ORAL ARGUMENT SCHEDULED FOR APRIL 10, 2017

Case No.: 16-7108

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHANTAL ATTIAS, Individually and on behalf of all others similarly situated, *et al.*,
Appellants,

v.

CAREFIRST, INC., *et al.*,
Appellees.

On Appeal from the United States District Court
For the District of Columbia, Civil
1:15-cv-882 (CRC)
Hon. Christopher R. Cooper

BRIEF OF APPELLEES

Robert D. Owen
EVERSHEDS SUTHERLAND (US) LLP
1114 Avenue of the Americas
The Grace Building, 40th Floor
New York, New York 10036
RobertOwen@eversheds-sutherland.com
(212) 389-5000 (phone)
(212) 389-5099 (facsimile)
Counsel for Appellees

Matthew O. Gatewood
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth St., NW, Suite 700
Washington, D.C. 20001
MatthewGatewood@eversheds-sutherland.com
(202) 383-0122 (phone)
(202) 637-3593 (facsimile)
Counsel for Appellees

February 8, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Circuit Rule 28(a)(1), counsel for Defendants-Appellees hereby certify that:

(A) Parties and Amici:

Except for the following, all parties, intervenors, and amici appearing in this court are listed in the Brief for Appellants:

Movant-Amicus Curiae for Appellants: Electronic Privacy Information Center

Movant-Amicus Curiae for Appellants: National Consumers League

(B) Rulings Under Review:

All references to the rulings at issue in this case appear in the Brief for Appellants.

(C) Related Cases.

This case has not been before this Court of Appeals or any other court. There are no related cases as defined by Circuit Court Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Defendants-Appellees CareFirst, Inc., Group Hospitalization and Medical Services, Inc., CareFirst of Maryland, Inc., and CareFirst BlueChoice, hereby certifies as follows:

Defendant-Appellee CareFirst, Inc., a private company, states that it is the parent corporation of CareFirst of Maryland, Inc., Group Hospitalization and Medical Services, Inc., and CareFirst BlueChoice, Inc. CareFirst, Inc. has no parent companies, and no publicly-held company has a 10% or greater ownership interest in CareFirst, Inc.

Defendant-Appellee CareFirst of Maryland, Inc. states that it is a wholly owned subsidiary of Care First, Inc., a private company. No publicly-held company has a 10% or greater ownership interest in CareFirst of Maryland, Inc.

Defendant-Appellee Group Hospitalization and Medical Services, Inc. states that it is a wholly owned subsidiary of CareFirst, Inc., a private company. No publicly-held company has a 10% or greater ownership interest in Group Hospitalization and Medical Services, Inc.

Defendant-Appellee CareFirst BlueChoice, Inc. states that it is a wholly owned subsidiary of CareFirst, Inc., a private company. No publicly-held company has a 10% or greater ownership interest in CareFirst BlueChoice, Inc.

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JURISDICTIONAL STATEMENT

Except for the standing issue noted herein, the district court had jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2). This Court has appellate jurisdiction over the district court's grant of dismissal pursuant to 28 U.S.C. § 1291.

The district court held that the Named Plaintiffs did not have Article III standing to pursue their claims against CareFirst. Based on the record before the district court, its conclusion was correct and should be affirmed.

COUNTERSTATEMENT OF ISSUES

1. Do Appellants lack Article III standing, as the district court concluded pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

2. In the alternative, do the Appellants assert any claims upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

SUMMARY OF THE ARGUMENT

The seven Appellants are individuals living in the District of Columbia, Maryland, or Virginia who enrolled in health insurance products provided by the Appellees (collectively "CareFirst"). For clarity, we refer to all seven Appellants collectively as the "Named Plaintiffs" and, where necessary, we distinguish Curt and Connie Tringler (the "Tringlers") from the other five individuals (the "Non-Tringlers"). No Named Plaintiff has Article III standing.

The district court properly framed the operative issue as follows:

> The question at issue here is whether the named Plaintiffs have demonstrated an 'injury in fact' that is concrete, particularized, and actual or imminent, *Lujan*, 504 U.S. at 560 (quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984)) (internal quotation marks omitted), and, if so, whether that injury is 'fairly traceable' to the CareFirst data breach, *id.* at 590 (alteration omitted) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S 26, 41 (1976)) (internal quotation marks omitted).

Joint Appendix (hereinafter "J.A.") 354-355. The Named Plaintiffs cannot demonstrate a concrete and particularized "injury in fact" that is "fairly traceable" to the CareFirst data breach. The district court agreed that the Named Plaintiffs lack standing, as did the two other federal courts to consider claims by other individuals alleging nearly identical harms from this same CareFirst data breach. *See Order* and *Mem. Op.* (Aug. 10, 2016) (hereinafter "*District Court Opinion*"), J.A. 350-362 (granting CareFirst's motion to dismiss and denying the Named

Plaintiffs' motion to strike); *see also Chambliss v. CareFirst, Inc.*, 189 F. Supp. 3d 564, 572-73 (D. Md. 2016) (dismissing similar complaint because plaintiffs could not allege Article III standing); Order in *Unchageri v. CareFirst of Maryland, Inc.*, No. 1:16-cv-1068-MMM-JEH, at *11-15 (C.D. Ill. Aug. 23, 2016), ECF No. 19 (finding putative class action plaintiff failed to assert actual injury and distinguishing case from *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015)).

The Non-Tringlers lack standing because they cannot articulate any cognizable injury in fact. First, they have not alleged that their identities have been compromised or misused in any way. Their theory of injury is based on an increased risk of harm but they cannot show that such risk of harm is certainly impending or has a substantial risk of occurring. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150-52 (2013) (reiterating standard for alleged future harms to confer standing). Given that almost three years have now passed since the CareFirst data breach and the Non-Tringlers can point to no actual injuries, their alleged future injuries are neither real nor immediate. Second, their alleged purchase of credit monitoring services does not confer standing. When alleged future injury is not certainly impending and does not have a substantial risk of occurring, prophylactic measures taken to prevent such future harm do not independently give rise to standing. *See, e.g., In re Sci. Applications Int'l Corp.*

("*SAIC*") *Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 28 (D.D.C. 2014) ("In sum, increased risk of harm alone does not constitute an injury in fact. Nor do measures taken to prevent a future, speculative harm.").

