ORAL ARGUMENT: MARCH 31, 2017

No. 16-7108

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHANTAL ATTIAS, Individually and on behalf of all others similarly situated, et al.
Appellants,

v.

CAREFIRST, INC., *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia, Civil
1:15-cv-882 (CRC)
Hon. Christopher R. Cooper

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The question before the Court is whether in 2017 federal courts provide a venue for victims of data theft to bring a lawsuit. More specifically, do victims of data breach have standing. CareFirst conflates the issues of standing and damages. The analyses of these two doctrines are not the same.

The victims of the CareFirst data breach need not yet have proved by a preponderance of the evidence each and every dollar or way in which they have been damaged. So the question before this Court is simple: in 2017 does the exposure of one's personal electronic data profile create an injury such that a federal court has jurisdiction to hear the case. If the courts are to follow decades of precedent respecting one's right to privacy, the answer must be "yes."

ARGUMENT

I. THE VICTIMS OF THE CAREFIRST DATA BREACH HAVE STANDING.

A. THE CAREFIRST DATA BREACH VICTIMS MUST ESTABLISH (1) INJURY IN FACT (2) FAIRLY TRACEABLE TO CAREFIRST'S CONDUCT WHICH IS (3) LIKELY TO BE REDRESSED BY A FAVORABLE JUDICIAL RESULT.

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Standing is a judicial requirement birthed to assure that "the judicial process [is not] used to usurp the powers of the political

branches . . . ." *Id.* at 1547. The "constitutional minimum" necessary to establish standing include (1) injury in fact (2) fairly traceable to the challenged conduct (3) that is likely to be redressed by a favorable judicial decision. *Id.*

B. "INJURY IN FACT" IS NOT A SYNONYM FOR "DAMAGES."

CareFirst blurs the lines between "injury in fact"—as required to establish standing—and "damages." As stated in the brief of *Amicus Curiae* Electronic Privacy Information Center, "[i]n the case of a dispute between two private parties, the concern about judicial usurpation of legislative functions diminishes. *Standing merely requires the plaintiff to successfully allege that the defendant's conduct violated her right.*" Brief of *Amicus Curiae* Electronic Privacy Information Center (hereinafter referred to as "EPIC Brief") at 4 (emphasis added). "Standing" should not be confused with "damage." The entirety of CareFirst's argument attacks the data breach victims' ability to establish "damages" and has little to do with standing.

Establishing injury in fact requires a twostep analysis. First, a plaintiff must establish that her injury is concrete and particularized. Then a plaintiff must establish that her injury is *either* actual or imminent. *Amicus Curiae* EPIC concisely explains "injury in fact": "Injury-in-fact, legal injury, requires the plaintiff to suffer an 'invasion of a legally protected interest' that is (1) 'concrete and particularized' and (2) 'actual or imminent, not conjectural or hypothetical.'" EPIC Brief at 4-5 (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992)). It is important to recognize

that this analysis requires *either* actual *or* imminent injury because the analysis differs whether a plaintiff has an actual injury or is claiming an imminent injury. Citing Justice Thomas's concurring opinion in *Spokeo*, EPIC explains that the Supreme Court's "contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring).

1. The Named Plaintiffs have alleged concrete and particularized harm of both their common law rights and statutory rights.

CareFirst does not seem to dispute that the Named Plaintiffs have alleged concrete and particularized violations of their common law and statutory rights. The first step of the injury in fact analysis does not appear to be at issue.

2. The Named Plaintiffs have alleged Actual—not Imminent—Injury.

Rather, CareFirst argues that the Named Plaintiffs do not have standing because any damages that might flow from the violations of these rights are too speculative. Brief of Appellees at 10. CareFirst, under the guise of discussing the elements to establish standing, shifts to a discussion of damages: "The Named Plaintiffs core allegation is that because their data was compromised in the CareFirst data breach, *they will suffer some non-descript harm in the future*—*i.e.* their identity will be compromised and harm will result." *Id.* at 10 (emphasis added). This discussion of future harm relates to the Named Plaintiffs' potential damages, and is

not relevant to a standing analysis.

