**CIRCUIT COURT FOR BALTIMORE CITY**

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| **JANE DOE, on behalf of herself and all others similarly situated, *et al.*** | * | |
| **Plaintiffs** | * | |
| **v.** | * | **Case No.: 24-C-20-000591** |
| **MEDSTAR HEALTH, INC., et al.** | * | |
| **Defendants** | * | |

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**MEMORANDUM OPINION ON**
**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**
**(Docket Nos. 70 & 71)**

Before the Court is the Plaintiffs' Motion for Class Certification (Docket Nos. 70 & 71) (the "Motion"). The Defendants filed an Opposition to the Motion (Docket No. 80) and the Plaintiffs filed a Reply (Docket No. 95.) A hearing was held on the Motion on November 30, 2022.

## I. BACKGROUND

This case is about the information that the Defendants allegedly shared with third parties when the Plaintiffs visited the Defendants' websites. Specifically, the Plaintiffs allege that the Defendants knowingly and intentionally collected and shared information about the Plaintiffs by means of "cookies" or "bugs" placed on the Defendants' websites. Further, the Plaintiffs allege that the Defendants shared that information with Google and Facebook (now called Meta), among others, for marketing purposes.

The Plaintiffs allege that these actions constitute a violation of Maryland's wiretapping statute and form the basis for several common law tort claims. In addition, the Plaintiffs request that the Court certify a class that would include every patient of the Defendants who "visited" any of the Defendants' websites.

## II. RELEVANT PROCEDURAL BACKGROUND

On January 31, 2020, a single, anonymous, plaintiff filed the initial complaint asserting five causes of action: Interception of Wire Communications (Count I), Invasion of Privacy – Intrusion Upon Seclusion (Count II), Invasion of Privacy – Publication of Private Facts (Count III), Breach of Confidential Relationship (Count IV), and Deceptive Trade Practices (Count V). The Plaintiff also sought class certification.

On April 15, 2020, the Defendants moved to dismiss the complaint, asserting that the Plaintiff had failed to state any valid causes of action. By order dated August 5, 2020, the Court agreed with the Defendants as to the claims for Breach of Confidential Relationship (Count IV) and Deceptive Trade Practices (Count V) and dismissed those claims with prejudice. However, the Court denied the motion as to the claims for Interception of Wire Communications (Count I), Invasion of Privacy – Intrusion Upon Seclusion (Count II), and Invasion of Privacy – Publication of Private Facts (Count III), allowing those claims to proceed.

On April 30, 2021, the Plaintiff, now accompanied by five other anonymous Plaintiffs, filed a First Amended Complaint. In the First Amended Complaint, the Plaintiffs asserted four causes of action: Counts I through III of the original Complaint, and a fourth cause of action for Negligence (Count IV). Again, the Plaintiffs sought class certification. This time, the Defendants did not move to dismiss.

On June 8, 2022, the parties jointly agreed and stipulated to the dismissal of two of the new Plaintiffs. Afterwards, four putative class representatives remained: Jane Doe I, Jane Doe III, Jane Doe IV, and John Doe II.

## III. CONTROLLING LAW

Maryland Rule 2-231 provides the framework for class certification. For a class to be certified, the following prerequisites must be satisfied:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Md. Rule 2-231(b). If those prerequisites are satisfied, and "justice" does not require otherwise, a class may be certified if it satisfies one of the following three conditions:

> (1) the prosecution of separate actions by individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

Md. Rule 2-231(c).

