IN THE SUPERIOR COURT OF FULTON COUNTY
METRO ATLANTA BUSINESS CASE DIVISION
STATE OF GEORGIA

DELTA AIR LINES, INC.,	)	
	)	
Plaintiff,	)	Civil Action
	)	File No. 24CV013621
v.	)	
	)	
CROWDSTRIKE, INC.,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT CROWDSTRIKE, INC.'S MOTION TO DISMISS

This matter comes before the Court on Defendant CrowdStrike, Inc.'s ("CrowdStrike's") Motion to Dismiss, filed December 16, 2024 ("Motion"). Having reviewed the record including Plaintiff Delta Air Lines, Inc.'s ("Delta's") Response in Opposition to the Motion, filed January 31, 2025 ("Response") and CrowdStrike's Reply Brief in Support of its Motion, filed February 28, 2025, and having considered argument offered during an April 16, 2025 hearing, the Court enters the following order.

1. BACKGROUND[1]

1.1 The Parties

Delta is a Delaware corporation headquartered in Atlanta, Georgia. (Compl. ¶ 8; Ans. ¶ 8.) It describes itself as one of the largest airlines in the world, operating a network of domestic and international routes with over 4,000 daily flights using a large fleet of aircraft. (Id. ¶ 14.) Delta invested billions of dollars in licensing and building its technology systems. (Id. ¶ 19.) Delta contracted with CrowdStrike, a leader in the cybersecurity industry, to assist in detecting and responding to cyber threats to its computer systems. (Id. ¶¶ 1, 19; Ans. ¶ 1, 19.) Delta's claims concern an update CrowdStrike released to Delta and its other customers on July 19, 2024 (the "July Update"). (Id. ¶ 1; Ans. ¶ 1.) CrowdStrike contends the July Update was intended to address a new cyber threat. (Ans. Intro.)

CrowdStrike does not deny the July Update was flawed and led to outages for Delta and its other customers. (See e.g. id. ¶¶ 1,7; Ans. Intro., ¶¶ 1, 7.) Delta alleges the outages "negatively impacted millions of people across the globe" and notes certain commentators have described the July Update "as the 'worst' and 'largest' cyber event in history." (Id. ¶ 1.) As described in more detail below, Delta not only

[1] In light of the appropriate standard for considering the Motion, the Court derives the background statement largely from the allegations of Delta's Complaint. See § 2, infra.

claims the July Update was faulty, it also asserts the July Update was deployed without its authorization and absent prudent measures to assure its quality.

1.2 Delta's Contract with CrowdStrike

Delta entered into a Subscription Services Agreement ("SSA") with CrowdStrike that governed, together with other documents, CrowdStrike's provision of products and services to Delta. (Id. ¶ 73; Ans. ¶ 73.) The SSA had an effective date of June 30, 2022. (Id.) Although Delta's Complaint quotes from the SSA and lodges a claim for breach of this agreement, Delta did not include a copy of the SSA in its pleadings. (Id. ¶¶ 42, 72-80.) However, in its Answer, CrowdStrike cites to the SSA and attaches a copy. (Ans. ¶¶ 55, 64, 70, 75-76, 78, 93, Ex. F.)

The SSA expressly "authorized [CrowdStrike] to access" Delta's computer systems and "to process and transmit data through the Subscription Services in accordance with this [SSA] and as necessary to provide[] Subscription Services." (SSA § 2.2)

In § 6.2(c) of the SSA, CrowdStrike warrants:

> [CrowdStrike] shall take commercially reasonable efforts to avoid the introduction, and [CrowdStrike] will not subsequently introduce into the Delta's computer systems where the Software is installed, any unauthorized 'back door,' 'time bomb,' 'Trojan horse,' 'worm,' 'drop dead device,' 'virus,' 'preventative routines' or other computer software routines designed to: (i) permit access to or use of Delta's computer systems by [CrowdStrike] or a third party not authorized by this Agreement . . . .

The SSA also contains provisions that limit and cap each party's liability and potential damages. (Id. §§ 9.1-9.2.) However, these limits and caps do not apply in the case of gross negligence or willful misconduct. (Id. § 9.3.)

1.3 Microsoft Operating System and Kernel-Level Controls

Many of Delta's computers run on a Miscrosoft Windows operating system ("Microsoft OS"), and "Delta uses Microsoft for some of its most mission-critical servers and most of its employee workstations, airport gate information screens, and productivity solutions." (Compl. ¶¶ 2, 19.) A basic understanding of the inner workings of Microsoft OS is necessary to fully understand Delta's claims, and the parties generally agree on those basics.

There are two levels of programming in the Microsoft OS. The first is "kernel-level" programming which is core to a computer's function. (Id. ¶¶ 20-21; Ans. ¶¶ 20-21.) The kernel manages the computer's hardware and interfaces between the hardware and software. (Id.) The second layer of programming is "user-level." (Id.) Kernel-level programming and user-level programming operate in separate spaces. (Id.) As described by Delta, user-level programming "typically contains non-operating system applications." (Id. ¶ 20.) Delta further contends,

> [b]ecause the kernel is the first level of software operations interfacing with hardware, if software crashes in the kernel, the entire computer crashes. Because of this, deploying unauthorized third-party kernel drivers (or computer programming components that help to operate components at the kernel-level) is very dangerous for an operating system.

(Id. ¶ 21.) CrowdStrike acknowledges in a Windows OS, if a kernel-level driver crashes, it can cause the operating system to crash. (Ans. ¶ 21.)

1.4 CrowdStrike Makes Unauthorized Alterations to Kernel-Level Controls

In light of this danger, beginning with Windows 10, Microsoft requires third parties submit all kernel-level drivers for testing and certification by its Windows Hardware Quality Lab ("WHQL"). (Compl. ¶¶ 23-24.) Both parties agree this certification must be obtained before kernel-level drivers are loaded by Windows OS. (Id.; Ans. ¶ 24.) Delta alleges, "[p]roperly tested, vetted, and verified driver packages are critical to the maintenance and safeguarding of a stable operating system." (Id. ¶ 26.) It also alleges this verification process is particularly important for Early Launch Antimalware ("ELAM") which is software that provides security for computers as they start up. (Id. ¶¶ 24-25.) CrowdStrike acknowledges, "Microsoft requires ELAM vendors certify their drivers through its WHQL prior to being loaded by Windows." (Ans. ¶ 25.) Delta contends CrowdStrike assured Delta, that it complied with the Microsoft certification requirements. (See e.g. Compl. ¶¶ 27, 32-35, 57.)

However, Delta further contends CrowdStrike circumvented the certification process, using its "privileged kernel-level access" to make unauthorized alterations to kernel-level controls as reflected in CrowdStrike's "Falcon" cybersecurity system.

(Id. ¶¶ 30-35.) Delta alleges CrowdStrike designed Falcon "as an unauthorized door and shortcut for CrowdStrike developers" so that it could easily provide "content updates" for its kernel drivers without seeking further Microsoft certification. (Id. ¶ 36.) Consequently, with each new "content update," Delta would receive unverified and unauthorized programming and data running in the kernel level of its Microsoft OS-enabled computers. (Id. ¶ 37.) According to Delta, CrowdStrike hid these practices from it and other customers in order to avoid scrutiny. (Id. ¶¶ 31, 37, 42.) Delta also claims CrowdStrike engaged in this secretive behavior to obtain a competitive advantage over its cybersecurity rivals. (Id. ¶¶ 28-31.)

1.5 Programming Errors in the July Update

Delta alleges this door in the Falcon software set the stage for the problems experienced with the July Update. Whereas the kernel-package certified by Microsoft defined 20 fields, in the July Update, CrowdStrike added an additional field and also changed the programming logic which caused the system to crash. (Id. ¶ 38.) Delta's pleadings offer a detailed explanation of what it believes caused the crash. Simply stated, this programming divergence in the number of input fields expected and the number supplied "directed the computer to look for information in a location that did not exist, which resulted in an 'access violation' and 'out-of-bounds' error the computer could not resolve." (Resp. 5; Compl. ¶ 38.)

1.6 Impact on Delta

Upon deployment of the July Update, many of Delta's workstations, servers, and redundancy systems enabled with Microsoft OS crashed as soon as they "read the faulty CrowdStrike programming and data," prompting the need for a re-start. (Compl. ¶¶ 44-45.) Delta's efforts to restore its normal operations after the July Update were protracted.

