**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**

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This Document Relates to All Actions

**DEFENDANT AMERICAN ANESTHESIOLOGY, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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Under Rule 56 of the Federal Rules of Civil Procedure, Defendant American Anesthesiology, Inc. ("AA") moves for summary judgment as to Plaintiffs' Consolidated Second Amended Complaint for Damages [ECF No. 115 ("Second Amended Complaint" or "SAC")].

## I. INTRODUCTION

The Court is undoubtedly well aware of the facts here, but AA offers a brief summary nonetheless since it has been over a year since the Court issued its August 18, 2022, motion to dismiss order. ECF No. 131. Plaintiffs allege that they, or their children, received medical services from Mednax, Inc., Mednax Services, Inc., Pediatrix Medical Group, Pediatrix Medical Group of Kansas, P.C. (together, "Mednax") or AA (together with Mednax, "Defendants"). SAC ¶¶ 16, 41, 59, 78, 101, 126, 151, 190, 217, 263. Plaintiffs Nielsen and Lee [redacted] Defendants' Joint Statement of Material Facts, ECF No. 256 ("SOMF") ¶¶ 127, 155. Plaintiffs Rumely, Bean, Jay, Soto, Baum, Larsen, Cohen, B.W., and Clark [redacted] *Id.* ¶¶ 20, 34, 59, 71, 91, 104, 117, 175, 189.

Only two named Plaintiffs, Brooke Nielsen and Gerald Lee (together, "AA Plaintiffs"), [redacted][1] SOMF ¶ 130, 158. [redacted] *Id.* ¶ 18; Ex. 64 (AA template notice letter). [redacted] *Id.* [redacted] *Id.*; Ex. 64 (template notice letter). The AA Plaintiffs' lawsuit followed a month later. *See* Complaint, *Nielsen v. Mednax, Inc.*, No. 4:21-cv-500 (D.S.C. Feb. 17, 2021), ECF No. 1.

The AA Plaintiffs plead the traditional litany of injuries often seen in data breach lawsuits: lost time, diminution in the value of their personal information, annoyance, interference, inconvenience, anxiety, increased concerns about privacy, increased risk of fraud, increased risk of identity theft, loss of privacy, loss of the benefit of their bargain with AA, credit issues, and an

[1] The other nine Plaintiffs—B.W., Rumely, Bean, Jay, Soto, Baum, Larsen, Cohen, and Clark (together, "Mednax Plaintiffs") [redacted] *Compare* SOMF ¶¶ 130, 158, *with* Ex. 6, 20, 35, 38, 41, 44, 47, 69.

increase in spam and telemarketing calls. *See* SAC ¶¶ 192, 196–98, 204, 209, 219, 222–24, 226. Nielsen specifically alleges that she has been injured by the receipt of an unwanted four-year "gift subscription" to *Shape* magazine and the opening of twelve fraudulent bank accounts in her maiden name (Gilbride). *Id*. ¶¶ 201, 208; SOMF ¶ 138. Lee specifically alleges that he has been injured because his Social Security number can be found on the dark web. SAC ¶ 227.

Now that this case has moved beyond the motion to dismiss phase, the AA Plaintiffs can no longer rely on hackneyed allegations to advance their lawsuit against AA. Plaintiffs had the benefit of sixteen months of discovery to offer actual evidence in support of their claims; they did not. Instead, discovery has borne out that [redacted] Accordingly, neither AA Plaintiff can show that a bad actor used any information taken from AA to cause them injury. Neither AA Plaintiff has standing to bring this action.

Further, Plaintiffs cannot present evidence to avoid summary judgment on the merits of their three remaining claims against AA: (1) breach of the Maryland Consumer Protection Act ("MCPA"), Md. Code Ann., Com. Law §§ 13-301, *et seq.*; (2) breach of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201, *et seq*.; and (3) common-law negligence. SAC ¶¶ 474–98, 521–32, 603–08. These substantive shortcomings are just as fatal to Plaintiffs' case. The Court should grant summary judgment and dismiss AA from this action.

## II. STANDARD OF REVIEW

Summary judgment is required when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Kerr v. McDonald's Corp*., 427 F.3d 947, 951 (11th Cir. 2005). If the party seeking summary judgment shows the absence of a genuine dispute of material fact, then the burden shifts to the non-moving party, who must go beyond the pleadings and present affirmative evidence that a genuine dispute of material fact exists. *Porter v. Ray*, 461 F.3d 1315, 1320 (11th Cir. 2006). "[M]ere conclusions and unsupported factual allegations are legally insufficient . . . ." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005).

## III. ARGUMENT

### A. Plaintiffs Lack Article III Standing to Sue AA.

Before considering Plaintiffs' substantive causes of action, this Court must determine a "threshold jurisdictional question": whether any Plaintiff has standing to sue AA now that the

Court has the benefit of a complete record. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 923 (11th Cir. 2020) (en banc). The "'irreducible constitutional minimum' of standing" has "three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The 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." *Id.* "The fairly traceable element explores the causal connection between the challenged conduct and the alleged harm." *Fed. Deposit Ins. Corp. v. Morley*, 867 F.2d 1381, 1388 (11th Cir. 1989). Essentially, "this requirement focuses on whether the line of causation between the illegal conduct and injury is too attenuated." *Id.* (internal quotation marks omitted). The causal link may be too attenuated if the injury is "the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations adopted). At the summary judgment stage, Plaintiffs can no longer rest on mere allegations. They must "set forth by affidavit or other evidence specific facts." *Id*. at 561 (citations omitted).

Here, no Plaintiff can establish that they suffered an "injury in fact" that is "fairly traceable" to any wrongdoing that AA allegedly committed. Plaintiffs cannot show that their personal information or that of their minor child was compromised in the Cyberattack, and no Plaintiff can fairly trace any misuse of such personal information back to AA. As a result, AA should be dismissed.

**1. None of the Mednax Plaintiffs have any connection with AA, and thus they lack standing to sue AA.**

Only the two AA Plaintiffs—Brooke Nielsen and Gerald Lee—allege they received a notification letter from AA. SAC ¶¶ 191, 218. This Court recognized as much in its August 18, 2022, motion to dismiss order, noting that "[o]nly Plaintiffs Nielsen and Lee allege any interaction with Defendant American Anesthesiology." ECF No. 131 at 9 (citing SAC ¶¶ 191, 218).

In denying AA's first motion to dismiss, the Court wrote that discovery was needed to determine whether there was a "causal connection" between the Mednax Plaintiffs' alleged injuries and AA's alleged misconduct. ECF No. 104 at 58. Discovery is now closed, and there can be no genuine dispute that there is no causal connection. [redacted] *Compare* SOMF ¶¶

128, 156, *with* SOMF ¶¶ 221–229.[2] In fact, [redacted] *Id.* ¶¶ 221–229.

