STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

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LAW COURT DOCKET NO. BCD-24-481

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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

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

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# BRIEF OF APPELLEE

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## I. INTRODUCTION

Over fifteen years ago, the Law Court was tasked with evaluating allegations of injury stemming from a data security incident and found no legally cognizable injury existed under Maine law.[1] Since then, instances of cyberattacks, cybersecurity evasion, and data security incidents perpetrated by criminal actors have proliferated daily life. Cybercriminals have impacted public safety, governments, industries, and organizations of all types and sizes, including nonprofit hospitals that provide critical links to emergent trauma care in areas like Mount Desert Island. With an average of more than 4,000 ransomware attacks occurring daily since January 1, 2016, it seems it is no longer a matter of if, but when an entity will be victimized.[2] Even the state of Maine itself experienced one such attack in May of 2023, when "a software vulnerability in MOVEit, a third-party file transfer tool…used by thousands of entities worldwide to send and receive data…was exploited by a group of cybercriminals and allowed them to access and download files" belonging to more than 1.3 million Maine residents.[3] That same month Mount Desert Island Hospital learned it was the victim of a cyberattack.

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[1] *See In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.,* 2010 ME 93, 4 A.3d 492 (Me. 2010).

[2] Federal Bureau of Investigation, How to Protect Your Networks from Ransomware, https://www.fbi.gov/file-repository/ransomware-prevention-and-response-for-cisos.pdf (Last viewed May 15, 2025).

[3] State of Maine information accessed and downloaded included the full names, Social Security numbers, dates of birth, state identification numbers, taxpayer identification numbers, and medical and health insurance information for 1,324,118 individuals. *See* https://www.maine.gov/agviewer/content/ag/985235c7-cb95-4be2-8792-a1252b4f8318/28acf6fd-b31d-427f-9988-1edb8ee5fda2.shtml

As law makers, enforcement, and legal systems grapple with the rapid evolution and expansion of cybercrime, legislation and regulations have evolved to require direct notice to individuals and published disclosure on government websites. Class action lawsuits subsequently filed have kept pace. Litigation resulting from data breach incidents has multiplied, as nearly one in five ransomware[4] incidents resulted in a lawsuit in 2023 and voluntary dismissal of cases increased from 5% in 2022 to 77% in 2023.[5] Further, it is predicted that in 2025 alone "ransomware costs will reach $57 billion annually." These ever-rising costs and shifting attacks have significant and complex consequences. When it comes to medical providers and emergent care, the impact of ransomware and cyberattacks on hospitals can even cross the line from an economic crime to a "threat-to-life crime" depending on the intent of the attacker.[6]

However, while incessant cyberattacks and rampant ransomware have inflicted significant harm on entities of all types, there is limited evidence to suggest that these events lead to actual episodes of individual identity theft. As Plaintiffs appropriately concede, it is only in "***rare cases*** where a plaintiff suffers unreimbursed monetary harm."

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[4] "Ransomware is a type of malicious software—or malware—that prevents you from accessing your computer files, systems, or networks and demands you pay a ransom for their return." *See* Federal Bureau of Investigation *How We Can Help You" Ransomware,* https://www.fbi.gov/how-we-can-help-you/scams-and-safety/common-frauds-and-scams/ransomware (Last viewed May 15, 2025).

[5] James Coker, *1 in 5 US Ransomware Attacks Triggers a Lawsuit*, May 1, 2024, https://www.infosecurity-magazine.com/news/ransomware-attacks-trigger-lawsuit/ (Last viewed May 15, 2025).

[6] John Riggi, American Hospital Association, Ransomware on Hospitals Have Changed, https://www.aha.org/center/cybersecurity-and-risk-advisory-services/ransomware-attacks-hospitals-have-changed (Last viewed May 15, 2025).

Appeal p. 36 (emphasis added). And according to Plaintiffs' complaint, this is not one of those rare cases.

Like almost every resident of Maine and beyond, Plaintiffs allege they are at risk of harm because they were notified of a cyberattack discovered in May 2023 that *may* affect their information. However, such speculation into whether one of these six named Plaintiffs will be the admittedly "rare" one who somehow, someday, someway befalls an unmitigated harm cannot establish a past or present cognizable injury. The law of Maine "does not compensate individuals for the typical annoyances or inconveniences that are a part of everyday life." *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.,* 2010 ME 93, ¶ 9, 4 A.3d 492, 496.

## II. STATEMENT OF ISSUES

1. Whether Plaintiffs' allegations of unauthorized charges that may or may not have been reimbursed, an attempted tax return, an increased amount of spam, or speculative allegations of dark web presence constitute a cognizable injury under Maine law.

2. Whether Plaintiffs' allegations of risk of future harm establishes a cognizable injury under Maine law.

3. Whether Plaintiffs' allegations of loss of privacy, lost benefit of bargain, diminished value of potentially impacted information, or emotional distress can establish injury cognizable under Maine law.

4. Whether the economic loss doctrine is dispositive of Plaintiffs' claims should the Court find in the affirmative for issues 1 through 3.

## III. SUMMARY OF ARGUMENT

Plaintiffs lack cognizable injury under Maine law and therefore are without standing and cannot establish prima facie evidence of their claims. The mere occurrence of a data security incident does not manufacture standing for everyone who receives notice of an incident. The law "does not compensate individuals for the typical annoyances or inconveniences that are a part of everyday life" and time and effort alone to avoid or remediate reasonably foreseeable harm, does not constitute a cognizable injury for which damages may be recovered under Maine law. *Hannaford*, ¶¶ 8, 9 4 A.3d at 492. Therefore, plaintiffs, including those who incurred fraudulent charges (subsequently reimbursed) after their information was "stolen" by "data thieves" were found to "have suffered no physical harm, economic loss, or identity theft." *Id*.

Central to the analysis of a class action complaint stemming from a data security incident is whether or not a plaintiff has sufficiently pled allegations of an injury. Often at issue is whether plaintiffs who have alleged no misuse of their information have a cognizable injury and further, whether plaintiffs who have alleged misuse but remain silent as to the harm suffered or whose allegations of injury are conclusively pled have a cognizable injury under Maine law. According to the precedent of this Court relied upon by the Business and Consumer Court, they do not.

None of these Plaintiffs have alleged a cognizable injury fairly traceable to an action of MDIH. While Maine is a notice-pleading state, conclusory statements are

legally deficient and reasonable inferences may only be drawn when they logically flow from *established facts*. The sole Plaintiff alleging unauthorized charges cannot avoid her burden establish injuries by intentionally omitting a material fact: whether the alleged charges have been reimbursed. Logically, when two or more equally probably inferences exist based on the pleadings, the court may not choose one over the others based on mere surmise and conjecture. Plaintiffs argue they do not have to allege whether or not unauthorized charges were reimbursed and assert causation has been conclusively established. However, as the trial court recognized, when it comes to establishing a cognizable injury "the approach advocated by Plaintiffs is not the law of Maine." *Mt. Desert Isl. Hosp.*, No. BCD-CIV-2023-00070, 2024 WL 4710279, at *5.

Absent actual injury or damages, Plaintiffs allege they are at risk of future harm should their potentially impacted information be used at some future point by some unknown criminal actor. Such tenuous and speculative allegations fail to establish a cognizable injury on their face and are directly contradicted by Plaintiffs' pleadings and concessions. Now over two years later, and still without any allegations of actual injury or damages, Plaintiffs wrongly accuse the trial court of "a complete negation of the notice pleading standard in Maine" resulting in cases being "stillborn at the pleadings stage" because the court "entirely ignored" their allegations. Appeal p. 7-8, 19. Plaintiffs now ask this Court to create a lower pleading standard that would amount to universal standing for any and all individuals who merely receive notice their information *may* be affected

by data security incident. As even the small sampling of dated statistics in Plaintiffs' complaint highlights- data security incidents happen frequently and potentially impact millions of records; however as admitted by Plaintiffs it is only in "rare cases where a plaintiff suffers unreimbursed monetary harm from actual fraud or identity theft." Am. Compl. ¶¶ 123-25 (App. 44); Appeal p. 36-37.

