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Honorable Megan B. Rhodebeck
Clerk of the Court

CASE NO. SC-23-0784

IN THE SUPREME COURT OF ALABAMA

SHYMIKKA GRIGGS,

on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

vs.

NHS MANAGEMENT, LLC,

Defendant-Appellee.

On Appeal from Jefferson County Circuit Court
Civil Action No. CV-23-902261

BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee contends that the facts and law of this case are straightforward and that oral argument is unnecessary. However, Defendant-Appellee recognizes that Plaintiff-Appellant has requested oral argument and Defendant-Appellee would be happy to appear to address any questions that the Court may have.

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STATEMENT OF THE CASE

This is an appeal of the Circuit Court's order dismissing the case under Alabama Rule of Civil Procedure 12(b).

Plaintiff Shymikka Griggs ("Plaintiff") filed her complaint in the Circuit Court of Jefferson County ("Complaint") on June 30, 2023 (*see* C. 8-76) against Defendant NHS Management, LLC ("NHS"). On behalf of herself and a putative class, Plaintiff asserted the following claims in her Complaint:

- **Count I:** Negligence (C. 53)
- **Count II:** Negligence Per Se (C. 57)
- **Count III:** Breach of Implied Contract (C. 58)
- **Count IV:** Invasion of Privacy (C. 60)
- **Count V:** Unjust Enrichment (C. 61)
- **Count VI:** Breach of Confidence (C. 62)
- **Count VII:** Breach of Fiduciary Duty (C. 65)

On behalf of an "Alabama Subclass," Plaintiff asserted the following claim:

- **Count VIII:** Violation of the Alabama Deceptive Trade Practices Act ("ADTPA") (Code of Alabama §§ 8-19-1. *et seq.*) (C. 69).

On August 5, 2023, NHS moved to dismiss Plaintiff's Complaint under Alabama Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that Plaintiff had not established the injury-in-fact necessary for her to have standing to sue and had not pled facts sufficient to state a claim. (C. 81-117). On September 13, 2023, Plaintiff opposed NHS's motion to dismiss (C. 147-81), but presented no argument in support of her claim for breach of implied contract (Count III) and expressly withdrew her claim for violations of the ADTPA (Count VIII), (C. 168). NHS filed a reply in support of its motion to dismiss on September 25, 2023. (C. 182-202).

On October 10, 2023, the Circuit Court, after due consideration of the pleadings and argument of counsel for the parties, entered an order granting NHS's motion to dismiss pursuant to Rule 12(b) and dismissing all Plaintiff's claims with prejudice. (C. 203). This order resolved all pending issues.

Plaintiff filed her Notice of Appeal on October 26, 2023. (C. 204-07). Plaintiff's opening appellate brief was due on January 19, 2024, with the Court accepting Plaintiff's January 29, 2024, filing as timely. (*See* Jan. 29, 2024, Brief of Appellant ("Appellant's Br."); Jan. 31, 2024, Order).

STATEMENT OF THE ISSUES

1. Whether the Circuit Court correctly dismissed Plaintiff's Complaint under Alabama Rule of Civil Procedure 12(b)(6), where Plaintiff failed to plead factual allegations to support the elements of her claims, instead offering conjecture and legal conclusions.

2. Whether the Circuit Court could appropriately dismiss Plaintiff's Complaint under Alabama Rule of Civil Procedure 12(b)(1), where Plaintiff's allegations of harm were speculative, not traceable to NHS, and failed to establish the existence of an injury-in-fact.

STATEMENT OF THE FACTS

Defendant NHS Management, LLC ("NHS") is a consulting firm that provides management services for nursing homes and physical rehabilitation facilities in Alabama, Arkansas, Florida, and Missouri. (C. 9 ¶ 1). On May 16, 2021, NHS learned that it was the victim of a cyberattack occurring between February 25 and March 16, 2021, perpetrated by cybercriminals who accessed NHS's systems containing confidential information. (C. 75).[1] NHS activated its response plan and engaged a third-party team of forensic experts to investigate the nature

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[1] Plaintiff attached as Exhibit A to her Complaint a letter she received from NHS notifying her of the data incident. (*See* C. 73-76). This letter is part of Plaintiff's pleadings, and it is properly considered at the Rule 12(b) stage. *See Cathedral of Faith Baptist Church, Inc. v. Moulton*, 373 So. 3d 816, 818 n.2 (Ala. 2022) (citing ALA. R. CIV. P. 10(c)).

and scope of the incident. (C. 75). According to Plaintiff, there has been a "substantial increase in data breaches" in the timeframe "preceding the date of the breach" in question here. (C. 25 ¶ 48). Plaintiff further urges that cyberattacks against entities like NHS "have become widespread." (*Id.* ¶ 49). According to Plaintiff, "[i]n 2021, there were a record 1,862 data breaches, surpassing both 2020's total of 1,108 and the previous record of 1,506 set in 2017. Additionally in 2021, there was a 15.1% increase in cyberattacks and data breaches since 2020." (*Id.* ¶¶ 50-51).

The Complaint alleges that unidentified, third-party criminals gained access to certain NHS systems and, therefore, potentially had access to the names, dates of birth, Social Security numbers, and medical information of NHS's current and past employees, as well as that of some of the patients/residents of the facilities it serves and their family members and guardians. (C. 10 ¶ 3; C. 74). Plaintiff does not allege that email addresses, mailing addresses, telephone numbers, credit card information, bank account information, financial information, or consumer purchase history was part of the information potentially exposed by the incident, the absence of which is consistent with NHS's breach notification letter. (C. 74).

On March 31, 2022, upon completion of its forensic investigation, NHS sent potentially affected individuals a letter notifying them of the data incident. (C. 73-76). As part of the notice, NHS informed potentially affected individuals that there was "no evidence of any identity theft or fraud" and that it was "unaware of any actual or attempted misuse of [their] information as a result of this incident." (C. 74-75). Nevertheless, in an abundance of caution NHS offered all of those noticed a free twelve-month enrollment for identity theft protection services through Kroll. (*Id.*).

Plaintiff is a resident of Birmingham, Alabama, and is a former employee of NHS. (*See* C. 40-41 ¶¶ 103–04). Plaintiff received NHS's letter notifying her of the security incident on April 4, 2022. (*See* C. 41 ¶ 105). The Complaint alleges that, after NHS's security incident, Credit Karma informed Plaintiff that her information had been "found on many different sites on the 'dark web'" and that she spent time working with that entity "to freeze her credit and correct errors on her credit reports." (*Id.* ¶ 108). Plaintiff further alleges that she has been "receiving a high number of spam emails, calls, and texts." (*Id.* ¶ 109). Plaintiff asserts that she has been receiving phone calls and emails stating she owes

money for "payday loans," despite not "ow[ing] any payday loans." (C. 42 ¶ 111). Plaintiff further alleges that she received calls from someone claiming to be Apple's fraud department asking "whether she made certain Apple product purchases worth about $3000" and that she explained to Apple that she had not done so recently. (*Id.* ¶ 110). Plaintiff finally claims to spend "about 15 minutes per day" monitoring her financial accounts. (*Id.* ¶ 112).

Absent from the Complaint are any facts stating (1) why Plaintiff began subscribing to Credit Karma; (2) why she would need Credit Karma to freeze her credit where no financial accounts were impacted by the NHS incident; (3) what errors appear on her credit report and how those possibly relate to NHS where no financial information was exposed; (4) how spam calls, "payday loan" calls, and emails can be tied to NHS where her telephone number and email address were not exposed in the incident; (5) how Apple's calls to her relate to NHS when her telephone number and any information relating to her being an Apple customer were not exposed in the incident; (6) how anyone would purchase items from Apple in her name when her financial information was not exposed; (7) whether she experienced any financial loss based on the attempted

Apple purchases and how NHS could be culpable given that no financial information was impacted in the incident; or (8) why she has to monitor financial accounts when those accounts were not exposed in the incident.

STATEMENT OF THE STANDARD REVIEW

This Court reviews a Circuit Court's judgment of dismissal under Alabama Rule of Civil Procedure 12(b)(6) using the same standard as that of the Circuit Court. *Roberts v. Meeks*, 397 So. 2d 111, 114 (Ala. 1981) ("[W]e are left to test the action of the trial court under the standard of review applicable to 12(b)(6) dismissals."). Under this standard, a court takes the factual allegations of the complaint as true, viewing them in the pleader's favor. *Smith v. National Sec. Ins. Co.*, 860 So. 2d 343, 345 (Ala. 2003) (quoting *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993)). The Court is not required to accept as true conclusory allegations, unwarranted deductions of facts, or legal conclusions. *Ex parte Gilland*, 274 So. 3d 976, 985 n.3 (Ala. 2018) (directing trial court to grant 12(b)(6) motion to dismiss). Conclusory allegations are not enough—a plaintiff is "required to plead *facts*." *Id.* (emphasis in original). A plaintiff cannot survive a 12(b)(6) motion to dismiss without some level of "specificity" in

her pleadings. *See J.K. v. UMS-Wright Corp.*, 7 So. 3d 300, 305-06 (Ala. 2008) (affirming dismissal under Rule 12(b)(6)).

