NOT YET SCHEDULED FOR ORAL ARGUMENT

Case No.: 19-7020

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-00882-CRC
Hon. Christopher R. Cooper

BRIEF OF APPELLEES

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July 24, 2019

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

(B) Rulings Under Review:

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

(C) Related Cases:

All references to related cases appear in the Brief for Appellants.

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. states that is a not-for-profit, private holding company. It is the parent company of co-appellees CareFirst of Maryland, Inc. and Group Hospitalization and Medical Services, Inc. CareFirst, Inc. has no parent companies, and no publicly-held company has a 10% or greater ownership interest in CareFirst, Inc.

Defendant-Appellee Group Hospitalization and Medical Services, Inc. is a not-for-profit entity formed by an act of Congress. CareFirst, Inc. is the parent company of Group Hospitalization and Medical Services, Inc. No publicly-held company has a 10% or greater ownership interest in Group Hospitalization and Medical Services, Inc.

CareFirst of Maryland, Inc. is a not-for-profit Maryland corporation. CareFirst, Inc. is the parent company of CareFirst of Maryland, Inc. No publicly-held company has a 10% or greater ownership interest in CareFirst of Maryland, Inc.

CareFirst BlueChoice, Inc. is a for-profit District of Columbia corporation.

CareFirst Holdings, LLC is the sole member of CareFirst BlueChoice, Inc. No publicly-held company has a 10% or greater ownership interest in CareFirst BlueChoice, Inc.

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COUNTERSTATEMENT OF ISSUES

1. Should Appellants' claims be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state any claims upon which relief may be granted?

STATEMENT ON STATUTES, RULES, AND REGULATIONS

Appellees provide in the addendum to this brief the four statutes that form the basis for four of Plaintiffs' causes of action: Counts III (D.C. Consumer Protection Act), IV (D.C. Data Breach Notification Statute), V (Maryland Consumer Protection Act), and VI (Virginia Consumer Protection Act). The addendum to Appellants' brief did not include them.

SUMMARY OF THE ARGUMENT

In 2014 an unknown thief (or thieves) breached certain electronic data maintained by Appellees (collectively "CareFirst"). Once discovered, CareFirst informed any individuals who had personal information potentially accessed about the data breach. Some individuals who received this notification filed three putative class action lawsuits in U.S. District Courts in Maryland, the District of Columbia, and Illinois. All three District Courts separately held that the individuals lacked Article III standing and granted CareFirst's Rule 12(b)(1) motions to dismiss. The Maryland and Illinois decisions became final decisions,[1] but this Court reversed the U.S. District Court for the District of Columbia ("District Court") and concluded that the seven individuals who brought this action have "cleared the low bar to establish their standing at the pleading stage." *Attias v. CareFirst, Inc.*, 865 F.3d 620, 622, *cert. denied*, (D.C. Cir. 2017) [hereinafter *Attias I*].

When CareFirst originally briefed its Rule 12(b)(1) motion to dismiss, CareFirst raised alternative arguments for dismissal based on Rule 12(b)(6), but because the District Court believed it did not have subject matter jurisdiction it did not reach those alternative arguments. On appeal, this Court also declined to reach the Rule 12(b)(6) arguments and instead remanded the case to the District Court.

[1] *See Chambliss v. CareFirst, Inc.*, 189 F. Supp. 3d 564, 569–70 (D. Md. 2016); *Unchageri v. CareFirst of Maryland, Inc.*, No. 1:16-cv-1068, 2016 WL 8255012, at *6 (C.D. Ill. Aug. 23, 2016).

See id. at 630 (finding that "[i]t would thus be inappropriate for us to reach beyond the standing question"). Upon return to the District Court, CareFirst renewed its Rule 12(b)(6) arguments, specifically arguing that even though Plaintiffs have constitutional standing at this stage, they fail to allege viable causes of action under D.C. or state law.

Plaintiffs are individuals living in the District of Columbia (Andreas Kotzur and Chantal Attias), Maryland (Curt Tringler, Connie Tringler, and Lisa Huber), or Virginia (Richard Bailey and Latanya Bailey) who enrolled in health insurance products provided by CareFirst. Second Am. Compl. [hereinafter Compl.] ¶¶ 1–4, 25, Joint Appendix [hereinafter J.A.] 18, 22. They bring eleven causes of action arising under D.C., Maryland, or Virginia law. The claims are based in contract (breach of contract and unjust enrichment), tort (negligence, negligence *per se*, fraud, constructive fraud, and breach of the duty of confidentiality), and statutory law (D.C., Maryland, and Virginia consumer protection laws, and the D.C. Data Breach Notification Statute). Despite having constitutional standing, Plaintiffs fail to allege any viable causes of action.

After full briefing and oral argument, the District Court agreed almost entirely. The District Court dismissed all claims brought by Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur and all but two claims brought by Curt and Connie Tringler. *See Order and Mem. Op.* (Jan. 30, 2019)

[hereinafter *District Court Opinion*], J.A. 157. The two surviving claims are the Tringlers' claims for breach of contract and violation of the Maryland Consumer Protection Act.[2] The District Court stayed the Tringlers' non-dismissed claims until this appeal is resolved.[3]

In resolving CareFirst's Rule 12(b)(6) motion to dismiss, the District Court got it right. Notwithstanding this Court's finding of Article III standing, Plaintiffs must still allege that they suffered actual damages to plead the vast majority of their claims. They do not, and the District Court properly dismissed those claims. Other than the carved-out Tringlers' claims, the Complaint contains no allegations of

[2] The District Court concluded that the Tringlers sufficiently pleaded actual damages to support their causes of action based on the allegation of actual misuse of their compromised data. Specifically, the District Court found that "only the Tringlers—who . . . have alleged actual misuse in the form of tax-refund fraud—would be able to recover consequential damages like the money spent monitoring their credit." *District Court Opinion*, J.A. 136. The District Court additionally concluded that they were the only Plaintiffs to "actually allege that they have already experienced any kind of economic injury." *See id.* at J.A. 128.

[3] For purposes of clarification, when referring to "Plaintiffs" throughout the remainder of the brief, we refer only to those with claims on appeal. Specifically, that is all seven named Plaintiffs for the causes of action alleging negligence (Count II), fraud (Count VII), negligence *per se* (Count VIII), unjust enrichment (Count IX), and breach of the duty of confidentiality (Count X); Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur for the breach of contract cause of action (Count I); Chantal Attias and Andreas Kotzur for the D.C. statutory claims (Counts III and IV); solely Lisa Huber for the Maryland statutory claim (Count V); Mr. and Mrs. Bailey for the Virginia statutory claim (Count VI); and Ms. Huber and the Tringlers for constructive fraud (Count XI).

"actual damages" under applicable D.C. or state law. Plaintiffs try to avoid the consequences of their pleading failure by conflating two different legal analyses (whether a federal court plaintiff can overcome the constitutional jurisdictional hurdle to allege an injury-in-fact that is fairly traceable to defendant's conduct and potentially redressable by the court versus whether a plaintiff pleads viable causes of action upon which relief may be granted under the applicable law governing each specific cause of action).

The District Court separately dismissed Plaintiffs' tort claims because an independent duty for health insurers to safeguard their insureds' personal information apart from their insurance contract does not exist in D.C. Even if there were such a duty, Plaintiffs' tort claims fail because they articulate the same complained-of conduct that forms their breach of contract claim. That is, Plaintiffs have not alleged that CareFirst owes them an independent duty of care beyond the parties' contractual relationship. Furthermore, the economic loss rule precludes recovery in tort.

Plaintiffs' claim under the D.C. Consumer Protection Act ("DCCPA") fails because it also targets the same alleged conduct as their claim for breach of contract. Plaintiffs' unjust enrichment claim fails because they did not allege, in the alternative, that their contract with CareFirst may be unenforceable. Plaintiffs' fraud claims additionally fail for want of particularity under Rule 9(b) of the Federal Rules

of Civil Procedure. Finally, insofar as Plaintiffs attempt to premise their claims on alleged Health Insurance Portability and Accountability Act of 1996 ("HIPAA") violations, Plaintiffs cannot because HIPAA does not afford them with a private right of action. For these reasons, this Court should affirm the dismissal of Plaintiffs' claims.

ARGUMENT

I. Plaintiffs Must Allege Valid Causes of Action Despite Having Article III Standing.

Plaintiffs contend that because this Court found that they have Article III standing, Plaintiffs adequately plead actual damages for the nine causes of action that require an allegation of actual damages to proceed. App. Br. at 17 ("If the district court had given this Circuit's *Attias* opinion the controlling impact it has, it would have found that the *Attias* plaintiffs have sufficiently pled actual damages."). But meeting the federal court jurisdictional hurdle of Article III standing is entirely distinct from the requirement that a plaintiff must allege valid causes of action upon which relief may be granted pursuant to the applicable law that governs each cause of action. *See District Court Opinion*, J.A. 133–34 at n.8 ("Article III standing and actual damages are separate questions governed by federal and state law respectively."). Whether Plaintiffs allege valid causes of action is governed

exclusively by D.C. law for Counts I, II, III, IV, VII, VIII, IX, X, and XI;[4] Virginia law for Count VI; and Maryland law for Count V. Plaintiffs do not satisfy the requirement for pleading actual damages for these causes of action.

The District Court understood the distinction between constitutional standing and the requirement to plead each element of a cause of action. *Id.* at J.A. 124 (finding that "[Plaintiffs] must still plead a proper cause of action under the relevant D.C. or state law" despite having standing) (relying upon *Krottner v. Starbucks Corp.*, 406 F. App'x 129, 131 (9th Cir. 2010)); *see also Carlsen v. GameStop, Inc.*, 833 F.3d 903, 909 (8th Cir. 2016) (cautioning "not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action" because they are not concepts that are "coextensive") (quoting *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 960 (8th Cir. 2011)); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264–65 (2d Cir. 2006) (distinguishing injury-in-fact for standing from injury to sustain tort law cause of action by recognizing that the plaintiffs have suffered "[an] injur[y]-in-fact, irrespective of whether their injuries are sufficient to sustain any cause of action"); *In re Volkswagen "Clean Diesel" Mktg., Sales*

[4] Federal courts sitting in diversity jurisdiction apply the law of the jurisdiction in which it sits, here D.C., for those counts not based on a specific state's statutory law. *See Metz v. BAE Sys. Tech. Sol. & Servs. Inc.*, 774 F.3d 18, 21–22 (D.C. Cir. 2014) (recognizing that "[a] federal court sitting in diversity must apply the substantive law of the jurisdiction in which it sits"); *see also District Court Opinion*, J.A. 123 n.2 (noting parties' agreement that D.C. law applies to all but the state-specific statutory claims).

