**STATE OF WISCONSIN**
**COURT OF APPEALS**
DISTRICT I

JANET REETZ,

*Plaintiff-Appellant*,

v.

ADVOCATE AURORA HEALTH, INC.,

*Defendant-Respondent*.

APPEAL NO. 2021-AP-520
On Appeal from the Circuit Court of Milwaukee County
The Honorable Timothy M. Witkowiak Presiding
Circuit Court Case No. 2020-CV-2361

# RESPONSE BRIEF OF ADVOCATE AURORA HEALTH, INC.

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## ISSUES PRESENTED FOR REVIEW

**1.** After Advocate Aurora Health ("Aurora") experienced a data breach, Plaintiff Janet Reetz attempted to bring a class action against Aurora, but twice failed to adequately allege that the data breach caused her any actionable harm; in light of this, did the circuit court apply the correct legal standard and properly exercise its authority in dismissing the amended complaint?

**2.** The circuit court gave Reetz the benefit of the doubt, applying Wisconsin's liberal approach to standing; should the circuit court have exercised jurisdiction over such speculative claims?

## STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Aurora requests publication of the Court's opinion in this appeal under subdivisions 2 and 5 of Wis. Stat. (Rule) § 809.23(1)(a). Publication is appropriate under § 809.23(1)(a)2, because the Court's opinion will apply the rules regarding speculative damages to a factual situation different from those considered in earlier published opinions. In particular, it would address what is necessary to allege damages in the wake of a data breach. Publication would also be appropriate under § 809.23(1)(a)5, because the case presents issues of substantial and continuing public interest—which are virtually certain to recur as plaintiff lawyers vie to bring class actions after cyber-attacks. The Court's opinion would not only affirm the correct rulings below but would also clarify Wisconsin courts' role, if any, in dictating cybersecurity rules in the future.

Aurora requests oral argument. Given the novelty of Reetz's claims, oral argument would be appropriate unless the Court determines that the briefs "fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant." Wis. Stat. (Rule) § 809.22(2)(b).

## STATEMENT OF THE CASE

This case addresses an issue not squarely dealt with by Wisconsin courts before: whether Wisconsin businesses victimized by cyber-criminals should be subject to class action litigation by persons who can alleged no credible harm? As the news frequently shows us, cyber-attacks are becoming an increasingly routine experience, even for businesses with robust security measures. Reetz argues she should be able to sue Aurora, the victim of such an attack, without any allegation that the incident that Aurora suffered caused her any cognizable harm. Allowing such claims will open the floodgates to litigation every time a Wisconsin business is the target of an attack.

In January 2020, Aurora was the victim of a security incident: attackers hacked into its internal systems and changed direct deposit instructions for sixty-three current employees, rerouting paychecks for those employees into the attacker's bank accounts. Appx. 136, R.23:2.[1] Upon learning of the incident, Aurora immediately worked to mitigate the risk, fix the payments, and investigate what information might have been visible to the hacker. R.22:2. Reetz, the purported class representative, was not one of those whose paycheck was diverted. R.23:3.

[1] This brief's citations to the record on appeal use the form "R.__:__," with the first blank referencing each document's number in the Index for Appeal, and the second blank referring to the pagination electronically applied to the document by the court. Citations to Reetz's Appendix use the form "Appx. ___." A copy of the February 18, 2021 Decision and Order from which this appeal was taken is located at Appx. 133–140.

After an extensive investigation, Aurora saw no evidence that the attacker accessed or acquired any information other than what was necessary to carry out the redirected transactions. R.23:2–3. Aurora could not, however, rule out the possibility that the attacker might have been able to see other human resources information for certain current and former employees, even though that was not the attacker's target. Because it could not exclude that risk, on February 20, 2020, Aurora took the precautionary step of sending a letter to all current and former employees whose information could have been seen by the attacker, which provided timely notice of the incident (the "Notice"). R.22; R.23:3.

Plaintiff Janet Reetz is a former employee of Aurora who received the Notice. R.59:19. Although she was not a current employee of Aurora at the time of the incident, her information was still in Aurora's systems from her previous employment, dating back to 2015. R.23:3. After receiving the Notice, Reetz filed suit against Aurora on March 26, 2020. R.2:2.

Even though Reetz learned about the incident only upon receiving the Notice and did not identify any injury plausibly caused by the incident, the complaint sought damages purportedly flowing from the cyberattack, which she admits is a common event in society today. R.59:5–8. Because Reetz failed to allege any cognizable injury in the complaint and failed to state a claim upon which relief could be granted, Aurora moved to dismiss the complaint. R.20:1. Reetz initially opposed Aurora's motion, but then changed course, filing a slightly amended complaint. R.57; R.59. Aurora then moved to dismiss the amended complaint. R.61.

After significant briefing and two court hearings with argument, the circuit court issued a written decision and order on February 18, 2021, holding that Reetz had standing to bring her case but that she failed to state any claim upon which the court could grant her relief. Appx. 140–143. The court therefore dismissed her amended complaint in its entirety, with prejudice. Appx. 143.

# ARGUMENT

## I. Summary of Argument

Reetz charges the circuit court with seven distinct errors. She argues that the court (1) failed to apply the correct legal standard and erred in (2) finding she failed to plead cognizable injury, (3) requiring allegations of intentional conduct to state a claim for invasion of privacy, (4) finding that theft of personal information is not a "disclosure" under Wisconsin's invasion of privacy law, (5) finding that she failed to allege a contractual relationship to support her breach of contract claims, (6) finding that the Economic Loss Doctrine precluded her tort claims, and (7) dismissing her declaratory relief claim due to a lack of ongoing controversy. App. Br. at 10–11. Nothing in this shotgun approach merits reversal.

At the crux of her appeal, Reetz argues the circuit court misapplied Wisconsin law when it found she had not stated a claim upon which relief could be granted. The reality is that the circuit court gave Reetz every benefit of the doubt in reviewing her amended complaint. While the court did hold that Reetz made the minimum allegations necessary to meet Wisconsin's standing bar, it could not find that Reetz alleged facts sufficient to support her claims of tort violation, breach of contractual duty, or invasion of privacy. Appx. 140–143. This measured response from the circuit court properly applied Wisconsin law, which has a long history of declining to impose duties—contractual, statutory, or otherwise—where the legislature has not created them. This Court should find likewise, leave the matter of cybersecurity regulation to the legislature, and affirm the circuit court's decision.