Under these facts, there can be no "injury in fact" that is "fairly traceable" to AA. *Spokeo*, 578 U.S. at 338. The Mednax Plaintiffs also lack Article III standing for the additional reasons detailed in Mednax's summary judgment brief. ECF No. 254 at 11–24. But even if any of these Plaintiffs could sue Mednax (they cannot), the Article III standing analysis must proceed plaintiff-by-plaintiff, claim-by-claim, and defendant-by-defendant. *See, e.g.*, *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), *aff'd*, 962 F.3d 1324 (11th Cir. 2020). Because no Mednax Plaintiff has any injury in fact that is fairly traceable to AA, no Mednax Plaintiff has standing to bring any claim against AA.

**2. The AA Plaintiffs also lack Article III standing to sue AA.**

The AA Plaintiffs also lack standing to sue AA. Again, the test for Article III standing requires that Nielsen and Lee show an injury that is "concrete and particularized and actual or imminent," and that injury must be "fairly traceable" to AA's alleged misconduct. *Lujan*, 504 U.S. at 560. Thus, Nielsen and Lee must show a "causal connection" between AA's alleged misconduct and an injury in fact. *Id.* at 560.

Neither AA Plaintiff can show an injury in fact—much less an injury fairly traceable to the Cyberattack. In its recent decision in *Green-Cooper v. Brinker International, Inc.*, the Eleventh Circuit clarified that a plaintiff lacks standing unless they can show that a bad actor actually *used* personal information in a way that caused harm. 73 F.4th 883, 889–90 (11th Cir. 2023). Mere unauthorized possession of personal information is not enough. *See id.*; *see also Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021). Neither Nielsen nor Lee can meet this test because [redacted]

[2] [redacted] SOMF ¶¶ 221-228.

**a. The AA Plaintiffs cannot show that their information was actually accessed in the Cyberattack.**

Neither Nielsen nor Lee has shown that any bad actor actually *accessed* their personal information following the Cyberattack. Instead, all they can show is akin to someone walking into a file room but never opening a single drawer, much less pulling out a specific file and reading a specific page for specific information. Nielsen offers no evidence that [redacted] *See* SOMF ¶133. Likewise, Lee offers no evidence that [redacted] *See id.* ¶ 159.[3] [redacted] *Id.* ¶¶ 133, 141, 160–61. With no showing of actual access, neither AA Plaintiff has standing to bring this action.

**b. Nielsen cannot show that a bad actor actually used the personal information contained in the source file to her detriment.**

Nielsen alleges a multitude of "injuries." SAC ¶ 190–216. However, she provided evidence of only three instances where her personal information may have been misused: (1) twelve fraudulent Charles Schwab accounts; (2) an unwanted four-year "gift" *Shape* subscription; and (3) spam mail. *See id.* ¶¶ 201–03, 207–08. None of these injuries are fairly traceable to the Cyberattack for a simple reason—[redacted]

As Nielsen admits, SAC ¶ 202, a Social Security number is necessary to open a bank account. *See, e.g.*, *Open an Account*, CHARLES SCHWAB (last visited Dec. 1, 2023), https://onboard.schwab.com/retail/personal-info (asking new account customers to provide their Social

[3] [redacted] Ex. 16 [redacted] Ex. 10 [redacted]

Security number and noting "[a]ll brokerage firms require this information for new account applicants to comply with IRS regulations and the USA PATRIOT Act"); FINRA, Rule 6840 (requiring an "individual tax payer identification number ('ITIN')/social security number ('SSN')" for each customer); 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(i) (requiring banks to implement a written Customer Identification Program that includes obtaining a taxpayer identification number for a U.S. person opening a bank account). [redacted] SOMF ¶¶ 134, 141.

Nielsen's *Shape* subscription and other spam mail allegations fare no better. [redacted] *Id.* ¶ 138. [redacted] *Id.* ¶¶ 136–37. The chart below sets out the personal information found in the source file within a mailbox impacted in the Cyberattack, compared to the personal information used for the fraudulent bank accounts, magazine subscription, and spam mail.

| | STORED | | USED | |
|---|---|---|---|---|
| | **Mednax Email** | **Charles Schwab Bank Accounts** | **Shape Magazine** | **Spam Mail** |
| Name | [redacted] | [redacted] | [redacted] | [redacted] |
| Mailing Address | [redacted] | [redacted] | [redacted] | [redacted] |
| Telephone | [redacted] | [redacted] | [redacted] | [redacted] |
| DOB | [redacted] | [redacted] | [redacted] | [redacted] |
| SSN | [redacted] | [redacted] | [redacted] | [redacted] |

SOMF ¶¶ 133–34, 137–38. Accordingly, whatever alleged harm Nielsen suffered because of the Charles Schwab accounts, free *Shape* subscription, and spam mail cannot be traced to AA or the Cyberattack. She has no standing.

In its May 10, 2022, motion to dismiss order, this Court wrote that "[e]ven if the data accessed in the Data Breaches did not provide all the information necessary to inflict these harms, they very well could have been enough to aid therein." ECF No. 104 at 19. As to Nielsen, however,

there is no evidence that her information was compromised in the Cyberattack. [redacted] SOMF ¶ 141. [redacted] *id.* ¶¶ 151, 210, [redacted]

Without any evidence that Nielsen's personal information was actually compromised in the Cyberattack and without any evidence that any information supposedly obtained from AA was misused, Nielsen's other alleged injuries do not confer standing. *See Brinker*, 73 F.4th at 890. "Injuries" like lost time, increased risk, loss of privacy, devaluation of her PHI and PII, or lost benefit of her AA bargain are simply insufficient.[4] *Cf. id.* Even if these injuries were sufficient to confer standing, Nielsen provided no evidence to support her allegations. None of her alleged injuries can be traced to AA, and Nielsen offers no evidence to support her claims.[5]

**c. Lee cannot show that a bad actor actually used the personal information implicated in the Cyberattack to his detriment.**

Like Nielsen, Lee alleges a slew of injuries in a futile effort to establish standing, SAC ¶¶ 217–40; however, none of these alleged injuries give Lee standing. Specifically, Lee alleges an increase in spam calls and texts and the presence of his Social Security number for sale on the dark web. SAC ¶¶ 227, 233–34. [redacted]

[4] Courts have rejected this "diminished value" theory when, as here, the plaintiff does not allege that "a market for legitimate sales of PII exists" or that "the ransomware attack prevented them from profitably participating in that market." *Fraga v. UKG, Inc.*, 2022 WL 19486310, at *11 (S.D. Fla. May 10, 2022).

