *see* Plaintiffs’ S/J Opposition at 11, the Seventh Circuit in *Discovery House* made no mention of *Barnes*.

Indeed, in *START*, the United States District Court for the District of Maryland recognized the seeming tension between *Barnes* and *Discovery House*, observing: “While *Barnes*

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substantive test for proving lost profits applies in this case, with the Town contending that CRC cannot meet the applicable standard. *See* Defendant’s S/J Motion at 1 n.1.; Plaintiffs’ S/J Opposition at 3 n.1. However, the Town does not press this as a basis for summary judgment, *see* Defendant’s S/J Motion at 1 n.1, and that issue, therefore, is not before the court.

suggests that Title II [of the ADA] generally permits compensatory awards, the Seventh Circuit recently held that a for-profit drug treatment clinic could not seek lost profits as a remedy for the denial of a zoning permit.” *START*, 295 F. Supp.2d at 581 (citations omitted). Although the court reserved a final ruling on the question of remedies until the plaintiff’s claims were adjudicated on the merits, it observed:

The logic of *Discovery House* . . . is in tension with other decisions . . . which have held that medical providers like *START* may pursue ADA claims not merely as a matter of third-party standing to assert the rights of their patients, but rather because the ADA confers the right to sue upon entities who are injured by discrimination because of their association with disabled persons. If *START* itself has an affirmative claim based on discrimination against it, it would seem that *START* should be entitled to relief for any injury it suffered, regardless of the effect, direct or indirect, on the disabled individuals with whom it associated.

*START*, 295 F. Supp.2d at 581-82 (citations and internal quotation marks omitted).

Finally, CRC persuasively argues that the availability of lost profits as part of a damages award harmonizes with, rather than undercutting, the remedial aims of statutory schemes such as the ADA for the simple reason that such awards tend to deter unlawful discrimination. *See* Plaintiffs’ S/J Motion at 11-12 (observing that the Supreme Court, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), recognized that awards of monetary damages pursuant to Title VII of the Civil Rights Act serve as “the spur or catalyst” to eliminate unlawful discrimination). The Town’s argument that the availability of lost profits awards would tend to deter for-profit entities such as CRC from providing services to the disabled, *see* Defendant’s S/J Motion at 9-10, is at best strained. Those entities would not be in a position either to realize their expected profits or to receive an award of lost profits as compensation for harm suffered as a consequence of unlawful discrimination against the disabled *unless* they endeavored to provide services to disabled clients.

Nor can any award of lost profits fairly be described as “reward[ing] CRC with a windfall for *not* providing services to the disabled after having decided to abandon its Warren project.” Defendant’s S/J Reply at 4 (emphasis in original). Rather, “[r]ecovery of lost profits is predicated . . . on the principle that an injured party is to be placed in the same position he would have been in had the contract been performed” – or, in the case of CRC, but for the Town’s alleged unlawful discrimination. *Knightsbridge Mktg. Servs., Inc. v. Promociones Y Proyectos, S.A.*, 728 F.2d 572, 575 (1st Cir. 1984).

For the foregoing reasons, I recommend that the court decline the Town’s invitation to follow *Discovery House* in holding that CRC has no standing to seek lost profits or, alternatively, that lost profits exceed the scope of remedies appropriately awarded pursuant to Title II of the ADA and, hence, are unavailable as a matter of law.

## **2. Defendant’s Motion To Exclude**

The Town next moves for summary judgment as to CRC’s claim for lost profits on the basis of its motion to exclude the testimony of Dr. Feldman pursuant to Federal Rule of 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See* Defendant’s S/J Motion at 14; Motion To Exclude at 1-2. For the reasons that follow I conclude that this challenge, as well, falls short.

### **a. Applicable Legal Standard**

Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Under Rule 702, “it is the responsibility of the trial judge to ensure that an expert is sufficiently qualified to provide expert testimony that is relevant to the task at hand and to ensure that the testimony rests on a reliable basis.” *Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22, 25 (1st Cir. 2006).

As the First Circuit has observed, “*Daubert* does not require that the party who proffers expert testimony carry the burden of proving to the judge that the expert’s assessment of the situation is correct.” *United States v. Mooney*, 315 F.3d 54, 63 (1st Cir. 2002) (citation and internal quotation marks omitted). “It demands only that the proponent of the evidence show that the expert’s conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.” *Id.* (citation and internal quotation marks omitted). That said, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998) (citation and internal quotation marks omitted).

