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

PLAINTIFFS' RESPONSE IN OPPOSITION TO AMERICAN ANESTHESIOLOGY, INC.'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STANDARD OF REVIEW 1

III. ARGUMENT 2

a. Plaintiffs Have Set Forth Sufficient Facts to Support Article III Standing. 2

1. The Eleventh Circuit's Decision in *Green-Cooper v. Brinker International, Inc.* Does Not Affect This Court's Prior Holding that Actual Misuse or Access of Data is Sufficient to Satisfy Article III's Injury-in-Fact Requirement 3

2. The AA Plaintiffs Have Demonstrated Actual Misuse of Their Data That is Fairly Traceable to the Data Breach. 4

i. Plaintiff Lee Has Produced Evidence of Misuse of His PII and PHI. 4

ii. Plaintiff Nielsen Has Produced Evidence of Misuse of Her PII and PHI. 6

3. Plaintiffs Have Demonstrated Actual Access of Their PII/PHI Resulting in a Substantial Risk of Future Harm 8

4. Plaintiffs Have Satisfied the Standard Set Forth in *TransUnion, LLC v. Ramirez* to Support Their Claim for Damages 8

i. Plaintiffs Have Suffered Emotional Damages. 8

ii. Plaintiffs Have Taken Reasonable Mitigating Measures to Protect Themselves Against Future Harm. 8

iii. Plaintiffs Have Suffered a Diminution in Value of Their PII and PHI. 9

iv. Plaintiffs Have Suffered a Loss of Privacy. 10

b. The Facts Show that AA Violated State Statutory Laws. 10

1. Plaintiff Cohen Does Not Allege Maryland Consumer Protection Act Claims Against Defendant AA. 10

2. Plaintiffs Nielsen's and Lee's Do Not Allege MCPA Claims. 10

3. Plaintiffs Do Not Allege Florida Deceptive and Unfair Trade Practices Act Claims Again AA. 10

c. There are Genuine Issues of Material Fact as to Plaintiffs' Negligence Claims. 10

1. Plaintiffs' Negligence Claims Are Governed by Florida Law 10

i. The Evidence Shows that Florida Law Governs Plaintiffs' Negligence Claims. 10

ii. Applying Florida Law is Proper and Constitutional 11

2. Plaintiffs Have a Cognizable Negligence Claim Under Florida Law 13

3. Nielsen's Negligence Claim Under Virginia Law. 14

4. Lee's Claim Under South Carolina and Tennessee Law. 16

5. Mednax Plaintiffs Do Not Bring Negligence Claims Against AA. 18

IV. CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Allstate Ins. Co. v. Hauge
449 U.S. 302 (1981) 12

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986) 1–2

Baldwin v. Nat'l W. Life Ins. Co.
No. 2:21-CV-04066-WJE, 2021 WL 4206736 (W.D. Mo. Sept. 15, 2021) 15

Baldwin v. Peoples
2006 WL 7285670 (S.C. Ct. App. Jan. 18, 2006) 17

Bannum v. City of Ft. Lauderdale
901 F.2d 989 (11th Cir. 1990) 2

Buckley v. Santander Consumer USA, Inc.
No. C17-5813 BHS, 2018 WL 1532671 (W.D. Wash. Mar. 29, 2018) 15

Burns v. Gagnon
283 Va. 657, 727 S.E.2d 634 (2012) 15

Carr v. Oklahoma Student Loan Auth.
No. CIV-23-99-R, 2023 WL 6929850 (W.D. Okla. Oct. 19, 2023) 15

Davis v. Williams
451 F.3d 759 (11th Cir. 2006) 2

Didato v. Strehler
262 Va. 617, 554 S.E.2d 42 (Va. 2001) 14

Doe by Doe v. Brentwood Academy Inc.
578 S.W.3d 50 (Ct. App. Tenn. 2018) 18

Dorsey v. Reider
139 So.33d 860 (Fla. 2014) 13

Edmondson v. Velvet Lifestyles, LLC
43 F.4th 1153 (11th Cir. 2022) 1

Erie Railroad Co. v. Thompkins
304 U.S. 64 (1938) 11–12

Fairfax Hospital v. Curtis
492 S.E.2d 642 (1997) 14

Focus on the Family v. Pinellas Suncoast Transit Auth.
344 F.3d 1263 (11th Cir. 2003) 4

Green-Cooper v. Brinker International, Inc.
73 F. 4th 883 (11th Cir. 2023) 3–4

Hutchins v. Frontier Airlines, Inc.
No. 23-CV-80210-ROSENBERG, 2023 WL 7461324 (S.D. Fla. Oct. 13, 2023) 2

In re Banner Health Data Breach Litig.
No. CV-16-02696-PHX-SRB, 2017 WL 6763548 (D. Ariz. Dec. 20, 2017) 15

In re Blackbaud, Inc., Customer Data Breach Litig.
567 F. Supp. 3d 667 (D.S.C. 2021) 16

In re Cap. One Consumer Data Sec. Breach Litig.
488 F. Supp. 3d 374 (E.D. Va. 2020) 15–16

In re Equifax Inc. Customer Data Security Breach Litig.
999 F.3d 1247 (11th Cir. 2021) 2

In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.
No. 19-MD-2879, 2020 WL 6290670 (D. Md. Oct. 27, 2020) 15–16

In re Zappos.com, Inc.
888 F.3d 1020, 1027–28 (9th Cir. 2018) 4

Kellermann v. McDonough
278 Va. 478, 684 S.E.2d 786 (Va. 2009) 14

Krefting v. Kaye-Smith Enterprises Inc.
No. 2:23-CV-220, 2023 WL 4846850 (W.D. Wash. July 28, 2023) 15

McComick v. England
494 S.E.2d 431 (S.C. Ct. App. 1997) 16–17c

McMorris v. Carlos Lopez & Assocs., LLC
995 F.3d 295 (2d Cir. 2021) 4

Miccosukee Tribe of Indians of Fla. v. U.S.
516 F.3d 1235 (11th Cir. 2008) 2

Morris v. ADT Sec. Servs., Inc.
2009 WL 10691165 (S. Fla. Sept. 11, 2009) 12

Movie Prop Rentals, LLC, et al. v. The Kingdom of God Global Church, et al.
No. 22-cv-22594-BLOOM, 2023 WL 8275922 (S.D. Fla. Nov. 30, 2023) 2