[5] Nielsen also alleges that the Cyberattack caused a previously-paid $81.47 bill to go to collections, negatively affecting her credit score. SAC ¶¶ 204–06. [redacted] OMF ¶ 146. [redacted] OMF ¶ 231.

[redacted] *Id.* ¶ 230. [redacted] AA cannot have been responsible for that number being on the dark web.

[redacted]. SOMF ¶ 160. However, [redacted] *Id.* ¶ 166. [redacted] Similarly, [redacted] *Id.* ¶ 167. [redacted] *Id.* [redacted] *Id.* ¶ 168. [redacted] *Id.* ¶ 169. [redacted] *Id.* [redacted] *Id.* ¶ 170. [redacted] there is no way to trace any alleged harm to AA. *See Walters v. Fast AC, LLC*, 60 F.4th 642, 650 (11th Cir. 2023) (finding "traceability to be lacking if the plaintiff would have been injured in precisely the same way without the defendant's alleged misconduct" (internal quotation marks omitted)).

The chart below sets forth the personal information found in the source file within a mailbox impacted in the Cyberattack, compared to the personal information Lee alleges has been used to send his spam messages and the personal information available for Lee on the dark web.

| | STORED | USED | |
|---|---|---|---|
| | **Mednax Email** | **Spam Texts, Calls, and Email** | **Dark Web** |
| **Name** | [redacted] | [redacted] | [redacted] |
| **Mailing Address** | [redacted] | [redacted] | [redacted] |
| **Email** | [redacted] | [redacted] | [redacted] |
| **Telephone** | [redacted] | [redacted] | [redacted] |
| **DOB** | [redacted] | [redacted] | [redacted] |

| SSN | [redacted] | [redacted] | [redacted] |
|---|---|---|---|

*See* SOMF ¶¶ 159–62. Whatever alleged harm Lee suffered because of an increase in spam or the presence of his Social Security number on the dark web cannot be traced to the Cyberattack or AA. Simply put, Lee cannot show that, because of any alleged acts by AA, his personal information was actually used in a way that caused him harm. Lee therefore lacks Article III standing to bring any claims against AA.[6]

**B. The Two Remaining Statutory Claims Against AA Fail.**

Two statutory claims remain against AA: Count I (Maryland Consumer Protection Act) and Count IV (Florida Deceptive and Unfair Trade Practices Act). Plaintiff Cohen is the only Plaintiff asserting an MCPA claim, SAC ¶ 474, while all Plaintiffs pursue a FDUTPA claim against AA, *id.* ¶ 521. AA is entitled to summary judgment on both statutory claims.

**1. Plaintiff Cohen cannot pursue a claim under the Maryland Consumer Protection Act against AA, because neither she nor her daughter ever received services from AA.**

It is axiomatic that a plaintiff must be a consumer to pursue a consumer protection claim. "A 'consumer' is defined as 'an actual or prospective purchaser, lessee, or recipient of consumer goods, consumer services, or consumer credit.'" *Alkali Sci. LLC v. Wang*, 2022 WL 4484071, at *8 (D. Md. Sept. 27, 2022) (quoting Md. Code Ann., Com. Law, § 13-101(c)(1)).

The record is clear, however, that Plaintiff Cohen was never a "consumer" of AA's services. [redacted] SOMF ¶ 228. And Cohen has not provided any evidence to the contrary. [redacted] *Id.* ¶ 176. [redacted] *Id.* ¶ 180; Ex. 68 (Cohen Dep. at 68:4–8). Cohen was not a "consumer" of AA's services, and therefore, she lacks statutory standing to bring a MCPA claim against AA.

[6] Even in a class action, there must be at least one plaintiff with standing to sue each defendant. *Prado-Steiman*, 221 F.3d at 1280 ("[E]ach claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."); *see also Warren Tech.*, 2018 WL 10550930, at *5; *Pares v. Kendall Lakes Auto., LLC*, 2013 WL 3279803, at *5 (S.D. Fla. June 27, 2013). Because no named Plaintiff has standing to sue AA, the Court should dismiss AA from this action.

**2. The AA Plaintiffs cannot pursue a claim under the Maryland Consumer Protection Act against AA because neither is a resident of Maryland and neither "relied" on any representation or omission made by AA.**

Though only Plaintiff Cohen brings a MCPA claim in this case, *see* SAC ¶ 474, that claim would fail even if the AA Plaintiffs purported to sue AA under the MCPA.

**a. Neither AA Plaintiff is a resident of Maryland.**

No other Plaintiff can assert a MCPA claim against AA because [redacted] *See* SAC ¶ 241; SOMF ¶ 174. By its plain language, the MCPA "was intended to 'provide minimum standards for the protection of consumers in the State.'" *Consumer Prot. Div. v. Outdoor World Corp*., 603 A.2d 1376, 1382 (Md. 1992) (quoting Md. Code Ann., Com. Law, § 13-103(a)). The MCPA "prohibit[s] the communication *to Maryland residents* of false or misleading statements and inducements." *Id.* (emphasis added); *see also Penn-Plax, Inc. v. L. Schultz, Inc*., 988 F. Supp. 906, 909 (D. Md. 1997) (collecting cases under Maryland law that only Maryland consumers are proper plaintiffs in an MCPA claim).

Plaintiff Nielsen is a resident of Virginia [redacted] SOMF ¶¶ 127–128. Plaintiff Lee, a resident of South Carolina, [redacted] *Id*. ¶ 155. Because neither AA Plaintiff is a Maryland resident, neither has statutory standing to bring a MCPA claim.

**b. Neither AA Plaintiff relied on any alleged representation or omission made by AA.**

The AA Plaintiffs also cannot satisfy the substantive elements of a MCPA claim. To bring a viable MCPA claim, a plaintiff must show actual reliance on a false or misleading statement. *Bank of Am., N.A. v. Jill P. Mitchell Living Trust*, 822 F. Supp. 2d 505, 532 (D. Md. 2011) (holding a plaintiff's "bare conclusion" was insufficient to create a genuine dispute of material fact as to alleged reliance). The plaintiff must "prove that the false or misleading statement substantially induced their choice." *Id.* This reliance requirement "flows from the MCPA's prescription that [a] party's 'injury or loss' be the result of the prohibited practice." *Peete-Bey v. Educ. Credit Mgmt. Corp*., 131 F. Supp. 3d 422, 432 (D. Md. 2015) (internal quotation marks omitted) (holding MCPA claims failed for lack of reliance). "[A] consumer relies on a material omission under the MCPA where it is substantially likely that the consumer would not have made the choice in question had the commercial entity disclosed the omitted information." *Willis v. Bank of Am. Corp*., 2014 WL 3829520, at *22 (D. Md. Aug. 1, 2014) (citation omitted) (holding a complaint failed to state an

MCPA claim when the plaintiff did not allege facts to show he relied on the defendant's misrepresentations or omissions or otherwise explain how alleged errors in foreclosure filings materially impacted his circumstances or conduct); *see generally Luskin's, Inc. v. Consumer Prod. Div.*, 726 A.2d 702, 716–17 (Md. 1997) (finding substantial evidence of omission when customers anticipated getting free airline tickets after making purchases, but advertisements about free airfare omitted the cost of a minimum stay).