The trial court examined the "question of what constitutes a legally cognizable, actual injury to patients in the wake of unauthorized access of a hospital's systems by an unknown bad actor." *Mt. Desert Isl. Hosp.*, No. BCD-CIV-2023-00070, 2024 WL 4710279, at *1. The court reasoned "in the face of a [data security incident] which creates a future risk of identity theft, Maine law requires alleging facts sufficient to plead a legally cognizable, actual injury. All six counts of Plaintiffs' Amended Complaint fail to cross this essential threshold and must be dismissed." *Mount Desert Island Hosp. Data Sec. Incident Litigation*, 2024 WL 4710279, at *3 (emphasis added). Therefore, the court concluded that "[a]s Plaintiffs have not pled an injury cognizable under Maine Law, MDIH's Motion to Dismiss is GRANTED on all counts. Counts I-VI are DISMISSED with prejudice." *Id.* 2024 WL 4710279, at *7. The Law Court should affirm the trial court's decision on the same grounds. However, the Court may affirm dismissal on alternative grounds such as Maine's economic loss rule.

## IV. ARGUMENT

Plaintiffs have failed to establish an injury that is "[c]apable of being known or recognized" under Maine law for purposes of standing *and* stating a claim and therefore dismissal is warranted. *See* COGNIZABLE, *Black's Law Dictionary* (12th ed. 2024). In order to survive a motion to dismiss pursuant Rules 12(b)(1) and 12(b)(6) of the Maine Rules of Civil Procedure, each plaintiff must, in part, sufficiently plead an injury cognizable under Maine law that is fairly traceable to, or caused by, an identified action of a defendant to establish standing and substantiate their claims. *See* Me. R. Civ. P. 12. Here they have not and therefore the trial court did not commit an error or abuse its discretion in dismissing all claims.

### A. Maine Precedent is Binding, Persuasive, and Instructive

The Law Court should not ignore its longstanding precedent in lieu of nonbinding decisions in its review of the trial court's determination Plaintiffs have not pled an injury cognizable under Maine law. "Before embarking on this Maine-centric, multi-factor analysis…a threshold question asks whether our precedent has already addressed the issue presented." *Dupuis v. Roman Cath. Bishop of Portland*, 2025 ME 6, ¶ 12, 331 A.3d 294, 301. While the trial court "acknowledge[d] the developing law of other jurisdictions" and Plaintiffs' "interesting argument" regarding nonbinding decisions, the court determined they "do[] not reflect the law in Maine." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *6. As the trial court held: Maine law is applicable, controlling, and

dispositive of Plaintiffs' claims. *Id.* Plaintiffs have not met their burden to sufficiently plead a cognizable injury caused by an act or omission of MDIH and therefore cannot survive a motion to dismiss pursuant to both Rules 12(b)(1) and 12(b)(6) of the Maine Rules of Civil Procedure. The Law Court need not conduct a fifty-state survey to determine whether a cognizable injury exists when "Maine law appears up to the task." *See Gonzales*, 2020 WL 6596389, at *2.

### 1. Plaintiffs' Injury Allegations Cannot Establish Standing Pursuant to Rule 12(b)(1)

"Standing of a party to maintain a legal action is a "threshold issue" and [the] courts are only open to those who meet this basic requirement." *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984). "It is the plaintiffs' burden to establish standing, which is determined based on the circumstances that existed when the complaint was filed." *Clardy*, ¶ 12, 322 A.3d at 1158 (citing *Black v. Bureau of Parks & Lands*, 2022 ME 58, 288 A.3d 346). "To have standing, a party must show they suffered an injury that is fairly traceable to the challenged action" of the defendant "that is likely to be redressed by the judicial relief sought." *Collins*, ¶ 6, 750 A.2d at 1257; *See also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)(An injury must not be the result of the independent action of some third party not before the court).

"[T]he hallmark of standing is the plaintiff's personal stake in the outcome of the litigation," meaning "the injury must be distinct from the harm suffered by the public-at-large." *Clardy*, ¶ 12, 322 A.3d at 1158, (citing *Collins*, ¶ 5, 750 A.2d at 1257). A plaintiff

must "demonstrate a concrete and particularized injury that is actual or imminent, not conjectural or hypothetical." *Id.*, 2024 ME 61, ¶ 23, 322 A.3d 1158 citing *Madore v. Maine Land Use Regul. Comm'n*, 1998 ME 178, ¶ 13, 715 A.2d 157 (quotation marks omitted). Absent cognizable injury, a plaintiff cannot establish a direct adverse effect on their "property, pecuniary or personal rights" and the court must dismiss their action for lack of standing. *Collins*, ¶ 6, 750 A.2d at 1257 citing *Stull*, ¶ 11, 745 A.2d at 979.

Plaintiffs argue they have established standing because it requires "a different, lower threshold" than applied in *Hannaford* and urges this Court to craft a lower pleading standard for establishing a cognizable injury in these types of cases based on nonbinding federal rulings. Appeal p. 31. The trial court found "the approach advocated by Plaintiffs is not the law of Maine," but nonetheless analyzed the federal requirements "[t]o establish Article III standing [that] an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling" and noted these factors make up the "injury in fact" analysis applied in federal courts.[7] *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *5; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)("State courts are not subject to applying the same Article III standard, but there is a parallel with plaintiffs needing to allege a recognizable injury."). The trial

[7] "Federal Courts are limited to hearing only "cases" or "controversies." U.S. Const. art. III, § 2. For there to be a case or controversy, a plaintiff must have standing.

court concluded Plaintiffs failed to allege any recognizable injury sufficient to overcome dismissal.

### 2. Plaintiffs' Injury Allegations Cannot Establish Their Claims Pursuant to Rule 12(b)(6)

A plaintiff must also allege a cognizable injury sufficient to establish prima facie evidence of each claim. *Nader v. Maine Democratic Party*, 2012 ME 57, ¶ 34, 41 A.3d 551, 562, abrogated by *Gaudette v. Davis*, 2017 ME 86, ¶ 34, 160 A.3d 1190. Therefore, to state a claim upon which relief may be granted for causes of action requiring damages, a plaintiff must "show actual injury or damage." *Am. v. Sunspray Condo. Ass'n*, 2013 ME 19, ¶ 23, 61 A.3d 1249, 1257 citing *Hannaford*, ¶ 8, 4 A.3d at 492 (internal quotations omitted); *See also Burns v. Architectural Doors & Windows*, 2011 ME 61, ¶ 25, 19 A.3d 823, 830. In order to establish liability for individual claims such as negligence, a plaintiff "must show that the defendant's negligence was the proximate cause of the plaintiff's harm." *Walter v. Wal-Mart Stores, Inc*., 2000 ME 63, ¶ 17, 748 A.2d 961, 968 (Causation means there is "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.") *See also Wheeler v. White*, 1998 ME 137, ¶ 7, 714 A.2d 125.

Plaintiffs have failed to establish any legally cognizable injury that was the proximate cause of or fairly traceable to MDIH. Speculative or conclusive allegations cannot manufacture standing or circumvent Plaintiffs' burden to establish an injury cognizable under Maine law. Therefore, Plaintiffs are without standing, cannot establish

prima facie evidence of their claims, and dismissal was correctly granted pursuant to Rule 12(b)(1) and 12(b)(6) of the Maine Rules of Civil Procedure. Insufficient factual pleadings cannot be remedied by ignoring Maine law merely because this case involves a modern-day subject matter: the risk of harm from cyberattacks.