## **b. Background**

Dr. Feldman is a former professor of economics at Brown University, having retired from teaching in 2009, although he continues to research and publish on economics. *See* Deposition of Allan M. Feldman, Ph.D. (“Feldman Dep. I”) (ECF No. 104-4), attached to Joint Record, at 4. He has not taught or published on the subject of calculation of business losses, but has consulted

as an expert on the subject and has testified on four or five occasions regarding business losses over the past 20 years. *See id.* at 5, 32. He has calculated lost profits for going concerns, but it has been some time – about 10 years – since he has done so. *See id.* at 24. He does not recall having calculated lost profits for a startup venture like the proposed clinic in Warren. *See id.*

The opinion at issue is contained in a supplemental report of Dr. Feldman dated July 15, 2013, in which he estimated the losses to CRC resulting from the Town’s actions based on four delay scenarios (permanent abandonment of the clinic, a one-year delay, a two-year delay, and a three-year delay) and three different projected patient populations (520, 395, and 245 patients). *See Supplemental Report [dated July 15, 2013] on Losses To CRC Health Group, Inc. and CRC Recovery, Inc. Resulting from Actions of the Town of Warren, Maine (“Operative Feldman Report”),* Exh. 124, filed on Exhibit CD, at 7. Estimated lost profits ranged from a high of \$1,253,000 for permanent abandonment, assuming a patient population of 520, to nothing in any scenario assuming a patient population of 245, taking into account a MaineCare reimbursement rate of \$60 per week. *See id.*

The Operative Feldman Report superseded three prior reports by Dr. Feldman and contains the sum total of opinions that he intends to express in the case, aside from background information contained in the earlier reports. *See Continued Deposition of Allan M. Feldman, Ph.D. (“Feldman Dep. II”) (ECF No. 104-5),* attached to Joint Record, at 6-7.

In his initial report dated January 31, 2013, Dr. Feldman did not offer a lost profits opinion, but concluded that CRC clinics in general are very profitable and that, once established, the Warren clinic would likely earn roughly \$750,000 per year. *See Exh. 110, filed on Exhibit CD, at 11.* He relied for his general conclusions regarding CRC clinic profitability on spreadsheets supplied by CRC reflecting the profitability of its CTCs, or comprehensive

treatment clinics, generally and of its startup CTCs, *see id.* at 4-7, and for his conclusions regarding projections for the Warren clinic on two spreadsheets supplied by CRC, the CRC 2011 Budget for Application/CRC Maine Clinic and the “ROI-CTC Startup Maine v9 MH” spreadsheet (“ROI-CTC”), *see id.* at 7.<sup>26</sup>

In a revised report dated April 18, 2013, Dr. Feldman for the first time offered a lost profits opinion, using the four delay scenarios and three patient population assumptions contained in the Operative Feldman Report. *See* [Revised Report dated April 18, 2013] (“April 18 Report”), Exh. 111, filed on Exhibit CD, at 23. Estimated lost profits ranged from a high of \$4,411,000 assuming a permanent delay and a patient population of 520 to a low of \$32,000 assuming a one-year delay and a patient population of 245. *See id.* He relied only on the ROI-CTC, which he explained he had learned was more up to date than the CRC 2011 Budget for Application/CRC Maine Clinic. *See id.* at 9. He derived the patient population figure of 520 from the ROI-CTC, and made alternative estimates of patient populations of 395 and 245. *See id.* at 10.

Dr. Feldman issued an addendum dated April 23, 2013, in which he applied a different methodology to his delay calculations, which he continued to base on data derived from the ROI-CTC. *See* Exh. 112, filed on Exhibit CD, at 1-3. This change resulted in higher estimated losses for delay of one to three years, for example, a loss of \$95,000 assuming a patient population of 245 and a one-year delay. *See id.* at 4.

In the Operative Feldman Report, Dr. Feldman made corrections to take into account new information received, including points raised by the Town’s expert, Mark G. Filler. *See* Operative Feldman Report at 2-6. These included a correction to reflect a reduction in Maine’s

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<sup>26</sup> “ROI” stands for “return on investment.” *See* Motion To Exclude at 4.

Medicaid reimbursement rate effective April 1, 2012, from \$72 to \$60 per week. *See id.* at 4-5.<sup>27</sup>

Dr. Feldman stated that he was also now aware that the new Maine law placed a 24-month cap on state funding for Medicaid methadone patients, which he understood went into effect on or around the beginning of 2013, but it was not yet clear whether that was a “hard” cap (strictly enforced with no exceptions) or a “soft” cap (easily avoided with many exceptions), and so he had made no changes based on that information. *See id.* at 6.

Dr. Feldman has no knowledge of, or experience, education, or training in, addiction treatment or the health-care industry, and is not an expert on financial models used in that industry, Medicaid programs, private insurance, or Medicaid and insurance reimbursement trends. *See* Feldman Dep. I at 30-31.

