UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Gene Tox Worldwide, LLC d/b/a TrueGenX, Plaintiff, vs. Thermo Fisher Scientific Inc., Defendant.	Civil Case No.: 21-cv-2854-MCA-MAH **Oral Argument Requested** Date of Hearing: May 3, 2021

MEMORANDUM IN SUPPORT OF
DEFENDANT THERMO FISHER SCIENTIFIC INC.'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Defendant Thermo Fisher Scientific Inc. ("Defendant") submits this memorandum in support of its Motion to Dismiss.

INTRODUCTION

Over $3.75 million in outstanding invoices remains owed by Plaintiff Gene Tox Worldwide, LLC d/b/a TrueGenX d/b/a Scientia d/b/a Scientia Diagnostics ("Gene Tox") to Thermo Fisher Scientific Inc.'s affiliate, Fisher Scientific Company L.L.C. d/b/a Fisher HealthCare d/b/a Fisher Scientific ("Fisher HealthCare"). In an effort to avoid paying its debts, Gene Tox asserts allegations concerning the claimed failures of certain products sold by Fisher HealthCare. The evidence will demonstrate, however, the issues Gene Tox experienced cannot be attributed to Defendant, Fisher Healthcare, or to the manufacturers of the products. To the contrary, the products involved, specifically including the TaqPath Covid-19 Assay or its components, have an impressive quality record. In fact, of the over 2 million Covid-19 tests administered, there have been only 298 complaints. That establishes a complaint rate of no greater than .00014751%—nowhere near the alleged defect rate claimed in Plaintiff's Complaint—and consistent with the findings reported in a January 8, 2021 letter, referenced in Plaintiff's Complaint, concluding the problems are not with the products purchased by Plaintiff, but with the "significant contamination" and "workflow" issues in Plaintiff's lab.[1]

Gene Tox's four count, 111 paragraph Complaint alleging failures involving over a dozen products must be dismissed for a plethora of reasons. ***First***, Plaintiff asserted claims

[1] *See* April 7, 2021 Declaration of Lee W. Yeckel ("Yeckel, Decl.") at ¶ 5, Ex. 1.

against the wrong party. ***Second***, Plaintiff failed to identify which specific transactions are the basis for its alleged breach of contract/warranty claims, or the specific terms of the contract allegedly breached, therefore, Plaintiff's contract-based claims are improperly pleaded, fail to state a claim, and must be dismissed. ***Third***, Plaintiff's fraud-based claims must be dismissed based on the parol evidence rule and operative contract language, including an integration clause, which precludes reasonable or justified reliance on the representations alleged in Plaintiff's Complaint. And ***fourth***, Plaintiff's fraud-based claims are barred by the economic loss doctrine as duplicative of Plaintiff's contract-based claims.

BACKGROUND

Plaintiff's 111 paragraph, 31-page Complaint vaguely refers to "obligations" under the parties' "arrangement" and unspecified "Terms and Conditions of Sale" (Compl., ¶¶ 90, 94-95, 98), but never identifies whether Plaintiff is suing on a single contract or multiple contracts. Plaintiff failed to attach any contract documents or "Terms and Conditions of Sale" to its Complaint. Plaintiff generally alleges product failures or defects with respect to numerous goods it purchased, and although it identifies a number of them with a degree of particularity, it also refers numerous times to other goods in a manner that does not allow Defendant to understand what specific products/goods are at issue.[2] (Yeckel Decl., ¶ 6.)

[2] *Compare* Plaintiff's references in its Complaint: (A) AB 7500 Fast Dx Real-Time PCR Instrument ("7500 FDx RT-PCR") (Compl., ¶ 2); TaqPath COVID-19 Combo Kit (*id.*); (B) MS2 phage control ("MS2") (*id.*, ¶ 11); (C) MicroAmp™ Fast Optical 96-well reaction plates ("reaction plates" or "plates") (*id.*, ¶ 12); (D) MicroAmp™ Optical adhesive film ("optical adhesive film") (*id.*); (E) TaqPath RT-PCR COVID-19 Kit ("RT-PCR Kit") (*id.*, ¶ 19); (F) TaqPath COVID-19 Control Kit ("Control Kit") (*id.*); (G) COVID-19 Combo Kit a/k/a TaqPath COVID-19 Combo Kit (*id.*); (H) COVID-19 Interpretive Software ("Interpretive Software") (*id.*, ¶ 9); (I) Sequence Detection System ("SDS") Software (*id.*,

The "Terms and Conditions of Sale" referenced in the Complaint, and that Defendant understands are at issue, identify "Fisher Scientific Company, L.L.C."—not Defendant—as the "Seller." (*See* Compl., ¶¶ 94-95, 98; Yeckel Decl., ¶ 10, Exs. 3-5.) Between September 9, 2019 and January 19, 2021, three different versions of these "Terms and Conditions of Sale" existed, with effective dates of: (1) September 9, 2019; (2) April 23, 2020, and (3) January 19, 2021. (Yeckel Decl., ¶10, Exs. 3-5.)

Plaintiff's Complaint does not identify the specific transactions or dates when it purchased the goods at issue; accordingly, Defendant does not possess proper notice of which sales contract(s) and which Terms and Conditions of Sale are giving rise to Plaintiff's breach of contract/warranty claims and fraudulent inducement claim. (*Id.*, ¶¶ 6,-8, 11.) Plaintiff purchased goods from Fisher HealthCare in more than 110 separate transactions from May of 2019 through February of 2021, involving the sale of goods manufactured by over 40 different manufacturers, with sales totaling over $9.2 million. (*Id.*, ¶ 11.) Defendant was neither the seller nor the manufacturer of the goods involved in any of those transactions. (*Id.*)

Plaintiff's Complaint does not identify a specific start or end date for the sales transactions at issue. (*See generally,* Compl.) Although the Complaint references

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¶ 8); and (J) Deep-Well Magnet Tip Combs ("tip combs") (*id.*, ¶ 38); ***with*** (A) unspecified "reagents and consumables" (Compl., ¶ 51); (B) unspecified "master mix reagents" (*id.*, ¶ 13); (C) unspecified "warped supplies and reagents purchased from TFS" (*id.*, ¶ 58); (D) "various supplies necessary for COVID-19 testing" (*id.*, ¶¶ 88-89 and 98); (E) unspecified "testing supplies" (*id.*, ¶ 58); (F) unspecified "testing supplies and reagents" (*id.*, ¶ 67); (G) unspecified "plate seals" (*id.*, ¶ 73); and (H) unspecified "spare parts purchased from TFS" (*id.*, ¶ 95); *see also* Yeckel Decl., ¶ 6.

Plaintiff's first purchase of a 7500FDx RT-PCR in April of 2020 (*id.*, ¶ 29), some of the goods alleged to be at issue in the Complaint may have been purchased prior to that date. (Yeckel Decl., ¶ 9.) Based on the Complaint, the last sales contract that may be at issue appears to be in January of 2021 and is reflected by a Fisher HealthCare invoice, dated January 20, 2021, referring to goods shipped on January 19, 2021. (Compl., ¶ 82; Yeckel Decl., ¶ 9, Ex. 2, Fisher HealthCare Invoice No. 0385721.)

