

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2013-001096

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Phillip Morgan, Individually and on Behalf of All Similarly Situated  
Plaintiffs,.....Appellant,

v.

South Carolina Department of Revenue; South Carolina Division of State Information  
Technology; the Office of the Governor of the State of South Carolina; and Trustwave Holdings,  
Inc.....Respondents.

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**RECORD ON APPEAL**

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DEC 20 2013 AT  
SC Court of Appeals

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## INDEX

|                                                                                                                    | <u>PAGE</u> |
|--------------------------------------------------------------------------------------------------------------------|-------------|
| Summons and Complaint.....                                                                                         | 1           |
| Amended Summons and Complaint.....                                                                                 | 11          |
| Motion to Dismiss or to Stay Case.....                                                                             | 25          |
| Motion to Dismiss.....                                                                                             | 30          |
| Notice of Motion and Motion to Dismiss.....                                                                        | 38          |
| South Carolina Division of State Information Technology's<br>Responses to Plaintiff's First Requests to Admit..... | 66          |
| Department of Revenue's Responses to Plaintiff's First<br>Requests to Admit.....                                   | 70          |
| Memorandum in Support of Motion to Dismiss.....                                                                    | 72          |
| Defendant South Carolina Division of State Technology's<br>Memorandum in Support of Motion to Dismiss.....         | 100         |
| Plaintiff's Memorandum of Law for All Motions.....                                                                 | 125         |
| Memorandum in Support of Governor Haley and the Department<br>Of Revenue's Motion to Dismiss.....                  | 228         |
| Transcript of Record.....                                                                                          | 247         |
| Form 4.....                                                                                                        | 315         |
| Stipulation of Dismissal Without Prejudice as to Trustwave<br>Corporation.....                                     | 316         |
| Order Granting Motion to Dismiss The Department of Revenue<br>And the Office of the Governor.....                  | 318         |
| Order Granting the South Carolina Division of State Information<br>Technology's Motion to Dismiss.....             | 340         |
| Order Granting Trustwave Defendants' Motion to Dismiss.....                                                        | 362         |
| Motion for Reconsideration.....                                                                                    | 370         |

|                                                   |     |
|---------------------------------------------------|-----|
| Amended Motion for Reconsideration.....           | 378 |
| Order Denying Plaintiff's Motion to Consider..... | 387 |
| Notice of Appeal.....                             | 390 |



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Phillip Morgan,

Individually, and on behalf of  
all similarly situated Plaintiffs,

Plaintiff

v.

Nimrata "Nikki" Haley, in her Official  
Capacity as Governor of South  
Carolina; James F. Etter, in his Official  
Capacity as Director of The South  
Carolina Department of Revenue; and  
The South Carolina Department of  
Revenue

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

**SUMMONS**

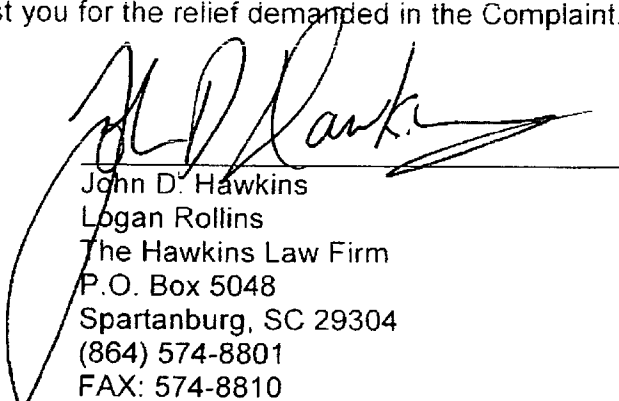
(Jury Trial Demanded)

Civil Action No. 2012-CP-40-

2012 OCT 31 PM 12:57

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office with an address of P.O. Box 5048, Spartanburg, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

  
John D. Hawkins  
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P.O. Box 5048  
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Attorney for the Plaintiff

Spartanburg, South Carolina  
October 31, 2012

Record on Appeal

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan, )

Individually, and on behalf of )  
all similarly situated Plaintiffs, )

Plaintiff )

v. )

Nimrata "Nikki" Haley, in her Official )  
Capacity as Governor of South )  
Carolina; James F. Etter, in his Official )  
Capacity as Director of The South )  
Carolina Department of Revenue; and )  
The South Carolina Department of )  
Revenue )

Defendants. )

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

**COMPLAINT**  
(Jury Trial Demanded)

Civil Action No. 2012-CP-40-

2012 OCT 31 PM 12:57

Plaintiff, Phillip Morgan, complaining of the Defendants, alleges as follows:

**PARTIES**

1. Plaintiff Phillip Morgan is a resident and citizen of Spartanburg County, South Carolina.
2. Defendant Nimrata "Nikki" Haley is the Governor of the State of South Carolina.
3. Defendant South Carolina Department of Revenue is an agency of the State of South Carolina, and James F. Etter is the Director of said agency.
4. For jurisdictional purposes, Defendants are residents and citizens of Richland County, South Carolina.

5. Jurisdiction and venue for this case are proper in Richland County, South Carolina.

### **PROPOSED PLAINTIFF CLASS**

6. The proposed Plaintiff class consists of the following: all persons now domiciled in South Carolina whose personal identifying information, including but not limited to, Social Security numbers and credit/debit card information, was compromised between August 27, 2012 and the present as a result of the acts and omissions of Defendants as stated below.

7. The proposed Plaintiff class is so numerous that joinder of all members is impracticable.

8. There are questions of law and/or fact common to the named Plaintiff and to the proposed Plaintiff class, including, but not limited to:

- a. Whether Defendants have violated S.C. Code Ann. §1-11-490;
- b. Whether Defendants are liable to Plaintiff for violation of S.C. Code Ann. §1-11-490;
- c. Whether the above Defendants knowingly and willfully violated the above statute and are subject to a fine of up to \$1,000.00 for each resident whose information was accessible by reason of said breach;
- d. Whether Defendants were grossly negligent *per se* and grossly negligent as stated below.

9. The claims of the named Plaintiff are typical of the claims of the proposed Plaintiff class members.

10. The defenses of the Defendants to the named Plaintiff's claims are typical of the defenses available against each member of the proposed Plaintiff class.

11. The representative named Plaintiff will fairly and adequately protect the interests of the proposed Plaintiff class.

12. To the extent that the relief sought in this action is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class per the damages allowed by S.C. Code Ann. §1-11-490.

13. Pursuant to S.C. Code Ann. §15-53-130, this action is declaratory in character, as residents of the State are asking for a determination of whether they are entitled to recover damages in accordance with S.C. Code Ann. §1-11-490.

14. A class action is superior to other available methods for the fair and efficient adjudication of the issues in dispute. Upon information and belief, the interests of members of the proposed Plaintiff class in individually controlling the prosecution of separate actions is low, given the small amount at stake (\$1,000.00 or less) for the class members. Further, prosecution of separate actions by individual members of the proposed Plaintiff class could result in inconsistent rulings, requiring incompatible standards of conduct on the part of Defendants and substantially impairing the interests of the proposed Plaintiff class and would require duplication of and inefficient use of judicial resources.

15. Plaintiff asks this Court to issue its Order, as soon as is practicable, pursuant to S.C.R.C.P. 23(d)(1), allowing this action to be maintained on behalf of all members of the proposed Plaintiff class as described above.

16. Plaintiff requests that this Court, pursuant to S.C.R.C.P. 23(d)(2), direct that notice be given to the members of the proposed class in the best manner practical under the circumstances, including notice to all members who can be identified through reasonable efforts:

- a. That the Court will exclude the members from the class if the member so requests by a specified date; and
- b. That the judgment, whether favorable or not, will bind and include all members of the class who did not request exclusion.

### **FACTS**

17. Upon information and belief, on or about August 27, 2012, third parties infiltrated the database of the South Carolina Department of Revenue and acquired approximately 3.6 million Social Security numbers, approximately 387,000 credit and/or debit card numbers, and a yet unknown number of tax returns and other documents containing personal identifying information.

18. On or about October 10, 2012, the S.C. Division of Information Technology informed the S.C. Department of Revenue and the Nikki Haley administration of the breach.

19. Inexplicably, the persons whose data had been compromised were not notified by Defendants until October 26, 2012.

20. The Social Security numbers stored by Defendants in the database were not encrypted.

**FOR A FIRST CAUSE OF ACTION**  
**(VIOLATION OF S.C. CODE ANN. §1-11-490, BREACH OF SECURITY OF STATE  
AGENCY DATA)**

21. Allegations set forth in Paragraphs 1 through 20 are incorporated by reference in this claim.

22. Pursuant to S.C. Code Ann. § 1-11-490(D)(1), agency "means any agency department, board, commission, committee, or institution of higher learning in the State or a political subdivision of it." Pursuant to S.C. Code Ann. § 1-11-490(D)(2), "'Breach of the security of the system' means unauthorized access to and acquisition of computerized data that was not rendered unusable through encryption, redaction, or other methods that compromise the security, confidentiality, or integrity of personal identifying information maintained by the agency."

23. Pursuant to S.C. Code Ann. § 1-11-490(A), the agency "shall disclose a breach of the security of the system following discovery or notification of the breach in the security of the data to a resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident. The disclosure must be made in the most expedient time possible and without unreasonable delay [ . . . ]"

24. Pursuant to S.C. Code Ann. §16-13-510, "personal identifying information" includes "Social Security number" and "financial account number, or credit card or debit card number in combination with any required security code, access code, or password that would permit access to a resident's financial account," as well as "other numbers or

information which may be used to access a person's financial accounts or numbers or information issued by a governmental or regulatory entity that uniquely will identify an individual."

25. Upon information and belief, this Honorable Court should declare that Defendants have breached S.C. Code Ann. §1-11-490, and pursuant to S.C. Code Ann. §1-11-490(g)(1), Plaintiff is entitled to institute this suit to recover damages.

26. Upon information and belief, this Honorable court should declare that Defendants have knowingly and willfully breached S.C. Code Ann. §1-11-490, and the amount of damages caused by said breach for each violation is to be determined.

27. Upon information and belief, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fees and costs in an amount to be determined by the trier of fact.

**FOR A SECOND CAUSE OF ACTION**  
**(NEGLIGENCE *PER SE*)**

28. Allegations set forth in Paragraphs 1 through 27 are incorporated by reference in this claim for relief.

29. Defendants owe to Plaintiff a duty to comply with S.C. Code Ann. §1-11-490 by rendering data "unusable through encryption, redaction, or other methods" and by disclosing any breach of security of personal identifying information "in the most expedient time possible and without unreasonable delay."

30. Defendants have willfully, wantonly, recklessly, and with gross negligence violated and failed to comply with the duties imposed upon them to encrypt data and to expeditiously disclose the breach of security in accordance with S.C. Code Ann. §1-11-490 and are, therefore, grossly negligent *per se*.

31. As a direct and proximate result of Defendants' gross negligence *per se*, Plaintiff has suffered actual damages and is in imminent danger of suffering further material injury and loss by being placed in a material risk of harm for identity theft.

32. As a result of the above-described gross negligence *per se*, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and costs in an amount to be determined by the trier of fact.

**FOR A THIRD CAUSE OF ACTION**  
**(CIVIL CONSPIRACY)**

33. Allegations set forth in Paragraphs 1 through 32 are incorporated by reference in this claim for relief.

34. Defendants formed a combination to engage in a civil conspiracy for the purpose of harming Plaintiff.

35. As a direct and proximate result of the conspiracy of the Defendants, Plaintiff has suffered special damages.

36. As a result of the above-described civil conspiracy, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fee and costs in an amount to be determined by the trier of fact.