Practices & Prods. Liab. Litig., 349 F. Supp. 3d 881, 916 (N.D. Cal. 2018) (holding that "a plaintiff may suffer an Article III injury and yet fail to adequately plead damages for purposes of a particular cause of action"); *Razuki v. Caliber Home Loans, Inc.*, No. 17-cv-1718-LAB, 2018 WL 2761818, at *1 (S.D. Cal. June 8, 2018) (finding Article III standing, but finding plaintiff's allegations insufficient for actual damages under negligence claim) (applying *Krottner*, 406 F. App'x at 131); *Worix v. MedAssets, Inc.*, 857 F. Supp. 2d 699, 705 (N.D. Ill. 2012) (recognizing "distinct inquiries" between injury-in-fact under Article III and injury under state negligence law).

Plaintiffs do not grasp the distinction. *See* App. Br. at 17 (noting that "it is [the] law of the case that the Appellants ***do have standing to sue*** which includes a binding ruling that Appellants have damages which are redressable" and alleging that if the District Court had followed *Attias I*, "it would have found that the *Attias* plaintiffs have sufficiently pled actual damages").

This Court's ruling on standing to gain access to federal court is jurisdictional and does not address whether any Plaintiff has alleged a valid cause of action pursuant to applicable D.C., Maryland, or Virginia law. Likewise, this Court's finding as to redressability for purposes of the standing analysis only means that Plaintiffs' alleged injury-in-fact "creates the *potential* for [Plaintiffs] to be made whole by monetary damages." *Attias I*, 865 F.3d at 629 (emphasis added). It does

not mean that any Plaintiff has satisfied any individual cause of action's requirement to plead actual damages pursuant to applicable D.C., Maryland, or Virginia law. Plaintiffs have standing, but they still must assert actual damages for nine of their causes of action to proceed.

II. Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur Fail To Plead Actual Damages, Which Requires Dismissal of Nine of Plaintiffs' Eleven Causes of Action.

Nine of Plaintiffs' eleven causes of action require actual damages. Plaintiffs do not argue otherwise. Actual damages is a requisite element for the following causes of action:

Breach of Contract (Count I). D.C. law requires actual damages for a breach of contract claim. *Sloan v. Urban Title Servs., Inc.*, 689 F. Supp. 2d 123, 133 & n.7 (D.D.C. 2010) (D.C. law "require[s] proof of injury (*i.e.*, damages) as an element of claims for breach of contract") (citing *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 324–25 (D.C. 1999)). The mere possibility of harm that may occur in the future does not meet this standard. *Smith v. Henderson*, 982 F. Supp. 2d 32, 48 (D.D.C. 2013); *Sloan*, 689 F. Supp. 2d at 134–35 (finding future harm, without present injury, insufficient for a breach of contract claim under D.C. law). Although the actual amount of damage need not be proven precisely, Plaintiffs must establish "the fact of damage and a reasonable estimate." *Cahn v. Antioch Univ.*, 482 A.2d

120, 130 (D.C. 1984) (quoting *W.G. Cornell Co. of Wash., D.C. v. Ceramic Coating Co., Inc.*, 626 F.2d 990, 993 (D.C. Cir. 1980)).

Negligence (Count II) and Negligence *Per Se* (Count VIII). As with a breach of contract claim, D.C. law requires Plaintiffs to plead damages to assert a claim for negligence. "[A] plaintiff must allege more than speculative harm from defendant's allegedly negligent conduct" in order to sufficiently maintain a negligence action. *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 708 (D.C. 2009). An action for negligence *per se* likewise requires an "injury" or "harm suffered." *See Tolson v. The Hartford Fin. Servs. Grp., Inc.*, 278 F. Supp. 3d 27, 36 (D.D.C. 2017) (requiring plaintiff to prove "she was *injured*" for negligence *per se* action). Mere "threat[s] of future harm" or harm that has "not yet [been] realized" are inadequate. *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 573 (D.C. 2011) (quoting *Knight v. Furlow*, 553 A.2d 1232, 1235 (D.C. 1989)).

Fraud (Count VII) and Constructive Fraud (Count XI). D.C. law considers "provable damages" an "essential element[] of common law fraud." *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 860–61 (D.C. 1999) (citing *Dresser v. Sunderland Apartments Tenants Ass'n, Inc.*, 465 A.2d 835, 839 (D.C. 1983)); *see also Wetzel v. Capital City Real Estate, LLC*, 73 A.3d 1000, 1002–03 (D.C. 2013). Proof of damages is "crucial" in maintaining a claim for fraud. *See C & E Servs., Inc. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 257 (D.D.C. 2007) (citing *Kitt*, 742 A.2d at 861).

Claims for constructive fraud and actual fraud differ only in the requisite mental state associated with the alleged misrepresentations, but both require a plaintiff to plead actual damages. *See De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 185 (D.D.C. 2008) (relying upon *Nguyen v. Voorthuis Opticians, Inc.*, 478 F. Supp. 2d 56, 64 (D.D.C. 2007)).

D.C. Data Breach Notification Statute (Count IV). The D.C. Data Breach Notification Statute provides a cause of action for D.C. residents only if they have been "injured by a violation of this subchapter," and only to "recover actual damages . . . [which] shall not include dignitary damages, including pain and suffering." D.C. Code Ann. § 28-3853(a).[5]

[5] Plaintiffs also do not sufficiently allege that CareFirst failed to notify them in the "most expedient time possible and without unreasonable delay." D.C. Code. Ann. § 28-3852(a). Where Plaintiffs do provide minimal detail regarding the timing of notification, they do not sufficiently allege either how much time occurred before notification or why that timing was unreasonable. Specifically, Plaintiffs allege only that CareFirst discovered the breach sometime in April 2015, and that the notification of the breach took place on May 20, 2015. Compl. ¶¶ 35–36, J.A. 23–34. The majority of states that provide any specific timeline regarding breach notification provide that notice should occur within 45 days after the discovery of the breach. *See, e.g.*, Md. Code Ann. Com. Law § 14-3504 (providing notification must be no later than 45 days after the business concludes its investigation); N.M. Stat. Ann. § 57-12C-6 (providing notification must be no later than 45 days following the discovery of the security breach); Ohio Rev. Code Ann. § 1349.19 (same); R.I. Gen. Law, tit. 11-49.3.4 (same); Tenn. Code Ann. § 47-18-2107 (same); Vt. Stat. Ann. tit. 9 § 2435 (same); Wash. Rev. Code Ann. § 19.255.010 (same); Wis. Stat. Ann. § 134.98 (same).

Maryland and Virginia Consumer Protection Acts (Counts V and VI). Statutory claims under the Maryland and Virginia Consumer Protection Acts also require an allegation of actual damages. The Maryland Consumer Protection Act specifically requires Plaintiffs to "plead actual injury or harm," thereby requiring Plaintiffs to have sustained an identifiable loss. *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 280 (Md. 2007); *see also* Md. Code Ann., Com. Law § 13-408(a) (providing that "any person may bring an action to recover for *injury or loss sustained by him* as a result of a practice prohibited by this title") (emphasis added); *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 right of action"). The Virginia Consumer Protection Act likewise requires Plaintiffs to plead actual loss. *Polk v. Crown Auto, Inc.*, 228 F.3d 541, 543 (4th Cir. 2000) (citing Va. Code Ann. § 59.1-204(A)); *see also Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 549 (E.D. Va. 2000).

Breach of the Duty of Confidentiality (Count X). Plaintiffs' claim for breach of the duty of confidentiality is equivalent to a claim for breach of fiduciary duty. *See Democracy Partners v. Project Veritas Action Fund*, 285 F. Supp. 3d 109, 120 (D.D.C. 2018) (equating breach of fiduciary duty under D.C. law of breach of duty of confidentiality). An alleged "breach of a fiduciary [duty] is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby." *Day v. Avery*, 548

F.2d 1018, 1029 n.56 (D.C. Cir. 1976); *see also Headfirst Baseball LLC v. Elwood*, 239 F. Supp. 3d 7, 14 (D.D.C. 2017) (finding that a claim for breach of fiduciary duty under D.C. law "require[s] a showing of injury or damages").

Only the Tringlers plead actual damages in the form of tax refund fraud. Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur fail to plead actual damages. *See District Court Opinion*, J.A. 117 ("[P]laintiffs' alleged injuries . . . are largely insufficient to satisfy the 'actual damages' element of nine of their state-law causes of action."). For this reason alone, the Court should affirm the District Court's dismissal of Counts I, II, VII, VIII, X, and XI for Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur; Count IV for Chantal Attias and Andreas Kotzur; Count V for Lisa Huber; and Count VI for Richard and Latanya Bailey.

A. Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur Do Not Plead Actual Damages Under Relevant D.C. and State Law.

Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur's alleged "actual damages" include (i) substantial threat of misuse of their data to commit identity theft; (ii) loss of the benefit of the bargain of their health insurance contracts; (iii) mitigation costs spent on credit monitoring services in response to the potential misuse of their data; and (iv) emotional distress.

1. Substantial Threat of Misuse of Personal Information

Only the Tringlers allege actual misuse of their compromised data by asserting that they "*have experienced* tax-refund fraud" resulting from the data breach. Compl. ¶ 57, J.A. 28 (alleging actual fraud and delay in obtaining tax refund) (emphasis added).[6] The other Plaintiffs, now more than five years removed from the breach, do not allege any misuse. Instead, the other Plaintiffs allege only an increased risk of misuse of their personal information in the future based on what unknown potential identity thieves "*can*" or "*may*" do with it at some undetermined point in time. *Id.* at ¶¶ 49–51, 55, J.A. 26, 28 (emphasis added).

This Court has found that those allegations qualify as a substantial risk of identity theft for purposes of Article III standing, but that does not mean they qualify as actual damages under D.C. law. *See, e.g.*, *In re Volkswagen*, 349 F. Supp. 3d at 916 (recognizing that "a plaintiff may suffer an Article III injury and yet fail to adequately plead damages for purposes of a particular cause of action" because "certain causes of action may require a particular type of injury, such as economic damages, while Article III is less restrictive"). A federal court in D.C. sitting in diversity jurisdiction is tasked with "achiev[ing] the same outcome it believes would

[6] The District Court, in distinguishing the Tringlers' allegations of actual misuse and tax-refund fraud from the allegations of the other Plaintiffs, recognized that economic loss could qualify as actual damages where it was actually and sufficiently asserted in the Complaint. *District Court Opinion*, J.A. 118 (acknowledging that the Tringlers "have plausibly alleged actual misuse of personal information").

result if the District's highest court considered this case." *See Metz*, 774 F.3d at 21–22; *District Court Opinion*, J.A. 123. The District Court held that based on governing D.C. law, the D.C. Court of Appeals would find that allegations of a *future* threat of misuse of personal information are not sufficient to constitute actual damages under D.C. law. *District Court Opinion*, J.A. 129.

