

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

AARON HERNANDEZ,

Plaintiff,

v.

SECURUS TECHNOLOGIES, INC.,

Defendant.

C.A. No. 1:16-cv-12402-RGS

**SECURUS TECHNOLOGIES, INC.’S  
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

Defendant Securus Technologies, Inc. (“Securus”), pursuant to Fed. R. Civ. P. 7, 12(b)(1), and 12(b)(6), and LR 7.1, and through counsel, files this memorandum in support of its Motion to Dismiss.

**SUMMARY**

Plaintiff has suffered no injury and thus can neither demonstrate standing nor make out the required element of damages for any of his claims. Count VI – Invasion of Privacy – is inarguably the core of this lawsuit, but Plaintiff incurred no injury that would enable him to pursue this claim in an Article III court. More is required of plaintiffs than mere allegations that the defendant violated the terms of a privacy statute – the Supreme Court held in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), that a plaintiff must allege some concrete harm that befell him due to that violation. Aaron Hernandez did not and cannot make such allegations. He has no right of privacy in any of the three calls at issue.

Plaintiff’s lack of any cognizable injury, in addition to the absence of other elements more specific to each count, warrant dismissal of this lawsuit:

Count I – Negligence – Plaintiff suffered no harm and thus lacks standing as well as an element required for a negligence claim.

Count II – Misrepresentation – Plaintiff did not see or hear the representation on which this claim rests, a “Securus Integrity Pledge” (Am. Compl. Ex. A), and thus was given no promise by Securus.

Count III – Breach of Contract – The promise on which this claim rests is the “Pledge” that Plaintiff never saw, and thus Plaintiff suffered no harm and cannot allege the required element damages.

Count IV – Breach of Contract (Third-Party Beneficiary) – Plaintiff suffered no harm and thus lacks standing and cannot make out a required element of his claim. In addition, the Massachusetts Department of Corrections (“DOC”) regulation does not endow Plaintiff with a private right of action.

Count V – 42 U.S.C. §1983 – Securus is not a state actor and the conduct alleged in the Amended Complaint did not occur under color of state law. In addition, Plaintiff suffered no infringement of any right secured by the First, Fifth, Sixth, or Fourteenth Amendments to the U.S. Constitution that are the predicate of this claim.

Finally, Count VII, which seeks injunctive relief only in the form of preservation of potentially relevant records, is moot pursuant to the Court’s entry of the Stipulated Order for Preliminary Injunction on December 6, 2016 (ECF 25). In addition, Securus does not provide service at the Souza Baranowski Correctional Institution in Shirley, MA where Plaintiff is serving his sentence. Declaration of Stephanie A. Joyce, **Ex. A** (Jan. 9, 2017).

### **FACTUAL BACKGROUND**

Securus provides inmate telecommunications services at Suffolk County Jail where

Plaintiff was incarcerated during his 2014 trial. This contract was awarded after a public bidding process, Joyce Decl., **Ex. B**,<sup>1</sup> and incorporates the representations and promises that Securus made in its bid. Joyce Decl., **Ex. D**.<sup>2</sup> Among the promises Securus made is that it will ensure that “[a]ll calls, with the exception of telephone calls to attorneys, designated and pre-approved ordained clergyman, and pre-approved and licensed psychotherapists, physicians, social workers and/or mental health and human service professionals, are recorded.” Joyce Decl., **Ex. B** at p.3 (Section 6.1).

Plaintiff was incarcerated at Suffolk County jail during his 2014 trial in Bristol County Superior Court. *See* Am. Compl. ¶ 4. Plaintiff faces a second trial in Suffolk County Superior Court which is presently calendared for February 2017. In defending that second case, Plaintiff has alleged that his defense might have been hampered due to alleged unauthorized access of recordings of calls placed from Suffolk County Jail in the summer of 2014. *E.g.*, Joyce Decl., **Ex. E** at 6-7. Plaintiff first raised this matter in the criminal case on November 22, 2016. *Id.*, **Ex. F** (Docket Entry 87). This civil lawsuit against Securus was filed on that same day. It was removed to this Court on November 25, 2016. ECF 1.

Judge Locke of Suffolk County Superior Court held a hearing on December 20, 2016, regarding Plaintiff’s demand for call records in order to demonstrate that attorney-client communications had been breached. Suffolk County produced call records on that day which, as Judge Locke observed and Plaintiff did not dispute, show that no recordings of Plaintiff’s calls

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<sup>1</sup> The Bristol County RFP states that “[t]he contract resulting from this procurement may be used by the other member Departments of the Massachusetts Sheriffs’ Association.” *Id.* at p. 2 (Item 27). The Securus-Suffolk County Contract flowed from this RFP. Joyce Decl., **Ex. C** at p. 1 (“piggyback a previously awarded Stateside Contract between Securus and the Bristol County Sheriff’s Department”).