Phillips Petroleum Co. v. Shutts
472 U.S. 797 (1985) 11–12

Resnick v. AvMed, Inc.
693 F.3d 1317 (11th Cir. 2012) 4

Satterfield v. Breeding Insulation Co.
266 S.W.3d 347 (Tenn. 2008) 17

S.E. v. Inova Healthcare Services
1999 WL 797192 (Va. Cir. June 1, 1999) 14

Spokeo, Inc. v. Robins
578 U.S. 330 (2016) 2

Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.
418 S.W.3d 547 (Tenn. 2013) 18

TransUnion, LLC v. Ramirez
594 U.S. 413 (2021) 8

Tsao v. Captiva MVP Restaurant Partners
986 F.3d 1332 (11th Cir. 2021) 2–3

U.S. Structural Plywood Integrity Coalition v. PFS Corp.
524 F. Supp. 3d 1320 (S.D. Fla. 2021) 13

Wilding v. DNC Services Corp.
941 F.3d 1116 (11th Cir. 2019) 4

OTHER AUTHORITIES

Fed. R. Civ. P. 56 1

NAPA, *Privacy Policy*,
https://www.napa.fi/about-napa/privacy-policy/#:~:text=We%20may%20collect%20personal
%20data,our%20trusted%20third%2Dparty%20partners. (last accessed on Jan. 2, 2024). 15–17

S.C. Code Ann. § 39-1-90(B) 16

Tenn. Code Ann. § 47-18-2107(c) 16

Plaintiffs respectfully file this Response in Opposition to Defendant American Anesthesiology, Inc.'s ("AA" or "Defendant") Motion for Summary Judgment ("Motion" or "Motion for Summary Judgment") [Doc. 260]. In support thereof, Plaintiffs state the following:

I. INTRODUCTION

American Anesthesiology, Inc. ("AA"), a company owned and operated by Mednax Services, Inc. ("Mednax")[1] until May 6, 2020,[2] does not dispute that in June 2020, Mednax determined that a thief successfully gained access to several Mednax employees' user credentials (logins and passwords) for its employee Office365 accounts. Once the hacker gained access to the first account, he/she sent additional phishing emails to other users within the Mednax network, prompting them to click on a malicious link in the email and enter their account credentials. Cyber criminals were able to access the Personally Identifying Information (PII) and Protected Health Information (PHI) of Plaintiffs and over 1.1 million patients of AA, including newborn babies and infants (the "Data Breach"). AA also does not dispute: (1) the hackers had the ability to access to that PII and PHI for several days, and (2) Plaintiffs suffered fraud in the days and months following the unauthorized access of their PII and PHI.

In a complete distortion of the summary judgment standard, AA ignores the undisputed evidence of this major and preventable Data Breach and the reasonable inferences that this Court may draw from it (that the hacker used Plaintiffs' PII and PHI to perpetrate fraud against them or disseminated it for others to use). Rather, AA impermissibly asks this Court to conclude, based on a curated and restricted investigation, that there is no genuine issue of material fact that the fraud in this case resulted from the Data Breach. AA's Motion must be denied.

II. STANDARD OF REVIEW

To win on a summary judgment motion, AA must show "that [1.] there is no genuine dispute as to any material fact and [2.] [Mednax] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering whether summary judgment is appropriate, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Edmondson v. Velvet Lifestyles, LLC*, 43 F.4th 1153, 1159 (11th Cir. 2022) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). A disputed fact "is 'material' if it would affect

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[1] Defendants Mednax, Inc., Mednax Services, Inc., Pediatrix Medical Group, and Pediatrix Medical Group of Kansas, P.C. are collectively referred to as "Defendants."

[2] On May 6, 2020, Mednax sold AA to a corporate affiliate of North American Partners in Anesthesia ("NAPA"). [redacted] [Doc. 256, ¶ 4].

the outcome of the suit under the governing law, and 'genuine' if a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. U.S.*, 516 F.3d 1235, 1243 (11th Cir. 2008).

To prevail on a motion for summary judgment, the movant has the burden of proof to show that the evidence is *so one-sided* that, as a matter of law, a reasonable jury could not find for the nonmovant. *Anderson*, 477 U.S. at 251. To withstand summary judgment, the nonmovant need only show more than a scintilla of evidence in support of the nonmovant's position. *Id.* at 252. In assessing a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Hutchins v. Frontier Airlines, Inc.*, No. 23-CV-80210-ROSENBERG, 2023 WL 7461324, at *2 (S.D. Fla. Oct. 13, 2023) (citing *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006)). "'If more than one inference could be construed from the facts by a reasonable fact finder, and that inference introduces a genuine issue of material fact, then the district court should not grant summary judgment.'" *Movie Prop Rentals, LLC, et al. v. The Kingdom of God Global Church, et al.*, No. 22-cv-22594-BLOOM, 2023 WL 8275922, at *4 (S.D. Fla. Nov. 30, 2023) (quoting *Bannum v. City of Ft. Lauderdale*, 901 F.2d 989, 996 (11th Cir. 1990)).

III. ARGUMENT

AA makes several legal challenges to both Plaintiffs' Article III standing as well as elements of Plaintiffs' claims that are contrary to both state law and this Court's prior rulings. Plaintiffs' allegations (on which this Court concluded Plaintiffs' claims were plausibly stated and that Plaintiffs had standing to pursue them) are now fully borne out by the evidence. Therefore, AA's motion for summary judgment must be denied.

a. Plaintiffs Have Set Forth Sufficient Facts to Support Article III Standing.

To establish the prerequisites for Article III 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). The Eleventh Circuit is clear that the risk of future harm or identity theft is sufficiently concrete to establish injuries in fact when it is a "substantial risk" or "certainly impending." *Tsao v. Captiva MVP Restaurant Partners*, 986 F.3d 1332, 1339 (11th Cir. 2021); *In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247, 1262-63 (11th Cir. 2021). The threat of future identity theft has been considered "certainly impending" or a "substantial risk" in cases where plaintiffs have alleged "actual misuse or actual access to personal data." *Tsao*, 986 F.3d at 1340; *In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d at 1263.

As noted by this court at the motion to dismiss stage, "Article III generally requires no showing of privity between a plaintiff and a defendant." [Doc. 104, p. 58]. Nevertheless, as evidenced by Plaintiffs' Motion for Class Certification, Plaintiffs' proposed AA class consists of only AA patients impacted by the Data Breach. [Doc. 232]. Only Plaintiffs Nielsen and Lee (the "AA Plaintiffs") pursue claims against AA in this action.

