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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,	:	
Plaintiff-Below/Appellant,	:	C.A. No. 193,2025
v.	:	
BLACKBAUD, INC.,	:	**Appeal from the Superior Court of the State of Delaware, C.A. No. N22C-12-130 KMM (CCLD)**
Defendant-Below, Appellee.	:	

REPLY BRIEF OF APPELLANT TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

HEYMAN ENERIO
GATTUSO & HIRZEL LLP
Kurt M. Heyman (# 3054)
Gillian L. Andrews (# 5719)
222 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 472-7300
Attorneys for Plaintiff-Below/ Appellant Travelers Casualty and Surety Company of America

Dated: August 13, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

As shown in Travelers'[1] Opening Brief ("OB"), the Complaint sets forth a straightforward claim for breach of the Contracts. Blackbaud agreed to maintain commercially reasonable security procedures to protect the Insureds' data. It failed to do so. As a direct result of that failure, the Data Breach occurred, causing the Insureds damages in the form of Remediation Expenses. The Insureds were advised by Blackbaud to incur these Remediation Expenses regardless of what type of data they maintained with Blackbaud and regardless of what states' privacy laws applied. The Complaint identifies each Insured, and the amount of Remediation Expenses each incurred, and it generally describes the types of Remediation Expenses that each incurred. The Superior Court recognized the merits of Travelers' position during the oral argument below but reached a different and erroneous conclusion in its Opinion granting Blackbaud's motion to dismiss, with prejudice.

In its Answering Brief, Blackbaud argues against the appeal that it wishes were filed instead of the appeal that was actually filed. It spends numerous pages responding to contractual arguments not made by Travelers. It essentially ignores the contractual arguments that Travelers does make. It ignores the Complaint's well-pled allegations regarding Blackbaud's antiquated security systems that led to the

[1] Capitalized terms not defined herein have the meanings set forth in the Opening Brief.

Data Breach. Blackbaud also ignores its own admission through the Toolkit sent to the Insureds that the Insureds needed to undertake investigations irrespective of what data was affected and what states' laws applied. While further admitting that it knows exactly what data was affected by the Data Breach, Blackbaud nevertheless argues that the Complaint did not adequately put it on notice regarding that issue. In contravention of the standards on a motion to dismiss, it asks the Court to accept ***its own*** factual assertions as true and to draw inferences in ***its*** favor – rather than in Travelers'. Blackbaud further advocates a heightened pleading standard for multi-subrogor claims that has no basis in the law.

The Superior Court's Opinion dismissing the Complaint with prejudice should be reversed, and the case should be remanded for further proceedings.

ARGUMENT

I. THE COMPLAINT PROPERLY ALLEGES A CLAIM FOR BREACH OF CONTRACT AGAINST BLACKBAUD.

A. Merits of Argument

Superior Court Civil Rule 8(a) requires a plaintiff to provide "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled." Super. Ct. Civ. R. 8(a). Delaware is a notice pleadings jurisdiction under which "a party need not plead evidence, but at a minimum must allege facts that, if true, state a claim upon which relief can be granted." *Wellgistics, LLC v. Welgo, Inc.*, 2024 WL 4327343, at *7 (Del. Super. Sept. 27, 2024) (quotations and citations omitted).

At the pleading stage, a plaintiff does not need to plead all facts that could provide defendant with a defense; but needs only set forth facts to put the defendant on notice of the claims asserted against it. The standard to survive a motion to dismiss in Delaware is reasonable conceivability. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 n.12 (Del. 2013). All reasonable inferences are to be drawn in plaintiff's favor – not defendant's. *Id*. at 813. "At the motion to dismiss stage, … it matters not which party's assertions are actually true." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 538 (Del. 2011). In *Central Mortgage*, at the pleading stage, this Court found that plaintiff had provided

sufficient notice of breach of contract, noting "[w]hether this notice was sufficient as a matter of fact is an inquiry more appropriate for a later stage of the proceeding." *Id.* "By eliding the inquiry—whether [plaintiff's] well-pleaded Complaint stated a claim that is provable under any reasonably conceivable set of circumstances—and instead deciding substantively that [plaintiff] did not provide adequate notice, the Vice Chancellor inappropriately shifted the burden and held [plaintiff] to a higher standard than required." *Id.*; *see also Fox News Network, LLC v. US Dominion, Inc.*, 270 A.3d 273 (TABLE) (Del. 2022) ("the Superior Court found that there was no reason to deviate from the general rule that the law of the forum governs procedural matters and applied Delaware's 'reasonable conceivability' pleading standard to the motion").