The evidence clearly shows that the consumer choices made by the AA Plaintiffs were unrelated to AA's data security practices. [redacted] SOMF ¶¶ 127–28, 157. [redacted] *Id.* 157; Ex. 50 (Nielsen Dep. at 83:13–17). [redacted] SOMF ¶ 129. [redacted] *Id.* ¶ 148. [redacted] It had nothing to do with AA's security practices. [redacted] *Id.* ¶ 157. [redacted] *Id.* ¶ 171. [redacted]

There is no genuine dispute: Neither AA Plaintiff considered AA's security practices in choosing a medical provider. This lack of reliance would defeat their MCPA claim if they could and did plead one. *See, e.g.*, *Lupo v. JPMorgan Chase Bank, N.A.*, 2015 WL 5714641, at *11 (D. Md. Sept. 28, 2015) (granting summary judgment when the plaintiff provided no evidence that he "justifiably relied" on the defendants' alleged misrepresentation); *Jill P. Mitchell Living Trust*, 822 F. Supp. 2d at 536 (granting summary judgment because the plaintiff did not rely on alleged misrepresentation).

**3. No Plaintiff can pursue a claim against AA under the Florida Deceptive and Unfair Trade Practices Act.**

All Plaintiffs purport to sue AA under FDUTPA, but those claims fail for four reasons.

**a. Any alleged "offending conduct" by AA did not occur in Florida, such that the FDUTPA claim cannot stand.**

Under Florida law, FDUTPA generally applies only to in-state consumers and actions that occur in Florida. *See Océ Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.*, 760 So. 2d 1037,

1042 (Fla. Dist. Ct. App. 2000) (holding "only in-state consumers can pursue a valid claim under" FDUTPA); *Stein v. Marquis Yachts, LLC*, 2015 WL 1288146, at *6 (S.D. Fla. Mar. 20, 2015) ("FDUTPA does not apply to actions that occurred outside of Florida."). In its May 10, 2022, motion to dismiss order, this Court held that the statute "applies to non-Florida residents if the offending conduct took place predominantly or entirely in Florida." ECF No. 104 at 30. But even under this standard, Plaintiffs' FDUTPA claims against AA must fail because none of AA's alleged "offending conduct" took place in Florida.

Plaintiffs contend that AA failed to maintain appropriate security measures and practices, failed to disclose that AA's computer systems and data practices were inadequate, and failed to disclose the Cyberattack to patients in a timely manner. SAC ¶ 524. Even if those alleged failures occurred (which they did not), they did not occur predominantly or entirely in Florida. Any purported failure to "implement and maintain appropriate and reasonable security procedures and practices," *id*. ¶ 524(a), occurred predominantly, if at all, in New York, where AA maintains its headquarters and principal place of business, *id*. ¶ 213. [redacted] *Id*. Likewise, the alleged "failure to disclose that [AA's] computer system and data security practices were inadequate," *id*. ¶ 524(b), occurred predominantly, if at all, where and when AA provided services. [redacted] *Id*. ¶¶ 128, 156. Finally, any alleged failure "to disclose the Healthcare Data Breach" in a timely manner, SAC ¶ 524(c), did not occur predominantly, if at all, in Florida. [redacted] SOMF ¶ 217. At the time of those submissions, [redacted] *Id.*

In summary, none of AA's alleged "offending conduct" took place in Florida. Plaintiffs' FDUTPA claim, therefore, cannot stand.

**b. AA made no representations or omissions to either AA Plaintiff, much less deceptive ones.**

Plaintiffs' FDUTPA claim also fails because Plaintiffs cannot show that AA committed a deceptive or unfair trade practice. To establish a deceptive or unfair practice under FDUTPA, a plaintiff must show that the "alleged practice was likely to deceive a consumer acting reasonably in the circumstances." *Carriuolo v. Gen. Motors Co*., 823 F.3d 977, 983–84 (11th Cir. 2016). Deception occurs if there is a "representation, omission, or practice that is likely to mislead the

consumer acting reasonably in the circumstances, to the consumer's detriment." *PNR, Inc. v. Beacon Prop. Mgmt.*, 842 So. 2d 773, 777 (Fla. 2003) (quoting *Millennium Commc'ns & Fulfillment, Inc. v. Office of Att'y Gen.*, 761 So. 2d 1256, 1263 (Fla. Dist. Ct. App. 2000)). "This standard requires a showing of 'probable, not possible, deception' that is 'likely to cause injury to a reasonable relying consumer.'" *Zlotnick v. Premier Sales Grp.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting *Millennium Commc'ns*, 761 So. 2d at 1263).

The AA Plaintiffs are the only named Plaintiffs to have any interactions with AA, and neither has provided any evidence that AA made false or misleading misrepresentations or omissions at or before the time they received healthcare services. Section III.B.2.b, *supra*. Generic, conclusory allegations generally lobbed at "Defendants" will not do. *See, e.g.*, SAC ¶¶ 524–32; *Hall v. Sunjoy Indus. Grp.*, 764 F. Supp. 2d 1297, 1304 (M.D. Fla. 2011). As a result, Plaintiffs' FDUTPA claims cannot survive summary judgment.

**c. AA's disclosures following the Cyberattack did not violate Florida Statute § 501.171.**

The AA Plaintiffs have no evidence that AA failed to disclose the Cyberattack in a timely and accurate manner in violation of Florida Statute § 501.171—nor could they, for two reasons.

*First*, AA was not conducting any trade or commerce when it notified individuals about the Cyberattack. By its terms, FDUTPA prohibits unfair or deceptive practices "in the conduct of any trade or commerce." Fla. Stat. § 501.204(1). The term "trade or commerce" is defined as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, commodity, or thing of value, wherever situated." *Id.* § 501.203(8). In sending correspondence regarding the incident to the AA Plaintiffs, AA was not "providing . . . by sale, rental, or otherwise . . . any good or service . . . or thing of value." AA did not sell or rent anything to either AA Plaintiff through the notice letters, and thus AA did not engage in a "trade or commerce." *See AMG Trade & Distribution, LLC v. Nissan N. Am., Inc.*, 813 F. App'x 403, 408 (11th Cir. 2020) (per curiam) (affirming summary judgment because defendant was not engaged in "trade or commerce" in responding to a request for information); *Law Office of David J. Stern, P.A. v. Florida*, 83 So. 3d 847, 850 (Fla. Dist. Ct. App. 2013) (processing foreclosure applications, rather than "initial applications for mortgages or the initial lending relationships," is not "trade or commerce").

