



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

CENTENE CORPORATION and )  
HEALTH NET, LLC, )  
 )  
Plaintiffs, )  
 )  
v. ) C.A. No. 2021-\_\_\_\_ -\_\_\_\_  
 )  
ACCELLION, INC., )  
 )  
Defendant. )

**VERIFIED COMPLAINT**

Plaintiffs Centene Corporation ("Centene") and Health Net, LLC ("Health Net"), by and through their undersigned counsel, hereby allege as follows:

**PRELIMINARY STATEMENT**

1. Health Net is a health insurance company that provides affordable health plans for families, individuals, Medicare and businesses. Health Net is a wholly owned subsidiary of Centene.

2. Defendant Accellion, Inc. ("Defendant" or "Accellion") is a data transfer solutions company that claims to provide secure processes and infrastructure that can be used to store, maintain and transfer highly sensitive and confidential information.

3. Plaintiffs contract to use Accellion's software to transfer Protected Health Information ("PHI"), Personally Identifiable Information ("PII"), and other

confidential information belonging to people who have health insurance plans with Plaintiffs. When Plaintiffs transfer PHI, PII and other confidential information using Accellion's software, the Accellion system maintains and stores that confidential information for a period of time, usually up to 30 days.

4. This case arises out of the January 2021 breach of Accellion's purportedly "secure" file transfer system, known as the File Transfer Appliance ("FTA") (the "Accellion Data Breach"). The Accellion Data Breach exposed and compromised the PHI, PII and other confidential information of a significant number of Plaintiffs' members.

5. The Accellion Data Breach has also caused—and will continue to cause—Plaintiffs to incur significant costs and expenses associated with, among other things: remediation; mitigation; notifying members whose data was exposed; providing credit monitoring for members whose data was exposed; reporting the Accellion Data Breach to regulators; and attorneys' fees.

6. The Accellion Data Breach implicates and triggers a number of provisions in the contract that governs Accellion's relationship with Plaintiffs—the March 18, 2015 Business Associate Agreement ("BAA"). Under the BAA, Accellion is required to, among other things: (1) comply with specified security and privacy requirements; (2) allow Plaintiffs, on ten business days' notice, to audit Accellion's compliance with the BAA; (3) bear responsibility for all costs Plaintiffs

incur in connection with a data breach of Plaintiffs' data, including the costs of any notifications and mitigation activities; and (4) indemnify Plaintiffs for all costs or expenses arising out of a data breach.

7. Notwithstanding the BAA's clear requirements, Accellion has refused to comply with them. Most notably, Accellion has: (i) denied Plaintiffs their right to audit Accellion's compliance with the BAA; (ii) refused to honor its indemnification obligation; and (iii) refused to bear responsibility for all costs that Plaintiffs have incurred and will incur as a result of the Accellion Data Breach.

8. Plaintiffs seek: (i) specific performance of their audit rights, as required by Section IV of the BAA; (ii) a declaration that Accellion must indemnify Plaintiffs for, and hold Plaintiffs harmless against, any claim, cause of action, liability, damage, cost or expense (including attorneys' fees) arising out the Accellion Data Breach, as required by Section II.q of the BAA; and (iii) damages, in an amount to be proven at trial, for the costs that Plaintiffs have incurred as a result of the Accellion Data Breach, as required by Section II.g of the BAA.

### **PARTIES**

9. Centene is a Delaware corporation with its principal place of business at 7700 Forsyth Boulevard, St. Louis, Missouri 63105.

10. Health Net is a wholly owned subsidiary of Centene. Before its acquisition by Centene in March 2016, Health Net was a publicly traded corporation called Health Net, Inc.

11. Accellion is a Delaware corporation with its principal place of business at 1804 Embarcadero Road, Suite 200, Palo Alto, CA 94303.

### **JURISDICTION**

12. The Court has subject matter jurisdiction over this matter pursuant to 10 *Del. C.* § 341, 10 *Del. C.* § 6501, and Del. Const. art. 4, § 10.

13. The Court has personal jurisdiction over Accellion because it is organized under the laws of Delaware.

### **ALLEGATIONS**

#### **I. Plaintiffs Contract With Accellion To Use Accellion's "Secure" System To Transfer And Store Highly Sensitive Information**

14. Accellion offers cloud-based, file-transfer services through its FTA system. Accellion marketed the FTA system as a solution for companies who need to "transfer large and sensitive files securely." Indeed, Accellion routinely touted its system as a way for companies to securely protect PHI and to comply with the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

15. Health insurance companies, like Plaintiffs, may need to transfer PHI or other confidential information for a variety of reasons. Under one common scenario, a health insurance company may need to send a patient's confidential health information to a health care provider (or, conversely, a health care provider may need to send confidential health information to the insurer).

