IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANTAL ATTIAS, ANDREAS KOTZUR, RICHARD AND LATANYA BAILEY, CURT AND CONNIE TRINGLER, and LISA HUBER,	)	**Case No. 1:15-cv-882-CRC**
Plaintiffs,	)	
v.	)	
CAREFIRST, INC.; GROUP HOSPITALIZATION SERVICES, INC.; CAREFIRST OF MARYLAND, INC.; and CAREFIRST BLUECHOICE,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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Defendants CareFirst, Inc.; CareFirst of Maryland, Inc.; Group Hospitalization and Medical Services, Inc.; and CareFirst BlueChoice (collectively "Defendants" or "CareFirst") move to dismiss Plaintiffs' Second Amended Complaint (the "Complaint") in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

In June 2014, hackers breached certain of CareFirst's computer servers. Neither Plaintiffs nor CareFirst know the hackers' identity or intent. Plaintiffs are seven CareFirst health insurance policyholders who allege that the exposure of some of their personal information during the theft gave rise to 11 causes of action pursuant to District of Columbia, Virginia, and Maryland law. This Court dismissed the Complaint in its entirety after concluding that Plaintiffs alleged neither a present injury nor a high enough likelihood of future injury sufficient to support Article III standing. *See* Aug. 10, 2016 *Memorandum Opinion*, ECF No. 40. On appeal, however, the D.C. Circuit concluded that "Plaintiffs have cleared the low bar to establish their standing at the pleading stage." *Attias v. CareFirst, Inc.*, 865 F.3d 620, 622 (D.C. Cir. 2017). Citing the growing divide on standing following data breaches across the Courts of Appeal,[1] CareFirst petitioned the U.S. Supreme Court for a *writ of certiorari*, which was denied. The case has thus returned to this Court for consideration of Plaintiffs' claims.

Even though Plaintiffs have standing to assert their claims "at this pleading stage," their claims must still meet federal pleading requirements. Each of Plaintiffs' 11 causes of action fails to present a cognizable claim for different, and in some cases multiple, reasons. *See* Ex. A, a

[1] For example, the named Plaintiffs are individuals in the District of Columbia, Maryland, and Virginia. Those in Maryland and Virginia would not have standing to bring their claims in federal district courts within their home states given the Fourth Circuit does not recognize increased risk of identity theft as a basis for constitutional standing. *See Beck v. McDonald*, 848 F.3d 262, 274–75 (4th Cir. 2017) (citing *Chambliss v. CareFirst, Inc.*, 189 F. Supp. 3d 564, 570 (D. Md. 2016)).

summary chart articulating why each claim fails. Generally speaking, each of the 11 claims fails for at least one of five categorical reasons.

First, the breach occurred more than 1,400 days ago and Plaintiffs' alleged damages remain entirely speculative. Plaintiffs must plead a tangible injury or loss of some form to sustain most of their causes of action. Yet Plaintiffs plead *none*. No Plaintiff alleges specific facts about how he or she has been damaged. Plaintiffs offer only generic statements that their impending harms include time spent "to protect themselves" and costs associated with identity theft, credit monitoring, and damage assessment services, Compl. ¶¶ 19, 56, and non-specific "mental and emotional pain and suffering and aguish [sic]" as a result of the cyberattack. *Id.* ¶¶ 38, 109, 122, 129, 152. Two of the named Plaintiffs also allege that they "have experienced tax-refund fraud and have still [] not received their federal or state tax refund," *id.* ¶¶ 13, 57, but those Plaintiffs do not allege facts as to any circumstances related to such fraud, much less how the cyberattack caused it. The failure to plead damages sufficient to meet federal pleading standards eliminates, at minimum, Counts I, II, IV, V, VI, VII, X, and XI. The fraud counts should additionally be dismissed for failure to be pled with particularity.[2]

[2] CareFirst previously argued that even if Plaintiffs had standing, they also failed to plead causation given they could not fairly trace the information they alleged was stolen in the breach to any of their alleged injuries. CareFirst based this argument on the fact that Plaintiffs' Complaint does not allege that Social Security numbers were accessed by the hackers. This Court agreed with that reading of the Complaint. *See* Aug. 10, 2016 *Memorandum Opinion*, ECF No. 40, at 1 n.1 ("Although Plaintiffs assert in their opposition to the motion to dismiss that their social security numbers were stolen in the data breach, the Complaint neither makes that allegation explicitly nor contains any factual contentions that would support that conclusion."). The D.C. Circuit, however, disagreed with that conclusion. *See* D.C. Circuit Decision, 865 F.3d at 627–28. In briefing the issue of standing with this Court, CareFirst introduced the Declaration of Clayton Moore House that states that the hackers did not access any of the named Plaintiffs' Social Security numbers. Although such a declaration could be considered as part of the Court's Rule 12(b)(1) analysis, it cannot be considered as part of this Rule 12(b)(6) motion, and thus the Court must assume, for purposes of this motion, that Social Security numbers were accessed. To the extent any claims proceed beyond this pleading stage, once evidence is developed demonstrating that Plaintiffs'

Second, Plaintiffs' Complaint is premised on their contractual relationship with CareFirst, but they nonetheless assert myriad tort claims. These negligence (Counts II and VIII) and fraud (Counts VII and XI) claims are barred by the parties' alleged contractual relationship and the economic loss rule. The parties' contractual relationship also precludes Plaintiffs' claim for unjust enrichment (Count IX).

Third, Plaintiffs allege that CareFirst violated the Health Insurance Portability and Accountability Act ("HIPAA"). These alleged violations constitute the basis for Plaintiffs' breach of contract, negligence, negligence per se, and D.C. Consumer Protection Act causes of action. These claims are merely disguised attempts to assert a private right of action under HIPAA where none exists.

Fourth, CareFirst is specifically exempt from private civil liability under the Maryland Consumer Protection Act (Count V) and the Virginia Consumer Protection Act (Count VI) based on its role as an insurance company.

