ORAL ARGUMENT NOT YET SCHEDULED

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

CORRECTED BRIEF OF APPELLANTS

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January 10, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to the Circuit Rule 28, Appellants state the following:

1. Parties and Amici

Plaintiffs-Appellants:	Chantal Attias, Individually and on behalf of all other similarly situated
	Andreas Kotzur, Individually and on behalf of all others similarly situated
	Richard Bailey, Individually and on behalf of all others similarly situated
	Latanya Bailey, Individually and on behalf of all others similarly situated
	Curt Tringler, Individually and on behalf of all others similarly situated
	Connie Tringler, Individually and on behalf of all others similarly situated
	Lisa Huber, Individually and on behalf of all others similarly situated
Defendants-Appellees:	CareFirst, Inc.
	Group Hospitalization and Medical Services, Inc.
	CareFirst of Maryland, Inc.
	CareFirst BlueChoice

2. Rulings under Review

The Named Plaintiffs are appealing from the Order and supporting memorandum opinion of District Judge Christopher R. Cooper entered on August 10, 2016, granting Defendants' Motion to Dismiss, dismissing the Plaintiffs' Second

Amended Complaint without prejudice for lack of subject matter jurisdiction, and denying Plaintiffs' Motion to Strike. The order and supporting memorandum opinion appear [App.350 et seq.]

3. **Related Cases**

The instant case has not been before this Court of Appeals or any other court. There are no related cases as defined by Circuit Rule 28(a)(1)(C).

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**Authorities upon which we chiefly rely are marked with asterisks.*

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The United States District Court for the District of Columbia had jurisdiction under on 28 U.S.C. § 1332(d)(2), and by virtue of the fact that all acts and omissions complained of occurred within the District of Columbia.

This Court's jurisdiction over the appeal from the district court's order granting defendants-appellees' motion for summary judgment rests on 28 U.S.C. § 1291.

The district court Order appealed from was entered on August 10, 2016, and the Appellants timely filed their Notice of Appeal on September 6, 2016. The district court's August 10, 2016 Order is a final, appealable order.

STATEMENT OF THE ISSUES

I. Whether victims of a data breach have standing to file suit in an Article III court when the breach has forced the victims to mitigate their damages.

II. Whether the victims of a data breach whose statutory rights have been violated and have suffered concrete harm have standing in an Article III court.

III. Whether the imminent threat of future identity theft is a concrete injury when data thieves successfully steal victims' sensitive information.

IV. Whether a data breach victims' subsequent identity theft is "fairly traceable" to the data breach.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

CareFirst Inc., Group Hospitalization and Medical Services, Inc., CareFirst of Maryland, Inc., and CareFirst BlueChoice (hereinafter collectively referred to as "CareFirst") is a network of for-profit health insurers which provide health insurance coverage to individuals in the District of Columbia, the State of Maryland and the Commonwealth of Virginia. Collectively, CareFirst insures in excess of one million individuals with health coverage in the relevant geographic area. Chantal Attias, Andreas Kotzur, Richard and Latanya Bailey, Curt and Connie Tringler, and Lisa Huber (hereinafter "the Named Plaintiffs") are the customers and insureds of CareFirst in the District of Columbia, Maryland and Virginia.

In June of 2014, the sensitive and personal information of the Named Plaintiffs was obtained by data thieves who conducted a sophisticated cyberattack on CareFirst's servers. CareFirst failed to recognize the attack had even occurred—given the apparent expertise of the attackers—until April of 2015. On May 20, 2015, the Named Plaintiffs and the members of the putative class were first notified that personal and sensitive information in the custody and care of CareFirst had been attacked and taken by data thieves.

CareFirst admits that it was attacked and breached by a data thief. (App.9).

CareFirst offered to purchase identity theft protection—though not comprehensive—for the putative class. *Id*. ¶¶ 36-37. CareFirst warned the victims about their need to seek identity theft protection. *Id*. And CareFirst admitted that names, birthdays, email addresses, and subscriber identification numbers were stolen.[1, 2] (App.4).

The Named Plaintiffs each received a notification letter from CareFirst. After reviewing the letters and their options, the Named Plaintiffs purchased more comprehensive identity theft protection to mitigate their harm, having determined that the risk of identity theft would not be adequately addressed by the protection offered by CareFirst. Each then filed suit for the damages they sustained.

