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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, Plaintiff-Below/Appellant, v. BLACKBAUD, INC., Defendant-Below/Appellee.	**C.A. No. 193, 2025** **Appeal from the Superior Court of the State of Delaware,** **C.A. No. 22C-12-130 KMM (CCLD)**

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff Travelers Casualty and Surety Company of America ("Plaintiff") appeals the Superior Court's decision dismissing the 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 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.

Plaintiff alleges that seventy-eight (78) 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 millions of dollars in unidentified forensic services and legal fees. Those 78 Insureds were reimbursed by Plaintiff. Plaintiff then filed this lawsuit, now asserting 78 subrogation claims for breach of contract, even though Plaintiff 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, Plaintiff does not dispute (i) that it did not plead facts specific to any Insured; (ii) the Superior Court's interpretation of the Contracts; (iii) that Plaintiff did not identify the general categories of Affected Data for the Insureds; or (iv) that Plaintiff did not identify the laws that allegedly triggered the Insureds' "investigations."

Instead, Plaintiff argues that none of those dispositive circumstances should have any impact on the First Amended Complaint. In so doing, Plaintiff seeks reversal of the Superior Court's holdings that Plaintiff (i) failed to plead facts supporting 78 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 Plaintiff 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 Plaintiff (i) did not identify any provision of the Contracts that requires Blackbaud to provide the relief Plaintiff seeks; (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 Plaintiff did not and cannot state an actionable claim for relief.

SUMMARY OF ARGUMENTS

1. Denied. The Superior Court correctly held that Plaintiff's 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 FACTS[1]

A. Applicable Contracts

Blackbaud provides "donor relationship management" software to its Customers, primarily nonprofit organizations.[2] 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."[3] Blackbaud's Customers collect information from their donors (Constituents),[4] and input that information into Blackbaud's Solutions, in Customer-determined fields.[5] Blackbaud then helps its Customers to analyze and maximize use of that data.[6]

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[1] The Statement of Facts draws from the First Amended Complaint (A0067-A0124 [hereinafter, as "FAC"]), and documents referenced and relied upon therein, including Blackbaud's March 9, 2023 Form 8-K (B0065-73 [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).

[2] A0070-71 (FAC ¶¶ 14, 16-17).

[3] *See* A0195 (BSA § 18) (defining Services, Subscriptions, and Solutions); A0071 (FAC ¶ 17).

[4] A0072-73 (FAC ¶ 23).

[5] A0086 (FAC ¶ 91(a)) ("Blackbaud Customers . . . decide to store" Constituents' data in Blackbaud products); A0114 (FAC ¶ 187) (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).

[6] A0071 (FAC ¶ 17).

According to Plaintiff, Blackbaud's relationship with each Insured was governed by the 2019 Blackbaud Solutions Agreement (the "BSA" or, collectively, the "Contracts"), among other agreements.[7] The Contracts are "governed by the laws of the State of New York."[8]

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.[9] Section 10 of the BSA is a limitation of liability provision.[10] 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."[11] 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.[12]

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[7] *See* A0190-95 (BSA); *see also* A0207-16.

[8] A0194 (FAC § 14). The parties and the Superior Court agree that New York substantive law and Delaware procedural law apply. Op. at 6 (citing A0194 § 14).

[9] A0194 (BSA § 15(b)); A0191-95 (BSA §§ 15, 8).

[10] A0193 (BSA § 10).

[11] A0193 (BSA § 10) (sentence case).

[12] A0193 (BSA § 10) (sentence case).

The First Amended Complaint turns on Sections 6(a)-(d) of the Contracts.[13] Under **Section 6(a)**, Plaintiff alleges 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."[14] **Section 6(b)** is similar to 6(a), requiring Blackbaud to "implement[] commercially reasonable, written policies and procedures addressing potential Security Breaches."[15] **Section 6(c)** requires Blackbaud to provide notice of a Security Breach within 72-hours.[16]

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.[17]

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[13] Appellant's Opening Brief [hereinafter, as "Pl. Br."], at 24; Pl. Br., Exhibit A (the Opinion) [hereinafter, as "the Opinion," or "Op."], at 6 (citing A0192 §§ 6(a)-(d)).

[14] A0192 (BSA § 6(a)) (emphasis added).

[15] A0192 (BSA § 6(b)).

[16] A0192 (BSA § 6(c)).

[17] A0192 (BSA § 6(d)).

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.[18] Plaintiff alleges 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.[19] Blackbaud, along with forensics experts and law enforcement, successfully prevented the cybercriminals from blocking Customers' access to Blackbaud's system, and expelled the cybercriminals from its system.[20]

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).[21]

On July 14, 2020, Kudelski issued its report, which did not identify social security numbers or bank accounts among the Affected Data.[22] Two days after

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[18] A0078 (FAC ¶ 52); A0081 (FAC ¶ 71 n.12) (citing https://investor.blackbaud.com/node/22136/ixbrl-viewer); B0069-70 (Form 8-K ¶ 5).

[19] A0078-79 (FAC ¶¶ 56-57).

[20] A0080 (FAC ¶¶ 60, 66).

[21] A0078-79 (FAC ¶¶ 52-52).