For some of Delta's crashed devices, a re-start could not be readily accomplished. (Id. ¶ 45.) With each restart, the Microsoft OS would again encounter the same faulty programming and data causing another crash. (Id.) Many Delta employees could not remove the problematic July Update files from their computers for several hours. (Id.)

For those devices that could re-start, the fix was prolonged as they had to be remediated manually, one at a time. (Id. ¶ 46.) Like many contemporary computer networks, Delta's were designed to be remotely managed, "so that fixes and remediations can be done quickly and consistently across the entire inventory of computer workstations and terminations from a centralized location by the qualified technical personnel." (Id.) However, the problems caused by the July Update could not be resolved remotely and had to be addressed individually and in person. (Id.) This prolonged repair "crippled Delta's business and created immense delays for Delta customers." (Id.) Delta claims it "suffered over $500 million in out-of-pocket

losses from the [July Update], in addition to future revenue and severe harm to its reputation and good will.[2] (Id. ¶ 2.)

1.7 Other Issues with the July Update

1.7.1 Testing and Deployment Issues

Apart from CrowdStrike's kernel-level adjustments, Delta raises other issues about the July Update. First, it alleges, "even computer programming novices would know such fundamental alternations of programming logic require exhaustive testing" which CrowdStrike failed to perform. (See e.g. id. ¶¶ 39, 44, 52.) Delta contends, "[i]f CrowdStrike had tested the [July] Update on even one computer before deployment, the computer would have crashed," alerting CrowdStrike to the error in its programming logic. (Id. ¶ 44.) CrowdStrike denies the allegations and

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[2] In a lengthy narrative "Introduction" to CrowdStrike's Answer and Affirmative Defenses, it offers a differing view of Delta's difficulties in recovering from the July Update.

> CrowdStrike reverted the July 19 content update 78 minutes after it was initially deployed and followed that up immediately with a host of remediations to affected systems. CrowdStrike took responsibility for the outage, investigating the cause of it, publishing insights as to how it occurred, and apologizing to affected stakeholders . . . .
>
> In contrast to CrowdStrike's forthright and collaborative approach, Delta went into attack mode. While Delta alone lagged days behind other airlines in returning to normal operations, it elected to turn down CrowdStrike's repeated offers of help. And, rather than examining how Delta's own business decisions unrelated to CrowdStrike -- before, during, and after July 19 -- caused Delta's uniquely delayed recovery, Delta immediately threatened to sue CrowdStrike for hundreds of millions of dollars.

(Ans. 1-2.) In this same introductory statement, CrowdStrike also asserts allegations about its actions and services are "belied by Delta's own conduct" because,

> [t]o this day, Delta continues to use CrowdStrike's Falcon platform – the very same platform that Delta alleges CrowdStrike deliberately designed to enable malicious, unauthorized 'backdoor' access into Delta's systems.

(Id. 4.)

argues the issue "evaded the multiple layers of CrowdStrike's validation and testing." (Mot. 6.)

Additionally, Delta asserts CrowdStrike imprudently pushed the July Update to most of its customers without staged deployment. (Compl. ¶¶ 43-44.) With staged deployment, a new update is disseminated first to a small and then gradually increasing number of customers so errors can be detected before an update is widely deployed. (Id.) Delta asserts staged deployments are a "basic and standard software development practice[]" known to CrowdStrike. (Id. ¶ 51.) Delta also claims CrowdStrike pushed the July Update to its customers without any rollback capacity which would allow a customer to revert back to the same state as if the deployment had not occurred. (Id. ¶ 44.)

1.7.2 Delta Received CrowdStrike's July Update Absent its Permission

Delta alleges "any kernel-level computer programming and data that alters and changes the system programming and memory needed customer consent." (Id. ¶ 52.) Moreover, Delta alleges, "CrowdStrike offered its clients the ability to turn off automatic updates." (Id. ¶ 31.) Delta asserts it chose not to enable its "automatic update setting." (Id. ¶ 43.) Indeed, Delta alleges it was exceedingly clear "in not allowing for automatic updates in the Falcon System." (Id. ¶ 52.) Delta made this choice, "so that it could control installations and updates onto Delta's infrastructure." (Id. ¶¶ 31, 43, 54.) Despite this "clear" choice not to receive

automatic updates, Delta claims it automatically received the July Update. (Id. ¶¶ 43, 52, 54.)

1.8. CrowdStrike's Actions After the July Update

In the immediate aftermath of the July Update, CrowdStrike did not deny the flaws inherent in the update or the difficulties that resulted from its deployment.[3] A few weeks after the July Update, CrowdStrike published its own analysis as to the cause of the widespread outages resulting from the July Update. (Compl. ¶ 49; Ans. ¶ 49.) It opined on the programming error contained within the July Update and identified problems with its release including: (1) the lack of a staged deployment which CrowdStrike likened to "canary testing" and (2) the lack of control customers could exercise over the type of content contained within the July Update.[4]

1.9 Delta Files the Instant Lawsuit

Delta filed this lawsuit on October 25, 2025 setting forth various substantive claims against CrowdStrike including: Count I – Computer Trespass (O.C.G.A. § 16-9-93); Count II – Trespass to Personalty (O.C.G.A. § 51-10-3); Count III – Breach of Contract; Count IV – Intentional Misrepresentation/Fraud by Omission,

[3] CrowdStrike admits that less than one month after the July Update, its President appeared at a computer hacking conference and accepted an award for the "Most Epic Fail" bestowed upon CrowdStrike for the July Update. In accepting the dubious honor he remarked it is, "super important to own it when you do things horribly wrong, which we did in this case." (Compl. ¶ 7; Ans. ¶ 7.)

[4] See generally External Technical Root Cause Analysis — Channel File 291, CrowdStrike (Aug. 6, 2024), https://www.crowdstrike.com/wp-content/uploads/2024/08/Channel-File-291-Incident-Root-Cause-Analysis-08.06.2024.pdf. (Compl. ¶ 49, n. 20; Ans. ¶ 49.)

and Count VI – Gross Negligence.[5] Delta also asserts two derivative claims: Count VIII – Attorney's Fees and Count IX – Punitive Damages.

On December 16, 2024, CrowdStrike filed its Answer and Affirmative Defenses as well as the instant Motion seeking to dismiss all counts but for Delta's claim for breach of the SSA. (Mot. 3, 38.)

On December 19, 2024, the matter was transferred to the Metro Atlanta Business Case Division pursuant to CrowdStrike's unopposed motion. (Ord. Directing Trans.; Def.'s Unopposed Mot. to Transf.)

The Court heard oral argument on the Motion on April 16, 2025.

2. STANDARD OF REVIEW

CrowdStrike seeks to dismiss Delta's Complaint for failing to state a claim under O.C.G.A. § 9-11-12(b)(6). (Mot. 4-5, 10, 16-17.) As outlined in Doe v. Saint Joseph's Catholic Church, 313 Ga. 558, 561 (2022),

> [a] motion to dismiss for failure to state a claim cannot be granted unless
>
> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

[5] In responding to this Motion, Delta withdrew its Counts V and VII concerning claims for product liability and violations of Georgia's Fair Business Practices Act of 1975 ("FBPA"). (Resp. n. 1.)

In considering a motion to dismiss under O.C.G.A. § 9-11-12(b)(6), a trial court should "construe the pleadings in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor." Id. Further, the trial court's review is restricted to the pleadings. It may "consider only the answer, the complaint, and documents attached to either the answer or the complaint and explicitly incorporated therein by reference." Dep't of Transp. v. Mixon, 355 Ga. App. 463, 465 (2020).[6]

3. ANALYSIS

3.1 The Economic Loss Rule's Application to Delta's Tort Claims

3.1.1 The Economic Loss Rule Generally

CrowdStrike contends Delta turns a blind eye to the SSA which limits CrowdStrike's liability and caps Delta's damages by seeking to recover largely through tort claims. (Mot. 11-17; SSA § 9.) CrowdStrike argues this approach contravenes Georgia's economic loss rule. (Id.) Pursuant to this rule, CrowdStrike seeks to dismiss all of Delta's remaining tort claims. (Mot. 3, 11). This includes Delta's trespass, negligence, and fraud counts. See § 1.9, supra.