During his first deposition on May 22, 2013, Dr. Feldman testified that his profit numbers were based on the ROI-CTC (marked as Exh. 108), *see id.* at 52, 80, that he did not undertake any independent steps to verify the data in that document, *see id.* at 82, that he accepted those numbers at face value and incorporated them straight into his own analysis, *see id.*, and that his opinions were totally built on that document with one exception involving the addition of one staffing position, *see id.* at 81-82. He agreed that the ROI-CTC was a series of projections related to the future performance of the clinic, including a forecast of future expenses and future revenue, and, with respect to his expertise, such forecasts for a clinic like the CRC clinic were “only slightly connected to what I do as an economist.” *Id.* at 82-83. During his second deposition on August 20, 2013, Dr. Feldman confirmed that, but for accounting for the changed Medicaid reimbursement rate, he continued to rely on revenue and expense projections in the ROI-CTC. *See* Feldman Dep. II at 32-33.

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<sup>27</sup> Dr. Feldman uses the terms “MaineCare” and “Medicaid” interchangeably. *See* Operative Feldman Report at 4, 7.

Dr. Feldman testified that his opinions in this case were “based on a general methodology, which is widely used having to do . . . with the calculation of profits year by year” and the use of a discounted cash flow analysis to convert those amounts to present value. Feldman Dep. I at 10-11. He also followed a “comparables” approach to the extent that he reviewed earnings figures for other startup methadone clinics operated by CRC. *Id.* at 15. However, he assumed that the Warren clinic would reach profitability sooner than other CRC startup clinics based not only on the ROI-CTC but also on information gleaned from Joseph Pritchard, former Vice President of Operations for CRC. *See id.* at 16; *see also* Pritchard Dep. at 47-49.

Pritchard, who was involved in the creation and review of the CTC-ROI, *see* Pritchard Dep. at 13-17, learned in July 2010 that Turning Tide, a methadone clinic in Rockland, Maine, was being shut down, and viewed its closure as an excellent opportunity for CRC, *see* April 18 Report at 3. He spoke with Guy Cousins, director of the Maine Office of Substance Abuse, who told him that he believed a new clinic could support 300 patients initially. *See id.*; Pritchard Dep. at 21. CRC typically collects and analyzes demographic data to estimate potential patient population but did not do so with respect to the Warren clinic because of the unusual circumstance that the Rockland clinic was closing. *See* Pritchard Dep. at 28-29; Feldman Dep. I at 73. Dr. Feldman testified that, in his opinion, knowing that a provider with 180 to 200 patients has just shut down is more tangible and gives a higher level of confidence than estimating demand by analyzing demographic data. *See* Feldman Dep. I at 19-20.

Pritchard explained to Dr. Feldman that he had projected that the new CRC clinic would quickly capture the 180 to 200 patients who had been at Turning Tide and would expand its patient base within five years to 520 patients, partly by way of offering additional services

beyond the provision of methadone. *See* Feldman Dep. I at 54-55. However, Pritchard told Dr. Feldman it would be “plausible” for him to do a couple of calculations involving alternate estimates of patient populations, one of which might be an ultimate number between 375 and 400. *See id.* at 55.

Prior to preparing the Operative Feldman Report, Dr. Feldman also spoke with Michael Harrison, a senior analyst at CRC who prepared the ROI-CTC spreadsheets. *See* Feldman Dep. II at 12, 68. Dr. Feldman learned that Harrison was “basically the scrivener” of the spreadsheets, entering information based on conversations with other people at CRC. *See id.* at 13-14.

### **c. Discussion**

The Town argues that:

1. Dr. Feldman’s lost profits opinion is based on insufficient facts or data in that he relied on CRC’s untested and unverified forecasts from the ROI-CTC. *See* Motion To Exclude at 11.

2. Dr. Feldman did not apply principles or methodologies to the ROI-CTC; instead, he simply adopted it and made further calculations. *See id.* at 16. As a result, his opinion is merely a conduit for hearsay testimony contained in the ROI-CTC and is, therefore, inadmissible. *See id.*

CRC rejoins that (i) Dr. Feldman’s methodology for calculating lost profits is reliable and sound, (ii) Dr. Feldman relied on sufficient facts and data to render his opinion, (iii) the Town’s criticisms of Dr. Feldman’s reliance on specific factual assumptions contained in the ROI-CTC go the weight, not the admissibility, of his testimony, (iv) Dr. Feldman properly relied on the ROI-CTC, which was prepared under the supervision of Pritchard, and (v) Dr. Feldman’s opinions are not merely a conduit for hearsay testimony, both because the ROI-CTC is

admissible pursuant to the business records exception to the hearsay rule, Federal Rule of Evidence 803(6), and because an expert may base his opinion on facts or data not ordinarily admissible if experts would reasonably rely on such facts or data in forming an opinion. *See* Plaintiffs' Opposition to Defendant's Motion in Limine To Exclude Lost Profits Testimony by Dr. Allan M. Feldman ("Exclude Opposition") (ECF No. 113) at 13-20.