**FOR A FOURTH CAUSE OF ACTION**  
**(GROSS NEGLIGENCE)**

37. Allegations set forth in Paragraphs 1 through 36 are incorporated by reference in this claim for relief.

38. Defendants owed Plaintiff a duty to provide a reasonable standard of care under the circumstances by protecting Plaintiff's personal identifying information, including, but not limited to, the duty to encrypt or otherwise protect said information,



and the duty to expeditiously disclose to Plaintiff that the information had been breached.

39. Defendants have failed to exercise slight care and have willfully, wantonly, recklessly, and with gross negligence breached the standard of care owed to Plaintiff by failing to exercise reasonable care under the circumstances in their handling of Plaintiff's personal identifying information; by failing to properly hire, train, supervise, and retain their employees; and by failing to timely notify Plaintiff that his personal identifying information had been breached; as well as in such other particulars as discovery will disclose.

40. As a direct and proximate result of this negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants, Plaintiff has suffered actual damages and is in imminent danger of suffering further material injury and loss.

41. As a direct and proximate result of the above-described gross negligence, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and costs in an amount to be determined by the trier of fact.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for the following relief, temporarily and permanently:

1. For certification of the class alleged above;
2. For an injunction enforcing Defendants' full compliance with the notification required by S.C. Code Ann. § 1-11-490, including, but not limited to,

disclosing with specificity the nature of the personal identifying information that has become accessible by reason of the breach;

3. For a determination of whether Defendants have knowingly and willfully violated S.C. Code Ann. § 1-11-490(H) so as to be liable for a fine of up to one thousand dollars for each resident whose information has become accessible by reason of the breach.

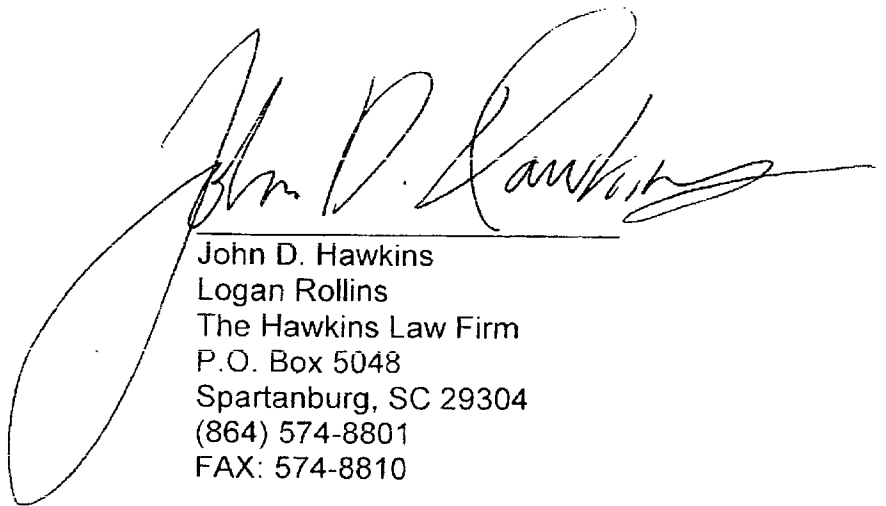
4. For judgment against the Defendants;

5. For actual and incidental damages in an amount to be determined by the trier of fact;

6. For attorney's fees and costs;

7. For a trial by jury;

8. For such other and further relief as this Court deems just and proper.



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Attorneys for the Plaintiff

Spartanburg, South Carolina

October 31, 2012

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan, )

Individually, and on behalf of )  
all similarly situated Plaintiffs, )

v. )

Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina )  
Department of Revenue; South Carolina )  
Division of State Information )  
Technology; Trustwave Corporation; )  
and Trustwave Holdings, Inc. )

Defendants. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

**SUMMONS**

(Jury Trial Demanded)

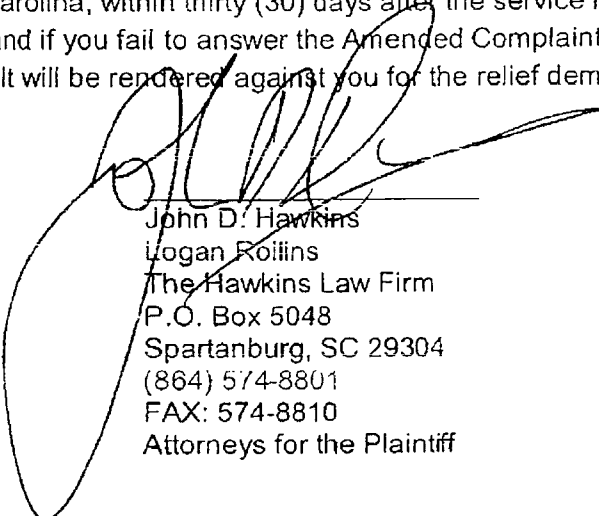
Civil Action No. 2012-CP-40-731

2012 NOV -5 AM 9:33  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

RICHLAND COUNTY  
FILED

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Amended Complaint on the subscriber at his office with an address of P.O. Box 5048, Spartanburg, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

  
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Logan Rollins  
The Hawkins Law Firm  
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FAX: 574-8810  
Attorneys for the Plaintiff

Spartanburg, South Carolina

November 5, 2012

Record on Appeal

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
Phillip Morgan, )  
Individually, and on behalf of )  
all similarly situated Plaintiffs, )  
v. )  
Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina )  
Department of Revenue; South Carolina )  
Division of State Information )  
Technology; Trustwave Corporation; )  
and Trustwave Holdings, Inc. )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

**AMENDED COMPLAINT**  
(Jury Trial Demanded)

Civil Action No. 2012-CP-40-7331

RICHLAND COUNTY  
FILED  
2012 NOV -5 AM 9:33  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

Plaintiff, Phillip Morgan, complaining of the Defendants, alleges as follows:

**PARTIES**

1. Plaintiff Phillip Morgan is a resident and citizen of Spartanburg County, South Carolina.
2. Defendant Nimrata "Nikki" Haley is the Governor of the State of South Carolina.
3. Defendant South Carolina Department of Revenue is an agency of the State of South Carolina, and James F. Etter is the Director of said agency.
4. The South Carolina Division of State Information Technology ("DSIT") is an agency of the State of South Carolina.
5. For jurisdiction and venue purposes, Defendants Haley, Etter, Department of Revenue, and DSIT are residents and citizens of Richland County, South Carolina.

6. Upon information and belief, Defendant Trustwave Corporation ("Trustwave") is a Delaware corporation with its principal place of business at 70 West Madison St., Suite 1050, Chicago, Illinois 60602 and has appointed The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801 as its registered agent for the service of process.

7. Upon information and belief, Defendant Trustwave Holdings, Inc. ("Trustwave Holdings") is a Delaware Corporation with its principal place of business at 70 West Madison Street, Suite 1050, Chicago, Illinois 60602. Trustwave Holdings, Inc. has made The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801 its registered agent for the service of process.

8. Jurisdiction and venue for this case are proper in Richland County, South Carolina.

#### **PROPOSED PLAINTIFF CLASS**

9. The proposed Plaintiff class consists of the following: all persons who currently reside and are domiciled in South Carolina whose personal identifying information including but not limited to, Social Security numbers, credit/debit card information, tax returns, and other personally identifying information was compromised between August 27, 2012 and the present as a result of the acts and omissions of Defendants as stated below.

10. The proposed Plaintiff class is so numerous that joinder of all members is impracticable.

11. There are questions of law and/or fact common to the named Plaintiff and to the proposed Plaintiff class, including but not limited to:

- a. Whether Defendants have violated S.C. Code Ann. §1-11-490.
- b. Whether Defendants are liable to Plaintiff and to the proposed Plaintiff class for violation of S.C. Code Ann. §1-11-490.
- c. Whether the above Defendants knowingly and willfully violated the above statute and are subject to a fine of up to \$1,000.00 for each resident whose information was accessible by reason of said breach.
- d. Whether Defendants were grossly negligent *per se* and grossly negligent as stated below.
- e. Whether Defendants Trustwave and Trustwave Holdings have violated S.C. Code Ann. §39-1-90.
- f. And such other and future particulars to be shown at trial.

12. The claims of the named Plaintiff are typical of the claims of the proposed Plaintiff class members.

13. The defenses of the Defendants to the named Plaintiff's claims are typical of the defenses available against each member of the proposed Plaintiff class.

14. The representative named Plaintiff will fairly and adequately protect the interests of the proposed Plaintiff class.

15. To the extent that the relief sought in this action is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class per the damages allowed by S.C. Code Ann. §1-11-490 and S.C. Code Ann. §39-1-90.

16. Pursuant to S.C. Code Ann. §15-53-130, this action is declaratory in character, as residents of the State are asking for a determination of whether they are entitled to recover damages in accordance with S.C. Code Ann. §1-11-490 and S.C. Code Ann. §39-1-90.

17. A class action is superior to other available methods for the fair and efficient adjudication of the issues in dispute. Upon information and belief, the interests of members of the proposed Plaintiff class in individually controlling the prosecution of separate actions is low, given the small amount at stake (\$2,000.00 or less) for the class members. Further, prosecution of separate actions by individual members of the proposed Plaintiff class could result in inconsistent rulings, requiring incompatible standards of conduct on the part of Defendants and substantially impairing the interests of the proposed Plaintiff class and would require duplication of and inefficient use of judicial resources.

18. Plaintiff asks this Court to issue its Order, as soon as practicable, pursuant to S.C.R.C.P. 23(d)(1), allowing this action to be maintained on behalf of all members of the proposed Plaintiff class as described above.

19. Plaintiff requests that this Court, pursuant to S.C.R.C.P. 23(d)(2), direct that notice be given to the members of the proposed class in the best manner practical under the circumstances, including notice to all members who can be identified through reasonable efforts:

- a. That the Court will exclude the members from the class if the member so requests by a specified date; and

- b. That the judgment, whether favorable or not, will bind and include all members of the class who did not request exclusion.

**FACTS**

20. Upon information and belief, on or about August 27, 2012, third parties infiltrated the database of the South Carolina Department of Revenue and acquired approximately 3.6 million Social Security numbers, approximately 387,000 credit and/or debit card numbers, and a yet unknown number of tax returns and other documents containing personal identifying information.

21. Upon information and belief, Defendants Trustwave and Trustwave Holdings were charged with the duty of securing the personal identifying information.

22. On or about October 10, 2012, the S.C. Division of Information Technology informed the S.C. Department of Revenue and the Nikki Haley administration of the breach.

23. Inexplicably, the persons whose data had been compromised were not notified by Defendants until October 26, 2012. As of the drafting of this Complaint, Trustwave still has not notified victims of the breach.

24. The Social Security numbers stored by Defendants in the database were not encrypted.

**FOR A FIRST CAUSE OF ACTION**  
**(VIOLATION OF S.C. CODE ANN. §1-11-490, BREACH OF SECURITY OF STATE**  
**AGENCY DATA)**  
**(AS TO DEFENDANTS HALEY, ETTER, DEPARTMENT OF REVENUE, AND DSIT)**

25. Allegations set forth in Paragraphs 1 through 24 are incorporated by reference in this claim.



26. Pursuant to S.C. Code Ann. § 1-11-490(D)(1), agency "means any agency, department, board, commission, committee, or institution of higher learning in the State or a political subdivision of it." Pursuant to S.C. Code Ann. § 1-11-490(D)(2), "'Breach of the security of the system' means unauthorized access to and acquisition of computerized data that was not rendered unusable through encryption, redaction, or other methods that compromise the security, confidentiality, or integrity of personal identifying information maintained by the agency."