[22] A0082 (FAC ¶ 78) (telling Customers, two days after receiving the Kudelski report, that "[t]he cybercriminal did not access . . . bank account information, or social security numbers").

receiving the Kudelski report, Blackbaud notified approximately 13,000 Affected Customers ("roughly a quarter[] of Blackbaud's customers") about the Incident (the "July Notice").[23] The July Notice identified "the name of the [Blackbaud S]olution(s) that were part of th[e] incident" for each Affected Customer.[24] The notice also told Customers that "**[n]o action is required on your end because no personal information about your constituents was accessed**."[25] Blackbaud provided a "Toolkit" to help its Affected Customers understand the Incident better.[26] The Toolkit "made no mention of compensating" the Insureds for incurring any expenses.[27]

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.[28] After further investigation, in September 2020, Blackbaud sent a supplemental notice ("Supplemental Notice") to

[23] A0081 (FAC ¶¶ 71); A0082 (FAC ¶ 72).

[24] *See* A0200 (describing the July Notice).

[25] A0083 (FAC ¶ 78) (emphasis in original).

[26] A0196-A0206 (Toolkit).

[27] A0102 (FAC ¶ 141).

[28] A0083 (FAC ¶ 81); *see* B0070 (Form 8-K ¶¶ 9-11).

that corresponding *subset* of Affected Customers.[29] Plaintiff does not allege that any Insured received the Supplemental Notice.[30]

C. Plaintiff's Allegations[31]

According to Plaintiff, the Insureds received the July Notice, which stated that "no personal information about [their] constituents was accessed."[32] Plaintiff alleges that the Insureds then chose to incur millions 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[.]"[33] Plaintiff then reimbursed the Insureds.

In this lawsuit, Plaintiff presumes 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

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[29] B0071 (Form 8-K ¶ 17); A0083 (FAC ¶ 83).

[30] *See* generally A0067-A0124 (FAC).

[31] Plaintiff relies heavily on the subsequent government inquiry into the Incident (a common step following a ransomware attack), but the SEC ruling is far narrower than Plaintiff suggests—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." B0071 (Form 8-K ¶¶ 21-22); *see* A0081 (FAC ¶ 71 & n.12.) The cited consent settlements with the state attorneys general do not include factual findings.

[32] A0083 (FAC ¶ 78) (emphasis omitted).

[33] A0088 (FAC ¶ 104); *see* A0089 (FAC ¶ 100).

any negative consequences resulting directly from" the Incident) of the Contracts.[34] It alleges that, pursuant to insurance policies that Plaintiff did not provide, it "paid amounts covered" to the Insureds.[35] Plaintiff therefore demands that Blackbaud reimburse it for any expense that the Insureds incurred, in an amount "in excess of $2,000,000."[36]

D. Procedural History

On December 13, 2022, Plaintiff filed the original Complaint, which asserted claims for breach of contract, "gross negligence/willful misconduct," and "misrepresentation."[37] 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

[34] Plaintiff does not allege in the First Amended Complaint that the Insureds incurred *any* damages caused by an alleged breach of Section 6(c), and it does 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 Plaintiff's own allegations—that Blackbaud notified Affected Customers two days after receiving notice of the Affected Customers and Affected Data (*see* A0078 (FAC ¶ 52) (receiving the report on July 14); A0082 (FAC ¶ 72) (notifying Affected Customers on July 16))—and Plaintiff's failure to allege or argue that any alleged damages were caused by a breach of Section 6(c). *See generally* A0067-A0124 (FAC).

[35] A0069 (FAC ¶ 10).

[36] A0123 (FAC ¶ 217).

[37] A0020-33 (Original Complaint).

"fail[ed] to sufficiently allege that the breaches were the proximate cause of the alleged damages (the Expenses)."[38]

On April 4, 2024, Plaintiff filed a Motion for Reargument under Rule 59(e), contending that it "should have been permitted an opportunity to amend the Complaint as to its Breach of Contract claims, in lieu of dismissal with prejudice."[39] Plaintiff complained that it asked for an opportunity to amend the pleading, but that the Superior Court "did *not* provide Plaintiff[] with an opportunity to amend."[40]

The Superior Court noted that Plaintiff's 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.[41]

The court further reminded that (i) Plaintiff 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 plaintiff[] from filing an amended complaint."[42]

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[38] A0059.

[39] *See* B0001-06 ("Rule 59(e) Motion"); B0001 at 1; *see id.* at 1, n.1. ("To be clear, this motion is explicitly intended only to address this Court's decision as to the dismissal of Plaintiff's Breach of Contract claims under Count 1 of Plaintiff's Complaint.").

[40] B0003 (Rule 59(e) Motion ¶ 7) (emphasis added).

[41] B0016; B0014-18 ("Rule 59(e) Order").

[42] B0016.

Despite Plaintiff's procedural missteps, the Superior Court treated its Rule 59(e) Motion as a motion to amend, and allowed Plaintiff to file an amended pleading.[43]

On May 17, 2024, Plaintiff filed the First Amended Complaint, alleging only breach of contract claims on behalf of each Insured, and omitting its tort claims.[44] Plaintiff's allegations turn on the theory that, because Blackbaud was attacked by cybercriminals, Blackbaud must reimburse Plaintiff 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 under Rule 12(b)(6) on June 28, 2024.[45] On April 3, 2025, the Superior Court issued the Opinion, dismissing the First Amended Complaint with prejudice.[46]

[43] B0016.