This Court reviews *de novo* a Circuit Court's judgment of dismissal under Alabama Rule of Civil Procedure 12(b)(1). *Hudson v. Ivey*, No. SC-2022-0836, 2023 WL 2620607, at *2 (Ala. Mar. 24, 2023).

SUMMARY OF THE ARGUMENT

A. The Circuit Court Properly Dismissed Plaintiff's Complaint Under Rule 12(b)(6) Because Plaintiff Did Not Allege Injury or Damage or Otherwise Plead Facts Establishing the Requisite Elements of Her Claims.

To survive a motion to dismiss under Alabama Rule of Civil Procedure 12(b)(6), it is Plaintiff's burden to plead "*facts*" to support her claims. *Gilland*, 274 So. 3d at 985. She cannot rely on mere conclusory allegations and legal conclusions. *Id.* Plaintiff failed to carry this burden because she did not plead facts showing that she suffered a "manifest, present injury." *See Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001) (requiring "manifest, present injury").

Even reading the allegations of the Complaint in the light most favorable to Plaintiff, she pled at most (1) an increased but unrealized risk of future identity theft which is insufficient to support the claims

asserted; (2) the appearance of her unidentified information on the "dark web" through a third-party service that Plaintiff apparently engaged to help her repair a pre-existing credit problem that she does not allege relates to NHS; (3) time spent monitoring financial accounts that were not exposed in the incident; (4) receipt of spam communications and phone calls to an email address and telephone number that were not exposed in the incident; and (5) telephone notification of attempted charges to an Apple account where Plaintiff's telephone number and status as an Apple customer were not exposed by NHS and where she fails to allege that she incurred any fraudulent charges. In short, none of these injuries suffice to fulfill the damage element of the causes of action alleged and, even if they could, these purported injuries are not traceable to the NHS data incident. The Circuit Court's Order of dismissal was correct for this reason alone.

But Plaintiff also failed to plead facts to support the elements of each of her claims even beyond damages. Specifically:

- Plaintiff's negligence and negligence per se claims fail because (1) NHS does not have a duty to prevent the actions of a third-party criminal; (2) the FTCA and HIPAA cannot provide the requisite

duty because neither allow for a private right of action, the sole enforcement mechanism for both is through federal agencies, and neither statute articulates a specific standard of care to which NHS could adhere; (3) Plaintiff has not alleged any facts that NHS breached any duty beyond the occurrence of the incident itself; and, (4) even if Plaintiff had suffered an injury or damages, her factual allegations show that those damages could not have been caused by NHS;

- Plaintiff fails to address and therefore concedes that the dismissal of her breach of implied contract claim was appropriate;
- Plaintiff's invasion of privacy claim fails because (1) a data breach is not an intentional disclosure of information; and (2) suffering a data incident does not qualify as highly offensive or wanton conduct on the part of NHS;
- Plaintiff's unjust enrichment claim fails because she has not pled any facts that show how wages paid to her were supposed to be used to fund data security or that NHS otherwise made any promises of security as part of her employment;

- Breach of confidence is not a cause of action in Alabama but, even if it were, a claim for breach of confidence cannot arise in the employer-employee context and such a claim requires an affirmative disclosure which cannot be alleged in this data breach context; and
- Plaintiff's breach of fiduciary duty claim fails because an employer cannot have a fiduciary relationship with an employee like Plaintiff absent exceptional circumstances which are not pled here.

For all of these reasons, the Circuit Court properly dismissed Plaintiff's Complaint under Rule 12(b)(6).

B. The Circuit Court Properly Dismissed Plaintiff's Complaint Under Rule 12(b)(1) Because Plaintiff Did Not Establish the Injury-In-Fact Necessary for Standing.

Plaintiff argues that Alabama caselaw ignores the requirement that a plaintiff suffer injury-in-fact before she can have standing to sue, despite the fact that Alabama law adopts the federal standard verbatim and the Alabama Constitution has a "cases and controversies" requirement just like the one in the U.S. Constitution. *See Ex parte Alabama Educ. Television Comm'n*, 151 So. 3d 283, 290 n.6 (Ala. 2013), *as modified on denial of reh'g* (Jan. 24, 2014) (Murdock, J. concurring).

To the extent that Plaintiff identifies authority that interprets Alabama's Rule 12(b)(1) and case and controversy requirement differently, it should be reevaluated. *Key v. Warren Averett, LLC*, 372 So. 3d 1132, 1141 n.5 (Ala. 2022) (Mitchell, J., concurring). Indeed, notwithstanding this Court's language in *Ex parte BAC Home Loans Servicing, LP*, 159 So. 3d 31 (Ala. 2013), later opinions seemingly reject the proposition that standing has no applicability in private law cases. *See Ex parte Endo Health Sols. Inc.*, 354 So. 3d 488, 493 (Ala. 2021); *Milton v. Haywood*, No. SC-2023-0382, 2023 WL 8855663, at *4 (Ala. Dec. 22, 2023). To have standing to sue, a plaintiff must establish that she has suffered concrete, particularized injury that is actual or imminent, and that it is traceable to the alleged action of the defendant. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiff failed to meet these requirements, such that the Circuit Court's dismissal of the Complaint can also be affirmed under Rule 12(b)(1).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT FOR FAILING TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A. Dismissal Under Alabama Rule of Civil Procedure 12(b)(6).

To survive a motion to dismiss for failure to state a claim, the standard under Rule 12(b)(6) is whether "when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief." *Smith*, 860 So. 2d at 345 (quoting *Nance*, 622 So. 2d at 299); *Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C.*, 828 So. 2d 285, 288 (Ala. 2002) (test is whether "the allegations of the complaint, taken as true, state a justiciable controversy"). Rule 12(b)(6) under the Alabama Rules is interpreted as its federal counterpart. *Simon v. Jackson*, 855 So. 2d 1026, 1029 (Ala. 2003) (interpreting Alabama Rule of Civil Procedure 12(b)(6), and recognizing that "[b]ecause the Alabama Rules of Civil Procedure are derived from the corresponding federal rules, federal jurisprudence construing the rules is persuasive"); *Gilland*, 274 So. 3d at 985 n.3 (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)) (recognizing that "on review of the dismissal of a

complaint for failure to state a claim, that the plaintiff's factual allegations are accepted as true but that conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal."). Viewing allegations in a plaintiff's favor does not mean she is absolved of the responsibility to plead facts supporting her claims. As explained by this Court: "to survive [defendant's] motion to dismiss, [plaintiff] was required to plead *facts* that would support those conclusory allegations." *Id.* (emphasis in original) (directing trial court to grant 12(b)(6) motion). To survive a 12(b)(6) motion to dismiss under Alabama law, plaintiffs must allege a "set of facts that would entitle them to relief on their claims." *J.K.*, 7 So. 3d at 305 (recognizing plaintiffs had "not describe[d] with any specificity conduct" or other factual allegations that would support their claims). Merely pointing at the complaint's conclusory allegations or legal conclusions and insisting that the plaintiff has met her pleading burden is not enough—there must be specific facts alleged that support the asserted claims. *Id.* (affirming dismissal under Alabama Rule 12(b)(6)).

B. Plaintiff's Failure To Plead Cognizable Injury or Damages Is Fatal to Each of Her Claims.

Plaintiff did not sufficiently allege injury or damages to survive a 12(b)(6) motion. She argues that her purported allegations of increased risk of identity theft (Appellant's Br. at 31), time lost to mitigate that potential risk (*id.* at 37), and "data misuse and unwanted spam" (*id.* at 40) should have been sufficient to survive a motion to dismiss. As explained below, Plaintiff's allegations fall well short of meeting Alabama's pleading standard.

In her opening brief's argument regarding dismissal under Alabama Rule of Civil Procedure 12(b)(6), Plaintiff concedes that she relies heavily on federal caselaw. *See* Appellant's Br. at 31 n.6 ("Federal caselaw is persuasive authority when interpreting the Alabama Rules of Civil Procedure, especially when the corresponding federal rule is nearly identical to the Alabama Rule of Civil Procedure being considered."). Interestingly, the federal caselaw she relies on analyzes the injury-in-fact requirements for standing under Federal Rule of Civil Procedure 12(b)(1). *See id.* at 31 (citing *Clapper*, 568 U.S. at 414 n.5; *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021)). Ultimately, however, this line of cases does not assist Plaintiff, as these

federal standing cases show that Plaintiff has not suffered any injury or damages.

Indeed, the requirements to sufficiently plead damages in Alabama are more rigorous than those required to establish injury-in-fact under federal caselaw. *Compare Hinton*, 813 So. 2d at 829 ("Alabama law has long required a manifest, present injury before a plaintiff may recover in tort. . . . [O]ur recognizing a cause of action based upon nothing more than an increased risk that an injury or an illness might one day occur would result in the courts of this State deciding cases based upon nothing more than speculation and conjecture."), *with TransUnion LLC v. Ramirez*, 594 U.S. 413, 435 (2021) ("[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial."). Here, and as discussed below, Plaintiff's factual allegations fulfill neither the injury-in-fact requirement under Article III nor the more rigorous damage requirements under Alabama law.

