UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:21-md-02994-RAR

In re:

MEDNAX SERVICES, INC.,
CUSTOMER DATA SECURITY BREACH LITIGATION
_____/

This Document Relates to All Actions

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiffs seek certification of two nationwide classes and five State subclasses under both Rules 23(b)(3) and 23(b)(2). They also seek certification of six issue classes under Rule 23(c)(4). For each of these nationwide classes, subclasses, and issue classes, Plaintiffs' cursory analysis of Rule 23's requirements ignores many layers of individualized issues and falls far short of the rigorous analysis that Rule 23 demands. For example:

- Plaintiffs' quest to be class representatives stumbles out of the gate because none of the named Plaintiffs has Article III standing, as discovery has confirmed that none has suffered any legally cognizable injury that is fairly traceable to the Cyberattack (as defined below).
- Plaintiffs' class definition is not ascertainable because it includes many individuals who are not capable of identification and is hopelessly vague.
- Plaintiffs offer no evidence that their State subclasses satisfy the numerosity requirement.
- Plaintiffs' class definition sweeps in vast swaths of individuals who have suffered no injury at all, and Plaintiffs therefore have not established that all putative class members suffered a common injury.
- Plaintiffs are neither adequate nor typical class representatives because they have not shown that they have suffered the same harm as the members of the putative class and overlook substantial variations in the types of information involved in the Cyberattack across members of the putative class.
- Numerous individualized issues predominate over common issues, including individualized issues of determining Article III standing for the putative class members, confronting substantial State-law variations in Plaintiffs' negligence claims, and establishing causation and damages. These same individualized issues demonstrate that a class action is not superior to other methods of adjudication.
- Plaintiffs cannot obtain certification of any issue classes because Rule 23(c)(4) cannot be used to sidestep the requirements in Rule 23.
- Plaintiffs do not satisfy the requirements of Rule 23(b)(2) because they lack standing to pursue the injunctive relief they seek and because their claims for damages are not incidental.

For each of these reasons, and those discussed below, Plaintiffs' Motion for Class Certification (ECF No. 232) must be denied.

II. BACKGROUND

Mednax is a leading provider of physician services, including newborn, maternal-fetal, pediatric cardiology, and other pediatric subspecialty care. Mednax's national network comprises affiliated physicians who provide clinical care in 39 States and Puerto Rico (until December 2022). Ex. 7 (OCR Case Closure Ltr.) at MEDNAX0130103. Mednax's affiliated physician practices include physicians who provide neonatal clinical care, primarily within hospital-based neonatal intensive care units, to babies born prematurely or who are critically ill. Until May 6, 2020, Mednax Services, Inc. owned American Anesthesiology ("AA"). *Id.* Pursuant to a Securities Purchase Agreement dated May 6, 2020, Mednax Services, Inc. sold all outstanding capital stock of AA to an affiliate of North American Partners in Anesthesia ("NAPA"). *Id.* In connection with this sale, certain Mednax employees transitioned to being employees of AA under a Transition Services Agreement, and Mednax temporarily continued to host certain AA employee email accounts on Mednax's computer network. *Id.*

On June 19, 2020, Mednax became aware that an unauthorized third party gained access to certain Office 365 business email accounts through a phishing attack from June 17, 2020 through June 22, 2020. Ex. 1 (OCR Initial Breach Report) at MEDNAX0000457-58; Ex. 2 at MEDNAX0001515. [redacted] Ex. 3 (Mathews Dep.) at 23:18-24:5; Ex. 2 at MEDNAX0001515; *see also* Ex. 4 at MEDNAX0002884. [redacted] Ex. 2 (Summary of Forensic Review) at MEDNAX0001517; Ex. 5 (Miller Dep.) at 195:6-23, 196:19-197:2; Ex. 3 (Mathews Dep.) at 255:14-16.

In December 2020, Mednax notified the U.S. Department of Health and Human Services Office for Civil Rights ("OCR") about the Cyberattack. *See* Ex. 1 (OCR Initial Breach Report) at MEDNAX0000430-461; *see also* Ex. 6 (Breach Report Addendum) at MEDNAX0000398-429. Defendants also provided notice of the Cyberattack to *all* individuals—through either written or

substitute notice under HIPAA—whose personally identifiable information or protected health information was contained in one of the Office 365 accounts involved in the Cyberattack. Ex. 5 (Miller Dep.) at 194:7-24. [redacted] Ex. 7 (OCR Case Closure Letter) at MEDNAX0130102-0130104.

Plaintiffs allege that they received notice from Mednax or from AA that some of their or their minor child(ren)'s personal information was potentially involved in the Cyberattack.[1] They seek to certify, under Rules 23(b)(2) and Rule 23(b)(3), two nationwide classes comprised of "all current and former patients" of Mednax and AA who reside in the United States and "whose PHI and PII was compromised as a result of the Data Breach disclosed beginning in December 2020," plus five subclasses of "all current and former Mednax patients" residing in Arizona, California, Florida, Maryland, or Washington "whose PHI and PII was compromised as a result of the Data Breach disclosed beginning in December 2020." Mot. at 5. In the alternative, Plaintiffs seek to certify various issue classes under Rule 23(c)(4). *See id.* at 19-20.

III. LEGAL STANDARD

"All else being equal, the presumption is *against* class certification because class actions are an exception to our constitutional tradition of individual litigation." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (emphasis added) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)). "The party *seeking* class certification has the burden of proof," *id.*, and this Court "may certify a class only if, after 'rigorous analysis,' it determines that the party seeking certification has met its burden of a preponderance of the evidence," *Bacon v. Stiefel Labs., Inc.*, 275 F.R.D. 681, 689 (S.D. Fla. 2011) (citation omitted). "A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see Comcast*, 569 U.S. at 33. Plaintiffs

[1] *See* Ex. 8-17 (Notice Letters) at BAUM_000027-30, BEAN_000013-16, B.W._000006-9, COHEN_000005-8, JAY_000005-8, LARSEN_000170-173, LEE_000002, NIELSEN_000126-29, RUMELY_000003-4, SOTO_000010-13. [redacted] Ex. 18 (Clark Dep.) at 50:13-52:10; *id.* at 47:12-48:5; *see also Nielsen v. Mednax, Inc.*, No. 21-cv-500 (D.S.C. Feb. 17, 2021), ECF No. 1-3. [redacted]

cannot rely on allegations; they must put forward evidence to support each element of certification. *Bussey v. Macon Cnty. Greyhound Park, Inc*., 562 F. App'x 782, 790 (11th Cir. 2014) (per curiam) ("[C]lass certification is an *evidentiary* question, not just an analysis of the pleadings.").

IV. ARGUMENT

A. Plaintiffs Lack Standing to be Class Representatives.

A court cannot certify a class without first determining that a named plaintiff has standing. *See Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003); *Piazza v. EBSCO Indus.*, 273 F.3d 1341, 1347 (11th Cir. 2001). To have standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (en banc). In the data-breach context, this means a plaintiff must show that "as a result of the breach, he [has] experience[d] 'misuse' of his data in some way." *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 889 (11th Cir. 2023). And at the class-certification stage, the Court "may review both the allegations in the complaint and evidence in the record so far to determine whether the named plaintiffs in this case have established Article III standing for class certification purposes." *Id.* at 888 n.6. Indeed, when "the facts developed in discovery firmly contradict the allegation[s] in the complaint, the District Court cannot rely on the complaint's factual allegation[s]." *Id.* at 891. Instead, the court must "'probe behind the pleadings' to assess standing." *Id.* (citation omitted).

Though Plaintiffs acknowledge that the first step of any class certification determination is to establish their own standing, their Motion devotes only a single sentence to the issue, forgoing the submission of *any* proof and relying exclusively on this Court's prior motion-to-dismiss ruling that Plaintiffs had sufficiently *alleged* standing at the pleading stage. *See* Mot. at 6. But this does not satisfy Plaintiffs' evidentiary burden, as "the standing burden is lower at the motion to dismiss stage than the class certification stage." *Quilty v. Envision Healthcare Corp*., 2018 WL 2445824, at *3 (M.D. Fla. May 31, 2018).

As discussed more fully in Defendants' motions for summary judgment, "the facts developed in discovery firmly contradict the allegation[s] in the complaint" and show that Plaintiffs have no evidence that they have suffered any legally cognizable injury that is fairly traceable to the Cyberattack. *Brinker*, 73 F.4th at 891. Several Plaintiffs either make no allegations of misuse of their PII or PHI or withdrew those allegations after discovery showed they were

unsupported. *See, e.g.*, Mednax's MSJ, § III.A.2.i. Other Plaintiffs rely on the alleged presence of their Social Security numbers ("SSNs"), or their children's SSNs, on the deep and dark web to try to establish misuse, but discovery has confirmed that this could not have been caused by the Cyberattack because none of these SSNs was involved in the Cyberattack and because Mednax did not even have them anywhere in its possession. *See id.* § III.A.2.ii. Similarly, discovery has confirmed that Plaintiffs' other allegations of misuse could not have been caused by the Cyberattack because the bad actor who committed that misuse possessed information that was not involved in the Cyberattack and/or that Defendants did not have. *See id.* §§ III.A.2.iii-iv; AA's MSJ, §§ III.A.1, III.A.2.a.

Because Plaintiffs have submitted no evidence that they have standing, and the undisputed record evidence demonstrates that they cannot do so, Plaintiffs fail to carry their burden of proof on this critical gating issue. Their Motion must be denied for that reason alone.

B. Plaintiffs' Proposed Classes Are Not Ascertainable.

Implicit within Rule 23 is a requirement that "the proposed class is adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012). This is a critical factor that cannot be ignored—"without an adequate definition for a proposed class, a district court will be unable to ascertain who belongs in it." *Cherry v. Domestic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021). A class is "clearly ascertainable" if the Court is "certain that its membership is capable of being determined." *Id.* (internal quotation marks omitted). To that end, "[a] court should deny class certification where the class definitions are overly broad, amorphous, and vague." *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003).