27. Pursuant to S.C. Code Ann. § 1-11-490(A), the agency "shall disclose a breach of the security of the system following discovery or notification of the breach in the security of the data to a resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident. The disclosure must be made in the most expedient time possible and without unreasonable delay [ . . . ]"

28. Pursuant to S.C. Code Ann. §16-13-510, "personal identifying information" includes "Social Security number" and "financial account number, or credit card or debit card number in combination with any required security code, access code, or password that would permit access to a resident's financial account," as well as "other numbers or information which may be used to access a person's financial accounts or numbers or information issued by a governmental or regulatory entity that uniquely will identify an individual."

29. Upon information and belief, this Honorable Court should declare that Defendants have breached S.C. Code Ann. §1-11-490, and pursuant to S.C. Code Ann. §1-11-490(g)(1), Plaintiff is entitled to institute this suit to recover damages.

30. Upon information and belief, this Honorable Court should declare that Defendants have knowingly and willfully breached S.C. Code Ann. §1-11-490, and the amount of damages caused by said breach for each violation is to be determined.

31. Upon information and belief, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fees and costs in an amount to be determined by the trier of fact.

**FOR A SECOND CAUSE OF ACTION**  
**(GROSS NEGLIGENCE *PER SE*)**  
**(AS TO DEFENDANTS HALEY, ETTER, DEPARTMENT OF REVENUE, AND DSIT)**

32. Allegations set forth in Paragraphs 1 through 31 are incorporated by reference in this claim for relief.

33. Defendants owe to Plaintiff a duty to comply with S.C. Code Ann. §1-11-490 by rendering data "unusable through encryption, redaction, or other methods" and by disclosing any breach of security of personal identifying information "in the most expedient time possible and without unreasonable delay."

34. Defendants have willfully, wantonly, recklessly, and with gross negligence violated and failed to comply with the duties imposed upon them to encrypt data and to expeditiously disclose the breach of security in accordance with S.C. Code Ann. §1-11-490 and are, therefore grossly, negligent *per se*.

35. As a direct and proximate result of Defendants' gross negligence *per se*, Plaintiff has suffered actual damages and is in imminent danger of suffering further material injury and loss by being placed in a material risk of harm for identity theft.

36. As a result of the above-described gross negligence *per se*, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fees and costs in an amount to be determined by the trier of fact.

**FOR A THIRD CAUSE OF ACTION**  
**(CIVIL CONSPIRACY)**  
**(AS TO DEFENDANTS HALEY, ETTER, DEPARTMENT OF REVENUE, DSIT,**  
**TRUSTWAVE, AND TRUSTWAVE HOLDINGS)**

37. Allegations set forth in Paragraphs 1 through 36 are incorporated by reference in this claim for relief.

38. Defendants formed a combination to engage in a civil conspiracy for the purpose of harming Plaintiff.

39. As a direct and proximate result of the conspiracy of the Defendants, Plaintiff has suffered special damages.

40. As a result of the above-described conspiracy, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fees and costs in an amount to be determined by the trier of fact.

**FOR A FOURTH CAUSE OF ACTION**  
**(GROSS NEGLIGENCE)**  
**(AS TO DEFENDANTS HALEY, ETTER, DEPARTMENT OF REVENUE, AND DSIT)**

41. Allegations set forth in Paragraphs 1 through 40 are incorporated by reference in this claim for relief.

42. Defendants owed Plaintiff a duty to provide a reasonable standard of care under the circumstances by protecting Plaintiff's personal identifying information, including, but not limited to, the duty to encrypt or otherwise protect said information, and the duty to expeditiously disclose to Plaintiff that the information had been breached.

43. Defendants have failed to exercise slight care and have willfully, wantonly, recklessly, and with gross negligence breached the standard of care owed to Plaintiff by failing to exercise reasonable care under the circumstances in their handling of Plaintiff's personal identifying information; in their failure to properly hire, train, supervise, and retain their employees; and in failing to timely notify Plaintiff that his personal identifying information had been breached; as well as in such other particulars as discovery will disclose.

44. As a direct and proximate result of this gross negligence, carelessness, recklessness, willfulness, wantonness, and heedlessness of Defendants, Plaintiff has suffered actual damages and is in imminent danger of suffering further material injury and loss.

45. As a direct and proximate result of the above-described gross negligence, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fees and costs in an amount to be determined by the trier of fact.

**FOR A FIFTH CAUSE OF ACTION  
VIOLATION OF S.C. CODE ANN. § 39-1-90  
(AS TO TRUSTWAVE AND TRUSTWAVE HOLDINGS)**

46. Allegations set forth in Paragraphs 1 through 45 are incorporated by reference in this claim.

47. Pursuant to S.C. Code Ann. 39-1-90, "A Person conducting business in this State, and owning or licensing computerized data or other data that includes personal identifying information, shall disclose a breach of the security of the system following discovery or notification of the breach in the security of the data to a resident of this State whose personal identifying information that was not rendered unusable through encryption, redaction, or other methods was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident. The disclosure must be made in the most expedient time possible and without unreasonable delay [ . . . ]"

48. Pursuant to S.C. Code Ann. § 39-1-90(B), "A person conducting business in this State and maintaining computerized data or other data that includes personal identifying information that the person does not own shall notify the owner or licensee of the information of a breach of the security of the data immediately following discovery, if the personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person."

49. Upon information and belief, this Honorable Court should declare that Defendants have breached S.C. Code Ann. §39-1-90, and pursuant to S.C. Code Ann. § 39-1-90(G)(1) and (2), Plaintiffs are entitled to institute this suit to recover damages.

50. Upon information and belief, this Honorable Court should declare that Defendants have knowingly and willfully breached S.C. Code Ann. § 39-1-90(H), and the amount of damages caused by said breach for each violation is to be determined.

51. Upon information and belief, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fees and costs in an amount to be determined by the trier of fact.

**FOR A SIXTH CAUSE OF ACTION**  
**(NEGLIGENCE *PER SE*)**  
**(AS TO TRUSTWAVE AND TRUSTWAVE HOLDINGS)**

52. Allegations set forth in Paragraphs 1 through 51 are incorporated by reference in this claim for relief.

53. Defendants owed to Plaintiff a duty to comply with S.C. Code Ann. §39-1-90 by rendering data "unusable through encryption, redaction, or other methods" and by disclosing any breach of security of personal identifying information "in the most expedient time possible and without unreasonable delay."

54. Defendants have violated and failed to comply with the duties imposed upon them to encrypt data and to expeditiously disclose the breach of security in accordance with S.C. Code Ann. §39-1-90 and are, therefore, negligent *per se*.

55. As a direct and proximate result of Defendants' negligence *per se*, Plaintiff has suffered actual damages and is in imminent danger of suffering further material injury and loss by being placed in a material risk of harm for identity theft.

56. As a result of the above-described negligence *per se*, Plaintiff is entitled to judgment against Defendants for actual damages, incidental damages, and attorney's fees and costs in an amount to be determined by the trier of fact.

damages, incidental damages, punitive damages and attorney's fees and costs in an amount to be determined by the trier of fact.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for the following relief, temporarily and permanently:

1. For certification of the class alleged above;
2. For an injunction enforcing Defendants' full compliance with the notification required by S.C. Code Ann. § 1-11-490 and S.C. Code Ann. §39-1-90 including, but not limited to, disclosing with specificity the nature of the personal identifying information that has become accessible by reason of the breach;
3. For a determination of whether Defendants have knowingly and willfully violated S.C. Code Ann. § 1-11-490(H) and S.C. Code Ann. §39-1-90 so as to be liable for a fine of up to one thousand dollars for each resident whose information has been breached;
4. For judgment against the Defendants;
5. For actual, incidental, and punitive damages in an amount to be determined by a the trier of fact;
6. For attorney's fees and costs;
7. For a trial by jury;
8. For such other and further relief as this Court deems just and proper.

**[SIGNATURE PAGE FOLLOWS]**



John D. Hawkins  
Logan Rollins  
The Hawkins Law Firm  
P.O. Box 5048  
Spartanburg, SC 29304  
(864) 574-8801  
FAX: 574-8810  
Attorneys for the Plaintiff

Spartanburg, South Carolina  
November 5, 2012



STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Phillip Morgan, individually and on  
behalf of all similarly situated plaintiffs,

Plaintiffs,

vs.

Nikki R. Haley, Governor of South  
Carolina; James F. Etter, Director of the  
South Carolina Department of Revenue;  
the South Carolina Department of  
Revenue; South Carolina Division of  
State Information Technology;  
Trustwave Corporation; and Trustwave  
Holdings, Inc.,

Defendants.

Civil Action No. 2012-CP-40-7331

MOTION TO DISMISS OR TO STAY  
CASE

Governor Haley, Director Etter, and the South Carolina Department of Revenue  
move the Court for an order dismissing this case on the following grounds:

**I. Failure to State a Claim**

Plaintiff has failed to plead claims on which relief can be based and, therefore, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6), SCRPC. Among other defects, all claims against these Defendants should be dismissed (1) due to the absence of any recoverable damages and (2) because these Defendants have immunity from suit and Plaintiff's claims are barred by the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.*

In addition, Plaintiff's claims are deficient individually in at least the following ways:

- Plaintiff's claim under South Carolina Code § 1-11-490 fails because, as has been publicized, the breach of the State's databases has been the subject of an ongoing criminal investigation, rendering the Plaintiff's claim void under South Carolina Code § 1-11-490(C).
- Plaintiff's claims for gross negligence *per se* and gross negligence fail because, *inter alia*, the duty alleged in these causes of action has no support in the cited statutes or in the common law.
- Plaintiff's claim for civil conspiracy fails because Plaintiff has not alleged, nor is he able to allege, a single fact that would support the actual elements of this claim. *See, e.g., Lawson v. S.C. Dep't of Corr.*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000) (dismissing a civil conspiracy claim "[b]ecause no special damages are alleged"); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) (holding that a plaintiff "was not entitled to maintain his conspiracy cause of action" because he "merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy").
- Though the issue of class certification has not yet been presented for the Court's review, the South Carolina Code prohibits any class action from being filed against the Department of Revenue.

Accordingly, the Amended Complaint should be dismissed as to these Defendants pursuant to Rule 12(b)(6), SCRPC.

## II. Lack of Subject Matter Jurisdiction

Plaintiff's primary relief sought is a statutory penalty under South Carolina Code § 1-11-490, but the Court lacks subject matter jurisdiction over such relief. This statute specifically provides that any such penalty must be determined by the Department of Consumer Affairs, not by the Judiciary. Accordingly, Plaintiff's First Cause of Action in the Amended Complaint should be dismissed pursuant to Rule 12(b)(1), SCRPC. Alternatively, Plaintiff's failure to present this claim first to the Department of Consumer Affairs amounts to a failure to exhaust his administrative remedies, making dismissal proper for this additional reason.

**III. Need for a More Definite Statement**

The Amended Complaint pleads claims against government officials and identifies them as government officials. The Amended Complaint, however, is not specific with respect to whether these claims are pled against the officials in their official or individual capacities. Certainly, none of these Defendants have done anything beyond act in their official capacities, and no credible argument can be made to the contrary. Nonetheless, the Court should order Plaintiff to clarify this issue so that it can be properly addressed by the Defendants.

**IV. Stay of Litigation**

Alternatively, if the Court finds that dismissal of this action is not appropriate at this time, these Defendants respectfully move the Court for an order staying this case until the close of the ongoing law enforcement investigation regarding the underlying matter so that these efforts are not impaired by this action.

This Motion shall be supported by written memoranda, arguments of counsel, and all other submissions permitted by the Court.