Each contract for the sale of goods (*i.e.*, sales transaction) with Plaintiff generally involved a Purchase Order, an Order Confirmation and notices, packaging and shipping documents, and an Invoice. (Yeckel Decl., ¶ 12.) Many also involved Sales Quotations. (*Id.*) Each of these will be discussed below. Defendant was not identified as the "seller" on any of these documents or their corresponding digital equivalent. (*Id.*)

Sales Quotations—Plaintiff received "Sales Quotations" from Fisher HealthCare, or other third-parties, regarding products at issue in the Complaint but never received such documents from Defendant. (Yeckel Decl., ¶ 13.) These Sales Quotations generally included a Quote Number and asked Plaintiff to include that number on all correspondence and/or purchase orders. (*Id.*) Additionally, each Sales Quotation provided a hotlink to the Terms and Conditions of Sale governing each transaction stating: "For complete Terms and Conditions, please click here" or words of similar effect. (*Id.* at Ex. 6, examples of Fisher HealthCare's Sales Quotations.) Plaintiff also received Sales Quotations from Life Technologies Corporation relating to certain goods at issue in the Complaint, but those goods were not purchased from Defendant; Defendant believes they were ordered through, and sold by, Fisher HealthCare. (*Id.* at ¶ 13.)

Purchase Orders—Plaintiff placed its orders to purchase the goods at issue in the Complaint in three different ways: (A) using traditional purchase orders; (B) through the internet; and (C) by directly contacting a Fisher HealthCare sales or customer service representative to place the order via telephone, email, or facsimile. (*Id.*, ¶ 14.)

Traditional Purchase Orders—Plaintiff submitted traditional purchase orders to Fisher HealthCare for goods at issue in the Complaint. Those purchase orders were directed to Fisher HealthCare a/k/a Fisher Scientific as the seller/vendor, not to Defendant. (*Id.*) Examples of Plaintiff's purchase orders to Fisher HealthCare are attached to the Yeckel Declaration. (*Id.*, ¶ 15, Ex. 7.)

Internet Orders—On November 12, 2019, Plaintiff registered online with Fisher HealthCare to submit orders via the internet for purchasing goods and continued placing internet orders using Account No. 068428-002 through January 14, 2021. (Yeckel Decl., ¶ 16.) As a necessary part of the registration process, Fisher HealthCare required Plaintiff to check a box next to the words "I agree with the Terms and Conditions," with the phrase "Terms and Conditions" being a hotlink to Fisher HealthCare's Terms and Conditions of Sale. (*Id.*, ¶ 16, and Ex. 8, screenshot of registration page.) Each time an internet order was placed by Plaintiff, Fisher HealthCare's Terms and Conditions of Sale were available as a link at the bottom of the internet page. (*Id.*, ¶ 17, Ex. 9, screenshot of typical page with link to Terms and Conditions of Sale.) Each time Plaintiff placed an internet order, Plaintiff could request an order confirmation, and if Plaintiff subscribed to an order confirmation, then Plaintiff received an order confirmation that included a hotlink to Fisher HealthCare's

Terms and Conditions of Sale. (*Id.*, ¶ 18, Ex. 10, order confirmation examples sent via email to Plaintiff by Fisher HealthCare.)

Telephone/eMail Orders—Plaintiff also placed a number of orders for the purchase of goods at issue in the Complaint by calling or emailing a representative of Fisher HealthCare. Once these orders were received, a Fisher HealthCare representative would enter the order on Fisher HealthCare's computer system. Examples of printouts of those orders are attached to the Yeckel Declaration. (*Id.*, ¶ 19, Exs. 11-12.) These documents reflect, for example, the customer's purchase order number, Fisher HealthCare's internal order number, the date the order was made, and the goods ordered. (*Id.*, ¶ 20.) This information confirms that Fisher HealthCare was the seller, not Defendant. (*Id.*)

Notifications/Confirmations—After Plaintiff ordered goods at issue in the Complaint, it typically received a number of documents—all of which contained hotlinks to the Terms and Conditions of Sale applicable when the order was placed—further confirming that the seller was Fisher HealthCare, not Defendant, and comprising (in part) the contract documents relative to each transaction at issue in the Complaint. (*Id.*, ¶ 21.) Such documents included: (A) Invoice Notifications; (B) Shipping Notifications; and (C) Order Confirmations. (*Id.*) The only exceptions occurred if Plaintiff did not subscribe to those notifications when placing its orders with Fisher HealthCare. (*Id.*)

Packing and Shipping Documents—Goods ordered and sold through Fisher HealthCare, but direct shipped by their manufacturer (Life Technologies Corporation) to Plaintiff were accompanied by a Dispatch Note. Dispatch Notes typically reflect that the itemized goods were purchased through Fisher HealthCare a/k/a Fisher Scientific (not

Defendant) and also reference the Fisher HealthCare purchase order number associated with the goods. (Yeckel Decl., ¶ 22, Ex. 13, examples of Dispatch Notes.)

Invoices—Plaintiff received access to invoices via email for each sales contract/transaction it entered into with Fisher HealthCare for the purchase of goods at issue in the Complaint. (Yeckel Decl., ¶ 23.) Those emails provided Plaintiff with the invoice information as well as the Terms and Conditions of Sale. (*Id.*) Examples of invoices received by Plaintiff are attached to the Yeckel Declaration. (*Id.*, Ex. 14.) Notably, each invoice identifies the seller as Fisher HealthCare. Each invoice also contains a hotlink to Fisher HealthCare's Terms and Conditions of Sale. (*Id.*)

LEGAL STANDARD

I. LEGAL STANDARD FOR A RULE 12(B)(6) MOTION TO DISMISS.

Rule 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8. Under Rule 8(a), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief," (*see* Fed. R. Civ. P. 8(a)(2)), "in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A complaint merely alleging entitlement to relief, without alleging facts showing entitlement, must be dismissed. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). Notably,

courts need not accept "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Iqbal*, 556 U.S. at 678.

It is "good practice for a plaintiff to attach to the complaint a copy of the contract sued upon, [but] the Federal Rules do not require it." *Scholar Intelligent Sols., Inc. v. N.J. Eye Ctr., P.A.*, No. 13-642, 2013 WL 2455959, at *2 (D.N.J. June 5, 2013). Nonetheless, courts may consider the allegations of a complaint, as well as documents attached to or specifically referenced in a complaint, and matters of public record, in deciding a Rule 12(b)(6) motion. *Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998); *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 302 (D.N.J. 2005). "Plaintiffs cannot prevent a court from looking at the texts of the document on which its claim is based by failing to attach or explicitly cite them." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). Such a document may be examined "to see if it contradicts the complaint's legal conclusions or factual claims." *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp., Ltd.*, 181 F.3d 410, 427 (3d Cir. 1999).