Here, Travelers was improperly held to a higher pleading standard. Under New York law, a breach of contract claim has three elements, "(1) the existence of a contract; (2) that the contract was breached; and (3) damages suffered as a result of the breach." (Op. at 19) (citations omitted).

The Contracts governed the relationships between the Insureds and Blackbaud. (AB at 6).

The Superior Court observed that, pursuant to those Contracts, "Blackbaud agreed to maintain 'commercially reasonable information security procedures and standards.' If a Security Breach occurred due to Blackbaud's failure to maintain this

level of security, it would be breach the Contract." (Op. at 27) (quoting A0192 § 6.a.). Relying on information contained in the Kudelski Security report and the multi-state settlement with all 50 states attorneys general, Travelers alleged that Blackbaud "ignored warning signs that its cybersecurity measures exposed it to an attack[,]" that included "[f]ailure to run security patches[,]" failure to "discontinue[] storing information on obsolete servers given the potential for unauthorized access" and failure to implement proper multifactor authentication and encryption measures. (OB at 16-18; Op. at 11-12 (citations omitted)).

The Superior Court also found that "[t]he Insureds incurred expenses to investigate and comply with their obligations under applicable laws." (Op. at 13). The Insureds were provided with a "Toolkit [that] explained the scope of the data breach and ***outlined steps the customer should take to assess whether it had any further notification obligations***." (*Id.* at 8) (emphasis added). The Toolkit advised the Insureds to "also consult with your organization's legal counsel to understand any notification requirements." (A102-03 (¶¶ 142, 144)). The Complaint identified the affected Insureds, their location, generally described the types of expenses incurred, the deductible paid by each Insured and the payments made by Travelers to each Insured to reimburse them for their losses. (*Id.* at 13-14) (citations omitted).

The foregoing allegations state a claim for breach of Blackbaud's obligation to maintain commercially reasonable information security procedures and standards under Section 6.a. of the Contracts.

Blackbaud does not meaningfully address Section 6.a. of the Contracts, which forms the primary basis of Travelers' breach of contract claim and this appeal. (*See generally* AB at 14-22). Blackbaud instead focuses almost exclusively on Section 6.d. relating to Blackbaud's mitigation obligations—a provision not implicated on this appeal. (*See id.* at 7, 26-29).

Moreover, even when Blackbaud does address the actual issues on appeal, it attempts to turn the standards on a motion to dismiss on their heads. First, Blackbaud asserts that "the relevant factual allegations compel the inference [in ***Blackbaud's*** favor] that the Insureds' Affected Data does ***not*** include sensitive information." (AB at 34). Next, it asks the Court to accept as true its statements in the July Notice that "the Affected Data did *not* include sensitive data like bank account information and social security numbers, and … that '**no personal information about [their] constituents was accessed.**" (*Id.* at 34-35) (emphases in original). On that basis, Blackbaud concludes that "there is no reasonable basis to infer that the types of Affected Data *here* triggered any obligation to act." (*Id*. at 35) (emphasis in original). Blackbaud further seeks an inference that none, or at least not all, of the

Insureds were among those who received the Supplemental Notice saying that their sensitive information ***was*** affected. (*Id*.).

