

OH209 - L7

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

JOHN DOE #1, <i>et al.</i> ,	:	
	:	Case No. 24 CV 6195
Plaintiffs,	:	
v.	:	Judge Carl A. Aveni
	:	
CITY OF COLUMBUS,	:	
	:	
Defendant.	:	

JOHN DOE 1, <i>et al.</i> ,	:	
	:	Case No. 24 CV 6428
Plaintiffs,	:	
v.	:	Judge Carl A. Aveni
	:	
CITY OF COLUMBUS,	:	
	:	
Defendant.	:	

REPLY IN SUPPORT OF
DEFENDANT CITY OF COLUMBUS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs have sued the City of Columbus (the “City” or “Columbus”)—a governmental entity—for purported injuries they contend were caused by a criminal intrusion into Columbus’s information technology (“IT”) system. Plaintiffs’ Complaint, however, lacks critical allegations to state cognizable claims against the City for several reasons.

First, the City is immune from Plaintiff’s tort-based claims under R.C. 2744.02(A). While Plaintiffs attempt to circumvent that immunity, their arguments lack merit. Second, even if Plaintiffs could somehow bypass the City’s immunity, Plaintiffs’ claims still fail because Plaintiffs lack standing to sue. The Complaint is utterly devoid of factual allegations articulating concrete injuries Plaintiffs’ sustained as a result of the cyberattack on the City. Third, the Complaint fails to allege sufficient facts to state cognizable negligence, negligence per se, or breach of fiduciary duty claims. Meanwhile, Plaintiffs have abandoned their claim for breach of implied contract and

did not oppose the City's Motion to Dismiss ("Motion") with respect to the breach of implied contract and invasion of privacy claims. Consequently, this Court should dismiss the Complaint against Columbus pursuant to Civ.R. 12(B)(6) with prejudice.

II. LAW AND ARGUMENT

A. Plaintiffs' Tort Claims Must Be Dismissed Because Columbus Is Immune.

The negligence, negligence per se, invasion of privacy, and breach of fiduciary duty claims should be dismissed because Columbus, as a political subdivision, is immune from these tort-based claims. R.C. 2744.02(A). The maintenance and operation of the City's IT system is a quintessential governmental function to which no exception to immunity applies. (Motion ("Mot.") at 7-12.) For liability to attach under Plaintiffs' theories, Plaintiffs must demonstrate that (1) the maintenance and operation of a city-wide IT system is a proprietary function rather than a governmental function, (2) an employee was negligent in performing the alleged proprietary function, (3) the maintenance and operation of the IT system was not discretionary, and (4) the maintenance and operation of a city-wide IT system was done with malice, in bad faith, or in wanton or reckless manner. *See Pelletier v. City of Campbell*, 2018-Ohio-2121, ¶ 15. Failure to establish any one of these requirements is fatal to Plaintiffs' tort-based claims. *See id.* The factual scenario alleged in the Complaint falls well short of satisfying each of these requirements. (Mot. at 6-13.) As set forth below, the City's broad and general immunity applies. The maintenance and operation of the City's IT system was a governmental function – it was not proprietary – and entailed significant discretion through which there was no malice, bad faith, or wanton or reckless misconduct alleged in the Complaint to have been perpetrated by any City employee.

1. Columbus Is Presumed Immune and No Exception Under R.C. 2744.02(B) Applies.

As a political subdivision, Columbus is presumptively immune from tort liability. (Mot.

at 6-7.) Plaintiffs do not dispute that “the City enjoys general immunity[.]” (Plaintiffs’ Opposition (the “Opposition” or “Opp.”) at 5.) Plaintiffs therefore bear the burden of demonstrating that an exception to the City’s general immunity applies. *Fried v. Friends of Breakthrough Schools*, 2020-Ohio-4215, ¶ 22 (8th Dist.). The threshold immunity question here is simply whether the activity at issue in this case—maintenance and operation of the City’s IT system—is a government or proprietary function. (Compl. ¶ 18.) If it is a government function, the analysis ends there, and Columbus is immune. If it is a proprietary function, however, immunity can only be circumvented if the performance of the function was done negligently.

The Opposition generically posits that the City was allegedly negligent in maintaining and operating its IT system. (Opp. at 5-6.) To support its argument, the Opposition misapplies Ohio case law in defining governmental functions, fails to distinguish the authority showing that the City is immune, and does not cite to any authority or factual allegations in the Complaint supporting its conclusory contentions that the functions here were somehow proprietary. (Opp. at 6-11.) Because the Complaint fails to properly plead a factual scenario that an exception to immunity applies, Columbus maintains its general immunity against Plaintiffs’ tort-based claims. (Mot. at 7-13.)

a. The Maintenance and Operation of the IT System Is a Governmental Function.

