**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| MARY BETH RIDLEY, on behalf of herself and all others similarly situated, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. N17C-04-306 JRJ |
| BAYHEALTH MEDICAL CENTER, INC., d/b/a MILFORD MEMORIAL HOSPITAL and KENT GENERAL HOSPITAL, | ) | |
| Defendant. | ) | |

**OPINION**

Date Submitted: February 8, 2018
Date Decided: March 20, 2018

*On Defendant Bayhealth Medical Center Inc.'s Motion to Dismiss the Complaint and Strike Class Allegations*: **GRANTED in part, DENIED in part, and DEFERRED in part.**

Kelley M. Huff, Esquire (argued), Murphy & Landon, 1011 Centre Road, Suite 210, Wilmington, Delaware, Attorney for Plaintiff.

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**Jurden, P.J.**

## I. INTRODUCTION

This putative class action stems from a request for copies of medical records.[1] Plaintiff, Mary Beth Ridley ("Ridley"), is suing because the Defendant allegedly overcharged her for copies of her medical records, falsely represented she had to pay per-page rates for paper copies to obtain them, and concealed the material fact that Ridley is entitled to her medical records in electronic format. Ridley asserts claims for consumer fraud, breach of contract, violation of 24 *Del. C.* § 1761 (the Delaware Medical Practice Act), declaratory judgment, attorneys' fees, and punitive damages. She also seeks class certification. Now before the Court is Defendant Bayhealth Medical Center, Inc.'s ("Bayhealth") Motion to Dismiss the Complaint and Strike Class Allegations. For the reasons that follow, Bayhealth's Motion is **GRANTED in part, DENIED in part, and DEFERRED in part.**

## II. FACTS

Bayhealth is a Delaware corporation and healthcare provider as defined under 18 *Del. C.* § 6801(5) and does business as Milford Memorial Hospital and Kent General Hospital.[2] In March 2017, Ridley, a former patient of Bayhealth, sent two

[1] Plaintiff brings this action on behalf of herself and all others similarly situated, as representative of the following proposed classes: "[a]ll persons, who at any time since February 17, 2009, paid Bayhealth directly or indirectly, for access to or copies of their medical records (the "Damages Class")," and "[a]ll patients in the State of Delaware whose request for access to their records are processed, directly or indirectly, by Bayhealth (the "Declaratory Relief Class")." (Collectively, "Proposed Classes.") Plaintiff filed her Complaint on April 26, 2017. Compl. ¶¶ 41, 42 (Trans. ID 6052433) (D.I. 1).

[2] Compl. ¶ 6.

letters to Bayhealth requesting her medical records. One letter requested her medical records from Milford Memorial Hospital from May 1, 2016 to March 10, 2017 ("Milford Letter").[3] The Milford Letter stated, "[p]lease provide the records **in electronic form on CD** in the Adobe Acrobat PDF format," and it directed Bayhealth to send the CD to Ridley's attorney.[4] Bayhealth sent Ridley's attorney the Milford records and an invoice dated March 30, 2017 for $193.75 for 425 paper pages of medical records.[5]

Ridley's second letter requested her medical records from Kent General Hospital from May 1, 2016 to March 10, 2017 ("Kent General Letter"). Like the Milford Letter, the Kent General Letter stated, "[p]lease provide the records **in electronic form on CD** in the Adobe Acrobat PDF format," and it directed Bayhealth to send the CD to her attorney.[6] Bayhealth sent Ridley's attorney the Kent General records and an invoice dated March 30, 2017 for $41.00 for 35 paper pages of medical records.[7]

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[3] *Id.* at ¶ 33.
[4] *Id.* (emphasis in original).
[5] *Id.* at ¶ 34; Def.'s Opening Br. at 2 (Trans. ID 60793467) (D.I. 9). The invoice for the Milford records was broken down as follows:

1 to 10 x $2.10 = $21.00
11 to 20 x $1.10 = $11.00
21 to 100 x $0.60 = $48.00
101 to 425 x $0.35 = $113.75

[6] *Id.* at ¶ 36 (emphasis in original).
[7] Compl. ¶ 37. The invoice for the Kent General records was broken down as follows:

Ridley's Complaint alleges she paid the sums claimed due "in reliance on the representation of Bayhealth that she was required to pay the sums demanded in order to obtain access to her medical records."[8]

## III. PARTIES' CONTENTIONS

Ridley asserts multiple claims against Bayhealth. First, she alleges Bayhealth violated 6 *Del. C.* § 2513, the Delaware Consumer Fraud Act ("DCFA").[9] According to Ridley's Complaint, Bayhealth intended Ridley and class members to rely on misrepresentations and concealments "so that they would believe they needed to pay more money for paper copies of their medical records, which they did."[10] Second, she alleges that Bayhealth's conduct constitutes a violation of 24 *Del. C.* § 1761, the Delaware Medical Practice Act, because the fees for Ridley's medical records exceeded the limits provided in a regulatory fee schedule.[11] Third, Ridley alleges that Bayhealth's excessive charges and wrongful refusal to produce medical records in electronic format constitute a breach of contract.[12] Along with requests for monetary damages (including punitives) and attorneys' fees,[13] Ridley

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1 to 10 x $2.10 = $21.00
11 to 20 x $1.10 = $11.00
21 to 35 x $0.60 = $9.00

