# Exhibit A1

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**Case No. 8:22-cv-1472-TPB-AAS**

In re:

**LINCARE HOLDINGS, INC.,**
**DATA BREACH LITIGATION**

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**DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**[1]

As a threshold matter, it is not enough for Plaintiffs to "plausibly" *allege* standing here—they must now *establish* standing. Because Lincare has challenged Plaintiffs' standing factually (in addition to mounting a facial challenge), and because Plaintiffs now have been allowed to conduct jurisdictional discovery, the burden is on Plaintiffs to establish by a preponderance of the evidence that the Court has subject matter jurisdiction. The Court may now independently weigh the facts and is not constrained to view them in the light most favorable to Plaintiffs.[2]

## I. PLAINTIFFS HAVE NOT OVERCOME LINCARE'S FACIAL AND FACTUAL CHALLENGES TO PLAINTIFFS' STANDING.

Plaintiffs repeatedly lump together their allegations of present injury, *see* Resp. at 7, 11, in the apparent hope that their collective allegations, taken together, will be enough to establish standing for each member of the group. But each "plaintiff must

[1] Because this Reply is limited to seven pages, Lincare lacks sufficient space to reply to all issues raised in Plaintiffs' 25-page Response in Opposition (Doc. 78) ("Response" or "Resp."), which does not comport with Local Rule 3.01(b).

[2] *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir.1981); *Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1252 (M.D. Fla. 2003); *Eldridge v. Pet Supermarket, Inc.*, 446 F. Supp. 3d 1063, 1067 (S.D. Fla. 2020); *Odyssey Marine Expl. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1169 (11th Cir. 2011). For the benefit of the Court, all cases cited herein have been hyperlinked.

clearly allege facts demonstrating *each element*" of standing.[3] Thus, even if one of the named Plaintiffs possessed standing, this would be insufficient to accord standing to other named Plaintiffs; rather, they each must individually establish their *own* standing. Moreover, because the state statutory claims can be asserted only by a resident of the relevant state, these claims must be dismissed if the individual Plaintiff asserting that claim lacks standing.

**A. Plaintiffs Have Not Established Concrete *Present* Injury.**

Notwithstanding Plaintiffs' attempts to collectivize their allegations of present injury, the allegations do not demonstrate present concrete injury-in-fact even if taken together, much less if considered separately.[4] Most of the Plaintiffs allege only *attempts* to commit identity theft or financial fraud, and all conspicuously omit any claim of accompanying monetary loss. Mot. at 3-5. But, without monetary loss to Plaintiffs, none have established concrete injury-in-fact.[5]

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[3] *See* Spokeo v. Robbins, 578 U.S. 330, 338 & n.6 (2016) (cleaned up). For instance, by listing seriatim each separate injury supposedly suffered by each named Plaintiff, Plaintiffs imply that *all* Plaintiffs suffered *all* of the listed injuries. But a cursory review of the Complaint reveals that the only common injury allegedly inflicted by a third-party (versus self-inflicted) involves spam, health ads, and suspicious phone calls and texts. As discussed in Defendant's Motion to Dismiss (Doc. 62) ("Motion" or "Mot."), most courts have rejected arguments that increased spam or emails establish misuse of data. Mot. at 3, n.10.

[4] As discussed in the Motion, Plaintiffs also cannot premise injury on diminished data value. *See* Mot. at 7; Perkins v. Welldynerx, LLC, 2023 WL 2610157, *2 (M.D. Fla. March 23, 2023).

[5] *See, e.g.,* Torres v. Wendy's Co., 195 F. Supp. 3d 1278, 1282-83 (M.D. Fla. 2016) (collecting cases) (Plaintiff has not alleged injury-in-fact stemming from two fraudulent charges when "Plaintiff has not alleged that the two fraudulent charges went unreimbursed by his credit union"); Hymes v. Earl Enters. Holdings, 2021 WL 1781461, *10 (M.D. Fla. Feb. 10, 2021); Smith v. Sabre Corp., 2017 WL 11678765, *3 (C.D. Cal. Oct. 23, 2017); Whalen v. Michael Stores Inc., 153 F. Supp. 3d 577, 580 (E.D.N.Y. 2015) ("in order to have suffered an actual injury, plaintiff must have had an unreimbursed charge…") (cleaned up), *aff'd.*, 689 F. App'x 89, 90 (2d Cir. 2017).

