

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PHILADELPHIA INDEMNITY)
INSURANCE COMPANY, ACADIA)
INSURANCE COMPANY, UNION)
INSURANCE COMPANY,)
) C.A. No. 198, 2025
)
Plaintiffs-Below/Appellants,)
)
v.) Appeal from the Superior Court of
) the State of Delaware,
) C.A. No 22C-12-141 KMM (CCLD)
)
BLACKBAUD, INC.,)
)
Defendant-Below, Appellee.)
_____)

APPELLEE'S ANSWERING BRIEF

OF COUNSEL:

**PARKER POE ADAMS &
BERNSTEIN LLP**

Sarah Fulton Hutchins
Corri A. Hopkins
620 S. Tyron Street, Suite 800
Charlotte, NC 28202
(704) 372-9000

**MORRIS, NICHOLS, ARSHT &
TUNNELL LLP**

John P. DiTomo (#4850)
Jialu Zou (#7478)
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
jditomo@morrisnichols.com
jzou@morrisnichols.com
*Attorneys for Defendant Below/
Appellee Blackbaud, Inc*

July 24, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS	iii
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENTS.....	4
STATEMENT OF FACTS	5
A. Applicable Contracts.....	5
B. The Ransomware Attack.....	7
C. Plaintiffs’ Allegations	10
D. Procedural History	11
ARGUMENT	14
I. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO PROPERLY PLEAD THEIR SUBROGATION CLAIMS.....	14
A. Question Presented.....	14
B. Scope of Review	14
C. Merits of Argument.....	15
II. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO ALLEGE PROXIMATE CAUSE.	23
A. Question Presented.....	23
B. Scope of Review	23
C. Merits of Argument.....	23
1. The Contracts do not authorize the Remediation Expenses.	25
i. No provision of the Contracts allows Plaintiffs to recover the Remediation Expenses.	25

ii.	The Contracts do not have a “reasonable reliance” provision.	26
iii.	Plaintiffs’ interpretation of the Contracts is unreasonable.....	26
2.	Plaintiffs’ allegations of proximate cause are conclusory.....	30
i.	Plaintiffs declined to identify the Insureds’ Affected Data that allegedly caused the Insureds to incur the Remediation Expenses.	31
ii.	Plaintiffs declined to identify the laws that allegedly caused the Insureds to incur the Remediation Expenses.	36
III.	DISMISSAL WITH PREJUDICE WAS PROPER.	44
A.	Question Presented.....	44
B.	Scope of Review	44
C.	Merits of Argument.....	45
CONCLUSION.....		48

TABLE OF CITATIONS

Cases

<i>A.O. Fox Mem'l Hosp. v. Am. Tobacco Co.</i> , 754 N.Y.S.2d 368 (2003).....	17
<i>Am. Bottling Co. v. Repole</i> , 2020 WL 7787043 (Del. Super. Ct. Dec. 30, 2020).....	46
<i>Aspen Am. Ins. Co., et al. v. Blackbaud, Inc.</i> , 624 F.Supp.3d 982 (N.D. Ind. 2022)	1, 40, 41, 42
<i>Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.</i> , 344 F.3d 211 (2d Cir. 2004)	17
<i>Brehm v. Eisner</i> , 746 A.2d 244 (Del. 2000)	40
<i>Chambliss v. Carefirst, Inc.</i> , 189 F. Supp. 3d 564 (D. Md. 2016).....	32
<i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013).....	36
<i>Clemens v. ExecuPharm Inc.</i> , 48 F.4th 146 (3d Cir. 2022)	31
<i>Com. Union Ins. Co. v. S&L Contractors, Inc.</i> , 2002 WL 31999352 (Del. Com. Pl. Nov. 8, 2002).....	15
<i>Cousins v. Goodier</i> , 283 A.3d 1140 (Del. 2022)	14, 23
<i>CRE Niagara Holdings, LLC v. Resorts Grp., Inc.</i> , 2022 WL 1749181 (Del. Super. Ct. May 31, 2022)	46
<i>E. States Health & Welfare Fund v. Philip Morris, Inc.</i> , 729 N.Y.S.2d 240 (Sup. Ct. 2000).....	16, 17, 18
<i>Erisman v. Zaitsev</i> , 2021 WL 6134034 (Del. Ch. Dec. 29, 2021).....	23
<i>Estate of Reilly by Reilly v. Turko</i> , 2022 WL 301701 (Del. Super. Ct. Feb. 1, 2022)	46

<i>Fernandez v. Leidos, Inc.</i> , 127 F. Supp. 3d 1078 (E.D. Cal. 2015)	32
<i>Friedman v. Maspeth Fed. Loan & Sav. Ass’n</i> , 30 F. Supp. 3d 183 (E.D.N.Y. 2014)	24
<i>Greco v. Syracuse ASC, LLC</i> , 218 A.D.3d 1156, 193 N.Y.S.3d 511 (2023)	31
<i>Harper v. State</i> , 970 A.2d 199 (Del. 2009)	44
<i>In re Asbestos Litig. Estate of Franco v. CSX Transp., Inc.</i> , 2015 WL 4399960 (Del. Super. Ct. July 13, 2015)	46
<i>In re Benzene Litig.</i> , 2007 WL 625054 (Del. Super. Ct. Feb. 26, 2007)	33, 42
<i>In re Blackbaud, Inc., Customer Data Breach Litigation</i> , MDL No. 2972, 2024 WL 2155221 (D.S.C. May 14, 2024)	5, 24
<i>In re Gen. Motors (Hughes) S’holder Litig.</i> , 897 A.2d 162 (Del. 2006)	5, 14, 23
<i>In re Proton Pump Inhibitors Prod. Liab. Litig.</i> , 2023 WL 5165406 (Del. Super. Ct. Aug. 11, 2023)	42
<i>In re Samsung Data Sec. Breach Litig.</i> , 761 F. Supp. 3d 781 (D.N.J. 2025)	32
<i>In re Sci. Applications Int’l Corp. (SAIC) Backup Tape Data Theft Litig.</i> , 45 F. Supp. 3d 14 (D.D.C. 2014)	32
<i>Keach v. BST & Co. CPAs, LLP</i> , 71 Misc. 3d 1204(A), 142 N.Y.S.3d 790 (N.Y. Sup. Ct. 2021)	32
<i>Lawyers Fund for Client Protection v. JP Morgan Chase Bank</i> , 80 A.D.3d 1129, 915 N.Y.S.2d 731 (2011)	20, 21
<i>Lazard Debt Recovery GP, LLC. V. Weinstock</i> , 864 A.2d 955 (Del. Ch. 2004)	37
<i>Lola Roberts Beauty Salon, Inc. v. Leading Ins. Grp. Ins. Co.</i> , 76 N.Y.S.3d 79 (2d Dep’t 2018)	23

<i>Masterson v. IMA Fin. Grp., Inc.</i> , 2023 WL 8647157 (D. Kan. Dec. 14, 2023)	32
<i>Mullen v. Alarmguard of Delmarva, Inc.</i> , 625 A.2d 258 (Del. 1993)	44, 45
<i>MVC Capital Inc. v. U.S. Gas & Elec., Inc.</i> , 2021 WL 4486462 (Del. Super. Ct. Oct. 1, 2021)	44, 45
<i>Ryan v. Buckeye Partners, L.P.</i> , 2022 WL 389827 (Del. Ch. Feb. 9, 2022), <i>aff'd</i> , 285 A.3d 459 (Del. 2022)	15
<i>Scifo v. Alvaria, Inc.</i> , 2024 WL 4252694 (D. Mass. Sept. 20, 2024)	32
<i>Servidori v. Mahoney</i> , 515 N.Y.S.2d 328 (3d Dep’t Apr. 30, 1987)	15, 20
<i>State Farm Fire & Cas., Co. v. Gen. Elec. Co.</i> , 2009 WL 5177156 (Del. Super. Ct. Dec. 1, 2009)	15
<i>Strom v. Paytime, Inc.</i> , 90 F. Supp. 3d 359 (M.D. Pa. 2015)	24
<i>Talkdesk, Inc. v. DM Trans, LLC</i> , 2024 WL 2799307 (Del. Super. Ct. May 31, 2024)	17, 25, 42
<i>Trustwave Holdings, Inc. v. Beazley Ins. Co., Inc.</i> , 2019 WL 4785866 (Del. Super. Ct. Sept. 30, 2019)	15
<i>Turner v. Jones</i> , 1997 WL 1737123 (Del. Comm. Pl. Oct. 13, 1997)	15, 20
<i>Wellgistics, LLC v. Welgo, Inc.</i> , 2024 WL 113967 (Del. Super. Ct. Jan. 9, 2024)	24
<i>White v. Panic</i> , 783 A.2d 543 (Del. 2001)	16, 23
<i>Yu v. GSM Nation</i> , 2018 WL 2272708 (Del. Super. Ct., Apr. 24, 2018)	17
<i>Zemo v. Cnty. Tr. Co.</i> , 133 N.Y.S.2d 291 (Sup. Ct. 1954)	17

Statutes

Health Insurance Portability and Accountability Act, A0108	40, 41
N.Y.C.P.L.R. 3211(a)(7)	18

Rules

Superior Court Civil Rule 8	20
Superior Court Civil Rule 12	15, 20
Superior Court Civil Rule 12(b)(6)	14, 18, 23, 32
Superior Court Civil Rule 15(a)	44
Superior Court Civil Rule 59(e)	12, 45

NATURE OF PROCEEDINGS

Plaintiffs Philadelphia Indemnity Insurance Company (“PIIC”), Acadia Insurance Company, and Union Insurance Company (collectively, “Plaintiffs”)¹ appeal the Superior Court’s decision dismissing their First Amended Complaint, which asserted breach of contract claims stemming from a ransomware attack on the software systems of Defendant Blackbaud, Inc. (“Blackbaud”) in 2020.