[8] *Id.* at ¶ 39.
[9] *See id.* at ¶¶ 55–58.
[10] *Id.* at ¶¶ 55–57.
[11] *Id.* at ¶¶ 60-63.
[12] Compl. ¶¶ 64–67.
[13] *Id.*, Prayer for Relief ¶¶ c, d, e.

seeks a declaratory judgment that Bayhealth violated federal and state laws in connection with its charges and the manner in which it provides patients with copies of their medical records.[14] Ridley also seeks class certification.[15]

Bayhealth moves to dismiss on several grounds. First, Bayhealth argues that Ridley lacks standing to assert the claims alleged in the Complaint because Bayhealth never charged Ridley for the medical records at issue, and the Complaint fails to state that Ridley was obligated to pay for the records.[16] Second, Bayhealth contends that Ridley's DCFA claim must be dismissed because furnishing medical records is not the type of transaction the DCFA was intended govern.[17] Third, Bayhealth argues that Ridley fails to state a claim for violation of 24 *Del. C.* § 1761, the Delaware Medical Practice Act, because this statute does not apply to hospitals, and even if it does, Ridley has failed to sufficiently plead a violation.[18] Fourth, Bayhealth maintains that Ridley's breach of contract claim must be dismissed because there is no allegation in the Complaint that a contract existed between Bayhealth and Ridley, or that a breach of contract caused injury to Ridley. Fifth, Bayhealth argues that Ridley fails to state a claim for breach of the implied covenant of good faith and fair dealing because Ridley has not alleged a specific implied

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[14] *Id.* at ¶¶ 68–73.
[15] *Id.*, Prayer for Relief ¶ a; *See* Proposed Classes, *supra* note 1.
[16] Def.'s Opening Br. at 5.
[17] *Id.* at 14.
[18] *Id.* at 14–15.

contractual obligation or how a violation of such obligation denied Ridley the fruits of the contract.[19] Sixth, Bayhealth contends that Ridley's claim for declaratory judgment must be dismissed because there is no private right cause of action under the Health Insurance Portability and Accountability Act ("HIPAA"), money damages are more appropriate, and other claims already alleged adequately address the damages Ridley seeks.[20] Seventh, Bayhealth argues Ridley's claim for punitive damages must be dismissed because Ridley fails to state a claim for violation of the DCFA or a claim entitling her to punitive damages.[21] Eighth, Bayhealth maintains Ridley fails to allege any viable claim that would entitle her to attorneys' fees. Finally, Bayhealth asserts that the Complaint fails to satisfy the requirements for class certification pursuant to Delaware Superior Court Civil Rule 23(a).[22]

## IV. STANDARD OF REVIEW

On a motion to dismiss for failure to state a claim upon which relief can be granted,[23] the Court must read the complaint generously, accept all well-pled allegations contained therein as true, and draw all reasonable inferences in a light most favorable to the non-moving party.[24] A complaint is well-pled if it puts the

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[19] *Id.* at 21–22.
[20] *Id.* at 22–24.
[21] Def.'s Opening Br. at 26–27.
[22] *Id.* at 30–37.
[23] *See* Super. Ct. Civ. R. 12(b)(6).
[24] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006); *Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *4 (Del. Super. Sept. 4, 2008).

opposing party on notice of the claim being brought against it.[25] "Dismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'"[26] Allegations that are merely conclusory and lacking factual basis will not survive a motion to dismiss.[27]

When a complaint includes claims of fraud, the Court must also take into account Delaware Superior Court Civil Rule 9(b), which requires the plaintiff to plead allegations of actual fraud with particularity.[28] "Rule 9(b) does not require an exhaustive cataloguing of facts but on sufficient factual specificity to provide assurance that the plaintiff has investigated...the alleged fraud and reasonably believes that a wrong has occurred."[29]

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[25] *Lagrone*, 2008 WL 4152677, at *4 (citing *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995)).

[26] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 168 (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)). *See also Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

[27] *Brevet Capital Special Opportunities Fund, LP v. Fourth Third, LLC*, 2011 WL 3452821, at *6 (Del. Super. Aug. 5, 2011).

[28] *See Ki-Poong Lee v. So*, 2016 WL 6806247, at *3 (Del. Super. Nov. 17, 2016) ("Claims for actual fraudulent transfer brought under § 1304(a)(1) must meet the heightened pleading standard of Superior Court Civil Rule 9(b)."); *In re Aphton Corp.*, 423 B.R. 76, 87 (Bankr. D. Del. 2010) (applying Rule 9(b) of the Federal Rules of Civil Procedure to claims brought under the DUFTA); *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008) (noting that a fraudulent transfer claim must be pled with particularity); *In re Nat'l Serv. Indus., Inc.*, 2015 WL 3827003, at *3 (Bankr. D. Del. June 19, 2015) ("Actual fraudulent transfer claims [made under the DUFTA and the Bankruptcy Code] must meet the elevated pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure.").

[29] *Ki-Poong Lee v. So*, 2016 WL 6806247, at *4 (Del. Super. Nov. 17, 2016).