### B. Plaintiffs' Allegations of Mitigation Do Not Establish Cognizable Injury Under Maine Law

Fifteen years ago, this Court examined allegations of reimbursed and unreimbursed unauthorized charges posted to numerous plaintiffs' accounts and their mitigative efforts in response to the same following a data security incident and found no cognizable injury under Maine law. *Hannaford*, ¶ 3, 4 A.3d at 494.

In *Hannaford*, "data thieves breached [defendant's] computer system" and "due to the data theft, a number of [defendant's] customers initially experienced fraudulent and unauthorized charges on their credit card accounts or bank accounts. These customers expended time and effort identifying the fraudulent charges and convincing their banks and credit card companies that the charges should be reversed." *Hannaford*, ¶ 3, 4 A.3d at 494. In applying Maine law, the United States District Court of Maine held in part that plaintiffs who "do not claim that they have had to pay [unauthorized charge] amounts or that they remain outstanding" and do not "claim specific expenses incurred to remove the fraudulent charges" failed to establish a cognizable injury. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 613 F. Supp. 2d 108, 133 (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).

After ruling on the motion to dismiss, 613 F.Supp.2d 108, plaintiffs moved for reconsideration and for certification of questions to the Maine Supreme Judicial Court. *Hannaford*, 660 F. Supp. 2d at 94. In the absence of unreimbursed fraudulent charges[8] this Court held mitigation efforts, including those undertaken to have *fraudulent charges* reimbursed, do not establish a cognizable injury "in the absence of physical harm or economic loss or identity theft."[9] *See Hannaford*, ¶ 3, 4 A.3d at 494.

Plaintiffs' complaint is replete with duplicative, conclusory allegations they "suffered ascertainable losses" for "the value of their time reasonably incurred to remedy or mitigate the effects of the attack." Am. Compl. ¶¶ 10, 18, 51, 64, 78, 88, 102, 120 (App. 24, 26, 32, 34, 36, 38, 40, 43). These allegations fail to establish any cognizable injuries as pled and under Maine law. "The doctrine of mitigation of damages, or

[8] The single plaintiff that alleged an unreimbursed fraudulent charge on her account was found to have a cognizable injury. *Hannaford*, ¶ 6, 4 A.3d at 495. However, as this Court recognized, that charge was later reimbursed, ending the plaintiffs' case.

[9] Following this Court's ruling, the parties cross-appealed and the United States Court of Appeals for the First Circuit held that "[u]nder Maine contract and negligence law, ***costs incurred*** by store's customers in obtaining replacement debit and credit cards and identity theft insurance, after thieves had stolen electronic payment data from store, were cognizable under Maine law." *Hannaford*, 659 F.3d at 151 (emphasis added). However, on remand after "claims against Hannaford [had] been pared down to negligence and breach of implied contract, and the damages [were] limited to out-of-pocket expenditures customers made" as specifically alleged for "fees to obtain new cards; fees paid to expedite delivery of new cards; and fees paid for identity theft insurance and credit monitoring" the court denied plaintiffs' motion for class certification. *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21, 33 (D. Me. 2013)(finding plaintiffs failed to show predominance because of an inability to demonstrate they can "prove total damages to the jury is fatal."). While not binding, the tortured tale and ultimate demise of this litigation for lack of demonstrable injury underscores the lack of support for such tenuous allegations of injury stemming from data security incidents.

avoidable consequences, encourages plaintiffs to take reasonable steps to minimize losses caused by a defendant's negligence by prohibiting recovery for any damages that the plaintiff could reasonably have avoided." *Id.*, ¶ 12, 4 A.3d at 497. As this Court reasoned "it must still be established that the time and effort expended constitute a legal injury rather than an inconvenience or annoyance." *Id*. Accordingly, this Court held plaintiffs whose information was accessed in a cyberattack, stolen by "data thieves" and fraudulently used, resulting in charges posting to their accounts that were later reimbursed had failed to allege a cognizable injury under Maine law. *Id.*, ¶ 12, 4 A.3d at 496.

The trial court has repeatedly analyzed and applied the Law Court's longstanding precedent and when doing so again here reasoned that in *Hannaford,*

> there was actual misuse [of plaintiffs' information] yet the Law Court clearly found the time the plaintiffs there spent in mitigation was not a form of cognizable damages. Thus, Plaintiffs here have suffered no physical harm, economic loss, or identity theft, as the exposure of their personal data on its own is not a legally cognizable harm, and the neither is their expenditure of time on mitigation efforts.

*Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *6 citing *Hannaford*, ¶¶ 3, 8, 11, 4 A.3d at 492. No Plaintiffs alleged unreimbursed fraudulent charges like the single *Hannaford* plaintiff maintained for the initial stages of litigation (until reimbursement). *Hannaford*, ¶ 3, 4 A.3d at 494. Therefore, allegations of mitigation undertaken in response to notice of a data security incident as alleged here, which over the last fifteen years have certainly

become more regular and prevalent inconveniences in everyday life, do not and should not establish cognizable injuries under Maine law.

### C. Plaintiffs Cannot Meet Their Burden of Establishing Cognizable Injury Under Maine Law With Speculation or Conclusions

While Maine is a notice-pleading state, conclusory statements are legally deficient absent sufficient facts to support them; reasonable inferences may only be drawn when they logically flow from established facts. *See Carey v. Bd. of Overseers of the Bar*, 2018 ME 119, ¶ 23, 192 A.3d 589; *Hersum v. Kennebec Water Dist*., 151 Me. 256, 263, 117 A.2d 334, 238 (1955). "It is well settled law that damages are not recoverable when uncertain, contingent or speculative." *Michaud v. Steckino*, 390 A.2d 524, 530 (Me. 1978); *Also see Wood v. Bell*, 2006 ME 98, ¶ 21, 902 A.2d 843 (Me. 2006) (Damages must be grounded on established positive facts or on evidence from which their existence and amount may be determined to a probability. They must not rest wholly on surmise and conjecture.). Critically, when two or more equally probable inferences exist, the court may not choose one over the others based on mere surmise and conjecture. *Id*., 117 A.2d at 288. Plaintiffs' pleadings are replete with conjecture, conclusions, and contradictions leaving the trial court with no option but to speculate as to the most basic facts required to establish any cognizable injury and therefore dismissal was both appropriate and necessary.

### 1. Contradictory Pleadings Fail to Establish Standing or Prima Facie Evidence of Plaintiffs' Claims

Contradictory allegations that "are at odds with each other" cannot form the basis of cognizable injury under Maine law. *See Michaud*, 390 A.2d at 530; *Manter v. United States*, No. 1:22-CV-00030-JDL, 2024 WL 691384, at *2 (D. Me. Feb. 20, 2024). Conclusive contradictions only further illustrate the speculative nature of Plaintiffs' allegations and the trial court's lack of error in granting dismissal. For instance, Plaintiffs allege they were expressly notified their "information *may* be affected" and that MDIH was conducting a review of the "information *potentially* impacted to determine the type of information and to whom it related". Am. Compl. ¶ 36 (App. 29)(emphasis added). The notice stated the "types of information *may* include" and goes on to list each piece of information that *may* be affected. *Id.* There are no allegations potentially impacted information was exfiltrated or stolen as concluded in verbatim pleadings. Am. Compl. 45-46, 58-59, 72-73, 87, 101-102, 114-115 (App. 31, 33, 35-36, 38, 40, 42-43). "Aside from the factual allegations pulled from the [n]otice, [p]laintiffs provide no additional allegations that might provide a credible basis to conclude their [information] w[as] taken." *Greenstein v. Noblr Reciprocal Exch*., No. 22-17023, 2024 WL 3886977, at *2 (9th Cir. Aug. 21, 2024). The same holds true here.