Plaintiffs' proposed classes are far from "clearly ascertainable." *Cherry*, 986 F.3d at 1302. Plaintiffs claim their proposed classes (1) "use only objective criteria that limit the Class to current and former patients . . . whose PHI and PHI was compromised as a result of the Data Breach disclosed beginning in December 2020" and (2) are "easily identified through Defendants' records of current and former patients and individuals whose PHI and PII was compromised, each of whom was notified of the Data Breach." Mot. at 6. Neither assertion is correct.

First, the idea that the class is "easily identifiable" based on a simple examination of Defendants' records is untrue. A *significant* portion of the individuals potentially impacted in the Cyberattack were not capable of identification. There are two categories of "notified" individuals here. Those who were capable of identification—approximately [redacted]—received

written notice from Mednax.[2] *See* Ex. 19 (R&O to Second Interrogs.) at 3. The rest of the Mednax population—approximately [redacted]—received "substitute notice" under HIPAA because Mednax lacked sufficient information to provide written notice.[3] *Id.*; Ex. 20 (Mar. 30, 2023 Ltr. to Plfs' re: Interrog. 19). [redacted] *See* Ex. 21 (Ellman Rep.) ¶ 30. [redacted] In other words, there is not some "record[] of current and former patients and individuals whose PHI and PII was compromised" that Defendants could use to identify all putative class members, as Plaintiffs incorrectly suggest, Mot. at 6.

Second, Plaintiffs' proposed class definition is not ascertainable because it is "defined through vague . . . criteria" that precludes the Court from being able to "ascertain who belongs in it." *Cherry*, 986 F.3d at 1302. Plaintiffs define their putative nationwide classes and State subclasses to include those individuals whose "PHI and PII was compromised" as a result of the Cyberattack. Mot. at 5. But Plaintiffs do not define what it means for an individual's PHI and PII to be "compromised." It is unclear if Plaintiffs intend to include in their class definition all individuals whose PHI or PII was present in the accounts that were affected by the Cyberattack. If so, Plaintiffs' class definitions are "overbroad" because they include individuals whose PHI or PII was not even accessed by the threat actor in the Cyberattack and who could not and would not have been injured in any way. *Ohio State Troopers Ass'n v. Point Blank Enters.*, 481 F. Supp. 3d 1258, 1276 (S.D. Fla. 2020) (Ruiz, J.); *see Simmons v. Ford Motor Co.*, 592 F. Supp. 3d 1262, 1284 (S.D. Fla. 2022). This is undoubtedly at least a substantial portion of the putative class, as

[2] Even a count of those with written notice would not accurately reflect the class, as the number of notices mailed does not necessarily correspond to the number of unique individuals (as there could be duplication of names, re-mailing of letters, etc.). *See* Ex. 19 (R&O to Second Interrogs.) at 3.

[3] Under HIPAA, when "there is insufficient or out-of-date contact information that precludes written notification to the individual . . . a substitute form of notice reasonably calculated to reach the individual shall be provided." 45 C.F.R. § 164.404(d)(2). Substitute notice comes through web site postings or conspicuous notice in major print or broadcast media, as well as an active toll-free phone number. *Id.*

evidenced by the fact that discovery revealed no evidence of misuse of any putative class members' PHI or PII as a result of the Cyberattack. And if Plaintiffs intend to restrict their class definition to a subset of individuals whose PII or PHI was in the accounts affected by the Cyberattack, Plaintiffs do not explain how they would limit the putative class or how that subset is "clearly ascertainable." *Cherry*, 986 F.3d at 1302. Plaintiffs therefore do not satisfy the ascertainability requirement. *See, e.g.*, *Jerue v. Drummond Co.*, 2023 WL 6610603, at *17 (M.D. Fla. Aug. 25, 2023) (holding a "vague" class definition was not ascertainable).

C. Plaintiffs Fail to Meet the Rule 23(a) Requirements.

1. Plaintiffs Fail to Establish Numerosity for Their State Subclasses.

To satisfy the numerosity requirement under Rule 23, Plaintiffs must show that the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This requires that they "proffer some evidence of the number of members in the purported class, or at least a reasonable estimate of that number." *Leszcvnski v. Allianz Ins.*, 176 F.R.D. 659, 669 (S.D. Fla. 1997). Plaintiffs must make this showing for not only the two proposed nationwide classes, but also for each of the five State-specific subclasses (Arizona, California, Florida, Maryland, and Washington). *Baez v. LTD Fin. Servs., L.P.*, 2016 WL 3189133, at *1 (M.D. Fla. June 8, 2016).

Plaintiffs fail to carry their burden of showing that each proposed State subclass satisfies the numerosity requirement. Plaintiffs offer ***no evidence*** about the size of the proposed subclasses, which is fatal to their attempt to assert State statutory claims on behalf of those subclasses. *See Brown*, 817 F.3d at 1233 ("The party *seeking* class certification has the burden of proof. And the entire point of a burden of proof is that, if doubts remain about whether the standard is satisfied, 'the party with the burden of proof loses.'" (citations omitted)).[4]

2. Plaintiffs Cannot Establish Commonality Because They Cannot Demonstrate Each Class Member Suffered the Same Injury.

As Plaintiffs correctly note, commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" such that "all their claims can productively be litigated at once." *Dukes*, 564 U.S. at 350 (citation omitted). Plaintiffs argue that commonality exists between the proposed class members because "each Class Member's PII and PHI was compromised in the Data Breach." Mot. at 7. But Plaintiffs provide no evidence to support this assumption, and therefore they have not met their burden to show that all proposed class members

[4] Even if Plaintiffs seek to rectify this failing on reply, it is too late. *See Little*, 691 F.3d at 1307.

suffered the same injury. This is fatal to establishing commonality.

As discussed above, the term "compromised" is impermissibly vague. *See* Section III.B, *supra*. But to the extent that Plaintiffs intend to define the class by reference to all individuals whose personal information was in the Office 365 accounts that were involved in the Cyberattack, the mere inclusion of personal information in an account that is involved in a phishing attack is not a standalone injury. *Brinker*, 73 F.4th at 892 (explaining that individuals "who have simply had their data accessed by cybercriminals" are "uninjured"). An uninjured individual who received a notice letter simply because their personal information was in one of the Office 365 accounts involved in the Cyberattack, [redacted] does not suffer the same injury as a hypothetical putative class member who can prove that they experienced identity theft as a result of the Cyberattack.[5] *See* Ex. 21 (Ellman Rep.) at 4-5 ([redacted]).

Plaintiffs' failure to corroborate their factual assumption that each class member's data was "compromised" in the same way—which forms the core of their commonality argument and is a defining characteristic of the proposed class definitions—warrants denial of class certification. *Kruszka v. Toyota Motor Corp.*, 2011 WL 9820198, at *3 (C.D. Cal. Aug. 2, 2011) ("[B]ecause Plaintiff does not provide sufficient evidence that the class suffered the same injury, Plaintiff's Motion . . . fails to meet the requirements of commonality under Rule 23(a)(2)."); *Ogrizovich v. CUNA Mut. Grp.*, 2013 WL 12140983, at *7 & n.4 (W.D. Pa. Sept. 4, 2013) (finding no commonality when "the defined class [was] so broad that there [were] members subsumed by the definition that suffered no injury at all"); *Dolmage v. Combined Ins. Co. of Am.*, 2017 WL 1754772, at *7 (N.D. Ill. May 3, 2017) (finding no commonality when "determining whether each class member suffered a 'resulting injury' will require a highly individualized inquiry").

3. Plaintiffs Cannot Establish Typicality or Adequacy.

Typicality requires that the claims or defenses of the named plaintiffs be "typical of the claims or defenses of the class"—meaning there must be a "sufficient nexus" between the two. *Piazza*, 273 F.3d at 1346. Adequacy focuses on whether the named plaintiffs will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Typicality and adequacy

[5] In addition, any such showing would require individualized proof that is incompatible with Rule 23(b)(3)'s predominance requirement. *See* Section IV.D, *infra*.

"overlap and tend to merge," as both focus on "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *In re Takata Airbag Prod. Liability Litig.*, 2023 WL 6274837, at *8 (S.D. Fla. Aug. 24, 2023) (citations omitted). Here, the named Plaintiffs' claims are not typical of the rest of the putative class. That makes them inadequate representatives for at least two reasons.

First, Plaintiffs suggest (for both adequacy and typicality) that "Plaintiffs and Class Members experienced the same harm of having their PII and PHI exposed to fraudulent misuse and suffered damages typical to the Class." Mot. at 8. But Plaintiffs' unsubstantiated assertion that all putative class members' PII and PHI was "exposed to fraudulent misuse" is patently false. [redacted] Ex. 2 at MEDNAX0001517; *see also* Ex. 21 (Ellman Rep.) ¶ 10. If a putative class member's information was not accessed, viewed, or saved by the threat actor, then that putative class member's PII and PHI could not possibly have been "exposed to fraudulent misuse" as Plaintiffs contend.

Second, the types of information involved in the Cyberattack vary substantially across the putative class. [redacted] *See* Ex. 22 (Olsen Dep.) at 98:7-18 ([redacted]). This [redacted] Ex. 21 (Ellman Rep.) ¶ 19(a). This fact drastically distinguishes this case from the primary case Plaintiffs rely on to support their conclusion that typicality and adequacy are satisfied, *In re Target Corp. Customer Data Sec. Breach Litig.*, 2017 WL 2178306, at *7 (D. Minn. May 17, 2017), which involved the theft of uniform data—namely, payment card information. It is unremarkable that a court might conclude that the "risk of future injury" would be the same across a class of people who all had the exact same type of data stolen.[6] But those are not the facts here.

[6] *Target* is also distinguishable because it involved a settlement motion. Plaintiffs' only other cited data-breach case on typicality, *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040 (S.D. Tex. 2012), likewise involved a settlement concerning the theft of uniform data across the class—again, payment card information.

Third, as explained in greater detail in § IV.D.1.f, *infra*, Plaintiffs simply ignore significant categories of damages that may apply to putative class members. Plaintiffs rely exclusively on their "expert," Gary Olsen, for assessing damages on a class-wide basis, [redacted].[7] If Plaintiffs are now abandoning those alleged harms in an effort to avoid individualized issues, then they are inadequate representatives. *See Tasion Commc'ns, Inc. v. Ubiquity Networks, Inc.*, 308 F.R.D. 630, 641 (N.D. Cal. 2015); *Drimmer v. WD-40 Co.*, 2007 WL 2456003, at *3 (S.D. Cal. Aug. 24, 2007).

