UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANTAL ATTIAS AND ANDREAS KOTZUR, Individually and on behalf of all others similarly situated, *et al.*	:	
Plaintiffs,	:	Case No.: 1:15-CV-00882-CRC
v.	:	
CAREFIRST, INC. d/b/a Group Hospitalization Medical Services, Inc., Carefirst of Maryland, Inc., Carefirst BlueCross Blueshield, Carefirst BlueChoice, *et al.*	:	
Defendants.	:	

SUR-REPLY IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Recognizing that Plaintiffs have pled damages, Defendants give up the argument that damages were not alleged, and for the first time in reply claim that Plaintiffs did not plead special damages adequately under Rule 9(g). Defendants' argument is meritless.

First, it cannot be seriously disputed that Defendants raised a new argument regarding Rule Federal Rule of Civil Procedure 9(g) in its reply. Therefore, Plaintiffs' move to strike this argument in its entirety. "[I]t is a well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief." *Aleutian Pribilof Islands Ass'n v. Kempthorne*, 537 F. Supp. 2d 1, 12 n.5 (D.D.C. 2008) (citing *Herbert v. National Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992)). This is Defendants' *second* motion to dismiss and *second* reply, and raising this argument is especially inappropriate because "the Parties have had extensive opportunities to brief their arguments comprehensively…" and a new argument is unwarranted. *Id.*

Second, Defendants' wrongfully state that special damages were inadequately pled because

Plaintiffs did not "quantify the costs" into categories according to "responding to the data breach, identity theft protection, damage assessments and 'mitigation costs.'" Doc. 48 pp. 14-15 of 17. But the law does not require this.

> "When items of special damage are claimed, they shall be specifically stated." Moore's annotation to the Rule contains the following:
>
> "* * * Items of general damage need not be pleaded with particularity, but items of special damage must be specifically stated * * *.
>
> ***
>
> "* * * if words are not slanderous per se no cause of action can be stated without alleging special damage; * *. Where special damage must be alleged before a cause of action can be stated the courts require a good deal of particularity, especially in the slander and libel cases: the complaint must set forth precisely ***in what way*** the special damage resulted from the spoken or written words; it is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses."

Fowler v. Curtis Publishing Co., 182 F.2d 377, 379 (D.C. Cir. 1950) (quoting 2 Moore's Federal Practice 1921-1923 (1948)) (emphasis in original). There is no requirement to "quantify the costs." Rule 9(g) requires Plaintiffs to allege "in what way the special damage resulted." *Id.* Defendants do not allege that Plaintiffs failed to allege in what way the special damage resulted, and Plaintiffs did in fact allege this in great detail. Doc. 8-1, *e.g.* ¶¶ 16-21, 46-58.

Finally, to the extent Defendants seek dismissal for failure to allege putative class members damages with particularity, Defendants' motion is misplaced for two obvious reasons. For instance, Defendants claim the data breach victims' "damages depend on future events that still have not occurred in the more than 1,400 days since the cyberattack." Doc. 48, p. 6 of 17.[1] First, Defendants are not entitled to the inference that putative class members have not suffered the same actual damages in the form of loss of time and money, and the loss of the benefit of the bargain

[1] Defendants cannot and do not allege that Plaintiffs Curt and Connie Tringler have not alleged tax refund fraud.

due to identity theft, medical identity theft, mitigation costs and other alleged damages. *See In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 216 (D.C. Cir. 2010)("Recognizing that courts "…treat the complaint's factual allegations as true ... and must grant [appellants] the benefit of all inferences that can be derived from the facts alleged."). Second and more basically, this argument—*i.e.* that putative class members have not been alleged to have suffered damage—is a premature conflation of class certification requirements in a motion to dismiss. Simply, Plaintiffs have no obligation to plead or allege that any putative class members suffered damage to defeat a Rule 12(b)(6) motion.

Assuming, *arguendo*, the Court finds that special damages must be quantified by category, Plaintiffs respectfully and formally move for leave to amend their complaint to add such specifics pursuant to Fed. R. Civ. P. 15(a)(2). The amendment is not futile, and justice would not be served by dismissing a complaint which can be cured so easily. *See Bullock v. Am. Sec. Programs, Inc.*, Civil Action No. 16-1645 (JEB), 3-4 (D.D.C. 2017) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *Nwachukwu v. Karl*, 222 F.R.D. 208, 211 (D.D.C. 2004) ("In this Circuit, "it is an abuse of discretion to deny leave to amend unless there is sufficient reason." Furthermore, under Rule 15, "the non-movant generally carries the burden in persuading the court to deny leave to amend.").

WHEREFORE, Plaintiffs respectfully request that this Court grant them leave to file their "Sur-Reply in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint" or, in the alternative, provide leave to amend any deficiencies in the Second Amended Complaint. Plaintiffs further request the Court grant them such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Jonathan B. Nace_____
Jonathan B. Nace, Esq. D.C. Bar No. 985718
Nidel & Nace, PLLC
5335 Wisconsin Ave., NW
Suite 440
Washington, DC 20015
Tel: 202-478-9677
Fax: 202-888-5456 jon@nidellaw.com

Christopher T. Nace, Esq. Bar No. 977865
Paulson & Nace, PLLC
1025 Thomas Jefferson Street, NW
Suite 810
Washington, DC 20007
ctnace@paulsonandnace.com
202-463-1999 (Tel.)
202-223-6824 (Fax)

Troy N. Giatras Esq. Bar No. 429086
The Giatras Law Firm, PLLC
118 Capitol Street
Suite 400
Charleston, WV. 25301
troy@thewvlawfirm.com
304-343-2900 (Tel.)
304-343-2942 (Fax)