The maintenance and operation of the City’s IT system is a governmental function. (Mot. at 7-10.) More specifically, the maintenance and operation of the city-wide IT infrastructure falls squarely within the general definitions prescribed in R.C. 2744.01(C)(1). It is “for the common good of all citizens of the state,” it “promotes . . . public peace, health, safety, or welfare . . . not customarily engaged in by nongovernmental persons” and is “not specified in 2744.01(G)(2)” which provides a list of proprietary functions. R.C. 2744.01(C)(1). As the Complaint

acknowledges, Columbus operates “a single unified IT system for all City Services and entities” through the Department of Technology (“DOT”), “using technology to serve the residents and businesses of Columbus and Central Ohio.” (Compl. ¶¶ 22, fn. 1, 28.)

In arguing the contrary, Plaintiffs rely on two misguided theories. First, they contend that maintenance of the City’s IT system does not fall under the broad definition in R.C. 2744.01(C)(1)(b) because the City’s IT system benefits “just the City.” (Opp. at 6-7.) Second, they claim that the function does not fall under the R.C. 2744.01(C)(1)(c) definition because “almost all nongovernmental entities” customarily maintain IT systems. (*Id.* at 7-9.) Both arguments, however, lack merit.

First, the geographic reach of the benefits provided by the political subdivision’s activity is irrelevant to the analysis of whether the activity falls within the ambit of a governmental function under R.C. 2744.01(C)(1)(b). Plaintiffs cite *Alcus v. Bainbridge Twp.*, 2020-Ohio-543, ¶ 115 (11th Dist.), and erroneously argue that the maintenance and operation of the City’s IT system are not governmental functions under the statute because the City’s IT services are limited to the City as opposed to the entire state of Ohio.¹ (Opp. at 6-7.) Yet, Plaintiffs ignore the litany of case law contradicting their narrow and geographically limited interpretation.² For example, functions that relate to public safety are necessarily found to be for the common good of all state citizens irrespective of whether the activities are confined within a political subdivision’s geographic boundary. *See, e.g., Georgantonis v. Reading*, 2020-Ohio-3961, ¶ 21, 27 (1st Dist.) (operation and

¹ The argument that the IT system only benefits city residents is belied by the allegations in the Complaint. The Complaint avers that the IT infrastructure affects “many of the citizens of the City of Columbus *and the surrounding area.*” (Emphasis added.) (Compl. at ¶ 25.)

² The definition of a “political subdivision” also undermines the Opposition’s argument because political subdivisions are entitled to immunity, and yet, are recognized by the law to not have a statewide reach. *Compare* R.C. 2744.02(A) (providing that political subdivisions are entitled to immunity from tort-based claims) *with* R.C. 2744.01(F) (defining political subdivision as any “body corporate and politic *responsible for governmental activities in a geographic area smaller than that of the state*”) (Emphasis added.).

maintenance of street-lighting system in Reading, Ohio relates to public safety and serves the common good of all state citizens); *Nordonia Landscape Supplies, LLC v. Akron*, 2020-Ohio-2809, ¶ 2, 10 (9th Dist.) (ice and snow removal from public roads in Akron, Ohio is for the good of all state citizens by making vehicular travel “more convenient and safe[.]”); *Svette v. Caplinger*, 2007-Ohio-664, ¶ 2, 17 (4th Dist.) (operation of emergency dispatch services in Ross County, Ohio serves the common good of all state citizens). Likewise, here, the maintenance and operation of Columbus’ IT system serves the common good of all citizens because—among other services—it relates to the provision of public safety and law enforcement by supporting city agencies like CPD, CFD, Franklin County Municipal Court, and City Attorney’s Office which unquestionably impact citizens beyond the City’s border. (Compl. ¶¶ 21-22, 27; *see also id.*, Ex. 1 (demonstrating how the cyberattack on Columbus affected provision of police services).)

Moreover, *Alcus* is inapposite. *Alcus* dealt with the alleged negligent “parking of the backhoe [used for] the maintenance of nonpublic grounds” accessible only to township employees and permitted visitors during limited hours. *Alcus* at ¶¶ 7, 114. The Eleventh District found “no legislative duty imposed on the Township to maintain trees on its grounds.” *Id.* at ¶ 114. And because the maintenance of its grounds benefitted only its employees and permitted visitors, the court found that the township was not engaged in a government function under R.C. 2744.01(C)(1)(b). *Id.* at ¶ 115. Here, in stark contrast, Columbus is under a legislative duty to provide an IT system. *See* Columbus Muni. Code § 225.01. Further, the City’s IT infrastructure supports all of the City’s agencies and departments, including the City’s provision of police, fire, and other rescue services. (*See* Compl. ¶¶ 21-23, 26.) Unlike in *Alcus* where the activity in that case primarily benefitted township employees, the City’s IT infrastructure “serve[s] the residents and businesses of Columbus and Central Ohio.” (*Id.* at ¶ 22, fn. 1.). Thus, there can be no question

that the maintenance and operation of the City's IT system falls within 2744.01(C)(1)(b)'s broad definition of a governmental function. This alone requires dismissal of Plaintiffs' tort-based claims because no exception applies to the City's immunity from these government functions.

Second, a government function is defined to broadly include:

A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in [subdivision (G)(2)] as a proprietary function.

