SUPERIOR COURT
OF THE
STATE OF DELAWARE

PAUL R. WALLACE
JUDGE

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Decided: November 8, 2023

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RE: *Triple-S Steel Holdings, Inc. v. Crowe LLP*
N23C-03-225 PRW CCLD
Defendant's Motion to Dismiss

Dear Counsel:

The Court provides this Letter Opinion and Order in lieu of a more formal writing to resolve Defendant Crowe LLP's Motion to Dismiss the Complaint (D.I. 14). For the reasons explained below, the Rule 12(b)(6) Motion is **DENIED** as to almost all of the claims but **GRANTED** on one.

THE PARTIES, THIS SUIT, AND THE PENDING MOTION

Triple-S Steel Holdings, Inc., ("Triple-S") is a Texas Corporation with its

principal place of business in Harris County, Texas.[1] Triple-S is a steel supplier.[2]

Crowe LLP ("Crowe") is an Indiana LLP with its principal place of business in Chicago, Illinois.[3] Crowe is a global accounting, consulting, and technology firm.[4]

Triple-S brings this action against Crowe charging breaches of contract, fraud, and other misconduct because of Crowe's alleged failure to deliver on its promise of certain functioning software.[5]

Crowe has now moved to dismiss Triple-S's eight-count complaint under Superior Court Civil Rule 12(b)(6) for failure to state a claim. In sum, Crowe says that Triple-S's claims are barred by the plain and unambiguous terms of the parties' operative contracts.[6]

APPLICABLE LEGAL STANDARDS

"Under Superior Court Civil Rule 12(b)(6), '[t]he legal issue to be decided is, whether a plaintiff may recover under any reasonably conceivable set of

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1 Plaintiff Triple-S Steel Holdings, Inc.'s Original Complaint ("Compl.") ¶ 2 (D.I. 1).

2 *Id.* ¶ 1.

3 *Id.* ¶ 3.

4 *Id.* ¶ 7.

5 *Id.* ¶ 1.

6 Opening Brief in Support of Defendant's Motion to Dismiss ("Def.'s Opening Br.") at 1 (D.I. 15).

circumstances susceptible of proof under the complaint.'"[7] Under that Rule, the Court will:

> (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [not dismiss the claims] unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[8]

"If any reasonable conception can be formulated to allow Plaintiffs' recovery, the motion must be denied."[9] This is because "[d]ismissal is warranted [only] where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[10]

Now, the complaint generally confines "the universe of facts" the Court might consider on a Rule 12(b)(6) motion.[11] But, "for carefully limited purposes,"[12] the

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[7] *Vinton v. Grayson*, 189 A.3d 695, 700 (Del. Super. Ct. 2018) (alteration in original) (quoting Super. Ct. Civ. R. 12(b)(6)).

[8] *Id.* (alteration in original) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011)).

[9] *Id.* (citing *Cent. Mortg. Co.*, 27 A.3d at 535).

[10] *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Ct. Aug. 20, 2004) (citation omitted).

[11] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citations omitted).

[12] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995) (citation omitted).

Court "may consider matters outside the pleadings when the document is integral to a claim and incorporated into the complaint."[13] And "a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[14]

Superior Court Civil Rule 9(b) requires the plaintiff to plead a fraud claim with particularity. To state a claim for fraud, a plaintiff must allege that:

> (1) the defendant falsely represented a material fact or omitted facts that the defendant had a duty to disclose; (2) defendant knew that the representation was false or made with a reckless indifference to the truth; (3) defendant intended to induce plaintiff to act or refrain from action; (4) plaintiff acted in justifiable reliance on the representation; and (5) plaintiff was injured by its reliance on defendant's representation.[15]

ANALYSIS

A. Triple-S Has Sufficiently Pled Its Breach-of-Contract Claim (Count I).

Crowe contends that Triple-S's breach-of-contract count is barred by the Master Services Agreement ("MSA") and Statements of Work ("SOWs").[16] According to Crowe, the Court must dismiss Count I because (1) the "out-of-the-

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[13] *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 873 (Del. 2020) (cleaned up).