All of this ignores the well-pled allegations recognized by the court below that Blackbaud's own Toolkit "outlined steps the customer ***should take*** to assess whether it had any further notification obligations[]" and advised the Insured to consult with their legal counsel. (Op. at 8 (emphasis added); A102-03 (¶¶ 142, 144)). The process outlined in the Toolkit would necessarily require the expenditure of resources regardless of what law applied. Therefore, the Complaint states a reasonably conceivable claim that Blackbaud's failure to maintain commercially reasonable information security procedures, in breach of the Contracts, permitted the Data Breach to occur and caused damage to the Insureds.

By relying so heavily on its own July Notice as proof that none of the Insureds' sensitive data was compromised, Blackbaud admits that it knows what data was affected. (OB at 30). Indeed, Blackbaud goes farther and asserts (or perhaps seeks an inference) that it "*did* investigate the Incident, and *did* identify the Affected Customers and the Affected Data for those Customers." (AB at 26 n.93) (emphases in original). This concession fatally undermines Blackbaud's assertion that the Complaint does not adequately put it on notice under Rule 8(a) regarding the data that was affected. (*Id.* at 19, 31, 33-34).

The Complaint generally alleges that the Insureds stored data with Blackbaud "about their donors, including identifying information, donation history, and financial information." (A0071 (¶16)). That is sufficient to put Blackbaud on notice, particularly where Blackbaud admittedly ***knows*** what data was affected. *See Seiden v. Kaneko*, 2015 WL 7289338, at *14 (Del. Ch. Nov. 3, 2015) (finding complaint stated claim for constructive trust even though plaintiff had not identified specific property to be subjected to the trust because "such an omission is not fatal at this stage in the proceeding as the factual record is subject to further development" and the "information [was] allegedly in [defendant's] possession") (citing *McMullin v. Beran*, 765 A.2d 910, 926 (Del. 2000)).

Suggesting that multi-subrogor complaints are subject to higher pleading standards than other breach of contract cases—including "ascertaining what the ***specific injuries are for each person***"—Blackbaud relies on New York case law supposedly "applying similar facts" to argue the inadequacy of the pleadings here. (AB at 15-17). As pointed out in the Opening Brief (at 29), in addition to being non-binding authority in Delaware (whose law governs procedural matters in this case), those cases are distinguishable as personal injury tort claims where "the claims in those cases were dismissed not merely because the injured persons had not been identified, but because they could not be identified in a manner appropriate to a subrogation claim." *Lawyers' Fund for Client Protection v. JP Morgan Chase Bank,*

N.A., 915 N.Y.S.2d 741, 743 (N.Y. 2011) (citing *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 217-18 (2d Cir. 2004); *A.O. Fox Mem'l Hosp. v. Am. Tobacco Co.*, 754 N.Y.S.2d 368, 370 (N.Y. 2003); *States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S.2d 240, 252-53 (N.Y. 2000)). (*See also* OB at 29-30).

In *Lawyers' Fund*, the New York Court of Appeals held that allegations setting forth the "number of complaints, time frame within which their losses occurred, and the ***aggregate*** amount of damages" were ***sufficient*** to withstand a motion to dismiss a subrogation claim. *Lawyers' Fund*, 915 N.Y.S.2d at 743 (emphasis added). That standard is supported by Delaware case law in the products liability context, which holds that "[t]hese defendants must be given fair notice of the claims, including the products that are alleged to be defective and some well-directed sense of time, locations, and general circumstances of the exposure." *In re Benzene Litig.*, 2007 WL 625054, at *7 (Del. Super. Feb. 26, 2007). The Answering Brief cites no Delaware case law requiring particularized facts to state a breach of contract claim in a multi-subrogor context. (*See* AB at 32 n.114).

Blackbaud admits that Travelers was not required "to identify every datum for each Constituent of each Insured." (AB at 33). But it nevertheless asserts that it "is 'right to expect' that Plaintiff will identify the *general categories* of each Insured's Affected Data …." (emphasis in original) (quoting *In re Benzene Litig.*, 2007

WL 625054, at *7). Blackbaud is already aware of the "general categories of each Insured's Affected Data" because it has possession of that information. (*See* OB at 30). At the pleading stage, Travelers is entitled to a reasonable inference that the underlying data accessed necessitated the Insureds at a minimum to consult their legal counsel and investigate whether it had further notification obligations to its donors due to Blackbaud's Data Breach. That is what Blackbaud's own Toolkit advised the Insured.