In *Greenstein*, the Ninth Circuit determined that although plaintiffs affirmatively alleged their information was stolen by cyberthieves, such allegations were merely conclusory and unsupported by the facts alleged within the notice. *Id.* Therefore the court

held "[p]laintiffs ha[d] not sufficiently alleged that their personal information was actually stolen [and] they cannot rely on the increased risk such a theft might have posed had it occurred." *Id.*

*Greenstein* is factually analogous insofar as the express notice Plaintiffs alleged receiving from MDIH did not confirm any individual recipient's information was stolen or exfiltrated. *Id.* No Plaintiffs allege they were notified their potentially impacted information was instead determined to have been "stolen." The trial court found "Plaintiffs here have suffered no physical harm, economic loss, or identity theft, as the exposure5 [sic] of their personal data on its own is not a legally cognizable harm, and the [sic] neither is their expenditure of time on mitigation efforts." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *6. The trial court specifically included a footnote to "exposure" in its analysis noting

> Here, the [c]ourt assumes for purposes of the motion to dismiss that Plaintiffs' personal data has actually been exposed, as Plaintiffs have pled this in their Amended Complaint. However, it is noteworthy that Plaintiffs also included in their Amended Complaint the language from the notice they received from MDIH which states only that their personal data *may* have been exposed. Am. Compl. ¶ 36. These two statements are at odds with each other, and further illustrate the speculative nature of Plaintiffs' alleged injury of the risk of future harm.

*Id.* (emphasis in original). Plaintiffs' conclusions and conjecture cannot establish a legally cognizable injury amidst such contradictory pleadings.

### 2. Risk of Future Harm Stemming from a Data Security Incident Fails to Establish an Injury Cognizable Under Maine Law

Plaintiffs cannot satisfy their burden to establish standing through homogenous allegations of "imminent and impending injury arising from the substantially increased risk of fraud, identity theft, and misuse" based on a written notification that *may* (or may not) affect them and was received over two years ago. Am. Compl. ¶¶ 47, 60, 74, 89(v), 103, 116 (App. 31, 33, 36, 38, 41, 43). "It is well settled law that damages are not recoverable when uncertain, contingent, or speculative. Damages must be grounded on established positive facts or on evidence from which their existence and amount may be determined to a probability." *Manter*, 2024 WL 691384, at *2. "A mere possibility that future pain or suffering might be caused by an injury…is not sufficient. Mere surmise or conjecture as the term "possibility" usually connotes cannot be regarded as legal proof of an existing fact or of a future condition that will result." *Michaud*, 390 A.2d at 530; *See also Bernier v. Raymark Industries, Inc*., 516 A.2d 534, 543 (Me. 1986). And specifically in terms of seeking injunctive or declaratory relief ***only***, "standing requires that a plaintiff demonstrate a concrete and particularized injury that is actual or imminent, *not conjectural or hypothetical*."[10] *Clardy*, ¶ 23, 322 A.3d at 1165 citing *Madore*, ¶ 13, 715 A.2d at 157 (internal quotations omitted)(emphasis added).

[10] Absent standing, Count VI of the Am. Compl. must be dismissed.

Plaintiffs argue Maine law "provides no guidance on how to evaluate the question of whether or not the [alleged] prospect of future harm flowing from a targeted data breach is sufficiently imminent and non-conjectural." *Id.* Plaintiffs are incorrect. In *Hannaford*, a case born of a targeted cyberattack that resulted in numerous plaintiffs alleging their data had been *stolen and misused* by cyberthieves, the Law Court directly analyzed whether "[i]n 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. *Hannaford*, ¶ 1, 4 A.3d at 494 (emphasis added). The Court concluded it did not. *Id.* Beyond analyzing the "prospect of future harm" that *may* occur following the theft of millions of pieces of personal information, the Court was faced with numerous plaintiffs who had experienced fraudulent charges to their financial accounts from the unauthorized use of their stolen information. Tellingly, these fraudulent charges had already been reimbursed for all but one of the plaintiffs at the time the Court rendered its decision. *Id.* The Court concluded that even those plaintiffs who had already experienced the criminal misuse of their stolen information lacked a legally cognizable injury once the charges had been reimbursed. *Id.* Any and all mitigation to remediate or prevent future occurrences failed to establish a cognizable injury under Maine law. *Id.* Plaintiffs' contention the Law Court "provides no guidance" misapprehends *Hannaford* where the exact type of harm Plaintiffs allege to be at risk of here (i.e., "fraud, identity theft, and misuse") occurred and was directly

analyzed, ruled upon, and also guided the United States District Court of Maine, which seems to be one of the federal courts Plaintiffs fail to acknowledge. *Id.*

Here, five of the six Plaintiffs raise identical allegations of an "imminent and impending injury arising from the substantially increased risk of fraud, identity theft, and misuse resulting from [their potentially impacted information] being placed in the hands of unauthorized third parties". Am. Compl. ¶¶ 47, 60, 74, 103, 116 (App. 31, 33, 36, 41, 43). The sixth Plaintiff, Plaintiff Hannan, alleges a "continued and certainly increased risk to his Private Information". Am. Compl. ¶ 89(v) (App. 38). However, it has been over two years since the data security incident and Plaintiffs are still without the admittedly rare allegations of actual injury fairly traceable to a defendant. Am. Compl. ¶¶ 122-125 (App. 44), Appeal at p. 36. While Plaintiffs may argue that their potentially impacted information *may* include different data points those in *Hannaford,* they have not and cannot feign Maine law is without precedent to address their allegations as pled, which remain purely speculative.

Nonetheless Plaintiffs ask the Law Court to ignore its longstanding precedent that the mere possibility of future harm does not establish a cognizable injury under Maine law. Appeal p. 20. Instead, Plaintiffs argue cherrypicked, nonbinding federal rulings should be followed here simply because they involve a data security incident of some variety, claiming "no Maine case…analyzes the question of what constitutes an imminent injury in the context of a data breach like the one at issue here." *Id.* For instance, Plaintiffs

point to two distinguishable Ninth Circuit cases, one decided in 2010 and another in 2018, but wholly ignore the analogous Ninth Circuit decision from less than a year ago in *Greenstein* that is directly reflected, but not cited, within the trial court's analysis. *See*, 2024 WL 3886977, at *2. Based on Plaintiffs' logic that factually analogous cases should be applied, *Greenstein* should be considered here.

Plaintiffs wrongly argue "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." Appeal p. 20-21. However, the trial court analyzed both Maine law and Plaintiffs' argument that non-dispositive "guideposts" from other jurisdictions should replace this Court's precedent. *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *5. In addition to applying Maine state law, the trial court also reasoned "[i]n 2021, the Supreme Court decided *Transunion LLC v. Ramirez*,[11] holding that a mere risk of future harm is too speculative to support Article III standing, looking specifically at the risk of future harm of dissemination of misleading information to third parties" in its analysis. *In re Mount Desert Island Hosp. Data Sec. Incident Litigation*, No. BCD-CIV-2023-00070, 2024 WL 4710279, at *5 (Me.B.C.D. Oct. 07, 2024) citing 594 U.S 413, 437 (2021).

Plaintiffs argue "allegations of an imminent risk of imminent and impending injury arising from the compromise of their [potentially impacted data]" creates standing

[11] In analyzing *Transunion*, the trial court went on to explain "[w]hile federal case law is not binding on the issue of Maine's state law regarding data breaches, *Transunion* establishes that imminent risk of future harm is not sufficiently concrete to confer standing and is instructive to the [c]ourt's analysis here." *In re Mount Desert Island Hosp. Data Sec. Incident Litigation*, No. BCD-CIV-2023-00070, 2024 WL 4710279, at *6.

at the pleadings stage. Appeal p. 19. However, merely repeating the word "imminent" does not invoke facts that support its meaning- it invokes speculation.[12] Alleging a "risk of harm" contingent on some future criminal acts pertaining to *potentially* impacted information cannot establish a cognizable injury under Maine law. Merely alleging that "risk" is "imminent" merits no other finding. Over two years have passed since the alleged incident giving rise to the notification(s) forming the basis of Plaintiffs' claims and they still have not and cannot establish a concrete, present or past, non-speculative injury stemming from this data security incident.