In its reply brief, the Town elaborates that its "argument for the exclusion of Dr. Feldman's testimony rests not on any general objection to the use of a 'discounted cash flow' methodology to calculate lost profits, but on the fact that Dr. Feldman's 'opinion' is based on expert analysis performed by CRC personnel who have not been designated as experts in this case." Reply in Support of Motion To Exclude Dr. Allan M. Feldman ("Exclude Reply") (ECF No. 121) at 1. It reasons:

[T]he real meat of the expert opinion Dr. Feldman seeks to offer lies not in the discount-rate calculations he performed, but instead in the 'projections related to the future performance of the clinic' that forms the basis for his calculations. And that creates a problem for CRC, because the projections Dr. Feldman used also constitute expert opinion – but not the expert opinion of Dr. Feldman, CRC's designated expert witness.

*Id.* at 2. It adds, "The inherent problem created by Dr. Feldman presenting the work of another as his own expert opinion is exacerbated in this case by the weak empirical foundation on which the numbers in the ROI-CTC document rest." *Id.* at 3.

For the proposition that Dr. Feldman's opinion is based on insufficient facts or data, the Town cites *Downeast Ventures, Ltd. v. Washington County*, Civil No. 05-87-B-W, 2007 WL 679887 (D. Me. Mar. 1, 2007), *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp.2d 1022 (D. Kan. 2006), which Magistrate Judge Kravchuk cited in *Downeast Ventures*, and three other cases, *Capital Concepts, Inc. v. Mountain Corp.*, 936 F. Supp.2d 661 (W.D. Va. 2013), *MDK, Inc. v. Village of Grafton*, No. 03-C-0026, 2005 WL 6748915 (E.D. Wis. Aug. 22, 2005),

and *Otis v. Doctor's Assocs., Inc.*, No. 94 C 4227, 1998 WL 673595 (N.D. Ill. Sept. 14, 1998). See Motion To Exclude at 8-11.

In *Downeast*, Magistrate Judge Kravchuk excluded an expert's testimony as to profits estimated to have been lost because of the defendants' allegedly wrongful interference in a steel building construction venture that the plaintiff's principal testified the company would have pursued. See *Downeast*, 2007 WL 679887, at \*3. The expert had based his projected sales figures "entirely on [the plaintiff's principal's] subjective expectations." *Id.* Magistrate Judge Kravchuk observed: "I am not simply concerned that the evidence is weak. I am concerned that there is not sufficient data upon which to base a projection." *Id.* She stated that she was not persuaded that the expert could turn those expectations into evidence merely by characterizing them as reasonable based on his own, albeit considerable, experience as an accountant. See *id.* She cited *Sunlight Saunas* for the proposition that, standing alone, the mere facts that each building would realize \$250,000 in revenue and that the plaintiff intended to pursue that line of work were "insufficient data on which to base a lost profits projection." *Id.* She noted that, in *Sunlight Saunas*, the court had granted a *Daubert* motion with respect to an "expert's economic loss calculation that was based on the plaintiff's own sales projections, without any explanation of the basis for those projections or independent market analysis[.]" *Id.*

She distinguished three cases cited by the plaintiff, *Great N. Storehouse, Inc. v. Peerless Ins. Co.*, No. CIV. 00-7-B, 2000 WL 1900299 (D. Me. Dec. 29, 2000), *Whitney v. Wal-Mart Stores, Inc.*, No. 03-65-P-H, 2003 WL 22961210 (D. Me. Dec. 16, 2003) (rec. dec., *aff'd* Jan. 21, 2004), and *McLaughlin v. Denharco, Inc.*, 129 F. Supp.2d 32 (D. Me. 2001), on the basis that, in *Great Northern*, "the owner actually supplied data to the expert[.]" in *Whitney*, "the expert relied on data supplied by the plaintiff concerning his past annual bonuses to determine a percentage

figure to apply to calculate the value of lost future bonuses[.]” and, in *McLaughlin*, “the expert relied on photographs and testimony concerning past usage of a machine to form an opinion that ‘metal fatigue’ caused it to break[.]” *Id.* at \*4. She concluded, “Because the *quantity* of data on likely sales is *nil* in this case, I conclude that [the expert’s] projection of steel building construction revenue is unreliable and must be excluded from the trial.” *Id.*

In *Capital Concepts*, a copyright infringement case, the court excluded an expert’s testimony regarding the defendants’ costs related to the production and sale of allegedly infringing t-shirts when the defendants had failed to disclose information that was necessary to calculate those costs accurately, such as invoices, and the expert “relied solely upon information provided to him by [the defendants’ employee], and his report [was] devoid of any analysis concerning the determination of direct costs and the amounts thereof.” *Capital Concepts*, 936 F. Supp.2d at 671. The court reasoned:

It would be inappropriate to permit [the expert] to opine that Defendants’ direct costs are reasonable when he has made no such determination on his own, but has simply relied upon and re-published information provided to him in summary format by Defendants. An expert cannot simply parrot his client’s findings or calculations and then pass that data off as his own expert opinion.