Even though the Tringlers plausibly allege an injury in fact, the record before the district court makes clear that their alleged injury is not fairly traceable to the CareFirst data breach. The Tringlers allege "tax-refund fraud", J.A. 13 at ¶ 57, but do not allege any facts as to the circumstances of the fraud. *See id.* The Tringlers allege only that it is "possible" that information used for the tax-refund fraud was stolen in the attack. J.A. 13-14 at ¶¶ 57-58. In fact, it is not possible that the information stolen in the breach was used to commit the Tringlers' alleged tax-refund fraud because that type of theft would have required the Tringlers' Social Security numbers. The Tringlers did not allege that their Social Security numbers were stolen in the breach and, in fact, no Named Plaintiffs' Social Security number was accessed or stolen. *See* Second Amended Complaint (the "Complaint"), J.A. 1-36; Decl. of Clayton Moore House, J.A. 167 at ¶ 11.[1]

[1] The district court rejected the Named Plaintiffs' attempt to add this allegation by way of their briefing on the motion to dismiss. J.A. 351 n.1 ("Although Plaintiffs assert in their opposition to the motion to dismiss that their social security numbers were stolen in the data breach, the Complaint neither makes that allegation explicitly nor contains any factual contentions that would support that conclusion."); *see also Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000) ("[A] complaint may not be amended by the briefs in opposition to a motion to dismiss"). In their appellate brief, the Named Plaintiffs claim that they did allege that "social security numbers were taken" but do not cite

This Court should affirm the district court's conclusion that subject-matter jurisdiction is lacking. Even if, however, the Named Plaintiffs have standing to bring their claims, all of their claims should be dismissed for failure to state claims upon which relief can be granted for myriad reasons explained herein. The district court did not have to address these alternative arguments once it found subject-matter jurisdiction lacking but these arguments are part of the record and were advanced before the district court. *See Carney v. The Am. Univ.*, 151 F.3d 1090, 1096 (D.C. Cir. 1998) (explaining the Court may affirm "the district court judgment on any basis supported by the record").

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any allegations in their Complaint for support. App. Br. at 2 n.2. This attempt to amend the Complaint on appeal should be rejected. *Henthorn v. Dep't of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994) (in reviewing dismissal of a complaint by the trial court, appellate court "will look only to the allegations made in [plaintiff's] actual complaint").

ARGUMENT

Data theft is an unfortunate and increasingly common occurrence in today's world, victimizing millions of Americans, countless companies and organizations of all types, and even the federal government. Fortunately, data loss does not always produce actual harm to its victims. Just as companies are learning how to harden their defenses against cyber theft, courts have had to sort out the claims of truly injured victims from those who launch class actions without having suffered real harm. The doctrine that plaintiffs must allege a cognizable injury in fact for a court to adjudicate their claims is longstanding and unchanged. *See, e.g.*, *McCabe v. Atchison, Topeka, & Santa Fe Ry. Co.*, 235 U.S. 151, 163-64 (1914). In the wake of a data breach, an individual who has had his or her data compromised must still articulate an injury in fact fairly traceable to the breach to clear the threshold of standing. In this case, the Named Plaintiffs cannot.

In 2014 an unknown thief (or thieves) stole electronic data from CareFirst. Nearly three years have elapsed since the theft, but the thief has not been apprehended or even identified. The Named Plaintiffs allege in their Complaint that their identities have been or could be compromised as a result of the theft, but do not allege actual injuries fairly traceable to the CareFirst data breach. The Named Plaintiffs also do not allege that the thief is or was in any way affiliated with CareFirst, yet through this litigation they seek to recover from CareFirst on

behalf of themselves and unidentified others. In short, they ask for money to rectify a harm that has not occurred and which they cannot identify.

I. The Court Does Not Have Subject Matter Jurisdiction Because the Named Plaintiffs Lack Article III Standing.

Article III of the Constitution limits the power of federal courts to the resolution of "Cases" and "Controversies." U.S. Const. art. III § 2. The requirement that a plaintiff establish standing to bring suit "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Every federal court plaintiff must therefore meet the "irreducible constitutional minimum" of Article III standing, which requires: (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury be fairly traceable to the challenged action; and (3) that the injury can be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560-61 (internal citations omitted); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). In a class action, each named plaintiff must allege that he or she has personally been injured. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong . . .").

To survive a motion to dismiss under Rule 12(b)(1) a plaintiff bears the burden of proving that the court has jurisdiction to hear its claims. *Lujan*, 504 U.S. at 561. Federal courts have an affirmative obligation to ensure that they have jurisdiction, and thus "the [P]laintiff's factual allegations in the complaint … will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (internal quotations omitted). Unlike a Rule 12(b)(6) motion, courts may also consider matters beyond the pleadings in resolving a Rule 12(b)(1) motion to dismiss, J.A. 352-354 (citing *SAIC*, 45 F. Supp. 3d at 23 (citing *Jerome Stevens Pharm. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005))), as was the case when the district court considered CareFirst's declaration confirming the specific data compromised in this data breach. *See* J.A. 165-168.

The Named Plaintiffs' allegations of injury can be grouped into three main categories: (1) increased risk of future harm (J.A. 5 at ¶¶ 17-18; J.A. 19 at ¶ 74; J.A. 26 at ¶ 109; J.A. 29 at ¶ 129; J.A. 32-33 at ¶ 152); (2) incurred expenses and time associated with mitigating the alleged future harm (*id.* ¶ 19); and (3) the Tringlers' tax-refund fraud (*id.* ¶ 20).[2] The Named Plaintiffs also contend on

[2] The Named Plaintiffs abandoned their arguments regarding the intrinsic value of their personal information and overpayment for services. *See U.S. ex rel. Totten v.*

appeal that alleged violations of certain statutory rights confer standing upon the two Named Plaintiffs from the District of Columbia.

A. The Allegations of Increased Risk of Future Harm Are Too Speculative To Support Article III Standing.

The Named Plaintiffs' core allegation is that because their data was compromised in the CareFirst data breach, they will suffer some non-descript harm in the future—*i.e.*, their identities will be compromised and harm will result. Five of the seven Named Plaintiffs, the Non-Tringlers, allege only this increased risk of future harm. *Clapper* recently provided the Supreme Court with an opportunity to clarify the threshold for when an alleged increased risk of future harm can be sufficient to confer Article III standing. The Court "repeated[] [its] reiterat[ion] that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis in original)). In a footnote, the Court recognized that there may be instances where an injury in fact is alleged if a "substantial risk" that the alleged harm will occur is present. *See id.* at 1150 n.5 (finding no "substantial risk" of harm when dependent on "attenuated chain of inferences necessary to find harm"). In clarifying this threshold, the Court found the Second Circuit's analysis of whether a future harm

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Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) (argument not made on appeal is deemed waived).

had an objectively reasonable likelihood of occurring was not the correct standard. *Id.* at 1147. Instead, any alleged future harm must be certainly impending or have a substantial risk of occurring to provide standing. *Id.* at 1147-48.

