IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANTAL ATTIAS AND ANDREAS KOTZUR Individually and on behalf of all others Similarly Situated, *et al.*	:	Case No.: 1:15-CV-00882-CRC
Plaintiffs,	:	
v.	:	
CAREFIRST, INC., et al.	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

COME NOW Plaintiffs, by and through undersigned counsel, and for the reasons more fully set out in the accompanying Memorandum of Points and Authorities, Opposes Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 9th day of July 2018 I caused a copy of the foregoing *Plaintiffs' Opposition to Defendants' Motion to Dismiss* to be served upon the Court and all parties via ECF.

/s/ Jonathan B. Nace
Jonathan B. Nace, Esq.

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CHANTAL ATTIAS AND ANDREAS KOTZUR Individually and on behalf of all others Similarly Situated, *et al.* Plaintiffs, v. CAREFIRST, INC., et al. Defendants.	: : : : : : : : : : :	Case No.: 1:15-CV-00882-CRC

MEMORANDUM OF POINTS AND AUTHORITIES IN
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INTRODUCTION

CareFirst failed it customers. Because of CareFirst, more than a million innocent consumers suffered the loss of sensitive personal and medical information necessitating past and future out-of-pocket expenditures, and, to this day, suffer anxiety that such sensitive information will be used to nefarious, potentially disastrous ends.

All of the named Plaintiffs and putative class members have had their private information violated. And though Defendants now admit that a theft occurred, they move to dismiss the claims by complaining that though they lost highly personal, sensitive, and criminally useful information, no damage has befallen anyone. This is the underlying concept behind nearly every argument that the Defendants put forth as a reason the Plaintiffs' claims should be dismissed. This is also, in fact, the exact same argument which the Defendants have been positing to escape liability since this litigation began more than three (3) years ago, and which was litigated and found wanting all the way to the Supreme Court of the United States, which denied certiorari to hear it. The Defendants continue to waste judicial resources arguing the same philosophy, this time under the guise of Rule 12(b)(6).

Despite promises and contractual obligations to do so, Defendants did not employ the type of security measures that they promised and did not employ other measures of which they were required. Further, the Defendants were charged with a special duty to safeguard highly sensitive information. Defendants' failures exposed the personal, protected and sensitive information of over one million residents in the District of Columbia, State of Maryland and Commonwealth of Virginia. Due to Defendants' failures, Plaintiffs' personal and sensitive information is now in the hands of criminal third parties who already have misused that information, and likely will misuse it again. Many of the named Plaintiffs have suffered financial fraud due to the data theft, and others have

been subject to concern, inconvenience, mental anguish and pecuniary loss. All of the Plaintiffs and class members have been harmed and suffered damage by the failures of Defendants.

Defendants have now moved to dismiss every single claim based on Federal Rules of Civil Procedure 12(b)(6). Both arguments fail. Respectfully, Defendant's motion to dismiss should be denied.

STATEMENT OF FACTS

CareFirst, Inc., Group Hospitalization and Medical Services, Inc., CareFirst of Maryland, Inc., and CareFirst BlueChoice (hereinafter collectively referred to as "Defendants") provide health care insurance to over a million individuals throughout the Mid-Atlantic region. Plaintiffs were the actual service customers of Defendants and had contracted for health insurance benefits with the Defendants. Doc. 8-1, ¶ 21. In addition to providing health insurance benefits, Defendants contracted and promised in a myriad of ways, explicitly and implicitly, that it would protect its customers' personal information, protected health information, and other sensitive information, including names, addresses, birthdates, telephone numbers, Social Security numbers, and other sensitive information. *See e.g., id.* at ¶¶ 28-29.

Defendants did not keep their promises to protect Plaintiffs' information. *Id.* ¶ 31. Instead, Defendants elected to store and manage Plaintiffs' information on its internet-accessible computer system and failed to adequately or reasonably safeguard such computer system to protect Plaintiffs' information. *Id.*

As a result, Defendants' computer networks fell dramatically below accepted industry standards for protecting personal and other sensitive information from a breach. Contrary to the Defendants' Statement of Facts, Defendants lost more than "members' names, birth dates, email addresses and subscriber identification number[s]." Doc. 13-1, p. 4. Defendants additionally lost

"Plaintiffs personal 'PII', 'PHI' and Sensitive Information," considered protected under the Health Insurance Portability and Accountability Act ('HIPAA')." Doc. 8-1, ¶ 15; *see also id.* at ¶¶ 16-20, 34.

Defendants failed to discover the data breach until April 2015. *Id.* ¶ 35. As a result of the data breach and Defendants' failure to timely and reasonably notify Plaintiffs, Plaintiffs suffered a variety of injuries including identity theft, fraud and abuse and the threat thereof. However, Defendants then advised Plaintiffs and members of the Class to "protect themselves with identity theft protection and monitoring..." *Id.* at ¶ 37. Plaintiffs complied with *Defendants'* instructions.

Nevertheless, all Plaintiff and class members are at an increased and impending risk of becoming victims of identity theft crimes, fraud, and abuse; and all have been forced to spend considerable time and money to investigate and mitigate the imminent risk of harm from identity theft, fraud, and abuse as a result of Defendants' conduct. *Id.* at ¶¶ 46-58. These mitigation efforts include but are not limited to: detecting and preventing identity theft and unauthorized use of financial and/or medical information; monitoring accounts for fraudulent charges; canceling and obtaining reissued credit cards; dealing with the IRS and other government agencies; purchasing credit monitoring and identity theft protection services and insurance. *Id.* at ¶ 56. Some of the named Plaintiffs - Curt and Connie Tringler - and other victims of the data breach have already suffered actual identity theft and fraud. *Id.* at ¶ 57.

STANDARD OF LAW

Defendants' motion to dismiss was filed pursuant to Federal Rule of Civil Procedure 12(b)(6). So, in addition to having sought and failed to dismiss Plaintiffs' Second Amended Complaint for lack of alleging "harm," Defendants claim that the pled causes of action fail to state a

claim pursuant to Rule 12(b)(6) for failing to allege damage. Consequently, the following standard applies:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, **accepted as true**, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." For legal conclusions, however, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable."

In re InterBank Funding Corp. Sec. Litig., 393 U.S. App. D.C. 415, 420, 629 F.3d 213, 218 (2010) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)) (emphasis added). Plaintiffs have a low threshold to overcome Defendants' 12(b)(6) motion as the facts pled in the Second Amended Complaint must be accepted as true, and they must only state a claim for relief that is "plausible on its face."

Determining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense. *Iqbal*, 556 U.S. at 663 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, L.Ed.2d 929 (2007)). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). The standard only requires enough facts to raise a reasonable expectation that discovery will reveal evidence of the claim. *Twombly*, 550 U.S. at 545.

ARGUMENT

I. PLAINTIFFS' HAVE ADEQUATELY PLED ACTUAL DAMAGES.

a. Plaintiffs' have pled actual economic loss.

Though the Court of Appeals has clarified that Plaintiffs have alleged injury-in-fact, Defendants persist in downplaying the losses to the Named Plaintiffs and the proposed classes in

asserting that damages are lacking. This meritless argument is nothing more than a "new label for an old error." *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018).

Accepting Plaintiffs' allegations as true, the Plaintiffs have pled actual damages including both economic and non-economic damage. The allegations of actual damage include:

> 19. Consequently, the Plaintiffs and Class Members have or will have to spend significant time and money to protect themselves; ***including, but not limited to: the cost of responding to the data breach, the cost of acquiring identity theft protection and monitoring, cost of conducting a damage assessment, mitigation costs, costs to rehabilitate Plaintiffs' and Class Members' PII/PHI/Sensitive Information, and costs to reimburse from losses incurred as a proximate result of the breach.***
>
> 20. Many Plaintiffs and Class Members suffered from ***actual economic injury resulting in tax-refund fraud, identify theft, credit card fraud, and other conduct causing direct economic injury*** as a result of the identity theft they suffered when Defendants did not protect and secure their PII/PHI/Sensitive Information and disclosed their PII/PHI/Sensitive Information to hackers.
>
> 21. Plaintiffs contracted for services that included a guarantee by Defendants to safeguard their personal information and, instead, ***Plaintiffs received services devoid of these very important protections.*** Accordingly, Plaintiffs allege claims for breach of contract, unlawful trade practices, unjust enrichment, negligence, and negligence per se.
>
> * * *
>
> 37. Defendants suggested that Plaintiffs and each class member protect themselves with identity theft protection and monitoring to combat Defendants' failures to adequately and appropriately safeguard personal information, to identify a cyberattack in a timely fashion, and to provide the privacy security and safeguards promised in Defendants' Internet Privacy Policy.
>
> 38. Plaintiffs and members of The Class have suffered economic and non-economic loss in the form of mental and emotional pain and suffering and aguish as a result of Defendants' failures.