Blackbaud provides donor relationship management software to non-profit organizations (“Customers”). Blackbaud’s Customers collect data from their donors (“Constituents”), which the Customers input into Blackbaud’s software and, in exchange, receive data analytics and consulting services from Blackbaud. In May of 2020, Blackbaud learned that it was the victim of a ransomware attack (the “Attack” or “Incident”), wherein an unknown cybercriminal “exfiltrated” data (the “Affected Data”) input by a *subset* of Blackbaud’s Customers (the “Affected Customers”). Blackbaud acted immediately to expel the cybercriminal from its systems, and to identify the Affected Customers and their Affected Data.

None of the Affected Data was lost or destroyed as a result of the Incident, and *none* of the Affected Customers lost access to their Blackbaud software or

¹ PIIC is the alleged subrogee of 17 subrogor-Insureds. A0063-64 (FAC ¶¶ 6-8). Acadia and Union are the alleged subrogees of one subrogor-Insured each. A0065-65 (FAC ¶¶ 13-17). The GAIG Plaintiffs and their six subrogors are not parties to this appeal. A0064 (FAC ¶¶ 9-11).

services for any period of time. On July 14, 2020, Blackbaud's data security vendor determined that the Affected Data did not include sensitive information like bank accounts and social security numbers. On July 16, 2020—two days later—Blackbaud notified Affected Customers about the Incident and their Affected Data.

Plaintiffs allege that nineteen (19) Affected Customers (the “Insureds”) were among the Affected Customers who received Blackbaud's July 16, 2020 notice. Despite being told that sensitive information was not among their Affected Data, the Insureds still elected to incur hundreds of thousands of dollars for unidentified forensic services and legal fees. Those 19 Insureds were reimbursed by Plaintiffs. Plaintiffs then filed this lawsuit, now asserting 19 subrogation claims for breach of contract, even though Plaintiffs cannot identify *any* provision of the Customer agreements that requires Blackbaud to reimburse the voluntary expenses.

As with the original Complaint, the Superior Court dismissed the First Amended Complaint. On appeal, Plaintiffs do not dispute (i) that they did not plead facts specific to any Insured; (ii) the Superior Court's interpretation of the Contracts; (iii) that Plaintiffs did not identify the general categories of Affected Data for the Insureds; or (iv) that Plaintiffs did not identify the laws that allegedly triggered the Insureds' “investigations.”

Instead, Plaintiffs argue that none of those dispositive circumstances should have any impact on the First Amended Complaint. In so doing, Plaintiffs seek reversal of the Superior Court's holdings that Plaintiffs (i) failed to plead facts

supporting 19 discrete subrogation claims, and (ii) failed to plead the essential element of proximate cause.

The Superior Court's decision should be affirmed for the following reasons:

First, the Superior Court correctly held that Plaintiffs did not provide factual support for each subrogation claim, and thus did not put Blackbaud on notice of the allegations against it.

Second, the Superior Court correctly held that Plaintiffs (i) did not identify any provision of the Contracts that requires Blackbaud to provide the relief Plaintiffs seek; (ii) did not offer a reasonable interpretation of the Contracts; and (iii) did not provide a factual basis for the essential element of proximate cause.

Third, the Superior Court properly dismissed the First Amended Complaint with prejudice, because Plaintiffs did not and cannot state an actionable claim for relief.

SUMMARY OF ARGUMENTS

1. Denied. The Superior Court correctly held that Plaintiffs' conclusory allegations were not supported by allegations of fact sufficient to meet Delaware's minimal pleading standards.
2. Denied. The Superior Court correctly dismissed the First Amended Complaint with prejudice.

STATEMENT OF FACTS²

A. Applicable Contracts

Blackbaud provides “donor relationship management” software to its Customers, primarily nonprofit organizations.³ Blackbaud’s software products and services (together, Blackbaud “Solutions”), include “cloud and hosted environments,” “software maintenance and support services,” and “implementation, consulting, training, and analytic services.”⁴ Blackbaud’s Customers collect information from their donors (Constituents),⁵ and input that information into Blackbaud’s Solutions, in Customer-determined fields.⁶ Blackbaud then helps its Customers to analyze and maximize use of that data.⁷

² The Statement of Facts draws from the First Amended Complaint (A0061-A0111 [hereinafter, as “FAC”]), and documents referenced and relied upon therein, including Blackbaud’s March 9, 2023 Form 8-K (B0067-75 [hereinafter, as “Form 8-K”). The Court can take judicial notice of “publicly available fact[s]” in SEC filings. *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 171 (Del. 2006).

³ A0066-67 (FAC ¶¶ 22-23, 26).

⁴ See A0189 (BSA § 18) (defining Services, Subscriptions, and Solutions); A0067 (FAC ¶¶ 25-26).

⁵ A0068 (FAC ¶¶ 32-33).

⁶ A0080 (FAC ¶ 98(a)) (“Blackbaud Customers . . . decide to store” Constituents’ data in Blackbaud products); A0105 (FAC ¶ 192) (alleging the Insureds “maintained private data for [Constituents]”). Blackbaud’s “customers have ultimate control over the data that is stored using these products, how it is stored, whether encrypted fields are used as designed by [Blackbaud], and whether a product is customized to suit a given customer’s specific needs.” *In re Blackbaud, Inc., Customer Data Breach Litigation*, MDL No. 2972, 2024 WL 2155221, at *2 (D.S.C. May 14, 2024).

⁷ A0067 (FAC ¶ 26).

According to Plaintiffs, Blackbaud's relationship with each Insured was governed by the 2019 Blackbaud Solutions Agreement (the "BSA" or, collectively, the "Contracts"), among other agreements.⁸ The Contracts are "governed by the laws of the State of New York."⁹

The Contracts allocate risk and responsibilities among the parties in the event of a dispute. For example, in the case of a material breach, the BSA is terminable by either party.¹⁰ Section 10 of the BSA is a limitation of liability provision.¹¹ Under Section 10, "each party's maximum liability" to the other is "limited to the greater of (x) \$25,000 or (y) the amount of fees paid or payable" by the Customer for the applicable Solution "during the six (6) months preceding the claim."¹² Section 10 specifically bars recovery of special and consequential damages:

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.¹³

⁸ See A0175-80 (BSA).

⁹ A0179 (FAC § 14). The parties and the Superior Court agree that New York substantive law and Delaware procedural law apply. See Appellant's Opening Brief [hereinafter, as "Pls.' Br."], Exhibit A [hereinafter, as "the Opinion" or "Op."] at 6 (citing A0179 § 14).

¹⁰ A0179 (BSA § 15(b)); A0177-80 (BSA §§ 15, 8).

¹¹ A0178 (BSA § 10).

¹² A0178 (BSA § 10) (sentence case).

¹³ A0178 (BSA § 10) (sentence case).

The First Amended Complaint turns on Sections 6(a)-(d) of the Contracts.¹⁴ Under **Section 6(a)**, Plaintiffs allege that Blackbaud agreed to “maintain commercially reasonable information security procedures” and “safeguards designed to [] protect against anticipated threats” and “unauthorized access to or use of Confidential Information.”¹⁵ **Section 6(b)** is similar to 6(a), requiring Blackbaud to “implement[] commercially reasonable, written policies and procedures addressing potential Security Breaches.”¹⁶ **Section 6(c)** requires Blackbaud to provide notice of a Security Breach within 72-hours.¹⁷

Section 6(d) of the Contracts states as follows:

In the event of a Security Breach, [Blackbaud] will use commercially reasonable efforts to mitigate any negative consequences resulting directly from the Security Breach and will use commercially reasonable efforts to implement procedures to prevent the recurrence of a similar Security Breach.¹⁸

B. The Ransomware Attack

On May 14, 2020, Blackbaud learned that it was the victim of the ransomware Incident on certain of its software servers by unknown cybercriminals.¹⁹ Plaintiffs

¹⁴ Op. at 6 (*citing* A0177 §§ 6(a)-(d)).

¹⁵ A0177 (BSA § 6(a)) (emphasis added).

¹⁶ A0177 (BSA § 6(b)).

¹⁷ A0177 (BSA § 6(b)).

¹⁸ A0177 (BSA § 6(d)).

¹⁹ A0073 (FAC ¶ 59); A0076 (FAC ¶ 78 n.11) (*citing* <https://investor.blackbaud.com/node/22136/ixbrl-viewer>); B0071-72 (Form 8-K ¶ 5).

allege that the criminals “used a Blackbaud customer’s login and password . . . to access the customer’s Blackbaud-hosted database,” and “exfiltrated” a subset of the data that Blackbaud Customers had input into Blackbaud’s systems.²⁰ Blackbaud, along with forensics experts and law enforcement, successfully prevented the cybercriminals from blocking Customers’ access to Blackbaud’s systems, and expelled the cybercriminals from its system.²¹

The same day that Blackbaud detected the Incident, Blackbaud retained a cybersecurity firm, Kudelski Security, to identify the Affected Customers and, for each such Customer, their Affected Data (*i.e.*, the data involved in the Incident).²²

On July 14, 2020, Kudelski issued its report, which did not identify social security numbers or bank accounts among the Affected Data.²³ Two days after receiving the Kudelski report, Blackbaud notified approximately 13,000 Affected Customers (“roughly a quarter[] of Blackbaud’s customers”) about the Incident (the “July Notice”).²⁴ The July Notice identified “the name of the [Blackbaud S]olution(s) that were part of th[e] incident” for each Affected Customer.²⁵ The

²⁰ A0073-74 (FAC ¶¶ 63-64).

²¹ A0074 (FAC ¶ 70); A0075 (FAC ¶ 73).

²² A0073 (FAC ¶¶ 59-60).

²³ A0076 (FAC ¶ 85) (telling Customers, two days after receiving the Kudelski report, that “[t]he cybercriminal did not access . . . bank account information, or social security numbers”).

²⁴ A0076 (FAC ¶¶ 78-79).