16. In that scenario, an employee of the health insurance company who has access to the Accellion system will log in through Accellion's portal and use the Accellion system to upload the confidential information. The Accellion system will then send a notification to the intended recipient that he or she has a secure file waiting. The recipient can then log into the Accellion system to access and retrieve the confidential information. The Accellion system will store and maintain that confidential information for a set period of time, usually 30 days.

17. Health Net first started contracting to use Accellion's FTA system in 2010.

## **II. Health Net And Accellion Enter Into The BAA And Incorporate The BAA Into Their Contracting Agreement**

18. In January 2015, Heath Net informed Accellion that the parties needed to enter into a so-called business associate agreement. That is because, under HIPAA, a data transfer solutions provider like Accellion that receives, maintains, or transmits PHI should be bound by a business associate agreement that complies with

45 C.F.R. § 164.504(e). A business associate agreement requires a service provider like Accellion to use appropriate safeguards to prevent unauthorized access to, or disclosure of, PHI.

19. Accellion initially resisted signing the BAA. Accellion relented, however, after Health Net told Accellion that Health Net would not renew its FTA licensing agreement if Accellion did not enter into the BAA. Health Net and Accellion then negotiated the terms of the BAA over the course of nearly two months, during which the parties exchanged drafts of the BAA and held several calls. The negotiations included account representatives and the legal department of Accellion. As part of these discussions, Health Net made clear—and Accellion agreed—that the BAA would be "part of the contract" governing Health Net's access to, and use of, Accellion's FTA system.

20. On March 19, 2015, Health Net and Accellion executed the BAA. Accellion's Chief Financial Officer, Glen M. Segal, signed the BAA for Accellion. The BAA is attached to this Complaint as Exhibit A.

21. The BAA designates Accellion as a "Business Associate," which "includes a person or entity that creates, receives, maintains, or transmits PHI on behalf of a covered entity."

22. The BAA requires Accellion and any of its subcontractors to "use appropriate administrative, physical, and technical safeguards to prevent improper

use or disclosure of PHI, in any form or media," to "remain in compliance with HIPAA" and to comply with a set of security and privacy requirements. Those security and privacy requirements are detailed in Schedule B to the BAA.

23. The BAA further provides that Accellion "shall be responsible for all costs incurred in connection with the loss [of PHI], Security Incident or Breach, including but not limited to, any notifications and mitigation activities taken" pursuant to such an event. The BAA adopts HIPAA's definition of a "Security Incident," which is "the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an information system." 45 C.F.R. § 164.304. A "Breach" means "the acquisition, access, use, or disclosure of protected health information in" an unauthorized manner "which compromises the security or privacy of the protected health information." 45 C.F.R. § 164.402.

24. The BAA also includes a broad indemnification provision. Under that provision, Accellion must indemnify Health Net for any cost or expense arising out of any loss of PHI, Security Incident, or Breach. Specifically, Accellion:

shall defend, indemnify and hold harmless Health Net and any of Health Net's affiliates, directors, officers, employees and agents from and against any claim, cause of action, liability, damage, cost or expense (including reasonable attorneys' fees) arising out of or relating to any loss, Security Incident, Breach or other non-permitted use or disclosure of PHI, failure to safeguard ePHI, or other breach of this Agreement by [Accellion] or any affiliate, director, officer, employee,

or Subcontractor of [Accellion]. The exclusions and limits of liability, if any, provided in the Health Net - Vendor Contract(s) shall not apply in the event of a breach of this Business Associate Agreement or with respect to [Accellion]'s indemnification obligations.

25. The BAA further grants Health Net the right, upon ten business days' notice, to audit and inspect Accellion's "facilities, systems, records, policies and procedures relating to the access, use and/or disclosure of PHI or ePHI pursuant to this Agreement for the purpose of determining whether [Accellion] has complied with this Agreement."

### **III. Centene Acquires Health Net And Administers The Contracting Relationship With Accellion**

26. On March 24, 2016, Centene completed its acquisition of Health Net, through which Health Net became a wholly owned subsidiary of Centene.

27. Following the merger, Centene assumed the responsibility for providing and supporting an IT platform for Health Net and its affiliates. In providing those services, Centene began administering the contracting relationship with Accellion—to which Accellion agreed.