Further, the Court need not accept "'unsupported conclusions and unwarranted inferences,'" *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citation omitted), and "[l]egal conclusions made in the guise of factual allegations . . . are given no presumption of truthfulness." *Wyeth v. Ranbaxy Labs., Ltd.*, 448 F.Supp.2d 607, 609 (D.N.J. 2006); *see also Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005) ("a court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss."). Accordingly, when the allegations of a complaint are contradicted by

the terms of a contract, such allegations do not create a disputed issue of fact precluding dismissal of the complaint.[3]

ARGUMENT

I. PLAINTIFF ASSERTED ITS CLAIMS AGAINST THE WRONG PARTY.

Plaintiff's inability to assert a viable contract with Defendant requires dismissal of its contract-based claims. Plaintiff never entered into any contract with Defendant. Instead, Plaintiff entered into a series of transactions involving the sale of goods based on an exchange of price quotes, purchase orders, order acknowledgments/notices, shipping documents and invoices. Each sale created a new contract governed by the Terms and Conditions of Sale acknowledged in Plaintiff's Complaint. (*See* Compl., ¶¶ 94-95, 98; Yeckel Decl., ¶¶ 10, 12, 24, and Exs. 3-14.) The name of the vendor/seller in the operative documents (price quotes, purchase orders, order acknowledgments, and invoices, etc.) was

[3] *Boldrini v. Wilson*, 542 F. App'x 152, 155 (3d Cir. 2013) (where "'there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control.'") (citation omitted); *Goldenberg v. Indel, Inc.*, 741 F.Supp.2d 618, 624 (D.N.J. 2010) ("to the extent [documents referenced in the Complaint] contradict the Complaint's factual allegations, the documents will control"); *E. Coast Advanced Plastic Surgery v. Aetna Inc.*, No. CV 18-9429, 2019 WL 2223942, at *3 and n.7 (D.N.J. May 23, 2019) (dismissing claims based on factual allegations contradicted by an "integral document" not attached to the complaint); *Lopez v. Blink Fitness Linden*, No. 17-6399, 2018 WL 6191944, at *3 (D.N.J. Nov. 28, 2018) ("a court is not bound to accept [allegations] as true when the allegations are clearly contradicted by an underlying document on which the allegations rely"); *Columbus LTACH Mgmt., LLC v. Quantum LTACH Holdings, LLC*, No. 16-6510, 2017 WL 2213149, at *3 (D.N.J. May 19, 2017) ("Despite the factual allegations in the Complaint, it is clear from the [Agreement] that Quantum Income is not a signatory or party to that contract. * * * As a result, the Court will look to the [Agreement], rather than the allegations in the Complaint, in analyzing this motion to dismiss."); *In re PDI Sec. Litig.*, No. 02–CV–0211, 2005 WL 2009892, at *21 (D.N.J. Aug. 17, 2005) ("When allegations contained in a complaint are contradicted by the document it cites, the document controls.").

not Thermo Fisher Scientific Inc.; rather, the contract documents consistently identified Fisher Scientific Company L.L.C. d/b/a Fisher HealthCare ("Fisher HealthCare") or other independent, third-party affiliates of Defendant, as the contracting party.

Under New Jersey Law, "[t]o state a claim for breach of contract, a plaintiff must establish that it entered into a valid contract ***with the party*** against whom it seeks relief." *TBI Unlimited, LLC v. Clearcut Lawn Decisions, LLC*, No. 12-3355, 2013 WL 1223643, at *3 (D.N.J. Mar. 25, 2013) (emphasis added); *MK Strategies, LLC v. Ann Taylor Stores Corp.*, No. 1:07CV02519, 2007 WL 4322796, at *2 (D.N.J. Dec. 6, 2007) (dismissing breach of contract claim on a Rule 12(b)(6) motion as the "complaint fails to allege the first essential element of a breach of contract claim: that there exists a contract between the parties"); *TBI Unlimited, LLC v. Clearcut Lawn Decisions, LLC*, No. 12-3355, 2013 WL 1223643, at *3 (D.N.J. Mar. 25, 2013) (dismissing breach of contract claim on a Rule 12(b)(6) motion as "Defendants did not enter into a contract with Plaintiff").

Pennsylvania law is to the same effect.[4] In Pennsylvania, "[i]t is a well-established principle of law that a contract cannot legally bind persons not party thereto." *In re Barilla*, 535 A.2d 125, 128 (Pa. Super. 1987); *see also Furniture Sols. & Resources v. Symmetry Off., LLC*, No. 15-4774, 2015 WL 9302915, at *3, n.2 (E.D. Pa. Dec. 22, 2015) (granting Rule 12(b)(6) motion); *McClarin Plastics, Inc. v. Blackford Cap., Inc.*, No. 1:16-CV-

[4] Pursuant to the express terms of Fisher Scientific Company L.L.C.'s Terms and Conditions of Sale during all relevant time periods, "[t]he rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania, without reference to its choice of law provisions." *See* Yeckel Decl. at Ex. 3, Terms and Conditions of Sale, effective Sept. 9, 2019, at 9; *id.* Ex. 4 at 8; *id.* Ex. 5 at 5.

02508, 2017 WL 635114, at *5 (M.D. Pa. Feb. 16, 2017) (granting Rule 12(b)(6) motion as plaintiff failed to offer evidence plausibly supporting [d]efendants' assent to . . . a contractual relationship with [p]laintiff"); *Gould, Inc. v. Cont'l Cas. Co.*, 585 A.2d 16, 18 (Pa. Super. 1991) ("[a] contract cannot legally bind a person or entity which is not a party to the contract"). Accordingly, "[i]t is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract." *Fox Fuel, a Div. of Keroscene, Inc. v. Delaware Cty. Sch. Joint Purchasing Bd.*, 856 F.Supp. 945, 953 (E.D. Pa. 1994); *see also CGB Occupational Therapy, Inc. v. RHA/Penn. Nursing Homes, Inc.*, No. 00-4918, 2001 WL 1175150, at *4 (E.D. Pa. 2001) (denying motion to amend based on futility, applying a Rule 12(b)(6) motion to dismiss standard); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976) ("[u]nder Pennsylvania law, generally a person not a party to the contract cannot be liable for a breach").

Here, Plaintiff alleges a contract with Thermo Fisher Scientific Inc. in a conclusory manner. Notwithstanding those allegations, the documents constituting the contracts demonstrate Plaintiff entered into numerous sales transactions constituting individual contracts with Fisher HealthCare or other independent affiliates of Thermo Fisher Scientific Inc., and ***NOT*** Thermo Fisher Scientific Inc. itself. Under those circumstances, where the allegations of Plaintiff's Complaint are contradicted by the contracts at issue, such allegations do not create a disputed issue of fact precluding the Complaint's dismissal. (*See supra* at 8-9 and n. 3.) Plaintiff's contract-based claims against Defendant must therefore be dismissed as "[i]t goes without saying that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

Just as Plaintiff mistakenly directed its contract-based claims at Thermo Fisher Scientific Inc., it also mistakenly directed its fraud-based claims against Thermo Fisher Scientific Inc. Because Plaintiff misapprehended the entity with whom it was engaged in business, it also misdirected its fraud-based claims. Those claims should likewise be dismissed (or voluntarily withdrawn) for the same reason.