1. The Eleventh Circuit's Decision in *Green-Cooper v. Brinker International, Inc.* Does Not Affect This Court's Prior Holding that Actual Misuse or Access of Data is Sufficient to Satisfy Article III's Injury-in-Fact Requirement.

AA relies on a misinterpretation of newly decided *Green-Cooper v. Brinker International, Inc.* ("*Brinker*"), in contending a plaintiff must have suffered actual misuse to confer Article III standing and that unlawful access to PII/PHI is no longer sufficient. 73 F. 4th 883 (11th Cir. 2023). In *Brinker*, the Eleventh Circuit considered a definition for a payment card data breach class certified by the district court. Importantly, the Eleventh Circuit acknowledged the class was properly defined for standing purposes, as it limited the class to individuals who either experienced fraudulent charges because of the breach or had their payment card information appear on the dark web. *Id.* at 892. But turning to the question of predominance, the court expressed a limited concern that the language "accessed by cybercriminals" might be overbroad because it could include individuals who had their payment cards accessed in the breach but subsequently canceled them and, therefore, had no continuing risk of fraudulent misuse. *Id.*

The Eleventh Circuit has noted that in payment card data breaches, there is no risk of future injury to an individual who responds to the breach by canceling their card. *See Tsao*, 986 F.3d at 1344. In *Tsao*, the Eleventh Circuit contrasted payment care information from PII such as social security numbers, birth dates, and driver's license numbers. *Id.* at 1343 ("Tsao has not alleged that social security numbers, birth dates, or driver's license numbers were compromised in the [data] breach, and the card information allegedly accessed by the hackers 'generally cannot be used alone to open unauthorized new accounts.'"). Unlike *Brinker* and *Tsao* where the plaintiffs could save themselves from the risk of future injury by canceling their cards, Plaintiffs and putative class members in this class cannot cancel or otherwise change their birth dates, Social Security numbers, or PHI. That information will remain immutable and be personally identifying for the rest of their lives, thus putting them at a continued risk of misuse of their personal information. Post *Brinker*, the threat of future identity theft can still be established by evidence of actual misuse or actual access to personal data where that data is of the type that cannot be subsequently altered or cancelled by the victim.

2. The AA Plaintiffs Have Demonstrated Actual Misuse of Their Data That is Fairly Traceable to the Data Breach.

Confusing proximate cause with traceability, AA argues Plaintiffs Nielsen and Lee cannot demonstrate traceability between the Data Breach and misuse of their PII and PHI.[3] In the context of Article III standing, however, the "fairly traceable" standard does not mean "certainly traceable." Thus, to satisfy Article III's standing causation requirement, a plaintiff need not show proximate causation. *Wilding v. DNC Services Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019). "[E]ven harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Id.* (citing *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003). In the data breach context, as this Court acknowledged in its Order Denying in part Defendants' Motion to Dismiss, "[e]ven if the data accessed in the Data Breaches did not provide all the information necessary to inflict [alleged] harms, they very well could have been enough to aid therein. And '[e]ven a showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement.'" [Doc. 104, p. 19 (quoting *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012))].

i. Plaintiff Lee Has Produced Evidence of Misuse of His PII and PHI.

It is undisputed that the Eleventh Circuit recognizes "that the exposure of personal information 'for theft and sale on the dark web . . . establishes both a present injury . . . and a substantial risk of future injury' for Article III standing." [Doc. 254, p. 6 (quoting *Brinker*, 73 F. 4th at 889–90)]. AA does not appear to dispute that [redacted] AA argues, however, that it did not have possession of Plaintiff Lee's "full" Social Security number and even if it did, there is no evidence it was compromised in the Data Breach, so traceability to the dark web does not exist. On that issue, there are genuine disputes of material fact precluding summary judgment.

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[3] As this Court previously found: "[a]s to evidence that certain individuals' data affected by a given data breach has been misused, courts have found such evidence helpful in establishing a "substantial risk" of future harm for plaintiffs who remain unaffected. *See McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 301–02 (2d Cir. 2021) (finding that courts have been more likely to conclude that plaintiffs have established a substantial risk of future injury where they can show that at least some part of the compromised dataset has been misused—even if plaintiffs' particular data subject to the same disclosure incident has not yet been affected); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1027–28, n.7 (9th Cir. 2018) (explaining that although some plaintiffs in the suit had not yet suffered identity theft, allegations that other customers whose data was compromised had reported fraudulent charges helped establish that plaintiffs were at substantial risk of future harm."). [Doc. 104, p. 13].

[Doc. 290, Pl.s' SOMF ¶ 5]. . *Id.* . *Frantz Initial Report*, ¶ 36, attached as Exhibit 2; [Doc. 290, Pl.s' SOMF ¶ 7]. . [Doc. 290, Pl.s' SOMF ¶¶ 7, 35]; *see, e.g.*, *Matthews Deposition*, pp. 113:15; 123:10-125:13; 128:21-130:7; 132:7-15; 142:12-143:21; 188:22-189:2;190:9-25, attached as Exhibit 1 (. [Doc. 290, Pl.s' SOMF ¶¶ 5, 34]. Ex. 2, ¶ 32; *Frantz Deposition*, pp. 189:2–192:17, attached as Exhibit 3. . [Doc. 290, Pl.s' SOMF # 8].

see. *Id.* at ¶ 5; Ex. 3, pp. 117:10-23, 119:2-11, 331:10-13, 332:20-333:11 [Doc. 290, Pl.s' SOMF ¶ 9]. Considering that on summary judgment, the Court must view the record and inferences therefrom in a light most favorable to Plaintiffs and resolve reasonable doubts about the facts in favor of Plaintiffs, the Court must infer from the incompleteness of did not look at all areas of Mednax's systems wherein Plaintiffs' PHI and PII could have been stored.

[REDACTED]. *Id.* at ¶¶ 1–3, 11. [REDACTED] *Id.* at ¶ 3. [REDACTED]. *Frantz Wojcieszek Rebuttal Report*, ¶ 27; attached as Exhibit 4; Ex. 2, ¶¶ 208, 227, 237 [REDACTED]).