Doc. 8-1 pp. 5-6, 9 ¶¶ 19-21, 37-38 (emphasis added). These allegations plainly allege two types of actual economic damage: 1) the loss of money and time in the form of expenditures made to protect

themselves; and 2) a loss of the benefit of the bargain. Neither of these types of damage are novel theories of damage, nor are they controversial.[1]

Defendants only argue damages are not pled by ignoring these allegations and continually suggesting that Plaintiffs have not alleged "harm." *See e.g.*, Doc. 44-1, p. 6 ("Plaintiffs do not allege any actual *harm*. Instead they generally allege a host of vague impending *harms*...Plaintiffs do not allege that they will suffer future *harm*...") (emphasis added). It is law of the case that Plaintiffs have alleged "harm," and Defendants' re-packaging of their failed argument is only made by ignoring the allegations in the Second Amended Complaint. *See Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017).

Defendants *admit* that Plaintiffs have alleged these actual damages sufficient to meet their burden to overcome a 12(b)(6) motion. Doc. No. 44-1, p. 7 ("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.'"). With this admission, Defendants must necessarily be arguing that these allegations are not legally sufficient allegations of actual damage. But Defendants do not present any case law to support this outlandish argument that money lost is not actual damage.[2]

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[1] Defendants make reference to the fact that the breach occurred "1,400 days ago" as somehow relevant to their arguments. Doc. 44-1, p. 2. First, the Plaintiffs have pled damages that have happened shortly after the breach was disclosed, including the purchase of sufficient identity theft protection and the loss of the benefit of the bargain. Second, Defendants wrongfully imply that no damage has occurred since the breach occurred to Plaintiffs or the class. This is only true if the Court, like the Defendants do here, ignore the allegations of the Complaint and foreclose *discovery* on these losses. However, Defendants are not entitled to these erroneous inferences at this time.

[2] The Defendants go on to claim that the 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." *Id.* Even if true, this argument does not suggest that damages are lacking. Instead, it seems to be an undeveloped suggestion that Plaintiffs have failed to plead a breach occurred, and it is also patently absurd. The Plaintiffs' alleged breach is based upon the fact that they were all customers of the Defendants, and the Defendants, despite promising to protect their sensitive information, and despite being paid to do so, allowed the Plaintiffs' information to be stolen, thus injuring Plaintiffs both contemporaneously, as well as in the future.

Economic loss is the epitome of actual damage. Defendants make no effort to explain their definition of "actual damages," but actual damages are nothing more than "any loss" or "any compensable damage." *See Maxwell v. Gallagher*, 709 A.2d 100, 104 (D.C. 1998). The gravamen of "actual damage" is an allegation that Plaintiffs have suffered "any loss," and Plaintiffs have alleged that as a consequence of Defendants' failures, breaches and misrepresentations, they have lost time and money.

The Seventh Circuit recently overturned dismissal by a district court for finding a failure to allege actual damages in the context of a data breach. *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826 (7th Cir. 2018). The *Dieffenbach* Court was presented with allegations from two different plaintiffs suggesting the same types of damage alleged here: (1) lost time in restoring funds; (2) lost time "sorting things out;" (3) lost time in making purchases; and (4) loss of the benefit of her bargain; 5) the cost of credit monitoring. *Id.* at 828-29, 829-30. The Court had no trouble finding damages were pled stating "Money out of pocket is a standard understanding of actual damages in contract law, antitrust law, the law of fraud and elsewhere. To get damages plaintiffs must show that a culpable data breach caused the monthly payments, but the complaint cannot be dismissed before giving the class an opportunity to do so." *Id.* at 830 (applying Illinois law). The Court further ruled "there are innumerable ways in which economic injury—may be shown." *Id.* at 829 (quoting *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)) (applying California law). Further, the Court recognized that the "time value of money" validates a loss, as does "significant time and paperwork costs incurred to rectify violations." *Id.*

Plaintiffs have filed claims that fall into one of three categories: 1) contract claims; 2) tort claims; and 3) consumer protection and other statutory claims. Each of these types of causes of action also specifically identify these losses as "actual damage."

i. Breach of Contract Damages.

Plaintiffs have filed a count for breach of contract. Defendants do not suggest at this stage that a contract was not formed, nor that there was not a breach of the terms of the contract. The only basis for dismissal is an alleged lack of damages. Defendants' argument is flawed.

The damages sought in the Second Amended Complaint are the standard type of actual damages which District of Columbia law awards to a non-breaching party whose contract has been breached:

> "Contract damages ... are intended to give the injured party the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."

Vector Realty Group v. 711 14TH STREET, 659 A.2d 230, 234 (D.C. 1994) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 347 comment (1981)). "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." *Capital Keys, LLC v. Democratic Republic of Congo*, 278 F.Supp.3d 265, 272 (D.D.C. 2017) (Jackson, J.) (citing *Id.*; *United House of Prayer for All People v. Therrien Waddell, Inc.,* 112 A.3d 330, 339-40 (D.C. 2015)). The benefit-of-the-bargain damage is the standard measure of damages in contract cases.[3]

Further, plaintiffs who allege a breach of contract may recover both consequential and incidental damages. In the District of Columbia, a party who demonstrates a breach of contract may

[3] *See also U.S. ex rel Landis v. Tailwind Sports Corp.*, 234 F.Supp.3d 180, 199 (D.D.C. 2017) (quoting *United States v. Bornstein*, 423 U.S. 303, 324, n. 13, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976)) (Cooper, J.) (discussing False Claims Act damages and stating such "are generally measured on the 'benefit of the bargain' received by both parties. Under this approach, 'the government's actual damages are equal to the difference between the market value of the [products] it received and retained and the market value that the [products] would have had if they had been the specified quality. Applying this benefit-of-the-bargain rule is often straightforward.

collect "an expense reasonably incurred" as a "proper element of consequential damages." *District News Co. v. Goldberg*, 107 A.2d 375, 377 (DC 1954). The District of Columbia Court of Appeals has determined:

> "The term 'consequential' is generally used to describe what treatises denominate natural or general damages whereas 'incidental' damages refer to other special damages accompanying breach of contract; both 'incidental' and 'consequential' damages are intended to compensate one party for loss incurred by the other's breach"

Bay General Industries, Inc. v. Johnson, 418 A.2d 1050, 1057 n.19 (D.C. 1980); *see also Capital Keys, LLC*, 278 F.Supp.3d at 272-73 (quoting Restatement (Second) of Contracts § 347) ("Expectation damages typically are measured by (a) the loss in the value to [the injured party] of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, *less* (c) any cost or other loss that [the injured party] has avoided by not having to perform.") (emphasis in original). Plainly, "Incidental damages include any costs [the plaintiff] incurred while making reasonable efforts to avoid losses, whether the efforts were successful or not." D.C. Civ. Jur. Ins. § 11.31. Plaintiffs allege and seek these damages which are recoverable in contract.

Plaintiffs seek the standard types of damages that are awardable under the controlling law. Defendants' suggestion that Plaintiffs have not alleged damages is incomprehensible as to Plaintiffs' contract claim.

ii. Tort Damages

Plaintiffs' tort claims likewise seek those damages for which DC law permits recovery. These tort claims include Negligence, Negligence *Per Se*, Fraud, Constructive Fraud and Breach of the Duty of Confidentiality.

Plaintiffs have pled damages that are recoverable in tort.

> The primary purpose of tort law is to compensate plaintiffs for injuries they have sustained due to the wrongful conduct of others. The normal measure of tort damages is the amount which compensates the plaintiff for all of the damages proximately caused by the defendant's negligence.

Haymon v. Wilkerson, 535 A.2d 880, 885 (DC 1987) (citing *District of Columbia v. Barriteau,* 39 A.2d 563, 566-67 (D.C. 1979); RESTATEMENT (SECOND) OF TORTS § 901, comment (a); PROSSER & KEETON, *supra,* § 4, at 20). Plaintiffs allegations are that they suffered injuries as a result of Defendants' negligence or other tortious activity, including economic and non-economic injury as identified. These are compensable actual damage in tort.[4]

Finally, Plaintiffs' are entitled to compensation for non-economic loss for breach of the duty of confidentiality. "A plaintiff whose private life is given publicity may recover damages...for the 'emotional distress or personal humiliation . . . if it is of a kind that normally results from such an invasion and it is normal and reasonable in its extent.' Actual harm need not be based on pecuniary loss, and emotional distress may be shown simply by the plaintiff's testimony. Proof of special damages is not required." *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 594 (DC 1985) (adopting the tort of breach of the duty of confidentiality and acknowledging non-economic damages are legally allowable under a theory for invasion of privacy and finding.). As to this specific cause of action, Plaintiffs have legally sufficient damages for their non-economic loss.

iii. Statutory Claims

Finally, Plaintiffs state that the measure of "actual damages" for their statutory claims is identical to those for their contract claims. This is the standard definition for "actual damages," and is fully appropriate in the context of Plaintiffs' various statutory claims. *See* D.C. Civ. Jur. Ins. 20.11,

[4] Defendants again rely on the law of standing to claim that damages are lacking. *See* Doc. 44-1, p. 8 (citing *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 708 (DC 2009)). The law of the case is that Plaintiffs have standing at a preliminary motions stage. But, Defendants argument does not reasonably stand for the suggestion that actual damage has not been alleged because it relies upon the law of standing, not damages.