II. PLAINTIFF'S CONTRACT-BASED CLAIMS ARE INSUFFICIENTLY PLEADED AND FAIL TO STATE A CLAIM.

Plaintiff's Complaint fails to state a claim for relief based on either a breach of contract or a breach of warranty theory and, in any event, Plaintiff's contract-based claims are insufficiently pleaded. In either event, Plaintiff's contract-based claims must be dismissed. To state a claim for breach of contract/warranty, a plaintiff must do more than simply recite the elements for those causes of action in a *formulaic* manner. *See Khorchid v 7-Eleven, Inc.*, No. 18-8525, 2018 WL 5149643, at *8 (D.N.J. Oct. 22, 2018) ("A plaintiff cannot meet the burden of establishing these elements [for breach of contract] by merely making conclusory allegations"). As a defendant, Thermo Fisher Scientific Inc. must be provided "fair notice of what the . . . claim[s] [are] and the grounds upon which [they] rest[]" *Twombly*, 550 U.S. at 555. Plaintiff's "[l]egal conclusions made in the guise of factual allegations . . . are given no presumption of truthfulness," *Ranbaxy Labs.*, 448 F.Supp.2d at 609, and Plaintiff's bald assertions need not be credited.

A. Plaintiff's Contract-Based Claims are Insufficiently Pleaded.

Plaintiff impermissibly alleges legal conclusions not factual allegations. Plaintiff fails to identify *which* contract Defendant allegedly breached. Plaintiff's allegations are

entirely conclusory and devoid of specific facts. Accordingly, Plaintiff's Complaint must be dismissed. *See e.g., HV Assocs. LLC v. PNC Bank, N.A.*, No. 17-8128, 2018 WL 1731346, at *8 (D.N.J. Apr. 10, 2018); *Utah v. Strayer Univ.*, 667 F. App'x 370, 371 (3d Cir. 2016) (finding "the District Court properly rejected the breach of contract claim because Utah failed to identify a valid and binding contract . . . with [defendant]").

Plaintiffs' vague and/or non-existent identification of the contract(s) at issue does not satisfy Rule 8 pleading standards. *In re Samsung DLP T.V. Class Action Litig.*, No. 07–2141, 2009 WL 3584352, at *6 (D.N.J. Oct. 27, 2009) ("Plaintiffs . . . failed to sufficiently identify the contracts" where they "simply allude to 'contracts and agreements' that Samsung allegedly breached without more."); *Rapid Models & Prototypes, Inc. v. Innovated Sols.*, 71 F.Supp.3d 492, 501 (D.N.J. 2014) (applying Rule 8 to dismiss warranty claims as "[d]efendants cannot defend against a claim for breach of an express warranty when [p]laintiffs do not provide facts sufficient to identify the warranty [and the source of the warranty] . . . allegedly breached."). In its entire Complaint, Plaintiff never identifies which contract(s) are allegedly at issue. In Count 1, alleging "Breach of Contract," Plaintiff vaguely refers only to "obligations under [the parties'] arrangement." (Compl., ¶ 90.) In Count II, alleging "Breach of Express Warranty," Plaintiff refers to unspecified "Terms and Conditions of Sale" without identifying their effective date or the specific transactions to which they are applicable, or the specific contract/warranty terms allegedly applicable. (*Id.*, ¶¶ 94-9, 98.) Moreover, although certain products are identified with particularity, Plaintiff vaguely refers to numerous other products allegedly at issue due to claimed failures, but fails to provide a level of specificity allowing Defendants to identify the

specific transactions at issue.[5] (Yeckel Decl., ¶¶ 6-8.) Even with respect to the products identified with specificity, they were often purchased with such frequency that Defendant is unable to ascertain the particular transaction(s) (*i.e.*, contract(s)) at issue. (*Id.*)

"It is axiomatic that contract-based claims that do not adequately identify the contract at issue fail to 'set forth fair notice' of a claim and 'the grounds upon which it rests' and do not 'raise a right to relief above the speculative level.'" *DiAntonio v. Vanguard Funding, LLC*, 111 F.Supp.3d 579, 582 (D.N.J. 2015) quoting *In re Samsung*, 2009 WL 3584352, at *6; *see also Ctr. for Special Procs. v. Conn. Gen. Life Ins. Co.*, No. 09-6566, 2010 WL 5068164, at *5 (D.N.J. Dec. 6, 2010) (same); *see also Levari Enter., LLC v. Kenworth Truck Co.*, No. 1:20-cv-06210, 2021 WL 672657, at *5 (D.N.J. Feb. 22, 2021) (dismissing breach of contract and warranty claims on a Rule 12(b)(6) motion as plaintiff "failed to identify the contracts and express warranties which govern [its] transactions with [d]efendants").

Here, Plaintiff does not attach the contact(s) or warranties, at issue. Nor does Plaintiff provide anything other than formulaic pleading that fails to put Thermo Fisher Scientific Inc. on fair notice of ***which*** contact(s) is, or are, at issue so Defendant can respond and prepare a defense. Identifying the contact(s) at issue is particularly important as the parties' relationship spanned numerous transactions spanning over the course of nearly a year, or more.[6] During that time, the Terms and Conditions of Sale changed.

[5] *See* footnote 2 on page 3.
[6] *See* Compl., ¶ 29, alleging Pltf's. first purchase of a 7500 FDx RT-PCR in April of 2020; *id.*, ¶ 82, referencing ongoing COVID testing through Jan. 5, 2021; *see also* Yeckel Decl.,

Moreover, the Terms and Conditions of Sale provide that certain warranties at issue have a duration of only 90-days.[7] Accordingly, identifying the specific contract (*i.e.*, transaction) at issue is of vital importance, for example, as it may likely allow Defendant to escape liability based on the expiration of the term of the express warranties allegedly at issue, without incurring significant costs and expenses associated with discovery.

B. Plaintiff's Fraudulent Inducement of Contract Claim Fails to Satisfy Both Rule 8's General Pleading Standard and Rule 9's Heightened Pleading Standards for Fraud.

Plaintiff's fraud count—pleading a fraudulent inducement of contract claim—must be dismissed as Plaintiff failed to comply with the necessary pleading standards. Claims asserting fraudulent inducement must satisfy Rule 8's pleading requirements under the *Iqbal/Twombly* standard as well as satisfying Rule 9(b)'s ***heightened*** pleading standard. *Kare Distribution, Inc. v. Jam Labels & Cards LLC*, No. 09-00969, 2009 WL 3297555, at *4 (D.N.J. Oct. 9, 2009). Because Plaintiff failed to identify the particular contract(s) allegedly induced by fraud, its fraud claims fail as a matter of law and must be dismissed.

Plaintiff undeniably attempts to assert a ***fraudulent inducement of contract*** claim in Count III. The Complaint alleges Defendant made misrepresentations "[i]n an effort to ***induce*** [Gene Tox] to purchase and continue purchasing COVID-19 testing instruments, products, and supplies[.]" (Compl., ¶ 104, emphasis added.) Notably absent from Count III, or anywhere else in the Complaint, is a clear allegation of inducement to enter into a

¶¶ 9, 11, 16, Exs. 2, 6-14, demonstrating contracts for the sale of goods between Plaintiff and Fisher HealthCare from May, 2019 to January, 2021.)