Travelers has identified the Insureds, the time period during which their losses occurred (the Data Breach and their ensuing investigations) and the aggregate amount of damages apportioned by Insured. (Op. at 14; A0098-101 (¶¶ 133-34, 192); OB at 25-30). It has also generally described the types of Remediation Expenses that comprise their damages, including the reasonable costs and fees for the retention of computer forensic firms, outside counsel, printing and mailing notifications to donors, communicating with Blackbaud about the Data Breach and credit monitoring services. (Op. at 13-14) (citing A0098-101 (¶¶ 133-37)). Travelers adequately stated a breach of contract claim under Delaware's minimal notice pleading standard and the Court should not adopt Blackbaud' novel (and heightened) derivative multi-subrogor pleading standard.

II. THE COMPLAINT ADEQUATELY PLED PROXIMATE CAUSE AND DAMAGES.

A. Merits of Argument

On this appeal, Travelers contests the Superior Court's finding that the Complaint failed to state a claim for breach of contract under the minimal notice pleading requirements of Superior Court Civil Rules 8 and 12(b)(6). The facts alleged in the Complaint in support of proximate cause, and the "Remediation Expenses," or damages, raise questions of fact not subject to resolution on a motion to dismiss. *See Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 830 (Del. 1995) ("issue of proximate cause is generally a question for the jury[ ]"); *Torrent Pharma, Inc. v. Priority Healthcare Distribution, Inc.*, 2022 WL 3272421, at *13 (Del. Super. Aug. 11, 2022) ("a plaintiff need not plead monetary damages to sustain a breach of contract claim.") (quotations and citation omitted)). As discussed more fully below, Blackbaud's Answering Brief distorts Travelers' positions on appeal regarding proximate cause and damages.

1. The Complaint Sufficiently Alleges Proximate Cause

"Delaware recognizes the traditional 'but for' definition of proximate causation." *Duphily*, 662 A.2d at 828. "Under Delaware law, a proximate cause is one 'which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 864 (Del. 2015)

(citations omitted). At the pleading stage, a plaintiff needs only establish facts, a ***reasonable interpretation*** of which support each element of the claim. *See Wellgistics*, 2024 WL 113967, at *4 (emphasis added). "This Court has consistently held that the issue of proximate cause is ordinarily a question of fact to be determined by the trier of fact." *Duphily*, 662 A.2d at 830 (collecting cases).

Travelers pleads sufficient facts to give rise to a reasonable inference that Blackbaud's cybersecurity failures proximately caused the Data Breach and that the Insureds' Remediation Expenses were incurred in response to that Data Breach. Blackbaud is engaged in the business of "provid[ing] donor relationship management software to non-profit organizations" where Blackbaud's customers "collect data from their donors … [and] input into Blackbaud's software …." (AB at 1). Under Section 6.a. of the Contracts, Blackbaud promised the Insureds that it had "implemented and will maintain administrative, physical, and technical safeguards" and "will ***at all times*** maintain commercially reasonable information security procedures and standards" to protect the donor information stored by the Insureds. (A0192 § 6.a.) (emphasis added). As the court below observed, "Blackbaud agreed to maintain 'commercially reasonable information security procedures and standards.' If a Security Breach occurred due to Blackbaud's failure to maintain this level of security, it would breach the Contract." (Op. at 27) (quoting A0192 § 6.a.). As the Superior Court further pointed out at oral argument below, if

Blackbaud failed to maintain "commercially reasonable information security procedures and standards" that would constitute a breach of Section 6.a., regardless of what, if any, remediation steps Blackbaud did or did not undertake under Section 6.d. (*See* Op. at 27). Indeed, Blackbaud itself acknowledges that "if a Security Breach occurred due to Blackbaud's failure to maintain this level of security, ***it would breach the Contract***." (AB at 27) (emphasis added) (citing Op. at 27).