Comment "Compensatory Damages Instruction." ("Instruction 13-1 of this volume supplies language appropriate to deciding the compensatory damages question.").

b. The DC Plaintiffs have adequately sought statutory damages.

In addition to the loss of actual time and money, Chantal Attias and Andrea Kotzur (hereinafter "the DC Plaintiffs") seek statutory damages afforded to them by the DC CPPA. These legally sufficient damages defeat Defendants' motion as the DC Plaintiffs are not required to seek anything more to state a claim for damages, even assuming, *arguendo*, there is no sufficient allegation of "actual damages." Within their cause of action under the DC CPPA, "Mr. Kotzur and Mrs. Attias and members of the DC Class have been injured and seek the following for herself and on behalf of the general public and members of the class: (d) $1500 per violation or treble damages, whichever is greater." Doc. 8-1, pp 21-22 ¶ 90(d). These statutory damages are expressly provided for by the DC CPPA. *See* DC Code § 28-3905(k)(2)(A).

Statutory damages are sufficient to defeat dismissal even in the absence of any other loss. In *Parr v. Ebrahimian*, 70 F.Supp.3d 123 (D.D.C. 2014) (Friedman, J.), defendants moved for *summary judgment after extensive discovery*, and alleged that the plaintiff had failed to provide evidence of damages that would entitle her to relief under the DC CPPA. The defendants in that case argued that "even with the benefit of discovery, Ms. Parr has failed to produce evidence sufficient to support a reasonable jury's finding that any misrepresentations regarding code compliance caused her any damages." *Id.* at 135. But, the district court correctly held "The CPPA also provides for recovery where a violation of its provisions does not cause actual harm to the consumer; in such cases, the consumer may be able to collect statutory damages in the amount of $1500 per violation." *Id.* (citing D.C. Code § 28–3905(k)(2)(A)). Then, the district court definitively found "The Court concludes that Ms. Parr has raised genuine issues of fact regarding whether

Rimcor's representations ***regarding code compliance*** and housing inspections could constitute a violation of one or more of the CPPA provisions cited supra at 16, ***which could entitle her to recover statutory damages***." *Id.* (emphasis added).[5] Ms. Parr was entitled to trial by jury, defeating summary judgment without evidence of actual damages, based upon the available statutory damages. *See also* D.C. Civ. Jur. Ins. § 20.11, Liability Without Proof of Actual Harm ("It is conceivable a plaintiff could bring a CPPA action seeking the minimum statutory damages of $1,500 and injunctive relief without pleading or proving any actual damages.").

The DC Plaintiffs have brought a claim under the DC CPPA claim seeking, *inter alia*, statutory damages. Even assuming *arguendo*, that they have failed to allege actual damages, the DC Plaintiffs' claim for statutory damages entitles them, and the DC class to trial on the issues of damages.[6]

II. PLAINTIFFS HAVE ADEQUATELY PLED THEIR TORT CLAIMS.

Defendants argue that under the DC, Maryland or Virginia "economic loss rule," they are entitled to dismissal. Plaintiffs note that a federal court sitting in diversity applies the choice of law rules of the jurisdiction in which it sits. *See e.g., Meng v. Schwartz*, 305 F.Supp.2d 49, 58 (D. D.C. 2004). Defendants do not allege any conflict, and so only D.C. law is pertinent to this Court's analysis of the economic loss rule. Further, if the Court perceives, or Defendants allege a conflict in reply, Plaintiffs' suggest that under the "interests analysis," the appropriate law to apply is the District of Columbia law because the District of Columbia has the most substantial interest in applying its laws. *Id.*

[5] The district court additionally found evidence of separate and distinct, but "probably minimal," damages were available under the DC CPPA. But specifically, as to housing "code compliance," the district court found no actual loss occurred, yet she was still entitled to a trial by jury on the question of statutory damages.

[6] There is no argument that the DC Plaintiffs' claim does not allege material and/or misleading statements that suffice as violations of the DC CPPA. *See id.* at 135, 136.

Before engaging this portion of Defendants' "kitchen-sink" motion, Plaintiffs call attention to the discrepancy Defendants engage in by 1) claiming Plaintiffs did not allege any actual damages; and simultaneously claiming some of Plaintiffs' claims are barred because they have only "alleged economic damages." Doc. 44-1, p. 12. Plaintiffs have alleged both economic and non-economic damages adequately, and allegations do not shift based upon Defendants' multiple, inconsistent arguments.

a. The Economic Loss Rule is inapplicable because Plaintiffs have pled they have suffered non-economic damages.

The District of Columbia has adopted a limited "economic loss rule" which Defendants ask this Court to expand and apply to a case in which non-economic damages have been caused by Defendants' bad acts. "Generally, under the 'economic loss' rule, a plaintiff who suffers *only* pecuniary injury as a result of the conduct of another cannot recover those losses in tort." *Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 982 (D.C. 2014) (quoting *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 479 (9th Cir. 1995)) (emphasis added). The economic loss rule has no application in tort claims that have caused more than pecuniary injury. Defendants must not be permitted to morph the limited DC economic loss rule from a rule which applies when "only pecuniary injury" occurs to one which applies when plaintiffs "seek largely to recover economic loss." *Contrast*, *id.* and (Doc. 13-1, p. 23).

Plaintiffs have not merely "tacked on" pain and suffering to their causes of action. The District of Columbia recognizes a broad range of non-economic damages that are recoverable in tort including "emotional distress," and any past or future "inconvenience" that a plaintiff has or may suffer in the future. *See* DC. Civ. Jur. Ins. § 13.01. Defendants know well that this breach has caused serious concern and inconvenience for their insureds and stated so in their own data breach notification web site. "We deeply regret the concern this attack may cause..."

www.carefirstanswers.com (last visited July 2, 2018) (quoting CareFirst President and CEO Chet Burrell). Due to the inactions and failures of Defendants, Plaintiffs and members of the class have experienced concern, inconvenience and mental anguish to support a tort claim due to the loss of their data and their necessary need to spend time and effort protecting themselves from future identity theft. (*See* Doc. 8-1, *e.g.* ¶¶ 54, 57). Therefore, as a matter of law, Plaintiffs have pled more than simple economic loss in support of their tort causes of action.

b. The "special relationship" exception bars application of the economic loss rule.

In *Aguilar*, the District of Columbia Court of Appeals indicated that when a "special relationship" exists between the plaintiff and defendant, the economic loss rule is inapplicable. The DC Court of Appeals confirmed this broad exception since *Aguilar* stating, "We left open the possibility that a plaintiff could recover economic damages if it had a 'special relationship' with the defendant." *Whitt v. Am. Prop. Constr., P.C.*, 157 A.3d 196, 205 (D.C. 2017) (quoting *Aguilar*, 98 A.3d at 985–86). As the *Whitt* Court explained, the economic loss rule is not a true independent bar to a negligence claim, but a product of the Court's analysis as to whether a duty in tort existed. *Whitt* at 205 (quoting *Aguilar* at 981) ("...we did not signal that economic loss is unimportant. Rather, we were grappling with the question of whether the defendants owed a duty of care to the plaintiffs."). The economic loss rule does not command that, even in the unambiguous claim of ***mere*** economic loss, duty is lacking. Instead, the overall question is a broader legal analysis as to whether tort duty attaches to the relationship between a plaintiff and a defendant. *Id.* at 205.

In *Whitt*, the plaintiff brought a negligence claim seeking only economic damages to her business caused by the defendants. The Court of Appeals reversed the trial judge's application of the economic loss rule and found that a special relationship existed, even though no contractual privity existed. The Court of Appeals reviewed the nature of the relationship between the plaintiff

and defendants and found that based upon 1) the period of time the negligence occurred, and 2) a written permit requiring defendants to act in a certain manner, a special relationship existed. *Id.* at 206. The Court summarized that a special relationship flows, not necessarily from a contract or professional relationship, but from any obligation that implicates a party's "economic expectancies." *Id.* (quoting *Aguilar* at 985).