Clapper, albeit not a data breach case, concluded that the plaintiffs lacked standing because their theory of injury was "too speculative" and "relie[d] on a highly attenuated chain of possibilities." *Id.* at 1148. In *SAIC*, a district court of this Circuit applied *Clapper* in the context of a data breach and concluded that the *SAIC* plaintiffs who did not allege any actual misuse of data did not have a cognizable injury in fact because their injury theory relied on a series of assumptions predicated on the behavior of an unknown third party that stole their data. *In re SAIC*, 45 F. Supp. 3d at 19, 28; *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 40-42 (3d Cir. 2011). As the district court in the case at bar found, even setting aside the factual differences between the *SAIC* breach and the CareFirst breach, the Named Plaintiffs require the court "to assume, at a minimum, that the hackers have the ability to read and understand [the Named] Plaintiffs' personal information, the intent to 'commit future criminal acts by misusing the information,' and the ability to 'use such information to the detriment of [the Named Plaintiffs] by making unauthorized transactions in [their] names.'" *District Court Opinion*, J.A. 357-358 (quoting *Chambliss*, 189 F. Supp. 3d at 570) (other internal citations omitted).

Even though the data breach occurred nearly three years ago, the Non-Tringlers do not allege that any of their personal information compromised in the CareFirst data breach has been misused in any way.[3] The Non-Tringlers simply allege that because unknown third parties were able to access their personal information that they "now face years of constant surveillance of their financial and personal records, monitoring, and loss of rights." App. Br. at 18. The fact that the Non-Tringlers have experienced no actual misuse of their identities to date strongly suggests that their alleged future injuries are not certainly impending and do not have a substantial risk of occurring. *See Beck v. McDonald*, --- F.3d ---, No. 15-1395, 2016 WL 477781, at *8 (4th Cir. Feb. 6, 2017) ("Moreover, 'as the breaches fade further into the past,' the Plaintiffs' threatened injuries become more and more speculative.") (quoting *Chambliss*, 189 F. Supp. 3d at 570).

The Named Plaintiffs cannot rely on an increased risk of future harm to establish standing because (i) no harm has occurred in almost three years, and (ii)

[3] In their brief, the Named Plaintiffs contend that they "alleged theft and actual misuse of their personal information" and then cite to certain allegations in their Complaint. App. Br. at 18. But in doing so, the Non-Tringlers improperly conflate their claims with the claims of the Tringlers, who alleged that they suffered "tax-refund fraud" as a result of the data theft. The Tringlers' alleged injury in fact does not give the rest of the Named Plaintiffs a free pass through Article III's injury-in-fact requirement. The district court's separate analysis of the Tringlers versus the Non-Tringlers is exactly what the district court did in *SAIC*. *See In re SAIC*, 45 F. Supp. 3d at 24 (separately analyzing the standing of certain plaintiffs). The Named Plaintiffs acknowledge that *SAIC* followed this procedure and describe it as "important to note," *see* App. Br. at 9 n.3, but then ignore it as described above.

they cannot demonstrate a sufficiently substantial risk that any future harms will, in fact, ever occur. *See District Court Opinion*, J.A. 358-359 (citing cases that have agreed that the mere loss of data, without evidence of misuse of data, is insufficient to confer standing).

The cases that grant standing to plaintiffs following data breaches, specifically those on which the Named Plaintiffs principally rely, are readily distinguishable based on pivotal underlying facts. In these other cases, (1) the specific data that was stolen was of the type more likely to lead to actual identify theft; and/or (2) there was a record of actual misuse of that data since the breach. These facts are critical in data breach cases where courts find that plaintiffs clear the threshold of standing.

To illustrate, consider two recent decisions of the Seventh Circuit that found the plaintiffs had pled a substantial risk of future harm: *Remijas*, 794 F.3d at 694 , and *Lewert v. P.F. Chang's China Bistro, Inc.*, No. 14-3700, 2016 WL 1459226, at *3 (7th Cir. Apr. 14, 2016). In *Remijas*, hackers carried out a cyberattack on the defendant department store chain that resulted in "potential[] expos[ure]" of 350,000 credit and debit card numbers. 794 F.3d at 690. Within a few months, cards belonging to two of the four named plaintiffs and approximately 9,200 other store customers "were known to have been used fraudulently." *Id.* The Seventh Circuit found that two named plaintiffs alleged actual harm and the remaining

plaintiffs and putative class members had standing because of the type of data that was stolen, the already-sustained injuries to certain plaintiffs and class members, and the short period of time between the breach and incurred credit fraud. *Id.* at 692 (concluding there was a "concrete risk of harm"). Similarly, in *Lewert*, the plaintiffs alleged that their credit and debit card data was stolen by hackers from the defendant restaurant chain. 2016 WL 1459226, at *1. One of the two plaintiffs also alleged that he already had suffered fraudulent charges on his debit card that could be traced to the breach. *Id*. Again, the court focused on the type of data that was stolen, the ease with which that data could be used to commit fraud, and the actual fraud that had already occurred. *Id.* at *2-4 (plaintiffs "have alleged sufficient facts to support standing based on their present injuries"). The case at bar is different.

First, the hackers in *Remijas* and *Lewert* stole credit and debit card data, which could be (and was) used to carry out fraud and identity theft without additional information.[4] Here, however, the Named Plaintiffs do not allege that the

[4] Likewise, in *Galaria v. Nationwide Mut. Ins. Co.*, Nos. 15-3386/3387, 2016 WL 4728027, at *1 (6th Cir. Sept. 12, 2016), the stolen data included Social Security numbers. Furthermore, even if the Non-Tringlers had alleged an actual concrete injury, their injury was caused "at the hands of criminal third-party actors, and their complaints do not make the factual allegations necessary to fairly trace that injury to" CareFirst. *See, e.g.*, *Galaria*, 2016 WL 4728027, at *6 (Batchelder, J., dissenting). To find otherwise would produce an unfair result: holding CareFirst liable for failing to prevent crimes by third parties. *See id.* at *7 ("But *no one* prevented the data breach; this hardly means that the plaintiffs have standing to sue

information allegedly stolen (*e.g.*, names, addresses, and subscriber identification numbers) could be used to carry out fraud or identity theft *without* additional information (such as credit card or Social Security numbers) that the Named Plaintiffs do not allege was stolen.

Second, some of the *Remijas* and *Lewert* plaintiffs (and, in *Remijas*, thousands of others) already had experienced the exact type of harm that the remaining plaintiffs and putative class members alleged was likely to occur. That evidence established that the alleged future identity theft had a substantial risk of occurring and was certainly impending.[5] The Non-Tringlers cannot allege any

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the FBI or the [state] Attorney General for not thwarting the hackers' criminal activities.") (emphasis in original).

