In The

United States Court of Appeals

for the

Third Circuit

Case No. 15-3690

DANIEL B. STORM; HOLLY P. WHITE;
DORIS MCMICHAEL; KYLE WILKINSON,
individually and on behalf of all others similarly situated;

v.

PAYTIME, INC.

BARBARA HOLT; LINDA REDDING,
individually and on behalf of all others similarly situated

v.

PAYTIME HARRISBURG, INC.,
d/b/a Paytime, Inc.

DANIEL B. STORM; HOLLY P. WHITE;
DORIS MCMICHAEL; KYLE WILKINSON;
BARBARA HOLT; LINDA REDDING,

Appellants.

Appeal from an Order entered from the
United States District Court for the Middle District of Pennsylvania

BRIEF FOR APPELLEES

CLAUDIA D. MCCARRON, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH
550 East Swedesford Road
Suite 270
Wayne, Pennsylvania 19087
(215) 977-4100

Attorneys for Appellees,
Paytime, Inc., and Paytime
Harrisburg Inc., dba Paytime, Inc.

COUNSEL PRESS • (888) 700-3226

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. STATEMENT OF JURISDICTION 1

II. ISSUES PRESENTED FOR REVIEW 1

III. STATEMENT OF THE CASE 2

IV. SUMMARY OF THE ARGUMENT 8

V. LEGAL ARGUMENT 11

A. The Court Should Dismiss Plaintiffs' Appeal for Lack of Jurisdiction Because Plaintiffs Should Not be Permitted to Manufacture Jurisdiction by Moving to Amend Their Pleadings Where the Proposed Amended Pleading is not Materially Different from the Dismissed Pleadings. 11

B. The District Court Did Not Abuse its Discretion When it Denied Plaintiffs' Motion for Leave to File the Proposed Complaint Because the Complaint Does Not Allege an Injury-in-Fact Sufficient to Confer Standing under Article III of the United States Constitution. 14

1. Standard of Review 14

2. To establish standing under Article III of the United States Constitution at the pleadings stage, plaintiffs must clearly and specifically allege an injury-in-fact that is concrete, particularized and actual or imminent. 15

3. The District Court correctly applied existing precedent in holding that the Proposed Complaint does not allege an injury-in-fact sufficient to confer Article III standing. 18

a. *Reilly v. Ceridian Corp*. sets forth the standard in the Third Circuit that a plaintiff in a data breach case must allege misuse of their data, actual harm or imminent threat of harm in order to have alleged an injury-in-fact. 18

b. The Supreme Court's decision in *Clapper v. Amnesty Int'l USA* confirmed *Reilly's* holding that a threatened injury must be "certainly impending" to confer standing. 20

c. Plaintiffs have not alleged well-pleaded facts that establish actual or certainly impending future injury under the controlling standards set forth in *Clapper* and *Reilly*. 22

d. Plaintiffs cannot rely on irrelevant studies and statistics to establish an actual or imminently threatened injury. 29

e. The District Court did not err in the method it used to analyze the Proposed Complaint's allegations regarding injury-in-fact. 31

4. Courts across the country have agreed that neither an increased risk of identity theft, nor costs associated with that risk, can confer standing. 34

5. Pleading a "substantial risk" of identity theft does not confer standing under governing law......................................36

a. Neither the United States Supreme Court nor the Third Circuit has adopted the "substantial risk" standard as an alternative to "certainly impending" injury. 36

b. The cases relied upon by Plaintiffs that have found standing based upon a substantial risk that identity theft may occur sometime in the future are not binding and are distinguishable. 38

6. The rationale of medical monitoring cases cannot be properly applied to data breach cases because occurrence of the threatened injury is not reliant on an extrinsic event. 42

7. This Court should affirm the District Court's decision because it is the only result that is consistent with Constitutional principles regarding the limited role of the Judiciary. 43

V. CONCLUSION...46

TABLE OF AUTHORITIES

Page(s)

Cases:

Ahmed v. Dragovich,
297 F.3d 201 (3d Cir. 2002) 15

Allen v. Wright,
468 U.S. 737 (1984)..44

Allison v. Aetna, Inc.,
No. 2:09-cv-02560, 2010 U.S. Dist. LEXIS 22373
(E.D. Pa. Mar. 9, 2010)..35, 36

Alonso v. Blue Sky Resorts, LLC,
No. 4:15-cv-00016, 2016 U.S. Dist. LEXIS 50607
(S.D. Ind. Apr. 14, 2016)...34, 41

Am. States Ins. Co. v. Dastar Corp.,
318 F.3d 881 (9th Cir. 2003) 14

Amburgy v. Express Scripts, Inc.,
671 F. Supp. 2d 1046 (E.D. Mo. 2009) 35, 45

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..18, 23, 25, 29, 32

Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters,
459 U.S. 519 (1983)...17, 29

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)...17, 18, 22

Berke v. Bloch,
242 F.3d 131 (3d Cir. 2001) 11

Brit Ins. Holdings, N.V. v. Krantz,
No. 1:11-cv-00948, 2012 U.S. Dist. LEXIS 1398
(N.D. Ohio Jan. 5, 2012) 36

Burtch v. Milberg Factors, Inc.,
662 F.3d 212 (3d Cir. 2011) 15

Burton v. MAPCO Express, Inc.,
47 F. Supp. 3d 1279 (N.D. Ala. 2014) 35

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 14

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013)..9, 12, 20-22, 25-27, 38, 40

Constitutional Party v. Aichele,
757 F.3d 347 (3d Cir. 2014) 17

Finkelman v. NFL,
810 F.3d 187 (3d Cir. 2016) 18, 23, 25

Frederico v. Home Depot,
507 F.3d 188 (3d Cir. 2007) 11, 12

Galaria v. Nationwide Mut. Ins. Co.,
998 F. Supp. 2d 646 (S.D. Ohio 2014)..35

Green v. eBay, Inc.,
2015 U.S. Dist. LEXIS 58047 (E.D. La. May 4, 2015) 31, 35, 41

Hammer v. Sam's East, Inc.,
No. 2:12-cv-02618, 2013 U.S. Dist. LEXIS 98707
(D. Kan. July 16, 2013) 35

Hammond v. Bank of N.Y. Mellon Corp.,
No. 1:08-cv-06060, 2010 U.S. Dist. LEXIS 71996
(S.D.N.Y. June 25, 2010) 35, 36

Hueghley v. Eaton Corp.,
572 F.2d 556 (6th Cir. 1978) 14

Huey v. Telodyne, Inc.,
608 F.2d 1234 (9th Cir. 1979) 14

In re Adobe Sys. Privacy Litig.,
66 F. Supp. 3d 1197 (N.D. Cal. 2014)......................................10, 39, 40, 41

In re Barnes & Noble Pin Pad Litig.,
No. 12-cv-8617, 2013 U.S. Dist. LEXIS 125730
(N.D. Ill. Sept. 3, 2013) 35, 36

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997) 15

In re Horizon Healthcare Servs. Data Breach Litig.,
No. 2:13-cv-07418, 2015 U.S. Dist. LEXIS 41839
(D.N.J. Mar. 31, 2015)..35

In re SAIC Backup Tape Data Theft Litig.,
2014 U.S. Dist. LEXIS 64125 36

In re Schering-Plough Corp. Intron/Temodar Consumer Class Action,
678 F.3d 235 (3d Cir. 2012) 17, 33

In re Sci. Applications Int'l (SAIC) Backup Tape Data Theft Litig.,
45 F. Supp. 3d 14 (D.D.C. 2014)..35

In re Zappos.com, Inc.,
108 F. Supp. 3d 949 (D. Nev. 2015) 32, 34, 36, 41

Lake v. Arnold,
232 F.3d 360 (3d Cir. 2000) 14, 15

Lewis v. Casey,
518 U.S. 343 (1996)..16, 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..9, 15-16, 19, 22, 33, 43

Nat'l Res. Def. Council v. Envtl. Prot. Agency,
464 F.3d 1 (D.C. Cir. 2006)..45

Neale v. Volvo Cars of N. Am., LLC,
794 F.3d 353 (3d Cir. 2015) 38

O'Shea v. Littleton,
414 U.S. 488 (1974)..16

Peters v. St. Joseph Servs. Corp.,
74 F. Supp. 3d 847 (S.D. Tex. 2015)..31, 35, 41

Randolph v. ING Life Ins. & Annuity Co.,
486 F. Supp. 2d 1 (D.D.C. 2007)..35, 36

Reilly et al. v. Ceridian Corporation,
No. 2:10-cv-05142-JLL-CCC (D.N.J. October 7, 2010)..............................27

Reilly v. Ceridian Corp.,
664 F.3d 38 (3d Cir. 2011) ....*passim*

Remijas v. Neiman Marcus Group, LLC,
794 F.3d 688 (7th Cir. 2015) 10, 38-39, 40, 41

Ruhrgas Ag v. Marathon Oil Co.,
526 U.S. 574 (1999)...11, 32, 33

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976)..44

Spokeo, Inc. v. Robins,
578 U.S. ___, No. 13-1339 (May 16, 2016)................................16-17, 43-44

