STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-24-481

IN RE MOUNT DESERT ISLAND HOSPITAL DATA SECURITY INCIDENT LITIGATION

JOHN DESJARDIN, LINDEN BUZZELL, BEATRICE GRINNELL, DEREK HANNAN, NICOLE BRIGHT & ERIN WALSH,

Plaintiffs-Appellants

v.

MOUNT DESERT ISLAND HOSPITAL, INC.,

Defendant-Appellee

On Appeal from the Business and Consumer Court
Docket No. BCD-CIV-2023-00070

BRIEF OF APPELLANTS

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INTRODUCTION

Data breach cases in Maine effectively have been rendered forum-less claims through a series of wrongly decided cases by a single judge of the Business and Consumer Court. This appeal involves the latest such case, where the trial court wrongly dismissed – *with prejudice* – a putative data breach class action at the pleadings stage for an alleged lack of standing. The trial court's excessively crabbed conception of standing under Maine law – a conception not supported by this Court's precedent, coupled with a complete negation of the notice pleading standard in Maine, means that the only type of data breach case that will survive a motion to dismiss on the pleadings is one where a plaintiff has sustained actual fraud or identity theft that results in an unreimbursed out-of-pocket monetary loss. It wholly ignores the harm that results when a healthcare provider fails to protect its patients' most private and sensitive information—names, Social Security numbers, financial account information, medical record numbers, mental or physical treatment/condition information, diagnosis information, and more (collectively, "Private Information"). As it stands today, in the eyes of the trial court, every other data breach case in Maine would be stillborn at

the pleadings stage, just as this case was. No reasonable person would deny, however, that the negligent disclosure of Social Security numbers and medical information is without foul.

Making matters worse, the practical effect of the trial court's erroneous application of Maine law is a merits determination of these data breach plaintiffs' claims, at the pleadings stage, before any discovery has taken place, and without any recourse to refile a lawsuit if the imminent risk of future harm that Plaintiffs-Appellants allege becomes a reality. Rather than being afforded a forum where the facts may be adduced through discovery and the merits of these claims can be adjudicated, the Business and Consumer Court short-circuits due process by finding plaintiffs' claims as lacking standing.

Informational and privacy rights, which protect inherently intangible interests, are particularly vulnerable to the trial court's erroneous misconception of standing. The trial court is forcing litigants, like the Plaintiffs-Appellants, to wait until their bank accounts are completely cleaned out – with no reimbursement – before they can even maintain a lawsuit past the pleadings stage. And, since the trial court dismissal of Plaintiffs-Appellants' claims was with prejudice, Plaintiffs-

Appellants are now foreclosed from renewing any lawsuit even if they later were to suffer the kind of monetary harm the trial court wrongly holds is necessary to have standing.

Maine law on standing is neither so constrained nor limited in its conception of what constitutes an allegation of an injury at the pleadings stage. Maine trial courts are courts of general jurisdiction. *Town of Kittery v. Dineen*, 2017 ME 53, ¶ 18, 157 A.3d 788, 793 ("The Superior Court is a court of general jurisdiction . . ."). Unlike federal courts, the doors to the Maine trial courts are open to any litigant who asserts "a personal stake in the outcome of the litigation and present[s] a real and substantial controversy touching on the legal relations of parties with adverse legal interests." *Collins v. State*, 2000 ME 85, ¶ 5, 750 A.2d 1257, 1260, quoting *Franklin Property Trust v. Foresite, Inc.*, 438 A.2d 218, 220 (Me.1981) (internal citations omitted). The complained-of injury must be particular to the plaintiff as opposed to "the harm suffered by the public-at-large." *Id*, ¶ 6 (citing *Stull v. First American Title Ins. Co.*, 2000 ME 21, ¶ 11, 745 A.2d 975). The standing analysis is satisfied where "the defendant's actions have adversely and directly affected the plaintiff's property, pecuniary or personal rights." *Stull*, 745 A.2d at 980.

Here, the Plaintiffs-Appellants satisfied the relatively low burden imposed by Maine law on standing, and the Maine notice pleading requirements. Plaintiffs-Appellants' allegations that they were personally injured and suffered damages all demonstrate a personal stake in the outcome of the litigation. There are allegations of a real and substantial controversy – whether Defendant-Appellee's data breach caused the Plaintiffs-Appellants injury and damages. This case does not involve allegations of "harm suffered by the public-at-large," but instead involves complained of injury particular to the Plaintiffs-Appellants and the putative class of persons whose data was also involved in this data breach. Contrary to the lower court's limited conception of what constitutes an injury, Plaintiffs-Appellants here plead multiple forms of injury that are sufficient to swing open the doors to a Maine courthouse. And the Plaintiffs-Appellants' allegations fairly put the Defendant-Appellee on notice of the claims asserted. Maine's "notice pleading standard ... [is] forgiving," and the complaint need only "give fair notice of the cause of action by providing a short and plain statement of the claim showing that the pleader is entitled to relief." *Burns v. Architectural Doors & Windows,* 2011 ME 61, ¶¶ 16, 21, 19 A.3d 823. "A

dismissal should only occur when it appears beyond a doubt that a plaintiff is entitled to no relief under any set of facts that [Plaintiffs] might prove in support of [Plaintiffs'] claim." *Oakes v. Town of Richmond*, 303 A.3d 650, 655 (Me. 2023) (citation omitted). "The general rule is that only the facts alleged in the complaint may be considered…and must be assumed as true." *Id.*, ¶ 8. Nothing more is required under Maine law to survive a standing challenge.

Also, the Business and Consumer Court committed plain error when it dismissed this case with prejudice. This is a particularly grievous error in a case where the Plaintiffs-Appellants expressly allege that they are likely to suffer future harm imminently. This Court should reverse and remand.