Fifth, CareFirst does not owe any common law duty of confidentiality to Plaintiffs, which eliminates Count X.

As explained in greater detail herein, even though the D.C. Circuit has stated that Plaintiffs have standing at this pleading stage, their Complaint fails to state a claim upon which relief may be granted. The Court should dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Social Security numbers were not in fact accessed, the Court will have to reassess Plaintiffs' standing. *See id.* at 625 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("The burden to make [the showing of standing] always remains with the plaintiff, but the burden grows as the litigation progresses.")). Further, Plaintiffs' counsel is well aware of the House Declaration, and is therefore on notice that the claims relying on stolen Social Security numbers will ultimately fail.

STATEMENT OF FACTS[3]

Plaintiffs allege that Defendants are a network of health insurers that provide coverage to individuals primarily in the District of Columbia, Maryland, and Virginia. *See* Compl. ¶ 23. Plaintiffs are customers and insureds of CareFirst. *Id.* ¶ 25. In June 2014, CareFirst suffered a cyberattack. *Id.* ¶ 33. CareFirst learned of the cyberattack in April 2015 and subsequently notified Plaintiffs on May 20, 2015. *Id.* ¶¶ 35–36. Plaintiffs allege that the information stolen in the cyberattack includes "members' names, birth dates, email addresses and subscriber identification number[s]." *Id.* ¶¶ 32, 94, 104.

Plaintiffs' claims, as articulated in the Complaint, generally arise from Plaintiffs' contractual relationships with Defendants and from Defendants' statutory obligations as covered entities under HIPAA and the Health Information Technology for Economic and Clinical Health Act ("HITECH"). *See id.* ¶¶ 25–31, 40–44. Plaintiffs are residents of the District of Columbia, Maryland, and Virginia.

All Plaintiffs bring the following causes of action:

- Count I: Breach of Contract. *Id.* ¶¶ 64–75.
- Count II: Negligence. *Id.* ¶¶ 76–84.
- Count VII: Fraud. *Id.* ¶¶ 117–123.
- Count VIII: Negligence Per Se. *Id.* ¶¶ 124–130.
- Count IX: Unjust Enrichment. *Id.* ¶¶ 131–137.
- Count X: Breach of the Duty of Confidentiality. *Id.* ¶¶ 138–145.

D.C. Plaintiffs Chantal Attias and Andreas Kotzur assert:

[3] The facts are taken from Plaintiffs' Second Amended Complaint (the "Complaint") and are assumed to be true for purposes of this Rule 12(b)(6) motion to dismiss. *In re U.S. Office of Pers. Mgmt. Data Sec. Litig.*, 266 F. Supp. 1, 15–16 (D.D.C. 2017).

- Count III: D.C. Consumer Protection Act violation. *Id.* ¶¶ 85–91.
- Count IV: D.C. Data Breach Notification Statute violation. *Id.* ¶¶ 92–99.

Maryland Plaintiffs Curt Tringler, Connie Tringler, and Lisa Huber assert:

- Count V: Maryland Consumer Protection Act violation. *Id.* ¶¶ 100–111.
- Count XI: Constructive Fraud. *Id.* ¶¶ 146–154.

Virginia Plaintiffs Richard Bailey and Latanya Bailey assert:

- Count VI: Virginia Consumer Protection Act violation. *Id.* ¶¶ 112–116.

STANDARD OF LAW

In evaluating a motion to dismiss under Rule 12(b)(6), the Court must "treat the complaint's allegations as true . . . and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *In re U.S. Office of Pers. Mgmt. Data Sec. Litig.*, 266 F. Supp. at 15–16 (quoting *Sparrow v. United Airlines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000)) (internal quotation marks omitted). The Court need not, however, "accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions." *Id.* at 16 (citing *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002)). Plaintiffs' Complaint must "contain sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). "Labels and conclusions," "formulaic recitation of the elements of a cause of action," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient. *Id.*

ARGUMENT

I. Plaintiffs Fail To State Causes of Action Requiring Actual Damages or Loss.

Plaintiffs do not allege any actual harm. Instead, they generally allege a host of vague impending harms they could suffer in the future, none of which has yet to occur, and all of which could arise only following a specific chain of events that has not been set in motion. Plaintiffs do not allege that they will suffer future harm at the hands of CareFirst. Instead, they allege that some unknown harm may befall them at some point in the future if an unknown and unidentified party—perhaps the cyber thief, perhaps not—uses the accessed information for an ill-gotten purpose. *See, e.g.*, Compl. ¶ 17 (alleging "increased risk of identity theft, and also actual identify theft and resulting losses"); *id.* ¶ 18 (alleging that "instances of identity theft are certainly impending and imminent").

According to the Complaint, if an unknown party does use Plaintiffs' accessed information for ill, then Plaintiffs would need "to protect themselves," and expend costs associated with identity theft, credit monitoring, and damage assessment services. *See id.* ¶¶ 19, 56. Plaintiffs do not specifically allege that they spent money "to protect themselves," and the most they offer is a vague statement that the two D.C. Plaintiffs "have purchased" monitoring services. *See, e.g.*, *id.* ¶ 97. Plaintiffs also allege that they suffered "mental and emotional pain and suffering and aguish [sic]" as a result of the cyberattack. *Id.* ¶ 38; *see also id.* ¶¶ 109, 122, 129, 152. They do not, however, allege who among them suffered mental and emotional pain and suffering or that any mental or emotional pain and suffering manifested itself in any physical symptoms.

In addition, Curt and Connie Tringler allege that their personal information was "disclosed," "compromised," and that they "have experienced tax-refund fraud and have still [] not received their federal or state tax refund." *See id.* ¶¶ 13, 57. The Tringlers do not allege any facts as to the circumstances of the tax-refund fraud nor do they allege, even generally, how the

cyberattack led directly or indirectly to their alleged "tax-refund fraud." These allegations are not sufficient to meet federal pleading requirements for damages.

