IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BRADLEY S. SMITH and JULIE S. MCGEE, et al.,	)	
Plaintiff,	)	
	)	**CIVIL ACTION NO:**
vs.	)	
	)	**1:14-CV-00324**
TRIAD OF ALABAMA, LLC, d/b/a FLOWERS HOSPITAL;	)	
Defendant.	)	

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now the Defendant, Triad of Alabama, LLC d/b/a Flowers Hospital ("Flowers Hospital" or "Hospital") and files this brief in support of its Motion to Dismiss. Because Plaintiffs lack standing to bring the claims in this lawsuit, the Amended Complaint is due to be dismissed under Rule 12(b)(1). In the alternative, certain claims in the Amended Complaint are due to be dismissed under Rule 12(b)(6).

Introduction

In late February 2014, the Hospital learned that it was a victim of a data breach involving the theft of patient information by a Hospital employee. Upon information and belief, the patient data was taken from the restricted area in which the employee worked. Following the discovery of the data theft, the Hospital

immediately terminated the employee, and it also sent notification to patients alerting them about the data breach. The Hospital has taken a number of steps to maintain its commitment to patient security and to help protect the privacy of its patients, including those whose information may have been taken as part of the data breach, and has worked to remediate the breach. For example, the Hospital has offered, and continues to offer, free credit report monitoring for any Hospital patient whose personal information may have been part of the data taken by the former employee.

Plaintiffs have filed this lawsuit seeking to hold the Hospital responsible for the criminal conduct of its former employee. There is no question that the data breach perpetrated by the employee has affected individuals in the area, as well as the Hospital itself. Notwithstanding, the law requires certain allegations be pled in order for a civil lawsuit to be maintained against the Hospital in a case such as this. As set forth below, the Amended Complaint fails to make the necessary allegations that would allow this lawsuit to proceed. In particular, the Plaintiffs have failed to establish that they have standing to bring this lawsuit, and some counts of the Amended Complaint fail to state claims upon which relief can be granted. Either way, the Amended Complaint should be dismissed.

I. MOTION TO DISMISS UNDER RULE 12(b)(1)

A. Rule 12(b)(1) Standard of Law

"A motion to dismiss for lack of standing is one attacking the Court's subject matter jurisdiction, therefore it is appropriately brought under Fed. R. Civ. P. 12(b)(1))." *See Doe v. Pryor*, 344 F.3d 1282, 1284 (11th Cir. 2003). The plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A Fed. R. Civ. P. 12(b)(1) motion can be made in the way of a "facial attack" on the complaint" which "requires the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citations omitted). In the alternative, a defendant may raise a "factual attack" which challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings." *Id*. at 1529. Because a factual Rule 12(b)(1) motion challenges this Court's power to hear the claim, the Court must closely examine the plaintiff's factual allegations and "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* The Court is not limited to the four corners of the complaint, and it may consider materials outside of the pleadings to determine whether or not it has jurisdiction. "In short, no presumptive truthfulness attaches to plaintiff's

allegations, and the existence of disputed material facts will not preclude the trial court from evaluating itself the merits of jurisdictional claims." *Id.*

B. ARGUMENT

1. Because Plaintiffs' Amended Complaint fails to allege facts that would establish that the Plaintiffs have suffered an injury in fact that is fairly traceable to the Hospital, the Plaintiffs lack standing to bring the claims they assert.

Litigants must show that their claims present the Court with a case or controversy under the Constitution that meets the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To fulfill this requirement, a plaintiff must show the following: (1) it has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180-181 (2000). The named Plaintiffs in this case lack standing because they have not alleged facts demonstrating they suffered an injury in fact and because their perceived injury is not fairly traceable to the Hospital.

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. The Supreme Court has repeatedly determined that "allegations of possible future injury do not satisfy the

requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

The Supreme Court recently reiterated the need for a plaintiff to have an actual injury in order to have standing. In *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), the Supreme Court analyzed whether the plaintiffs had suffered an injury in fact where they alleged that *they would likely* be the targets for surveillance under the Foreign Intelligence Surveillance Act. *Id.* at 1145-46 (emphasis added). The Court held that the plaintiffs did not have an injury in fact because the threat of surveillance was too speculative. *Id.* at 1150. The court concluded that "a highly attenuated chain of possibilities does not satisfy the requirement that threatened injury must be certainly impending." *Id.* at 1148. The Court expressed its "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 1150.