1. *Plaintiff's fear of future identity theft is not sufficient to support her claims.*

Plaintiff does not allege that she or any class member has been the victim of identity theft as a result of NHS's data incident, but instead relies on the conclusory allegation that she has been "placed at an imminent, immediate, and continuing increased risk of harm from fraud and identity" theft because of NHS's data incident. (C. 44 ¶ 121; *see also* C. 12 ¶ 10; C. 13 ¶ 14). She also claims that Credit Karma informed her that her personal information "was found on many different sites on the 'dark web'" and that Credit Karma has assisted her to "freeze her credit and correct errors on her credit reports." (C. 41 ¶ 108). Absent from her Complaint, however, are any allegations stating when she contacted Credit Karma and their relationship began, whether the information that is apparently on the dark web is the same information that was impacted in the NHS incident, or how the impacted information (which did not include any financial account information) negatively impacted her credit or caused errors on her credit report. Plaintiff's conclusory allegations that have no plausible connection to NHS must be rejected, particularly where Plaintiff references and relies on NHS's notice letter, which

expressly states that NHS is "unaware of any actual or attempted misuse of [Plaintiff's] information as a result of this incident." (C. 74).

a. *Equifax* Is Distinguishable.

In arguing that her allegation of the possibility of future identity theft is sufficient to plead damages, Plaintiff relies heavily on *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021). In *Equifax*, the plaintiffs pled that their information—along with that of 150 million other individuals—had been exposed in a data incident and that "many have already been victims of identity theft." *Id.* at 1257. The Eleventh Circuit, in a decision published June 3, 2021, concluded this allegation of concrete harm was sufficient to establish the "injury-in-fact" necessary for plaintiffs to have standing to bring their claims. *Id.* at 1262.

Plaintiff's allegations bear no similarity to *Equifax*. Again, the Plaintiffs in *Equifax* alleged that "many *have already been victims of identity theft*." *Id.* at 1257 (emphasis added). The Court therefore found that "the allegations of some Plaintiffs that they have suffered injuries resulting from *actual* identity theft support the sufficiency of all Plaintiffs' allegations that they face a *risk* of identity theft." *Id.* at 1263

(emphasis in original). Plaintiff here has made no such allegation, and instead attempts to rely on the mere possibility that she *might* be the target of identity theft in the future, distinguishing her claims from the "concrete harms" and "*actual* identity theft" pled in *Equifax*. *Id.* at 1262.

b. The Supreme Court's Analysis in *TransUnion* Further Shows That Allegations of Present Harm Are Required.

Roughly three weeks after *Equifax*, the U.S. Supreme Court handed down its opinion in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), where the plaintiff had sued and obtained a judgment against TransUnion LLC, a credit reporting agency, on behalf of an 8,000-person class due to the inclusion of inaccurate information in their credit reports in violation of the Fair Credit Reporting Act (the "FCRA"). *Id.* at 417. TransUnion had disseminated inaccurate credit reports of approximately 2,000 of the class members to third parties. *Id.* at 421. Roughly 6,000 class members, though, had not had their credit reports transmitted to third parties. For these individuals, the Court concluded that a "mere risk of future harm" cannot support standing when a plaintiff does "not demonstrate that the risk of future harm materialized" (*e.g.*, the credit report was disseminated to a third party) and "exposure to the risk itself"

did not cause independent concrete harm (*e.g.*, reputational or emotional injury). *Id.* at 436-37.

Based on this reasoning, the Court held that only the named plaintiff and the 2,000 class members whose reports had actually been disseminated to third parties had sufficiently pled their claims because only these plaintiffs had pled actual injury. *Id.* at 441-42. Thus, only those plaintiffs who had already experienced *actual* injury could sufficiently allege injury-in-fact. *Id.* ("The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm.").

TransUnion's holding regarding claims of future harm shows that Plaintiff's claim of an increased risk of identity theft in the future is insufficient to constitute an "injury-in-fact" under federal law, and certainly cannot represent a "manifest, present injury" as required under Alabama law. *See, e.g.*, *Hinton*, 813 So. 2d at 829; *C.C. v. Med-Data Inc.*, No. 21-2301-DDC-GEB, 2022 WL 970862, at *7 (D. Kan. Mar. 31, 2022) (dismissing complaint, recognizing that *TransUnion* meant that claims of an increased risk of harm flowing from a data breach were insufficient to confer standing); *Legg v. Leaders Life Ins. Co.*, 574 F. Supp. 3d 985,

993 (W.D. Okla. 2021) (dismissing complaint, recognizing that, "[g]iven the holding in *TransUnion*, it is far from clear that any case finding a concrete injury based merely on an abstract risk of future identity theft following a data breach is still good law."). To further evidence that Plaintiff's allegations of possible future harm are insufficient under the more lenient, federal injury-in-fact standard, the court in *Med-Data* even relied on *Equifax* for the proposition that "a mere compromise of personal information, without more, fails to satisfy the injury-in-fact element in the absence of an identity theft." *Med-Data*, 2022 WL 970862 at *7.

Here, because Plaintiff has failed to allege that the risk of future harm (*i.e.*, identity theft) has "materialized," the Complaint's allegations concerning an increased risk of identity theft do not constitute injury or damage under any of the causes of action alleged. *Id.*; *see also Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1343 (11th Cir. 2021) (affirming dismissal, recognizing that "conclusory allegations of an 'elevated risk of identity theft'—or . . . a 'continuing increased risk' of identity theft—'are simply not enough'" to establish injury-in-fact); *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 824 (5th Cir. 2022) (mere possibility of future harm cannot support suit for damages);

Holmes v. Elephant Ins. Co., No. 3:22CV487, 2023 WL 4183380, at *4 (E.D. Va. June 26, 2023) (dismissing claim for failing to allege injury-in-fact, recognizing that, "[a]lthough the plaintiffs closely monitor their credit reports and financial accounts, none have alleged misuse of their PI. None have pleaded facts to support their allegations of certainly impending identity theft.").

c. Plaintiff's Claim of Possible Future Harm Is Not Ripe.

Even if Plaintiff's allegation that she might be the target of attempted identity theft by an unidentified third party at some point in the future were sufficient to support her claims (it is not), it still runs afoul of Alabama's ripeness requirement. "Ripeness is defined as the '[c]ircumstance existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.'" *Ex parte Safeway Ins. Co. Alabama, Inc.*, 990 So.2d 344, 353 n.5 (Ala. 2008) (quoting *Black's Law Dictionary* 1353 (8th ed. 2004)). The Alabama Supreme Court has found that where damages are speculative, a case is not ripe for adjudication. *Martin v. Battisella*, 9 So.3d 1235, 1241 (Ala. 2008) ("This case has not reached that point as [counterclaimant] has only speculated as to what her damages

may be."). Plaintiff has not alleged that she has actually suffered identity theft. Her allegation that identity theft could happen in the future is at most speculative, such that it is not ripe.

2. *Plaintiff's alleged "lost time" cannot manufacture cognizable damages.*

Plaintiff's argument that her "past and future lost time" is sufficient to plead damages is similarly unavailing. (*See* Appellant's Br. at 37-40). Again, Plaintiff relies entirely on federal caselaw analyzing requirements to establish injury-in-fact, (*see id.)* (citing *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020); *Tsao*, 986 F.3d 1332), conceding that such authority is persuasive in determining whether she sufficiently pled damages under Rule 12(b)(6). But the caselaw Plaintiff cites does not support her damage theory.

Plaintiff's "lost time" allegation is simply an attempt to "manufacture" her own damages, which falls short of the mark in a data breach case like this. *See Clapper*, 568 U.S. at 416; *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011) ("[A]lleged expenditures to monitor . . . financial information do not establish standing") (collecting cases); *Torres v. Wendy's Co.*, 195 F. Supp. 3d 1278, 1284 (M.D. Fla. 2016) ("[T]he majority of courts in data breach cases have held that the cost to

mitigate the risk of future harm does not constitute an injury in fact unless the future harm being mitigated against is itself imminent."); *Worix v. MedAssets, Inc.*, 857 F. Supp. 2d 699, 704-05 (N.D. Ill. 2012) (citation omitted) (collecting cases for proposition that time and expense of credit monitoring to combat an increased risk of future identity theft is not, in itself, an actionable injury).

Here, Plaintiff's allegation that she unilaterally decided to spend "about 15 minutes per day" monitoring her financial accounts (C. 42 ¶ 112) cannot create an injury or damage where it would not otherwise exist, particularly where no information regarding Plaintiff's credit card accounts or "financial accounts" was exposed in the NHS data incident. Indeed, the fact that she is monitoring accounts that were not impacted by the breach means that her so-called "monitoring" is logically untethered to NHS. Neither *Muransky* nor *Tsao* compel a contrary conclusion.

In *Muransky*, the Eleventh Circuit explained that "[w]here a 'hypothetical future harm' is not 'certainly impending,' plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves.'" 979 F.3d at 931 (citing *Clapper*, 568 U.S. at 416). In *Tsao*, the Eleventh

Circuit followed *Muransky* in acknowledging that time spent mitigating a perceived risk of identity theft is not automatically sufficient for injury-in-fact but rises and falls along with the court's "determination of whether there was a substantial risk of harm." *Tsao*, 986 F.3d at 1344 (affirming dismissal for plaintiff's failure to establish injury-in-fact). Again, Plaintiff's allegations regarding risk of harm do not rise to the level of injury or damage under *Muransky* or *Tsao* because the time purportedly spent by Plaintiff was in monitoring accounts unaffected by the incident.