*Second*, Florida Statute § 501.171 requires businesses to notify "each individual *in this state* whose personal information was, or the covered entity reasonably believes to have been,

accessed as a result of the breach." Fla. Stat. § 501.171(4)(a) (emphasis added). [redacted] SOMF ¶¶ 127, 155, 256. [redacted] *See id.* ¶¶ 20, 34, 59, 71, 91, 104, 117, 127, 155, 174, 189. Thus, a FDUTPA claim against AA cannot be grounded in any alleged violation of § 501.171.

**d. Plaintiffs are not entitled to the injunctive and declaratory relief they seek under FDUTPA.**

Plaintiffs initially pursued actual damages and injunctive relief against all Defendants for alleged violations of FDUTPA. ECF No. 71 ¶ 540. This Court, however, held that Plaintiffs did not sufficiently allege "damages attributable to the diminished value of the healthcare services they received from Defendants." ECF No. 104 at 31. Although this Court granted leave to amend, the Second Amended Complaint abandoned any claim for damages under FDUTPA. Plaintiffs now seek only injunctive and declaratory relief. SAC ¶¶ 531–32. But those equitable remedies are just as unavailing.

Plaintiffs seek an order directing AA to retain third party resources (*e.g.*, security auditors and penetration testers) to perform security testing, retrofit company policies and procedures (*e.g.*, employee training, record retention, and vendor management), and implement internal controls (*e.g.*, firewalls, database scanning, and access controls). *See* SAC ¶ 532. [redacted] SOMF ¶ 5. [redacted] *Id.* [redacted] *Id.* ¶ 4. [redacted] *Id.* ¶¶ 4, 214. [redacted] *Id.* ¶¶ 214–16. [redacted] *Id.* ¶ 216.

This Court cannot enjoin AA to [redacted] Under Florida law, "an injunction will not be granted where it appears that the acts complained of have already been committed and there is no showing by the pleadings and proof that there is a reasonably well grounded probability that such course of

conduct will continue in the future." *City of Jacksonville v. Wilson*, 27 So. 2d 108, 111 (Fla. 1946). "Injunctive relief," after all, "is inherently prospective in nature." *Gagliardi v. TJCV Land Tr.*, 889 F.3d 728, 734 (11th Cir. 2018); *see also Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997) ("Equitable relief is a prospective remedy, intended to prevent future injuries. In contrast, a claim for money damages looks back in time and is intended to redress a past injury."). The Court now finds itself weighing the legality and legitimacy of this requested remedy over three years after the Cyberattack. Since May 6, 2020, there have been no reportable security incidents on the NAPA IT infrastructure supporting AA. SOMF ¶ 219. And the AA Plaintiffs have not attempted to find, much less identify, any shortcomings in the security posture of AA's new IT systems. Plaintiffs and their experts focus their Monday morning quarterbacking on Mednax's IT systems, which are irrelevant to the injunctive relief Plaintiffs now seek from AA.

Moreover, a plaintiff who brings claims that are "equitable in nature . . . must . . . lack[] an adequate remedy at law." ECF No. 104 at 37 (citing *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 839 n.2, 844 (9th Cir. 2020); *In re Cal. Gasoline Spot Mkt. Antitrust Litig.*, 2021 WL 1176645, at *7–8 (N.D. Cal. Mar. 29, 2021)).[7] Plaintiffs do not allege that they lack an adequate legal remedy. Instead, they seek monetary damages throughout their other claims, asserting both common law negligence claims and state statutory claims for damages. *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994) (explaining that "cases in which the remedy sought is the recovery of money damages do not fall within the jurisdiction of equity"). Plaintiffs' FDUTPA claims stem from the same Cyberattack as their claims seeking damages. Plaintiffs cannot assert that there is no adequate remedy at law while simultaneously seeking damages arising from the same alleged misconduct. The FDUTPA claims, therefore, fail.

[7] In its August 2022 motion to dismiss order, the Court did not apply this limitation to the FDUTPA claim, stating that "FDUTPA has a lower threshold." ECF No. 131 at 3. But the question is not whether FDUTPA authorizes relief as a matter of state law. Federal law—not state law—governs the availability of equitable relief in federal court. *See, e.g.*, *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 106 (1945); *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991); *Blue-Grace Logistics LLC v. Fahey*, 340 F.R.D. 460, 464 (M.D. Fla. 2022). One rule limiting equitable relief in federal court is that the "traditional principles of equity jurisdiction" apply. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999). And one traditional principle is that equitable relief is not allowed unless legal remedies are inadequate. *See, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008). FDUTPA cannot remove that limit from federal courts.

### C. Plaintiffs' Negligence Claims Fail

The AA Plaintiffs' negligence claims fail under Florida, Virginia, South Carolina, and—to the extent applicable—Tennessee law.

#### 1. Florida law does not govern all negligence claims in this action.

##### a. Virginia law governs Nielsen's negligence claim, while South Carolina law most likely governs Lee's negligence claim.

As shown in Defendants' Opposition to Plaintiffs' Motion for Class Certification, Florida law uses a four-factor "most significant relationship" test to determine which state's substantive law governs a tort claim. ECF No. 250 at 26; *Grupo Televisa, S.A. v. Telemundo Commc'ns Grp.*, 485 F.3d 1233, 1240 (11th Cir. 2007). As to Nielsen, all four factors of Florida's choice-of-law analysis point to Virginia law. As to Lee, the factors generally favor South Carolina or, alternatively, Tennessee law. ECF No. 250 at 26–28. In its May 2022 motion to dismiss order, the Court considered Plaintiffs' allegations and held that Florida substantive law applies. ECF No. 104 at 8. But now that discovery has closed, Plaintiffs' allegations are not supported by the record. Neither AA Plaintiff had any relationship with Florida, much less a significant one. Virginia has the "most significant relationship" to Nielsen's claim because, among other reasons, [redacted] where she is domiciled, and where her relationship with AA was "centered." *See, e.g.*, SOMF ¶¶ 127–128. For Lee, the choice-of-law factors point to South Carolina law, [redacted] he was domiciled in South Carolina at the time of the Cyberattack and any resulting "injury." *See, e.g.*, *id.* ¶¶ 155–56.