STATEMENT OF FACTS

1. Factual Background

This action arises from a 2023 data breach, where cyberthieves accessed portions of Defendant-Appellee Mount Desert Island Hospital, Inc.'s ("MDIH") network between April 28, 2023, and May 7, 2023. Consolidated Amended Class Action Complaint ("Amended Complaint" or "Am. Compl.") at ¶ 36 (App. 29). On or around May 4, 2023, MDIH

became aware of suspicious activity occurring within its network. *Id*. at ¶ 7 (App. 24). On or around June 30, 2023, Defendant notified Plaintiffs and Class Members (i.e., its patients) of the Data Breach (the "Notice of Data Breach), stating:

> On May 4, 2023, MDIH became aware of unusual activity on our computer network and immediately began an investigation with the assistance of third-party specialists. The investigation determined that certain portions of our network were accessed by an unauthorized party between April 28, 2023 and May 7, 2023. Therefore, we are conducting a thorough review of the information potentially impacted to determine the type of information and to whom it related.
>
> Although our review is ongoing, on June 21, 2023, we determined that your information may be affected by this incident. The types of information may include your name and the following: address, date of birth, driver's license/state identification number, Social Security number, financial account information, medical record number, Medicare or Medicaid identification number, mental or physical treatment/condition information, diagnosis code/information, date of service, admission/discharge date, prescription information, billing/claims information, personal representative or guardian name, and health insurance information.

Id. Approximately 26,000 persons, including Plaintiffs-Appellants, were among those affected. *Id*. at ¶ 10 (App. 24). Acknowledging the risk posed to Plaintiffs-Appellants and the putative Class Members, MDIH offered a 12-month credit monitoring service. *Id*. at 49 (App. 32).

On July 23, 2023, Plaintiffs-Appellants Buzzell and Grinnell filed the first class action complaint against Defendant arising from its data Breach. Thereafter, Plaintiffs-Appellants Desjardin and Hannan filed additional class action complaints on August 4, 2023, with Plaintiffs-Appellants Bright and Walsh filing their class action complaint on October 6, 2023. These cases were consolidated on January 16, 2024, and Plaintiffs-Appellants filed the consolidated class action complaint on March 1, 2024, asserting causes of action for: (1) negligence; (2) breach of contract; (3) breach of implied contract; (4) unjust enrichment; (5) breach of fiduciary duty; and (6) declaratory and injunctive relief.

Plaintiffs-Appellants allege that MDIH wrongfully failed to properly protect and safeguard Plaintiffs' Private Information. Am. Compl. ¶ 38 (App. 29). As a direct and foreseeable consequence, "an unauthorized third party was able to access Defendant's database, and exfiltrate Plaintiffs' and Class Members' Private Information stored on Defendant's database." *Id.* Particularly alarming is that the private information compromised in the Data Breach included Social Security numbers and medical information. *Id.* ¶ 2 (App. 23).

Plaintiffs-Appellants, as patients, allege that they provided their information as a condition of receiving services from MDIH; that they were otherwise careful about sharing and storing their sensitive Private Information; and that they believed MDIH would use basic security measures to protect their Private Information. *Id.* ¶¶ 40-42, 53-55, 66-68, 82, 84-85, 96-98, 109-111 (App. 30, 32, 34-35, 37, 39, 41-42). As a result of the Data Breach, Plaintiffs-Appellants and Class Members suffered ascertainable losses, including but not limited to, a loss of privacy, the loss of the benefit of their bargain, out-of-pocket monetary losses and expenses, the value of their time reasonably incurred to remedy or mitigate the effects of the attack, the diminished value of their Private Information, and the substantial and imminent risk of identity theft. *Id.* ¶ 18 (App. 26). Five Plaintiffs-Appellants each independently allege that they "suffer imminent and impending injury arising from the substantially increased risk of fraud, identity theft, and misuse resulting from [their] Private Information being placed in the hands of unauthorized third parties." *Id.* ¶¶ 47, 60, 74, 103, 116 (App. 31, 33, 36, 41, 43).

Multiple Plaintiffs-Appellants make allegations of actual, present misuse of their compromised data. Plaintiff-Appellant Buzzell "has recently received notices from Equifax, Experian, and Transunion alerting him to the presence of his sensitive information on the dark web. Additionally, someone attempted to file federal and state tax returns in his name using his Social Security number." *Id.* ¶ 59 (App. 33). Plaintiff Grinnell, "[s]oon after the Data Breach, and as a result thereof . . . experienced multiple unauthorized charges on both her debit and credit cards, including but not limited to, charges for Sam's Club and L.L. Bean products that she never purchased and three repeated charges of $41.00 that she did not authorize." *Id.* ¶ 71 (App. 35). And Plaintiff-Appellant Hannan, "further suffered injury as a result of the Data Breach in the form of experiencing an increase in spam emails and/or phishing attempts to his email account." *Id.* ¶ 90 (App. 39).

Further, all Plaintiffs-Appellants allege that "[t]his risk from the Data breach has caused [them] to spend significant time dealing with issues related to the Data Breach, which includes time spent verifying the legitimacy of the Notice of Data Breach, and self-monitoring [their] accounts and credit reports to ensure no fraudulent activity has

occurred." *Id.* ¶¶ 48, 61, 75, 88, 104, 117 (App. 31, 34, 36, 38, 41, 43). Additionally, Plaintiffs-Appellants allege that the "substantial risk of imminent harm and loss of privacy have both caused [them] to suffer stress, fear, and anxiety;" *Id.* ¶¶ 50, 63, 77, 106, 119 (App. 32, 34, 36, 41, 43), and that the "need to expend resources mitigating the future harm suffered by [Plaintiffs] represents a concrete injury requiring remedy through a civil action." *Id.* ¶¶ 51, 64, 78, 107, 120 (App. 32, 34, 36, 41, 43).

2. Procedural Background

On April 8, 2024, MDIH filed a motion to dismiss with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the Maine Rules of Civil Procedure. App. 88. On April 29, 2024, Plaintiffs-Appellants filed their response in opposition, and on May 20, 2024, MDIH filed a reply. On September 5, 2024, the trial court heard oral argument and took the matter under advisement.

On October 7, 2024, the trial court granted MDIH's motion, holding that "Plaintiffs have not pled an injury cognizable under Maine Law," and dismissing Plaintiffs-Appellants' claims with prejudice. Order at 13 (App. 21). This appeal followed.

