IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AFFY TAPPLE, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N18C-07-216 MMJ CCLD
	)	
SHOPVISIBLE, LLC and	)	
APTOS INC.,	)	**CONFIDENTIAL - FILED UNDER**
	)	**SEAL**
	)	
Defendants.	)	

Submitted: December 11, 2018
Decided: March 7, 2019

Upon Defendants' Motion to Dismiss Plaintiff's Complaint
GRANTED IN PART
DENIED IN PART

OPINION

Kevin M. Coen, Esq., Jarrett W. Horowitz, Esq., Morris, Nichols, Arsht, & Tunnell, LLP, Wilmington, DE; Jennifer A. Beckage, Esq. (Argued), Beckage, PLLC, Buffalo, NY, *Attorneys for Plaintiff*

John A. Sensing, Esq., Jennifer Penberthy Buckley, Esq., Potter, Anderson, & Corroon LLP, Wilmington, DE; James F. Bogan III, Esq. (Argued), Jeffrey H. Fisher, Esq., Kilpatrick, Townsend, & Stockton, LLP, Atlanta, GA, *Attorneys for Defendants*

JOHNSTON, J.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute arose in the aftermath of computer hacking. Plaintiff Affy Tapple, LLC ("Affy Tapple") is a manufacturer of caramel apples and confection products that distributes its products nationally through multiple sales channels. Defendants ShopVisible, LLC ("ShopVisible") and Aptos Inc. ("Aptos") are e-commerce service providers that offer a software platform to manage clients' customer information. Affy Tapple entered into a Master Services Agreement ("MSA") with ShopVisible. In 2015, ShopVisible merged into Aptos.[1] Under the MSA, Aptos provided and maintained an e-commerce software platform ("Platform") to manage all of Affy Tapple's user data, including its customers' information.

According to Aptos, on or about November 28, 2016, Aptos detected potential unauthorized access to the Platform by a third party. The Federal Bureau of Investigation ("FBI") became involved. Aptos notified Affy Tapple of the incident the first business day after expiration of the FBI's 60-day non-disclosure period following an investigation of the data breach. Aptos advised Affy Tapple

[1] In 2015, Epicor Software Corporation ("Epicor") completed its acquisition of ShopVisible. Epicor's retail solutions business separated and was formed into a new and separate entity that was renamed Aptos. As part of Epicor's acquisition of ShopVisible and subsequent formation of Aptos, Aptos assumed ShopVisible's contractual obligations, duties, and liabilities. Aptos also assumed responsibility for servicing ShopVisible's customers.

that the unauthorized access to the Platform occurred from approximately February 2016 to December 2016.

Before entering into the MSA, Affy Tapple had sought an e-commerce service provider that could provide a high level of security to prevent data breaches. Affy Tapple required the provider to comply with applicable laws and regulations and industry standards for data security, including the Payment Card Industry Data Security Standards ("PCI DSS"). Aptos contractually committed to maintain a PCI Level 1 Certification – the highest level of certification. This certification required Aptos to protect data and the Platform against common coding vulnerabilities, such as "SQL injection." It is undisputed that there was a lapse in this certification from December 1, 2016 through March 17, 2017.

The parties entered into the MSA on March 6, 2014. The MSA contains pertinent information regarding Affy Tapple's need for an e-commerce vendor that specializes in data security. The MSA purports to reflect an understanding of this need and Aptos' alleged promise to fulfill that need.

Aptos was informed in July 2017 of another round of unauthorized activity.

Affy Tapple filed its Complaint on July 26, 2018 alleging the following causes of action:

I. Breach of Contract;

II. Declaratory Judgment;

III. Breach of Express Warranties;

IV. Breach of Implied Warranty of Fitness for a Particular Purpose;

V. Breach of Implied Warranty of Merchantability;

VI. Breach of Implied Covenant of Good Faith and Fair Dealing;

VII. Intentional Misrepresentations to Induce the Agreement;

VIII. Intentional Misrepresentations After Entering into the Agreement;

IX. Gross Negligence;

X. Negligent Misrepresentations;

XI. Unjust Enrichment; and

XII. Illinois Consumer Fraud Act, 815 ILCS 505/2.

Aptos filed a Motion to Dismiss on September 14, 2018. Oral argument was heard on December 11, 2018.