<sup>2</sup> Page one of the 2012 Suffolk County contract document states that “the Request for Response” is among the “terms governing performance of this Contract.” Joyce Decl., **Ex. D**.

with his attorneys were recorded, monitored, or accessed. Joyce Decl., **Ex. G.**<sup>3</sup> The attached Declaration of Shaheen Mohammadipour, the Securus Field Service Investigator at Suffolk County Jail, demonstrates that the calls were not to an attorney's number and each of them began with a verbal announcement that the call would be recorded.

### **STANDARD OF REVIEW**

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Branyan v. Sw. Airlines Co.*, 105 F. Supp. 3d 120, 124 (D. Mass. 2015) (dismissing invasion of privacy claim) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing this motion, the Court “‘must assume the truth of all well-plead[ed] facts and give the plaintiff the benefit of all reasonable inferences therefrom.’” *Markle v. HSBC Mortg. Corp. (USA)*, 844 F. Supp. 2d 172, 179 (D. Mass. 2011) (dismissing third-party beneficiary contract claim) (internal citation omitted). But the Court “need not accept legal conclusions as true,” *Branyan*, 105 F. Supp. 3d at 125, nor must the Court “accept every allegation made by the complainant, no matter how conclusory or generalized.” *U.S. v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992) (affirming dismissal). If the Amended Complaint does not “‘possess enough heft to show that plaintiff is entitled to relief.’” it should be dismissed. *Id.* (internal citation omitted).

### **ARGUMENT**

#### **I. PLAINTIFF MAKES NO ALLEGATION OF INJURY AND AS SUCH LACKS STANDING TO BRING THIS LAWSUIT**

Plaintiff has no cognizable injury, and as such lacks standing. Fed. R. Civ. P. 12(b)(1).

As the U.S. Court of Appeals for the First Circuit has recognized, standing is “jurisdictional in

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<sup>3</sup> The Court can take judicial notice of this transcript. *E.g., LoCicero v. Leslie*, 948 F. Supp 10, 12 (D. Mass. 1996) (settlement hearing transcript was public record which could be noticed without converting motion to dismiss); *Baker v. Cestari*, 569 F. Supp. 842, 843 n.2 (D.N.H. 1983) (judicial notice of transcript from criminal trial in state court).

nature,” and “is grounded in the case-or-controversy requirement of Article III.” *Donahue v. City of Boston*, 304 F.3d 110, 115, 117 (1st Cir. 2002) (affirming dismissal of 42 U.S.C. § 1983 claim for lack of standing). A court therefore “must resolve questions pertaining to its subject-matter jurisdiction before it may address the merits of a case.” *Id.* at 117. Plaintiff bears the burden of establishing standing. *E.g.*, *Ocediacz v. City of Cranston*, 414 F.3d 136, 143 (1st Cir. 2005) (dismissing for lack of standing claims under, *inter alia*, First Amendment arising out of city’s holiday display ); *see also Michaud v. Sheriff of Essex County*, 458 N.E.2d 702, 704-705 (Mass. 1983) (inmates failed to demonstrate standing to sue for violations of Dept. of Public Health regulations). To establish standing, Plaintiff “must set forth reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing,” and cannot merely set out “a Micawberish reading of a party’s generalized averments.” *AVX Corp.*, 962 F.2d at 115. The Court “is permitted to look beyond the pleadings to determine jurisdiction on a 12(b)(1) motion, hence the formality of converting the motion to one for summary judgment need not be observed.” *Katz v. Pershing, LLC*, 806 F. Supp. 2d 452, 456 (D. Mass. 2011) (dismissing case under 12(b)(1) and 12(b)(6)), *aff’d*, 672 F.3d 64 (1st Cir. 2012).

In *Donahue*, the First Circuit provided a methodical analysis of standing, noting first that “[t]he asserted injury must be ‘(a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical.’” 304 F.3d at 115 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The court then explained that a claimant also “must show that it is likely – rather than merely speculative – that ‘the injury will be redressed by a favorable decision.’” *Id.* (quoting *Lujan*, 504 U.S. at 561). And more specifically, “the standing inquiry requires careful judicial examination of ... whether the particular plaintiff is entitled to an adjudication of the

*particular claims asserted.*” *Id.* at 116 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis in original). Stated differently, the *Donahue* court demanded that “a plaintiff must ensure that he establishes standing *for each claim and for each form of relief sought.*” *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210-11(1995)) (emphasis added).

Though the Amended Complaint, like the initial Complaint, contains six substantive claims, the core of this case plainly is an alleged violation of Mass. Gen. Laws ch. 214, which states in full: “A person shall have a right against unreasonable, substantial or serious interference with his privacy.” This claim fails. Plaintiff lacks any protected privacy interest in the calls at issue, and as a matter of law he has suffered no cognizable privacy injury that could support his claim. And as such, Plaintiff cannot make out any damages under any of his claims, warranting their dismissal as well.