It is well-settled that the burden is on the plaintiff(s) to prove that the requirements of Md. Rules 2-231(b) and (c) have been satisfied. *Silver v. Greater Baltimore Med. Ctr., Inc.*, 248 Md. App. 666, 690 (2020) (citing *Creveling v. Gov't Emps. Ins. Co.*, 376 Md. 72, 88-89 (2003)). In analyzing a motion for class certification, the trial court is to accept as true the allegations contained in the complaint and is to refrain "from evaluating the underlying merits of the case." *Silver*, 248 Md. App. at 690 (citing *Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. 177, 190 (2007)). "Nevertheless, 'the court can go beyond the pleadings to the extent necessary to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 727 (2000) (internal quotation marks omitted) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). If it ultimately determines that the moving party has not satisfied its burden, the trial court may, but is not required to, modify the class definition. *Silver*, 248 Md. App. at 709.

## IV. ANALYSIS

### A. The Scope of the Proposed Class

By way of their Motion, the Plaintiffs seek certification of the following class:

> All Maryland residents who are, or were, patients of MedStar Health, Inc., or any of its affiliates and who exchanged communications at the MedStar web properties, including the myMedStar patient portal, prior to November 13, 2021.

Plaintiffs' Motion at 2. To fully understand the scope of the class, the Court needs to understand what the Plaintiffs mean by the terms "communications" and "myMedStar patient portal."

#### 1. "Communications"

The Plaintiffs do not define the term "communications" in their First Amended Complaint or in their Motion. Accordingly, the Court shall go beyond the pleadings to

understand the Plaintiffs' use of the term "communications" which, in turn, will assist it in understanding the scope of the proposed class and the nature of the Plaintiffs' claims.

The Court notes that the First Amended Complaint does not contain allegations that the Defendants shared substantive communications – such as texts, e-mails, or chat exchanges – with third parties. Rather, the First Amended Complaint discusses "HTTP and HTTPS Communications" (*see* First Amended Complaint at ¶ 87), explaining that a "communication starts" when a user clicks on a hyperlink or types a web address into his or her browser and hits "Enter." *Id.* at ¶ 83. According to the Plaintiffs, once a user hits "Enter," the user's browser "initiates a communication exchange by sending a request to a destination IP address to establish a connection between the [user's] browser and the [] server" of the destination website. *Id.* The Plaintiffs go so far as to characterize this exchange of computer information between a user's browser and a website's server as a "conversation." *Id.* at ¶ 87.

As mentioned, the Plaintiffs' Motion does not provide a definition of the term "communications," nor does it contain any express assertion that the Defendants shared text messages, e-mails, or chat exchanges with third parties. The Motion does contain an assertion that the Defendants redirected "communications which include Plaintiffs' and class members' status as MedStar patients, their medical conditions, providers, appointments, services, and payments." Motion at 7. However, the example provided by the Plaintiffs to illustrate the assertion simply involves the Defendants disclosing to third parties that a user has logged into the Defendants' "patient portal." *Id.*

In their Opposition to the Plaintiffs' Motion for Class Certification, the Defendants provide the following description of what the Plaintiffs mean by the term "communications":

> The "communications" referenced in Plaintiffs' brief are actually the mere transmission of information between computers resulting

> from a user's visit to a particular web page. At best, 'communications' means the transmission of the URL address of the page a particular person visited, which simply indicates that a user visited a particular publicly accessible page, not any substantive exchanges between patients and their healthcare providers.

Defendants' Opposition at 9. Importantly, the Plaintiffs did not dispute this description in their Reply Brief. Accordingly, the Court interprets the Plaintiffs' use of the term "communications" to include the transmission of information between computers when a person uses a browser on a phone or computer to "visit" a website.

**2. The myMedStar Patient Portal**

In the First Amended Complaint, the Plaintiffs discuss the myMedStar Patient Portal (the "Patient Portal") under the section heading "Defendants' Web Properties." First Amended Complaint at 8. The Plaintiffs allege that the Defendants' homepage "provides patients with access to the myMedStar Patient Portal to 'Securely email your myMedStar physician, request prescriptions [sic] renewals, appointments & referrals.'" *Id.* at ¶ 41. The Plaintiffs also indicate that a patient must "sign-up" for the Patient Portal. *Id.* at ¶ 43.