Reetz's amended complaint alleged a few basic facts: (1) she received the Notice about the incident from Aurora; (2) around the time of the incident, she noticed fraudulent charges on her bank account—which she admits were later reversed (R.59:20); and (3) she incurred an overdraft fee as a result of the reversed charges, but

twice failed to allege whether this was actually paid or would be reversed by the bank. R.2:22, R.59:20. Reetz was not one of the 63 employees whose direct deposit routing instructions were changed (R.23:3), and she does not allege that she was. Instead, she attempts to stack inferences on top of her thin allegations like a house of cards, claiming—without supporting factual allegations—that the bank charges she incurred were caused by the incident, even though her account was not the target of the attack.

No doubt recognizing that the only even potentially concrete harm—the bank overdraft fee, which the bank should have refunded if it was indeed caused by fraudulent charges—is too remote to be linked to the incident, Reetz instead focuses on future hypotheticals, alleging that she and unnamed members of the purported class could suffer general anxiety, vague devaluation of their personal data, and risks of other unspecified, amorphous harms.

Faced with these allegations, the circuit court "accepted as true all well-pleaded facts in the complaint and any *reasonable* inferences therefrom." *See, e.g., Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (emphasis added). Under Wisconsin's broad construction of standing, allowing anyone with a "personal stake" in the matter to bring a case, the court entertained jurisdiction and granted Reetz standing to bring her case based on her minimum allegations of temporary bank fees. Appx. 139 (quoting *Schill v. Wis. Rapids Sch. Dist.,* 2010 WI 86, ¶ 38, 327 Wis. 2d 572, 786 N.W.2d 177). But even granting standing and accepting her allegations as true, the circuit court found that "the well-pleaded facts" alleged by Reetz failed to satisfy the elements of the causes of action raised in the amended complaint and consequently failed to "state[] a claim upon which relief may be granted." Appx. 138 (quoting *Cattau v. Nat'l Ins. Servs. of Wisconsin, Inc.*, 2019 WI 46, ¶ 6, 386 Wis. 2d 515, 926 N.W.2d 756, reconsideration denied, 2019 WI 84, ¶ 6, 388 Wis. 2d 652, 931 N.W.2d 538.

The circuit court walked through each of the five claims that Reetz raised against Aurora—(1) negligence, (2) invasion of privacy, (3) breach of contract, (4) breach of the implied covenant of good faith and fair dealing, and (5) declaratory and injunctive relief—and explained why the amended complaint failed to state a claim for each count, following the law and precedent of Wisconsin in addressing each claim and concluding that "the injury Reetz has alleged is too disconnected from the actions of [Aurora]" to state a claim for relief. Appx. 143. Reetz's contorted attempt to plead contract, tort, and statutory actions expose the incoherence of her amended complaint.

Reetz's allegations are indeed such a slender reed that they do not support a recognition of standing, even under Wisconsin's permissive approach to standing. Lest the floodgates of litigation open for every cybersecurity attack on a Wisconsin company, this Court should recognize that the circuit court was overly solicitous in finding that Reetz had any actual injury that is sufficient to give her a concrete stake in the litigation. "Access to judicial remedy" is properly restricted to those with standing, which requires "a personal stake in the outcome." *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517; *see also Miller Brewing Co. v. Lab. & Indus. Rev. Comm'n*, 173 Wis. 2d 700, 706, 495 N.W.2d 660 (1993) (citing Wis. Stat. § 802.06(8)(c)). Indeed, what Reetz really needs is a cause of action that is created merely by getting a data breach notice, similar to California's Consumer Privacy Act. The Wisconsin legislature in 2020 considered and soundly rejected an attempt to pass a trilogy of such privacy bills, *see* Wisconsin Assembly Bills 870, 871, and 872 (2020), and the Wisconsin courts should not create a remedy for Reetz that the Wisconsin legislature has rejected. Maintenance of the institutional border between courts and legislatures requires standing; any Plaintiff must allege both a "distinct and palpable injury to the plaintiff" as well as a "fairly traceable causal connection between the claimed injury and the challenged conduct." *Bence v. City of Milwaukee*, 107 Wis. 2d 469, 479, 320 N.W.2d 199 (1982) (quoting *Duke Power Co. v.*

*Carolina Envtl. Study Grp. Inc.*, 438 U.S. 59, 72 (1978) (internal quotations omitted)); *see also TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, at *3 (June 25, 2021) ("No concrete harm, no standing."). Accordingly, this Court could affirm dismissal based on the alternative ground that the circuit court did not have jurisdiction even to consider the amended complaint because it fails to plead any concrete harms plausibly caused by the cyberattack on Aurora.

## II. Standard of Review

Whether a complaint states a claim upon which relief can be granted is "a question of law for [the appellate court's] independent review," though the reviewing court "benefit[s] from" any lower court discussion. *Data Key Partners*, 2014 WI 86, ¶ 17 (citing *DeBruin v. St. Patrick Congregation,* 2012 WI 94, ¶ 10, 343 Wis. 2d 83, 816 N.W.2d 878. To determine whether a complaint states a claim upon which relief can be granted, this Court accepts the well-pleaded facts and "the reasonable inferences therefrom." *Id.* ¶ 19. The Court is not, however, required to accept unreasonable inferences or presumptions, and it cannot add facts or accept legal conclusions—even those framed as allegations in the complaint—as true. *Id.*

## III. The circuit court applied the correct legal standard and properly concluded that Reetz's amended complaint fails to plead actual damages.

The circuit court was clearly focused on whether Reetz could state a plausible claim and used oral argument to explore any potentially viable avenues for Reetz to proceed. Even with an amended complaint and two hearings, however, Reetz was not able to articulate any harms that could plausibly have been related to the payroll diversion cyberattack. At the end of day, nothing Reetz can plead could get around the undeniable fact that former employee are no longer on the payroll and are not injured by a cyber attack that diverts pay checks.

### A. The circuit court appropriately distinguished between Wisconsin's permissive approach to the injury required for standing and the actual damages required to state a claim for relief.

Reetz argues that the circuit court erred by finding that the alleged damages supported her standing but did not support her claims. Reetz confuses two different standards. Wisconsin courts generally permit standing broadly. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855 ("The law of standing in Wisconsin is construed liberally, and even an injury to a trifling interest may suffice.") (quoting *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). While Aurora may disagree with just *how* broadly standing was extended in this case, given the speculative nature of Reetz's allegations, the circuit court's recognition of her "trifling interest" for standing purposes does not automatically translate into a ruling that she has stated a claim upon which relief can be granted.