The economic loss rule lies at the crossroads between contract and tort law. Its purpose has been described as "to distinguish between those actions cognizable in tort and those that may be brought only in contract . . . ." Flintkote Co. v. Dravo

[6] In its Motion, CrowdStrike cited various online resources which this Court has declined to consider as they are not part of the pleadings. (See e.g. Mot. n. 1-3.) Mixon at 465.

Corp., 678 F.Supp. 2d 942, 949 (11th Cir. 1982) (applying Georgia law). As some judges have noted, Georgia's economic loss rule can be "difficult to decipher" and "has often confounded law students, lawyers, and jurists (Citation omitted)." Int'l Bus. Machines Corps. v. Corning Optical Commc'ns, LLC, Civ. Action No. 1:18-CV-5027-AT, 2019 WL 13233710, at *7 (N.D. Ga. Sept. 11, 2019).

As a general matter, "[t]he economic loss rule[] provides that a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort." Id. CrowdStrike argues any duty relating to its products or services provided to Delta arises from and is governed by the SSA, and, therefore, Delta has impermissibly transformed contract disputes into tort claims which should be dismissed under the economic loss rule. (Mot. 11-17.)

3.1.2 Delta's General Arguments Against Application of the Economic Loss Rule

Delta has made some general arguments as to why the economic loss rule is inapplicable which the Court does not find persuasive.

Delta argues that it suffered property damages, not just economic losses which allow it to pursue a tort recovery. (Resp. 22.) Delta contends that while it "may have ultimately been able to recover the use of its machines, that fact does not preclude the finding of property damage," such that its losses were not solely economic. (Id.) In support, Delta cites solely to a factually dissimilar Arizona case, Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc., Civ. Action No. 99-185 TUC

ACM, 2000 WL 726789 (D. Ariz. Apr. 18, 2000). It addressed the coverage afforded by a business interruption insurance policy when the insured's data center experienced a power outage. Id. at *1. The United States District Court of Arizona determined the policy's definition of "physical damage" extended to "loss of functionality" experienced by the insured's computer systems. Id. at * 2.

The Court finds this authority, which does not address the economic loss rule, unpersuasive based on Georgia authority more directly addressing the question at hand. Georgia courts generally look at the nature of the damages suffered in determining whether the economic loss rule applies. See Flintkote at 947-950 (costs of repairing a defective product was an economic loss not recoverable in tort); see also Vulcan Materials Co., Inc. v. Driltech, Inc., 251 Ga. 383, 387 (1983) ("The economic loss rule prevents recovery in tort when a defective product has resulted in the loss of value or use of the thing sold, or the costs of repairing it."); Home Depot U.S.A., Inc. v. Wabash Nat'l Corp., 314 Ga. App. 360, 366 (2012) ("costs of the repair or replacement of the defective product . . . unaccompanied by any claim of personal injury or damage to other property" are economic losses). Based on Delta's acknowledgment that its computers were repaired, the Court finds Delta

experienced no property damage that would avoid application of Georgia's economic loss rule. (Id.; Compl. ¶¶ 45-46.)[7]

Delta also asserts that the application of the economic loss rule contravenes the intent of the SSA. (Id. 23-24.) It relies on the limitation of liability and exclusion of consequential damage provisions found in § 9 of the SSA. Delta argues these provisions expressly anticipate a party to the contract could recover in "tort" or could recover "punitive damages" which are normally associated with tort claims. (SSA §§ 9.1-9.2.) Section 9 also provides its limitations would not apply to "liability and damages arising out of a party's gross negligence or willful misconduct." (Id. § 9.3.) Based on these references, Delta claims the parties intended that the economic loss rule would not apply to the SSA; otherwise, Delta continues, these references to torts and related damage concepts are rendered "meaningless and mere surplusage." (Resp. 24.) See generally Dean v. Dean, 361 Ga. App. 698, 701 (2021) ("a contract should not be construed in a manner that would render any of its provisions meaningless or mere surplusage.")

[7] Delta also asserts that the economic loss rule does not bar its claims for "reputational injury" which it contends is a "type of personal injury" and thus not subject to the economic loss rule. (Resp. 22-23.) Again, Delta relies on a single case that does not address the economic loss rule -- Hamilton v. Powell, Goldstein, Frazier & Murphy, 167 Ga. App. 411, 416 (1983) -- and offers very little in the way of analysis. (Id.) As CrowdStrike notes, Hamilton pre-dates Vulcan Materials, a seminal Georgia Supreme Court decision regarding the economic loss rule. (Reply 9.) Further, Hamilton concerns a professional malpractice claim which involves a special relationship between the parties that is not subject to the economic loss rule. See § 3.3.1.3, infra. Accordingly, the Court is not persuaded by this undeveloped argument that the July Update caused Delta to suffer the type of personal injury sufficient to avoid the economic loss rule.

The Court rejects this argument that applying the economic loss rule is violative of the contracting parties' intent. As alleged by Delta, it and CrowdStrike are both successful, sophisticated business entities. (Compl. ¶¶ 14-19.) If they sought to avoid application of this well-established rule, they could have clearly done so. Moreover, as discussed in more detail below, the economic loss rule is not an absolute barrier to all tort claims. There are numerous exceptions where it does not apply, and § 9 of the SSA merely reflects the parties' acknowledgment that a tort claim could arise through the course of their relationship.

3.1.3 Exceptions to the Economic Loss Rule

Because the economic loss rule arises in diverse disputes giving rise to a host of injuries, numerous exceptions have evolved through caselaw. See generally IBM at *8 (outlining various exceptions to the economic loss rule recognized by Georgia courts). These include the independent duty exception which concerns duties that arise from sources outside the contract. "The independent duty exception to the economic loss rule applies in cases where the plaintiff identifies a statutory or common law duty that would apply regardless of the existence of an underlying contract." IBM at *9. For example, in Hanover Ins. Co. v. Hermosa Constr. Grp., LLC, 57 F. Supp. 3d 1389, 1397 (N.D. Ga. 2014), a motion to dismiss under the economic loss rule was denied in part. The Northern District of Georgia held a statutory duty imposed under Georgia's Uniform Fraudulent Transfers Act satisfied

the independent duty exception because "the Georgia legislature created a cause of action independent of any underlying breach of contract claim." Id.

Another exception to the economic loss rule is when a defendant violates a duty imposed by virtue of a special relationship between the parties. See generally IBM at *8.

Georgia has also "recognized exceptions to the economic loss rule in (1) cases of misrepresentation/fraud and (2) where the conduct of the defendant poses an unreasonable risk of injury to other persons or property. . ." Id.

Delta asserts that each of its tort claims falls into one or more of these exceptions. (Resp. 9-22.) Below the Court will address each of Delta's tort claims. It will consider Delta's arguments as to the applicability of any exception that would preclude the economic loss rule as well as CrowdStrike's arguments that the claims themselves are not viable.

3.2 Trespass

3.2.1 The Economic Loss Rule's Application to Delta's Trespass Claims

Delta asserts its trespass claims are based on independent duties that exist apart from the SSA. (Resp. 10-12.) Specifically, Delta alleges CrowdStrike's conduct is independently unlawful under two separate trespass statutes, O.C.G.A. §§ 16-9-93(b) and 51-10-3. (Compl. ¶¶ 61-62, 69-70.)

Arguing against the independent duty exception, CrowdStrike asserts Delta's trespass claims concern the same "harm and damage" as its contract claim and thus give rise to no independent duty. (Reply 15.) CrowdStrike's focus on the harm Delta suffered is misplaced as this exception focuses on the nature of the duty owed and not the similarity of the damages suffered. As noted in Rosen v. Protective Life Ins. Co., Civ. Action No. 1:09-cv-03620 WSD, 2010 WL 2014657, at *9 (N.D. Ga. May 20, 2010), "[w]here a party's claim **arises only from a duty owed in contract** and the party only alleges economic damages the economic loss rule applies (Citations and punctuation omitted; emphasis supplied)."