Aptly, Plaintiffs concede that it is only in "rare cases where a plaintiff suffers unreimbursed monetary harm from actual fraud or identity theft." Appeal p. 36. While data breaches occur with frequency, there is limited evidence to suggest that these events lead to actual episodes of identity theft. [13] Several courts have analyzed the same data in Plaintiffs' complaint and determined that the mere happening of a data breach is not

[12] "Imminent" is defined as "[o]f a danger or calamity threatening to occur immediately; dangerously impending; [and] [a]bout to take place." See IMMINENT, Black's Law Dictionary (12th ed. 2024).

[13] Beyond admitting actual harm from actual fraud or identity theft is rare, Plaintiffs' allegations of imminence are also based on a 2007 Congressional Report by the Government Accountability Office (herein "GAO Report") Am. Compl. ¶ 139; p. 27 n.25 (App. 48). This very evidence that is cited in the Am. Compl. and repeatedly relied upon by Plaintiffs has been examined by other courts who have held it actually *SuperValu, Inc*., 870 F.3d 763 769 (8th Cir. 2017) ("Ultimately, the findings of the GAO report do not plausibly support the contention that consumers affected by a data breach face a substantial risk of credit or debit card fraud") and *Pulliam v. W. Tech. Grp., LLC*, No. 8:23-CV-159, 2024 WL 356777, at *4 (D. Neb. Jan. 19, 2024); *Also see eg. Khan v. Children's National Health System*, 188 F.Supp.3d 524, 533 (D. Md. 2016) (allegations that "data breach victims are 9.5 times more likely to suffer identity theft and that 19 percent of data breach victims become victims of identity theft" did not establish a "substantial risk" of harm); *In re Sci. Application Int'l Corp. (SAIC) Backup Tape Data Theft Litig*., 45 F.Supp.3d 14, 26 (D.D.C. 2014) (finding that there was no "substantial risk" of harm where the plaintiff's allegations suggest that injury is not impending for 80% of data breach victims).

indicative of imminent identity theft or fraud. The trial court was "obliged to apply the binding precedent articulated by *Hannaford* and other Maine cases addressing injury in fact" and in doing so held Plaintiffs' failed to establish any injury cognizable under Maine law. *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *6 citing *Hannaford*¸ 2010 ME 93, 4 A.3d 492. Plaintiffs' claims cannot survive dismissal on a risk of harm theory or flawed allegations that such harm is imminent as years pass.

### D. Plaintiffs' Allegations of Misuse of Potentially Impacted Information Fail to Establish a Cognizable Injury

"Plaintiffs here needed to plead a specific actual injury cognizable under Maine law, which they have not done." *Id.*; *Also see Michaud*, 390 A.2d at 530 ("a mere possibility" of future pain or suffering or some later injury not sufficient to warrant damages); *Bernier*, 516 A.2d at 543. Plaintiffs Bright, Desjardin, and Walsh, fail to sufficiently describe even a single incident in which their potentially impacted information was actually misused. Of the three Plaintiffs who have alleged misuse of their information, one (Plaintiff Hannan) alleges his email was misused, another (Plaintiff Grinnell) alleges her credit or debit card was misused, and another (Plaintiff Buzzell) alleges someone attempted to use his potentially impacted information to file taxes but failed. Am. Compl. ¶ 59, 71, 90 (App. 33, 35, 39). Plaintiffs Hannan, Grinnell, and Buzzell do not allege actual injury or damages, have not claimed an unmitigated or unreimbursed loss or harm, and fail to establish how their conclusive and speculative allegations establish a direct adverse effect on any of their property, pecuniary, or

personal rights. Instead, the trial court and Law Court are forced to speculate whether harm has actually occurred or how any risk of future harm could be considered "imminent" or fairly traceable years later based on conjecture alone.

Critically, email addresses are not included in the information alleged to have been impacted, the credit or debit card at issue was not alleged to have been in MDIH's possession or fraudulently created, and the allegation of an attempted tax filing is self-defeating. Further, Plaintiffs' speculative, conclusive, and contradictory allegations of potentially impacted information "likely" being somewhere on the "dark web" cannot manufacture a cognizable injury for purposes of standing or save Plaintiffs' claims from dismissal. Am. Compl. ¶ 39, 59 (App. 30, 33). Plaintiffs do not allege this to be the only data breach they have received notice of or been impacted by. Plaintiffs do not claim their information has never been previously made available on the "dark web" or even that they have never received notice of the same. Conclusions masquerading as factual allegations cannot establish the existence of a cognizable injury. Conjecture is not a concrete injury. And speculation cannot fairly trace Plaintiffs' conclusive injury allegations to some unidentified action of MDIH. None of these vague, conclusive, speculative pleadings allege even a single Plaintiff has experienced an actual loss or unmitigated harm.

Further, Plaintiffs have contradicted or conceded their own allegations. Plaintiffs cannot establish a cognizable injury or traceability by conclusively pleading contradicting

factual allegations. For instance, affirmative conclusions alleging their information was "exfiltrated" and "stolen" are directly contradicted by the plain language of the online and mailed notice. Am. Compl. ¶¶ 16, 37 (App. 25-26, 29). All Plaintiffs allege receiving notice that their information *may* have been *potentially* impacted in the data security incident. Am. Compl. ¶ 39 (App. 29). As noted by the trial court, "the language from the notice [Plaintiffs] received from MDIH which states only that their personal data *may* have been exposed" is "at odds" with an allegation the potentially impacted information was actually exposed and "further illustrate[s] the speculative nature of Plaintiffs' alleged injury." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *6.

As such, Plaintiffs have not established it is plausible the conclusive harm alleged is traceable to MDIH without conjecture or contingencies. Logically, without a legally cognizable injury that can be traced to MDIH, the complaint fails to establish that a favorable resolution of Plaintiffs' claims would redress any alleged harm. *Collins*, ¶ 6, 750 A.2d at 1260. Therefore, Plaintiffs have failed to establish standing, cannot state a claim upon which relief may be granted by a Maine court, and dismissal should be affirmed.

### 1. Plaintiff Hannan's Allegation of Receiving an Increased Amount of Spam Fails to Establish a Cognizable Injury

Plaintiff Hannan alleges he "suffered injury as a result of the [data security incident] in the form of experiencing an increase in spam emails and/or phishing attempts to his email account." Am. Compl. ¶ 90 (App. 39). An increase in "the receipt of

unwanted spam after the plaintiff's personal email address *was* disclosed" is not a cognizable injury in Maine. *Hannaford*, ¶ 15, 4 A.3d at 497 citing *Cherny v. Emigrant Bank*, 604 F.Supp.2d 605, 609 (S.D.N.Y.2009)(emphasis added).[14] Pointedly, email addresses are not alleged to have been amongst the potentially impacted information and Plaintiff Hannan conceded he was already receiving spam that has now increased by some unknown amount. Am. Compl. ¶¶ 36, 90; p. 3 n.2-3 (App. 24, 29, 39). Plaintiff Hannan's alleged increase in spam merely demonstrates his inability to establish any injury fairly traceable to an action of MDIH. Therefore, the trial court did not commit error in finding "[a]n increase in spam and phishing attempts is too amorphous to treat seriously as misuse or cognizable injury" and such allegations fail to establish standing or substantiate Plaintiff Hannan's claims. *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *5.