*SIGNATURE PAGE ATTACHED*

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE &  
RICE, LLP

By: 

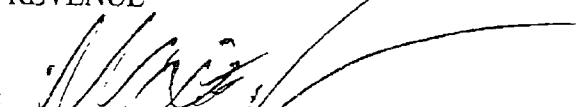
Karl S. Bowers, Jr.  
S.C. Bar No. 16141  
butch.bowers@wcsr.com  
Kevin A. Hall  
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Theodore F. Claypoole  
*Pro Hac Vice Application Forthcoming*  
One Wells Fargo Center  
Suite 3500, 301 South College Street  
Charlotte, NC 28202-6037  
(704) 331-4910

Attorneys for Governor Nikki R. Haley

December 6, 2012  
Columbia, South Carolina

SOUTH CAROLINA DEPARTMENT OF  
REVENUE

By: 

Milton G. Kimpson  
S.C. Bar No.  
KimpsoM@sctax.org  
Post Office Box 12265  
Columbia, South Carolina 29211  
(803) 898-5131

Attorneys for Director James F. Etter and  
South Carolina Department of Revenue

### CERTIFICATE OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Carlyle Sandridge & Rice LLP, attorneys for Governor Nikki Haley, do hereby certify that I have served all parties in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

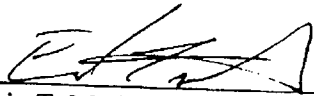
Pleading:

**MOTION TO DISMISS OR TO STAY CASE**

Parties Served:

John D. Hawkins, Esq.  
C. Logan Rollins, Esq.  
The Hawkins Law Firm  
Post Office Box 5048  
Spartanburg, SC 29304

Robert E. Stepp, Esq.  
Sowell Gray  
Post Office Box 11449  
Columbia, SC 29211

  
\_\_\_\_\_  
Edwin T. Mathis

December 6, 2012

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
Philip Morgan, Individually, and on behalf of all  
similarly situated Plaintiffs,  
[ ] Plaintiffs,

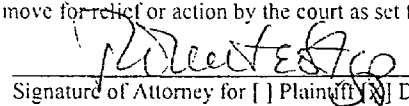
vs.

Nimrata "Nikki" Haley, Governor of South Carolina;  
James F. Etter, Director of the South Carolina  
Department of Revenue; the South Carolina  
Department of Revenue; South Carolina Division of  
State Information Technology; Trustwave Corporation;  
and Trustwave Holdings, LLC,  
[X] Defendants.

Check box above indicating submitting party

IN THE [X] COURT OF COMMON PLEAS  
[ ] FAMILY COURT  
Civil Action No. 2012-CP-40-7331

**MOTION AND ORDER INFORMATION FORM  
AND COVER SHEET**

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <u>name, SC Bar no. and address of plaintiff's attorney</u><br>e-mail: other:<br>John D. Hawkins, Esquire<br>C. Logan Rollins, Esquire<br>The Hawkins Law Firm<br>Post Office Box 5048<br>Spartanburg, South Carolina 29304                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <u>name, SC Bar no. and address of defendant's attorney</u><br>e-mail: other:<br>Robert E. Stepp, SC Bar #5335<br>Robert E. Tyson, Jr., SC Bar #10820<br>Bess J. DuRant, SC Bar #77920<br>Sowell Gray Stepp & Laflitte<br>1310 Gadsden Street<br>Columbia, South Carolina 29201<br>Telephone: 803-929-1400<br>Fax: 803-929-0300<br>Email: <a href="mailto:rstepp@sowellgray.com">rstepp@sowellgray.com</a><br><a href="mailto:ryson@sowellgray.com">ryson@sowellgray.com</a><br><a href="mailto:bdurant@sowellgray.com">bdurant@sowellgray.com</a> |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete SECTIONS II and III)<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: Motion to Dismiss<br>Estimated Time Needed: 30 minutes Court Reporter Needed: YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>SECTION II: Motion Type</b><br><input type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion:<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="text-align: center;"><span style="margin-left: 100px;">12/4/12</span></div> <div style="display: flex; justify-content: space-between;"><span>Signature of Attorney for <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant</span><span>Date Submitted</span></div>                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>SECTION III: Motion Fee</b><br><input checked="" type="checkbox"/> <b>PAID - AMOUNT:</b> <u>\$25.00</u><br>(check reason) <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post Conviction Relief<br><input type="checkbox"/> Motion for Stay in Bankruptcy<br><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)<br><input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions<br>Name of Court Reporter: _____<br><input type="checkbox"/> Other: |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>JUDGE</b> _____<br><b>CODE:</b> _____ <b>Date:</b> _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

CLERK'S VERIFICATION

DATE FILED

Collected by: \_\_\_\_\_  
(print name)

☐ MOTION FEE COLLECTED: \_\_\_\_\_

☐ CONTESTED - AMOUNT DUE: \_\_\_\_\_

SCCA/233 (1/2003)

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) |                                  |
| COUNTY OF RICHLAND                       | ) | IN THE FIFTH JUDICIAL CIRCUIT    |
|                                          | ) |                                  |
| Phillip Morgan,                          | ) | Civil Action No. 2012-CP-40-7331 |
| Individually, and on behalf of           | ) |                                  |
| all similarly situated Plaintiffs,       | ) |                                  |
|                                          | ) |                                  |
|                                          | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) |                                  |
| vs.                                      | ) |                                  |
|                                          | ) | <b><u>MOTION TO DISMISS</u></b>  |
| Nimrata "Nikki" Haley, Governor of       | ) |                                  |
| South Carolina; James F. Etter, Director | ) |                                  |
| of the South Carolina Department of      | ) |                                  |
| Revenue; the South Carolina Department   | ) |                                  |
| of Revenue; South Carolina Division of   | ) |                                  |
| State Information Technology; Trustwave  | ) |                                  |
| Corporation; and Trustwave Holdings,     | ) |                                  |
| LLC,                                     | ) |                                  |
|                                          | ) |                                  |
| Defendants.                              | ) |                                  |
|                                          | ) |                                  |

Defendant South Carolina Division of State Information Technology ("DSIT") hereby moves for an Order dismissing all claims asserted against it in the captioned action for the following reasons:

1. Plaintiff lacks standing to sue because the complaint fails to allege that he has suffered any legally cognizable injury in fact.
2. The complaint fails to allege facts sufficient to constitute a cause of action because it fails to allege that Plaintiff has suffered any injury or damage.
3. The complaint fails to state facts sufficient to constitute a cause of action under S.C. Code Ann. §1-11-490 because DSI neither owns nor maintains the data that is alleged to have been acquired by a third party.



4. The complaint fails to state facts sufficient to constitute a cause of action under S.C. Code Ann. §1-11-490 because the statute imposes no duty on DSIT to take any action in connection with the alleged breach of the security system that is the subject of the complaint.
5. This Court lacks subject matter jurisdiction to impose a fine or grant any other relief pursuant to the provisions of S.C. Code Ann. §1-11-490(H).
6. The complaint fails to state facts sufficient to constitute a cause of action under S.C. Code Ann. §1-11-490(H).
7. The complaint fails to state facts sufficient to constitute a cause of action under S.C. Code Ann. §1-11-490(G) because the complaint does not allege that Plaintiff has suffered any legally cognizable injury proximately caused by the alleged failure to notify within the time permitted by the statute.
8. The complaint fails to state facts sufficient to constitute any cause of action sounding in tort because any such claims are barred or limited by S.C. Code Ann. §15-78-10 *et seq.*
9. The complaint fails to state facts sufficient to constitute any cause of action sounding in tort because to the extent that any injuries are alleged or implied in the complaint, they are purely economic, and tort claims may not be used to recover purely economic losses.
10. The complaint fails to state facts sufficient to constitute a cause of action for gross negligence per se because as a matter of law, a violation of S.C. Code Ann. § 1-11-490 is not negligence per se.
11. The complaint fails to state facts sufficient to constitute a cause of action for gross negligence or gross negligence per se because as matter of law DSIT owes no duties to Plaintiff

or to the public for the matters set out in the complaint and is not vicariously liable as a matter of law for any alleged acts or omissions of third parties, including but not limited to vendors.

12. The complaint fails to allege facts sufficient to constitute a cause of action for civil conspiracy because it fails to allege any separate acts or omissions as a part of the conspiracy.

13. The complaint fails to allege facts sufficient to constitute a cause of action for civil conspiracy because it fails to allege that DSIT acted with the intention of harming Plaintiff.

14. The complaint fails to allege facts sufficient to constitute a cause of action for civil conspiracy because any damages that might be recovered under this cause of action could also be recovered under one or more of the other causes of action in the complaint.

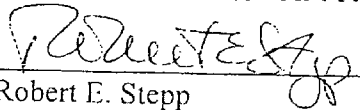
15. The complaint fails to allege facts sufficient to constitute a cause of action for civil conspiracy because it does not allege any special damages proximately caused by the conspiracy.

16. The complaint fails to allege facts sufficient to constitute a cause of action for civil conspiracy against DSIT based upon alleged concerted action with any other agency of the State on the ground that such agencies may not conspire with each other as a matter of law pursuant to the intra-corporate conspiracy doctrine.

17. The complaint fails to allege facts sufficient to constitute a cause of action triable by jury.

[Signature on following page]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Robert E. Stepp

Robert E. Tyson, Jr.

Bess J. DuRant

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

*Attorneys for Defendant South Division of State  
Information Technology*

Columbia, South Carolina  
December 4, 2012

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) IN THE FIFTH JUDICIAL CIRCUIT

Phillip Morgan, ) Civil Action No. 2012-CP-40-7331  
Individually, and on behalf of )  
all similarly situated Plaintiffs, )  
Plaintiffs, )

vs. )

**CERTIFICATE OF SERVICE**

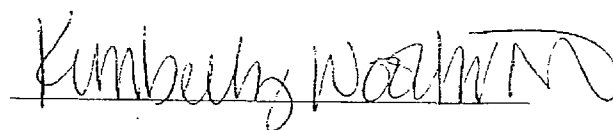
Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina Department )  
of Revenue; South Carolina Division of )  
State Information Technology; Trustwave )  
Corporation; and Trustwave Holdings, )  
LLC, )  
Defendants. )

I, the undersigned Paralegal of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant South Carolina Division of State Information Technology do hereby certify that I have served all counsel in this action with a copy of the document specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

**Pleadings: MOTION TO DISMISS**

**Parties Served:** John D. Hawkins, Esquire  
C. Logan Rollins, Esquire  
The Hawkins Law Firm  
Post Office Box 5048  
Spartanburg, South Carolina 29304  
*Attorneys for the Plaintiff*

Butch Bowers  
Womble Carlyle Sandridge & Rice, LLP  
1727 Hampton Street  
Columbia, SC 29201

A handwritten signature in black ink, appearing to read "Kimberly Woodworth", written over a horizontal line.

Kimberly Woodworth

Columbia, South Carolina

December 4, 2012

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan, Individually and on behalf of  
all similarly situated Plaintiffs,

Plaintiff, )

vs. )

Nimrata "Nikki" Haley, Governor of South  
Carolina, James F. Etter, Director of the South  
Carolina Department of Revenue, the South  
Carolina Department of Revenue, South  
Carolina Division of State Information  
Technology, Trustwave Corporation and  
Trustwave Holdings, Inc.,

Defendants. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2012 -CP-40-7331

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

Plaintiff's Attorney:

John D. Hawkins, Bar No. \_\_\_\_\_

Address:

P.O. Box 5048, Spartanburg, SC 29304

Phone: 864-574-8801 Fax \_\_\_\_\_

E-mail: john@hawkinslawsc.com Other: \_\_\_\_\_

Defendant's Attorney:

James G. Long, III, Bar No. 64103

Address:

P.O. Drawer 2426, Columbia, SC 29202

Phone: 803-253-8224 Fax 803-727-1460

E-mail: jlong@nexsenpruet.com Other: \_\_\_\_\_

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

**SECTION I: Hearing Information**

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 60 minutes

Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

December 21, 2012

Date submitted

**SECTION III: Motion Fee**

☒ **PAID - AMOUNT:** \$ 25.00

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

☐ Other: \_\_\_\_\_

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached  
order.