Strautins v. Trustwave Holdings, Inc.,
27 F. Supp. 3d 871 (N.D. Ill. 2014)...35

Susan B. Anthony v. Driehaus,
134 S. Ct. 2334 (2014)..36, 37, 41

Sutton v. St. Jude Med. S.C., Inc.,
419 F.3d 568 (6th Cir. 2005) 42, 43

Tierney v. Advocate Health & Hosp. Corp.,
No. 1:13-cv-06237, 2014 U.S. Dist. LEXIS 158750
(N.D. Ill. Sept. 4, 2014) 35

TMA Fund, Inc. v. Biever,
520 F.2d 639 (3d Cir. 1975) 11

United States v. S.C.R.A.P.,
412 U.S. 669 (1973)..17

Warth v. Seldin,
422 U.S. 490 (1975)...44

Whalen v. Michael Stores Inc.,
No. 2:14-cv-07006, 2015 U.S. Dist. LEXIS 172152
(E.D.N.Y. Dec. 28, 2015) 35, 36

Whitmore v. Arkansas,
495 U.S. 149 (1990)...16, 19, 22, 33, 44

Zenith Radio Corp. v. Hazeltine Research,
401 U.S. 321 (1971)...14

Statutes & Other Authorities:

U.S. Const. art. III, § 2, cl. 1 15

28 U.S.C. § 1291 (2012) 1, 11

Fed. R. App. P. 4(a) 8

Fed. R. App. P. 4(a)(1)(A) 12

Fed. R. Civ. P. 15(a). 15

I. STATEMENT OF JURISDICTION

The Court does not have jurisdiction to hear this appeal because Plaintiffs have not properly appealed from a final order as defined in 28 U.S.C. § 1291. As more fully discussed below, Plaintiffs failed to take a timely appeal of the March 13, 2015 Order dismissing their Complaints without prejudice, and having waived appellate review of that Order, cannot obtain it now by appealing the October 6, 2015 Order denying their Motion for Leave to File a Consolidated Amended Class Action Complaint. Brief for Appellee at 8-11.

II. ISSUES PRESENTED FOR REVIEW

A. Having chosen not to stand on their Complaints when they were dismissed without prejudice, may Plaintiffs manufacture jurisdiction months later by moving to amend when the Proposed Complaint is not materially different from the dismissed Complaints?

Suggested Answer: No.

B. Do Plaintiffs whose personal identifying information has been accessed by an unauthorized third-party have standing to sue when they have not pled actual use of personal information or any other facts indicative of actual harm or an imminent threat of future harm?

Suggested Answer: No.

III. STATEMENT OF THE CASE

Paytime, Inc. (Paytime), a payroll company, was victimized by a criminal who illegally accessed electronic data in its computer network. JA0088 (*Storm v. Paytime, Inc.* First Amended Class Action Complaint ¶ 6 (*Storm* Am. Compl.)); JA0041-0042 (*Holt v. Paytime Harrisburg Inc.* Complaint ¶¶ 1-3 (*Holt* Compl.)). This action was brought by six individuals who alleged that their current or former employers contracted with Paytime to handle payroll and provide other services. JA0088 (*Storm* Am. Compl. ¶¶ 8-11); JA0043-0044 (*Holt* Compl. ¶¶ 9-10). To provide those services, Paytime possessed Plaintiffs' personal identifying information (PII), stored on its computer network. Plaintiffs alleged that their personal identifying information was accessed and stolen by the hacker who breached Paytime's network. JA0087, 0089 (*Storm* Am. Compl. ¶¶ 1, 16); JA0042, 0043-0044 (*Holt* Compl. ¶¶ 5, 9-10).

This matter began as two cases: *Storm v. Paytime, Inc.* in the Middle District of Pennsylvania and *Holt v. Paytime Harrisburg, Inc.* in the Eastern District of Pennsylvania. JA0035 (*Holt* Docket); JA0068 (*Storm* Docket); JA0087 (*Storm* Am. Compl.); JA0041 (*Holt* Compl). After the cases were consolidated before The Honorable John E. Jones, III in the United States District Court for the Middle District of Pennsylvania, both were dismissed for lack of standing. JA005-0027 (March 13, 2015 Mem. Op. and Order dismissing the *Holt* Compl. and the *Storm* Am. Compl.).

In dismissing the cases, Judge Jones based his decision upon "the failure to allege facts showing a misuse of data or that such misuse is imminent." JA0023.

In ruling that neither complaint alleged facts sufficient to demonstrate standing to sue, the District Court had the following factual allegations regarding injury to the named Plaintiffs to consider. In *Storm,* the Plaintiffs alleged that they spent or will need to spend time and money to protect themselves from identity theft. JA0092 (*Storm* Am. Compl. ¶ 28). One of the *Storm* Plaintiffs, Kyle Wilkinson, alleged that he temporarily lost his security clearance when he reported the data breach to his current employer, a government contractor, and that as a result, he was temporarily reassigned to a position that increased his daily commute by four hours, adding to his travel expenses. JA0092 (*Storm* Am. Compl. ¶ 29). The named Plaintiffs in *Storm* alleged that their information was "accessed without authorization" and "stolen." JA0087, 0089 (*Storm* Am. Compl. ¶¶ 1,16). They did not allege that any of the information had been used.

The *Holt* Plaintiffs also alleged that they incurred cost and lost time monitoring accounts for identity theft and costs of obtaining replacement checks and/or credit and debit cards. JA0051 (*Holt* Compl. ¶ 40). They also alleged "the significant possibility of monetary losses arising from unauthorized bank account withdrawals, fraudulent payments and/or related bank fees charged to their accounts." JA0051 (*Id.* ¶ 39). While the *Holt* Complaint contains one statement that "hackers continue to use the

information obtained," the named Plaintiffs alleged only that their information was "exposed." *Compare* JA0042 (*Holt* Compl. ¶ 5) *with* JA0043-0044 (*Holt* Compl. ¶¶ 9, 10). The *Holt* Complaint does not contain any allegations of actual or attempted use of information belonging to the *Holt* Plaintiffs.

The Complaints contain general allegations regarding the risks of identity theft and the manner in which thieves misuse information. The *Storm* Amended Complaint referenced a "Javelin Strategy & Research" study allegedly finding that "nearly 1 in 4 data breach letter recipients became a victim of identity fraud . . . ." JA0090 (*Storm* Am. Compl. ¶ 23). The *Holt* Complaint similarly made use of reports describing generally the use of personal information by identity thieves. Citing a Government Accountability Office report, the *Holt* Plaintiffs alleged that "[a] person whose personal information has been compromised may not see any signs of identity theft for *years.*" JA0048 (*Holt* Compl. ¶ 27) (emphasis in the original). There were no allegations that the sources state that the information accessed in the Paytime data breach has been used to commit identity theft or attempted identity theft, or that it will be in the future.

Two months after the consolidated cases were dismissed, Plaintiffs filed a Motion for Leave to file a Consolidated Amended Class Action Complaint, hereafter referred to as the "Proposed Complaint." JA0105-0144. In filing their Motion for Leave to Amend, Plaintiffs created a "redline" version of the Proposed Complaint,

which shows how it differs from the *Storm* Amended Complaint that was dismissed. It was not included in the Joint Appendix. It is submitted for the Court's consideration in Paytime's Supplemental Appendix. SA1-33.

When the comparison or redline version is examined, most of the insertions merely represent the merging of *Holt* allegations into the *Storm* Amended Complaint, either verbatim or with minor changes. The following list compares the paragraphs of the Proposed Complaint to their source paragraphs in the dismissed *Holt* Complaint. The first number is the paragraph of the Proposed Complaint and the second number is the corresponding paragraph of the *Holt* Complaint : 1:1 & 2; 3:3; 4:4; 5:5; 6:6; 7:7; 8:8; 15:9; 16:10; 18:13; 20:15; 21:16; 22:14; 25:17; 31:20; 32:21; 33:22; 34:23; 36:25; 37:26; 38:27; 39:28; 40:26; 41:30; 42:31; 43:32; 44:33; 45:34; 46:35; 54:36; 56:38; 57:39; 58:40; 60:43; 64:45; 88:53; 90:55; 91:56; 92:57; 93:58; 95:49; 97:61; 98:62; 99:63; 100:64; 101:65; 102:66; 103:67; 104:68; 105:69; 106:70; 107:71; 108:72; 110:73.

The Proposed Complaint contains a few entirely new allegations that are different from the *Storm* Amended Complaint and the *Holt* Complaint. The paragraphs identifying the named Plaintiffs involved in *Storm* have been augmented with language from the *Holt* Complaint to the effect that these Plaintiffs "entered into an express and implied contract with Paytime." JA0111-0112; SA4-5 (Proposed Compl. ¶¶ 11-14). In paragraph 28 of the Proposed Complaint, Plaintiffs allege that

"Paytime took no steps to confirm that former or even present employees were actually notified." JA0115; SA8. There is no allegation that the named Plaintiffs were not notified.

Specifically on the topic of harm, actual or threatened in the future, the Proposed Complaint makes very few new statements when compared to the dismissed pleadings. In paragraph 30, which is based on paragraph 19 of the *Holt* Complaint, Plaintiffs insert the words "and certainly impending" to the phrase that formerly read "serious, ongoing risk." JA0115; SA8. Similarly, in two paragraphs taken from *Holt*, the only change was that a "significant possibility" identity theft became a "significant probability" of identity theft. *Compare* JA0116, 0122 (Proposed Compl. ¶¶ 35, 54) *with* JA0047, 0050 (*Holt* Compl. ¶¶ 24, 36). No additional facts are pled to support or explain these changes.