(Emphasis added.) R.C. 2744.01(C)(1)(c). As set forth below, the analysis of whether a function fits within this definition centers on whether the activity was solely performed for the political subdivision's corporate benefit—*not* whether nongovernmental entities also happen to perform such activities.

Yet, the Opposition erroneously asserts that because the operation and maintenance of an IT system is customarily performed by nongovernmental entities, such activity should not be considered a government function. (Opp. at 7-9.) Plaintiffs' myopic interpretation ignores the Supreme Court of Ohio's seminal analysis on immunity and its progeny. *E.g.*, *City of Wooster v. Arbenz*, 116 Ohio St. 281, 285 (1927) (explaining that "another familiar test" in applying immunity is "whether the act is for the common good of all people of the state, or whether it relates to special corporate benefit or profit"); *Hack v. City of Salem*, 174 Ohio St. 383, 387 (1963) (instructing that liability only applies "if the function being exercised is proprietary and in pursuit of private and corporate duties, for the particular benefit of the [political] corporation"), quoting *Arbenz* at 283.

The threshold question of whether a political subdivision's activity fits within R.C. 2744.01(C)(1)(c)'s broad definition therefore focuses on *who benefits* from the activity, as opposed to *who performs* the activity. See *Dalrymple v. Westerville*, 2022-Ohio-4094, ¶ 34-35 (10th Dist.) ("[A]n activity that is customarily performed by nongovernmental persons does not render

proprietary an overarching function that is governmental.”), quoting *McDonald v. Lacy*, 2018-Ohio-2753, ¶ 18 (2d Dist.). Here, the City’s maintenance and operation of its IT system is not for a limited corporate or city-centered benefit. (*See also* Mot. at 7-10.) The Complaint concedes this reality:

As a municipal corporation, **the City maintains a host of city services**, including but not limited to first responders such as the Columbus Police Department (“CPD”) and the Columbus Fire Department. The City is also responsible for the Franklin County Municipal Court. **In connection with providing these services, Defendant has a Department of Technology (“DoT”).** According to its website, “[t]he Department of Technology’s (DOT) primary mission **is supporting and partnering with public facing agencies across the City in using technology to serve the residents and businesses of Columbus and Central Ohio.**”

(Emphasis added.) (Compl. ¶¶ 21-22.) There can therefore be no doubt the City’s IT services are governmental functions that benefit the residents and businesses throughout Central Ohio – including the state officials and offices located here in the State’s capital.

In a final attempt to argue otherwise, Plaintiffs point to distinctions without differences in the authority cited by the City. (Opp. at 8-9.) But Plaintiffs fail to—nor could they—argue against the fundamental issue in each case: the activities necessary to perform governmental functions constitute governmental functions themselves. *E.g.*, *Doe v. Cleveland Metro. School Dist.*, 2012-Ohio-2497, ¶ 34 (8th Dist.) (distributing grants and overseeing grants are governmental functions related to providing education); *Moncrief v. Bohn*, 2014-Ohio-837, ¶ 11-18 (8th Dist.) (providing security is a governmental function related to providing public housing); *Wolanin v. Holmes*, 2007-Ohio-3410, ¶ 11 (8th Dist.) (operating a tram is a governmental function related to operating a zoo); *Union Township-Clermont Cty., C.I.C., Inc. v. Lamping*, 2015-Ohio-1092, ¶ 19 (12th Dist.) (maintenance of township website is a governmental function in an analogous proceeding).³ And

³ *Union Township-Clermont Cty., C.I.C., Inc. v. Lamping* involved an equitable estoppel claim, which involves a similar analysis of governmental versus proprietary functions.

courts have repeatedly applied this interpretation favoring immunity liberally. *E.g., Lyons v. Teamhealth Midwest Cleveland*, 2011-Ohio-5501, ¶ 34, 49 (8th Dist.) (forwarding emergency calls to private ambulance service was a governmental function to which immunity applied); *City of Akron ex rel. Christman-Resch v. City of Akron*, 2005-Ohio-715, ¶ 40 (9th Dist.) (capturing animals at-large equates to law enforcement function in which immunity applies). Similarly, here, the DoT and its operation of the City’s IT system “are the instrumentalities through which the [City] carr[ies] out governmental functions.” *See Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 452 (1994). Among other services, the maintenance and operation of the City’s IT infrastructure relates to governmental functions enumerated in R.C. 2744.01(C)(2):

- the provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection (Compl. ¶¶ 21-22, Ex. 1);
- judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions (Compl. ¶¶ 21-23, 27);
- the operation of buildings that are used in connection with the performance of a governmental function (Compl. ¶ 26);
- the enforcement or nonperformance of any law (Compl. ¶¶ 21-22, 27.)

In short, the factual scenario pled in the Complaint centers on the City’s IT system that is integral to the City’s governmental services provided to individuals and businesses. The maintenance and operation of the City’s IT infrastructure is therefore a governmental function and the City is immune from Plaintiffs’ tort-based claims.

b. The Maintenance and Operation of an IT System Is Not a Proprietary Function.