[14] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citations omitted).

[15] *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

[16] *See* Def.'s Opening Br. at 6.

box" ready promise wasn't expressly mentioned in the MSA and (2) the MSA's integration clause bars consequential damages.[17] Crowe says that Triple-S's inability to "point to any contractual promise that Crowe breached" bars its right to bring this claim[18] and that Triple-S can't rely on any extracontractual statements.[19]

To Triple-S, the MSA, SOWs, and Project Change Authorizations ("PCAs") all contain Crowe's contractual promises to deliver functioning software for Triple-S's stated goals.[20]

To "survive a motion to dismiss for failure to state a breach-of-contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff."[21]

Crowe doesn't dispute the existence of the contract or the damages alleged by Triple-S. So, the primary issue is whether there was a contractual breach of Crowe's obligations.

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[17] *Id.*

[18] *Id.* at 8.

[19] *Id.* at 11.

[20] Triple-S Steel Holdings, Inc.'s Answering Brief in Opposition to Defendant Crowe LLP's Motion to Dismiss ("Pl.'s Answering Br.") at 23 (D.I. 24).

[21] *VLIW Tech., LLC v. Hewlett-Packard Co.,* 840 A.2d 606, 612 (Del. 2003) (citations omitted).

Here, Crowe had an express contractual obligation through the MSA, SOWs, and PCAs to deliver functioning software to Triple-S. MSA Section 2(b) ("Statements of Work") states in relevant part: "Crowe will supply Client with the Services as described in an SOW."[22]

The SOWs contain language concerning Crowe's obligations. For example, SOW-001 lays out the "Project Background" that includes the "defined business goals" of Triple-S.[23] And to achieve those "defined business goals," Crowe and Triple-S would "collaborat[e] to implement Microsoft Dynamics™ 365 for Finance and Operations ('Dynamics 365') and Crowe Metals Accelerator ('CMA')."[24]

Dismissal of a breach-of-contract claim is only proper if "a defendant has offered the singular reasonable construction of the operative language as a matter of law, and that construction reveals there has been no breach."[25] The heart of Triple-S's breach-of-contract claim is that Crowe hasn't delivered on its contractual obligation to provide functioning software for Triple-S's defined business goals as

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[22] Def.'s Opening Br., Exhibit 1, MSA § 2(b) (underlining in original).

[23] Def.'s Opening Br., Exhibit 2, SOW-001 at 1 ("Establish platform to better facilitate future growth (organic and/or acquisition); Standardize business processes for improved and more consistent global operations . . . .").

[24] *Id.*

[25] *Anschutz Corp. v. Brown Robin Cap., LLC*, 2020 WL 3096744, at *9 (Del. Ch. June 11, 2020) (citing *Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine P'rs 2006, L.P.*, 93 A.3d 1203, 1205 (Del. 2014)).

required and defined by the MSA and the SOWs' language.[26] In support thereof, Triple-S has offered a reasonable construction of the relevant contractual language.

Accordingly, Triple-S has sufficiently pled breach of contract. It has alleged the existence of a contract—the MSA and the SOWs. It has alleged Crowe's failure to provide functioning software. And it has pled the $5,000,000 purported damages resulting from the alleged breach.[27]

Accordingly, Crowe's Rule 12(b)(6) request to dismiss Count I is **DENIED.**

B. The Fraud Claims (Counts II and III) Survive.

Triple-S charges in Count II that Crowe fraudulently induced it by "falsely represent[ing] to Triple-S that it had 'out-of-the-box ready' software that would fit Triple-S's goals without the need for PCAs or further investments" and then "reiterating in each PCA its promises indicating its ability to produce functioning software."[28] In Count III, Triple-S separately and distinctly pleads that Crowe made "material, false representations to Triple-S concerning, among other things, its ability to produce functional ERP software tailored to the needs of Triple-S's 23

[26] Pl.'s Answering Br. at 23 ("Crowe fixates on the notion of the CMA being 'out-of-the-box ready' to deflect attention away from Triple-S's core contractual allegation—the CMA was never 'ready' at all.").