The minimum interest required for standing is less exacting than the requirements to state a specific claim. To establish a claim for negligence, for instance, Reetz must prove, among other elements, not just injury, but "a causal connection between the defendant's breach of the duty of care and the plaintiff's injury" and "actual loss or damage resulting from the injury." *Gritzner v. Michael R.*, 2000 WI 68, ¶ 19, 235 Wis. 2d 781, 611 N.W.2d 906 (2000) (citing *Miller v. Wal-Mart Stores, Inc.,* 219 Wis. 2d 250, 260, 580 N.W.2d 233 (1998)). *See also Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018) (noting that, even where a plaintiff has established Article III standing, a federal district court could grant judgment on the pleadings "if none of the plaintiffs' injuries is compensable, as a matter of law, under the statutes on which they rely.").

Reetz argues that the circuit court did not rely on any case law in deciding that her allegations did not support her damages claims because, as she asserts, "[d]amages that support a plaintiff's standing to sue necessarily support a plaintiff's claims for damages." App. Br. at 21. This proposition is not stated anywhere in Wisconsin case law and would be inconsistent with the law in many other data breach cases.

To try to build support for this legal conclusion, Reetz points to *Fox v. Iowa Health Systems*, 399 F. Supp. 3d 780, 795–96 (W.D. Wis. 2019). In that case, the federal court held that additional allegations of damages beyond the pleading standard were not required to state a claim for *negligence per se*. Two key points distinguish this case from *Fox*.

First, as discussed above, the Wisconsin standard for establishing standing is construed broadly and applied liberally. *McConkey*, 2010 WI 57, ¶ 15. In contrast, "federal courts are courts of limited jurisdiction" with a heightened pleading standard to establish standing. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Allegations that would establish standing in Wisconsin courts, therefore, are not scrutinized as closely and may be further from the standard for stating a claim.

Second, the plaintiffs in *Fox* pleaded negligence per se, which the court allowed to proceed along with the plaintiffs' properly alleged claims for violation of Wisconsin's confidentiality of health care records statute, a claim that did not require actual damages. *Fox*, 399 F. Supp. 3d at 795; *see also In re Ortiz*, 477 B.R. 714, 727 (E.D. Wis. 2012) (finding proof of actual damages was not necessary to recovery for a plaintiff whose legal rights under the Wisconsin's confidentiality of health care records statute had been affected by the defendant). Where the court found the plaintiffs had sufficiently alleged violation of a state statute, it makes sense that the court would find no additional pleadings were necessary to allege negligence per se, which is based on statutory violations.

Here that is not the case. The circuit court ruled that Reetz failed to state a claim for negligence. To the extent Reetz now attempts to turn her claim into one of negligence per se, it would also fail, because the circuit court found that she failed to state a claim for any statutory violation. Indeed, if there were a statute on point, she likely would not have pled various tort and contract claims in the first place. Citing the Wisconsin Supreme Court and the U.S. Court of Appeals for the Seventh Circuit applying Wisconsin law, the circuit court properly required that Reetz plead "actual damages"—an element of her negligence claim—to survive Aurora's motion to dismiss, and the court correctly found that she failed to meet that bar. Appx. 143.

### B. The circuit court properly considered Reetz's allegations.

Contrary to Reetz's argument that the circuit court did not consider all of her injury allegations, the circuit court spent a considerable amount of time weighing the issues raised by Reetz's complaints, Aurora's motions to dismiss, and the related briefing and argument.

Reetz filed her initial complaint on March 26, 2020. On June 3, 2020, Aurora responded by filing a motion to dismiss the complaint for failure to allege sufficient injury for standing or state a claim upon which relief could be granted. Reetz filed an opposition to Aurora's motion on July 10, 2020, and, just a few weeks later, on July 27, filed an amended complaint. Aurora filed its motion to dismiss the amended complaint on September 10, 2020, and the circuit court heard initial oral argument on the motion. Judge Witkowiak stated that, at the time, he was still weighing some of the issues and requested additional briefing. The parties each provided supplemental briefing to the court on November 13 and November 30, 2020. The parties then, again, came before Judge Witkowiak on December 16, 2020 for an extended argument. Two months later, after consideration of all of the preceding arguments,

on February 18, 2021, the circuit court issued its final decision and order, dismissing the case with prejudice.

After two versions of the complaint, two rounds of briefing on Aurora's motion to dismiss, and two arguments, the circuit court was well aware of Reetz's factual allegations, including her alleged damages, and considered them all in rendering its decision. Before and after its standing analysis of the fraudulent charges and overdraft fees Reetz alleged, the circuit court noted Reetz's alleged "continued risk of identity theft" and "time and money protecting her [personally identifiable information (PII)] from future fraud." Appx. 138. Then, in analyzing Reetz's claims, the circuit court noted the requirement that Reetz plead "actual damages" and stated that "[t]he only present injury Reetz has alleged are fraudulent charges to her bank accounts," which were refunded. App. 141. The circuit specifically referenced on the next page the other damages Reetz had alleged, naming them—"monetary losses, lost time, loss of the ability to control personally identifiable information, costs for remediation, opportunity costs, lost wages, and delayed tax refunds" —and concluding that these did "not ple[a]d any actual present injury to person or property that would amount to damages." R.92:8. The circuit court recognized these additional damages theories as so utterly speculative to not merit more detailed discussion. Reetz's argument that the circuit court did not properly consider her allegations of harm is therefore baseless.[2]

[2] To the extent the circuit court did not exhaustively explain why Reetz failed to plead damages for other claims beyond negligence, that was harmless because those claims were properly dismissed for other reasons, as discussed below.

### C. The circuit court did not err by refusing to make an inference in Reetz's favor where that inference defied reason and logic.

Reetz argues the circuit court drew an improper inference regarding the overdraft fee she alleged was still pending last summer. Reetz's quibble is unfounded. Under Wisconsin law—indeed the very case Reetz cites, *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶ 13, 284 Wis. 2d 264, 700 N.W.2d 158—courts considering a motion to dismiss must draw all "reasonable" inferences in favor of the plaintiff. If an inference is not reasonable, however, or there is no basis to draw one, then the court is not obliged to make logical leaps or plead the plaintiff's case for her. *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 36, 284 Wis. 2d 307, 700 N.W.2d 180 ("In short, we will dismiss a complaint if, '[u]nder the guise of notice pleading, the complaint before us requires the court to indulge in too much speculation leaving too much to the imagination of the court.'" (quoting *Wilson v. Cont'l Ins. Cos.,* 87 Wis. 2d 310, 326–27, 274 N.W.2d 679 (1979)).