II. PROCEDURAL BACKGROUND

Chantal Attias, Richard Bailey and Latanya Bailey filed an initial complaint in the United States District Court for the District of Columbia. Ultimately, the Complaint was amended twice with leave of Court prior to the filing of any motion.

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[1] The district court wrongfully believed that "account numbers" were not lost in this case, and the matter was distinguishable from *Remijas*. "Without a hack of information such as social security numbers, account numbers, or credit card numbers, there is no obvious, credible risk of identity theft that risks real, immediate injury." (App.358). (quoting *Antman v. Uber Techs. Inc.* No. 3:15-cv-01175, 2015 WL 6123054, at *11 (N.D. Cal. Oct. 19, 2015)]. It is not disputed that health account numbers were taken.

[2] The named Plaintiffs alleged that social security numbers were taken as well based upon the nature of the attack and expert opinion that data thieves do not leave tracks without gaining such valuable information.

The amendments largely added individuals as either named plaintiffs or named defendants; and the amendments added state-specific statutory actions as plaintiffs were added.

On September 24, 2015, CareFirst filed its motion to dismiss for lack of subject matter jurisdiction and for failure to state claim. (App.37). On November 12, 2015 and in support of its reply to the opposition, CareFirst submitted an affidavit of Clayton Moore House in support of CareFirst's motions. The arguments were fully briefed. While the motions were ripe but before the district court ruled, Notices of Supplemental Authority were submitted by both the Named Plaintiffs and CareFirst at various times. (App.201, 287, 290, and 338).

On August 10, 2016, the district court entered a dismissal without prejudice for lack of subject matter jurisdiction as to all Named Plaintiffs. (App.350). No decision on CareFirst's Motion to Dismiss for Failure to State a Claim was reached.

The district court found a lack of subject matter jurisdiction for the "non-Tringler Plaintiffs" due to a perceived failure to show injury-in-fact. The district court largely focused on the alleged imminent future harm identified as the "increased risk of identity theft" and held that the risk was not "sufficiently substantial" to support standing. (App.351). The court also dismissed mitigation expenses as "either self-inflicted" or "too flimsy." And finally, the district court determined that the violations of the victims' statutory rights did not satisfy the

requirement of "concreteness." (App.361). It further found that the two remaining Named Plaintiffs, Curt and Connie Tringler, had not suffered an injury that was fairly traceable to the data breach.

On September 6, 2016, the Named Plaintiffs timely noted their appeal to this Honorable Court. (App.363).

SUMMARY OF THE ARGUMENT

The district court's mis-application of Article III standing is contrary to the holdings of the most recent and applicable Circuit Court opinions that have examined this issue. It places no value on a citizen's right to maintain the privacy of her digital data and held that the privacy of one's digital profile is of no value. This is a dangerous precedent in 2017.

The Named Plaintiffs have standing to pursue their claims, individually and on behalf of all others similarly situated, because they have each suffered injury-in-fact that is fairly traceable to the data breach and their harms may be redressed by a favorable decision.

All of the Named Plaintiffs have injury-in-fact under the analysis that has been adopted by both the Sixth Circuit Court of Appeals and the Seventh Circuit Court of Appeals. The necessity of mitigation expenses and the substantial risk of imminent harm in the form of identity theft is concrete, particularized and actual and imminent harm for which the Named Plaintiffs can seek redress. *Galaria v. Nationwide Mut.*

Ins. Co., No. 15-3386, 2016 WL 4728027 (6th Cir. Sept. 12, 2016); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015). The analysis of these Courts of Appeals has also been implicitly accepted in *dictum* by this Court. *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016).

The Named Plaintiffs can additionally show injury-in-fact through the violation of their statutory rights coupled with both tangible and also intangible but concrete harm. *Id*.

Two of the Named Plaintiffs, Curt and Connie Tringler (hereinafter "the Tringlers") have already suffered identity theft in the form of tax fraud. While the district court implicitly acknowledged that the Tringlers had suffered injury-in-fact, the Tringlers' injury—as well as the injuries of all the Named Plaintiffs—is also fairly traceable to the CareFirst data breach.

Therefore, each of the Named Plaintiffs has standing under Article III to pursue their claims in federal court and to seek redress for the harms they have suffered.