CareFirst argues that this case is governed by the Supreme Court's decision in *Clapper v. Amnesty Int'l* USA, 133 S. Ct. 1138 (2013): "*Clapper* recently provided the Supreme Court with an opportunity to clarify the threshold for when an alleged increased risk of future harm can be sufficient to confer Article III standing." *Id.*

But this is not a *Clapper* case. *Clapper* addressed what is necessary when proceeding on a claim of *imminent injury*, not *actual injury*. In *Clapper*, the plaintiffs had not yet suffered a violation of a right. Rather, they brought suit hoping to stop a government surveillance program. The Court wrote "Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under §1881a *at some point in the future*. But respondents' theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)) (emphasis added).

CareFirst argues that *Clapper* is controlling and mandates dismissal for lack of standing. But *Clapper* is inapplicable in this case because the Named Plaintiffs' right—*i.e.* the right to privacy—has already been violated, unlike in *Clapper*. The *Clapper* plaintiffs had not yet suffered the violation of a right; they brought suit in

anticipation of such a violation (which the Supreme Court found too speculative). Here, the Named Plaintiffs have already suffered the violation of a right, *i.e.* the contractual, common law, and statutory right to privacy. They are not bringing suit in anticipation of a violation of a right. The Court need not speculate whether the injury will come; it already has.

Likewise, CareFirst's application of *In re: SAIC*, 45 F. Supp. 3d 14 (D.D.C. 2014) is also misplaced. In that case, the plaintiffs brought suit based upon the theft of a laptop that included confidential data. But there was no evidence in that case that the plaintiff's personal information had in fact been accessed. In other words, there was no evidence that a violation of the plaintiffs' rights had occurred. Here, it is not disputed that the Named Plaintiffs' personal information was in fact stolen. *The harm has already occurred; the right has been violated.*

CareFirst's reliance on cases that deal with future harm are simply misplaced. CareFirst's analysis—and the district court's—are incorrect because they fail to appreciate the difference between injury in fact and damages, as well as the difference between actual damages and imminent damages.

II. MEDICAL IDENTITY THEFT IS INJURY IN FACT.

From the outset of its Brief, CareFirst seeks to dismiss the significance of their negligence: "Fortunately, data loss does not always produce harm to its victims." Appellees' Brief at 7. But medical identity theft is a serious problem. As detailed in

the brief of *Amicus Curiae* National Consumers League, "Medical identity theft is a greater 'sleeper' crime than credit account breaches. Unless and until medical bills show up through debt collection, the police show up for prescription drug abuse arrests, medical care is denied due to a non-existent condition, or loans or jobs are denied, a consumer is generally unaware of the violation." Brief of *Amicus Curiae* National Consumers League (hereinafter referred to as "NCL Brief") at 5. The NCL Brief goes on to explain how medical identity theft is used:

> While credit card or Social Security numbers from a medical file have obvious value for basic financial fraud, thieves also sell the medical information. Shin, supra. The thief could steal the file and sell the Social Security number, and then sell other useful parts of the file to others: almost like laundering the information or stripping cars for parts. For example, a medical file's PII (Social Security number and other financial information) is sold directly to one type of "customer" on the black market. The rest of the patient data, goes to another "customer" on the black or grey market.

NCL Brief at 5. Moreover, NCL explains that the "worst case scenario" is that medical data is used to "foster a more complete (and false) profiles (sic) for visas and passports."

Regardless of CareFirst's attempts to downplay the harm done, medical data theft is a significant problem that poses significant damage to its victims. This is not a "victimless" crime.