In two places, the Proposed Complaint adds this general statement: "Plaintiffs and other Class members face a substantial likelihood that their PII will be misused in the future." JA0131, 0133; SA25, 27 (Proposed Compl. ¶¶ 94, 109). In addition, where the *Storm* Amended Complaint had read "Plaintiffs and the proposed Class members are at an increased and imminent risk of becoming victims of identity theft, crimes, and abuses," the Proposed Complaint adds the words "have become, or" so that the sentence reads: "Plaintiffs and the proposed Class members *have become, or* are at an increased and imminent risk of becoming victims of identity theft, crimes,

and abuse." *Compare* JA0130; SA23 (Proposed Compl. ¶ 86) with JA0097 (*Storm* Am. Compl. ¶ 52). There are still no allegations specific to the named Plaintiffs that they have been the victims of actual or attempted identity theft or fraud of any kind.

Finally, the Proposed Complaint contains this new paragraph:

> These coordinated intrusions by foreign hackers, as here, are not the work of pranksters, but, rather dedicated thieves who steal the information to use or sell on the black market. Indeed, the underground internet is rife with black sites dedicated to the sale of stolen PII. There are specific prices set for the information—as much as $300 for the type of information stolen from plaintiffs and the class—and the commerce in the information is brisk. It is folly to assume that the information stolen from Paytime will not be sold and used by thieves. The only issue is when, not if, Plaintiffs and the Class will be damaged.

JA0121; SA14 (Proposed Compl. ¶ 49) (emphasis supplied).

The Proposed Complaint does not allege the *Plaintiffs'* information is for sale on the dark web or being used by thieves. This averment appears to be mostly speculation and opinion rather than well-plead facts, but if it were treated as true in the current posture of the case, this paragraph and the other allegations of the Proposed Complaint do not contain the answer to its rhetorical question -- when?

IV. SUMMARY OF THE ARGUMENT

Plaintiffs' appeal is not properly before this Honorable Court because Plaintiffs have not properly invoked this Court's appellate jurisdiction. Plaintiffs should not be permitted to proceed with the appeal because it has reached this Court solely as a result of conduct designed to manufacture jurisdiction where jurisdiction does not exist. Plaintiffs could have converted the March 13 Order granting Paytime's Motion to Dismiss into a final order by electing to stand on the dismissed Complaints, and appealing the decision at that time. Plaintiffs failed to timely appeal the March 13 Order. Fed. R. App. P. 4(a). More than two months later, they sought leave to file a complaint essentially the same as those dismissed. Given that their Proposed Complaint did nothing to cure the jurisdictional deficiencies that led to the prior Complaints' dismissal, Plaintiffs could not have in good faith believed they would be permitted to file it, suggesting that it was filed for the express purpose of placing before this Court the issues it failed to timely appeal following the March 13, 2015 dismissal. By appealing the District Court's inevitable denial of the motion to amend and now claiming to "stand" on the allegations of the Proposed Complaint, Plaintiffs attempt to manufacture jurisdiction over the March 13, 2015 Order, as a consideration of the merits of the Proposed Complaint is necessarily a consideration of the prior Complaints that they failed to timely appeal. Plaintiffs should not be permitted to

create appellate jurisdiction in this manner. For these reasons, this Honorable Court should dismiss Plaintiffs' appeal for lack of jurisdiction.

In order to properly plead standing, Plaintiffs have the burden to allege clear and sufficient facts establishing that they have personally suffered an actual or "certainly impending" future injury, meaning one that is concrete, particularized, and actual or imminent, not conjectural, speculative or hypothetical. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Risk of future possible harm is particularly speculative where the occurrence of the harm depends entirely upon the possible decisions and actions of an unknown third party. *Lujan*, 504 U.S. at 564. In *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011), this Court held that plaintiffs whose personal information was stolen by criminals cannot meet their burden to establish standing unless their data was misused, or such misuse is imminent. *Id.* at 42-43.

Here, the Proposed Complaint does not contain any well-pleaded allegations that the named Plaintiffs' data was misused, or that misuse was imminent. The only well-pleaded facts in the Proposed Complaint regarding the consequences of the Paytime data incident are that Plaintiffs' information was exposed, compromised, accessed and/or stolen by unknown hackers. These facts do not suffice to properly allege a risk of future injury that is concrete, particularized, actual or imminent.

Though Plaintiffs couch their position as that the District Court's decision misapplied *Clapper* and *Reilly*, Plaintiffs' actual contention seems to be that substantial risk of future harm is sufficient to confer standing and is a less stringent standard than "certainly impending," citing *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015) and *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014). Therefore, Plaintiffs' argument rests on cases that are not binding upon this Court. Moreover, as the courts in those cases were faced not only with allegations that hackers accessed or stole the plaintiffs' personal information, but also that hackers were able to misuse the stolen information, these decisions are distinguishable. *Remijas*, 794 F.3d at 690-91; *Adobe*, 66 F. Supp. 3d at 1215. To the extent they are not distinguished on their facts, they fail to conform to United States Supreme Court precedent as to when a threat of future harm can satisfy the injury-in-fact requirement of Article III of the United States Constitution. *Reilly* is consistent with that precedent which supports the District Court's decision.

As the Proposed Complaint does not contain any new well-pleaded allegations of misuse, harm or imminent harm that would be sufficient to confer standing under Article III of the United States Constitution, permitting amendment would have been futile as it did not cure the jurisdictional deficiencies that led the District Court to dismiss the *Storm* Amended Complaint and the *Holt* Complaint. Therefore, the District Court did not abuse its discretion when it denied Plaintiffs' Motion for Leave

to File the Consolidated Amended Class Action Complaint, and this Court should affirm the District Court's decision.

V. LEGAL ARGUMENT

A. The Court Should Dismiss Plaintiffs' Appeal for Lack of Jurisdiction Because Plaintiffs Should Not be Permitted to Manufacture Jurisdiction by Moving to Amend Their Pleadings Where the Proposed Amended Pleading is not Materially Different from the Dismissed Pleadings.

Article III requires a federal court to satisfy itself of its subject-matter jurisdiction before considering the merits of a case. *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). The courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States. 28 U.S.C. § 1291 (2012). If the jurisdictional requisite of a "final order" is not satisfied, an appeal must be dismissed. *TMA Fund, Inc. v. Biever*, 520 F.2d 639, 642 (3d Cir. 1975).

An order dismissing a case without prejudice is generally not final and appealable. *Berke v. Bloch*, 242 F.3d 131, 135 (3d Cir. 2001). However, as Plaintiffs acknowledge, a plaintiff can convert an order dismissing a case without prejudice into a final appealable order if the plaintiff elects to "stand upon the original complaint." *Frederico v. Home Depot*, 507 F.3d 188, 192 (3d Cir. 2007).

The March 13, 2015 Order granting Paytime's Motion to Dismiss was entered without prejudice. JA0025; JA0027. Therefore, Plaintiffs had the ability convert the March 13 Order into a final order and invoke this Court's jurisdiction by electing to

stand on their dismissed Complaints and appealing the order within thirty (30) days of its entry. *Frederico*, 507 F.3d at 192; Fed. R. App. P. 4(a)(1)(A).

Plaintiffs stated in their Notice of Appeal that they were appealing both the March 13, 2015 Order granting Paytime's Motion to Dismiss and the October 6, 2015 Order denying Plaintiffs' Motion for Leave to File the Proposed Complaint. However, inasmuch as Plaintiffs now state in their briefing before this Court that the March 13 Order was not appealable, they have admitted that their failure to "stand" on the dismissed Complaints and appeal at that time was fatal to an appeal of the March 13 Order. Plaintiffs instead now claim that they are electing to "stand" on the Proposed Complaint that was the subject of the October 6 Order and that such election renders this appeal timely and proper.

The District Court granted Paytime's Motion to Dismiss for lack of standing because the court found that the dismissed Complaints did not contain factual allegations that Plaintiffs' data had been misused in any way, or that such misuse was "imminent" or "certainly impending" as required by *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) and *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011). JA0020, JA0021. Yet, as the District Court stated, Plaintiffs' Proposed Complaint does not add any new particularized allegations regarding actual or imminent misuse of their data critical to the existence of standing to sue. JA0031. Rather, it added only "references to unrelated studies and reports regarding trends in

identity theft occurrences nationwide" and "legal buzzwords" taken from the language of this Court's decision in *Reilly v. Ceridian Corp.* JA0031. The District Court found that these allegations did not establish that risk of identity theft was "certainly impending or otherwise imminent." *Id.* As the Proposed Complaint did not include any factual allegations that were responsive to the deficiencies that led the District Court to dismiss the earlier Complaints, the District Court held that permitting amendment would be futile and properly denied Plaintiffs' Motion. *Id.*

Paytime respectfully submits that Plaintiffs' course of conduct was designed to manufacture appellate jurisdiction in an attempt to cure their failure to timely appeal the District Court's March 13 Order granting Paytime's Motion to Dismiss. Having failed to make a timely election to stand on the dismissed Complaints, Plaintiffs were precluded from appealing the March 13 Order. To circumvent the consequences of the failure to appeal that order, Plaintiffs filed a motion seeking leave to file an amended complaint nearly identical to the dismissed Complaints in all aspects that are material to the existence or non-existence of standing to sue. Plaintiffs could not have believed in good faith that their Motion would be granted. Indeed, in his October 6, 2015 Memorandum Opinion denying the Motion, Judge Jones stated:

> "Given Plaintiffs' acknowledgment that there is no injury, and that the question remains whether and when any injuries might even occur, the Court questions why [Proposed Complaint] in its current iteration was even submitted for leave to file. Indeed, as [Paytime] contends, the [Proposed Complaint] appears to be little more than an effort at a back-door, untimely motion for reconsideration."