[44] *See generally* A0067-A0124 (FAC).

[45] B0019-20.

[46] *See generally* the Opinion.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF FAILED TO PROPERLY PLEAD ITS SUBROGATION CLAIMS.

A. Question Presented

Whether the Superior Court correctly held that Plaintiff failed to plead factual allegations in connection with each of the 78 separate subrogation claims. B0038-41; B0082-84.

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.'"[47]

When considering a motion under Rule 12(b)(6), courts treat specific, well-pleaded factual allegations as true.[48] Courts "do not, however, accept conclusory allegations unsupported by specific facts, [or] draw unreasonable inferences in the plaintiff's favor."[49] "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."[50]

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

[48] *In re Gen. Motors*, 897 A.2d at 168.

[49] *Id.* (quotation marks omitted).

[50] 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]."[51] Instead, Plaintiff lumped the Insureds' 78 discrete claims together by simply "list[ing] a series of actions taken and expenses incurred by the collective, unrelated group of Insureds."[52] Because the First Amended Complaint failed to "give the defendant 'fair notice' of the claim being asserted against him,"[53] it was properly dismissed.

Under both Delaware and New York law, a subrogee-insurer steps into the shoes of its insureds.[54] Subrogee-insurers like Plaintiff are therefore subject to the same defenses as their Insured-subrogors.[55] This includes defenses under Rule 12.[56]

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[51] Op. at 33.

[52] Op. at 25.

[53] *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).

[54] 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).

[55] *Servidori v. Mahoney,* 515 N.Y.S.2d 328, 129 A.D.2d 944 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.").

[56] *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,

Because Plaintiff's 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.[57]

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.[58] 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***."[59] 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

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at *3 (Del. Super. Ct. Dec. 1, 2009) (rejecting defense applicable only to the plaintiff subrogee, but not to the nonparty subrogors, and granting dismissal).

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

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

[59] *E.* States *Health & Welfare Fund*, 729 N.Y.S.2d at 252-53 (emphasis added).

action."[60] Thus, the court found the plaintiff failed to state its subrogation claims under "any cognizable theory."[61]

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.").[62]

Here, the First Amended Complaint fails for the same reasons that the multi-subrogor complaints from New York failed: Plaintiff did not plead facts related to any particular Insured's claim.[63] Instead, Plaintiff argues that it satisfied its pleading

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[60] *Id.*

[61] *Id.*, at 245.

[62] *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).

[63] 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.").

obligations by simply pleading (i) "the identities of each Insured," (ii) "the types of expenses incurred [collectively,]" and (iii) the total dollar amount for each Insured.[64]

On appeal, as it did below, Plaintiff complains that it was held to a "higher pleading standard" than required, suggesting that New York's pleading standard is higher than that in Delaware.[65] 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. More specifically, the New York "test is so liberal that the standard is simply whether the plaintiff has a cause of action, not even whether one has been stated." *E. States Health & Welfare Fund*, 729 N.Y.S.2d at 245 (explaining that the court asks "whether the facts as alleged fit within any cognizable legal theory."). Thus, Plaintiff was not held to a higher standard here.

Next, Plaintiff argues that it is sufficient to allege that the Insureds' Remediation Expenses "flowed from the Data Breach and Blackbaud's breach of the Contracts."[66] The problem is that Plaintiff did not actually provide factual support for those allegations.[67]

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[64] Pl. Br. at 26-27.

[65] Pl. Br. at 18, 23, 28.

[66] Pl. Br. at 24.

[67] 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.[68] 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."[69] By omitting the Affected Data and the allegedly relevant laws from the First Amended Complaint, Plaintiff improperly insulates its deficient claims and prevents Blackbaud from understanding its available defenses as to *any* Insured.[70]

In an effort to distinguish the New York cases cited by Blackbaud and the Superior Court, Plaintiff 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, the *Lawyers Fund* 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"

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[68] *See* A0200 (identifying each Blackbaud Solution that was involved in the Incident); *see* A0078 (FAC ¶ 94).

[69] Op. at 21-22.

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

in the proposed amendment, not whether it satisfied pleading standards in the first instance.[71] 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.[72] The First Amended Complaint does not approach that degree of detail for the 78 subrogation claims here.

Plaintiff also points out that the *Lawyers Fund* complaint alleged that "[e]ach claimant was injured in the same way."[73] But, that does not help Plaintiff here, because it does not allege that ***all*** 78 Insureds were injured in the same way (*i.e.*, incurred the same Remediation Expenses). In fact, Plaintiff generally alleges that the Insureds each had ***different*** types of Affected Data, ***different*** legal obligations, and thus ***different*** Expenses.[74]

Plaintiff also says that the *Lawyers Fund* complaint specifically pled "the time frame within which [the claimants' alleged] losses occurred."[75] However relevant that was to the *Lawyers Fund* complaint, it does not translate here—the Superior Court aptly noted that Plaintiff "do[es] not allege when any Insured conducted its

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

[72] *Id.* at 1130 (emphasis added).