The Court also determined that plaintiffs could not establish standing by showing that they incurred certain costs as a reasonable reaction to a risk of harm. *Id.* at 1151. The court reasoned that the plaintiffs' argument that they had standing because of precautionary expenses was "unavailing – because the harm respondents seek to avoid is not certainly impending. In other words, [plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.*

In the Amended Complaint, the named Plaintiffs allege that they have standing, in part, because of an increased likelihood that they *might* suffer identity theft in the future. Based on *Clapper*, 133 S. Ct. 1138, the increased likelihood that damage may arise from a third-party's actions in the future, does not confer standing. In fact, most federal courts that have analyzed data-breach cases, especially the post-*Clapper* cases, have determined that plaintiffs lacked standing because their claims of increased likelihood of harm were too attenuated. *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3rd Cir. 2011); *In re: Science Applications International (SAIC) Backup Tape Data Theft Litigation*, 2014 U.S. Dist. LEXIS 64125 (D. D.C. 2014); *Galaria v. Nationwide Mut. Ins. Co.*, 2014 U.S. Dist. LEXIS 23798 (S.D. Ohio 2014)(considering *Clapper* and decisions in other courts in determining that the increased risk of identity theft does not confer standing); *Strautins v. Trustwave Holdings, Inc.*, 2014 WL 960816 (N.D. Ill. 2014)(court dismissed data breach victim's complaint because of lack of standing. The court, in analyzing *Clapper*, determined that the data breach victim's increased risk of identity theft was speculative based "on a number of variables, such as whether their data was actually taken during the breach, whether it was subsequently sold or otherwise transferred, whether anyone who obtained the data attempted to use it, and whether or not they succeeded").

Admittedly, all of the named Plaintiffs except one in this case take their allegations a step further. Except for Sandra Hall, the named Plaintiffs allege that some unidentified person used their social security numbers to file fraudulent tax returns in their names.[1] The Amended Complaint also makes the blanket assertion that Plaintiffs have suffered "economic harm" as a result of the data breach perpetrated against the Hospital. Eleventh Circuit precedent requires actual economic damages in order to confer standing on an alleged identity theft victim, but looking at the allegations in the Complaint as a whole, Plaintiffs have failed to allege that they have actually been financially harmed by the data breach.[2]

In *Resnick v. Avmed, Inc.*, 693 F. 3d 1317 (11th Cir. 2012), five plaintiffs filed a class action arising out of a data breach involving the theft of an Avmed company laptop that contained personal information of patients. Two of the named plaintiffs suffered economic harm as a result of fraudulent accounts being opened in the plaintiffs' names. The fraudulent accounts were created twelve to fourteen months following the theft of the Avmed computer. The 11th Circuit determined that the plaintiffs had standing if they were the victims of identity theft and had suffered economic harm as a result of the data breach. *Id.* at 1323. The *Resnick* court commented that "had [the] Plaintiffs alleged fewer facts we doubt whether the

[1] Plaintiff Sandra Hall makes no allegations that her allegedly stolen identity was actually used, such as through the filing of a fraudulent tax return.

[2] In an apparent effort to vaguely plead cognizable damages, Plaintiffs have lumped together allegations of "economic harm" and "emotional distress." *See, e.g., Am. Compl. ¶23 ("Hall has suffered economic damages and other actual harm…including but not limited to emotional distress…").*

complaint would have survived a motion to dismiss." *Resnick*, 693 F.3d at 1327. However, because the Plaintiffs had pled "a logical connection" between the theft and the damages, and not simply "a mere temporal connection," the motion to dismiss was denied. *Id.* While the Amended Complaint in this case contains the conclusory statement that Plaintiffs suffered "economic harm," the Amended Complaint nonetheless fails to allege facts establishing an entitlement to relief and conferring standing on Plaintiffs. Unlike the plaintiffs in *Resnick*, who alleged that they suffered economic harm in conjunction with fraudulent accounts opened in their names, the Amended Complaint does not contain any allegations of how the named Plaintiffs were economically harmed by having their identities stolen—the "logical connection" of *Resnick* is absent. Plaintiffs allege that an unidentified third-party filed false tax returns in their names, but the Complaint does not allege that Plaintiffs have suffered any financial harm as a result of that criminal act. Plaintiffs do not allege that they have lost the ability to receive a tax refund otherwise owed, nor are there allegations that Plaintiffs have been subjected to some unreimbursed fees or expenses as a result of the third-party filing fraudulent tax returns in their names.[3] *See In re Barnes & Noble Pin Pad*, 2013 U.S. Dist. LEXIS 125730, 15 (N.D. Ill. 2013)(dismissed data breach lawsuit, determining that