The circuit court noted that the "only present injury" Reetz has alleged related to the fraudulent charges to her bank accounts. Appx. 141. Throughout briefing on the motion to dismiss, Reetz repeatedly refused to acknowledge that reimbursement had been requested or that the bank had denied reimbursement. This persisted even in the amended complaint, after Aurora directly and specifically raised the issue in its initial motion to dismiss.

Instead, the amended complaint cryptically stated only that the fees "*at this time* have not been refunded." R.59:20 (emphasis added). Given Reetz's admission that the underlying fraudulent charges have been credited back to her account and her repeated refusal to clarify the status of the related fees, the circuit court appropriately declined to draw the unreasonable inference that "Plaintiff requested reimbursement [of the overdraft fees] but did not succeed." App. Br. at 20.

To have inferred otherwise would have defied logic and common sense regarding the normal operation of banks, especially given that the amended complaint was filed more than six months after the alleged fraudulent charges. Indeed, were the bank to recognize and reverse the fraudulent charges but refuse to reverse overdraft fees incurred solely as a result of those fraudulent charges, the bank itself would be liable to Reetz for those fees. There is already a very large inference drawn in Reetz's favor that these overdraft fees have anything at all to do with the cyberattack on Aurora. Even assuming that the fees are related to that incident, any inference that the bank would refuse to reverse the overdraft fees if they were caused by fraudulent charges would still have been unreasonable for the circuit court to adopt, and it properly rejected it. *Archdiocese of Milwaukee*, 2005 WI 123, ¶ 36.

Instead, the circuit court pointed to a clear gap in Reetz's allegations: more than once, and even *after* this discrepancy was pointed out, she failed to plead reasonably complete information about the status of the overdraft fees. *See* Appx. 141. Reetz disclosed the overdraft fees in an attempt to establish standing and plead damages, strategically withholding crucial information about those fees in a misguided attempt to manufacture damages and game the pleading standard. The circuit court saw Reetz's allegations for what they were—and what they were *not*—and correctly declined to draw an unreasonable inference in her favor.

### D. The circuit court properly exercised its discretion in finding that Reetz's other theories of loss did not constitute damages.

The circuit court considered Reetz's litany of other damage theories—risk of misuse of her PII or future identity theft, time spent reacting to Aurora's Notice, and loss of value of her PII—and, citing Wisconsin Supreme Court case law on such hypothetical damages, correctly determined that they were too speculative to support Reetz's claims. Appx. 143 ("Reetz has not

pled any actual present injury to person or property that would amount to damages, and Wisconsin courts have not recognized tort claims for speculative risks of future harms.") Allegations of the "mere possibility of future harm" are not sufficient to establish "actual damages." *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 17, 270 Wis. 2d 146, 677 N.W.2d 233. No "Wisconsin case [has] awarded damages based solely on an increased risk of future harm without any present injury." *Alsteen v. Wauleco, Inc.*, 2011 WI App 105, ¶ 11, 335 Wis. 2d 473, 802 N.W.2d 212.

Wisconsin courts have not directly addressed the sufficiency of claims for speculative damages in a data security incident case like this one, but they have addressed analogous issues regarding an alleged heightened risk of future medical problems. For example, in *Alsteen*, this Court rejected various alleged injuries that weren't "actual" because they were not certain. 2011 WI App 105, ¶¶ 10, 12 ("Alsteen has not alleged any actual injury or damage caused by Wauleco's release of Penta from the Crestline site. […] Alsteen's risk of developing cancer is, at present, a 'mere possibility,' and therefore is not an injury for which she can recover."). The Court also rejected injuries that involved "mere exposure to a dangerous substance" and "medical monitoring." *Id.* ("Alsteen's argument turns tort law on its head by using the remedy sought—compensation for future medical monitoring—to define the alleged injury"). *Id.* ¶ 20. The Court concluded, "[W]e therefore refuse to step into the legislative role and mutate otherwise sound legal principles by creating a new medical monitoring claim that does not require actual injury." *Id.* ¶ 37 (citations omitted). The circuit court, applying similar logic, refused to create a data security monitoring claim that does not require actual injury. R.92:6.

In addition, while Wisconsin has not addressed speculative damages in a case involving a data breach, many other courts have applied a similar rule in this context, holding that possible increased risk of future identity theft and credit-monitoring costs such as those alleged here cannot establish the damages element of

negligence claims. *See, e.g., Ruiz v. Gap, Inc.*, 380 F. App'x 689 (9th Cir. 2010) (increased risk of future theft is not sufficient for a negligence claim); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 639–40 (7th Cir. 2007) (same); *Attias v. CareFirst, Inc.*, 365 F. Supp. 3d 1, 9–10 (D.D.C. 2019) (an action for negligence requires more than speculative harm).

Similarly, damages under contract claims cannot be purely speculative or "hypothetical." *In re Allis' Will*, 174 Wis. 527, 184 N.W. 381 (1921). While Wisconsin has not applied that standard in the context of a security incident, again, multiple other courts have concluded that plaintiffs in data security incident cases cannot establish breach of contract claims based solely on speculative future damages. *See, e.g., Enslin v. Coca-Cola Co.*, 739 F. App'x 91, 95 (3d Cir. 2018) (contract claim required actual damages that were causally connected to the breach); *Ruiz*, 380 F. App'x at 689 (increased risk of future theft is not sufficient for an implied contract claim). This Court should follow those courts' sound logic.

Reetz's alleged time spent attending to this matter also is not compensable. In addition to credit monitoring, which Aurora has already offered to provide at no expense (R.22:3), Reetz apparently seeks money damages for contacting her bank about certain charges and fees. The only published Wisconsin case she cites in support of compensable inconvenience or annoyance is inapposite. *See Piorkowski v. Liberty Mut. Ins. Co.*, 68 Wis. 2d 455, 463, 228 N.W.2d 695 (1975) (holding, after a jury verdict, that plaintiffs were entitled to damages for the "actual physical inconveniences" of enduring several months without water).