[27] Compl. ¶ 31.

[28] *Id*. ¶¶ 33-34.

locations, the feasibility of the project timeline, and the critical shortcomings of the CMA program's design, configuration and deployment."[29] While Crowe urges otherwise, the Court cannot at this point find these two claims to be impermissibly duplicative of each other such that dismissal is warranted.[30]

Additionally, Crowe argues that the Triple-S's fraud allegations—both those in Counts II and III—are deficient because they are not pled with the required particularity.[31] According to Crowe, Triple-S is missing the "newspaper facts" as to either or both fraud claims.[32]

In order to plead a claim for fraud, Triple-S must satisfy Civil Rule 9(b)'s heightened pleading standard.[33] And to properly plead fraud, Triple-S must identify a false representation.[34] Triple-S has identified the false representations as Crowe's

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[29] *Id.* ¶ 40.

[30] Recall, "pleading standards governing the motion to dismiss stage of a proceeding in Delaware [] are minimal." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011). The "reasonable conceivability" query on a Rule 12(b)(6) motion is simply whether there is a "possibility" of recovery on the claim pled. *Id.* at 537, 537 n.13 (citations omitted). And there are certainly circumstances where "[a] party may set forth two or more statements of a claim . . . alternately or hypothetically, either in one count . . . or in separate counts." Super. Ct. Civ. R. 8(e)(2).

[31] Def.'s Opening Br. at 15.

[32] *Id.*

[33] *Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, at *21 (Del. Super. Ct. July 29, 2021) (observing that common law fraud and fraudulent inducement claims have the same elements).

[34] *Prairie Cap. III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 49 (Del. Ch. 2015).

(1) supposed promise of "out-of-the-box ready" software and (2) its ability to produce functioning software for the needs of all 23 Triple-S locations.[35] Triple-S has made cognizable fraud claims because it has sufficiently pled the time, place, and manner of the alleged fraud.[36]

Crowe moves past its mere technical complaints about Triple-S's pleading, however, to insist that the MSA's non-reliance and integration clauses bar resort to the extra-contractual promises it says Triple-S must be relying upon.[37] In Crowe's view, these contract clauses won't countenance turning to any "representations or warranties other than those expressly set forth in the MSA."[38] The ultimate issue here is whether Triple-S can rely on Crowe's "out-of-the-box ready" promise for

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[35] Compl. ¶¶ 33, 40.

[36] The "particularity requirement obligates [a] plaintiff[] to allege the circumstances of the fraud 'with detail sufficient to apprise the defendant of the basis for the claim.'" *MicroStrategy Inc. v. Acacia Rsch. Corp.*, 2010 WL 5550455, at *12 (Del. Ch. Dec. 30, 2010) (quoting *Grunstein v. Silva*, 2009 WL 4698541, at *14 (Del. Ch. Dec. 8, 2009)). By way of example here, Triple-S's complaint directly references the late spring 2019 pitch and website statements with details sufficient to apprise Crowe of the basis of the claim. *See* Compl. ¶ 10 ("Crowe's website says: 'Now, the cloud-based Microsoft Dynamics™ 365 ERP system can manage nearly every aspect of your business in one place, with continuous updates that don't affect your customizations. And specialized technology like the Crowe Metals Accelerator comes ready to use, with the capabilities metals companies need out of the box.'"); Compl. ¶ 11 ("Ray Conley, an application consultant for Crowe, pitched the software demo to the Triple-S team on May 28, 2019.").

[37] Def.'s Opening Br. at 14.

[38] *Id.*

fraud if there is an integration provision in the MSA.[39] Again, this not something the Court can resolve at this point.