Breach of Contract (Count I). "Under District of Columbia law, the standard measure of actual damages arising from a breach of contract is the non-breaching party's expectation interest—that is, an amount sufficient to give the non-breaching party the benefit of the bargain." *CapitalKeys, LLC v. Democratic Republic of Congo*, 278 F. Supp. 3d 265, 272 (D.D.C. 2017). The possibility of future harm is insufficient to meet this standard. *See Smith v. Henderson*, 982 F. Supp. 2d 32, 48 (D.D.C. 2013). Plaintiffs allege that the data breach "diminished [the] value" of the services Defendants provided them under their insurance policies, and that they "have been harmed and/or injured and will incur economic and non-economic damages as a proximate and direct result of the breach by defendants." Compl. ¶¶ 73–74. But Plaintiffs allege no facts to make these conclusory allegations plausible. *See, e.g.*, *In re Office of Pers. Mgmt. Data Security Breach Litig.*, 266 F. Supp. 3d at 40–42 (dismissing claims where alleged injuries under the Privacy Act not sufficiently plead). Plaintiffs do not articulate the specific ways in which the health insurance services provided under the agreement were sub-par, how the services they received were below market value, or how they have been otherwise deprived of the benefit of their bargain. Nor do Plaintiffs allege that they have actually suffered any economic or non-economic damages. Indeed, Plaintiffs' allegations speak of possibilities, and not realities, of actual damage or loss. They allege only that they "*will incur*" economic and non-economic damages. *Id.* Plaintiffs do not allege when that will happen or even when it is likely to happen. Given that approximately four years have elapsed since the cyberattack, this allegation is entirely implausible. If Plaintiffs cannot "describe how they were damaged" they cannot assert a claim for breach of contract. *See Smith*, 982 F. Supp. 2d at 48.

Negligence (Count II) and *Negligence Per Se* (Count VIII). Similarly, damages are required to assert a claim for negligence. "To maintain an action for negligence, a plaintiff must allege more than speculative harm from defendant's allegedly negligent conduct." *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 708 (D.C. 2009); *see also Blue Ridge Serv. Corp. of Va. v. Saxon Shoes, Inc.*, 624 S.E.2d 55, 62 (Va. 2006) ("The elements of an action in negligence are a legal duty on the part of the defendant, breach of that duty, and a showing that such breach was the proximate cause of injury, resulting in damage to the plaintiff."). Negligence per se similarly requires an "injury" or "harm suffered." *See Schlimmer v. Poverty Hunt Club*, 597 S.E.2d 43, 46 (Va. 2004); *McNeil Pharm. v. Hawkins*, 686 A.2d 567, 578 (D.C. 1996). The "threat of future harm" or harm "not yet realized" is not sufficient to state a claim for negligence. *See Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 573 (D.C. 2011).

Fraud (Count VII) and *Constructive Fraud* (Count XI). Both fraud and constructive fraud require sufficient allegations of damages. *See Dresser v. Sunderland Apartments Tenants Ass'n, Inc.*, 465 A.2d 835, 839 (D.C. 1983) (requiring a plaintiff to plead that the alleged fraud "resulted in provable damages"); *Dynacorp Ltd. v. Aramtel Ltd.*, 56 A.3d 631, 683 n.45 (Md. Ct. Spec. App. 2012) ("Constructive fraud, a type of fraud, requires proof of damages."). A plaintiff's proof of damages is "crucial" to state a claim for fraud. *See C & E Servs., Inc. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 257 (D.D.C. 2007); *see also Lloyd v. Smith*, 142 S.E. 363, 367 (Va. 1928) ("It is fundamental that bare allegations of fraud will not of themselves support an action for damages – the facts showing the fraud *and the resulting damage* must be alleged." (emphasis added)). For these counts, Rule 9(b) of the Federal Rules of Civil Procedure also requires a heightened specificity. *See In re U.S. Office Prods. Sec. Litig.*, 326 F. Supp. 2d 68, 73 (D.D.C. 2004) ("Rule 9(b) requires that the pleader provide the 'who, what, when, where, and how' with respect to the

circumstances of the fraud."); *see also Feeley v. Total Realty Mgmt.*, 660 F. Supp. 2d 700, 712 (E.D. Va. 2009); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D. Md. 2000) (same).[4]

Maryland and Virginia Consumer Protection Acts (Counts V and VI). The Maryland and Virginia Consumer Protection Acts both require Plaintiffs to allege actual damages to state a claim. *See Citaramanis v. Hallowell*, 613 A.2d 964, 969 (Md. 1992) (requiring that "actual injury or loss be sustained by a consumer before recovery of damages is permitted in a private right of action"); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 549 (E.D. Va. 2000) ("[S]ome loss as a result of the Virginia Consumer Protection Act violation is required.").

D.C. Data Breach Notification Statute (Count IV). Likewise, the D.C. Data Breach Notification Act provides that any D.C. resident "injured by a violation of this subchapter" may institute a civil action to "recover actual damages, . . . [which] shall not include dignitary damages, including pain and suffering." D.C. Code. Ann. § 28-3853(a). As explained herein, Plaintiffs have failed to plead actual damages thus rendering this cause of action insufficient to proceed. *See, e.g.*, *Richardson v. Bd. of Governors of Fed. Reserve Sys.*, 288 F. Supp. 3d 231, 236–38 (D.D.C. 2018)

[4] In addition to failing to plead the damages from Defendants' alleged fraud or constructive fraud with particularity, Plaintiffs fail to plead any of the requisite elements for fraud with the requisite particularity. For example, Plaintiffs do not allege (1) which Defendant entity made representations; (2) the identity of the particular Plaintiffs to whom representations were made; (3) the specifics of what was said; (4) when the representations were made; (5) where the representations were made; or (6) how the representations were made. Any one of these failures would be enough to doom the fraud claim. *In re U.S. Office Prods. Sec. Litig.*, 326 F. Supp. 2d at 73. Plaintiffs similarly fail to allege that they actually read or saw the policies in question. *See, e.g.*, *Fero v. Excellus Health Plan, Inc.*, 236 F. Supp. 3d 735, 771–73 (W.D.N.Y. 2017) (finding that plaintiffs did not sufficiently plead reliance because they "have failed to allege with any particularity that they actually read or saw the notices concerning privacy policies and practices"); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2017 WL 3727318, at *27–28 (N.D. Cal. Aug. 30, 2017) (dismissing plaintiffs' fraud claim because they had not sufficiently alleged that they had read the terms of service or privacy policy in question, even despite having had to "click through" the policy to create their accounts).