AA's arguments that the presence of Plaintiff Lee's Social Security number on the dark web could have come from other instances where is Social Security number was impacted is a quintessential proximate cause argument and not appropriate for a standing analysis. Accordingly, given the circumstantial evidence, a jury could reasonably find that AA *did* have Plaintiffs' full Social Security number. After all, Social Security numbers are generally provided to (and required by) healthcare providers. Although Plaintiff Lee could not remember whether he provided his full Social Security number to AA, Plaintiff Nielsen testified that AA did indeed collect her Social Security number. [Doc. 290, Pl.s' SOMF ¶ 10]. Plaintiffs have certainly produced sufficient evidence, from which the Court must infer, that the presence of certain Plaintiffs' Social Security numbers on the Dark Web is fairly traceable to the Data Breach.

In addition to Plaintiff Lee's [REDACTED] after the Data Breach, Plaintiff Lee has produced evidence of an increase of spam phone calls, emails, and text messages. This Court has already found increased spam to amount to "actual misuse" of data. *See* [Doc. 104, pp. 18–19]. Plaintiff Lee testified that after the Data Breach, he was subject to increased spam phone calls, emails, and text messages, including repugnant adult websites. [Doc. 290, Pl.s' SOMF ¶ 14]. Once again, AA's argument that these spam communications could have been from other sources does not defeat Plaintiff Lee's standing, as AA is clearly demonstrating for the Court a dispute of material fact regarding proximate cause.

ii. Plaintiff Nielsen Has Produced Evidence of Misuse of Her PII and PHI.

AA does not dispute that Plaintiff Nielsen produced evidence of at least "three instances where her personal information may have been misused." [Doc. 260, p. 5]. Specifically, Plaintiff Nielsen has

produced evidence of: (1) twelve fraudulent Charles Schwab accounts being opened in her name without her authorization; (2) the receipt of an unwanted and unauthorized subscription to Shape magazine; and (3) the receipt of various spam mail. This Court has already found increased spam to amount to "actual misuse" of data, [Doc. 104, pp. 18–19], and there is little doubt that the creation of fraudulent bank accounts certainly amounts to misuse. AA contends, however, that these injuries are not fairly traceable to the Data Breach because the last name, address, and telephone number used for the bank accounts, magazine subscription, and spam mail does not match Plaintiff Nielsen's personal information found in the source file involved in the Data Breach – but AA critically omits that all of the information used to commit identity theft and fraud against Plaintiff Nielsen is information that AA had collected from Plaintiff Nielsen prior to the Data Breach.

Indisputably, the telephone number and home address used to open the fraudulent bank accounts and receive the magazine subscription and spam mail were the telephone number and home address belonging to Plaintiff Nielsen's parents. Plaintiff Nielsen testified that her parents' home telephone number was the primary telephone number that she used to fill out paperwork associated with her medical care. *Nielsen Deposition*, p. 21:8-20, attached as Exhibit 5. While Plaintiff Nielsen couldn't say with absolute certainty the address she provided to AA (as this was 10 years ago), she testified that it was probably her parents' address as that was where she was living when her son was born. *Id.* at pp. 97:22, 98:1–8. Also indisputably, the last name associated with the fraudulent bank accounts, magazine subscription, and spam mail was Plaintiff Nielsen's maiden name. Plaintiff Nielsen testified that she was on her parents' insurance at the time of her son's birth and therefore her insurance carrier likely had her maiden name on file; she could not recall the name she provided to on hospital forms, but testified it was possibly her maiden name for the birth of her son. *Id.* at pp. 98:15–99:15. Plaintiff Nielsen has certainly produced evidence that these instances of misuse of her PHI and PII are fairly traceable to the Data Breach.

Further, for the reasons described in section III.a.2.i, *supra*, there are genuine disputes of material fact regarding the scope of the Data Breach and the information that was involved. Plaintiff Nielsen testified that she called AA after the Data Breach to confirm what information they possessed on her; the representative told her that AA had at least her first and last name, date of birth, Social Security number, and address. *Id.* at pp. 142:14–143:4. And, "[e]ven if the data accessed in the Data Breaches did not provide all the information necessary to inflict [alleged] harms, there very well could have been enough to aid therein." [Doc. 104, p. 19]. Any argument AA asserts that the misuse of

Plaintiff Nielsen's PII and PHI could have come from other sources is a clear proximate cause issue and not appropriate when analyzing standing

3. Plaintiffs Have Demonstrated Actual Access of Their PII/PHI Resulting in a Substantial Risk of Future Harm.

It is undisputed that "[o]n June 19, 2020, Mednax discovered that a thief gained access to certain Microsoft Office 365 Mednax business email accounts through a phishing attach beginning June 17, 2020. [Doc. 256, ¶ 5]. It [REDACTED] *Id.* at ¶ 10. [REDACTED], *supra* section III.a.2.i, [REDACTED] *Id.* at ¶ 12. The presence of Plaintiffs' Social Security numbers on the dark web only further confirms the thief had actual access to Plaintiffs' PII and PHI.

4. Plaintiffs Have Satisfied the Standard Set Forth in *TransUnion, LLC v. Ramirez* to Support Their Claim for Damages.

In addition to establishing a substantial risk of future harm, Plaintiffs have evidence of separate concrete harms that this Court already recognized would be sufficient to satisfy the U.S. Supreme Court's holding in *TransUnion, LLC v. Ramirez*, 594 U.S. 413, 437 (2021).[4] [Doc. 104, pp. 14–15]. Although AA does not directly address these separate concrete harms, these, too, clearly establish Plaintiffs have standing to pursue their claims against AA.

i. Plaintiffs Have Suffered Emotional Damages.

The record is clear that Plaintiffs have experienced emotional distress over the Data Breach. [Doc. 290, Pl.s' SOMF ¶ 12]. Plaintiff Nielsen testified she experienced anxiety, distress, and anger over her personal information being placed in the hands of cybercriminals. Ex. 5, pp. 110:1–11, 216:17–22. Plaintiff Lee similarly testified that since the Data Breach, he has experienced an increase in his anxiety levels. *Lee Deposition*, p. 191:4–23, attached as Exhibit 6.

ii. Plaintiffs Have Taken Reasonable Mitigating Measures to Protect Themselves Against Future Harm.

The record is also clear that Plaintiffs have taken mitigation measures to protect themselves against future harm. [Doc. 290, Pl.s' SOMF ¶ 13]. Plaintiff Nielsen, for example, testified she called

[4] Plaintiffs no longer assert a benefit of the bargain theory to support standing.

three credit bureaus to put a freeze fraud alert on her accounts and filed a police report. Ex. 5, pp. 110:1–11, 149:9–18. AA does not appear to dispute Plaintiffs have developed evidence demonstrating mitigation measures have been taken.

iii. Plaintiffs Have Suffered a Diminution in Value of Their PII and PHI.

