IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANTAL ATTIAS AND ANDREAS KOTZUR Individually and on behalf of all others Similarly Situated, *et al.*	:	Case No.: 1:15-CV-00882-CRC
Plaintiffs,	:	
v.	:	
CAREFIRST, INC., et al.	:	
Defendants.	:	

PLAINTIFFS' RULE 59 MOTION TO AMEND ORDER
AND DEEM IT APPEALABLE PURSUANT TO 28 U.S.C. §1292(B)

COME NOW Plaintiffs, by and through undersigned counsel, and respectfully submit their Rule 59 Motion to Amend this Court's January 30, 2019 Order and Deem it Appealable pursuant to 28 U.S.C. §1292(b). Plaintiffs respectfully request that this Court indicate in its January 30, 2019 Order that the Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Plaintiffs respectfully refer to the accompanying Memorandum in Support of this Motion, and request that this Honorable Court GRANT the relief requested.

Respectfully submitted,

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RULE LCVR 7(M) CERTIFICATION

This is to certify that Plaintiffs have sought and failed to obtain consent for the relief sought in this motion.

/s/ Christopher T. Nace
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CERTIFICATE OF SERVICE

This is to certify that on this 11th day of February 2019, I caused a copy of the foregoing Motion to Amend and the corresponding Memorandum in Support to be served upon the Court and all parties via ECF Filing.

/s/ Christopher T. Nace
Christopher T. Nace

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Defendants.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND ORDER AND DEEM IT APPEALABLE PURSUANT TO 28 U.S.C. §1292(B)

On February 11, 2019, Plaintiffs filed their Rule 59 Motion to Amend this Honorable Court's January 30, 2019 Order and deem it appealable pursuant to 28 U.S.C. §1292(b). This memorandum in support follows:

I. INTRODUCTION

On January 30, 2019, this honorable Court issued an order and memorandum opinion granting in part and denying in part Defendants' motion to dismiss for failure to state a claim. The Court's opinion effectively ended the litigation for nearly the entire purported class, as well as two entire subclasses, *i.e.* the District of Columbia sub-class and the Virginia sub-class. Nevertheless, the parties must now proceed to litigation on numerous topics which will be both costly and time consuming on issues related to class certification and the merits. Thereafter, these sub-classes will seek appellate review on these very same issues. And litigation will be repeated on the same applicable law and set of facts should the Plaintiffs be successful in their appeal. Further, while the District of Columbia and Virginia sub-classes have constitutional interests in seeing that their certification is sought as soon as practicable under Federal Rule 23, those sub-classes are left on the sideline without any ability to advance their own litigation interests.

The Court's opinion recognizes the potential for different outcomes and the lack of appellate authority that would typically be available to determine these complex and novel questions of law.

> …the Court is bound by decisions of the District of Columbia Court of Appeals—the highest court in D.C.—interpreting D.C. law. *Id.* This requirement is all the more salient in a data-breach case like this because federal courts across the country have applied the relevant state law to claims arising out of data breaches to very different effect. In the absence of a decision by the District of Columbia Court of Appeals, the Court's role in interpreting and applying D.C. law is to achieve the same outcome it believes would result if the District's highest court considered this case.

Doc. 54. P. 8 (citing *Metz v. BAE Sys. Tech. Sol. & Servs. Inc.*, 774 F.3d 18, 21-22 (D.C. Cir. 2014).

The Court's opinion presents multiple questions appropriate for interlocutory review. Receiving rulings on these questions will materially, and more efficiently, advance the litigation. These questions include, at a minimum:

- Whether data breach claims have unique pleading requirements as to damages;
- Whether the determinate factor in assessing the pleading of damages is an allegation that *data thieves* stole data;
- Whether a loss of the benefit of the bargain is an actual and compensable damage in a breach of contract claim;
- Whether mitigation of damages is an actual damage in a breach of contract claim;[1]
- Whether victims of cyber-crime can allege legally cognizable damages for their emotional distress related to the loss of their personal information;
- Whether there is an independent duty to safeguard personal information;
- Whether Plaintiffs can plead a claim for negligence above and beyond their contract claims;[2]
- Whether a party must allege a fiduciary relationship to state a claim for negligence or tort;

[1] The court relied on *Randolph v. ING Life Insurance & Annuity Co.*, 973 A.2d 702 (D.C. 2009) in which no breach of contract claim was made or attempted.

[2] *See* Rule Fed. R. Civ. P. 8(d).

- Whether an alleged breach of contract precludes a District of Columbia Consumer Protection Procedures Act claim;

- Other appealable questions.