STATEMENT OF ISSUES

1. Whether the Business and Consumer Court erred as a matter of law in finding that Plaintiffs-Appellants' allegations of imminent and impending injury arising from the compromise of their personal data does not constitute legally cognizable injury for purposes of standing at the pleadings stage.

2. Whether the Business and Consumer Court erred as a matter of law in finding that Plaintiffs-Appellants' allegations of actual misuse did not adequately plead an injury for purposes of standing at the pleadings stage of the case.

3. Whether the Business and Consumer Court erred as a matter of law in finding that Plaintiffs-Appellants' allegations of Loss of Privacy, Lost Benefit of Bargain, and Diminished Value of Private Information are not injuries in fact for purposes of standing at the pleadings stage.

4. Whether the Business and Consumer Court erred as a matter of law in finding that Plaintiffs-Appellants' allegations of Emotional Distress did not sufficiently plead injury at the pleadings stage.

5. Whether the Business and Consumer Court erred as a matter of law by dismissing the Plaintiffs-Appellants' claims with prejudice, where the potential of future harm is plainly alleged.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants plead multiple forms of injury that are sufficient to establish standing under Maine law, especially at the "forgiving" pleading stage. *Burns,* 2011 ME 61, ¶¶ 16, 21, 19 A.3d at 828-29. The standing threshold under Maine law is minimal, and the doors to the Maine trial courts are open to any litigant who asserts a personal stake in the outcome of the litigation and presents a real and substantial controversy touching on the legal relations of parties with adverse legal interests. "Cognizable injury" for purposes of standing is not the same as "cognizable injury" and damages in the context of stating legal claims.

The trial court erred in dismissing Plaintiffs-Appellants' case with prejudice. First, the trial court erroneously held that the non-speculative allegations of an imminent injury do not constitute cognizable injury under Maine law, when this Court has recognized that an imminent injury can suffice for purposes of standing. Second, the trial court erred in discounting Plaintiffs-Appellants' allegations of identity theft

(including in the form of using a plaintiff's identity to file fraudulent tax returns) and actual misuse of the compromised data, and by substituting its own merits determination and factual conclusions for the litigation process. Third, the trial court entirely ignored multiple forms of injury alleged, including loss of the benefit of the bargain, invasion of privacy, diminished value of private information, and emotional distress. All of these injuries pled are sufficient to establish standing. And last, the trial court committed plain error in dismissing this case with prejudice, as Maine law is unambiguous that if a court lacks standing, the dismissal must be without prejudice.

ARGUMENT

1. Maine Law Recognizes Imminent Harm as a Legally Cognizable Injury for Purposes of Standing.

The Business and Consumer Court erred as a matter of law in finding that Plaintiffs-Appellants' allegations of an imminent risk of imminent and impending injury arising from the compromise of their personal data do not constitute legally cognizable injury for purposes of standing at the pleadings stage. This Court has unambiguously endorsed imminent injury as legally cognizable: Generally, "to have standing to seek injunctive and declaratory relief, a party must show that the

challenged action constitutes" a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical." *Clardy v. Jackson*, 2024 ME 61, ¶ 15, 322 A.3d 1158, 1163 (quoting *Madore v. Me. Land Use Regul. Comm'n*, 1998 ME 178, ¶ 13, 715 A.2d 157, 161 (internal citation and quotation omitted). Other than the Business and Consumer Court's string of case law (consisting of *Gonzales v. Sweetser*, No. BCD-CIV-2020-21, 2020 WL 6596389 (Me. B.C.D. Oct. 13, 2020); *Bathe v. Keybank N.A.*, No. BCD-CIV-2021-00043, 2021 WL 6125321 (Me. B.C.D. Nov. 23, 2021), and; *Chabot v. Spectrum Healthcare Partners, P.A.*, No. BCD-CIV-2020-18, 2021 WL 659565 (Me. B.C.D. Jan. 14, 2021)), there is no Maine case that analyzes the question of what constitutes an imminent injury in the context of a data breach like the one at issue here.

In this case, the trial court offers little rationale for rejecting the allegations of imminent injury, other than to cite to an inapposite asbestos case, *Bernier v. Raymark Industries, Inc.*, 516 A.2d 534, 543 (Me. 1986). *See* Order at 7 (App. 15). *Bernier* provides no guidance on how to evaluate the question of whether or not the prospect of future harm flowing from a targeted data breach is sufficiently imminent and non-conjectural, and the trial court provides little explanation in this case for

how it reached the conclusion that Plaintiffs had not sufficiently pled an imminent, non-conjectural injury.

Instead, the trial court rejected the Plaintiffs-Appellants' allegations and arguments regarding the imminent risk of harm from this data breach, making the astonishing statement that "several cases in non-binding jurisdictions . . . have developed a less stringent standing requirement for data breach cases." *Id.* at 9 (App. 17). The "non-binding jurisdictions" are all federal courts of appeals – specifically, the First, Second, and Third Circuits. *See McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 300-01 (2d Cir. 2021); *Webb v. Injured Workers Pharmacy, LLC*, 72 F.4th 365, 375 (1st Cir. 2023); *Bohnak v. Marsh & McLennan Cos.*, 79 F.4th 276, 280 (2d Cir. 2023); and *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 153 (3d Cir. 2022). Federal courts are obviously courts of limited jurisdiction under the U.S. Constitution, Article III, and the standing requirements for every federal court are *more stringent* than those of every state court, including Maine. This is true regardless of the underlying subject matter of the case. Thus, it is erroneous to state that any federal courts have adopted a "less stringent standing requirement for data breach cases."