D. Plaintiffs Cannot Establish Rule 23(b)(3)'s Requirements.

Plaintiffs also bear the burden of satisfying Rule 23(b)(3) by proving both that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) the proposed class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs have not carried their burden of establishing either predominance or superiority.

1. Plaintiffs Cannot Demonstrate that Common Issues Predominate Over Individual Issues.

To satisfy Rule 23(b)(3)'s predominance requirement, Plaintiffs must establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This inquiry "is 'far more demanding' than Rule 23(a)'s commonality requirement." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270 (11th Cir. 2009) (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000)). A question is common only where it is "of such a nature that it is capable of classwide resolution—

[7] [redacted] Ex. 23 (Lee Dep.) at 113:22-114:9. [redacted] Olsen Rep. at tbl. 5 & ¶ 21.

which means that [the] determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Put another way, "the raising of common questions—even in droves," is not enough. *Id.* (internal quotation marks and citation omitted). Rather, the relevant focus is on "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted). To assess predominance, the Court must examine how Plaintiffs and the putative classes intend to prove standing, liability, and damages and whether the required evidence is common or individualized. *See Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1190-91 (11th Cir. 2009). Class certification is inappropriate if, "after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem.*, 553 U.S. 639 (2008).

a. Individualized Questions of Article III Standing Preclude Certification.

In *Brinker*, the Eleventh Circuit explained that "Rule 23(b)(3)'s predominance analysis implicates Article III standing," in part "because a district court must ultimately weed out plaintiffs who do not have Article III standing before damages are awarded to a class." 73 F.4th at 891. Thus, in order to determine whether Rule 23(b)(3)'s predominance requirement is satisfied, Plaintiffs must show that common questions predominate even when "this standing question is added to the mix." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1274 (11th Cir. 2019) (vacating grant of class certification where the "district court did not account for or consider [standing] in any way in deciding whether issues common to the class actually predominated").

Plaintiffs do not even attempt to explain how the Court could assess standing of the putative class members with common evidence. Their failure to address this "important" part of the predominance inquiry, when they bear the burden of doing so, is reason enough to deny their Motion. *See Brinker*, 73 F.4th at 891. Even setting aside Plaintiffs' failure of proof, the Article III standing analysis that would be required before awarding damages to the putative class is highly individualized and easily overwhelms any common issues. As discussed in Defendants' motions for summary judgment and above, the Eleventh Circuit "require[s] misuse of the data cybercriminals acquire from a data breach" to satisfy Article III's injury-in-fact requirement. *Brinker*, 73 F.4th at 889. Establishing this threshold jurisdictional requirement demands several layers of individualized analysis for each of the putative class members:

- ***First,*** each putative class member must offer evidence that his data was "acquire[d] from" the Cyberattack. *Id.* There is no common evidence that can be used to make this showing across the putative class. [redacted] Ex. 2 at MEDNAX0001517. [redacted] Ex. 26 at MEDNAX0001370. [redacted]
- ***Second,*** there is no common evidence that can be used to show whether each putative class members' information was actually misused in the Cyberattack. The named Plaintiffs' own allegations of misuse drive this point home. Several named Plaintiffs attempt to establish misuse by arguing that their SSNs were found for sale on the deep and dark web. As discussed in Mednax's motion for summary judgment, even if these allegations were true, they could not have resulted from the Cyberattack because Mednax did not possess any of these individuals' SSNs. Mednax's MSJ, § III.A.2.ii. That aside, there is no common proof that can be used to identify whether any individual's SSN has been posted to the deep and dark web. [redacted] Ex. 25 (Frantz Dep.) at 234:10-14. And the named Plaintiffs' other allegations of misuse—which include alleged spam calls and emails and the unauthorized opening of a bank account—are all highly individualized and can only be established by examining each individual's own unique experience.

Even if there were a way to determine whether each putative class member suffered an injury-in-fact sufficient to confer Article III standing, an individualized analysis would still be required to determine whether those injuries are fairly traceable to Defendants. To show this, each of the putative class members must offer evidence that shows "a specific connection between the breach and the type of data used" to cause the alleged harm. *Greenstein v. Noblr Reciprocal Exch.*, 585 F. Supp. 3d 1220, 1231 (N.D. Cal. 2022); *see also McCombs v. Delta Grp. Elecs., Inc.*, ___ F. Supp. 3d ___, 2023 WL 3934666, at *6 (D.N.M. June 9, 2023) (no fair traceability when plaintiff "has not provided a nexus between the data breach and the listed unwanted communications"); *Blood v. Labette Cnty. Med. Ctr.*, 2022 WL 11745549, at *6 (D. Kan. Oct. 20,

2022) (no fair traceability when data elements required to cause harm were not stolen). Making this determination is rife with individualized issues. As discussed above, there are thousands of different combinations of data elements that were potentially involved in the Cyberattack. *See* Section III.C.3, *supra*. [redacted] Ex. 21 (Ellman Rep.) ¶ 19. Analyzing whether the unique combinations of data elements associated with each putative class member bears the requisite causal relationship with that putative class member's unique alleged injuries can be done only on an individual, class-member-by-class-member basis, as Defendants' motions for summary judgment demonstrate. *See, e.g.*, Mednax's MSJ, § III.A.2; AA's MSJ, § III.A.2. [redacted] *See* Section IV.D.1.c, *infra*.

In short, the numerous individualized questions on the issue of Article III standing that the Court must confront before awarding damages would require "a great deal of individualized proof" and is incompatible with a finding of predominance. *Klay*, 382 F.3d at 1255.

b. Variations in State Law Preclude Certification of Plaintiffs' Proposed Nationwide Classes.

In moving for class certification, Plaintiffs assume their nationwide claims are governed by Florida negligence law because this Court previously applied Florida law to that claim in ruling on Defendants' motion to dismiss. Intervening Eleventh Circuit case law and facts developed in discovery, however, require the Court to revisit its choice-of-law analysis.

Though this Court previously treated "the location of the injury" as the location of the "breach," ECF No. 104 at 7, the Eleventh Circuit has now clarified that a plaintiff experiences injury not from a data breach itself, but instead when, "as a result of the breach, [she] experiences 'misuse' of [her] data in some way." *Brinker*, 73 F.4th at 889. This Court's holding that Florida law applied globally was also based on the assumption that "Florida is where the data was maintained, multiple Defendants are domiciled, and Defendants' security protocols allegedly broke down." ECF No. 104 at 8. But discovery has shown that [redacted] Ex. 27 (Hale Rep.) ¶ 28; Ex. 28 (Lerman Dep.) at 49:22-50:12; Ex. 29 at MEDNAX0082937.

Florida's choice-of-law rules require this Court to apply the "'most significant relationship' test" to the negligence claims. *Grupo Televisa, S.A. v. Telemundo Commc'ns Grp.*, 485 F.3d 1233, 1240 (11th Cir. 2007).[8] "When determining the most significant relationship, the courts consider '(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.'" *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016) (quoting *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)). Here, an "individualized choice of law analysis" shows that the law of different States governs each of the named Plaintiffs' claims. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743 (5th Cir. 1996) (quoting *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997)). For example, applying the four choice-of-law factors to Plaintiff Nielsen's claim points decisively to Virginia law:

- ***First***, the State "where the injury occurred" is Virginia. Nielsen was a citizen of Virginia at the time of the data breach. ECF No. 115 ("SAC") ¶ 190; Ex. 30 (Nielsen Dep.) at 13:14-18. It is in Virginia that [redacted]. Ex. 30 (Nielsen Dep.) at 55:14-56:7. Thus, that State is where her alleged injury occurred. *See Brinker*, 73 F.4th at 889 (explaining that "misuse" of data following a breach "constitutes both a 'present' injury and a 'substantial risk' of harm in the future"). Nielsen did not experience misuse of her data in Florida. Nielsen therefore cannot have been injured in Florida.

[8] Defendants focus on Florida's choice-of-law test because the Eleventh Circuit recently stated that an "MDL court" "sitting in diversity in Florida" must "appl[y] Florida choice-of-law rules." *In re Jan. 2021 Short Squeeze Trading Litig.*, 76 F.4th 1335, 1346 (11th Cir. 2023). This is "[b]ecause the master complaint superseded the original complaints," making Florida "the forum for pretrial purposes." *Id.* at 1345-46. If the choice-of-law rules of the other four transferor States were to apply, the result would be the same. *See Larsen v. Citibank FSB*, 871 F.3d 1295, 1303 (11th Cir. 2017); ECF No. 84 at 44 n.9. Arizona and Missouri use the same "most significant relationship" test that Florida uses. *See Winter v. Novartis Pharma. Corp.*, 739 F.3d 405, 410 (8th Cir. 2014); *Barten v. State Farm Mut. Auto. Ins.*, 28 F. Supp. 3d 978, 982-83 (D. Ariz. 2014). South Carolina looks *only* at where the injury occurred. *Butler v. Ford Motor Co.*, 724 F. Supp. 2d 575, 579 (D.S.C. 2010). And California uses the "governmental interest" test. *Castro v. Budget Rent-Car Sys., Inc.*, 154 Cal. App. 4th 1162, 1179-80 (2007). "In all five transferor states, the analysis centers on where the injury 'occurred.'" ECF No. 104 at 7. *Brinker* confirms that any injury occurred, if at all, where any data misuse occurred. 73 F.4th at 889.