3. ***Plaintiff's allegations of purported "data misuse" are insufficient to support her claims.***

Lacking any actual injury to rely on, Plaintiff resorts to vague allegations about potential "data misuse" and "unwanted spam." (*See* Appellant's Br. at 40). None of these allegations constitute a manifest, present injury and, indeed, none are even traceable to NHS. Plaintiff herself admits that none of these allegations are sufficient to establish injury or damage but urges the Court to consider the allegations in aggregate. (*Id.* at 41). According to Plaintiff, "[a]dmittedly, if each incident (finding her information on the dark web, the Apple charges, and spam communications) were standing alone (which it is not), it might not

constitute an injury-in-fact." (*Id.*) But a collection of hypothetical injuries does not add up to real injury.

Addressing these purported injuries one by one reveals their inadequacy and Plaintiff's inability to tie the injuries to NHS. ***First***, Plaintiff alleges that Credit Karma informed her that some unspecified personal information was found on unspecified "sites on the 'dark web'" causing her to "spen[d] time working . . . to freeze her credit and correct errors on her credit reports." (C. 41 ¶ 108). The mere allegation that Plaintiff received a report that some of her unspecified information is on the "dark web" does not create an injury to support her claims absent some allegation of actual misuse, even if the dark web allegations could be plausibly tied to NHS. *See Holmes*, 2023 WL 4183380, at *4 ("Because the plaintiffs have not alleged any misuse of their PI or resulting harm from their driver's license numbers appearing on the dark web, this alleged injury simply echoes the claim of heightened risk of identity theft.").

Indeed, Plaintiff does not even attempt to tie the Credit Karma allegations to NHS. Absent from the pleading are any facts articulating when and why she began subscribing to Credit Karma. Nor does Plaintiff

allege facts stating why she would need Credit Karma to freeze her credit when no credit card or financial account information was impacted in the NHS incident. Plaintiff also fails to allege what errors appear on her credit report, when they appeared, and how the errors could be possibly tied to NHS. In short, Plaintiff offers no factual allegations to plausibly tie her work with Credit Karma to NHS.

Plaintiff's allegations regarding the ubiquity of cyberattacks is also self-defeating. According to Plaintiff, data breaches like the one here "have become widespread"—with over 1,862 data breaches occurring in 2021 alone—making it impossible to tie the allegedly reported appearance of Plaintiff's unspecified information on the "dark web" to NHS. (C. 25-26 ¶ 49-52). Plaintiff's acknowledgment of the ubiquity of cyberattacks explains her inability to plead facts establishing a causal link between NHS's data incident and her Credit Karma and dark web allegations such that any damage allegations relating thereto are inadequate. And that is before considering NHS's notice letter, which stated that there was "no evidence of any identity theft or fraud." (*See* C. 74).

Second, Plaintiff alleges that she "received several calls from the Apple fraud department asking whether she made certain Apple product

purchases worth about $3000. She has not purchased any Apple products recently and explained that to Apple." (C. 41 ¶ 110; Appellant's Br. at 41). These allegations are inadequate for many reasons. Plaintiff does not allege facts tying the calls or purported charges to NHS, which is essential since her telephone number and financial account information were not exposed in the breach. Plaintiff does not allege how a fraudster would purchase items on her Apple account where her status as an Apple customer was not amongst the information impacted. And perhaps most critically, Plaintiff does not allege that any fraudulent charges were actually incurred such that she has suffered a manifest, present injury.

Third, Plaintiff alleges that she "has been receiving a high number of spam emails, calls, and texts, often receiving over 3 spam calls or texts in a given day." (C. 41 ¶ 109). Plaintiff fails to allege a baseline of spam emails, calls, and texts received daily prior to the incident and, even if she had, it is unclear how spam could ever be tied to NHS. Indeed, given the ubiquity of spam calls, "[c]ourts have generally rejected the theory that unsolicited calls or emails constitute an injury in fact" because they fail to "'rise[] beyond the level [of annoyance] typically experienced by consumers' in their everyday lives." *Liau v. Weee! Inc.*, No. 23 CIV. 1177

(PAE), 2024 WL 729259, at *6 (S.D.N.Y. Feb. 22, 2024) (collecting cases from across the country) (citations omitted). *See also In re Practicefirst Data Breach Litig.*, No. 121CV00790JLSMJR, 2022 WL 354544, at *5 n.8 (W.D.N.Y. Feb. 2, 2022) ("[E]ven if plaintiffs had shown that they received an increase in spam because of this data breach, the Court would still find these allegations insufficient to allege injury in fact."); *Cherny v. Emigrant Bank*, 604 F. Supp. 2d 605, 609 (S.D.N.Y. 2009) ("The receipt of spam by itself, however, does not constitute a sufficient injury entitling Cherny to compensable relief."); *Legg*, 574 F. Supp. at 993 (dismissing claim under Rule 12(b)(6) because allegations of "dramatic increase in the amount and frequency of phishing emails," though perhaps "consistent with" data misuse, was insufficient to suggest "actual misuse"). But Plaintiff's allegations are also deficient because *neither her email address nor her phone number were exposed through the NHS data incident*, so there is no logical connection between the alleged spam communications and NHS.

Plaintiff relies on readily distinguishable cases in an attempt to overcome the authority that spam does not constitute injury or damage. (*See* Appellant's Br. at 42, citing *Holmes v. Elephant Ins. Co.*, 2023 WL

4183380 (E.D. Va. June 26, 2023) and *Garey v. James S. Farrin, P.C.*, 35 F.4th 917 (4th Cir. 2022)). *Garey* involved a claim under the Driver's Privacy Protection Act ("DPPA") where "Defendants knowingly obtain[ed] [plaintiffs'] name and address from a motor vehicle record for an impermissible purpose in violation of law." 35 F.4th at 922. Specifically, the defendant personal injury lawyers obtained car accident reports from law enforcement agencies and data brokers and then used that information to mail unsolicited advertising materials in violation of the DPPA. *See id.* at 919-20. Here, Plaintiff cannot tie the spam to NHS at all given that it did not expose Plaintiff's phone number or email address, and NHS certainly did not spam Plaintiff as in *Garey*.

Holmes fully supports NHS's no-damage argument. There, the plaintiff alleged that he "began experiencing an uptick in spam text and telephone calls that he attributes to this Data Breach." *Holmes*, 2023 WL 4183380, at *6. But, like here, plaintiff had not alleged that the data breach "included cell phone numbers" and "he ha[d] not pleaded any facts that causally connect this uptick in spam to [defendant]," such that plaintiff could not establish injury or damage. *Id.* As in *Holmes*, to the

extent Plaintiff relies on the receipt of spam communications to plead injury, her claims should be dismissed.

4. ***Plaintiff does not argue in support of her alleged "diminution in value" damage theory.***

Plaintiff's conclusory allegation that her information has diminished in value also does not result in a compensable damage. (C. 44 ¶ 125). Plaintiff must allege "actual" (not "hypothetical") diminution in value to establish an injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks omitted). In her brief, Plaintiff fails to articulate how her personal information lost value or whether there is a defined market for her information that she intended to take advantage of through a sale. *See, e.g.*, *In re 21st Century Oncology Customer Data Sec. Breach Litig.*, 380 F. Supp. 3d 1243, 1257 (M.D. Fla. 2019). Indeed, Plaintiff does not support this purported harm with any argument at all. *Lynd v. Marshall Cnty. Pediatrics, P.C.*, 263 So. 3d 1041, 1053 n.5 (Ala. 2018) ("'waiver of an argument for failure to comply with Rule 28(a)(10), Ala. R. App. P.,' occurs when 'there is no argument presented in the brief and there are few, if any, citations to relevant legal authority'") (citation omitted). This alleged injury is therefore not cognizable to plead damages under any of the causes of action alleged.

C. The Circuit Court Properly Dismissed All Of Plaintiff's Claims for Failure To State a Claim.

In addition to failing to allege any injury or damage sufficient to support her claims, Plaintiff's allegations do not support the other required elements of each claim.

1. ***Plaintiff failed to state a claim for negligence or negligence per se (Counts I & II).***

Plaintiff asserts claims that NHS negligently secured and safeguarded her information. (C. 53-58 ¶¶ 147-67). To survive a motion to dismiss under Alabama law, a plaintiff must sufficiently allege facts to support all of the following elements of her claim: "(1) a duty to a foreseeable plaintiff; (2) breach of that duty; (3) proximate causation; and (4) damage or injury." *Martin v. Arnold*, 643 So. 2d 564, 567 (Ala. 1994). Plaintiff's failure to plead facts in support of any one of these elements would be independently fatal to her negligence claims, but she has not pled facts sufficient to support any one of them.

First, neither Alabama law nor federal statutes imposes a duty on NHS to safeguard Plaintiff's private information and prevent criminal cyberattacks by third parties. *Second*, even if such a duty exists (it does not), Plaintiff alleged zero facts suggesting there was a breach of that duty—instead, Plaintiff appears to assert that a data breach is *ipso facto*

evidence of negligence. *Third*, Plaintiff did not allege facts showing any causal nexus between NHS and her alleged damages. *Fourth*, Plaintiff did not suffer any cognizable injury or damage.

a. Plaintiff Does Not Allege Facts Establishing Any Duty Owed Her by NHS.