The Plaintiffs provide more information about the Patient Portal in their Motion. There, the Plaintiffs explain how patients "sign-up" for the Patient Portal: "To create an account, patients use their email address or 'MedStar Patient ID' to obtain credentials. Once MedStar grants the patient access, patients enter the patient portal using their email address and a password." Motion at 4. This description makes clear that not every one of the Defendants' patients has a Patient Portal account. It also makes it clear that patients without Patient Portal accounts can only "visit" the Defendants' publicly accessible website pages.

### 3. Summary

With an understanding of what the Plaintiffs mean by "communications" and an understanding that not every patient has a Patient Portal account, the breadth of the Plaintiffs' proposed class becomes evident. In addition to those patients who log onto their Patient Portal accounts and send messages to their healthcare providers or check their medical records, the proposed class would also include patients who do not have Patient Portal accounts and who simply "visit" one or more of the Defendants' publicly accessible websites. Those patients could have visited the site for any number of reasons, including to check operating hours, to get directions, or to look for a job.

## B. Ascertainability

In ruling on a motion for class certification, many courts impose an "implicit requirement" that the members of the proposed class be ascertainable based on objective criteria. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012); *see also* WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3.1 (6th Ed. 2022). The "ascertainability" requirement furthers three goals:

> First, it eliminates "serious administrative burdens that are incongruous with the efficiencies expected in a class action" by insisting on the easy identification of class members. Second, it protects absent class members by facilitating the "best notice practicable" under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.

*Marcus*, 687 F.3d at 593 (internal citations omitted).

The Maryland federal district court and the Fourth Circuit Court of Appeals have expressly adopted the "ascertainability" requirement.[1] *See, e.g., EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *In re Marriott Int'l, Inc., Customer Data Security Breach Litig.*, 341 F.R.D. 128, 143 (D. Md. 2022). As applied in the Fourth Circuit, the ascertainability requirement has two components: first, class members have to be identifiable with reference to objective criteria and, second, whether there is an administratively feasible way for the court to determine whether a particular individual is a member of the class. *Marriott*, 341 F.R.D. at 143. Like in *Marriott*, the Plaintiffs in this case have satisfied the objective criteria prong of the ascertainability requirement. The real question is whether there is an administratively feasible way to identify all of the putative class members in this case.

First, the Plaintiffs argue that it is administratively feasible to determine those members of the class who use the Patient Portal. Specifically, the Plaintiffs assert that the Defendants can relatively easily provide a list of patients who have Patient Portal accounts and who have logged into those accounts. The Court agrees.

The Court disagrees, however, that it is administratively feasible to determine those patients who do not have a Patient Portal account and merely visited the Defendants' publicly available websites. As an initial matter, the Plaintiffs have failed to provide any information regarding the number of visits to the publicly available websites, nor have they provided any information regarding the number of MedStar patients who have used the publicly available websites. As a result, the Court is hampered in making an informed decision regarding the administrative feasibility of identifying those patients. However, even if the Defendants were

[1] The Appellate Court of Maryland has referenced the ascertainability test in a recent unreported decision. *See Smith v. Westminster Mgmt., LLC*, No. 2508, 2023 WL 1097564 (Md. Ct. Spec. App. Mar. 3, 2023).

able to produce a log of all of the visits to their publicly available websites, there would be no definitive way to identify the actual person who "visited" the website. The Plaintiff counters that this issue can be resolved by requiring putative class members to submit affidavits averring that they are Maryland patients who have visited the Defendants' publicly available websites. However, the Court does not find the prospect of wading through (potentially) tens of thousands of affidavits to be "administratively feasible."

Accordingly, the Court finds that the Plaintiffs have failed to show that the broad class that they have proposed is ascertainable.