- ***Second***, no evidence establishes where the conduct causing the injury—the alleged misuse of Nielsen's personal information—occurred. No evidence supports the allegation, on which this Court relied at the motion-to-dismiss stage, that "Florida is where [Nielsen's] data was maintained." ECF No. 104 at 8. Discovery demonstrated that the Cyberattack involved only Mednax's Microsoft Office 365 environment. Ex. 27 (Hale Rep.) ¶ 28 [redacted]). That is a cloud-based environment. Ex. 28 (Lerman Dep.) at 49:22-50:12. As this Court pointed out, the location of "data stored on the cloud" may "be unknown or even unknowable." ECF No. 104 at 8. The unknown nature of this location prevents this factor from weighing heavily in the choice-of-law analysis. Nor is there evidence that Defendants' "security protocols allegedly broke down" in Florida. *Id.* [redacted] Ex. 29 at MEDNAX0082937.
- ***Third***, Nielsen is a citizen of Virginia. SAC ¶ 190; Ex. 30 (Nielsen Dep.) at 13:14-18, 83:17-18. Her domicile "is the single most important contact for determining the state of the applicable law as to most issues" when, as here, she alleges that private information was exposed. Restatement (Second) of Conflict of Laws § 145 cmt. e (1971).
- ***Fourth***, the "relationship" between Nielsen and AA was "centered" in Virginia. Nielsen [redacted] Ex. 31 (08/01/2023 Nielsen Resp. to Interrog. No. 3); *cf.* Ex.30 (Nielsen Dep.) at 73:19-75:8.

Applying these factors to each of the members of the putative classes' negligence claims will likely result in the application of a multitude of States' laws. At the time of the Cyberattack, Mednax's "national network [was] comprised of affiliated physicians who provide clinical care in 39 states and Puerto Rico."[9] Thus, the putative class members—who consist of individuals who received medical services from clinicians who work for affiliates of Mednax—are scattered across dozens of States. Under *Brinker*, to the extent any putative class members were injured at all, they were injured when they experienced "misuse" of data taken in the Cyberattack—which, like Nielsen, likely occurred in their home States. 73 F.4th at 889. The second factor, which examines the conduct that caused any injury the putative class members suffered, will not weigh significantly

[9] Mednax, Inc., Annual Report at 3 (Form 10-K) (Feb. 18, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/893949/000119312521047064/d51794d10k.htm.

in the choice-of-law analysis for the same reasons it does not weigh significantly in the choice-of-law analysis for Nielsen. Finally, the third and fourth factors typically point toward applying each putative class member's home State's laws, just as they do for Nielsen.[10]

Because the negligence claims of the putative class collectively implicate the laws of dozens of States, Plaintiffs "must . . . provide an *extensive analysis* of state law variations to reveal whether these pose insuperable obstacles" to class certification. *Sacred Heart Health Sys. Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010) (citation omitted). It is Plaintiffs' burden "to show the absence of conflicts among other states' laws." *Townhouse Rest. of Oviedo, Inc. v. NuCO2, LLC*, 2020 WL 5440581, at *5 (S.D. Fla. Sept. 9, 2020). Plaintiffs make no effort to do this; they simply assume that Florida law will govern the negligence claims of each of the members of the putative class. Mot. at 11. Plaintiffs' failure to analyze (or even mention) the variations of relevant State laws is "is fatal to certifying a nationwide class." *Id.*; *Powers v. Gov't Emps. Ins.*, 192 F.R.D. 313, 319 (S.D. Fla. 1998) ("If a plaintiff fails to carry his or her burden of demonstrating similarity of state laws, then certification should be denied.").[11]

Even if Plaintiffs tried to engage in the requisite extensive choice-of-law analysis, the variations in State laws would still bar class certification. Indeed, as discussed more fully in Defendants' motions for summary judgment, the law of negligence varies considerably between jurisdictions. For example:

- This Court previously held that "entities which collect sensitive, private data from consumers and store such data on their networks have a duty to protect the information" under Florida law. ECF No. 104 at 48. Other States—like Virginia, which governs Nielsen's negligence claim—reject "a common law duty to protect an individual's private information from an

[10] An individualized choice-of-law analysis would be required for each putative class member and would often be more complex. For instance, Florida's choice-of-law factors generally favor applying South Carolina law to Plaintiff Lee's claims, because he was domiciled in South Carolina at the time of the Cyberattack. *See* Ex. 23 (Lee Dep.) at 19:23-20:9. Yet Lee received anesthesia services from AA in Tennessee. *Id.* at 175:20-176:15.

[11] *See also, e.g.*, *Gelfound v. MetLife Ins. Co. of Conn.*, 313 F.R.D. 674, 677 (S.D. Fla. 2016); *Miller v. Wells Fargo Bank, N.A.*, 2017 WL 698520, at *12 (S.D. Fla. Feb. 22, 2017); *Karhu v. Vital Pharms., Inc.*, 2014 WL 815253, at *8 (S.D. Fla. Mar. 3, 2014), *aff'd*, 621 F. App'x 945 (11th Cir. 2015); *DA Air Taxi LLC v. Diamond Aircraft Indus.*, 2009 WL 10668159, at *5 (S.D. Fla. Nov. 5, 2009).

electronic data breach." *Deutsche Bank Nat'l Tr. v. Buck*, 2019 WL 1440280, at *6 (E.D. Va. Mar. 29, 2019); *see Parker v. Carilion Clinic*, 819 S.E.2d 809, 825 (Va. 2018).

- There is also substantial variation in the economic loss rule across the various States. Florida's economic loss rule applies only to "cases involving products liability." *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399, 407 (Fla. 2013). Other States apply the doctrine more broadly. *See, e.g.*, *Perdue v. Hy-Vee, Inc.*, 455 F. Supp. 3d 749, 761-62 (C.D. Ill. 2020) (applying Illinois and Missouri ELRs to preclude recovery in a data-breach case).

These "variations in state law . . . swamp any common issues and defeat predominance." *Klay*, 382 F.3d at 1261 (quoting *Castano*, 84 F.3d at 741); *see also Sacred Heart*, 601 F.3d at 1180, 1183 (finding that "substantial variations among the six bodies of state law" were great enough to defeat predominance). And they are not unique to this case. As another district court in this Circuit noted, "negligence claims are not commonly certified under Rule 23." *Teggerdine v. Speedway, LLC*, 2018 WL 2451248, at *7 n.10 (M.D. Fla. May 31, 2018). For instance, in *Southern Independent Bank v. Fred's, Inc.*, 2019 WL 1179396 (M.D. Ala. Mar. 13, 2019), another district court in this Circuit declined to certify a nationwide class asserting negligence claims in a data-breach case. *Id.* at *1. Its reasoning was straightforward: "There are too many differences in state law to certify this case as a class action." *Id.* at *19. "While all fifty states recognize the tort of negligence and its elements of duty, breach, causation, and damages, each jurisdiction 'sing[s] negligence with a different pitch.' And the court has a constitutional obligation to recognize, and not gloss over, variations in common-law tort rules across the fifty states." *Id.* at *13 (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995)). The same is true here, and this Court should deny class certification.[12]

c. Individualized Questions of Causation Preclude Class Certification.

Causation is a required element of all of Plaintiffs' claims.[13] Plaintiffs and the putative class members must prove that any injuries they allege to have incurred resulted from the

[12] *See also, e.g.*, *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913, at *6 (S.D. Fla. Jan. 10, 2013); *Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729, 736 (S.D. Fla. 2007); *cf. Lewis v. Mercedes-Benz USA, LLC*, 530 F. Supp. 3d 1183, 1205 (S.D. Fla. 2021) (Ruiz, J.) ("Although the First Amended Complaint lists one generic general unjust enrichment claim, that claim is, in reality, fifty unjust enrichment claims—one for each state. Such a claim would thus need to be brought on behalf of fifty state subclasses.").

[13] *See, e.g.*, *Lewis v. City of St. Petersburg*, 260 F. 3d 1260, 1262 (11th Cir. 2001) (negligence); *Barnhill v. A&M Homebuyers, Inc.*, 2022 WL 3586448, at *7 (D. Md. Aug. 22, 2022) (Maryland

Cyberattack. Plaintiffs argue that they can do so based on *Smith v. Triad of Alabama, LLC*, 2017 WL 1044692, at *13 (M.D. Ala. Mar. 17, 2017), where the Middle District of Alabama found that common issues "predominate[d] despite individualized questions of causation and damages." That case is distinguishable, however, because the Court's holding was predicated on the fact that "each class member suffered the same general type of damages." *Id.* Moreover, the class in *Smith* was limited to individuals whose PII or PHI was actually "stolen" by a criminal third-party, which is not the case here. *Id.* at *16.

Here, there are numerous individualized issues of causation that were not present in *Smith*. Plaintiffs do not limit their class definition to individuals whose personal information was stolen.[14] They seek to bring claims on behalf of a putative class that presumably includes all individuals whose PII or PHI was merely included in the Office 365 accounts that were involved in the Cyberattack, whether or not the threat actor even accessed, viewed, or exfiltrated their information. To establish that the Cyberattack caused any of their harms, Plaintiffs must establish that an unauthorized third-party accessed, viewed, or exfiltrated their information in the Cyberattack—which Plaintiffs cannot do. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (stating that "unless and until" the hacker has "read, copied, and understood [the plaintiffs'] personal information" and "is able to use such information to the[ir] detriment," "there has been no misuse of the information, and thus, no harm"). Because there is no common evidence that can be used to prove what information (if any) the threat actor actually accessed, viewed, or exfiltrated in the Cyberattack, Plaintiffs must rely on individualized proof to establish this core threshold element for each of their claims.

Even if Plaintiffs could overcome that hurdle, numerous other individualized issues of

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Consumer Protection Act); *Kuehn v. Stanley*, 208 Ariz. 124, 129 (Ct. App. 2004) (Arizona Consumer Fraud Act); *In re Ambry Genetics Data Breach Litig.*, 567 F. Supp. 3d 1130, 1148 (C.D. Cal. 2021) (California Confidentiality of Medical Information Act); *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig.*, 613 F. Supp. 3d 1284, 1300 (S.D. Cal. 2020) (California Customer Records Act); *G.G. v. Valve Corp.*, 579 F. Supp. 3d 1224, 1232 (W.D. Wash. 2022) (Washington Consumer Protection Act); *Super. Consulting Servs. v. Shaklee Corp.*, 2017 WL 2834783, at *7 (M.D. Fla. June 30, 2017) ("To state a claim seeking declaratory or injunctive relief under FDUTPA[,] a plaintiff must allege that . . . 'the plaintiff [is] a person "aggrieved" by the deceptive act or practice.' . . . [A] plaintiff is 'aggrieved' under FDUTPA when the deceptive conduct alleged has *caused a non-speculative injury* that has affected the plaintiff beyond a general interest in curbing deceptive or unfair conduct." (emphasis added) (citations omitted)).