Plaintiffs argue that the District Court committed plain error by relying on *Randolph* for the proposition that allegations of future identity theft do not satisfy pleading obligations for actual damages.[7] App. Br. at 18–19 (alleging that "the district court continued its error by . . . rel[ying] on this standing opinion"). Plaintiffs maintain that *Randolph* was solely a standing case, and thus allege that the District Court's reliance on *Randolph* for purposes of CareFirst's Rule 12(b)(6) motion is misplaced. *Id.* at 18, 26 (referring to *Randolph* as a "decade-old" standing decision). Plaintiffs, however, selectively ignore *Randolph*'s recognition that "rather than an analysis of standing . . . the better approach toward resolving [the] motion to dismiss is to analyze whether the amended complaint succeeded in stating a claim." *See Randolph*, 973 A.2d at 707 (recognizing distinct standards between standing and

[7] The *Randolph* court also explained that it was not alone in its conclusion. Footnote nine of the *Randolph* court's opinion cites ten cases from other jurisdictions that held similarly. *See* 973 A.2d at 708 n.9.

D.C. or state law, and proceeding to analyze motion to dismiss under applicable D.C. law).[8]

The future risk of identity theft, without more, is insufficient under D.C. law to qualify as actual damages. *See id.* at 708–09 (declining to find "speculative harm" and "risk of identity theft" as adequate injuries).

2. Loss of Benefit of the Bargain

Plaintiffs also contend they allege that they overpaid for health insurance because CareFirst's services did not include data security protections for which they purportedly bargained. Compl. ¶¶ 25–26, J.A. 21 (alleging Plaintiffs "provided payment to Defendants for certain services . . . [and] Plaintiffs contracted for services that included a promise by Defendants to safeguard . . . their personal information"). Plaintiffs rely exclusively on general allegations of how the data breach "diminished [the] value" of CareFirst's services as provided under Plaintiffs' insurance policies, and that they "have been harmed and/or injured and will incur economic and non-economic damages" as a result of the data breach. *Id.* ¶¶ 73–74, JA. 34. Plaintiffs do not plead facts as to the specific ways in which they were allegedly deprived of the benefit of their bargain, or how any individual Plaintiff was deprived.

[8] Plaintiffs admitted at oral argument that their alleged future risk of identity theft and their mitigation argument would be insufficient to establish damages for purposes of a D.C. negligence claim based on the D.C. Court of Appeals's decision in *Randolph*. J.A. 99:2-11.

Without alleging how the services provided by CareFirst were below market value or otherwise sub-par or how Plaintiffs were actually damaged, Plaintiffs do not assert a claim for breach of contract under D.C. law. *See Henderson*, 982 F. Supp. 2d at 48 (holding that plaintiffs cannot assert a breach of contract claim if they cannot "describe how they were damaged"); *see also District Court Opinion*, J.A. 131 (declining to reach beyond fellow D.C. district court decisions rejecting loss of benefit of the bargain theory for standing "especially because the standard for alleging actual damages is generally higher than that for plausibly alleging an injury-in-fact").[9]

The District Court considered decisions relied upon by Plaintiffs from other jurisdictions in which benefit-of-the-bargain damages have qualified as actual damages. The District Court found these decisions to be non-controlling given they

[9] Plaintiffs allege error in the District Court's reliance on *In re Sci. Applications Int'l Corp.*, 45 F. Supp. 3d 14 (D.D.C. 2014) [hereinafter *SAIC*], and *Austin-Spearman v. AARP & AARP Servs. Inc.*, 119 F. Supp. 3d 1 (D.D.C. 2015). App. Br. at 16–17 (claiming that the District Court relied on cases "related to those very issues of standing, including *Austin-Spearman*, *SAIC*"). However, the District Court expressly acknowledged that *SAIC* and *Austin-Spearman* are Article III standing cases with standards separate and apart from state damages law. *District Court Opinion*, J.A. 128–29 (discussing *SAIC* and *Austin-Spearman* as cases addressing the benefit-of-the-bargain theory of damages "when considering 12(b)(1) motions to dismiss for lack of standing" and finding it to be "too indeterminate") (citations omitted). Rather than rely on *SAIC* and *Austin-Spearman* as binding authority as Plaintiffs suggest, the District Court reasoned that if these courts did not find this theory of harm to qualify for standing, then this theory would not qualify under the generally higher bar for pleading actual damages. *Id.* at J.A. 131.

were not decided under D.C. law. *See District Court Opinion*, J.A. 130–31. In any event, those cases' specific factual allegations are distinguishable from Plaintiffs' vague allegations. *See, e.g.*, *Carlsen*, 833 F.3d at 907, 909 (finding plaintiff's allegation of devaluation in magazine subscription due to $14.99/year magazine subscription with terms of service including privacy policy as sufficient for actual injury under Article III standing); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1130 (N.D. Cal. 2018) (finding that plaintiff who alleged costs of $19.95/year for defendant's premium email service and alleged that defendant's representations regarding security was part of the reason plaintiff used defendant's services and incurred yearly cost for services sufficiently pleaded benefit of the bargain losses). This Court should likewise rely upon authority applying D.C. law that requires Plaintiffs to "describe how they were damaged" in order to state a claim for breach of contract. *See Henderson*, 982 F. Supp. 2d at 48.

3. "Mitigation Costs"

Plaintiffs contend that they would need to "protect themselves" and spend money on identity theft protection and credit monitoring to combat future identity theft. Compl. ¶¶ 19, 56, J.A. 20 (alleging that Plaintiffs have or will have to spend time and money and "face years" of surveillance and monitoring). As a matter of D.C. law, prophylactic mitigation measures do not constitute actual damages. *Randolph*, 973 A.2d at 708 ("the time and expense of credit monitoring to combat

an increased risk of future identity theft is not, in itself, an injury the law [of negligence] is prepared to remedy") (alteration in original) (quoting *Shafran v. Harley-Davidson*, No. 07-cv-1365, 2008 WL 763177, at *3 (S.D.N.Y. Mar. 24, 2008)); *see also District Court Opinion*, J.A. 117.

Preventative measures involving time and expense to respond to a mere increased risk of future identity theft, while they may help a plaintiff meet the "low bar" for standing at the pleading stage, do not qualify as actual damages under D.C. law. *Randolph*, 973 A.2d at 708 (declining to find expenses and "security measures to guard against *possible misuse* of [plaintiffs'] data" as sufficient injury) (emphasis added); *see also Hendricks v. DSW Shoe Warehouse, Inc.*, 444 F. Supp. 2d 775, 783 (W.D. Mich. 2006) (rejecting "plaintiff's position that the purchase of credit monitoring constitutes either actual damages or a cognizable loss," which would have been "a novel legal theory of damages" for Michigan breach of contract claim, "based on a risk of injury at some indefinite time in the future"); *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1020–21 (D. Minn. 2006) (rejecting plaintiffs' contention "that the time and money they have spent monitoring their credit suffices to establish damages" in "anticipation of future injury that has not materialized" constitutes damages for plaintiffs' negligence and breach-of-contract claims).

At the crux of Plaintiffs' brief is this Court's decision in *U.S. OPM Data Security Breach Litigation*, No. 17-5217, 2019 WL 2552955 (D.C. Cir. June 21, 2019). Plaintiffs rely on *OPM* for the proposition that mitigation expenses in the face of a risk of future identity theft is sufficient to constitute actual damages. App. Br. at 33 (using Article III vernacular of "legally cognizable injury" in context of mitigation of future harm). Additionally, Plaintiffs label *OPM*, decided under the federal Privacy Act[10] and not D.C. law, as dispositive of the damages issue underlying their appeal because this Court said that "incurred out-of-pocket expenses are the paradigmatic example of 'actual damages' resulting from the violation of privacy protections." *In re U.S. OPM*, 2019 WL 2552955, at *13 (citing *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 298 (2012)). The factual allegations in Plaintiffs' Complaint do not resemble those that were before this Court in *OPM*.

Plaintiffs selectively rely on pieces of this Court's decision in *OPM*, which when examined within *OPM*'s full factual context, are distinguishable from Plaintiffs' allegations. In determining whether the cost of credit monitoring and other mitigation expenses could qualify as actual damages under the Privacy Act, *OPM* largely focused on detailed allegations of *actual misuse* of personal data. *See*

[10] Notably, the Privacy Act is a federal statute explicitly targeting federal agency violations of rules protecting the confidentiality of private information in agency records. *In re OPM*, 2019 WL 2552955, at *10 (citing *Tomasello v. Rubin*, 167 F.3d 612, 617–18 (D.C. Cir. 1999)).

id. at *13–15. This Court provided an enumerated list of expenses the plaintiffs incurred to combat *actual misuse that had already allegedly occurred*: (i) one plaintiff's legal fees to close a fraudulently opened account; (ii) one plaintiff's unauthorized charges on fraudulently accessed electricity account; (iii) nine plaintiffs who specifically purchased credit protection and/or credit repair services after learning of the breach, such as plaintiff Paul Daly who purchased credit monitoring services after a fraudulent tax return was filed in his name; (iv) seven plaintiffs who had fraudulent accounts opened and purchases made in their names, such as two plaintiffs who had several fraudulent credit card accounts opened and loans taken out in their names; (v) seven plaintiffs who had false tax returns filed in their names and experienced delays in receiving state and federal tax refunds; and (vi) one plaintiff who spent more than 100 hours resolving a fraudulent tax return and account. *Id.*

Reviewing the Consolidated Amended Complaint in *OPM* reveals that those plaintiffs went to great lengths to plead each individual named plaintiff's specific alleged injuries in separate paragraphs. Consol. Am. Compl. ¶¶ 13–50 [*OPM* Docket No. 63]. The allegations by Plaintiffs in this case come nowhere near the allegations this Court relied on in finding that actual damages were sufficiently asserted under the federal Privacy Act in *OPM* with respect to credit monitoring purchases. *See, e.g.*, *id.* at ¶¶ 21 (Plaintiff Paul Daly alleging fraudulent tax returns, spending "many

hours to resolve these tax fraud issues," paying $20.95/month in credit monitoring services, and refraining from online bill payments resulting in $30.95/month in fees); 25 (Plaintiff John Doe II alleging $329 in annual credit monitoring services and time to change bank accounts and to more frequently review credit reports and financial accounts); 28 (Plaintiff Kelly Flynn alleging lack of receipt of tax refunds, $10/month in credit monitoring services, $5,000 fraudulent loan, $1,400 fraudulent loan, and spending more than 50 hours to resolve tax fraud and close fraudulent accounts and loans); 39 (Plaintiff Ryan Lozar alleging many hours to resolve $1,000 fraudulent PayPal cash advance and $3,500 purchase in fraudulent account and paying $15 to lift credit freeze); and 41 (Plaintiff Charlene Oliver alleging many hours to resolve fraudulent activity on utility, debit card, and credit card accounts and spending $100/month in credit monitoring expenses).