## V. DISCUSSION

### A. Standing

Because it is jurisdictional, the Court first considers Bayhealth's argument that Ridley lacks standing.[30] The term "standing" refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance.[31] To have standing to bring an action in Delaware, a plaintiff must establish: (1) an injury-in-fact, to a legally protected interest, that is concrete and particularized, actual or imminent, and not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's conduct; and (3) the claim is redressable by a favorable decision.[32]

Bayhealth points out that the Complaint alleges it sent Ridley's medical records and invoices for those records to Ridley's attorney. The Complaint does not allege that the invoices were addressed to Ridley by care of her attorney.[33] Thus,

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[30] *See, e.g., Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) ("Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers.").

[31] *Id.* at 1110–11 (citing *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)).

[32] *Id.* The Delaware Supreme Court recognized in that case the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[33] *See* Def.'s Opening Br. at 6.

according to Bayhealth, Ridley never suffered an injury-in-fact because she was never charged for the allegedly overpriced copies and, therefore, lacks standing.[34]

In support of this argument, Bayhealth relies on *Spiro v. HealthPort Techs., LLC*,[35] where defendants in a putative class action successfully argued a similar challenge in a case also involving alleged overcharges for medical records.[36] In *Spiro*, plaintiffs' counsel requested plaintiffs' medical records from the defendant hospitals and their billing agent, which allegedly charged inflated rates for producing the records.[37] The defendants in *Spiro* asserted a standing challenge, arguing that plaintiffs had failed to plead a cognizable injury-in-fact because the plaintiffs' counsel, not the plaintiffs, was charged for (and paid for) copies of the plaintiffs' medical records.[38] In response, the *Spiro* plaintiffs argued that each plaintiff later reimbursed plaintiffs' counsel for the costs of the copies after the case settled. According to the *Spiro* plaintiffs, because the cost was passed along to them, each suffered an out-of-pocket monetary loss, and it was irrelevant that their counsel fronted the payments for them. The *Spiro* court held that because the plaintiffs did not allege in their complaint that they were obligated to pay the copying costs that their counsel incurred, the plaintiffs' decision to reimburse their counsel after the

[34] *Id.*
[35] 73 F.Supp.3d 259 (S.D.N.Y. 2014).
[36] *See id.* at 267-70.
[37] *Id.* at 265.
[38] *Id.* at 266.

fact "was a volitional act – an act of grace,"[39] and "any legal right to challenge defendants' ostensible overcharging would belong exclusively to [plaintiffs' counsel], who suffered an injury *caused* by defendants' overcharging."[40] The *Spiro* court noted that the analysis would have been different had plaintiffs been obligated to reimburse their counsel at the time he incurred the copying expenses.[41] Had that fact been pled, the liability to repay their counsel for the copying costs would have given plaintiffs standing because they, not their counsel, would have suffered an injury-in-fact (a legal duty to pay these excessive costs) traceable to the defendants responsible for the charges.[42]

Unlike the complaint in *Spiro*, Ridley alleges *she* paid the copying costs charged by Bayhealth, "in reliance on Bayhealth's representation that she was required to pay the sums demanded in order to obtain access to her medical records."[43] The facts, as pled, establish that Ridley was obligated to pay for the records in order to obtain them,[44] and she paid those charges. Unlike the plaintiffs

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[39] *Id.* at 268.
[40] *Spiro*, 73 F.Supp.3d at 268 (emphasis in original). According to the *Spiro* court, "[p]laintiffs' later decision to reimburse their lawyer, and…[his] decision to accept such reimbursement, must be taken as independent, volitional, discretionary acts, breaking the chain of causation necessary to establish…standing."
[41] *Id.* at 269.
[42] *Id.*
[43] *Id.* at ¶ 39. Notably absent from the Complaint is any allegation that Ridley instructed or requested Bayhealth to send the invoices to her attorney. According to the pled facts, Ridley only directed Bayhealth to send her records to her attorney. *See* Compl. ¶¶ 33, 36. Bayhealth acted on its own in sending the invoices to Ridley's attorney instead of Ridley.
[44] Transcript of Mot. to Dismiss Dated December 20, 2017, 36:12–16.

in *Spiro*, Ridley alleged facts establishing an injury-in-fact and a chain of causation unbroken by an independent volitional, discretionary act.[45] Bayhealth's Motion to Dismiss based on lack of standing is therefore **DENIED**.

### B. Delaware Consumer Fraud Act

The DCFA states, in pertinent part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.[46]

To prove a claim under the DCFA, the consumer must establish that the merchant made a false statement with the knowledge that the statement was untrue, or the merchant negligently made a misrepresentation.[47] To plead a cause of action for damages under the DCFA, Ridley must allege that: (1) Bayhealth engaged in conduct that violated the statute; (2) Ridley was a "victim" of the unlawful conduct;

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[45] *See Spiro*, 73 F.Supp.3d at 268.
[46] 6 *Del. C.* § 2513(a).
[47] *Norman Gershman's Things To Wear, Inc. v. Mercedes-Benz of North America, Inc.*, 558 A.2d 1066, 1074 (Del. Super. Feb. 10, 1989) (citing *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

and (3) there exists a causal relationship between Bayhealth's conduct and Ridley's ascertainable loss.[48]

According to Bayhealth, no Delaware court has applied the DCFA in a case like this one.[49] Bayhealth suggests that the DCFA may not be applicable here "because furnishing medical records to patients at cost is not a traditional relationship between a consumer and a business enterprise as contemplated by the DCFA's purpose..."[50] Assuming arguendo that the DCFA is applicable, Ridley's DCFA claim cannot survive a motion to dismiss because the alleged conduct giving rise to the fraud and the breach of contract is the same.[51] Without alleged separate and distinct conduct, where a defendant is bound by a contract with a plaintiff, the defendant will not be liable in tort for failure to comply with the contract.[52] Ridley does not contest that her fraud claim is based entirely on breach of contract,[53] but argues that "[w]hatever holdings there may be on the subject of combining breach

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[48] *See Teamsters Local 237 Welfare Fund v. AstraZeneca Pharmaceuticals LP*, 136 A.3d 688, 693 (Del. 2016).