### 2. Plaintiff Grinnell's Allegation of Unauthorized Charges Fail to Establish Cognizable Injury

Plaintiff Grinnell's allegation of unauthorized charges to her credit or debit card fails to establish cognizable injury under Maine law. Plaintiff Grinnell argues it is

[14] *See also Cooper v. Bonobos,* 21-CV-854, 2022 U.S. Dist. LEXIS 9469 (S.D.N.Y. Jan. 19, 2022); *Legg v. Leaders Life Ins. Co*., No. 21-655, 2021 U.S. Dist. LEXIS 232833 (W.D. Okla. Dec. 6, 2021)(receipt of phishing emails, while perhaps "consistent with" data misuse, did not "plausibly suggest" that any actual misuse of plaintiff's personal identifying information had occurred); *Travis v. Assured Imaging LLC,* 2021 U.S. Dist. LEXIS 89129 at *19 (D. Ariz. May 10, 2021)(a dramatic increase in targeted spam phone calls after ransomware attack did not constitute an injury for purposes of standing); *Cherny,* 604 F. Supp. 2d at 609 ("The receipt of spam by itself... does not constitute a specific injury entitling [plaintiff] to compensable relief."); *Gordon v. Virtumundo, Inc*., 06-0204, 2007 U.S. Dist. LEXIS 35544 (W.D. Wash. May 15, 2007)(the harm suffered "must rise beyond the level typically experienced by consumers - i.e., beyond the annoyance of spam.").

irrelevant whether alleged unauthorized credit card charges have been reimbursed and thus fails to establish anything more than the speculation necessary to grasp such an assertion. *See Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *4. However, a plaintiff suffers no physical harm, economic loss, or identity theft where fraudulent charges were reimbursed. *Hannaford*, ¶ 8, 4 A.3d at 495.

In Maine, "[i]t is beyond doubt that only one whose definite and personal legal rights are at stake may act as a plaintiff in a proper legal action" and therefore "[o]ne who suffers only an abstract injury does not gain standing to challenge [a defendant's] conduct." *Nichols v. City of Rockland*, 324 A.2d 295, 297 (Me.1974) citing *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943). A complaint void of sufficient facts to establish cognizable personal, pecuniary, or proprietary harm that establishes a particularized, concrete injury cannot establish standing. *Id.* And in terms of stating a claim for each cause of action within a complaint, "it is well settled law that damages are not recoverable when uncertain, contingent, or speculative. Damages must be grounded on established positive facts or on evidence from which their *existence* and *amount* may be determined to a probability. They must not rest wholly on surmise and conjecture." *Michaud*, 390 A.2d 530 citing *Gottesman*, 139 Me. 90, 27 A.2d 394 (emphasis added).

"It is the plaintiffs' burden to establish standing, which is determined based on the circumstances *that existed* when the complaint was filed." *Clardy*, ¶ 12, 322 A.3d at 1163 (citing *Black*, ¶ 26, 288 A.3d at 346)(emphasis added). It was Plaintiff Grinnell's burden

to establish a cognizable injury existed at the time her complaint was filed and as detailed supra, conclusions and conjecture are not enough to meet her burden. Nor can Plaintiff Grinnell avoid dismissal by intentionally withholding from her pleadings whether she experienced actual injury or damages or a directly adverse affect on her pecuniary rights as this intentional omission leaves her without injury cognizable under Maine law.

Plaintiff Grinnell's allegation of "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" fails to establish an injury cognizable under Maine law. Am. Compl. ¶ 71 (App. 35). First, Plaintiff Grinnell failed to allege whether the card(s) with unauthorized charges were ever provided to or in the possession of MDIH. Second, the complaint is silent as to whether these charges were ever reimbursed yet Plaintiff Grinnell alleges "time, effort, and money…has been…expended to…detect, contest, and repair" alleged harm. Am. Compl. ¶ 246 (App. 72). Plaintiff Grinnell intentionally omitted whether her alleged unauthorized charges were reimbursed or caused a pecuniary loss. Plaintiff cannot avoid the law of Maine through omission nor should the law change to allow such potential gamesmanship. To do so would negate the well establish precedent of this Court that a plaintiff must establish actual injury or damages free of speculation and conjecture.

In dismissing Plaintiff Grinnell's claims, the trial court held she suffered no injury when unauthorized charges are merely posted to an account or had been reimbursed and

result in no allegations of economic loss. *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *4 citing *Hannaford*, ¶ 8, 4 A.3d at 495. The trial court found alleging mere misuse of information failed to sufficiently plead a nonspeculative injury for, in part, failing to allege whether or not fraudulent charges were reimbursed pertaining to the information that *may* have been exposed. *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *4. Absent this material fact, the court was left to speculate as to whether an actual loss existed and what amount is alleged lost. *Id.*

In further addressing the impermissible use of speculation, the court noted although it was assumed "for purposes of the motion to dismiss that Plaintiffs' personal data has actually been exposed, as Plaintiffs have pled this in their Amended Complaint… Plaintiffs also included in their Amended Complaint the language from the notice they received from MDIH which states only that their personal data *may* have been exposed." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *6 (emphasis in original). The court went on to determine "[t]hese two statements are at odds with each other, and further illustrate the speculative nature of Plaintiffs' alleged injury." *Id* As the court reasoned in granting MDIH's motion to dismiss, "if there are two or more equally probable inferences, then the evidence is speculative and the court may not select from them as to do so rests upon mere surmise and conjecture." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *1 citing *Hersum*, 151 Me. at 263, 117 A.2d at 288.

Plaintiffs cannot avoid their pleading burden by omitting "the circumstances that existed when [their] complaint was filed" – specifically whether they have suffered a non-speculative injury to their property, pecuniary, or personal rights in the form of a loss that both exists and is a determinable amount. *See Clardy*, ¶ 12, 322 A.3d at 1163; *Also see North East*, ¶ 11, 26 A.3d at 798; *Stull*, ¶ 11, 745 A.2d 979; *Weinstein v. Old Orchard Beach Fam. Dentistry*, LLC, 2022 ME 16, ¶ 8, 271 A.3d 758, 764.

"Here, in an attempt to avoid dismissal based on *Hannaford*, Plaintiff Grinnell did not plead whether [her] fraudulent credit card charges had been reversed." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *4. Although Plaintiffs took the position at oral argument that the question of reimbursement was irrelevant, despite the *Hannaford* decision, this is at odds with the established precedent of this Court. *Id.*, *passim.* In order to establish an actual, nonspeculative, concrete injury, a plaintiff must allege, in part, whether or not unauthorized charges to their account(s) were reimbursed leaving them whole or unreimbursed leaving them suffering an existing injury. *Hannaford*, ¶ 8, 4 A.3d at 495 ("The plaintiffs here have suffered no physical harm, economic loss, or identity theft" where fraudulent charges were reimbursed.).

As data security incidents continue to potentially impact more individuals than not, as evidenced "by many practitioners [reporting], from 2005 to 2019, the total number of individuals affected by healthcare data breaches was 249.09 million," Plaintiffs must establish a nonspeculative, actual injury distinct from the harm experienced by the public

at large (i.e., merely receiving notice their information *may* have been impacted in a data security incident and experiencing the mere inconvenience that may follow). Am. Compl. ¶ p. 23, n.13 (App. 44). To survive dismissal, a complaint must contain sufficient factual allegations to establish "a legal injury rather than an inconvenience or annoyance." *Hannaford*, ¶ 12, 4 A.3d at 497; *Kuhns*, 868 F.3d at 718 ("Massive class action litigation should be based on more than allegations of worry and inconvenience."). Plaintiff Grinnell has failed to allege establish the alleged unauthorized charges involved information that was potentially impacted in this incident or caused actual injury or damages under Maine law. This Plaintiff cannot avoid her burden to establish standing and prima facie evidence of her claims by intentionally omitting material facts that existed at the time the complaint was filed, forcing the Court to speculate as to how these unauthorized charges may amount to a cognizable injury under Maine law.