[3] Based on information published by the IRS, it appears that a victim of a fraudulent tax return will still receive any tax refund that the individual is owed. However, it appears a refund could be delayed by an estimated 180 days while the IRS verifies the identity of the victim. http://www.irs.gov/uac/Newsroom/Tips-for-Taxpayers,-Victims-about-Identity-Theft-and-Tax-Returns-2014 (last visited July 7, 2014). While a delay in receiving a refund is unquestionably an annoyance, federal law requires a greater showing of harm in order to properly plead standing.

that the plaintiff had not suffered an actual injury because the plaintiff must have suffered an unreimbursed charge on her credit card. The mere delay in the use of the credit card does not confer standing).

The Amended Complaint is devoid of sufficient facts to show that they have suffered an injury-in-fact in order to confer standing. In light of *Clapper's* determination that credit reporting monitoring expense, which the Hospital has already offered to provide, and other prophylactic measures are not sufficient to confer standing on a data breach plaintiff, it is increasingly necessary for Plaintiffs in this case to allege sufficient facts to show that they have indeed suffered actual economic harm.[4] The conclusory allegations in the Amended Complaint fail to satisfy the requirement that they show an injury in fact in order to confer standing.

2. Plaintiffs fail to plead the remaining two elements required by *Resnick*.

Furthermore, the Complaint fails to contain sufficient allegations to show that Plaintiffs' alleged identity theft is "fairly traceable" to the data breach that occurred at Flowers Hospital. The Eleventh Circuit in *Resnick* analyzed whether the complaint contained sufficient allegations in order for the data breach victims to show causation. The court reasoned that an identity theft plaintiff must allege the following in order to sufficiently show a causal connection: (1) that the

[4] Nor do Plaintiffs' assertions that they have suffered emotional distress satisfy the harm needed to convey standing in this case. Plaintiffs are not entitled to emotion distress damages under Alabama law. *White Consol. Indus., Inc. v. Wilkerson*, 737 So. 2d 447 (Ala. 1999)(one can recover for emotional injury in a negligence action only under two circumstances: (1) where a plaintiff "sustains a physical injury as a result of a defendant's negligent conduct; or (2) where the plaintiff is in the zone of danger).

plaintiff gave the defendant his/her personal information; (2) the plaintiff's identity theft occurred in a time period after a data breach involving the defendant occurred; and (3) the plaintiff previously has not suffered any such incidents of identity theft. *Resnick*, 693 F.3d at 1326-27; citing *Stollenwerk v. Tri-West Health Care Alliance*, 254 FDR 664 (9th Cir. 2007). The *Resnick* Court required allegations concerning all three elements and admonished that "had plaintiffs alleged fewer facts, we doubt whether the Complaint could have survived a motion to dismiss." *Id.* at 1327.

The Amended Complaint in this case fails to allege facts establishing all three elements needed to show a casual connection. The Amended Complaint alleges that both named Plaintiffs were patients of the Hospital and entrusted the Hospital with their personal identification information during the "relevant time period," a term undefined in the Amended Complaint. This allegation satisfies the first element, but the Amended Complaint fails to contain sufficient allegations for the two remaining elements. Plaintiffs do not allege that they were actual identity theft victims after the alleged data breach occurred at the Hospital. The Amended Complaint states that the named plaintiffs "recently . . . learned" that their social security numbers were used to file fraudulent tax returns. *See, e.g.*, ¶ *12.* However, the Amended Complaint does not state when the fraudulent tax returns were allegedly filed, nor does the Amended Complaint allege that the fraudulent

tax returns were filed at a time following the data breach at the Hospital. The Amended Complaint fails to provide the required allegations under *Resnick* of a sequential connection of the use of Plaintiffs' stolen personal information after the data breach.

Further straining the argument for causation is the fact that the Complaint fails to allege that the named Plaintiffs have never been the victims of identity theft in the past. In analyzing the sufficiency in pleading causation, the Eleventh Circuit in *Resnick* noted that the complaint contained allegations that the plaintiffs were good stewards of protecting their own personal identification information and had never been victims of identity theft prior to the data breach involving the defendant. *Resnick*, 693 F.3d at 1327-28. In this case, the Amended Complaint is void of any allegations that Plaintiffs have taken measures to protect their own personal information, nor does the complaint allege that the named Plaintiffs have never been a victim of identity theft prior to the data breach at the Hospital, or since the data breach through a different mechanism. Without these allegations, the named Plaintiffs' theory of causation is nothing more than speculation and does not move the Amended Complaint "from the realm of the possible into the plausible." *Resnick*, 693 F.3d at 1327 ("allegations only of time and sequence are not enough to establish causation").