Here, the allegations note that Defendants were the parties given the Named Plaintiffs most sensitive, personal, and private information. Part of the relationship between the Named Plaintiffs and Defendants was an obligation, or duty, upon the Defendants to safeguard this information so that Plaintiffs need not be subject to identity theft, which necessarily implicates economic loss. *See e.g.* Doc. 8-1 ¶¶ 25-26. Under DC's economic loss rule, and the "special relationship" exception, Defendants owed a duty to Plaintiffs to protect this information as part of Plaintiffs' economic expectancies.

Defendants address this limitation on the economic loss rule only in a footnote, failing to identify the *Whitt* case which has clarified the opinion from *Aguilar*. But, it has already been held that an insurer has "additional obligations" beyond those stated in a contract by nature of the insurer-insured relationship.

> Neither party has presented any authority from the District of Columbia which establishes the relationship between an insurer and its insured. Some indication that insurers have additional obligations appears in *Continental Insurance Company v. Lynham*, 293 A.2d 481, 483 (D.C.App.1972). There the Court noted that "the insurer has a duty to process and pay claims expeditiously and in good faith ...." Moreover, like the real estate broker in Brown v. Coates, the insurance carrier is an industry regulated in the public interest by a comprehensive statutory scheme. 35 D.C. Code §§ 101-2004. Given these considerations, the court concludes that under the law of the District of Columbia, an insurer has additional obligations to its insured which subject it to more stringent standards of conduct than those normally imposed on parties to a contract.

Cent. Armature Works, Inc. v. Am. Motorists Ins. Co., 520 F. Supp. 283, 292 (D.D.C. 1980) (internal citations omitted). This well-reasoned district court opinion relied largely upon the *binding* federal Court of Appeals precedent from prior to the creation of the "home rule courts." "In Brown, the Court emphasized the 'fiduciary' relationship that it found between the real estate broker and his clients. In establishing this relationship and the accompanying high standard of conduct, the Court relied not only on the agency relationship between the parties, but also on the public policy considerations which had lead [*sic*] to the regulation of the real estate broker industry." *Id.* at *291-92* (citing *Brown v. Coates*, 102 U.S. App. D.C. 300, 253 F.2d 36 (1958)). Like the fiduciary relationship between the real estate broker and its clients in *Brown*, the district court reasoned that an insurance company has a similar special relationship with its insureds. Therefore, Defendants' argument is inconsistent with the law of the District of Columbia.

Defendants' argument would lead this court to find that a health insurance company—with access to healthcare records, financial records, and some of the most sensitive information available about a given individual—has the same type of relationship with its insured that a consumer has with any street vendor. This suggestion is inapposite with DC Court of Appeals precedent that found even entities that have no privity with an individual can be held liable in tort for purely economic loss if the relationship "implicates [a party's] economic expectancies." Here, Plaintiffs had every expectation that their information would be reasonably guarded, and the parties understood that this sensitive information could cause economic harm if to the Plaintiffs if it was not appropriately safeguarded. Therefore, a special relationship exists, and the economic loss rule does not bar Plaintiffs' tort claims.

c. Defendants' reliance on *Choharis* is significantly misplaced.

In their final attempt to dismiss all tort claims against it, Defendants erroneously claim that *Choharis v. State Farm Fire & Casualty*, 961 A.2d 1080 (D.C. 2008) precludes *any and all* tort actions when a contract exits. However, *Choharis* stands for the much narrower proposition that the District of Columbia does not have a first-party bad faith cause of action.

> Choharis principally challenges the refusal to recognize a tort of bad faith by insurance companies in the handling of policy claims. He asserts that a number of jurisdictions have recognized such a tort and that the District of Columbia should do the same. Although a common-law court, we are not persuaded that we should do so.

Id. at 1087. Instead of offering some expansive, blanket ruling that tort claims may not arise out of contractual relationships, *Choharis* stands for the mere proposition that there is no first-party bad faith action in the District of Columbia for an insurer's failure to provide covered insurance claims. In fact, *Choharis* expressly stated that the Court was not excluding tort claims against insurers:

> Choharis asserts that the consequence of the ruling by the trial court insulates insurance companies from any tort liability in the handling of policy claims made by their insureds. ***Such an interpretation goes too far.*** An insurance company that, for example, slandered or assaulted an insured in the course of a claims dispute would not be immune from tort liability.

Id. at 1088 (emphasis added). *Choharis* simply held that a claim for a failure to provide the insurance benefits contracted for is addressed via contract law and not a newly created special tort of first-party bad faith.

Plaintiffs have made no claim that CareFirst, *et al.* failed to provide the *insurance benefits* that were bargained for or have acted in bad faith. Instead, Plaintiffs complain of an "independent injury over and above the mere disappointment of plaintiff's hope to receive his contracted-for benefit." *Id.* at 1089; see also *Tate v. Aetna Cas. & Sur. Co.*, 149 Ga. App. 123, 124-25, 253 S.E.2d 775, 777 (1979) (*citing E. & M. Const. Co. v. Bob*, 115 Ga. App. 127, 153 SE2d 641 (GA 1967));

Floyd v. Morgan, 106 Ga. App. 332 (127 SE2d 31); *Moody v. Martin Motor Co.*, 76 Ga. App. 456 46 SE2d 197 (GA 1948) ("It is well settled that misfeasance in the performance of a contractual duty may give rise to a tort action."). Plaintiffs' Second Amended Complaint makes absolutely no allegation that health insurance benefits were wrongfully denied. Plaintiffs unequivocally complain of Defendants' negligent security policies and unlawful trade practices that caused a loss of sensitive information. This negligent act caused an independent harm that gives rise to tort cause of action under DC substantive law. Defendants' argument is inapposite with *Choharis*.

III. DISMISSAL OF PLAINTIFFS' UNJUST ENRICHMENT CLAIM WOULD BE PREMATURE.

Regarding the Defendants' argument that the contractual relationship among the parties precludes a claim for unjust enrichment, dismissal is unwarranted at this stage of the proceedings because Plaintiffs are entitled to plead alternative theories of relief.

> Under District of Columbia law, "there can be no claim for unjust enrichment when an express contract exists between the parties." Under the Federal Rules of Civil Procedure, however, a plaintiff may plead alternative theories of recovery. Courts in this District have found that a plaintiff should be permitted to plead both breach of contract and unjust enrichment. Such a conclusion is in the interest of justice -- to find that a plaintiff may not plead unjust enrichment where he or she also has alleged a breach of contract could leave that plaintiff without any remedy should the fact-finder determine at a later stage that there was no express agreement between the parties.

The Scowcroft Grp., Inc. v. Toreador Res. Corp., 666 F. Supp. 2d 39, 44 (D.D.C. 2009) (quoting *Schiff v. Am. Ass'n of Retired Persons*, 697 A.2d 1193, 1194 (D.C. 1997); *McWilliams Ballard, Inc. v. Broadway Mgmt. Co.*, 636 F. Supp. 2d 1, 9 n.10 (D.D.C. 2009) (finding that while "plaintiff ultimately cannot recover under both a breach of contract claim and an unjust enrichment claim pertaining to the subject matter of that contract . . . at [the pleadings stage], plaintiff's unjust enrichment claim is an alternate theory of liability which it may pursue"); *Nevius v. Afr. Inland Mission Int'l*, 511 F. Supp. 2d 114, 122 n.6 (D.D.C. 2007) (finding that, in light of Federal Rule of

Civil Procedure 8(d), "[t]he court is not persuaded . . . that [Plaintiff] cannot allege an express contract while asserting a claim for unjust enrichment, a remedy designed for the absence of a contract")) (citing *Albrecht v. Comm. on Employee Benefits of the Fed. Reserve Employee Benefits Sys.*, 357 F.3d 62, 69, 360 U.S. App. D.C. 47 (D.C. Cir. 2004) (finding that there can be no claim for unjust enrichment when the claim relies on the terms of an express contract between the parties); Fed. R. Civ. P. 8(d)). Therefore, it would be contrary to the interests of justice to dismiss a cause of action for unjust enrichment at the motion to dismiss stage due to the potential that no express agreement may be found between the parties in the later stages of the litigation.

IV. HIPAA DOES NOT PRECLUDE ANY OF PLAINTIFFS' CAUSES OF ACTION.

Defendants attempt to dismiss Plaintiffs' breach of contract, negligence, DC Consumer Protection Act, and negligence *per se* claims by asking this Court to find that the Health Insurance Portability and Accountability Act (hereinafter "HIPAA") precludes these causes of action. Doc. 44-1, pp. 16-19. This is inconsistent with all law on HIPAA's preemptive abilities. Defendants' argument misstates the law.

a. Plaintiffs' causes of action do not rely upon HIPAA violations.