Upon being informed of the Data Breach, the Insureds proceeded in the manner they were instructed to by Blackbaud's own Toolkit, which "outlined steps the customer should take to assess whether it had any further notification obligations[,]" and further advised the Insureds to "consult with legal counsel[to] determine what laws applied …." (Op. at 8, 16; *see also* A0102-03 (¶¶ 142, 144)). These are precisely the Remediation Expenses that Travelers seeks through this action, which include the costs and fees for the retention of computer forensic firms, outside counsel, printing and mailing notifications to donors, communicating with Blackbaud about the Data Breach and credit monitoring services. (Op. at 13-14) (citing A0098-101 (¶¶ 133-37)).

Blackbaud nevertheless asserts that Section 6.d.—setting forth Blackbaud's mitigation obligations in the event of a "Security Incident"—is the ***only*** provision in the Contracts that could give rise to contractual liability for Remediation Expenses arising from the Data Breach. (AB at 29). According to Blackbaud, "***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)." (*Id*.) (emphasis in original). As stated in the Opening Brief, Blackbaud's construction of the Contracts would improperly read out Blackbaud's obligations under Section 6.a. (OB at 32). Nothing in Section 6.d. purports to eliminate Blackbaud's ***separate*** contractual obligation under Section 6.a. to maintain commercially reasonable security procedures ***before*** a Security Incident occurs, or its liability for failure to do so. Any ambiguity in how Sections 6.a. and 6.d. interact should be construed against Blackbaud as the drafter of the Contracts and result in the denial of the motion to dismiss. *See Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003) (discussing the doctrine of *contra preferentem*); *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) ("Dismissal is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law.") (emphasis in original)). The breach here was Blackbaud's failures to maintain commercially reasonable information security procedures, as it promised to do under Section 6.a. of the Contracts. Those failures permitted the Data Breach and resulted in the exposure of data housed in Blackbaud's systems.

Blackbaud also relies on its arguments below that the Complaint fails to plead proximate cause because it does not identify the specific (i) data that was impacted

in the Data Breach and (ii) applicable privacy laws that led the Insureds to incur the Remediation Expenses. (AB at 31). In addition to being erroneous for the reasons discussed in Argument I above, this argument ignores that proximate cause is a question of fact properly reserved for a later stage of the proceeding. *See Duphily*, 662 A.2d at 830.

Blackbaud also invokes the limitation of liability provision in Section 10 of the Contracts. (AB at 28). Any limitations on the amount of Blackbaud's liability can be asserted as affirmative defenses to be developed during discovery. *See Plume Design, Inc. v. DZS, Inc.*, 2023 WL 5224668, at *6 (Del. Super. Aug. 10, 2023) (holding that motion for judgment on the pleadings on contractual limitation of liability defense was "premature in light of the under-developed record in this case").

2. The "Remediation Expenses" Are Damages Which May Be Pled Generally

"Damages may be pled generally" where a plaintiff has alleged sufficient "facts raising a reasonable inference that damages are causally related to the alleged misconduct." *Spring League, LLC v. Frost Brown Todd LLP*, 2024 WL 4442006, at *2 (Del. Super. Oct. 8, 2024) (citing Super. Ct. Civ. R. 9(g)). As with proximate cause, damages are established at trial. "'[T]he injured party need not establish the *amount* of damages with precise certainty if the *fact* of damages is established instead.' After all, 'a plaintiff need not plead monetary damages to sustain a breach of contract claim. The plaintiff need only plead causally related harm, which the

plaintiff can accomplish by pleading a violation of the plaintiff's contractual rights.'" *Torrent Pharma*, 2022 WL 3272421, at *13 (citations omitted). An inference of "nominal damages from a contractual injury" is sufficient to withstand summary judgment. *See id.* "'Doubts about the extent of damages are generally resolved against' the breaching party." *Id.* (citation omitted).