*Id.* at 671-72 (footnote omitted).

In *MDK*, the court excluded testimony of an expert regarding profits lost as the result of the closure of a tavern based on an unconstitutional ordinance when the expert relied on responses of seven owners of burlesque clubs to a “confidential questionnaire” apparently prepared by the plaintiff’s counsel. *See MDK*, 2005 WL 6748915, at \*1. The court reasoned that the questionnaire responses did not constitute sufficient facts or data upon which to base the opinion “because none of the information in the responses is in any manner verified, and as a result, I cannot reasonably conclude that it is accurate.” *Id.* The court observed, “Although the

information is financial in nature, it is entirely unsupported by any financial documents such as tax returns or financial statements.” *Id.* It further noted:

Plaintiff correctly notes that an expert may reach conclusions based on inadmissible evidence. However, experts may do so only if the evidence is of a type reasonably relied upon by experts in the particular field. As explained, the club owners’ responses are not reliable sources of information, and therefore a reasonable accountant attempting to calculate lost profits would not rely on them.

*Id.* at \*2 (citations and internal quotations marks omitted).

In *Otis*, the court excluded expert testimony regarding profits lost following the failure of a fast food franchise restaurant, allegedly as a result of the defendant’s fraud in inducing the plaintiff to enter into a development agent agreement. *See Otis*, 1998 WL 673595, at \*1. The court noted that the expert relied on projections contained in the agreement but had not performed “any independent market analysis to verify the reasonableness or accuracy of the projections” or “any comparative analysis which measured the [agreement’s] projections against actual results achieved by other fast food chicken franchise restaurants[,]” and neither party had supplied the court with a detailed explanation of precisely how the formula contained in the agreement operated. *See id.* at \*1-\*2. It reasoned that the plaintiff had made no showing that the formula was accurate or had been tested for accuracy or that the average weekly sales estimates contained in the agreement had “any basis in fact or fast food market reality.” *Id.* at \*4. The court found that the plaintiff had not shown that its expert’s methodology was “anything more than an exercise in arithmetic based on inherently unreliable values.” *Id.*

The Town argues that in this case, as in *Downeast*, *Sunlight Saunas*, *Capital Concepts*, *MDK*, and *Otis*, Dr. Feldman merely republished expense and revenue forecasts provided to him by CRC, with no independent evaluation, testing, or validation of his client’s own opinions regarding its projected revenues, expenses, and related variables. *See Motion To Exclude* at 11.

It contends that there is no material distinction between CRC's estimate that the Warren clinic ultimately would attract 520 clients and the plaintiff's principal's subjective expectations concerning demand for new buildings conveyed to the expert in *Downeast*. See Exclude Reply at 5. It argues that Dr. Feldman's reliance on the ROI-CTC is "particularly troubling" because he testified that he had done nothing to test how the 24-month eligibility cap on MaineCare reimbursement for methadone treatment would impact the profitability of the proposed clinic and had not "checked" to see whether the ROI-CTC assumed that all MaineCare patients of the clinic in Year 1 remained patients in Year 5, although in documentation in his file he conceded that this was the case. See Motion To Exclude at 13-14.

The Town adds that Dr. Feldman knows nothing about the experience, education, or other qualifications of the authors of the ROI-CTC and that he learned that Harrison, who prepared the document, acted as a scrivener and included assumptions and forecasts by other unknown persons. See *id.* at 15. It reasons that, because CRC has not designated any of its employees as expert witnesses to speak to the issue of the projections contained in the ROI-CTC, and such opinions would be beyond the scope of permissible lay opinion testimony, Dr. Feldman offers what amounts to inadmissible hearsay or double hearsay. See *id.* at 15-16.

The Town cites *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991), for the proposition that Dr. Feldman did not apply principles and methods reliably to the facts of the case, reasoning that there is no methodology to cutting and pasting a third party's forecast of revenues and expenses and related assumptions into an expert's report. See *id.* at 16-17. In *Hutchinson*, the United States Court of Appeals for the Second Circuit reversed a judgment in favor of a defendant physician in a medical malpractice case on the basis of the trial court's error in permitting defense counsel to use letters by three physicians in examining expert witnesses.

*See Hutchinson*, 927 F.2d at 723. The court reasoned that, “[b]y asking [the defendant’s expert physician] to identify the documents, offer his own opinion regarding plaintiff’s prognosis, and then state whether his opinion was consistent with those expressed in the documents, defense counsel used [the defendant’s expert] as a conduit for hearsay testimony[,]” introducing the purported opinions of physicians who were not designated as experts during discovery and whom the plaintiff had no opportunity to examine. *Id.* at 725.