Because the allegations in the Amended Complaint fail to establish that Plaintiffs have suffered an injury in fact through economic damages and because the Amended Complaint also lacks the required elements to show that the Hospital's data breach was fairly traceable to the named Plaintiffs' identity theft, Plaintiffs have not sufficiently pled standing and the Amended Complaint, in its entirety, is due to be dismissed.

II. MOTION TO DISMISS UNDER RULE 12(b)(6)

A. RULE 12(b)(6) Standard of Law

On a motion to dismiss under *Rule 12(b)(6),* the complaint's factual allegations are assumed true and construed in the light most favorable to the plaintiff. *Hardy v. Regions Mortg., Inc.,* 449 F.3d. 1357, 1359 (11th Cir. 2006); *M.T.V. v. DeKalb County School Dist.,* 446 F.3d 1153, 1156 (11th Cir. 2006). "However, conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis,* 297 F.3d 1182, 1188 (11th Cir. 2002) (citations omitted).

"While a complaint…does not need detailed factual allegations,…a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (citations omitted);

accord *Financial Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007) (recognizing that "while notice pleading may not require that the pleader allege a specific fact to cover every element or allege with precision each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory") (citations and internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level…, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Twombly*, 127 S. Ct. at 1966-67.

A plaintiff's complaint will be dismissed if it does not contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

B. ARGUMENT

Even if the Court finds that Plaintiffs have alleged sufficient facts in the Amended Complaint to confer standing, some of Plaintiffs' various claims namely, Negligence per se, Invasion of Privacy, and Breach of Contract, are still due to be dismissed because they fail to state claims upon which relief can be granted.

1. Because a HIPAA violation does not create a private cause of action, nor provide a dispositive standard of care, Plaintiffs' negligence per se claim is due to be dismissed.

In Count IV of the Amended Complaint, Plaintiffs allege that that the Hospital is negligent as a matter of law because it violated "[f]ederal and state statutory law and applicable regulations." The Amended Complaint only references two statutes/regulations that were allegedly violated: (1) "HIPAA's Privacy Rule;" and (2) "the Alabama state law referenced above." As an initial matter, despite Count IV's statement concerning an Alabama state law "referenced above," the Amended Complaint does not cite any Alabama statute, regulation, or other legislative/regulatory enactment. A search of the Code of Alabama did not uncover any relevant statute that concerns the security of patient information, nor require the disclosure of a data breach. In fact, it appears that Alabama is one of but a handful of states in the entire country that has not enacted information privacy laws and/or data breach notification laws.[5] In the absence of such a statute, Plaintiffs' negligence per se claim based on an uncited and nonexistent Alabama law, fails to state a claim upon which relief can be granted. *See Prickett v. BAC Home Loans, et. al.*, 946 F. Supp. 2d 1236 (N.D. Ala. 2013)(dismissing the negligence per se claim when the complaint failed to identity the applicable statute or regulation that has been violated).

[5] http://www.natlawreview.com/article/new-mexico-moves-one-step-closer-to-becoming-47th-state-breach-notification-law (last visited July 7, 2014).

The Amended Complaint's reference to HIPAA's Privacy Rule still fails to specifically cite which federal statute/regulation serves as the basis of Plaintiffs' negligence per se claim. The "Privacy Rule" is not a single rule, but rather is the name which collectively references a number of federal regulations promulgated under HIPAA. *See generally* 45 C.F.R. §160, *et. seq.* & 45 C.F.R. §164 *et. seq.* The regulations taken together govern the gathering and disclosure of healthcare information and form the "Privacy Rule." *Id.; Steinberg, et. al. v. CVS Caremark Corporation*, 899 F. Supp. 2d 331 (E.D. Pa. 2012).

It appears that Plaintiffs are alleging that the Hospital violated HIPAA's Privacy Rule by failing to safeguard and protect Plaintiffs' personal information from the theft perpetrated by the Hospital's former employee. Flowers Hospital vehemently denies that it has violated HIPAA, but even assuming a violation occurred, a violation of HIPAA does not amount to negligence per se.