(citing *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 296 (2012) (interpreting "actual damages" requirement within Privacy Act context to require some pecuniary harm)).[5]

Breach of the Duty of Confidentiality (Count X). Finally, Plaintiffs' claim for breach of the duty of confidentiality fails for the same reason. This claim is equivalent to a claim for breach of fiduciary duty. *Democracy Partners v. Project Veritas Action Fund*, 285 F. Supp. 3d 109, 120 (D.D.C. 2018). In turn, an alleged "[b]reach of a fiduciary [duty] is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby." *Day v. Avery*, 548 F.2d 1018, 1029 n.56 (D.C. Cir. 1976); *see also Headfirst Baseball LLC v. Elwood*, 239 F. Supp. 3d 7, 14 (D.D.C. 2017) (finding that a claim for breach of fiduciary duty "require[s] a showing of injury or damages").

II. The Parties' Contractual Relationships and Plaintiffs' Request for Monetary Damages Preclude Their Tort and Unjust Enrichment Claims.

Plaintiffs bring multiple tort claims (negligence, negligence per se, fraud, and constructive fraud), but only seek recovery for non-descript pecuniary losses that may occur in the future. The economic loss rule precludes these causes of action. Similarly, Plaintiffs plead a contractual

[5] Plaintiffs do not sufficiently allege that CareFirst failed to notify them in the "most expedient time possible and without unreasonable delay." D.C. Code. Ann. § 28-3852(a). Where Plaintiffs do provide minimal detail regarding the timing of notification, they do not sufficiently allege either how much time occurred before notification or why that timing was unreasonable. Specifically, Plaintiffs allege only that CareFirst discovered the breach sometime in April 2015, and that the notification of the breach took place on May 20, 2015. Compl. ¶¶ 35–36. The majority of states that provide any specific timeline regarding breach notification to impacted individuals provide that notice should occur within 45 days after the discovery of the breach. *See, e.g.*, Md. Code Ann. Com. Law § 14-3504 (providing notification must be no later than 45 days after the business concludes its investigation); N.M. Stat. Ann. § 57-12C-6 (providing notification must be no later than 45 days following the discovery of the security breach); Ohio Rev. Code Ann. § 1349.19 (same); R.I. Gen. Law, tit. 11-49.3.4 (same); Tenn. Code Ann. § 47-18-2107 (same); Vt. Stat. Ann. tit. 9 § 2435 (same); Wash. Rev. Code Ann. § 19.255.010 (same); Wis. Stat. Ann. § 134.98 (same).

relationship with Defendants, which provides another reason to dismiss these tort claims and separately precludes Plaintiffs' claim for unjust enrichment.

A. The Economic Loss Rule Precludes Plaintiffs' Tort Claims.

The District of Columbia, Maryland, and Virginia apply the economic loss rule to preclude recovery of pecuniary injury only (as opposed to personal injury or property damage) from recovering those losses in tort. *See Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 982, 986 (D.C. 2014) (stating that "a plaintiff who suffers only pecuniary injury as a result of the conduct of another cannot recover those losses in tort"); *Pulte Home Corp. v. Parex, Inc.*, 923 A.2d 971, 1002 (Md. Ct. Spec. App. 2007) ("Generally, plaintiffs cannot recover in tort for . . . purely economic losses. Such losses are often the result of some breach of contract and ordinarily should be recovered in contract actions." (internal quotation marks and citations omitted)); *Filak v. George*, 594 S.E.2d 610, 613 (Va. 2004) ("[L]osses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts."). "This rule safeguards the 'bedrock principle' that damages stemming from a contract dispute are limited to those contemplated by the parties at the time of the creation of the contract." *Bank of Am., N.A. v. Jercho Baptist Church Ministries, Inc.*, No. PX 15-02953, 2017 WL 193498, at *6 (D. Md. Jan. 17, 2017).

Plaintiffs' tort claims seek compensation for "damages, including pain and suffering and past future economic loss," Compl. ¶ 83 (negligence claim), *id.* ¶ 129 (negligence per se claim), for "compensable injury . . . [that] they each must now purchase credit monitoring and/or identity theft protection, in addition to pain and suffering, and inconvenience," *id.* ¶ 122 (fraud claim), and for "economic and non-economic damages including damage to the physician-patient relationship that had been established, pain and suffering, mental anguish, past and future medical bills, and

loss of earning capacity," *id.* ¶ 152 (constructive fraud claim). The core of each of these claims seeks recovery for pecuniary losses.