MOTION TO DISMISS STANDARD

In a Rule 12(b)(6) motion to dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[2] The Court must accept as true all well-pleaded allegations.[3]

[2] *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).
[3] *Id.*

Every reasonable factual inference will be drawn in the non-moving party's favor.[4] If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.[5]

ANALYSIS

Affy Tapple argues that this is not a data breach case. Rather, Affy Tapple claims this is a "lemon" case, specifically that the Platform was a "lemon." Affy Tapple argues that Affy Tapple was damaged as a result of Aptos' misrepresentations about the quality of its service, and that Aptos was grossly negligent in failing to maintain the Platform as promised.

The MSA states: "ShopVisible shall comply with all applicable laws relating to User Data and the handling, security and transfer thereof. If ShopVisible has knowledge of any unauthorized disclosure of or access to Personal Data, ShopVisible shall promptly notify Client of such unauthorized disclosure or access."[6] The MSA further provides that "ShopVisible will maintain annual PCI Level 1 Certification."[7] Aptos also agreed to several warranties. Aptos promised to promptly repair and replace nonconforming elements of the Platform.[8]

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[4] *Wilmington Sav. Fund. Soc'v, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del.2005)).
[5] *Spence*, 396 A.2d at 968.
[6] Master Services Agreement § 10.3.
[7] Master Services Agreement § 6.4.
[8] Master Services Agreement § 6.1.

Affy Tapple argues that it relied on Aptos' representation that any defect in the site's security system would be remedied to prevent any further issues. Affy Tapple claims that following the lapse in PCI Certification, Affy Tapple was induced to stay on the Platform. Affy Tapple contends that Aptos abandoned the Platform and failed to repair or replace the Platform.

COUNT VII – Intentional Misrepresentation/Fraudulent Inducement

Section 6.5 of the MSA states:

> 6.5. CLIENT UNDERSTANDS AND AGREES THAT THE LIMITED EXPRESS WARRANTIES SET FORTH IN THIS SECTION 6 ARE EXCLUSIVE, AND SHOPVISIBLE SPECIFICALLY DISCLAIMS ALL OTHER REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SITE, SYSTEM, SHOPVISIBILE MATERIALS, ECOMMERCE SERVICES AND ANY OTHER TECHNOLOGY OR SERVICE PROVIDED HEREUNDER, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR TITLE. SHOPVISIBLE MAKES NO RESPRESENTATION THAT THE OPERATION OF ANY OF THE FOREGOING WILL BE UNINTERRUPTED OR ERROR-FREE OR THAT ANY OF THEM WILL PROVIDE SPECIFIC RESULTS. SHOPVISIBLE DOES NOT WARRANT THAT ANY INTEGRATION WITH CLIENT'S AND, AS APPLICABLE, CLIENT'S PARTNERS' SYSTEMS, EVEN IF SUPPORTED BY SHOPVISIBLE, WILL BE COMPLETE, ACCURATE, OR ERROR-FREE. CLIENT FURTHER ACKNOWLEDGES THAT WITHOUT ITS AGREEMENT TO THE LIMITATIONS CONTAINED IN THIS AGREEMENT, INCLUDING SECTIONS 6 AND 12, THE FEES AND CHARGES CHARGED BY SHOPVISIBLE HEREUNDER WOULD BE HIGHER.

Section 6.5 purports to disclaim any warranties not expressed within the MSA. Aptos argues that this is an anti-reliance provision, such that the warranties provided in the MSA are the exclusive warranties and Affy Tapple may not rely on any implied or express warranty made outside of the MSA.

In *TEK Stainless Piping Prod., Inc. v. Smith*,[9] this Court stated: "Although Delaware courts will honor clauses in which sophisticated parties disclaim reliance on extra-contractual representations, such provisions must 'clearly state that the parties disclaim reliance upon extra-contractual statements.'"[10] The Court discusses *Anvil Holding Corp. v. Iron Acquisition Co., Inc.*,[11] a Court of Chancery case considering the validity of an anti-reliance provision. The provision in *Anvil* stated that neither party "makes any other express or implied representation or warranty…contemplated by this Agreement."[12] The *Anvil* Court held that this language did not reflect a clear promise by the buyer that it would not rely on statements made outside of the contract. Therefore, the buyer's fraud claim was not precluded.[13]

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[9] 2013 WL 5755468 (Del. Super.).
[10] *Id.* at *4 (citing *Anvil Holding Corp. v. Iron Acquisition Co., Inc.*, 2013 WL 2249655 (Del. Ch.)).
[11] 2013 WL 2249655 (Del. Ch.).
[12] *Id.* at *8.
[13] *Id.*

However, in *Prairie Capital III, L.P. v. Double E Holding Corp.*,[14] the Court of Chancery interpreted *Anvil*, stating: "I do not read *Anvil* as requiring a specific formula, such as the two words 'disclaim reliance.'"[15] The Court further stated that "[l]anguage is sufficiently powerful to reach the same end by multiple means, and drafters can use any of them to identify with sufficient clarity the universe of information on which the contracting parties relied."[16] There is no special formula required to disclaim reliance. Language indicating a clear understanding of the parties' intent is all that is required.