##### b. It would be unconstitutional to apply Florida negligence law across the board to AA.

Florida's choice-of-law factors are not the only reason to conclude that Florida law does not apply across the board to AA. The Due Process and Full Faith and Credit Clauses of the U.S. Constitution compel the same conclusion, barring the Court from applying Florida substantive law to negligence claims brought by out-of-state plaintiffs who had out-of-state transactions with AA. U.S. Supreme Court precedent makes this clear.

*First*, consider *Phillips Petroleum Co. v. Shutts*, which held that even in a nationwide class action, applying a forum state's substantive law requires "a 'significant contact or significant aggregation of contacts' to the claims asserted *by each member of the plaintiff class* . . . in order to ensure that the choice of . . . law is not arbitrary or unfair." 472 U.S. 797, 821–22 (1985)

(quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality)) (emphasis added).[8] In *Shutts*, the defendant "own[ed] property and conduct[ed] substantial business" in Kansas. *Id.* at 819. Some of the oil and gas leases at issue were in Kansas, and "hundreds of Kansas plaintiffs were affected by [the defendant's] suspension of royalties." *Id*. Given those contacts, the Kansas court assumed that it could apply forum law "unless compelling reasons exist[ed] for applying a different law." *Id*. at 821.

Yet the Supreme Court reversed, holding Kansas law could *not* apply to all transactions at issue in the purported nationwide class action:

> [W]hile a State may . . . assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law."

*Id*. The "constitutional limits" on choice-of-law analysis "must be respected even in a nationwide class action," *id.* at 823, and those limits are "not altered by the fact that it may be more difficult or more burdensome to comply," *id.* at 821. "Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with [other] jurisdictions," applying Kansas law to each claim was "sufficiently arbitrary and unfair as to exceed constitutional limits." *Id*. at 822.[9]

*Second*, consider *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* "held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (citing *Erie*, 304 U.S. at 78–80). In other words, Article III "does not empower" federal courts to create a single

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[8] *See also Allstate*, 449 U.S. at 310–11 (explaining that Supreme Court precedent "stand[s] for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional"); *Steele v. G.D. Searle & Co.*, 483 F.2d 339, 348 n.25 (5th Cir. 1973) ("[A] state . . . can be constitutionally precluded by the Due Process and Full Faith and Credit Clauses from applying its own law if it lacks sufficient contact with the parties or the event giving rise to the litigation.").

[9] "When considering fairness in this context, an important element is the expectation of the parties." *Shutts*, 472 U.S. at 822. In *Shutts*, there was "no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control." *Id.*

common law that is "merely an amalgam, an averaging, of the nonidentical . . . laws of 51 jurisdictions." *Rhone-Poulenc*, 51 F.3d at 1302.[10]

In the decades since *Erie* and *Shutts*, courts nationwide have enforced these limits on the choice-of-law analysis. The Eleventh Circuit, for instance, affirmed the denial of class certification for state law claims in *Kirkpatrick v. J.C. Bradford & Co.*, explaining that "even if Georgia law would require application of its own common law rules to some claims involving purchases in other states, the law of Georgia could be applied consistent with due process only if the particular transaction had some significant relation to Georgia." 827 F.2d 718, 725 n.6 (11th Cir. 1987) (citing *Shutts*, 472 U.S. 797). The Third Circuit cited *Shutts* for the proposition that "constitutional limitations on choice of law apply even in nationwide class actions" and explained that courts "must apply an individualized choice of law analysis to each plaintiff's claims." *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). The Eighth Circuit echoed that "an individualized choice-of-law analysis must be applied to each plaintiff's claim in a class action." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (citing *Shutts*, 472 U.S. at 822–23). And the Ninth Circuit agreed that a plaintiff in a putative nationwide class action must "show how application of [the forum's] law satisfies constitutional due process requirements." *Zinser v. Accufix Rsch. Inst.*, 253 F.3d 1180, 1187 (9th Cir. 2001) (citation omitted), *amended*, 273 F.3d 1266 (9th Cir. 2001).

Federal district courts in the Eleventh Circuit have joined the chorus, as well, recognizing that "a state must have a significant contact or significant aggregation of contacts to the claims asserted *by each member of the plaintiff class*." *Montgomery v. The New Piper Aircraft, Inc.*, 209 F.R.D. 221, 229 (S.D. Fla. 2002) (emphasis added). The Constitution bars courts from applying a forum state's substantive law to common law claims by out-of-state putative class members who had out-of-state transactions with a defendant. *See, e.g.*, *Morris v. ADT Sec. Servs., Inc.*, 2009 WL 10691165, at *8 (S.D. Fla. Sept. 11, 2009) (holding it was unconstitutional to apply Florida law to out-of-state class members because "no putative class member who purchased or acquired [the defendant's product] outside of Florida could have reasonably expected Florida law to apply to

[10] *See also, e.g.*, *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (explaining that *Erie* requires considering "how the law of negligence differs from jurisdiction to jurisdiction"); *McBride v. Galaxy Carpet Mills, Inc.*, 920 F. Supp. 1278, 1284 (N.D. Ga. 1995) (rejecting the claim that a court "can apply a generalized law, or group of laws, based upon apparent similarities," as that "would result in the formulation of a federal common law, which is contrary to *Erie*").

those out-of-state transactions simply because [the defendant] is headquartered in Florida"); *Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729, 735 (S.D. Fla. 2007) (holding the court could not apply Florida substantive law to common law claims of out-of-state putative class members).[11]

Under this case law, it is unconstitutional to apply Florida substantive law to the negligence claims brought by out-of-state Plaintiffs against AA. AA's headquarters and principal place of business are in New York; AA's corporate affiliate-anesthesia practices provide services to patients in twelve (12) states. SOMF ¶¶ 212–13. As explained above, [redacted] Neither interacted with AA in Florida, and the Mednax Plaintiffs had no relevant connection to AA—much less one in Florida. *Id.* ¶¶ 221–229. Florida law cannot apply across the board simply because Mednax is headquartered in Florida. Because the AA Plaintiffs have no link to Florida, they had no reasonable expectation that Florida law would apply. While simply applying Florida common law across the board may be easier, that is not the legal standard, and it would be arbitrary and unfair. The Constitution precludes that result.[12]

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[11] *See also, e.g.*, *Ace Tree Surgery, Inc. v. Terex South Dakota, Inc.*, 332 F.R.D. 402, 409–10 (N.D. Ga. 2019) (holding it was improper to apply the law of only one state in a putative nationwide class action); *Peterson v. Aaron's, Inc.*, 2017 WL 364094, at *6 (N.D. Ga. Jan. 25, 2017) (finding "insufficient contacts to apply Georgia common law to all claims" even though the defendant was based in Georgia); *Krise v. SEI/Aaron's Inc.*, 2017 WL 3608189, at *8 (N.D. Ga. Aug. 22, 2017) (similar); *Shepherd v. Vintage Pharms., LLC*, 310 F.R.D. 691, 699 (N.D. Ga. 2015) (recognizing the need "to consider whether Georgia has had significant contacts to the claims such as would create a state interest so that the application of Georgia law would not be arbitrary or unfair"); *Clopton v. Budget Rent A Car Corp.*, 197 F.R.D. 502, 509 (N.D. Ala. 2000); *Poe v. Sears, Roebuck & Co.*, 1998 WL 113561, at *4 (N.D. Ga. Feb. 13, 1998) ("[T]his court is convinced that applying the law of a single state to the claims of all plaintiffs would not pass constitutional muster."); *McBride*, 920 F. Supp. at 1285 (concluding "it is the law of the states wherein each plaintiff resides, rather than the forum state, [that] should govern their causes of action").