CRC rejoins that *Downeast* is distinguishable in that, here, as in *Great Northern*, *Whitney*, and *McLaughlin*, the plaintiff supplied actual data to the expert. *See* Exclude Opposition at 14-16. It distinguishes *Sunlight Saunas* on the basis that the plaintiff there provided no coherent explanation of how it arrived at its projections, *Otis* on the basis that the underlying data were target estimates rather than financial projections or any actual data, *Capital Concepts* on the ground that the expert’s report in that case was devoid of any analysis concerning the determination or amounts of direct costs, and *MDK* on the basis that it was unclear how the information on which the expert relied was derived. *See id.* at 17 & n.14.

It defends Dr. Feldman’s decision not to take into account the two-year cap on MaineCare payments on the basis that he explained that it remains to be seen whether the cap will be a hard or soft cap and, depending how it is applied, it could have a significant or minimal impact on damages. *See id.* at 17-18; Feldman Dep. II at 34-35, 39-40. It argues that, in any event, this criticism, like others raised by the Town, goes to weight rather than admissibility. *See* Exclude Opposition at 18.

Finally, it protests that it is not attempting to evade requirements for experts by presenting testimony through a layperson that can only be presented through an expert witness. *See id.* at 19. It states that Pritchard, who was intimately familiar with its business, treatment

clinics, budgets, and projections and was subject to cross-examination by the Town, was competent to testify on those matters without qualifying as an expert, the ROI-CTC is admissible pursuant to the business records exception to the hearsay rule and, in any event, an expert may base his opinion on facts or data not ordinarily admissible if experts would reasonably rely on such facts and data in formulating an opinion. *See id.* at 19-20. It argues that *Hutchinson* is plainly distinguishable, involving an attempt by a defendant in a medical malpractice suit to bolster his expert's opinion by introducing letters from three doctors who were not disclosed as experts during discovery. *See id.* at 20 n.16.

CRC carries its burden of demonstrating the admissibility of Dr. Feldman's testimony. As CRC observes, *see* Exclude Opposition at 10, "[w]hen the adequacy of the foundation for the expert testimony is at issue, the law favors vigorous cross-examination over exclusion[.]" *Kirouac v. Donahoe*, No. 2:11-cv-00423-JAW, 2013 WL 173475, at \*2 (D. Me. Jan. 16, 2013) (citations and internal quotation marks omitted). "If the factual underpinnings of the expert's opinions are in fact weak, that is a matter affecting the weight and credibility of their testimony." *Id.* (citations and internal punctuation omitted). *See also, e.g., McLaughlin*, 129 F. Supp.2d at 36 ("The jury may disbelieve some of the plaintiff's statements that form part of the basis for [the expert's] conclusions . . . [b]ut this determination is for the jury at trial.").

As CRC acknowledges, *see* Exclude Opposition at 10, the line between weight and admissibility is crossed when an expert's opinion is so insufficiently buttressed by factual underpinnings that it amounts to pure speculation, *see, e.g., Seahorse Marine Supplies, Inc. v. Puerto Rico Sun Oil Co.*, 295 F.3d 68, 82 (1st Cir. 2002) ("There is a distinction between proof which allows the jury to make a just and reasonable inference of damages and proof which only

provides a basis for pure speculation or guesswork.”) (citations and internal punctuation omitted). However, that is not this case.

CRC correctly distinguishes *Downeast* on the basis that, in this case, CRC supplied data to its expert, not only in the form of its specific projections for the Warren clinic but also in the form of historic data concerning the profitability of CRC clinics generally and CRC startup clinics in particular. In *Downeast*, the plaintiff offered speculative projections for an entirely untried business; in this case, the running of methadone clinics was CRC’s business. Dr. Feldman took that data into account, as well as Pritchard’s explanations for the manner in which the Warren clinic projections were undertaken and the reason why CRC viewed the clinic as likely to achieve profitability more quickly than a typical CRC startup. In this respect, as CRC argues, *see* Exclude Opposition at 16, this case is more closely aligned with *Great Northern*, *Whitney*, and *McLaughlin* than with *Downeast*. There is underlying data, and its asserted weaknesses, for example, CRC’s decision to forgo its customary demographic analysis given the closing of the Turning Tide clinic, go to weight rather than admissibility.

As CRC argues, *see id.* at 17 & n.14, this case also is distinguishable from *Sunlight Saunas*, *Capital Concepts*, *MDK*, and *Otis*, which involved experts’ reliance on data that was neither validated nor explained. In this case, Pritchard explained to Dr. Feldman the reasons why CRC was interested in establishing a clinic in Warren, the steps it took to estimate the patient base, and the manner in which the ROI-CTC was compiled. There is no indication that CRC, like the defendants in *Capital Concepts* or the plaintiff in *MDK*, withheld financial data underpinning its projections.