[14] Again, there is no evidence to establish that *any* information was stolen by the threat actor.

causation overwhelm any common issues. [redacted] Ex. 21 (Ellman Rep.) ¶ 20. [redacted] *Id.* ¶ 19. [redacted] *Id.*

Again, the PII or PHI that was present in the Microsoft Office 365 accounts involved in the Cyberattack varies substantially for each putative class member. The alleged harms that the putative class members may have experienced also vary substantially, as evidenced by the named Plaintiffs' own allegations. For example, five named Plaintiffs (Bean, Jay, Soto, Baum, and Clark) do not allege any actual misuse of their information (or their children's information) at all.[15] SAC ¶¶ 59-150, 263-283. Several other Plaintiffs allege (incorrectly) that their SSNs have been found for sale on the dark web as a result of the Cyberattack. *Id.* ¶¶ 28, 88, 111, 136, 161, 227, 251, 273. One Plaintiff, Nielsen, alleges (again incorrectly) that twelve unauthorized bank accounts were opened in her name as a result of the Cyberattack. *Id.* ¶¶ 201-03. To assess whether each putative class members' alleged harms could have resulted from the Cyberattack, [redacted] Ex. 21 (Ellman Rep.) ¶ 19(b). Plaintiffs do not and cannot propose any mechanism for conducting this inquiry on a class-wide basis. *See McGlenn v. Driveline Retail Merch., Inc.*, 2021 WL 165121, at *10 (C.D. Ill. Jan. 19, 2021) (finding no predominance where five of the six claims at issue involved causation, the court had "considerable concerns relating to individual proof required for causation and damages," and the defendant "raised doubt as to whether Plaintiff and other class members have actually suffered any injury").

The Court must also assess whether the putative class members' alleged harms resulted from something *other* than the Cyberattack. *See Amchem*, 521 U.S. at 624 (no predominance when each putative class member had "a different history of cigarette smoking, a factor that

[15] Plaintiffs Jay, Soto, Baum, and Clark have withdrawn their allegations that their SSNs were found on the deep and dark web as a result of the Cyberattack. ECF No. 222.

complicate[d] the causation inquiry" (citation omitted)); *City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 636 n.4 (S.D. Fla. 2010) ("[I]ndividual issues are particularly likely to predominate . . . [where] members are likely to have suffered different types of injuries at different times and through different causal mechanisms." (citation omitted)). For example, [redacted] *See* Ex. 21 (Ellman Rep.) at 20. An individualized analysis is necessary to determine whether these Plaintiffs' alleged harms resulted from something *other* than the Cyberattack.

d. Individualized Questions of Injury Preclude Class Certification.

Like causation, injury is an element of all of Plaintiffs' remaining claims.[18] Plaintiffs do not—and cannot—explain how they will establish the required element of injury on a class-wide basis. As discussed above, Plaintiffs appear to seek certification of a putative class that includes all individuals whose PII or PHI was included in the Office 365 accounts that were involved in the Cyberattack, regardless of whether those individuals' information was accessed, viewed, or exfiltrated. But these "proposed class definitions would sweep in *all* [Mednax and AA patients]

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[16] Of particular note, Lee filed two other lawsuits (in which he was also represented by William B. Federman) where he contended that many of the exact same injuries that he allegedly suffered as a result of this Cyberattack were caused by other, unrelated security incidents. *See* Ex. 32 (*Lee v. QRS, Inc.*, Compl.); Ex. 33 (*Lee v. CareSouth, Inc.*, Compl.); *see also* Ex. 23 (Lee Dep.) at 126:2-7; 127:11-128:7; 136:11-25 ([redacted]); *id.* at 149:24-150:1; 154:22-155:3 ([redacted]). [redacted] Ex. 34 ([redacted]); Ex. 35 (QRS Notice Letter). [redacted] ECF No. 84-1, ¶¶ 7, 13; AA's MSJ § III.A.2.c; Ex. 14 at LEE_000002.

[17] Plaintiffs argue in a footnote that they need not consider these alternative causes because, they say, Florida law only requires them to determine whether the Cyberattack was "'a substantial cause of the injury'" they claim to have suffered. Mot. at 13 n.20 (citing *Ruiz v. Tenet Hialeah Healthsystem, Inc.*, 260 So. 3d 977, 982 (Fla. 2018)). But Plaintiffs do not even attempt to explain how a determination of "substantial cause" can be made on a class-wide basis. Whether putative class members have had the same information exposed in an unrelated data breach is relevant to the "substantial cause" cause inquiry and can only be assessed with individualized proof. Such individual inquiries preclude class certification. *See McGlenn*, 2021 WL 165121, at *9 (finding individual inquiry into causation predominated where several purported class members "likely had been involved in other data breaches in the two to four years prior to the [breach]").

[18] *See* n.13, *supra* (listing cases enumerating the elements of Plaintiffs' causes of action).

whose personal information was put at risk in the data breach." *Attias v. CareFirst, Inc.*, 344 F.R.D. 38, 53 (D.D.C. 2023). Broad class definitions like the ones Plaintiffs advance here "would yield a high number of 'false positives'"—individuals who, under the governing Eleventh Circuit standard in *Brinker*, had not experienced any misuse of their PII or PHI as a result of the Cyberattack. *Id.* Indeed, Plaintiffs' proposed class definitions are so overbroad that they sweep in individuals who may not have "even [been] aware of the data breach."[19] *Id.* Because Plaintiffs "briefing . . . does not grapple . . . with the logistical hurdles of identifying class members who were injured," Plaintiffs have not carried their burden of establishing that "common issues predominate over individualized inquiries." *Id.* at 55.

e. Additional Individualized Issues Doom Each Putative Subclass.

Plaintiffs seek certification of various State subclasses to assert various State statutory claims.[20] Plaintiffs fail to grapple with each element that they must prove to establish these claims. Instead, they lob conclusory statements that "uniform misrepresentations or omissions" and a "presumption of reliance" allow for class-wide proof. Mot. at 15-16. This ignores substantial variation in the elements of Plaintiffs' remaining claims and falls far short of Plaintiffs' burden of establishing that common issues predominate for each putative subclass. In fact, courts regularly deny certification of State consumer protection statutory claims due to their inherently individualized nature. *See, e.g.*, *Est. of Pilgrim v. Gen. Motors LLC*, 344 F.R.D. 381, 404-09 (E.D. Mich. 2023) (denying class certification of 19 claims asserted under State consumer protection statutes). The same result should follow here for each remaining statutory claim:

- **Maryland Consumer Protection Act ("MCPA"):** The MCPA requires each putative class member to prove he relied to his detriment upon alleged misrepresentations or omissions of the defendant. *Attias*, 344 F.R.D. at 55. Plaintiffs argue that they can establish this requirement with common evidence through "'[t]he use of an objective test to determine materiality.'" Mot. at 16 (quoting *In re Marriott, Int'l, Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 160 (D. Md. 2022)). Plaintiffs are wrong. Maryland's highest court has rejected the use of an objective test and has "deemed reliance to be both a 'necessary precondition to awarding'

[19] This is particularly true given the large number of individuals who received substitute notice.
[20] Plaintiffs do not seek certification of a State subclass under Rule 23(b)(3) for alleged violations of Arizona's Consumer Fraud Act, brought by Plaintiff Larsen. *See* Mot. at 15 n.22. Plaintiffs seek only certification of a single issue under that statute, but that attempt fails for the reasons discussed in Section IV.F, *infra*.

MCPA damages and an 'issue unique to each putative class member, thus adding extra weight to the predominance of individual over common questions.'" *Attias*, 344 F.R.D. at 55 (quoting *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 234-35 (Md. 2000)). Moreover, *Marriott* indicates that an "objective test" only applies to an "alleged omission [that] is uniformly applicable to the putative class." 341 F.R.D. at 160. Plaintiffs have identified no such uniform omission here, nor can they given that the members of the putative class visited numerous independent hospitals.

- **California Customer Records Act ("CCRA"):** To prevail on a CCRA claim, each putative class member must prove that he has been injured as a result of the alleged delay in receiving notice of the Cyberattack, not just from the Cyberattack generally. *Dugas v. Starwood Hotels & Resorts Worldwide, Inc*., 2016 WL 6523428, at *7 (S.D. Cal. Nov. 3, 2016) (citing *In re Adobe Sys. Inc. Privacy Litig*., 66 F. Supp. 3d 1197, 1216 (N.D. Cal. 2014)). Plaintiffs do not mention the CCRA at all in their Motion, nor do they explain how they can establish this element on a class-wide basis. Extensive individualized analysis of each individual's experience would be required to assess not only all of the individualized questions of injury and causation above, but also when that injury occurred and whether it could have been prevented or mitigated if notice of the Cyberattack had been provided sooner.
- **Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"):** Proof of causation also precludes class certification under FDUTPA. "[T]o determine whether [Defendants] caused patients to sustain losses, the Court will have to consider each patient's knowledge of [Defendants' privacy] practices," and thus "individualized issues will predominate over determinations of causation." *Bennett v. Quest Diagnostics, Inc.*, 2023 WL 3884117, at *13 (D.N.J. June 8, 2023) (denying class certification of FDUTPA claim); *see also Est. of Pilgrim*, 344 F.R.D. at 408-09 (same). Again, Plaintiffs have not—and cannot—point to a single uniform omission or misrepresentation Defendants made to all members of the putative class. Plaintiffs' unsupported statement that there were "uniform misrepresentations or omissions," Mot. at 15, does not satisfy their evidentiary burden.
- **Washington Consumer Protection Act ("WCPA"):** Proof of causation under Washington's consumer protection statute requires an individualized assessment that bars class certification.