[12] The reasoning in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), also limits the application of Florida law. *Gore* considered Alabama's ability to penalize BMW for conduct that occurred and was lawful in other jurisdictions. *Id.* at 562–64. The Supreme Court held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states." *Id.* at 572. Relying on "principles of state sovereignty and comity," the Court reasoned that Alabama's imposition of economic sanctions for conduct that occurred outside the state and was lawful elsewhere "infring[ed] on the policy choices of other states." *Id.* Instead, those sanctions "must be supported by the State's interest in protecting its own consumers and its own economy." *Id.* So too here. Just as Alabama cannot impose penalties for conduct that was lawful elsewhere, Florida cannot supplant another state's negligence law, and instead apply its own law, because differences among those state laws may result in "punish[ing]"

**2. Nielsen cannot prevail on her negligence claim under Virginia law.**

To state a negligence claim under Virginia law, a plaintiff must show "the existence of a legal duty, a breach of the duty, and proximate causation resulting in damage." *Atrium Unit Owners Ass'n v. King*, 585 S.E.2d 545, 548 (Va. 2003). Nielsen cannot establish that AA had a duty or that a breach of any duty was the proximate cause of her alleged harm. Virginia's economic loss rule also bars Nielsen's negligence claim.

*First*, Nielsen does not expressly allege that AA owed her a duty; instead, she merely claims that she had "an expectation that her PHI and PII would not be disclosed." SAC ¶ 210. The Second Amended Complaint only generally alleges that HIPAA and HITECH, although not creating a private right of action, put a duty on healthcare providers to protect their patients' PHI and PII. Virginia law, however, is clear that when a statute does not provide a private cause of action, it cannot be used to establish the duty prong of a negligence claim. To do so would create a private cause of action when the legislature did not. *See Snapp v. Lincoln Fin. Sec. Corp.*, 2018 WL 1144383, at *7 & n.7 (W.D. Va. Mar. 2, 2018) (applying Virginia law to dismiss a negligence claim for want of a duty when plaintiff tried to establish a duty based on a statute that did not have a private cause of action), *aff'd*, 767 F. App'x 452 (4th Cir. 2019) (per curiam); *see also Navy Fed. Credit Union v. Lentz*, 890 S.E.2d 827, 830 (Va. 2023) ("While Congress could have done so, it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself. As such, we find no reason to create a duty in this jurisdiction alone where Congress did not explicitly do so itself." (citation and internal quotation marks omitted)). Virginia has applied this line of authority to explicitly foreclose a tort duty on healthcare providers to protect PHI from unauthorized access. *See Parker v. Carilion Clinic*, 819 S.E.2d 809, 825 (Va. 2018) ("None of our precedents has ever imposed a tort duty on a healthcare provider" to safeguard PHI from unauthorized access); *Deutsche Bank Nat'l Trust v. Buck*, 2019 WL 1440280, at *6 (E.D. Va. Mar. 29, 2019) (Virginia law does not "recognize[] a common law duty to protect an individual's private information from an electronic data breach"). "The absence of a tort duty under Virginia law renders irrelevant the standard of care under HIPAA." *Baker v. NRA Grp.*, 2020 WL 1258764,

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the defendants "for conduct that was lawful where it occurred and had no impact on [Florida] or its residents." *Id.* Applying Florida law nationwide would result in Florida "infringing on the policy choices of other States." *Id.*

at *3 (W.D. Va. Mar. 16, 2020).

*Second*, Nielsen has failed to show that any alleged breach by AA proximately caused her any damages. Just as she cannot meet the traceability requirement for standing, Nielsen cannot meet the higher standard of showing AA's alleged breach caused her injury. To maintain her negligence claim, Nielsen must "prove that [AA's alleged] breach of duty was more likely than not (i.e., probably) the cause of injury." *Murray v. United States*, 215 F.3d 460, 463 (4th Cir. 2000) (applying Virginia law). She cannot. [redacted] *See* Section III.A.2.b, *supra*. Nielsen's attribution of her alleged injuries is misplaced. AA cannot be liable for any alleged harm from new bank accounts, unwelcome magazine subscriptions, and spam calls when [redacted][13] Nielsen cannot carry her burden on causation.

*Third*, the economic loss rule bars Nielsen's negligence claim. "Virginia law bars recovery for purely economic losses due to negligence unless the parties are in privity of contract." *Ironworks Dev. LLC v. Truist Bank*, 574 F. Supp. 3d 376, 381 (W.D. Va. 2021); *see Redman v. Brush & Co.*, 111 F.3d 1174, 1182 (4th Cir. 1997) ("[A] plaintiff who is not in privity of contract with the defendant cannot maintain an action for negligence . . . based on purely economic losses."). "This follows from the bedrock principle of Virginia common law that tort actions protect the safety of persons and property, while contract law governs bargained-for expectations." *Ironworks*, 574 F. Supp. 3d at 381 (citing *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 58 (Va. 1988)). Nielsen, however, does not allege she was in privity of contract with AA. Indeed, the Court has already dismissed her claim for breach of implied contract (Count XVIII). ECF No. 104 at 47. Even more importantly, Nielsen offers no evidence of physical injury or the diminution of the value of her PII or PHI. Her negligence claim therefore fails.

[13] The letter mailed to Nielsen states that [redacted] SOMF ¶ 132. [redacted]

**3. Lee cannot prevail on his negligence claim under South Carolina law.**

[redacted] So, any "injury" felt by Lee presumably occurred in South Carolina. Lee, however, cannot make out a viable negligence claim under South Carolina law. To state a negligence claim under South Carolina law, a plaintiff must show: "(1) a duty of care owed by the defendant; (2) a breach of that duty by a negligent act or omission; (3) a negligent act or omission resulted in damages to the plaintiff; and (4) that damages proximately resulted from the breach of duty." *Savannah Bank, N.A. v. Stalliard*, 734 S.E.2d 161, 163–64 (S.C. 2012). An essential element of a negligence claim is the existence of a legal duty of care owed by the defendant to the plaintiff. *Bishop v. S.C. Dep't of Mental Health*, 502 S.E.2d 78, 81 (S.C. 1998). Without a duty, there is no actionable negligence. *Id*. Lee fails to show that AA owed him any duty of care, much less that AA breached that duty, allegedly causing him direct and foreseeable damages.