Plaintiffs’ argument that the maintenance and operation of the City’s IT system is a proprietary function misconstrues the law. “Proprietary functions include the operation of a hospital, a public cemetery, a utility such as a light, gas, power, or heat plant, a railroad, a business

or other transit company, an airport, and a municipal corporation water supply system, a sewer system, a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.” *Michael v. Worthington Ohio City Sch. Dist.*, 2020-Ohio-1134, ¶ 18 (10th Dist.). Nothing about those examples compares to the maintenance and operation of the City’s IT system.

Nevertheless, the Opposition cites no case law to support the contention that the maintenance and operation of the IT system is proprietary. (*See* Opp. at 9.) Instead, the Opposition references unadorned conclusions in the Complaint that maintaining an IT system is somehow proprietary. (*Id.* (citing Compl. ¶¶ 18-19).) This, they argue, is enough to establish that the function is proprietary. (*Id.*) Not so. As courts have explained repeatedly, “even if a nongovernmental entity customarily engages in the same type of activity, the overlap does not necessarily mean that the function is a proprietary function.” *Student Doe v. Adkins*, 2021-Ohio-3389, ¶ 45 (4th Dist.); *see also* *Lawson v. Mahoning Cnty. Mental Health Bd.*, 2010-Ohio-6388, ¶ 5, 7 (7th Dist.) (noting that even where an activity is part of “everyday business,” it is not inherently a proprietary function). The fact that other entities have IT systems does not magically transform this activity from a governmental function to one that is not. Especially here, where the DoT is mandated by the City’s Code to provide a sweeping set of governmental functions that are at the foundation of the Plaintiffs’ tort-based claims. *See* Columbus Muni. Code § 225.01. Plaintiffs have not overcome their burden to establish that the maintenance and operation of an IT system is proprietary and therefore cannot pierce the City’s immunity.⁴ *See* *Fried*, 2020-Ohio-4215 at ¶ 22.

⁴ Even if maintenance of a city-wide IT system related to provision of city-wide services is somehow a proprietary function (which it is not), Columbus maintains its broad immunity against Plaintiffs’ tort-based claims because Columbus was not negligent in the criminal cyberattack alleged to have occurred in the Complaint. (Mot. at 16-22.)

2. Even if an Immunity Exception Could Apply (Which None Do), Columbus Is Immune Because It Did Not Act with Malice, in Bad Faith, or in a Wanton or Reckless Manner in Exercising Its Discretion.

Even if the exception to the City’s general immunity for negligent performance of a proprietary function applies (which it does not for the reasons discussed above), immunity may still apply when the political subdivision exercised judgment or discretion in performing the activity at issue. R.C. 2744.03(A)(5); *see also Pelletier*, 2018-Ohio-2121, at ¶ 15. Plaintiffs must then establish that the discretionary activity was made “with malicious purpose, in bad faith, or in a wanton or reckless manner.” R.C. 2744.03(A)(5). The City’s maintenance and operation of its IT system is an exercise of judgment or discretion because Columbus “plan[s], design[s], develop[s], procure[s], and deliver[s]” its own IT infrastructure.⁵ (Compl. ¶ 23.) The Complaint fails to plead any factual allegations establishing that such discretionary performance was made with malice, in bad faith, or in a wanton or reckless manner. (Mot. at 11-12.) Rather, the Opposition presents two arguments to the contrary, both of which are unavailing. (Opp. at 10-11.)

First, Plaintiffs misunderstand R.C. 2744.03(A)(5). Plaintiffs point to various appellate district cases arguing that R.C. 2744.03(A)(5) should be interpreted “narrowly[,]” applying only to discretionary decisions by the political subdivision itself and not to discretionary decisions of its employees. (Opp. at 10-11.) But the Supreme Court of Ohio has rejected this very same argument because it “unnecessarily manipulate[s] and confuse[s] [R.C. 2744.03(A)(5)].” *Elston v. Howland Local Schools*, 2007-Ohio-2070, ¶ 26. Because “a political subdivision acts through its employees[,]” immunity follows any “discretion exercised through the actions of [political

⁵ This discretion is further contemplated in the Columbus Municipal Code. *See* Columbus Muni. Code § 225.01 (“The department of technology shall have as its primary duties developing recommendations for information technology management policy, procedures, and standards; identifying opportunities to share information resources; and assessing and addressing the needs of the city’s information technology workforce developing and overseeing the implementation of uniform information resources management policies, principles, standards, and guidelines.”).

subdivision] employees.” *Id.* at ¶ 19-26; *see also Dearth v. City of Columbus*, 2019-Ohio-556, ¶ 46-49 (10th Dist.) (applying *Elston* in finding that city employees’ discretionary decisions in prioritizing and allocating resources to address multiple leak reports were entitled to immunity). Regardless, the Complaint does not assert allegations against actions by city employees, but by the City itself, as a political subdivision, in “maintain[ing] a single, unified IT system for all City services and entities.” (Compl. ¶ 28.) Such a decision—i.e. the “planning, designing, developing, procuring, and delivering information technology, telecommunications, and media services in partnership with City departments, City Council, boards and commissions, and other government entities” (*Id.* at ¶ 23)—cannot possibly be “routine,” they are plainly discretionary.