**B. Plaintiffs Have Not Established a Substantial Risk of *Future* Injury.**

Rather than introduce evidence that the relevant threat actor was seeking to extract data for the purpose of stealing and selling (versus extorting) it, or that Plaintiffs' ultra-sensitive information was actually exposed, Plaintiffs merely seek to create doubts regarding same, apparently hoping the Court will resolve any doubts in their favor.[6] For instance, although Plaintiffs speculate that the Incident might have been more than a mere attempt to extract a ransom, Plaintiffs present no *actual* evidence of same. Resp. at 8. Plaintiffs also fail to overcome Lincare's assertion that the sensitivity of the data involved was low, Mot. at 2-3, because Plaintiffs' Social Security numbers, driver's license numbers, and unredacted financial information account data were never disclosed. Dobi Dec. (Doc. 62-2 at ¶ 13). Although in their control, Plaintiffs do not present any evidence that: (i) their Social Security numbers actually were ever given to Lincare; (ii) they took pre-breach precautions to avoid harm from a data breach; or (iii) their PII was not compromised in any other data breach.[7] Instead, Plaintiffs argue that Lincare could have done more to verify that no such ultra-sensitive data was exposed, and further speculate that cyber thieves might

[6] *See* Burns v. Mammoth Media, Inc., 2021 WL 3500964, *3 (C.D. Cal. Aug. 6, 2021) ("the plaintiff cannot rest on the mere assertion that factual issues may exist."); *see also* note 2, *supra*.

[7] *See* Yankovich v. Applus Techs., Inc., 621 F.Supp.3d 269, 275-76 (D. Conn. 2022) (where no "private or sensitive personal or financial information" was exposed, as established by defendant's evidence, Plaintiffs cannot "rely upon their allegations to establish Article III standing"); Shepherd v. Cancer & Hematology Ctrs. of W. Mich., 2023 WL 4056342, *3-6 (W.D. Mich. Feb. 28, 2023); Fus v. CafePress, Inc., 2020 WL 7027653, *2-4 (N.D. Ill. Nov. 30, 2020); Patterson v. Med. Review Inst. of Am., LLC, 2022 WL 3702102, *2-3 (N.D. Cal. Aug. 26, 2022). Although three Plaintiffs allege in the Complaint to have never been a "victim" of a prior data breach, four other Plaintiffs are silent regarding this issue. But none of the Plaintiffs provide any *evidence* that their PII was never before compromised, as is now their burden.

have obtained some Social Security numbers via "handwritten" materials.[8] But without presenting affirmative countervailing evidence, the undisputed record demonstrates that this was a ransom attack and Plaintiffs' Social Security numbers were *not* exposed during the Incident.[9]

**C. Plaintiffs Have Not Established Any Cognizable Intangible Injury.**

Plaintiffs also cannot establish that their claimed intangible injuries, including invasion of privacy, have a close relationship to harms traditionally recognized as providing a basis for a lawsuit or have been elevated by Congress to the status of legally cognizable injuries.[10] Mot. at 6-13. Plaintiffs also fail even to respond to Lincare's authority that Plaintiffs cannot recover for "self-inflicted" harm, such as

[8] Plaintiffs' assertion that "Lincare relied solely on the hacker's representations" to determine the scope of the Incident, Resp. at 9, is contravened by Brian Nannie's deposition testimony explaining the independent measures Lincare took internally and with its forensic vendor to investigate the intrusion and retrace the threat actor's steps, including the review of Lincare's network logs. (DE 94-2 at 104:1 – 105:10; 156:4-23).

[9] Numerous courts have held that, even if a few class members may have experienced identity fraud after a data breach, this does not establish that fraud will inevitably follow for the remaining class members. *See* Mot. at 5. Similarly, in *JW v. Birmingham Board of Education*, 904 F.3d 1248, 1268 (11th Cir. 2018), the Eleventh Circuit concluded that there was no substantial risk of future injury for standing purposes where only a .003 percent chance existed that class members would be harmed. That percentage would equate in the present case to approximately 5,190 individuals based on the class size of at least 1.73 million individuals as most recently reported on the HHS Office of Civil Rights Breach Reports website. *See* https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf (last visited June 20, 2023) (link cited in the Complaint at ¶ 46, n.11).