Express integration clauses are defined as those 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."[40] Delaware courts consistently uphold fraud as an exception to express integration clauses.[41] And indeed, "[t]he presence of a standard integration clause alone, which does not contain explicit anti-reliance representations and which is not accompanied by *other contractual provisions* demonstrating with clarity that the plaintiff had agreed that it was not relying on facts outside the contract, will not suffice to bar fraud claims."[42]

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[39] While invited to, the Court will not here address Crowe's suggestion as to any claimed fraud damages. Crowe asserts that Triple-S's damage claims are also barred by Section 7 of the MSA. Def.'s Opening Br. at 4. Whether any consequential damages were foreseeable or a actionable consequence of the breach(es) pled is for later; it isn't appropriate for the Court to make such a call at this pleadings stage. *See Indep. Realty Tr., Inc. v. USA Carrington Park 20, LLC*, 2022 WL 625293, at *5 (Del. Super. Ct. Mar. 1, 2022), *reargument denied*, 2022 WL 1008852 (Del. Super. Ct. Mar. 31, 2022).

[40] *Kronenberg v. Kutz*, 872 A.2d 568, 593 (Del. Ch. 2004).

[41] *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059 (Del. Ch. Feb. 14, 2006) ("[M]urky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations.") (citing *Kronenberg*, 872 A.2d at 593).

[42] *Kronenberg*, 872 A.2d at 593 (emphasis added).

MSA Section 34[43] is the only clause of the contract that speaks to this subject.[44] Given its best read for Crowe, Section 34 is a one-way non-reliance provision binding only Triple-S.

No doubt, our courts will enforce unambiguous integration clauses where a party has contractually represented that it has not relied upon statements or information outside of the four corners of the written agreement. But it is not at all clear that Section 34 itself is sufficient to shield Crowe from potential fraud claims.[45]

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[43] Def.'s Opening Br., Exhibit 1, MSA § 34.

[44] The Court appreciates—but cannot agree with—Crowe's suggestion that MSA Section 33 is also a type of integration clause that would defeat the fraud claims and warrant Rule 12(b)(6) dismissal. Def.'s Opening Br. at 3-4. Section 33 reads: "Entire Agreement. This Agreement and any SOWs attached hereto contain the entire understanding between the parties with respect to the subject matter hereof and supersede all previous written or oral understandings, agreements, negotiations, commitments, or any other writing or communications with respect to such subject matter." Def.'s Opening Br., Exhibit 1, MSA § 33 (underlining in original).

[45] *See Abry Partners*, 891 A.2d at 1059 ("[P]arties can protect themselves against unfounded fraud claims through explicit anti-reliance language," but "[i]f parties fail to include unambiguous anti-reliance language, they will not be able to escape responsibility for their own fraudulent representations made outside of the agreement's four corners."); *see also Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, at *14 (Del. Super. Ct. July 29, 2021) (finding that because the SPA contained several provisions reinforcing anti-reliance on extra-contractual statements that plaintiffs' fraud claims were barred). In *Techview Invs. Ltd. v. Amstar Poland Prop. Fund I, L.P.*, the Delaware Superior Court found that the Subscription Agreements integration provision barred plaintiffs' fraud claims. Plaintiffs had alleged they were fraudulently induced by defendants' investment presentation. The provision read:

> *No Other Information:* Other than as provided in this Subscription Agreement, the Partnership Agreement and any other separate agreement in writing with the fund executed in conjunction with the Investor's subscription for Interests, the Investor is not relying upon any other information (including any advertisement, article, notice or other communication published in any newspaper, magazine or similar media or broadcast over television or radio, and any seminars or meetings whose attendees have been invited by any general solicitation or advertising),

And, in the end, the Court must enforce the "delicate balance that Delaware courts have struck between supporting freedom of contract and condemning fraud."[46]

Lastly, Crowe argues that Counts II and III should be dismissed as merely duplicative of the breach-of-contract claim.[47] "[A] fraud claim alleged contemporaneously with a breach-of-contract claim may survive, so long as the claim is based on conduct that is separate and distinct from the conduct constituting breach."[48] With the plaintiff-friendly read the Court must give to the complaint's allegations, Counts II and III aren't impermissibly duplicative of Count I because they are based on separate and distinct conduct.[49]

Accordingly, Crowe's Motion to Dismiss Counts II and III under Rule 12(b)(6) is **DENIED.**

> representation or warranty by any Covered Person in determining to invest in the Fund . . . .