[73] Pl. Br. at 29 (citation omitted).

[74] *See* A0114 (FAC ¶¶ 187-88, 190); A0116-17 (FAC ¶¶ 192-93); A0121 (FAC ¶ 207).

[75] Pl. Br. at 29 (citation omitted).

investigation."[76] If anything, the inferential "time frame" appears to ***foreclose*** Plaintiff's 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."[77] Thus, the July Notice—the only notice the Insureds received, according to the First Amended Complaint—did not obligate any particular Insured to act.

Finally, Plaintiff suggests that the New York cases involved separate causes of action for each subrogation claim, and that the Superior Court should not have required "Insured-by-Insured claims" here, either.[78] But, that is *not* what the Superior Court required. Rather, it held that, "in a multi-subrogor action, a plaintiff must separately plead facts for each" suborgor's claim.[79] In other words, the Superior Court emphasized pleading ***facts***, not separate causes of action.

In sum, the Superior Court did not impose a "higher pleading standard" or require pleading "with factual particularity," as Plaintiff suggests on appeal.[80] Rather, the court required "well-pleaded allegations; *i.e.*, allegations supported by

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[76] Op. at 32.

[77] A0082-83 (FAC ¶ 78) (emphasis omitted).

[78] Pl. Br. at 28-29; *id.* at 28.

[79] Op. at 21; *id.* at 22 (requiring "factual allegations" and "factual information for each Insured's claim").

[80] *See* Op. at 31; Pl. Br. at 28.

facts," which is exactly what the First Amended Complaint lacks.[81] Plaintiff's decision to sue on behalf of 78 different Insureds within one complaint and one cause of action does not negate its obligation to put Blackbaud on notice of the claims alleged against it, and Plaintiff entirely sidestepped that obligation here.

[81] Op. at 22.

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

A. Question Presented

Whether the Superior Court correctly held that Plaintiff failed to allege contractual or factual support for the essential element of proximate cause in connection with its breach of contract claims. *See* B0041-52; B0084-94.

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*,"[82] and treats specific, well-pleaded factual allegations as true.[83] Courts "do not, however, accept conclusory allegations unsupported by specific facts, [or] draw unreasonable inferences in the plaintiff's favor."[84] A plaintiff must provide "specific allegations of fact and conclusions supported by specific allegations of fact."[85]

C. Merits of Argument

Under New York law, "[p]roximate cause is an essential element of a breach of contract cause of action."[86] Specifically, "[t]he injured party must prove that

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[82] Cousins, 283 A.3d at 1147 (citation omitted).

[83] *In re Gen. Motors*, 897 A.2d at 168.

[84] *Id.* (quotation marks omitted).

[85] White *v. Panic*, 783 A.2d at 549, n.12.

[86] 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,

breach was a *direct*, proximate cause of the damages alleged."[87] To plead this essential element, "a factual basis to relate the alleged injury to the breach is required."[88] 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.[89] 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.

Moreover, "the fact that a data breach occurred and the insureds incurred expenses, alone, is not sufficient to state a claim."[90] Without any direct harm, Plaintiff needed to plead "specific allegations of fact" to support the conclusory

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2021) (dismissing contract claim that "does not properly allege an essential element of breach of contract (resulting harm).").

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

[88] *Wellgistics, LLC v. Welgo, Inc.*, 2024 WL 113967, at *4 (Del. Super. Jan. 9, 2024).

[89] 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.).

[90] A0038; *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.'")).

assertion that the Insureds' elective Expenses were the "*direct*, proximate cause of" the alleged breaches.[91]

Plaintiff failed satisfy its pleading obligations in at least three ways: (1) No provision of the Contracts allows Plaintiff to recover the Remediation Expenses; (2) Plaintiff's 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 Plaintiff to recover the Remediation Expenses.

Plaintiff's flawed theory of liability presumes that ***any*** contractual breach—no matter how attenuated—imposes on Blackbaud an unwritten obligation to reimburse Plaintiff for ***any*** expense that the Insureds chose to incur. The problem with Plaintiff's theory is that it is not supported by ***any*** provision of the Contracts.

More precisely, the Remediation Expenses are "not specifically tied to any contractual provision that the parties bargained for and agreed to."[92] Therefore, Plaintiff cannot show why the Contracts obligate Blackbaud to reimburse expenses to "investigate" data that the Insureds input into Blackbaud's system, and which they never lost access to, during or after the Incident. In short, the Contracts do not authorize Plaintiff to recover the Remediation Expenses from Blackbaud.

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[91] *Friedman*, 30 F. Supp. 3d at 192 (emphasis added).

[92] *Talkdesk*, 2024 WL 2799307, at *5.

ii. The Contracts do not have a "reasonable reliance" provision.

Recognizing the lack of contractual support for its contract claims, Plaintiff also alleges that the Insureds incurred the Remediation Expenses because they could not "reasonably rely on Blackbaud's investigation into the Incident."[93] As the Superior Court pointed out, however, "there is no 'reasonable reliance' term in the Contracts," and Plaintiff did not identify "any contractual provision that grants an Insured a right to declare Blackbaud's investigation unreliable[.]"[94] Moreover, the First Amended Complaint does not allege "that any Insured actually made such a determination."[95] Thus, Plaintiff's "reasonable reliance" allegations do not find support in the Contracts or the First Amended Complaint.

iii. Plaintiff's interpretation of the Contracts is unreasonable.