The Court finds the present situation much like the one addressed in AMC Cobb Holdings, LLC v. Plaze, Inc., Civ. Action No. 1:18-CV-04865-SDG, 2019 WL 13207581 (N.D. Ga. Dec. 11, 2019) where the Northern District of Georgia denied a motion to dismiss trespass claims in a lease dispute. It held these claims were "not barred by the economic loss rule because an independent duty to not commit trespass exist[ed]" apart from the parties' lease agreement. Id. at *4.[8] Likewise, Delta's trespass claims are not barred by the economic loss rule because these statutory duties prohibiting trespass are separate and apart from any duties imposed upon CrowdStrike by the SSA.

[8] Similarly, in Sheppard v. Yara Eng'g Corp., 248 Ga. 147, 149 (1981), the Georgia Supreme Court held allegations of the unauthorized removal of topsoil were sufficient to allow the trespass claim to proceed despite the existence of a mining contract between the landowner and defendant.

The primary authority CrowdStrike relies upon, Lancaster v. Susa P'Ship, L.P., 300 Ga. App. 567 (2009) does not lead to a different outcome. (Reply 15-16.) In Lancaster, the personal belongings plaintiff placed in a rented storage space disappeared, leading plaintiff to sue the self-storage facility and its representatives for breach of contract and several torts including trespass to chattels. Id. at 567. The appellate court affirmed summary judgment for the storage facility on all the tort claims. It held: "[m]ere failure to perform a contract does not constitute a tort. A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law." Id. at 570. Lancaster does not discuss a trespass statute or identify an alleged independent duty arising from its facts. Thus, it fails to illuminate the issue at hand.

3.2.2 Viability of Delta's Trespass Claims

3.2.2.1 Computer Trespass

In its Count I, Delta seeks to recover for computer trespass under O.C.G.A. § 16-9-93(b) which is part of the Georgia Computer Systems Protection Act ("GCSPA"). O.C.G.A. § 16-9-90 et seq. It provides the criminal offense of computer trespass occurs when,

> [a]ny person who uses a computer or computer network with knowledge that such use is without authority and with the intention of:
>
> (1) Deleting or in any way removing, either temporarily or permanently, any computer program or data from a computer or computer network;

(2) Obstructing, interrupting, or in any way interfering with the use of a computer program or data; or

(3) Altering, damaging, or in any way causing the malfunction of a computer, computer network, or computer program, regardless of how long the alteration, damage, or malfunction persists . . . .[9]

O.C.G.A. § 16-9-93(b). O.C.G.A. § 16-9-93(g)(1) establishes a private cause of action for computer trespass.

The statute establishes three elements to this claim: (1) the user acted without authority, (2) the user knew his use lacked authority, and (3) the user intended to commit an activity prohibited by O.C.G.A. § 16-9-93(b). Mindful of the stage at which the Court is considering the Motion, the Court finds Delta properly alleged a computer trespass claim.

As to the first element, the GCSPA directs a user's access is "without authority" when it "exceeds any right or permission granted by the owner of the computer or computer network." O.C.G.A. § 16-9-92(18). CrowdStrike argues the SSA expressly allowed it to access Delta's computer systems in order to perform the security updates that were the subject of the SSA. (Mot. 21-23; Reply 20; SSA §§ 2.1- 2.2.) However, the SSA expressly conditioned that any access it provided must be performed "in accordance with" the agreement. (SSA § 2.2.) Because Delta has

[9] While Delta's Complaint does not specify which of the three subsections of O.C.G.A. § 16-9-93(b) CrowdStrike violated, it is expansively drafted to suggest Delta may have violated all three. (See Compl. ¶¶ 60-64.) However, in briefing and oral argument, Delta made no argument under subsection (b)(2). (See Resp. 27-28.) Accordingly, the Court focuses its attention on subsections (b)(1) and (3).

alleged that CrowdStrike's access was not performed "in accordance with" the agreement and contrary to Delta's election not to receive automatic updates, it has alleged the access was made without authorization. (See e.g. Compl. ¶¶ 31, 37, 42-43, 54, 60-61, 76.)

As to the second element, CrowdStrike contends the Complaint fails to allege that it knowingly accessed Delta's computer systems without authority. (Mot. 23; Reply 20-21.) See Wachovia Ins. Servs., Inc. v. Fallon, 299 Ga. App. 440, 450 (2009) (unauthorized use alone does not establish the knowledge element of a violation under GCSPA). However, Delta alleged that CrowdStrike intentionally designed its Falcon platform to circumvent the permissions required by Delta. (Compl. ¶¶ 4, 70.) Delta has sufficiently alleged CrowdStrike's unauthorized access was knowingly committed.

As to the third element of intent, Delta has sufficiently alleged the intentional deletion of computer programming and data and the alteration of computers and computer programs under O.C.G.A. § 16-9-93(b)(1) and (3). (Id. ¶¶ 62-63.) CrowdStrike interprets this element as requiring the intent to cause harm or disruption to the impacted computer, computer network, or computer program. (Mot. 24; Reply 21-22.) The Court disagrees and finds the intent required is the intent necessary to perform those acts prohibited by O.C.G.A. § 16-9-93(b). As addressed above, to impose liability under the statute, a plaintiff must demonstrate

that the prohibited act was performed with the knowledge that it was unauthorized. It is not necessary to further demonstrate the act was motivated by ill will or malevolence.[10] See generally Ware v. Am. Recovery Sol. Servs., Inc., 324 Ga. App. 187, 191 (2013) ("The statute only requires that the intruder use a computer or a network knowing he was without authority and either temporarily or permanently remove data . . .")

Delta alleges that in deploying the July Update, CrowdStrike "deleted and removed previously certified computer programming or data, replacing them with what was unverified, untested and unauthorized." (Compl. ¶ 63.) This indicates CrowdStrike intentionally performed an act covered by O.C.G.A. § 16-9-93(b)(1). Delta also alleges that by deploying its July Update, CrowdStrike "altered" Delta's computers, computer networks, and computer programs. (Compl. ¶ 62.) This is an act prohibited by O.C.G.A. § 16-9-93(b)(3). These allegations fulfill the intent element of O.C.G.A. § 16-9-93(b).

[10] CrowdStrike relies heavily on Kinslow v. State, 311 Ga. 768 (2021), to support its intent argument. (Reply 21-22.) However, Kinslow, was decided on far different facts and in a far different posture. In that criminal case, evidence presented at trial indicated the defendant, a disgruntled employee, changed computer email settings so that he was forwarded copies of emails addressed to his supervisor. Id. at 769. The defendant was charged and convicted of "interfering with data from a computer" in violation of O.C.G.A. § 16-9-93(b)(2). Id. at 770. Kinslow does not concern subsections (b)(1) or (b)(3). In a divided opinion, this conviction was reversed based on a narrow reading of what constituted interference under subsection (b)(2). Id. at 771-777. The reversal was informed by the limited manner in which the case was prosecuted. Id. at 768, see also 777 (concurrence of J. Bethel). Of particular note to the question at hand, Kinslow does not purport to address the intent required to demonstrate computer trespass, and, while the majority determined the portion of (b)(2) on which the State exclusively relied did not reach the defendant's conduct, it observed, "the statute in general is extremely broad." Id. at 768.

3.2.2.2 Trespass to Personalty

In Count II, Delta seeks to recover for trespass to personalty under O.C.G.A. § 51-10-3. It provides, "[a]ny unlawful abuse of or damage done to the personal property of another constitutes a trespass for which damages may be recovered." As a general matter, in construing O.C.G.A. § 51-10-3, "[c]ourts applying Georgia law have found that 'digital trespass' can sustain a claim for trespass upon one's personal belongings." Bowen v. Porsche Cars, N.A., Inc., 561 F. Supp.3d 1362, 1375 (N.D. Ga. 2021).

CrowdStrike first argues Delta's trespass to personalty claim fails because "the General Assembly has enacted a specific statute to address the question of computer trespass." (Mot. 24.) It cites Fleureme v. City of Atlanta, 371 Ga. App. 416, 420 (2024) for the proposition, "[f]or purposes of statutory interpretation, a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent." (Id.) CrowdStrike ignores the contrary legislative intent expressly stated in O.C.G.A. § 16-9-93(g)(3) which directs the GCSPA "shall not be construed to limit any person's right to pursue any additional civil remedy otherwise allowed by law." [12] See also O.C.G.A. § 9-11-18(a) (party filing a complaint may join "as many claims, legal or equitable, as he has against an opposing party").