Reetz's reliance on *Dieffenbach*, *see* App. Br. at 28–29, is similarly problematic. She cherry-picks language from the opinion, removing a key qualification regarding when damages may be available: "(if [defendant] violated the statutes on which the claims rest)." 887 F.3d 826, 828. As the *Dieffenbach* court noted on the same page, a court could still grant judgment on the pleadings "if

none of the plaintiffs' injuries is compensable, as a matter of law, under the statutes on which they rely." *Id.* This points to the larger issue that the Seventh Circuit's analysis was of California and Illinois statutes, not Wisconsin common law claims like those Reetz brought. Again, Wisconsin has no similar statute, so the Seventh Circuit's damages analysis does not apply here.

The same is true of the alleged loss of value of Reetz's PII. While Wisconsin has not addressed the issue, yet again, several other courts have held that such a theory does not even support standing, much less damages to support a claim.[3] The cases Reetz cites in support of this damages theory concern, variously, damages under California statutes, invasion of privacy in West Virginia, and Article III standing. The two cases that support her proposition are unpublished federal district court decisions out of California, neither addressing Wisconsin law. Reetz has not pleaded how she was so injured, and this Court should not create new law in Wisconsin on this flimsy basis.

[3] *In re Uber Techs., Inc., Data Sec. Breach Litig.*, No. 18-CV-2970, 2019 WL 6522843, at *5 (C.D. Cal. Aug. 19, 2019) (rejecting diminution of value theory where plaintiff had not established an impairment of his ability to participate in that market for personal information); *Khan v. Children's Nat'l Health Sys.*, 188 F. Supp. 3d 524, 533 (D. Md. 2016) (plaintiff "does not, however, explain how the [cyber thief's] possession of that information has diminished its value, nor does she assert that she would ever actually sell her own personal information"); *In re: Cmty. Health Sys., Inc.*, No. 15-CV-222, 2016 WL 4732630, at *9 (N.D. Ala. Sept. 12, 2016); *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1088, 1088–89 (E.D. Cal. 2015).

## IV. The circuit court appropriately rejected Reetz's invitation to create by judicial fiat a tort cause of action that the Wisconsin legislature has chosen not to create.

The amended complaint raised claims under several different and inconsistent theories—negligence, contract, invasion of privacy—all of which amounted to the same request: Reetz wants the courts to create Wisconsin law obligating employers to protect personal information of former employees, even after the employment relationship ends. This would create in Wisconsin a cause of action along the lines of the California Consumer Privacy Act ("CCPA"), Cal. Civ. Code § 1798.150, which gives every person whose data is subject to a breach based on unreasonable security a private cause of action to sue the victim of the data breach.

Problematically for Reetz, the Wisconsin legislature in 2020 considered and soundly *rejected* an attempt to pass a set of three privacy bills similar to the one in place in California. *See* Wisconsin Assembly Bills 870, 871, and 872 (2020). In other words, Reetz would have this Court create rights that the Assembly chose not to adopt *in its most recent session*. The circuit court declined that invitation, finding that Wisconsin courts have *never* recognized such a cause of action. R.92:7; *see also Fox*, 399 F. Supp. 3d at 799 (W.D. Wis. 2019). This Court should do the same.

The Wisconsin Supreme Court first confronted modern privacy in 1956 in *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956) (hereinafter "*Sad Sam's Tavern*"). In that case, the plaintiff attempted to bring charges against a man who took pictures of her in the women's bathroom at Sad Sam's Tavern and then passed the photos around to bar patrons. Despite the odious nature of this conduct, the Supreme Court opined that the court was not the appropriate institution to create a remedy. *Id.* Following that case, the Wisconsin legislature passed the invasion of privacy statute to address the kind of intentional exposure that

occurred in the case of *Sad Sam's Tavern*, Wis. Stat. § 995.50. But that statute does not create a private right of action triggered by the unintentional loss of data. *Fox*, 399 F. Supp. 3d at 796 ("Wisconsin Statute § 893.57 categorizes invasion of privacy as an intentional tort.").

If there is to be a cause of action in the circumstances presented here, it is for the legislature, not this Court, to create it. Wisconsin courts have repeatedly refused to find a private right of action for privacy violations where the Wisconsin legislature has not, and this Court should continue along that prudent course. *See Fox*, 399 F. Supp. 3d at 800. ("Under Wisconsin law, a statute provides a private right of action only if there is a clear indication of the legislature's intent to create such a right."); *see also Grube v. Daun*, 210 Wis. 2d 681, 689, 563 N.W.2d 523 (1997). ("[A] statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability.") (citation omitted).

### A. The circuit court properly dismissed Reetz's invasion of privacy claim.

Recognizing that the Wisconsin right of privacy statute—created in the wake of *Sad Sam's Tavern*—is the only Wisconsin statute directly addressing general privacy rights, Reetz also attempted to bring a claim under this statute. The circuit court appropriately found that Reetz did not meet the burden of pleading a claim against Aurora under that statute, both because she pled only unintentional actions by Aurora and because there has been no publication of Reetz's data. Appx. 140–41.

To establish a claim under Wisconsin's privacy statute, Reetz must allege an intentional action consisting of (1) public disclosure of (2) private facts regarding the plaintiff, (3) "which would be highly offensive to a reasonable person of ordinary sensibilities,"

and (4) that the defendant acted "either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed." *Zinda v. La. Pac. Corp.*, 149 Wis. 2d 913, 929–30, 440 N.W.2d 548 (1989).

Fundamental to an invasion of privacy claim is an allegation of actual "publicity," "which means that the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id.* at 929. Although § 995.50 "does not specify" that the first element of an invasion of privacy claim requires intentional disclosure, "Statute § 893.57 categorized invasion of privacy as an intentional tort, alongside other intentional torts like assault, battery, and false imprisonment," and the Wisconsin law is to be "interpreted in accordance with the developing common law of privacy," which imposes an intentionality requirement. *Fox*, 399 F. Supp. 3d at 796; *see also Elliott-Lewis v. Abbott Labs.*, 378 F. Supp. 3d 67 (D. Mass. 2019) (invasion of privacy claim was insufficient because the claim lacked any facts to plausibly suggest intent).

Further, the *Restatement (Second) of Torts* defines publicity as requiring that the data be "made public, by *communicating* it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Comment to Restatement (Second) of Torts § 652D (1977) (emphasis added). The active verb "communicating" suggests intentional action and is not consistent with unintentional disclosure.