2021 WL 3891573, at *3, *10 (Del. Super. Ct. Aug. 31, 2021) (citations omitted). This provision includes the type of information that can't be relied upon. Unlike in *Techview*, the provision in this case doesn't contain specific non-reliance language. It isn't written with the particularity of *Techview's* Subscription Agreements provision.

[46] *Fortis Advisors LLC v. Johnson & Johnson*, 2021 WL 5893997, at *12 (Del. Ch. Dec. 13, 2021).

[47] Def.'s Opening Br. at 16.

[48] *inVentiv Health Clinical, LLC v. Odonate Therapeutics, Inc.*, 2021 WL 252823, at *7 (Del. Super. Ct. Jan. 26, 2021) (citing *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *8 (Del. Super. Ct. Apr. 16, 2014)).

[49] *See id.* ("Fraud claims focused on the inducement to contract, rather than the performance of a contract, are considered separate and distinct conduct.").

C. The Court Lacks Jurisdiction Over Triple-S's Negligent Misrepresentation Claim (Count IV).

Triple-S alleges that Crowe negligently misrepresented material information "concerning [Crowe's] ability to produce functional ERP software tailored to the needs of Triple-S's 23 locations."[50] Triple-S contends Crowe failed to exercise reasonable care in communicating "time and time again throughout each of the separate SOWs and PCAs."[51] Crowe, in turn, contends the claim is barred by the MSA's integration and non-reliance clauses.[52]

What both sides ignore, though, is that well-settled Delaware law grants our Court of Chancery exclusive subject matter jurisdiction over negligent misrepresentation claims.[53] Indeed, this Court "has been persistently consistent" in denying jurisdiction over such claims.[54] And the Court may, where necessary, address this issue of subject matter jurisdiction *sua sponte*.[55]

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[50] Compl. ¶ 46.

[51] *Id*. ¶ 47.

[52] Def.'s Opening Br. at 17.

[53] *Bobcat N. Am., LLC v. Inland Waste Holdings, LLC*, 2020 WL 5587683, at *9 (Del. Super. Ct. Sept. 18, 2020); *see also Lehman Bros. Hldgs., Inc. v. Kee*, 268 A.3d 178, 184 n.46 (Del. 2021).

[54] *Bobcat N. Am.*, 2020 WL 5587683, at *9; *Lehman Bros. Hldgs.*, 268 A.3d at 184 n.46.

[55] *See Gunn v. McKenna*, 116 A.3d 419, 421 (Del. 2015) ("This Court has also held lack of jurisdiction may be raised at any time on motion of the court *sua sponte*, even though the parties, by failure to raise the question, may have waived the right. Accordingly, whenever it appears by suggestion of the parties or by being raised *sua sponte* that the court lacks jurisdiction, the court must dismiss the action.") (cleaned up); *Critchfield v. Engfer*, 2016 WL 2755933, at *1 (Del. Ch.

Crowe's Motion to Dismiss Count IV under Rule 12(b)(6)—insofar as it seeks outright dismissal of the negligent representation claim—must be **DENIED.** Triple-S may seek its transfer to the Court of Chancery under 10 *Del. C.* § 1902 or elect to have this Court enter an order of dismissal without prejudice.[56] Triple-S's counsel are to submit, within 10 days: (1) an order on notice of its election; and (2) if transfer is sought, a status report explaining the practical effect on the remainder of its case here.