²⁵ *See* A0185 (describing the July Notice).

notice also told Customers that “[n]o action is required on your end because no personal information about your constituents was accessed.”²⁶ Blackbaud provided a “Toolkit” to help its Affected Customers understand the Incident better.²⁷ The Toolkit “made no mention of compensating” the Insureds for incurring any expenses.²⁸

After it sent the July Notices to Customers, Blackbaud learned that a *subset* of those Affected Customers had additional Affected Data, which included bank account information and social security numbers.²⁹ After further investigation, in September 2020, Blackbaud sent a supplemental notice (“Supplemental Notice”) to that corresponding *subset* of Affected Customers.³⁰ Plaintiffs do not allege that any Insured received the Supplemental Notice.³¹

²⁶ A0076 (FAC ¶ 85) (emphasis in original).

²⁷ A0181-91.

²⁸ A0094 (FAC ¶ 146).

²⁹ A0077 (FAC ¶ 88); *see* B0072 (Form 8-K ¶¶ 9-11).

³⁰ B0073 (Form 8-K ¶ 17); A0077 (FAC ¶ 90).

³¹ *See generally* A0060-A0101 (FAC).

C. Plaintiffs' Allegations³²

According to Plaintiffs, the Insureds received the July Notice, which stated that “no personal information about [their] constituents was accessed.”³³ Plaintiffs allege that the Insureds then chose to incur hundreds of thousands of dollars in “Remediation Expenses,” claiming that they were “forced to undertake independent investigations into the Incident to meet their legal obligations to investigate and notify affected Consumers[.]”³⁴ Plaintiffs then reimbursed the Insureds.

In this lawsuit, Plaintiffs presume that the mere occurrence of the Incident means that Blackbaud breached Sections 6(a) and (b) (“commercially reasonable” security measures) and Section 6(d) (“commercially reasonable efforts to mitigate any negative consequences resulting directly from” the Incident) of the Contracts.³⁵

³² Plaintiffs rely heavily on the subsequent government inquiry into the Incident (a common step following a ransomware attack), but the SEC ruling is far narrower than Plaintiffs suggest—it focused on the position that Blackbaud’s “senior management” was “not made aware of these facts prior to the company filing its Form 10-Q on August 4, 2020” and lacked “controls or procedures designed to ensure that such information was communicated to senior management.” B0073 (Form 8-K ¶¶ 21-22); *see* A0078 (FAC ¶ 92 & n.13.) The cited consent settlements with the state attorneys general do not include factual findings.

³³ A0076 (FAC ¶ 79) (emphasis omitted).

³⁴ A0091 (FAC ¶ 104); *see* A0082 (FAC ¶ 107).

³⁵ Plaintiffs do not allege in the First Amended Complaint that the Insureds incurred *any* damages caused by an alleged breach of Section 6(c), and they do not argue on appeal that the pleading should survive based on any alleged breach of Section 6(c). Further, any claim under Section 6(c) is foreclosed by Plaintiffs’ own allegations (that Blackbaud notified Affected Customers two days after receiving notice of the Affected Customers and Affected Data (*see*

They allege that, pursuant to insurance policies that Plaintiffs did not quote from, cite, or even provide, they paid “policy benefits” to the Insureds.³⁶ Plaintiffs therefore demand that Blackbaud reimburse them for any expense that the Insureds incurred, in an amount “in excess of \$600,000.”³⁷

D. Procedural History

On December 13, 2022, Plaintiffs filed the original Complaint, which asserted claims for breach of contract, negligence, and “recklessness/gross negligence/willful misconduct.”³⁸ Blackbaud moved to dismiss the Complaint under Rule 12(b)(1) and Rule 12(c). On March 27, 2024, the Superior Court dismissed the original Complaint because, among other deficiencies, the original Complaint “fail[ed] to sufficiently allege that the breaches were the proximate cause of the alleged damages (the Expenses).”³⁹

On April 4, 2024, Plaintiffs filed a Motion for Reargument under Rule 59(e), contending that “Plaintiffs should have been permitted an opportunity to amend the

A0073 (FAC ¶ 60) (receiving the report on July 14); A0076 (FAC ¶ 79) (notifying Affected Customers on July 16)), and Plaintiffs’ failure to allege or argue that any of the alleged damages were caused by a breach of Section 6(c). *See generally* A0061-A0111 (FAC).

³⁶ A0065 (FAC ¶ 19).

³⁷ A0110 (FAC ¶ 219).

³⁸ A0014-27 (Original Complaint).

³⁹ A0054.

Complaint as to its Breach of Contract claims, in lieu of dismissal with prejudice.”⁴⁰

Plaintiffs complained that they asked for an opportunity to amend the pleading, but that the Superior Court “did *not* provide Plaintiffs with an opportunity to amend.”⁴¹

The Superior Court noted that Plaintiffs’ motion “d[id] not attempt to meet the Rule 59(e) standards,” and instead “raise[d] a new argument”:

Plaintiffs are incorrect when they assert that during oral argument their counsel requested an opportunity to amend should the Court dismiss the actions. Plaintiffs did not make such a request. Rather, during oral argument plaintiffs’ counsel offered to “supplement” the briefs/complaints with citations to data breach laws from 50 states.⁴²

The court further reminded Plaintiffs that (i) they never moved to amend the original Complaint; (ii) the court did not dismiss the original Complaint with prejudice, and (iii) the dismissal did not “prevent plaintiffs from filing an amended complaint.”⁴³ Despite Plaintiffs’ procedural missteps, the Superior Court treated their Rule 59(e) Motion as a motion to amend, and allowed Plaintiffs to file an amended pleading.⁴⁴

On May 17, 2024, Plaintiffs filed the First Amended Complaint, alleging only breach of contract claims on behalf of each Insured, and omitting their earlier-filed

⁴⁰ B0001-06 (“Rule 59(e) Motion”); *see* B0001 at n.1. (“To be clear, this motion is explicitly intended only to address this Court’s decision as to the dismissal of Plaintiffs’ Breach of Contract claims under Count 1 of Plaintiffs’ Complaint.”).

⁴¹ B0003 (Rule 59(e) Motion ¶ 7).

⁴² B0017; B0015-19 (“Rule 59(e) Order”).

⁴³ B0017.

⁴⁴ B0017.

tort claims.⁴⁵ Plaintiffs' allegations turn on the theory that, because Blackbaud was attacked by cybercriminals, Blackbaud must reimburse Plaintiffs for every elective Expense that the Insureds unilaterally decided to incur, despite lacking any contractual basis for doing so.

Blackbaud moved to dismiss the First Amended Complaint on June 28, 2024.⁴⁶ Oral argument was held on December 13, 2024.⁴⁷ On April 3, 2025, the Superior Court issued the Opinion, dismissing the First Amended Complaint with prejudice.⁴⁸

⁴⁵ See generally A0061-A0111 (FAC).

⁴⁶ B0020-22.

⁴⁷ A0009 (Dkt. No. 34).

⁴⁸ See generally the Opinion.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO PROPERLY PLEAD THEIR SUBROGATION CLAIMS.

A. Question Presented

Whether the Superior Court correctly held that Plaintiffs failed to plead factual allegations in connection with each of the 19 separate subrogation claims. (Preserved at B0039-43, B0083-85).

B. Scope of Review

This Court reviews “the Superior Court’s granting of a motion to dismiss a complaint under Rule 12(b)(6) *de novo* ‘to determine whether the judge erred as a matter of law in formulating or applying legal precepts.’”⁴⁹

When considering a motion under Rule 12(b)(6), courts treat specific, well-pleaded factual allegations as true.⁵⁰ Courts “do not, however, accept conclusory allegations unsupported by specific facts, [or] draw unreasonable inferences in the plaintiff’s favor.”⁵¹ “Accordingly, the Court should dismiss a complaint if the plaintiff fails to make specific allegations supporting each element of a claim or if no reasonable interpretation of the alleged facts reveals a remediable injury.”⁵²

⁴⁹ *Cousins v. Goodier*, 283 A.3d 1140, 1147 (Del. 2022) (citation omitted).

⁵⁰ *In re Gen. Motors*, 897 A.2d at 168.

⁵¹ *Id.* (quotation marks omitted).

⁵² *Op.* at 18 (citations omitted).

C. Merits of Argument

As the Superior Court correctly held, the First Amended Complaint “fail[s] to properly allege subrogation claims because [it] fail[s] to provide any factual support for each Insured’s claim[s].”⁵³ Instead, Plaintiffs lumped the Insureds’ 19 discrete claims together in a single cause of action by simply “list[ing] a series of actions taken and expenses incurred by the collective, unrelated group of Insureds.”⁵⁴ Because the First Amended Complaint failed to “give the defendant ‘fair notice’ of the claim being asserted against him,”⁵⁵ it was properly dismissed.

Under both Delaware and New York law, a subrogee-insurer steps into the shoes of its insureds.⁵⁶ Subrogee-insurers like Plaintiffs are therefore subject to the same defenses as their Insured-subrogors.⁵⁷ This includes defenses under Rule 12.⁵⁸

⁵³ Op. at 33.

⁵⁴ Op. at 25.

⁵⁵ *Ryan v. Buckeye Partners, L.P.*, 2022 WL 389827, at *6 (Del. Ch. Feb. 9, 2022) (citation omitted), *aff’d*, 285 A.3d 459 (Del. 2022).

⁵⁶ *Trustwave Holdings, Inc. v. Beazley Ins. Co., Inc.*, 2019 WL 4785866, at *7 (Del. Super. Ct. Sept. 30, 2019) (citation omitted); *Servidori v. Mahoney*, 515 N.Y.S.2d 328, 329 (3d Dep’t Apr. 30, 1987).

⁵⁷ *Servidori*, 515 N.Y.S.2d at 329 (“A subrogee . . . is subject to any claims or defenses which may be raised against the subrogor[.]”); *Turner v. Jones*, 1997 WL 1737123, at *2 (Del. Comm. Pl. Oct. 13, 1997) (“Progressive stands in the shoes of the subrogors and is subject to any defense to its claim.”).