AA argues that courts have rejected a diminution in value theory where a plaintiff does not allege that a market for legitimate sales of PII exist or that the ransomware attack prohibited them from profitably participating in that market. As noted by this Court, Plaintiffs need not "reduce their PHI or PII to terms of dollars and cents in some fictitious marketplace where they offer such information for sale to the highest bidder . . . . Rather, Plaintiffs' 'actual' (rather than 'hypothetical') diminution in value . . . occurred within the very marketplace in which they actually use their PHI and PII—the marketplace of credit, wherein the compromise of such information damages their ability to 'purchase goods and services remotely and without the need to pay in cash or a check.'" [Doc. 104, pp. 16–17] (citations omitted).

Plaintiffs have produced evidence demonstrating the value of PHI and PII, their role in the marketplace, and the effects of both being stolen. [Doc. 290, Pl.s' SOMF ¶ 15]. . *Id.* at ¶ 16. . *Id.* at ¶ 17. *Id.* of the PHI and PII. *Olsen Report*, ¶ 59, attached as Exhibit 7. that there is a market for the type of PHI and PII exposed by Mednax because of the Data Breach. *Id.* at ¶ 56.

Plaintiff Nielsen testified her ability to obtain credit has directly been affected by the Data Breach. Specifically, she testified that after the Data Breach, she experienced a reduction in her credit score. [Doc. 290, Pl.s' SOMF ¶¶ 19-20]. After the Data Breach, Plaintiff Nielsen received notice that her account at AA was being sent to a debt collection agency due to an unpaid bill. *Id.* at ¶ 20. Plaintiff Nielsen established that she did not owe any money to AA, and that the bill had been paid years prior. *Id.* Nevertheless, the debt collection agency appeared on her credit score when she tried financing for a home. *Id.*

iv. Plaintiffs Have Suffered a Loss of Privacy.

Finally, Plaintiffs have clearly produced evidence that they have suffered a loss of privacy as a result of the Data Breach. *Id.* at ¶ 21]. Plaintiff Nielsen testified she experienced stress after losing control over her private information. Ex. 5, p. 258:1–18. Plaintiff Lee testified he has concerns for the loss of his privacy, specifically not knowing what has his private information and what they are doing with it. Ex. 6, p. 191:4–23.

b. The Facts Show that AA Violated State Statutory Laws.

1. Plaintiff Cohen Does Not Allege Maryland Consumer Protection Act Claims Against Defendant AA.

AA's arguments regarding Plaintiff Cohen's Maryland Consumer Protect Act ("MCPA") claims are moot and do not require resolution by the Court. As indicated above, only Plaintiffs Lee and Nielsen, the AA Plaintiffs, bring claims against AA.

2. Plaintiffs Nielsen's and Lee's Do Not Allege MCPA Claims.

AA's arguments regarding Plaintiff Nielsen's and Lee's ability to bring MCPA claims are moot and do not require resolution by the Court. Plaintiffs Lee and Nielsen do not allege MCPA claims.

3. Plaintiffs Do Not Allege Florida Deceptive and Unfair Trade Practices Act Claims Again AA.

AA's arguments about Plaintiffs' Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") claims are moot and do not require resolution by the Court. By definition, the Florida subclass includes only patients of Mednax. Accordingly, members of the subclass who were patients of AA solely have no FDUTPA claims against AA. To the extent there are any Plaintiffs or putative class members who were patients of both AA and Mednax, they may only pursue their FDUTPA claims against Mednax.

c. There are Genuine Issues of Material Fact as to Plaintiffs' Negligence Claims.

1. Plaintiffs' Negligence Claims Are Governed by Florida Law.[5]

i. The Evidence Shows that Florida Law Governs Plaintiffs' Negligence Claims.

Despite this Court's correct application of Florida law to Plaintiffs' negligence claims at the motion to dismiss stage [Doc. 104, pp. 6–8], AA tries to claim Florida law does not apply to Plaintiff

[5] In their Response to Mednax's Motion for Summary Judgment, address Mednax's choice-of-law arguments and the governance of Florida law in this case. To the extent applicable here, Plaintiffs incorporate by reference Plaintiffs' assertions in their Response to Mednax's Motion for Summary Judgment. [Doc. 283, pp. 20-22].

Nielsen's and Plaintiff Lee's claims under "most significant relationship test." At the motion to dismiss stage, this Court, evaluating the different choice of law provisions relating to the Plaintiffs' domiciles and/or places of treatment, concluded that all choice of law provisions center on where the injury occurred. [Doc. 104, p. 7]. "This Court join[ed] other courts in finding that the location of the breach itself is fortuitous in such cases; here, Florida is where the data was maintained, multiple Defendants are domiciled, and Defendants' security protocols allegedly broke down." [Doc. 104, p. 8].

AA incorrectly states that, under the most significant relationship test, Plaintiff Nielsen's negligence claims are governed by the State of Virginia and Plaintiff Lee's by the State of South Carolina, relying primarily on Plaintiff Nielsen's and Lee's individual domicile. But one's domicile does not dictate all choice-of-law analysis for every claim. Here, AA has not pointed to any discovery in this case which would affect the facts this Court relied on in previous choice-of-law analysis. Rather, the evidence in this case shows that Mednax maintained the Plaintiffs' PII/PHI in Florida, multiple Defendants are domiciled in Florida, and Mednax's security protocols broke down in Florida. [Doc. 290, Pl.s' SOMF ¶¶ 38-39]. Moreover, the contract governing AA's and Mednax's relationship their promises to protect and keep confidential PII and PHI is governed by Florida law. *Id.* at ¶ 40.

ii. Applying Florida Law is Proper and Constitutional.

AA claims that the Due Process and Full Faith and Credit Clauses of the United States Constitution to apply Florida law bars this Court from applying substantive Florida law to Plaintiff Nielsen's and Lee's claims. [Doc. 260, p. 16]. AA relies on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938) to support its claim. However, nothing in either of these cases, nor the facts in this case, bars this Court from properly applying Florida law to all Plaintiffs' negligence claims.