Second, the Complaint lacks any allegations regarding “reckless conduct” beyond conclusory statements. (Mot. at 11-12.) Plaintiffs argue that the “extent of the breach” demonstrates the alleged reckless conduct occurred and parrots the definition of reckless conduct without more. (Opp. at 11.) Plaintiffs’ tact is insufficient as a matter of law. Neither the occurrence nor the severity of an event *alone* establishes reckless conduct. *See State v. Peck*, 2007-Ohio-2730, ¶ 12 (10th Dist.) (“A mere failure to perceive or avoid a risk . . . does not constitute reckless conduct.”). For there to be recklessness, “one must recognize the risk of the conduct and proceed with a *perverse disregard* for that risk.” (Emphasis added.) *Id.* This high standard was neither alleged nor established here. *See Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 2008-Ohio-2567, ¶ 37 (“[R]ecklessness is subject to a high standard.”). A conclusory regurgitation of the definition of recklessness fails to properly plead an exception to immunity. *See, e.g., Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193 (1988) (“Unsupported *conclusions* [of a complaint] are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion.” (Emphasis in original.)). Thus, even if an exception to immunity applies (which it

does not), Columbus maintains its immunity because the maintenance and operation of its IT system is discretionary, and the Complaint fails to plead that sufficient misconduct occurred.

B. Plaintiffs Lack Standing to Sue.

Regardless of immunity, the Complaint remains deficient for lack of standing. Critically, the Complaint fails to establish that Plaintiffs have suffered a cognizable injury, and even if it did establish as much, the injury cannot be traced to Columbus. (Mot. at 13-16.)

1. The Complaint Lacks Factual Allegations to Establish Concrete Injury.

The Complaint fails to allege a cognizable injury. At best, the Complaint contains vague allegations of purported speculative harms. (Compl. ¶¶ 57-85.) The Opposition contends there is standing because Plaintiffs' injuries are concrete and actual. (Opp. at 12.) But critically missing from the Complaint and Opposition is any specificity as to *what information* Plaintiffs provided the City. Plaintiffs instead generically allege that they provided personally identifiable information ("PII") to the City, and that the data security incident leaves them at risk of a future injury. (Compl. ¶¶ 57-85, 93.) But, that is insufficient as a matter of law. Not all PII is sufficient to establish a risk of harm, which the Plaintiffs base their standing on here. *See, e.g., Antman v. Uber Techs, Inc.*, 2018 U.S. Dist. LEXIS 79371, *28 (N.D. Cal. May 10, 2018) (name and driver's license, combined with bank account and routing information, were not sensitive enough to constitute an "immediate, credible risk of harm" because "[it] is not plausible that a person could apply for a credit card without a social security number"). Without more, the Complaint fails to allege a cognizable harm.

Moreover, Plaintiffs' assertion that they "have alleged—in no uncertain terms—that their data has been stolen" is not supported by the Complaint. (Opp. at 14.) The Complaint instead states that criminals are auctioning stolen information on the Dark Web, without alleging that Plaintiffs' information was part of that auctioned data, much less what of Plaintiffs' information

was auctioned. (Compl. ¶¶ 39-41.) Put differently: the allegation that there is stolen information on the Dark Web does not, in and of itself, mean Plaintiffs' information was there or is even at issue in this case. While courts must draw all *reasonable* inferences in favor of the non-moving party to decide a motion to dismiss, there is nothing reasonable about inferring, for example, that criminals are auctioning Jane Doe's social security number, where Jane Doe has not even alleged that the City ever possessed that information. (See Compl. ¶¶ 77-81.) Accordingly, Plaintiffs' reliance upon case law recognizing increased risk of harm does not apply here.

For those same reasons, the alleged harm identified in the Complaint is speculative. (Opp. at 14.) By way of example, certain Plaintiffs claim that they have had their bank information compromised. But there are *no allegations* in the Complaint that can link Plaintiffs' financial accounts to the cyberattack, especially when it is wholly unclear what information they provided to the City or even whether it was enough to provide access to the accounts. (Mot. at 14-15.)

Finally, Plaintiffs' reliance upon Ohio's notice pleading standard rings hollow. (Opp. at 15.) Plaintiffs must be aware of what specific information they provided to the City. The fact that the City stores a "litany of highly sensitive personally identifiable information" (Opp. at 15) is not enough to show that the City stores Plaintiffs' PII, where Plaintiffs have failed to specify the PII provided that is central to their claims. See, e.g., *Scifo v. Alvarai, Inc.*, 2024 U.S. Dist. LEXIS 170093, *10-11 (D. Mass. Sept. 20, 2024) (finding no standing where plaintiffs allegations of "actual misuse" were unsupported by the allegations regarding the information in defendant's possession at time of breach). These glaring omissions do not put Columbus on notice of what specific information Plaintiffs are suing over, much less demonstrate how Plaintiffs could have sustained tangible, concrete harms from the compromise of unspecified information.