ARGUMENT

I. The Named Plaintiffs Have Alleged Injury-in-Fact

Article III demands "an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, 130 S. Ct. 2743,

2752, 177 L. Ed. 2d 461 (2010) (citing *Horne v. Flores*, 557 U.S. 433, ——, 129 S.Ct. 2579, 2591–2592, 174 L.Ed.2d 406 (2009)). This first requirement—that an injury be concrete, particularized and actual or imminent—is commonly referred to as "injury-in-fact" and compels a plaintiff to make three separate showings.

A. The victims' mitigation expenses are injury-in-fact.

While the majority of the district court's opinion is focused on the impending nature of allegations of future imminent harm (App.356), the Named Plaintiffs alleged legally sufficient and already sustained "actual harm" that is both a sufficiently substantial and certainly impending harm.

Each Named Plaintiff has suffered actual harm in the form of necessary mitigation costs to prevent future harm. This harm has been held by other Circuits to be not merely "imminent," but to be "actual" and to alone meet the requirements of a showing of Article III standing. The Sixth Circuit most recently found "these costs are a concrete injury suffered to mitigate an imminent harm, and satisfy the injury requirement of Article III standing." *Galaria v. Nationwide Mut. Ins. Co.*, No. 15-3386, 2016 WL 4728027, at *3 (6th Cir. Sept. 12, 2016). Similarly, the Seventh Circuit has held "[t]hese credit-monitoring services come at a price that is more than *de minimis* . . . . That easily qualifies as a concrete injury." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 694 (7th Cir. 2015). Because each named plaintiff has already expended time and money to mitigate the risk of identity theft, the

Named Plaintiffs "easily" satisfy the requirement of injury-in-fact. *See Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 439, n.10 (D.C. Cir. 1986) ("[A]lleged economic loss clearly constitutes a 'distinct and palpable' injury, that 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision…'") (citations omitted). Therefore, the economic loss already sustained qualifies as injury-in-fact in the presence of a targeted data breach.

The district court discredited this actual harm by finding that the named Plaintiffs had "manufactured standing" by protecting themselves from identity theft. (App.360). This finding is inconsistent with other Circuit Court holdings that have found the purchase of identity theft protection is a legitimate and reasonable mitigation of damages. This is because when a hacker steals data "the risk that Plaintiffs' personal data will be misused by the hackers . . . is immediate and very real." *Remijas*, 794 F.3d at 693 (7th Cir. 2015) (quoting *In re Adobe Sys., Inc. Privacy Litig.*, 66 F.Supp.3d 1197, 1214 (N.D.Cal.2014) ((citing *Clapper*, 133 S. Ct. at 1148))). *Remijas* then held "[a]n affected customer, having been notified by Neiman Marcus that her card is at risk, might think it necessary to subscribe to a service that offers monthly credit monitoring." *Id.* at 694. This is an explicit rejection of the district court's contrary finding that these mitigation expenses were "manufactured" or were otherwise unreasonable or unnecessary. *See also, Galaria* at *3 (6th Cir. Sept. 12, 2016) ("although it might not be 'literally certain' that

Plaintiffs' data will be misused, there is a sufficiently substantial risk of harm that incurring mitigation costs is reasonable.") (internal citations omitted). Therefore, the rule from federal Circuit Courts addressing mitigation costs associated with data breaches is that when a "data thief" has stolen data, mitigation through the purchase of identity theft protection is a reasonable measure that confers standing.

While the district court focused on the factually disputed claim that social security numbers were not lost, the prevailing rule reveals that the loss or "non-loss" of social security numbers is indeterminate of the reasonableness of mitigating damages. In *Remijas*, the defendant similarly supplied an affidavit claiming "there is no indication that social security numbers or other personal information were exposed in any way." *Remijas*, at 690. But this did not defeat the Circuit Court's view that plaintiffs had standing in an Article III court. Nevertheless, the Seventh Circuit found that identity theft protection was an existing actual harm. As the Seventh Circuit explained "it is important not to overread [sic] *Clapper*. *Clapper* was addressing speculative harm based on something that may not even have happened to some or all of the plaintiffs. In our case, Neiman Marcus does not contest the fact that the initial breach took place." *Id*. at 694 (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)). The facts here are consistent with *Remijas*, and for the same reasons, the *Clapper* analysis is inapposite. The district court in this case, however, over-read *Clapper* to eliminate this actual

harm as a basis for standing.