This Court's decision in *Gillund v. Meridian Mut. Ins. Co.*, 2010 WI App 4, ¶ 31, 323 Wis. 2d 1, 778 N.W.2d 662, cited by Reetz, is consistent with this understanding. In that case, the Court considered whether there could be a civil invasion of privacy without a criminal violation. Reetz tries to stretch the court's discussion of two invasion of privacy torts, only one relevant here,

to contend that publication of private facts does not require intent. App Br. at 26. Her block quote is notable for what it includes and what it omits. By noting the defamation statute requires "the specific intent to defame and the absence of truth," the *Gillund* court made no comment on the intent required for the publication of private facts, which requires a different kind of intent. Further, the first and last sentences of the paragraph make clear that the court is merely noting that, because there is no criminal analogue to publication of private facts, one could commit the intentional tort without committing a crime. *Gillund*, 2010 WI App 4, ¶ 31.

Following the compelling logic of *Fox*, the circuit court correctly determined that Aurora had not intentionally disclosed Reetz's PII to the public. Appx. 140–41. While Reetz argues that disclosure of personal information to a single person can under certain special facts constitute publicity, *Pachowitz v. Ledoux*, 2003 WI App 120, 265 Wis. 2d 631, 666 N.W.2d 88, the circuit court rightly noted those kinds of facts are not present here. Appx. 141. Further, as the circuit court noted, no Wisconsin case has held that third-party theft of personal data constitutes publicity by the target of the theft. As numerous courts from around the country have held, third-party theft of personal data does not constitute publicity or "intentional disclosure," as necessary for the tort of invasion of privacy. *See, e.g., Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 662 (S.D. Ohio 2014) (theft does not amount to disclosure), *rev'd on other grounds*, 663 F. App'x 384 (6th Cir. 2016); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 1004 (N.D. Cal. 2016) (same); *Fero v. Excellus Health Plain, Inc.*, 236 F. Supp. 3d 735, 784 (W.D.N.Y. 2017) (same). It therefore stands to reason that a defendant cannot be liable for invasion of privacy when, as here, the information in question was stolen by a third party. *Fox*, 399 F. Supp. 3d at 796–97.

### B. The circuit court properly applied the Economic Loss Doctrine in dismissing Reetz's negligence claim, because any economic losses occurred in the context of contracted-for employment.

As the circuit court noted, the Economic Loss Doctrine prevents parties from using tort claims to recover purely economic or commercial losses that should have been covered by contract. Appx. 142. Contract law "is better suited than tort law for dealing with purely economic loss." *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 404, 573 N.W.2d 842 (1998). The circuit court recognized that each of the amended complaint's litany of hypothetical "damages"—monetary losses, lost time, loss of the ability to control PII, costs for remediation, opportunity costs, lost wages, and delayed tax refunds—are all economic injuries. Reetz appears to agree, repeatedly emphasizing the monetary value and loss at issue in purely economic terms, yet she pleads negligence. Absent an applicable statute, this Court should "reject [her] attempt to create this tort within a contractual relationship and emphasize the need to preserve the boundary between tort law and contract law." *Mackenzie v. Miller Brewing Co.*, 2001 WI 23, ¶ 26, 241 Wis. 2d 700, 623 N.W.2d 739 (citation omitted).

Although Wisconsin has not addressed the Economic Loss Doctrine in a cybersecurity case, other courts have held that the economic loss rule bars recovery of damages on similar negligence claims. *See e.g., Cmty. Bank of Trenton v. Schnuck Mkts., Inc.*, 887 F.3d 803 (7th Cir. 2018) (holding that negligence claim in data breach case was barred by the Economic Loss Doctrine); *Longnecker-Wells v. Benecard Srvs., Inc.*, 658 F. App'x 659 (3d Cir. 2016) (same); *Selco Cmty. Credit Union v. Noodles & Co.*, 267 F. Supp. 3d 1288 (D. Colo. 2017) (same); *Irwin v. Jimmy John's Franchise, LLC,* 175 F. Supp. 3d 1064 (C.D. Ill. 2016) (same).

Reetz's arguments to the contrary are without merit. Her theory that she contracted with her former employer for PII-safeguarding *services*, taking her beyond the reach of the Economic Loss Doctrine, is nonsensical. Further, the Economic Loss Doctrine has been applied outside the context of contracts for goods. *See Linden v. Cascade Stone Co.*, 2005 WI 113, 283 Wis. 2d 606, 699 N.W.2d 189 (barring suits by property owners against subcontractors); *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶ 52, 349 Wis. 2d 587, 836 N.W.2d 807 (barring suits from contractors against suppliers).

Even if Reetz's negligence claim is not barred by the Economic Loss Doctrine, Reetz has failed to plead negligence. Wisconsin law imposes no general duty to safeguard personal information, and the amended complaint contains no cognizable allegations of physical harms. Without either of these factors, a negligence claim cannot be sustained. *See, e.g.*, *In re SuperValu, Inc.*, 925 F.3d 955, 963 (8th Cir. 2019) (upholding dismissal of negligence claim where the state law does not recognize a cause of action in negligence for failure to adequately protect personal information); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953 (same).

Moreover, the only allegations of damages to Reetz's person or property concern potential future harms to her and other purported class members' PII, such as "loss of opportunity to control how their PII is used" as well as allegations that she and other class members suffer from "feelings of rage and anger, anxiety, sleep disruption, stress, fear, and physical pain" and are at risk of suffering "embarrassment, humiliation, frustration, and emotional distress." R.59:22, 31. Wisconsin courts have not recognized tort claims for such speculative risks of future harms. *Tietsworth*, 2004 WI 32, ¶ 17. Moreover, psychological harms like anxiety are not recognized in negligence cases absent allegations of "severe emotional distress" that the plaintiff has already suffered and a "causal connection" to the defendant's conduct as a cause-in-fact of the injury. *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627,

632, 517 N.W.2d 432 (1994); *see also Alsteen*, 2011 WI App 105, ¶¶ 10, 12. Because Reetz has not pleaded actual present injury, her right to seek emotional damages is foreclosed, leaving only her allegations of economic damages.

## V. The circuit court properly dismissed Reetz's contract-based claims as improperly pleaded.

### A. Reetz failed to plead an express contract to protect personal data.

Reetz has not identified an express contract provision that obligates Aurora to protect her PII—nor can she. To state a claim for breach of contract, she must plead three elements: offer, acceptance, and consideration. *Piaskoski & Assocs. v. Ricciardi*, 2004 WI App 152, ¶ 7, 275 Wis. 2d 650, 686 N.W.2d 675.