JA0032.

Plaintiffs should not be permitted to manipulate the procedural rules to manufacture appellate jurisdiction. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 246 n.1 (3d Cir. 2013) (citing with approval *Huey v. Telodyne, Inc.*, 608 F.2d 1234, 1236 (9th Cir. 1979) for the proposition that a plaintiff cannot cause a dismissal in order to appeal); *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 885 (9th Cir. 2003) (stating that a party may not "engage in manipulation" to create appellate jurisdiction); *Huey*, 608 F.2d at 1236 (citing with approval *Hueghley v. Eaton Corp.*, 572 F.2d 556 (6th Cir. 1978) for the proposition that counsel cannot provoke the court into ruling against them to create appellate jurisdiction). Therefore, this Court should dismiss Plaintiffs' appeal for lack of appellate jurisdiction.

B. The District Court Did Not Abuse its Discretion When it Denied Plaintiffs' Motion for Leave to File the Proposed Complaint Because the Complaint Does Not Allege an Injury-in-Fact Sufficient to Confer Standing under Article III of the United States Constitution.

1. Standard of Review

The grant of leave to amend pleadings pursuant to Federal Rule of Civil Procedure 15(a) is within the discretion of the trial court, which has "substantial leeway" in making the determination of whether to permit the amendment. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971); *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000). Therefore, a district court's decision to deny leave to amend is reviewed for abuse of discretion, though the underlying legal determinations

are reviewed *de novo*. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 220 (3d Cir. 2011); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). While Rule 15(a) requires that leave to amend should be freely given when justice so requires, a district court may deny this request if it is apparent from the record that, *inter alia*, (1) the moving party has demonstrated undue delay, bad faith or dilatory motives or (2) the amendment would be futile. *Lake*, 232 F.3d at 373; Fed. R. Civ. P. 15(a). An amendment is futile if the proposed pleading, as amended, would fail to state a claim on which relief may be granted. *Burlington*, 114 F.3d at 1434. Failure to cure the defects in the original pleading is a valid reason for denying a motion to amend. *Ahmed v. Dragovich*, 297 F.3d 201, 209 (3d Cir. 2002).

Plaintiffs failed to timely appeal the March 13 Order granting Paytime's Motion to Dismiss for lack of standing. Therefore, the issue before this Court is whether the District Court's October 6 Order denying Plaintiffs' Motion for Leave to File the Proposed Complaint was an abuse of the court's discretion.

2. To establish standing under Article III of the United States Constitution at the pleadings stage, plaintiffs must clearly and specifically allege an injury-in-fact that is concrete, particularized and actual or imminent.

Article III of the United States Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). *See* U.S. Const. art. III, § 2, cl. 1. The doctrine of standing contains three elements: (a) an "injury-in-fact" (b) fairly traceable to the challenged action of the

defendant and (c) likely to be redressed by a favorable decision of the court. *Id.* at 560. Injury-in-fact is "the 'first and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 578 U.S. ___, No. 13-1339, slip op. at 7 (May 16, 2016) (citations omitted). An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "A 'concrete' injury must be '*de facto*;' that is, it must actually exist; it must be "real," not "abstract." *Spokeo, Inc.*, 578 U.S. ___, slip op. at 8.

To establish standing in a proposed class action, the named Plaintiffs must be able to demonstrate that their individual claims merit the exercise of jurisdiction by showing that they have been personally injured, not that injury has been suffered by other, unidentified members of the class. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Thus, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of [himself] or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (citations omitted).

It is the burden of the party invoking federal jurisdiction to establish standing at the pleading stage. *Reilly v. Ceridian Corp.*, 664 F.3d 38, 41 (3d Cir. 2011). Here, Paytime makes a "facial" challenge to Plaintiffs' claim of jurisdiction, *i.e.*, that the allegations of Plaintiffs' Proposed Complaint, on their face, are insufficient for

Plaintiffs to meet this burden. *Constitutional Party v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). To overcome this challenge, a plaintiff's complaint must set forth clear and specific facts that are sufficient to satisfy the Article III requirement. *Spokeo, Inc.*, 578 U.S. ___, slip op. at 6; *Reilly*, 664 F.3d at 41. A complaint must allege facts that raise a right to relief above the speculative level, and a court should not assume that the plaintiff can prove facts that he has not alleged. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Particularly with respect to challenges to jurisdiction, such as lack of standing, a plaintiff "must assert facts that affirmatively and plausibly suggest" that he has the right to jurisdiction, "rather than facts that are merely consistent with such a right." *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012) (citations omitted). "Pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has or will in fact be perceptibly harmed by the challenged … action, not that he can imagine circumstances in which he could be affected by the … action." *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973).

When reviewing the sufficiency of a proposed pleading, though a court must accept all well-pleaded factual allegations as true and draw all reasonable inferences from those facts in favor of the plaintiff, bare assertions "devoid of further factual

enhancement," conclusory statements or legal conclusions are not sufficient to carry the day. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Even at the pleading stage, a court "need not accept as true unsupported conclusions and unwarranted inferences." *Finkelman v. NFL*, 810 F.3d 187, 202 (3d Cir. 2016). This is especially true where, as here, Plaintiffs seek to bring a "potentially massive…controversy" through class-action litigation. *Twombly*, 550 U.S. at 558.

3. The District Court correctly applied existing precedent in holding that the Proposed Complaint does not allege an injury-in-fact sufficient to confer Article III standing.

a. *Reilly v. Ceridian Corp.* sets forth the standard in the Third Circuit that a plaintiff in a data breach case must allege misuse of their data, actual harm or imminent threat of harm in order to have alleged an injury-in-fact.

In *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011), the Third Circuit determined the issue of class action standing in a data breach case very similar to the case at bar. Ceridian was a payroll processing firm. *Id.* at 40. Like Paytime, it had possession of its customers' employees' personal information such as social security numbers, dates of birth and bank account information. *Id.* Ceridian suffered a security breach when an unknown hacker gained access to its system. *Id.* Similar to Plaintiffs here, the *Reilly* plaintiffs alleged increased risk of identity theft, costs to monitor their credit activity, and emotional distress. *Id.*

Applying long-standing principles of Article III standing, the *Reilly* court found that standing requires an actual injury, or a threatened injury that is "certainly

impending" to qualify as an injury-in-fact, *i.e.*, one that "proceed[s] with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* at 42 (citing *Lujan*, 504 U.S. at 564 n.2; *Whitmore*, 495 U.S. at 158). An injury-in-fact "must be concrete in both a *qualitative and temporal sense*. The complainant must allege an injury to himself that is 'distinct and palpable,' as distinguished from merely 'abstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citing *Whitmore*, 495 U.S. at 155) (emphasis supplied).

Since there was no evidence that the data had been or would ever be misused, the Court concluded that the claims lacked "actuality" and were merely hypothetical speculation of possible future injury. *Id*. The *Reilly* plaintiffs had not alleged, and did not know, what use if any would be made of their private information. Moreover, the fact that the plaintiffs' data was in the hands of a hacker made their claim that they were at an increased risk of future injury "even more attenuated, because it is dependent on entirely speculative, future actions of an unknown third party." *Id.* (citing *Lujan*, 504 U.S. at 564). To demonstrate the hypothetical nature of their claim, the Court observed, "*if* the hacker read, copied, and understood the hacked information, and *if* the hacker attempts to use the information and *if* he does so successfully, only then will [Plaintiffs] have suffered an injury." *Id.* at 43.

The *Reilly* court also held that, as the risk of identity theft was not an actual or certainly impending injury, expenditures of time and money to mitigate the potential consequences of that risk could not confer standing because such expenditures were the result of a perceived threat of future injury, not of an actual present injury. *Id.* at 46. Under these standards, the Court upheld a dismissal for lack of standing at the pleadings stage. *Id.*

b. The Supreme Court's decision in *Clapper v. Amnesty Int'l USA* confirmed *Reilly's* holding that a threatened injury must be "certainly impending" to confer standing.

This Court held in *Reilly* that a threatened future injury must be "certainly impending" to qualify as an injury-in-fact under Article III, otherwise costs incurred in response to a perceived increased risk of identity theft, do not qualify as such an injury. The *Reilly* court's reasoning was confirmed by the subsequent United States Supreme Court decision of *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

In *Clapper*, the plaintiffs were organizations which feared that their communications with individuals outside the United States would be targeted and intercepted by the government under the Foreign Intelligence Surveillance Act and filed suit claiming that this fear constituted a present manifestation of future harm. *Id.* at 1145-46. The plaintiffs articulated two "present injuries" as grounds for standing: (1) the likelihood that their conversations would be intercepted by government surveillance, and (2) the threat of surveillance caused them to undertake "costly and

burdensome measures," such as traveling to meet their contacts in person, to protect the confidentiality of their international communications. *Id.* at 1146. None of the plaintiffs alleged that their communications had been intercepted. The Court held both alleged injuries insufficient to confer standing. *Id.* at 1150-51.