### 3. Plaintiff Buzzell's Allegation of Attempted Tax Filing Fails to Establish Cognizable Injury

Plaintiff Buzzell alleged his potentially impacted information was used to *attempt* an unauthorized tax filing, which is not a cognizable injury under Maine law. The attempted misuse admittedly failed, leaving him suffering no cognizable harm whatsoever. The sole allegation "someone attempted to file federal and state tax returns in his name using his Social Security number" cannot establish standing or an injury sufficient to maintain his claims. Am. Compl. ¶ 59 (App. 33). There are no allegations as to how or when an admittedly failed attempt caused any actual injury or damages. *Id.*

One must also speculate as to how this attempt is fairly traceable to an action of MDIH or sufficient to establish causation. Therefore, any possible injury would be wholly based on speculation and self-defeating as the pleading is unambiguous that a fraudulent return was not successfully filed and therefore injury logically flows from the same.

Plaintiff argues nonbinding standards from various federal courts should be applied over Maine law to circumvent this Court's longstanding precedent in *Hannaford* and his obligation to allege cognizable injury. However, the trial court aptly identified "Plaintiffs' counsel argue[d] the attempted fraudulent tax return filings are the key to the case, but the allegation is self-defeating. The attempts were obviously unsuccessful and no harm befell Plaintiff Buzzell—a result akin to that of the consumers in *Hannaford* whose unauthorized credit card charges were reversed." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *5 citing *Hannaford*, ¶¶ 7-8, 4 A.3d at 492.

Further, the trial court was "not willing to read the Amended Complaint so broadly as to apply a generic causation allegation at the start of a lengthy paragraph, to everything that follows in that paragraph" in its determination "Plaintiffs have not pled an injury cognizable under Maine law." *Id.*, 2024 WL 4710279, at *7. In its analysis of the allegations of attempted tax filing the trial court held

> Looking to Paragraph 59 of the Amended Complaint, Plaintiffs have not tied the occurrence of the Data Breach to the specific injury pled by Plaintiff Buzzell…and the attempted tax return filing. The Court cannot infer causation on its own, especially when multiple alternative possibilities exist. Consequently, Plaintiffs have failed to cross the

> threshold of the basic notice pleading requirements as their allegations are too speculative to infer any nexus to the Data Breach.[15]

*Id.* Plaintiff Buzzell has alleged no harm resulting from any attempted misuse of his potentially impacted information. Although it is unclear whether any of the conclusively pled allegations pertaining to mitigation apply to Plaintiff Buzzell's response to learning of the attempt to file a tax return, Maine's "case law…does not recognize the expenditure of time and effort alone as a harm". *Hannaford,* ¶ 11, 4 A.3d 496. Plaintiff Buzzell cannot establish a particularized injury under the law of this state that adversely and directly affected his property, pecuniary or personal rights based on an *attempted* tax return that is not wholly based on upon conjecture. Nor do they establish prima facie evidence of Plaintiff Buzzell's claims. Therefore, dismissal for lack of standing and failure to state any claims was appropriate and should be affirmed.

#### 4. Plaintiffs' Allegations of Speculative Dark Web Presence Fails to Establish Cognizable Injury

Conclusive, speculative allegations that are contradicted within the pleadings do not establish cognizable injury under Maine law. *Michaud*, 390 A.2d at 530 (Me. 1978). Based on the notice provided by MDIH, Plaintiffs Desjardin, Grinnell, Bright, and Walsh uniformly speculate and conclude their potentially impacted information was "stolen by the unauthorized actors" and "was placed for sale on the dark web." Am. Compl. ¶¶ 46,

[15] The trial court also held Plaintiffs have not tied the occurrence of this data security incident to allegations of notices alerting Plaintiff Buzzell to the presence of his sensitive information on the dark web as this allegation was also too speculative to infer any nexus to this cyberattack discovered by MDIH in May 2023.

59, 73, 102, 115 (App. 31, 33, 36, 40, 43). And Plaintiff Buzzell alleges he was alerted to the "presence of his sensitive information on the dark web" Am. Compl. ¶ 59 (App. 33). Plaintiffs fail to establish how these allegations amount to actual injury or damages absent speculation. Plaintiffs' allegations are based on various forms of conjecture and hypothetical future criminal conduct, contradicted within the pleadings, and thus cannot establish injury. As such, dismissal was warranted and should be affirmed by the Law Court.

First, Plaintiffs cannot establish legally cognizable injury with identical conclusive allegations their potentially impacted information was actually "placed for sale on the dark web." Am. Compl. ¶¶ 46, 59, 73, 102, 115 (App. 31, 33, 36, 40, 43). There are contradictory allegations within the complaint itself, including "it is *likely* this information is already on the dark web" or alternatively has "*yet to be* dumped on the black market". Am. Compl. ¶¶ 39, 141 (App. 30, 48). These contradictions, based on the speculative allegation that "the purpose of exfiltrating [information] is to list it on the black market and sell it," cannot establish standing or Plaintiffs' claims. Further, any allegation pertaining to "purpose of exfiltrating Plaintiffs' information" is directly contradicted by the allegations the notice expressly stated their information *may* have been amongst "potentially impacted" information, not that information was exfiltrated or stolen. Am. Compl. ¶¶ 39, 141 (App. 30, 48).

Plaintiffs mistakenly argue the trial court "completely ignored the dark web allegation" in granting dismissal. The court directly cited to the allegations in its ruling which found "the language from the notice [Plaintiffs] received from MDIH which states only that their personal data *may* have been exposed" is "at odds" with an allegation the potentially impacted information was actually exposed and "further illustrate[s] the speculative nature of Plaintiffs' alleged injury." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *6 (emphasis in original). The trial court did not "ignore" the insufficient "dark web" allegations, but found it further demonstrated Plaintiffs' inability to establish any cognizable injury under Maine law absent speculation that was self-evident in Plaintiffs' contradictory pleadings. *Id.*

### E. Allegations of Loss of Privacy, Loss of the Benefit of the Bargain, and Diminution of Value of Potentially Impacted Information Fail to Establish Cognizable Injury

Plaintiffs allege multiple theories of injury based wholly on legal conclusions that Maine courts are not bound to accept. *Carey*, 2018 ME 119, ¶ 23, 192 A.3d 589. Here, all Plaintiffs conclusively allege a loss of privacy, loss of the benefit of the bargain, and the diminution of the value of their personal information in practically identical pleadings. Am. Compl. at ¶¶ 45, 46, 58, 59, 72, 73, 87, 89(i), 89(ii), 101, 102, 114, 115 (App. 31, 33, 35-6, 38, 40, 42-3). And further conclude the alleged injuries are the "*result* of the Data Breach". Am. Compl. ¶ 18 (App. 26)(emphasis added). The trial court reasoned it was not bound to accept legal conclusions- "[a] complaint must allege facts

sufficient to demonstrate that a plaintiff has been injured in a legally cognizable way in order to survive a motion to dismiss." *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *2; citing *Sunspray Condo. Ass'n*, 2013 ME 19, ¶ 20, 61 A.3d 1249 (quoting *Burns*, 2011 ME 61, ¶ 17, 19 A.3d 823); *Carey*, 2018 ME 119, ¶ 23, 192 A.3d 589.

Plaintiffs again argue the trial court "completely ignored" allegations. Appeal p. 37. Plaintiffs cannot establish "injuries in fact that imbue…standing" by conclusively alleging that as a "*result* of the Data Breach" they have "suffered…a loss of privacy, the loss of the benefit of their bargain…[and] the diminished value of their [potentially impacted information]." *Id.* The trial court did not ignore these conclusive theories of injury but instead directly addressed the weight they carry: none. The court held it "is not bound to accept legal conclusions" or engage in speculation and thus appropriately found such allegations failed to manufacture standing here. *Mt. Desert Isl. Hosp.*, 2024 WL 4710279, at *2 citing *Carey*, 2018 ME 119, ¶ 23, 192 A.3d 589.