Further, this case is distinct from the non-binding district court opinion discussed extensively by the lower court: *In re: Science Applications International Corp. (SAIC) Backup Tape Data Theft Litigation*, 45 F. Supp. 3d 14 (D.D.C. 2014). In *SAIC*, a thief broke into a car parked in a San Antonio parking garage and stole the car's GPS system, stereo, and several data tapes. *SAIC*, 45 F. Supp. 3d at 19. On the stolen data tapes were personal information and medical records of 4.7 million members of the United States military and their families. *Id.* Plaintiffs filed suit against the company whose employee's car was broken into, along with SAIC, claiming that their information should have been properly safeguarded. *Id.* In denying standing, the district court noted that no one could maintain that the purpose of the theft was to steal the data tapes and that it was unlikely that the thief even knew what the data tapes were, let alone could figure out how to decode them. The critical factor in finding a lack of standing was the nature of the attack itself because in *SAIC* there was no reasonable belief that the target of the theft was data. The data thieves in this case were exactly that, *data thieves*. (App.10-14). The holding in *SAIC* should have no bearing on this case because the Named Plaintiffs and the members of the Class were in fact the targets of the attack.[3]

[3] It is important to note that even in *SAIC* the district court allowed those plaintiffs who had actually suffered identity theft to move forward with their claims. *SAIC*, 45 F. Supp. 3d at 19.

The Named Plaintiffs have already suffered economic loss after a targeted attack seeking their personal and sensitive data. Therefore, the victims of the data breach have already suffered cognizable injury-in-fact harm because they have taken reasonable steps to mitigate the damage. This meets the threshold for standing in an Article III Court, and reversal is warranted.

B. The violation of the victims' statutory rights is a "concrete" injury-in-fact.

1. *Tangible harms caused by statutory rights violations confer standing*

Each of the Named Plaintiffs has suffered injury-in-fact due to the violation of their statutory rights coupled with concrete and tangible harm. The mitigation expenses, *i.e.* economic loss, is not an intangible injury, but a tangible one. *Tangible* injuries coupled with violations of statutory rights establishes standing under Article III.

In interpreting the District of Columbia Consumer Protection Procedures Act, D.C. Code 28-3901, *et seq*., this Court and the District of Columbia Court of Appeals have held that the right to be free from unlawful trade practices is a legally protected interest that confers standing when violated. The District of Columbia Court of Appeals, sitting *en banc*, found that a violation of D.C. CPPA statutory rights confer standing on their own: "Our principles of justiciability recognize that the injury-in-fact requirement can be satisfied 'solely by virtue of 'statutes creating legal rights,

the invasion of which creates standing.'" *Grayson v. AT&T Corp*., 15 A.3d 219, 247 (D.C. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992)). Further, "Mr. Grayson alleges personal injury to himself, or injury in fact, based on the defendants' violation of his statutory right (derived from D.C. Code § 28-3904) to the disclosure of information about their failure to report and turn over to the District government breakage for the benefit of those who obtain calling cards in the District." *Grayson v. AT&T Corp.*, 15 A.3d 219, 249 (D.C. 2011).

Similarly, this Court found that the D.C. CPPA creates a legal interest that can satisfy part of Article III's standing requirements:

> [Shaw and Mendelson] maintain that they have suffered a legally cognizable injury because *Marriott invaded their interest in being free from improper trade practices, an interest protected under the CPPA.* The deprivation of such a statutory right may constitute an injury-in-fact sufficient to establish standing, even though the plaintiff "would have suffered no judicially cognizable injury in the absence of [the] statute."

Shaw v. Marriott Int'l, Inc., 390 U.S. App. D.C. 422, 425, 605 F.3d 1039, 1042 (D.C. Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 514, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 619, 370 U.S. App. D.C. 269 (D.C. Cir. 2006) ("Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right

conferred on a person by statute.") (emphasis added); *see also Nat'l Consumers League v. Bimbo Bakeries USA*, 2015 D.C. Super. LEXIS 5, *8 (D.C. Super. Ct. 2015) ("the National Consumers League 'can meet the requirement to show an injury-in-fact by showing a deprivation of a statutory right to be free from improper trade practices under the CPPA.'"); *Nat'l Consumers League v. Gerber Prods. Co*., 2015 D.C. Super. LEXIS 10 (D.C. Super. Ct. 2015) (relying upon *Bimbo Bakeries*.). Violations of legal rights created by the District of Columbia Consumer Protection Procedures Act, and other similar state consumer acts, is part of a concrete injury. When the violation occurs along with tangible harm such as economic loss, concrete injury exists.