[7] *See* Compl., ¶ 95; Yeckel Decl., Ex. 3, Terms and Conditions of Sale effective as of Sept. 9, 2019 at 3; *id.*, Ex. 4 at 3; *id.*, Ex. 5 at 2.

specific, identified contract. Accordingly, the pleading standards of Rule 8 and Rule 9 are not satisfied. *See, e.g., Exal Corp. v. Roeslein & Assocs., Inc.*, No. 4:12CV1830, 2013 WL 6843022, at *6 (N.D. Ohio Dec. 27, 2013) (noting plaintiff's failure to identify a "specific contract" and dismissing a fraud count as "[p]laintiffs have not complied with the pleading requirements of Rule 9(b), leaving the Court unable to determine whether the claim alleges separate and independent acts unrelated to contractual obligations.").

In this case, Plaintiff's complete failure to identify the specific contract(s) at issue is of additional importance as it does not allow the Court or Defendant to fully assess whether Plaintiff's claims are duplicative of its contract-based claims and, therefore, subject to dismissal. Under both New Jersey and Pennsylvania law, without an "independent duty imposed by law," a fraud claim is not extraneous to the contract and must be dismissed. *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 310 (2001).[8] Without such minimum pleading, Defendant lacks sufficient notice concerning the fraud claim asserted. Plaintiff's pleading deficiencies require dismissal of Count III.

[8] *See also Int'l Minerals & Mining Corp. v. Citicorp N.A., Inc.*, 736 F.Supp. 587, 597 (D.N.J. 1990) ("It has . . . consistently been held that an independent tort action is not cognizable where there is no duty owed to the plaintiff other than the duty arising out of the contract itself."); *Galdieri v. Monsanto Co.*, 245 F.Supp.2d 636, 650-51 (E.D. Pa. 2002) (granting defendant's motion for summary judgment on plaintiffs' misrepresentation claim because each alleged misrepresentation "addresse[d] a breach of duty incorporated into the parties' various agreements" and was thus "'intertwined' with plaintiff's breach of contract claim"); *Okulski v. Carvana, LLC*, No. CV 20-1328, 2020 WL 4934345, at *6 (E.D. Pa. Aug. 24, 2020) (applying Pennsylvania law) (granting Rule 12(b)(6) motion to dismiss plaintiff's fraud and negligent misrepresentations claims "'inextricably intertwined' with the parties' contractual terms").

C. Plaintiff Failed to State A Claim Upon which Relief May Be Granted for Breach of Contract/Warranty.

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This requires Plaintiff's Complaint to set forth enough ***factual*** allegations to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The Third Circuit directs trial courts to "disregard threadbare recitals of the elements of a cause of action, legal conclusions, and conclusory statements." *City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp.*, 908 F.3d 872, 878-79 (3d Cir. 2018). Here, Plaintiff failed to state a claim upon which relief may be granted for breach of contract/warranty because, among other things, Plaintiff's pleadings omitted essential facts necessary to establish a contract, *e.g.*, an offer, an acceptance, and a meeting of the minds, with respect to specific transactions (*i.e.*, contracts) for the sale of specific goods. Further, Plaintiff failed to state a claim for breach contract/warranty because it also failed to identify the material terms of the alleged contract(s) breached and, instead, generally referred to unspecified "Terms and Conditions of Sale," "specifications" or the parties' alleged "arrangement." (Compl., ¶¶ 86, 90, 93-95.)

To state a breach of contract claim under New Jersey law, a plaintiff must allege "(1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007). "[A] complaint must, at a minimum, identify the contracts and provisions breached." *Khorchid*, 2018 WL

5149643, at *9 quoting *Epotec Pres., Inc. v. Engineered Materials, Inc.*, 2011 WL 867542, at *8 (D.N.J. Mar. 9, 2011). ***Failure to allege the specific provision of the contracts breached is grounds for dismissal***. *Id.* citing *Skypala v. Mtg. Regist. Sys., Inc.*, 655 F.Supp.2d 451, 459 (D.N.J. 2009) (dismissing claim where "the Complaint does not identify the provisions Plaintiff asserts were breached"). In the *Khorchid* case, for example, the court dismissed plaintiff's breach of contract claim as the complaint did not contain adequate pleading concerning "which contract" and "which provisions" were at issue. *Id.* at *10. Similarly, under Pennsylvania law, to state a claim for breach of contract, a plaintiff must allege: "(1) the existence of a contract, ***including its essential terms***; (2) a breach of a duty imposed by the contract; and (3) resultant damage." *Woods v. ERA Med LLC*, No. 08-2495, 2009 WL 141854, at *3 (E.D. Pa. Jan. 21, 2009) (emphasis added) (quoting *Pittsburgh Constr. Co. v. Grifith*, 834 A.2d 572, 580 (Pa. Super. 2003)).

In this case, because Plaintiff's allegations concerning the existence of a contract and its terms are conclusory, its threadbare recitals of breach of contract/warranty causes of action are insufficient. Plaintiff's Complaint lacks the factual allegations necessary to state a plausible claim. It lacks the specifics to demonstrate the essential terms of the contract(s), when the contract(s) were entered into, the specific provisions upon which there was a meeting of the minds, the specific provisions breached, and the specific products at issue in each transaction (*i.e.*, contract). Indeed, the only specifics Plaintiff provided regarding the parties' "arrangement" (*see* Compl., ¶ 90) are incorrect as the contracting parties did not include Thermo Fisher Scientific Inc., but rather Fisher HealthCare or other independent, affiliated third parties.

Similarly, Plaintiff's allegation that Thermo Fisher Scientific Inc. warranted "each product it sold would meet its specification[s] and would be free of defects in materials and workmanship" (*see* Compl., ¶ 93) fails to state a claim for at least two additional reasons. ***First***, the Terms and Conditions of Sale expressly state in the "WARRANTY" section no warranty is provided by "Seller" for goods originally manufactured by others or obtained from a third party supplier.[9] But Plaintiff alleges only that the goods at issue were ***sold*** by Thermo Fisher Scientific Inc., not that they were ***manufactured*** by Thermo Fisher Scientific Inc.[10] Plaintiff's Complaint indicates the actual goods sold were manufactured by third-parties, including affiliated entities of Thermo Fisher Scientific Inc. (Compl., ¶¶ 2, 24-25, 81.) ***Second***, Plaintiff's warranty allegations are refuted by the "WARRANTY" section of the Terms and Conditions of Sale which state in all capital letters: "***SELLER***

[9] *See, e.g.,* Yeckel Decl., Ex. 4, Terms and Conditions of Sale, effective April 23, 2020, at 4, § 7, "Notwithstanding the foregoing, Products supplied by Seller that are obtained by Seller from an original manufacturer or third party supplier are ***not warranted by Seller***, but Seller agrees to assign to Buyer any warranty rights in such Product that Seller may have from the original manufacturer or third party supplier . . ." (emphasis added). *See also id.*, Ex. 3 at 4; *id.*, Ex. 5 at 2-3, § 7.

[10] *See* Compl.,¶ 2, "[Defendant] sells various COVID-19 testing instruments . . ."; *id.* at ¶ 7, "TFS marketed and sold various products"; *id.* at ¶ 24 alleging "customer can order LTC's products through [Defendant]"; *id.* at ¶ 29, "TGX purchased . . . through [Defendant]"; *id.* at ¶ 31, "TGX purchased various equipment and supplies from [Defendant]" *id.* at ¶ 51, "7500 FDx RT-PCRs, Interpretive Software, reagents and consumables purchased through [Defendant]"; *id.* at ¶ 62, "testing supplies and reagents . . . purchased from [Defendant]"; *id.* at ¶ 81, admitting Defendant "resells . . . MS2[s'] at an increased price".) Indeed, Defendant Thermo Fisher Scientific Inc. does not manufacture any product purchased by Plaintiff; all such products were manufactured by independent, third parties including some third parties affiliated with Defendant through degrees of common ownership. (Yeckel Decl., ¶ 11.)