Plaintiffs argue they have established standing because they "pled that their privacy was invaded" and that there "is more than mere legal conclusions of this invasion" by alleging "cybercriminals accessed and wrongfully *acquired* their [potentially impacted information]…thereby invading their privacy." Appeal p. 39. Again, this is directly contradicted by their allegations they were expressly informed their potentially impacted information *may* have been affected, that there was an ongoing investigation, and that there was no evidence of misuse. This is not tantamount to the

conclusion cybercriminals acquired their information. If there are two or more equally probable inferences, then the evidence is speculative and the court may not select from them as to do so rests upon mere surmise and conjecture. *See Toto*, ¶ 10, 261 A.3d at 233. And in consistently applying Maine law, the trial court previously held "picking one inference to the exclusion of the others is unreasonable" as "[a] court is permitted to draw reasonable inferences in determining issues of causation but must avoid speculation." *Saunders v. Sappi North America, Inc*., No. BCD-CIV-2023-00033, 2024 WL 1908964, at *3 (Me.B.C.D. Jan. 02, 2024) citing *Toto*, ¶ 10, 261 A.3d at 233 (vacating summary judgment).

Plaintiffs allege "they 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." Appeal p. 37-38. Plaintiffs argue their allegations of "the loss of the benefit of the bargain" itself constitutes a legally cognizable injury that is unto itself sufficient for standing under Maine law. *Id.* Plaintiffs are wrong, and this theory of injury fails to manufacture standing. As argued herein, Maine law does not bind a court to accept legal conclusions and Plaintiffs have alleged no cognizable injury amounting to damages.

Plaintiffs' conclusion their potentially impacted information lost value cannot establish cognizable injury under Maine law. Speculation into how such a conclusion may be the case is undercut and contradicted by pleadings pontificating on hypothetical

scenarios involving the potentially impacted information being exposed. Plaintiffs' alleged diminution-of-value injury is neither particularized nor concrete, and their conclusory statements that their information has lost value are speculative, unsupported, and unavailing.

Courts have consistently held allegations of diminution of value of one's information do not establish a legally cognizable injury.[16] The trial court committed no error in determining conclusive allegations such as these failed to establish injury and dismissal should be affirmed.

### F. Allegations Fail to Establish Emotional Distress

Plaintiffs' allegation of "emotional distress" based on "stress, fear, and anxiety" absent of some financial, physical, or property damage cannot establish cognizable injury under Maine law for purposes of standing or prima evidence of their claims. *See Curtis v. Porter*, 2001 ME 158, ¶ 19, 784 A.2d 18; *Bryan R. v. Watchtower Bible & Tract Soc. Of N.Y. In*c., 1999 ME 144, ¶ 12, 738 A.2d 839; *Desjardins v. Reynolds*, 2017 ME 99, ¶ 20, 162 A.3d 228. Plaintiffs allege no financial damage and there are no allegations

[16] See *In re SuperValu, Inc*., No. 14-MD-2586 ADM/TNL, 2016 WL 81792, at *7, aff'd in part, rev'd in part and remanded, 870 F.3d 763 (8th Cir. 2017) (citing *In re Zappos.com, Inc*., 108 F. Supp. 3d 949 (D. Nev. 2015) (finding no injury in fact where plaintiffs had not alleged that the data breach had prevented them from selling their personal information at the price it was worth)); *Sci. Applications Int'l Corp.,* 45 F. Supp. 3d at 30; *Green v. eBay Inc.,* No. CIV.A. 14-1688, 2015 WL 2066531, at *5 n.59 (E.D. La. May 4, 2015)("Even if the [c]ourt were to find that personal information has an inherent value and the deprivation of such value is an injury sufficient to confer standing, [p]laintiff has failed to allege facts indicating how the value of his personal information has decreased as a result of the [d]ata [b]reach."). *Pulliam*, 2024 WL 356777, at *8 ("diminished value of [p]laintiffs' personal information is not an injury sufficient to confer standing".).

whatsoever of physical or property damage. Merely alleging a "substantial risk of imminent harm and loss of privacy have both caused [them] to suffer stress, fear, and anxiety" cannot establish a legally cognizable injury in Maine. Am. Compl. ¶¶ 50, 63, 77, 91, 106, 119 (App. 32, 34, 36, 39, 41, 43). Further, allegations "occasioned by the events of every day life are endurable…and will rarely constitute the kinds of damages that are "so severe" that a reasonable person could not be expected to carry on." *Schelling v. Lindell*, 2008 ME 59, ¶ 26, 942 A.2d 1226, 1233.

**G. Plaintiffs Fail to Establish Prima Facie Evidence of Each Claim**

Plaintiffs must establish prima facie evidence of each claim to survive dismissal pursuant to Rule 12(b)(6) of the Maine Rules of Civil Procedure. *See Sunspray Condo. Ass'n*, ¶ 23, 61 A.3d at 1257 citing *Hannaford*, ¶ 8, 4 A.3d at 492 (internal quotations omitted) However, Plaintiffs cannot establish actual injury or damage which is an element of negligence, breach of contract and implied contract claims, and breach of fiduciary duty. *See Bell ex rel. Bell v. Dawson*, 2013 ME 108, ¶ 17, 82 A.3d 827 (negligence); *Tobin v. Barter*, 2014 ME 51, ¶ 10, 89 A.3d 1088 (contract); *Hannaford*, ¶ 16, 4 A.3d at 492 (implied contract); *Byran R.*, ¶ 12, 738 A.2d at 839 (fiduciary duty). *Also see Nader*, ¶ 34, 41 A.3d at 562, abrogated by *Gaudette*, ¶ 34, 160 A.3d at 1190. Therefore, dismissal of Counts I, II, III, and IV of the Plaintiffs' complaint pursuant to Maine Rule of Civil Procedure 12(b)(6) should be affirmed.

### 1. Plaintiffs Fail to Establish Unjust Enrichment

"Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay, and the damages analysis is based on principles of equity, not contract." *Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d 269, 271. Plaintiffs have failed to plead facts sufficient to establish any benefit being conferred upon MDIH.[17] Plaintiffs fail to include any details about alleged payments and MDIH is a non-profit hospital that was never enriched because by design, the entity does not generate a profit. And while there is no competent evidence of a benefit conferred upon or retained by MDIH, there are also no circumstances making it inequitable or unjust for MDIH to retain a benefit if, arguendo, one was found to exist. "The most significant element of the doctrine of unjust enrichment is whether the enrichment of the defendant is unjust." *Howard & Bowie, P.A. v. Collins*, 2000 ME 148, ¶ 14, 759 A.2d 707, 710. Here, not only have Plaintiffs failed to show how MDIH has been enriched, but they have wholly failed to establish that fairness and justice compels the performance of a legal and moral duty to pay Plaintiffs. *Paffhausen*, ¶ 6, 708 A.2d at 271 (emphasis added).

[17] "To prevail on a claim for unjust enrichment, the complaining party must show that (1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." *Knope v. Green Tree Servicing, LLC*, 2017 ME 95, ¶ 12, 161 A.3d 696, 699, as revised (Nov. 30, 2017).

### H. Economic loss

While this Court should affirm the trial court's dismissal of all claims however may affirm on alternative grounds, including the economic loss doctrine inquiry not reached in *Hannaford*. *See e.g., Oceanside at Pine Point Condo. Owners' Association v. Peachtree Doors, Inc*., 659 A.2d 267 (Me.1995)(Economic loss rule prohibits the recovery of purely economic losses in tort actions).

## V. CONCLUSION

MDIH respectfully requests that this Court affirm "Plaintiffs have not pled an injury cognizable under Maine law, MDIH's Motion to Dismiss is GRANTED on all counts. Counts I-VI are DISMISSED with prejudice."

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Respectfully Submitted,

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