Plaintiffs' vague allegations that they suffered compensable "pain and suffering" and "mental anguish" are not supported by factual allegations. Plaintiffs cannot evade the economic loss rule by simply tacking on a conclusory "pain and suffering" label to their alleged economic damages. *See, e.g.*, *Determan v. Johnson*, 613 N.W.2d 259, 261 (Iowa 2000) (concluding that the economic loss rule barred tort-based recovery for a poorly constructed house, even where plaintiff "sought to recover 'repair costs, loss of use, inconvenience, emotional distress, and mental pain and suffering'"); *Davis v. Wells Fargo Home Mortg.*, No. 34136–1–II, 2007 WL 2039077, at *6-7 (Wash. Ct. App. July 17, 2007) (holding that the economic loss rule barred negligence-based claims for emotional distress in a case concerning a mortgage contract "because the parties' relationship is governed by their mortgage contract . . . from which their emotional distress and negligence claims originate"). The economic loss rule serves no purpose if Plaintiffs could so easily plead their way around it by vaguely stating, in conclusory fashion, that they have suffered some non-economic loss.[6]

[6] D.C. and Maryland courts have recognized a "limited exception" to the economic loss rule, but that exception is inapplicable here. *See Aguilar*, 98 A.3d at 986; *100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 60 A.3d 1, 11 (Md. 2013). The "special relationship" exception exists where there is an "independent duty of care" between the parties, such as the physician-patient relationship, stemming from a specific duty or obligation. *See Aguilar*, 98 A.3d at 985. In other words, a contract may create an independent duty of care where the conduct at issue "was not an indirect or collateral consequence" of the contract but was, instead, "the end and aim of the transaction." *See, e.g.*, *Glanzer v. Shepard*, 135 N.E. 275, 275 (N.Y. 1922); *Jacques v. First Nat'l Bank of Md.*, 515 A.2d 756, 760 (Md. 1986). Plaintiffs' Complaint does not suggest, much less allege, that the primary aim of the insurance contract between Plaintiffs and CareFirst was anything other than providing health insurance. *See* Compl. ¶ 25 ("Plaintiffs . . . provided payment to Defendants for certain services, including health insurance coverage, *part* of which was intended to pay administrative costs of securing their PII/PHI/Sensitive Information" (emphasis added)). Protecting data was, at best, "an indirect or collateral" aim of the contract. The alleged contract in this case does not create the sort of independent duty of care, special relationship, or intimate nexus

The economic loss rule bars Counts II, VII, VIII, and XI.

B. Plaintiffs' Tort Claims Arise Directly from the Parties' Alleged Contractual Relationship.

The Court should dismiss Plaintiffs' tort claims for a separate, related reason: the alleged claims arise entirely from Plaintiffs' contractual relationship with Defendants. D.C. courts, for example, have indicated a strong preference to keep tort and contract claims separate. In *Choharis v. State Farm Fire and Casualty*, the D.C. Court of Appeals rejected the plaintiff's request to "recognize a tort of bad faith by insurance companies in the handling of policy claims." 961 A.2d 1080, 1087 (D.C. 2008). The *Choharis* court's reasoning echoed the *Aguilar* court's justification for adopting the economic loss rule: "Disputes relating to the respective obligations of the parties to an insurance contract should generally be addressed within the principles of law relating to contracts, and bad faith can be compensated within those principles." *Id.* The court identified "no compelling basis for complicating matters by intertwining such disputes with considerations peculiar to tort." *Id.* Accordingly, the court refused to adopt a tort of bad faith for the handling of an insurance policy, noting that if "the insurance relationship" required "protection of policy holders beyond that provided by contract principles, such a determination is one most appropriately to be made by the legislative body." *Id.*

The *Choharis* court also dismissed the plaintiff's claims for fraud and negligent misrepresentation. *Id.* at 1089. Because those claims stemmed from a contractual relationship, the court reiterated that the plaintiff was limited to contractual remedies. *Id.* To maintain a tort claim, "the injury to the plaintiff must be an independent injury over and above the mere disappointment of plaintiff's hope to receive his contracted-for benefit." *Id.* (internal quotation

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required to satisfy the "limited exception" to the economic loss rule. *See Aguilar*, 98 A.3d at 985–86; *see also 100 Inv. Ltd. P'ship*, 60 A.3d at 11.

marks omitted). Specifically, the D.C. Court of Appeals held that the plaintiff's fraud and negligent misrepresentation claims, which were based on alleged misstatements the insurer made while handling the plaintiff's insurance claim, "directly related to an obligation arising under the contract." *Id.* at 1090. Thus, the plaintiff could not bring separate tort claims.

Choharis underscores the inability of Plaintiffs in this case to maintain their tort-based claims. To bring tort-based claims for conduct arising out of a contractual relationship, plaintiffs must be able to point to "facts separable from the terms of the contract" and "a duty independent of that arising out of the contract itself, so that the action for breach of contract would reach *none of the damages suffered by tort*." *Id.* at 1089 (emphasis added). As this Court has explained, the tort "must stand as a tort even if the contractual relationship did not exist." *Armstrong v. Navient Sols., LLC*, No. 16–2212 (RDM), 2018 WL 1143154, at *7 (D.D.C. Mar. 2, 2018) (internal quotation marks omitted); *see also Gebretsadike v. Travelers Home & Marine Ins. Co.*, 103 F. Supp. 3d 78, 84 (D.D.C. 2015) (dismissing tort claims "[b]ecause [plaintiff's] tort claims exist only because of his insurance contract with defendant] and are therefore foreclosed by District of Columbia law"); *Plesha v. Ferguson*, 725 F. Supp. 2d 106, 113 (D.D.C. 2010) ("[Plaintiff's] fraud claim arises out of the same alleged conduct by Defendants . . . that provides the basis for his breach of contract claim. Therefore, his fraud claim cannot stand independent of his breach of contract claim. . . . Therefore, [Plaintiff's] claim for fraud shall be dismissed."); *Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 322, 327 (D.D.C. Aug. 15, 2017) (dismissing fraud claim where it rested on "indistinct" allegations from the plaintiff's breach of contract claims).

The conduct complained of and the damages sought in Plaintiffs' tort claims is nearly identical to that complained of in Plaintiffs' breach of contract claim. *Compare* Compl. ¶ 74 (alleged contract damages), *with id.* ¶¶ 83, 129 (alleged damages for negligence and negligence

per se). But for the parties' insurance contract, CareFirst would have no reason to collect Plaintiffs' personal information, which was necessary exclusively to provide the contracted-for insurance services. Plaintiffs specifically premise their claims on the existing contractual relationship: "In its written services contract, Defendants promised Plaintiffs and the class members that Defendants only disclose health information when required to do so by federal or state law. Defendants further promised that it would protect Plaintiffs' Sensitive Information." *Id.* ¶ 66. Plaintiffs have alleged no independent duties that would apply in this context. Thus CareFirst's alleged failure to protect Plaintiffs' information "could [not] be considered a tort independent of contract performance." *See Choharis*, 961 A.2d at 1089. For this additional reason, the Court should dismiss Plaintiffs' tort claims.