☐ Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

Record on Appeal

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

☐ MOTION FEE COLLECTED: \$ \_\_\_\_\_

☐ CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE CIRCUIT COURT

Phillip Morgan, Individually and on behalf of  
all similarly situated Plaintiffs,

Case No. 2012-CP-40-7331

Plaintiff,

**NOTICE OF MOTION  
AND MOTION TO DISMISS**

vs.

Nimrata "Nikki" Haley, Governor of South  
Carolina; James F. Etter, Director of the South  
Carolina Department of Revenue; the South  
Carolina Department of Revenue; South  
Carolina Division of State Information  
Technology; Trustwave Corporation and  
Trustwave Holdings, Inc.,

Defendants.

TO THE PLAINTIFF AND HIS ATTORNEY, JOHN HAWKINS, ESQ.:

YOU WILL PLEASE TAKE NOTICE that the Defendants Trustwave Holdings, Inc. and Trustwave Corporation (herein Trustwave Defendants) will, within ten days of the date hereof or as soon thereafter as may be heard, move before the Presiding Judge of the Richland County Circuit Court, Court of Common Pleas, in the Fifth Judicial Circuit, for an Order dismissing this action against the Trustwave Defendants pursuant to Rule 12 of the South Carolina Rules of Civil Procedure. By way of background, the Trustwave Defendants would show as follows:

1. The Plaintiff filed his Amended Complaint on November 5, 2012. As evidenced by the Affidavit of Process Server filed with the Court on November 27, 2012, the Plaintiff purported to serve Trustwave Holdings, Inc. with a letter, summons, and amended complaint by personal service on November 13, 2012. *See* Affidavit of Process Server, attached as **Exhibit A**. The personal service was affected on a Marci Johnson at 630 Davis, Suite 300, Evanston,



Illinois. The affidavit further identifies the person served as “Marci Johnson, Secretary, Authorized to Accept Service.”

2. As properly identified in the Amended Complaint, Trustwave Holdings, Inc., is a Delaware Corporation with its principal place of business at 70 West Madison Street, Suite 1050, Chicago, Illinois, with the Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware, as its identified registered agent and registered address. *See* Amended Compl. at ¶7.

3. Defendant Trustwave Corporation is not an entity in existence and, as of August 8, 2011, has been identified as “dissolved” by the Delaware Secretary of State. Attached as **Exhibit B** is the affidavit of Alice Geene, General Counsel for Trustwave Holdings, Inc., which sets forth the history and current status of Trustwave Corporation.

4. The Plaintiff failed to serve Trustwave Holdings, Inc. at its corporate offices or any registered agent for Trustwave Holdings, Inc., and made no attempt to serve Trustwave Corporation, instead alleging that the attempted service on Trustwave Holdings, Inc. is effective as to serving the defunct Trustwave Corporation.

5. According to the records of the Richland County Clerk of Court, the Plaintiff filed an Affidavit of Default and Motion for Damages against both Trustwave Defendants on December 18, 2012, the 35<sup>th</sup> day after the purported service on Trustwave Holdings, Inc.

6. Also on December 18, 2012, counsel for the Trustwave Defendants contacted counsel for the Plaintiff to discuss the lack of proper service and the timing for responsive pleadings. Because the Plaintiff’s attorney did not have the authority to discuss the matter with counsel, the call was followed up and formalized with a letter dated December 19, 2012, explaining the defects in the service on the Trustwave Defendants and asking that the Plaintiff

agree to discontinue attempts to hold the Trustwave Defendants in default and allow responsive pleadings. *See* 12/19/12 Letter J. Long to J. Hawkins and L. Rollins, attached as **Exhibit C**.

7. Having had no response to these inquiries and understanding that time is of the essence to inform the Court of this inaccuracy of default and needing to respond to the Amended Complaint, these Trustwave Defendants move pursuant to Rule 12, SCRCF, for an Order dismissing this action for the reasons set forth hereinbelow.

8. As to the Defendant Trustwave Holdings, Inc., dismissal of this action is appropriate pursuant to subsections (5) and (6) of Rule 12(b), SCRCF. As a foreign corporation purportedly having done business in South Carolina, the Plaintiff must serve Trustwave Holdings, Inc., pursuant to Rule 4(d)(3), SCRCF.<sup>1</sup> Under Rule 4(d)(3), SCRCF, service may be affected by delivering a copy of the pleadings “to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . .” *Id.* Ms. Marci Johnson does not meet any of the criteria identified in Rule 4(d)(3), SCRCF, in that Ms. Johnson is not an officer, managing or general agent, or an agent authorized by Trustwave Holdings, Inc., to receive service. *See* Affidavit of Ms. Geene at **Exhibit B**.

9. As has been discovered by counsel for Trustwave Holdings, Inc., since learning of this lawsuit, Ms. Johnson was at the time of the service an employee of Arland Energy Systems, LLC, whose business address is 630 Davis Street, Evanston, Illinois, the address of service. *See* **Exhibit C**.

10. Despite identifying the proper Delaware registered agent for service of process for Trustwave Holdings, Inc., in the Amended Complaint, the Plaintiff apparently attempted to serve

---

<sup>1</sup> In the alternative, arguably the Plaintiff could have served Trustwave Holdings, Inc., according to S.C. Code Ann. § 15-9-245 (Rev. 2005), allowing service of process on the South Carolina Secretary of State for certain foreign businesses. The Plaintiff did not attempt service pursuant to this statute.

the registered agent for Trustwave Holdings, Inc., on the records of the Illinois Secretary of State, Eric Decatur.

11. At the time of the filing of this action, the records of the Illinois Secretary of State identified Eric Decatur as the registered agent for Trustwave Holdings, Inc., with a registered address of 70 West Madison Street, Suite 4100, Chicago Illinois.

12. As evidenced by Ms. Geene's Affidavit, Trustwave Holdings, Inc.'s registered agent, Eric Decatur, had no authority to expand the persons eligible to accept service of process for Trustwave Holdings, Inc., or to change the registered address for service. Marci Johnson was not authorized to accept service on behalf of Trustwave Holdings, Inc.

13. Under South Carolina law, authority to accept service can only be granted or extended by the intentions of the principal; apparent authority "is established based upon manifestations by the principal, not the agent." *Roberson v. Southern Finance of S.C., Inc.*, 365 S.C. 6, 11, 615 S.E.2d 112, 115 (2005). As in the *Roberson* matter, where the defendant was determined not to have authorized the person served to accept service, there is no evidence that Trustwave Holdings, Inc. had authorized Ms. Johnson to accept service of process on its behalf. Because Ms. Johnson was not authorized to accept service of process on behalf of Trustwave Holdings, Inc., the attempted service on this Defendant was deficient and the matter should be dismissed as to Trustwave Holdings, Inc.

14. In the alternative, the Amended Complaint fails to allege facts sufficient to constitute a cause of action against Trustwave Holdings, Inc. for the following reasons:

- (a) Plaintiff lacks standing to sue because the complaint fails to allege that Plaintiff has suffered a legally cognizable injury-in-fact.
- (b) The Amended Complaint fails to plead facts that establish a cause of action under S.C. Code Ann. § 39-1-90 because Trustwave Holdings, Inc. does not own, hold a license for, or maintain the data that a third party

allegedly acquired. Moreover, the statute imposes no duty on Trustwave Holdings, Inc. to take any action in connection with the alleged breach of the security system that is the subject of the complaint.

- (c) The Amended Complaint fails to plead facts that establish a cause of action under S.C. Code Ann. § 39-1-90(H) because Trustwave Holdings, Inc. has not knowingly or willfully violated S.C. Code Ann. § 39-1-90.
- (d) The Amended Complaint fails to plead facts that establish a cause of action under S.C. Code Ann. § 39-1-90(G) because the complaint does not allege that Plaintiff has suffered any legally cognizable injury proximately caused by the alleged failure to notify within the time permitted by the statute.
- (e) The Amended Complaint fails to plead facts that establish any cause of action in tort because it fails to allege that Plaintiff has suffered any injury or damages. An increased risk of harm is not an injury itself, but rather an element of damages that is recoverable from a present injury.
- (f) The Amended Complaint fails to plead facts that establish any cause of action in tort because any injuries that the complaint alleges or implies are purely economic, and the Economic Loss Rule bars recovery of purely economic losses.
- (g) The Amended Complaint fails to plead facts that establish a cause of action for negligence or negligence *per se* because, as a matter of law, Trustwave Holdings, Inc. owes no duties to Plaintiff or to the public in connection with the matters set out in the complaint.
- (h) The Amended Complaint fails to plead facts that establish a cause of action for negligence *per se* because, as a matter of law, a violation of S.C. Code Ann. § 39-1-90 is not negligence *per se*. Moreover, the Amended Complaint has not pled facts indicating that Trustwave Holdings, Inc. violated any statute.
- (i) The Amended Complaint fails to plead facts that establish a cause of action for civil conspiracy because it fails to allege any separate acts or omissions in connection with the conspiracy. In addition, any damages that might be recovered under this cause of action could also be recovered under one or more of the other causes of action in the complaint. Furthermore, the Amended Complaint does not allege any special damages that the conspiracy has proximately caused.
- (j) The Amended Complaint fails to allege facts sufficient to establish a cause of action triable by jury.

15. As to the Defendant Trustwave Corporation, dismissal of this action is appropriate pursuant to subsections (2), (5), and (6) of Rule 12(b), SCRPC.

16. The Plaintiff must establish that the Court can exercise jurisdiction personally over Trustwave Corporation and that the entity was properly served. Necessitating dismissal under Rules 12(b)(2) and (5), SCRPC, are the facts that this Court has no jurisdiction over the dissolved Delaware Corporation and at no time did the Corporation have ties with or do business in the State of South Carolina. *See* Affidavit of Alice Geene, General Counsel, at **Exhibit B**.

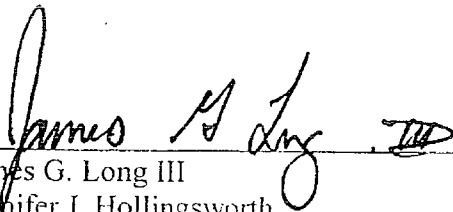
17. Moreover, the service on Trustwave Holdings, Inc., a separate corporate entity, regardless of whether proper under the Rules of Procedure or not, is not service on Trustwave Corporation and, in fact, the Affidavit of Process Server makes no reference to service on Trustwave Corporation. Because Trustwave Corporation is not a proper defendant to this action and has not been properly served with process, the action should be dismissed as to this Defendant.

18. In the event the Court reaches the issue of whether the Amended Complaint should be dismissed against Trustwave Corporation pursuant to Rule 12(b)(6), Trustwave Corporation adopts and incorporates herein subparagraphs 14(a) through (j) above as if repeated herein verbatim and applied to Trustwave Corporation.

19. The Trustwave Defendants respectfully request this Court issue its Order dismissing from this action the Defendants herein identified and modifying the caption to represent the proper parties to this lawsuit.

20. This Motion will be further supported by a Memorandum of Law at the hearing on this matter. While Rule 11, SCRPC, does not require consultation prior to filing a motion to

dismiss, counsel did make a concerted and good faith effort to resolve the issue of service with the Plaintiff's counsel prior to filing this Motion.