**C. <u>The Rule 2-231(b) Pre-Requisites.</u>**

**1. Numerosity**

"The first requirement of Maryland Rule 2-231 is that the class be so numerous that joinder of all members is impracticable." *Angeletti*, 358 Md. at 732. In their Motion, the Plaintiffs assert that there have been over 515,000 visits to the Patient Portal as of April 25, 2022. Motion at 16. While the Plaintiffs do not provide any information as to the number of patients who have Patient Portal accounts, or the number of patients who do not have patient portal accounts but who visited the Defendants' publicly accessible website, the Defendants do not contest this issue. Accordingly, the Court finds that the Plaintiffs have satisfied the numerosity prerequisite set forth in Maryland Rule 2-231(b)(1).

**2. Commonality**

Often referred to as the "commonality" requirement, Rule 2-231(b)(1) "does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist." *Angeletti*, 358 Md. at 734 (quoting *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993)) (internal quotation

marks omitted) While standards vary across jurisdictions, "a common articulation requires that a lawsuit exhibit a 'common nucleus of operative facts.'" *Id.* (citations omitted). As such, "[t]he threshold of commonality is not a high one and is easily met in most cases." *Id.* (citations omitted).

In their First Amended Complaint, the Plaintiffs plead a common nucleus of operative facts. Specifically, according to their allegations, all members of the putative class are patients of the Defendants who "visited" one or more of the Defendants' websites. In addition, the facts relating to what "cookies" or "bugs" were employed by the Defendants on its websites will be the same for every member of the putative class. Based upon these allegations, the Court finds that the Plaintiffs have satisfied this low threshold.

**3. Typicality**

Maryland Rule 2-231(b)(3), often referred to as the "typicality" requirement, "demands a common-sense inquiry into whether the incentives of the plaintiffs are aligned with those of the class, and is meant to ensure representative parties will adequately represent the class." *Angeletti*, 358 Md. at 737-38 (citations omitted). "Representative claims need not be identical to those of the rest of the class; instead, there must be similar legal and remedial theories underlying the representative claims and the claims of the class." *Id.* at 738. However, if the class representatives' "individual circumstances are markedly different," there may be no typicality because "there exists the danger that the unique circumstances . . . will receive inordinate emphasis and that the other claims will not be pressed with equal vigor or will go unrepresented." *Weiss v. York Hosp.*, 745 F.2d 786, 809 n. 36 (3d Cir. 1984), *cert. denied,* 470 U.S. 1060 (1985).

Putative class members who log into their Patient Portal are at a fundamentally greater risk of having confidential health information (i.e., patient status) shared than class members who only use the publicly available websites, regardless of the webpages they "visit" or the

searches they conduct on the Defendants' websites. Specifically, the Defendants do not deny that, in some situations, they share with third parties the fact that a user visits and uses the Patient Portal log-in page. By doing this, the Defendants indirectly identify the user as a patient (because only patients have Patient Portal accounts). In addition, the Defendants have admitted that, in a "perfect situation," Facebook and Google may be able to identify a user of the publicly available webpages as a particular person. When you couple that information with the fact that the person has "visited" and used the Patient Portal log-in page, Facebook and Google can then identify a specific, identifiable individual as a patient of MedStar.[2] Conversely, if a patient does not have a Patient Portal account, or never uses their Patient Portal account, his or her "patient status" is never revealed to Facebook or Google.

Based upon these two facts – the heightened expectation of confidentiality in the Patient Portal and the sharing of "patient status" information – the Court finds that putative class members who have and use a Patient Portal account are in a fundamentally different – and fundamentally stronger – position than putative class members who only use the publicly available websites operated by the Defendants.

In the First Amended Complaint, the Plaintiffs fail to provide any factual allegations that indicate that the individual class representatives have claims that are typical of the proposed class. Indeed, the only information provided in the First Amended Complaint as to the individual class representatives is contained in paragraphs 8 through 13 in which the Plaintiffs state that each individual class representative resides in Maryland and that he or she is a patient of the Defendants. Incredibly, the Plaintiffs provide no information regarding the individual

[2] Under federal regulations, a person's "patient status" is protected health information. 45 C.F.R. § 160.103.

class representatives in their Motion. Arguably, by failing to provide this information in their First Amended Complaint or in their Motion, the Plaintiffs have failed to sustain their burden of showing "typicality."