First, inmates have a greatly diminished expectation of privacy. According to the Supreme Court, “society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell.”<sup>4</sup>

Secondly, courts have consistently held that inmates have no expectation of privacy in their communications when they are informed that their calls may be monitored or recorded, and one party’s consent is sufficient.<sup>5</sup> Plaintiff never alleges that he was unaware that calls to friends and families would be recorded. Indeed, he cannot. Mohammadipour Decl. ¶ 7.

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<sup>4</sup> *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

<sup>5</sup> *Commonwealth v. Morganti*, 917 N.E.2d 191, 202 (Mass. 2009) (“Under Federal law, California law, and Massachusetts law, the oral interception of the defendant's statements during this telephone call was not illegal if he knew of, or consented to, the interception.”); *see also* *United States v. Novak*, 531 F.3d 99, 101-03 (1st Cir. 2008); *United States v. Lucas*, 499 F.3d 769, 780 (8th Cir. 2007) (*en banc*); *United States v. Friedman*, 300 F.3d 111, 123 (2d Cir. 2002); *United States v. Van Poyck*, 77 F.3d 285, 292 (9th Cir. 1996) (“routine taping policy” did not violate Wiretap Act, 18 U.S.C. § 2510).

Third, even the regulations on which the Amended Complaint partly relies<sup>6</sup> not only permit but require the monitoring and recording of inmate calls. Mass. DOC rules state that “[a]ll inmate telephone calls ... **are subject to telephone monitoring**” except for calls to pre-approved telephone numbers belonging to attorneys, consular officers, diplomats, and licensed psychologists, social workers, and mental health workers. 103 CMR 482.06(3)(d) (emphasis added). The rules also state that “[i]nmate acceptance of a PIN and use of inmate telephones shall be deemed as consent to the conditions and restrictions placed upon inmate telephone calls, **including call monitoring, recording**, call detail, and pre-recorded announcements.” 103 CMR 482.09(1) (emphasis added).

Fourth, and related to the previous point, Securus is required by its contract with the Suffolk County’s Sheriff Department to record inmate calls. Joyce Decl., **Exs. B and D**.<sup>7</sup>

The Supreme Court held in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), that the mere existence of a statute “does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” There, plaintiff filed a putative class action under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (“FCRA”), on allegations that Spokeo, Inc. had disseminated incorrect credit information about him. Plaintiff made, however, no allegations that the allegedly incorrect information caused him harm. Rather, he had alleged only “a bare procedural violation” of FCRA but could not show “concrete and particularized” harm that was

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<sup>6</sup> Am. Compl. ¶ 38 (referring to “Massachusetts Department of Corrections Regulations” and citing “103 CMR 482.11”).

<sup>7</sup> The Court can take judicial notice of this public contract. *Henning v. Wachovia Mortg., FSB*, 969 F. Supp. 2d 135, 147 (D. Mass. 2013) (citing *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (courts may take notice of “documents the authenticity of which are not disputed by the parties” and “official public records”)). Plaintiff himself relies on the Securus contract with Suffolk County for Count IV (“Breach of Contract (Third Party Beneficiary”).

‘actual or imminent, not conjectural or hypothetical.’ 136 S. Ct. at 1548-49 (quoting *Lujan*, 504 U.S. at 560).

Several federal courts have dismissed privacy claims under the injury-in-fact analysis of *Spokeo*. In *Gubala v. Time Warner Cable, Inc.*, No. 15-cv-1078-PP, 2016 WL 3390415 (E.D. Wis. June 17, 2016), *appeal filed* No. 16-2613 (7th Cir. June 22, 2016), plaintiff sued under the Cable Communications Policy Act, 47 U.S.C. § 551(e) (“CCPA”), for Time Warner’s alleged retention of customers’ personally identifiable information after their subscription terminates. The Eastern District of Wisconsin found that “the plaintiff does not have Article III standing to bring this suit,” because not only had plaintiff failed to allege that Time Warner “disclosed his information to a third party,” but “[e]ven if he had alleged such a disclosure, he does not allege that the disclosure caused him any harm.” 2016 WL 3390415, at \*4-5. For example, the court noted, Gubala did not allege “that he has been contacted by marketers who obtained his information from the defendant,” nor that “he has been the victim of fraud or identity theft.” *Id.* at \*4. The fact that the statute required Time Warner “to destroy personally identifiable information ... and that [Time Warner] hasn’t destroyed his,” the court reasoned, was merely a “procedural violation.” *Id.* at 4-5.<sup>8</sup> “Given the clear directive in *Spokeo*,” the court held that Gubala failed to “allege a concrete harm” and dismissed the claim. *Id.* at \*5.