To determine whether an enforceable term existed in a properly formed contract, Wisconsin courts look to whether the contractual provision is "definite and certain as to its basic terms." *Metro. Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶ 22, 291 Wis. 2d 393, 717 N.W.2d 58, *opinion clarified on denial of reconsideration*, 2007 WI 23, ¶ 22, 299 Wis. 2d 174, 727 N.W.2d 502 (citation omitted). Any "[v]agueness or indefiniteness as to an essential term of the agreement prevents the creation of an enforceable contract, because a contract must be definite as to the parties' basic commitments and obligations." *Mgmt. Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996) (citations omitted). If a plaintiff does not allege factual support for the legal conclusion that a contract existed, she fails to state a claim upon which relief can be granted and must be dismissed. *See Tsamota Certification Ltd. v. ANSI ASQ Nat'l Accreditation Bd. LLC*, Case No. 17-cv-893, 2018 WL 1936840, at *8 (E.D. Wis. Mar. 24, 2018).

As the circuit court concluded, Reetz's amended complaint identifies no provision requiring protection of personal information in the contract that governed her former employment with Aurora. Instead, Reetz alleges that, by requiring current employees "to provide their PII, including names, addresses, Social Security numbers, and other personal information, to Defendant as a condition of employment," Aurora offered an employment contract which she accepted when she provided the necessary PII and came to work. R.59:33. She further alleges that Aurora promised to protect her personal information as part of that contract, and that its alleged failure to do so means she did not receive the benefit of her bargain. R.59:34. Reetz does not allege what document or statement created the supposed contract between her and Aurora, nor does she indicate any other terms or details about the contract. Reetz cannot adequately plead breach of an express contract without such facts about the contract in question.

Reetz also vaguely states that Aurora's "Code of Conduct contained additional covenants restricting its disclosure of PII." R.59:34. Reetz, however, never pleads that she saw the Code of Conduct and accepted it before providing her PII. Further, the Code of Conduct would, if anything, restrict her conduct, not serve as a protection for her. The circuit court therefore rightly concluded that "Reetz has not provided the court with any provisions expressly agreed upon requiring Aurora to safeguard her PII." Appx. 142.

### B. Reetz failed to plead an implied contract or term.

Recognizing she can point to no express contract or term that obligated Aurora to protect her PII, Reetz pivots to more imaginative theories to support such an obligation. She alleges that Aurora's requirement that employees provide PII, consistent with federal law, *see, e.g.*, 26 C.F.R. § 31.6051-1 & -2 (requiring employers to submit W-2 forms with Social Security numbers), somehow led to the formation of an implied contract. But Aurora's

request for such information does not amount to a contract offer; and providing federally mandated information and then showing up to a job for which Reetz was paid cannot be sufficient separate consideration to establish a contract for the security of her information. In other words, Reetz worked for Aurora in exchange for money, not in exchange for Aurora's providing PII-safeguarding services. Like the circuit court, this Court should not accept Reetz's post-hoc litigation theory.[4]

Reetz does not plead any facts to support an inference that she and Aurora had an agreement creating the alleged implied obligation to maintain information confidentially. While Wisconsin does not require a literal "meeting of the minds," there must be sufficient allegations to draw a reasonable inference as to the parties' intent to accept the contract. *Metro. Ventures*, 2006 WI 71, ¶ 24. Even if Plaintiff expected Aurora to take certain steps to protect her PII, her subjective understanding and unilateral intent to contract—"she *presumed* Defendant would keep her PII safe," App. Br. at 42 (emphasis added)—cannot establish an enforceable contract term. Instead, there must be mutual understanding and intent, even for implied contracts. *See In re SuperValu*, 925 F.3d at 965–66 (upholding dismissal of putative data breach class action where plaintiff had not sufficiently pled the existence of an implied contract).

Reetz does not allege any agreement to take specific steps, which were not taken, to keep the information safe. Rather, the indefinite contract that Reetz would have this court imply would, in effect, be a guarantee that there would be no breach under any circumstances, regardless of the protections in place. That would be a highly unusual agreement that would create a cause of action

[4] Reetz also fails to explain the duration of this hypothetical contract. She was no longer employed by AAH at time of the data security incident. Reetz's authority for the proposition that this implied contract would survive her employment with AAH is a 1939 case about contractual duties surviving a *party* to the contract. App. Br. at 46.

even broader than the cause of action under California's Consumer Protection Act for failure to have "reasonable security procedures and practices" information that results in a breach. See Cal. Code §1798.150(a)(1). Certainly, the Wisconsin courts should not infer such an expansive guarantee without more specific evidence of mutual intent to agree to such a term.

After grasping for and failing to find a contract, Reetz then asks the Court to find an implied PII-protection term in that elusive contract. In support of such an implied term, Reetz cites cases from the customer-merchant context. But courts have not found an obligation to safeguard PII in the employment context, as relevant here. *In re Zappos.com, Inc.,* MDL No. 2357, 2016 WL 2637810, at *6 (D. Nev. May 6, 2016) (dismissing breach of implied contract where plaintiffs failed to show personal information was provided in consideration for data security), *rev'd and remanded on other grounds*, 888 F.3d 1020 (9th Cir. 2018); *see also, e.g.*, *Krottner v. Starbucks Corp.*, 406 F. App'x 129, 131–32 (9th Cir. 2010) (affirming dismissal of implied contract claim where plaintiffs failed to allege prior review or acknowledgement of documents purportedly to give rise to implied contract).

Reetz's citation to the *Restatement (Second) of Contracts* § 204 does not support her theory that a protection of PII term is an essential term not foreseen by the parties. Creating such a term would require the Court to position itself between the employee and employer to alter the terms of their agreement and set the conditions and scope of cybersecurity requirements for employers. This is exactly the kind of second-guessing of businesses that Wisconsin courts have repeatedly refused to do. Wisconsin courts have never read such a duty into employment contracts and are "apprehensive of injecting the judiciary between employees and their employers, thereby altering basic tenets of [the Wisconsin] labor market and … economy." *Mackenzie*, 2001 WI 23, ¶ 17 (citation omitted). Again, the Wisconsin legislature has refused to create such an obligation.

### C. The circuit court properly dismissed Reetz's breach of implied covenant of good faith claim because there was no underlying contract.