DOES NOT WARRANT THAT THE PRODUCTS ARE ERROR FREE OR WILL ACCOMPLISH ANY PARTICULAR RESULT."[11]

This Court must not accept Plaintiff's superficial pleading in direct contradiction of the parties' contract(s). Plaintiff's conclusory allegations and legal conclusions are insufficient to state a claim. They fail to demonstrate the: (1) existence of one or more contracts with Defendant; or (2) essential terms of any such contract(s) allegedly breached. Given such bare bones pleading, Defendant is without sufficient notice and opportunity to defend against Plaintiff's claims and must not be made to endure the time and expense of discovery.[12] Accordingly, Counts I and II fail to state a claim and must be dismissed.

III. PLAINTIFF FAILED TO PLEAD REASONABLE/JUSTIFIABLE RELIANCE IN COUNTS III AND IV OF ITS COMPLAINT.

Reasonable/justifiable reliance is a necessary element of Plaintiff's fraud and negligent misrepresentation claims, whether pleaded under New Jersey or Pennsylvania law.[13] Notwithstanding Plaintiff's conclusory pleading of reliance in its Complaint, Plaintiff cannot satisfy that necessary element as a matter of law as the express terms of the contract(s) at issue preclude reliance in at least two respects. ***First***, the Terms and

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[11] *See* Yeckel Decl., Ex. 3, Terms and Conditions of Sale, effective Sept. 9, 2019 at 4-5; *id.*, Ex. 4 at 4-5, § 7; *id.*, Ex. 5 at 3, § 7, emphasis added.

[12] *See Twombly*, 550 U.S. at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process."); *Iqbal*, 556 U.S. at 678-79 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

[13] *See, e.g., Torsiello v. Strobeck*, 955 F.Supp.2d 300, 316 (D.N.J. 2013) (reasonable reliance is an element of common law fraud, and justifiable reliance is an element of negligent misrepresentation, under New Jersey law); *Tran v. Metropolitan Life Ins. Co.*, 408 F.3d 130, 135 (3rd Cir. 2005) (justifiable reliance is an element of both fraudulent misrepresentation and negligent misrepresentation claims under Pennsylvania law).

Conditions of Sale contain a complete integration clause. ***Second***, the Terms and Conditions of Sale contain language negating any reasonable/justifiable reliance on representations allegedly made regarding the performance of products Plaintiff purchased. Additionally, Plaintiff's claim of reasonable/justifiable reliance cannot stand, as a matter of law, in light of Plaintiff's admitted knowledge of: (1) alleged product failures that Defendant informed it were not caused by any failure of Plaintiff's own laboratory staff, (2) the "FDA Alert to Clinical Laboratories Regarding TFS's Products," and (3) the "FDA Device Recall" relating to TaqPath RT-PCR COVID-19 Kits with COVID-19 Interpretive Software—each of which is alleged in the Complaint. (Compl., ¶¶ 21-27, 49, 54, 72.)

The Terms and Conditions of Sale could not be more clear concerning integration:

> This is the complete and exclusive statement of the contract between Seller and Buyer with respect to Buyer's purchase of the Products. No waiver, consent, modification, amendment or change of the terms contained herein shall be binding on Seller unless in writing and signed by Seller and Buyer. * * * Seller's failure to object to terms contained in any subsequent communication from Buyer will not be a waiver or modification of the terms set forth herein.[14]

The Terms and Conditions of Sale contain additional language further demonstrating reliance on alleged representations relating to the quality or performance of the products sold was not reasonable as a matter of law. ***First***, "notwithstanding" any warranties to the contrary regarding whether products will "perform substantially in conformance with Seller's published specifications and be free from defects in material and workmanship," the warranty language expressly provided "***Products supplied by***

[14] *See* Yeckel Decl., Ex. 3, Terms and Conditions of Sale, effective Sept. 9, 2019 at 1; *id.*, Ex. 4 at 1, § 1; *id.*, Ex. 5 at 1, § 1, emphasis added.

Seller that are obtained by Seller from an original manufacturer or third party supplier are not warranted by Seller[.]"[15] ***Second***, and perhaps more important because Defendant did not manufacture any of the goods sold to Plaintiff, the terms and conditions expressly state in all capital letters:

> ***SELLER DOES NOT WARRANT THAT THE PRODUCTS ARE ERROR-FREE OR WILL ACCOMPLISH ANY PARTICULAR RESULT.***[16]

In combination, these facts demonstrate the reliance element of Plaintiff's fraud and negligent misrepresentation counts cannot be established as a matter of law.

Plaintiff's allegations concerning its fraud and negligent misrepresentations claims essentially boil down to statements about the quality or the future performance of goods allegedly sold by Thermo Fisher Scientific Inc. Because those representations are all contradicted by express terms of the written warranty in a completely integrated contract, Plaintiff's conclusory claims of reliance were neither reasonable nor justifiable. To the extent those alleged representations were outside the four corners of the contract at issue, there can be no reliance on them in light of the complete and full integration of the parties' contract(s) and application of the parol evidence rule.

New Jersey and Pennsylvania law on this issue are in harmony. "[T]here is no actual conflict between New Jersey and Pennsylvania's definition of fraudulent inducement or parol evidence rule." *Moore Eye Care, P.C. v. Softcare Solut's. Inc.*, No. 15-5290, 2017

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[15] *See* Yeckel Decl., Ex. 3, Terms and Conditions of Sale, effective Sept. 9, 2019 at 4; *id.*, Ex. 4 at 4, § 7; *id.*, Ex. 5, at 2, § 7, emphasis added.

[16] *See* Yeckel Decl., Ex. 3, Terms and Conditions of Sale, effective Sept. 9, 2019 at 4-5; *id.*, Ex. 4 at 4-5, § 7; *id..*, Ex. 5 at 3, § 7, emphasis added.

WL 3838657, at *6 (E.D. Pa. Sept. 1, 2017); *see also Atl. Pier Assocs., LLC v. Boardakan Rest. Partners*, 647 F.Supp.2d 474, 489 (E.D. Pa. 2009) ("there is no conflict between the application of the parol evidence rule under Pennsylvania and New Jersey law"). "[B]oth Pennsylvania and New Jersey courts allow final disposition based upon the parol evidence rule at the motion to dismiss stage." *Atl. Pier Assocs.*, 647 F.Supp.2d at 489 (citing cases). Accordingly, this Court should apply the law of the forum state, New Jersey.[17]

"It is manifestly unreasonable" for a party to rely on prior oral statements when the express language of the contract is written "explicitly nullifying any previous agreements, oral or written." *Alexander v. CIGNA Corp.*, 991 F. Supp. 427, 436 (D.N.J. 1998). Where a contract contains an integration clause, the parol evidence rule generally bars the introduction of evidence of extrinsic negotiations or agreements to supplement or vary its terms. *CDK Glob., LLC v. Tulley Auto. Grp., Inc.*, No. 15-310, 2016 WL 1718100, at *3 (D.N.J. Apr. 29, 2016). This is especially true in cases like this when the parties to the contract are "particularly experienced, knowledgeable business people." *Alexander*, 991 F. Supp. at 436. Under the facts of the present case, Plaintiff's fraud and negligent misrepresentation claims are, therefore, barred as matter of law.