The U.S. Court of Appeals for the Eighth Circuit reached a similar result a few months later in *Braitberg v. Charter Communc’ns, Inc.*, 836 F.3d 925 (8th Cir. 2016), where plaintiff sued his former cable provider under the CCPA for failure to destroy his personal information

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<sup>8</sup> The *Gubala* court also analyzed a case on which the plaintiff relied, *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535 (7th Cir. 2012), in which the Court of Appeals for the Seventh Circuit held that a plaintiff cannot sue for damages under the document-destruction requirements of the Video Privacy Protection Act “without proof of an actual injury.” 2016 WL 3390415, at \* 5. Here, Plaintiff sues for damages under the Massachusetts Privacy Act.



after he terminated his subscription. The Court of Appeals found only “a bare procedural violation, divorced from any harm,” *id.* at 930 (quoting *Spokeo*, 136 S. Ct. at 1549), seeing no allegation that the information was used or disseminated. The demand for concrete injury in *Braitberg* is squarely apposite to this case, but it should be noted that, there, the information actually was protected by the CCPA, whereas in this case the information is not considered private or protectable – inmates have no right of privacy in their phone calls to non-attorneys, particular when they, like Hernandez, are on notice that the calls will be monitored and recorded.

In *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016), the U.S. Court of Appeals for the Eleventh Circuit applied *Spokeo* to a claim lodged pursuant to a New York statute, N.Y. Real Prop. Law §§ 275, 1921, for CitiMortgage’s failure “to record the satisfaction of [plaintiff’s] mortgage until more than 90 days after the date of satisfaction.” *Id.* at 1000. Applying *Spokeo*, the Court of Appeals held that the violation of the New York statutes did not “establish that he suffered or could suffer any harm that could constitute a concrete injury.” *Id.* at 1003. The appeal was dismissed for lack of jurisdiction. *Id.*

In *Groshek v. Great Lakes Higher Educ. Corp.*, No. 15-cv-143, 2016 WL 6819697 (W.D. Wis. Oct. 4, 2016), the U.S. District Court for the Western District of Wisconsin dismissed a FCRA claim arising out of defendant’s failure to give plaintiff the requisite notice that it would be requesting his credit report. Plaintiff alleged that he had suffered “informational injury” of the type that is suffered when a Freedom of Information Act request is denied, and that such injury confers standing for FOIA litigants. The court disagreed, finding that the deprivation of information, even information guaranteed by statute, “is not, in itself, a concrete injury.” 2016 WL 6819697, at \*2; *see also Lee v. Hertz Corp.*, No. 15-cv-4562-BLF, 2016 WL 7034060, at \*5 (N.D. Cal. Dec. 2, 2016) (violation of FCRA reporting requirement by including “extraneous”

information did not establish standing).

These cases instruct that standing is not formed by the mere violation of statutory requirement, but rather by concrete harm flowing from the tangible deprivation of some recognized right, be it a right to property or a civil right. Here, Plaintiff failed to allege the existence of any recognized right. As shown in Section II. below, the calls at issue were not private: they were inmate-initiated calls with a non-attorney that are subject to recording pursuant to the policy of Suffolk County and Securus's contract with Suffolk County. Joyce Decl., **Exs. B and D**. No cognizable right was infringed. Plaintiff suffered no injury, could allege no injury, and therefore lacks standing to pursue his claims.

## **II. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6)**

### **A. Plaintiff Fails to State a Claim for Invasion of Privacy**

Count VI of the Amended Complaint is lodged pursuant to Mass. Gen. Laws ch. 214 (sometimes called the "Massachusetts Privacy Act") and alleges that "Defendant engaged in the gathering of private information by recording phone conversations between Plaintiff and his friends, family members, and attorneys while Plaintiff was incarcerated in the Suffolk County House of Corrections." Am. Compl. ¶ 49. The fatal infirmities in this claim, which is the core underpinning of every other claim in the complaint, warrant dismissal of Count VI pursuant to Fed. R. Civ. P. 12(b)(6) and of this entire lawsuit.

This Court has held that, "[i]n order for a plaintiff to succeed on an invasion of privacy claim, he must prove not only that the defendant **unreasonably, substantially and seriously interfered with his privacy** by disclosing facts of **highly personal or intimate nature**, but also that it had no legitimate reason for doing so." *Martinez v. New England Med. Ctr. Hosps., Inc.*, 307 F. Supp. 2d 257, 267 (D. Mass. 2004) (emphasis added). This holding encapsulates the

three-part test that the U.S. Court of Appeals for the First Circuit applies under Mass. Gen. Laws ch. 214: (1) the facts are private; (2) defendant gathered and disseminated those facts; and (3) defendant acted unreasonably. *Dasey v. Anderson*, 304 F.3d 148, 155 (1st Cir. 2002). For the reasons stated above, Plaintiff is unable to satisfy this test.