To the extent that the Town suggests that Dr. Feldman’s refusal to make adjustments for the two-year MaineCare cap on methadone payments, in itself, undermines reliance on the

factual underpinnings of his opinion sufficiently to merit its exclusion, Dr. Feldman offers a reasonable explanation. He testified that “it’s not at all clear that it’s a hard cap or a soft cap[,] [s]o it’s not obvious that it’s going to have a major effect[,]” and “it’s not clear how that effect should be quantified.” Feldman Dep. II at 61. He noted that he “could make some assumptions about it, but I think they would be excessively arbitrary.” *Id.* The Town points out that, by using the ROI-CTC data, Dr. Feldman in effect does make an assumption that the Town characterizes as “very speculative”: that the cap would have no effect on the clinic’s profitability. *See* Motion To Exclude at 15. Yet, the Town does not contest that it is unclear whether the cap will be a hard or soft one. Given this uncertainty, reasonable people could disagree as to whether it ought to be factored in and, if so, how. This criticism, hence, goes to the weight, rather than the admissibility, of the Feldman opinion.

Turning, finally, to the issue of Dr. Feldman’s methodology, I agree with CRC that *Hutchinson* is distinguishable. Whereas, in *Hutchinson*, the physician expert effectively introduced similar opinions from undesignated physician experts who could not be subjected to cross-examination, Dr. Feldman does not introduce a lost profits opinion from an undesignated expert. The ROI-CTC does not calculate lost profits as such; rather, it projects revenues, expenses and net revenues for a five-year period for the Warren clinic. *See* ROI-CTC. While the ROI-CTC data is central to Dr. Feldman’s opinion, and he relied on it, it is more accurately characterized as foundation for his opinion than a competing expert opinion. Moreover, unlike the authors of the opinion letters in *Hutchinson*, an author of the ROI-CTC, Pritchard, has been made available for cross-examination.

Setting aside whether, as CRC contends and the Town contests, the ROI-CTC itself is admissible pursuant to the business records exception to the hearsay rule, Pritchard at the least is

qualified to testify as a layperson, based on his personal involvement in the Warren clinic project and the preparation of the ROI-CTC, as to the manner in which that document was prepared and the rationales behind its projections. *See, e.g., R.I Spiece Sales Co. v. Bank One, NA*, No. 1:03-CV-175-TS, 2005 WL 3005484, at \*1 (N.D. Ind. Nov. 9, 2005) (“those who have special knowledge of [a] business and its operations may also testify as to the facts of the business that underlie profit expectations under Federal Rule of Evidence 701 without qualifying as experts”).<sup>28</sup> The jury, thus, will be positioned to assess whether some or all of the CRC information upon which Dr. Feldman’s opinion rests is worthy of credence.

### **3. Bid for Summary Judgment as to Plaintiff CRC Health**

The Town finally seeks summary judgment as to CRC Health on the basis that it has not stated a claim and has no standing to press a claim in this case. *See* Defendant’s S/J Motion at 14-16. I agree.

It is undisputed that CRC Health owns CRC Corporation, which in turn owns CRC Recovery. *See* Factual Stip. ¶¶ 1-3. CRC Recovery, not CRC Health, was qualified to do business in Maine, applied to the State of Maine for a license to operate a methadone clinic, and would have actually operated a clinic in Warren. *See id.* ¶¶ 8-9; Defendant’s SMF ¶ 22; Plaintiffs’ Opposing SMF ¶ 22.

This court has noted:

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<sup>28</sup> While the creation of the ROI-CTC was a team effort, for purposes of Rule 701, knowledge acquired through others can qualify as personal knowledge. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993) (“[I]t is logical that in preparing a damages report the author may incorporate documents that were prepared by others, while still possessing the requisite personal knowledge or foundation to render his lay opinion admissible under Fed. R. Evid. 701.”) (citation and internal punctuation omitted); *National Starch & Chem. Trading Co. v. MV Star Inventana*, No. 05-91-P-S, 2006 WL 1876996, at \*3 (D. Me. July 5, 2006) (“A witness may testify under Rule 701 about inferences that he could draw from his perception of a business’s records, or facts or data perceived by him in his corporate capacity.”) (citation and internal quotation marks omitted).

Constitutional standing limitations require that a plaintiff have suffered a distinct and palpable injury in order to pursue a claim in federal court. Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights. An individual plaintiff must show that he himself has been injured. The ultimate burden of proving injury rests with the plaintiff, and a defendant may obtain summary judgment on the ground of lack of standing unless affidavits or other submissions indicate that a genuine issue of material fact exists concerning standing.

Injury arising solely out of harm done to a subsidiary corporation is generally insufficient to confer standing on a parent corporation. If that is the case, the even more attenuated relationship between a subsidiary and a subsidiary of a separate subsidiary of a parent corporation cannot possibly support the assertion of a claim by the former when the injury, if any, was suffered by the latter.