2. The Complaint Lacks Allegations that the Alleged Harms Are Fairly Traceable to Columbus' Actions.

The Complaint likewise fails to allege any facts tracing Plaintiffs' alleged harms to Columbus for two reasons. First, as the Complaint acknowledges, cyberattacks are frequent (Compl. ¶ 105), and there is no allegation that warrants the inference that any harm suffered by Plaintiffs is traceable to any specific cyberattack – much less the attack on Columbus. Second, because the Complaint fails to plead what information Plaintiffs provided to the City, any injuries arising from Plaintiffs' information cannot be traced to Columbus. Critical to the claims alleged here, “[a]n important component of traceability . . . is whether the information used in the identity theft matches the information defendant had on file.” *Santos-Pagan v. Bayamón Med. Ctr.*, 2024 U.S. Dist. LEXIS 179273, *19-20 (D.P.R. Sept. 30, 2024).

Plaintiffs' arguments to the contrary lack merit. Critically, Plaintiffs provide no response to the City's arguments that an injury resulting from a cyberattack must be traced to the information provided to the City. (*See Opp.* at 16.) Plaintiffs instead rely on the Complaint's utterly vague allegations regarding the unspecified information provided to the City. (*Id.*) Further, Plaintiffs' reliance on *Finesse Express, LLC v. Total Quality Logistics, LLC*, 2021 U.S. Dist. LEXIS 60648 (S.D. Ohio Mar. 30, 2021) is misleading. (*Opp.* at 16.) There, the plaintiffs were businesses who alleged that the incident included their “tax ID number [and] bank account numbers.” *Finesse* at *11. Thus, the traceability arguments in *Finesse* were entirely different than those presented here, where the *Finesse* plaintiffs at least provided the defendant with some notice of what information was at issue. Without more, Plaintiffs' injuries cannot be traced to the City.

C. The Complaint Fails to State a Claim.

Even if Plaintiffs could circumvent the City's immunity and adequately allege standing, the Complaint fails to allege sufficient facts to state cognizable claims for negligence/recklessness,

negligence per se, breach of implied contract, invasion of privacy, and breach of fiduciary duty. Therefore, each claim must be dismissed.

1. The Complaint Fails to Plead Facts to Sustain Cognizable Negligence or Negligence Per Se Claims.

Plaintiffs' claim for negligence and negligence per se should be dismissed for three reasons. First, the Complaint fails to establish the existence of a duty. Second, even if a duty existed, the Complaint has not established a breach of that duty. And third, Plaintiffs have not pled recoverable damages under Ohio law.

a. The Complaint Fails to Allege a Duty and No Statutory Duty Gives Rise to Negligence Per Se.

The Supreme Court of Ohio does not recognize a general duty to protect a plaintiff's data from an unauthorized user. *See, e.g., Brickman v. Maximus, Inc.*, 2023 U.S. Dist. LEXIS 46038, *9 (S.D. Ohio Mar. 17, 2023). Moreover, the Opposition fails to identify a statute or regulation detailing such specific requirements to safeguard information such that negligence per se is proper. Thus, Plaintiffs have not pled a duty to maintain a negligence or negligence per se claim.

Plaintiffs aver that they have established a duty for two erroneous reasons. First, Plaintiffs assert that when a person engages in "affirmative conduct that creates a risk to others, he has a corresponding duty to take reasonable precautions against foreseeable harms." (Opp. at 17 (citing *Parker v. L.T.*, 2017-Ohio-7674, ¶ 20 (1st Dist.)). Their reliance on *Parker* is misplaced. *Parker* concerned a negligence claim for injuries sustained by an elderly woman from people playing football in a church parking lot; the court determined that the defendants owed the elderly woman a duty of reasonable care because they engaged in affirmative conduct that came with foreseeable harms. *Id.* at ¶¶ 19-20. Here, Plaintiffs have not pled what "affirmative conduct" the City engaged in that created such a risk to others. Instead, Plaintiffs state that the City "affirmatively collected

highly sensitive PII from Plaintiffs” and thus “had a duty to take precautions against the foreseeable consequences of that choice.” (Opp. at 18.) This, however, does not explain how collecting data clearly creates a risk to others. And although Plaintiffs suggest that it was “highly foreseeable” that hackers would target Plaintiffs’ information (Opp. at 17-18) foreseeability is not enough to establish the existence of a duty. *Gonzalez v. Posner*, 2010-Ohio-2117, ¶ 13 (6th Dist.).⁶

Second, Plaintiffs contend that the City owed them statutory duties under the FTC Act, thereby creating the existence of a duty and allowing them to proceed under a negligence per se theory. (Opp. at 18-21.) This theory likewise fails. As an initial matter, Plaintiffs state that the FTC Act applies in this case and therefore, creates a duty because “Plaintiffs John Doe #1-5 brought this case against the City for its failure to safeguard PII that it collected within the scope of their employer-employee relationship.”⁷ (Opp. at 19.) In support, Plaintiffs rely upon *Covington v. Gifted Nurses, LLC*, 2023 U.S. Dist. LEXIS 141859, *24 (N.D. Ga. July 19, 2023), wherein the court found that the FTC has pursued companies who failed to secure the data of their employees. Plaintiffs do not and cannot provide authority establishing that a political subdivision should be considered a company for purposes of the FTC Act.