In *Phillips*, the Supreme Court held that there must be a significant contact claimed by each member of the class in order to apply the forum state's substantive law. *Phillips*, 472 U.S. at 821–22. *Phillips* involved class members seeking royalty payments from their mineral interests in land in 11 different states. *Phillips*, 472 U.S. at 799. The *Phillips* Court held that because Kansas lacked interest in claims unrelated to that State, and because the laws of Kansas conflicted with the substantive laws of Texas, applying Kansas law to every claim exceeded constitutional limits. *Phillips*, 472 U.S. at 822. In determining the application of Kansas law to all class members was unconstitutional, the Court reasoned that "Kansas must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law was not arbitrary or unfair." *Phillips*, 472 U.S. at 821-22. The crux of the

choice-of-law analysis in *Phillips* regarded **absent** plaintiffs in a class action suit. Ultimately the Court found in favor of the class members on this issue, holding that the analysis for an absent plaintiff differs from that of an absent defendant, and that Notice with the right to opt-out is sufficient to apply the forum state's law to absent plaintiffs. *Phillips*, 472 U.S. at 814. *Phillips* does not conclude whether Florida law may apply to Plaintiffs' Nielsen and Lee – two *present* plaintiffs – in this case.

AA argues that, under *Erie*, it is 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 matter were being tried in state rather than federal court. [Doc. 260, p.17]. *Erie* did not involve a class action, but rather one individual citizen of Pennsylvania who was allegedly injured in Pennsylvania by the negligence of Erie Railroad, a New York Company, and who brought his claims in the U.S. District Court for the Southern District of New York. *Erie*, 304 U.S. at 69.

AA further cites to law holding it 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 . . . ." [Doc. 260, p. 18 (*Morris v. ADT Sec. Servs., Inc.*, 2009 WL 10691165, at *8 (S. Fla. Sept. 11, 2009))]. But, AA ignores the direct connection it had to Florida at the time the Data Breach occurred and at the time it obtained Plaintiff Nielsen's and Plaintiff Lee's PII and PHI for protection and safekeeping. AA is a former Mednax company, which has its principal place of business in Florida. [Doc. 115, ¶¶ 286, 288]. Plaintiff Nielsen's PII and PHI were obtained by AA during the time AA was a Mednax company. [Doc. 115, ¶ 190]. Plaintiff Nielsen and Plaintiff Lee each received letters from AA informing them that their PII and PHI were compromised because of the Data Breach of its "business associate," Mednax. [Doc. 290, Pl.s' SOMF ¶ 41]. Following its acquisition by NAPA, AA's relationship with Mednax was governed by Florida law. *Id.* at ¶ 40.

AA clearly had a "significant contact" in Florida given its relationship with Mednax. AA's assertion that neither Plaintiff Nielsen nor Plaintiff Lee "interacted with AA in Florida" is moot and without merit on its face. [Doc. 260. ¶ 19]. As this Court already reasoned in its Motion to Dismiss Order, Florida is the state in which the security protocols at issues broke down. [Doc. 104, p.8]. AA cannot argue it would be unreasonable for a class to expect Florida law to apply based on the facts connected to AA and the Plaintiffs' damage to the forum. Plaintiff Nielsen and Plaintiff Lee have a reasonable expectation that claims could and would be brought against AA in the State of Florida based on the multiple significant connections AA has to the forum.

The Due Process Clause requires notice, an opportunity to appear in person or by counsel, an opportunity to "opt out," and adequate representation. *Phillips*, 472 U.S. at 812-813. For a state's substantive law to apply in a constitutionally permissible way, the state "must have a significant contact or significant aggregation of contacts." *Allstate Ins. Co. v. Hauge*, 449 U.S. 302, 312-313 (1981). AA has not argued or shown that Due Process has or will be violated by a failure to provide notice, an opportunity to appeal, or an opportunity to opt out. AA likewise cannot and has not shown a lack of significant contact with the forum. AA is grasping at piecemeal case law to support its assertion that this Court's Motion to Dismiss Order is not relevant. AA did not seek a reconsideration or appeal of the Motion to Dismiss Order and is far time-barred from raising such an argument now. The issue of constitutionality and choice of law has already been determined by this Court. [Doc. 104, pp. 6–8]. Such determinations were made consistent with precedent law of the Eleventh Circuit. *Id.* As for AA's claims that Mednax Plaintiffs have no connection to AA, only AA Plaintiffs bring claims against AA. [Docs. 232; 280, p. 10].

2. Plaintiffs Have a Cognizable Negligence Claim Under Florida Law.

Plaintiffs have established sufficient evidence that AA's breach proximately caused their injuries. AA – in violation of HIPAA, HITECH, the FTC Act, and other state and federal statutes – failed to protect and keep confidential Plaintiffs' PII and PHI. [Doc. 290, Pl.s' SOMF ¶ 41]. Under Florida law, the element of proximate cause merely requires a showing that the defendant's breach foreseeably caused the plaintiff's suffered harm. *U.S. Structural Plywood Integrity Coalition v. PFS Corp.*, 524 F. Supp. 3d 1320, 1338 (S.D. Fla. 2021) (citing *Dorsey v. Reider*, 139 So.33d 860, 863 (Fla. 2014)). This inquiry is typically reserved for the fact finder. *Id.*

From June 17, 2020 to June 22, 2020, as a result of AA's failure to implement security policies and procedures necessary to keep Plaintiffs' PII/PHI confidential, an unauthorized party gained access to AA's user Office 365 email accounts. Ex. 2, ¶ 152. [REDACTED] Ex. 2, ¶¶ 150, 151–152. By failing to protect and keep confidential Plaintiffs' PII/PHI, AA breached its duty to Plaintiffs.

Plaintiff Nielsen has set forth sufficient evidence that her damages were proximately caused by AA's breach. Nielsen testified that she gave AA her Social Security number. [Doc. 290, Pl.s' SOMF ¶ 10]. [REDACTED] *Id.* at ¶¶ 1, 11. After receiving the Notice from AA, Nielsen had to take measures to mitigate her harm and protect herself against the effects of the Data Breach. *Id.* at ¶ 13. Shortly after the Data

Breach, Nielsen experienced a reduction in her credit score and was notified that her AA account was delinquent. *Id.* at ¶¶ 18–19. These damages were reasonably foreseeable results of AA's failure to keep Plaintiff's PII/PHI safe and confidential from cyber criminals.

Plaintiff Lee has also set forth sufficient evidence of his reasonably foreseeable injuries resulting from the Data Breach. Shortly following the Data Breach, Lee experienced an increase in spam calls, emails, and text messages. *Id.* at ¶ 14]. Lee has also suffered, emotional distress, *id.* at ¶ 12, a loss of privacy, *id.* at ¶ 21, and diminution in value of his PII/PHI, *id.* at ¶ 4. [REDACTED] *Id.* at ¶¶ 1, 11. These injuries are reasonably foreseeable results of AA's breach of duty.