Plaintiffs' reliance on the Seventh Circuit holding in *Dieffenbach* is similarly misplaced. App. Br. at 8. Plaintiffs misconstrue *Dieffenbach* as broadly allowing for expenses incurred in data breach cases to constitute actual damages. In that case, however, the Seventh Circuit found that credit-monitoring and mitigation services were cognizable injuries for the two named plaintiffs who also raised allegations of pre-existing, actual misuse of their personal information. *Dieffenbach v. Barnes &*

Noble, Inc., 887 F.3d 826, 828–29 (7th Cir. 2018).[11] *Dieffenbach* is thus inapplicable to the alleged damages raised by Plaintiffs.

Plaintiffs here have not alleged fraudulent, or even potentially fraudulent, charges on any accounts or credit cards. As a result, Plaintiffs have not had to incur any expenses to respond to alleged fraudulent charges like in *OPM* or *Dieffenbach*. Not even the Tringlers have alleged any affirmative act to protect themselves following their purported tax refund fraud. The only allegation that any specific Plaintiff spent any money on anything is a generic allegation in Paragraph 97, limited to Count IV (the D.C. Data Breach Notification Statute), that D.C. Plaintiffs Andreas Kotzur and Chantal Attias "have suffered actual damages in that they and members of the D.C. Class have purchased and will need to purchase credit monitoring and identity theft protection for life." J.A. 38, ¶ 97.

These generic allegations do not meet a federal complaint's general pleading standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that Rule 8 pleading

[11] The Seventh Circuit found that Heather Dieffenbach, one of the two named plaintiffs alleged sufficient injury under California's Customer Records Act and Unfair Competition Law because she spent time to sort out a fraudulent purchase made with her bank account and could not make purchases with her account for three days while her bank restored the fraudulently spent funds. *Id.* The Seventh Circuit likewise found that the other named plaintiff, Susan Winstead, alleged actual damages under the Illinois Consumer Fraud and Deceptive Business Practices Act because she purchased credit monitoring services at $17/month after her bank informed her of a potentially fraudulent charge on her credit card and deactivated her credit card for several days. *Id.* at 829–30.

requirements "demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusations"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (holding that a plaintiff's pleading obligations "require[] more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do"). They certainly do not meet the requirement for pleading "special damages," which is required for consequential or incidental damages. *See* Fed. R. Civ. P. 9(g); *Browning v. Clinton*, 292 F.3d 235, 245 (D.C. Cir. 2002).[12]

Plaintiffs "complain only of the cost of prophylactic, rather than responsive, measures" and thus fail to plead actual damages. *District Court Opinion*, J.A. 136.

4. Emotional Distress

For Counts II, V, VII, VIII, and XI, Plaintiffs also argue that their alleged emotional distress qualifies as actual damages. They do not. *See District Court Opinion*, J.A. 136 (finding that Plaintiffs are only left with allegations of pure emotional damages as their purported economic loss is unsupportable); *see also Hawkins v. Wash. Metro. Area Transit Auth.*, 311 F. Supp. 3d 94, 107–08 (D.D.C. 2018) (dismissing negligent infliction of emotional distress claim where plaintiffs failed to plead "serious and verifiable" emotional distress); *Hedgepeth v. Whitman*

[12] Plaintiffs admit that their alleged "mitigation costs" are consequential and incidental damages. *See* App. Br. at 11–12 (citing D.C. law regarding "incidental damages" and citing *Goldberg* case for elements of "consequential damages").

Walker Clinic, 22 A.3d 789, 795, 810–11 (D.C. 2011) (requiring plaintiffs with pure emotional distress claims to satisfy additional requirements under D.C. law).

To bring fraud and constructive fraud claims, Plaintiffs must put forth some showing of pecuniary loss or economic harm in order to seek recovery of their purportedly related economic damages. *Kitt*, 742 A.2d at 861. The Maryland Consumer Protection Act likewise requires some alleged actual injury to support claims for emotional damages. *Sager v. Hous. Comm'n of Anne Arundel Cty.*, 855 F. Supp. 2d 524, 548–49 (D. Md. 2012) (allowing for emotional distress damages "if there [is] at least a 'consequential' physical injury") (quoting *Hoffman v. Stamper*, 867 A.2d 276, 296 (Md. 2005)). Conclusory statements grounded in upset feelings or mental and emotional pain and suffering, as alleged by Plaintiffs, do not provide the requisite support on which Plaintiffs may base non-economic loss. *Id.* Further, Plaintiffs do not attempt to substantiate these allegations as they do not plead who among them suffered mental and emotional pain and suffering or that any such purported pain and suffering manifested itself in any physical symptoms. Compl. ¶¶ 38, 109, 122, 129, 152, J.A. 24, 41, 43–44, 47–48 (broad allegations of pain and suffering and non-economic harm).

Because Chantal Attias, Richard Bailey, Latanya Bailey, Lisa Huber, and Andreas Kotzur do not plead actual damages, the Court should affirm dismissal of Counts I, II, IV, V, VI, VII, VIII, X, and XI for these individuals.

III. Plaintiffs Cannot Bring Tort Claims.

None of the Plaintiffs, including the Tringlers, can bring any of their five tort claims (for negligence, negligence *per se*, fraud, constructive fraud, and breach of the duty of confidentiality). CareFirst owes Plaintiffs no independent duty that could give rise to a tort action under D.C. law. D.C. law does not recognize an independent duty for a health insurer to reasonably safeguard Plaintiffs' data separate and distinct from any insurance contract that exists between the parties. *See District Court Opinion*, J.A. 143 (explaining that the D.C. Court of Appeals "has not confronted th[e] question" of whether there is an independent duty to provide reasonable data security).[13]

Even if this Court were to impose such an independent duty, Plaintiffs' contractual relationship with CareFirst bars Plaintiffs' tort claims, as does the economic loss doctrine. In addition, Plaintiffs' claims alleging breach of a duty of confidentiality cannot be sustained as there is no fiduciary relationship between Plaintiffs and CareFirst, and Plaintiffs' fraud claims fail for lack of particularity required under Rule 9(b).

[13] D.C. law does recognize the tort of invasion of privacy, but it is an intentional tort. *Randolph*, 973 A.2d at 711 ("[I]n this jurisdiction, invasion of privacy is an intentional tort.") (citing *Heard v. Johnson*, 810 A.2d 871, 881 n.5 (D.C. 2002)). The allegations in the Complaint do not assert that CareFirst intentionally invaded Plaintiffs' privacy.

A. D.C. Law Does Not Recognize an Independent Duty Giving Rise to Potential Tort Liability Based on Plaintiffs' Allegations.

Plaintiffs recognize that CareFirst owes no independent tort duty to Plaintiffs under governing D.C. law. *See* App. Br. at 32 (asking this Court to recognize an independent duty). Facing dismissal of their claims, Plaintiffs request that this Court take it upon itself to create an independent duty that could give rise to tort liability for companies (beyond any contractual obligations arising from any contract) to reasonably safeguard personal information. *See* App. Br. at 32–45. That is a political issue, reflecting important policy considerations, and one on which the D.C. Attorney General is currently seeking to legislate. *See* Press Release, Office of the Att'y Gen. for the District of Columbia, AG Racine Introduces Legislation to Protect District Residents' Personal Data (Mar. 21, 2019), https://oag.dc.gov/release/ag-racine-introduces-legislation-protect-district (recommending additional protections for D.C. residents' personal information on belief that D.C.'s current data security law is insufficient).

Plaintiffs raise myriad policy arguments asserting why this Court should create an independent duty on health insurers to give rise to potential tort liability separate and apart from the parties' insurance contract. This task, including the weighing of purported societal costs and the pros and cons of increased regulation, is a political matter best considered by D.C.'s legislative function, not a federal court operating where D.C.'s own courts have not. *See, e.g.*, *Al-Tamimi v. Adelson*, 916

F.3d 1, 11 (D.C. Cir. 2019) (holding that "policy choices are to be made by the political branches and purely legal issues are to be decided by the courts"); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc) (declining to exercise jurisdiction under political question doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch") (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

Moreover, under D.C. law, heightened foreseeability is required to impose a duty on the defendant when the claimant's injury results from intervening criminal acts. *See Bd. of Tr. of Univ. of Dist. of Columbia v. DiSalvo*, 974 A.2d 868, 871 (D.C. 2009) ("[H]eightened foreseeability factors directly into the duty analysis because a defendant is only liable for the intervening criminal acts of another 'if the criminal act is so foreseeable that a duty arises to guard against it.'") (citation omitted). Importantly, CareFirst must have or should have been on prior notice as to the reasonable likelihood of an intervening criminal act, notwithstanding any relationship it has with Plaintiffs. *See id.* at 872 (holding that relationship among parties alone insufficient to meet heightened foreseeability standard); *see also id.* at 875 (holding that possibility to foresee criminal act insufficient under D.C. law,

"which require[s] a reasonable probability—and thereby constructive notice—that the intervening act will occur").

Plaintiffs rely on authority from jurisdictions *outside* D.C. to support their theory of an independent duty to safeguard personal information.[14] Setting aside that they are not controlling, these cases are each factually distinguishable. *See* App. Br. at 39–40; *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1327 (11th Cir. 2012) (finding plaintiffs' allegations that their sensitive information stored on stolen laptops was used to open fraudulent accounts were sufficient, but "doubt[ing] whether the [c]omplaint could have survived a motion to dismiss" with fewer facts); *McKenzie v. Allconnect, Inc.*, 369 F. Supp. 3d 810, 818 (E.D. Ky. 2019) (finding duty as between employer and employees); *In re Arby's Rest. Grp. Inc. Litig.*, No. 1:17-cv-0514-AT, 2018 WL 2128441, at *4–5 (N.D. Ga. Mar. 5, 2018) (applying Georgia law and finding facts sufficient to put defendant on notice of potential breach, including susceptibility of defendant's systems to hacking and prior breach experienced by defendant's parent company and former corporate affiliate); *Brush v. Miami Beach Healthcare Grp. Ltd.*, 238 F. Supp. 3d 1359, 1362, 1365 (S.D. Fla. 2017) (applying duty as to healthcare *provider*); *In re: The Home Depot, Inc.*,

[14] While Plaintiffs cite to several jurisdictions in support of creating an independent duty, some jurisdictions have declined and have dismissed data breach negligence claims accordingly. *See District Court Opinion*, J.A. 141, 147–48 (collecting cases that find no duty).