The trial court also misapprehends what these federal circuit court cases embody. None of these cases sets a standard or requirement for standing. Rather, all four of these cases (*McMorris*, *Webb*, *Bohnak*, and *Clemens*) merely provide an analytical framework for how to address the question of whether or not a future injury that is pled is sufficiently imminent and non-conjectural so as to support Article III standing. Maine law currently has no similar analytical framework and is not bound to use the *McMorris* "three commonality" test. But, satisfying the three-commonality test has been sufficient to cause multiple federal courts to conclude that plaintiffs have adequately alleged a concrete and particularized injury for purposes of Article III standing in data breach cases (which is a higher threshold than the Maine standing requirement for its courts of general jurisdiction). Surely there is some persuasive value to this authority – authority that includes the First Circuit, which is the federal circuit encompassing Maine – and a useful analytical framework for Maine courts to rely upon.

Where imminent, non-conjectural injury is sufficient for standing in Maine courts, this Court should not decline the invitation to evaluate Plaintiffs-Appellants' allegations here using this useful analytical

framework. The three commonalities identified by the federal First, Second, and Third Circuit Courts of Appeal to analyze whether the threat of identity theft and fraud from a data breach is sufficiently imminent to satisfy Article III in federal courts are: (1) when "the data breach was intentional"; (2) when "the data was misused"; and (3) when "the nature of the information accessed through the data breach could subject a plaintiff to a risk of identity theft." *McMorris*, 995 F.3d at 300-01; *Webb*, 72 F.4th at 375; *Bohnak,* 79 F.4th at 280; *Clemens*, 48 F.4th at 153 ("These non-exhaustive factors can serve as useful guideposts, with no single factor being dispositive to our inquiry," noting that "misuse is not necessarily required"). All three "commonalities" point towards the conclusion that Plaintiffs-Appellants plead injury in the form of present, non-conjectural imminent risk of future harm from this data breach.

The Amended Complaint alleges that this data breach was carried out by cyber thieves. Am. Compl. ¶¶ 36-37 (App. 29). The involvement of criminals in the data breach demonstrates that this breach was intentional – this case is not a stolen laptop case where the data theft might be incidental to the theft of the laptop itself. *See, e.g. Beck v. McDonald*, 848 F.3d 262, 267 (4th Cir. 2017) (no standing in stolen laptop

case). The Amended Complaint further alleges that some portion of the data set has already been actually misused to file fraudulent tax returns (Am. Compl. ¶ 59 (App. 33)), to make fraudulent charges (Am. Compl. ¶ 71 (App. 35)), and to phish for more sensitive data by spam texts and emails (Am. Compl. ¶ 90 (App. 39)). A non-speculative threat of future injury should be presumed because the fact that "at least some information stolen in a data breach has already been misused also makes it likely that other portions of the stolen data will be similarly misused." *Webb*, 72 F.4th at 376; *McCreary v. Filters Fast LLC*, No. 3:20-CV-595-FDW-DCK, 2021 WL 3044228, at *5 (W.D.N.C. July 19, 2021) ("[A]llegations of actual misuse bring the 'actual and threatened harm' alleged by Plaintiffs 'out of the realm of speculation and into the realm of sufficiently imminent and particularized harm.'").

As for the third commonality, the type of data compromised here – Social Security numbers – is precisely the type of information that would subject Plaintiffs-Appellants to a non-speculative threat of identity theft. *See Portier v. NEO Tech. Sols.*, No. 3:17-CV-30111 (TSH), 2019 WL 7946103, at *12 (D. Mass. Dec. 31, 2019) ("Because Social Security numbers are the gold standard for identity theft, their theft is

significant....”). Here, all three commonalities point towards the same conclusion – that Plaintiffs-Appellants have adequately pled a non-speculative imminent risk of harm that qualifies as an injury for standing purposes under Maine law.

The trial court’s rationale for refusing to find that Plaintiffs-Appellants adequately pleaded an injury based on imminent harm is its lengthy discussion of *Transunion LLC v. Ramirez*, 594 U.S 413 (2021). Order at 9-11 (App. 17-19). This analysis is deeply flawed. The trial court’s conclusion (a conclusion never adopted by the Maine Law Court) that “*Transunion* establishes that imminent risk of future harm is not sufficiently concrete to confer standing” (Order at 10 (App. 18)) is not accurate and has been rejected by a score of federal courts in 2024 alone, particularly in cases where actual misuse was alleged.[1]

[1] *See e.g. Clemens*, 48 F.4th at 157 (standing where there was actual misuse in the form of data posted on the dark web); *Tignor v. Dollar Energy Fund, Inc.*, No. 2:23-CV-1916, 2024 WL 3830929, at *7 (W.D. Pa. Aug. 15, 2024) (standing based on imminent harm where PII was used to submit two fraudulent credit card applications); *Roma v. Prospect Med. Holdings, Inc.*, No. CV 23-3216, 2024 WL 3678984, at *5 (E.D. Pa. Aug. 6, 2024) (standing based on imminent harm where there was dark web posting of PII, fraudulent charges, and car and credit loans taken out in plaintiff’s name); *In re Unite Here Data Sec. Incident Litig.*, 740 F. Supp. 3d 364, 375 (S.D.N.Y. 2024), motion to certify appeal denied, No. 24-CV-1565 (JSR), 2024 WL 4307975 (S.D.N.Y. Sept. 26, 2024); *Owen-Brooks, et al. v. DISH Network Corporation, et al.*, 2024 WL 4333660, *1 (D. Colo. Sept. 27, 2024) (at the pleadings stage, allegations of fraud or attempted fraud as a result of the data breach “is enough” for standing); *Savidge v. Pharm-Save, Inc.*, 727 F. Supp. 3d 661, 690 (W.D. Ky. 2024); *Capiau v. Ascendum Mach., Inc.*, No. 3:24-CV-00142-MOC-SCR, 2024 WL 3747191, at *5 (W.D.N.C. Aug. 9, 2024)(“Even absent a showing of actual misuse, Plaintiff satisfies the concreteness