D. The Breach of Warranties and Covenants Claims (Counts V, VI, and VII) Will Not Be Dismissed.

Crowe has moved to dismiss Triple-S's pled claims for breaches of the implied covenant of good faith and fair dealing, the implied warranty of fitness for a particular purpose, and the implied warranty of merchantability (the "Implied Warranties and Covenants Claims").[57] Crowe also contends in its reply brief that the express warranty claim introduced in Triple-S's brief opposing dismissal, but not

May 9, 2016) ("The issue of subject matter jurisdiction is 'crucial,' and the Court is obligated to ensure it exists, even if it must raise the issue *sua sponte*.") (quoting *Appoquinimink Educ. Ass'n v. Appoquinimink Sch. Dist.*, 2003 WL 1794963, at *3 n.24 (Del. Ch. Mar. 31, 2003); *B/E Aerospace, Inc. v. J.A. Reinhardt Hldgs., LLC*, 2020 WL 4195762, at *2 (Del. Super. Ct. July 21, 2020) (noting that subject matter jurisdiction challenges "might be raised *sua sponte* by the Court at any time").

[56] *See Otto Candies, LLC v. KPMG, LLP*, 2018 WL 1960344, at *4 (Del. Ch. Aug. 21, 2020) (granting such relief on motion to dismiss, but notably where the entire case then transferred to the Court of Chancery).

[57] Def.'s Opening Br. at 18.

pled in the complaint, should be disregarded.[58]

Crowe says the three specific Implied Warranties and Covenants Claims are barred by the CMA License Agreement's Disclaimer of Warranties clause ("Disclaimer").[59] Triple-S counters that the Disclaimer is inconspicuous and therefore ineffective.[60]

The Disclaimer first provides a limited warranty that "covers the Licensed Software for the six-month period following Licensee's initial production use of the Licensed Software."[61] The Disclaimer then states this limited warranty is the exclusive warranty, the software is provided "as is," and the "licensor expressly disclaims all other representations, warranties, conditions and guarantees, whether express, implied, statutory or otherwise."[62] That disclaimed includes "all implied representations, warranties, conditions and guarantees of merchantability, quality, fitness for a particular purpose, non-infringement."[63] The disclaimer's text is all

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[58] Reply Brief in Support of Defendant's Motion to Dismiss ("Def.'s Reply Br.") at 20-21 (D.I. 27).

[59] Def.'s Opening Br. at 18.

[60] Pl.'s Answering Br. at 40.

[61] Def.'s Opening Br., Exhibit 3, CMA License Agreement § 12.

[62] *Id.*

[63] *Id.*

caps.[64]

For a disclaimer of warranties in a writing to be effective, it must be conspicuous.[65] Arguably, here it is. But that feature itself may not be dispositive. The timing of delivery, placement, and other like factors relating to such a disclaimer are salient issues to be resolved before determining whether it vanquishes implied warranties and covenants claims such as Triple-S's.[66] At bottom, to determine whether the Disclaimer held up here can do so, the Court must examine the entirety of the contractual relationship between the parties, its several instruments, and the timing of their execution and delivery.[67] It is far too early to do all that at this pleading stage.

In turn, Crowe's Motion to Dismiss Counts V, VI, and VII under Rule

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[64] *Id.*

[65] DEL. CODE ANN. tit. 6, § 2-316(2) (2018).

[66] *See, e.g.*, *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 169-70 (Del. Super. Ct. 1986); *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of N. Am., Inc.*, 558 A.2d 1066, 1069-70 (Del. Super. Ct. 1989).

[67] Crowe asks the Court to, upon 12(b)(6) review, resolve the integration and effectiveness of provisions spread over numerous documents to resolve that the posited Disclaimer exists and effectively shuts out any reasonably conceivable implied warranty or covenant claim. *See* Def.'s Opening Br., Exhibit 3, CMA License Agreement §§ 12-13, 15; *id.*, Schedule 1, ¶ 6; Def.'s Opening Br., Exhibit 2 (SOW-001); Pl.'s Answering Br., Exhibit 1 (SOW-002); *id.*, Exhibit 3 (SOW-004).