(1) There Is No Common Law Duty To Support Plaintiff's Negligence Claim.

NHS owes no duty to safeguard the data in its possession of individuals like Plaintiff from the criminal acts of third parties. In assessing whether a defendant owes a plaintiff a duty, Alabama courts consider a "number of factors, including public policy, social considerations, and foreseeability. The key factor is whether the injury was foreseeable by the defendant." *DiBiasi v. Joe Wheeler Elec. Membership Corp.*, 988 So. 2d 454, 461 (Ala. 2008). "In Alabama, the existence of a duty is a strictly legal question to be determined by the court." *Bryan v. Alabama Power Co.*, 20 So. 3d 108, 116 (Ala. 2009) (citation omitted).

Plaintiff has not identified—and NHS is not aware of any—Alabama caselaw holding that corporations such as NHS owe a common law duty to safeguard the data of individuals like Plaintiff in their possession from the criminal acts of third parties. Given there is no

governing Alabama statute or precedent stating that a duty exists under these circumstances, this Court should refuse to radically expand state tort law and recognize a general, untethered common law duty to safeguard the data of third parties. *See, e.g.*, *Attias v. CareFirst, Inc.*, 365 F. Supp. 3d 1, 20-24 (D.D.C. 2019) (collecting cases and finding no duty to provide reasonable data security in "typical commercial relationship"); *Buckley v. Santander Consumer USA, Inc.*, No. C17-5813 BHS, 2018 WL 1532671, at *5 (W.D. Wash. 2018) (declining to find "common law legal duty" where plaintiff alleged "failure to maintain adequate security" but failed to allege negligent affirmative acts or a special relationship with defendant); *Parker v. Carilion Clinic*, 819 S.E.2d 809, 825 (Va. 2018) ("None of our precedents has ever imposed a tort duty on a healthcare provider" to safeguard PHI from unauthorized access); *Worix*, 869 F. at 897 (declining to recognize a "'new common law duty' to safeguard information") (quotation omitted); *McConnell v. Dep't of Lab.*, 814 S.E.2d 790, 798 (Ga. Ct. App. 2018) (finding no "general duty to safeguard personal information"), *aff'd*, 828 S.E. 2d 352 (Ga. 2019).

In Alabama, absent a recognized special relationship, there is also no duty to protect against the criminal acts of a third party. *New Addition*

Club, Inc. v. Vaughn, 903 So. 2d 68, 73 (Ala. 2004). Plaintiff admits that the cyberattack was committed by "cybercriminals." (C. 17 ¶ 29). Her bare assertion that a "special relationship" existed between her and NHS (C. 54 ¶ 151) is an unwarranted legal conclusion unsupported by factual allegations and therefore not entitled to a presumption of truth. *See Gilland*, 274 So. 3d at 985 n.3. To the contrary, under black-letter law, there is no recognized special relationship between Plaintiff and NHS imposing a special duty of care on NHS. *See Restatement (Second) of Torts*, § 314A (1965) (listing the special relationships that give rise to a duty to protect to include common carriers, innkeepers, and a possessor of land who opens the land to the public). Indeed, the general rule in Alabama is that "an employer is not liable to its employees for criminal acts committed by third persons against an employee." *Carroll v. Shoney's, Inc.*, 775 So. 2d 753, 755 (Ala. 2000).

Only in the most "extraordinary" and "highly unusual" circumstances do courts make an exception to this rule, namely where the employer had "specialized knowledge" that the criminal conduct was a "probability." *Id.* (emphasis added). Here, Plaintiff has not alleged that NHS had "specialized knowledge" of an imminent attack by

cybercriminals (*e.g.*, that it had been the repeated target of such attacks in the past) and that the criminal conduct was a "probability" rather than a mere possibility. *See id.* Ultimately, Alabama has recognized a "special relationship" sufficient to establish a duty in the face of criminal conduct under only two circumstances: (1) in the context of premises liability, where the owner was "given actual, express, and specific notice that [the criminal] might attempt to commit a criminal act," and (2) in holding that a hospital has a duty to protect an anesthetized patient from the criminal acts of a third-party bad actor known to the hospital. *Baptist Memorial Hosp. v. Gosa*, 686 So. 2d 1147, 1151 (Ala. 1996).

Neither circumstance applies here. Again, while Plaintiff argues that the frequency of data breaches made NHS's data incident foreseeable, Plaintiff's allegation of a general threat of data incidents posed to companies does not constitute actual knowledge of a specific threat posed by a specific person. *See Hail v. Regency Terrace Owners Ass'n*, 782 So. 2d 1271, 1274–75 (Ala. 1999) (special relationship a question for jury in wrongful arson death case where eight to thirteen fires had occurred onsite previously and maintenance man was an arson suspect); *Thetford v. City of Clanton*, 605 So. 2d 835, 837–38 (Ala. 1992)

(special relationship was jury question where hotel was told that husband posed threat to decedent, overheard husband threaten to kill decedent, and yet "cut the chain lock on the decedent's room door and permitted the decedent's husband to access the room"); *Nail v. Jefferson County Truck Growers Ass'n, Inc.*, 542 So. 2d 1208, 1212 (Ala. 1988) (special relationship was jury question where defendant knew for several weeks of feud on premises, was asked to increase security, and was told numerous times of impending violence). Plaintiff has made no factual allegation to warrant the "extraordinary finding" of a special-relationship duty under Alabama law to support her negligence claim.

(2) Neither the FTCA Nor HIPAA Creates a Legally Enforceable Duty.

In apparent recognition that NHS does not have a common law duty to protect Plaintiff from the criminal acts of third parties, Plaintiff contends that federal statutes, namely the Federal Trade Commission Act ("FTCA") and the Health Insurance Portability and Accountability Act ("HIPAA"), create a duty to support her claim of negligence per se. *See* Appellant's Br. at 46-47. Plaintiff's bare allegations that these statutes create a legally enforceable duty (C. 57-58 ¶¶ 161-67) are unwarranted legal conclusions and not entitled to a presumption of truth.

See Gilland, 274 So. 3d at 985 n.3 (quoting *Oxford*, 297 F.3d at 1188) ("[L]egal conclusions masquerading as facts will not prevent dismissal.").

At most, all Plaintiff can argue is that "[n]o directly on-point, binding precedent in Alabama holds that HIPAA and the FTCA *cannot* serve as the basis of a negligence *per se* claim." (Appellant's Br. at 46). But Plaintiff concedes that "there is no private right of action under either HIPAA or the FTCA." (*Id.*). For this reason, courts have repeatedly refused to allow private plaintiffs to cloak their HIPAA or FTCA claims as state law claims (*i.e.*, negligence claims) because to do so would undermine Congress's express directive that private plaintiffs not be allowed to enforce those federal statutes, with the enforcement mechanism residing exclusively with the applicable agencies. *See, e.g.*, *In re Mednax Servs., Inc., Customer Data Sec. Breach Litig.*, 603 F. Supp. 3d 1183, 1225 (S.D. Fla. 2022) (dismissing negligence per se claim predicated on alleged violation of FTCA because a "negligence *per se* claim cannot rest on a federal statute that does not provide a private right of action."); *In re Brinker Data Incident Litig.*, No. 3:18-CV-686-J-32MCR, 2020 WL 691848, at *9 (M.D. Fla. Jan. 27, 2020) (same); *Weinberg v. Advanced Data Processing, Inc.*, 147 F. Supp. 3d 1359, 1365

(S.D. Fla. 2015) (dismissing negligence per se claim based on HIPAA); *Sheldon v. Kettering Health Network*, 40 N.E. 3d 661, 672 (Ohio Ct. App. 2015) (holding HIPAA cannot be used as a basis for negligence per se or as a standard of care for ordinary negligence because to do so "is tantamount to authorizing a prohibited private right of action for violation of HIPAA itself").

Alabama applies a similar standard whereby to supply a duty to support a negligence per se claim a statute must seek to protect a class of citizens that is *narrower* than the general public. *See Parker Bldg. Services Co., Inc. v. Lightsey*, 925 So. 2d 927, 931 (Ala. 2005). Indeed, HIPAA's stated purpose is, among other things, to "combat waste, fraud, and abuse in health insurance and health care delivery." *See* HIPAA, Pub. L. No. 104-191, 110 Stat. 1936. Similarly, the purpose of the FTCA is to "protect the public." *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1368 (11th Cir. 1988). Because HIPAA was intended to protect patients generally and the FTCA to protect the public-at-large, those federal statutes cannot form the basis of Plaintiff's negligence per se claims. *See In re Blackbaud, Inc., Customer Data Breach Litig.*, 567 F. Supp. 3d 667, 685 (D.S.C. 2021). This Court should not permit Plaintiff

to circumvent Congress's intent in not providing a private right of action under HIPAA and the FTCA by finding such statutes can form the basis of a duty of care for a negligence claim.

b. Plaintiff Does Not Allege Breach.

Even if Plaintiff's factual allegations supported a finding that NHS owed her a duty of care (it did not), her negligence claims still fail because she did not sufficiently plead facts showing that NHS breached any such duty. In short, she has failed to describe what data security practices and security principles NHS should have complied with or how those principles would have prevented the data incident in this case.