C. The Parties' Contractual Relationship Bars Plaintiffs' Unjust Enrichment Claim.

Similarly, Plaintiffs' claim for unjust enrichment fails as a matter of law because the Plaintiffs contend that the basis for their claims arises out of their express contractual relationship with Defendants. *See, e.g.*, Compl. ¶¶ 23–25.

Unjust enrichment is a remedy intended to allow courts to achieve just results in the *absence* of an express contract. The theory of unjust enrichment "has its roots in the common law concept of quasi-contract" and enables a court, "in the absence of an actual contract," to "nevertheless impose[] a duty under certain conditions upon one party to requite another in order to avoid the former's unjust enrichment." *4934, Inc. v. D.C. Dep't of Emp't Servs.*, 605 A.2d 50, 55 (D.C. 1992) (emphasizing that unjust enrichment "permit[s] recovery by contractual remedy in cases where, in fact, there is no contract"). Where there is an existing contract, however, courts "will not displace the terms of that contract and impose some other duties not chosen by the parties." *Emerine v. Yancey*, 680 A.2d 1380, 1384 (D.C. 1996).

The existence of an express contract precludes a claim for unjust enrichment. *See, e.g.*, *Harrington v. Trotman*, 983 A.2d 342, 346 (D.C. 2009) (reversing Superior Court judgment awarding damages for unjust enrichment "because the court fundamentally erred as a matter of law in finding unjust enrichment when there was a valid contract between the parties"); *Schiff v. Am. Ass'n of Retired Persons*, 697 A.2d 1193, 1194 (D.C. 1997) ("We . . . conclude that . . . there can be no claim for unjust enrichment where an express contract exists between the parties."). Thus, "[u]nless there is a basis to set aside a contract as unenforceable," Plaintiffs may not bring a claim for unjust enrichment. *See Harrington*, 983 A.2d at 347. Because Plaintiffs allege that there is an express and valid contract between Plaintiffs and Defendants, the Court must dismiss Plaintiffs' unjust enrichment claim (Count IX).

III. Plaintiffs Cannot Create a HIPAA Private Right of Action.

Plaintiffs may not bring a private cause of action where one does not exist. HIPAA rules and regulations cannot form the basis for other claims. Plaintiffs' breach of contract (Count I), negligence (Count II), negligence per se (Count VIII), and D.C. Consumer Protection Act (Count III) claims, at least in part if not in toto, are premised on HIPAA violations. *See, e.g.*, Compl. ¶ 69 ("Defendants' promises to comply [with] all HIPAA standards and to make sure that Plaintiffs' health information and Sensitive Information was protected and specifically encrypted created an implied contract."); *id.* ¶ 88(c) ("Did not comply with federal law requirements for data security and protection, including HIPAA's requirements …"); *id.* ¶ 128(a) ("Defendants failed to comply with the duties imposed upon them by applicable federal laws in protecting Plaintiffs, The Class and the Subclasses by: Failing to comply with HIPAA and HITECH …"). Allowing alleged violations of those rules and regulations via such claims effectively allows Plaintiffs to bring a HIPAA private right of action where none exists.

As Plaintiffs allege, Defendants are "covered entities" under HIPAA, which requires Defendants to implement certain policies and procedures aimed at protecting customers' personal information from disclosure. *See* Compl. ¶¶ 24, 40–44. HIPAA, however, can be enforced only by the U.S. Department of Health and Human Services. HIPAA provides neither an express nor an implied private right of action. *See Johnson v. Quander*, 370 F. Supp. 2d 79, 100 (D.D.C. 2005) ("While only a handful of courts have examined whether a private right of action is implied under the HIPAA, each Court has rejected the position."); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 195 (D.D.C. 2011) (dismissing claim supported by allegations that defendant "breached its fiduciary duty, confidential relationship with Plaintiff, and invaded Plaintiff's privacy . . . in violation of HIPAA" (internal citation omitted)); *Logan v Dep't of Veterans Affairs*, 357 F. Supp. 2d 149, 155 (D.D.C. 2004) ("[T]he law specifically indicates that the Secretary of HHS shall pursue the action against an alleged offender, not a private individual.").

Federal courts repeatedly have found that statutory violations cannot support breach of contract claims, particularly where the statute does not provide a private right of action. *See, e.g.*, *Peltier v. Almar Mgmt., Inc.*, 229 F. Supp. 3d 1160, 1169–70 (D. Haw. 2017) ("Where contracts simply incorporate statutory obligations, a third-party suit to enforce the contract is in essence a suit to enforce the statute itself and is not consistent with the statutory scheme.") (internal quotation marks omitted); *Patel v. Catamaran Health Sols., LLC*, No. 15-cv-61891-BLOOM/Valle, 2016 WL 5942475, at *8 (S.D. Fla. Jan. 14, 2016) ("[It] is clear that no private right of action exists for alleged statutory violations, even on common law theories, unless the text or legislative history of the statute at issue confirms that the Legislature intended to confer such a right."); *Fossen v. Caring for Montanans, Inc.*, 993 F. Supp. 2d 1254, 1265 (D. Mont. 2014) ("Plaintiffs' breach of contract claim is merely another backdoor method of presenting an alleged

violation of a statute that they have no right to enforce."). As the Southern District of Florida recently explained, "[b]ecause the Defendants are required by law to adhere to HIPAA without receiving any consideration from the Plaintiff or any other patient, these provisions cannot create contractual obligations." *See Brush v. Miami Beach Healthcare Grp. Ltd.*, 238 F. Supp. 3d 1359, 1367 (S.D. Fla. 2017).