More importantly, the Defendants have provided unrebutted evidence obtained during class certification discovery that all of remaining class representatives have and use Patient Portal accounts. In other words, there is not a single class representative who does not have, or does not use, a Patient Portal account.

The Plaintiffs have proposed a huge class, which includes patients who do nothing more than visit the Defendants' websites. However, the Plaintiffs do not have a single class representative who only visited the Defendants' publicly available websites; rather, they all have and used the Patient Portal. As such, proof that would support the claims of the class representatives who have and use the Patient Portal would likely not be sufficient to support all of the claims of those plaintiffs who do not have or use the portal. *See Brooks v. S. Bell Tel & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990) (citation omitted) ("If proof of the representatives' claims would not necessarily prove all the proposed class members' claims, the representatives' claims are not typical of the proposed members' claims.")

Accordingly, the Court finds that the Plaintiffs have failed to sustain their burden of showing that the class representatives have claims that are typical of the claims of a huge portion of the putative class. While the Court could *sua sponte* alter the class definition to limit it to only patients who have and use the Patient Portal, the Court declines to do so for the reasons discussed below.

**4. Adequacy**

Maryland Rule 2-231(b)(3) "addresses two related concerns, ensuring that both the class representatives as well as class counsel are adequate to represent the interests of all class members." *Angeletti*, 358 Md. at 740. The Defendants do not challenge the ability of Plaintiffs' counsel to handle this matter, and the Court finds that class counsel is adequate. As to the adequacy of the class representatives, the inquiry seeks to determine whether the class representatives have any conflict with the members of the putative class and that the class representatives will "prosecute the action vigorously on behalf of the class." *Id.*

In regard to the conflict-of-interest analysis, the Courts have recognized the significant overlap between this requirement and the requirement of typicality. *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985). Specifically, if the class representatives' claims differ enough from those of the putative class members, there is a danger that "insufficient emphasis" will be placed on prosecuting those claims because the class representatives do not have a "direct stake in the outcome." *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 408 (D.N.J. 1990). As noted above, the claims of the class representatives differ significantly from a majority of the class members. Accordingly, there is a substantial risk that "insufficient emphasis" will be placed on proving the claims of those class members who do not have a Patient Portal account.

In addition, the Court has doubts as to whether any of the current class representatives will "vigorously" prosecute the action of behalf of the class. It is clear through their depositions that none of the class representatives have a true understanding of the nature of the claims in this case. None of the class representatives read the complaint and all of them believed that the Defendants had been guilty of intentionally or negligently leaking substantive confidential medical communications. The Plaintiffs have not provided any evidence that the class

representatives have an actual understanding of their claims. Nor have the Plaintiffs provided any evidence that, upon understanding the true nature of the claims, the class representatives would be willing to see this litigation through discovery and trial. Indeed, two of the six class representatives have already dropped out of this litigation, and this case has not even entered full fact discovery.

Both because there is a substantial risk for a conflict of interest and because none of the class representatives understands the true nature of this case, the Court finds that the Plaintiffs have not satisfied their burden of showing the adequacy of the class representatives.

## D. The Rule 2-231(c) Requirements

The Plaintiffs assert that class certification for the proposed class is appropriate in this case because the common issues of law and fact predominate over individual issues and because class treatment is superior to other methods of adjudication of the controversy. In other words, the Plaintiffs assert that this case satisfies the requirements of Rule 2-231(c)(3), also known as the "predominance" test. *Angeletti*, 358 Md. at 743.