[5] The Named Plaintiffs' reliance on several Ninth Circuit cases, including *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), and lower court opinions applying *Krottner*, is misplaced. All are equally distinguishable. *See* App. Br. at 17-19; *id*. at 18 n.6. *Krottner*, which was decided pre-*Clapper*, and *Krottner*'s progeny, have been called into question by courts outside the Ninth Circuit, including by judges in this Circuit. *See, e.g.*, *In re SAIC*, 45 F. Supp. 3d at 28 ("Most cases that found standing in similar circumstances, however, were decided pre-*Clapper* or rely on pre-*Clapper* precedent and are, at best, thinly reasoned."). Even within the Ninth Circuit, there is disagreement among lower courts about *Krottner*'s continuing viability after *Clapper*. *See, e.g.*, *Antman v. Uber Techs., Inc.*, No. 3:15-cv-01175-LB, 2015 WL 6123054, at *11 (N.D. Cal. Oct. 19, 2015), ("Without a hack of information such as social security numbers, account numbers, or credit card numbers, there is no obvious, credible risk of identity theft that risks real, immediate injury."). Even under *Krottner*'s analysis, however, the Non-Tringlers would not allege a cognizable injury in fact because the *Krottner* plaintiffs could point to actual misuse of the data that had been stolen (which also included Social Security numbers). For example, one of the plaintiffs in *Krottner*

actual identity theft from the data that they allege was stolen in the CareFirst data breach.

The substantial risk that future identity theft will occur that was present in *Remijas*, *Lewert*, and other data breach cases where courts found standing is not present here. Notably, the U.S. District Court for the Central District of Illinois, which was required to apply the Seventh Circuit's reasoning in *Remijas* and *Lewert*, recently found the CareFirst data breach distinguishable and granted CareFirst's motion to dismiss a similar putative class action for lack of standing. *See Unchageri*, 1:16-cv-1068-MMM-JEH, at *11-15, ECF No. 19.

B. When Alleged Future Harm Is Not Certainly Impending, Expenses To Guard Against Such Harm Do Not Confer Standing.

The Named Plaintiffs assert that each of them "has suffered actual harm in the form of necessary mitigation costs to prevent future harm."[6] App. Br. at 6. Alleged costs incurred to prevent hypothetical future harm are entirely speculative and cannot alone create standing. *See In re SAIC*, 45 F. Supp. 3d at 24; *see also Clapper*, 133 S. Ct. at 1151 (holding that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future

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alleged "that his bank notified him . . . that someone had attempted to open a new account using his Social Security number." *Krottner*, 628 F.3d at 1141.

[6] According to the Complaint, only two of the Named Plaintiffs—Chantal Attias and Andreas Kotzur—actually alleged they purchased credit monitoring services. *See* J.A. 23 at ¶ 97.

harm that is not certainly impending") (internal citations omitted). As the district court explained, "because the increased risk of future identity theft or fraud is too speculative to confer standing, Plaintiffs cannot opt in to standing-conferring economic injury by purchasing protection from that future harm." J.A. 360; *see also Chambliss*, 189 F. Supp. 3d at 571 ("In the context of data breach litigation . . . the plaintiff must first show that the harm is 'certainly impending' before costs to mitigate against that risk will also be an injury in fact.") (internal citations omitted).

The Supreme Court has rejected this type of purported injury as a transparent attempt to manufacture standing based on a non-existent, future injury. *Clapper*, 133 S. Ct. at 1151 ("If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear."); *see also In re SAIC*, 45 F. Supp. 3d at 24-26; *Reilly*, 664 F.3d at 46; *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 8 (D.D.C. 2007). Only when a future harm is "certainly impending" can prophylactic measures to mitigate that harm confer standing. *See id.* at 1151. Again, the Named Plaintiffs' alleged future identity theft is not certainly impending because they did not allege any instances of misuse of the stolen data, and the type of data that was stolen cannot be used to inflict the harm they allege will occur.

On appeal, the Named Plaintiffs rely on *Galaria* and *Remijas* in characterizing their mitigation damages as "economic loss already sustained."[7] As explained above, however, those cases involved stolen data that specifically included the type of data most likely used to commit identity theft, including Social Security numbers (*Galaria*) and credit card numbers (*Remijas*). *Galaria*, 2016 WL 4728027, at *1; *Remijas*, 794 F.3d at 689-90. In *Remijas*, plaintiffs also alleged that their stolen data—and the data of thousands of putative class members—had already been misused. *Remijas*, 794 F.3d at 693. The Named Plaintiffs allege no such facts. The so-called "economic loss already sustained" by the Named Plaintiffs was not sustained in the face of certainly impending harm. The Named Plaintiffs' attempt to manufacture standing by spending money on a perceived and unrealistic threat of future harm is not sufficient for purposes of Article III standing.

[7] The Named Plaintiffs also cite this Court's decision in *Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430 (D.C. Cir. 1986). App. Br. 6-7. The cited footnote is nothing more than dicta in a case involving a pesticide manufacturer's challenge to the Environmental Protection Agency's interpretation of required procedures accompanying changes in labeling. *Ciba-Geigy Corp.*, 801 F.2d at 439 n.10. The issue on appeal was the ripeness of the challenge, not the manufacturer's standing to bring the challenge. *Id.* at 431.

C. The Tringlers' Allegation of Tax Refund Fraud Is Not Fairly Traceable to the CareFirst Data Breach.

Although the Tringlers allege tax-refund fraud that is plausibly a cognizable injury in fact, they cannot fairly trace that alleged injury to the CareFirst data breach. *See NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 81 (D.C. Cir. 2012) (quoting *Lujan*, 504 U.S. at 560-61) (emphasizing that a plaintiff's alleged injury must be "fairly traceable to the challenged action of the defendant"); *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 135 (D.C. Cir. 2006) (quoting *Simon*, 426 U.S. at 41-42) (explaining that the causal link will be weaker when dependent on the independent action of some third party not before the court). The Tringlers' alleged injury—in its entirety—is as follows:

> Since the data breach, the Tringlers have experienced tax-refund fraud and have still has [sic] not received their federal or state tax refund. The Tringlers have spent significant hours to prevent further fraud and in dealing with the ramifications of the data breach at issue in this case. The Tringlers were harmed by having their Sensitive Information compromised, suffered monetary damages, and face an ongoing, imminent threat of future additional harm from the data breach like all members of the proposed class.

J.A. 13 at ¶ 57. The Tringlers conceded in the Complaint that it was, at best, only "possible" that the stolen information from the attack was used to carry out tax-refund fraud. J.A. 4 at ¶ 14. The Tringlers did not connect, with factual allegations, their alleged tax-refund fraud with the attack on CareFirst, nor could

they without alleging that their Social Security numbers were stolen. As the district court also noted, the Tringlers "have not suggested, let alone demonstrated, how the CareFirst hackers could steal their identities without access to their Social Security or credit card numbers." *Id.* at J.A. 358 (citing *Antman*, 2015 WL 6123054, at *11); *see also Randolph*, 486 F. Supp. 2d at 8 (dismissing complaint where plaintiffs did not allege that the thief intended to access their specific information or that their information had actually been accessed since the theft, and where plaintiffs could therefore only allege "mere speculation that at some unspecified point in the indefinite future they will be the victims of identity theft").