Reetz argues that the circuit court misconstrued her breach of implied covenant claim as a tort. Regardless of whether the implied duty sounds in tort or contract, Wisconsin law is clear that such claims must be connected to a valid underlying contract, which courts will look to first. *Marine Travelift, Inc. v. Marine Lift Sys., Inc.*, No. 10-C-1046, 2013 WL 6255689, at *17 (E.D. Wis. Dec. 4, 2013) ("While it is important to hold parties to their implied duty of good faith and fair dealing, courts must avoid adding obligations and conditions to contracts go beyond the agreement reached by the … parties. The implied duty of good faith is not a license to rewrite a contract."). As the circuit court rightly noted, without a contract, there cannot be a breach of the implied covenant of good faith and fair dealing. Appx. 142 (citing *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶ 52, 334 Wis. 2d 23, 798 N.W.2d 467, among other cases). The lack of an underlying contract for the protection of personal data alone is sufficient to affirm the dismissal of the breach of implied covenant claim.

### D. The circuit court appropriately found that Reetz pleaded no basis for declaratory and injunctive relief.

Wisconsin law allows plaintiffs to seek declaratory relief independently, but it must have a predicate statutory or common law basis, and it must be tailored toward remedying an ongoing harm, not premised on past conduct. *Zehner v. Vill. of Marshall*, 2006 WI App 6, ¶ 10, 288 Wis. 2d 660, 709 N.W.2d 64 (dismissing on standing grounds but finding that invasion of a legally protected interest is necessary prerequisite to a declaratory relief claim); *Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203, 188 N.W.2d 198 (1971); *see also Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309 Wis. 2d 365, 749 N.W.2d 211 (the purpose of

declaratory relief is to obtain a decision "prior to the time that a wrong has been threatened or committed") (citation omitted). Reetz has failed to plead any predicate statutory or common law basis, as explained above, so declaratory relief is inappropriate here. The amended complaint also does not allege what impermissible conduct on the part of Aurora is ongoing and continuing to harm Reetz. Instead, Reetz is focused on past conduct—the security incident—and speculative future harms that could result from that past conduct. As the circuit court noted, the data incident Aurora suffered "is not ongoing," making declaratory relief inappropriate. Appx. 143.

## VI. The circuit court should not even have exercised jurisdiction over such speculative claims.

The circuit court's efforts to draw every reasonable inference in favor of Reetz is most apparent in the fact that it charitably found Reetz had standing to bring these paper-thin claims in the first place. Reetz pleads invasion of privacy against Aurora, a fellow victim of a cybercriminal's attack, making no plausible allegations that her PII was publicized. She pleads breach of contract and a related breach of the implied covenant of good faith and fair dealing when she can point to no contract—written or oral, express or implied—that obligated Aurora to safeguard her PII. And she pleads negligence even though her alleged damages are all economic and occurred within the context of her (former) employment.

On top of this, whatever damages Reetz asserts have not actually befallen her. R.59:17 ("lost time, anxiety and emotional distress," "lost opportunity costs from wages due to addressing actual and future consequences of the incident"); R.59:31 ("improper disclosure of their PII, lost benefit of their bargain, lost value of their PII, and lost time and money incurred to mitigate and remediate the effects of the Data Breach").

Standing is required for the survival of any complaint. *Krier*, 2009 WI 45, ¶ 20 ("access to judicial remedy" is restricted to those with standing, which requires "a personal stake in the outcome") (citations omitted); *Miller Brewing Co.*, 173 Wis. 2d. at 706 (citing Wis. Stat. § 802.06(8)(c)). To establish standing, a plaintiff must allege both a "distinct and palpable injury to the plaintiff" as well as a "fairly traceable causal connection between the claimed injury and the challenged conduct." *Bence*, 107 Wis. 2d at 479 (quoting *Duke Power*, 438 U.S. at 72 (internal citations and quotations omitted)). The United States Supreme Court recently summed this up clearly in a similar case: "No concrete harm, no standing." *TransUnion*, 2021 WL 2599472, at *3; *see also McMorris v. Carlos Lopez & Assoc. LLC*, 995 F.3d 295, 305 (2d Cir. 2021) ("Because [plaintiff] did not allege that her [personal information] was subject to a targeted data breach or allege any facts suggesting that her [personal information] (or that of any others) was misused, the district court correctly dismissed her complaint.").

Alleged injuries cannot be hypothetical or presumed; they must be concrete and particularized to the plaintiff. *Fox*, 112 Wis. 2d at 532. The only injury Reetz pleads with any specificity is her allegation that fraudulent charges were made to her bank accounts, which cannot be fairly traced to Aurora's actions. *Duke Power*, 438 U.S. at 72 (standing requires an injury that is "fairly traceable" to the defendant's conduct) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977)). To trace the injury to Aurora's actions, there must be a "close causal relationship." *Fox*, 112 Wis. 2d at 528 (quoting *Metro. Edison v. People Against Nuclear Energy*, 460 U.S. 766 (1983)).

The amended complaint is therefore implausible on its face in its unsupported conclusion that "the suspicious activity on Reetz's bank accounts" is "fairly traceable" to Aurora's security incident. R.59:22. Reetz fails to allege any facts that would lead to a reasonable inference that the incident at Aurora—and not some other exposure or issue—led to the bank account activity.

Temporally, this cannot be. Reetz alleges that fraudulent charges appeared on her bank statements "near the end of January of 2020" (R.59:20), but the incident occurred in January 2020. The amended complaint rests on the unusual premise that the hacker was able to make *incredibly* rapid use of the data, even though it also acknowledges such things usually "take years to spot." *Id.* ¶ 64. Due to all of these inadequacies, the amended complaint fails to allege any cognizable "injured interest" that can be fairly traced to Aurora's actions. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n.*, 2011 WI 36, ¶ 6, 333 Wis. 2d 402, 797 N.W.2d 789.

Wisconsin standing principles are liberal, but they do not permit a plaintiff to seek a judicial remedy without alleging facts to support her conclusory allegations of damages, because doing so would open the floodgates "without bounds" to similar claims from any individual who has ever received notice of a data security incident. *Krier*, 2009 WI 45, ¶ 20.

## CONCLUSION

For the foregoing reasons, Aurora respectfully asks this Court to affirm the circuit court's February 18, 2021 order.

Dated: July 6, 2021

Respectfully submitted,

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## CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 9,556 words.

*Electronically signed by*
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