[49] Def.'s Opening Br. at 9, n. 2.

[50] *Id.*

[51] *See* Compl. ¶¶ 57, 66. When a complaint alleges claims for fraud and breach of contract, "the fraud claim will survive only if premised 'on conduct that is separate and distinct from the conduct constituting the breach.'" *Hiller & Arban, LLC v. Reserves Management, LLC*, 2016 WL 3678544, at *4 (Del. Super. July 1, 2016) (quoting *ITW Global Investments, Inc. v. American Industrial Partners Capital Fund IV, L.P.*, 2015 WL 3970908, at *6 (Del. Super. June 24, 2015) (citing *Midland Red Oak Realty, Inc. v. Friedman, Billings, Ramsey & Co., Inc.*, 2005 WL 445710, at *3 (Del. Super. Feb. 23, 2005))).

[52] *See Hiller & Arban, LLC*, 2016 WL 3678544, at *4; *see also Diver v. Miller*, 148 A. 291 (Del. Super. Mar. 19, 1929) (the first Superior Court opinion to explain the distinction needed for concurrent tort and contract actions).

[53] *See* Pl.'s Answering Br. at 21 (Trans. ID 60875126) (D.I. 10).

of contract with common law fraud, this Court...has upheld the simultaneous pleading of contract claims and CFA claims..."[54] The cases Ridley relies upon in support of this argument, however, are inapposite because they turn on something other than the separate and distinct conduct rule governing concurrent fraud and contract claims. In fact, none of the cases cited by Ridley analyze the separate and distinct conduct rule.[55]

Another reason Ridley's fraud claim does not survive is that a plaintiff who alleges fraud and breach of contract must prove that the damages pled under each

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[54] *Id.*

[55] *See Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222 (Del. Super. Apr. 1, 2010) (Plaintiffs were named insureds under a Hartford automobile policy who tendered claims for personal injury protection benefits. The Court ruled that the Rule 9 particularity requirement applies to private DCFA actions and denied a motion to dismiss a DCFA claim for failure to plead with particularity.); *Thomas v. Hartford Mut. Ins. Co.*, 2003 WL 220511 (Del. Super. Jan. 31, 2003) (reargument and clarification granted in part by *Thomas v. Hartford Mut. Ins. Co.*, 2003 WL 21742143 (Del. Super. July 25, 2003)) (granting summary judgment on a consumer fraud claim because the fraud alleged was perpetrated by an agent after the sale of an insurance policy and the facts demonstrated the fraud was not "in connection with the sale or advertisement of the policy, and therefore does not fall within the constructs of the DCFA); *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542 (Del. Super. Apr. 26, 2001) (The Court applied the particularity standard to a complaint for statutory consumer fraud, and did not analyze the separate and distinct conduct rule); *Mentis v. Delaware Amer. Life Ins. Co.*, 1999 WL 744430 (Del. Super. July 28, 1999) (The Court did not analyze the separate and distinct conduct rule, and focused its consumer fraud analysis on whether the Unfair Trade Practices Act prohibits a private DCFA action against an insurance company); *DiSimplico v. Equitable Variable Life Ins. Co.*, 1988 WL 15394 (Del. Super. Jan. 29, 1988) (The case did not involve a breach of contract claim and the Court focused its consumer fraud analysis on whether the Unfair Trade Practices Act prohibits a private DCFA action against an insurance company); *Coleman DuPont Homsey v. Vigilant Ins. Co.*, 496 F.Supp.2d 433 (D. Del. 2007) (Plaintiff was named insured who sued his insurer for breach of contract, declaratory judgment, bad faith, and statutory fraud. The District Court of Delaware ruled that the Rule 9 particularity standard applied to private DCFA actions, and did not analyze the separate and distinct conduct rule).

cause of action are distinct.[56] Fraud damages allegations cannot simply "rehash" damages that were allegedly caused by a claimed breach of contract.[57] Failure to plead separate damages is an independent ground for dismissal,[58] and Ridley's damages claims for the alleged consumer fraud and breach of contract are virtually identical.[59]

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[56] *See EZLinks Golf, LLC v. PCMS Datafit, Inc.*, 2017 WL 1312209, at *6 (Del. Super. Mar. 21, 2017).

[57] *Cornell Glasgow, LLC*, 2012 WL 2106945, at *8 (citing *Albert v. Alex Brown Mgt. Serv., Inc.*, 2005 WL 2130607, at *7 (Del. Ch. Aug. 26, 2005)) ("Cornell's fraud, negligent misrepresentation and one of its tortious interference with contract claims all arise from or are related to the [Agreement]. Cornell also seeks damages for La Grange's alleged breach of the [Agreement]. Delaware courts will not permit a plaintiff to "bootstrap" a breach of contract claim into a tort claim merely by intoning the *prima facie* elements of the tort while telling the story of the defendant's failure to perform under the contract. To be viable, the tort claim must 'involve violation of a duty which arises by operation of law and not by the mere agreement of the parties.'").