First, Securus has not “unreasonably, substantially [or] seriously interfered” with Plaintiff’s privacy, *Martinez*, 307 F. Supp. 2d at 267, because the only three calls at issue were non-attorney calls that Plaintiff knows can be monitored and recorded. Plaintiff has no expectation of privacy in these calls. *E.g.*, *Van Poyck*, 77 F.3d at 292. As a matter of law, they were neither “of highly personal or intimate nature,” *Martinez*, 307 F. Supp. 2d at 267, nor “private.” *Dasey*, 304 F.3d at 155. In *Dasey*, plaintiff was a former state trooper who was discharged when a videotape was found that showed him smoking marijuana with friends. He sued under the Massachusetts Privacy Act, as well as 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act. This Court held that the making of a videotape “in the presence of others who owe no duty of confidentiality ... is hardly private.” 304 F.3d at 154.

Secondly, Securus “gathered” the recordings in accordance with its contractual duty to Suffolk County. *Dasey*, 304 F.3d. at 155. And there is no allegation that Securus “disseminated” any of the facts, *id.*, non-private as they were. In fact, there is no allegation that any of Plaintiff’s information was “disseminated” at all – no allegation that they were published, transcribed, or transferred. For their part, Suffolk County Jail and the Bristol County Office of the Prosecutor have made clear that no attorney or staffperson on the prosecutorial team ever accessed the recordings or learned what they contained. Plaintiff thus fails both of these required elements of a claim under Mass. Gen. Laws ch. 214, and Count VI should be dismissed.

**B. Plaintiff Has No Claim Under 28 U.S.C. § 1983**

Count V of the Amended Complaint is a claim under 28 U.S.C. § 1983 alleging violation of rights secured by the First, Fifth, Sixth and Fourteenth Amendments of the United States Constitution. Plaintiff alleges that Securus “interfered with the exercise of Plaintiff’s rights to the extent Defendant recorded privileged and confidential communications between Plaintiff and his attorneys and stored such recordings on an unsecure electronic database.” Am. Compl. ¶ 46. It is notable that Count V mentions **only** the purported recording of calls “**between Plaintiff and his attorneys.**” *Id.* (emphasis added); *see also id.* ¶ 43 (“attorney-client communication”), ¶ 44 (“attorney client [*sic*] communications”). It thus appears that **Plaintiff concedes that he has no constitutional rights in his calls to non-attorneys.**

42 U.S.C. § 1983 establishes a civil claim for the infringement of a Constitutional right done “under color of state law,” that is, by a state actor. *E.g., Harrington v. City of Nashua*, 610 F.3d 24, 28 (1st Cir. 2010) (affirming dismissal of claim). Companies that hold contracts with governmental entities are not *ipso facto* state actors: “Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (nonprofit school for troubled children, which issued diplomas on behalf of public school system and received public funds, was not a state actor). Nor will allegations of “a ‘symbiotic relationship’” between Securus and Suffolk County establish that Securus is a state actor. *Id.* at 842. Rather, “the question is whether the function performed has been ‘traditionally the exclusive prerogative of the State.’” *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). Here, then, the Court must accept the dubious premise that the government “traditionally” provides telephone services.

Other courts have declined to accept that notion, and providers of inmate telephone service – including Securus specifically – have been deemed non-state actors such that 42 U.S.C. § 1983 claims do not apply. In *Belton v. SecurusTech.net, et al.*, No. 13-CV-4850, 2014 WL 524470 (E.D.N.Y. Feb. 7, 2014), the court *sua sponte* dismissed a 42 U.S.C. § 1983 claim against “SecurusTech.net”<sup>9</sup> on the ground that “is not a state actor, or acting under color of state law, merely by virtue of its public contract with the Suffolk Jail.” 2014 WL 524470, at \*6. The court reasoned that “the provision of telephone services” is not ‘a traditional public function’ delegated by the state to SecurusTech.net.” *Id.* In *Streater v. Thaler*, No. 11-CV-0068, 2012 WL 3308109 (E.D. Tex. July 2, 2012), report and recommendation adopted by 2012 WL 3308105 (E.D. Tex. Aug. 13, 2012), the court held that “[t]he fact that Securus has contracted with the Texas Department of Criminal Justice to provide telephone services to prisoners does not make Securus or any of its employees state actors.” *Id.* at \*14.

In *Evans v. Skolnik*, No. 08-cv-00353, 2009 WL 3763041 (D. Nev. Nov. 5, 2009), *aff’d*, 637 F. App’x 285 (9th Cir. 2015), inmates sued three inmate telephone companies, Global Tel\*Link, Inmate Calling Solutions, and Embarq Payphone Services, under the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2521, alleging that they had intercepted attorney-client telephone calls. The U.S. District Court for the District of Nevada granted the carriers’ motions to dismiss and for summary judgment on the ground that the carriers were not state actors: “[p]roviding services that the state would not necessarily provide does not automatically render the acts of privately owned enterprises attributable to the state.”