### 1. Predominance

The predominance test does not require "that all or even most questions of fact or law involved in the claim be common to all would-be class members." *Silver*, 248 Md. App. at 692. "Instead, it asks the certifying court to weigh the relative importance of issues common to all class members compared to those issues particular to only some." *Id.* However, "before a court can engage in a *balancing* of issues involved in a case to determine which will predominate, it must first *classify* those issues as common or individual." *Id* (emphasis in original).

"At the classification step, courts must do more than look at the class members' shared factual and legal questions in the abstract. What matters is how those questions would be

answered – how the parties would go about making their case – at trial." *Id.*, at 693. "Questions are 'common' . . . when class members may use the same evidence to answer them." *Id.* (quoting *Tyson Foods, Inc. v. Bouaphakos*, 577 U.S. 442, 453 (2016)). To classify issues in this case, it is necessary to look at the claims individually.

**a. The Wiretap Act Claim**

In Count I of their First Amended Complaint, the Plaintiffs assert claims for breach of Maryland's Wire Tap Act. Subtitle 4 of the Courts & Judicial Proceedings Article contains the State's "Wiretapping and Electronic Surveillance" statute (hereinafter the "Wiretap Act"). Section 10-402(a) provides, in relevant part, that it is "unlawful for any person to: (a) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral or electronic communication . . ." Section 10-401(5)(i) defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system." Importantly, Maryland law provides a civil cause of action for a violation of the Wiretap Act. Specifically, § 10-410(a) provides the following, in relevant part:

> Any person whose wire, oral or electronic communications is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use communications, and be entitled to recover from any person:
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> (1) Actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
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> (2) Punitive damages; and
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> (3) A reasonable attorney's fee and other litigation costs reasonably incurred.

The Plaintiffs argue that common issues of fact and law predominate as to this claim because the Defendants' mere attempt to "intercept" or "disclose" any aspect or part of the Plaintiffs' "communications" provides the Defendants with a cause of action for statutory (or "liquidated") damages. According to the Plaintiffs, this means that there are essentially no individual issues of law or fact as to this claim: once it is established that a patient is a member of the class (that is, the patient "visited" one of the Defendants' websites), all other factual issues are limited to whether the Defendants attempted to intercept or disclose any of the patient's communication. Having classified the issues relating to this claim, the Court agrees that, if the Plaintiffs have stated a valid cause of action under the Wiretap Act, the common issues of law and fact would predominate over individual issues for this claim.

**b. Invasion of Privacy – Intrusion Upon Seclusion**

In Count II, the Plaintiffs assert a claim for "Invasion of Privacy – Intrusion Upon Seclusion" (hereinafter "intrusion upon seclusion"). To prevail on a claim for this tort, a plaintiff must prove three elements: (1) the intentional intrusion; (2) into a private place, or affairs of another; and (3) such intrusion would be highly offensive to a reasonable person. *Furman v. Sheppard*, 130 Md. App. 67, 73 (2000) (quoting *Pemberton v. Bethlehem Steel Corp.*, 66 Md. App. 133, 163 (1986)).

The Plaintiffs cite to the Restatement and a case from Iowa for the proposition that this tort is "complete" when a defendant attempts an intrusion (or, as the Plaintiffs put it, "places an intrusion device"). (Motion at 25.) Thus, according to the Plaintiffs, there are no individualized factual or legal questions because proof of the tort is based solely on the Defendants' actions.

The Plaintiffs' argument ignores Maryland law, which is clear that there needs to be an actual intrusion, not merely an attempt, for the tort of intrusion upon seclusion to have been

committed. In this case, there are several different ways in which an intrusion could have been intentionally, or even inadvertently, thwarted, including the use of different browsers, different settings on their browsers, or even the use of different search engines. Accordingly, for each putative class member, the question of whether there has been an actual intrusion must be answered individually, requiring potentially thousands of mini trials regarding what browser, browser setting, and search engine was being used.