To be clear, even if the City were subject to the FTC Act, which it is not, Plaintiffs’ attempts to disguise an FTC Act enforcement claim where no private cause of action exists should be rejected. “Courts have uniformly held that a private right of action does not exist under section 5 of the FTCA.” *Smith v. ABN AMRO Mortg. Grp., Inc.*, 2007 U.S. Dist. LEXIS 26585, *30 (S.D. Ohio Mar. 27, 2007). Indeed, “[n]owhere does the Act bestow upon either competitors or

⁶ Plaintiffs rely on *Tate v. EyeMed Vision Care, LLC*, 2023 U.S. Dist. LEXIS 175840 (S.D. Ohio Sept. 29, 2023) for this point. (Opp. at 18.) In *Tate*, the defendants did not argue they lacked a duty, as the City argues here. *Tate*, 2023 U.S. Dist. LEXIS 175840, at *21 (stating that “EyeMed does not address duty or breach”).

⁷ The Complaint does not allege a negligence per se theory arising from an employer-employee relationship. (Compl. ¶¶ 156-165.) Nevertheless, should this be Plaintiffs’ theory, Jane Doe cannot maintain a claim against the City because she is not a City employee. (*Id.* at ¶ 76.)

consumers standing to enforce its provisions.” (Citation omitted.) *FTC v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 464 (6th Cir. 1988). “Where Congress has not explicitly authorized a private right of action, this court cannot create one by judicial fiat.” *Culbreath v. Golding Enters., L.L.C.*, 2007-Ohio-4278, ¶ 20, citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Moreover, the existence of a duty cannot be premised upon the FTC Act as numerous courts have held. *See, e.g., Brickman v. Maximus, Inc.*, 2022 U.S. Dist. LEXIS 205627, *18-19 (S.D. Ohio May 2, 2022) (FTC Act is not a basis for negligence per se because it does not provide a private right of action); *Allen v. Wenco Mgt., LLC*, 696 F. Supp. 3d 432, 440 (N.D. Ohio 2023) (finding no negligence per se claim premised on the FTC Act because it does not lay out objective standards to give rise to a negligence per se claim). Plaintiffs contend that the FTC Act satisfies the negligence per se requirements because the Act sets forth “fixed and absolute” standard of conduct to follow, and that other jurisdictions have allowed such a theory to proceed. (Opp. at 20.) Not only is this belied by the standards in the FTC Act, which only prohibits “unfair or deceptive acts or practices affecting commerce,” but is also expressly admonished by Ohio courts. (Mot. at 18-19.) Plaintiffs’ contrary arguments and citations to out of state case law must be ignored.

b. The Complaint Fails to Allege that Columbus Breached a Duty.

With respect to the requisite breach element, the Opposition invites this Court to find that the occurrence of *any* cyberattack, in and of itself, demonstrates a breach of a standard of care. (Opp. at 22-23.) This dangerous precedent should be rejected.

Plaintiffs rely on *Purvis v. Aveanna Healthcare, LLC*, 563 F. Supp. 3d 1360 (N.D. Ga. 2021), for the proposition that failure to comply with industry standards can give rise to breach of a duty. But unlike the *Purvis* defendant, who “simply disagree[d] that the numerous standards and practices cited in [the complaint] apply to Defendant,” Plaintiffs have not alleged beyond

unadorned conclusions that Columbus somehow breached industry standards (without specifying which industry the City—a governmental entity—purportedly fits within).

Similarly, Plaintiffs argue that the doctrine of *res ipsa loquitur* is instructive because Plaintiffs are without knowledge as to the City’s security measures without discovery. (Opp. at 22-23.) Yet, at the very least, the Complaint should identify which duty is alleged to have been breached along with sufficient facts describing how the duty was purportedly breached. To hold otherwise would improperly substitute a strict liability standard for that of negligence. *In re Waste Mgmt. Data Breach Litig.*, 2022 U.S. Dist. LEXIS 32798, *13 (S.D.N.Y. Feb. 24, 2022).

c. The Complaint Fails to Allege Any Cognizable Damages.

Lastly, Plaintiffs do not allege damages recoverable under Ohio law. The Opposition asserts that Plaintiffs have suffered a privacy injury from the disclosure of their “PII and PHI.”⁸ (Opp. at 23.) As detailed above, Plaintiffs have not alleged a privacy injury because they have not identified what information they provided to the City to sustain one. *Supra* Sec. II.B. Plaintiffs’ reliance on case law wherein a plaintiff alleged that a social security number had been provided and was involved in a data security incident to support a claim of some privacy injury is therefore inapposite. (Opp. 23-25.)