⁵⁸ *Com. Union Ins. Co. v. S&L Contractors, Inc.*, 2002 WL 31999352, at *2 (Del. Com. Pl. Nov. 8, 2002) (explaining subrogee “is subject to all defenses S&L may raise,” and specifically “S&L could raise the defense of improper venue against Laikowski[.]”); *State Farm Fire & Cas., Co. v. Gen. Elec. Co.*, 2009 WL 5177156, at *3 (Del. Super. Ct. Dec. 1, 2009) (rejecting defense

Because Plaintiffs' subrogation claims are "purely derivative" of the Insureds' rights, the First Amended Complaint must fail if its legal conclusions are not "supported by specific allegations of fact" about the subrogor-Insureds' underlying claims.⁵⁹

Neither the parties nor the Superior Court were able to locate Delaware cases addressing a multi-subrogor complaint; therefore, Blackbaud and the Superior Court relied on New York cases applying similar facts.⁶⁰ For example, in *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S.2d 240, 252–53 (Sup. Ct. 2000), the court dismissed a subrogation complaint because the plaintiff-subrogee Funds "failed to sufficiently allege facts entitling them to recover on behalf of the participants and beneficiaries [the subrogors]." The court explained that the defendants "c[ould] not fairly defend the Funds' claims" "[w]ithout ascertaining what the specific injuries are *for each person*."⁶¹ In other words, "[w]ithout greater detail specifying each participant's or beneficiary's claim, Defendants are unable to conduct an individual analysis and adequately defend the subrogation cause of

applicable only to the plaintiff subrogee, but not to the nonparty subrogors, and granting dismissal).

⁵⁹ Op. at 20; *id.* (quoting *White v. Panic*, 783 A.2d 543, 549, n.12 (Del. 2001)).

⁶⁰ Op. at 20 n.69 (describing it as "a matter of first impression" in Delaware).

⁶¹ *E. States Health & Welfare Fund*, 729 N.Y.S.2d at 252–53 (emphasis added).

action.”⁶² Thus, the court found the plaintiff failed to state its subrogation claims under “any cognizable theory.”⁶³

Other New York courts faced with the same circumstances have reached the same results. *See, e.g., Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 217–18 (2d Cir. 2004) (“***At the very least***, a subrogation claim would require Empire to identify its subrogors ***and those subrogors’ claims*** so that defendants would have the opportunity to assert defenses against those claims.”).⁶⁴

Here, the First Amended Complaint fails for the same reasons that the multi-subrogor complaints from New York failed: Plaintiffs did not plead facts related to any particular Insured’s claim.⁶⁵ Instead, Plaintiffs argue that they satisfied their

⁶² *Id.*

⁶³ *Id.*, at 245.

⁶⁴ *Id.* (emphasis added) (reversing judgment that had allowed subrogation claim to proceed); *A.O. Fox Mem’l Hosp. v. Am. Tobacco Co.*, 754 N.Y.S.2d 368, 370 (2003) (dismissing subrogation claims for failure to state a claim); *Zemo v. Cnty. Tr. Co.*, 133 N.Y.S.2d 291, 293–94 (Sup. Ct. 1954) (dismissing claim where alleged subrogee did not “clearly and distinctly state the facts which show the subrogation” for each claim).

⁶⁵ Op. at 22; *see Yu v. GSM Nation*, 2018 WL 2272708, at *4 (Del. Super. Ct., Apr. 24, 2018) (A complaint is only “well-pled if it puts the opposing party on notice of the claim being brought against it.”); *Talkdesk, Inc. v. DM Trans, LLC*, 2024 WL 2799307, at *4 (Del. Super. Ct. May 31, 2024) (“[G]eneralized grievances over the performance of Talkdesk’s product fail to put Talkdesk on notice of how it breached the Agreement.”).

pleading obligations by simply pleading “the identities of each Insured” and “the types of expenses incurred [collectively].”⁶⁶

On appeal, as they did below, Plaintiffs first complain that they were “improperly held . . . to a higher pleading standard than required,” suggesting that New York’s pleading standard is higher than that in Delaware.⁶⁷ In fact, the opposite is true. The pleading standard in New York under N.Y.C.P.L.R. 3211(a)(7) for failure to state a claim, like Rule 12(b)(6) is *lower*, if anything, than the standard in Delaware.⁶⁸ Thus, Plaintiffs were not held to a higher standard here.

Next, Plaintiffs argue that it is sufficient to allege that the Insureds’ Remediation Expenses “all involved investigative expenses, and some additional notification expenses for certain Insureds.”⁶⁹ The problem is that Plaintiffs did not actually provide factual support for those allegations.⁷⁰

⁶⁶ Pls.’ Br. at 27.

⁶⁷ Pls.’ Br. At 17.

⁶⁸ *E. States Health & Welfare Fund*, 729 N.Y.S.2d at 245 (explaining that, on a motion to dismiss for failure to state a claim, “the pleadings must be liberally construed” and the court asks “whether the facts as alleged fit within any cognizable legal theory”—a “test [that] is so liberal that the standard is simply whether the plaintiff has a cause of action, not even whether one has been stated.”).

⁶⁹ Pls.’ Br. at 30.

⁷⁰ Op. at 22 (“Without providing the factual information for each Insured’s claim, Blackbaud, and the Court, cannot assess whether the subrogor-Insureds have a valid claim against Blackbaud.”).

For example, it is not apparent how Blackbaud’s alleged breaches caused *any* particular Insured to incur their unspecified Remediation Expenses. According to the First Amended Complaint, the Insureds incurred the Expenses (1) to investigate the “involved persons and their data” (of which Blackbaud had already informed the Insureds), and (2) to investigate the Insureds’ legal obligations, if any.⁷¹ But, as the Superior Court correctly found, the First Amended Complaint did *not* (1) “identify the data stored by each [Insured],” or (2) “allege what privacy law requirements any Insured allegedly had to satisfy.”⁷² Thus, Plaintiffs did not put Blackbaud on notice of even the most basic facts alleged against it.

Plaintiffs then protest that it is “simply inexplicable” how “extra facts” about any particular Insureds’ claim “could ever affect the validity of Plaintiffs’ claims.”⁷³ But such circumstances are not hard to imagine. For example, Plaintiff alleges that a North Carolina notification statute applies to “fingerprints,” but does not allege that any Insured even collected its Constituents’ “fingerprints.”⁷⁴ In that case, there is no reasonable basis for the Insured to have incurred costs to comply with that statute. Or, if a particular Insured only incurred notification expenses, but had no notification obligations, then the Incident did not proximately cause the Expenses.

⁷¹ See A0125 (identifying each Blackbaud Solution that was involved in the Incident); see A0081 (FAC ¶¶ 101, 104).

⁷² Op. at 21-22.

⁷³ Pls.’ Br. at 29.

⁷⁴ A0107 (FAC ¶ 200).

By omitting the Affected Data and the allegedly relevant laws from the First Amended Complaint, Plaintiffs improperly insulate their deficient claims and prevent Blackbaud from understanding its available defenses as to *any* Insured.⁷⁵

In an effort to distinguish the New York cases cited by Blackbaud and the Superior Court, Plaintiffs cited another New York multi-subrogor case, *Lawyers Fund for Client Protection v. JP Morgan Chase Bank*, 80 A.D.3d 1129, 915 N.Y.S.2d 731 (2011). But, *Lawyers Fund* did not involve a motion to dismiss; the court assessed and allowed an amended pleading under the “relation back” standard. The question was whether the original complaint put the defendants on notice of the “transactions or occurrences” in the proposed amendment, not whether it satisfied Rules 8 and 12 in the first instance.⁷⁶ Moreover, the amended pleading in *Lawyers Fund* included—for *each* of the 14 subrogated claims—“*separate causes of action which particularized each claimant’s losses and specific reasons*” for the defendants’ alleged liability.⁷⁷ The First Amended Complaint does not approach that degree of detail for the 19 subrogation claims here.

Plaintiffs also point out that the *Lawyers Fund* complaint alleged that “[e]ach claimant was injured in the same way.”⁷⁸ But, that does not help Plaintiffs here. In

⁷⁵ *Servidori*, 515 N.Y.S.2d at 329; *Turner v. Jones*, 1997 WL 1737123, at *2.

⁷⁶ *Lawyers Fund*, 80 A.D.3d at 1130, 915 N.Y.S.2d at 742.

⁷⁷ *Id.* at 1130 (emphasis added).

⁷⁸ Pls.’ Br. at 32 (citation omitted).

the First Amended Complaint, they do not allege that *all* 19 Insureds incurred the same Remediation Expenses; in fact, they allege that the Insureds each had *different* types of Affected Data, *different* legal obligations, and thus *different* Expenses.⁷⁹

Plaintiffs also say that the *Lawyers Fund* complaint specifically pled “the time frame within which [the claimants’ alleged] losses occurred.”⁸⁰ However relevant that was to the *Lawyers Fund* complaint, it does not translate here—the Superior Court aptly noted that Plaintiffs “do not allege when any Insured conducted its investigation.”⁸¹ If anything, the inferential “time frame” appears to *foreclose* Plaintiffs’ requested relief. The First Amended Complaint *only* alleges that the Insureds received the July Notice, which informed them that the “cybercriminal did not access” sensitive information,” and that “[n]o action is required on your end because no personal information about your constituents was accessed.”⁸² Thus, the July Notice did not trigger an obligation for any particular Insured to act.

In sum, the Superior Court did not require Plaintiffs to meet a “higher pleading standard” or to plead “with factual particularity,” as they suggest on appeal.⁸³ Rather, the court required “well-pleaded allegations; *i.e.*, allegations supported by facts,”

⁷⁹ See A0105 (FAC ¶¶ 192-93); A0106 (FAC ¶ 197); A0109 (FAC ¶ 211).

⁸⁰ Pls.’ Br. at 32 (citation omitted).

⁸¹ Op. at 32.

⁸² A0076 (FAC ¶ 85) (emphasis omitted).