[12] Moreover, Fleureme was discussing a straightforward question of statutory interpretation – comparing various statutory provisions for accomplishing service, not the dismissal of claims. Similarly, the other case cited by CrowdStrike, In re Krieg, 951 F.3d 1299, 1301 (11th Cir. 2020) also addressed a question of statutory interpretation -

Second, CrowdStrike alleges Delta fails to state a claim under O.C.G.A. § 51-10-3 because its allegations do not fulfill the statutory elements reflecting the "unlawful abuse of or damage" to Delta's computer systems. CrowdStrike argues Delta has not pled that its actions were "unlawful" because, once again, CrowdStrike had authority to access Delta's computer systems under the SSA. (Mot. 24-25.) At this motion to dismiss stage, the Court rejects this argument finding Delta's pleadings allege CrowdStrike exceeded its authority in accessing Delta's computer system. (See e.g. Compl. ¶¶ 31, 37, 42-43, 60-61, 76-77.)

CrowdStrike also argues Delta has failed to allege the intent necessary for this trespass claim. Like the defendant in Bowen, CrowdStrike has "fail[ed] to cite to a Georgia case where a scienter requirement has been imposed as a prerequisite for a claim for trespass to personalty." Bowen at 1376.[13] The Court does not find any such scienter requirement.

"The gist of a trespass to personalty claim is the injury done to the possession of the property (Citation and punctuation omitted)." Othman v. Navicent Health, Inc., 373 Ga. App. 240, 250 (2024). This same emphasis on protecting the right of

- comparing various statutes addressing the recording requirements for a security deed, not the dismissal of claims. (Mot. 24.)

[13] CrowdStrike relies on Fowler v. S. Wire & Iron, Inc., 104 Ga. App., 401, 406 (1961) rev'd on other grounds 217 Ga. 727 (1962) for the proposition, "the intention to inflict an injury, which is an essential element of an intentional personal tort (trespass), is entirely lacking where injury is the result of an accident, or a negligent act (case)." Fowler did not address the application of O.C.G.A. § 51-10-3 but rather grappled with the wholly unrelated premise of whether the Workers Compensation Act foreclosed an injured employee's intentional tort action against his employer who was alleged to have willfully forced the employee to work in unsafe conditions as a retaliatory measure. Id. at 402.

possession is likewise the heart of a claim for trespass to real property. O.C.G.A. § 51-9-1 ("The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie."); see also Justice v. SCI Georgia Funeral Servs., Inc., 329 Ga. App. 635, 640 (2014) (trespass claim failed when plaintiff offered no evidence of interference with his "possessory interest in the realty.") Accordingly, the Court finds caselaw considering the intent to commit trespass upon real property as persuasive in considering the intent necessary to commit a trespass to personalty.

In Lanier v. Burnette, 245 Ga. App. 566, 570 (2000), the Georgia Court of Appeals flatly rejected the argument that no liability attaches for an "unintentional trespass." See also Floyd v. Chapman, 353 Ga. App. 434, 439 (2020)("Liability for a trespass upon real property produced by a voluntary act is absolute . . . so long as the act causing the trespass was intended.") In light of this persuasive authority, the Court finds that to state a claim, Delta need not allege that CrowdStrike intended to interfere with its personalty, only that it intended to perform the acts which led to the interference.

3.3 Gross Negligence[14]

3.3.1 Application of Economic Loss Rule to Delta's Gross Negligence Claim

3.3.1.1 Nature of Delta's Harm

Delta contends the nature of its injuries reflect that its gross negligence claim falls within the independent duty exception to the economic loss rule. (Resp. 16.) Delta relies primarily on Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363 (1973) wherein a homeowner sued a pest control company that he contracted with after his home suffered termite damage. Orkin pre-dates the economic loss rule in Georgia but grapples with the similar notion of when a contract breach can give rise to an independent tort action. Id. at 365-366. The Georgia appellate court found the homeowner was relegated to his contractual remedies because the only loss he suffered was "the loss of the hoped-for value of his bargain" – a house free from termite damage.

Based on this reasoning, Delta argues,

> Georgia courts distinguish between a plaintiff's mere failure to receive the contracted-for bargain (a contract claim) and an independent injury plaintiff suffers due to the contractor's lack of care in the face of foreseeable danger (a tort claim.) Here . . . Delta does not claim injury because CrowdStrike failed to deliver the bargained-for protection against third-party cyber-attacks. Instead, Delta seeks to recover

[14] Delta argues that regardless of the disposition of its gross negligence claim, its allegations of CrowdStrike's grossly negligent conduct continue to stand for purposes of determining whether Delta's contract claim should be exempt from the SSA's limitations of liability. (Resp. n. 16; SSA § 9.) CrowdStrike acknowledges that it only seeks dismissal of the gross negligence claim and the parties may continue to litigate allegations that its actions were grossly negligent in the context of Delta's claim for breach of contract. (Reply 19.)

> injuries it suffered because CrowdStrike's own grossly careless actions crashed Delta's computer network – the infliction of an independent injury. (Citation and punctuation omitted).

(Resp. 16.)

Orkin is more than fifty years old. The concept that Delta relies upon -- evaluating a party's contractual expectations in determining whether he can pursue a tort claim -- does not appear to hold. Murray v. ILG Techs., LLC, 378 F. Supp. 3d 1227, 1241-1244 (S.D. Ga. 2019) thoughtfully traces how Georgia's jurisprudence around the economic loss rule has evolved and how its application has expanded. The focus on whether a party received the "benefit of his bargain" appears to be a remnant from the early days of the economic loss rule when it only applied to product liability actions. Id. at 1242. As Murray observes, under current Georgia law, when the parties have a contract, "all negligence-based tort actions where a plaintiff seeks to recover purely economic losses" are precluded by the economic loss rule unless there is some applicable, legally recognized exception. Id. at 1244.

With that in mind, the Court will consider the various independent duty exceptions advanced by Delta. Delta claims a number of independent duties allow its claim for gross negligence to avoid the economic loss rule – an independent duty owed by skilled service providers, an independent duty to exercise care not to cause foreseeable injury, and the existence of a special relationship between it and CrowdStrike. (Resp. 12-18.)

3.3.1.2 Independent Duty Owed by a Skilled Service Provider

Delta contends CrowdStrike, as a skilled service provider, owed it a duty independent of the SSA. (Resp. 12-16.) This independent duty is described in Schofield Interior Contractors, Inc. v. Standard Bldg. Co., 293 Ga. App. 812 (2008). Schofield concerned a building renovation project where the trial court granted summary judgment on the negligence claim plaintiffs filed against the project's manager. On appeal the project manager asserted this was not error because he owed plaintiffs no duty other than a contractual obligation. Id. 813-814. The Georgia Supreme Court disagreed. It held,

> [a]s a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner. The law imposes upon building contractors **and others performing skilled services** the obligation to exercise a reasonable degree of care, skill, and ability, which is generally taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by others of the same profession (Citation omitted and emphasis added)

Id. at 814. As Schofield recognized, this duty owed by a skilled service provider is independent of the contract. Id.

Delta argues this independent duty owed by skilled service providers precludes application of the economic loss rule to its claim for gross negligence. While Schofield's broad allusion to "other" skilled service providers suggests this independent duty exists outside the context of construction disputes, Delta is hard-

pressed to identify such a case. It relies primarily on IBM where the Northern District of Georgia applied this concept in a dispute involving the construction of the Mercedes Benz Stadium. Id. at *1. (Resp. 13-14.) The plaintiff was a subcontractor in charge of technology suing its sub-subcontractor who was "responsible for designing, implementing, testing, and commissioning a technology system that would deliver voice and data services" for the stadium through an antenna network. Id. Applying Georgia law, the federal court denied a motion to dismiss plaintiff's negligence claims under the economic loss rule finding defendants owed an independent duty to perform skilled services in accordance with industry standards. Id. at *9. While IBM dealt with a defendant who was supplying technological solutions, the claim arose as part of a construction dispute. Id. at *1. The same is true of many cases cited by Delta for application of this skilled service provider exception.[14]

One non-construction case Delta cites where a court expressly relied on the skilled service provider exception is Johnson v. Citimortgage, Inc., 351 F.Supp. 2d 1368 (N.D. Ga. 2004), a non-binding decision of the Northern District of Georgia.