Additionally, Plaintiffs rely on cases that involve medical monitoring to allege that they have suffered an injury due to an increased risk of privacy theft. (Opp. at 25-26.) Tellingly, Plaintiffs fail to cite a single Ohio case to support this argument, and indeed *Allen*, upon which Plaintiffs rely, in part, found this argument unpersuasive. *See Allen v. Wenco Mgmt., LLC*, 696 F. Supp. 3d 432, 438 (N.D. Ohio Sept. 29, 2023) (“Allen analogizes his claim to medical monitoring, which the Supreme Court of Ohio has blessed ‘under the proper circumstances.’ Yet **the public-**

⁸ The Complaint is devoid of allegations that Plaintiffs’ private health information, as opposed to unspecified personally identifiable information, was involved in the breach. That assertion should therefore be ignored.

health concerns underlying medical monitoring are absent here, and Allen cites no Ohio cases extending medical monitoring to this (or any other new) context.” (Emphasis added.)). Unlike medical monitoring cases, where individuals need to monitor themselves for injuries as a result of known exposure to toxins, Plaintiffs have not shown how they have been harmed, or will suffer some future harm, to support such an analogy. And again, even if an increased risk of privacy theft was available to Plaintiffs, it remains the case that the Complaint fails to allege what information Plaintiffs provided to the City to support such an inference.⁹

2. The Complaint Fails to State a Claim for Breach of Fiduciary Duty.

In their final argument against dismissal, Plaintiffs contend that they have set forth the requisite elements to withstand the City’s Motion. (Opp. at 30.) The Complaint, however, fails to plead the existence of a cognizable fiduciary duty. Courts throughout the country, including in Ohio, have found no fiduciary duty exists with respect to protecting private information, especially in cases involving the receipt of PII alone. *See, e.g., Brooks v. Peoples Bank*, 2024 U.S. Dist. LEXIS 91834, *25-26 (S.D. Ohio May 6, 2024) (“If accepting confidential information was itself enough to give rise to fiduciary duties, [the Supreme Court of Ohio’s opinion in] *Groob* would have so held.”). Nor have courts found that an employee-employer relationship, in and of itself, creates the existence of a fiduciary relationship. *See State v. Masein*, 2010-Ohio-1864, ¶ 37 (finding a “fiduciary relationship requires more than the ordinary relationship of employer and employee.” (citation omitted)). The Opposition mischaracterizes case law to contend that courts recognize that the “mandatory receipt of sensitive, confidential information gives rise to a fiduciary relationship.” (Opp. at 30.) These cases involve health care providers, wherein courts have, in

⁹ Plaintiffs have abandoned their contract-based claims. (Infra. Sec. II.C.3., and Opp. at 28 (“[T]here is no contract between the parties.”).) To the extent Plaintiffs could proceed on a contract-based claim, Ohio’s economic loss rule would bar their negligence claim. *Lawarre v. Fifth Third Sec.*, 2012-Ohio-4016, ¶ 141 (1st Dist.); (Mot. at 20-21.).

certain circumstances, recognized a fiduciary duty with respect to medical information. *See, e.g., Tucker v. Marietta Area Health Care, Inc.*, 2023 U.S. Dist. LEXIS 13974, *18 (S.D. Ohio Jan. 26, 2023) (“Ohio recognizes that *medical providers* . . . hold ‘a fiduciary position’ with patients and have a duty to keep a patient’s medical information confidential.” (Emphasis added.)); *Herman v. Kratche*, 2006-Ohio-5938, ¶ 20 (“There is no dispute that the Clinic, as plaintiff’s *medical provider*, held a fiduciary position with plaintiff as its patient and had a duty to keep plaintiff’s medical information confidential.” (Emphasis added.)). Plaintiffs’ Complaint is not premised upon the City providing medical services, nor is it premised on health information. Thus, those cases are irrelevant. The breach of fiduciary duty claim should therefore be dismissed.

3. Plaintiffs Do Not Oppose the City’s Arguments Regarding Its Remaining Claims – Those Claims Should Be Dismissed.

Lastly, Plaintiffs do not dispute that their claims for breach of implied contract and invasion of privacy should be dismissed. The Complaint fails to allege the requisite elements to sustain these actions for the reasons outlined in the City’s Motion. (Mot. at 12-13 (political subdivisions cannot be sued for breach of implied contract); 22-27 (Complaint fails to plead elements of breach of implied contract); 27-28 (Complaint fails to allege invasion of privacy claim).)

The Opposition abandons the implied contract claim, admitting that “there is no contract between the parties that regulates data security.” (Opp. at 28.) Moreover, a party’s “failure to oppose a motion to dismiss . . . generally constitutes a waiver of any opposition to the movant’s arguments.” *Clay v. Galita*, 2024-Ohio-833, ¶ 7 (8th Dist.). The Opposition does not oppose the dismissal of either claim, and therefore they should be dismissed.

III. CONCLUSION

For the foregoing reasons, Plaintiffs’ Complaint should be dismissed with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served this 7th day of March, 2025 via e-mail on counsel for all parties.

/s/ Christopher L. Ingram
Defendant's Counsel