  
James G. Long III  
Jennifer J. Hollingsworth  
NEXSEN PRUET, LLC  
1230 Main Street, Suite 700 (29201)  
Post Office Drawer 2426  
Columbia, SC 29202  
803.771.8900

Attorneys for Defendants  
Trustwave Holdings, Inc. and  
Trustwave Corporation

December 21, 2012  
Columbia, South Carolina

**CERTIFICATE OF SERVICE**

This is to certify that the foregoing Motion to Dismiss has been served on counsel of record by U.S. Mail postage prepaid addressed as shown below this 21<sup>st</sup> day of December, 2012:

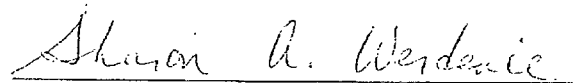
John D. Hawkins, Esquire  
C. Logan Rollins, Esquire  
The Hawkins Law Firm  
Post Office Box 5048  
Spartanburg, SC 29304

Karl S. Bowers, Esquire  
Womble Carlyle Sandridge & Rice, LLP  
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Columbia, SC 29201

Theodore F. Claypoole, Esquire  
One Wells Fargo Center  
301 South College Street, Suite 3500  
Charlotte, NC 28202-6037

Milton G. Kimpson, Esquire  
South Carolina Department of Revenue  
Post Office Box 12265  
Columbia, SC 29211

Robert E. Stepp, Esquire  
Robert E. Tyson, Jr., Esquire  
Bess J. DuRant, Esquire  
Sowell Gray Stepp & Laffitte  
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Sharon A. Werdenie  
Legal Assistant to James G. Long III  
NEXSEN PRUET, LLC  
Post Office Drawer 2426 (29202)  
1230 Main Street, Suite 700  
Columbia, SC 29201  
(803) 771-8900

# EXHIBIT A





# EXHIBIT B

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

Phillip Morgan,

Plaintiff,

v.

Nimrata "Nikki" Haley, in her Official  
Capacity as Governor of South Carolina, James  
F. Etter, in his Official Capacity as Director of  
The South Carolina Department of Revenue;  
South Carolina Division of State Information  
Technology; Trustwave Corp.; Trustwave  
Holdings, Inc.,

Defendants.

Civil Action No. 2012-CP-40-7331

**AFFIDAVIT OF  
ALICE LIN GEENE, ESQUIRE**

I, Alice Lin Geene, Esq., submit this Declaration on behalf of Trustwave Holdings, Inc.,  
and declare as follows:

1. I have personal knowledge of the facts set forth in this declaration, and could competently testify to them if called as a witness.
2. I am currently General Counsel for Trustwave Holdings, Inc. ("Trustwave Holdings"). Trustwave Holdings is a Delaware Corporation with its principal place of business at 70 West Madison Street, Suite 1050, Chicago, IL 60602.
3. I assumed the position of General Counsel in September 2012. Prior to joining Trustwave Holdings, I was Group Vice President and Interim General Counsel at Orbitz Worldwide, Inc. As General Counsel, I am responsible for all of Trustwave Holdings' global legal matters and the company's internal risk and compliance teams.

### **Trustwave Corporation**

4. As General Counsel and a member of Trustwave Holdings' management, I am familiar with Trustwave Holdings' corporate structure and the corporate entities that have operated within it, including Trustwave Corporation.

5. Trustwave Corporation was incorporated in the State of Delaware, but no longer exists today. Trustwave Corporation and Ambiron, LLC (an Illinois liability company) were previously separate companies in the payment card industry compliance business. In April 2005, Trustwave Corporation and Ambiron, LLC combined their businesses through a transaction under which each company contributed all of its assets to Trustwave Holdings. Following that transaction, Trustwave Holdings became the operating entity for the company comprising the former Trustwave Corporation and Ambiron, LLC businesses. Trustwave Corporation was dissolved by the Delaware Secretary of State on August 8, 2011. Attached as **Exhibit A** is a true and accurate copy of the Certificate of Dissolution of Trustwave Corporation that is on file with the State of Delaware. As a result, Trustwave Corporation has not legally existed since August 8, 2011.

6. I am familiar with the contracts pursuant to which certain Trustwave Holdings' products and services were provided to the South Carolina Department of Revenue. The signatories to these contracts were Ambiron Trustwave and Trustwave Holdings, Inc. For a period of time, Trustwave Holdings, Inc. did business as Ambiron Trustwave. Ambiron Trustwave is not a legal entity distinct from Trustwave Holdings, Inc.

7. Trustwave Corporation was not a party to any contracts related to the provision of Trustwave Holdings' products or services to the South Carolina Department of Revenue. To my knowledge, Trustwave Corporation has not had any contacts or business dealings in the State of South Carolina since at least 2005, if ever.

### **Registered Agent**

8. As General Counsel, I am familiar with the registered agent for Trustwave Holdings for service of process in the State of Illinois.

9. On November 13, 2012, Trustwave Holdings' registered agent for the State of Illinois was Eric R. Decator, and the registered agent's address was 70 West Madison Street, Suite 4100, Chicago, IL 60602.

10. I have reviewed the Affidavit of Process Server filed by the Plaintiff in this matter and understand that the Plaintiff contends that a letter, summons and amended complaint intended for Trustwave Holdings was purportedly served on Marci Johnson at the address of 630 Davis Street, Suite 300, Evanston, IL 60201 on November 13, 2012.

11. Prior to reviewing the Plaintiff's Affidavit of Process Server, I was not familiar with Ms. Johnson, but since that time, I have learned that at the time of attempted service, Ms. Johnson was an employee of Arland Energy Systems, LLC, which has a business address of 630 Davis Street, Evanston, IL 60201.

12. Arland Energy Systems, LLC, has no corporate affiliation with Trustwave Holdings.

13. Ms. Johnson was not an employee, officer or agent of Trustwave Holdings on November 13, 2012, and there is no evidence or record indicating that Ms. Johnson has, or ever been, an employee, officer or agent of Trustwave Holdings.

14. Ms. Johnson also did not have authority to accept service on behalf of Trustwave Holdings, and Mr. Decator did not have authority from Trustwave Holdings to grant Ms. Johnson, or anyone else, the authority to accept such service, or to change the registered address for service.

15. I am not familiar with the address of 630 Davis Street, Suite 300, Evanston, IL 60201, and no authorization was provided by Trustwave Holdings to change the registered address for services of process to that location.

16. The State of Delaware registered agent for service of process for Trustwave Holdings is The Corporation Trust Company, with an address of Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

17. I declare under penalty of perjury under the applicable laws that the foregoing is true and correct and that this Declaration was executed December 21, 2012, in Chicago, Illinois.

*Alice Lin Geene*

Alice Lin Geene, Esq.  
General Counsel  
Trustwave Holdings, Inc.

Sworn to and subscribed before me  
This 21<sup>st</sup> Day of December, 2012

*Mar Tenas Bastida*, L.S.  
Notary Public for the State of Illinois  
My commission expires: 4/05/2014

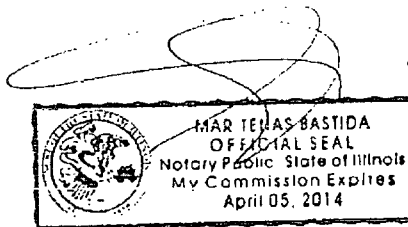


**EXHIBIT A TO**  
**AFFIDAVIT OF ALICE LIN GEENE, ESQUIRE**

# Delaware

PAGE 1

*The First State*

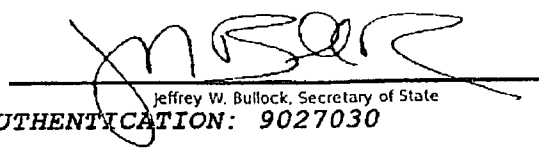
I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF DISSOLUTION OF "TRUSTWAVE CORPORATION", FILED IN THIS OFFICE ON THE EIGHTH DAY OF AUGUST, A.D. 2011, AT 6:10 O'CLOCK P.M.



3786912 8100

111004459

You may verify this certificate online  
at [corp.delaware.gov/authver.shtml](http://corp.delaware.gov/authver.shtml)

  
Jeffrey W. Bullock, Secretary of State  
AUTHENTICATION: 9027030

DATE: 09-14-11

Record on Appeal

56



CERTIFICATE OF DISSOLUTION

OF

TRUSTWAVE CORPORATION

\* \* \* \* \*

*Adopted in accordance with the provisions  
of §275(c) of the General Corporation  
Law of the State of Delaware*

\* \* \* \* \*

Justin Choi, being the President of Trustwave Corporation, a corporation duly authorized and existing under and by virtue of the General Corporation Law of the State of Delaware, does hereby certify as follows:

**FIRST:** The name of the corporation is Trustwave Corporation (the "Corporation"), and its original Certificate of Incorporation was filed on April 6, 2004 with the Delaware Secretary of State.

**SECOND:** In accordance with §228 and §275(c) of the General Corporation Law of the State of Delaware, the liquidation and dissolution of the Corporation was duly approved and adopted on August 8, 2011 by written consent signed by the holder of all of the issued and outstanding shares of capital stock entitled to vote thereon of the Corporation.

**THIRD:** The names and addresses of the directors and officers of the Corporation are as follows:

| <u>NAME AND ADDRESS</u>                                         | <u>TITLE</u>           |
|-----------------------------------------------------------------|------------------------|
| Justin Choi<br>70 W. Madison, Suite 1050<br>Chicago, IL 60602   | Director and President |
| Phillip Smith<br>70 W. Madison, Suite 1050<br>Chicago, IL 60602 | Director and Secretary |

**FOURTH:** The dissolution of the Corporation shall be deemed effective immediately upon the filing of the Certificate of Dissolution with the Secretary of State of Delaware.

\* \* \* \* \*

IN WITNESS WHEREOF, the undersigned, being the duly elected and qualified President of the Corporation hereinabove named, for the purpose of effecting the dissolution of the Corporation pursuant to the laws of the State of Delaware, under penalties of perjury, does hereby declare and certify that this is the act and deed of the Corporation and the facts stated herein are true, and accordingly has hereunto signed this Certificate of Dissolution as of the 8th day of August, 2011.

TRUSTWAVE CORPORATION

By: /s/ Justin Choi  
Name: Justin Choi  
Title: President

# EXHIBIT C

December 19, 2012

**VIA E-MAIL**

John D. Hawkins, Esquire  
C. Logan Rollins II, Esquire  
The Hawkins Law Firm  
P.O. Box 5048  
Spartanburg, SC 29304

Re: Phillip Morgan, Individually, and on behalf of all similarly situated Plaintiffs v. Nimrata "Nikki" Haley, Governor of South Carolina, James F. Etter, Director of the South Carolina Department of Revenue; the South Carolina Department of Revenue, South Carolina Division of State Information Technology, Trustwave Corporation, and Trustwave Holdings, Inc.  
Civil Action No. 2012-CP-40-7331

Charleston

Charlotte

**Columbia**

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Dear John and Logan:

I spoke with Logan yesterday. First, I want to confirm that Nexsen Pruet represents Trustwave Holdings in the above referenced case. Trustwave Holdings is located at the address identified in the Complaint which is 70 West Madison Street, Suite 1050, Chicago, IL. Trustwave has not been served with the Morgan complaint. As shown in the affidavit of service, the Complaint was served on Marci Johnson at 630 Evans Street, Suite 300, in Evanston, IL. Ms. Johnson is an employee of Arland Energy Systems and Arland's office is located at 630 Evans Street, Suite 300 in Evanston. Attached to the letter are two internet yellow page cites showing Arland Energy Systems located at this address in Evanston, IL. In addition, I have confirmed that Marci Johnson was an employee of Arland Energy Systems in November 2012 and that Arland Energy has no relationship with Trustwave Holdings or Trustwave Corporation.