In order to properly plead a breach of duty necessary to state a negligence claim, a plaintiff must allege sufficient facts to establish the applicable standard of care and how the defendant violated that standard of care. "The bald allegation that defendants owed plaintiffs a duty, and breached that duty does not satisfy plaintiffs' burden of stating a claim." *Jasso v. Citizens Telecomms. Co. of Cal.*, No. CVS05 2649GEB EFB PS, 2007 WL 97036, at *5 (E.D. Cal. Jan. 9, 2007). Instead, "plaintiffs must be clear on the relevant standard of care applicable here, the source of

that standard, and what factual allegations show that the duty was breached." *Id.*

Here, Plaintiff fails to allege facts showing how NHS breached any duty it might have owed. Instead, Plaintiff provides a laundry list of possible ways in which NHS *might* have breached its duty to provide reasonable data security, including "[f]ailing to maintain an adequate security system to reduce the risk of cyber-attacks and data breaches," "[f]ailing to comply with FTC guidelines for cybersecurity, in violation of Section 5 of the FTC Act," and "[f]ailing to adhere to industry standards for cybersecurity." (C. 20-22 ¶ 38; C. 55-56 ¶¶ 154–56). But these conclusory allegations cannot stand in place of *facts* required to show NHS did not have any specific security measures in place that fulfill an established standard of care and which would have prevented the cyberattack. Indeed, Plaintiff's attempted reliance on the FTCA and HIPAA fall flat because neither the FTCA nor HIPAA articulate a specific standard of care applicable to data security. *See Lee v. Accredo Pharmacy-Express Scripts*, No. 2:15-CV-01013-JEO, 2016 WL 1365587, at *3 (N.D. Ala. Apr. 6, 2016) (dismissing complaint for failure to state a claim

because plaintiff's conclusory allegations failed to establish that defendants had breached a legal duty).[2]

Ultimately, Plaintiff's negligence claim hinges on the circular argument that because a cyberattack occurred, NHS must have failed to provide reasonable data security. Such tautological claims are no substitute for pleading facts demonstrating that NHS owed a duty which it then breached. *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 717 (8th Cir. 2017) ("The implied premise that because data was hacked [defendant's] protections must have been inadequate is a naked assertion devoid of further factual enhancement that cannot survive a motion to dismiss.") (quotation mark omitted); *Anderson v. Kimpton Hotel & Rest. Grp., LLC*, No. 19-cv-01860-MMC, 2019 WL 3753308, at *5 (N.D. Cal. Aug. 8, 2019)

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[2] While Plaintiff also seems to urge breach based on the amount of time it took NHS to send notifications regarding the data incident (C. 17-19 ¶¶ 28, 31, 32), courts regularly reject conclusory allegations in this vein where a plaintiff cannot identify any incremental harm caused by the purportedly delayed notice. *See Martin*, 643 So. 2d at 567 (breach must be proximate cause of plaintiff's injury); *see also In re Sony Gaming Networks & Consumer Data Sec. Breach Litig.*, 996 F Supp 2d 942, 1010 (S.D. Cal. 2014), *correcting order*, 2014 WL 12603117 (Feb. 10, 2014) ("[A] plaintiff must allege actual damages flowing from the unreasonable delay," not simply damages from "the intrusion itself.").

(granting motion to dismiss where "plaintiffs fail to allege any facts in support of their conclusory assertion that [defendant] . . . 'fail[ed] to implement and maintain reasonable security procedures and practices'"); *Gilland*, 274 So. 3d at 985 n.3 ("[T]o survive [defendant's] motion to dismiss, [plaintiff] was required to plead *facts* that would support those conclusory allegations."). Because Plaintiff has failed to allege any facts showing how NHS breached any alleged duty of care, her negligence claim should be dismissed.

c. Plaintiff Does Not Allege Causation or Damages.

Plaintiff's negligence claim also fails for the independent reason that she has failed to allege any cognizable damages caused by the alleged breach. Damages are an essential element of a claim for negligence. *Martin*, 643 So. 2d at 567. It is a "basic principle of tort law that in negligence cases" a plaintiff must show some appreciable, "actual injury." *Southern Bakeries, Inc. v. Knipp*, 852 So. 2d 712, 717 n.7 (Ala. 2002); *Matthews Bros. Const. Co. v. Stonebrook Dev., L.L.C.*, 854 So. 2d 573, 578 (Ala. Civ. App. 2001) ("[O]ur courts have long recognized that non-contract causes of action accrue only when the plaintiff actually suffers injury or loss."), *aff'd sub nom. Ex parte Stonebrook Dev., L.L.C.*,

854 So. 2d 584 (Ala. 2003); *Abrams v. Ciba Specialty Chemicals Corp.*, 663 F. Supp.2d 1259, 1265 (S.D. Ala. 2009) ("It is fundamental that a plaintiff seeking to recover for tortious conduct under Alabama law must show an injury.").

Here, as explained above, *see supra* Section I(B), Plaintiff's alleged damages consist of an increased risk of identity theft (C. 12 ¶ 10), time expended to mitigate that risk (C. 42 ¶ 112), spam communications (C. 41 ¶ 109), and calls asking whether she had made certain purchases and stating she owes money. (C. 42 ¶¶ 110-11). Plaintiff's purported damages necessarily fail on causation and damage grounds. Plaintiff has not tied the information purportedly exposed to the damages allegedly suffered.

First, as previously detailed, Plaintiff did not plead that she has experienced identity theft. Rather, Plaintiff has alleged that she is at an increased risk of suffering harm in the future, alleging communications with Credit Karma that cannot be tied temporally or to the information exposed. (C. 12 ¶ 10; C. 13 ¶ 14; C. 44 ¶ 122). Plaintiff's fear of being the victim of identity theft at some undefined time in the future is insufficient to sustain a negligence claim in Alabama because "in negligence cases,

the plaintiff must suffer actual injury; the threat of future harm, not yet realized, is not enough." *Southern Bakeries*, 852 So. 2d at 717 n.7.

Second, Plaintiff's alleged time expended monitoring her financial accounts to "guard against identity theft" is not sufficient to support a negligence claim, particularly where her financial account information was not exposed. *See supra* Section I(B)(2). In Alabama, time and money spent in anticipation of possible future harm cannot support a negligence claim. *See Lindsey v. 3M Co.*, No. 5:15-CV-01750-AKK, 2020 WL 1479170, at *2 (N.D. Ala. Mar. 26, 2020); *Hinton*, 813 So. 2d at 831-32 (collecting cases) (rejecting plaintiff's argument that the expense of monitoring is sufficient harm to support a cause of action because "our recognizing a cause of action based upon nothing more than an increased risk that an injury or an illness might one day occur would result in the courts of this State deciding cases based upon nothing more than speculation and conjecture.").

Third, spam communications and calls inquiring about purchases and payday loans cannot fulfill the damage element of a negligence claim, particularly where her email address and telephone number were not exposed. *See supra* Section I(B)(3). And as with increased risk of identity

theft, increased risks of receiving spam communications and unrealized fraud are not in themselves damages sufficient to support a negligence claim. *Southern Bakeries*, 852 So. 2d at 717 n.7 (noting that in negligence cases, threat of future harm "is not enough").

2. ***Plaintiff waived any challenge to the Circuit Court's dismissal of her claim for breach of implied contract (Count III).***

Plaintiff did not respond to NHS's motion to dismiss her breach of implied contract claim, and therefore Plaintiff waived her right to appeal the proper dismissal of this claim by the Circuit Court. *See Berry v. PHH Mortg. Corp.*, No. SC-2022-0474, 2023 WL 3558244, at *2 (Ala. May 19, 2023) (holding party who failed to address issue in responsive brief waived the issue). She has also not presented any argument on appeal regarding the Circuit Court's dismissal of this claim, requiring affirmance of the dismissal. *Ex parte Riley*, 464 So. 2d 92, 94 (Ala. 1985) ("[I]t has long been the law in Alabama that failure to argue an issue in brief to an appellate court is tantamount to the waiver of that issue on appeal."). Any "attempt to raise this issue in [her] reply brief comes too late." *Ex parte Wilcox Cnty. Bd. of Educ.*, 374 So. 3d 641, 649 n.9 (Ala. 2022), *reh'g denied* (Oct. 21, 2022).

3. ***Plaintiff failed to state a claim for invasion of privacy (Count IV).***

Plaintiff did not sufficiently allege facts to support her claim of invasion of privacy. Specifically, she did not allege facts demonstrating NHS's intent or that NHS's conduct was "highly offensive."

In Alabama, invasion of privacy is an *intentional* tort. *Rosen v. Montgomery Surgical Ctr.*, 825 So. 2d 735, 737 (Ala. 2001) ("[T]he tort of invasion of privacy as the *intentional* wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.") (emphasis added); *Burton v. MAPCO Exp., Inc.*, 47 F. Supp. 3d 1279, 1288 (N.D. Ala. 2014) ("Under Alabama law, invasion of privacy is an intentional tort."). Plaintiff's invasion of privacy claim is apparently predicated on an intentional disclosure of private facts, one of the four recognized bases for an invasion of privacy claim. *See Facebook, Inc. v. K.G.S.*, 294 So. 3d 122, 144 (Ala. 2019); *Borden v. Malone*, 327 So. 3d 1105, 1129 (Ala. 2020) (Mitchell, J., concurring in part) (collecting cases). However, she has not alleged that NHS intentionally disclosed Plaintiff's personal information—instead, the Complaint avers that Plaintiff's personal information was stolen by "cybercriminals." (*See* C. 17-18 ¶ 29).