In *Abry Partners V, L.P. v. F&W Acquisition LLC*,[17] the Court held that "murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations. The integration clause must contain 'language that…can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.'"[18]

Section 6.5 of the MSA is more than a standard integration clause. It explicitly states that Affy Tapple agrees that the warranties provided in the MSA

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[14] 132 A.3d 35 (Del. Ch. 2015).
[15] *Id.* at 51.
[16] *Id.*
[17] 891 A.2d 1032 (Del. Ch. 2006).
[18] *Id.* at 1059 (citing *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004)).

are the exclusive warranties. The provision was drafted with sufficient clarity to establish that there was an understanding that Affy Tapple could not rely upon any implied warranties, or any express warranties outside of the MSA.

Additionally, Count VII seeks the same damages as Affy Tapple's claim for breach of contract. "To survive as a separate claim, a fraud claim must be collateral to the breach of contract claims. The party asserting fraud must plead damages separate and apart from the alleged damages for breach of contract. The fraud damages must be more than a 'rehash' of the contract damages."[19]

The language in Section 6.5 of the MSA is sufficiently clear to demonstrate that there was an understanding that Affy Tapple would not rely upon warranties not specifically encapsulated in the MSA. Further, a fraud claim must be plead separate and apart from the alleged damages for breach of contract. For these reasons, Count VII for intentional misrepresentation/fraudulent inducement must be dismissed.

COUNT VIII – Intentional Misrepresentation

Affy Tapple argues that Aptos made misrepresentations regarding the repairs made to the Platform after the data incident. Affy Tapple alleges that Aptos had a

[19] *AFH Holding Advisory, LLC v. Emmaus Life Sciences, Inc.*, 2013 WL 2149993, at *13 (Del. Super.)(citing *Cornell Glasgow, LLC, v. La Grange Properties, LLC*, 2012 WL 2106945, at *7-8 (Del. Super.)).

contractual duty to repair the Platform upon discovering a security issue, and that Aptos led Affy Tapple to believe those repairs had been made. This claim necessarily focuses on conduct after the parties had entered into the MSA.

In *Brasby v. Morris*,[20] this Court determined that fraud claims brought after the formation of a contract, that are focused exclusively on the performance of the contract, do not arise independent of the underlying contract.[21] The Court determined that such claims must be dismissed.[22]

In *Khushaim v. Tullow Inc.*,[23] this Court held that the economic loss doctrine barred a tort claim that was "based entirely on the parties' contractual rights and obligations."[24] The Court contemplated a situation in which contracting plaintiffs may bring separate tort and contract claims, but that situation may only arise when "the defendant breached a duty that is *independent* of the duties imposed by the contract."[25] (emphasis in original).

The Court finds the factual circumstances in this case analogous to those in *Brasby* and *Khushaim*. Affy Tapple's claim for intentional misrepresentation arises solely from the performance of the MSA and is not independent of the duties

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[20] 2007 WL 949485 (Del. Super.).
[21] *Id.* at *8.
[22] *Id.*
[23] 2016 WL 3594752 (Del. Super.).
[24] *Id.* at *5.
[25] *Id.* at *4 (citing *McKenna v. Terminex Intern. Co.*, 2006 WL 1229674, at *2 (Del. Super.)).

imposed under the contract. Therefore, Count VIII for intentional misrepresentation must be dismissed.

COUNT X – Negligent Misrepresentation

Under Delaware law, the Court of Chancery has exclusive jurisdiction over claims for negligent misrepresentation.[26] Further, Aptos is not in the business of supplying information, which might create a "special relationship" and possibly a cause of action.[27] For these reasons, Affy Tapple's claim for negligent misrepresentation must be dismissed.

COUNT VI – Breach of Covenant of Good Faith and Fair Dealing

Affy Tapple has brought a claim for breach of the covenant of good faith and fair dealing in addition to a breach of contract claim. However, there cannot be a separate implied covenant claim involving the same conduct as the breach of contract claim.

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[26] *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at *11 (Del. Super.)(citing *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.*, 2011 WL 5593163, at *4 (Del. Super.)); *see also Mark Fox Group, Inc. v. E .I. duPont de Nemours & Co.*, 2003 WL 21524886, at *6 (Del. Ch.)("In addition to developing the concept of claims for negligent or innocent misrepresentation, the Court of Chancery has retained exclusive, rather than concurrent, jurisdiction over such causes of action.").