The district court failed to mention the *Shaw* decision in its opinion by misapplying the recent Supreme Court decision of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016). Specifically, the district court found the "concrete" requirement of the injury-in-fact triumvirate to be lacking. ("Because they do not plausibly allege concrete harm, they have not demonstrated that they have standing to press their claims."). (App.362). But *Spokeo* is consistent with this Court's ruling in *Shaw*, and further supports a finding that the violation of the statutory rights of the Named Plaintiffs is a concrete "injury-in-fact."

In *Spokeo*, the issue before the Court was whether *intangible* harms coupled with purely "procedural" statutory rights violations were enough to confer standing.

The Supreme Court explained, "'Concrete' is not, however, necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Spokeo*. at 1549. As the Supreme Court grappled with whether an *intangible* harm can be designated "concrete" by Congress, the Court critically noted:

> Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." Similarly, Justice Kennedy's concurrence in that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."

Id. (quoting *Lujan*, 504 U.S. at 578, 580).

The Named Plaintiffs have already shown "tangible harm" in the form of mitigation expenses. The district court did not deny this in the initial part of its opinion, instead finding that the mitigation expenses were "manufactured" because the risk of future harm was "too speculative."[4] *Supra*; (App.360). But assuming, *arguendo*, mitigation expenses are "manufactured," the district court did not—and CareFirst cannot—deny that money paid for mitigation is *tangible*.

[4] The district court seemed to consider the violation of the statute as a harm that was not concrete, but this is an erroneous application of *Spokeo*, *Shaw*, *et al.* The violation of the statutory right is necessarily "intangible," but the loss of money, most notably, is undeniably concrete. The district court did not "couple" these or find that the loss of money was not concrete.

Because tangible harm coupled with a violation of statutory rights satisfies the Article III requirement of injury-in-fact, the Named Plaintiffs have alleged standing. Because *Spokeo* did not disturb long-standing law that statutory rights violations and tangible harm confer standing, it is wholly consistent with *Shaw v. Marriott*; and this Court's precedent that violations of the right to be free from deceptive trade practices coupled with *tangible harm* confers standing.

2. The Named Plaintiffs' intangible harms are concrete and confer standing.

The Named Plaintiffs have also alleged intangible harms in the form of invasion of privacy and future risk of identity theft that are concrete and confer standing when coupled with statutory rights violations. In *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016), a post-*Spokeo* opinion, this Court confirmed that these intangible but concrete harms coupled with violations of statutory rights confer standing. The *Hancock* plaintiffs alleged "only a bare violation of the requirements of D.C. law in the course of their purchases." *Id*. at 514. The Court noted that what was lacking was an allegation of a concrete injury such as "any *invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury.*" *Id*. (emphasis added). The Named Plaintiffs have alleged these exact intangible but concrete harms.

The Named Plaintiffs have plausibly alleged invasion of privacy and

increased risk of identity theft. Therefore, the Court must only apply this Court's finding in *Shaw* that plaintiffs have a legal "interest in being free from improper trade practices, an interest protected under the CPPA," and the well-reasoned statements from *Hancock*. *Shaw*, 605 F.3d at 1042. The violation of these legally protected interests conjoined with the intangible but concrete losses of privacy invasion and increased risk of identity theft validate that the Named Plaintiffs have standing to pursue their claims under Article III.

Invasion of privacy—a long standing tort capable of redressability—is a classic example of intangible harm that is nonetheless concrete. *See Spokeo* at 1549 (citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 775–777, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) ("it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."). In this manner, the Supreme Court reaffirmed that "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *Spokeo*, at 1549 (citing Restatement (First) of Torts §§ 569 (libel), 570 (slander *per se*) (1938). This includes risk of future harm and the harms associated with an invasion of privacy.[5]

[5] The Supreme Court further stated that even more difficult to prove intangible harms such as "the inability to obtain information" coupled with a statutory violation is enough to confer standing. *Spokeo* at 1549 (citing *Federal Election Comm'n v. Akins,* 524

Therefore, all of the Named Plaintiffs have standing to pursue claims because they have alleged violations of their statutory rights coupled with intangible, but concrete harm.