[10] For the reasons discussed by this Court in *Perkins,* 2023 WL 2610157, *3, Plaintiffs' alleged intangible harms do not even qualify for consideration as concrete injuries under the foregoing tests because they are asserted in the context of common law, versus statutory, claims. For this reason, *Perry v. CNN*, 854 F.3d 1336, 1340-41 (11th Cir. 2017), does not support Plaintiffs' position. In *Perry*, the Eleventh Circuit held that, by enacting the Video Privacy Protection Act, Congress had created a cause of action bearing a close relationship to the tort of intrusion upon seclusion, which requires intentionality. Here, Plaintiffs are not asserting any such federal statutory claims by which Congress could have elevated a *de facto* injury to concrete injury status for federal jurisdictional purposes. And Plaintiffs cannot analogize their intangible injury claims here to an intrusion upon seclusion because they cannot demonstrate "intentionality." *Id.* at n.1; *see* Mot. at 13; *see also Pet Supermarket v. Eldridge*, 2023 WL 3327267, *4 (Fla. 3d DCA 2023) (describing other essential elements of the tort).

lost time and emotional distress, without prior *actual knowledge* of facts establishing a substantial risk of future harm. *Id*. at 7-12. Plaintiffs' reliance on cases that ignore these threshold Supreme Court-articulated prerequisites is thus misplaced. Resp. at 5.

**D. Plaintiffs Have Not Established Traceability.**

Plaintiffs have not plausibly established a sufficient connection between their alleged injuries and the Incident. For instance, Plaintiffs have not explained how medical information can facilitate financial fraud.[11] Additionally, *none* of the Plaintiffs allege (much less prove) that they had previously guarded their sensitive personal data such that it could not have been otherwise exposed (for example, they do not claim they avoided transmitting personal information over the Internet or that they shredded mail containing personal information).[12] At best, Plaintiffs allege only "time and sequence," which courts repeatedly have held is insufficient to establish that an injury is fairly traceable to a data breach.[13]

## II. PLAINTIFFS FAIL TO STATE THEIR CLAIMS.

Due to space limitations, Lincare addresses only certain arguments raised in Plaintiffs' Response. Regarding Plaintiff Torres' North Carolina UDTPA claim,

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[11] Mot. at 3, 13-14; *In re Illuminate Educ. Data Sec. Incident Litig.*, 2023 WL 3158954, *2 (C.D. Cal. April 19, 2023).

[12] *See Brush v. Miami Beach Healthcare Grp. Ltd.*, 238 F. Supp. 3d 1359, 1365 (S.D. Fla. 2017). Unlike the plaintiffs in *Gilbert v. Bioplus Specialty Pharmacy Services, LLC*, 2023 WL 3555006 at *2 (M.D. Fla. March 3, 2023), Plaintiffs here have not pled that the information compromised was the same as that used to commit later financial fraud or that their identities had never previously been stolen.

[13] *See* Mot. at 13-14. Plaintiffs' contention that the Court cannot decide Lincare's standing argument because it is intertwined with the merits is also unavailing. Courts *must* decide standing issues before reaching the merits. *See Gardner v. Mutz*, 962 F.3d 1329, 1340 (11th Cir. 2020); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 at n.2 (1998). *In re Mednax Servs.*, 603 F. Supp. 3d 1183, 1208 (S.D. Fla. May 10, 2022), is easily distinguishable. In that case, unlike here, the plaintiffs submitted their own expert declaration, and there had been no opportunity for discovery.

Torres does not plead a "present monetary injury," as required by North Carolina courts. Indeed, Plaintiff Torres does not state whether the claimed $10,000 bank withdrawal went unreimbursed, which suggests there was no real monetary loss.[14]

As it relates to Plaintiff Juarez's CMIA claim, California courts have limited the CMIA to situations where a person's "medical records were, in fact, viewed by an unauthorized individual."[15] Juarez does not dispute this, but claims that his medical information was viewed because he "experienced an increase in spam and suspicious phone calls, texts, targeted health advertisements, and emails." Resp. at 22. But an increase in "health" spam would plausibly suggest "viewing" only if the spam received contained similar content as the medical records that were compromised. Unless the specific advertisements were based on medical information contained in Juarez's potentially accessed records (such as his medical treatments, provider names, or diagnosis), there is no plausible connection between the spam received by Juarez and any healthcare information maintained by Lincare.[16] But

[14] *See, e.g.,* Allen v. Ferrera, 540 S.E.2d 761, 767 (N.C. App. 2000). Torres' reliance on Debernardis v. IQ Formulations, LLC, 942 F.3d 1076, 1084 (11th Cir. 2019), is misplaced because the court's discussion of "economic injury" in that case arose in the context of Article III standing. The court there cautioned that it must "not…conflate Article III's standing requirement of injury in fact with a plaintiff's potential causes of action, for the concepts are not coextensive." *Id.* (citation omitted); Ponzio v. Mercedes-Benz USA, LLC, 447 F. Supp. 3d 194, 240-41 (D. N.J. 2020). As to the location of any conduct relevant to her NC UDTPA claim, Torres' allegations are contradictory because she alleges that Lincare's "principal place of business" is in Florida, Compl. ¶ 35, but later references "Defendant's headquarters [] in North Carolina," Compl. ¶ 311, in an attempt to invoke jurisdiction.