Indeed, Plaintiff herself alleges that Defendant's conduct was "negligent" and not intentional. (C. 11 ¶ 8; C. 20-22 ¶¶ 38-39; C. 61 ¶ 176). This is fatal to Plaintiff's invasion of privacy claim. *See Burton*, 47 F. Supp. 3d at 1288 ("Even if the defendants were negligent, as alleged, in safeguarding [plaintiff's] account information, such negligence does not morph into an intentional act of divulging [plaintiff's] confidential information."); *Blanchard v. United States*, No. 5:13-CV-00729-JEO, 2015 WL 1643402, at *6 (N.D. Ala. Apr. 13, 2015) (granting summary judgment on invasion of privacy claim where uncontroverted evidence showed that the disclosure of private information was "accidental rather than intentional"); *Orthman v. Premiere Pediatrics, PLLC*, 2024 OK CIV APP 7, 2024 WL 411480 (Ct. Civ. App. Ok. Jan. 5, 2024) (dismissing invasion of privacy claim because defendant "did not intentionally take the Plaintiffs' information and publish it to others. The information was stolen by a hacker."); *Carr v. Oklahoma Student Loan Auth.*, No. CIV-23-99-R, 2023 WL 6929853, at *6-7 (W.D. Okla. Oct. 19, 2023) (same). As explained by the court in *Carr*:

> Plaintiffs attempt to ascribe the intentional and highly offensive acts of hackers to [defendant]. Inconsistently, however, Plaintiffs expressly attribute the data breach—the intrusive act—to [defendant's] negligence. Doc. 42 at 20 ("As a

> result, Nelnet's intentional choice to negligently provide inadequate data security. . . ."). While Plaintiffs are entitled to pursue alternative theories of the case, Plaintiffs do not plausibly allege the necessary intentional conduct by [defendant]. Accordingly, Plaintiffs' remedy against [defendant] only properly sounds in negligence, not an intentional tort.

Id. at *7. Plaintiff here suffers the same fate. She cannot base an intentional tort claim on conduct she herself has alleged was negligent.

Recognizing the deficiencies in her claim, Plaintiff tries to recast it as being based on NHS's delay in notifying her about the data incident. (*See* Appellant's Br. at 49). The privacy tort Plaintiff seeks to impose, though, must be based on an intentional *disclosure*—not a delay in notification regarding the potential misconduct of a third-party bad actor. *Borden*, 327 So. 3d at 1129; *Edwards v. Nat'l Vision, Inc.*, 946 F. Supp. 2d 1153, 1179 (N.D. Ala. 2013), *aff'd*, 568 F. App'x 854 (11th Cir. 2014) (invasion of privacy requires that *defendant* gave publicity to private or false information) (emphasis added).

Even if Plaintiff's invasion of privacy claim was based on an alleged intentional disclosure (it was not), it would still fail for the independent reason that NHS's alleged conduct—suffering a cyberattack, notifying potentially affected individuals, and offering free risk-mitigation

services—was not "highly offensive." The cases Plaintiff relies on are wholly inapposite. (*See* Appellant's Br. at 50) (citing *Pickett v. Williamson*, No. 5:11-CV-03439-JHE, 2015 WL 2450767, at *3 (N.D. Ala. May 22, 2015) (did not involve an invasion of privacy claim); *Cunningham v. Dabbs*, 703 So. 2d 979, 980 (Ala. Civ. App. 1997) (involving lewd and sexually suggestive comments by male supervisor to female employee and sexually suggestive actions, including sticking his tongue in plaintiff's ear)). To be highly offensive, Plaintiff would have had to allege intentional or wanton conduct on the part of NHS that caused the alleged invasion. Courts nationwide have consistently rejected claims for invasion of privacy brought against victims of cybercrime and data breaches because *it is the third party's crime*, not the defendant cybercrime victim's response to it, that is "highly offensive." *See In re Accellion, Inc. Data Breach Litig.*, No. 5:21-CV-01155-EJD, 2024 WL 333893, at *16 (N.D. Cal. Jan. 29, 2024) ("[C]ourts have declined to find 'highly offensive' conduct or an 'egregious breach of social norms' where only negligence is alleged with respect to a data breach, as opposed to intentional violations of privacy rights.") (collecting cases); *Carr*, 2023 WL 6929853, at *6-7 (dismissing claim for invasion of privacy and

explaining that a hacker's "highly offensive" conduct is not imputed to the defendant cybercrime victim).

Finally, "Alabama law has long required a manifest, present injury before a plaintiff may recover in tort." *Hinton*, 813 So. 2d at 829. As demonstrated above, *see supra* Section I(B), not one of Plaintiff's alleged harms reflects a manifest, present injury, which is independently fatal to her claim for the intentional tort of invasion of privacy.

Because Plaintiff has failed to sufficiently allege the elements of her claim for invasion of privacy, the Circuit Court was correct to dismiss it.

4. *Plaintiff failed to state a claim for unjust enrichment (Count V).*

Plaintiff concedes that NHS did not receive any monetary benefit from her and that NHS has not held onto any such benefit unjustly. (*See* Appellant's Br. at 51). Instead, she hinges her unjust enrichment argument on the conclusory allegation that "[p]art of the wages or pay terms that [she and other] Class Members negotiated with Defendant was intended to be used by Defendant to fund adequate security of" Plaintiff's information. (*See id.* (quoting C. 45 ¶ 127)).

As an initial matter, this does not make any sense; funds that *NHS paid to Plaintiff* cannot possibly fund additional data security. Moreover,

if Plaintiff could articulate any so-called promise of data security, she would have done so in defending her breach of implied contract claim, which she has abandoned. Indeed, Plaintiff has not alleged any facts from which this Court could realistically infer that any promise of data security formed part of the employment bargain between her and NHS. *See Gilland*, 274 So. 3d at 985 n.3 ("[T]o survive [defendant's] motion to dismiss, [plaintiff] was required to plead *facts* that would support those conclusory allegations."); *Irwin v. Jimmy John's Franchise, LLC*, 175 F. Supp. 3d 1064, 1072 (C.D. Ill. 2016) (dismissing unjust enrichment claim in data breach suit because "[plaintiff] paid for food products. She did not pay for a side order of data security and protection."). Given that this claim is based on threadbare conclusory allegations, the Circuit Court was correct to dismiss it.

Plaintiff's reliance on distinguishable Eleventh Circuit caselaw does nothing to salvage her claim. In *Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012), plaintiffs alleged that they "conferred a monetary benefit on [defendant] in the form of monthly premiums," *id.* at 1328, "part of which were intended to pay for the administrative costs of data security," *id.* The plaintiffs alleged that the defendant had not taken care

to secure two unencrypted laptops containing the information of 1.2 million individuals, and thus defendant could not justly retain the monetary premiums. *Id.* Here, unlike in *Resnick*, NHS received no monetary benefit from Plaintiff because Plaintiff was an employee and not a premium-paying customer. (C. 10 ¶ 2 n.1; C. 9 ¶ 1). Thus, *Resnick* is neither controlling nor persuasive.

For these reasons, this Court should affirm the dismissal of Plaintiff's unjust enrichment claim.

5. ***Plaintiff failed to state a claim for breach of confidence (Count VI).***

NHS counsel is aware of no authority—and Plaintiff has identified none—recognizing a breach of confidence claim as an independent cause of action under Alabama law. Plaintiff relies entirely on non-Alabama caselaw and secondary sources discussing the substantive law of other states. (*See* Appellant's Br. at 52-54). Moreover, one case relied on by Plaintiff lists the types of relationships in which breach of confidence claims typically arise: "those involving physicians, therapists, financial institutions, and the like." *Muransky*, 979 F.3d at 932 (vacating lower court's denial of motion to dismiss breach of confidence claim). Breach of confidence claims do not arise in employer-employee relationships like

the one alleged here, and Plaintiff has provided no authority to the contrary. *See Clemens v. ExecuPharm, Inc.*, No. CV 20-3383, 2023 WL 4139021, at *6 (E.D. Pa. June 22, 2023) (dismissing breach of confidence claim in data breach case brought against employer by former employee).

Even if Alabama recognized the tort of a breach of confidence (it does not), and that tort arose in employer-employee relationships (it cannot), it would still be inapplicable here because Plaintiff has not alleged that NHS affirmatively and intentionally disclosed her information to a third party. *See, e.g.*, *Purvis v. Aveanna Healthcare, LLC*, 563 F. Supp. 3d 1360, 1378 (N.D. Ga. 2021) (no breach of confidence in data breach action as there were "no alleged facts suggesting that Defendants disclosed Plaintiffs' information;" rather, the information was "stolen by third-parties"); *Farmer v. Humana, Inc.*, No. 8:21-cv-1478-MSS-SPF, 2022 WL 732126, at *7 (M.D. Fla. Jan. 25, 2022) (same); *Brinker*, 2020 WL 691848, at *22 ("Even assuming, arguendo, that Brinker's inadequate security facilitated the theft [of data], such a claim would lie in negligence not breach of confidence.").