C. Imminent future harm is injury-in-fact.

The Named Plaintiffs also allege they are at an increased and certainly impending risk of becoming victims of identity theft crimes, fraud, and abuse due to having their PII, PHI, and Sensitive Information stolen, and have been forced to spend considerable time and money to investigate and mitigate the imminent risk of harm from identity theft, fraud, and abuse as a result of CareFirst's conduct. These allegations are also sufficient to establish the Named Plaintiffs have Article III standing.

Article III does not foreclose any and all claims in which future injuries allegedly support Article III standing. *Remijas*, 794 F.3d at 693. Instead, future injuries properly support standing when there is a substantial risk that the harm will occur.

In *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1144, 185 L. Ed. 2d 264 (2013), the plaintiffs sought a declaration that 50 U.S.C. §1881a, which permits the government to surveil communications made by "non-United States persons" who

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U.S. 11, 20–25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998))

are reasonably believed to be located outside the United States, is unconstitutional. *Clapper*, 133 S. Ct. 1142. The statute provides that permission must be obtained from the Foreign Intelligence Surveillance Court before such surveillance can occur. *Id.* The *Clapper* plaintiffs were individuals who *might potentially* communicate with someone whose communications were being surveilled. *Id.*

The *Clapper* Court, in denying standing, relied on the fact that plaintiffs' theory "necessarily rests on their assertion that the Government will target *other individuals." Clapper,* 133 S. Ct. at 1148. Standing was denied because the plaintiffs themselves were not victims of the statute they sought to make unconstitutional, *i.e.* there was a lack of particularization, and the only particularized harm they could assert was not concrete.

Unlike in *Clapper*, which was a constitutional challenge to a statute, courts typically find a substantial risk of future harm when plaintiffs allege that theft and actual misuse of their personal information has already occurred. As the Seventh Circuit explained in *Remijas:*

> At this stage of the litigation, it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach. Why else would hackers break into a store's database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities.

Remijas, 794 F.3d at 693; *See also, In re Adobe Systems, Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1215 (N.D. Cal. 2014) ("Some of the stolen data has already surfaced

on the Internet, and other hackers have already misused it to discover vulnerabilities in Adobe's products. Given this, the danger that Plaintiffs' stolen data will be subject to misuse can plausibly be describe as "certainly impending."); *Benecard*, 2015 WL 5576753, at *4 (finding that allegations of future financial harm, on their own, satisfied the "injury-in-fact" prong of Article III, because unknown persons who had access to the plaintiffs' private information had misused that information to file fraudulent tax returns in plaintiffs' names).[6]

Like the plaintiffs in *Remijas*, *Adobe* and *BeneCard*, the Named Plaintiffs alleged theft and actual misuse of their personal information:

> 1) Defendants' inadequate security procedures and practices allowed third parties to access and steal Plaintiffs' personal information. (App.7-8)
>
> 2) Plaintiffs now face years of constant surveillance of their financial and personal records, monitoring, and loss of rights. (App.13)
>
> 3) Plaintiffs have suffered actual theft of their income tax returns as a result of Defendants' inadequate security procedures and practices. (App.13)

These allegations clearly show that hackers were able to read, recognize and

[6] Other courts found standing on allegations of theft alone. *See In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 962 (S.D. Cal. 2014) ("Plaintiffs' allegations that their Personal Information was collected by Sony and then wrongfully disclosed as a result of the intrusion [is] sufficient to establish Article III standing"); *Krottner v. Starbucks*, 628 F.3d 1139, 1143 (9th Cir. 2010) (alleging "a credible threat of real and immediate harm stemming from the theft of a laptop containing their un-encrypted personal data.").

steal the Named Plaintiffs' personal information and have actually misused it, and have the capability and intent to continue misusing it in the future. Accordingly, there is a substantial risk of future harm sufficient to confer standing. *Clapper* at 1150, n5. ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.'").