28. On November 15, 2016, Accellion CFO Mr. Segal signed an attestation for Centene, confirming for Centene Accellion's compliance with the BAA. Mr. Segal attested, among other things, that Accellion: (1) "[a]dhered to the privacy and security standards and requirements" in the BAA; (2) "[i]ncorporated into the contractual arrangement with any entity that performs services or functions on

[Accellion's] behalf that involve the access, use or disclosure of Protected Information on behalf of [Plaintiffs], the provisions required by [the BAA] including, executing a Business Associate Agreement and/or Non-Disclosure Agreement, as applicable, between [Accellion] and its Business Associate(s)"; and (3) "has a documented security and privacy compliance program that is in compliance with the requirements of [HIPAA]."

29. Centene also took over payments under the contract with Accellion. In that regard, Centene directed Accellion to send all future invoices to Centene in St. Louis. Accellion agreed and has continued to invoice Centene for the use of Accellion's FTA system.

#### **IV. Attackers Infiltrate Accellion's FTA System, Leading To A Loss Of PHI, A Security Incident, And A Breach**

30. On or about December 16, 2020, Accellion discovered vulnerabilities in its FTA system that had allowed outsiders to remotely access customer data.

31. On December 21, 2020, Accellion alerted Plaintiffs that it had discovered these vulnerabilities. Accellion did not, however, disclose that attackers had already exploited the vulnerabilities and stolen data from certain of its customers. Instead, Accellion merely stated that it had unilaterally updated its software in an effort to "patch" those vulnerabilities.

32. Accellion updated its software again on December 23 and December 28.

33. On January 12, 2021, Accellion issued a press release stating that in mid-December it "was made aware" of a "vulnerability in its legacy File Transfer Appliance (FTA) software." Accellion claimed that it had "resolved the vulnerability and released a patch within 72 hours to the less than 50 customers affected." Accellion again did not disclose that attackers had stolen customer data.

34. Despite the successful infiltration into the FTA system, Accellion failed to prevent a future, similar attack, which took place less than a month later.

35. On or about January 20, 2021, attackers exploited another set of vulnerabilities in Accellion's FTA system, allowing outsiders to once again remotely access customer data, including data belonging to Plaintiffs' members. It appears the attackers also obtained Accellion's encryption keys, which allowed them to decrypt the files that they exfiltrated from Accellion. It took the attackers less than two hours to issue over 4,000 "GET" requests and download all of Plaintiffs' files, which consisted of over nine gigabytes of data.

36. On January 22, 2021, two days after the attackers stole Plaintiffs' files that were maintained on Accellion's system, Accellion's Chief Information Security Officer emailed Plaintiffs stating, "Accellion has just discovered an active exploit in your FTA software that is an extension of the P0 vulnerability previously reported

on 12/20/20." Accellion's Chief Marketing Officer later conceded that Accellion's FTA system "just wasn't designed for these types of threats."

37. Due to the Accellion Data Breach, Plaintiffs' members had their PHI and PII compromised. As a result, Plaintiffs will be required to issue notices and offer free credit monitoring to affected members, as required by state laws and HIPAA, and as contemplated by the BAA. Plaintiffs must also make disclosures to the appropriate regulators and governmental agencies. The Accellion Data Breach has thus caused—and will continue to cause—Plaintiffs to incur significant costs and fees, including with respect to, among other things, remediation, mitigation, notifying affected customers, providing credit monitoring for affected customers, reporting the breach to the required regulators and governmental entities, and hiring attorneys and other outside vendors and professionals to investigate and help manage the fallout.

#### **V. Accellion Refuses To Abide By The Terms Of The BAA**

38. On February 11, 2021, Plaintiffs' counsel sent a letter to Accellion regarding the Accellion Data Breach. Among other requests, Plaintiffs notified Accellion of its intent to audit Accellion to assess its compliance with the BAA, as the BAA permits Plaintiffs to do. Plaintiffs also demanded, pursuant to the BAA, that Accellion indemnify Plaintiffs and bear responsibility for all costs that Plaintiffs have incurred and will incur as a result of the Accellion Data Breach.

39. Three weeks later, on March 2, 2021, counsel for Accellion finally responded, refusing Plaintiffs' request to audit Accellion, refusing to bear responsibility for the costs that Plaintiffs have incurred and will incur, and denying Plaintiffs' demand for indemnification.

## **COUNT I – BREACH OF CONTRACT**

### **(Specific Performance)**

40. Plaintiffs repeat, reallege and incorporate by reference as though fully set forth herein the allegations in paragraphs 1 through 39, inclusive.

41. The BAA is a valid and enforceable contract between the parties.

42. Pursuant to Section IV of the BAA, Plaintiffs have a right to "inspect the facilities, systems, records, policies and procedures relating to the access, use and/or disclosure of PHI or ePHI" in order to "determin[e] whether Accellion has complied with the BAA."