Defendants attempt to convert several of Plaintiffs' causes of action into "HIPAA actions." However, only Plaintiffs' Negligence *per se* cause of action requires a finding that HIPAA was violated to be plausibly stated. Plaintiffs' breach of contract claim listed several terms other than HIPAA violations which were breached. Doc. 8-1 ¶¶ 67, 70, 71. Likewise, Plaintiffs' negligence claim is not based on a violation of HIPAA, and recitation to HIPAA appears nowhere within the cause of action. *Id.* ¶¶ 76-84. Finally, Plaintiffs' DCCPPA claim specifically referenced violations that are not reliant on a finding that HIPAA was violated; and instead alleges that Defendants' Privacy

and Internet Privacy Policies were untruthful. *Id.* at 86-88.b. Therefore, Plaintiffs do not rely on HIPAA and do not need or intend to show a violation of HIPAA to establish these causes of action.

Plaintiffs identified in their Second Amended Complaint a series of false and misleading statements regarding the security in place by Defendants that give rise to an actionable unlawful trade practice under each respective consumer protection act. Defendants' "Privacy Policy" and "Internet Privacy Policy" detailed a series of security measures that Defendants proffered they employed to protect Plaintiffs' data:

> 28. Defendants issued an "Internet Privacy Policy" intended to convey how PII/PHI and other Sensitive Information would be secured and protected. Specifically, Defendants Internet Privacy Policy stated:
>
> > CareFirst BlueCross BlueShield respects the need for security regarding your personal information. Whenever you provide personal information, your information will be protected using Secure Sockets Layer (SSL) technology. SSL is an industry standard that encrypts the information you provide, to avoid the decoding of that information by anyone other than CareFirst BlueCross BlueShield. This technology, however, does not absolutely guarantee the total privacy of information that has been provided to this site.
> >
> > Information you submit directly to us will remain on our servers or those of our affiliates, secured by various industry approved technologies to prevent unauthorized access to your personal information.
>
> 29. In September 2013, Defendants issued an amended Privacy Policy which stated:
>
> > We maintain physical, electronic and procedural safeguards in accordance with federal and state standards to protect your health information. All of our associates receive training on these standards at the time they are hired and thereafter receive annual refresher training. Access to your protected health information is restricted to appropriate business purposes and requires pass codes to access our computer systems and badges to access our facilities. Associates who violate our standards are subject to disciplinary actions.

Doc. 8-1 ¶¶ 28, 29. Plaintiffs then pled that Defendants did not employ the types of security protocols that the respective privacy policies alleged were employed. *Id.* ¶ 30-32. Ultimately, Plaintiffs pled that these untrue, unlawful and deceptive statements caused Plaintiffs to become the

victim of a preventable cyberattack. *Id.* ¶ 34. Further, these false statements were unlawful trade practices that violated the DC Plaintiffs' statutory rights to be free from unlawful trade practices.

Unlawful trade practices include statements that "represent that services have characteristics, benefits, or quantities that they do not have," or "misrepresent as to a material fact which has a tendency to mislead." D.C. Code § 28-3904(a), (e); see also Md. Comm. Law Code Ann. § 13-301(1) "False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;" see also Va. Code Ann. § 59.1-200 "Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction." Plaintiffs' Second Amended Complaint adequately pled that Defendants' misrepresentations as to the type, quality, characteristics, and benefits of the security and privacy protections in place were misleading and violated the consumer protection acts. Doc. 8-1, *e.g.* ¶ 88 a, b.

In further support of their well-pled Second Amended Complaint that these privacy policy violations constitute unfair and deceptive trade practices, Plaintiffs point to the Federal Trade Commission's Director of the Bureau of Consumer Protection statement on privacy policy violations. The Federal Trade Commission Director's statement is summed up as follows: "If a company makes materially misleading statements or omissions about privacy or data security that are likely to mislead reasonable consumers, such statements or omissions are deceptive." https://www.ftc.gov/system/files/documents/public_statements/626841/150226section5symposium.pdf (last visited October 19, 2015.) The promise to protect privacy and to employ data security is a serious one; and the failure to live up to those promises is a "per se" deceptive trade practice according to a commissioner of foremost federal agency in charge of policing unlawful and deceptive trade practices.

Similarly, Plaintiffs claims in tort and contract do not rest on HIPAA. As stated *supra*, Plaintiffs' tort claims rest upon the duty owed by virtue of the relationship between Defendants and Plaintiffs. And Plaintiffs' contract claims rest upon, not HIPAA, but the agreement between the parties. HIPAA is ancillary to these claims.

Plaintiffs' claims, therefore, do not rest upon a finding of a violation of HIPAA. Instead, they are based upon material misrepresentations made by Defendants to Plaintiffs in regard to the safety and security of the sensitive information shared. Plaintiffs did not bring a claim for a violation of HIPAA; instead, they brought claims of negligence, negligence *per se*, breach of contract, and violations of various consumer protection acts.

b. HIPAA does not preempt Plaintiffs' causes of action.

Assuming *arguendo* that Plaintiffs' causes of action necessitated a finding of a HIPAA violation, dismissal is still unwarranted. Plaintiffs concur with Defendants' assessment that HIPAA does not *create* a private right of action. However, Defendants fail to recognize a significant distinction. HIPAA also *does not preclude*—nor preempt—a private right of action for violation of written policies, nor does it preempt any state law that is stricter or more punitive than HIPAA.[7] "HIPAA does not preempt state law that is 'more stringent' than the requirements that it mandates." *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 2004 U.S. Dist. LEXIS 21830, *10 (D.D.C. May 17, 2004) (citing 42. U.S.C. §§ 1320d-2, 1320d-7); *see also Law v. Zuckerman*, 307 F. Supp. 2d 705, 709 (D. Md. 2004) (citing 42 U.S.C. § 1320d-7(a)(2)(B); 45 C.F.R. § 160.203.) ("Under the relevant exception, HIPAA and its standards do not preempt state law if the state law relates to the privacy of individually identifiable health information and is 'more stringent'

[7] Defendants do not expressly argue that HIPAA "preempts" Plaintiffs' causes of action in this case; however, Plaintiffs can imagine no other potential legal vehicle in which Defendants may believe that HIPAA's lack of its own private right action precludes state law claims for violation of federal law. Therefore, Plaintiffs have addressed the non-preemption of HIPAA for this Court's review.

than HIPAA's requirements."). *See also* 42 USCS § 1320d-7(a)(2)(A)(i)(I) ("A provision or requirement under this part [42 USCS §§ 1320d et seq.], or a standard or implementation specification adopted or established under sections 1172 through 1174 [42 USCS §§ 1320d-1 through 1320d-3], shall not supersede a contrary provision of State law, if the provision of State law is a provision the Secretary determines is necessary to prevent fraud and abuse."). While HIPAA does not *create* a private right of action, it likewise does not preempt or otherwise preclude any and all actions based upon state law for fraud and abuse, including the consumer protection act, or other common law claims such as negligence and breach of contract.[8] It simply does not create its own stand-alone private right of action.

Contrary to Defendants' assertions, it is well-established that individual state consumer protection claims and common law claims can be brought on the basis of HIPAA violation. See *Dickman v. MultiCare Health Sys.*, 2015 U.S. Dist. LEXIS 71306 (W.D. Wash. June 2, 2015) (remanding action based on violations of Washington Consumer Protection Act predicated on HIPAA violations.) Federal courts have noted that actions based upon HIPAA violations are routinely viable in state courts under both theories of negligence and consumer protection acts.[9] Although Plaintiffs' claims for privacy violations are not based on HIPAA alone, there would be nothing novel about such an action, and certainly nothing that required dismissal.

Defendants also specifically attack only one of three consumer protection act claims pled with this argument, the DC CPPA. But the DC Court of Appeals has recently held that a statute

[8] Plaintiffs suggest that Defendants intentionally refrain from arguing preemption of these claims because it is well-settled that HIPAA does not preempt these causes of actions.