⁸³ See Op. at 31.

which is exactly what the First Amended Complaint lacks.⁸⁴ Plaintiffs' decision to sue on behalf of 19 different Insureds within one complaint and one cause of action does not negate their obligation to put Blackbaud on notice of the claims alleged against it, and Plaintiffs entirely sidestepped that obligation here.

⁸⁴ Op. at 22.

II. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO ALLEGE PROXIMATE CAUSE.

A. Question Presented

Whether the Superior Court correctly held that Plaintiffs failed to allege contractual or factual support for the essential element of proximate cause in connection with their breach of contract claims. (Preserved at B0043-55, B0085-95).

B. Scope of Review

This Court reviews “the Superior Court’s granting of a motion to dismiss a complaint under Rule 12(b)(6) *de novo*,”⁸⁵ and treats specific, well-pleaded factual allegations as true.⁸⁶ Courts “do not, however, accept conclusory allegations unsupported by specific facts, [or] draw unreasonable inferences in the plaintiff’s favor.”⁸⁷ A plaintiff must provide “specific allegations of fact and conclusions supported by specific allegations of fact.”⁸⁸

C. Merits of Argument

Under New York law, “[p]roximate cause is an essential element of a breach of contract cause of action.”⁸⁹ Specifically, “[t]he injured party must prove that

⁸⁵ *Cousins*, 283 A.3d at 1147 (citation omitted).

⁸⁶ *In re Gen. Motors*, 897 A.2d at 168.

⁸⁷ *Id.* (quotation marks omitted).

⁸⁸ *White v. Panic*, 783 A.2d at 549, n.12.

⁸⁹ *Lola Roberts Beauty Salon, Inc. v. Leading Ins. Grp. Ins. Co.*, 76 N.Y.S.3d 79, 81 (2d Dep’t 2018); *Erisman v. Zaitsev*, 2021 WL 6134034, at *11 (Del. Ch. Dec. 29, 2021) (dismissing contract claim that “does not properly allege an essential element of breach of contract (resulting harm).”).

breach was a *direct*, proximate cause of the damages alleged.”⁹⁰ To plead this essential element, “a factual basis to relate the alleged injury to the breach is required.”⁹¹ The First Amended Complaint does not come close to satisfying this standard.

This lawsuit is unlike “traditional” data breach cases where the owners of the data (here, the Constituents) experience some direct harm (*e.g.*, identity theft) as a direct result of a security incident.⁹² Here, by contrast, the Incident did not result in any direct harm to the Affected Data, and did not interrupt the services provided by Blackbaud under the Contracts.

But, “the fact that a data breach occurred and the insureds incurred expenses, alone, is not sufficient to state a claim.”⁹³ Thus, without any direct harm, Plaintiffs needed to plead “specific allegations of fact” to support the conclusory assertion that

⁹⁰ *Friedman v. Maspeth Fed. Loan & Sav. Ass’n*, 30 F. Supp. 3d 183, 192 (E.D.N.Y. 2014) (emphasis added).

⁹¹ *Wellgistics, LLC v. Welgo, Inc.*, 2024 WL 113967, at *4 (Del. Super. Ct. Jan. 9, 2024).

⁹² The Constituents’ claims have been litigated in a Multi-District Litigation. *See In re Blackbaud, Inc., Customer Data Breach Litigation*, MDL No. 2972 (D.S.C.).

⁹³ A0032; *see id.* (quoting *Strom v. Paytime, Inc.*, 90 F. Supp. 3d 359, 360 (M.D. Pa. 2015) (“[T]here are only two types of companies left in the United States, according to data security experts: ‘those that have been hacked and those that don’t know they’ve been hacked.’”)).

the Insureds’ attenuated Expenses were the “*direct*, proximate cause of” the alleged breaches.⁹⁴

Plaintiffs failed satisfy their pleading obligations in at least three ways: (1) No provision of the Contracts allows Plaintiffs to recover the Remediation Expenses; (2) Plaintiffs’ interpretation of the Contracts is unreasonable as a matter of law; and (3) the First Amended Complaint lacks factual allegations of proximate cause.

1. The Contracts do not authorize the Remediation Expenses.

i. No provision of the Contracts allows Plaintiffs to recover the Remediation Expenses.

Plaintiffs’ flawed theory of liability presumes that *any* contractual breach—no matter how attenuated—imposes on Blackbaud an unwritten obligation to reimburse Plaintiffs for *any* expense that the Insureds chose to incur. The problem with Plaintiffs’ theory is that *no* provision of the Contracts requires Blackbaud to reimburse the Remediation Expenses.

More precisely, the Remediation Expenses are “not specifically tied to any contractual provision that the parties bargained for and agreed to.”⁹⁵ Therefore, Plaintiffs cannot show why the Contracts obligate Blackbaud to reimburse elective legal and forensic fees to “investigate” data that the Insureds input into Blackbaud’s system, and which they never lost access to during or after the Incident. Thus, the

⁹⁴ *Friedman*, 30 F. Supp. 3d at 192 (emphasis added).

⁹⁵ *Talkdesk*, 2024 WL 2799307, at *5.

Contracts do not authorize Plaintiffs to recover the Remediation Expenses from Blackbaud.

ii. The Contracts do not have a “reasonable reliance” provision.

Recognizing the lack of contractual support for their contract claims, Plaintiffs also allege that the Insureds incurred the Remediation Expenses because they could not “reasonably rely on Blackbaud’s investigation into the Incident.”⁹⁶ As the Superior Court pointed out, however, “there is no ‘reasonable reliance’ term in the Contracts,” and Plaintiffs did not identify “any contractual provision that grants an Insured a right to declare Blackbaud’s investigation unreliable[.]”⁹⁷ Moreover, the First Amended Complaint does not allege “that any Insured actually made such a determination.”⁹⁸ Thus, Plaintiffs’ “reasonable reliance” allegations do not find support in the Contracts.

iii. Plaintiffs’ interpretation of the Contracts is unreasonable.

Plaintiffs then invoked the mitigation provision in Section 6(d), in an unsuccessful attempt to link the attenuated Remediation Expenses to the Contracts. Section 6(d) sets out Blackbaud’s responsibilities in the event of a security incident.

⁹⁶ A0081 (FAC ¶ 103). In so doing, Plaintiffs concede (as they must) that Blackbaud *did* investigate the Incident, and *did* identify the Affected Customers and the Affected Data for those Customers.

⁹⁷ Op. at 31-32.

⁹⁸ Op. at 32.

Specifically, Section 6(d) required Blackbaud to “mitigate any negative consequences resulting directly from the Security Breach.”⁹⁹ Plaintiffs contend that the “direct[]” mitigation obligation in Section 6(d) required Blackbaud to reimburse *all* of the Remediation Expenses.

The Superior Court held that Plaintiffs’ interpretation of Section 6(d) was not reasonable as a matter of law.¹⁰⁰ “Security Breach” was defined in the Contracts as “*any* unauthorized access, use, disclosure, modification, or destruction affecting the confidentiality of Your Confidential Information.”¹⁰¹ Under Section 6(a) and 6(b), Blackbaud agreed to implement and maintain “commercially reasonable information security procedures and standards.”¹⁰² Thus, if a Security Breach occurred due to Blackbaud’s failure to maintain this level of security, it would breach the Contract.¹⁰³

But, the duty to mitigate in Section 6(d) “applies to *any* data breach, no matter the cause”—not just for “fail[ing] to maintain commercially reasonable security measures.”¹⁰⁴ As the Superior Court explained, “[u]nder Plaintiffs’ interpretation, Blackbaud contractually agreed that for every data breach”—no matter whose fault—“it would undertake an investigation for every customer and provide

⁹⁹ A0177 (BSA § 6(d)).

¹⁰⁰ Op. at 27 (holding Plaintiffs’ interpretation of Blackbaud’s obligations under Section 6(d) “proves too much”).

¹⁰¹ Op. at 27 (quoting BSA §§ 6(c)).

¹⁰² A0177 (BSA §§ 6(a)-(b)).

¹⁰³ Op. at 27.

¹⁰⁴ Op. at 27 (“No cybersecurity system is full-proof.”).

notification where required.”¹⁰⁵ Under the risk allocation scheme in the Contracts, however, that interpretation is not reasonable.

Specifically, Section 10 “capped the amount of damages an Insured could recover from Blackbaud and limited the types of damages recoverable,” thereby demonstrating the parties’ intent to allocate the risk of loss if Blackbaud breached the Contract or committed a tort.¹⁰⁶ Under Plaintiffs’ interpretation, a no-fault data breach would require Blackbaud to perform the same investigation and provide the same notifications as a data breach that resulted from a breach of contract or a tort.¹⁰⁷ The Superior Court correctly held that, given the thoughtful risk allocation scheme in the Contracts,

[i]t is not reasonable to construe the Contracts to essentially impose strict liability on Blackbaud for every data breach when the parties expressly agreed to a risk allocation scheme. Thus, the mitigation clause does not provide a causal link between the Contracts and the Expenses, as Plaintiffs assert. Because the Expenses are untethered to any contractual term, Plaintiffs failed to adequately plead proximate cause.¹⁰⁸

In short, Plaintiffs cannot invoke Section 6(d) to impose *contractual* liability on Blackbaud to mitigate every expense incurred after the Incident.

¹⁰⁵ Op. at 27-28.

¹⁰⁶ Op. at 28.

¹⁰⁷ Op. at 28.

¹⁰⁸ Op. at 28-29.

On appeal, Plaintiffs attempt to distance themselves from Section 6(d), arguing that the Superior Court overemphasized it, and that Plaintiffs did not need Section 6(d) to survive a motion to dismiss.¹⁰⁹ But that argument ignores the allegations throughout Plaintiffs’ briefing below, in which they repeatedly asserted that the duty to mitigate in Section 6(d) *is* their contractual basis for damages. Specifically, Plaintiffs argued that ***Blackbaud “breached the parties’ contracts*** by failing to secure its clients’ data and also *by failing to ‘mitigate any negative consequences’ resulting from the data breach”* which, in turn, “forced” the Insureds “to incur significant remediation expenses for post-breach services that should have been provided by Blackbaud.”¹¹⁰ There is no contractual duty “to *secure* its clients’ data”—only to implement commercially reasonable security measures—and thus the only way to connect the alleged *contractual* breach to the Remediation Expenses is through Section 6(d).