Customer Data Sec. Breach Litig., No. 1:14-MD-2583-TWT, 2016 WL 2897520, at *2–4 (N.D. Ga. May 18, 2016) (finding foreseeability when defendant received numerous warnings of data security risk, experienced a prior data breach, and was informed of risk by outside security consultant).

Plaintiffs continue to conflate this Court's decision on Article III standing with Plaintiffs' requirements to assert valid causes of action. Plaintiffs suggest that because this Court found that they have alleged an injury-in-fact "fairly traceable to CareFirst[,]" this Court "gives the impression" that CareFirst owes Plaintiffs an independent duty. *See* App. Br. at 37. Plaintiffs additionally maintain that "[w]orking backward" from the Court's holding regarding their alleged injury-in-fact, "such injury must have a cause – the breach of a duty owed." *Id.* at 36. These legal concepts are different and the requisite analysis applying them is entirely distinct, as discussed herein, *supra*, Part I.

The Court should decline from engaging in a legislative function and should decline Plaintiffs' invitation to create an independent duty that the D.C. Court of Appeals has not.

B. Even If This Court Were To Create and Impose An Independent Tort Duty, Plaintiffs' Contractual Relationship With CareFirst Bars Plaintiffs' Tort Claims.[15]

Under D.C. law, in order for a tort claimant to recover from the same conduct that also gives rise to a contract claim, "the tort must exist in its own right independent of the contract." *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1089 (D.C. 2008). D.C. courts have indicated a strong preference to keep tort and contract claims separate. *See id.* at 1087 (rejecting the plaintiff's request to "recognize a tort of bad faith by insurance companies in the handling of policy claims").

To bring tort-based claims for conduct arising out of a contractual relationship, a plaintiff must be able to point to "facts separable from the terms of the contract" and "a duty independent of that arising out of the contract itself, so that an action for breach of contract would reach *none of the damages suffered by tort*." *Id.* at 1089 (emphasis added). "The tort must stand as a tort even if the contractual

[15] The District Court did not reach the alternative bases asserted in CareFirst's motion to dismiss as to why Plaintiffs' tort claims fail once the District Court found that CareFirst does not have an independent duty to reasonably safeguard Plaintiffs' personal information. *See District Court Opinion*, J.A. 139 (acknowledging that it "starts and stops with the independent duty rule[,]" thereby declining to reach CareFirst's alternative arguments). Notwithstanding the foregoing and to preserve the arguments raised below, CareFirst provides this Court additional grounds as to why Plaintiffs' tort claims cannot go forward. *See also Broudy v. Mather*, 460 F.3d 106, 116 (D.C. Cir. 2006) (finding that this Court can "affirm the dismissal of a complaint on different grounds than those relied upon by the district court") (citation omitted).

relationship did not exist." *Id.*; *see also Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 322, 327 (D.D.C. Aug. 15, 2017) (dismissing fraud claim where it rested on "indistinct" allegations from the plaintiff's breach of contract claims); *Gebretsadike v. Travelers Home & Marine Ins. Co.*, 103 F. Supp. 3d 78, 84 (D.D.C. 2015) (dismissing tort claims "[b]ecause [plaintiff's] tort claims exist only because of his insurance contract with [defendant] and are therefore foreclosed by District of Columbia law"); *Plesha v. Ferguson*, 725 F. Supp. 2d 106, 113 (D.D.C. 2010) ("[Plaintiff's] fraud claim arises out of the same alleged conduct by Defendants . . . that provides the basis for his breach of contract claim. Therefore, his fraud claim cannot stand independent of his breach of contract claim . . . Therefore, [Plaintiff's] claim for fraud shall be dismissed.").

Plaintiffs' tort claims arise *entirely* from their contractual relationship with CareFirst. The conduct about which Plaintiffs complain in their tort claims is nearly identical to those set forth in their breach of contract claim. *See District Court Opinion*, J.A. 140. Plaintiffs specifically ground their tort claims in their insurance contract with CareFirst: "In its written services contract, Defendants promised Plaintiffs and the class members that Defendants only disclose health information when required to do so by federal or state law. Defendants further promised that it would protect Plaintiffs' Sensitive Information." *Id.* at J.A. 33, ¶ 66.

Because Plaintiffs' tort claims must exist independently from their contractual claims, Plaintiffs cannot recover in tort for breach of duties that simply restate CareFirst's alleged contractual duties. As the District Court explained, "Plaintiffs cannot have their cake (a contract that sets forth specific promises to safeguard information) and eat it too (a contract that provides only for the provision of health insurance)." *District Court Opinion*, J.A. 142.[16] But for the contractual relationship, CareFirst would not have had access to Plaintiffs' information. *Id.* at J.A. 141.

C. The Economic Loss Rule Precludes Plaintiffs' Tort Claims.

D.C. law also prevents tort claimants from recovering purely pecuniary injury. *See Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 982, 985–86 (D.C. 2014) ("[A] plaintiff who suffers only pecuniary injury as a result of the conduct of another cannot recover those losses in tort").

[16] When asked by the District Court at oral argument regarding Plaintiffs' support for their argument that CareFirst's Internet Privacy policy is outside the contract, Plaintiffs' counsel responded that CareFirst's Internet Privacy policy "is not part of your contract to cover my claim if I hurt my leg . . . ." J.A. 107:24-25. Plaintiffs' counsel further described the privacy policy as "a separate representation and separate conduct." *Id.* at J.A. 108:1-2. When further asked by the District Court how Plaintiffs reconcile their allegations as to the Internet Privacy Policy in their breach of contract claim, Plaintiffs' counsel maintained that "[i]t's broken promises in the four corners of the contract, and it's broken promises outside of the four corners of the contract." *Id.* at J.A. 109:23-25. As noted in the District Court's opinion, this response further suggests and reinforces that the insurance contract between Plaintiffs and CareFirst underlies Plaintiffs' contract and tort claims and that Plaintiffs "have not alleged an *independent* duty." *District Court Opinion*, J.A. 142 n.12.

Plaintiffs seek recovery only for alleged economic loss. Plaintiffs cannot circumvent the economic loss rule by asserting conclusory and vague allegations that they have suffered "pain and suffering." Such conclusory statements only serve as a nonconsequential label to Plaintiffs' largely economic loss pleaded throughout their Complaint. Compl. ¶¶ 38, 109, 122, 129, 152, J.A. 24, 41, 43–44, 47–48; *see, e.g.*, *Determan v. Johnson*, 613 N.W.2d 259, 261 (Iowa 2000) (concluding that the economic loss rule barred tort-based recovery for a poorly constructed house, even where plaintiff "sought to recover 'repair costs, loss of use, inconvenience, emotional distress, and mental pain and suffering'"); *Davis v. Wells Fargo Home Mortg.*, No. 34136–1–II, 2007 WL 2039077, at *6 (Wash. Ct. App. July 17, 2007) (holding that the economic loss rule barred negligence-based claims for emotional distress in a case concerning a mortgage contract "because the parties' relationship is governed by their mortgage contract . . . from which their emotional distress and negligence claims originate").

Plaintiffs fail to raise any facts related to their alleged pain and suffering or purported mental "aguish [sic]." *See* Compl. ¶ 38, J.A. 24 (alleging "economic and non-economic loss in the form of mental and emotional pain and suffering and aguish [sic]"). As explained above in Part II(A)(4), no individual Plaintiff has any individual allegation of how he or she suffered any emotional distress beyond the generic conclusory allegations in Paragraphs 38, 109, 122, 129, and 152 of the

Complaint. Allowing Plaintiffs to raise vague and unspecified allegations of pain and suffering would render the economic loss rule meaningless, and thus Plaintiffs' addition of conclusory phrases related to "pain and suffering," without more, is not sufficient to overcome this express limitation imposed on tort claimants under D.C. law. *See, e.g.*, *Aguilar*, 98 A.3d at 983 ("[w]here pure economic loss is at issue . . . the reach of legal liability is quite limited").

Although there is a limited "special relationship" exception to the economic loss rule, such exception is not applicable. *See id.* at 985 (acknowledging "special relationship" exception if "independent duty of care" between the parties). Relationships giving rise to this exception stem from a specific duty or obligation between the parties, such as that between a physician and patient. *See id.* In this case, Plaintiffs allege no more than a contractual relationship with CareFirst, including a purported obligation undertaken by CareFirst to secure Plaintiffs' personal information. *See* Compl. ¶ 25, J.A. 22 ("[Plaintiffs] provided payment to Defendants for certain services, including health insurance coverage, *part* of which was intended to pay administrative costs of securing their PII/PHI/Sensitive Information") (emphasis added); *District Court Opinion*, J.A. 151 ("Plaintiffs fail to plead anything to suggest that their relationship with CareFirst was anything more than the typical commercial relationship between insurer and insureds.").

The contract between Plaintiffs and CareFirst does not create the sort of special relationship sufficient to set aside the economic loss rule. *Aguilar*, 98 A.3d at 985–86; *see also Whitt v. Am. Pro. Constr., P.C.*, 157 A.3d 196, 205 (D.C. 2017) (finding special relationship in long-term, extensive construction contract that included written duty to protect plaintiff's business and where resulting harm was not "isolated and unexpected" and basing finding on defendant's legal obligation to look out for plaintiff's economic expectancies).[17]

D. D.C. Law Does Not Recognize the Insurer-Insured Relationship as a Fiduciary Relationship, Which Precludes Plaintiffs' Claim for Breach of a Duty of Confidentiality.