III. <u>THE NAMED PLAINTIFFS HAVE NOT WAIVED ANY ARGUMENT REGARDING THE VIOLATION OF THEIR STATUTORY RIGHTS</u>

CareFirst does not address that the Named Plaintiffs have alleged both

tangible harm and violations of the statutory rights. These allegations confer standing to the Named Plaintiffs. Instead, CareFirst deftly asserts that the Named Plaintiffs have only alleged statutory rights violations and intangible harm. By failing to address the Named Plaintiffs' argument, CareFirst apparently concedes it. *Compare* Brief of Appellants at 10, *with* Brief of Appellees at 24.

The Named Plaintiffs argued that they suffered both tangible economic loss and violations of their statutory rights. *See* App. 102-12. The Named Plaintiffs also argued that "[a]t the heart of the statutes which confer standing in the instant matter is the violation of the Plaintiffs' right to privacy, a well-established injury which confers standing in the common law." App. 310 (quoting See Restatement (Second) of Torts § 652A (1977) ("One who invades the right of privacy of another is subject to liability of the resulting harm to the interests of the other.")) (other citations omitted). The Named Plaintiffs "coupled" these damages, but also accurately quoted what was binding case law from this Court.

Further, upon the issuance of *Hancock v. Urban Outfitters*, 830 F.3d 511 (D.C. Cir. 2016), the Named Plaintiffs promptly supplemented the record, and argued "the Hancock Court wrote that intangible harm, such as "any invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury," may give rise to concrete injury." App. 338. The Named Plaintiffs then requested oral argument to advance their arguments. Id. No oral argument was held.

Assuming, *arguendo*, the Named Plaintiffs failed to preserve any argument, this Court has broad discretion to hear these arguments even for the first time on appeal.

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where "injustice might otherwise result."

Singleton v. Wulff, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (*citing Turner v. City of Memphis*, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762 (1962)); (quoting *Hormel v. Helvering*, 312 U.S., at 557, 61 S.Ct. at 721). The Named Plaintiffs raised all the issues before the district court, and attempted to argue them orally to complete their record. If they failed to preserve some argument, it would be in the interests of justice to have the correct application of law to the facts in this matter because this is not the type of reversal of theory that prejudices CareFirst.

IV. THE VICTIMS OF THE CAREFIRST DATA BREACH HAVE SUFFICIENTLY PLED DAMAGES SUCH THAT THEY EASILY DEFEAT A RULE 12(B)(6) MOTION.

A. THE TRIAL COURT DID NOT RULE ON CAREFIRST'S RULE 12(B)(6) MOTION TO DISMISS.

CareFirst sought dismissal of the data breach victims' complaint under Federal Rule of Civil Procedure 12(b)(6) on the basis that they failed to state a claim upon which relief could be granted. The trial court properly addressed CareFirst's

Rule 12(b)(1) motion first. Once it determined that it did not have jurisdiction under Article III, the trial court (properly) elected not to address CareFirst's Rule 12(b)(6) Motion. CareFirst now renews its Rule 12(b)(6) Motion, asking that should this Court determine that Article III standing exists, the Court dismiss the victims' claims for failure to state a claim upon which relief can be granted.

The data breach victims have sufficiently pled all the elements necessary to defeat a Rule 12(b)(6) motion. Accordingly, CareFirst's argument fails.

B. PLAINTIFFS HAVE PLED CAUSATION AND DAMAGES.

CareFirst sought dismissal of the victims' complaint alleging that the Named Plaintiffs failed to sufficiently plead causation and damages as necessary to satisfy each element of the claims brought in their Second Amended Complaint. This argument lacks merit.

The Named Plaintiffs incorporate their argument on standing made *supra*, § I. Named Plaintiffs have adequately pled causation and damages for each claim in that CareFirst's conduct caused the loss of Named Plaintiffs' information. This has caused the damages defined above including past and future pecuniary loss, identity theft, pain and suffering, and violation of statutory rights.