[27] *See Continental Finance Company, LLC v. TD Bank, N.A.*, 2018 WL 6498687, at *3 (Del. Super.)(holding that because no common law "special relationship" existed between the plaintiff and defendant, no duty arose from the relationship between the parties.).

In its answering brief, Affy Tapple re-casts its claim for breach of the implied duty of good faith and fair dealing and focuses on Aptos' alleged wrongful non-renewal of the MSA. Affy Tapple also focuses on the dissolution of the Platform, but there is no allegation that Aptos dissolved the Platform. Affy Tapple's claim suggests only that Aptos exercised the contractual right not to renew the MSA.

Affy Tapple's implied covenant claims are duplicative of its breach of contract claim. Therefore, Count VI for breach of the covenant of good faith and fair dealing must be dismissed.

COUNT XII – Illinois Consumer Fraud Act (ICFA)

Affy Tapple argues that Aptos engaged in unfair or deceptive practices in the course of conduct involving trade or commerce in Illinois by making material misrepresentations concerning products and services.

"[T]he Act was not intended to cover all commercial transactions regardless of the relationship between the parties involved."[28] "Courts continue to adhere to

[28] *Carol Studios, Inc. v. Doo Young Hong*, 2013 WL 6592747, at *8 (Ill. App. Ct.)(citing *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 654 N.E.2d 1109, 1114 (Ill. App. Ct. 1995)).

the rule that every individual breach of contract between two parties does not amount to a cause of action under the Act."[29]

Affy Tapple has not made any allegations of consumer complaints or claims. Affy Tapple's claim arises out of Aptos' alleged breach of the MSA. Affy Tapple has not alleged that Aptos' conduct was directed to the market or that it implicates consumer protection. There is no consumer nexus, and only a private contractual relationship between the parties. Because there have been no allegations of fraud that would affect a broad consumer base, Count XII under the Illinois Consumer Fraud Act must be dismissed.

COUNT IX – Gross Negligence

In Delaware, there is a statutory duty imposed on businesses to protect the security of personal information:

> Any person who conducts business in this State and owns, licenses, or maintains personal information shall implement and maintain reasonable procedures and practices to prevent the unauthorized acquisition, use, modification, disclosure, or destruction of personal information collected or maintained in the regular course of business.[30]

Many states have enacted similar statutes in order to protect confidential information. Delaware's statute imposes a statutory duty on businesses to safely

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[29] *Id.* at *8.
[30] 6 *Del. C.* § 12B-100.

manage personal information. However, the statute authorizes enforcement only by the Delaware Attorney General and does not create a private right of action:

> Pursuant to the enforcement duties and powers of the Director of Consumer Protection of the Department of Justice under Chapter 25 of Title 29, the Attorney General may bring an action in law or equity to address the violations of this chapter and for other relief that may be appropriate to ensure proper compliance with this chapter or to recover direct economic damages resulting from a violation, or both....[31]

Affy Tapple's claim for gross negligence is a rehash of its claim for breach of the MSA. Because Affy Tapple has not brought a separate claim for gross negligence and because any breach of a statutory duty imposed on Aptos does not give rise to a private right of action, Affy Tapple's Count IX for gross negligence must be dismissed.

COUNT I – Breach of Contract; COUNT II – Breach of Express Warranties; COUNT XI – Unjust Enrichment

Aptos claims that the facts alleged are undisputed. Both parties have cited *Delmarva Power & Light Co. v. ABB Power T&D Co.*[32] to address the issue of whether the exclusive remedy provided in the MSA has failed in its essential purpose. Under Delaware law, "a party may limit the remedies available to the

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[31] 6 *Del. C.* § 12B-104(a).
[32] 2002 WL 840564 (Del. Super.).

other party, provided the remedy excluding consequential damages, does not fail of its essential purpose, and is not unconscionable."[33] In *Delmarva*, the Court enforced the exclusive remedy (repair or replace) provision and found that it had not failed in its essential purpose.[34] However, the Court made its decision at the summary judgment stage.

Affy Tapple argues that the exclusive remedy agreed upon – the repair or replace provision – has failed of its essential purpose. Under Section 6.6 of the MSA, "ShopVisible does not assume any responsibility for Client's or any third party's use or misuse of data or information transmitted, monitored, stored or received using the Site or the System."