The trial court here grossly misapprehends *TransUnion*, which does not change the overall legal framework established in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013), that a sufficiently imminent injury is enough to imbue a plaintiff with Article III standing. As shown in *Clardy*, *supra*, Maine has adopted a similar rule that a sufficiently imminent injury will support standing. 2024 ME 61, ¶ 15, 322 A.3d at 1163. Instead, the point of *TransUnion* is that in determining whether an injury is sufficiently imminent, a plaintiff must allege a separate, concrete injury. As the Third Circuit noted, "[s]pecifically, that plaintiff can satisfy concreteness where 'the exposure to the risk of future harm itself causes a *separate* concrete harm.'" *Clemens*, 48 F.4th at 155 (quoting *TransUnion*, 594 U.S. at 436). The Third Circuit went on to hold that:

> Following *TransUnion*'s guidance, we hold that in the data breach context, where the asserted theory of injury is a substantial risk of identity theft or fraud, a plaintiff suing for damages can satisfy concreteness as long as he alleges that the exposure to that substantial risk caused additional, currently felt concrete harms. For example, if the plaintiff's knowledge of the substantial risk of identity theft causes him

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and imminence requirements of Article III injury by highlighting the 'substantial risk' that his PII will be misused in the future.*"); In re Mondelez Data Breach Litig.*, No. 23 C 3999, 2024 WL 2817489, at *3 (N.D. Ill. June 3, 2024).

> to presently experience emotional distress or spend money on mitigation measures like credit monitoring services, the plaintiff has alleged a concrete injury.

Id. at 155–56. This is the proper construction of *TransUnion*.

In *TransUnion*, the Supreme Court found that those "class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III." 594 U.S at 433. Like those plaintiffs in *TransUnion* for whom the Supreme Court did find standing, the confidential information of Plaintiffs-Appellants is now in the hands of unauthorized individuals. Moreover, the Amended Complaint's allegations go well beyond the mere dissemination of the Plaintiffs-Appellants' confidential data and allege actual misuse of that data. Simply put, if mere dissemination of confidential data is enough to satisfy the concrete injury-in-fact requirement for Article III standing, actual misuse of the compromised data surely satisfies the same requirement, even if that misuse does not result in any monetary harm.

For all these reasons, the trial court committed error in finding that Plaintiffs-Appellants did not properly plead an imminent injury sufficient to support standing. Under the *de novo* review standard, this Court may now – and should – apply Maine law recognizing that

imminent injury can serve to support standing, provide the analytical framework that Maine courts must apply in analyzing whether a particular claimed injury is sufficiently imminent and non-speculative, and find that Plaintiffs-Appellants met their pleading burden for standing here.

2. Plaintiffs-Appellants Pled Injury Sufficient for Standing in the Form of Actual Misuse.

"Nobody doubts that identity theft, should it befall one of these plaintiffs, would constitute a concrete and particularized injury." *Attias v. CareFirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017). Yet, this is precisely the Business and Consumer Court's holding, finding that even though Plaintiff-Appellant Buzzell alleges that his name and Social Security number were used by an unknown and unauthorized third party in an attempt to file federal and state tax returns (Am. Compl. ¶ 59 (App. 33), and that he spent significant time dealing with issues arising from the Data Breach, he fails to allege any injury that would support standing. This argument fails here, just as it failed in *Webb*, *supra*. In *Webb*, which was a similar healthcare-related data breach where Social Security numbers were in the compromised dataset, the First Circuit held that "the complaint's plausible allegations of actual misuse of Webb's stolen

PII to file a fraudulent tax return suffice to state a concrete injury under Article III." 72 F.4th at 373. While *Webb* is not binding on this Court, it is persuasive authority.

Also persuasive is federal circuit court case law involving posting a plaintiff's data to the dark web. Plaintiff-Appellant Buzzell also makes that allegation of injury, including that he was alerted to the fact that his private information was posted to the dark web after this data breach. Am. Compl. ¶ 59 (App. 33). Plaintiffs Desjardin, Grinnell, Bright, and Walsh also allege that the information stolen by the unauthorized actors here was placed for sale on the dark web. *Id*. ¶¶ 46, 73, 102, 115 (App. 31, 35-36, 40, 42). The Eleventh Circuit, in *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 889-90 (11th Cir. 2023*)* held that the posting of personal information on the dark web "establishes both a present injury—personal information floating around on the dark web—and a substantial risk of future injury—future misuse of personal information associated with the hacked credit card."). The trial court here completely ignored the dark web allegation, which provides a basis for standing on its own.

Notwithstanding this persuasive federal appellate precedent finding standing based upon two forms of actual misuse pled in this case, the Business and Consumer Court dismissed this case for lack of standing. In so doing, the trial court again (for the fourth time) misreads and misapplies this Court's decision in *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 2010 ME 93, 4 A.3d 492. Simply put, *Hannaford* is not a standing case. The questions certified to the Maine Law Court were not questions raised in the context of any challenge to standing. A cursory examination of the U.S. District Court's decision that led to the certified questions shows that the defendant in *Hannaford* did not raise any standing challenge under Federal Rule of Civil Procedure 12(b)(1), but instead filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 613 F. Supp. 2d 108, 115 (D. Me. 2009), aff'd in part, rev'd in part sub nom. *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011).

More to the point, the federal district court in *Hannaford* was examining the concept of "cognizable injury" in the context of a Rule 12(b)(6) challenge to the damages allegations – not a standing challenge.

The district court in *Hannaford* noted that for the otherwise properly stated negligence and implied contract claims to proceed, where the defendant contended "that the plaintiffs have alleged no damages that Maine law recognizes or any injury that would support an injunction," "a plaintiff must have suffered an injury for which Maine law will grant relief, in this case either damages or injunctive relief." *Hannaford*, 613 F. Supp. 2d at 131.

This is a distinction with a major difference, as pleading injury-in-fact for purposes of standing is a different, lower threshold than adequately pleading damages for state law claims. Multiple federal courts have articulated the distinction, and cautioned trial courts not to "conflate Article III's requirement of injury in fact with [the Plaintiffs'] potential causes of action, for the concepts are not coextensive." *Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076, 1084 (11th Cir. 2019); accord *Krottner v. Starbucks Corp.*, 406 F. App'x 129, 131 (9th Cir. 2010) ("[O]ur holding that [p]laintiffs[ ] pled an injury-in-fact for purposes of Article III standing does not establish that they adequately pled damages for purposes of their state-law claims."). Significantly, "the standard for alleging actual damages is generally higher than that for

plausibly alleging injury in fact." *Attias v. CareFirst, Inc.*, 365 F. Supp.3d 1, 13 (D.D.C. 2019).