[9] "Moreover, state courts routinely apply federal law in state law consumer protection and negligence suits." *Id.* at *7 (citing *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318, 125 S. Ct. 2363 (2005) ("The violation of federal statutes and regulations is commonly given negligence per se effect in state court proceedings."); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) ("State courts frequently handle state law consumer protection suits that refer to or are predicated on standards set forth in federal statutes."); *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078 (9th Cir. 2007) (Analyzing whether a HIPAA violation occurred that could support a state consumer protection act claim.)

need not be among the expressly enumerated offenses to be a predicate for a DC CPPA claim. In *Velcoff v. MedStar Health, Inc.*, Case No.: 17-CV-139 (D.C., June 21, 2018), the Court of Appeals reviewed a privacy claim made against a provider of workers' compensation healthcare. Exhibit 1 (slip opinion). *Id.* at *2-3. The plaintiff filed a claim under the DC CPPA, *et al.*, alleging that Medstar "committed illegal trade practices in violation of the CPPA by breaking its promise to protect [plaintiff's] confidential mental-health information except as required by law" and additionally by violating a separate statute, the D.C. Health Mental Information Act. *Id.* at *3. The DC Court of Appeals, interpreting the substantive meaning and application of the DC CPPA to a healthcare privacy statute, had no trouble finding "the complaint clearly and specifically identifies several trade practices that the complaint alleges are illegal..." *Id.* at *7. And the Court found that the plaintiff had stated a claim under the DC CPPA in alleging violations of a statute as a predicate for her DC CPPA claim. *Id.* Similarly, violations of HIPAA may be prosecuted under the DC CPPA, which provides a remedy for *illegal trade practices*.

Defendants argument is based on disparate causes of action and inapplicable and uninstructive foreign case law. First, Defendants' reliance on *Johnson v. Quander*, 370 F. Supp 2d 79 (D.D.C. 2005), *et al.* is misplaced. In *Johnson*, the plaintiff filed a complaint which listed "Sixth Claim – Health Insurance Portability and Accountability Act Violation" as a cause of action. Case No. 1:04-cv-00448-RBW, Doc. 1, March 18, 2004; see also *Hudes v. Aetna Life Ins. Co*, Case No. 1:10-cv-01444-JEB, Doc. 49, ¶ 28. This is inconsistent with the pleading in Plaintiffs' Second Amended Complaint and has no application to the case *sub judice*.

Second Defendants' reliance on other, out-of-jurisdiction authority is likewise misguided to show that statutory violations cannot support breach of contract claims. *Peltier v. Almar Mgmt., Inc.,* 229 F. Supp. 3d 1160 (D. Haw. 2017) actually stated the opposite of Defendants' implication when

it denied the moving parties 12(c) dismissal on a breach of contract claim over a pleading similar to the Plaintiffs. *Id.* at 1169. While the court in that case did find that the statute analyzed did not *confer* a private cause of action, it stated that, as a matter of law, it could not be determined that the plaintiff's breach of contract claim relied *solely* upon the defendant's violation of a statute. *Id.* As stated, the Plaintiffs in this case base their breach of contract claim on a host of violations beyond HIPAA.[10]

For these reasons, this Court should refrain from becoming the first court to find that HIPAA preempts state consumer protection actions and common law claims, or further finding that HIPAA preempts and precludes Plaintiffs' privacy claims which are *not* based solely on HIPAA, but based on Defendants' violations of their individual privacy policies, material terms of the contract, and unreasonable acts.

V. PLAINTIFFS' MARYLAND AND VIRGINIA CONSUMER PROTECTION ACT CLAIMS ARE NOT BARRED.

a. The Maryland Plaintiffs have stated a claim under the Maryland Consumer Protection Act.

Defendants allege that their status as a network of for-profit health insurers exempts them from private civil liability under the Maryland. Doc. 44-1, pp. 19-20. Specifically, Defendants point to a provision in the MCPA, which states that it does not apply to "(1) the professional services of ... [an] insurance company." Md. Code Ann., Comm. Law § 13-104(1). But Maryland appellate case law interpreting this exemption have found it to be a narrow exemption that does not apply to everything an insurer does in the course of its business.

[10] The Defendant's other cases to this point are likewise distinguishable. *Patel v. Catamaran Health Sols., LLC* No. 15-CV-61891, 2016 WL 5942475, at *4, *9 (S.D. Fla. Jan. 14, 2016)was decided on the basis of a Florida statute (a) the violation of which was the *entire* basis for the breach of contract claim, and (b) was found to not even be violated.. The same can be said for *Fossen v. Caring for Mountains, Inc.*, 993 F. Supp. 2d 1254 (D. Mont. 2014), which found similarly applying a Montana statute. *Id.*

When applying the "professional services exemption," there is a distinction between the actual "professional services" provided by the insurance company and the entrepreneurial and commercial aspects of an insurance company. In *Scull v. Groover*, 435 Md. 112, 76 A.3d 1186 (2013) the Maryland Court of Appeals examined the applicability of this very section to medical professionals. As the Court of Appeals has noted, "not everything that a licensed professional does is a 'professional service.'" *Id.* at 1196. Similarly, and employing the same reasoned approach to the same statute, the only applicability of this exemption is to the actual rendering of health care benefits to the insureds. Plaintiffs' claim in the instant matter is based on Defendants' failure to safeguard Plaintiffs' personal information and is separate and distinct from the Defendants' actual professional service of providing health insurance coverage. As a result, the Defendants are not exempt from private civil liability under the Maryland Consumer Protection Act for their acts that were not specifically in the furtherance of providing medical care coverage.

This interpretation of the statute is based on the plain language of the statute, and relevant case law interpreting the meaning of "professional services;" but it is further bolstered by the fact that the Maryland Consumer Protection Act is the vehicle by which Maryland consumers—including the instant Maryland Plaintiffs—can enforce Maryland's data breach notification statute, *i.e.* Md. Comm. Law Code 14-3501, *et seq.* (hereinafter the "Personal Information Protection Act."). The Personal Information Privacy Act applies to "a sole proprietorship, partnership, corporation, association, or any other business entity, whether or not organized to operate at a profit." Md. Comm. Law Code Ann. § 14-3501(1). The statute plainly applies to Defendants in that they are a business entity under the definition. However, if Defendants' argument of a blanket exemption for any false and misleading statement offered by an "insurance company"—*i.e.* without determining whether those statements were made in the performance of "professional services"—were accepted by this Court, it

would be wholly irreconcilable with the Personal Information Protection Act. That is, the Personal Information Protection Act directly conflicts with Defendants interpretation of the limited insurance exemption. However, if this Court interprets the limited exemption as the Maryland Court of Appeals did in *Scull*, then there is no conflict between these two provisions of the Maryland Consumer Protection Act. Defendants can be found exempt from the MCPA for their "professional service" or rendering health insurance, yet still be liable for unlawful violations of the Personal Information Protection Act.

The Defendants' contention that courts have interpreted the MCPA exemption broadly is misleading. Doc. 44-1, p. 20. With one exception, every case which the Defendants cite regards the professional services of attorneys.[11] There is obviously a great deal of difference between the services of a private attorney, who performs myriad functions and can always be said to be acting within the scope of his professional services regarding any work done for clients, and the services of an insurance company, whose professional services entail the provision of insurance benefits, alone.

b. The Virginia Plaintiffs have stated a claim under the Virginia Consumer Protection Act.

Similarly, the Virginia Consumer Protection Act also provides an exemption for "insurance companies regulated by the State Corporate Commission." Va. Code Ann. § 59.1-199(D). Yet it is important to note "[u]nder Va. Code Ann. § 59.1-199, aspects of consumer transactions authorized by federal and state law are exempt from the Virginia Consumer Protection Act." *Wingate v. Insight Health Corp.*, 87 Va. Cir. 227, 234 (2013). Defendants' failure to safeguard Plaintiffs' personal

[11] *See Lembach v. Bierman*, 528 F. App'x 297, 304 (4th Cir. 2013) (attorneys); *Stewart v. Bierman*, 859 F. Supp. 2d 754, 768 (D. Md. 2012) (the underlying case decided on appeal in *Lembach*, and declined to extend by *Scull v. Groover*, 435 Md. 112); *Robinson v. Fountainhead Title Grp. Corp.*, 447 F. Supp. 2d 478, 490 (D. Md. 2006) (title insurance company, but concerning the exact conduct and the same players as the previous two (2) listed cases, and declined to extend by *Scull v. Groover*); *Butler v. Wells Fargo Bank, N.A.*, No. CIV.A. MJG-12-2705, 2013 WL 145886, at *3 (D. Md. Jan. 11, 2013) (attorneys); *Puffinberger v. Commercion, LLC*, No. CIV. SAG-13-1237, 2014 WL 120596, at *9 (D. Md. Jan. 10, 2014)(attorneys).

information is separate and distinct from the Defendants' actual professional service of selling health insurance. The Defendants point to the Second Amended Complaint, which states 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." Doc. No. 44-1p. 20. However, there is no basis for stating that something done in an entity's "regular course of business" are implicitly part of its professional services regarded in the exemption. Most directly, the statements in Defendants Privacy Policy and Internet Privacy Policy are not "authorized by federal and state law." Therefore, these false and misleading statements are subject to the Virginia Consumer Protection Act as any other false and misleading statement. Consequently, the Defendants are also not exempt from private civil liability under the Virginia Consumer Protection Act.