The Court held that the plaintiffs' fear of surveillance was too speculative to meet the certainly impending standard for threatened injuries because it involved too "attenuated a chain of possibilities." *Id.* at 1148. Whether the threatened injury, *i.e.,* surveillance of their communications, would occur depended on whether (1) the government would imminently target plaintiffs' communications; and (2) the government would succeed in intercepting the communications. *Id.* at 1148-49. Moreover, the Court stated that the speculative nature of the plaintiffs' claimed injury was amplified by the fact that the occurrence of successful surveillance depended entirely on independent third parties, and the Court declined "to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 1150.

With regard to the costs that the plaintiffs allegedly incurred to avoid possible surveillance, the Court held that "economic and professional harms" based on a threat of future harmful conduct could not confer standing because only actual improper government surveillance is an injury-in-fact, the threat of surveillance is not. *Id.* at 1151. If the threat of surveillance is not a "certainly impending" injury, then neither

are costs undertaken to avoid that threat. *Id.* "Allowing respondents to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of their first failed theory of standing." *Id.* In other words, the plaintiffs cannot "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a non-paranoid fear." *Id.*

c. Plaintiffs have not alleged well-pleaded facts that establish actual or certainly impending future injury under the controlling standards set forth in *Clapper* and *Reilly*.

For Plaintiffs to meet their burden to establish standing here, the Proposed Complaint must contain well-pleaded, specific and clear facts affirmatively suggesting that the named Plaintiffs themselves have suffered an injury that is concrete and particularized in both the qualitative and temporal sense, not speculative, conjectural or hypothetical. *Whitmore*, 495 U.S. at 155; *Lujan*, 504 U.S. at 555; *Twombly*, 550 U.S. at 555. Under the controlling standards of *Reilly* and *Clapper*, this means that the Proposed Complaint must articulate well-pleaded, clear and specific facts that the named Plaintiffs have suffered an actual or "certainly impending" future injury, which cannot be found absent allegations that the named Plaintiffs' data was misused or that risk of misuse was imminent. *Reilly*, 664 F.3d at 38. Though the court will draw all

reasonable inferences from well-pleaded allegations regarding alleged injuries in favor of Plaintiffs, bare assertions, unsupported conclusions and unwarranted inferences do not suffice. *Iqbal*, 556 U.S. at 678-79; *Finkelman*, 810 F.3d at 202.

In the Proposed Complaint, Plaintiffs allege the following facts: that Paytime suffered a security breach and that Plaintiffs' personal information was "exposed," "compromised," "accessed" and "stolen" by "foreign hackers" who "on information and belief, subsequently appropriate[d] [unnamed] Class members' identities" and "continue to use the information they obtained…to injure and exploit [unnamed] Class members across the United States." JA0110, 0115 (Proposed Compl. ¶¶ 3-6, 30). They further allege that the named Plaintiffs have experienced the following: (1) exposure of their personal information; (2) an "increased risk" or "significant probability" of identity theft, and costs to protect their identities from being used fraudulently; (3) Plaintiff Redding, in order to "safeguard" her exposed data, closed her savings account and paid out-of-pocket for fraud monitoring; and (4) Plaintiff Wilkinson incurred commuting expenses and lost time because he had to work at a different location while his security clearance was suspended so his employer could "investigate the situation." JA0111-0113, 0116-0117, 0122-0124 (Proposed Compl. ¶¶ 12-16, 35, 53, 54, 59). The Proposed Complaint does not allege that any named Plaintiff suffered actual, or even attempted, identity theft or fraud.

Because Plaintiffs did not assert misuse of their data, actual harm or future harm that is imminent, *Reilly* controls and mandates a decision against Plaintiffs. *See Reilly*, 664 F.3d at 42-43. As Judge Jones noted in his March 13 Memorandum, "[i]n sum, [Plaintiffs'] credit information and bank accounts look the same today as they did prior to Paytime's data breach in April 2014. Under *Reilly*, we find that Plaintiffs have not alleged an actual injury." JA0020. *Clapper* and *Reilly* recognize that an injury-in-fact must be actual or "certainly impending." A complaint that, like Plaintiffs', cites to a study suggesting that 3 out of 4 individuals who receive a data breach notice will not be the victims of identity theft, and to a publication stating that a person whose information is compromised "may not see any signs of identity theft for *years*," cannot be said to have alleged a certainly impending injury. JA0118, 0120-121 (Proposed Compl. ¶¶ 38, 48) (emphasis in the original).

Plaintiffs argue that not only have they pled that the hackers accessed, and stole their personal information, but also that the hackers "continue to use" it, and that the District Court erred by failing to treat such allegations as true. Brief for Appellants at 18; JA0110, 0115 (Proposed Compl. ¶¶ 5, 30). To the contrary, the District Court correctly disregarded these allegations, and this Court should as well. Standing must be premised on the particular experiences of Plaintiffs, not bare assertions that hackers are using some unidentified data of unidentified, unnamed "Class Members." This amounts to nothing more than unsupported speculation that cannot be reasonably

inferred from any of Plaintiffs' substantive allegations. *Iqbal*, 556 U.S. at 678-79. The conclusory allegations as to Class Members are not entitled to the presumption of veracity afforded to well-pleaded factually supported allegations. *Id.*; *Finkelman*, 810 F.3d at 202. Given that the controlling test for standing set forth in *Reilly* requires misuse of data in order to find standing, common sense dictates that if Plaintiffs could allege misuse, surely they would have done so in the clear and specific manner required of them at the pleadings stage. *Id.* at 41. In any event, Plaintiffs cannot rely on alleged injuries to unnamed class members to confer standing; they must allege injury to themselves, which they have not done. *Lewis*, 518 U.S. at 357.

The only well-pleaded allegations in Plaintiffs' Proposed Complaint regarding the named Plaintiffs are that their data was exposed, accessed and/or stolen by a hacker. These allegations are insufficient to confer standing under *Reilly* and *Clapper*. As in *Clapper*, and as in *Reilly* before it, whether or not the ultimate injury of identity theft Plaintiffs fear will occur rests on a speculative chain of events depending entirely on the actions of an unknown third party, the hacker. *Clapper*, 133 S. Ct. at 1150; *Reilly*, 664 F.3d at 42. From the face of the Proposed Complaint, it is clear that Plaintiffs can do no more than speculate about whether the hacker will be able to read, copy and understand the data, will decide to try and use the data allegedly in the hackers' possession, and whether the hacker will be successful in using that data. That depends entirely on the intent and skill of the hacker and, as Judge Jones noted,

"courts cannot be in the business of prognosticating whether a particular hacker was sophisticated or malicious enough to both be able to successfully read and manipulate the data and engage in identity theft." JA0025 (March 13, 2015 Mem. Op.). Therefore, under both *Reilly* and *Clapper*, it is clear that the allegations in the Proposed Complaint amount to nothing more than a fear of possible future injury, which is not actual or concrete in either the temporal or qualitative sense. In the words of *Clapper* and *Reilly,* it is not certainly impending and therefore, not sufficient to confer standing. *Clapper*, 133 S. Ct. at 1150; *Reilly,* 664 F.3d at 43.

The sums allegedly expended by Plaintiffs to protect themselves from the possibility of future identity theft, such as costs to monitor their credit, or costs incurred because of a longer commute, also do not qualify as cognizable injuries-in-fact under *Reilly* and *Clapper*. As the risk of identity theft is not an actual or certainly impending injury, neither are costs incurred to protect against that alleged risk. *Clapper*, 133 S. Ct. at 1151; *Reilly*, 664 F.3d at 46. With regard to Plaintiff Wilkinson, Plaintiffs do not allege that he suffered the harms of increased commuting time and costs because his security clearance was compromised by an identity theft. JA0123-0124 (Proposed Compl. ¶ 59). Rather, they allege that these expenditures were incurred because Mr. Wilkinson's current employer, which was not even an entity affected by the data breach, was investigating the potential ramifications of the data breach on his security clearance. *Id.* Thus, Mr. Wilkinson incurred these alleged

costs not because of any present injury, but because an unaffected third party, his employer, wanted to investigate whether a threat existed, a harm that is entirely dependent upon the actions of another third party, the hacker. This attenuated chain of events is not sufficient to confer standing. *Clapper*, 133 S. Ct. at 1148.

Plaintiffs attempt to differentiate their allegations from those of the *Reilly* plaintiffs, but this attempt is unavailing. Contrary to Plaintiffs' assertions, the *Reilly* plaintiffs did not merely allege that the hackers "potentially" gained access to the plaintiffs' data. Rather, they alleged that "an outside hacker was able to infiltrate Ceridian's security system and gain access to the confidential personal and financial information of approximately 27,000 employees." Complaint of Plaintiffs at ¶ 11, *Reilly et al. v. Ceridian Corporation*, No. 2:10-cv-05142-JLL-CCC (D.N.J. October 7, 2010). The complaint also cited to the notice letter sent by Ceridian, which stated that Ceridian believed that the hacker was able to access first and last names, social security numbers and, "in several cases, birth date and/or bank account" information. *Id.* ¶ 16. The complaint further alleged that plaintiffs would have to expend funds to ensure that "their credit records are not *misused by criminals who now have Plaintiffs' and the Class' personal and financial information.*" *Id.* ¶ 19(d) (emphasis supplied).