Moreover, ***Section 6(d)***—not Sections 6(a) or (b)—sets out Blackbaud’s contractual obligations following a Security Incident (mitigating “negative consequences resulting *directly* from” the Incident). It is undisputed that Blackbaud

¹⁰⁹ In a footnote, Plaintiffs say that they *do* allege Blackbaud breached Section 6(d). Pls.’ Br. at 35 n.6 (“To be clear, Plaintiffs do also allege that Blackbaud breached its mitigation obligations. But that separate alleged breach is unnecessary . . .”).

¹¹⁰ A0210 (emphasis added); *see also* A0212, A0214, A0226, A0227, A0227-28, A0228 n.8, A0231, A0232, A0238 & n.13, A0241.

protected the Affected Data from direct harm and provided the results of its investigation to Affected Customers.¹¹¹ Because the Contracts do not require Blackbaud to reimburse Plaintiffs for the Remediation Expenses, their contract claims (and, thus, the First Amended Complaint) fail as a matter of law.

2. Plaintiffs' allegations of proximate cause are conclusory.

In the absence of any contractual provision creating liability for the Remediation Expenses, Plaintiffs contend that, to state a claim for breach of contract, it is enough to allege that Blackbaud breached the Contracts.¹¹² But Plaintiffs did not provide factual support for such an attenuated causal link between the alleged breaches and the Remediation Expenses.

Quite the opposite, Plaintiffs' allegations of proximate cause are entirely conclusory. Plaintiffs allege that,

[a]s a direct and proximate result of Blackbaud's breaches, as noted above, the Insureds were required to comply with numerous state and federal statutes and regulations, which compelled them to retain legal experts to assess and comply with such laws following exposure or possible exposure of private data; to retain computer experts to investigate the breadth of the data breach and the private data involved; and to retain firms (or to incur costs themselves) to comply with data breach notification laws.¹¹³

¹¹¹ A0075 (FAC ¶ 73) (alleging Blackbaud paid the cybercriminals' ransom); A0184-85 (alleging Blackbaud "expelled [cybercriminals] from [Blackbaud's] system" and informed the Affected Customers of "the solution(s) that were part of this incident" (Affected Data)).

¹¹² A0177 (BSA §§ 6(a)-(b)).

¹¹³ A0104 (FAC ¶ 191).

Thus, the overarching failure in the First Amended Complaint is that Plaintiffs (1) do not identify the general categories of Affected Data stored by each Insured, and (2) “provide no factual support identifying the ‘numerous state and federal statutes’” allegedly at issue.¹¹⁴ Because of this factual void, the Superior Court correctly held that Plaintiffs failed to plead proximate cause.

i. Plaintiffs declined to identify the Insureds’ Affected Data that allegedly caused the Insureds to incur the Remediation Expenses.

According to Plaintiffs, their legal obligations “depend[] on the nature of the data accessed” which, in turn, “compel[] certain investigatory steps and notifications.”¹¹⁵ In dismissing the original Complaint, the Superior Court indicated that Plaintiffs should have, but failed to, identify the general categories of Affected Data.¹¹⁶ In the First Amended Complaint, Plaintiffs still refuse to identify the Affected Data.

In the data-breach context, identifying the affected data is elementary.¹¹⁷ Failing to identify that data, or revealing that such data is not sensitive, often means

¹¹⁴ Op. at 21, 33.

¹¹⁵ A0106 (FAC ¶ 197); *see also* A0081 (FAC ¶ 101 (describing the Insureds’ investigation based on “the nature of private data”); A0105 (FAC ¶ 193) (same); A0107 (FAC ¶ 202) (describing “the need after a breach to investigate what type of private data was exposed”).

¹¹⁶ The original Complaint was also dismissed for lack of proximate cause. A0054.

¹¹⁷ *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 152 (3d Cir. 2022) (“[T]he type of data involved in a data breach may be such that mere access and publication

the plaintiff lacks standing to sue altogether—a lower burden for plaintiffs to satisfy than even under Rule 12(b)(6).¹¹⁸ For example, in *In re Sci. Applications Int’l Corp. (SAIC) Backup Tape Data Theft Litig.*, the plaintiffs alleged identity theft related to their bank accounts.¹¹⁹ But, the court explained, “here’s the problem: No one alleges that credit-card, debit-card, or bank-account information was [involved in the

do not cause inherent harm to the victim.”); *Greco v. Syracuse ASC, LLC*, 218 A.D.3d 1156, 193 N.Y.S.3d 511, 514 (2023) (finding no standing where the complaint “does not allege that a third party accessed data more readily used for financial crimes”).

¹¹⁸ *In re Samsung Data Sec. Breach Litig.*, 761 F. Supp. 3d 781, 800 (D.N.J. 2025) (finding no standing “when the information needed to commit the alleged identity theft was not obtained in the data breach.”); *Chambliss v. Carefirst, Inc.*, 189 F. Supp. 3d 564, 570-71 (D. Md. 2016) (finding no standing where the breach did not compromise “sensitive data”); *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078, 1086 (E.D. Cal. 2015) (holding plaintiff did not “allege injuries in fact fairly traceable to the Data Breach, since Plaintiff has not alleged that bank account information or email addresses were [involved.]”); *Scifo v. Alvaria, Inc.*, 2024 WL 4252694, at *4 (D. Mass. Sept. 20, 2024) (finding no standing based on unauthorized charges where “Plaintiffs do not allege that debit card information or bank account information was disclosed in the Data Breach”); *Masterson v. IMA Fin. Grp., Inc.*, 2023 WL 8647157, at *5 (D. Kan. Dec. 14, 2023) (“it is unclear how the misuse of any information is traceable to the data breach if IMA never had the sensitive information—Medicare information and credit/debit card numbers”); *Keach v. BST & Co. CPAs, LLP*, 71 Misc. 3d 1204(A), 142 N.Y.S.3d 790 (N.Y. Sup. Ct. 2021) (finding no standing injury in part because “[t]he personal information at issue here consists of names, dates of birth, [and] medical record numbers”).

¹¹⁹ 45 F. Supp. 3d 14, 31–32 (D.D.C. 2014).

breach].”¹²⁰ Consequently, the court held that “Plaintiffs cannot causally link [their alleged bank account injuries] to the SAIC breach.”¹²¹

The same rationale applies here. Delaware pleading standards “are, by their nature, fluid,” and so “the sufficiency of a pleading under Rule[] 8 . . . must be measured according to the particular circumstances of the case.”¹²² For example, when a plaintiff sues to recover for an injury caused by a power tool, she “may not be able to identify the product by name or model number,” but she “typically is able to offer a sufficient description of the product to provide fair notice to the defendant(s) of the product at issue.”¹²³ Here, likewise, Plaintiffs do not have to identify every datum for each Constituent of each Insured. But, it is “right to expect” that Plaintiffs will identify the *general categories* of each Insured’s Affected Data *in a case about alleged disclosure of that Affected Data*.¹²⁴

To avoid identifying the Affected Data, Plaintiffs conclusorily aver that the Insureds’ Constituents’ data is comprised of “protected health information (‘PHI’) and personally identifiable information (‘PII’), and proprietary and confidential information.”¹²⁵ The First Amended Complaint defines this information collectively

¹²⁰ *Id.*

¹²¹ *Id.* (finding five of six Plaintiffs lacked standing).

¹²² *In re Benzene Litig.*, 2007 WL 625054, at *6 (Del. Super. Ct. Feb. 26, 2007).

¹²³ *Id.*, at *7.

¹²⁴ *Id.*

¹²⁵ A0068 (FAC ¶ 33).

as “Blackbaud Client Data.”¹²⁶ But Plaintiffs did not (and cannot) allege that all of the “Blackbaud Client Data” is *Affected Data*. And they did not elaborate on the “Blackbaud Client Data” with supporting facts *anywhere* in the First Amended Complaint.¹²⁷

Plaintiffs then suggest, with no detail whatsoever, that the Incident involved “bank account information and social security numbers for *certain* of the impacted customers, including Blackbaud Clients.”¹²⁸ But they do not (and cannot) allege that this sparse allegation applies to *all* of the Insureds. And Plaintiffs do not say *which* Insureds they believe fall into this category. Stripped of mere conclusions, the First Amended Complaint does not support an inference that the Insureds’ Affected Data was the type of sensitive data that could trigger any obligation to investigate.

Perhaps most importantly, the relevant factual allegations compel the inference that the Insureds’ Affected Data does *not* include sensitive information. Plaintiffs only allege that the Insureds received the July Notice.¹²⁹ The July Notice stated that the Affected Data did *not* include sensitive data like bank account information and social security numbers, and informed the Insureds that “**no personal information about [their] constituents was accessed.**”¹³⁰ Thus, there is

¹²⁶ *Id.*

¹²⁷ *See generally* A0061-A0111 (FAC).

¹²⁸ A0077 (FAC ¶ 90) (emphasis added).

¹²⁹ A0076 (FAC ¶ 79).

¹³⁰ A0076 (FAC ¶ 85) (emphasis in original).

no reasonable basis to infer that the types of Affected Data *here* triggered any obligation to act.¹³¹

After the July Notices were sent, Blackbaud learned that social security numbers and bank information were among Affected Data for “certain” Blackbaud Customers,¹³² and Blackbaud notified *those* Affected Customers in late September 2020.¹³³ But, as the Superior Court noted, Plaintiffs did not allege that *any* of the Insureds received the Supplemental Notice.¹³⁴ Even read generously, it is not reasonable to infer from the pleading that all 19 Insureds are among the subset of Affected Customers who received the Supplemental Notice.

In short, there is no factual basis for the necessary inference that any of the Insureds’ Affected Data could have triggered the Insureds’ “investigation.” This factual deficiency dooms the First Amended Complaint.