VI. PLAINTIFFS HAVE PLED FRAUD BASED CLAIMS WITH THE REQUISITE PARTICULARITY.

The basis for Plaintiffs' fraud claims was stated with particularity in their Second Amended Complaint. This court has held "the circumstances that the claimant must plead with particularity include matters such as the time, place, and content of the false misrepresentations, the misrepresented fact, and what the opponent retained or the claimant lost as a consequence of the alleged fraud." *Semon v. Ledecky (In re United States Office Prods. Sec. Litig.)*, 326 F. Supp. 2d 68, 73 (D.D.C. 2004) (citing *United States ex rel. Totten v. Bombardier Corp.*, 351 U.S. App. D.C. 30, 286 F.3d 542, 551-52 (D.C. Cir. 2002); *United States ex rel. Joseph v. Cannon*, 206 U.S. App. D.C. 405, 642 F.2d 1373, 1385 (D.C. Cir. 1981)). Plaintiff pled these facts with particularity.

Specifically, Plaintiffs identified false statements in Defendants' Privacy Policy and Internet Privacy Policy. Doc 8-1, ¶¶ 28-29, 117-18. Plaintiffs also pled when these written statements were made, *i.e.* no later than September 2013. *Id.* The entirety of the misleading content was identified

for Defendants. *Id.* And Plaintiffs identified what the Defendants gained, and Plaintiffs' lost. *Id.* at ¶ 122.

Therefore, Plaintiffs have satisfied the heightened pleadings requirements of Federal Rule of Civil Procedure 9(b) in pleading claims for Fraud (Count VII) and Constructive Fraud (Count XI) and dismissal is unwarranted at this time.

VII. PLAINTIFFS HAVE STATED A CLAIM FOR BREACH OF THE DUTY OF CONFIDENTILIATY.

The Defendants do not dispute that they breached the sensitive and legally protected medical information of more than a million people. Instead, the Defendants argue they owe no duty to preserve and protect the confidentiality of the patient-physician relationship. The duty of confidentiality exists not only by virtue of the contractual relationship, but also inherently according to the very sensitive nature of the personal information which was to be safeguarded in this case. The right to privacy and duty of secrecy should be analyzed against the backdrop of public policy, and, when repugnant to such, is subject to a valid cause of action. *See Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 590 (D.C. 1985).[12] *See also Suesbury v. Caceres*, 840 A.2d 1285, 1287 (D.C. 2004); *Hammonds v. Aetna Cas. & Sur. Co.*, 7 Ohio Misc. 25 (N.D. Ohio 1965).

The relationship between insurance providers and patients, particularly when insurers acquire private medical information, is obviously a confidential one. To be actionable, a claim for breach of confidentiality in a medical context requires the "unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential

[12] "In other jurisdictions, in the absence of legislation, courts have found the basis for a right of action for breach of the physician-patient confidential relationship in four main sources of public policy: state physician licensing statutes, evidentiary rules and privileged communication statutes which prohibit a physician from testifying in judicial proceedings, common law principles of trust, and the Hipprocratic oath and principles of medical ethics."

relationship." *Doe v. Medlantic Health Care Group, Inc.*, 814 A.2d 939, 950-51 (D.C. 2003) (citing *Vassiliades*, 492 A.2d at 591). The Plaintiffs' information is certainly nonpublic and was known to Defendants by virtue of their confidential relationship with the Plaintiffs, and at no point did any Plaintiff consent to having such information disclosed to thieves who undoubtedly intended (and who still intend) to use it for nefarious purposes, nor was such disclosure to "hackers" a privileged one. Defendants' conduct resulted in the undeniable massive breach of the confidential physician-patient relationship and this claim should persist beyond the pleading stage.

CONCLUSION

WHEREFORE, for the reasons set forth above, Plaintiffs, by counsel, respectfully request that this Honorable Court DENY Defendants' Motion to Dismiss the Second Amended Complaint.

Exhibit 1

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CV-139

JESSICA VELCOFF, Ph.D., APPELLANT,

v.

MEDSTAR HEALTH, INC., APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CAB-6448-16)

(Hon. Jeanette J. Clark, Trial Judge)

(Argued December 19, 2017 Decided June 21, 2018)

Jonathan B. Nace for appellant.

K. Nichole Nesbitt for appellee.

Before GLICKMAN, THOMPSON, and MCLEESE, *Associate Judges*.

MCLEESE, *Associate Judge*: Appellant Jessica Velcoff, Ph.D., brought this action against MedStar Health, Inc., alleging that MedStar unlawfully disclosed her sensitive mental-health information. Dr. Velcoff appeals the trial court's dismissal of the complaint for failure to state a claim. We vacate the trial court's decision and remand for further proceedings.

I.

The complaint alleges the following. Dr. Velcoff suffered life-threatening injuries in a work-related car collision. She was admitted to National Rehabilitation Hospital (NRH), which is owned and operated by MedStar, for treatment that included psychological treatment. She submitted a claim for workers' compensation benefits. At some point during her inpatient treatment, she was told that "workers' comp was the client, not you." After she was discharged, she continued outpatient psychological treatment with an NRH clinical psychologist. During her treatment, MedStar gave her a privacy policy indicating that her personal health information would be kept confidential and disclosed only as required by law.

In connection with her treatment, Dr. Velcoff shared personal and confidential information with her psychologist, unrelated to the processing of any workers' compensation claim. When her psychologist began questioning her on topics similar to those asked by her workers' compensation insurance company, Dr. Velcoff became concerned that her psychologist was not protecting her confidential information. When Dr. Velcoff asked what her psychologist had shared with the insurance company, her psychologist acknowledged having

"shared everything." At this point, Dr. Velcoff stopped treatment with NRH's psychology department. Dr. Velcoff ordered a copy of her records, which confirmed that her psychologist had shared Dr. Velcoff's treatment file, including detailed notes of her sessions, with the insurance company, without Dr. Velcoff's consent.

The complaint alleges that MedStar violated the District of Columbia Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 *et seq*. (2013 Repl. & 2017 Cum. Supp.). Under the CPPA, "[a] consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District." D.C. Code § 28-3905 (k)(1)(A). Illegal trade practices include "represent[ing] that . . . services . . . have characteristics . . . that they do not have"; "misrepresent[ing] as to a material fact which has a tendency to mislead"; or "fail[ing] to state a material fact if such failure tends to mislead." D.C. Code § 28-3904 (a), (e), (f). The complaint alleges that MedStar committed illegal trade practices in violation of the CPPA by breaking its promise to protect Dr. Velcoff's confidential mental-health information except as required by law. The complaint also alleges that MedStar violated the CPPA by disclosing Dr. Velcoff's mental-health information in violation of the D.C. Mental Health Information Act (MHIA), D.C. Code § 7-1201.01 *et seq*. (2018 Repl.).

The MHIA prohibits the unauthorized disclosure of mental-health information. D.C. Code § 7-1201.02. Under the MHIA, the following mental-health information may in some circumstances be disclosed to third-party payors: "(1) Administrative information; (2) Diagnostic information; (3) The status of the client (voluntary or involuntary); (4) The reason for admission or continuing treatment; and (5) A prognosis limited to the estimated time during which treatment might continue." D.C. Code § 7-1202.07 (a); *see also* D.C. Code § 7-1201.01 (15) (defining "[t]hird-party payor" as "any person who provides . . . medical . . . benefits whether on an indemnity, reimbursement, service or prepaid basis, including, but not limited to, insurance carriers, governmental agencies and employers"). Disclosure under this provision requires the client's written authorization or consent. D.C. Code §§ 7-1202.02 (a), -1202.07 (a).

The MHIA provides additional protection to "personal notes regarding a client." D.C. Code § 7-1201.03. Specifically,

> such personal notes shall not be maintained as a part of the client's record of mental health information. Notwithstanding any other provision of this chapter, access to such personal notes shall be strictly and absolutely limited to the mental health professional and shall not be disclosed except to the degree that the personal notes or the information contained therein are needed in litigation brought by the client against the

> mental health professional on the grounds of professional malpractice or disclosure in violation of this section.

Id. If a third-party payor questions the payment of mental-health benefits, the MHIA provides for independent mental-health professionals to help resolve the dispute while protecting against the disclosure of mental-health information to the third-party payor. D.C. Code § 7-1202.07 (b). Additionally, pursuant to the MHIA, "[m]ental health information may be disclosed in a civil or administrative proceeding in which the client . . . initiates his mental or emotional condition or any aspect thereof as to an element of the claim or defense." D.C. Code § 7-1204.03 (a).

The complaint further alleges that MedStar breached its common-law duty of confidentiality by disclosing Dr. Velcoff's personal mental-health information without authorization.

II.