[58] *Id.* at *9 ("[Plaintiff] has failed to plead fraud damages separate and apart from its breach damages. The fraud claim, therefore, must be dismissed for this reason as well."); *See also ITW Global Investments Inc.*, WL 3970908, at *5.

[59] *See* Compl. ¶¶ 59, 67.

Consumer Fraud:

> As a direct result of Bayhealth's violation of 6 Del. C. § 2513, Plaintiff and members of the Classes have suffered and will continue to suffer injury.

Breach of Contract:

> As a direct result of Bayhealth's breaches of contract (as described herein), Plaintiff and the Classes have suffered injury as heretofore alleged.

Because Ridley's Complaint fails "to separate the damages incurred by any fraudulent conduct from those incurred by any breach of contract,"[60] and the conduct giving rise to the alleged fraud and the breach is the same, Bayhealth's Motion to Dismiss the DCFA claim is **GRANTED**.

### C. 24 *Del. C.* § 1761, The Delaware Medical Practice Act

Ridley alleges that Bayhealth violated 24 *Del. C.* § 1761, the Delaware Medical Practice Act, when it charged more than its actual costs for copying medical records.[61] 24 *Del. C.* § 1761(d) provides that patients have the right to obtain copies of their medical records according to a payment schedule established by the Board of Medical Licensure and Discipline. Bayhealth argues that § 1761 does not apply to hospitals.[62] 24 *Del. C.* § 1761(e) states:

> This section *does not apply* to a person certified to practice medicine who has seen or treated a patient on referral from another person certified to practice medicine and who has provided a copy of the record of the diagnosis and/or treatment to the other person, or *to a hospital* or an agency which has provided treatment for the patient.[63]

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[60] *Khushaim v. Tullow, Inc.*, 2016 WL 3594752, at *6–7 (Del. Super. June 27, 2016) (dismissing claim for fraud where plaintiff "merely pled identical damages"); *ITW Global Invs., Inc.*, 2015 WL 3970908, at *5 (dismissing claim for fraud where plaintiff pleaded materially identical damages); *Cornell Glasgow, LLC*, 2012 WL 2106945, at *8 (dismissing fraud claims where breach-of-contract claim alleged identical damages); *4C, Inc. v. Pouls*, 2014 WL 1047032, at *7 (D. Del. Mar. 5, 2014) ("A plaintiff alleging both fraudulent misrepresentation and breach of contract must prove that the damages pled under each cause of action are distinct."); *Greenstar, LLC v. Heller*, 934 F.Supp.2d 672, 697 (D. Del. 2013) (claim for fraud failed because plaintiff failed to demonstrate fraud damages "separate and apart from" the alleged breach of contract damages).

[61] Compl. ¶ 61.

[62] Def.'s Opening Br. at 14; Transcript of Mot. to Dismiss Dated December 20, 2017, 11:7–14; *see also* 24 *Del. C.* § 1761(e).

[63] Emphasis added.

The express language of the statute is clear, and Ridley did not respond to Bayhealth's argument on this point in her Answering Brief.[64] Bayhealth's Motion to Dismiss Ridley's claim that Bayhealth violated 24 *Del. C.* § 1761 is **GRANTED**.

**D. Breach of Contract**

Ridley alleges in her Complaint that: (1) the relationship between her (and the classes) and Bayhealth "is contractual in nature;"[65] (2) "Bayhealth's imposition of excessive and unlawful charges for the disclosure of patients' medical records, and its wrongful refusal to produce such records in electronic format as required by law, are in breach of its contractual duties (including without limitation the duties of good faith and fair dealing) to Plaintiff and the classes;"[66] and (3) "[a]s a direct result of Bayhealth's breaches of contract (as described herein), Plaintiff and the classes have suffered injury as heretofore alleged."[67]

In order to survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must allege: (1) the existence of a contract, whether express or implied; (2) the breach of an obligation imposed by that contract; and (3) the resultant damage to the plaintiff.[68] Moreover, to recover damages, a plaintiff

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[64] *See* Super. Ct. Civ. R. 8(d). "Averments in a pleading to which a responsive pleading is required...are admitted when not denied in the responsive pleading."
[65] Compl. ¶ 65.
[66] *Id.* at ¶ 66.
[67] *Id.* at ¶ 67.
[68] *Shah v. American Solutions, Inc.*, 2012 WL 1413593, at *2 (Del. Super. Mar. 8, 2012) (citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

alleging breach of contract must demonstrate that he substantially complied with all provisions of the contract.[69]

Bayhealth maintains that the facts as pled do not give rise to an inference that it owed a contractual duty to Ridley.[70]

**Existence of a Contract**

An implied-in-fact contract is legally equivalent to an express contract; the only difference between the two is the proof by which the contract is established.[71] "An express agreement is arrived at by words, while an implied agreement is arrived at by acts."[72] To determine the existence of an implied-in-fact contract, the inquiry focuses on whether the parties have "indicated their assent to the contract."[73] In other words, to prevail on a theory of implied-in-fact contract, a plaintiff must establish that the parties, through their actions, demonstrated a "meeting of the minds" on all essential terms of the contract.[74]