C. HIPAA DOES NOT PRECLUDE ANY OF PLAINTIFFS' CAUSES OF ACTION

CareFirst seeks dismissal of the Named Plaintiffs' breach of contract, negligence, DC Consumer Protection Act, and Negligence *per se* claims by

contending that the Health Insurance Portability and Accountability Act (hereinafter "HIPAA") precludes these causes of action. Brief of Appellee at 37. The HIPAA argument is the *only* basis upon which CareFirst claims the Named Plaintiffs have failed to state a claim under the DC Consumer Protection Procedures Act (hereinafter "DCCPPA"). This is inconsistent with vast precedent on the preemptive effects of HIPAA. CareFirst's argument misstates the law.

1. Plaintiffs' causes of action do not rely upon HIPAA violations.

Initially, only the Named Plaintiffs' Negligence *per se* cause of action requires a finding that HIPAA was violated to be plausibly stated. The Named Plaintiffs' breach of contract claim listed several terms other than HIPAA violations which were breached. App. 18, ¶¶ 67, 70, 71. The Named Plaintiffs' negligence claim is not based on a violation of HIPAA, and recitation to HIPAA appears nowhere within the cause of action. App. 19-20, ¶¶ 76-84. Finally, Plaintiffs' DCCPPA claim specifically referenced violations that are not reliant on a finding that HIPAA was violated by pleading that CareFirst's Privacy and Internet Privacy Policies were untruthful. App. 20-21, at 86-88.b. Therefore, the Named Plaintiffs do not rely on HIPAA to establish these causes of action. Regardless, HIPAA does not preempt their claims.

2. HIPAA does not preempt Plaintiffs' causes of action.

Assuming *arguendo* that the Named Plaintiffs' causes of action necessitated

a finding of a HIPAA violation, dismissal is still unwarranted. It is undisputed that HIPAA does not *create* a private right of action. However, CareFirst fails to recognize a significant distinction: HIPAA also *does not preclude* a private right of action for violation of written policies, nor does it preempt any state law that is stricter or more punitive than HIPAA.[1] "HIPAA does not preempt state law that is 'more stringent' than the requirements that it mandates." *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 2004 U.S. Dist. LEXIS 21830, *10 (D.D.C. May 17, 2004) (citing 42. U.S.C. §§ 1320d-2, 1320d-7); "Under the relevant exception, HIPAA and its standards do not preempt state law if the state law relates to the privacy of individually identifiable health information and is 'more stringent' than HIPAA's requirements." *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709 (D. Md. 2004) (citing 42 U.S.C. § 1320d-7(a)(2)(B); 45 C.F.R. § 160.203.); *see also* 42 USCS § 1320d-7(a)(2)(A)(i)(I) "A provision or requirement under this part [42 USCS §§ 1320d et seq.], or a standard or implementation specification adopted or established under sections 1172 through 1174 [42 USCS §§ 1320d-1 through 1320d-3], shall not supersede a contrary provision of State law, if the provision of State law is a provision the Secretary determines is necessary to prevent fraud and abuse."

[1] CareFirst does not expressly argue that HIPAA "preempts" Plaintiffs' causes of action in this case; however, Plaintiffs can imagine no other potential legal vehicle in which CareFirst may believe that HIPAA's lack of its own private right action precludes state law claims for violation of federal law. Therefore, Plaintiffs have addressed the non-preemption of HIPAA for this Court's review.

While HIPAA does not *create* a private right of action, it likewise does not preempt or otherwise preclude any and all actions based upon state law for fraud and abuse, including the consumer protection act, or other common law claims such as negligence and breach of contract. It simply does not create its own stand-alone private right of action.

Contrary to CareFirst's assertions, it is well-established that individual state consumer protection claims and common law claims can be brought on the basis of HIPAA violations. *Dickman v. MultiCare Health Sys.*, 2015 U.S. Dist. LEXIS 71306 (W.D. Wash. June 2, 2015) (remanding action based on violations of Washington Consumer Protection Act predicated on HIPAA violations.) Federal courts have noted that actions based upon HIPAA violations are routinely viable in state courts under both theories of negligence and consumer protection acts.[2] Although the Named Plaintiffs' claims for privacy violations are not based on HIPAA alone, there would be nothing novel about such an action, and certainly nothing that required dismissal.