There is an exception that is inapplicable to this case for evidence of fraud in the inducement; such evidence is not offered to add or change contract terms, but to void the contract altogether. *Ocean Cape Hotel Corp. v. Masefield Corp.*, 164 A.2d 607, 611 (N.J.

[17] *Kase v. Seaview Resort & Spa*, 599 F.Supp.2d 547, 556 (D.N.J. 2009); *Ciecka v. Rosen*, 908 F.Supp.2d 545, 557 (D.N.J. 2012); *cf. Kerrigan v. Otsuka Am. Pharm., Inc.*, 560 F. App'x 162, 167 (3d Cir. 2014) (finding in light of no actual conflict between New Jersey and Pennsylvania law the court "may 'refer interchangeably' to" the law of both states).

App. Div. 1960). Significantly, the alleged fraud must concern a matter ***not addressed in the agreement***; in other words, the subject of the misrepresentation must be "wholly extraneous" to the agreement. *Travelodge Hotels, Inc. v. Honeysuckle Enters., Inc.*, 357 F.Supp.2d 788, 795 (D.N.J. 2005). Where, by contrast, the alleged misrepresentations are addressed by the terms of the contract, the claim becomes one for breach of contract, not fraudulent inducement. *CDK Glob.*, 2016 WL 1718100, at *3. In such cases the integration clause bars the fraud claim. *RNC Sys., Inc. v. Modern Tech. Grp., Inc.*, 861 F.Supp.2d 436, 454-55 (D.N.J. 2012).

Plaintiff's allegations of fraudulent inducement in this case all concern the quality and performance of the products allegedly sold by Thermo Fisher Scientific Inc. The alleged misrepresentations are either consistent with the warranties alleged by Plaintiff, or they are "contradictory of the express words"[18] of the Terms and Conditions of Sale which state "Seller does not warrant that the Products are error-free or will accomplish any particular result." In either event, they concern matters addressed in the alleged contract(s) that are not wholly extraneous to the alleged contract(s), therefore, Plaintiff could not reasonably or justifiably rely on them as a matter of law. In light of the integration clause and express terms of the alleged contract(s), as well as Plaintiff's admissions in the Complaint, Plaintiff's claims for Fraud and Negligent Misrepresentation must be dismissed.

[18] *RNC Sys.*, 861 F.Supp.2d at 454.

IV. PLAINTIFF'S FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS ARE BARRED BY THE ECONOMIC LOSS DOCTRINE.

Both New Jersey and Pennsylvania recognize the economic loss doctrine and apply it to bar tort claims. Generally, the economic loss doctrine prohibits plaintiffs from recovering in tort economic losses to which they are entitled only by contract. *Arcand v. Brother Intern. Corp.*, 673 F.Supp.2d 282, 308 (D.N.J. 2009); *see also KDH Elec. Sys., Inc. v. Curtis Tech. Ltd.*, 826 F.Supp.2d 782, 801 (E.D. Pa. 2011). Whether a tort claim can be asserted alongside a breach of contract claim depends on whether the tortious conduct is extrinsic to the parties' contract. *Id.* Here, Plaintiff's claims for fraud and negligent misrepresentation are barred by application of the economic loss doctrine, under New Jersey and/or Pennsylvania law, as Plaintiff seeks only to recover its economic losses.

A. New Jersey's Economic Loss Doctrine Law Bars Fraud Claims.

Courts in this district generally distinguish between fraud claims intrinsic to the contract, which are barred by the economic doctrine, and fraud claims extrinsic to the contract, which are not barred by the economic loss doctrine. *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 144 (3d Cir. 2001) ("The New Jersey District Courts still hold that fraud claims not extrinsic to underlying contract claims are not maintainable as separate causes of action."); *7-Eleven, Inc. v. Maia Inv. Co.*, 2015 WL 1802512, at *5 (D.N.J. Apr. 17, 2015) ("Although the New Jersey Supreme Court has yet to resolve the question, courts in this District consistently distinguish between fraud in the inducement and fraud in the performance of a contract."). Accordingly, New Jersey's economic loss doctrine bars fraud claims pertaining to the performance of a contract, because performance is intrinsic to the

contract. *See, e.g., Unifoil Corp. v. Cheque Printers & Encoders Ltd.*, 622 F.Supp. 268, 271 (D.N.J. 1985) (finding courts have "construed the law of New Jersey to prohibit fraud claims when the 'fraud contemplated by the plaintiff . . . does not seem to be extraneous to the contract, but rather on fraudulent performance of the contract itself.'")

B. Pennsylvania's Economic Loss Doctrine Bars Fraud Claims.

Pennsylvania state courts are quite hostile to torts alleging economic losses. *See Public Srvc. Enter. Grp. v. Philadelphia Elec. Co.*, 722 F.Supp. 184, 193 (D.N.J. 1989); *Air Prods. And Chems. v. Eaton Metal Prods.*, 272 F.Supp.2d 482, 491 (E.D. Pa. 2003). While the Pennsylvania Supreme Court has not directly addressed how the economic loss doctrine applies to intentional fraud claims, the Third Circuit has predicted it would bar intentional fraud claims "that overlap with contract claims." *Norristown On-Site, Inc. v. Reg'l Indus., L.L.C.*, No. 19-369, 2020 WL 4592745, at *6 (E.D. Pa. Aug. 10, 2020) *quoting Werwinski v. Ford Motor Co.*, 286 F.3d 661, 675-81 (3d Cir. 2002). In *Werwinski*, the Third Circuit held the fraud exception to the economic loss doctrine does not apply where the intentional misconduct relates to the quality of the good sold. 286 F.3d at 677.[19] Where misrepresentations relate to the quality of the goods sold, the misrepresentation is "'intertwined' with, and not 'extraneous' to, [a] breach of warranty claim," and "are properly remedied through claims for breach of warranty." *Id.* at 676-78. When misrepresentations relate to the quality of goods sold, the economic loss doctrine bars tort recovery for purely economic losses. *Id.* Consequently, Pennsylvania's economic loss

[19] *Werwinski* was abrogated on other grounds by *Earl v. NVR, Inc.*, No. 20-2109, 2021 WL 833990 (3d Cir. Mar. 5, 2021).

doctrine bars common law fraud claims pertaining to the performance of a contract, as performance is intrinsic to the contract. *Norristown On-Site*, 2020 WL 4592745, at *6.

