

Kenneth L. Chernof
Ken.Chernof@aporter.com
+1 202.942.5940
+1 202.942.5999 Fax
601 Massachusetts Ave., NW
Washington, DC 20001-3743

September 15, 2016

VIA ECF

Marcia M. Waldron
Clerk of Court
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *In Re: Horizon Healthcare Services, Inc. Data Breach Litigation*,
Case No. 15-2309
Submission Pursuant to Federal Rule of Appellate Procedure 28(j)

Dear Ms. Waldron:

Horizon respectfully submits this response to Appellant's Rule 28(j) letter concerning *Galaria v. Nationwide Mutual Insurance Co.*, --- Fed. App'x ---, 2016 WL 4728027 (Sept. 12, 2016). *Galaria* is an out-of-Circuit, unpublished, split decision (over a vigorous dissent by Judge Batchelder) that decided not to rely on this Court's controlling decision in *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011). Whether *Galaria* withstands further review is up to the Sixth Circuit, but by its own admission it is not the law of this Circuit.

Galaria attempted to distinguish *Reilly* by suggesting it would not apply to an "intentional theft of data." *Galaria* at *4. Of course, *Reilly* concerned actual hacking, yet this Court nonetheless concluded that where "Appellants have alleged no misuse, [they have alleged] no injury." 664 F.3d at 44. The actual hacking in *Reilly* was far more of an "intentional theft of data" than the theft of two laptops in this case.

To the extent *Galaria* found *Reilly* to be "unpersuasive" (*Galaria* at *4, n.3), it is of no force. In any event, it is premised on inapplicable case law. *Galaria* relied on (a) a Ninth Circuit decision that this Court rejected as applying "skimpy rationale," see *Reilly*, 664 F.3d at 44, and (b) two Seventh Circuit decisions, which the *Galaria* court conceded applied an erroneous legal standard, see *Galaria* at *4 n.2.

Marcia M. Waldron
September 15, 2016
Page 2

Galaria did not address the impact of the plaintiff's FCRA claim on standing under *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), other than to recognize that procedural violations of a statute do not confer standing where "plaintiff suffers no harm." *Id.* at *4. In this regard, Horizon brings the Court's attention to *Braitberg v. Charter Commc'n, Inc.*, --- F.3d ---, 2016 WL 4698283 (8th Cir. Sept. 8, 2016), which applied *Spokeo* and affirmed dismissal for lack of standing. *Braitberg* held that a violation involving the handling of personal information does not constitute cognizable injury absent the defendant's actual *disclosure* of that information. *Id.* at *4. Here, too, Appellants offer no plausible allegation that their data was actually disclosed.

Respectfully Submitted,

/s/ Kenneth L. Chernof
Kenneth L. Chernof

Enclosure