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[2] "Moreover, state courts routinely apply federal law in state law consumer protection and negligence suits." *Id.* at *7 (citing *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318, 125 S. Ct. 2363 (2005) ("The violation of federal statutes and regulations is commonly given negligence per se effect in state court proceedings."); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) ("State courts frequently handle state law consumer protection suits that refer to or are predicated on standards set forth in federal statutes."); *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078 (9th Cir. 2007) (Analyzing whether a HIPAA violation occurred that could support a state consumer protection act claim.)

Specific to the DCCPPA, the Act expressly identifies violation of federal law as a proper basis for an unfair and deceptive trade practice claim brought by a consumer. It is an unlawful trade practice to "sell consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, *or by operation or requirement of federal law*." DC Code 28-3904(x) (emphasis added).

CareFirst's reliance on *Johnson v. Quander*, 370 F. Supp 2d 79 (D.D.C. 2005), *et al*. is misplaced. In *Johnson*, the plaintiff filed a complaint which listed "Sixth Claim – Health Insurance Portability and Accountability Act Violation" as a cause of action. Case No. 1:04-cv-00448-RBW, Doc. 1, March 18, 2004; see also *Hudes v. Aetna Life Ins. Co*, Case No. 1:10-cv-01444-JEB, Doc. 49, ¶ 28. This is inconsistent with the pleading in the Named Plaintiffs' Second Amended Complaint.

Similarly, CareFirst's citation to *Citizens Bank of Pa. v. Reimbursement Techs.*, 609 F. App'x 88 (3d Cir. 2015) is misguided. Brief of Appellee at 37. The Third Circuit declined to find that the plaintiffs could rely on HIPAA to support a claim for negligence not because HIPAA was cited, but because "[t]o establish negligence per se, it must show that the purpose of the statute relied upon is, at least in part, to protect the interest of the plaintiff individually, as opposed to the public interest." *Id*. at 93. In *Citizens Bank*, the plaintiff seeking to establish negligence *per se* was a bank, and not an individual protected by HIPAA, which protects *only*

individuals. *Citizens Bank* does not stand for the proposition cited by CareFirst.

Therefore, CareFirst's motion to dismiss and subsequent appellate argument is based on a misapplication of HIPAA case law.

D. THE NAMED PLAINTIFFS HAVE ADEQUATELY PLED VIOLATIONS OF EACH CONSUMER PROTECTION ACT.

1. CareFirst is not exempt from Maryland and Virginia Consumer Protection Act Claims.

CareFirst alleges that their status as a network of for-profit health insurers exempts them from private civil liability under the Maryland and Virginia Consumer Protection Acts Brief of Appellee at 32. Specifically, CareFirst points to a provision in the MCPA, which states that it does not apply to "(1) the professional services of … [an] insurance company", and the VCPA, which states that it does not apply to "insurance companies regulated and supervised by the State Corporate Commission." *See* Md. Code Ann., Comm. Law § 13-104(1); *see also* Va. Code Ann. § 59, 1-199(D). Neither of these provisions supports their contention that their mere status as an insurance company exempts them from private civil liability.

The Maryland Consumer Protection Act provides a limited exemption for claims relating to "the professional services of … [an] insurance company." Md. Code Ann., Comm. Law § 13-104(1). This is not a blanket exemption for all acts an insurance company engages in however. When applying this exemption, there is a distinction between the actual "professional services" provided by the insurance

company and the entrepreneurial and commercial aspects of an insurance company. In *Scull v. Groover*, 435 Md. 112, 76 A.3d 1186 (2013) the Maryland Court of Appeals examined the applicability of this very section to medical professionals. As the Court of Appeals has noted, "not everything that a licensed professional does is a 'professional service.'" *Id*. at 1196. Similarly, and employing the same reasoned approach to the same statute, the only applicability of this exemption is to the actual rendering of health care benefits to the insureds. The Named Plaintiffs' claim in the instant matter is based on CareFirst's failure to safeguard their personal information and is separate and distinct from the CareFirst's actual professional service of providing health insurance coverage. As a result, the CareFirst is not exempt from private civil liability under the Maryland Consumer Protection Act.