As an initial matter, every circuit court, including the Eleventh Circuit, as well as this Court, has determined that HIPAA does not create a private right of action. *Sneed v. Pan Am. Hosp.*, 370 Fed. App'x. 47, 50 (11th Cir. 2010); Acara v. Banks, 470 F. 3d 569 (5th Cir. 2006); *Franklin v. The Healthcare Authority for Baptist Health, et. al.*, 2010 U.S. Dist. LEXIS 82384 (M.D. Ala. 2010)(dismissing plaintiff's claims alleging a HIPAA violation based on the disclosure of personal information, noting that HIPAA does not create a private right of action); *Doe v.*

Board of Trs. of Univ. of Ill., 429 F. Supp. 2d 930, 944 (N.D. Ill. 2006)(citing a number of cases and noting that "[e]very court to have considered the issue . . . has concluded that HIPAA does not authorize a private right of action"). Enforcement of the statute and its regulations is reserved by the Secretary of Health and Human Services; thus, there is no private right of action. *See Sneed*, 370 Fed. App'x. at 50. Plaintiffs are seeking to circumvent, if not completely undermine, this precedent by attempting to disguise a HIPAA cause of action under the label of a state law claim of negligence per se. Allowing negligence per se based on a HIPAA violation would have the same effect as judicially creating a private right of action, setting jurisdictional issues aside.

Courts have resisted requests to allow HIPAA to serve as a basis for a negligence per se claim. *See L.S. v. Mount Olive Board of Education, et. al.*, 765 F. Supp. 2d 648 (D. N.J. 2011)(dismissing the negligence per se claim based on a HIPAA violation because the plaintiffs made no showing that it furthered the effectiveness of the statute); *Salatto v. Hospital of St. Raphael*, 2010 Conn. Super. LEXIS 2420 (Conn. Super. 2010)(dismissing the plaintiff's negligence per se claims based on HIPAA violations, holding that HIPAA does not create a private cause of action); *Espinoza v. Gold Cross Services, Inc.* 234 P.3d 156 (Utah. App. 2010)(affirming dismissal of the plaintiffs state law claims based on HIPAA violations, noting that because Utah did not have any HIPAA-related statutes, "we

have no basis in state or federal law to enforce federal regulations promulgated under HIPAA, either directly or as a component of a state cause of action"); *Young v. Carran*, 289 S.W. 3d 586 (Ky. App. 2008)(Court dismissed negligence per se claim based on HIPAA violation because HIPAA did not provide a private cause of action and because of a state statute).

No opinion was found where an Alabama federal or state court analyzed whether HIPAA can serve as a basis for a negligence per se claim, but based on existing Alabama law, a violation of a HIPAA regulation would not support a negligence per se theory of liability.

Under Alabama law, not every violation of a statute or an ordinance is negligence per se. Alabama courts have consistently required that four elements be met for violation of a statute to constitute negligence per se:

(1) The statute must have been enacted to protect a class of persons, of which the plaintiff is a member;

(2) the injury must be of the type contemplated by the statute;

(3) the defendant must have violated the statute; and

(4) the defendant's statutory violation must have proximately caused the injury.

Parker Bldg. Services Co., Inc. v. Lightsey, 925 So. 2d 927, 931 (Ala. 2005). The alleged HIPAA violation in the Amended Complaint fails to meet two out of the four elements.[6]

a. HIPAA was not enacted in order to protect a particular class of citizens.

The Alabama Supreme Court has determined that in order for the violation of statute to constitute negligence per se, the statute allegedly violated must protect a class of citizens which is narrower than the general public. *Parker Bldg. Services Co., Inc.*, 925 So. 2d 927. In *Parker*, the Alabama Supreme Court addressed whether the violation of the building code constitutes negligence per se. The court determined that because the stated purpose was to protect the general public, negligence per se was inapplicable. *Id.* at 931.

In contrast, the Alabama Supreme Court has found negligence per se based on a federal regulation which addressed a narrow health concern of "sulfate-sensitive individuals." *Allen v. Delchamps*, 624 So. 2d 1065, 1067 (Ala. 1993).