Plaintiffs cite a single case and declare that they can rely on a "presumption of reliance,"[21] as if it creates a free pass to class certification. It does not. For one, any presumption only attaches to WCPA claims that are based primarily on omissions. *See Blough v. Shea Homes, Inc.*, 2014 WL 3694231, at *13 (W.D. Wash. July 23, 2014) (plaintiffs were not entitled to presumption of reliance because they did not "primarily assert fraud through omissions"); *cf. Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004) (RICO claims that are "best characterized as either affirmative misrepresentations or 'mixed claims'" are not entitled to a presumption of reliance). Here, Plaintiffs' claims are based primarily on misrepresentations. *See* Mot. at 16; SAC ¶ 588 (listing seven "unfair or deceptive acts or practices" with only two being omissions). But even if Plaintiffs could rely on a "presumption" of reliance, individual issues would still predominate because that presumption can be rebutted "by proving that the plaintiff's decision would have been unaffected even if the omitted fact had been disclosed." *Blough*, 2014 WL 3694231, at *14 (quoting *Morris v. Int'l Yogurt Co.*, 729 P.2d 33, 41 (Wash. 1986)). *Blough* is directly on point: "[W]here discovery has revealed substantial variations" in the experiences of the members of the putative class, "a presumption of reliance does not alter the predominance of individualized inquiries into causation over common questions." *Id.* Like *Blough*, Plaintiffs offer *no* evidence, much less any *common* evidence, that any given Plaintiff or class member would have chosen a medical practice or hospital unaffiliated with Mednax had he or she been told some (unspecified) information about Mednax's data security. [redacted] *See* Mednax's MSJ, § III.B.5. It is not a hypothetical possibility that there would be individualized evidence on rebuttal—decisions about healthcare are unique and personal, and the need to inquire into each putative class member's individual circumstance dwarfs any efficiency to be gained by class treatment. *See Blough*, 2014 WL 3694231, at *14.[22] Plaintiffs accordingly cannot certify a class on this claim.

[21] It is not even clear that a "presumption of reliance" applies to WCPA claims, as "the Washington Supreme Court has never affirmed" it. *Blough*, 2014 WL 3694231, at *13.

[22] Plaintiffs' citation to one court's interpretation of the WCPA cannot overcome the substantial authority denying class certification because individualized WCPA causation issues predominate. *See, e.g.*, *Rydman v. Champion PetFoods USA, Inc.*, 2023 WL 3506133, at *13 (W.D. Wash. May 17, 2023); *Wetzel v. CertainTeed Corp.*, 2019 WL 3976204, at *16 (W.D. Wash. Mar. 25, 2019); *Pierce v. Novastar Mortg., Inc.*, 2006 WL 2571984, at *10 (W.D. Wash. Sept. 5, 2006).

- **California Confidentiality of Medical Information Act ("CMIA"):** To establish entitlement to statutory damages under the CMIA, Plaintiffs must prove that their confidential medical information "was 'improperly viewed or otherwise accessed'" in the Cyberattack. *In re Ambry Genetics Data Breach Litig.*, 567 F. Supp. 3d 1130, 1148 (C.D. Cal. 2021) (citation omitted). Plaintiffs do not even attempt to explain how they can prove this element on a class-wide basis. They cannot. As discussed above, there is no common evidence that Plaintiffs can use to establish what information, if any, was viewed or otherwise accessed in the Cyberattack. Indeed, the California Court of Appeal denied class certification of a CMIA claim for this reason, holding that "individual issues would predominate over common issues" where "[t]he record demonstrates that [an unauthorized third party] may have viewed some of the information on the patient spreadsheet, but [the plaintiff] presented no evidence indicating whose information was viewed." *Vigil v. Muir Med. Grp. IPA, Inc.*, 84 Cal. App. 5th 197, 221-22 (2022). As that court explained, proving any putative class member's confidential medical information was actually viewed under these circumstances would require the court to resolve numerous individualized questions, including "questions regarding whether third parties used plaintiffs' information, whether this use was without authorization, the timing of this misuse, whether plaintiffs took measures to protect against the misuse of their information, whether the information used was involved in the data breach, and whether third parties could have obtained this information through other means." *Id.* at 222. The same result follows here.

f. Individualized Damages Issues Preclude Class Certification.

As the Eleventh Circuit recently recognized, though sometimes individualized damages issues do not preclude class certification, "[i]ndividualized damages issues predominate if 'computing them will be so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable' or if 'significant individualized questions go to liability.'" *Brinker*, 73 F.4th at 893 (citation and internal alterations omitted).

Plaintiffs argue that Gary Olsen's Report demonstrates how damages can be assessed on a class-wide basis. But Olsen's Report has numerous critical flaws that prevent it from being a valid class-wide damages model for at least three reasons.

First, [redacted]

[redacted] The Eleventh Circuit's *Brinker* decision confirms that neither of these categories of alleged damages is compensable. There, the Eleventh Circuit reversed and remanded a district court's grant of class certification in *Brinker* because the district court did not explain how it could "weed out" individuals whose information had merely been "accessed by cybercriminals" and were therefore "uninjured" under Eleventh Circuit precedent. 73 F.4th at 891-92. And the Eleventh Circuit confirmed that, "[w]ithout specific evidence of *some* misuse of class members' data," there is no certainly impending increased future risk of identity theft, and therefore no legally cognizable injury. *Id.* at 889 (internal quotation marks and citation omitted). [redacted]

Second, [redacted] Ex. 22 (Olsen Dep.) at 59:22-60:4, 64:3-65:6. As discussed above, there is no evidence to support that proposition. Ex. 21 (Ellman Rep.) ¶ 27.

Third, [redacted] Only those individuals who can prove that their confidential medical information "was 'improperly viewed or otherwise accessed'" are entitled to statutory damages. *In re Ambry*, 567 F. Supp. 3d at 1148 (citation omitted). [redacted] By assuming all putative class members are entitled to damages, regardless of whether they can establish that their information was actually accessed or misused as a result of the Cyberattack, Plaintiffs have not "prove[n] . . . that a reliable damages methodology" exists, as Olsen's damages model would impermissibly "giv[e] class members an award for an injury they could not otherwise prove in an individual action" by awarding all putative class members damages whether or not they could establish that their personal information was actually accessed or misused as a result of the Cyberattack. *Brinker*, 73 F.4th at 894.

Without Olsen's flawed damages model, Plaintiffs are left with their claims for compensatory damages for unique injuries, including out-of-pocket expenses they contend they incurred as a result of the Cyberattack and money to compensate them for time that they claim they spent responding to the Cyberattack. Plaintiffs do not—and cannot—explain how these

alleged damages, which are inherently individualized, can be calculated in a way that does not create an intolerable burden on the court system. Moreover, Plaintiffs' damages calculations are "accompanied by significant individualized questions going to liability," including whether each putative class member's personal information has been actually accessed or misused as a result of the Cyberattack. *Brown*, 817 F.3d at 1240 (internal quotation marks and citation omitted). Under these circumstances, "individualized damages defeat predominance." *Id.*

E. Plaintiffs Have Not Met Their Burden to Prove that a Class Action is the Superior Method of Adjudication.

The final factor specified in Rule 23(b)(3) requires Plaintiffs to establish that class litigation is superior to other available methods for adjudication of their claims. *See* Fed. R. Civ. P. 23(b)(3). As part of the superiority showing, Plaintiffs must address "whether certification will cause manageability problems"—including evaluating how a trial on the merits would be conducted if a class were certified. *Klay*, 382 F.3d at 1272; *see also Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996) ("Issues of class action manageability encompass the 'whole range of practical problems that may render the class action format inappropriate for a particular suit.'" (citation omitted)), *abrogated in part on other grounds by Bridge*, 553 U.S. 639.

For the same reasons Plaintiffs cannot establish predominance, they also cannot establish superiority. Because the superiority analysis hinges on whether class-action litigation is superior to other methods of adjudication, it necessarily "involves two forms of comparison. First, would a class action create more manageability problems than its alternatives? And second, how do the manageability concerns compare with the other advantages or disadvantages of a class action?" *Cherry*, 986 F.3d at 1304-05 (citations omitted); *see also Perez*, 218 F.R.D. at 273 ("Severe manageability problems are a prime consideration that can defeat a claim of superiority.").

Plaintiffs fail to provide the Court with any guidance (much less a plan) for how the individualized and fact-intensive claims at issue here could be tried on a class-wide basis. Instead, they simply conclude that class treatment is superior because it will "conserve the resources of the courts and the litigants and further the efficient adjudication of the Class Members' claims" in a case in which "[t]he relatively small amount" of individual damages would not justify separate lawsuits. Mot. at 17. This argument both oversimplifies the individualized nature of each putative class member's potential claim and overstates the efficiencies that class-action litigation would

offer with respect to damages.[23]

Here, there are individualized issues relating numerous aspects of Plaintiffs' claims—from proximate causation and reliance[24] to the different types of personal information impacted by the Cyberattack[25] and the mitigation efforts and actions (or lack thereof) taken by each individual in response to receiving notice[26]—that are central to each proposed class member's claims such that "any trial of this case would require the presentation of a substantial amount of evidence specific to each of an unknown number of class members." *Vega*, 564 F.3d at 1278. And these manageability problems are not confined to issues of liability because the Eleventh Circuit has held that difficulties in determining damages on a class-wide basis may justify the denial of class certification. *See, e.g.*, *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1366 (11th Cir. 2002) (the fact that class claims "involve extensive individualized inquiries on the issues of injury and damages [demonstrated] that a class action is not sustainable"), *abrogated in part on other grounds by Bridge*, 553 U.S. 639. Plaintiffs fail to provide ***any*** suggestion as to how a jury or the Court would calculate many of the categories of damages Plaintiffs seek on behalf of the putative class.[27] *See* SAC ¶ 607. The individualized claims and damages at the center of this litigation would cause any so-called class action to devolve into an endless series of mini-trials, "pos[ing] serious challenges to the efficiency and manageability of a class action proceeding." *Vega*, 564 F.3d at 1278. In short, "the potential burden imposed by the individualized proof required in this particular case" swamp any benefits of class-action litigation. *Bouton v. Ocean Props., Ltd.*, 322 F.R.D. 683,

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[23] Although a trial plan is not "necessarily a prerequisite, as a matter of law, for a finding of superiority in every case," there is a "direct correlation between the importance of a realistic, clear, detailed, and specific trial plan and the magnitude of the manageability problems a putative class action presents." *Vega*, 564 F.3d at 1278 n.20. Here, there are significant individualized issues that present significant manageability concerns, and Plaintiffs propose no trial plan.