Plaintiffs have pointed to ample evidence of foreseeable injuries, which began after the Data Breach. These injuries are the same injuries that result of having one's PII and PHI disclosed to cyber criminals. [Doc. 104, pp. 51–52]. Plaintiffs have sufficient evidence to show that they have suffered injuries because of AA's failure to protect and keep confidential their PII/PHI.

3. Nielsen's Negligence Claim Under Virginia Law.

Although not applicable in this case, Nielsen's negligence claim is viable under Virginia law. AA claims Plaintiff Nielsen cannot establish AA owed her a duty, that AA proximate caused Plaintiff Nielsen's harm, and that Plaintiff Nielsen's are barred by the economic loss doctrine. [Doc. 260, p. 20]. However, Neilsen has established sufficient evident to supper her claim that (1) AA owed her a duty to protect and keep confidential her PII/PHI, and (2) Plaintiff Neilsen's injuries were proximately caused by AA's breach of its duty. Resultingly, Plaintiffs negligence claims are not barred by the economic loss doctrine.

As a healthcare provider, AA owed Plaintiff Nielsen a duty to keep her personal information confidential. "[T]he Supreme Court of Virginia has recognized the assumption of a duty of care in the medical care context." *In re Capital One Consumer Data Breach Litig.*, 488 F. Supp. 3d 374, 399 (E.D. Va. 2020) (citing *Didato v. Strehler*, 262 Va. 617, 629, 554 S.E.2d 42, 48 (Va. 2001)). The "Supreme Court of Virginia held that a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization and that a violation of this duty gives rise to a common law action in tort." *S.E. v. Inova Healthcare Services*, 1999 WL 797192, *5 (Va. Cir. June 1, 1999) (citing *Fairfax Hospital v. Curtis,* 492 S.E.2d 642 (1997)).

Virginia also recognizes the concept of "the assumption of duty: 'one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.'"

In re Capital One Consumer Data Breach Litig., 488 F. Supp. 3d at 399 (quoting *Kellermann v. McDonough*, 278 Va. 478, 493–94, 684 S.E.2d 786, 791 (Va. 2009)). The Virginia Supreme Court has indicated that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Burns v. Gagnon, 283 Va. 657, 644, 727 S.E.2d 634 (2012).

Here, AA (now a part of NAPA) promised Plaintiff Nielsen that it would protect and keep confidential her PII and PHI in accordance with HIPAA, HITECH, and other laws. AA promises that it has "implemented necessary technological solutions to protect [] data." NAPA, *Privacy Policy*, https://www.napa.fi/about-napa/privacy-policy/#:~:text=We%20may%20collect%20personal%20data,our%20trusted%20third%2Dparty%20partners. (last accessed on Jan. 2, 2024). It also states that, while it may use third party platforms to process and manage personal data, it has "necessary contracts with these providers to ensure a third party is not accessing data without [] prior approval." *Id.* In collecting and promising to keep confidential Plaintiffs' PII and PHI, AA voluntarily assumed a duty to comply with these promises.

Moreover, legal authority overwhelmingly demonstrates that AA has a duty to protect Plaintiffs' PII/PHI. *See Krefting v. Kaye-Smith Enterprises Inc.*, No. 2:23-CV-220, 2023 WL 4846850, at *5 (W.D. Wash. July 28, 2023) (recognizing duty to protect PII under Washington law since defendant's acts "exposed [plaintiff] to a high risk of harm thereby creating a duty"); *Buckley v. Santander Consumer USA, Inc.*, No. C17-5813 BHS, 2018 WL 1532671, at *5 (W.D. Wash. Mar. 29, 2018) (same); *In re Banner Health Data Breach Litig.*, No. CV-16-02696-PHX-SRB, 2017 WL 6763548, at *8 (D. Ariz. Dec. 20, 2017) (applying Arizona law and recognizing duty to protect patient information sufficient to state a negligence claim); *Carr v. Oklahoma Student Loan Auth.*, No. CIV-23-99-R, 2023 WL 6929850, at *2 (W.D. Okla. Oct. 19, 2023) (Defendant, who allegedly had no prior relationship with the named plaintiffs, "owed a duty to Plaintiffs to act reasonably in safeguarding the Plaintiffs' PII" under Oklahoma law); *In re Cap. One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d at 400–01 (holding that a duty to protect exists in data breach case based on the "voluntary undertaking doctrine under Virginia law"); *Baldwin v. Nat'l W. Life Ins. Co.*, No. 2:21-CV-04066-WJE, 2021 WL 4206736, at *3-4

(W.D. Mo. Sept. 15, 2021) (finding negligence claim sufficiently pled under Missouri law on behalf of data breach victims and thereby finding duty to protect PII); *Krefting*, 2023 WL 4846850, at *5 (recognizing duty to protect PII under Washington law since defendant's acts "exposed [plaintiff] to a high risk of harm thereby creating a duty"); *Buckley*, 2018 WL 1532671, at *5 (same); *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2020 WL 6290670, at *6-7 (D. Md. Oct. 27, 2020) (holding that defendant had a duty to protect customers' PII under Maryland law).

As set out above in Section III.c.2, *supra*, AA breached its duties to Plaintiffs, proximately causing their injuries. Given AA's duty, breach, and proximate cause of Plaintiff's damages, Plaintiff's claims are not barred under the economic loss doctrine. *In re Cap. One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d at 401 (economic loss rule does not bar negligence claim in data breach case under Virginia law since defendant "voluntarily undertook a duty to protect its customers' PII").

4. Lee's Claim Under South Carolina and Tennessee Law.

Although not applicable in this case, Lee's negligence claim is viable under South Carolina and Tennessee laws. Both South Carolina and Tennessee require that an injured party immediately be notified upon the realization of a breach of personal information. S.C. Code Ann. § 39-1-90(B), requiring immediate notification following discovery of the breach; Tenn. Code Ann. § 47-18-2107(c), requiring disclosure of the breach within 45 days of its occurrence. AA did not send its notice until approximately six months after becoming aware of the Data Breach. [Doc. 290, Pl.s' SOMF ¶ 42]. This is a clear duty owed under both South Carolina and Tennessee law, which was breached. Had Plaintiff Lee been made aware of the Data Breach within a reasonable time frame pursuant to either South Carolina or Tennessee law, he could have taken precautions to mitigate injury. Lee further states claims cognizable under South Carolina and Tennessee law.