[15] Regents of Univ. of Cal. v. Sup. Ct., 220 Cal. App. 4th 549, 570 (2d Ct. App. 2013).

[16] *Id.* at 570 n.15 (alleged identity theft "within months" of the data theft that "use[d] the same personal information" still required "too many layers of speculation" to plausible assert viewing of *medical* information); *see also* Doe v. Sutherland Healthcare Sol. Inc., 2021 WL 5765978, at *10 (2d Dist. Ct. App. Dec. 6, 2021) (noting that the "volume of data and variety of attachments" at issue in the subject data breach involving approximately 340,000 patients "would have made it infeasible for

Juarez fails to provide any detail of the spam he received that would establish such a connection.[17]

Plaintiff Miller's New York statutory claim (Section 349), which alleges that Lincare "actively and knowingly mispresented or omitted disclosure of material information...", Compl. ¶ 369, not only lacks factual detail beyond the conclusion that Lincare's security measures were "defective," but is inconsistent with Miller's position that he is pursuing only an "omissions claim." Resp. at 25. A consumer making this claim cannot obliquely claim misrepresentations but must allege "that he was aware of the deceptive conduct and was 'personally misled' to satisfy the causation requirement."[18] Miller, however, does not allege viewing any particular Lincare policies or documents, let alone identify a specific misrepresentation.

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anyone to manually view all the data [under the CMIA] even if the contents of the hard drives were accessed"). Plaintiffs also lack standing to assert the statutory claims pled, including the CMIA, because they have not established a sufficiently "close relationship" between the intangible injuries these statutes seek to redress, and harms traditionally recognized as providing bases for lawsuits. Mot. at 6, 11-13.

[17] Juarez's UCL claim also should be dismissed because the UCL governs only liability-creating conduct occurring in California, and there are no such allegations in the Complaint. The decision Juarez cites on this issue, *In re Marriott Int'l Inc. Customer Data Security Breach Litigation*, 440 F.Supp.3d 447, 461 (D. Md. 2020), contains no analysis regarding the UCL's extraterritorial effect.

[18] *In re Am. Med. Collection Agency, Inc. Customer Data Sec. Breach Litig.*, 2021 WL 5937742, at *32 (D.N.J. Dec. 16, 2021) (finding that data breach plaintiffs could not show they were exposed to any misrepresentations where they did not allege reading any privacy policies before purchasing medical devices); *Fero v. Excellus Health Plan, Inc.*, 502 F. Supp. 3d 724, 739-40 (W.D.N.Y. 2020) ("[W]hile a plaintiff pursuing a GBL § 349 claim need not have relied on (or even necessarily have believed) the allegedly deceptive conduct, he or she must have at least been exposed to it."); *see also Abdale v. N. Shore Long Island Jewish Health Sys., Inc.*, 49 Misc. 3d 1027, 1039 (N.Y. Sup. Ct. 2015) ("Here, despite the broad language contained in the complaint, the statements allegedly made by defendants in the privacy policy and online notices do not constitute an unlimited guaranty that patient information could not be stolen or that computerized data could not be hacked."). Relatedly, Miller does not rebut Lincare's argument that the NY GBL § 349 claim should be dismissed to the extent it seeks class-wide statutory minimum and treble damages. *Super Glue Corp. v. Avis Rent A Car Sys.*, 132 A.D.2d 604, 606 (1987).

**CERTIFICATE OF SERVICE**

We hereby certify that on June 20, 2023, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court by using the CM/ECF system which will provide service to all counsel of record.

*/s/ Michael S. Hooker*
Michael S. Hooker, Esq. / FBN: 330655
michael.hooker@phelps.com
Jason A. Pill, Esq. / FBN: 0070284
jason.pill@phelps.com
100 South Ashley Drive, Suite 2000
Tampa, Florida 33602-5311
P: 813.472.7550 / F: 813-472-7570
*Counsel for Defendant Lincare Holdings Inc.*