The Maine Law Court, in *Hannaford,* was not deciding the question of what constitutes a legally cognizable injury for purposes of standing. Rather, the Law Court in *Hannaford* was asked to – and did – address this certified question in the context of evaluating the sufficiency of plaintiffs' negligence or implied contract claims pursuant to a Rule 12(b)(6) motion:

> In the absence of physical harm or economic loss or identity theft, do time and effort alone, spent in a reasonable effort to avoid or remediate reasonably foreseeable harm, constitute a cognizable injury for which damages may be recovered under Maine law of negligence and/or implied contract?

Hannaford, 2010 ME 93, ¶ 1, 4 A.3d 492, 494.

Placed in its proper context, the Business and Consumer Court committed error when it transposed the "cognizable harm" standard for evaluating the sufficiency of negligence or implied contract claims to the standing analysis. "[S]tanding is a threshold issue bearing on the court's power to adjudicate disputes." *Franklin Prop. Trust*, 438 A.2d at 220 (citations omitted). In Maine, standing is prudential, not constitutional:

> Our standing requirement is a matter of Maine jurisprudence. Unlike the language of article III, section 2 of the United

> States Constitution, the Maine Constitution contains no "case or controversy" requirement. Therefore, "[o]ur standing jurisprudence is prudential, rather than constitutional." *Collins v. State,* 2000 ME 85, ¶ 11, 750 A.2d 1257, 1261 (Calkins and Dana, JJ., concurring) (citation omitted). The basic premise underlying the doctrine of standing is to "limit access to the courts to those best suited to assert a particular claim." *Halfway House, Inc. v. City of Portland,* 670 A.2d 1377, 1380 (Me.1996). There is no set formula for determining standing. The judicial doctrine of standing "has been applied in varying contexts causing it to have a plurality of meanings." *Walsh v. City of Brewer*, 315 A.2d 200, 205 (Me.1974).

Roop v. City of Belfast, 2007 ME 32, ¶ 7, 915 A.2d 966, 968. But as the *Roop* court went on to note, "the standing threshold is minimal" in certain contexts. Federal courts echo this low burden under the more demanding Article III standard, noting that stablishing an injury-in-fact at the motion to dismiss stage "is not Mount Everest. The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that [a] claimant allege[ ] some specific, identifiable trifle of injury." *Knudsen v. MetLife Grp., Inc.*, 117 F.4th 570, 577 (3d Cir. 2024).

Under the lower, standing threshold, where the sufficiency of the legal claims is not at issue, but rather the sufficiency of the Plaintiffs to assert the particularized, individual claims for injury is, Plaintiffs-

Appellants' allegations of actual present misuse of their data are more than sufficient to establish standing, where they have a particularized, individual interest in the outcome of this litigation. *Hannaford* does not compel any different result, and the trial court erred in dismissing this case on standing grounds.

The trial court also completely discounts Plaintiff Grinnell's plain allegations of payment card fraud, resorting to speculating that fraudulent charges were reimbursed when the Amended Complaint makes no such allegation. Order at 8 (App. 16). Under the guise of not being required to take all inferences in favor of the Plaintiffs-Appellants when assessing a Rule 12(b)(1) motion, the trial court made a merits determination that Plaintiff Grinnell was reimbursed for fraudulent credit card charges, because the trial court found (based upon no authority) that it was "more probable." *Id.* As the court pointedly noted in *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.,* 440 F. Supp. 3d 447, 494-95 (D. Md. 2020), the trial court "turns the pleading requirement on its head. The pleadings do not indicate that plaintiffs were reimbursed." *Id.* at 494–95; *see also In re Brinker Data Incident Litig.*, No. 3:18-CV-686-J-32MCR, 2020 WL 691848, at *8 (M.D. Fla. Jan.

27, 2020) ("Plaintiffs did not allege that the charges were reimbursed—only that they incurred fraudulent charges. These allegations are sufficient to withstand a motion to dismiss.").

"A court deciding a motion to dismiss does not adjudicate facts but must evaluate the complaint's allegations." *20 Thames St. LLC v. Ocean State Job Lot of Maine 2017 LLC*, 2021 ME 33, ¶ 14, 252 A.3d 516, 521 (citing *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). The trial court erred in deciding an open question of fact at the pleadings stage by taking an inference that flies in the face of what the Amended Complaint alleges.

The trial court further erred by interjecting the unsupported conclusions that the fraudulent tax returns "were obviously unsuccessful and no harm befell Plaintiff Buzzell." Order at 8 (App. 16). Neither of these conclusions can be found within the four corners of the Amended Complaint. Rather than allowing the Parties to conduct discovery and letting the litigation process test the sufficiency of these allegations, the trial court simply substituted its own judgment for due process. This was error.

The trial court also erred in substituting its own judgment (and showing its disdain for) the allegations of an increase in spam and

phishing attempts post data breach. Order at 8 (App. 16). The receipt of spam and phishing attempts following a data breach are readily recognized as injuries by courts analyzing data breach claims. Indeed, Plaintiffs-Appellants allege that such spam is designed to solicit additional information from victims to compile "fullz" or to initiate phishing attacks (Am. Compl. ¶¶ 182-86 (App. 59-60) "which are ways for hackers to exploit information they already have to get even more PII." *In re Zappos.com, Inc.*, 888 F.3d 1020, 1027 (9th Cir. 2018).[2] These allegations also plead an injury sufficient to establish standing.