The court below acknowledged during oral argument that Travelers has "enough to state a claim. It was a contract, there was a breach, we had damages. The amount of damages and then, ultimately, whether they all are, the whole category is proximate cause, figure that out through discovery." (OB at 21-22 (quoting A0379-80)). Ignoring this, Blackbaud constructs a strawman: it argues at length that the Complaint fails to state a claim for breach of its mitigation obligations under Section 6.d. of the Contracts. (*See* AB at 25-30). The problem is that Travelers makes no argument under Section 6.d. on this appeal. And as set forth above, nothing in Section 6.d. purports to eliminate or limit Blackbaud's liability for breaching its obligation under Section 6.a. to maintain commercially reasonable security standards, in the first instance. The "Remediation Expenses" are damages, generally pled, and to be established on a more developed factual record. *See* Super. Ct. Civ. R. 9(g).

III. THERE WAS NO FINDING BELOW THAT APPELLANT COULD NOT STATE AN ACTIONABLE CLAIM.

A. Merits of Argument

Leave to amend "shall be freely given where justice so requires." Super. Ct. Civ. R. 15(a). Under Rule 15(a), the Superior Court has discretion to permit an amendment. *See Reylek v. Albence*, 2023 WL 142522, at *3 (Del. Super. Jan. 10, 2023). "'In exercising that discretion, the Court considers certain factors, which include bad faith, undue delay, dilatory motive, ***repeated*** failures to cure by prior amendment, undue prejudice, and ***futility*** of amendment.'" *Matter of Est. of Childres*, 2020 WL 1659351, at *1 (Del. Ch. Mar. 25, 2020) (emphasis added) (citation omitted). An amendment would be futile if it "would be subject to dismissal under Court of Chancery Rule 12(b)(6) for failure to state a claim." *Id.*

The Superior Court did not engage in any analysis before erroneously dismissing the Complaint with prejudice. (*See* Op. at 27). There was no finding below that any amendment would be futile. Travelers amended its pleading once, which does not constitute ***repeated*** attempts to assert a legally cognizable claim. *See, e.g., Malachi v. Sosa*, 2011 WL 2178626, at *4 (Del. Super. May 25, 2011) (refusing to permit ***fourth*** amendment to complaint as "repeated attempts"). The Superior Court acknowledged the plain statement of Travelers' breach of contract claim under Section 6.a. but incorrectly found that the Complaint failed to provide non-conclusory facts regarding the separate damages suffered by each Insured—***not*** that the alleged

damages are unrecoverable as a matter of law. (*See* Op. at 2-3, 27, 33). If the Court finds that Travelers is subject to a heightened pleading standard, it should have the opportunity to amend to provide the information that is allegedly missing. Travelers preserved its ability to amend in the proceedings below. (*See* A0224, A0257, A0414).

The Superior Court's dismissal of the Complaint with prejudice—and without elaboration—was error.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the ruling below and remand for further proceedings.

HEYMAN ENERIO
GATTUSO & HIRZEL LLP

/s/ Gillian L. Andrews
Kurt M. Heyman (# 3054)
Gillian L. Andrews (# 5719)
222 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 472-7300
Attorneys for Plaintiff-Below and Appellant Travelers Casualty and Surety Company of America

Dated: August 13, 2025

CERTIFICATE OF SERVICE

Gillian L. Andrews, Esquire, hereby certifies that on August 13, 2025, copies of the foregoing Reply Brief of Appellant Travelers Casualty and Surety Company of America were served electronically on the following:

John P. DiTomo, Esquire
Elise Wolpert, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, DE 19801

Emily C. Friedman, Esquire
Ballard Spahr LLP
919 North Market Street, 11th Floor
Wilmington, DE 19801

Wade A. Adams, III, Esquire
The Law Offices of Wade A. Adams III
111 Continental Drive, Suite 309
Newark, DE 19713

Kenneth T. Levine, Esquire
De Luca Levine LLC
301 E Germantown Pike 3rd Floor,
East Norriton, PA 19401

/s/ Gillian L. Andrews
Gillian L. Andrews (# 5719)