Due to the depth and breadth of Plaintiffs' claims, and the questions raised regarding purely legal matters, resolution of these questions at the appellate level is critical. This case presents that rare exception to the federal courts' general preference for avoiding piecemeal appellate review: "where an immediate appeal may avoid protracted and expensive litigation." *In re Baker & Getty Fin. Servs.,* 954 F.2d 1169, 1172 (6th Cir. 1992); *Zygmuntowicz v. Hospitality Investments, Inc.,* 828 F. Supp. 346, 353 (E.D.Pa. 1993). Because of this case's magnitude and the novelty of the legal issues involved, Plaintiffs assert that interlocutory review of the questions presented is appropriate. *See Zenith Radio Corp. v. Matsushita Elec. Inds. Col.,* 478 F. Supp. 889, MDL No. 189 (E.D.Pa. Aug. 21, 1979). Accordingly, Plaintiffs respectfully request this Court amend its January 30, 2019 Order and indicate that the Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. This would permit Plaintiffs to seek interlocutory appeal to the Circuit Court of Appeals for the District of Columbia.

II. STANDARD OF REVIEW

28 U.S.C. §1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order….

In *APCC Servs., Inc. v. Sprint Commc'ns Co., L.P* it was recognized that a court may certify such an appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. *See* 28 U.S.C. § 1292(b); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n. 2 (D.C. Cir. 1986); *APCC Servs., Inc. v. Sprint Commc'ns Co.*, L.P., 297 F. Supp. 2d 90, 95 (D.D.C. 2003). Because all of these elements are satisfied here, Plaintiffs respectfully request that the Court grant the motion for leave to bring interlocutory appeal.

III. ARGUMENT

A. THE ISSUES PRESENTED INVOLVE CONTROLLING QUESTIONS OF LAW.

As an initial matter, each of the questions presented involves legal, rather than factual matters. Plaintiffs' request for interlocutory review is based exclusively on questions of law. The Court's opinion itself noted the absence of controlling law on this point:

> At the hearing, plaintiffs argued that 'there has been a definite trend' away from the conclusion in cases like *SAIC* and towards those in cases like *Anthem* and *Yahoo!*. Hr'g Tr. At 35:2–35:6. But trend or no across the country, the Court declines to go beyond the decisions of its fellow courts in cases like *SAIC* and *Austin-Spearman* in **the absence of controlling law** from the District of Columbia Court of Appeals.

See Doc. 54(emphasis added). Moreover, these legal issues control this case's outcome. In other words, should the DC Circuit Court of Appeals answer any of these questions in Plaintiffs' favor, as many as one million claims will be able to proceed and will be revived. *See W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis,* (In re City of Memphis), 293 F.3d 345, 352 (6th Cir. 2002) (holding that petitioner must show that "resolution of the issue on appeal could materially affect the outcome of litigation in the district court"); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982) (same); *Katz v. Carte Blanche Corp.*, 496 F.2d. 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 885, 42 L.Ed. 2d 125, 95 S.Ct. 152 (1974). A question is generally considered controlling by courts "if error in its resolution would warrant reversal of a final judgment or dismissal." *See* 16 Charles Alan Wright, Arthur

R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3930(200))("There is no doubt that a question is controlling if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district court proceedings.").

Litigating this case for years, with the prospect of reviving a million claims at the close of the matter, further illustrates the need to resolve controlling questions of law and an interlocutory appeal. This is even more compelling in this case, which has been pending since June of 2015 and has already seen the development of controlling law regarding the law of standing. Accordingly, Plaintiffs have met the first element of the well-established test for certifying an interlocutory appeal in presenting an issue with respect to controlling law.

B. SUBSTANTIAL GROUNDS EXIST FOR DISAGREEING WITH THE DECISION ON THESE ISSUES.

A question of law is appropriately certified for interlocutory review if "the question is not settled by controlling authority and there is a substantial likelihood . . .that the district court ruling will be reversed on appeal." *Gamboa v. City of Chicago*, 2004 U.S. Dist. LEXIS 25105, at *11 (N.D. Ill. Dec. 13, 2004) (internal citations omitted). *See also Praxair, Inc. v. Hinshaw & Culbertson*, 1997 U.S. Dist. LEXIS 16707, at *2 (N.D. Ill. Oct. 15, 1997) (same). In *Gamboa*, the defendants presented the district court with a question for certification—what constitutes "pattern of activity" under federal RICO statute—that the appellate court had not yet settled. *Gamboa*, 2004 U.S. Dist. LEXIS at 1-2. Moreover, the district court recognized that because of the complexity and scope of the question presented, a substantial likelihood existed that the Seventh Circuit might disagree with its initial decision. *Id.* At *11. As a result, the district court certified the question to the Seventh Circuit, noting that "because Defendants pose a question that has not been settled and could ultimately overturn a jury verdict a year or more in the future, an immediate resolution of this question seems sensible." *Id.* At *12.

