

ORAL ARGUMENT HELD ON MARCH 31, 2017**Case No. 16-7108**

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**CHANTAL ATTIAS, Individually
and on behalf of all others similarly
situated, *et al.*,
Appellants,**

v.

**CAREFIRST, INC., *et al.*,
Appellees.**

On Appeal from the United States District Court
For the District of Columbia, Civil
1:15-cv-882 (CRC)
Hon. Christopher R. Cooper

**APPELLEES' MOTION FOR STAY OF MANDATE
PENDING FILING OF PETITION FOR WRIT OF CERTIORARI**

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August 31, 2017

Pursuant to 28 U.S.C. § 2101(f), Federal Appellate Rule of Procedure 41, and D.C. Circuit Rule 41, Appellees CareFirst, Inc., Group Hospitalization and Medical Services, Inc., CareFirst of Maryland, Inc., and CareFirst BlueChoice, Inc. (“CareFirst” or “Appellees”) move this Court for an Order Staying the Mandate in this case for 90 days pending the filing of a Petition for a Writ of Certiorari with the United States Supreme Court. The Court should stay the mandate because the certiorari petition will present a substantial question and good cause for a stay exists. *See* Fed. R. App. P. 41(d)(2)(A).¹

I. BACKGROUND

The Appellants filed a putative class action in the U.S. District Court for the District of Columbia alleging certain injuries arising from a data breach of CareFirst’s servers. On August 10, 2016, the district court dismissed Appellants’ Second Amended Complaint for lack of standing pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, as did the two other federal district courts to consider claims by other individuals alleging nearly identical harms from this same data breach. *See Chambliss v. CareFirst, Inc.*, 189 F. Supp. 3d 564, 572-73 (D. Md. 2016); Order in *Unchageri v. CareFirst of Maryland, Inc.*, No. 1:16-cv-1068-MMM-JEH, at *11-15 (C.D. Ill. Aug. 23, 2016), ECF No. 19.

¹ The Appellants do not oppose this motion.

On August 1, 2017, this Court reversed the district court's order dismissing Plaintiffs' Second Amended Complaint. CareFirst intends to file a petition for a writ of certiorari in the Supreme Court within the 90-day period permitted by law and now seeks a stay of that mandate for the reasons explained herein.

II. REASONS FOR STAYING THE ISSUANCE OF THE MANDATE

A motion to stay the mandate pending the filing of a petition for certiorari should be granted where (1) the petition presents a "substantial question" and (2) there is "good cause" for a stay. Fed. R. App. P. 41(d)(2)(A); *see also* D.C. Cir. R. 41(a)(2) (requiring that movant for stay of mandate provide "facts showing good cause for the relief sought").

A. This Case Presents a Substantial Question.

To determine whether a petition for a writ of certiorari presents a "substantial question," the Court considers whether the petition "tenders [issues that] are substantial." *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978). Courts may also consider whether there is a reasonable probability that the Supreme Court will grant certiorari and whether there is a reasonable probability of reversal. *See U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (in considering staying issuance of a mandate the court considers "whether four Justices would vote to grant certiorari [and] some consideration as to predicting the

final outcome of the case in [the Supreme] Court”). A petition for a writ of certiorari in this proceeding meets this requirement. The Supreme Court should grant certiorari in this case to guide courts in sorting out the claims of truly injured victims of data breaches from those who file class actions without being able to allege that any harm is real or immediate.

The doctrine that plaintiffs must allege a cognizable injury-in-fact for a court to adjudicate their claims is longstanding and unchanged. *See, e.g., McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 163-64 (1914). Despite the well-settled general principles involved, the Supreme Court has recently visited the issue of injury in two recent and well known cases, first in *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013), and then in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), in order to further clarify standing principles in light of new and emerging issues in the modern world. Even though lower courts have been forced to apply these principles to the data breach context at length in recent years as data breaches have become more frequent, the Supreme Court has yet to examine the issue of standing in the context of a data breach case.

The Supreme Court needs to address this area of the law to provide more guidance to federal district and appellate courts, especially given that federal courts have struggled to reach consensus as to when the prospect of future injury resulting from stolen information truly presents a “substantial risk” of actual harm. *See,*

e.g., *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384 (6th Cir. 2016); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015).

On a granular level, the issues in this case have already been shown to be “debatable among jurists of reason.” *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). This Court disagreed with the district court as to the legal consequence of a number of factual issues often central to any data breach case, namely the legal effect of the specific allegations about what data was stolen and whether that data presents a substantial risk of injury sufficient to meet the hurdle of standing. Moreover, this Court’s opinion is at odds with federal courts in two other circuits that found no standing for nearly identical putative class action complaints against CareFirst arising from the same breach. *See Chambliss*, 189 F. Supp. 3d at 572-73; *Unchageri*, No. 1:16-cv-1068-MMM-JEH, at *11-15, ECF No. 19.

More broadly, the Court’s opinion leaves unclear the standard for pleading a substantial threat of future harm sufficient to satisfy Article III’s injury-in-fact requirement. The district court held that Appellants did not approach the pleading standard, largely due to their failure to plead that their Social Security numbers were stolen, or that the majority altogether failed to allege any injury even remotely traceable to the data theft. The district court’s order was reconcilable

with opinions from other Circuits, including the Fourth, Sixth, and Seventh Circuits, where those courts found that an injury-in-fact had been alleged where the plaintiffs alleged very different facts than did Appellants in this case. The Court's opinion, however, lowers the bar required for standing in a data breach case, an issue on which the Supreme Court presumably is interested in resolving given that data breach is an unfortunate and increasingly common occurrence in today's world.

This case presents a substantial question. The fact that reasoned jurists have come to differing conclusions on the standing of plaintiffs from this same data breach, let alone the differences in application of the principles of standing among other jurisdictions in different data breaches, suggests that there is a reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious for a grant of certiorari. This is especially true given the Supreme Court's recent guidance on standing in *Clapper* and *Spokeo*, and the significant public policy concerns at stake in obtaining clarity for what individuals who have their data compromised must plead in order to articulate an injury in fact fairly traceable to the breach to clear the threshold of standing.

B. Good Cause Exists for an Issuance of a Stay of the Mandate.

To determine whether there is "good cause" to stay the mandate, the Court should consider the equities of granting the stay and whether the applicant will

suffer “irreparable injury” if the stay is granted. *Nanda v. Bd. of Tr. of the Univ. of Ill.*, 312 F.3d 852, 853 (7th Cir. 2002); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *Books v. City of Elkhart*, 239 F.3d 826, 827-28 (7th Cir. 2001). The irreparable injury standard is not difficult to meet, and merely requires that the movant show some harm will ensue absent the stay, or that some public interest supports the stay. *See Books*, 239 F.3d at 829.

Here, CareFirst will suffer irreparable injury without the issuance of the stay. Returning to district court to litigate a suit that does not invoke federal subject matter jurisdiction would prejudice CareFirst until the issue of Plaintiffs’ standing is fully resolved.

Perhaps more importantly, as a matter of public policy the stay of mandate should be granted. If this case proceeds at the district court at this time, before receiving guidance and a possible reversal from the Supreme Court, it will encourage others to bring suits following other data breaches without allegations of real and immediate harm.

CONCLUSION

For the reasons set forth above, the Court should stay the mandate pending Appellees’ filing of a petition for writ of certiorari to the Supreme Court.

Dated: Washington, D.C.
 August 31, 2017

/s/ Matthew O. Gatewood

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2017, I electronically filed the foregoing Motion for Stay of Mandate Pending Filing of Petition for Writ of Certiorari with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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