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[14] Jai Ganesh Lodging, Inc. v. David M. Smith, Inc., 328 Ga. App. 713, 724 (2014) (negligent construction claim regarding structural damage to newly constructed hotel allegedly caused by grading contractors); Glen Falls Ins. Co. v Donmac Golf Shaping Co. Inc., 203 Ga. App. 508, 512 (1992) (insurance coverage dispute concerning a negligence claim that arose from placement and construction of a golf course on federally protected wetlands); E. & M. Constr. Co. v. Bob, 115 Ga. App 127, 128 (1967) (contractor repairing home had independent "duty not to negligently and wrongfully injure and damage the property of another.") (Resp. 13-14.)

During oral argument Delta cited other cases that applied the skilled services exception in the context of construction work: Bilt Rite of Augusta, Inc. v. Gardner, 221 Ga. App. 817, 818 (1996) (homeowner sued roofer for negligently installing insulation product) and Church v. SMS Enters., 186 Ga. App. 791, 793 (1988) (flooring contractor who worked on plant renovation was sued after employee slipped on surface she claimed was improperly finished).

In Johnson, the trial court denied a motion to dismiss plaintiff's claim for negligent loan servicing, finding the claim was not pre-empted by the Fair Credit Reporting Act and the plaintiff could possibly develop evidence the loan servicer negligently oversaw his loan. Id. at 1379-1380. However, Johnson has received significant negative treatment, and the Court finds it lacks much persuasive value.[15]

The court has surveyed the other cases cited by Delta where defendant owed a duty independent of the contract and find they are distinguishable as they do not mention the skilled service exception and/or they involve non-economic losses such as personal injury or property damage where the economic loss rule does not apply.

For example, Delta relies upon Monitronics Int'l, Inc. v. Veasley, 323 Ga. App. 126 (2013) where a customer sued the company who monitored her home's security system alarm after she was assaulted inside her home. Id. at 126-128. (Resp. 28.) That case involved a personal injury, and the independent duty at issue did not involve the provision of a skilled service but an extra-contractual duty which the monitoring company undertook voluntarily. Id. at 131.

[15] Courts outside the Northern District of Georgia have disagreed with Johnson. For example, Aleshire v. Harris, N.A., 586 Fed.Appx. 668, 671 (7th Cir. 2013) and Himmelstein v. Comcast of the Dist., L.L.C., 931 F. Supp. 2d 48, 56-61 (D.D.C. 2013) disagreed with Johnson's pre-emption analysis. Subsequent decisions within the Northern District of Georgia also look upon Johnson disfavorably. For example, Spencer v. Nat'l City Mortgage, 831 F. Supp. 2d 1353, 1358-1362 (N.D. Ga. 2011) declined to follow Johnson, again finding fault with its pre-emption analysis. While Kynes v. PNC Mortgage, Civ. Action No. 1:12-CV-4477-TWT, 2013 WL 4718294, at *11-12 (N.D. Ga. Aug. 30, 2013) does not cite Johnson, it granted a motion to dismiss a claim for negligent loan servicing finding no such duty existed.

Delta also relies on Mauldin v. Sheffer, 113 Ga. App. 874, 880 (1966). (Id. n. 7.) In that case, the defendant was a registered professional mechanical engineer who was sued for negligent performance of an oral agreement. The court found an independent duty arising from his professional standing. Not only is this case factually distinct, it pre-dates Georgia's recognition of the economic loss rule which was first articulated in 1975 in Long v. Jim Letts Oldsmobile, 135 Ga. App. 293 (1975). See IBM at * 7 (discussing history of economic loss rule in Georgia).

Delta also cites to Purvis v. Aveanna Healthcare, LLC, 563 F. Supp. 3d 1360, 1372-1373 (N.D. Ga. 2021) and In re Equifax, Inc., Customer Data Sec. Breach Litig., 371 F. Supp. 3d 1150, 1172–1173 (N.D. Ga. 2019). (Id. n. 6, 8.) Both of those cases relied on a different independent duty that requires a defendant to safeguard highly sensitive personal or financial information it receives from a customer against a criminal data breach.

The Court finds the present case is more closely aligned with D.J. Powers Co., Inc. v. Peachtree Playthings, Inc., 348 Ga. App. 248 (2018) which concerned a gross negligence claim a sugar importer filed against a customs broker for its failure to "provide reasonably competent Customs brokerage services." Id. at 248, 251. This failure resulted in additional duties being assessed against the importer. Id. The defendant advertised itself as a licensed customs broker and was performing a skilled service for the importer. However, the importer's gross negligence claim was

precluded by the economic loss rule as the importer suffered only economic losses and could establish no independent duty apart from the parties' contract. Id. at 253-254.

3.3.1.3 Independent Duty to Avoid Foreseeable Harm

Delta also argues that in all cases a contractor has a duty apart from any contract, "to act with ordinary care under the same or similar circumstances to avoid causing foreseeable injury to the hiring party." (Id. 14.) Presumably, most contract breaches could foreseeably harm the hiring party in some way. The broad independent duty advanced by Delta would eviscerate not only the economic loss rule but "the well-settled principle that a defendant's mere negligent performance of a contractual duty does not create a tort cause of action . . . (Citation omitted)." Fielbon Dev. Co., LLC v. Colony Bank of Houston Cnty., 290 Ga. App. 847, 855 (2008).

The cases cited by Delta indicate this duty arises independent of a contract only when the foreseeable harm concerns personal injury or property damages, not economic losses. For example, Delta cites Bills v. Lowery, 286 Ga. App. 301 (2007). (Id. n. 5.) It concerned a tire repairman working on a mobile home who was sued for negligence after his failure to properly secure the home while making a repair resulted in his customer's death. Id. at 302. In that case, the repairman "was required to exercise ordinary care in making such repairs so as not to endanger the

lives and limbs of others by a negligent performance, the consequences of which may be foreseen by him." Id.[17]

Similarly, Delta cites cases where the duty to exercise ordinary care and avoid foreseeable harm caused property damage. (Id. n. 5-6.) In Energy Sys. Grp., LLC v. Ware, Inc., Civ. Action No. 1:14-CV-03049-ELR, 2016 WL 7888028 (N.D. Ga. June 28, 2016), a defendant was sued after one of the boilers it maintained exploded causing extensive property damage. In denying a motion for summary judgment, the trial court found, "[t]he breach of the legal duty to exercise ordinary care not to endanger the persons or property of others exists in law apart from any contractual obligation to do so." Id. at *2; accord Encompass Indem. Co. v. Ascend Techs., Inc., Civ. Action No. 1:13-CV-02668-SCJ, 2015 WL 10582168, at *6-7 (N.D. Ga. Sept. 29, 2015) (the company that performed repair work on the sprinkler system was sued for negligence after a home was damaged in a fire and jury question existed on whether company negligently breached duty to use ordinary care and avoid foreseeable harm).

3.3.1.4 Independent Duty based on a Special Relationship

Delta argues it has a special relationship with CrowdStrike. (Resp. 16-18.)

[17] Delta also cites to McKinney v. Compact Power Servs., LLC, Civ. Action No. 1:13-CV-567-WSD, 2013 WL 12063919, at *4 (N.D. Ga. Apr. 22, 2013) (Resp. n. 6). In McKinney, an employee injured in a forklift accident sued those who had serviced the machine. In addressing a fraudulent joinder argument in a motion to remand, the trial court referenced the independent duty owed by a skilled service person but appeared to primarily rely on the independent duty to make repairs "so as not to endanger the lives and limbs of others by a negligent performance" that existed apart from the repair contract.

A special relationship may impose an independent duty separate from a contract that merits exception from the economic loss rule. See generally Murray at 1243-1244 (the economic loss "rule does not bar recovery of purely economic losses in tort actions where the defendant breaches a duty . . . arising from a special relationship").

Specifically, Delta alleges CrowdStrike "exercise[d] a controlling influence over Delta's interests in the security, reliability and function of the computer systems vital to Delta's business," and therefore CrowdStrike was acting as Delta's fiduciary and agent. (Compl. ¶ 93.) Delta also alleges that it "placed immense trust and confidence in CrowdStrike." (Id. ¶ 82.)