Further, Section 11.1, an indemnification provision, states: "(a) ShopVisible agrees to indemnify, defend and hold Client and its affiliates…harmless from and against any and all losses, costs, expenses, obligations, liabilities, damages and recoveries, including interest, penalties and reasonable attorneys' fees arising from or as a result of third party claims, demands or proceedings…." Under Section 11.1(b), Aptos is entitled to notice of third-party action and has an option to either "(x) procure for Client the right to continue using the allegedly infringing portions of the ShopVisible Materials, System, or Documentation…or (y) modify or replace

[33] *Id.* at *4.
[34] *Id.* at *6.

any allegedly infringing portions of the ShopVisible Materials, System, or Documentation...." With these options, Aptos has an opportunity to control the defense.

Section 12.1 places a limitation on damages, specifically any special, indirect, incidental, exemplary, or consequential damages "in any way related to this agreement." Further, Section 12.2 places a cap on damages at $100,000.

Affy Tapple argues that the MSA's repair or replace provision failed of its essential purpose because Aptos knew the Platform could not be repaired. Affy Tapple argues that because the repair or replace remedy failed, any disclaimers of liability in the MSA also fail.

It appears to the Court that all damages sought by Affy Tapple theoretically are recoverable under a breach of contract theory if Affy Tapple establishes that the damages were proximately caused by Aptos' breach. However, the Court finds that the Affy Tapple cannot duplicate contract damages with alleged tort claims.[35] Further, the Court will not resolve the issue of punitive damages at this point. Whether or not Affy Tapple may seek punitive damages as a matter of law is a question that may be decided at either the summary judgment stage or at the conclusion of evidence at trial.

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[35] *See AFH Holding Advisory, LLC v. Emmaus Life Sciences, Inc.*, 2013 WL 2149993 (Del. Super.)("Tort claims must involve violation of a duty arising apart from the contractual agreement.").

The Court will not dismiss the claim for unjust enrichment at this stage. However, the Court notes that a claim for unjust enrichment is more properly a potential measure of damages, as opposed to a stand-alone claim.

Under Rule 12(b)(6) pleading standards, Affy Tapple has met its burden of pleading its breach of contract, breach of express warranties, and unjust enrichment claims. Therefore, the Motion to Dismiss Counts I, II, and XI must be denied.

CONCLUSION

The language in Section 6.5 of the Master Services Agreement is sufficiently clear to demonstrate that there was an understanding that Affy Tapple would not rely upon warranties not specifically mentioned in the MSA. Further, a fraud claim must be plead separate and apart from the alleged damages for breach of contract. Therefore, **Aptos' Motion to Dismiss Count VII for Intentional Misrepresentation/Fraudulent Inducement is hereby GRANTED.**

Affy Tapple's claim for intentional misrepresentation arises solely from the performance of the Master Services Agreement and is not independent of the duties imposed under the contract. Therefore, **Aptos' Motion to Dismiss Count VIII for Intentional Misrepresentation is hereby GRANTED.**

Under Delaware law, the Court of Chancery has exclusive jurisdiction over claims for negligent misrepresentation. Further, Aptos is not in the business of supplying information, which could create a "special relationship" and possibly a cause of action. Therefore, **Aptos' Motion to Dismiss Count X for Negligent Misrepresentation is hereby GRANTED.**

Affy Tapple's claims for breaches of implied covenants are duplicative of its breach of contract claim. Therefore, **Aptos' Motion to Dismiss Count VI for Breach of Covenant of Good Faith and Fair Dealing is hereby GRANTED.**

Affy Tapple has not made any allegations of consumer complaints or claims of fraud directed at a particular market. Affy Tapple's claim arises only out of Defendants' alleged breach of the MSA. Affy Tapple has not alleged that Defendants' conduct implicates consumer protection. There is no consumer nexus, only a private contractual relationship between the parties. Because there have been no allegations of fraud that would affect a consumer base, **Aptos' Motion to Dismiss Count XII under the Illinois Consumer Fraud Act is hereby GRANTED.**

Because Affy Tapple has not brought a separate claim for gross negligence and because any breach of a statutory duty imposed on Defendant does not give rise to a private right of action, **Aptos' Motion to Dismiss Count IX for Gross Negligence is hereby GRANTED.**

Under Rule 12(b)(6) pleading standards, Affy Tapple has met its burden of pleading its breach of contract, breach of express warranties, and unjust enrichment claims. Therefore, **Aptos' Motion to Dismiss Count I for Breach of Contract, Count II for Breach of Express Warranties, and Count XI for Unjust Enrichment is hereby DENIED.**

IT IS SO ORDERED.

The Hon. Mary M. Johnston