The same is true with the questions presented here. Because this is a case of first impression regarding the duty to safeguard information, the attendant legal theories have not yet been tested in the DC Circuit Court of Appeals. And, although this Court may have every reason to believe it correctly decided Defendants' motion to dismiss, *Gamboa's* rationale is persuasive: because the Plaintiffs' questions presented have never been addressed by the appellate court and could ultimately obviate the need to litigate for a year with the prospect of expensive and protracted litigation—immediate resolution of these questions is prudent. *See also, Wieboldt Stores, Inc. v. Schottenstein Stores Corp.*, 1989 U.S. Dist. LEXIS 5216 (N.D. Ill. May 5, 1989) (noting that novelty and complexity will be key factors when considering §1292(b)'s "substantial disagreement" element).

Moreover, a court's own conviction that it was correct regarding the question of law is not dispositive with regard to whether a substantial ground for difference of opinion exists. *See e.g., In re Vitamins Antitrust Litig.*, 2000 U.S. Dist. LEXIS 17412, at *21 ("Although this Court firmly believes that the facts of this case warrant a ruling in favor of application of the Federal Rules to jurisdictional discovery, the Court recognizes that the arguments in support of the opposite conclusion are not insubstantial."); *Brown v. Texas & Pac. R.R.*, 392 F.Supp. 1120, 1126 (W.D.La. 1975) ("Although in the Court's mind there does not exist the strong possibility that the Memorandum Ruling was incorrect, the Court recognizes that its ruling does involve a controlling question of law as to which there is a substantial ground for difference of opinion."). Thus, even if the Court firmly holds the conviction it was correct in its ruling, interlocutory appeal can still appropriately address unresolved arenas of law.

The Court's opinion also recognizes disparate outcomes by numerous courts when confronted with the same or similar questions. For example, this Court acknowledged that other courts have "embraced the benefit-of-the-bargain theory when considering 12(b)(6) motions in data-breach cases." Doc. 54, p. 15-16 (citations omitted). The Court also accepted that numerous courts have found an independent duty to safeguard private information, and also that there is some support in

the District of Columbia law to do the same. Doc. 56, pp. 28-37. The Court has already accepted that there is substantial room for disagreement as to numerous controlling issues, and appellate review would be required to resolve these legal questions.

C. AN IMMEDIATE APPEAL MATERIALLY ADVANCES THE ULTIMATE TERMINATION OF THE PLAINTIFFS' CASE.

As to the final element, federal courts have held that in determining whether certification will materially advance the ultimate termination of the litigation, a district court is to examine whether an immediate appeal would eliminate: (1) the need for trial; (2) complex issues so as to simplify the trial; or (3) issues to make discovery easier and less costly. *Zygmuntowicz,* 828 F. Supp. at 353 (citing *In re Magic Marker Secs. Litigation,* 472 F. Supp. 436, 439 (E.D. Pa. 1979)). Quite simply, certifying the above questions presented will give the DC Circuit the opportunity, at the outset, to resolve this case without dragging the parties through a year of protracted and expensive litigation only to later litigate more than a million additional claims. Piecemeal litigation is disfavored. And, even if only some of Plaintiffs' claims remain after appellate review, the appellate court will have the opportunity to (1) resolve an issue of controlling law and (2) set forth the legal standards Plaintiffs must meet to prevail on their claims already actively before this Court. The questions presented will have significant impact on questions of certification of the class and the merits of the case. Some of the claims dismissed may ultimately be certifiable after class discovery, while others may not. If the Court does not order interlocutory review, the parties will need to engage in expensive issues of certification, and then on numerous overlapping merits questions, on two occasions.

Judicial economy—at the District Court and also at the Circuit Court—is best served by certifying the issues presented for interlocutory appeal. Because the large majority of individuals have been excised from this litigation, final resolution of these issues at this time will potentially save the parties and the Court from spending considerable time, effort, and money litigating cases over which the appeals court may decide should have proceeded. As such, appellate review of the questions

presented above will be required at some point in time, but permitting the issues to be appealed now will materially advance the ultimate termination of the litigation; and, accordingly, these purely legal questions warrant certification.

IV. CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request this Court (1) stay the pending litigation in the District Court and (2) amend its January 30, 2019 Order pursuant to Rule 59, and (3) deem the January 30, 2019 Order appealable pursuant to 28 U.S.C. §1292(b).

Respectfully submitted,

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