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<sup>9</sup> www.securustech.net previously was the main website of Securus and could be referring to Securus. It is not the legal name of Securus. Securus was never served with the complaint or a summons in this case.

*Id.* at \*5. More specifically, the court held that “a contractual obligation to maintain the [jail’s] telephone system” did not convert the phone company defendants into state actors. *Id.*

Likewise, Embarq was found not to be a state actor for a 42 U.S.C. § 1983 claim alleging the inmate was prevented from calling several family members. *Iswed v. Caruso*, No. 08-cv-1118, 2009 WL 4251076 (W.D. Mich. Nov. 24, 2009). The U.S. District Court for the Western District of Michigan, like the Belton court reasoned that “the provision of telephone services is not a traditional public function delegated by the state to Embarq.” *Id.* at \*3 (citing *West v. Allen*, 487 U.S. 42, 56 (1988)).

Securus does not act as the state when it provides telephone service. It does not adopt policies for inmate use of the phones, it does not decide whether and how to monitor inmate calls, and it does not of its own accord implement call recording features. *See* Joyce Decl., Ex. B. More specifically to this case, it is never alleged that Securus worked with any county official or prosecutor to convict the Plaintiff and it has never been shown that any county official or prosecutor accessed any recording of Plaintiff’s calls. Plaintiff thus cannot establish that Securus acted under color of law with regard to the allegations in the Amended Complaint. This failing in itself requires dismissal of Count V.

Plaintiff also fails to establish that any Constitutional right was infringed. As explained in Sections I. and II. above, Plaintiff had no right of privacy in any of the calls at issue. Specifically with regard to Plaintiff’s allegations, the Sixth Amendment right to “effective assistance of counsel,” Am. Compl. ¶ 43, is not implicated in the calls, because Plaintiff was not speaking to an attorney. For the same reason, Plaintiff’s “right to access the courts,” which he invokes under “the First, Fifth, an Fourteenth Amendments,” *id.* ¶ 44, was not affected. For all these reasons, Count V should be dismissed.

### C. Plaintiff's "Misrepresentation" Claim Fails

Count II of the Amended Complaint is styled as a "Misrepresentation" claim and alleges that Securus made "representations to the inmates eligible for its services," Am. Compl. ¶ 25, "in order to induce inmates to use its services," *id.* ¶ 26, and that those representations "were reckless or even false." *Id.* ¶ 28.

Plaintiff fails to clarify whether his claim is for negligent misrepresentation or intentional misrepresentation; notably, neither "fraud" nor "fraudulent" conduct are alleged. For either claim, however, the First Circuit will require that a plaintiff show "a false statement of material fact made to induce the plaintiff to act, together with reliance on the false statement by the plaintiff to the plaintiff's detriment ... ." *Rodowicz v. Mass. Mut. Life Ins. Co.*, 279 F.3d 36, 42 (1st Cir. 2002) (vacating and remanding with instruction to enter judgment for defendant) (internal citation omitted). Plaintiff fails this standard.

Plaintiff does not allege that any representation was made to him. Rather, he alleges that Securus "makes representations to the inmates eligible for its services[,]" Am. Compl. ¶ 25, "in order to induce inmates to use its services." *Id.* ¶ 26. The misrepresentations which allegedly "induced inmates" are contained in Ex. A to the Amended Complaint, a document titled "Securus Integrity Pledge." **Plaintiff never alleges that he saw this document prior to the drafting of the complaint.** *See id.* ¶ 8 (quoting Pledge); ¶¶ 24-30 (Count II). He can allege only that "inmates" have seen the Pledge, *id.* ¶ 25, but nowhere in the 58-paragraph complaint does Plaintiff represent to this Court that *he* saw the Pledge. The Pledge was not given to inmates.

Plaintiff cannot have been "induced" by a statement he never saw, nor could he have acted "in reliance" on it. He therefore fails to state a claim for any type of "misrepresentation".

Plaintiff also fails to allege that the “Pledge”, even if he had seen it, was “a false statement of material fact.” *Rodowicz*, 279 F.3d at 42. He alleges that “**Defendant had knowledge** of the vulnerabilities of its electronic database **at least as early as 2011**, when breaches of the electronic database were first detected. Am. Compl. ¶ 27 (citing Ex. B) (emphasis added). That allegation is an unfortunate attempt to mislead the Court. Exhibit B is an article published on November 11, 2015. The article mentions a case in Texas that was filed **in 2014** regarding “privileged communications between lawyers and clients housed in the county jails” in Texas. Am. Compl. Ex. B. That article, which is Plaintiff’s sole source of knowledge for the allegations in Paragraph 27, never states that Securus knew anything in 2011. In fact, the 2014 case involved only calls made to Austin, Texas from inmates in a few Texas county jails. Plaintiff’s “Misrepresentation” claim thus rests on misrepresentations – he alleges *ex post facto* reliance on a document he never saw, then he attempts to manufacture the falsity of statements by misrepresenting the contents of an article.