43. Following the Accellion Data Breach, on February 11, 2021, Plaintiffs provided Accellion with written notice of Plaintiffs' intent to exercise their audit and inspection right within ten business days.

44. Accellion did not even respond to that request within ten business days. Instead, it waited until March 2, 2021, and only then refused Plaintiffs' audit and inspection request.

45. Plaintiffs have performed all of their obligations under the BAA, including all conditions precedent to their audit and inspection right under Section IV of the BAA.

46. Plaintiffs are without an adequate remedy at law because Plaintiffs have no other means besides an audit and inspection to determine the magnitude of Accellion's non-compliance with the BAA and the scope of the resulting Accellion Data Breach involving Plaintiffs' members' PHI.

47. Therefore, Plaintiffs are entitled to an order of specific performance to compel Accellion's compliance with its obligation to allow Plaintiffs to exercise their audit and inspection right under Section IV of the BAA.

## **COUNT II – DECLARATORY RELIEF**

### **(Declaratory Judgment For Contractual Indemnification)**

48. Plaintiffs repeat, reallege and incorporate by reference as though fully set forth herein the allegations in paragraphs 1 through 47, inclusive.

49. The declaratory relief sought in this Count will clarify and settle the legal relations between the parties and will afford relief from the uncertainty and controversy that presently exists with respect to Plaintiffs' indemnification rights.

50. The Court is authorized to issue a declaratory judgment pursuant to 10 *Del. C.* § 6501 and Court of Chancery Rule 57.

51. Under Section II.q of the BAA, Accellion is required to indemnify Plaintiffs "from and against any claim, cause of action, liability, damage, cost or expense (including reasonable attorneys' fees) arising out of or relating to any loss, Security Incident, Breach or other non-permitted use or disclosure of PHI, failure to safeguard ePHI, or other breach of" the BAA.

52. Following the Accellion Data Breach, Plaintiffs made a demand on Accellion for indemnification pursuant to Section II.q of the BAA.

53. Accellion refused to indemnify Plaintiffs or otherwise comply with the terms of Section II.q.

54. Plaintiffs are entitled to a declaratory judgment that Accellion is required to indemnify Plaintiffs from and against any claim, cause of action, liability, damage, cost or expense (including reasonable attorneys' fees) arising out of or relating to any loss, Security Incident, Breach or other non-permitted use or disclosure of PHI, failure to safeguard ePHI, or other breach of the BAA.

55. Plaintiffs have no adequate remedy at law.

### **COUNT III – BREACH OF CONTRACT**

#### **(Damages)**

56. Plaintiffs repeat, reallege and incorporate by reference as though fully set forth herein the allegations in paragraphs 1 through 55, inclusive.

57. The BAA is a valid and enforceable contract between the parties.

58. Plaintiffs have performed all of their obligations under the BAA, including timely paying all invoices sent to Health Net, and then to Centene.

59. Accellion did not perform its obligations under the BAA. Rather, Accellion breached the BAA by: (i) failing to maintain reasonable security and safeguards to prevent unauthorized access to PHI, and failing to otherwise abide by the Security & Privacy Requirements detailed in Schedule B to the BAA; (ii) refusing to bear responsibility for "all costs incurred in connection with" a loss of PHI, a Security Incident, or a Breach; and (iii) refusing to "indemnify and hold harmless" Plaintiffs in connection with "any claim, cause of action, liability, damage, cost or expense (including reasonable attorneys' fees) arising out of or relating to any loss, Security Incident, Breach or other non-permitted use or disclosure of PHI, failure to safeguard ePHI, or other breach" of the BAA.

60. As a direct and proximate result of these breaches, Plaintiffs have suffered damages in an amount to be determined at trial.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that a judgment be entered against Accellion as follows:

1. directing specific performance to compel Accellion to comply with its obligation to allow Plaintiffs to "inspect the facilities, systems, records, policies and procedures relating to the access, use and/or disclosure of PHI or ePHI pursuant to [the BAA] for the purpose of determining whether Accellion has complied with" the BAA;

2. declaring that Plaintiffs are entitled to indemnification pursuant to Section II.q of the BAA;

3. awarding Plaintiffs damages in an amount to be determined at trial;

4. awarding Plaintiffs their actual costs, expenses, and attorneys' fees incurred in bringing this lawsuit;

5. awarding Plaintiffs pre-judgment and post-judgment interest; and

6. awarding Plaintiffs such other and further relief as the Court shall deem just and proper.

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*/s/ Paul J. Lockwood*

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