The *Remijas* decision, again, is particularly instructive. Consistent with the Supreme Court's decision in *Clapper*, *Remijas* held that "[a]llegations of future harm can establish Article III standing if that harm is certainly impending," but "allegations of possible future injury are not sufficient." *Remijas*, 794 F.3d at 692 (quoting *Clapper*, 133 S. Ct. at 1147). The Court noted the plaintiffs' complaint alleged that class members suffered fraudulent charges on their credit cards, but such fraudulent charges had been reimbursed. *Id.* Nonetheless, the court held that there are identifiable costs associated with "sorting things out" when a person's identity has been stolen or compromised. *Id.* These identifiable costs may include the lost value of time necessary to deal with the various administrative tasks associated with protecting oneself against identity theft, and credit monitoring necessitated by the ongoing risk of future identity theft. *Id.*

The Named Plaintiffs assert they incurred costs associated with "sorting

things out" as a result of the data breach. Specifically, the Named Plaintiffs assert they expended time and money to investigate and mitigate the imminent risk of harm from identity theft. These costs, combined with the certainly impending and substantial risk of future identity theft, are sufficient to confer standing. *Remijas*, 794 F.3d at 692; *see also Galaria* at *3 ("Where Plaintiffs already know that they have lost control of their data, it would be unreasonable to expect Plaintiffs to wait for actual misuse—a fraudulent charge on a credit card, for example—before taking steps to ensure their own personal and financial security, particularly when Nationwide recommended taking these steps."); *accord.*, *In re , Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d at 1214–15.

The Named Plaintiffs have had their data stolen by data thieves, as defined by CareFirst. Therefore, there is a substantial risk of future harm that rises above the threshold to find injury-in-fact.

II. The Victims' Loss is "Fairly Traceable" to CareFirst's Conduct.

The district court noted that two of the named plaintiffs, *i.e.* Curt and Connie Tringler, alleged actual identify theft in the form of tax fraud.[7] (App.50). The district court seemingly agreed that this met the requirement of injury-in-fact, but declined to find the Tringlers had standing by claiming that the loss was not "fairly traceable"

[7] Though the district court did not analyze whether other victims' injuries were "fairly traceable" to the breach, Appellants state that all of the injuries-in-fact complained of are fairly traceable to the data breach for the reasons contained herein.

to the data breach. *Id.*

The district court applied an erroneous legal standard in determining the injury-in-fact was not "fairly traceable" to the data breach. Though the Tringlers, and all the Named Plaintiffs, would not have suffered harm but for the failures of CareFirst, the fairly traceable standard is less than a "but-for" requirement:

> This element of standing "is not focused on whether the defendant 'caused' the plaintiff's injury in the liability sense," because "causation to support standing is not synonymous with causation sufficient to support a claim." Indeed, the Supreme Court has made clear that "[p]roximate causation is not a requirement of Article III standing." "To that end, the fact that an injury is indirect does not destroy standing as a matter of course."

Galaria at *4 (internal citations omitted). The district court found that tax fraud was not fairly traceable to the data breach by asserting "[i]t is not plausible that tax refund fraud could have been conducted without the Tringlers' Social Security Numbers." (App.359). Though the Named Plaintiffs did allege that social security numbers were lost, the district court's statement is a classic "but-for" analysis and is more appropriate for a Rule 56 motion than for a standing analysis.[8]

Data fraud is fairly traceable to data theft. Applying the appropriate legal standards, Circuit Courts have almost uniformly found that identity fraud is fairly traceable to a data breach. *See e.g., Galaria*; *Resnick v. AvMed, Inc.*, 693 F.3d 1317,

[8] For instance, there was absolutely no testimony or evidence before the district court to support the statement that tax refund fraud requires social security numbers.

1324 (11th Cir. 2012); *Lewert*, 819 F.3d at 969; *Remijas*, 794 F.3d at 696; *Krottner*, 628 F.3d at 1141. And finally, even this jurisdiction's district court agreed that fraud was fairly traceable to a data breach. *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 32-33(D.D.C. 2014). The Tringlers have suffered tax fraud which is necessarily premised on a thief's ability to inappropriately gather their data. This type of harm easily fits Article III's second requirement.

Therefore, the Tringlers and all the Named Plaintiffs respectfully suggest that the injuries sustained, including the actual identity theft suffered by the Tringlers, is fairly traceable to the data breach.

CONCLUSION

For the reasons stated herein, the Named Plaintiffs respectfully request that the judgment of the District Court be reversed and this matter be remanded to commence with discovery and move toward trial by jury on all counts.

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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/s/ Christopher T. Nace
Christopher T. Nace, Esq.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2017 a copy of the foregoing Brief of Appellants was filed using the Court's ECF system as follows:

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