¹³¹ A0106 (FAC ¶ 197) (alleging the need to investigate “the nature of the data accessed”); *see also* A0081 (FAC ¶ 101 (“the nature of private data”); A0105 (FAC ¶ 193) (same).

¹³² As the SEC Order explained, this information was revealed after some Blackbaud “customers raised concerns that *they* had uploaded sensitive donor data—including social security numbers and bank account information—to fields that were not otherwise encrypted” B0072 (Form 8-K ¶ 9) (emphasis added).

¹³³ B0072 (Form 8-K ¶ 11); B0073 (Form 8-K ¶ 17).

¹³⁴ *See* A0061-A0111 (FAC). This illustrates the importance of sufficiently pleading causation (and other essential elements) for *each* Insured. *See supra* Part I.

ii. Plaintiffs declined to identify the laws that allegedly caused the Insureds to incur the Remediation Expenses.

Plaintiffs also allege that unidentified “data privacy laws and regulations” caused them investigate the Affected Data and thusly incur the Remediation Expenses.¹³⁵

As an initial matter, it is not reasonable to infer that the Insureds reasonably incurred the Remediation Expenses, simply to explore their legal obligations following the Incident. Given the modern prevalence of data breaches,¹³⁶ it is far more reasonable to expect that any organization that collects data already has institutional knowledge about whether they are subject to any data breach laws, and thus do not need to incur expenses to “investigate” those obligations in the first instance. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 417 (2013) (holding respondents’ elective expenses were “not fairly traceable” to a new statute because, “even before [the statute] was enacted, [respondents] had a similar incentive to engage in many of the countermeasures that they are now taking”). The First Amended Complaint does not allege that the Insureds lacked knowledge about their legal obligations before the Incident.

¹³⁵ A0081 (FAC ¶¶ 101, 104). The original Complaint failed because “the Insurers never identif[ied] these ‘various laws’” that triggered legal obligations to incur the Remediation Expenses, and Plaintiff “d[id] not show how these state’s laws have any application here.” A0053-54.

¹³⁶ *See* A0032 (noting that “83% of organizations experienced more than one data breach” in 2022).

The factual void in the First Amended Complaint does not alter the reasonable inferences here. Rather than identify *any* law applicable to *any* Insured, Plaintiffs vaguely allege that “[e]ach insured was subject to one more state’s data notification laws and regulations,” and “oftentimes multiple states.”¹³⁷ Then, Plaintiffs cite examples of state data breach laws that might have applied,¹³⁸ and hope the Court will draw an inference in their favor. But “[t]he requirement to draw reasonable inferences” at the pleading stage “is not an invitation to irrational, plaintiff-friendly speculation[.]”¹³⁹ Plaintiffs never actually allege that any particular data breach law applied to any particular Insured or its data, much less explain how those laws have application here.

When Plaintiffs attempt to add details to their threadbare conclusions, those details do not make sense. For example, the First Amended Complaint describes statutes from Arkansas, Florida, Illinois, Delaware, North Carolina, and California, but no Insureds are even from Arkansas, Florida, or North Carolina.¹⁴⁰ Plaintiffs also describe the types of data that trigger certain Delaware and North Carolina statutes, but do not allege that any *Insured’s* Affected Data included those types of data.¹⁴¹

¹³⁷ A0109 (FAC ¶ 211).

¹³⁸ A0106-07 (FAC ¶¶ 198-201).

¹³⁹ *Lazard Debt Recovery GP, LLC. V. Weinstock*, 864 A.2d 955, 964 (Del. Ch. 2004).

¹⁴⁰ Compare A0106-07 (FAC ¶¶ 198-201) with A0063-65 (FAC ¶¶ 8, 14, 17).

¹⁴¹ A0106-07 (FAC ¶¶ 199-200).

Plaintiffs’ garbled summary of a California statute likewise offers no insight into how it applies to *the Insureds*.¹⁴²

In another feeble deflection without factual support, Plaintiffs paradoxically complain that the Insureds’ investigations were “complicated” because “Blackbaud had sole access to its system,” but then complain that the Insureds incurred the Expenses to investigate data *in Blackbaud’s system*.¹⁴³ Plaintiffs cannot rationally claim that they had no access to Blackbaud’s system, but also that the Insureds incurred hundreds of thousands of dollars investigating that same system.

Plaintiffs also suggest that the Toolkit creates a basis for incurring the Remediation Expenses but, as the Superior Court correctly identified, the Toolkit is not a contract between Blackbaud and any Insured, and cannot be the basis for Plaintiffs’ *contract* claims.¹⁴⁴ In any event, Plaintiffs concede that the Toolkit did *not* suggest that Blackbaud would reimburse *any* Customer for *any* reason.¹⁴⁵

In lieu of identifying the laws that purportedly caused the Insureds to incur Expenses, Plaintiffs directed the Court and Blackbaud to a website containing a 50-

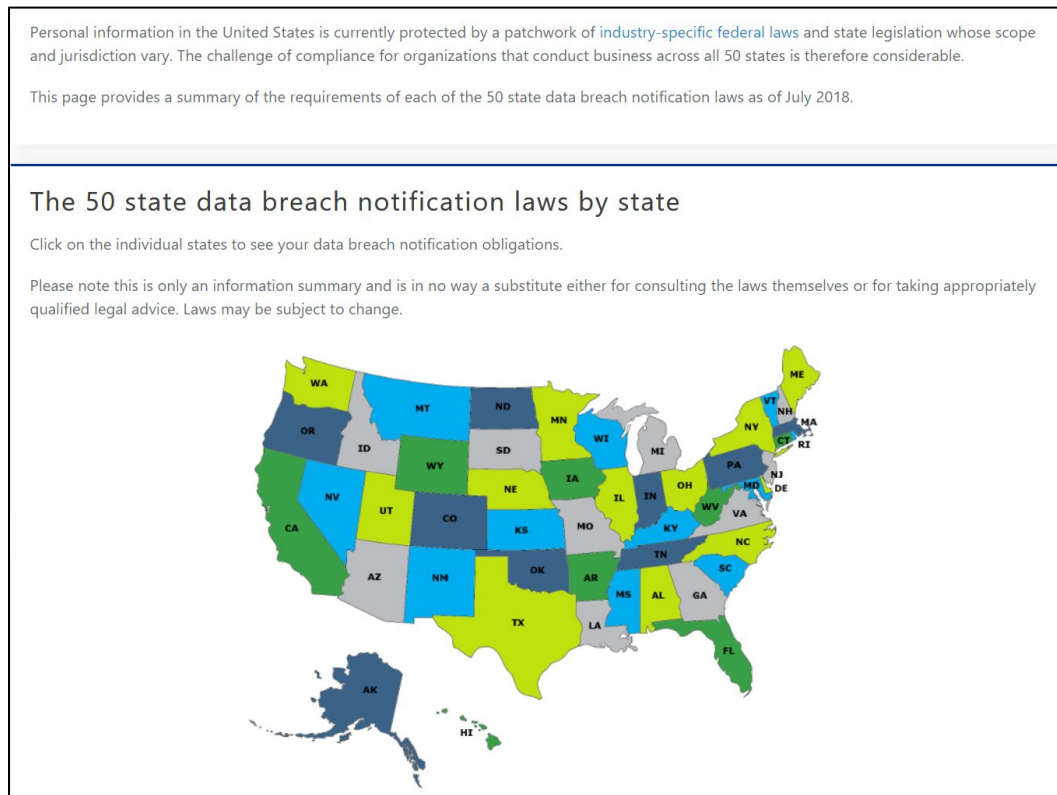
¹⁴² A0107 (FAC ¶¶ 201 (alleging the California statute “has its own breadth as to private data different than Delaware and North Carolina”), 203 (“There are similar differences as to standards from state to state[.]”)).

¹⁴³ *Compare* A0105 (FAC ¶ 194) *with* A0081 (FAC ¶ 101) (alleging that “each Insured had to investigate” the data that “was input into Blackbaud’s system or software”).

¹⁴⁴ Pls.’ Br. at 22-24; *see* A0363 (The Court: “[T]he toolkit is irrelevant to the obligations here.”).

¹⁴⁵ A0094 (FAC ¶ 146).

state survey of data breach laws in the United States.¹⁴⁶ But the linked website has *nothing to do* with the instant case—it simply summarizes *all* breach-related statutes in the United States, as demonstrated by the website’s home page:



The Insureds are only from 14 states.¹⁴⁷ Citing a 50-state survey that, in turn, cites *hundreds* of statutory provisions that may *or may not* have been applicable to or even considered by the Insureds, offers no clarity as to Plaintiffs’ claims.

Even a cursory review of the 50-state survey reveals that it does not put Blackbaud on sufficient notice. For example, the website is at least two years out of

¹⁴⁶ A0081 (FAC ¶ 105) (citing <https://www.itgovernanceusa.com/data-breach-notification-laws>).

¹⁴⁷ A0063-65 (FAC ¶¶ 8, 14, 17).

date—it summarizes U.S. data breach laws “as of July 2018,” but the Insureds were notified of the Incident in July 2020. The survey itself says it is “in no way a substitute for consulting the laws themselves.” Asking Blackbaud to root through an outdated website to guess which of the 19 Insureds considered which statute (*if any*) applicable to their unspecified Affected Data is neither “simple,” nor “concise,” nor “direct.”¹⁴⁸

Next, Plaintiffs vaguely reference the Health Insurance Portability and Accountability Act (“HIPAA”).¹⁴⁹ But they do not say which Insureds (*if any*) actually incurred expenses under HIPAA, or even allege that any particular Insured was subject to HIPAA. What’s more, the factual allegations in the First Amended Complaint do not compel inferences that the Insureds are healthcare providers, or that the Insureds—***fundraising*** organizations—collected PHI from their Constituents.