The Tringlers may have experienced an issue with their tax refund, but given the specific information that the thieves accessed, it is implausible to conclude that their trouble resulted from this data breach. The Named Plaintiffs allege only that the thief stole customers' "names, addresses, birthdates, subscriber identification numbers, [and] telephone numbers." J.A. 4 at ¶ 14; *see also* J.A. 167 at ¶¶ 10-11. They fail to allege in the Complaint that their Social Security numbers, which would be necessary for this type of fraud, were compromised and stolen. *District Court Opinion*, J.A. 359 (citing *Furlow v. United States*, 55 F. Supp. 2d 360, 362-63 (D. Md. 1999) ("to receive an income tax exemption . . . , the taxpayer must include the social security number or taxpayer identification number of the claimed

individual on his returns").[8] As the district court concluded, "[a]lthough Plaintiffs assert in their opposition to the motion to dismiss that their social security numbers were stolen in the data breach, the Complaint neither makes that allegation explicitly nor contains any factual contentions that would support that conclusion." *Id*. at J.A. 351 n.1, 359.

To counter the Named Plaintiffs' assertions improperly made in their response to CareFirst's motion to dismiss that Social Security numbers were stolen, CareFirst attached a declaration detailing the information compromised in the data breach to its reply brief. *See* J.A. 165-168. Once again, the Named Plaintiffs state in their appellate brief before this Court that "the Named Plaintiffs did allege that social security numbers were lost." App. Br. at 21. This argument should be disregarded. The Named Plaintiffs failed to make this allegation in the

[8] Both the Department of Justice and the Internal Revenue Service have noted that a victim's Social Security number is critical to filing a fraudulent tax return. *See* U.S. Dep't of Justice, *Alert: Stolen Identity Refund Fraud*, https://www.justice.gov/tax/stolen-identity-refund-fraud (observing that "[i]dentities used in [tax refund] crimes may be stolen from anywhere . . . *everyone with a Social Security Number* is potentially vulnerable to having his or her identity stolen") (emphasis added); Internal Revenue Service, *Identity Theft a Major Concern on the IRS Annual "Dirty Dozen" List of Tax Scams to Avoid* (Jan. 26, 2015), http://www.irs.gov/uac/Newsroom/Identity-Theft-a-Major-Concern-on-the-IRS-Annual-Dirty-Dozen-List-of-Tax-Scams-to-Avoid ("Tax-related identity theft occurs when someone uses your stolen Social Security number to file a tax return claiming a fraudulent refund."); *see also Furlow v. United States*, 55 F. Supp. 2d 360, 362-63 (D. Md. 1999) ("[T]o receive an income tax exemption . . . , the taxpayer must include the social security number or taxpayer identification number of the claimed individual on his returns.").

Complaint, and even if the Named Plaintiffs had made such an allegation, CareFirst's declaration makes clear that the Named Plaintiffs' Social Security numbers were not compromised in the data breach. J.A. 167 ¶¶ 10-11. It is not plausible, or even possible, for the Tringlers' alleged injuries to have been caused as a result of the CareFirst data breach.

Without the theft of their Social Security numbers, the only plausible scenario is that the Tringlers were the unfortunate victims of a separate and unrelated incident of identity theft. The fact that no other individuals have alleged "tax-refund fraud" in the wake of the CareFirst data breach further supports that conclusion. *See In re SAIC*, 45 F. Supp. 3d at 32 (finding no causation in part by suggesting that it was not surprising that at least five people out of a group of 4.7 million happened to have experienced some form of fraudulent charges given that 3.3% of the population will experience some form of identity theft); *see also In re Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 WL 4759588, at *6 (N.D. Ill. Sept. 3, 2013) (dismissing complaint where plaintiff alleged fraudulent charges on her credit card but failed to allege facts that would make it "directly apparent that the fraudulent charge was in any way related to the security breach at Barnes & Noble"); *In re SuperValu, Inc.*, No. 14-MD-2586 ADM/TNL, 2016 WL 81792, at *5 (D. Minn. Jan. 7, 2016) (dismissing complaint despite "isolated single instance of an unauthorized charge" because it was not "fairly traceable to the Data

Breach" and was "not directly apparent that the fraud[] was in any way related to the security breach at [issue]").

D. The Named Plaintiffs Cannot Establish Standing Through the Alleged Violations of Their Statutory Rights.

The Named Plaintiffs' argument that an alleged violation of the D.C. Consumer Protection Procedures Act ("DCCPPA") on its own can confer standing is flawed for three reasons.[9] First, statutory rights cannot confer Article III standing on a plaintiff who does not otherwise have it. Second, this Court's post-*Spokeo* decision in *Hancock v. Urban Outfitters, Inc.* does not help the Named Plaintiffs clear the threshold of standing. Third, the specific arguments the Named Plaintiffs make now on appeal were not made to the district court and have been waived.

In *Spokeo*, the Supreme Court reiterated that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." 136 S. Ct. at 1547-48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)). The Court emphasized that an injury must be both concrete and particularized. *Id.* at 1545 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

[9] Although not stated in the Named Plaintiffs' brief, this argument can only be advanced by the two Named Plaintiffs who allegedly are residents of the District of Columbia: Chantal Attias and Andreas Kotzur.

at 1549; *see also District Court Opinion*, J.A. 361 ("While violation of a plaintiff's statutory rights is not irrelevant to standing, it is also not sufficient because it 'concern[s] particularization, not concreteness.'" (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016))). A concrete injury, according to *Spokeo*, "must be '*de facto*'; that is, it must actually exist." 136 S. Ct. at 1548.

Here, the Named Plaintiffs have not alleged concrete harm (for the reasons articulated in Sections I.A and I.B), and thus the bare allegation of a statutory violation does not help them clear the threshold required for standing.

The holding in *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039 (D.C. Cir. 2010), is not to the contrary. In *Shaw*, this Court held that a plaintiff who alleged a violation of the DCCPPA had standing, but only because that plaintiff *also* alleged an accompanying pecuniary harm resulting from the consumer transaction covered by the statute. *Shaw*, 605 F.3d at 1042. The Court declined to find standing, however, for those individuals—like the Named Plaintiffs here—who had alleged *only* a violation of the DCCPPA without any accompanying pecuniary harm. *Id.* at 1039-42.

In arguing for standing based on a statutory violation coupled with intangible harms, the Named Plaintiffs rely heavily on this Court's post-*Spokeo* decision in *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016). App. Br. at 14-15. Their reliance is misplaced. In *Hancock*, this Court applied and

construed *Spokeo* to require a concrete injury in addition to the particularized allegation of a statutory violation. *Hancock*, 830 F.3d at 514 ("*Spokeo* held that plaintiffs must have suffered an actual (or imminent) injury that is both particularized and 'concrete . . . even in the context of a statutory violation.'"). In dismissing the plaintiffs' claims with prejudice, the *Hancock* court gave examples, in dicta, of potential injuries that the plaintiffs had not alleged. But the Court did not definitively hold that any one of these potential harms or a combination of them would suffice to confer standing when coupled with an alleged statutory violation. *Id*. As the district court noted, its holding is completely consistent with *Hancock* and *Spokeo* based on the specific facts and circumstances alleged in this Complaint. *District Court Opinion*, J.A. 362 n.5.