Plaintiff 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. Specifically, Section 6(d) required Blackbaud to "mitigate any negative consequences resulting directly from the Security Breach."[96] Plaintiff contends that

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[93] A0088 (FAC ¶ 96). In so doing, Plaintiff concedes (as it must) that Blackbaud *did* investigate the Incident, and *did* identify the Affected Customers and the Affected Data for those Customers.

[94] Op. at 31-32.

[95] Op. at 32.

[96] A0192 (BSA § 6(d)).

the "direct[]" mitigation obligation in Section 6(d) required Blackbaud to reimburse ***all*** of the Remediation Expenses.

The Superior Court held that Plaintiff's interpretation of Section 6(d) was not reasonable as a matter of law.[97] "Security Breach" was defined in the Contracts as "***any*** unauthorized access, use, disclosure, modification, or destruction affecting the confidentiality of Your Confidential Information."[98] Under Section 6(a) and 6(b), Blackbaud agreed to implement and maintain "commercially reasonable information security procedures and standards."[99] Thus, if a Security Breach occurred due to Blackbaud's failure to maintain this level of security, it would breach the Contract.[100]

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."[101] As the Superior Court explained, "[u]nder Plaintiff['s] interpretation, Blackbaud contractually agreed that for every data breach"—no matter whose fault—"it would undertake an investigation for every customer and provide

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[97] Op. at 27 (holding Plaintiff's interpretation of Blackbaud's obligations under Section 6(d) "proves too much").

[98] Op. at 27 (quoting BSA §§ 6(c)) (emphasis added).

[99] A0192 (BSA §§ 6(a)-(b)).

[100] Op. at 27.

[101] Op. at 27 (emphasis added); *id.* ("No cybersecurity system is full-proof.").

notification where required."[102] 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.[103] Under Plaintiff's 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.[104] 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.[105]

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

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[102] Op. at 27-28.

[103] Op. at 28.

[104] Op. at 28.

[105] Op. at 28-29.

On appeal, Plaintiff attempts to distance itself from Section 6(d), arguing that the Superior Court overemphasized it, and that Plaintiff did not need Section 6(d) to survive a motion to dismiss.[106] But that argument ignores the allegations throughout Plaintiff's briefing below, in which it repeatedly asserted that the duty to mitigate in Section 6(d) ***is*** its contractual basis for damages. Specifically, Plaintiff argued that Blackbaud's "inaction ***breached the parties' contracts by*** not only failing to secure its clients' data and also ***failing to 'mitigate <u>any</u> negative consequences'" resulting from the Incident*** which, in turn, "forced" the Insureds "to incur significant remediation expenses for post-breach services that should have been provided by Blackbaud."[107] 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

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[106] In a footnote, Plaintiff says that it *does* allege Blackbaud breached Section 6(d). Pl. Br. at 31 n.3 ("To be clear, Travelers does also allege that Blackbaud breached its mitigation obligations. But that separate alleged breach is unnecessary . . . .").

[107] A0225 (emphasis added); *see also* A0227, A0229, A0243, A0244, A0244-45 n.9, A0247, A0254 n.14, A0256 ("In the event of a security breach, Blackbaud was required to 'use commercially reasonable efforts to mitigate any negative consequences,' but failed to do so.").

protected the Affected Data from direct harm and provided the results of its investigation to Affected Customers.[108] Because the Contracts do not require Blackbaud to reimburse Plaintiff for the Remediation Expenses, its contract claims (and, thus, the First Amended Complaint) fail as a matter of law.

2. Plaintiff's allegations of proximate cause are conclusory.

In the absence of any contractual provision creating liability for the Remediation Expenses, Plaintiff contends that, to state a claim for breach of contract, it is enough to allege that Blackbaud breached the Contracts.[109] But Plaintiff did not provide factual support for such an attenuated causal link between the alleged breaches and the Remediation Expenses.

Quite the opposite, Plaintiff's allegations of proximate cause are entirely conclusory. Plaintiff alleges 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;

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[108] A0080 (FAC ¶ 66) (alleging Blackbaud paid the cybercriminals' ransom); A0199-A0200 (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)).

[109] A0192 (BSA §§ 6(a)-(b)); Pl. Br. at 24 ("Travelers alleged that the damages incurred by the Insureds flowed from the Data Breach and Blackbaud's breach of the Contracts."); *see also* Pl. Br. at 26-27 (arguing that alleging (i) the identities and (ii) the *amount* of Expenses (but not the *type*) sought by each Insured is sufficient).

> and to retain firms (or to incur costs themselves) to comply with data breach notification laws.[110]

Thus, the overarching failure in the First Amended Complaint is that Plaintiff (1) does not identify the general categories of Affected Data stored by each Insured, and (2) "provide[s] no factual support identifying the 'numerous state and federal statutes'" allegedly at issue.[111] Because of this factual void, the Superior Court correctly held that Plaintiff failed to plead the essential element of proximate cause.

i. Plaintiff declined to identify the Insureds' Affected Data that allegedly caused the Insureds to incur the Remediation Expenses.