Reilly and the present case are not distinguishable. As Judge Jones noted in his March 13, 2015 Memorandum Opinion:

> "Plaintiffs somewhat artfully chose other verbs [than the *Reilly* plaintiffs], but to draw a distinction of substance would require us to

> elevate the thesaurus above our logic and common sense. At the core of both cases, plaintiffs alleged a hacker broke into the defendant's data system and accessed it to some degree. Implicit in the *Reilly* complaint, of course, is that the access was without permission – thus, they also effectively alleged that the data was 'misappropriated,' as was alleged in the instant case. However, regardless of verbiage, Plaintiffs have only alleged the data was accessed by an unknown third party. There is no allegation that the hacker caused a new bank account or credit card to be opened in any of Plaintiffs' names, or any other form of identity theft. In other words, Plaintiffs have not alleged actual 'misuse' of the data, which is the touchtone of the *Reilly* standard."

JA0021. Despite allegations that information was "potentially" or "actually" accessed, "compromised," "stolen," or "taken," Plaintiffs have not alleged that the hackers read, copied or understood the named Plaintiffs' data or are prepared to use it.

Nor is this case distinguishable from *Reilly* because of Plaintiffs' allegations that data was stolen by "malicious criminals" who "intend" to commit identity fraud. Brief for Appellants at 32. First, the *Reilly* plaintiffs also alleged that their data was in the hands of criminals, and the Court found that this fact supported its holding that the plaintiffs' alleged injury was too speculative to be "certainly impending" because it introduced the element of an unpredictable third party to the questions of whether harm would ever occur. *Reilly*, 664 F.3d at 42. Furthermore, Plaintiffs' assertions that they profess to know the intentions of unknown individuals cannot be anything other than complete speculation that is not entitled to the presumption of truth, particularly where there is no indication from the Proposed Complaint that these individuals have attempted to carry through with such intention. Indeed, Judge Jones noted that such

assertions "seem to be quite a speculative assessment for a party or court to make…." JA0023 (March 13, 2015 Mem. Op.). That Plaintiffs have no more than speculation to offer in this regard is in fact illustrated by their own allegations: "It is folly to assume that the information stolen from Paytime will not be sold and used by the thieves." JA0121 (Proposed Compl. ¶ 49). This Court should not accept Plaintiffs' invitation to accept assumptions in lieu of well-pleaded facts. Plaintiffs' burden is to assert well-pleaded facts that affirmatively suggest that they have standing, and courts cannot assume that Plaintiffs can prove facts not alleged. *Assoc. Gen. Contractors of Cal.*, 459 U.S. at 526.

d. Plaintiffs cannot rely on irrelevant studies and statistics to establish an actual or imminently threatened injury.

The studies cited in Plaintiffs' proposed Amended Class Action Complaint cannot be used as a substitute for well-pleaded facts regarding whether Plaintiffs face an actual or imminent future injury. JA0117-0118, 0120-0121 (Proposed Compl. ¶¶ 36-39, 48, 49). Plaintiffs' Proposed Complaint does not allege any facts that would tend to show any sort of connection between the Paytime data breach and the breaches that were used to develop the statistics they cite. Therefore, it is not is a "reasonable inference" that national studies regarding risks associated identity theft in general have any bearing on the risks faced by Plaintiffs under the circumstances of the Paytime data incident in particular. *Iqbal*, 556 U.S. at 678. This Court was not persuaded by such allegations in *Reilly*, as the Court made no mention of the laws,

regulations and government publications cited in the *Reilly* Plaintiffs' Complaint as evidence that "data breaches can readily lead to identity theft." *Reilly* Compl. ¶¶ 21-34.

Moreover, at least one study cited in Plaintiff's Proposed Complaint actually contradicts their assertion that they are at an increased risk or have a "substantial likelihood" of identity theft. Plaintiffs cite to a study stating that "nearly" (as in, less than) 1 in 4 recipients of data breach notice letters, such as Plaintiffs, will experience identity theft at some point in the future. JA0120-121 (Proposed Compl. ¶ 48). However, even if citation to this study could constitute a well-pleaded allegation that could be taken as true, and it were assumed, *arguendo*, that its calculations may be directly correlated to the Paytime breach, the only "reasonable inference" is that more than 75% of the individuals who received a data breach notice letter from Paytime will not experience identity theft ever. There is no way to discern whether any of the named Plaintiffs would be among the 25% of individuals that Plaintiffs would have this Court believe, based upon the study, would experience identity fraud. A less than 1 in 4 chance that any of the putative class members, who may or may not be any of the named Plaintiffs, will suffer identity theft, certainly does not equate to a "substantial likelihood" of identity theft. It cannot be said to be anything more than a conjectural or hypothetical risk of possible injury that is insufficient to confer standing. *Reilly*, 664 F.3d at 42.

Furthermore, an injury-in-fact must be concrete not only in a qualitative sense, but also a temporal sense, *i.e.*, imminent, and statistics showing that data breach victims face a certain risk of identity fraud does nothing to establish that such risk is imminent. *Id.* at 41. As Judge Jones noted: "Plaintiffs fail to allege facts showing why this risk of identity theft is "certainly impending" or otherwise imminent beyond references to unrelated studies regarding trends in identity theft nationwide… citation to national studies and reports is simply not enough to create standing in the matter *sub judice*." JA0031-32 (Mem. Op. October 6, 2015). *See also Green v. eBay, Inc.*, 2015 U.S. Dist. LEXIS 58047 (E.D. La. May 4, 2015) (stating that studies cited in plaintiffs' complaint indicating individuals whose personal information is stolen are more likely to suffer identity fraud were not persuasive because "an increase in the risk of harm is irrelevant – the true question is whether the harm is certainly impending"); *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847, 854 (S.D. Tex. 2015) (declining to rely on references to government studies regarding the fraudulent uses that hackers could make of plaintiff's information as evidence that plaintiff faced imminent injury). The District Court properly declined to consider these studies and statistics when it engaged in its analysis of determining whether Plaintiffs have met their burden of pleading an injury-in-fact.

e. The District Court did not err in the method it used to analyze the Proposed Complaint's allegations regarding injury-in-fact.

The District Court opined that Plaintiffs' claim of an increased imminent risk of identity theft was undercut by their inability to allege any incidents of identity theft in the time between the April, 2014 data breach and when Plaintiffs filed their Proposed Complaint more than a year later. Plaintiffs contend that this was error. Brief for Appellants at 20. On the contrary, the court's statement was not improper fact finding, but a "context-specific" analysis of Plaintiffs' allegations in which a court is required to engage when analyzing the sufficiency of a pleading. *Iqbal*, 556 U.S. at 679. In doing so, a court is required to "draw on its own judicial experiences and common sense." *Id.* Therefore, it was perfectly proper, and reasonable, for the District Court to state that a "common sense notion of 'imminence'" would indicate that the lapse of time without identity theft "undermines the notion that identity theft would happen in the future." JA0022.

In *In re Zappos.com, Inc.*, 108 F. Supp. 3d 949 (D. Nev. 2015), the court engaged in a similar analysis when presented with a facial attack to the plaintiffs' complaint like the one made here by Paytime. *Id.* at 953. The court found that as years have passed without the plaintiffs making a single allegation of threat or fraud, "the possibility that the alleged harm could transpire in the as-of-yet undetermined future relegates plaintiffs' injuries to the realm of speculation." *Id.* at 959.

Plaintiffs further argue that the District Court's statement with regard to the import of their failure to allege identity theft was improper because Plaintiffs should

have been permitted to engage in discovery and present evidence on the issue. Brief for Appellants at 21. Plaintiffs' argument misunderstands their burden: "a party's standing is determined by the facts of the case at the time the lawsuit was filed" and it is the plaintiff's burden at the pleadings stage to allege facts sufficient to confer standing. *Lujan*, 504 U.S. at 569 n.4. Therefore, if Plaintiffs cannot properly allege standing at the pleadings stage, the case cannot proceed.

The District Court was not improperly requiring Plaintiffs to prove the merits of their case, or to quantify their damages. It was the court's responsibility to satisfy itself as to whether it had jurisdiction to proceed with a case. *Ruhrgas Ag*, 526 U.S. at 583. Therefore, when standing is at issue, the court must necessarily analyze the plaintiffs' allegations regarding the injury to determine whether they "affirmatively and plausibly suggest" that the injury suffered is concrete, distinct and palpable. *Whitmore*, 495 U.S. at 155; *In re Schering-Plough Corp.*, 678 F.3d at 244. The court's approach was a qualitative analysis of whether an injury has been pled, not a quantitative analysis of damages. *Reilly,* 664 F.3d at 41.

Based upon nearly identical allegations as those at bar, the *Reilly* court held that unless a plaintiff can allege that his data has been misused in some way, or is in imminent danger of misuse, he has not alleged an injury-in-fact under Article III. *Clapper* confirmed that the *Reilly* court's reasoning was correct. The District Court properly analyzed the face of the Proposed Complaint's allegations to find that it does

not assert well-pleaded facts from which the Court could find misuse, or imminent misuse, of the named Plaintiffs' data and that Plaintiffs' allegations amount to nothing more than speculation about a possible future injury insufficient to confer standing under *Reilly* and *Clapper*. Thus, contrary to Plaintiffs' assertions, to overturn the District Court's decision in this matter, the Court would have to overturn *Reilly* and act contrary to the Supreme Court's holding in *Clapper* that in cases where a plaintiff alleges a threatened injury, that injury must be actual or "certainly impending" to confer standing under Article III of the United States Constitution. Therefore, the District Court did not abuse its discretion when it denied Plaintiffs' Motion for Leave to File the Amended Class Action Complaint, and accordingly, this Court should affirm the District Court's decision.