In rejecting all of Plaintiffs-Appellants' allegations of injury based upon actual misuse of their compromised data, the trial court closes the doors to Maine courthouses for every data breach case other than those rare cases where a plaintiff suffers unreimbursed monetary harm from

[2] *See also Solomon v. ECL Grp., LLC*, No. 1:22-CV-526, 2023 WL 1359662, at *4 (M.D.N.C. Jan. 31, 2023) (Increased receipt of spam following data breach "sufficient to satisfy Article III standing"); *Farley v. Eye Care Leaders Holdings, LLC*, No. 1:22-CV-468, 2023 WL 1353558, at *4 (M.D.N.C. Jan. 31, 2023); *Baldwin v. Nat'l W. Life Ins. Co.*, No. 2:21-CV-04066-WJE, 2021 WL 4206736, at *4 (W.D. Mo. Sept. 15, 2021) ("this Court finds that the allegations of spam phone calls and emails can qualify as an injury to support Plaintiffs' claims."); *In re GE/CBPS Data Breach Litig.*, No. 20 CIV. 2903 (KPF), 2021 WL 3406374, at *6 (S.D.N.Y. Aug. 4, 2021) (finding evidence of malicious use of stolen data where plaintiff alleged "that he has received phishing and scam emails to his personal email address and phishing and scam phone calls to his personal phone number").

actual fraud or identity theft. Under the "minimal standing threshold" articulated by this Court in *Roop*, *supra*, the trial court is simply wrong. Accordingly, the injuries alleged by Plaintiffs-Appellants from actual misuse are sufficiently concrete and redressable to support standing. The trial court committed error when it held that Plaintiffs-Appellants' actual misuse allegations did not allege an injury for standing purposes.

3. Plaintiffs-Appellants' Allegations of Loss of Privacy, Lost Benefit of the Bargain, and Diminished Value of Private Information are Injuries in Fact for Purposes of Standing at the Pleadings Stage.

The trial court completely ignored Plaintiffs-Appellants' allegations of loss of privacy, lost benefit of the bargain, and diminished value of private information, all of which are injuries in fact that imbue Plaintiffs-Appellants with standing. Plaintiffs-Appellants alleged lost benefit of the bargain here. Am. Compl. ¶¶ 10, 18, 89, 258 (App. 24, 26, 38, 74). Plaintiffs-Appellants further alleged that part of their agreement with MDIH included the material obligation that MDIH would implement reasonable data safeguards sufficient to maintain that data as confidential. *Id*. ¶¶ 262-66 (App. 75). Plaintiffs-Appellants therefore did not get the benefit of their contractual bargain (medical services with data security), and they should be compensated for Defendants' failure to

provide what was promised. "The overriding purpose of an award of compensatory damages for a breach of contract is to place the plaintiff in the same position as that enjoyed had there been no breach." *Marchesseault v. Jackson,* 611 A.2d 95, 98 (Me. 1992) (citing *Forbes v. Wells Beach Casino, Inc.,* 409 A.2d 646, 654 (Me.1979).) Accordingly, Plaintiffs-Appellants are entitled to damages that would place them "in as good a position as [they] would have been in had the contract been performed." *Deering Ice Cream Corp. v. Colombo, Inc.*, 598 A.2d 454, 457 (Me. 1991).

While Maine courts have not addressed the question of whether lost benefit of the bargain in a data breach case is a cognizable injury for purposes of standing, multiple courts in other jurisdictions have. Those courts have addressed this injury and held that it is sufficient to confer standing. *See, e.g., In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d at 462-66 (recognizing injury caused by lost benefit of bargain related to data security); *Kostka v. Dickey's Barbecue Rests., Inc.*, No. 3:20-CV-03424-K, 2022 WL 16821685, at *4 (N.D. Tex. Oct. 14, 2022) (similar); *see also Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012) ("Injuries to

rights recognized at common law—property, contracts, and torts—have always been sufficient for standing purposes.").

Similarly, Plaintiffs-Appellants plead that their privacy was invaded. Am. Compl. ¶¶ 18, 45, 58, 72, 89, 101 (App. 26, 31, 33, 35, 38, 40). There is more in the Amended Complaint than mere legal conclusions of this invasion, as Plaintiffs-Appellants make numerous factual allegations of how cybercriminals accessed and wrongfully acquired their confidential data, including protected health information, thereby invading their privacy. *See*, *e.g., id.* ¶¶ 8, 36, 37 (App. 24, 27). Invasion of privacy is a compensable injury under Maine law. *Desjardin v. Wirchak*, 2023 WL 6309684, at *7 (Me. Bus. Ct. Aug. 31, 2023) ("it is an actionable tort to make an unauthorized intrusion upon a person's physical or mental solitude or seclusion.") (quoting *Nelson v. Me. Times,* 373 A.2d 1221, 1223 (Me. 1977). As for the claims of injury based upon invasion of privacy, "the plaintiff need not plead or prove special damages. Punitive damages can be awarded on the same basis as in other torts where a wrongful motive or state of mind appears") *Berthiaume's Est. v. Pratt*, 365 A.2d 792, 795 (Me. 1976).

"[C]ourts across the country have held that 'the invasion of [a plaintiff's] privacy interest that occurred as a result of the theft of their PII is a concrete injury that establishes Article III standing." *Medoff v. Minka Lighting, LLC*, No. 22-cv-8885, 2023 WL 4291973, at *3 (C.D. Cal. May 8, 2023); (quoting *Wynne v. Audi of Am.*, No. 21-cv-08518, 2022 WL 2916341, at *4 (N.D. Cal. July 25, 2022) (internal quotations omitted).); *Flores-Mendez v. Zoosk, Inc.*, No. 20-cv-0492, 2021 WL 308543, at *4 (N.D. Cal. Jan. 30, 2021) ("plaintiffs adequately allege damages in the form of a heightened risk of future identity theft, loss of privacy with respect to highly sensitive information, loss of time, and risk of embarrassment"); *Smallman v. MGM Resorts Int'l,* 638 F. Supp. 3d 1175, 1188 (D. Nev. 2022) ("In the data breach context, courts within the Ninth Circuit have found that an individual's loss of control over the use of their identity due to a data breach and the accompanying impairment in value of PII constitutes non-economic harms.").