This Court has evaluated whether a violation of the Fair Debt Collections Practices Act ("FDCPA") can serve as the basis of a negligence per se claim under Alabama law. *Winberry v. United Collection Bureau*, 697 F. Supp. 2d 1279 (M.D. Ala. 2010). In *Winberry*, the plaintiffs filed FDCPA claims arising out of the

[6] Plaintiffs cannot meet a third element, which is actually showing a statutory violation under HIPAA. Notwithstanding, because this is a motion to dismiss and because the Amended Complaint alleges that a violation occurred, this element is not addressed in this Motion.

defendant's conduct in collecting a debt. *Id.* at 1284. The plaintiffs' complaint also included a negligence per se claim based on the alleged FDCPA violations. *Id.* at 1293. In evaluating whether a violation of the FDCPA was negligence per se, the Court noted that the purpose of the FDCPA was "to promote consistent State action to protect consumers against debt collection abuses." *Id.* at 1294*;* citing 15 U.S.C. §1692(e). The definition of "consumer" under the FDCPA was "any natural person obligated or allegedly obligated to pay any debt." *Id.* (citing 15 U.S.C. §1692a(3)). While noting that the FDCPA provided a private cause of action to individuals, the court ultimately determined that because the FDCPA could apply to any consumer, the scope of those being protected was too expansive to allow a negligence per se claim under Alabama law. *Id.* at 1294-95; *See also Turner v. Scott Paper Co., Inc.*, 1995 U.S. Dist. LEXIS 6768 (S.D. Ala. 1995)(noting that while OSHA can provide evidence of the standard of care, the regulations "neither create an implied cause of action nor establish negligence per se").

HIPAA's purpose is:

> to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.

HIPAA, Pub. L. No. 104-191, 110 Stat. 19361; *U.S. Jones*, 471 F.3d 478 (3d Cir. 2006). The statute authorizes the Secretary of Health and Human Services to "adopt standards" that will "enable health information to be exchanged electronically, … consistent with the goals of improving the operations of the health care system and reducing administrative costs," and that will "ensure the integrity and confidentiality of [individual's health] information [and protect against] … unauthorized uses or disclosures of information." 42 U.S.C. § 1320d-2.

The plain language of HIPAA makes clear that its purpose is to improve the operation of the health care system and reduce administrative costs. While the security of patient information is also a part of the statute, HIPAA applies to all patients across the country, not a specific subset of patients like in the *Delchamps* case. In addition, HIPAA's protections of patient information not only further the interest of all patients, but as the statute provides, it was enacted for the purpose of aiding the country's overall healthcare system by helping to reduce administrative costs and waste. Thus, HIPAA's purpose is to protect the interest of the general public vis-à-vis the national healthcare system, not any one specifically identified group of individuals.

Just as the Court in *Winberry* found that the FDCPA was too broad to support a negligence per se claim because it could apply to any consumer, a HIPAA violation is not negligence per se because it can apply to any patient.

Furthermore, finding that a HIPAA violation does not amount to negligence per se is even more compelling in this case than in the *Winberry* case because unlike the FDCPA, HIPAA does not provide a private right of action. It can be inferred that Congress did not intend for a HIPAA violation to be a per se breach of the standard of care. *See Slue v. New York Univ. Med. Ctr.*, 409 F. Supp. 2d 349, 373 (S.D.N.Y. 2006)("Federal courts have found that Congress did not intend for HIPAA to created a private cause of action for individuals").

b. Plaintiffs cannot establish causation of damages resulting from any HIPAA violation.

Even assuming that HIPAA only applied to a certain, distinguishable class of persons, a HIPAA violation, under the facts alleged in the Amended Complaint, would still not be negligence per se because the HIPAA violation would not be the proximate cause of the Plaintiffs' claimed injuries. In evaluating the proximate cause element of a negligence per se claim, one district court found that the element was lacking in facts similar to the allegations made in this case. In *Citizens Bank of Pennsylvania v. Reimbursement Technologies, Inc., et. al.*, 2014 U.S. Dist. LEXIS 82098 (E.D. Pa. 2014)(the "RTI" case), the defendant was sued by a bank that was damaged when funds were fraudulently withdrawn from the bank's accounts. *Id.* at 4. The defendant possessed both financial and health-related information for its clients, and the complaint alleged that an employee of the defendant stole the private information and then sold the information to a fraud

ring that used the information to fraudulently withdraw money from the bank. *Id.* The bank alleged that the defendant failed to properly safeguard the private information it possessed. *Id.*

In the bank's second amended complaint, the plaintiffs asserted a negligence per se claim, alleging that the defendant violated HIPAA by allowing its clients' patients' data to be stolen by an employee and used in defrauding accounts at the bank. *Id.* at 12. The district court utilized the same four-part negligence per se test as used in Alabama in evaluating whether the HIPAA violation could be negligence per se. *Id.* In its analysis, the court went directly to the proximate cause element, and it determined that the alleged HIPAA violation was too remote and indirect in order to sustain the negligence per se claim. *Id.* The court determined that the alleged violation – which occurred when defendant allegedly mishandled its clients' information – was "causally separated from plaintiff's actual harm by multiple intervening acts" including the defendant's employees and the third parties that misused the information. *Id.* at 14. The district court dismissed the negligence per se claim pursuant to Rule 12(b)(6), Fed. R. Civ. Pro. *Id.* at 15.