With this new information, it is clear that service was deficient and therefore, the affidavit of default is not proper. I would hope we could agree that you would withdraw the affidavit of default and motion for damages. I will accept service of the Complaint on behalf of Trustwave. Because it involves default, I cannot let this

1230 Main Street  
Suite 700 (29201)  
PO Drawer 2426  
Columbia, SC 29202  
www.nexsenpruet.com

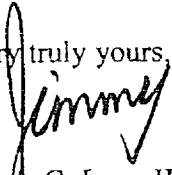
T 803.253.8224  
F 803.727.1460  
E JLong@nexsenpruet.com  
Nexsen Pruet, LLC  
**Attorneys and Counselors at Law**

John D. Hawkins  
Logan Rollins  
December 19, 2012  
Page 2

linger so I need a prompt response. My phone number is 803-253-8224 and my email address is [jlong@nexsenpruet.com](mailto:jlong@nexsenpruet.com).

I look forward to working with you.

Very truly yours,



James G. Long III

JGL/saw

Enclosures

## Arland Energy Systems LLC

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630 Davis St, Ste 300, Evanston, IL 60201  
(847) 868-8575

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## Arland Energy Systems LLC

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Evanston, IL 60201

**(847) 868-8575**

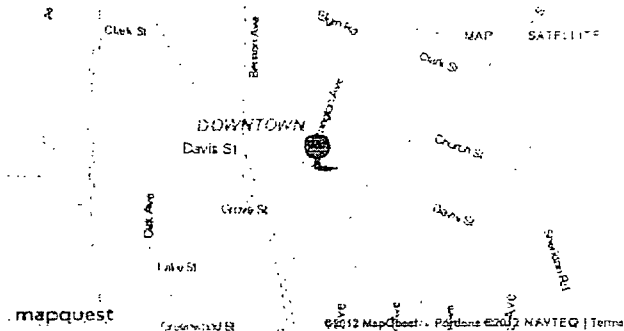
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|                         |   |                               |
|-------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS  |
|                         | ) |                               |
| COUNTY OF RICHLAND      | ) | IN THE FIFTH JUDICIAL CIRCUIT |

|                                    |   |                                  |
|------------------------------------|---|----------------------------------|
| Phillip Morgan,                    | ) | Civil Action No. 2012-CP-40-7331 |
| Individually, and on behalf of     | ) |                                  |
| all similarly situated Plaintiffs, | ) |                                  |

Plaintiffs,

vs.

**SOUTH CAROLINA DIVISION OF  
STATE INFORMATION  
TECHNOLOGY'S RESPONSES TO  
PLAINTIFF'S FIRST REQUESTS TO  
ADMIT**

Nimrata "Nikki" Haley, Governor of  
South Carolina; James F. Etter, Director  
of the South Carolina Department of  
Revenue; the South Carolina Department  
of Revenue; South Carolina Division of  
State Information Technology; Trustwave  
Corporation; and Trustwave Holdings,  
LLC,

Defendants.

---

TO: PLAINTIFF AND HIS ATTORNEYS OF RECORD, JOIN D. HAWKINS AND C.  
LOGAN ROLLINS

The Defendant, South Carolina Division of State Information Technology (hereinafter "Defendant" or "DSIT"), herein responds to Plaintiff's First Requests to Admit pursuant to Rule 36 of the South Carolina Rules of Civil Procedure. DSIT objects to the referenced Requests on the ground that they go beyond the scope of discovery as defined in Rules 36 and 26(b). In setting forth responses thereto, DSIT does not waive the referenced objection or the attorney-client, work product, or any other privilege or immunity from disclosure which may attach to information called for herein or responsive to the Requests. DSIT does not concede the relevance or materiality of the Requests, or the subject matters to which the Requests refer.

These responses are submitted by DSIT subject to and without in any way waiving or intending to waive, but on the contrary, intending to reserve and reserving:

A. All questions as to competency, relevancy, materiality, privilege and admissibility of evidence for any purpose of any of the documents referred to or responses given, or the subject matter thereof and any subsequent proceeding, or the trial of this action or any other action or proceeding;

B. The right to object to other discovery procedures involving or relating to the subject matters of the Requests herein responded to; and

C. The right at any time to revise, correct, add to or clarify any of the responses set forth herein or documents referred to herein. The Requests for Admissions are as follows:

#### **REQUESTS TO ADMIT**

1. Admit that South Carolina residents whose personal identifying information has been disclosed by the security breach that is the subject of this suit, as a proximate result of the security breach, have had credit monitoring services made available to them at the expense of the State of South Carolina.

**RESPONSE:** This request to admit calls for a legal conclusion; therefore Defendant DSIT neither admits nor denies it. However, to the extent the request is deemed a question of fact, DSIT denies this request.

2. Admit that persons of South Carolina whose information has been breached have suffered; as a proximate result of the breach that is the subject of this suit; loss, detriment, or injury to their persons, their property, or their rights.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS  
)  
) IN THE FIFTH JUDICIAL CIRCUIT

Phillip Morgan,  
Individually, and on behalf of  
all similarly situated Plaintiffs,

Plaintiffs,

vs.

Nimrata "Nikki" Haley, Governor of  
South Carolina; James F. Etter, Director  
of the South Carolina Department of  
Revenue; the South Carolina Department  
of Revenue; South Carolina Division of  
State Information Technology; Trustwave  
Corporation; and Trustwave Holdings,  
LLC,

Defendants.

Civil Action No. 2012-CP-40-7331

**CERTIFICATE OF SERVICE**

I, the undersigned Paralegal of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant South Carolina Division of State Information Technology do hereby certify that I have served all counsel in this action with a copy of the document specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

**Pleadings:** South Carolina Division of State Information Technology's Responses to Plaintiff's First Requests to Admit

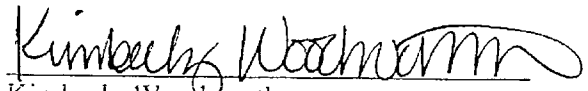
**Parties Served:** John D. Hawkins, Esquire  
C. Logan Rollins, Esquire  
The Hawkins Law Firm  
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*Attorneys for the Plaintiff*

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Kirk Pinkerton, PA  
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Sarasota, FL 34236  
*Attorneys for the Plaintiff*

Milton G. Kimpson, Esquire  
South Carolina Department of Revenue  
Post Office Box 12265  
Columbia, South Carolina 29211  
*Attorney for James F. Etter, Director of the South Carolina Department  
of Revenue and the South Carolina Department of Revenue*

Karl S. Bowers, Esquire  
Kevin A. Hall, Esquire  
M. Todd Carroll, Esquire  
Womble Carlyle Sandridge & Rice, LLP  
1727 Hampton Street  
Columbia, SC 29201  
*Attorney for Nimrata "Nikki" Haley, Governor of South Carolina*

James G. Long, III, Esquire  
Jennifer J. Hollingsworth, Esquire  
Nexsen Pruet  
Post Office Drawer 2426  
Columbia, South Carolina 29202  
*Attorney for Trustwave Corporation and Trustwave Holdings, LLC*

  
Kimberly Woodworth

Columbia, South Carolina  
January 18, 2011

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) FIFTH JUDICIAL CIRCUIT

Phillip Morgan, individually and on ) Civil Action No. 2012-CP-40-7331  
behalf of all similarly situated Plaintiffs, )

Plaintiffs, )  
vs. ) **DEPARTMENT OF REVENUE'S  
RESPONSES TO PLAINTIFF'S  
FIRST REQUESTS TO ADMIT**

Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina Department )  
of Revenue; South Carolina Division of )  
State Information Technology; )  
Trustwave Corporation; and Trustwave )  
Holdings, Inc., )  
Defendants. )

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TO: JOHN HAWKINS and LOGAN ROLLINS, ATTORNEYS FOR PLAINTIFF

Comes now, the South Carolina Department of Revenue and James F. Etter, its former Director, (collectively "Department") and provide the following responses to Plaintiff's First Requests to Admit to Defendants James F. Etter and the Department of Revenue:

1. Admit that South Carolina residents whose personal identifying information has been disclosed by the security breach that is the subject of this suit, as a proximate result of the security breach; have had credit monitoring services made available to them at the expense of the State of South Carolina.

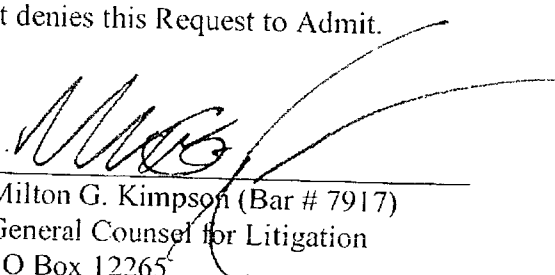
**Answer:** The Department denies this Request to Admit inasmuch as "proximate result" seeks a legal conclusion. Credit monitoring services have been provided to South Carolina taxpayers residing in the State.

2. Admit that persons of South Carolina whose information has been breached have suffered; as a proximate result of the breach that is the subject of this suit; loss, detriment, or injury to their persons, their property, or rights.

**Answer:** The Department denies this Request to Admit.

3. Admit that the credit monitoring services the State of South Carolina has thus far offered to the persons of South Carolina whose personal identifying information has been breached do not provide the full extent of protection that is available in the open market to said persons.

**Answer:** The Department denies this Request to Admit.



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Columbia, South Carolina  
January 18, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE CIRCUIT COURT

Phillip Morgan, Individually and on behalf of  
all similarly situated Plaintiffs,

Case No. 2011-CP-40-7331

Plaintiff,

**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

vs.

Nimrata "Nikki" Haley, Governor of South  
Carolina; James F. Etter, Director of the South  
Carolina Department of Revenue; the South  
Carolina Department of Revenue; South  
Carolina Division of State Information  
Technology; Trustwave Corporation and  
Trustwave Holdings, Inc.,

Defendants.

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The Defendants Trustwave Corporation and Trustwave Holdings, Inc., respectfully  
submit this Memorandum of Law in Support of their Motion to Dismiss.

**BACKGROUND<sup>1</sup>**

Trustwave Holdings, Inc. is a leading provider of products and services for data security  
and compliance with certain payment card industry requirements. For over 15 years, Trustwave  
Holdings has sold various database security and compliance products to hundreds of thousands  
of organizations, including Fortune 500 businesses and large governmental institutions.  
Trustwave Holdings, Inc. has provided, and continues to provide, SCDOR certain products and  
services that SCDOR has implemented to augment the security of its network.

<sup>1</sup> Trustwave Defendants provide a brief overview of the SCDOR data breach as reported by the media, in South  
Carolina governmental press releases, and in the report issued by the cyber-security firm, Mandiant, retained by  
South Carolina. Trustwave Defendants provide this overview for context and does not rely on its content as the  
basis for any argument advanced herein in support of dismissal. In addition, none of the Trustwave Defendants'  
arguments challenges the truthfulness of the averments in the Complaint, which are taken as true for purposes of this  
motion only. See S.C. R. Civ. P. 12(b)(6).



On October 10, 2012, the U.S. Secret Service informed SCDOR that private information had been stolen from several SCDOR databases. Two days later, SCDOR hired the private cyber-security firm Mandiant to investigate and remedy the breach.<sup>2</sup> Mandiant secured the SCDOR databases on October 20, and SCDOR informed the public of the breach six days later.<sup>3</sup> (Am. Compl. ¶ 23)

On November 20, 2012, SCDOR released publicly an incident investigation report that Mandiant prepared.<sup>4</sup> Mandiant concluded that the breach was not through any external vulnerability on SCDOR's website, but that the attacker used authorized-user credentials to access the SCDOR system, to navigate within it, and to extract data from SCDOR databases.<sup>5</sup> Mandiant concluded that the most likely method by which the attacker obtained authorized-user credentials was through a "phishing" email sent on August 13, 2012, to multiple SCDOR employees. Reportedly, at least one employee clicked on a link embedded in the email, giving the attacker access to that employee's username and password. On August 27, the hacker used these credentials to access remotely the employee's workstation and gained access to SCDOR databases containing encrypted and unencrypted tax-return data.<sup>6</sup>

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<sup>2</sup> See Mandiant, South Carolina Department of Revenue: Public Incident Response Report 2 (Nov. 20, 2012), available at <http://governor.sc.gov/Documents/MANDIANT%20Public%20IR%20Report%20-%20Department%20of%20Revenue%20-%2011%2020%202012.pdf> [hereinafter Mandiant Report].