Even if Plaintiff had seen the “Pledge”, his claim fails on the ground that its contents do not establish a promise that the conduct alleged in the Amended Complaint could have breached.<sup>10</sup> The Pledge states that Securus “will provide the most technologically advanced audio and video communications platform to allow calls with a high level of security,” and “will follow all Federal, State, and Local laws in the conduct of our business.” Am. Compl. Ex. A.

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<sup>10</sup> In addition, the “Pledge” is not a binding promise or a statement of fact. “The general rule in Massachusetts is ‘that statements promissory in nature and statements of conditions to exist in the future are not actionable.’” *Nationwide Book Indus., LLC v. A & S Booksellers, Inc.*, 950 F. Supp. 2d 264, 269 (D. Mass. 2013) (quoting *Bolen v. Paragon Plastics, Inc.*, 754 F. Supp. 221, 226 (D. Mass. 1990)). “[O]nly statements of fact are actionable; statements of opinion cannot give rise to a deceit action.” *Cummings v. HPG Int’l, Inc.*, 244 F.3d 16,21 (1st Cir. 2001) (affirming summary judgment for defendant). “Normal commercial puffing” is “in the opinion category.” *Id.* Mr. Smith’s statements plainly regard Securus’s intent for the future and his opinion that Securus can deliver “a high level of security.”



The Pledge did not promise perfect, error-free service, and, as shown in Sections II. and III. above, the conduct alleged in the Amended Complaint violates neither the Massachusetts Privacy Act nor any of the Constitutional amendments that form the basis of the 42 U.S.C. § 1983 claim. Even if Plaintiff had read the Pledge, and the Pledge established some duty of perfect performance, the core privacy concern giving rise to this lawsuit is not a cognizable right. Plaintiff's calls were not private. For these reasons, Count II should be dismissed.

**D. Plaintiff's "Negligence" Claim Fails**

Count I of the Amended Complaint is styled as a "Negligence" claim and alleges that Securus "owed Plaintiff a duty to protect the records with which Plaintiff entrusted" it, Am. Compl. ¶ 19, and that "[i]n breach of this duty, Defendant stored Plaintiff's records on an electronic data base [*sic*] that could be, and was, accessed by unauthorized party(ies)[*sic*]." *Id.* ¶ 21.

"Negligence in the abstract does not support a cause of action. A negligence claim cannot be maintained and, therefore, does not accrue, without a showing of some harm resulting from the negligence." *Inter'l Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 560 N.E.2d 122, 124 (Mass. App. Ct. 1990). "A cause of action based on negligence requires that both negligence and harm be shown, with a causal connection between these two elements." *Cannon v. Sears, Roebuck & Co.*, 374 N.E.2d 582, 584 (Mass. 1978). Plaintiff cannot allege any injury, because he had no right to privacy in the phone calls at issue in this case which were not to an attorney nor any other person whom the State of Massachusetts has designated as a protected person. 103 CMR 482.06(3)(d).

**E. Plaintiff's Claim for Alleged Breach of Contract Fails**

Count III of the Amended Complaint lodges a claim for alleged breach of contract,

alleging that “Plaintiff contracted with Defendant to use Defendant’s Secure Call Platform to communicate with friends, family, and his attorneys via a secure and confidential service.” Am. Compl. ¶ 32. He alleges that “Defendant breached its contract with Plaintiff when Defendant stored Plaintiff’s records on an electronic database that could be accessed by unauthorized parties.” *Id.* ¶ 34.

“An essential element in the pleading and proof of a contract claim is, of course, the ‘promise’ sought to be enforced.” *Kiely v. Raytheon Co.*, 914 F. Supp. 708, 712 (D. Mass. 1996), *aff’d*, 105 F.3d 734 (1st Cir. 1997) (dismissing case that included breach of contract claim). Plaintiffs must “describing, with ‘substantial certainty,’ the specific contractual promise the defendant failed to keep.” *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 586 (1st Cir. 2007) (dismissing contract claim) (internal citation omitted). Plaintiff alleges in conclusory fashion that he “contracted with Defendant” but has attached no contract. He provides only the “Pledge,” which, as explained above in Section IV., he does not allege that he had seen at the time he was incarcerated in Suffolk County Jail. It is axiomatic that one cannot make a promise to another unless it was seen or heard by that party.

More importantly, Plaintiff fails to allege that the “Pledge” forms any part of his purported “contract” with Securus. Plaintiff therefore has not met the “essential element” of his claim – stating the “‘promise’ sought to be enforced.” *Kiely*, 914 F. Supp. at 712.