Under D.C. law, the relationship between an insurer and insured is a "contractual relationship" that does not create "a fiduciary duty beyond the terms of

[17] The District Court addressed and dismissed Plaintiffs' contention that an insurer has been held to have additional obligations beyond those in its contractual relationship with the insured. *See District Court Opinion*, J.A. 142 n.13 (distinguishing Plaintiffs' reliance on *Cent. Armature Works, Inc. v. Am. Motorists Ins. Co.*, 520 F. Supp. 283, 292 (D.D.C. 1980)). The *Central Armature Works* court found that "an insurer has additional obligations to its insured which subject it to more stringent standards of conduct than those normally imposed on parties to a contract." 520 F. Supp. at 292. This Court later found that the "bad faith tort is grounded on the covenant of good faith and fair dealing that is implicit in all contracts, [and] supplemented by the idea that insurance contracts have special characteristics that warrant heightened liability for breach of that covenant." *Messina v. Nationwide Mut. Ins. Co.*, 998 F.2d 2, 5 (D.C. Cir. 1993). The D.C. Court of Appeals has since held, in *Choharis*, that bad faith can be compensated within the contractual concepts and principles of good faith and fair dealing. 961 A.2d at 1087. As held by the District Court, *Choharis* properly precludes any separate tort that Plaintiffs may read to be available to them under *Central Armature Works* or *Messina*.

the [] insurance policy." *See Fogg v. Fidelity Nat'l Title Ins. Co.*, 89 A.3d 510, 513–14 (D.C. 2014) (dismissing plaintiff's claim for breach of the fiduciary duty of disclosure). As recognized by the District Court, a fiduciary relationship may be implied in special circumstances depending on the "nature of the relationship, the promises made, the types of services or advice given and the legitimate expectations of the parties." *Council on Am.-Islamic Rel. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 341 (D.D.C. 2011) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C. Cir. 1996)); *Church of Scientology Int'l v. Eli Lilly & Co.*, 848 F. Supp. 1018, 1028 (D.D.C. 1994). Fiduciary relationships may additionally exist if the parties extended their contractual relationship "to a relationship founded upon trust and confidence." *Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1, 6 (D.D.C. 2008) (citing *Church of Scientology*, 848 F. Supp. at 1028); *see also Ying Qing Lu v. Lezell*, 919 F. Supp. 2d 1, 6 (D.D.C. 2013) ("While fiduciary relationships can be difficult to define . . . '[o]ne characteristic that District of Columbia courts have traditionally looked for is a "special confidential relationship" that transcends an ordinary business transaction and requires each party to act with the interests of the other in mind.'") (citing *High v. McLean Fin. Corp.*, 659 F. Supp. 1561, 1568 (D.D.C. 1987)).

Plaintiffs do not allege any facts to suggest that they have a relationship with CareFirst beyond the typical commercial relationship between a health insurer and

its insureds. *District Court Opinion*, J.A. 151 ("Plaintiffs do not allege a relationship beyond that envisioned in every day interactions with a health insurance provider that would give rise to either a common law duty to safeguard private information or a fiduciary duty."). CareFirst's collection of Plaintiffs' personal information, without more, does not amount to the special circumstances envisioned by D.C. courts justifying an implied fiduciary relationship. *See, e.g.*, *Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 951 (D.C. 2003) (recognizing tort of breach of confidential relationship in hospital-patient context); *Vassiliades v. Garfinckel's*, 492 A.2d 580, 592 (D.C 1985) (emphasizing unique aspects of physician-patient relationships in applying duty of confidentiality, including D.C.'s physician licensing statute, the testimonial privilege granted to a physician's testimony about his or her patient, and the longstanding rules of medical ethics concerning confidentiality); *Randolph*, 973 A.2d at 709 n.11 (suggesting that such a cause of action is limited to the "disclosure of medial patient information").

Instead, Plaintiffs attempt to characterize their relationship with CareFirst as one of a doctor-patient in order to pigeonhole their way into this fiduciary relationship recognized under D.C. law. *Vassiliades*, 492 A.2d at 591–92. It is not until Paragraph 139 of their Complaint, for purposes of their breach of duty of confidentiality claim *only*, that Plaintiffs allege they have a fiduciary relationship with CareFirst because CareFirst is their "*health care provider[]*." Compl. ¶ 139–

144, J.A. 46 (emphasis added). Elsewhere and repeatedly throughout their Complaint, Plaintiffs allege that CareFirst is simply their health care insurer. *See id.* ¶¶ 23, 25, 60, 77, 89, 125, J.A. 21–22, 29–30, 34, 36, 43–44. Because there is no fiduciary relationship between CareFirst and Plaintiffs and because the D.C. courts have limited the breach of a duty of confidentiality to a fiduciary relationship, such as that between a doctor and patient, Plaintiffs' claim for breach of a duty of confidentiality fails.

E. Plaintiffs' DCCPA Claim Fails Because It Is Duplicative of Plaintiffs' Breach of Contract Claim.

Plaintiffs' claims arising under the DCCPA must exist independently from their breach of contract claim. *See Slinski v. Bank of Am., N.A.*, 981 F. Supp. 2d 19, 35 (D.D.C. 2013) (finding that alleged misrepresentations under the DCCPA that are "equivalen[t] to [a plaintiff's] breach of contract claim" do not support a claim under the DCCPA).

Plaintiffs attempt to establish an independent basis for their DCCPA claim by alleging that CareFirst violated its Internet Privacy Policy. *See* Compl. ¶¶ 86–88, J.A. 35–36. Plaintiffs contend that such violation constitutes an "unfair and unlawful trade practice" under the DCCPA. *See id.* ¶ 88, J.A. 36. In so doing, Plaintiffs attempt to distinguish *Slinski* factually by alleging that the source of the purported false and misleading representations is the Internet Privacy Policy, which Plaintiffs characterize as existing outside of the contract. *See* App. Br. at 31–32. Plaintiffs

are undercut by their own inconsistent allegations, however, as they plead elsewhere in their Complaint that, in reality, the Internet Privacy Policy and the insurance contract are one in the same. *Compare* Compl. ¶¶ 66–72, J.A. 33–34 (alleging Internet Privacy Policy forms part of the insurance contract for breach of contract claim), *with id.* ¶¶ 86–88, J.A. 35–36 (alleging Internet Privacy Policy outside four corners of the contract for DCCPA claim).

Plaintiffs additionally overstate the holding in *Jacobson* as categorically rejecting the proposition that a plaintiff cannot bring both a breach of contract and DCCPA claim. *See* App. Br. at 31 (characterizing *Jacobson* as "expressly reject[ing] the insinuation that a plaintiff may not have both a breach of contract and a D.C. CPPA claim"). The *Jacobson* court expressly acknowledged that the plaintiffs' alleged misrepresentations, some of which were "duplicative of [their] breach of contract claim[,]" and because those alleged misrepresentations "directly involve the terms and conditions of the Sales Contract, they are duplicative of Plaintiffs' breach of contract claim and cannot provide the basis for an actionable, independent tort." *Jacobson v. Hofgard*, 168 F. Supp. 3d 187, 199 (D.D.C. 2016). *Jacobson* merely reaffirmed that the misrepresentations alleged in a breach of contract claim cannot support a tort claim. *See id.* *Jacobson* sustained plaintiffs' tort claim because the plaintiffs alleged "misrepresentations that *precede* the formation of the contract and are alleged to have induced plaintiffs to contract." *Id.* (emphasis added).

Additionally, to the extent Plaintiffs are alleging that CareFirst misrepresented a material fact as an unlawful trade practice under the DCCPA by indicating that it would comply with the Internet Privacy Policy knowing that it would not, an intentional breach of contract is not punishable under the DCCPA. *District Court Opinion*, J.A. 154; *see Slinski*, 981 F. Supp. 2d at 36.

F. Plaintiffs Have Failed To Plead Their Fraud Claims with Particularity as Required Under Rule 9.

Rule 9(b) of the Federal Rules of Civil Procedure requires heightened specificity for Plaintiffs' fraud and constructive fraud claims. *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."). Plaintiffs fail to plead any of the elements for fraud with the requisite particularity. For example, Plaintiffs do not allege (1) which CareFirst entity made representations; (2) the identity of the particular 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 representations were made. Any one of these failures alone is enough to doom the fraud claims. *See id.*

Plaintiffs similarly fail to allege that they actually read or saw the policies in question. *See, e.g., In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2017 WL 3727318, at *27–28 (N.D. Cal. Aug. 30, 2017)

(dismissing plaintiffs' fraud claim because they had not sufficiently alleged that they had read the terms of service or privacy policy in question, even despite having had to "click through" the policy to create their accounts); *Fero v. Excellus Health Plan, Inc.*, 236 F. Supp. 3d 735, 771–73 (W.D.N.Y. 2017) (finding that plaintiffs did not sufficiently plead reliance because they "have failed to allege with any particularity that they actually read or saw the notices concerning privacy policies and practices").

Plaintiffs do not address this requirement in their brief or explain how they have satisfied it in their Complaint. Without satisfying the particularity requirements imposed under Rule 9(b), Plaintiffs' fraud claims cannot move forward.

IV. Plaintiffs Cannot Bring a Claim For Unjust Enrichment Because They Do Not Allege That Their Contract with CareFirst Is Unenforceable.

Under D.C. law, a valid contract precludes a claim for unjust enrichment. *Harrington v. Trotman*, 983 A.2d 342, 346 (D.C. 2009) (holding that superior court "fundamentally erred as a matter of law in finding unjust enrichment when there was a valid contract between the parties"). Plaintiffs do not viably plead unjust enrichment in the alternative because they do not allege that their contract with CareFirst is invalid and unenforceable. *See Compl.* ¶¶ 131–137, J.A. 45; *see also He Depu v. Yahoo! Inc.*, 306 F. Supp. 3d 181, 193–94 (D.D.C. 2018) (allowing parties to plead unjust enrichment in the alternative in certain situations, provided plaintiff alleges "that the contract is invalid and unenforceable"). As held by the District Court, "the devil is in the details" as to Plaintiffs' pleading requirements to

sustain a claim for unjust enrichment under such alternate theory. *See District Court Opinion*, J.A. 152–53. CareFirst's counsel's statements at oral argument regarding the validity of CareFirst's contract with Plaintiffs is irrelevant as to whether the Complaint adequately pleads unjust enrichment in the alternative. Because Plaintiffs have not set forth such alternative basis to support an unjust enrichment claim in their Complaint, Plaintiffs' breach of contract claim precludes their attempted claim for unjust enrichment.

V. Plaintiffs Cannot Create a HIPAA Private Right of Action.

HIPAA rules and regulations cannot form the basis for Plaintiffs' claims because HIPAA can be enforced only by the U.S. Department of Health and Human Services; HIPAA provides neither an express nor an implied private right of action. *See 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") (citation omitted); *Logan v. Dep't of Veterans Affairs*, 357 F. Supp. 2d 149, 155 (D.D.C. 2004) ("[T]he law specifically indicates that the Secretary of HHS shall pursue the action against an alleged offender, not a private individual.").