Likewise, Plaintiffs cannot rely on HIPAA rules and regulations to provide an "ordinary negligence 'standard of care.'" *See, e.g.*, *Sheldon v. Kettering Health Network*, 40 N.E.3d 661, 672 (Ohio Ct. App. 2015). To do so would be "tantamount to authorizing a prohibited private right of action for violation of HIPAA itself." *Id.* Using HIPAA as the basis for establishing negligence would "circumvent" HIPAA's enforcement mechanism. *See Haywood v. Novartis Pharm. Corp.*, No. 2:15–CV–373, 2018 WL 437562, at *7 (N.D. Ind. Jan. 16, 2018) (finding that HIPAA "does not create a duty or provide a statutory basis for [the plaintiffs'] negligence claim"); *see also Cain v. Mitchell*, No. 06-00897-CV-W-FJG, 2007 WL 4287866, at *2–3 (W.D. Mo. Dec. 6, 2007) (dismissing a claim for intentional infliction of emotional distress, which relied on HIPAA rules and regulations to define the proper standard of care, in part on the grounds that HIPAA does not create a private cause of action and cannot be the basis for the claim).

Federal courts have held that a negligence per se claim (Count VIII) cannot be based on a violation of a statute with no private right of action. This court and others have held that whether a plaintiff "can assert a cause of action based on negligence per se is an issue akin to the question of whether a private cause of action exists under a statute." *325-343 E. 56th St. Corp. v. Mobil Oil Corp.*, 906 F. Supp. 669, 688 (D.D.C. 1995); *see also Jones v. Bank of Am., N.A.*, No. 2:11cv443, 2012 WL 405053, at *6 (E.D. Va. Feb. 7, 2012) (dismissing a claim for negligence per se because it was based on violations of a statute that has no private right of action); *Mcinnis v. BAC Home*

Loan Serv., LP, No. 2:11cv468, 2012 WL 383590, at *3 (E.D. Va. Jan. 13, 2012) (same); *Weinberg v. Advanced Data Processing, Inc.*, 147 F. Supp. 3d 1359, 1365 (S.D. Fla. 2015) (same).

Finally, alleged violations of HIPAA cannot provide a basis for Plaintiffs' claims under the D.C. Consumer Protection Act ("DCCPA"). The DCCPA specifically enumerates various statutory schemes for which a violation is sufficient to state a claim for an unlawful trade practice under Section 28-3904, but HIPAA is not among the listed statutes. This Court previously found that where a statute "does not provide for a private right of action" and is not included "among those statutes that can create a violation of the DCCPA," there is no basis to conclude that a violation of that statute constitutes a violation of the DCCPA. *See Ihebereme v. Capital One, N.A.*, 933 F. Supp. 2d 86, 109 (D.D.C. 2013). Because HIPAA does not provide a private right of action and is not included in Section 28-3904, HIPAA violations cannot sustain Plaintiffs' claim under the DCCPA.

To the extent Plaintiffs' claims are based on alleged violations of HIPAA rules and regulations, they represent an improper attempt to circumvent HIPAA's enforcement mechanisms and to create a private right of action where none exists.

IV. CareFirst Is Exempt from Private Civil Liability Under the Maryland and Virginia Consumer Protection Acts.

Both the plain language of the statutory schemes and relevant legal precedent firmly establish that CareFirst is exempt from civil liability under the Maryland Consumer Protection Act (MCPA) and the Virginia Consumer Protection Act (VCPA).

A. MCPA.

CareFirst is exempt from civil liability under the plain terms of the MCPA and the overwhelming body of case law interpreting the statute. The MCPA expressly states that its provisions do not apply to "the professional services of . . . [an] insurance company." Md. Code

Ann. Com. Law. § 13-104(1). Courts have interpreted the exemption broadly. *See, e.g.*, *Lembach v. Bierman*, 528 F. App'x 297, 304 (4th Cir. 2013); *Stewart v. Bierman*, 859 F. Supp. 2d 754, 768 (D. Md. 2012) ("[T]his Court has applied the exemptions to dismiss MCPA claims against the enumerated professionals even when plaintiffs have alleged that they were acting in some way other than their professional capacity."); *Robinson v. Fountainhead Title Grp. Corp.*, 447 F. Supp. 2d 478, 490 (D. Md. 2006); *Butler v Wells Fargo Bank, N.A.*, No. MJG-12-2705, 2013 WL 145886, at *3 (D. Md. Jan. 10, 2014); *Puffinberger v. Commercion, LLC*, No. SAG-13-1237, 2014 WL 120596, at *9 (D. Md. Jan. 11, 2013).

B. VCPA.

CareFirst is also exempt from civil liability under the VCPA, which provides that "[n]othing in this chapter shall apply to . . . insurance companies." Va. Code Ann. § 59.1-199(D). Virginia courts have definitively stated that the VCPA "does not offer plaintiffs a remedy" against a defendant insurer due to the explicit statutory exemption. *See Harris v. USAA Cas. Ins. Co.*, No. L94–369, 1994 WL 16040308, at *14 (Va. Cir. Ct. Sept. 22, 1994).

Here, Plaintiffs allege that CareFirst violated these acts while acting in its capacity as an insurer. *See, e.g.*, Compl. ¶ 23 ("Defendants are a network of for-profit health insurers which provide health insurance coverage to individuals in" Maryland and Virginia). The Complaint alleges that "Defendants collect and maintain possession, custody, and control of a wide variety of Plaintiffs' PII/PHI/Sensitive Information" in the "*regular course of business*." *Id.* ¶ 27 (emphasis added). Plaintiffs' claims arise from CareFirst's alleged conduct in handling their personal information, which directly stems from CareFirst's provision of professional services in the ordinary course.

Plaintiffs' claims under the MCPA and the VCPA are not viable given each statute's respective insurance exemption. The Court should dismiss Count V and Count VI for this reason.