Regardless, the Named Plaintiffs waived this argument when they did not assert it to the district court. *Bowyer v. District of Columbia*, 793 F.3d 49, 54 (D.C. Cir. 2015) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below") (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *Nat'l Rifle Ass'n of Am. v. Fed. Election Comm'n*, 854 F.2d 1330, 1337 (D.C. Cir. 1988) ("Having failed to raise the reopening argument as the basis for jurisdiction in the District Court, the NRA is not at liberty to raise it for the first time on appeal.").

For example, without any citation to the record, the Named Plaintiffs assert that they alleged an invasion of privacy, App. Br. at 14, yet their Complaint contains no such claim. J.A. 1-36. Before the district court, they argued that the alleged violations of statutory rights *alone* provided them with standing. J.A. 111-112. They now argue that their allegations of statutory violations coupled with "concrete" harms in the form of mitigation expenses, an increased risk of identity theft, and the previously unpled invasion of privacy provide them with standing. App. Br. at 10-16. To the extent the Named Plaintiffs may argue that these are simply new theories as opposed to new arguments, waiver still applies. *See, e.g.*, *Farrow v. Cahill*, 663 F.2d 201, 206 n.22 (D.C. Cir. 1980) ("[A] claimant ordinarily cannot expect to lose in the trial court on one theory but win on appeal under another." (quoting *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 850 n.15 (D.C. Cir. 1975))). In addition, the Named Plaintiffs concede that this is not a new theory of recovery based on the intervening decision in *Spokeo* given they argue that *Spokeo* "did not disturb long-standing law that statutory rights violations and tangible harm confer standing." App. Br. at 14.

II. Even if the Named Plaintiffs Have Standing, They Fail To State a Claim Upon Which Relief Can Be Granted.

In the event this Court finds that any Named Plaintiffs have standing, the Court should dismiss the case for the alternative reason that the Named Plaintiffs fail to state a claim upon which relief may be granted. Although the district court

did not need to reach CareFirst's Rule 12(b)(6) arguments, this Court can "affirm the dismissal of a complaint on different grounds than those relied upon by the district court." *Broudy v. Mather*, 460 F.3d 106, 116 (D.C. Cir. 2006) (upholding dismissal of complaint for failure to state a claim, an argument the lower court had not reached) (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 108, 111 (D.C. Cir. 2004)); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187-88 (D.C. Cir. 2006) (upholding dismissal of complaint for failure to state a claim, where lower court dismissed the complaint for lack of standing); *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("Although the district court erroneously dismissed the action pursuant to Rule 12(b)(1), we could nonetheless affirm the dismissal if dismissal were otherwise proper based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).").

A. The Non-Tringlers Cannot Assert Causes of Action Requiring Actual Damages or Loss.

Because the Non-Tringlers have alleged no actual damages or loss, they cannot bring the following claims given that actual damages constitute a required element of each claim.

- Breach of contract (Count I), *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009);

- Negligence (Count II), *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 708 (D.C. 2009) ("To maintain an action for negligence, a plaintiff must allege more than speculative harm from defendant's allegedly negligent conduct.");
- Violation of the D.C. Data Breach Notification Statute (Count IV), D.C. Code Ann. § 28-3853(a) (allowing recovery for "actual damages" and expressly excluding recovery for "dignitary damages, including pain and suffering");
- Violation of the Maryland Consumer Protection Act (Count V), *Citaramanis v. Hallowell*, 613 A.2d 964, 969 (Md. 1992) (requiring that "actual injury or loss be sustained by a consumer before recovery of damages is permitted in a private cause of action") (internal quotations omitted);
- Violation of the Virginia Consumer Protection Act (Count VI), *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 549 (E.D. Va. 2000) ("[S]ome loss as a result of the Virginia Consumer Protection Act violation is required.");
- Fraud (Count VII), *Dresser v. Sunderland Apartments Tenants Ass'n, Inc.*, 465 A.2d 835, 839 (D.C. 1983) (requiring a plaintiff to plead that the alleged fraud "resulted in provable damages"); and

- Constructive fraud (Count XI), *Dynacorp Ltd. v. Aramtel Ltd.*, 56 A.3d 631, 683 n.45 (Md. Ct. Spec. App. 2012) ("Constructive fraud, a type of fraud, requires proof of damages.").

Even if the Non-Tringlers had standing, they do not state claims on which relief can be granted under Counts I, II, IV, V, VI, VII, and XI.

B. The Tringlers Cannot Maintain Any Causes of Action Requiring Causation.

All claims alleged by the Tringlers that require pleading causation are fatally flawed. For example, their negligence-based claims (Counts II and VIII) require alleging that "the[ir] loss or injury proximately resulted from [CareFirst's] breach of their duty," which in turn requires allegations of "two elements: (1) cause in fact and (2) legally cognizable cause." *Wankel v. A&B Contractors, Inc.*, 732 A.2d 333, 348-49 (Md. Ct. Spec. App. 1999). So too does their breach of contract claim (Count I). *See Hoang v. Hewitt Ave. Assocs., LLC*, 936 A.2d 915, 934 (Md. Ct. Spec. App. 2007) ("In a breach of contract action, upon proof of liability, the non-breaching party may recover damages for [] the losses *proximately caused* by the breach . . . ") (emphasis added). Similarly, the Tringlers' fraud claim (Count VII) requires allegations that they "suffered compensable injury resulting from" the alleged fraudulent conduct. *Sass v. Andrew*, 832 A.2d 247, 260 (Md. Ct. Spec. App. 2003). By not pleading that their Social Security numbers were stolen in the

CareFirst data breach, the Tringlers fail to state claims upon which relief can be granted in Counts I, II, VII, and VIII.