Plaintiffs' breach of contract (Count I), negligence (Count II), negligence per se (Count VIII), and DCCPA (Count III) claims, at least in part if not in toto, are

premised on HIPAA violations. *See, e.g.*, *Compl.* ¶ 69, J.A. 33 ("Defendants' promises to comply [with] all HIPAA standards and to make sure that Plaintiffs' health information and Sensitive Information was protected and specifically encrypted created an implied contract."); *id.* at ¶ 88(c), J.A. 36 ("Did not comply with federal law requirements for data security and protection, including HIPAA's requirements …"); *id.* at ¶ 128(a), J.A. 44 ("Defendants failed to comply with the duties imposed upon them by applicable federal laws in protecting Plaintiffs, The Class and the Subclasses by: Failing to comply with HIPAA and HITECH …"). Because HIPAA does not create a private right of action, Plaintiffs' claims, disguised as HIPAA violations, cannot be sustained.[18]

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the District Court dismissing the following claims for:

Andreas Kotzur: Counts I, II, III, IV, VII, VIII, IX, and X;

Chantal Attias: Counts I, II, III, IV, VII, VIII, IX, and X;

Richard Bailey: Counts I, II, VI, VII, VIII, IX, and X;

[18] The District Court held that Plaintiffs have since disavowed their reliance on alleged HIPAA violations for all of their claims except the negligence *per se* claim. *District Court Opinion*, J.A. 153 n.17. The District Court, however, did not reach CareFirst's HIPPA preemption argument because it dismissed Plaintiffs' negligence *per se* claim for failure to allege actual damages and alternatively because CareFirst owed Plaintiffs no independent tort duty. *See id.*; *see also id.* at J.A. 137, 151.

Latanya Bailey: Counts I, II, VI, VII, VIII, IX, and X;

Lisa Huber: Counts I, II, V, VII, VIII, IX, X, and XI;

Curt Tringler: Counts II, VII, VIII, IX, X, and XI; and

Connie Tringler: Counts II, VII, VIII, IX, X, and XI.

Dated: Washington, D.C.
July 24, 2019

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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 10,998 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.
July 24, 2019

/s/ Matthew O. Gatewood
Matthew O. Gatewood

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2019, 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.

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ADDENDUM TO BRIEF OF APPELLEES

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D.C. Code Ann. § 28-3852. Notification of Security Breach

(a) Any person or entity who conducts business in the District of Columbia, and who, in the course of such business, owns or licenses computerized or other electronic data that includes personal information, and who discovers a breach of the security of the system, shall promptly notify any District of Columbia resident whose personal information was included in the breach. The notification shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (d) of this section, and with any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

(b) Any person or entity who maintains, handles, or otherwise possesses computerized or other electronic data that includes personal information that the person or entity does not own shall notify the owner or licensee of the information of any breach of the security of the system in the most expedient time possible following discovery.

(c) If any person or entity is required by subsection (a) or (b) of this section to notify more than 1,000 persons of a breach of security pursuant to this subsection, the person shall also notify, without unreasonable delay, all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined by section 603(p) of the Fair Credit Reporting Act, approved October 26, 1970 (84 Stat. 1128; 15 U.S.C. § 1681a(p)), of the timing, distribution and content of the notices. Nothing in this subsection shall be construed to require the person to provide to the consumer reporting agency the names or other personal identifying information of breach notice recipients. This subsection shall not apply to a person or entity who is required to notify consumer reporting agencies of a breach pursuant to Title V of the Gramm-Leach-Bliley Act, approved November 12, 1999 (113 Stat. 1436; 15 U.S.C § 6801 et seq).

(d) The notification required by this section may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation but shall be made as soon as possible after the law enforcement agency determines that the notification will not compromise the investigation.

(e) Notwithstanding subsection (a) of this section, a person or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information and is otherwise consistent with the timing requirements of this subchapter shall be deemed to be in compliance with the

notification requirements of this section if the person or business provides notice, in accordance with its policies, reasonably calculated to give actual notice to persons to whom notice is otherwise required to be given under this subchapter. Notice under this section may be given by electronic mail if the person or entity's primary method of communication with the resident is by electronic means.

(f) A waiver of any provision of this subchapter shall be void and unenforceable.

(g) A person or entity who maintains procedures for a breach notification system under Title V of the Gramm-Leach -Bliley Act, approved November 12, 1999 (113 Stat. 1436; 15 U.S.C § 6801 et seq.) (“Act”), and provides notice in accordance with the Act, and any rules, regulations, guidance and guidelines thereto, to each affected resident in the event of a breach, shall be deemed to be in compliance with this section.

D.C. Code Ann. § 28-3904. Unfair or Deceptive Trade Practices

It shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby, including to:

(a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;

(b) represent that the person has a sponsorship, approval, status, affiliation, certification, or connection that the person does not have;

(c) represent that goods are original or new if in fact they are deteriorated, altered, reconditioned, reclaimed, or second hand, or have been used;

(d) represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;

(e) misrepresent as to a material fact which has a tendency to mislead;

(e-1) Represent that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(f) fail to state a material fact if such failure tends to mislead;

(f-1) Use innuendo or ambiguity as to a material fact, which has a tendency to mislead;

(g) disparage the goods, services, or business of another by false or misleading representations of material facts;

(h) advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered;

(i) advertise or offer goods or services without supplying reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition which has no tendency to mislead;

(j) make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or the price in comparison to price of competitors or one's own price at a past or future time;

(k) falsely state that services, replacements, or repairs are needed;

(l) falsely state the reasons for offering or supplying goods or services at sale or discount prices;

(m) harass or threaten a consumer with any act other than legal process, either by telephone, cards, letters, or any form of electronic or social media;

(n) cease work on, or return after ceasing work on, an electrical or mechanical apparatus, appliance, chattel or other goods, or merchandise, in other than the condition contracted for, or to impose a separate charge to reassemble or restore such an object to such a condition without notification of such charge prior to beginning work on or receiving such object;

(o) replace parts or components in an electrical or mechanical apparatus, appliance, chattel or other goods, or merchandise when such parts or components are not defective, unless requested by the consumer;

(p) falsely state or represent that repairs, alterations, modifications, or servicing have been made and receiving remuneration therefor when they have not been made;

(q) fail to supply to a consumer a copy of a sales or service contract, lease, promissory note, trust agreement, or other evidence of indebtedness which the consumer may execute;

(r) make or enforce unconscionable terms or provisions of sales or leases; in applying this subsection, consideration shall be given to the following, and other factors:

(1) knowledge by the person at the time credit sales are consummated that there was no reasonable probability of payment in full of the obligation by the consumer;

(2) knowledge by the person at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;

(3) gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in transactions by like buyers or lessees;

(4) that the person contracted for or received separate charges for insurance with respect to credit sales with the effect of making the sales, considered as a whole, unconscionable; and

(5) that the person has knowingly taken advantage of the inability of the consumer reasonably to protect his interests by reasons of age, physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement, or similar factors;

(s) pass off goods or services as those of another;

(t) use deceptive representations or designations of geographic origin in connection with goods or services;

(u) represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not;

(v) misrepresent the authority of a salesman, representative or agent to negotiate the final terms of a transaction;

(w) offer for sale or distribute any consumer product which is not in conformity with an applicable consumer product safety standard or has been ruled a banned hazardous product under the federal Consumer Product Safety Act (15 U.S.C. §§ 2051-83), without holding a certificate issued in accordance with section 14(a) of that Act to the effect that such consumer product conforms to all applicable consumer product safety rules (unless the certificate holder knows that such consumer product does not conform), or without relying in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject to a consumer product safety rule issued under that Act;

(x) sell consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, or by operation or requirement of federal law;

(y) violate any provision of the District of Columbia Consumer LayAway Plan Act (section 28-3818);

(z) violate any provision of the Rental Housing Locator Consumer Protection Act of 1979 (section 28-3819) or, if a rental housing locator, to refuse or fail to honor any obligation under a rental housing locator contract;

(z-1) violate any provision of Chapter 46 of this title;

(aa) violate any provision of sections 32-404, 32-405, 32-406, and 32-407;

(bb) refuse to provide the repairs, refunds, or replacement motor vehicles or fails to provide the disclosures of defects or damages required by the Automobile Consumer Protection Act of 1984;

(cc) violate any provision of the Real Property Credit Line Deed of Trust Act of 1987;

(dd) violate any provision of title 16 of the District of Columbia Municipal Regulations;

(ee) violate any provision of the Public Insurance Adjuster Act of 2002 [Chapter 16A of Title 31];

(ff) violate any provision of Chapter 33 of this title;

(gg) violate any provision of the Home Equity Protection Act of 2007 [Chapter 24A of Title 42];

(hh) fail to make a disclosure as required by § 26-1113(a-1);

(ii) violate any provision of Chapter 53 of this title; or

(jj) violate any agreement entered into pursuant to section 28-3909(c)(6).

Md. Code Ann., Com. Law § 14-3504.
Investigation, Notification of Breach of Security[1]

(a) In this section:

(1) "Breach of the security of a system" means the unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of the personal information maintained by a business; and

(2) "Breach of the security of a system" does not include the good faith acquisition of personal information by an employee or agent of a business for the purposes of the business, provided that the personal information is not used or subject to further unauthorized disclosure.

(b)(1) A business that owns or licenses computerized data that includes personal information of an individual residing in the State, when it discovers or is notified of a breach of the security of a system, shall conduct in good faith a reasonable and prompt investigation to determine the likelihood that personal information of the individual has been or will be misused as a result of the breach.

(2) If, after the investigation is concluded, the business determines that the breach of the security of the system creates a likelihood that personal information has been or will be misused, the business shall notify the individual of the breach.

(3) Except as provided in subsection (d) of this section, the notification required under paragraph (2) of this subsection shall be given as soon as reasonably practicable, but not later than 45 days after the business concludes the investigation required under paragraph (1) of this subsection.

(4) If after the investigation required under paragraph (1) of this subsection is concluded, the business determines that notification under paragraph (2) of this subsection is not required, the business shall maintain records that reflect its determination for 3 years after the determination is made.

[1] To be modified by H.D. 1154, 2019 Gen. Assemb., Reg. Sess. (Md. 2019) (effective Oct. 1, 2019).

(c)(1) A business that maintains computerized data that includes personal information of an individual residing in the State that the business does not own or license, when it discovers or is notified of a breach of the security of a system, shall notify, as soon as practicable, the owner or licensee of the personal information of the breach of the security of a system.

(2) Except as provided in subsection (d) of this section, the notification required under paragraph (1) of this subsection shall be given as soon as reasonably practicable, but not later than 45 days after the business discovers or is notified of the breach of the security of a system.

(3) A business that is required to notify an owner or licensee of personal information of a breach of the security of a system under paragraph (1) of this subsection shall share with the owner or licensee information relative to the breach.

(d)(1) The notification required under subsections (b) and (c) of this section may be delayed:

(i) If a law enforcement agency determines that the notification will impede a criminal investigation or jeopardize homeland or national security; or

(ii) To determine the scope of the breach of the security of a system, identify the individuals affected, or restore the integrity of the system.