[24] Plaintiffs' reliance cannot be inferred on a class-wide basis because Plaintiffs do not allege that each of them received the same representations about data security and/or privacy practices. *Compare* Mot. at 16, *with* § IV.D.1.e, *supra*. Reliance necessarily requires an individualized inquiry into which alleged misrepresentations or omissions each Plaintiff supposedly relied upon.

[25] Mednax's MSJ, § III.A.2; AA's MSJ, § III.A.

[26] *See, e.g.*, Ex. 23 (Lee Dep.) at 169:22-170:11 ([redacted]); Ex. 18 (Clark Dep.) at 47:12-48:5, 109:18-24 ([redacted]).

[27] [redacted]

702 (S.D. Fla. 2017). Plaintiffs' failure to establish superiority requires denial of their Motion.

F. Rule 23(c)(4) is not an alternative to the Rule 23(b) requirements.

Plaintiffs argue that this Court should certify certain issues "if the Court finds that the Plaintiff has not met the requirements of Rule 23(b)(2) and/or Rule 23(b)(3)." Mot. at 20. That is wrong. To obtain class certification, a plaintiff "must . . . satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33.[28] Plaintiffs' attempt to certify "issue classes" under Rule 23(c)(4) fails for at least four reasons.

First, Rule 23(c)(4) cannot excuse Plaintiffs from their burden under Rules 23(a) and (b). Rule 23 never describes 23(c)(4) as an alternative to certification under one of the 23(b) provisions or as a way to avoid the 23(a) requirements. The U.S. Supreme Court and the Eleventh Circuit have never accepted class certification under Rule 23(c)(4) as an alternative to certification under Rule 23(b). And federal courts in this District "emphatically reject[] attempts to use the (c)(4) process for certifying individual issues as a means for achieving an end run around the (b)(3) predominance requirement." *Harris v. Nortek Glob. HVAC LLC*, 2016 WL 4543108, at *17 (S.D. Fla. Jan. 29, 2016) (citation omitted). Rule 23(c)(4) is therefore inapplicable here.[29]

Second, certifying a class for the issues listed in the Motion would achieve nothing. Individualized inquiries would still be necessary on a wide array of issues—including causation, injury, affirmative defenses, damages, and the existence of Article III standing for each putative class member as to claims against each defendant. Plaintiffs' proposal would still require millions of individual trials.

Third, Plaintiffs' request to certify "specific questions" for class treatment violates the Seventh Amendment.[30] *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (reversing certification of a nationwide class action based on the Seventh Amendment "right of a

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[28] *See also Baker v. State Farm Mut. Auto. Ins.*, 2022 WL 3452469, at *2 (11th Cir. 2022) (per curiam).

[29] *See also, e.g.*, *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 651 (M.D. Fla. 2001) ("[A] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." (quoting *Castano*, 84 F.3d at 745 n.21)); *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 700 (S.D. Fla. 2014) ("As the Court finds that predominance has not yet been demonstrated, certification of an issue class is also inappropriate.").

[30] *See* U.S. Const., amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

litigant to have only one jury pass on a common issue of fact"); *Cooper v. S. Co.*, 390 F.3d 695, 722 (11th Cir. 2004) (explaining that even if there were a finding for the plaintiffs on certain elements of a claim, "it would still be necessary for a single jury to hear and rule on more than 2,000 individual claims for compensatory damages"), *overruled in part on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). Plaintiffs' proposal to reserve certain elements of liability, like causation, for individualized determination would impermissibly allow future juries to re-examine an earlier jury's liability determination.[31]

Fourth, Plaintiffs' reliance on the five cases they cite to support their Rule 23(c)(4) argument is misplaced. None of those cited cases is controlling. None discussed the Seventh Amendment or the former Fifth Circuit and Eleventh Circuit opinions that control here. Three pre-date the Supreme Court's 2013 *Comcast* decision, which confirms the need to satisfy the requirements of one subdivision of Rule 23(b) to obtain class certification. Two are from outside the Eleventh Circuit.[32] And in one—*Hirsch v. Jupiter Golf Club LLC*—the court explained that "Plaintiffs must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)," thus rejecting Plaintiffs' position that Rule 23(c)(4) is an alternative to Rule 23(b). 2015 WL 2254471, at *5 (S.D. Fla. May 13, 2015) (citing *Comcast*, 569 U.S. at 33). Plaintiffs' arguments under Rule 23(c)(4) therefore fail.

G. Plaintiffs fail to satisfy the requirements for a Rule 23(b)(2) class.

Plaintiffs also move to certify a class under Rule 23(b)(2). Mot. at 18. But to proceed under that rule, Plaintiffs would have to prove that Defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Plaintiffs cannot meet

[31] *See also Castano*, 84 F.3d at 750 ("Another factor weighing heavily in favor of individual trials is the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment."); *In re Rhone-Poulenc*, 51 F.3d at 1303-04 (class certification for the purpose of determining whether defendant was negligent was precluded by the Seventh Amendment because subsequent juries on class members' individual claims would have to determine issues that "overlap the issue of the defendants' negligence"); *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698 (N.D. Ga. 2008) (denying certification of personal injury issues-class because of the "concern" that "Rule 23(c)(4) issues classes . . . could violate the parties' Seventh Amendment jury-trial rights").

[32] Plaintiffs cite *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), but that Ninth Circuit opinion *vacated* the district court's Rule 23(c)(4) class-certification order that was limited to certain issues, including negligence and causation in fact. *Id.* at 1229, 1235.

that burden for at least two reasons.

1. Plaintiffs' Requests for Monetary Relief Are Individualized and not Incidental.

Rule 23(b)(2) cannot apply when plaintiffs seek individualized damages awards or when damages are not "incidental" to injunctive or declaratory relief. As the U.S. Supreme Court explained, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Dukes*, 564 U.S. at 360-61. As this Court and the Eleventh Circuit have also held, "Rule 23(b)(2) 'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.'" *Ohio State Troopers*, 481 F. Supp. 3d at 1280 (quoting *AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins.*, 938 F.3d 1170, 1179 (11th Cir. 2019)). That test is stringent. Monetary relief—and *not* injunctive relief—*necessarily* predominates "unless it is *incidental* to requested injunctive or declaratory relief." *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (quoting *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). And damages are only "incidental" if they "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Id.* (citation omitted). After all, Rule 23(b)(2) remedies "group, as opposed to individual injuries," *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n.8 (11th Cir. 1983) (citation omitted), so "the forms of relief available in Rule 23(b)(2) class actions are in the nature of group remedies that benefit the entire class," *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1345 (11th Cir. 2006).[33]

Plaintiffs seek money damages on behalf of over 2.5 million putative class members. Mot. at 7. [redacted]. Olsen Rep. at 4-6. Throughout the SAC, Plaintiffs allege that they suffered "actual harms for which they are entitled to compensation." SAC ¶ 450; *see also*, *e.g.*, *id.* ¶¶ 6, 8, 10, 12, 461, 498, 509, 593, 602, 607. Plaintiffs argue that they have Article III standing because they are entitled to relief for harms caused in the past. ECF No. 92 at 24-36. And Plaintiffs define their classes based on whether their PII or PHI was "compromised" in the past—not whether Defendants currently possess their PII or PHI. Mot. at 5. Monetary relief cannot be "incidental"

[33] These limits are important because class members have "no opportunity . . . to opt out" of a Rule 23(b)(2) class, and a court need not give notice to such a class. *Dukes*, 564 U.S. at 362. When, as here, a class action is "predominantly for money damages," "that absence of notice and opt out violates due process." *Id.* at 363.

under these facts. *See, e.g.*, *Suncoast*, 938 F.3d at 1175 (reversing certification of a Rule 23(b)(2) class when "[e]verything about [the plaintiff's] claim—from its theory of standing to its request for relief to its class definition—looks back at *past* harms"); *Signor v. Safeco Ins. Co. of Ill.*, 2021 WL 1348414, at *7 (S.D. Fla. Feb. 18, 2021) (denying Rule 23(b)(2) certification).[34]

Plaintiffs also do not request damages as a "group remedy." *See Hummel v. Tamko Bldg. Prod., Inc.*, 303 F. Supp. 3d 1288, 1301 (M.D. Fla. 2017). To the contrary, each named Plaintiff purports to seek money damages for their own individual harms. Damages are "incidental" to injunctive relief "only when class members would be automatically entitled to [damages] once class-wide liability is established." *Randolph*, 303 F.R.D. at 699 (quoting *Colomar v. Mercy Hosp., Inc.*, 242 F.R.D. 671, 682 (S.D. Fla. 2007)). Here, however, "[a] finding of class-wide liability . . . would not 'automatically' entitle class members to a fixed, uniform damages recovery." *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 682 (S.D. Fla. 2012). Instead, the Court would have to "calculate money damages individually for each class member." *All Fam. Clinic of Daytona Beach Inc. v. State Farm Mut. Auto. Ins.*, 280 F.R.D. 688, 690 n.2 (S.D. Fla. 2012) (citing *DWFII Corp. v. State Farm Mut. Auto. Ins.*, 271 F.R.D. 676, 686 (S.D. Fla. 2010)). This fact alone precludes certification under Rule 23(b)(2).[35]

In their cursory argument to the contrary, Plaintiffs rely on a 30-year-old district court case for the proposition that a court can certify a class under both Rule 23(b)(2) and 23(b)(3) "where injunctive relief and damages are both important components of the relief." *Davis v. S. Bell Tel. & Tel. Co.*, 1993 WL 593999, at *7 (S.D. Fla. Dec. 23, 1993). Yet that assertion runs headlong into more recent, binding Eleventh Circuit precedent that Rule 23(b)(2) does not apply unless monetary relief is "incidental." *Murray*, 244 F.3d at 812; *see also Drossin v. Nat'l Action Fin. Servs., Inc.*, 255 F.R.D. 608, 618 (S.D. Fla. 2009). Plaintiffs also suggest Rule 23(b)(2) certification is appropriate because FDUTPA and WCPA permit injunctive relief. Mot. at 18 n.23. But the mere existence of those statutory claims does not satisfy Rule 23(b)(2). *See, e.g.*, *Ohio State Troopers*, 481 F. Supp. 3d at 1280; *Harris*, 2016 WL 4543108, at *11. Because Plaintiffs' claims focus on damages, Rule 23(b)(2) does not apply. *See Suncoast*, 938 F.3d at 1179.