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[69] *Id.* (citing *Emmett S. Hickman Co. v. Emilio Capaldi Developer, Inc.*, 251 A.2d 571, 573 (Del. Super. Mar. 4, 1969)).
[70] Def.'s Opening Br. at 19.
[71] *Lawrence v. DiBiase*, 2001 WL 1456656, at *5 (Del. Super. Feb. 27, 2001) (citing *In re Phillips Petroleum Sec. Litig.*, 697 F.Supp. 1344, 1356 (D. Del. 1988), *rev'd on other grounds*, 881 F.2d 1236 (3d Cir. 1989) (citations omitted)).
[72] *Trincia v. Testardi*, 57 A.2d 639, 642 (Del. Ch. Feb. 28, 1948).
[73] *Lawrence*, 2001 WL 1456656, at *5 (citing *Freedman v. Beneficial Corp.*, 406 F.Supp. 917, 923 (D. Del. 1975)).
[74] *Heiman, Aber & Goldlust v. Ingram*, 1999 WL 1240904, at *1 (Del. Super. Aug. 18, 1999).

The Complaint alleges Ridley ordered her medical records in electronic format and then "paid the sums claimed due by Bayhealth."[75] Bayhealth concedes it received payment for its production of Ridley's medical records.[76] Mutual assent is demonstrated by Ridley's letters, Bayhealth's delivery of the copies to Ridley's attorney (as instructed in the letters), and Ridley's payment for her medical records, which Bayhealth accepted.

Bayhealth cites to *Shah v. Am. Sols., Inc.*,[77] arguing any contractual relationship arising from the invoices is between Ridley's counsel and Bayhealth.[78] Based on the facts as pled, the Court disagrees, and the facts in *Shah* are inapposite. Ridley placed an order with Bayhealth for her medical records,[79] instructed Bayhealth as to the format in which her records should be produced,[80] directed Bayhealth to send her medical records to her attorney,[81] and Ridley paid the bill.[82] In response to Ridley's letters, Bayhealth produced the medical records, sent them along with the invoices to Ridley's attorney, and accepted payment for the records.[83]

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[75] Compl. ¶¶ 33, 36, 39.
[76] Def.'s Opening Br. at 20.
[77] *See* 2012 WL 1413593 (Del. Super. Mar. 8, 2012) (dismissing a plaintiff's breach of contract claim against a defendant who was not a party to the contract at issue because the complaint did not plead sufficient facts to establish a breach of contract claim and the plaintiff never performed services for the defendant).
[78] Def.'s Opening Br. at 19.
[79] Compl. ¶¶ 33, 36.
[80] *Id.*
[81] *Id.*
[82] *Id.* at ¶ 39.
[83] Def.'s Opening Br. at 20.

These allegations support a reasonable inference that an implied-in-fact contract exists between Ridley and Bayhealth.[84]

**Breach/Damages**

Bayhealth argues that even if an implied-in-fact contractual relationship exists, Ridley suffered no loss as a result of a breach of that contract.[85] Ridley relies on provisions of the HITECH Act[86] to allege a specific implied contractual obligation[87] (acquiring her electronic medical records at cost) that she was denied as a result of Bayhealth's breach.[88] It is reasonable to infer from the allegations that

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[84] *Heiman*, 1999 WL 1240904, at *1 (meeting of the minds); *Beta Data Services, Inc. v. Verizon Federal, Inc.*, 2014 WL 4219599, at *5 (Del. Super. Aug. 26, 2014) ("The *Qwest* court found that the parties had formed an implied-in-fact contract because the invoices were being billed and paid in full.") (An implied-in-fact contract was not found to exist because the plaintiff alleged an oral contract existed) (citing *Qwest Commc'ns v. Global NAPs*, 2007 WL 7714219 (E.D. Va. 2007)).

[85] Def.'s Opening Br. at 13.

[86] The HITECH Act provides the United States Department of Health and Human Services with the authority to establish programs to improve health care quality through the promotion of health information technology, including electronic health records and private and secure electronic health information exchanges. *See* 42 U.S.C. § 17935; HEALTH IT LEGISLATION AND REGULATIONS, https://www.healthit.gov/policy-researchers-implementers/health-it-legislation (last visited Feb. 7, 2018). It is undisputed among the parties that the HITECH Act and 45 C.F.R. § 164.524 govern Bayhealth's fees for medical records. *See* 45 C.F.R. § 164.524(c)(4); Def.'s Reply Br. at 5 (Trans. ID 60918214) (D.I. 11) ("Under federal law, healthcare providers are permitted to charge a 'reasonable, cost-based fee…'".); Pl.'s Answering Br. at 8; Compl. ¶¶ 12, 15–19.

[87] *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).