The Named Plaintiffs' interpretation of the statute is based on the plain language of the statute, and relevant case law interpreting the meaning of "professional services;" but it is further bolstered by the fact that the Maryland Consumer Protection Act is the vehicle by which Maryland consumers–including the instant Maryland Plaintiffs–can enforce Maryland's data breach notification statute, *i.e.* Md. Comm. Law Code 14-3501, *et seq*. (hereinafter the "Personal Information Protection Act."). The Personal Information Privacy Act applies to "a sole proprietorship, partnership, corporation, association, or any other business entity, whether or not organized to operate at a profit." Md. Comm. Law Code Ann.

§ 14-3501(1). The statute plainly applies to each CareFirst entity in that each is a business entity under the definition. If CareFirst's argument of a blanket exemption for any false and misleading statement offered by an "insurance company"–*i.e.* without determining whether those statements were made in the performance of "professional services"–were accepted by this Court, it would be wholly irreconcilable with the Personal Information Protection Act. That is, the Personal Information Protection Act directly conflicts with CareFirst's interpretation of the limited insurance exemption. However, if this Court interprets the limited exemption as the Maryland Court of Appeals did in *Scull*, then there is no conflict between these two provisions of the Maryland Consumer Protection Act. CareFirst can be found exempt from the MCPA for their "professional service" or rendering health insurance, yet still be liable for unlawful violations of the Personal Information Protection Act.

Similarly, the Virginia Consumer Protection Act also provides an exemption for "insurance companies regulated by the State Corporate Commission." Va. Code Ann. § 59.1-199(D). Yet it is important to note "[u]nder Va. Code Ann. § 59.1-199, aspects of consumer transactions authorized by federal and state law are exempt from the Virginia Consumer Protection Act." *Wingate v. Insight Health Corp.*, 87 Va. Cir. 227, 234 (2013). CareFirst's failure to safeguard the Named Plaintiffs' personal information is separate and distinct from CareFirst's actual professional

service of selling health insurance. Most directly, the statements in the relevant Privacy Policy and Internet Privacy Policy are not "authorized by federal and state law." Therefore, these false and misleading statements are subject to the Virginia Consumer Protection Act as any other false and misleading statement. Consequently, CareFirst is also not exempt from private civil liability under the Virginia Consumer Protection Act.

E. THE NAMED PLAINTIFFS HAVE ADEQUATELY PLED TORT BASED CLAIMS

1. The Economic Loss Rule is inapplicable because the Named Plaintiffs have pled they have suffered non-economic damages.

The District of Columbia has adopted a limited "economic loss rule" which CareFirst asks this Court to expand and apply to a case in which non-economic damages have been caused by CareFirst's bad acts. "Generally, under the 'economic loss' rule, a plaintiff who suffers *only* pecuniary injury as a result of the conduct of another cannot recover those losses in tort." *Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 982 (D.C. 2014) (quoting *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 479 (9th Cir. 1995)) (emphasis added). The economic loss rule has no application in tort claims that have caused more than pecuniary injury. CareFirst must not be permitted to morph the limited DC economic loss rule from a rule which applies when "only pecuniary injury" occurs to one which applies when plaintiffs "seek largely to recover economic loss."

The District of Columbia recognizes a broad range of non-economic damages that are recoverable in tort including "emotional distress," and any past or future "inconvenience" that a plaintiff has or may suffer in the future. *See* DC-Civ-JI 13.01. This breach has caused serious concern and inconvenience for their insureds, and stated so in their own data breach notification web site. "We deeply regret the concern this attack may cause…" www.CareFirstanswers.com (last visited October 21, 2015) (quoting CareFirst President and CEO Chet Burrell). Due to the inactions and failures of CareFirst, the Named Plaintiffs and members of the class have experienced concern, inconvenience and mental anguish to support a tort claim due to the loss of their data and their necessary need to spend time and effort protecting themselves from future identity theft.