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[34] *See also, e.g.*, *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 400 (D. Mass. 2007) ("Because the predominate motive behind this suit is financial, class certification pursuant to Rule 23(b)(2) is not justified.").

[35] *See also, e.g.*, *Bailey v. Rocky Mtn. Holdings, LLC*, 309 F.R.D. 675, 679 (S.D. Fla. 2015); *Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins.*, 271 F.R.D. 538, 546 (S.D. Fla. 2010).

2. Plaintiffs Cannot Obtain the Requested Injunctive Relief About Future Security.

Plaintiffs also cannot succeed under Rule 23(b)(2) because this Court cannot grant the requested injunctive relief. Plaintiffs bear the burden to identify "exactly what injunctive . . . relief" they seek. *Lakeland Reg'l Med. Ctr. v. Astellas US, LLC*, 763 F.3d 1280, 1291 (11th Cir. 2014). The closest Plaintiffs come to addressing that burden is asserting that injunctive relief is "needed to remediate Defendants' inadequate data security" and vaguely referring to "security measures needed to protect Class Members' PII and PHI now and in the future." Mot. at 18-19. Injunctions, however, "must be geared toward preventing *future* harm." *Suncoast*, 938 F.3d at 1175; *see Gagliardi v. TJCV Land Tr.*, 889 F.3d 728, 734 (11th Cir. 2018) ("Injunctive relief . . . is inherently prospective in nature."). Because Plaintiffs focus on improving Defendants' data security, the only "future harm" Plaintiffs could seek to avoid is a separate, future incident—not any alleged ongoing effects of what happened in 2020. *See Webb v. Injured Workers Pharm., LLC*, 72 F.4th 365, 378 (1st Cir. 2023) ("Naturally, an injunction requiring [a defendant] to improve its cybersecurity systems cannot protect the plaintiffs from future misuse of their PII by the individuals they allege now possess it. Any such relief would safeguard only against a future breach.").

But Plaintiffs lack Article III standing to seek any injunctive relief related to data security. To have Article III standing to seek prospective relief, "a plaintiff must show that he faces a substantial likelihood of injury in the future." *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001). The threat must be "real and immediate," not "conjectural or hypothetical." *Id.* (citation omitted). Past harm can be used as evidence, but "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)); *see Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1232-33 (11th Cir. 2019).

Plaintiffs cannot show a substantial likelihood of a separate, future data-security incident involving either Defendant. [redacted] Frantz Rep. at 101. [redacted][36] [redacted]

[36] [redacted] *See* Frantz Rep. at 103. Not only does this undermine any

[redacted] *See* Ex. 7 (OCR Case Closure Letter) at MEDNAX0130104 ([redacted]). [redacted] *See* AA's MSJ, § III.B.3.e. Defendants face no more risk of a future successful cyberattack than any other entity that possesses PII or PHI. "If that risk were deemed sufficiently imminent to justify injunctive relief, virtually every company and government agency might be exposed to requests for injunctive relief like the one [Plaintiffs] seek here." *Webb*, 72 F.4th at 378. Plaintiffs therefore lack standing to ask this Court to spend judicial resources re-writing Defendants' security protocols and re-arranging corporate structures. *See, e.g.*, *id.* (holding plaintiffs lacked Article III standing to seek an injunction to improve data security); *Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) (same). Plaintiffs therefore cannot obtain their requested injunctive relief, and their request to certify a class under Rule 23(b)(2) fails.

V. AMERICAN ANESTHESIOLOGY-SPECIFIC ARGUMENTS

A. Nine Named Plaintiffs Lack Article III Standing to Sue AA for the Additional Reason That They Had No Connection to AA.

As explained above and in Defendants' motions for summary judgment, none of the eleven named Plaintiffs has Article III standing to assert any claim against any Defendant. But as further explained in AA's motion for summary judgment, nine named Plaintiffs—A.W., Baum, Bean, Clark, Cohen, Jay, Larsen, Rumely, and Soto ("the Mednax Plaintiffs")—also lack standing to assert any claim against AA for an *additional* reason: They have no relevant connection to AA.

Even if one of the Mednax Plaintiffs somehow had Article III standing to sue Mednax (they do not), "standing is not dispensed in gross." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). The analysis must proceed plaintiff-by-plaintiff, claim-by-claim, and defendant-by-defendant. *See, e.g.*, *id.*; *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000); *Link v. Diaz*, ___ F. Supp. 3d ___, 2023 WL 2984726, at *2 (N.D. Fla. Apr. 17, 2023); *Warren Tech., Inc. v. UL LLC*, 2018 WL 10550930, at *5 (S.D. Fla. Oct. 31, 2018).[37] The Mednax

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theory about future harm, but it also falls short of Plaintiffs' burden to identify "exactly what injunctive . . . relief" they seek. *Lakeland*, 763 F.3d at 1291.

[37] *See also, e.g.*, *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017); *Mahon v. Ticor Title Ins.*, 683 F.3d 59, 65 (2d Cir. 2012); *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 247-48 (5th Cir. 2008); *Easter v. Am. W. Fin.*, 381 F.3d 948, 961-62 (9th Cir. 2004). The so-called "juridical link" doctrine

Plaintiffs cannot show they suffered any "injury in fact" that is "fairly traceable" to AA. *Spokeo*, 578 U.S. at 338. Plaintiff Clark asserts claims on behalf of her children only, *see* SAC ¶¶ 263-83, but AA never provided medical services to Clark's children and did not collect, store, or retain their PHI or PII. AA also never provided medical services to any other Mednax Plaintiffs or their children, and AA never collected, stored, or retained their PHI or PII. *See* AA's MSJ, § III.A.1. Plaintiffs' primary theory of liability is that Mednax lacked adequate security. But Mednax and AA are distinct entities; Mednax sold AA to NAPA before the Cyberattack. Mot. at 1-2; SAC ¶ 289. AA's own data security cannot have contributed in any way to the Cyberattack.

This leaves Plaintiffs with their theory that "AA/NAPA" somehow did not perform due diligence when NAPA bought AA and that AA should not have used Mednax's security. Mot. at 2. That "due diligence" theory cannot survive. NAPA is not a defendant and is therefore irrelevant to Article III standing. The "due diligence" theory was also never alleged in the SAC, even though Plaintiffs knew about the relationship between Mednax, AA, and NAPA. *See* SAC ¶ 289. And in any event, Plaintiffs' novel theory cannot give non-AA patients standing to sue AA. NAPA's acquisition of AA, NAPA's due-diligence efforts before the acquisition, and AA's interim use of Mednax's security systems after the acquisition had no effect on patients who did not receive medical services from AA, who did not provide their PHI or PII to AA, and whose PHI and PII AA did not possess. This is yet another reason the Mednax Plaintiffs lack standing to sue AA.

B. <u>This Court Should Not Certify Any Subclasses Against AA.</u>

Finally, the Court should not certify any of the five proposed subclasses against AA. Not only do the subclasses fail for the reasons above, but they also fail for two AA-specific reasons.

First, Plaintiffs themselves do not seek to certify any subclasses against AA. Mednax and AA are distinct, and Plaintiffs maintain that distinction in their proposed class definitions. One proposed nationwide class ("The Nationwide Mednax Class") would comprise certain "current and former patients of Mednax," while a different proposed nationwide class ("The Nationwide AA Class") would comprise certain "current and former patients of American Anesthesiology." Mot. at 5. When it comes to the subclasses, though, Plaintiffs *never* refer to AA. Each proposed

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cannot eliminate the rule or confer Article III standing. *See, e.g.*, *Gendler v. Related Grp.*, 2009 WL 10668980, at *6 (S.D. Fla. Sept. 14, 2009); *GB, L.L.C. v. Certain Underwriters at Lloyd's London*, 2009 WL 10669933, at *4 (S.D. Fla. Oct. 8, 2009); ECF No. 84 at 79-83.

subclass instead lists only "current and former *Mednax* patients." *Id.* (emphasis added). The proposed subclass definitions do not permit any subclasses against AA.[38]

Second, Plaintiffs' proposed subclasses are for residents of Arizona, California, Florida, Maryland, and Washington. Mot. at 5. As noted above, those subclasses correspond to Counts I, II, III, IV, IX, and X of the SAC, which assert statutory claims under the laws of those five States. But Plaintiffs do not assert the Arizona, California, or Washington statutory claims (Counts II, III, IX, and X) against AA. SAC ¶¶ 499, 510, 585, 594. And the AA Plaintiffs (Nielsen and Lee) do not reside in any of those five States and do not assert claims under those States' statutes. As a result, they cannot represent a class asserting statutory claims under the laws of those States. *See, e.g.*, *Lewis v. Mercedes-Benz*, 530 F. Supp. 3d at 1205 ("[N]amed plaintiffs in class actions have, time and again, been prohibited from asserting claims under a state law other than that which the plaintiff's own claim arises." (citation omitted)); *In re Takata Airbag Prods. Liab. Litig.*, 2016 WL 1266609, at *4 (S.D. Fla. Mar. 11, 2016) ("A named plaintiff lacks standing to assert legal claims on behalf of a putative class pursuant to state law under which the named plaintiff's own claims do not arise."); *see also Brinker*, 73 F.4th at 893 ("Without a named plaintiff with standing to bring the California claims, the California class cannot survive.").

VI. CONCLUSION

Plaintiffs have not satisfied Rule 23's requirements. Plaintiffs' claims are not susceptible of common proof and would require this Court to conduct millions of mini-trials to resolve the putative class members' claims and to calculate their damages. Put differently, class certification would not simplify the trial of this case or promote judicial economy in any way but, instead, would render this case hopelessly unmanageable and interminable. Moreover, Plaintiffs fall far short of establishing typicality and adequacy. For all of these reasons, as well as the others set forth above, Plaintiffs' Motion should be denied.

Dated: November 29, 2023

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[38] Plaintiff cannot expand the proposed subclasses in their reply. *See Eades v. Chicago Title Ins.*, 2012 WL 13001793, at *3 (N.D. Ga. July 18, 2012).

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/ Kristine McAlister Brown
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