Plaintiffs-Appellants also allege injury in the form of the diminished value of their Private Information. Am. Compl. ¶¶ 46, 59, 73, 89, 102, 115 (App. 31, 33, 35, 38, 40, 42). In the data breach context, "the value of consumer [data] is not derived solely (or even realistically) by its

worth in some imagined marketplace where the consumer actually seeks to sell it to the highest bidder ….” *In re Marriott*, 440 F. Supp. 3d at 462; *see also In re Mednax Servs., Inc., Customer Data Sec. Breach Litig.*, 603 F. Supp. 3d 1183, 1204 (S.D. Fla. 2022) (“[P]laintiffs need not reduce their . . . PII to terms of dollars and cents in some fictitious marketplace where they offer such information for sale to the highest bidder.”) (collecting cases); Rather, “the Data Breach devalued Plaintiffs’ PII by interfering with their fiscal autonomy.” *Smallman*, 638 F. Supp. 3d at 1191. This Court should similarly recognize that the value of PII and PHI is derived not from its sale but by virtue of its confidential and exclusive nature that allows Plaintiffs-Appellants to secure credit at favorable terms, verify their identities and financial histories, or even to receive medical services from MDIH.

All of these actual injuries are pled in the Amended Complaint. All support standing. None of these were addressed by the trial court. It was error to dismiss Plaintiffs-Appellants’ claims for lack of standing in the face of these allegations.

4. Plaintiffs-Appellants' Allegations of Emotional Distress Sufficiently Allege Injury at the Pleadings Stage.

In its recitation of the facts alleged in Amended Complaint, the trial court acknowledged the allegations of "stress, fear, and anxiety." Order at 4 (App. 12), citing Am. Compl. ¶¶ 50, 63, 77, 106, 119 (App. 32, 34, 36, 41, 43). Yet in its analysis, the trial court is silent about the effect of these allegations. This was in error, as multiple courts have held that emotional distress allegations are enough to establish standing.

The federal Third Circuit, in *Clemens,* held that the plaintiff had alleged "several additional concrete harms that she has already experienced" as a result of the imminent injury and ongoing risk, including "her emotional distress." 48 F.4th at 158. In reaching this conclusion, the Third Circuit relied heavily upon the Supreme Court's decision in *TransUnion*, noting that the Supreme Court "did indicate that 'a plaintiff's knowledge that he or she is exposed to a risk of future ... harm could cause its own current emotional or psychological harm,' which could be sufficiently analogous to the tort of intentional infliction of emotional distress." *Clemens*, 48 F.4th at 155 (quoting *TransUnion,* 594 U.S. at 436, n.7); *see also Bowen v. Paxton Media Grp., LLC*, No. 5:21-

CV-00143-GNS, 2022 WL 4110319, at *5 (W.D. Ky. Sept. 8, 2022) (finding plaintiffs "suffered emotional damages related to the breach, which *TransUnion* specifically recognized as a potential concrete injury").

In denying a similar motion to dismiss to the one filed in this case, the district court for the District of New Mexico found emotional distress claims to be injury sufficient to establish standing:

> Plaintiffs also allege a variety of non-speculative damages. Plaintiffs allege that, after the data breach, they spent increased time dealing with spam calls and monitoring their credit for suspicious activity. . . Plaintiffs further allege they "suffered a loss of value of their Private Information," . . . and have experienced anxiety and emotional distress because of the increased risk of having their data misused. . . .

Charlie v. Rehoboth McKinley Christian Health Care Servs., CV 21-652 SCY/KK, 2022 WL 1078553, *8 (D.N.M. Apr. 11, 2022). Also, "allegations of emotional distress, *coupled with the substantial risk of future harm*, are sufficiently concrete to establish standing in a claim for damages." *Desue*, *v. 20/20 Eye Care Network, Inc.*, No. 21-CIV-61275-RAR, 2022 WL 796367, at *5 (S.D. Fla. Mar. 15, 2022) (emphasis in original). Other district courts have made similar rulings. *See Dannunzio v. Liberty Mut. Ins. Co.,* No. 21-1984, 2021 WL 5117767, at*5 (E.D. Pa. Nov. 5, 2021) (allegations a data breach caused emotional distress constitutes injury

for Article III purposes); *Foster v. Health Recovery Servs., Inc.*, 493 F. Supp. 3d 622, 633 (S.D. Ohio 2020). Contrary to the trial court's finding of no injury plead for purposes of standing, these allegations of anxiety and emotional distress also plead injury.

5. The Business and Consumer Court Erred as a Matter of Law by Dismissing the Plaintiffs-Appellants' Claims with Prejudice.

Finally, the Business and Consumer Court's dismissal with prejudice is an unambiguous error of law. This Court's prior holdings plainly state that any dismissal for lack of standing is without prejudice, because the plaintiff "failed to show the minimum interest that is a predicate to bringing that claim in the first place." *Bank of New York v. Dyer*, 2016 ME 10, ¶ 10, 130 A.3d 966, 969. The Court in *Bank of New York* explained the logic of its holding further:

> A dismissal with prejudice "operate[s] as an adjudication on the merits." *Johnson v. Samson Constr. Corp.,* 1997 ME 220, ¶ 8, 704 A.2d 866 (quotation marks omitted). Because there is no dispute that the Bank lacked standing and therefore never had "the rights necessary to get through the courthouse door and pursue [its] claim in the first place," *Girouard,* 2015 ME 116, ¶ 8 n. 3, 123 A.3d 216, the trial court's power to make any adjudication on the merits of that claim, including a dismissal with prejudice, was not invoked. Accordingly, a dismissal without prejudice, which disposed of the case without exploring its merits, was the required result.

Bank of New York, 2016 ME 10, ¶ 11, 130 A.3d at 969. This clear error of law – standing alone – is sufficient basis to reverse the Business and Consumer Court's judgment. It also shows that the trial court was not performing a proper evaluation of the sufficiency of the pleadings, but rather was improperly deciding the merits of this data breach case without affording Plaintiffs-Appellants any forum in which to test their legally sufficient claims.

CONCLUSION

The Business and Consumer Court's order of dismissal with prejudice should be reversed, and the case remanded to the trial court for further proceedings.

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Respectfully submitted,

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