4. Courts across the country have agreed that neither an increased risk of identity theft, nor costs associated with that risk, can confer standing.

As in *Reilly,* and consistent with the rationales of *Lujan, Whitmore* and *Clapper*, the vast majority of courts considering the issue have held that absent identity theft or attempted identity theft, an alleged increased risk of identity theft arising from a data breach does not satisfy the injury-in-fact requirement for standing because it is not a "certainly impending" injury. Importantly, many of these courts have so held even in cases where plaintiffs' information has been allegedly accessed or stolen, as Plaintiffs allege here. *See Alonso v. Blue Sky Resorts, LLC*, No. 4:15-cv-00016, 2016 U.S. Dist. LEXIS 50607 (S.D. Ind. Apr. 14, 2016); *In re Zappos.com, Inc.*, 108 F. Supp. 3d at

958; *Peters*, 74 F. Supp. 3d at 856; *Whalen v. Michael Stores Inc.,* No. 2:14-cv-07006, 2015 U.S. Dist. LEXIS 172152 (E.D.N.Y. Dec. 28, 2015)*; In re Horizon Healthcare Servs. Data Breach Litig.,* No. 2:13-cv-07418, 2015 U.S. Dist. LEXIS 41839 (D.N.J. Mar. 31, 2015); *Green v. eBay*, No. 14-1688, 2015 U.S. Dist. LEXIS 58047 (E.D. La. May 4, 2015); *Burton v. MAPCO Express*, *Inc.*, 47 F. Supp. 3d 1279 (N.D. Ala. 2014); *In re Sci. Applications Int'l (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14 (D.D.C. 2014); *Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871 (N.D. Ill. 2014); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646 (S.D. Ohio 2014); *Tierney v. Advocate Health & Hosp. Corp.*, No. 1:13-cv-06237, 2014 U.S. Dist. LEXIS 158750 (N.D. Ill. Sept. 4, 2014); *In re Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 U.S. Dist. LEXIS 125730 (N.D. Ill. Sept. 3, 2013); *Hammer v. Sam's East, Inc.*, No. 2:12-cv-02618, 2013 U.S. Dist. LEXIS 98707 (D. Kan. July 16, 2013); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 1:08-cv-06060, 2010 U.S. Dist. LEXIS 71996 (S.D.N.Y. June 25, 2010); *Allison v. Aetna, Inc.*, No. 2:09-cv-02560, 2010 U.S. Dist. LEXIS 22373 (E.D. Pa. Mar. 9, 2010); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046 (E.D. Mo. 2009); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1 (D.D.C. 2007).

As identity theft, not the future risk thereof, is a present injury, courts across the country have also held that expenditures of time and money to mitigate the potential consequences of that risk cannot confer standing because such expenditures are the

result of a perceived threat of future injury, not of an actual present injury. *See In re Zappos.com, Inc.*, 108 F. Supp. 3d at 960; *Whalen,* 2015 U.S. Dist. LEXIS 172152, at *9; *In re SAIC Backup Tape Data Theft Litig.*, 2014 U.S. Dist. LEXIS 64125, at *23; *In re Barnes & Noble Pin Pad Litig.*, 2013 U.S. Dist. LEXIS 125730, at *12; *Hammond*, 2010 U.S. Dist. LEXIS 71996, at *25-26; *Allison v. Aetna, Inc.*, 2010 U.S. Dist. LEXIS 22373, at *21 n.7; *Randolph*, 486 F. Supp. 2d at 8. *See also Brit Ins. Holdings, N.V. v. Krantz*, No. 1:11-cv-00948, 2012 U.S. Dist. LEXIS 1398, at *26 (N.D. Ohio Jan. 5, 2012).

5. Pleading a "substantial risk" of identity theft does not confer standing under governing law.

a. Neither the United States Supreme Court nor the Third Circuit has adopted the "substantial risk" standard as an alternative to "certainly impending" injury.

Plaintiffs argue that they need not plead a "certainly impending" injury to establish standing because precedential cases decided after *Clapper* have recognized that a "substantial risk" of future harm suffices to confer standing. Brief for Appellants at 13-16. However, upon a careful reading of these cases in context, it is clear that "substantial risk" is not, and was not meant to be, an analogue to the requirement of certainly impending injury.

The primary case relied upon by Plaintiffs in support of their argument that a "substantial risk" suffices to confer standing illustrates that the standard is inapplicable to this case. *Susan B. Anthony v. Driehaus* involved a pre-enforcement

challenge to the constitutionality of an Ohio statute imposing criminal penalties for making false statements about a political candidate during an election. *Susan B. Anthony v. Driehaus*, 134 S. Ct. 2334, 2338 (2014). The plaintiffs were advocacy groups that had published and/or intended to publish similar statements about a candidate, Congressman Steven Driehaus, that Driehaus alleged violated the statute. *Id.* at 2339-40. Prior to the initiation of the suit, one of the plaintiff groups had already been charged with violation of the statute for their statements about Driehaus. *Id.* at 2339.

Though the Court noted that an allegation of future injury may suffice to confer standing if it is "certainly impending" or there is a "substantial risk" that the harm will occur, the question of whether the plaintiffs faced a substantial risk of harm was discussed not as a separate test for an injury-in-fact, or otherwise as an alternative to a "certainly impending" injury. *Id.* at 2341. Rather, it was discussed as part of an element in the standing doctrine specific to cases involving pre-enforcement challenges to government actions involving Constitutional rights, *i.e.*, whether the plaintiffs faced a "credible threat" of prosecution. *Id.* at 2342.

Furthermore, the *Driehaus* court held that the plaintiffs there faced a risk of injury because of future conduct in which the plaintiffs themselves intended to engage, not because of potential actions of a third party. *Id.* at 2342. This distinction is yet another compelling reason why *Clapper*, not *Driehaus*, applies to this case.

Here, whether Plaintiffs will ever suffer the injury of identity theft completely depends on the intentions of the hackers. The *Clapper* court specifically stated that a plaintiff could not show a substantial risk of harm in cases involving the intentions of a third party because to do so would necessarily rely on "speculation about the unfettered choices made by independent actors not before the court." *Id.* at 1150 n.5.

Plaintiffs also cite to the Third Circuit case of *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3d Cir. 2015) for the proposition that "substantial risk" of harm may confer standing, but the *Neale* case does not lend any weight to Plaintiffs' argument. The issue in *Neale* was completely unrelated to establishing an injury-in-fact through threatened injury; the issue before the court was whether all putative class members must have Article III standing. *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015). Beyond citing to *Clapper's* mention of substantial risk of future injury as a possible ground for standing, the court made no mention of it, let alone discuss its contours or relationship to the certainly impending requirement. *Id.* at 359.

b. The cases relied upon by Plaintiffs that have found standing based upon a substantial risk that identity theft may occur sometime in the future are not binding and are distinguishable.

Plaintiffs also argue that this Court should apply the substantial risk standard in light of the recent decisions of the Seventh Circuit in *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), and of the Northern District of California

in *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014), which both held the standard applicable to data breach cases. Brief for Appellants at 16-18. The *Remijas* court held that the increased risk of future identity theft alone confers standing because there is a "substantial risk" or "objectively reasonable likelihood" that persons affected by a data breach would become victims of identity theft. *Id.* at 693. In *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014), the court found that *Clapper* did not foreclose the possibility that standing could be established by a "substantial risk" of future harm, and that the risk that the *Adobe* plaintiffs' data would be misused was both real and immediate. *Id.* at 1214. Accordingly, the court held that plaintiffs' allegation that they faced an increased risk of identity theft after their data was stolen from Adobe's systems was sufficient to confer standing. *Id.* However, *Remijas* and *Adobe* are not controlling authority in the Third Circuit and in fact, hold directly contrary to binding precedent in this jurisdiction, *Reilly*.

It is also respectfully submitted that to the extent *Remijas* and *Adobe* hold that *Clapper's* "certainly impending" standard is satisfied by allegations of an *increased*, but not *imminent*, risk of identity theft, they were incorrectly decided for the reasons discussed above. Indeed, by holding that the plaintiffs had alleged a sufficient injury-in-fact because of the "objectively reasonable likelihood," or "substantial risk" of identity theft, the *Remijas* court's holding runs directly contrary to *Clapper*. In

Clapper, the United States Supreme Court explicitly rejected the Second Circuit's ruling that standing could be established by an "objectively reasonable likelihood" of future injury. *Clapper*, 133 S. Ct. at 1147.

In addition, the facts in both *Remijas* and *Adobe* can be distinguished from the present case. In *Remijas*, over 9,000 of the credit cards allegedly exposed by the data breach were used fraudulently, including those of three of the named plaintiffs. *Id.* at 690, 691. In *Adobe*, some of the data had already surfaced on the internet and been misused by the hackers. *Id.* at 1215. Because some of the data exposed in the breaches was stolen *and* misused, the *Remijas* and *Adobe* courts did not need to speculate about any of the factors that led the *Reilly* court to decline to exercise jurisdiction, *i.e.*, whether the hackers, read, copied and understood the information they stole, whether they would attempt to use the information, or whether they would be able to do so successfully. *Id.* at 41. In its opinion denying Plaintiffs' Motion for Leave, the District Court recognized these very distinctions, stating that: "*Remijas* is also somewhat distinguishable because there, the defendant, Neiman Marcus, admitted not only that their customers' personal data had been hacked and stolen, but also that 9,200 credit cards had already incurred fraudulent charges." JA0033.