*American Towers, Inc. v. Town of Falmouth, Me.*, 217 F. Supp.2d 154, 157 (D. Me. 2002) (citations and internal punctuation omitted).

CRC argues that *American Towers* is distinguishable because it involved two different subsidiaries, rather than a parent and its wholly owned subsidiary, and an injury arising solely out of harm done to a subsidiary. See Plaintiffs' S/J Opposition at 17 n.6. It asserts that "if a parent can prove that the financial gain from the subsidiary's profits would have flowed directly into the parent company, that is also a basis for standing to sue for damages." *Id.* at 16 (citing *St. Jude Med., Inc. v Access Closure, Inc.*, No. 08-CV-4101, 2010 WL 4968147, at \*6 (W.D. Ark. Dec. 1, 2010)). It contends that CRC Health might have standing if it could prove that the financial gain from the subsidiary's profits would have flowed directly into the parent company. See *id.* at 17. It adds that Pritchard testified that, in investigating whether to open a clinic in Warren, part of his work was for CRC Health and part of it for CRC Recovery, as a result of which "any diversion of resources or frustration of mission damages would flow to CRC Health Group." *Id.*

That *American Towers* involved two subsidiaries rather than a parent and a subsidiary is a distinction without a difference. “Wrongdoing to a subsidiary does not confer standing upon the parent company, even where the parent is the sole shareholder of the subsidiary.” *Tullett Prebon, PLC v. BGC Partners, Inc.*, Civil Action No. 09-5365 (SRC), 2010 WL 2545178, at \*4 (D.N.J. June 18, 2010), *aff’d*, 427 Fed. Appx. 236 (3d Cir. 2011).

Nor does CRC succeed in distinguishing *American Towers* on the basis that CRC Health raises a triable issue that it suffered an injury distinct from that to CRC Recovery. *St. Jude* does not stand for the proposition that a parent corporation has standing if it can prove that a subsidiary’s lost profits would have flowed directly to it. The parent corporation in that case disclaimed any bid to recover lost profit damages, instead seeking “the decrease in its own market value due to the lost sales of its wholly-owned subsidiaries.” *St. Jude*, 2010 WL 4968147, at \*6. Assuming, without deciding, that CRC Health could demonstrate standing if it adduced evidence of a decrease in its market value as a result of the alleged injury to CRC Recovery, it points to no such evidence. *See* Plaintiffs’ S/J Opposition at 16-17.<sup>29</sup> Indeed, it does not even identify any evidence that CRC Recovery’s profits would have flowed directly to it. *See id.*

CRC’s reliance on Pritchard’s testimony also falls short of staving off summary judgment as to CRC Health. First, it presents that testimony solely in the body of its opposing brief – a circumstance that counsels disregard of that evidence for violation of Local Rule 56. *See* Loc. R. 56(f). In any event, even were the Pritchard testimony cognizable, it is far from clear that, because Pritchard performed part of his work on the Warren clinic for CRC Health and part of it

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<sup>29</sup> The United States District Court for the District of New Jersey rejected the notion that a parent corporation can sue for diminution in its market value based solely on harm to a subsidiary. *See Tullett*, 2010 WL 2545178, at \*4-\*5.

for CRC Recovery, any diversion of resources or frustration of mission damages would flow to CRC Health. CRC adduces no evidence as to underlying agreements between the corporations regarding shared services or their manner of allocating costs.

The facts that are properly in evidence for purposes of summary judgment point to one conclusion: that CRC Health suffered no injury distinct from that suffered by CRC Recovery. *See* Defendant's SMF ¶¶ 23-25; Plaintiffs' Opposing SMF ¶¶ 23-25 (Dr. Feldman has done no evaluation of damages to CRC Health separate from those to CRC Recovery and has lumped losses for the two together and offered one opinion; there is no distinction between damages claimed by CRC Health and those claimed by CRC Recovery); *id.* ¶¶ 8-9 (the reason CRC named CRC Health as a plaintiff is because, through CRC Health's wholly owned subsidiaries, it owns and operates drug and alcohol treatment programs; if CRC Recovery collected damages, the money likely would flow up to CRC Corporation and then to CRC Health).

The Town, accordingly, is entitled to summary judgment as to CRC Health.

## V. Conclusion

For the foregoing reasons, I **DENY** the Motion To Exclude, recommend that the court **GRANT** the Plaintiffs' S/J Motion to the extent predicated on their theory of intentional, facial discrimination but otherwise **DENY** it, and recommend that the court **GRANT** the Defendant's S/J Motion as to CRC Health but otherwise **DENY** it.

### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within fourteen (14) days after being served with a copy thereof. A responsive memorandum and any request for*

*oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 31<sup>st</sup> day of March, 2014.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

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