C. Both New Jersey and Pennsylvania's Economic Loss Doctrine Bar Negligent Misrepresentation Claims.

Courts routinely dismiss negligent misrepresentation claims on Rule 12(b)(6) motions to dismiss pursuant to the economic loss doctrine.[20] A common denominator requiring dismissals is the failure of a plaintiff's negligent misrepresentation claim to allege tortious conduct extraneous to the contract based on a duty independent of any contractual duties.[21] Here, Plaintiff's negligent misrepresentation claim fails as Plaintiff failed to allege

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[20] *Eagle Traffic Control v. Addco*, 882 F.Supp. 417, 419 (E.D. Pa. 1995); *Whitaker v. Herr Foods, Inc.*, 198 F.Supp.3d 476, 491-92 (E.D. Pa. 2016); *Morrison v. AccuWeather, Inc.*, No. 4:14-CV-0209, 2014 WL 6634909, at *9-10 (M.D. Pa. Nov. 21, 2014) (dismissing negligent misrepresentation claims "with prejudice"); *Excavation Techs., Inc. v. Columbia Gas Co. of Penn.*, 985 A.2d 840, 841-44 (Pa. 2009) (affirming dismissal of negligent misrepresentation claim on a motion to demur); *Cesare v. Champion Petfoods USA Inc.*, 429 F.Supp.3d 55, 66-67 (W.D. Pa. 2019) (dismissing negligent misrepresentation claim "with prejudice"); *Aetna Inc. v. Insys Therapeutics, Inc.*, 324 F.Supp.3d 541, 555-57 (E.D. Pa. 2018); *Unifoil Corp. v. Cheque Printers & Encoders Ltd.*, 622 F.Supp. at 270; *Henry Heide, Inc. v. WRH Prod. Co.*, 766 F.2d 105, 109 (3d Cir. 1985) (applying New Jersey law); *Smith v. Citimortgage, Inc.*, No. 15-7629, 2015 WL 12734793, at *7 (D.N.J. Dec. 22, 2015); *Cudjoe v. Ventures Tr. 2013 I-H-R by MCM Cap. Partners, LLLP*, No. 18-10158, 2019 WL 3852700, at *4 (D.N.J. Aug. 16, 2019); *Park v. Inovio Pharm., Inc.*, No. 15-3517, 2016 WL 796890, at *2 (D.N.J. Mar. 1, 2016); *Longo v. Env't Prot. & Improvement Co., Inc.*, No. 2:16-cv-09114, 2017 WL 2426864, at *6 (D.N.J. June 5, 2017); *In re Hartman*, No. 15-01968, 2017 WL 2230336, at *4 (D.N.J. May 22, 2017) (affirming dismissal of negligent misrepresentation claim).

[21] *Cesare*, 429 F.Supp. at 66-67; *Chand v. Merck & Co.*, No. 19-0286, 2019 WL 3387056, at *6 (E.D. Pa. July 26, 2019) ("if [a] duty arises independently of any contractual duties between the parties, then a breach of that duty may support a tort action") quoting *Dittman v. UPMC*, 196 A.3d 1036, 1054 (Pa. 2018); *Welch v. Nationstar Mortg., LLC*, No. 19-2023, 2020 WL 470305, at *4 (E.D. Pa. Jan. 29, 2020); *Catena v. NVR, Inc.*, No. 2:20-CV-00160, 2020 WL 3412348, at *8 (W.D. Pa. June 22, 2020) ("[t]he economic loss doctrine . . . continues to preclude actions where the duty arises under a contract between the parties"); *Park*, 2016 WL 796890, at *2 (negligent misrepresentation claim dismissed because the

tortious conduct extraneous to the contract(s) at issue and because Defendant owed no duty to Plaintiff extraneous to the contract(s).

D. Analysis: The Economic Loss Doctrine Bar's Plaintiff's Fraud-Based Claims.

Analysis of Plaintiff's fraud-based claims is complicated as the Complaint fails to distinguish between representations upon which Plaintiff relies to assert its fraud-based claims and other representations. In that respect, Plaintiff's Complaint fails to satisfy Rule 9(b). However, a fair reading also demonstrates Plaintiff's allegations of fraud and misrepresentation are intertwined with, and not extraneous to, its breach of contract/warranty claims, and thus barred by the economic loss doctrine. Plaintiff's claims concern only the quality and performance of goods it purchased pursuant to contract, not representations extraneous to contractual duties.

Paragraph 58, for example, demonstrates Plaintiff's claims sound in contract rather than tort. Plaintiff alleges Defendant's "promises and representations" were "inten[ded] to not only profit off of [Plaintiff] without [Plaintiff] receiving the benefit of its bargain, but also [indicative of] [Defendant]'s intent to deceive and defraud [Plaintiff.]" (Compl., ¶ 58.) Accordingly, Plaintiff's pleading of its fraud-based claims are inextricably intertwined

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complaint did not allege a misrepresentation "extraneous to the contract"); *Longo*, 2017 WL 2426864, at *7 (negligent misrepresentation claim dismissed as no independent duty existed apart from duties arising under the contract); *In re Hartman*, 2017 WL 2230336, at *4 (dismissing negligent misrepresentation claim as plaintiff "failed to plausibly state a claim for relief because he has not pleaded . . . [defendant] owed him a duty of care independent from their contractual relationship"); *Amato v. Subaru of Am., Inc.*, No. 18-16118, 2019 WL 6607148, at *21 (D.N.J. Dec. 5, 2019) ("the threshold question regarding the economic loss doctrine's applicability [to negligent misrepresentation claims' is 'whether the allegedly tortuous conduct is extraneous to the contract'").

with contractual "benefit of the bargain" concepts demonstrating they are contract claims dressed-up as tort claims. This is further demonstrated by Plaintiff not pleading damages for its fraud-based claims different in any respect from damages alleged with respect to its contract-based claims—because Plaintiff's tort claims are just re-cast breach of contract/warranty claims. *Petric & Assocs., Inc. v. CCA Civ., Inc.*, No. 3571-17T2, 2020 WL 3041418, at *11 (N.J. App. Div. June 8, 2020) ("courts do not consider fraud claims extraneous to contract claims where both claims possess 'the same measure of damages'") (citing cases).

To the extent the standard for applying the economic loss doctrine to bar negligent misrepresentation claims is different, then Plaintiff's negligent misrepresentation claim must be dismissed as the Complaint fails to allege a duty independent of any contractual duties. Both parties are sophisticated merchants. The relationship of seller and buyer does not impose a duty independent of a sales contract. Numerous court decisions recognize no independent tort duty arises in a sales transaction because sellers like Defendant are in the business of selling products/goods, not providing information. *Battle Born Munitions, Inc. v. Dick's Sporting Goods, Inc.*, No. 18-1418, 2019 WL 1978429, at *8 (W.D. Pa. May 3, 2019) (citing cases). Here, any information provided to Plaintiff was ancillary to the sales at issue and is not analogous to cases involving professional representations made by accountants, lawyers, or architect for pecuniary gain. *See Whitaker*, 198 F.Supp.3d at 491-92. Nor does the Complaint allege or provide a plausible factual basis for concluding a special relationship existed between Plaintiff and Defendant that would impose a duty, independent and separate from a contractual duty, upon Defendant. Accordingly, the

limited exception that might otherwise preclude application of the economic loss doctrine is not satisfied, and Plaintiff's negligent misrepresentation claim must be dismissed.

CONCLUSION

Based upon the foregoing, Thermo Fisher Scientific Inc. respectfully requests this Court to grant its Motion to Dismiss and to dismiss Plaintiff's Complaint against it with prejudice.

Respectfully Submitted,

Date: April 7, 2021

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