Further, as to the second element of the tort, the putative plaintiffs must prove that the intrusion was into their "private affairs." This element requires the individualized fact inquiry as to whether the plaintiff utilized any tools (such as privacy settings) to keep his or her affairs "private." *See Barnhart v. Potsano Publications, LLC*, 457 F.Supp.2d 590, 593 (D. Md. 2006) (citation omitted) ("[a]n intrusion upon seclusion claim requires that the matter into which there was an intrusion is entitled to be private and is kept private by the plaintiff").

The Plaintiffs also argue that whether the intrusion was "highly offensive to a reasonable person" is an objective question that can be answered on a class-wide basis. The Court disagrees. A determination as to whether an intrusion was "highly offensive" – an undeniably high standard[3] – turns on the type of affairs into which the Defendants allegedly intruded. For example, one patient may have logged into his or her Patient Portal and conducted searches on their current health diagnosis, while another patient may have been searching for the location of the parking garage. While the sharing of information in the first situation may be "highly offensive," the sharing of information in the second situation could not reasonably be considered "highly offensive."

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[3] *See, e,g., Klipa v. Bd. of Educ. Of Anne Arundel Cnty.*, 54 Md. App. 644, 655 (1983) (*quoting* Restatement (Second) of Torts § 652D (1967)) ("the law is not for the protection of the hypersensitive").

In other words, there would need to be individualized factual inquiries for all three elements of this claim. Having classified the issues relating to this claim, the Court finds that common issues do not predominate over individualized issues for this claim.

**c. Invasion of Privacy – Publication of Private Facts**

In Count III, the Plaintiffs assert claims for "Invasion of Privacy – Publication of Private Facts" (hereinafter "publication of private facts"). To prevail on this tort, a plaintiff must prove three elements: (1) publicity; (2) of facts which are not of valid concern to the public; and (3) which would be highly offensive to a reasonable person. *Lindenmuth v. McCreer*, 233 Md. App. 343, 364 (2017) (citations omitted). The Plaintiffs make the same arguments about predominace for this claim as they do for the intrusion upon seclusion claim. The Court disagrees because, just as for the intrusion upon seclusion claim, this claim would require an individualized inquiry into exactly what each patient did while visiting the Defendants' website to determine whether a reasonable person would find the "public" sharing of that information "highly offensive." Accordingly, having classified the issues relating to this claim, the Court finds that common issues do not predominate over individualized issues for this claim.

**d. Negligence**

To prevail on a claim for negligence in Maryland, a plaintiff must prove four elements: (1) a duty of the defendant to protect the plaintiff from injury; (2) a breach of that duty; (3) actual injury or loss suffered by the plaintiff; and (4) the loss or injury proximately resulted from the defendant's breach of duty. *Hamilton v. Kirson*, 439 Md. 501, 523-24 (2014).

The Plaintiffs assert that common issues predominate for this claim because all of the elements are provable through the Defendants' conduct. The Court agrees as to the elements of duty, breach, and proximate cause. However, the Court parts ways with the Plaintiffs in regard

to actual loss and damages. First, as discussed above, there are many ways, both intentional and inadvertent, that the Defendants' alleged "cookies" or "bugs" could have been thwarted. Second, the Court simply does not agree with the Plaintiffs that the sharing of innocuous information (such as a search for the parking garage) causes the Plaintiffs "actual loss." Importantly, actual loss is a necessary element of a claim for negligence; in other words, if there is no loss, there is no valid claim for negligence. *MacCubbin v. Wallace*, 42 Md. App. 325, 328 (1979). Accordingly, having classified the issues, the Court finds that common issues do not predominate in regard to the negligence claim.

**2. Superiority**

The second aspect of the predominance requirement is that a class action would be better than other methods for the adjudication of the case. Md. Rule 2-231(c)(3). Rule 2-231(c)(3) sets forth a number of factors to be considered by the certifying court when making this determination. In this case, the most significant of those factor is the final factor – the manageability of the lawsuit as a class action. Md. Rule 2-231(c)(3)(D).