According to Plaintiff, its legal obligations "depend[] on the nature of the data accessed" which, in turn, "compel[] certain investigatory steps and notifications."[112] In dismissing the original Complaint, the Superior Court indicated that Plaintiff should have identified the general categories of Affected Data, but failed to do so.[113] In the First Amended Complaint, Plaintiff still refuses to identify the Affected Data. This failure is dispositive.

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[110] A0113 (FAC ¶ 186).

[111] Op. at 21, 33.

[112] A0117 (FAC ¶ 193); *see also* A0087 (FAC ¶ 94) (describing the Insureds' investigation based on "the nature of private data"); A0114 (FAC ¶ 188) (same); A0119 (FAC ¶ 198) (describing "the need after a breach to also have to investigate what type of private data was exposed"); A0115 (FAC ¶ 191(a)) (incurring fees to "identify the types of personal information involved in the Incident").

[113] A0059.

In the data-breach context, identifying the affected data is elementary.[114] Failing to identify that data, or revealing that such data is not sensitive, often means the plaintiff lacks standing to sue altogether—a lower burden for plaintiffs to satisfy than even under Rule 12(b)(6).[115] 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.[116] But, the court explained, "here's the problem: No one alleges that credit-card, debit-card, or bank-account information was [involved in the

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[114] *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 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").

[115] *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").

[116] 45 F. Supp. 3d 14, 31–32 (D.D.C. 2014).

breach]."[117] Consequently, the court held that "Plaintiffs cannot causally link [their alleged bank account injuries] to the SAIC breach."[118]

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." [119] 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."[120] Here, likewise, Plaintiff does not have to identify every datum for each Constituent of each Insured. But, it is "right to expect" that Plaintiff will identify the *general categories* of each Insured's Affected Data *in a case about alleged disclosure of that Affected Data*.[121]

To avoid identifying the Affected Data, Plaintiff conclusorily avers that the Insureds' Constituents' data is comprised of "protected health information ('PHI') and personally identifiable information ('PII'), and proprietary and confidential information."[122] The First Amended Complaint defines this information collectively

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[117] *Id.*

[118] *Id.* (finding five of six plaintiffs lacked standing).

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

[120] *Id.*, at *7.

[121] *Id.*

[122] A0073 (FAC ¶ 24).

as "Blackbaud Client Data."[123] But Plaintiff did not (and cannot) allege that all of the "Blackbaud Client Data" is *Affected Data*. And it did not elaborate on the "Blackbaud Client Data" with supporting facts *anywhere* in the First Amended Complaint.[124]

Plaintiff then suggests, with no detail whatsoever, that the Incident involved "bank account information and social security numbers for *certain* of the impacted customers, including Blackbaud Clients."[125] But it does not (and cannot) allege that this sparse allegation applies to *all* of the Insureds. And Plaintiff does not say *which* Insureds it believes 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. Plaintiff only alleges that the Insureds received the July Notice.[126] 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**

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[123] *Id.*

[124] *See generally* A0067-A0124 (FAC).

[125] A0083-84 (FAC ¶ 83) (emphasis added).

[126] A0082 (FAC ¶ 72).

personal information about [their] constituents was accessed."[127] Thus, there is no reasonable basis to infer that the types of Affected Data *here* triggered any obligation to act.

After the July Notices were sent, Blackbaud learned that social security numbers and bank information were among Affected Data for "certain" Blackbaud Customers,[128] and Blackbaud notified *those* Affected Customers in late September 2020.[129] But, as the Superior Court noted, Plaintiff did not allege that ***any*** of the Insureds received the Supplemental Notice.[130] Even read generously, it is not reasonable to infer from the pleading that all 78 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.

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[127] A0082-83 (FAC ¶ 78) (emphasis in original).

[128] 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 . . . ." B0070 (Form 8-K ¶ 9) (emphasis added).

[129] B0070 (Form 8-K ¶ 11); B0071 (Form 8-K ¶ 17).

[130] *See* A0067-A0124 (FAC). This illustrates the importance of sufficiently pleading causation (and other essential elements) for *each* Insured. *See supra* Part I.

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

Plaintiff also alleges that unidentified "data privacy laws and regulations" caused the Insureds to incur the Remediation Expenses.[131]

As an initial matter, it is not reasonable to infer that the Insureds incurred the Remediation Expenses to explore their legal obligations following the Incident. Given the modern prevalence of data breaches,[132] 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" the existence of 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.

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[131] A0088 (FAC ¶ 97). 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." A0059-60.

[132] *See* A0038 (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, Plaintiff vaguely alleges that "[e]ach insured was subject to one more state's data notification laws and regulations," and "oftentimes multiple states."[133] Then, Plaintiff cites examples of state data breach laws that might have applied,[134] and hopes the Court will draw an inference in its favor. But "[t]he requirement to draw reasonable inferences" at the pleading stage "is not an invitation to irrational, plaintiff-friendly speculation[.]"[135] Plaintiff never actually alleges that ***any*** particular law applied to ***any*** particular Insured or its data, much less explains ***how*** those laws have application here.