South Carolina

AA claims it did not owe Lee a duty of care under South Carolina law because it did not owe a duty to control the conduct of another. However, AA's assertion that it cannot be responsible for the conduct of another is misplaced. Plaintiff Lee has established that AA directly failed to safeguard his information. *See, e.g.*, Ex. 2, ¶¶ 12, 22, 152, 187, 189, 255]. AA failed to ensure that Mednax had sufficient cyber security measures before handing over Plaintiffs' PII/PHI. *Id.* at ¶¶ 183, 255.

Similar to Virginia law, as discussed above in Section III.c.3, *supra*, South Carolina "[w]here an act is voluntarily undertaken [] the actor assumes the duty to use due care." *In re Blackbaud, Inc., Customer Data Breach Litig.*, 567 F. Supp. 3d 667, 680 (D.S.C. 2021). AA promised patients, such as Lee, that it

would keep their PII/PHI safe and confidential. NAPA, *Privacy Policy*, https://www.napa.fi/about-napa/privacy-policy/#:~:text=We%20may%20collect%20personal%20data,our%20trusted%20third%2Dparty%20partners. (last accessed on Jan. 2, 2024).

Furthermore, The Court of Appeals in South Carolina has recognized that "that the confidentiality of the physician-patient relationship is an interest worth protecting." *McComick v. England*, 494 S.E.2d 431 (S.C. Ct. App. 1997) (citations omitted). Most of the jurisdictions faced with this issue have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law or is in the patient's interest or the public interest. *Id.* As a healthcare provider to Plaintiff Lee, AA is held to these standards and owed a duty to Plaintiff Lee to safe keep his private, personal information.

AA also asserts Plaintiff Lee cannot establish causation because (1) other prior breaches could have caused his injuries and (2) AA cannot be expected to foresee cyberattacks. AA's avoidance on other data breaches and the foreseeable acts of cybercriminals in misplaced. Lee testified that he saw in increase in spam messages "shortly after" the Data Breach. [Doc. 290, Pl.s' SOMF ¶ 14]. Plaintiffs have also demonstrated AA should have known of the risks of cyberattacks and that AA should have taken appropriate steps to prevent the same. [Doc. 115, ¶¶ 361–376].

As discussed *supra*, Section III.c.2, Plaintiff Lee has made very specific references to his damages, resulting from AA's breach of duty to safeguard his private information, including emotional distress; an increase in spam calls, emails, and text messages; lost time; annoyance; anxiety; and increased risk of identity theft. Based on Lee's evidence, "it is [] for the jury to determine whether the defendant's negligence was a concurring proximate cause of the plaintiff's injuries . . . ." *Baldwin v. Peoples*, 2006 WL 7285670, *4 (S.C. Ct. App. Jan. 18, 2006).

Tennessee

Similar to their prior claims, AA again argues that it does not owe a duty to Plaintiff Lee under Tennessee law. Tennessee courts have held that "all persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others." *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 357 (Tenn. 2008). Moreover, duties under common law will also arise when a special relationship exists between the defendant and the person who is foreseeably at risk from danger. *Id.* at pp. 359–60, 362–63. As the Tennessee Supreme Court has explained

> Normally, where there is an affirmative act which affects the interest of another, there is a duty not to be negligent with respect to the doing of the act. On the other hand, where the negligence of the actor consists in a failure to act for the protection or assistance of another, there is normally no liability unless some relation between the

> actor and the other, or some antecedent action on the part of the actor, has created a duty to act for the other's protection or assistance.

Id. at pp. 360–61. Here, AA intentionally stored its patients – including Lee's – PII/PHI, under the assurance that the information would be kept safe and confidential. NAPA, *Privacy Policy*, https://www.napa.fi/about-napa/privacy-policy/#:~:text=We%20may%20collect%20personal%20data,our%20trusted%20third%2Dparty%20partners. (last accessed on Jan. 2, 2024).

Allowing providers to provide inadequate security and ultimately disclose patients' medical records to cyber criminals would frustrate the purpose of HIPAA and HITECH laws and discourage patients from being open and honest with their providers. "Therefore, medical information obtained from a confidential medical record retains its confidentiality unless and until the patient puts his or her medical history at issue in a civil action or waives the confidentiality." *Doe by Doe v. Brentwood Academy Inc.,* 578 S.W.3d 50 (Ct. App. Tenn. 2018) (citing *Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 558 (Tenn. 2013)). Plaintiff Lee never authorized the dissemination of content contained in his medical records. Plaintiff Lee testified that if he knew AA used inadequate cyber security measures – allowing cyber criminals to gain access to his PII/PHI – he would have sought treatment elsewhere. [Doc. 290, Pl.s' SOMF ¶ 43]. AA, as a healthcare provider, had a duty to preserve and safekeep the contents of Plaintiff Lee's medical records. AA's assertion that this claim fails because Plaintiff Lee's information "was exposed in other ways" does not diminish AA's obligations in regard to Plaintiff Lee's PII and PHI.

AA also argues Plaintiff Lee's negligence claim fails because he has not offered evidence to show physical harm and that the breach was "more probable than any other cause of his injuries." [Doc. 260, p. 23]. Plaintiff Lee, however, has made very specific references to the damages directly caused by AA's failure to safeguard his information, including emotional distress; an increase in spam calls, emails, and text messages; lost time; diminution in value of his PII and PHI; and increased risk of identity theft. [Doc. 290, Pl.s' SOMF ¶¶ 4, 11, 12, 14, 21]. Plaintiff's evidence of injuries resulting from the Data Breach are sufficient to create a genuine issue of material fact.

5. Mednax Plaintiffs Do Not Bring Negligence Claims Against AA.

AA's arguments regarding Plaintiffs Bean's, Clark's, B.W.'s, Cohen's, Rumley's, Jay's, and Larsen's negligence claims are moot and do not require resolution by the Court. As indicated above, only Plaintiffs Lee and Nielsen, the AA Plaintiffs, bring claims against AA.

IV. CONCLUSION

Plaintiffs have established sufficient evidence to create a genuine issue of material fact as to Article III standing and negligence. AA intentionally overlooks, omits, and misstates Plaintiffs' supporting evidence to avoid liability and its duties under the law. As such, Defendant's Motion for Summary Judgment must be denied.

Respectfully submitted,

_/s/ *William B. Federman*_______________

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2024 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

_/s/ *William B. Federman*________________
William B. Federman