[88] *See Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1162 (3d Cir. 1992) (the Third Circuit explains an OSHA violation is allowed as evidence which a jury could consider in determining whether an employer acted negligently. "The admission of an OSHA violation as evidence of negligence would not contradict our interpretation of the 'enlarge or diminish or affect' language of OSHA."); *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 665–66 (4th Cir. 1963), *cert. denied*, 376 U.S. 952 (1964) (explaining a regulation under the Longshoremen's and Harbor Workers' Compensation Act could be admitted as evidence of a ship owner's negligence even though the regulation stated, "It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels…"); *Acosta v. Byrum*, 638 S.E.2d 246, 253 (N.C. Ct. App. Dec. 19, 2006) (explaining HIPAA violations can be used to

Ridley reasonably expected to be charged actual costs for her medical records and to receive them in the electronic format she requested, consistent with the federal law governing Bayhealth's handling of patient medical records. On a motion to dismiss, dismissal is only appropriate if it is "reasonably certain that the plaintiff could not prove any set of facts that would entitle…[her] to relief."[89] Accepting all well-alleged allegations as true, and drawing every factual inference in favor of the plaintiff, the Court finds Ridley has sufficiently pled a breach and damages caused by that breach.[90]

**Breach of the Implied Covenant of Good Faith and Fair Dealing**

Although not explicitly pled, Ridley includes in her breach of contract claim a breach of the covenant of good faith and fair dealing.[91] Bayhealth argues that Ridley's "vague reference" to breach of the implied covenant fails under Delaware law, and Delaware courts "routinely dismiss" such claims before allowing the case to proceed to discovery.[92] Ridley counters that a "fairly pleaded claim of good faith/bad faith raises essentially a question of fact which generally cannot be

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provide evidence of the duty of care owed); *see also* Mark A. Rothstein, *Occupational Safety and Health Law*, 500-502 (3d 1990).

[89] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

[90] Compl. ¶¶ 66–67.

[91] *Id.* at ¶ 66. "Bayhealth's imposition of excessive and unlawful charges for the disclosure of patients' medical records, and its wrongful refusal to produce such records in electronic format as required by law, are in breach of its contractual duties (*including without limitation the duties of good faith and fair dealing*) to Plaintiff and the Classes." (Emphasis added.)

[92] *See* Opening Br. at 21; Def.'s Reply Br. at 10.

resolved on the pleadings or without first granting an adequate opportunity for discovery."[93]

The implied covenant of good faith and fair dealing inheres in every contract and requires a party in a contractual relationship to refrain from arbitrary and unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.[94] An implied covenant claim seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to had those terms been considered before execution of the transaction.[95] In other words, rather than constituting a free floating duty imposed on a contracting party, the implied covenant can only be used to ensure the parties' reasonable expectations are fulfilled.[96] "To state a claim for breach of the implied covenant of good faith and fair dealing, the Plaintiff[] must identify a specific implied contractual obligation,"[97] and "allege how the violation of that obligation denied the plaintiff the fruits of the contract."[98]

If the jury believes the terms of the implied-in-fact contract were not sufficient to justify finding a breach of the contract, it could still find the alleged overcharging

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[93] Pl.'s Answering Br. at 22–23 (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1209 (Del. 1993)).
[94] *Kuroda v. SPJS Holding, LLC*, 971 A.2d 872, 888 (Del. Ch. Apr. 15, 2009).
[95] *See Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400, 418–19 (Del. 2013).
[96] *Kuroda*, 971 A.2d at 888.
[97] *Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939, at *10 (Del. Super. Jan. 17, 2002).
[98] *Kuroda*, 971 A.2d at 888.

and refusal to produce the copies in the requested electronic format was a breach of the implied covenant.[99] At this stage, it is too early to rule out the possibility that the implied covenant might apply.[100] Bayhealth's Motion to Dismiss Ridley's breach of contract claim is therefore **DENIED.**

**E. Declaratory Judgment**

Ridley seeks a declaratory judgment that Bayhealth acted in violation of the HITECH Act and applicable state law in connection with its charges for, and manner of producing, patient records.[101] Bayhealth argues Ridley's claim for declaratory judgment must be dismissed because there is no private right cause of action under

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[99] *See Marshall v. Priceline.com, Inc., 2006 WL 3175318, at *5 (Del. Super. Oct. 31, 2006).*

[100] *See Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *9 (Del. Ch. Dec. 9, 2011) (ruling the implied covenant claim is a "backstop" that "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain," and it was too early in the litigation to rule out the possibility that the implied covenant might apply to provisions of the governing contract); *see also Alltrista Plastics, LLC v. Rockline Industries, Inc.*, 2013 WL 5210255, at *7–8, *11 (Del. Super. Sept. 4, 2013) (ruling it was too early to determine whether the contract specifically addressed the payments alleged in the complaint and that when the plaintiff identifies an ambiguity or gap that the implied covenant could fill, Delaware courts have permitted plaintiffs to proceed with implied covenant and contract claims pled in the alternative); *Renco Group, Inc. v. MacAndrews AMG Holdings LLC*, 2015 WL 394011, at *7 (Del. Ch. Jan. 29, 2015) (holding that "[a]lthough the Court does not readily find breaches of the implied covenant and any success will be meaningless if the contract claims succeed," "[g]iven the early stage of the proceedings, the complexity of the business arrangement, and the breadth of the factual allegations, the Court cannot foreclose the reasonably conceivable [implied covenant claim].").

[101] Compl. ¶ 72.

HIPAA.[102] Bayhealth maintains that Ridley failed to address its argument in her Answering Brief and, therefore, does not contest it.[103]

The Court is statutorily authorized to consider an action for declaratory judgment,[104] provided that an "actual controversy" exists between the parties.[105] For an "actual controversy" to exist, the following prerequisites must be satisfied: (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination.[106] The Court has discretion to decline to adjudicate a declaratory judgment action unless the underlying controversy has "matured to a point where judicial action is appropriate."[107]

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[102] HIPAA requires healthcare providers to maintain the confidentiality of patients' medical records and other protected health information. *See* 45 C.F.R. § 164.524; *Burton v. Rite Aid Pharmacy*, 2010 WL 1924478, at *3 (D. Del. 2010) (holding HIPAA fails to provide for a private remedy).