The Circuit Court properly declined Plaintiff's invitation to invent a new cause of action in Alabama, and this Court should do the same.

6. ***Plaintiff failed to state a claim for breach of fiduciary duty (Count VII).***

In Alabama, the elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damage suffered as a result of that breach. *Aliant Bank, a Div. of USAmeribank v. Four Star Invs., Inc.*, 244 So. 3d 896, 907 (Ala. 2017). Plaintiff alleges she was an employee of NHS and, therefore, a fiduciary relationship existed. (*See* C. 65-69 ¶¶ 196–201). But this Court has been clear: "a principal or employer is not the fiduciary of the agent or employee." *Miller v. SCI Sys., Inc.*, 479 So. 2d 718, 720 (Ala. 1985); *Pruitt v. Charter Commc'ns*, No. 5:17-CV-1764-LCB, 2019 WL 1199837, at *11 (N.D. Ala. Mar. 14, 2019) (same).

Ignoring this Court's precedent, Plaintiff claims that "Alabama does not have a hard and fast rule that there can never be a fiduciary relationship between employees and employers." (*See* Appellant's Br. at 55). To support this misstatement of Alabama law, Plaintiff cites a case from the Eleventh Circuit on appeal from the Northern District of Georgia applying the law of ERISA, not Alabama state law. *Id.* (citing *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1224 (11th Cir. 2008)). *Lanfear* contains no language supporting Plaintiff's assertion concerning

Alabama law, *id.*, which is clear that NHS as her employer owed Plaintiff no fiduciary duty.

Plaintiff also alleges that NHS had a fiduciary relationship with other putative class members (*e.g.*, "patients/residents"). (C. 65 ¶ 197). However, because Plaintiff herself has no claim for a breach of a fiduciary duty, she cannot assert a breach of fiduciary duty claim on behalf of absent class members. *See Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 974 n.17 (11th Cir. 2007) ("[D]ismissal of this action would be warranted because 'a class representative whose claim is time-barred cannot assert the claim on behalf of the class.'"); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1347 (11th Cir. 2001) (same).

Finally, as with Plaintiff's other claims, she is required to sufficiently allege that she suffered injury as a result of NHS's alleged conduct. *See Hensley v. Poole*, 910 So. 2d 96 (Ala. 2005) ("A claim alleging breach of fiduciary duty sounds in tort, and a necessary element to be proven in an action alleging breach of duty is damages.") (citation and alteration omitted). Plaintiff has failed to allege actual injury, *see supra* Section I(B), providing additional and independent grounds upon which to affirm the Circuit Court's dismissal of her claim for breach of fiduciary

duty. *See Hinton*, 813 So. 2d at 829 ("Alabama law has long required a manifest, present injury before a plaintiff may recover in tort.").

II. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS BECAUSE PLAINTIFF CANNOT ESTABLISH STANDING.

The glaring weakness of Plaintiff's Complaint is that she cannot allege concrete injury traceable to NHS's conduct. As explained above, this requires dismissal of all of her claims under Rule 12(b)(6). But it also means that she does not have standing because her Complaint does not create a case or controversy that can be resolved by an Alabama Court under Rule 12(b)(1).

Plaintiff argues that the doctrine of "standing"—and thus the requirement that she allege concrete injury-in-fact—applies only in public law disputes and is irrelevant in private civil disputes. *See* Appellant's Br. at 23-26. NHS acknowledges that members of this Court have in the past expressed that the meaning of "standing" in Alabama is not identical to that in federal courts. But this does not mean Plaintiff has no obligation to plead concrete injury-in-fact.

Historically, this Court has aligned itself with other jurisdictions in recognizing that "[s]tanding turns on whether the party has been injured in fact and whether the injury is to a legally protected right." *Town of*

Cedar Bluff v. Citizens Caring for Child., 904 So. 2d 1253, 1256 (Ala. 2004) (citation omitted) (quoting *State v. Prop. at 2018 Rainbow Drive known as Oasis*, 740 So. 2d 1025, 1027 (Ala. 1999)). To the extent later precedent is inconsistent with this requirement that plaintiffs must establish injury-in-fact to have standing, that precedent should be clarified.

Plaintiff, relying on *Ex parte BAC Home Loans Servicing, LP*, 159 So. 3d 31 (Ala. 2013), contends that she is required to show only that she is the "proper party" to bring her claims, regardless of whether she pled injury at all. *Id.* at 24. But to conclude there is zero obligation for a party to have suffered concrete injury-in-fact for that party to have standing to sue is inconsistent with the Alabama Constitution—which contains a "cases and controversies" requirement like that of the U.S. Constitution. *Alabama Educ. Television Comm'n*, 151 So. 3d at 290 n.6 (Murdock, J. concurring) (citing ALA. CONST. art. VI, §§ 139, 140, 142 and U.S. CONST. art. III § 2.) ("The terminology of the Alabama Constitution limiting jurisdiction to cases and controversies is not unlike the language of the United States Constitution upon which the so-called 'case-or-controversy requirement' noted in *Steel* is based."). Both Constitutions grant

jurisdiction to courts to decide cases and controversies, which require plaintiffs to establish that they have suffered concrete "injury-in-fact," not the hypothetical or speculative injury alleged in Plaintiff's Complaint. *Town of Cedar Bluff*, 904 So. 2d at 1256; *TransUnion*, 594 U.S. at 423, 438. The cases and controversy requirement is for *all* suits (*see* ALA. CONST. art. VI, § 142(b)), and the Alabama Rules of Civil Procedure include requirements under both rules 12(b)(1) and 12(b)(6), such that both should be construed separately. *Voltz v. Dyess*, 148 So. 3d 425, 427 (Ala. 2014) ("When interpreting a rule of procedure, we must give the wording of the rule its plain meaning.").

Excusing parties from pleading injury-in-fact for standing purposes is inconsistent with U.S. Supreme Court precedent on standing, precedent that Alabama has historically followed in requiring a plaintiff to demonstrate "the existence of an actual, concrete, and particularized injury in fact." *Ex parte King*, 50 So. 3d 1056, 1059–60 (Ala. 2010) (citing *Alabama Alcoholic Beverage Control Bd. V. Henri-Duval Winery, LLC*, 890 So. 2d 70, 74 (Ala. 2003); *Lujan*, 504 U.S. at 560–61; and *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Indeed, the reasoning from *BAC* has been called into question by recent Alabama precedent for this very

reason. *Key*, 372 So. 3d at 1141 n.5 (Mitchell, J., concurring) (recognizing *BAC*'s broad holding warrants reevaluation because it is not consistent with the U.S. Supreme Court's decision in *TransUnion*). As recognized by Justice Mitchell in *Key*, "the United States Supreme Court has held, and the Wright & Miller treatise has acknowledged, that even private-law plaintiffs must satisfy the components of standing to invoke a court's subject-matter jurisdiction." *Id.* (citing *TransUnion*, 594 U.S. at 426, 432-42; *Lujan*, 504 U.S. at 576-77; 13A WRIGHT & MILLER § 3531).

Indeed, *TransUnion* actually demonstrates why a standing analysis is not simply an inquiry into whether the "proper party" has sued. As discussed in Section I(B)(1)(b), *supra*, in *TransUnion* more than 8,000 persons sued under the FCRA based on the inclusion of inaccurate information in their credit files. *TransUnion*, 594 U.S. at 435. Because all of these persons had inaccurate information in their files, they were "proper parties" in the civil suit and could even lay claim to the FCRA's statutory damage provision. Nevertheless, the U.S. Supreme Court found that only the 2,000 persons whose credit reports had been disseminated had standing to pursue their claims because only those persons had suffered an "injury-in-fact" necessary to fulfill Article III's case and

controversy requirement. Similarly, here Plaintiff can lay claim to being a proper party based on her receipt of the breach notification letter. But unless she has also suffered an injury traceable to the NHS data incident, there is no case and controversy worthy of the attention of the Alabama courts.

As explained above, *see supra* Section I(B), Plaintiff simply has not met this standard. Where, as here, a plaintiff has not established injury-in-fact, there is no case and controversy for Alabama courts to resolve, and therefore dismissal is appropriate for lack of standing under Rule 12(b)(1).

CONCLUSION

The Circuit Court properly dismissed Plaintiff's claims under Alabama Rule of Civil Procedure 12(b). Plaintiff has failed to allege damages or the other requisite elements of her claims, and she has failed to establish injury-in-fact or her standing to sue. NHS respectfully requests that this Court affirm the Circuit Court's Order dismissing Plaintiff's Complaint.

Dated: February 28, 2024 Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28 because it contains 12,469 words, excluding the parts of the brief exempted by Ala. R. App. P. 28(j)(1), 32(c), as counted by the word count function of Microsoft Word processing software.

2. This brief complies with the typeface and type style requirements of Ala. R. App. P. 32(a)(7) because this brief has been prepared in a proportionately spaced typeface using the Microsoft Word processing software in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing by electronically filing the same using the appellate online electronic filing system and by depositing a copy in the U.S. Mail, properly addressed and first-class postage prepaid, on the 4th day of March, 2024.

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