O.C.G.A § 23-2-58 outlines when a confidential relationship may arise. It states,

> [a]ny relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners; principal and agent; guardian or conservator and minor or ward; personal representative or temporary administrator and heir, legatee, devisee, or beneficiary; trustee and beneficiary; and similar fiduciary relationships. [18]

[18] The Court rejects CrowdStrike's argument that the "special" relationship necessary to preclude the application of the economic loss rule is strictly limited and does not include "confidential" relationships that may arise under Georgia law. (Reply 14.) CrowdStrike relies on Bulmer v. S. Bell Tel. & Tel. Co., 170 Ga. App. 659, 660 (1984) which provides a list of "special relationships" that includes "principal and agent, bailor and bailee, attorney and client, physician and patient, carrier and passenger or shipper, master and servant, and similar well-recognized relations." (Id.) CrowdStrike contends, "Delta alleges no such 'special relationship. . . ." (Id.) The distinction CrowdStrike draws between "special" and "confidential" relationships is semantic, not meaningful. As detailed above, the independent duty exception recognizes that certain duties may arise or exist outside the context of a contract and thus allows a tort claim to proceed despite the economic loss rule. IBM at *9. In Georgia, a confidential relationship imposes a duty to

Confidential relationships do not generally arise in arm's length business relationships. As outlined in Newitt v. First Union Nat'l Bank, 270 Ga. App. 538, 545–546 (2004),

> [i]n the majority of business dealings, opposite parties have trust and confidence in each other's integrity, but there is no confidential relationship by this alone. For this reason, most business relationships are not generally confidential or fiduciary relationships. Where parties are engaged in a transaction to further their own separate business objectives, there is no duty to represent or advance the other's interests. (Citations and punctuation omitted).

However, longstanding Georgia authority also provides, "a confidential relationship may exist between businessmen, depending on the facts." Cochran v. Murrah, 235 Ga. 304, 307 (1975). "Because a confidential relationship may be found whenever one party is justified in reposing confidence in another, the existence of a confidential or fiduciary relationship is generally a factual matter for the jury to resolve (Citation omitted)." Bush v. AgSouth Farm Credit, ACA, 346 Ga. App. 620, 629 (2018); accord Douglas v. Bigley, 278 Ga. App. 117, 120 (2006); see also Bienert v. Dickerson, 276 Ga. App. 621, 624 (2005) ("When a fiduciary or confidential relationship is not created by law or contract, we must examine the facts of a particular case to determine if such a relationship exists.") Notably, two of the cases upon which CrowdStrike relies, Newitt and AgSouth Farm Credit, ACA v.

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act with "the utmost good faith" that exists apart from any contract between the parties. O.C.G.A. § 23-2-58. Accordingly, a "confidential relationship" is a type of "special" relationship that merits exception from the economic loss rule.

West, 352 Ga. App. 751, 757-758 (2019), were summary judgment rulings issued after an opportunity for discovery. (Mot. 17.) One of the cases CrowdStrike cites, Williams v. Dresser Indus., Inc., 120 F.3d 1163, 1168 (11th Cir. 1997) was addressing a post-trial motion. (Reply 27.)

CrowdStrike also relies on that provision of the SSA that states,

> [n]othing contained in this Agreement shall be deemed to create an association, partnership, joint venture, or relationship of principal and agent or master and servant between the parties, or to grant either party the right or authority to assume, create or incur any liability or obligation of any kind, express, or implied, against, in the name of, or on behalf of, the other party.

(SSA § 13.8.) It argues this provision reflects the parties' intent that their relationship was nothing more than contractual, citing to Overlook Gardens Props., LLC v. Orix, USA, LP, 366 Ga. App. 820 (2023). (Mot. 30; Reply 27.) In Overlook the parties' contracting documents similarly "contained an explicit disclaimer indicating that neither was intended to create *any* joint venture, agency, or fiduciary relationship between the parties (Emphasis in original)." Id. at 830. However, Overlook was not decided on a motion to dismiss. It concerned a summary judgment ruling and this contractual provision was part of the evidence considered in determining whether a confidential relationship existed.

Construing the pleadings in the light most favorable to Delta, it has alleged the existence of a confidential relationship that could create an independent duty sufficient to allow its gross negligence claim to proceed.

3.3.2 Viability of Delta's Gross Negligence Claim

Having determined the economic loss rule does not bar Delta's gross negligence claim at this pleadings stage, the Court will next consider arguments as to its viability.

Gross negligence is the absence of even slight diligence which is "that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances." O.C.G.A. § 51-1-4. CrowdStrike argues Delta has failed to state a claim for gross negligence. (Mot. 32-35.)

To the contrary, Delta has alleged that in performing its July Update, CrowdStrike altered critical and highly sensitive kernel-level programming -- intentionally bypassing required verification and certification procedures -- and without performing basic quality assurance measures. (Compl. ¶ 95.) Furthermore, Delta has specifically pled that if CrowdStrike had tested the July Update on one computer before its deployment, the programming error would have been detected. (Id. ¶ 44.) As CrowdStrike has acknowledged, its own president publicly stated CrowdStrike did something "horribly wrong" with the July Update. (Id. ¶ 7; Ans. ¶ 7.) Construed under the indulgent standard applicable to a motion to dismiss, these allegations are sufficient to state a claim for gross negligence.

3.4 Intentional Fraud/Misrepresentation by Omission

3.4.1 Application of the Economic Loss Rule to Delta's Fraud/Misrepresentation Claim

Georgia recognizes an exception to the economic loss rule for misrepresentation. City of Cairo v. Hightower Consulting Eng'rs, Inc., 278 Ga. App. 721, 729 (2006). In pertinent part, it is defined as follows:

> [o]ne who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. (Citation omitted).

Id. In Holloman v. D.R. Horton, Inc., 241 Ga. App. 141, 148 (1990), the Georgia Court of Appeals evaluated the history of the exception and concluded, rather plainly, the economic loss rule has no application in the event of fraud. See also ASC Constr. Equip. USA, Inc. v. City Commercial Real Estate, Inc., 303 Ga. App. 309, 316 (2010) (applying the misrepresentation exception to the economic loss rule, appellate court reversed directed verdict on fraud claim where plaintiff "suffered a purely economic loss").[19] Accordingly, the Court will now consider whether Delta has stated a claim for fraud.

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[19] CrowdStrike cites to Private Label Nutraceuticals, LLC v. Hangover Joe's Holding Corp., Civ. Action No. 1:14-CV-683-ODE, 2014 WL 12695801, at *6 (N.D. Ga. Nov. 20, 2014) which dismissed fraud claims under the economic loss doctrine because the alleged misrepresentations all related to performance under the contract. (Mot. 14, Reply17-18.) In reaching its decision, the federal court considered analogous Florida law as well as the duplicative nature of damages the plaintiff sought via its fraud and contract claims. Notably, Private Label Nutraceuticals does not mention or offer any analysis on Georgia's misrepresentation exception to the economic loss rule.

3.4.2 Viability of Delta's Intentional Misrepresentation/Fraud by Omission Claim

"[T]he tort of fraud has five elements: "(1) a false representation or omission of a material fact; (2) scienter; (3) intention to induce the party claiming fraud to act or refrain from acting; (4) justifiable reliance; and (5) damages. (Citation and punctuation omitted)." Baker v. Cuthbertson, 372 Ga. App. 753, 759 (2024).

3.4.2.1 Fraud by Affirmative Misrepresentations

Delta alleges CrowdStrike made affirmative misrepresentations during its sales presentations and renewals of the SSA which occurred on or around June 30, 2022, July 1, 2023, and March 30, 2024.[20] The Court finds Delta has failed to state a claim for fraudulent inducement for any alleged misrepresentations prior to June 30, 2022 based upon Delta's affirmation of the SSA which contains a merger clause.

> In general, a party alleging fraudulent inducement to enter a contract has two options: (1) affirm the contract and sue for damages from the fraud or breach; or (2) promptly rescind the contract and sue in tort for fraud. Critical to rescission is the tender of benefits, the prompt

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[20] Delta alleges CrowdStrike made the following affirmative misrepresentations:

a. CrowdStrike did not take shortcuts;

b. CrowdStrike's Falcon product included various manufacturer and developer certifications, including Microsoft's WHQL certification;

c. CrowdStrike did not introduce into Delta's computer systems any unauthorized "back door", "time bomb", 'virus", "preventative routines" or other computer programming or data designed to permit access to or use of Delta's computer systems in an unauthorized matter; and

d. CrowdStrike does not disable, modify, damage or delete from the Delta computer systems and networks any data, software, computer hardware or other equipment operated or maintained by Delta, or perform any other such similar unauthorized actions.