V. There Is No Common Law Duty of Confidentiality Applicable to Plaintiffs' Relationship with Defendants.

Plaintiffs allege that Defendants violated a common law duty of confidentiality. The claim is evidently based on the allegation that Defendants are "health care providers," and therefore owe some duty beyond the duties imposed by a health insurer to its insureds. *See* Compl. ¶¶ 138–145 (Count X). Defendants are not healthcare providers, and the relationship between an insured and insurer does not create the obligations that Plaintiffs suggest.

Plaintiffs allege throughout the Complaint that Defendants are their health insurers. *See, e.g.*, *id.* ¶ 12 ("Defendants are a network of for-profit health insurers which provide health insurance coverage . . . ."); *id.* ¶ 25 ("Plaintiffs are customers and the insureds of Defendants"); *id.* ¶ 77 ("Plaintiffs are consumers of the Defendants' health insurance policies."). Only in the allegations relating to Count X do Plaintiffs allege that Defendants are "health care providers." *See id.* ¶¶ 138–145. Undoubtedly, Plaintiffs recast Defendants as healthcare providers in an attempt to impose upon them a "duty of confidentiality pursuant to [a] fiduciary relationship with the Plaintiffs." *Id.* ¶ 139. But Defendants are not healthcare providers. *See, e.g.*, *Johns Hopkins Hosp. v. CareFirst of Md.*, 327 F. Supp. 2d 577, 579 (D. Md. 2004) (recognizing that CareFirst is "a health insurer, whereby [the plaintiff hospital] agreed to render medical treatment and related services to eligible members and subscribers of CareFirst").

Plaintiffs also refer generally to "multiple statutes, regulations, and judicial decisions" which, they aver, impose on CareFirst a "minimum standard of care . . . in maintaining the confidentiality" of Plaintiffs' information. Compl. ¶ 141. Plaintiffs do not, however, allege which statutes, regulations, or judicial decisions Defendants violated, nor do they allege how Defendants "disclos[ed], breach[ed], and/or publi[shed] their personal and private information." *Id.* ¶ 142.

Accordingly, the only possible duties CareFirst owed to Plaintiffs are in connection with the relationship of health insurer and insured.

As a health insurer, and not a healthcare provider, CareFirst owes no common law "duty of confidentiality" to Plaintiffs. *See State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 97 (Va. 1988) ("The relationship of confidence and trust which exists between insurer and insured is not a fiduciary relationship."); *see also* Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries To Their Insureds*, 88 Ky. L.J. 1, at *6 (1999-2000) ("To routinely make insurers fiduciaries would preclude them from combating excessive or fraudulent claims, thus harming the insured public."). More specifically, Plaintiffs' common law duty of confidentiality claim fails under the laws of each of the three relevant jurisdictions.

Virginia. There is "no common law duty of confidentiality in Virginia." *See M-Cam Inc. v. D'Agostino*, No. 3:05 CV 00006, 2005 WL 2010171, at *2 (W.D. Va. Aug. 22, 2005).

D.C. The tort of breach of confidential relationship has been limited to attorney-client or doctor-patient relationships. *See, e.g.*, *Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 951 (D.C. 2003) ("The tort arises from a duty that attaches to nonpersonal relationships such as hospital-patient customarily understood to carry an obligation of confidence." (internal quotation marks and citations omitted)); *Vassiliades v. Garfinckel's Brooks Bros.*, 492 A.2d 580, 592 (D.C 1985) (emphasizing unique aspects of physician-patient relationships in applying duty of confidentiality, including D.C.'s physician licensing statute, the testimonial privilege granted to a physician's testimony about his or her patient, and the longstanding rules of medical ethics concerning confidentiality); *Randolph*, 973 A.2d at 709 n.11 (suggesting that such a cause of action is limited to the "disclosure of medial patient information"). There is no basis for extending this tort to the insurer-insured context. Under D.C. law, the relationship between an insurer and insured

is a "contractual relationship" that does not create "a fiduciary duty beyond the terms of the [] insurance policy." *See Fogg v. Fidelity Nat'l Title Ins. Co.*, 89 A.3d 510, 513–14 (D.C. Ct. App. 2014) (dismissing plaintiff's claim for breach of the fiduciary duty of disclosure).

Maryland. In Maryland, it is unclear whether this cause of action even exists. *See, e.g.*, *Ross v. Cecil Cty. Dep't of Soc. Servs.*, 878 F. Supp. 2d 606, 622–23 (D. Md. 2012); *Duty Free Ams., Inc. v. Legg Mason Wood Walker, Inc.*, No. 24-C-04-005696, 2005 WL 914395, at *4 (Md. Cir. Ct. Jan. 13, 2005) (declining to decide whether breach of confidential relationship existed in Maryland, and holding that plaintiff failed to allege existence of confidential relationship regardless). To the extent that this claim is even available, it would arise only where a confidential relationship exists between the parties. *See Sherlock v. Lockheed Martin Corp.*, No. Civ.A. AW–01–254, 2004 WL 3681614, at *8 (D. Md. Feb. 26, 2004) (dismissing claim for breach of confidential duty because no confidential relationship existed between the parties). As Maryland federal courts have recognized, the relationship between an insurance company and its insureds "does not warrant the imposition of tort duties." *See Stephens v. Liberty Mut. Fire Ins. Co.*, 821 F. Supp. 1119, 1121 (D. Md. 1993).

The Court should dismiss Count X because no Plaintiff has alleged a viable cause of action for breach of the common law duty of confidentiality.

CONCLUSION

For the reasons articulated herein, the Court should dismiss Plaintiffs' Complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: June 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew O. Gatewood, certify that on June 13, 2018, I served the foregoing **Defendants' Memorandum of Points and Authorities in Support of Motion To Dismiss the Second Amended Complaint** on counsel of record via the Court's CM/ECF system.

Dated: June 13, 2018 /s/ Matthew O. Gatewood