The same theory of liability that was espoused in RTI is in essence the same theory of liability being asserted by Plaintiffs in the Amended Complaint. Plaintiffs allege that the Hospital has violated HIPAA and is negligent per se for failing to safeguard patient information from the theft perpetrated by a former Hospital

employee and his accomplice(s). Because of the multiple intervening acts between the alleged HIPAA violation and the harm alleged by Plaintiffs, Plaintiffs' negligence per se claim fails to properly meet the proximate cause element of a negligence per se claim. Therefore, Plaintiffs' negligence per se claim fails to state a claim upon which relief can be granted.

2. Because the Hospital did not publish any of Plaintiffs' personal information, nor did the Hospital invade Plaintiffs' area of seclusion, the Amended Complaint fails to state a valid claim of invasion of privacy.

Under Alabama law, the tort of invasion of privacy consists of four distinct wrongs: (1) the intrusion upon the plaintiff's physical solitude or seclusion; (2) publicity which violates the ordinary decencies; (3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and (4) the appropriation of some element of the plaintiff's personality for a commercial use. *Phillips v. Smalley Maintenance Services, Inc.*, 435 So. 2d 705, 708-09 (Ala. 1983). The Amended Complaint does not contain the allegations sufficient to state an invasion of privacy claim against the Hospital under any of the four theories.

The heading for Count V of the Amended Complaint is "Invasion of Privacy by Disclosure of Private Facts." Despite this heading, there is no allegation in the Amended Complaint that the Hospital disclosed any of the Plaintiffs' personal information. Instead, Plaintiffs simply (and incorrectly) equate theft by an employee with disclosure. The first element in proving an invasion of privacy

claim premised on a disclosure of private facts is "publicity." *See Ex parte The Birmingham News, Inc.*, 778 So. 2d 814 (Ala. 2000). In the absence of a public disclosure of certain private facts, an invasion of privacy claim is due to be dismissed as a matter of law. *Id.* at 818.

The Amended Complaint contains no allegation of any public disclosure. The Amended Complaint alleges that a Hospital employee stole Plaintiffs' personal information. The Amended Complaint does not allege that the Hospital made any public disclosure, nor misappropriated Plaintiffs' personal information for any commercial purpose. Therefore, Plaintiffs' invasion of privacy claim should be dismissed because it fails to state a claim upon relief can be granted.

Moreover, it is not clear whether Plaintiffs are seeking to maintain an invasion of privacy claim on the basis that the Hospital is responsible for the employee's actions. The Amended Complaint contains no allegations that the Hospital is vicariously liable for the employee's actions in stealing patient information. The Amended Complaint is also void of any allegations alleging that the employee was acting within the line and scope of his employment when he took documents/information from the Hospital, and there are no allegations that the Hospital ratified the employee's conduct.

Regardless of whether the omission of allegations concerning vicarious liability was intentional or not, the Hospital is not liable for any intentional torts

the former employee may have committed. Alabama law provides that employers are generally not liable for the intentional acts of an employee. *See Kristi Connell v. Call-A-Cab, Inc.*, 937 So. 2d 71 (Ala. 2006). The Alabama Supreme Court has determined that in the absence of ratification, an employer is not responsible for an employee's intentional conduct when the employee's acts are not committed in furtherance of the business of the employer and the employee's acts are within the line and scope of his employment. *Potts v. BE&K Const. Co.*, 604 So. 2d 398, 400 (Ala. 1992). An employer is not liable for an employee's actions when those actions are based on the employee's "own lustful desires" where "no corporate purpose could conceivably be served." *Ex parte Atmore Community Hospital*, 719 So. 2d 1190, 1194 (1998) (determining that the plaintiff's invasion of privacy claim against the medical facility failed as a matter of law because its employee's actions where outside the scope of the employment).