Therefore, as a matter of law, the economic loss rule does not apply because the Named Plaintiffs have pled more than simple economic loss in support of their tort causes of action.

2. The "special relationship" exception bars application of the economic loss rule.

CareFirst argues that there is no "special relationship" between an insurance company and its insured; however, this is incompatible with the district court's previous interpretation of the relationship:

> Neither party has presented any authority from the District of Columbia which establishes the relationship between an insurer and its insured. Some indication that insurers have additional obligations appears in

> *Continental Insurance Company v. Lynham*, 293 A.2d 481, 483 (D.C.App.1972). There the Court noted that "the insurer has a duty to process and pay claims expeditiously and in good faith …." Moreover, like the real estate broker in Brown v. Coates, the insurance carrier is an industry regulated in the public interest by a comprehensive statutory scheme. 35 D.C. Code §§ 101-2004. Given these considerations, the court concludes that under the law of the District of Columbia, an insurer has additional obligations to its insured which subject it to more stringent standards of conduct than those normally imposed on parties to a contract.

Cent. Armature Works, Inc. v. Am. Motorists Ins. Co., 520 F. Supp. 283, 292 (D.D.C. 1980) (internal citations omitted). This well-reasoned district court opinion relied largely upon the *binding* federal Court of Appeals precedent from prior to the creation of the "home rule courts." "In Brown, the Court emphasized the 'fiduciary' relationship that it found between the real estate broker and his clients. In establishing this relationship and the accompanying high standard of conduct, the district court relied not only on the agency relationship between the parties, but also on the public policy considerations which had lead [*sic*] to the regulation of the real estate broker industry." *Id*. at *291*-92 (citing *Brown v. Coates*, 102 U.S. App. D.C. 300, 253 F.2d 36 (1958)). Like the fiduciary relationship between the real estate broker and its clients in *Brown*, the district court reasoned that an insurance company has a similar special relationship with its insureds. Therefore, CareFirst's argument is inconsistent with the law of the District of Columbia.

F. THE NAMED PLAINTIFFS HAVE PLED FRAUD BASED CLAIMS WITH THE REQUISITE PARTICULARITY.

The basis for the Named Plaintiffs' fraud claims was stated with particularity in their Second Amended Complaint. To plead fraud under Rule 9(b), "the circumstances that the claimant must plead with particularity include matters such as the time, place, and content of the false misrepresentations, the misrepresented fact, and what the opponent retained or the claimant lost as a consequence of the alleged fraud." *Semon v. Ledecky (In re United States Office Prods. Sec. Litig.)*, 326 F. Supp. 2d 68, 73 (D.D.C. 2004) (citing *United States ex rel. Totten v. Bombardier Corp.*, 351 U.S. App. D.C. 30, 286 F.3d 542, 551-52 (D.C. Cir. 2002); *United States ex rel. Joseph v. Cannon*, 206 U.S. App. D.C. 405, 642 F.2d 1373, 1385 (D.C. Cir. 1981)).

The Named Plaintiffs identified false statements in CareFirst's Privacy Policy and Internet Privacy Policy. App. pp. 7, 27-=28, ¶¶ 28-29, 117-18. The Named Plaintiffs also pled when these written statements were made, *i.e.* no later than September 2013. *Id*. The entirety of the misleading content was identified for CareFirst. *Id*. And the Named Plaintiffs identified what CareFirst gained, and the Named Plaintiffs' lost. *Id*. at ¶ 122 about the security policies that give rise to the Named Plaintiffs' fraud claims. *Id*. at ¶ 118.

Therefore, the Named Plaintiffs have satisfied the heightened pleadings requirements of Federal Rule of Civil Procedure 9(b) in pleading claims for Fraud

(Count VII) and Constructive Fraud (Count XI) and dismissal is unwarranted at this time.