In analyzing this factor, the Court of Appeals has noted "the difficulties of managing a class action when dealing with an 'immature tort.'" *Angeletti*, 358 Md. at 766. An "immature tort" is either "a new cause of action, or an old cause of action applied to a new situation." *Id.* at 767 (cleaned up). Quoting the United States Circuit Court for the Fifth Circuit in *Costano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) and the United States District Court for the Eastern District of Pennsylvania in *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469 (E.D.Pa. 1997), the Court of Appeals noted that "the certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication," and that "the lack of prior track record of trials in these types of cases makes it practically impossible to draw information

necessary to make the superiority analysis." *Id.* at 766 (cleaned up). Concluding that the matter before it was an "immature tort," the Court of Appeals ruled that "at this time, while the tort is immature, . . . class certification cannot be found to be a superior method of adjudication." *Id.*, at 769 (cleaned up).

While all four of the Plaintiffs' causes of action in this case are well established in Maryland law, the Plaintiffs are undoubtedly attempting to apply them in a new situation. The Plaintiffs have provided no cases in Maryland, and only one case in the rest of the United States, in which similar claims have been based upon similar facts. *See Doe v. Virginia Mason Med. Ctr.*, No. 19-2-26674-1 SEA, 2020 WL 1983046 (Wash.Super. Feb. 12, 2020). Importantly, the *Virginia Mason* case has not reached the "merits" stage, so there has not been an adjudication of the plaintiffs' claims in that case.

In addition, while the Plaintiffs' claims have survived the motion to dismiss stage, they each raise novel questions under Maryland law. As to the Wiretap Act claim, is the exchange of information between computers the type of "communication" that the Maryland General Assembly intended to protect in the Wiretap Act? *See Holmes v. State*, 236 Md. App. 636, 653 (2018) ("The clear purpose of the Maryland Wiretap Act is to prohibit secret recordings of private oral communications . . ."). In regard to the intrusion upon seclusion claim, are people's computer searches "a physical area a person would naturally consider private"? *See New Summit Assocs. Ltd. P'ship v. Nistle*, 73 Md. App. 351, 360 (1987) (citation omitted) (the tort of intrusion upon seclusion "is directed to protecting the integrity and sanctity of physical areas a person would naturally consider private and off limits to uninvited, unwelcome, prying persons"). In regard to the publication of private facts claim, is sharing information with Facebook for its use in marketing tantamount to sharing information with "the public at large"?

*See Lindenmuth v. McCreer*, 233 Md. App. 343, 364 (2017) ("To make 'public, or to 'publicize,' a private fact requires publication to the public at large"). In regards to the negligence claim, does the sharing of ISP and search content information constitute "actual harm" and is the Plaintiffs' "reasonable royalty" damages theory viable? *See, e.g., In re Google Android Consumer Privacy Litigation*, 2013 WL 128323, at *4 (N.D. Cal. 2013) (granting motion to dismiss on plaintiffs' market-theory damages theory).

In short, the novelty and immaturity of the Plaintiffs' claims compels the Court to hold that class certification is not the superior method for the adjudication of these claims at this time.

**3. The Plaintiffs have not Satisfied Rule 2-231(c)(3).**

As noted above, for three of their four claims, the Plaintiffs have failed to show that common issues of law and fact predominate over individual issues. In addition, the Plaintiffs have failed to show that class certification is the superior method of adjudication for any of their claims in this matter. Accordingly, the Plaintiffs have failed to satisfy the requirements of Maryland Rule 2-231(c)(3).

## V. CONCLUSION

For all of the foregoing reasons, the Plaintiff's Motion for Class Certification is **DENIED**.

**Anthony F. Vittoria**
**Judge's Signature**
**Appears on Original Document**

Circuit Court for [illegible]

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Xavier A. Conaway, Clerk of the Circuit Court

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