[103] *Id.*; *see* Pl.'s Answering Br. at 23.

[104] *See* 10 *Del. C.* § 6501.

[105] *XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1216–17 (Del. 2014) (citing *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 479 (Del. 1989)).

[106] *Id.* at 1217 (citing *Stroud*, 552 A.2d at 479–80).

[107] *Id.* at 1216 ("It is well settled that a trial court has discretion in determining whether to entertain a declaratory judgment action."); *Stroud*, 552 A.2d at 480.

The controversy has not matured to a point where the Court finds judicial action is appropriate. Therefore, Bayhealth's Motion to Dismiss Ridley's claim for declaratory judgment is **GRANTED**.

**F. Punitive Damages**

In her Prayer for Relief, Ridley seeks punitive damages for Bayhealth's "willful and wanton conduct."[108] In response, Bayhealth argues that Ridley "asserts no allegations of intentional misconduct outside the context of her unsupported fraud claim, and punitive damages are generally not available in breach of contract actions."[109]

Ridley's breach of contract claim is the only claim to survive Bayhealth's Motion to Dismiss. The Complaint does not sufficiently plead a claim sounding in tort. Nor, does the Complaint plead "particularly reprehensible" conduct.[110] Punitive damages are "reserved for defendants who exhibit an 'I don't care attitude' or willful or wanton disregard for the rights of others."[111] The facts pled in Ridley's Complaint do not raise an inference of "evil motive" or "reckless indifference" to the rights of others.[112] Punitive damages are not recoverable for breach of contract

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[108] Compl., Prayer for Relief ¶ d.
[109] Def.'s Opening Br. at 27.
[110] *Steward v. Honeywell Int'l Inc.*, 2014 WL 4348179, at *2 (Del. Super. Aug. 28, 2014) (citing *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987)).
[111] *Id.* (quoting *Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891 (Del. 1983)).
[112] *Id.* (quoting *Eby v. Thompson*, 2005 WL 486850, at *3 (Del. Super. Mar. 2, 2005)).

unless the conduct also amounts independently to a tort.[113] Bayhealth's Motion to Dismiss Ridley's punitive damages claim is therefore **GRANTED**.

**G. Attorneys' Fees**

Ridley also seeks attorneys' fees.[114] Delaware follows the "American Rule," whereby a prevailing party is generally expected to pay its own attorneys' fees and costs.[115] Typically, Delaware courts will only find exceptions to the American Rule where a fee-shifting statute or contractual agreement for fees applies.[116] No such statute applies here, and Ridley's Complaint does not allege a contractual agreement for attorneys' fees. While the Court has recognized limited equitable exceptions to the American Rule,[117] on the facts as pled, no such exceptions apply here. Bayhealth's Motion to Dismiss Ridley's claim for attorneys' fees is therefore **GRANTED**.

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[113] *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996); *Data Mgmt. Internationale, Inc. v. Saraga*, 2007 WL 2142848, at *5 (Del. Super. July 25, 2007). The introductory note to the remedies portion of the *Restatement (Second) of Contracts* provides that "[w]illful breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract…"

[114] Compl., Prayer for Relief ¶ e.

[115] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043 (Del.1996).

[116] *Transched Systems Ltd. v. Versyss Transit Solutions, LLC*, 2012 WL 1415466, at *1 (Del. Super. Mar. 29, 2012).

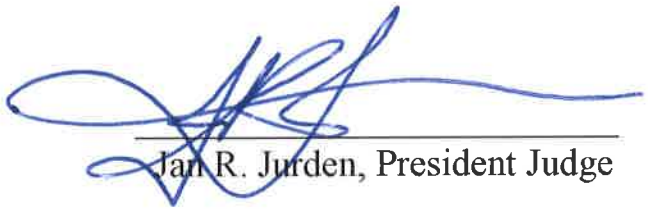
[117] These include the exception for "bad faith" conduct during litigation. *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005). Although there is no single, comprehensive definition of "bad faith" that will justify a fee-shifting award, Delaware courts have previously awarded attorneys' fees where "parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims." *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998).

### H. Class Action Certification

Ridley seeks class certification.[118] Bayhealth asks the Court to strike the class allegations. At this juncture, Ridley's request for certification is **DENIED without prejudice** to pursue the issue later, as the litigation on the surviving breach of contract claim progresses through discovery, and Bayhealth's Motion to Strike Ridley's Class Allegations is **DEFERRED.**[119]

## VI. CONCLUSION

**WHEREFORE, IT IS HEREBY ORDERED** that the Defendant's Motion to Dismiss the Complaint and Strike Class Allegations is **GRANTED in part, DENIED in part, and DEFERRED in part.**



Jan R. Jurden, President Judge

Original to Prothonotary
cc: Kelley M. Huff, Esq.
John S. Spadaro, Esq.
Colleen D. Shields, Esq.
Alexandra D. Rogin, Esq.

[118] Compl. ¶¶ 40–50, Prayer for Relief ¶ a.
[119] *Cf. Marshall*, 2006 WL 3175318, at *5.