When Plaintiff attempts to add details to its threadbare conclusions, those details do not make sense. For example, Plaintiff describes the types of data that trigger certain Delaware, North Carolina, and California statutes, but does not allege that any *Insured*'s Affected Data is among them.[136] Plaintiff's garbled summary of a California statute likewise offers no insight into how it applies to *the Insureds*.[137]

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[133] A0121 (FAC ¶ 207).

[134] A0117-19 (FAC ¶¶ 194-97).

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

[136] A0118-19 (FAC ¶¶ 195-97).

[137] A0119 (FAC ¶¶ 197 (alleging the California statute "has its own breadth as to private data different than Delaware and North Carolina"), 199 ("There are similar differences as to standards from state to state[.]")).

In another deflection without factual support, Plaintiff paradoxically complains that the Insureds' investigations were "complicated" because "Blackbaud had sole access to its system," but then also complains that the Insureds incurred the Expenses to investigate data *in Blackbaud's system*.[138] Plaintiff cannot rationally claim that the Insureds had no access to Blackbaud's system, but also incurred millions of dollars investigating that same system.

Plaintiff also suggests 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 Plaintiff's *contract* claims.[139] In any event, Plaintiff concedes that the Toolkit did *not* suggest that Blackbaud would reimburse *any* Customer for *any* reason.[140]

In lieu of identifying the laws that purportedly caused the Insureds to incur Expenses, Plaintiff directed the Court and Blackbaud to a website containing a 50-state survey of data breach laws in the United States.[141] But the linked website has

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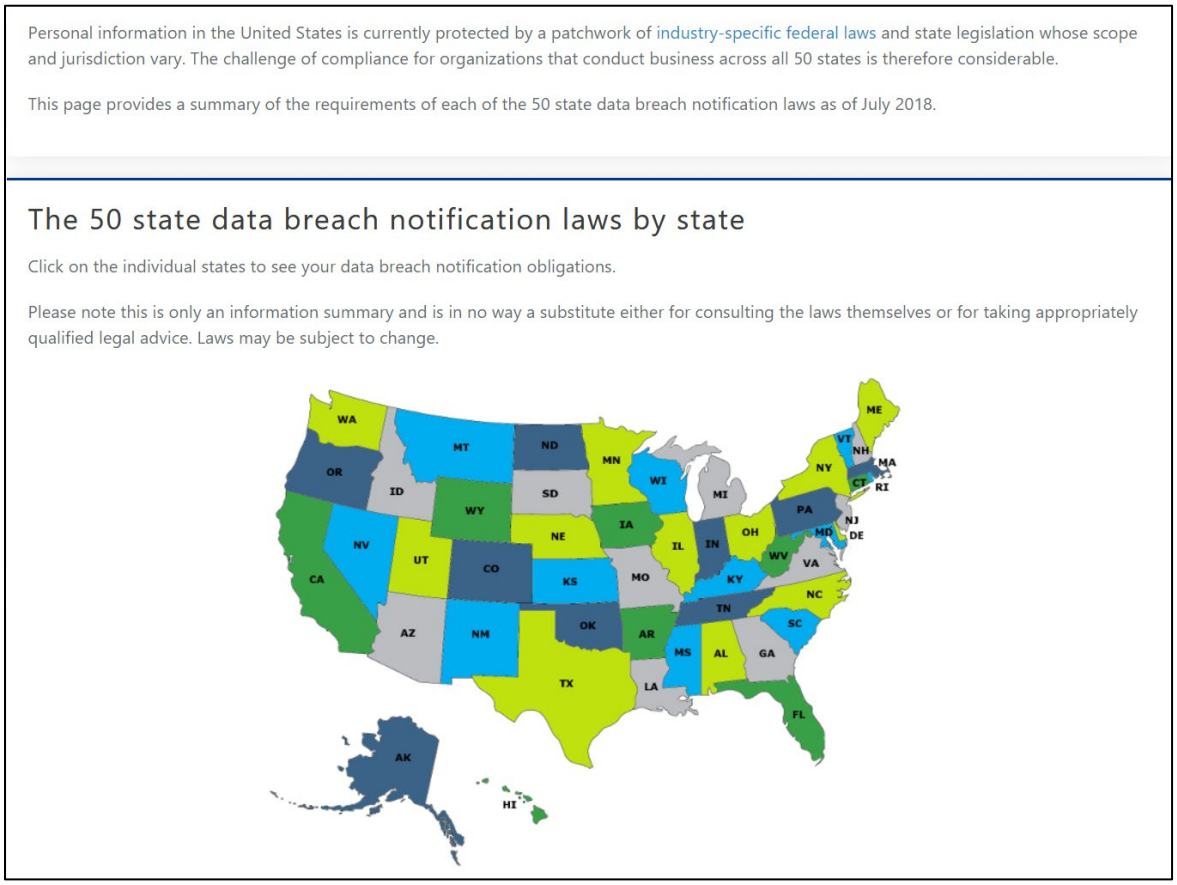
[138] *Compare* A0114 (FAC ¶ 189) *with* A0087 (FAC ¶ 94) (alleging that "each Insured had to investigate" the data that "was input into Blackbaud's system or software").

[139] Pl. Br. at 20-21; *see* A0378 (The Court: "[T]he toolkit is irrelevant to the obligations here.").