(Compl. ¶ 83.)

> restoration or offer to restore whatever the complaining party received by virtue of the contract. A party seeking to rescind a contract for fraud must restore or tender back the benefits received under the contract, or show a sufficient reason for not doing so.

Avery v. Grubb, 336 Ga. App. 452, 457 (2016). When a party makes "a claim for damages unaccompanied by a claim for rescission," it is generally assumed they have elected to affirm the contract. Weinstock v. Novare Grp., Inc., 309 Ga. App. 351, 354 (2011).

As part of the briefing for this Motion, not in its pleadings, Delta suggests it should be relieved of any obligation to rescind. (Resp. 36-37.) Indeed, Georgia law will sometimes excuse the requirement for rescission, recognizing that a party "need not tender back what he is entitled to keep, and need not offer to restore where the defrauding party has made restoration impossible or when to do so would be unreasonable (Citations omitted)." Crews v. Cisco Bros. Ford-Mercury, Inc., 201 Ga. App. 589, 590 (1991). Because of the nature of services provided by CrowdStrike, Delta now claims rescission would be "impractical and inequitable" and submits if it "needs to amend to plead those facts, it can easily do so." (Resp. 37.) This effort to avoid the rescission requirement is untimely.

The Court finds any claim to avoid the rescission requirement requires the same prompt action as an actual rescission. Weinstock at 354 ("An announcement of the intent to rescind the contract must be made in a timely fashion, as soon as the facts supporting the claim for recission are discovered."); see also O.C.G.A. § 13-4-

60 (". . . in order to rescind, the defrauded party must promptly, upon discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of the contract if it is of any value."). In Weinstock, the plaintiffs' attempts to establish a claim for rescission by amending their complaint "was too late because the original complaint for damages affirmed the purchase contracts." Id. at 356. Accordingly, the Court rejects the belated attempt to avoid the rescission requirement and finds Delta has affirmed the SSA.

"[W]here the allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he relied upon the other party's misrepresentation and his action for fraud must fail." Ekeledo v. Amporful, 281 Ga. 817, 819 (2007). Because Delta has affirmed the SSA which contains a merger clause, Delta cannot claim it reasonably relied on any representation not included within the SSA, foreclosing a fraud claim for any representation pre-dating the SSA.

Delta correctly notes that a merger clause only bars fraud claims based on misrepresentations made prior to the SSA, and not misrepresentations contained within the agreement itself. Id.; see also Authentic Architectural Millworks, Inc. v. SCM Grp. USA, Inc., 262 Ga. App. 826, 828 (2003)("because the record shows that [plaintiff] relied upon misrepresentations in the contract itself, no alleged merger clause can bar its fraud and misrepresentation claims.") In this regard, Delta has

only identified one such alleged misrepresentation contained within the SSA -- § 6.2 where CrowdStrike warranted it would not introduce any unauthorized "back door" into Delta's computer systems.[21] (Compl. ¶¶ 42, 83(c); Resp. 35.)

Delta offers another argument as to why its fraud claim survives. Again, citing to SSA § 6.2, Delta argues, "CrowdStrike never intended to abide by its representation in the [SSA] that it would not introduce an unauthorized back door . . . (Punctuation omitted)." (Resp. 35; SSA § 6.2; Compl. ¶¶ 30-37, 57, 70.)

> The general rule is that actionable fraud cannot be predicated upon promises to perform some act in the future. Nor does actionable fraud result from a mere failure to perform promises made. Otherwise, any breach of a contract would amount to fraud. An exception to the general rule exists where a promise as to future events is made with a present intent not to perform or where the promisor knows that the future event will not take place. (Citation omitted).

Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 314 (2008). Therefore, as Lumpkin concludes, "[a] promise made without a present intent to perform is a misrepresentation of a material fact and is sufficient to support a cause of action for fraud." Id. The legal premise upon which Delta relies is sound, and the Court accepts this alternate argument as to why Delta has stated a claim for fraud based on the alleged misrepresentation found in SSA § 6.2.

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[21] In its Reply, CrowdStrike argues that § 6.2 contains an exclusive remedy "which independently bars the fraud claim." (Reply 25.) This undeveloped argument raises the thorny question that CrowdStrike does not attempt to analyze or answer: may CrowdStrike take advantage of the exclusive remedy found in the very contract provision wherein Delta alleges CrowdStrike made a fraudulent misrepresentation? The Court finds this unsupported argument unpersuasive.

3.4.2.2 Fraud by Omission

Delta's fraud claim also alleges that throughout the parties' relationship, CrowdStrike omitted to disclose material facts.[22] "Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." O.C.G.A. § 23-2-53; see also William Goldberg & Co., Inc. v. Cohen, 219 Ga. App. 628, 631 (1995) ("An obligation to disclose must exist before a party may be held liable for fraud based upon the concealment of material facts.")

Delta argues it had a confidential relationship with CrowdStrike giving rise to an obligation for CrowdStrike to disclose its allegedly risky practices. (Resp. 37.) It also argues that the particular circumstances give rise to a duty to communicate because of the nature of "CrowdStrike's cybersecurity services, which necessarily

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[22] The material information Delta claims CrowdStrike omitted to disclose includes:

> a. CrowdStrike built dangerous doors into Delta's Microsoft OS systems, computers, and computer networks via the Falcon software, and CrowdStrike would use these doors to gain unauthorized access to those systems;
>
> b. CrowdStrike evaded and exploited a vulnerability in Microsoft's ELAM/WHQL certification standards and requirements by providing "content updates" that altered and replaced kernel-level programming or data without proper certification, including 'access violations';
>
> c. CrowdStrike instituted deficient controls in its procedure for updating Falcon;
>
> d. CrowdStrike was not adequately testing or appropriately rolling out updates to Falcon;
>
> e. CrowdStrike's inadequate software testing and unauthorized deployments such as the [July] Update may potentially cripple Delta's systems.

(Compl. ¶ 84.)

touch the most sensitive parts of Delta's business . . . ." (Id.) For the same reasons addressed above, the Court finds these allegations require factual inquiry and are not susceptible to disposition on the pleadings. See § 3.3.1.4, supra; see also ASC Constr. at 315 ("[W]hether the particular circumstances of a case give rise to an obligation to disclose will generally be a jury question.")

In light of all the foregoing, the Court finds Delta has stated a claim for fraud albeit more limited than the claim Delta has alleged.

3.5 Punitive Damages and Attorney's Fees

Delta seeks to recover its attorney's fees pursuant to O.C.G.A. §§ 16-9-93, 10-1-399, and 13-6-11. (Compl. Count VIII, Prayer for Relief (b).) It also seeks to recover punitive damages under O.C.G.A. §§ 10-1-399 and 51-12-5.1. (Id. Count IX.) Both parties agree these claims "rise or fall with the underlying substantive claims." (Resp. 38; Mot. 37-38.) Racette v. Bank of Am., N.A., 318 Ga. App. 171, 181 (2012) ("An award of attorney fees, costs, and punitive damages is derivative of a plaintiff's substantive claims.").

In light of Delta's withdrawal of its claims under the FBPA, the Court considers its claim for attorney's fees and punitive damages under O.C.G.A. § 10-1-399(a) and (d) to be similarly withdrawn.

As Delta's substantive claims for computer trespass, trespass to personalty, and fraud remain, its claims for damages pursuant to O.C.G.A. § 16-9-93(g)(1) as

well as attorney's fees under O.C.G.A. § 13-6-11 and punitive damages under OC.G.A. § 51-12-5.1 also survive.

4. CONCLUSION

In light of all the foregoing, the Court **ORDERS** Defendant CrowdStrike, Inc.'s Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

Specifically, the Court **GRANTS** the Motion and **DISMISSES** Count IV – Intentional Misrepresentation/Fraud by Omission in part as specifically delineated in § 3.4, above. The remainder of CrowdStrike's Motion is **DENIED**.

SO ORDERED this 16th **day of May, 2025.**

KELLY LEE ELLERBE, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit
Metro Atlanta Business Case Division

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