12(b)(6) must be **DENIED**.[68]

E. Delaware's Consumers Fraud Act (Count VIII) – Triple-S Doesn't Plead Any Consumer Fraud in Delaware.

Triple-S alleges in Count VIII that Crowe violated Delaware's Consumer Fraud Act ("DCFA").[69] Crowe counters that the DCFA can't apply here because Triple-S didn't plead that any alleged consumer fraud activity occurred in Delaware.[70]

The DCFA requires that an unfair or deceptive practice occur within the state of Delaware.[71] A choice of law provision naming Delaware is not enough to trigger the DCFA.[72] And a party's incorporation in Delaware is also insufficient to trigger

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[68] This disposition obviates the need to address Triple-S's assertion—not found in the complaint but suggested for the first time in an answering brief—that there is also an express-warranty claim that could be grounded upon the CMA License Agreement Disclaimer of Warranties provision. Pl.'s Answering Brief at 37-38. As Triple-S itself seems to recognize, the drawing out of that express-warranty claim likely requires amendment of its complaint. *Id.* at 38, 43.

[69] Compl. ¶¶ 64-66.

[70] Def.'s Reply Br. at 21-22.

[71] *Market America, Inc. v. Google, Inc.*, 2011 WL 1485616, at *4 (D. Del. Apr. 19, 2011); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 117 (Del. 2006) (plaintiff failed to state a claim under the DCFA where the complaint contained no allegations "any of the conduct at issue took place in Delaware" because the statute requires that that complained-of practice occur "in part or wholly within this State") (quoting DEL. CODE ANN. tit. 6, § 2512 (2006)).

[72] *Market America*, 2011 WL 1485616, at *3 (a choice of law provision may provide that Delaware courts shall have exclusive jurisdiction for adjudicating all disputes that may arise under an agreement, but the DCFA still requires a showing of an unfair or deceptive practice that occurred within the state).

this state's consumer fraud act protections.[73]

Count VIII alleges only that "Crowe made material, false representations to Triple-S concerning its ability to produce functional ERP software tailored to the needs of Triple-S's 23 locations"[74] and that Triple-S "relied on Crowe's representation that it could produce the software by entering into a contract and agreeing to pay the required fee."[75] Triple-S failed to plead any transaction or activity that occurred within the State of Delaware. Absent this element, Triple-S has failed to state a claim on which DFCA relief is reasonably conceivable.

Accordingly, Crowe's Motion to Dismiss Count VIII is **GRANTED**.

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[73] *Marshall v. Priceline.com, Inc.*, 2006 WL 3175318, at *2 (Del. Super. Ct. Oct. 31, 2006) ("Thus, while incorporation may be enough to allow Delaware law to apply to a dispute, it is not enough to allow the DCFA to apply to fraudulent transactions which did not occur in Delaware.").

[74] Compl. ¶ 64. But that alleged fraudulent activity occurred neither in whole nor in part in Delaware. So, for the first time during oral argument, Triple-S alluded to Crowe's potential failure to implement the CMA at Triple-S's New Castle warehouse—which it said was included in the planned implementation section of SOW-2—might create some material connection between Triple-S's allegations and Delaware. Hearing Transcript of Aug. 10, 2023, at 30 (D.I. 33). But that suggested resulting failure is not the act or occurrence Triple-S complained of. Nor does it alone seem to be offending "conduct" as contemplated by the DCFA. *See, e.g., Nieves v. All Star Title, Inc.*, 2010 WL 2977966, at *4-5 (Del. Super. Ct. July 27, 2010) (dismissing Delaware resident's DCFA claim regarding a settlement related to real property located in Delaware because "[plaintiff's] allegations of consumer fraud relate to All Star's provision of services in Maryland, where [defendant] is located and where the settlement occurred").

[75] Compl. ¶ 65.

CONCLUSION

Crowe's Motion to Dismiss Count VIII is **GRANTED;** Crowe's Motion to Dismiss Counts I, II, III, V, VI, and VII is **DENIED;** and Triple-S is granted leave to seek the relief described above for the negligent misrepresentation claim in Count IV.

IT IS SO ORDERED.

Paul R. Wallace, Judge