G. THE NAMED PLAINTIFFS HAVE PLED A VIOLATION OF THE DC DATA BREACH NOTIFICATION LAW.

CareFirst's interpretation of the DC Data Breach Notification Law does not pass muster. Accepting all factual allegations in the Named Plaintiffs' Second Amended Complaint as true, this Court must accept at this stage of the proceedings that CareFirst lost "names, birth dates, email addresses, and subscriber identification numbers." (Doc. 8-1, ¶ 32). Additionally, CareFirst lost the user names of the individual members whose personal information was hacked. This loss of information triggered the DC Data Breach Notification Law, *i.e.* DC Code 28-3851, *et seq*.

CareFirst's misplaced argument is that there is no allegation that CareFirst lost "any other number or code . . . that allows access to or use of any of the DC Plaintiffs' financial or credit account." Brief of Appellee at 38. This is patently incorrect. Each insured whose information was the subject of the hack, including the Named Plaintiffs, lost their own subscriber identification number. This number *is* a financial account number because the members had financial accounts with CareFirst. CareFirst essentially asks this Court to interpret the DC Notification Law as one that is only triggered if *a second* financial account is compromised by a data breach. Therefore, CareFirst lost the actual financial account number that the DC

Notification Law protects.

H. THE NAMED PLAINTIFFS HAVE ADEQUATELY PLED UNJUST ENRICHMENT.

While the presence of an express contract may preclude recovery on an unjust enrichment cause of action, dismissal is unwarranted at this stage of the proceedings because the Named Plaintiffs are entitled to plead alternative theories of relief.

> Under District of Columbia law, "there can be no claim for unjust enrichment when an express contract exists between the parties." Under the Federal Rules of Civil Procedure, however, a plaintiff may plead alternative theories of recovery. Courts in this District have found that a plaintiff should be permitted to plead both breach of contract and unjust enrichment. Such a conclusion is in the interest of justice -- to find that a plaintiff may not plead unjust enrichment where he or she also has alleged a breach of contract could leave that plaintiff without any remedy should the fact-finder determine at a later stage that there was no express agreement between the parties.

The Scowcroft Grp., Inc. v. Toreador Res. Corp., 666 F. Supp. 2d 39, 44 (D.D.C. 2009) (quoting *Schiff v. Am. Ass'n of Retired Persons*, 697 A.2d 1193, 1194 (D.C. 1997); *McWilliams Ballard, Inc. v. Broadway Mgmt. Co.*, 636 F. Supp. 2d 1, 9 n.10 (D.D.C. 2009) (finding that while "plaintiff ultimately cannot recover under both a breach of contract claim and an unjust enrichment claim pertaining to the subject matter of that contract . . . at [the pleadings stage], plaintiff's unjust enrichment claim is an alternate theory of liability which it may pursue"); *Nevius v. Afr. Inland Mission Int'l*, 511 F. Supp. 2d 114, 122 n.6 (D.D.C. 2007) (finding that, in light of Federal Rule of Civil Procedure 8(d), "[t]he court is not persuaded . . . that [Plaintiff] cannot

allege an express contract while asserting a claim for unjust enrichment, a remedy designed for the absence of a contract")) (citing *Albrecht v. Comm. on Employee Benefits of the Fed. Reserve Employee Benefits Sys.*, 357 F.3d 62, 69, 360 U.S. App. D.C. 47 (D.C. Cir. 2004) (finding that there can be no claim for unjust enrichment when the claim relies on the terms of an express contract between the parties); Fed. R. Civ. P. 8(d)). Therefore, it would be contrary to the interests of justice to dismiss a cause of action for unjust enrichment at the motion to dismiss stage due to the potential that no express agreement may be found between the parties in the later stages of the litigation.

CONCLUSION

For the reasons stated herein, Appellants respectfully request that this Court reverse the opinion of the trial court and remand the matter for further proceedings.

Respectfully submitted,

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RULE 32 CERTIFICATION

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2017 a copy of the foregoing Reply Brief of Appellants was filed using the Court's ECF system as follows:

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