[140] A0102 (FAC ¶ 141).

[141] A0088 (FAC ¶ 98) (citing https://www.itgovernanceusa.com/data-breach-notification-laws).

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 30 states.[142] 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 Plaintiff's 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 date—it summarizes U.S. data breach laws "as of July 2018," but the Insureds were

[142] A0189.

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 78 Insureds considered which statute (*if any*) applicable to their unspecified Affected Data is neither "simple," nor "concise," nor "direct."[143]

Next, Plaintiff vaguely references the Health Insurance Portability and Accountability Act ("HIPAA").[144] But it does 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.[145] 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 obligations under HIPAA and other 'similar' state and federal statutes."[146] But the

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

[144] A0120 (FAC ¶¶ 202-04).

[145] Op. at 29-31.

[146] 624 F.Supp.3d 982, 999 (N.D. Ind. 2022).

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.[147] The *Aspen* plaintiffs also cited to a privacy law treatise (like Plaintiff's 50-state survey here) as a basis for their Expenses, but that could not bolster the factually deficient pleading.[148] 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."[149]

The same result is warranted here. Plaintiff did not plead any facts explaining how HIPAA could apply to any Insured, and citing an outdated 50-state survey of data privacy laws does not plug that factual hole. Blackbaud cannot undertake the *Aspen* court's analysis in connection with any specific law, because Plaintiff has not identified those laws in the first place.[150] Like in *Aspen*, the Superior Court held that

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[147] *Id.*

[148] *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.").

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

[150] *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.").

Plaintiff cannot shortchange the essential element of proximate cause and expect its contract claims to survive dismissal.[151]

Finally, Plaintiff's pleading failure is particularly egregious because the Insureds allegedly incurred the Expenses "***to investigate the . . . relevant laws*** that may need compliance[.]"[152] 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."[153] Here, the First Amended Complaint asserts that unidentified laws were a catalyst for the Remediation Expenses. Under Delaware's "case-by-case" analysis, Plaintiff's failure to identify those laws, while simultaneously seeking to recover for time spent assessing those laws, does not warrant any deference.

Simply put, Plaintiff provides no factual or contractual basis for 78 Insureds to incur the Remediation Expenses. Because Plaintiff failed to meet Delaware's minimal pleading standard for proximate cause, its breach of contract claims fail in their entirety.

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[151] Op. at 29-31.

[152] A0087 (FAC ¶ 94) (emphasis added).

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

III. DISMISSAL WITH PREJUDICE WAS PROPER.

A. Question Presented

Whether the Superior Court properly dismissed the First Amended Complaint *with* prejudice. *See* B0063; B0103.

B. Scope of Review

It is not clear whether Plaintiff is complaining that it moved to amend the First Amended Complaint during the hearing and was denied, or something else.[154] To the extent that Plaintiff's 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."[155] "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."[156]

"Civil Rule 15(a) governs how and when parties may amend their pleadings," but an amendment "is not automatic."[157] "Denial is proper where there's 'evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated

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[154] *See* Pl. Br. at 33-34 (contesting dismissal with prejudice; citing the standard of review for procedural rules; quoting Rule 15(a)).

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

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

[157] *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.'"[158] For example, "inexcusable delay and repeated attempts at amendment may justify denial."[159]

C. Merits of Argument

Plaintiff argues that the Superior Court erred by dismissing the First Amended Complaint *with* prejudice. This argument lacks legal and factual support.

As an initial matter, Plaintiff already made this argument once, after the Court dismissed the original Complaint. Plaintiff did not move to amend its original deficient pleading, but instead filed a Motion under Rule 59(e), seeking reargument on Blackbaud's original motions to dismiss.[160] Plaintiff chastised the Superior Court for what it incorrectly believed was a dismissal with prejudice, but the Superior Court reminded Plaintiff (1) that it did not actually move to amend the original Complaint, save an informal comment in the middle of the hearing, (2) that its Rule 59(e) Motion was procedurally improper, and (3) that the original Complaint was *not* dismissed with prejudice, and thus Plaintiff was free to file an amended pleading.[161] The Superior Court *sua sponte* treated Plaintiff's Rule 59(e) Motion as a motion to amend, and allowed Plaintiff to file the First Amended Complaint.[162]

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[158] *MVC Capital*, 2021 WL 4486462, at *3 (citation omitted).

[159] *Mullen*, 625 A.2d at 263.

[160] B0001-06.

[161] B0014-18.

[162] B0017.

Now Plaintiff repeats history. It did not move to amend the First Amended Complaint, aside from a comment during the hearing. It did not file a motion to amend after the hearing. And it has never explained how it 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, Plaintiff suggests 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."[163] The Opinion does not reference that rule, and Plaintiff does not cite any factual basis for its 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.[164] Here, Plaintiff was given an opportunity

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[163] Pl. Br. at 35.

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

to amend the original Complaint, and failed to do so properly. And, for the second time, it failed to timely amend its deficient pleading. Thus, Plaintiff does not warrant yet another bite at the apple.

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 Plaintiff's claims.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2025, a copy of the foregoing *Appellee's Answering Brief* was served upon the following attorneys of record via File & Serve*Xpress*.

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