Under South Carolina law, "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." *Faile v. S.C. Dep't of Juvenile Justice*, 566 S.E.2d 536, 546 (S.C. 2002); Restatement (Second) of Torts § 314 (1965)). And though there are exceptions to this rule, none apply here. In the case of *In re Blackbaud, Inc., Customer Data Breach Litigation*, 567 F. Supp. 3d 667 (D.S.C. 2021), the court walked through the exceptions, ultimately imposing a duty because the defendant had "acknowledge[d] the risk of cyberattacks and [received] repeated notifications of the inadequacy of its systems, [but] failed to correct, update, or upgrade its security protections." *Id.* at 681 (internal quotation marks omitted). But here, aside from generally alleging that healthcare companies as a whole are "targets for cyberattacks," SAC ¶ 361, Plaintiffs do not allege—much less show—that AA knew its security measures, or that of its service provider, were inadequate. Accordingly, the *Blackbaud* exception does not apply, and AA owed Lee no duty.

Lee also cannot link the alleged breach of duty to his alleged injury—the "use" of his information because his Social Security number is allegedly present on the dark web. Under South Carolina law, proximate cause requires a showing of both (1) causation-in-fact and (2) legal cause. *Bramlette v. Charter-Medical-Columbia*, 393 S.E.2d 914, 916 (S.C. 1990). Causation-in-fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence, and legal cause is proved by establishing foreseeability. *Id.* A defendant is not, however, charged with foreseeing that which is "unpredictable or which would not be expected to happen as a natural

and probable consequence of the defendant's negligent act." *Vinson v. Hartley*, 477 S.E.2d 715, 721 (S.C. Ct. App. 1996). Lee cannot prove either element to establish proximate cause.

*First*, [redacted] The "injury" would have happened regardless of what AA did or did not do. *Second*, AA is not legally expected to foresee a criminal, third-party cyberattack. Such an attack is the very definition of "unpredictable." Lee cannot show that AA had anything to do with—much less should have predicted—the availability of his personal information on the dark web.

**4. Lee cannot prevail on his negligence claim under Tennessee law.**

Even if the Court determines that Tennessee law governs [redacted], Lee's negligence claim still fails. *First*, Lee cannot show that AA owed him "a duty of care." *Faber v. Ciox Health, LLC*, 944 F.3d 593, 597 n.3 (6th Cir. 2019) (quoting *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005)). A plaintiff cannot create a common law duty that does not exist merely by pointing to a federal statute that does not have a private right of action. Simply put, Lee cannot look to HIPAA to impose a Tennessee common law duty on healthcare providers to protect patient information. *See id.* at 597 (rejecting an attempt to look to HIPAA to establish a common law duty in support of a negligence claim). While Tennessee common law generally provides that "all persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others," that rule is limited. *Id.* (citation omitted). "All persons must exercise reasonable care to avoid causing *physical harm* to another's person or property." *Id.* at 598 (quoting *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 362 (Tenn. 2008)). Lee does not allege any physical harm arising out of the Cyberattack. His negligence claim therefore fails under Tennessee law.

*Second*, even if Lee could show that AA owed a duty, Lee's negligence claim still fails for lack of causation. Lee must offer enough evidence to show that AA's alleged breach of duty was "more probable than any other cause" of his injuries. *Roberts v. Ray*, 322 S.W.2d 435, 437 (Tenn. Ct. App. 1958). Like Nielsen, he cannot. [redacted] *See* Section III.A.2.c, *supra*. This factual discrepancy is fatal to Lee's negligence claim. [redacted] SOMF ¶ 169. [redacted]

[redacted], *id*. ¶ 168, [redacted] [redacted], *id*. ¶ 230. [redacted] SOMF ¶ 166; Ex. 59 (Lee. Dep. at 245:18-24). [redacted] SOMF ¶ 167, [redacted] *id*. ¶ 166. Because Lee's personal information was exposed in other ways, Lee cannot show that AA caused his alleged injuries.

**5. Even under Florida law, the AA Plaintiffs' negligence claims fail.**

Even if this Court continues to apply Florida law, no Plaintiff can sustain a negligence claim against AA. Under Florida law, a negligence claim requires: (1) "a duty . . . recognized by the law, requiring the defendant to conform to a certain standard of conduct"; (2) a failure by the defendant "to conform to that duty"; (3) a "reasonably close causal connection between the nonconforming conduct and the resulting injury to the claimant"; and (4) proof of "some *actual harm*." *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 127 (Fla. 2011) (alterations adopted) (citations and internal quotation marks omitted) (emphasis in original). Proving proximate causation is not easy under Florida law; the AA Plaintiffs must prove that AA's alleged negligence "more likely than not" caused their alleged injuries. *Gooding v. Univ. Hosp. Bldg., Inc*., 445 So. 2d 1015, 1018 (Fla. 1984). "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.*

The AA Plaintiffs cannot meet this test. They have no evidence that any alleged misconduct by AA *probably* caused them *actual loss or damage*. To the extent either AA Plaintiff was harmed at all, the record is clear that any information "used" to do so was not involved in the Cyberattack.

**6. The Mednax Plaintiffs cannot maintain negligence claims against AA.**

Finally, none of the Mednax Plaintiffs has a valid negligence claim against AA. [redacted]. *See* Section III.A.1, *supra*. Because AA had no relevant connection with the Mednax Plaintiffs, AA had no duty to the Mednax Plaintiffs under any applicable state law.

## IV. CONCLUSION

The time has come for this case to be dismissed against AA. Brooke Nielsen and Gerald

Lee are the only named Plaintiffs who had any dealings with AA, so they are the only Plaintiffs relevant to AA's presence in this action. Whether the cybercriminal *accessed* the AA Plaintiffs' information during the June 2020 Cyberattack is extremely dubious. Whether the cybercriminal *used* the AA Plaintiffs' information to cause the alleged injuries is factually impossible. Thus, neither AA Plaintiff has standing. And, in any event, an analysis of the substantive requirements of the three remaining claims against AA yields the same result. AA's Motion for Summary Judgment should therefore be GRANTED.

Respectfully submitted this the 1st day of December, 2023.

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**CERTIFICATE OF SERVICE**

I certify that on December 1, 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/ *Starr T. Drum*
Starr T. Drum