C. The Complaint's Tort-Based Claims Fail as a Matter of Law.

1. The Economic Loss Rule Precludes Recovery in Tort.

The Named Plaintiffs allege that this dispute arose out of the contractual relationship that existed between them and CareFirst. J.A. 6-7 at ¶¶ 22-26; J.A. 18-19 at ¶¶ 64-75; J.A. 32 at ¶ 150. Nonetheless, they assert multiple tort-based claims (negligence, negligence *per se*, fraud, and constructive fraud), for which they seek damages arising from economic losses. The District of Columbia, Maryland, and Virginia apply the economic loss rule to preclude plaintiffs who suffer only pecuniary injury (as opposed to personal injury or property damage) as a result of the alleged conduct of another from recovering those losses in tort. *See Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 982, 986 (D.C. 2014)[10]; *Pulte Home Corp. v. Parex, Inc.*, 923 A.2d 971, 1002 (Md. Ct. Spec. App. 2007) ("Generally, plaintiffs cannot recover in tort for . . . purely economic losses. Such

[10] The "one limited exception" or "special relationship" exception to the economic loss rule in the District of Columbia does not apply here. *Aguilar*, 98 A.3d at 986. The special relationship exception exists only where there is an "independent duty of care" between the parties, stemming from a specific duty or obligation, such as a physician-patient relationship. *Id.* at 985. Unless an independent duty of care arises from the primary purpose of a contract, a contract cannot create that duty. *See Holmes v. Amerex Rent-a-Car*, 710 A.2d 846, 849-50 (D.C. 1998). The Named Plaintiffs do not suggest that the primary aim of their insurance policies was anything other than receiving health insurance. *See* J.A. 7 at ¶ 25.

losses are often the result of some breach of contract and ordinarily should be recovered in contract actions.") (internal quotation marks and citations omitted); *Filak v. George*, 594 S.E.2d 610, 613 (Va. 2004) ("[L]osses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts."). Accordingly, even if the Named Plaintiffs had standing, they cannot bring Counts II, VII, VIII, and XI.[11]

2. The Parties' Contractual Relationship Precludes the Unjust Enrichment Claim.

The insurance contracts between the Named Plaintiffs and CareFirst provide the exclusive avenue for any contract-based claims against CareFirst, which undermines the Complaint's unjust enrichment claim (Count IX). Unjust enrichment is an equitable remedy intended to allow courts to provide just results "in the absence of an actual contract." *4934, Inc. v. D.C. Dep't of Emp't Servs.*, 605 A.2d 50, 55 (D.C. 1992). The existence of an express contract between the parties precludes the unjust enrichment claim. *See, e.g.*, *Harrington v. Trotman*,

[11] The Complaint's claims for fraud, negligence, and negligence *per se* fail for the additional reason that they are precluded by the existence of the contractual relationship between the Named Plaintiffs and CareFirst. *See Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1089-90 (D.C. 2008) (holding that the plaintiff policyholder could not maintain fraud and negligent misrepresentation claims against the defendant insurer because the allegations in support of those claims "directly related to an obligation arising under the contract"); *see also Gebretsadike v. Travelers Home & Marine Ins. Co.*, 103 F. Supp. 3d 78, 84 (D.D.C. 2015) (dismissing tort claims where they "exist only because of [plaintiff's] insurance contract with" defendant).

983 A.2d 342, 347 (D.C. 2009) (claims for unjust enrichment fail as a matter of law "[u]nless there is a basis to set aside a contract as unenforceable"). Count IX fails as a matter of law.

D. CareFirst Is Exempt From Private Civil Liability Under the Maryland and Virginia Consumer Protection Acts.

Statutory exemptions for insurance companies preclude the Named Plaintiffs' claims under the Maryland and Virginia Consumer Protection Acts. The Maryland Consumer Protection Act expressly states that its provisions do not apply to "the professional services of . . . [an] insurance company." Md. Code Ann., Com. Law § 13-104(1). Similarly, the Virginia Consumer Protection Act states that "[n]othing in this chapter shall apply to . . . insurance companies regulated and supervised by the State Corporation Commission." *See* Va. Code Ann. § 59.1-199(D); *see also Harris v. USAA Cas. Ins. Co.*, 37 Va. Cir. 553, at *14 (Va. Cir. Ct. 1994) (finding that the Virginia Consumer Protection Act "does not offer plaintiffs a remedy" against defendant insurer due to the explicit statutory exemption).

The Named Plaintiffs allege that CareFirst violated these acts while acting in its capacity as an insurer.[12] *See, e.g.*, J.A. 6 at ¶ 23 ("Defendants are a network of

[12] Courts apply this exemption "even when the plaintiff has alleged the defendant acted in some way other than his professional capacity." *Puffinberger v. Commercion, LLC*, No. SAG-13-1237, 2014 WL 120596, at *9 (D. Md. Jan. 10,

for-profit health insurers which provide health insurance coverage to individuals in" Maryland and Virginia); *id*. J.A. 6-8 at ¶¶ 24-29; J.A. 24 at ¶ 102 (alleging that CareFirst "violated their Internet Privacy Policy and General Privacy Policy," which is part and parcel of the insurance policies Named Plaintiffs purchased from CareFirst). The Named Plaintiffs cannot maintain causes of action against CareFirst under the Maryland Consumer Protection Act (Count V) or the Virginia Consumer Protection Act (Count VI).

E. CareFirst Owed No Common Law Duties to the Named Plaintiffs.

The relationship between CareFirst as health insurer and the Named Plaintiffs as enrollees in health insurance products does not give rise to any common law duties. The Named Plaintiffs allege throughout the Complaint that CareFirst is a health insurer. *See, e.g.*, J.A. 6 at ¶ 23; J.A. 7 at ¶ 25, J.A. 19 at ¶ 77; J.A. 21 at ¶ 89. Only in the allegations set forth in support of their claim for "Breach of the Duty of Confidentiality" (Count X) do they allege that the CareFirst entities are "health care providers." J.A. 30-32 at ¶¶ 138-45. But CareFirst is not, and was not, a health care provider. *See, e.g., Johns Hopkins Hosp. v. CareFirst of Md.*, 327 F. Supp. 2d 577, 579 (D. Md. 2004) (recognizing that CareFirst is "a health insurer, whereby [the plaintiff hospital] agreed to render medical treatment and related services to eligible members and subscribers of CareFirst").

2014) (quotations omitted); *see also Lembach v. Bierman*, 528 F. App'x 297, 304 (4th Cir. 2013) ("Maryland courts have applied the exemption broadly.").

As an insurer, CareFirst does not owe a common law "duty of confidentiality" to the Named Plaintiffs. *See State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 97 (Va. 1988) ("The relationship of confidence and trust which exists between insurer and insured is not a fiduciary relationship."); *see also* Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries To Their Insureds*, 88 Ky. L.J. 1, at *6 (1999-2000) ("To routinely make insurers fiduciaries would preclude them from combating excessive or fraudulent claims, thus harming the insured public."). Even if the Named Plaintiffs had standing, none could bring Count X. *See M-Cam Inc. v. D'Agostino*, No. 3:05-cv-6, 2005 WL 2010171, at *2 (W.D. Va. Aug. 22, 2005) (there is "no common law duty of confidentiality in Virginia"); *Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 951 (D.C. 2003) ("The tort arises from a duty that attaches to nonpersonal relationships such as hospital-patient customarily understood to carry an obligation of confidence.") (internal quotations omitted); *Stephens v. Liberty Mut. Fire Ins. Co.*, 821 F. Supp. 1119, 1121 (D. Md. 1993) ("In the context of a dispute between an insurance carrier and its insured, the relationship between the parties does not warrant the imposition of tort duties."). The claim for constructive fraud (Count IX) is similarly flawed because CareFirst did not owe a separate legal duty to the Named Plaintiffs. *See, e.g., Doe v. Prudential Ins. Co. of Am.*, 860 F. Supp. 243, 251-52 (D. Md. 1993) (dismissing plaintiffs' claim for constructive fraud, finding that

insurance companies do not owe the same duties as a medical provider or physician).