In this case, Plaintiffs have not, and indeed cannot, allege that stealing patient information was within the line and scope of employment. The employee's conduct was premised on his own personal interests, not that of the Hospital. None of the Hospital's corporate purposes could conceivably be served by having one of its employees steal patient information, and in fact, Flowers Hospital has been harmed by the theft that serves as the basis of this lawsuit. The Hospital is not liable for the actions of a rogue employee who was acting on his own personal

behalf. Therefore, assuming Plaintiffs are alleging that the Hospital is vicariously liable for Millender's actions, such a claim is due to be dismissed.

3. Because there is no consideration for an alleged breach of a notice required by federal law, the breach of contract count fails to state a claim upon which relief can be granted.

Count V[7] of the Amended Complaint alleges that Flowers Hospital breached a contract with Plaintiffs. In particular, Plaintiffs allege that a form distributed by Flowers Hospital, called the Notice of Privacy Practices, "constitutes an express contract" for which the Hospital allegedly breached. Am. Compl. ¶ 102. Plaintiffs did not attach a copy of the Hospital's Notice of Privacy Practices to their Amended Complaint, although the Notice of Privacy Practices is available to the public on the Hospital's website, and is attached to this Memorandum as "Exhibit A."[8]

Plaintiffs' breach of contract claim is a creative, albeit ineffective, attempt to circumvent the fact that HIPAA does not create a private cause of action. The Notice of Privacy Practices (the "Notice") at issue in this case is a form that lists the rights of patients with regard to patient information, i.e. how a patient can request their patient information. The Notice also provides information concerning

[7] Plaintiffs label both the Invasion of Privacy claim and the Breach of Express or Implied Contract claim as Count V.

[8] The Eleventh Circuit Court of Appeals has determined that a trial court may consider documents attached to a motion dismiss (without treating it as a motion for summary judgment) if the documents are (1) referred to in the complaint and are (2) central to the plaintiff's claim. *Starship Enterprises of Atlanta, Inc. v. Coweta County, Ga.*, 708 F. 3d 1253 n. 13 (11th Cir. 2013)(citing *Brooks v. Blue Cross and Blue Shield of Florida*, 116 F. 3d 1364, 1369-70 (11th Cir. 1997).

the Hospital's legal obligations under HIPAA, and states how the Hospital uses and discloses protected health information.

The Hospital is required to have such a Notice available by HIPAA regulations. 45 C.F.R. §164.520. While a medical provider has some leeway in terms of the information provided in the Notice, the federal regulation requires all "covered health care providers" to possess and distribute such a notice. *Id.* Flowers Hospital's Notice follows the language required by the regulation, and the Amended Complaint contains no allegation in the Notice does not comply with federal law.

Because the Notice is an item that is required by law, it is not part of any contract between Flowers Hospital and its patients. The inclusion or wording of the Notice is not a term that is negotiated when patients receive care from Flowers Hospital. The Amended Complaint does not contain any allegation that the Notice, or the Hospital's compliance with the Notice, was part of any bargained for exchange or that consideration was given prior to receiving medical services from the Hospital. Under Alabama law, consideration for a contract is anything of value promised or received, or doing or promising to do something which one has a right to do, or promising not to do something which one has a right to do. *Clark v. McGinn*, 105 So. 2d 668 (Ala. 1958). The obligation to provide a Notice was required by statute and was not a contractual right between the parties. Because

the Notice is required, there is no consideration given to the patient or taken from the Hospital in terms of that Notice.

A similar breach of contract claim was dismissed in the case of *In re: Marcellus A. Maple, et. al.*, 434 B.R. 363 (Bankr. E.D. Va. 2010). In *Maple*, the plaintiffs filed an adversary proceeding, asserting, in part, that the defendant medical office creditor had breached a contract with the plaintiffs when the medical office breached its Notice of Privacy Practices. The bankruptcy court dismissed the breach of contract action, determining that the alleged breach of a HIPAA privacy policy failed to meet the "plausible on its face" pleading requirement. *Id.* at 317 (citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)); see also *London v. Cerbrerus Capital Management (California) LLC, et. al.*, 2008 U.S. Dist. LEXIS 76246 (S.D. Cal. 2008)(dismissing a breach of contract claim against the defendant pharmacy where the alleged breach involved the pharmacy's unilaterally provided privacy notice).

Because Flower Hospital's Notice of Privacy Practices was not part of the consideration in relation to any contracts with its patients, Plaintiffs' breach of contract claim fails as a matter of law.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Flowers Hospital respectfully requests the Court grant the Hospital's motion and dismiss the Plaintiffs' Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date, using the CM/ECF filing system which will send notification of such filing, served a copy of the foregoing pleading upon all counsel of record on this the 7th day of July, 2014:

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