As the Superior Court recognized, other courts have quashed similarly vague pleading maneuvers.¹⁵⁰ For example, in *Aspen Am. Ins. Co., et al. v. Blackbaud, Inc.*, one of Blackbaud’s customers and its subrogee alleged that they “had to” incur expenses (nearly identical to the Remediation Expenses here) due to “statutory

¹⁴⁸ *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000) (citing Del. Ct. Ch. R. 8(e)).

¹⁴⁹ A0108 (FAC ¶¶ 206-08).

¹⁵⁰ Op. at 29-31.

obligations under HIPAA and other ‘similar’ state and federal statutes.”¹⁵¹ But the plaintiffs only asserted, “in a conclusory manner,” that “a complex web of 14 provisions” of HIPAA “somehow result[ed] in them having to make these expenditures,” which was insufficient to establish proximate cause.¹⁵² The *Aspen* plaintiffs also cited to a privacy law treatise (like Plaintiffs’ 50-state survey here) as a basis for their Expenses, but that could not bolster the factually deficient pleading.¹⁵³ The plaintiffs then cited Indiana’s Breach Notification Statute, but it also did not require the plaintiffs to incur their Expenses. Therefore, the *Aspen* court held that “citing it does not provide a plausible reason why the breach caused [plaintiffs] to spend these Remediation Damages.”¹⁵⁴

The same result is warranted here. Plaintiffs did not plead any facts explaining how HIPAA could apply, and citing an outdated 50-state survey of data privacy laws does not plug that factual hole. The lack of pleaded facts precludes Blackbaud and the Court from undertaking the *Aspen* court’s analysis in connection with any specific law, because Plaintiffs have not identified those laws in the first place. As

¹⁵¹ 624 F.Supp.3d 982, 999 (N.D. Ind. 2022).

¹⁵² *Id.*

¹⁵³ *Id.* at 1000 (“[T]his source merely provides a list of what [breach] mitigation *might include*, cites no cases in support, and says nothing about what mitigation efforts are obligated under HIPAA.”).

¹⁵⁴ *Id.* at 999-1000 (dismissing contract claim for lack of causation).

a result, Blackbaud cannot avail itself of otherwise straightforward defenses.¹⁵⁵ Like in *Aspen*, the Superior Court held that Plaintiffs here cannot shortchange the essential element of proximate cause, and expect their contract claims to survive dismissal.¹⁵⁶

Finally, Plaintiffs’ pleading failure is particularly egregious because the Insureds allegedly incurred the Expenses “*to investigate the . . . relevant laws* that may need compliance[.]”¹⁵⁷ Delaware courts “measur[e] the sufficiency of the pleadings on a case-by-case basis,” and their analysis “will differ depending upon the nature of the claim and the factual context in which it is made.”¹⁵⁸ Here, the First Amended Complaint asserts that unidentified laws were the catalyst for the Remediation Expenses. Under Delaware’s “case-by-case” analysis, Plaintiffs’ failure to identify those laws, while simultaneously seeking to recover for time spent assessing those laws, does not warrant any deference.

¹⁵⁵ *Talkdesk*, 2024 WL 2799307, at *5 (dismissing contract claim where allegations were “entirely too vague and subjective to allow [defendant] to prepare any defense.”); *In re Benzene Litig.*, 2007 WL 625054, at *6 (requiring “fair notice” at “the outset” to allow defendants to “map out their defense.”).

¹⁵⁶ Op. at 29-31.

¹⁵⁷ A0081 (FAC ¶ 101).

¹⁵⁸ *In re Proton Pump Inhibitors Prod. Liab. Litig.*, 2023 WL 5165406, at *10 (Del. Super. Ct. Aug. 11, 2023).

Simply put, Plaintiffs provide no factual basis for 19 Insureds to incur the Remediation Expenses. Because they failed to meet Delaware's minimal pleading standard for proximate cause, their breach of contract claims fail in their entirety.

III. DISMISSAL WITH PREJUDICE WAS PROPER.

A. Question Presented

Whether the Superior Court properly dismissed the First Amended Complaint *with* prejudice. (Preserved at B0064, B0104).

B. Scope of Review

It is not clear whether Plaintiffs are complaining that they moved to amend the First Amended Complaint during the hearing and were denied, or something else.¹⁵⁹ To the extent that Plaintiffs' argument is based on denial of a purported motion to amend, "a trial court's order permitting or refusing an amendment to a complaint is reviewable only for abuse of discretion."¹⁶⁰ "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice."¹⁶¹

"Civil Rule 15(a) governs how and when parties may amend their pleadings," but an amendment "is not automatic."¹⁶² "Denial is proper where there's 'evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated

¹⁵⁹ See Pls.' Br. at 38 (contesting dismissal with prejudice; citing the standard of review for procedural rules; quoting Rule 15(a)).

¹⁶⁰ *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 262 (Del. 1993).

¹⁶¹ *Harper v. State*, 970 A.2d 199, 201 (Del. 2009).

¹⁶² *MVC Capital Inc. v. U.S. Gas & Elec., Inc.*, 2021 WL 4486462, at *3 (Del. Super. Ct. Oct. 1, 2021) (citing Del. Super. Ct. Civ. R. 15(a)); *id.* (citation omitted).

failure to cure deficiencies, prejudice, futility, or the like.”¹⁶³ For example, “inexcusable delay and repeated attempts at amendment may justify denial.”¹⁶⁴

C. Merits of Argument

Plaintiffs argue that the Superior Court erred by dismissing the First Amended Complaint *with* prejudice. Plaintiffs’ argument lacks legal and factual support.

As an initial matter, Plaintiffs already made this argument once, after the Court dismissed the original Complaint. Plaintiffs did not move to amend their original deficient pleading, but instead filed a Motion Under Rule 59(e), seeking reargument on Blackbaud’s original motions to dismiss.¹⁶⁵ Plaintiffs chastised the Superior Court for what they incorrectly believed was a dismissal with prejudice, but the Superior Court reminded Plaintiffs (1) that they did not actually move to amend the original Complaint, save an informal comment in the middle of the hearing, (2) that their Rule 59(e) motion was procedurally improper, and (3) that the original Complaint was *not* dismissed with prejudice, and thus Plaintiffs were free to file an amended pleading.¹⁶⁶ To assist Plaintiffs, the Superior Court *sua sponte* treated Plaintiffs’ Motion Under Rule 59(e) as a motion to amend, and allowed Plaintiffs to file the First Amended Complaint.¹⁶⁷

¹⁶³ *MVC Capital*, 2021 WL 4486462, at *3 (citation omitted).

¹⁶⁴ *Mullen*, 625 A.2d at 263.

¹⁶⁵ B0001-06 (Rule 59(e) Motion).

¹⁶⁶ B0015-19 (Rule 59(e) Order).

¹⁶⁷ B0017.

Now Plaintiffs repeat history. They did not move to amend the First Amended Complaint, aside from a comment during the hearing. They did not file a motion to amend after the hearing. And they have never explained how they could amend the First Amended Complaint to state an actionable claim, even if given an opportunity.

In an effort to find some legal error with the Opinion, Plaintiffs suggest that the Superior Court “seemingly proceeded in accordance with the approach under Court of Chancery Rule 15(a)(5)(b) (formerly Rule 15(aaa)), but the Superior Court lacks any such rule.”¹⁶⁸ The Opinion does not reference that rule, and Plaintiffs do not cite any factual basis for their hypothetical.

In any event, *in Superior Court*, dismissal with prejudice is appropriate and routine where plaintiffs have already been given an opportunity to amend their pleadings, and failed to do so properly.¹⁶⁹ Here, Plaintiffs were given an opportunity

¹⁶⁸ Pls.’ Br. at 39-40.

¹⁶⁹ See, e.g., *In re Asbestos Litig. Estate of Franco v. CSX Transp., Inc.*, 2015 WL 4399960, at *3 n.15 (Del. Super. Ct. July 13, 2015) (dismissing First Amended Complaints with prejudice because “even with the opportunity to remedy the deficiencies (if they could be), Plaintiffs’ amended complaints still fail to plead the necessary elements” of the claim); *Estate of Reilly by Reilly v. Turko*, 2022 WL 301701, at *3 (Del. Super. Ct. Feb. 1, 2022) (dismissing First Amended Complaint with prejudice); *CRE Niagara Holdings, LLC v. Resorts Grp., Inc.*, 2022 WL 1749181, at *10 (Del. Super. Ct. May 31, 2022) (dismissing certain contract claims “with prejudice so as to avoid any possible threat to comity, to judicial economy, or of inconsistent judgments.”); *Am. Bottling Co. v. Repole*, 2020 WL 7787043, at *3 (Del. Super. Ct. Dec. 30, 2020) (dismissing First Amended Complaint *without* prejudice based on counsel’s representations about how it could properly amend the deficient

to amend their original Complaint, and failed to do so properly. And, for the second time, they failed to timely amend their deficient pleading. Thus, Plaintiffs do not warrant yet another bite at the apple.

pleading, and dismissing Second Amended Complaint *with* prejudice after counsel failed to deliver on those representations).

CONCLUSION

For all of these reasons, and those set forth in the Superior Court's well-reasoned decision below, this Court should affirm the dismissal of Plaintiffs' claims.

**MORRIS, NICHOLS, ARSHT &
TUNNELL LLP**

OF COUNSEL:

**PARKER POE ADAMS &
BERNSTEIN LLP**

Sarah Fulton Hutchins
Corri A. Hopkins
620 S. Tyron Street, Suite 800
Charlotte, NC 28202
(704) 372-9000

July 24, 2025

/s/ John P. DiTomo

John P. DiTomo (#4850)
Jialu Zou (#7478)
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
jditomo@morrisnichols.com
jzou@morrisnichols.com
*Attorneys for Defendant Below/
Appellee Blackbaud, Inc*

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2025, a copy of the foregoing *Appellee's Answering Brief* was served upon the following attorneys of record via File & ServeXpress.

Lisa C. McLaughlin, Esquire
Phillips McLaughlin & Hall, P.A.
1200 N. Broom Street
Wilmington, DE 19806

/s/ Jialu Zou

Jialu Zou (#7478)