The *Remijas* court's presumption that hackers' purpose in stealing data is to "sooner or later" make fraudulent charges or assume an individual's identity may have been understandable given the thousands of fraudulent charges consumers had already

incurred due to the breach. *Id.* at 693. However, that presumption is not appropriate in every case, and jurisprudence in this Circuit has recognized the unpredictability of the criminals who steal data. *Reilly*, 664 F.3d at 42. It also does not take into account the litany of other motivations that intruders may have when attempting to gain access to commercial and government databases, such as extortion or espionage. In such cases, though personal information may be accessed and stolen, the consumers whose data was compromised are not the most likely targets of the breach.

Plaintiffs would have this Court hold that *Reilly* has become outdated in light of *Driehaus*'s alleged relaxation of the standing doctrine, and that the *Remijas* and *Adobe* decisions signal a change in the law requiring only an increased, but not imminent, risk of identity theft, that will become the majority view going forward. However, courts have continued to follow *Clapper's* mandate that a risk of future harm must be imminent even after the *Driehaus* decision was announced. *See, e.g.*, *Peters*, 74 F. Supp. 3d at 854; *eBay*, 2015 U.S. Dist. LEXIS 58047, at *9-13. Additionally, even courts within the Seventh and Ninth Circuits deciding data breach cases have continued to hold that a harm must be imminent to confer standing, notwithstanding the *Remijas* and *Adobe* decisions. *See Alonso v. Blue Sky Resorts, LLC*, 2016 U.S. Dist. LEXIS 50607, at *15-16 (declining to apply *Remijas* because it is "at odds with" *Clapper*); *In re Zappos.com, Inc.*, 108 F. Supp. 3d at 951 (holding that because the

plaintiffs had not alleged any instance of identity theft, they could not meet their burden to show that they faced an imminent future injury).

The District Court correctly decided that the legal sufficiency of the Proposed Complaint should be measured against the standards in *Clapper* and *Reilly*, and in holding that the Complaint failed to meet those standards. Accordingly, the District Court did not abuse its discretion in denying Plaintiffs' Motion for Leave to Amend, as such amendment would be futile, and this Court should uphold the District Court's ruling.

6. The rationale of medical monitoring cases cannot be properly applied to data breach cases because occurrence of the threatened injury is not reliant on an extrinsic event.

Despite the clear mandate in *Reilly* that increased risk of harm alone does not confer standing in a data breach case, Plaintiffs argue that this Court should instead adopt the reasoning of the Sixth Circuit in *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 569 (6th Cir. 2005). Brief for Appellants at 22. In *Sutton*, the court held that a plaintiff's allegation that he had an increased risk of future harm from implantation of a medical device during surgery was sufficient to confer standing even though the device had not yet malfunctioned. *Id.* at 574.

First, *Sutton* is a Sixth Circuit case, and therefore is not a binding authority upon this Court. Moreover, as *Reilly* explicitly declined to apply its reasoning, it is not a persuasive authority either. *Reilly*, 664 F.3d at 45. The *Reilly* court stated that

Sutton was distinguishable because the implantation of a defective device into a human body is, in and of itself, the injury-causing event – there is no further extrinsic event required to cause such an individual harm. *Id.* Hackers stealing a person's data is not the injury-causing event. *Id.* Until the data is misused, there has been no injury because the plaintiffs' financial status is the same as it would have been had the data never been hacked. *Id.* Whether or not a data breach victim will be injured depends entirely on subsequent extrinsic events and circumstances – the decision of the hacker whether to attempt to misuse the information, and his success in doing so. *Id.* The *Reilly* court also noted that courts traditionally treat standing in medical-device and toxic-tort cases differently than others because such cases hinge on health concerns: "courts resist strictly applying the 'actual injury' test when the future harm involves human suffering or premature death." *Id.*

7. This Court should affirm the District Court's decision because it is the only result that is consistent with Constitutional principles regarding the limited role of the Judiciary.

The *Reilly* standard requiring a plaintiff to allege that his information was misused by a hacker after a data breach should be upheld not only because it is the binding law of this jurisdiction, but also because it is the only standard that comports with the purpose of Article III, which is to limit the power of the Judiciary to actual cases and controversies. *Spokeo, Inc.*, 578 U.S. ___, slip. op. at 6; *Lujan*, 504 U.S. at 559. Standing is "perhaps the most important" requirement of Article III, and it "is

founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It developed to ensure that "federal courts do not exceed their authority as it is traditionally understood." *Spokeo, Inc.*, 578 U.S. ___, slip. op. at 6. In keeping with this principle, courts have no power to address the grievances of a plaintiff unless he, himself, has asserted an injury that warrants the exercise of the court's limited powers to intercede on his behalf. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). An alleged injury is insufficient to meet this standard unless it is concrete in both the qualitative and temporal sense – actual or imminently threatened, not conjectural, speculative or hypothetical. *Reilly,* 664 F.3d at 41 (citing *Whitmore*, 495 U.S. at 155).

As Judge Jones noted, courts of law are not able to prognosticate whether a particular hacker is sophisticated or malicious enough to not only access and decode an individual's information, but also to successfully use it in such as way to cause a plaintiff injury. JA0025 (Mem. Op. March 13, 2015). Therefore, without allegations of misuse, *i.e.*, that a hacker was able to copy, understand and successfully use an individual's information, there is no objective method by which a court could discern whether a plaintiff will actually or imminently be injured by a hacker who has gained unauthorized access to their information. Plaintiffs in this case are no different than every individual who receives a letter stating that their information has been accessed

by unauthorized individuals or stolen. Allowing Plaintiffs to proceed absent allegations meeting this standard would open the floodgates to millions of litigants based solely on speculation that each may be at some undefined increased risk of injury at some point in the future. This would fundamentally undermine the injury-in-fact requirement: "[w]ere all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, non-imminent injuries could be dressed up as increased risk of future injury." *Amburgy*, 671 F. Supp. 2d at 1053 (citing *Nat'l Res. Def. Council v. Envtl. Prot. Agency*, 464 F.3d 1, 6 (D.C. Cir. 2006)). Such a result would be anathema to the principle of limited jurisdiction, and would nullify the long-standing bedrock principle of Article III requiring an actual or imminently threatened injury to confer standing.

V. CONCLUSION

The Court should dismiss this appeal for lack of appellate jurisdiction. If this Court concludes that it has jurisdiction to decide this appeal, it should affirm the decision of the District Court. Filing the Proposed Complaint would have been futile since it would not have cured the deficiencies of the dismissed Complaints and would still have led to a dismissal for lack of standing.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

BY: /s/Claudia D. McCarron
CLAUDIA D. McCARRON
ELIZABETH R. DILL
550 E. Swedesford Road, Suite 270
Wayne, PA 19087
Phone: (215) 977-4100
Fax: (215) 977-4101
claudia.mccarron@lewisbrisbois.com
elizabeth.dill@lewisbrisbois.com
Attorneys for Appellees, Paytime, Inc. and Paytime Harrisburg, Inc. dba Paytime, Inc.

Dated: May 16, 2016

CERTIFICATION OF ADMISSION TO BAR

I, Claudia D. McCarron, Esq., certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

/s/Claudia D. McCarron

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 11,463 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: May 16, 2016

/s/Claudia D. McCarron, Esq.

AFFIDAVIT OF SERVICE

DOCKET NO. 15-3690
---X
Daniel B. Storm, et al.

vs.

Paytime, Inc.
---X

I, Elissa Matias, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

On May 16, 2016

I served the Brief for Appellee within in the above captioned matter upon:

SEE ATTACHED LIST

via **electronic filing and electronic service**.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Sworn to before me on May 16, 2016

/s/ Robyn Cocho
____
Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2017

/s/ Elissa Matias
____
Elissa Matias

Job # 265657

SERVICE LIST

Katrina Carroll, Esq.
Lite DePalma Greenberg
211 West Wacker Drive
Suite 500
Chicago, IL 60606
(312) 750-1591

Jamisen A. Etzel, Esq.
Edwin J. Kilpela, Jr., Esq.
Carlson Lynch Sweet & Kilpela
1133 Penn Avenue
5th Floor Suite 210
Pittsburgh, PA 15222
(412) 322-9243

Eric N. Linsk, Esq.
Karen H. Riebel, Esq.
Lockridge Grindal Nauen
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
(612) 339-6900

Gary F. Lynch, Esq.
Carlson Lynch Sweet & Kilpela
36 North Jefferson Street
P.O. Box 7635
New Castle, PA 16107
(724) 656-1555

Mindee J. Reuben, Esq.
Lite DePalma Greenberg
1835 Market Street
Suite 2700
Philadelphia, PA 19103
(267) 314-7980

(CONTINUATION OF SERVICE LIST ON NEXT PAGE)

Joel C. Meredith, Esq.
Krishna B. Narine, Esq.
Meredith & Narine
100 South Broad Street
Suite 905
Philadelphia, PA 19110
(215) 564-5182

Marc Rotenberg, Esq.
Electronic Privacy Information Center
1718 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20009
(202) 483-1140