Another mandatory element of a breach of contract claim is damages. “Proof that reasonably specific damages were caused by the defendant's breach is essential to a contract claim. The defendant is entitled to a dismissal of the claim if the plaintiff fails to make out that proof.” *Id.* at 714. For the reasons already explained, Plaintiff can allege no harm and thus no

damages. Having no promise on which to rely nor any cognizable harm or damages, Count III should be dismissed.

**F. Plaintiff’s Claim as “Third Party Beneficiary” Fails**

Count IV of the Amended Complaint alleges breach of contract by way of duties allegedly owed to Plaintiff as a “third party beneficiary” of the “contract between Defendant and Suffolk County.” Am. Compl. ¶ 39. Plaintiff further alleges that “Defendant breached its contract with Suffolk County by failing to provide a phone services platform that adhered to the regulations set forth by the Massachusetts Department of Corrections.” *Id.* ¶ 40. This claim fails.

Plaintiff cites only to “103 CMR 482.11” for this claim. That rule states only that “[t]he superintendent of each institution shall be responsible for developing institutional procedures, in addition to implementing and monitoring 103 CMR 482.00.”<sup>11</sup> That rule provides no substantive restrictions or requirements for inmate telephone systems, and thus Plaintiff has failed to set forth the purported duty or restriction that could support his claim.

More importantly, there is no private right of action under Massachusetts DOC regulations. *Hudson v. McEachern*, 94 F. Supp. 3d 59, 70-71 (D. Mass. 2015) (citing, *inter alia*, *Loffredo v. Ctr. for Addictive Behaviors*, 689 N.E.2d 799, 803 (Mass. 1998) (no private right of action under Dept. of Public Health regulations governing methadone clinics)). Only equitable relief may be sought under DOC regulations. *Id.* But under this claim Plaintiff seeks only “damages” that “must be determined at trial.” Am. Compl. ¶ 41. And even if requested, Plaintiff cannot seek injunctive relief against Securus, because Securus does not serve the Souza Baranowski Correctional Institute where he is serving out his sentence. *See* Section VIII. below.

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<sup>11</sup> 103 CMR 482.00 designates the chapter of the regulations titled “Telephone Access and Use.”

Count IV therefore fails to provide any rule of law to serve as predicate for Securus's alleged breach of a purported duty to Plaintiff as a "third-party beneficiary".

To the extent that Plaintiff wants to rely on the "Pledge" as a promise for which he is a third-party beneficiary, this claim would still fail. Even if deemed a binding promise rather than an enforceable opinion or promise of future promise, *see supra* n.9, the "Pledge" has in fact not been breached. *See* Section IV. Plaintiff's calls to non-attorneys, which are the only calls at issue, are not private and thus Securus has not failed to comply with the Massachusetts Privacy Act nor were Plaintiff's First, Fifth, Sixth, or Fourteenth Amendment rights infringed. For these reasons, Count IV should be dismissed.

**G. Plaintiff's Claim for Injunctive Relief Is Moot**

Count VII of the Amended Complaint requests that the Court "order Defendant to take all necessary steps to preserve and retain any and all ... materials within Defendant's possession, custody, or control." Am. Compl. ¶ 57. The demand is moot. On December 5, 2016, the parties submitted a Joint Motion for Stipulated Request for Preliminary Injunction, which the Court granted on December 6, 2016. Stipulated Order for Preliminary Injunction (ECF 25). All information that Plaintiff identified for preservation was included in that stipulated motion.

In addition, as Plaintiff is aware, Securus does not provide service to the correctional facility in which he now is incarcerated. Plaintiff is serving his sentence at the Souza Baranowski Correctional Institution in Shirley, Joyce Decl., Ex. A, a facility that uses Global Tel\*Link for inmate telecommunications services, *id.*

**CONCLUSION**

For all these reasons, the Court should dismiss all counts of the Amended Complaint with prejudice.

Respectfully submitted,

SECURUS TECHNOLOGIES, INC.

By its attorneys,

/s/ Matthew P. Horvitz

Leonard H. Freiman (BBO #560233)

Denis M. King (BBO #555838)

Matthew P. Horvitz (BBO #664136)

GOULSTON & STORRS PC

400 Atlantic Avenue

Boston, MA 02110

tel. (617) 482-1776

fax (617) 574-4112

lfreiman@goulstonstorrs.com

dking@goulstonstorrs.com

mhorvitz@goulstonstorrs.com

Stephanie A. Joyce (admitted *pro hac vice*)

Joshua A. Fowkes (admitted *pro hac vice*)

ARENT FOX LLP

1717 K Street, N.W.

Washington, DC 20006

tel. (202) 857-6081

fax (202) 857-6395

stephanie.joyce@arentfox.com

joshua.fowkes@arentfox.com

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