We review de novo a trial court's decision to dismiss a complaint for failure to state a claim. *Woods v. District of Columbia*, 63 A.3d 551, 553 (D.C. 2013). "To survive a motion to dismiss, a complaint must set forth sufficient facts to

establish the elements of a legally cognizable claim." *Id*. at 552-53. We take the facts alleged in the complaint as true. *Id*. at 553. We conclude that the complaint was erroneously dismissed.

Before addressing the merits, we briefly address Dr. Velcoff's standing to raise the claims at issue. It is not entirely clear whether MedStar contests Dr. Velcoff's standing, but in any event we have no difficulty concluding that Dr. Velcoff has standing. *See generally Grayson v. AT&T Corp*., 15 A.3d 219, 233-35 (D.C. 2011) (en banc) (D.C. Court of Appeals generally follows Article III standing requirements, including requirement that plaintiff establish injury in fact). With respect to the CPPA claim, Dr. Velcoff claims that MedStar violated its promise to protect her confidential mental-health information, and she seeks, among other things: (a) statutory damages of $1,500 per violation or treble damages, whichever is greater; and (b) an injunction to stop future unauthorized disclosures of confidential information. D.C. Code § 28-3905 (k)(2)(A), (D). Such claims under the CPPA suffice to establish standing. *See Grayson*, 15 A.3d at 248-49 (finding standing where appellant's claim of injury was "derived solely from a violation or an invasion of his statutory legal rights created by the CPPA"). As to the claim of breach of the common-law duty of confidentiality, we conclude that an allegation that confidential mental-health information was unlawfully

disclosed suffices to support standing. *Cf*. *Robins v*. *Spokeo*, *Inc*., 867 F.3d 1108, 1117-18 (9th Cir. 2017) (concluding that plaintiff satisfied injury-in-fact requirement by showing that materially false information was disseminated in violation of federal Fair Credit Reporting Act); *In re Horizon Healthcare Servs*. *Inc*. *Data Breach Litig*., 846 F.3d 625, 638-41 (3d Cir. 2017) (same as to unauthorized disclosure of private information).

Turning to the merits, the trial court gave four reasons for dismissing the claims at issue. First, with respect to the CPPA claim, the trial court stated that the complaint fails to identify the specific illegal trade practices at issue. To the contrary, the complaint clearly and specifically identifies several trade practices that the complaint alleges are illegal, including failing to provide the promised benefit of confidentiality, misrepresenting the degree of confidentiality provided, and failing to state material facts about the lack of confidentiality. Although the complaint does not cite the specific subsections of the CPPA to which each specific allegation relates, matching allegations of the complaint to corresponding subsections of the CPPA is a straightforward task. *See*, *e*.*g*., D.C. Code § 28-3904 (a) (illegal trade practice to represent that service has characteristics or benefits that service does not have), (e) (illegal trade practice to misrepresent material fact that has tendency to mislead), (f) (illegal trade practice to omit

material fact where omission has tendency to mislead). Moreover, the rules do not explicitly require a civil complaint to cite the specific subsections upon which the plaintiff relies. D.C. Super. Ct. Civ. R. 8 (a)(2) (complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). Criminal charging documents do require statutory citations, but even there the omission of such citations is not a basis for dismissal in the absence of prejudice. D.C. Super. Ct. Crim. R. 7 (c)(1)-(2). We conclude that the complaint alleges violations of the CPPA with adequate specificity to survive a motion to dismiss. *Cf. Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346 (2014) (per curiam) ("Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.").

Second, the trial court suggested that the alleged disclosures were lawful under D.C. Code § 7-242 (a) (2018 Repl.), which authorizes the sharing of certain health information among "agenc[ies]" and "service provider[s]." At least on the current record, however, that provision does not appear to apply to MedStar and the third-party insurer. *See* D.C. Code § 7-241 (1) (2018 Repl.) ("'Agency' means an agency, department, unit, or instrumentality of the District of Columbia

government."), (9) (2018 Repl.) ("'Service provider' means an entity that provides health or human services to District residents pursuant to a contract, grant, or other similar agreement with an agency."). Moreover, § 7-242 (a) by its terms does not authorize disclosures that would be "specifically prohibited under District . . . law." Dr. Velcoff alleges that the disclosures in the present care were specifically prohibited by the MHIA. For these reasons, § 7-242 (a) does not provide a basis upon which to dismiss the complaint.

Third, the trial court concluded that the disclosures at issue were authorized under D.C. Code § 32-1507 (i) (2012 Repl.), which provides that "[t]he employee and employer are entitled upon request to all medical reports made pursuant to claims arising under this chapter." That provision, however, does not by its terms authorize the alleged disclosures in this case, which were to a third-party insurer rather than to an employer. Considered in isolation, therefore, § 32-1507 (i) does not support dismissal of the complaint. (Although it is unclear whether all of the mental-health information allegedly disclosed in this case, including detailed session notes by Dr. Velcoff's psychologist, falls within the scope of the term "medical reports," we need not express a view on that question.)

Finally, the trial court concluded that Dr. Velcoff consented to the disclosures, by seeking workers' compensation. Other than § 32-1507 (i), however, the trial court did not cite any specific statutory support for its consent ruling. The trial court did cite a federal district court decision, but the court in that case relied on a specific provision of Florida workers' compensation law that does not appear to have a counterpart under District of Columbia law. *Reed v. Ga.-Pac. Corp.*, No. 3:05-CV-615-J-25TEM, 2006 WL 166534, at *3 (M.D. Fla. Jan. 23, 2006) (dismissing claim of invasion of privacy for failure to state claim, because plaintiff seeking compensation for work-related injury "had no expectation of privacy during his medical examination"; "'[A]n employee who reports an injury or illness alleged to be work-related waives any physician-patient privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation.'") (quoting Fla. Stat. § 440.13(4)(c) (2017)).

As we have previously indicated, under the MHIA, consent to or authorization of disclosure of mental-health information to third-party payors must generally be in writing. D.C. Code §§ 7-1131.14 (6) (2018 Repl.); 7-1201.01 (8A), -1202.02 (a), -1202.07 (a); 45 C.F.R. § 164.508(b)(1)(i), (c) (2017). Moreover, personal notes relating to mental-health treatment are given special protection. D.C. Code § 7-1201.03. In contrast, the Workers' Compensation Act

contemplates that medical reports will be available to interested parties, which would presumably include third-party insurers. D.C. Code § 32-1520 (g) (2012 Repl.) ("All medical reports submitted by the claimant or any other interested party shall become part of the record, except that the Mayor shall have the discretion to require the testimony at the hearing of any reporting physician. Copies of all medical reports submitted shall be supplied to any party upon request."). Regulations specifically provide for access to medical records. 7 DCMR §§ 208.2 (2018) ("official record" in workers' compensation case "shall include . . . all medical records . . . relating to the claim"), 208.6 (2018) ("Interested parties may request copies of any document in the official record.").

Although Dr. Velcoff relied upon the MHIA in the complaint and cited the MHIA in opposing the motion to dismiss, the trial court did not mention the MHIA at all. It is not immediately apparent how to accommodate the requirements of both the MHIA and the Workers' Compensation Act. This court does not appear to have had occasion to address that issue. Nor, as far as we can tell, has the Compensation Review Board, the "expert[]" administrative body "responsibl[e] for administering the Workers' Compensation Act." *Howard Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 960 A.2d 603, 606 (D.C. 2008). We decline to attempt to resolve that significant and potentially complex issue in the first

instance on appeal. The issue was not addressed by the trial court and has not been fully briefed by the parties in this court. Moreover, we are particularly reluctant to decide the issue at this juncture because potentially relevant factual circumstances are not clear on the current record. For example, it is not clear exactly how NRH came to be Dr. Velcoff's health-care provider; what consents, authorizations, or waivers Dr. Velcoff may have signed in connection with her treatment; the nature and circumstances of the alleged disclosures; and to what extent the disclosures were necessary or appropriate for purposes of handling the workers' compensation matter. Under the circumstances, we conclude that the prudent course is to vacate the trial court's dismissal order and remand for further proceedings. *Cf*., *e*.*g*., *van Leeuwen v*. *Blodnikar*, 144 A.3d 565, 569 (D.C. 2016) ("The trial court has not yet addressed these questions and the parties have not fully briefed them. We therefore remand the case to the trial court to address those issues in the first instance.").

MedStar also seeks affirmance on several alternative grounds not decided by the trial court, including that Dr. Velcoff failed to adequately allege damages. We decline, however, to address these alternative grounds at this time, particularly given that Dr. Velcoff sought leave to amend the complaint and the trial court did not rule on that motion.

For the foregoing reasons, we vacate the judgment and remand for further proceedings.

So ordered.