(2) If notification is delayed under paragraph (1)(i) of this subsection, notification shall be given as soon as reasonably practicable, but not later than 30 days after the law enforcement agency determines that it will not impede a criminal investigation and will not jeopardize homeland or national security.

(e) The notification required under subsection (b) of this section may be given:

(1) By written notice sent to the most recent address of the individual in the records of the business;

(2) By electronic mail to the most recent electronic mail address of the individual in the records of the business, if:

(i) The individual has expressly consented to receive electronic notice; or

(ii) The business conducts its business primarily through Internet account transactions or the Internet;

(3) By telephonic notice, to the most recent telephone number of the individual in the records of the business; or

(4) By substitute notice as provided in subsection (f) of this section, if:

(i) The business demonstrates that the cost of providing notice would exceed $100,000 or that the affected class of individuals to be notified exceeds 175,000; or

(ii) The business does not have sufficient contact information to give notice in accordance with item (1), (2), or (3) of this subsection.

(f) Substitute notice under subsection (e)(4) of this section shall consist of:

(1) Electronically mailing the notice to an individual entitled to notification under subsection (b) of this section, if the business has an electronic mail address for the individual to be notified;

(2) Conspicuous posting of the notice on the Web site of the business, if the business maintains a Web site; and

(3) Notification to statewide media.

(g) Except as provided in subsection (i) of this section, the notification required under subsection (b) of this section shall include:

(1) To the extent possible, a description of the categories of information that were, or are reasonably believed to have been, acquired by an unauthorized person, including which of the elements of personal information were, or are reasonably believed to have been, acquired;

(2) Contact information for the business making the notification, including the business' address, telephone number, and toll-free telephone number if one is maintained;

(3) The toll-free telephone numbers and addresses for the major consumer reporting agencies; and

(4)(i) The toll-free telephone numbers, addresses, and Web site addresses for:

1. The Federal Trade Commission; and

2. The Office of the Attorney General; and

(ii) A statement that an individual can obtain information from these sources about steps the individual can take to avoid identity theft.

(h) Prior to giving the notification required under subsection (b) of this section and subject to subsection (d) of this section, a business shall provide notice of a breach of the security of a system to the Office of the Attorney General.

(i)(1) In the case of a breach of the security of a system involving personal information that permits access to an individual's e-mail account under § 14-3501(e)(1)(ii) of this subtitle and no other personal information under § 14-3501(e)(1)(i) of this subtitle, the business may comply with the notification requirement under subsection (b) of this section by providing the notification in electronic or other form that directs the individual whose personal information has been breached promptly to:

(i) Change the individual's password and security question or answer, as applicable; or

(ii) Take other steps appropriate to protect the e- mail account with the business and all other online accounts for which the individual uses the same user name or e-mail and password or security question or answer.

(2) Subject to paragraph (3) of this subsection, the notification provided under paragraph (1) of this subsection may be given to the individual by any method described in this section.

(3)(i) Except as provided in subparagraph (ii) of this paragraph, the notification provided under paragraph (1) of this subsection may not be given to the individual by sending notification by e-mail to the e-mail account affected by the breach.

(ii) The notification provided under paragraph (1) of this subsection may be given by a clear and conspicuous notice delivered to the individual online while the individual is connected to the affected e-mail account from an Internet Protocol address or online location from which the business knows the individual customarily accesses the account.

(j) A waiver of any provision of this section is contrary to public policy and is void and unenforceable.

(k) Compliance with this section does not relieve a business from a duty to comply with any other requirements of federal law relating to the protection and privacy of personal information.

Va. Code Ann. § 59.1-200. Prohibited Practices

A. The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;

3. Misrepresenting the affiliation, connection, or association of the supplier, or of the goods or services, with another;

4. Misrepresenting geographic origin in connection with goods or services;

5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;

6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;

7. Advertising or offering for sale goods that are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or that are "seconds," irregulars, imperfects, or "not first class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds," irregulars, imperfects or "not first class";

8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised.

In any action brought under this subdivision, the refusal by any person, or any employee, agent, or servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or amount of such goods or services for sale, and the supplier or offeror at the time of such advertisement or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;

9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts installed;

11. Misrepresenting by the use of any written or documentary material that appears to be an invoice or bill for merchandise or services previously ordered;

12. Notwithstanding any other provision of law, using in any manner the words "wholesale," "wholesaler," "factory," or "manufacturer" in the supplier's name, or to describe the nature of the supplier's business, unless the supplier is actually engaged primarily in selling at wholesale or in manufacturing the goods or services advertised or offered for sale;

13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of defense, or attempting to collect any liquidated damages or penalties under any clause, waiver, damages, or penalties that are void or unenforceable under any otherwise applicable laws of the Commonwealth, or under federal statutes or regulations;

13a. Failing to provide to a consumer, or failing to use or include in any written document or material provided to or executed by a consumer, in connection with a consumer transaction any statement, disclosure, notice, or other information however characterized when the supplier is required by 16 C.F.R. Part 433 to so provide, use, or include the statement, disclosure, notice, or other information in connection with the consumer transaction;

14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction;

15. Violating any provision of § 3.2-6512, 3.2-6513, or 3.2-6516, relating to the sale of certain animals by pet dealers which is described in such sections, is a violation of this chapter;

16. Failing to disclose all conditions, charges, or fees relating to:

a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be readily noticeable and readable by the person

obtaining the goods from the supplier. If the supplier does not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not less than 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase. In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser has requested the supplier to order merchandise of a specific or unusual size, color, or brand not ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in § 46.2-100;

b. A layaway agreement. Such disclosure shall be furnished to the consumer (i) in writing at the time of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches the agreement;

16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess of $5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of receiving overpayments. If the credit balance information is incorporated into statements of account furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

17. If a supplier enters into a written agreement with a consumer to resolve a dispute that arises in connection with a consumer transaction, failing to adhere to the terms and conditions of such an agreement;

18. Violating any provision of the Virginia Health Club Act, Chapter 24 (§ 59.1-294 et seq.);

19. Violating any provision of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et seq.);

20. Violating any provision of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et seq.);

21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ 59.1-207.17 et seq.);

22. Violating any provision of the Prizes and Gifts Act, Chapter 31 (§ 59.1-415 et seq.);

23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32 (§ 59.1-424 et seq.);

24. Violating any provision of § 54.1-1505;

25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter 17.6 (§ 59.1-207.34 et seq.);

26. Violating any provision of § 3.2-5627, relating to the pricing of merchandise;

27. Violating any provision of the Pay-Per-Call Services Act, Chapter 33 (§ 59.1-429 et seq.);

28. Violating any provision of the Extended Service Contract Act, Chapter 34 (§ 59.1-435 et seq.);

29. Violating any provision of the Virginia Membership Camping Act, Chapter 25 (§ 59.1-311 et seq.);

30. Violating any provision of the Comparison Price Advertising Act, Chapter 17.7 (§ 59.1-207.40 et seq.);

31. Violating any provision of the Virginia Travel Club Act, Chapter 36 (§ 59.1-445 et seq.);

32. Violating any provision of §§ 46.2-1231 and 46.2-1233.1;

33. Violating any provision of Chapter 40 (§ 54.1-4000 et seq.) of Title 54.1;

34. Violating any provision of Chapter 10.1 (§ 58.1-1031 et seq.) of Title 58.1;

35. Using the consumer's social security number as the consumer's account number with the supplier, if the consumer has requested in writing that the supplier use an alternate number not associated with the consumer's social security number;

36. Violating any provision of Chapter 18 (§ 6.2-1800 et seq.) of Title 6.2;

37. Violating any provision of § 8.01-40.2;

38. Violating any provision of Article 7 (§ 32.1-212 et seq.) of Chapter 6 of Title 32.1;

39. Violating any provision of Chapter 34.1 (§ 59.1-441.1 et seq.);

40. Violating any provision of Chapter 20 (§ 6.2-2000 et seq.) of Title 6.2;

41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46 (§ 59.1-525 et seq.);

42. Violating any provision of Chapter 47 (§ 59.1-530 et seq.);

43. Violating any provision of § 59.1-443.2;

44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.);

45. Violating any provision of Chapter 25 (§ 6.2-2500 et seq.) of Title 6.2;

46. Violating the provisions of clause (i) of subsection B of § 54.1-1115;

47. Violating any provision of § 18.2-239;

48. Violating any provision of Chapter 26 (§ 59.1-336 et seq.);

49. Selling, offering for sale, or manufacturing for sale a children's product the supplier knows or has reason to know was recalled by the U.S. Consumer Product Safety Commission. There is a rebuttable presumption that a supplier has reason to know a children's product was recalled if notice of the recall has been posted continuously at least 30 days before the sale, offer for sale, or manufacturing for sale on the website of the U.S. Consumer Product Safety Commission. This prohibition does not apply to children's products that are used, secondhand or “seconds”;

50. Violating any provision of Chapter 44.1 (§ 59.1-518.1 et seq.);

51. Violating any provision of Chapter 22 (§ 6.2-2200 et seq.) of Title 6.2;

52. Violating any provision of § 8.2-317.1;

53. Violating subsection A of § 9.1-149.1;

54. Selling, offering for sale, or using in the construction, remodeling, or repair of any residential dwelling in the Commonwealth, any drywall that the supplier knows or has reason to know is defective drywall. This subdivision shall not apply to the sale or offering for sale of any building or structure in which defective drywall has been permanently installed or affixed;

55. Engaging in fraudulent or improper or dishonest conduct as defined in § 54.1-1118 while engaged in a transaction that was initiated (i) during a declared state of emergency as defined in § 44-146.16 or (ii) to repair damage resulting from the event that prompted the declaration of a state of emergency, regardless of whether the supplier is licensed as a contractor in the Commonwealth pursuant to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1;

56. Violating any provision of Chapter 33.1 (§ 59.1-434.1 et seq.);

57. Violating any provision of § 18.2-178, 18.2-178.1, or 18.2-200.1;

58. Violating any provision of Chapter 17.8 (§ 59.1-207.45 et seq.);

59. Violating any provision of subsection E of § 32.1-126; and

60. Violating any provision of § 54.1-111 relating to the unlicensed practice of a profession licensed under Chapter 11 (§ 54.1-1100 et seq.) or Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1.

B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or lease solely by reason of the failure of such contract or lease to comply with any other law of the Commonwealth or any federal statute or regulation, to the extent such other law, statute, or regulation provides that a violation of such law, statute, or regulation shall not invalidate or make unenforceable such contract or lease.