F. The Named Plaintiffs Do Not Allege Fraud.

To state a claim for common law fraud (Count VII) in the District of Columbia, the Named Plaintiffs need to allege that CareFirst made: "(1) a false representation (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation." *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (citations omitted). The elements in Virginia and Maryland are essentially the same. *See Feeley v. Total Realty Mgmt.*, 660 F. Supp. 2d 700, 711 (E.D. Va. 2009); *Sass*, 832 A.2d at 260. Furthermore, to meet the heightened pleading requirement of Fed. R. Civ. P. 9(b), the Named Plaintiffs need to allege these elements with specificity. *See In re U.S. Office Prods. Sec. Litig.*, 326 F. Supp. 2d 68, 73 (D.D.C. 2004) ("Rule 9(b) requires that the pleader provide the 'who, what, when, where, and how' with respect to the circumstances of the fraud."); *see also Feeley*, 660 F. Supp. 2d at 712 (same); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D. Md. 2000) (same). The Named Plaintiffs do not meet Rule 9(b)'s heightened standard.

The Complaint describes CareFirst's allegedly fraudulent conduct in a single paragraph:

> Defendants made false representations of material facts to Plaintiffs and members of The Class in that

> Defendants proffered an Internet Privacy Policy and General Privacy Policy which indicated that information provided by Plaintiffs and members of The Class would be encrypted. Defendants further made false representations by claiming they would use various industry technologies to prevent unauthorized access of Plaintiffs' and members of The Class' (sic) personal information.

J.A. 27-28 at ¶ 118. This allegation does not suffice.

The Named Plaintiffs do not allege: (1) which CareFirst entity made representations; (2) the identity of the particular Named Plaintiffs to whom representations were made; (3) the specifics of what was said; (4) when the representations were made; (5) where the representations were made; or (6) how the misrepresentations were made. Any one of these numerous failures would be enough to doom the fraud claim. *In re U.S. Office Prods. Sec. Litig.*, 326 F. Supp. 2d at 73. Furthermore, the Named Plaintiffs do not make any specific factual allegations, as are needed, regarding CareFirst's knowledge of the falsity of their alleged statements, or that CareFirst acted with intent to deceive. *See* J.A. 28 at ¶¶ 119-120. General allegations are simply not enough. *See Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 73 (D.D.C. 2002) ("Conclusory allegations that a defendant's actions were fraudulent and deceptive are not sufficient to satisfy Rule 9(b)."). Count VII does not contain a cause of action on which relief may be granted.

G. HIPAA Does Not Provide a Private Right of Action.

The Named Plaintiffs' claims for breach of contract, negligence, violation of the D.C. Consumer Protection Act, and negligence *per se* were improperly founded on a theory that CareFirst violated the Health Insurance Portability and Accountability Act ("HIPAA"). J.A. 6 at ¶ 24; J.A. 9-10 at ¶¶ 40-45. In bringing these claims, the Named Plaintiffs improperly attempt to create private causes of action under a statute that expressly forbids them. Courts have uniformly recognized that HIPAA provides neither an express nor an implied private right of action. *See Johnson v. Quander*, 370 F. Supp. 2d 79, 99-100 (D.D.C. 2005) ("While only a handful of courts have examined whether a private right of action is implied under the HIPAA, each Court has rejected the position."); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 195 (D.D.C. 2011) (dismissing claim supported by allegations that defendant "breached its fiduciary duty, confidential relationship with Plaintiff, and invaded Plaintiff's privacy . . . in violation of HIPAA") (internal citation omitted); *Citizens Bank of Pa. v. Reimbursement Techs., Inc.*, 609 F. App'x 88, 93-94 (3d Cir. 2015) (dismissing plaintiff's negligence *per se* claim, holding that it "is clear that HIPAA was in no way intended to protect medical patients' banks from possible financial fraud"). Because HIPAA can only be enforced by the U.S. Department of Health and Human Services, Counts I, II, II, and VIII separately fail as attempted HIPAA private rights of action.

H. The Named Plaintiffs Do Not Plead a Violation of the D.C. Data Breach Notification Statute.

The Named Plaintiffs from the District of Columbia contend that CareFirst breached the D.C. Data Breach Notification Statute ("D.C. Statute") (Count IV) for failing to notify them of the data breach in the "most expedient time possible." J.A. 22-23 at ¶¶ 92-99; D.C. Code Ann. § 28-3852. But the requirements of the D.C. Statute were not triggered by the alleged breach because no "personal information," as that term is defined by the D.C. Statute, was stolen. The D.C. Statute requires that, in addition to an individual's name, number, or address, one of the following types of information must also be stolen to trigger the statute: (1) a social security number, (2) a driver's license number, (3) a credit card number, (4) "[a]ny other number or code or combination of numbers or codes, such as account number, security code, access code, or password, that allows access to or use of an individual's financial or credit account." D.C. Code Ann. § 28-3851(3)(A). The Named Plaintiffs did not allege that any of that information was stolen in the breach and thus the D.C. Statute was not triggered. Count IV fails to state a claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed for lack of subject-matter jurisdiction. Alternatively, the Court should uphold the dismissal of the Complaint on the grounds that it fails to state a claim upon which relief may be granted.

Dated: Washington, D.C.
February 8, 2017

/s/ Matthew O. Gatewood
Matthew O. Gatewood
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth St., N.W., Suite 700
Washington, D.C. 20001
MatthewGatewood@eversheds-sutherland.com
(202) 383-0122 (phone)
(202) 637-3593 (facsimile)

Robert D. Owen
EVERSHEDS SUTHERLAND (US) LLP
1114 Avenue of the Americas
The Grace Building, 40th Floor
New York, New York 10036
RobertOwen@eversheds-sutherland.com
(212) 389-5000 (phone)
(212) 389-5099 (facsimile)

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,322 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: Washington, D.C.
February 8, 2017

/s/ Matthew O. Gatewood
Matthew O. Gatewood

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2017, I electronically filed the foregoing Brief for Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Christopher T. Nace
PAULSON & NACE, PLLC
1615 New Hampshire Ave., NW
Washington, DC 20009
202-463-1999 – Telephone
202-223-6824 – Facsimile
ctnace@paulsonandnace.com

Jonathan B. Nace
Nidel & Nace, PLLC
5335 Wisconsin Ave., NW, Suite 440
Washington, DC 20015
202-478-9677 – Telephone
301-963-8135 – Facsimile
jon@nidellaw.com

Counsel for Plaintiffs-Appellants

/s/ Matthew O. Gatewood
Matthew O. Gatewood