<sup>3</sup> See Noelle Phillips, *3.6 Million Social Security Numbers Hacked in S.C.*, The State (Oct. 26, 2012), <http://www.thestate.com/2012/10/26/2496396/south-carolina-taxpayers-privacy.html#.UM9YH-Q1nSg>; Press Release, SC Department of Revenue Responds to Cyber Attack, Will Provide Credit Monitoring and Identity Theft Protection to Taxpayers, S.C. Dep't of Revenue (Oct. 26, 2012), <http://www.sctax.org/NR/rdonlyres/5AF6995A-F9F0-42E7-A430-EC620CCE8C7D/0/1DORmediarelease.pdf>. For a more detailed chronology, see *Chronology*, S.C. Dep't of Revenue, <http://www.sctax.org/NR/rdonlyres/3961B679-C036-4722-A475-473407A8B1D6/0/2Chronology.pdf> (last visited Jan. 6, 2013).

<sup>4</sup> See Mandiant Report, *supra* note, at 2.

<sup>5</sup> *Id.* at 2-3.

<sup>6</sup> *Id.* at 3-4.

Since the breach became known, SCDOR has also implemented extensive remedial measures to protect South Carolina taxpayers from harm. Once law enforcement officials informed SCDOR that information about the breach could be publicly disclosed, SCDOR provided notice to those South Carolina taxpayers whose information may have been implicated.<sup>7</sup> South Carolina established a website and toll-free hotline for potentially affected taxpayers to determine if their data was compromised,<sup>8</sup> and informed affected taxpayers of credit monitoring and protection services that would be provided free of charge to protect against the types of unlawful use that Plaintiff's Amended Complaint describes. Those free services include, among other things, a free credit report, free daily credit monitoring across three credit bureaus, \$2,000,000 in identity-theft insurance, and lifetime credit-fraud resolution.<sup>9</sup> The Amended Complaint does not allege whether Plaintiff has availed himself of the hotline, website or free credit protection, or even that he has received notification that his data has been compromised by the breach.

The crux of the Plaintiff's claim against the Trustwave Defendants in the Amended Complaint is the Plaintiff's statement that the Trustwave Defendants "were charged with the duty of securing the personal identifying information." Am. Compl. ¶ 21. The Plaintiff's allegation is made upon information belief and is not supported by any other allegation of fact regarding the Trustwave Defendants' role in the underlying factual circumstances. *Id.* ¶¶ 20-24. The Plaintiff asserts four causes of action against the Trustwave Defendants: civil conspiracy,

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<sup>7</sup> See Governor Nikki Haley, Keel, Etter Update Reporters Wednesday on DOR Information Security Breach, YouTube, <http://www.youtube.com/watch?v=rYohFHnQaE8> (last visited Jan. 6, 2013).

<sup>8</sup> See Phillips, *supra* note 3.

<sup>9</sup> See *Frequently Asked Questions Regarding SC DOR Security Breach*, S.C. Dept' of Revenue (Nov. 2, 2012), [http://www.sctax.org/NR/rdonlyres/57F3E754-6035-44E1-AF6D-E44BEA94485E/0/FAQ11\\_2.pdf](http://www.sctax.org/NR/rdonlyres/57F3E754-6035-44E1-AF6D-E44BEA94485E/0/FAQ11_2.pdf); Governor Nikki Haley and State Officials Deliver DOR Update, YouTube, <http://www.youtube.com/watch?v=ni9jQS3Nb80> (last visited Jan. 6, 2013).

violation of S.C. Code Ann. § 39-1-90, negligence *per se*, and negligence. For the reasons set forth herein, the Amended Complaint should be dismissed as to the Trustwave Defendants.

### **ARGUMENTS**

#### **I. THE PLAINTIFF HAS FAILED TO SERVE THE TRUSTWAVE DEFENDANTS IN ACCORDANCE WITH THE RULES OF CIVIL PROCEDURE.**

The Trustwave Defendants have, contemporaneously with this filing, filed a Memorandum of Law in Support of Motion to Quash Affidavit or Set Aside Default. In that writing, the Trustwave Defendants fully set forth the factual circumstances of the Plaintiff's purported service on Trustwave Holdings, Inc. and how that service fails to satisfy the Rules of Civil Procedure as a matter of law. In the interest of judicial economy, the Trustwave Defendants will only summarize herein the relevant matters for the Court to consider in dismissing the Amended Complaint pursuant to Rule 12(b)(5), SCRCP, but would direct the Court's attention to the contemporaneous briefing for a more detailed explanation of the facts and the law.

South Carolina's Rules of Civil Procedure allow for service of process on an agent of a corporation only if authorized by appointment or by law. *See* Rule 4(d)(3), SCRCP; *see also* *Hamilton v. J.D. Davis*, 300 S.C. 411, 414, 389 S.E.2d 297, 298 (Ct. App. 1990). "In order to be effective, service must be made on an actual agent." *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583-84, 560 S.E.2d 624, 631 (Ct. App. 2001), *citing* *Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 648 (D.S.C. 1989). The Amended Complaint identifies the registered agent for service of process for both Trustwave Holdings, Inc. and Trustwave Corporation as Corporation Trust Company in Wilmington, Delaware. Am. Compl. ¶¶ 6, 7. This is correct. The Amended Complaint also properly sets forth the business address for Trustwave Holdings, Inc. in Chicago, Illinois. *Id.* at ¶ 6. It is undisputed, however, that the

Plaintiff made an effort to *serve only* Trustwave Holdings, Inc. with service of process, and *only served* Marci Johnson, a secretary in Evanston, Illinois. (Affidavit of Process Server, attached as **Exhibit A**). As more fully explained in the contemporaneous Memorandum regarding service, Ms. Johnson was not an agent of Trustwave Holdings, Inc. and was not authorized to accept service on the company's behalf. Under South Carolina law, authority to accept service can only be granted or extended by the intentions of the principal; apparent authority "is established based upon manifestations by the principal, not the agent." *Roberson v. Southern Finance of S.C., Inc.*, 365 S.C. 6, 11, 615 S.E.2d 112, 115 (2005). As in the *Roberson* matter, where the defendant was determined not to have authorized the person served to accept service, Trustwave Holdings, Inc. never authorized Ms. Johnson to accept service of process on its behalf. Because Ms. Johnson was not authorized to accept service of process on behalf of Trustwave Holdings, Inc., the attempted service on any Trustwave Defendant was deficient and the matter should be dismissed as to the Trustwave Defendants pursuant to Rule 12(b)(5), SCRCPP.

**II. AS TO TRUSTWAVE CORPORATION, NO SERVICE HAS BEEN ATTEMPTED OR MADE ON TRUSTWAVE CORPORATION, AND AS A DEFUNCT ENTITY NO LONGER IN EXISTENCE, IT SHOULD BE DISMISSED FROM THIS ACTION.**

Rule 4(a), SCRCPP, requires that copies of the original summons and complaint "shall be served upon each defendant." (emphasis added). The Affidavit of Process Server clearly states the service was intended to be made solely on Trustwave Holdings, Inc. (See **Exhibit A**). The additional affidavits submitted by the Plaintiff clearly aver that service was only attempted on Trustwave Holdings, Inc. (Affidavit of Chris Moss, attached as **Exhibit B**). The Plaintiff must show compliance with the Rules of Civil Procedure for the presumption of proper service to apply. See e.g. *McCall v. IKON*, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005). The requirement of serving each defendant separately is not a "highly technical application of the

rules” but is an essential requirement to ensure proper notice to distinct parties. *See id.* at 655, 611 S.E.2d at 319 (finding notice of damages hearing sent by single letter to two separate defendants insufficient under the Rules of Civil Procedure). As a result of the Plaintiff’s failure to serve Trustwave Corporation with any process related to this lawsuit, Trustwave Corporation should be dismissed as a party to these proceedings pursuant to Rule 12(b)(5), SCRCPP.

In addition to the complete lack of evidence showing service on Trustwave Corporation, Trustwave Corporation is not a proper party to this proceeding in light of its status as a defunct entity. As evidenced by the dissolution documents attached as **Exhibit C**, Trustwave Corporation has been dissolved since August 8, 2011, and as averred by Alice Geene, General Counsel for Trustwave Holdings, Inc., Trustwave Corporation ceased to exist upon a merger with Ambiron, LLC, in April 2005, to create the Trustwave Holdings, Inc. entity. (Affidavit of Alice Geene, attached as **Exhibit D**). Given these facts, Trustwave Corporation should be dismissed from these proceedings.

### **III. THE AMENDED COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM AGAINST THE TRUSTWAVE DEFENDANTS.**

Unlike the federal counterpart, South Carolina’s Rules of Civil Procedure require the *pleading of facts* as opposed to simply stating a claim for a complaint to be sufficient. *See* Notes to Rule 8(a), SCRCPP. Failure of a plaintiff to plead facts sufficient to constitute a cause of action against a defendant warrants a dismissal under Rule 12(b)(6), SCRCPP. This Court “must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint.” *Hambrick v. GMAC Mortgage*, 370 S.C. 118, 122, 643 S.E.2d 5, 7 (Ct. App. 2006). Dismissal is warranted under Rule 12(b)(6) “if the facts and the inferences reasonably deducible from [Plaintiff’s Amended Complaint] show that [P]laintiff could not prevail on any theory of the case.” *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491

S.E.2d 272, 275 (Ct. App. 1997). “A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003).

**A. There Are No Facts Pled To Support A Claim For Civil Conspiracy.**

To establish civil conspiracy, the Plaintiff must prove: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 D.E.2d 871, 874 (Ct. App. 2009). Moreover, the Plaintiff must establish additional facts beyond those underlying other causes of action, as well as special damages that must “go beyond the damages alleged in other causes of action.” *Id.* Other than the bare legal conclusion that “Defendants formed a combination to engage in a civil conspiracy for the purpose of harming Plaintiff,” the Amended Complaint is entirely devoid of any factual allegations to support the claim of a civil conspiracy. Am. Compl. ¶¶ 38-40.

First, the Plaintiff has failed to allege a single fact to support an allegation or claim that the Trustwave Defendants combined with any other person or entity for the purpose of injuring the Plaintiff. A “plaintiff’s obligation to provide the grounds of his entitle[ment] to relief require more than labels and conclusion, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (quotations omitted). For this reason alone, the civil conspiracy claim should be dismissed.

Second, as to the requirement of special damages, the Plaintiff has not alleged damages arising from the alleged civil conspiracy that are separate or distinct from the damages arising from his other causes of action, as all of his causes of action arise from the same set of facts and seek the same or similar relief. *See Hackworth* at 117, 692 S.E.2d at 875 (holding a civil

conspiracy claim must be dismissed where a plaintiff merely repeats damages arising from other claims); *see also* *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167-68, 708 S.E.2d 218, 222-23 (Ct. App. 2011). “While general damages are the immediate, direct, and proximate result of the tortfeasor’s conduct, special damages are the natural, but not the necessary or usual, consequence of the tortfeasor’s conduct. Moreover, dismissal of a claim for civil conspiracy is appropriate when a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim.” *Benedict College v. Natl. Credit Systems, Inc.*, 400 S.C. 538, \_\_\_, 735 S.E.2d, 518, 522 (Ct. App. 2012) (internal quotations omitted). Items of special damage claimed must be “specifically stated.” Rule 9(g), SCRPC. Because the Plaintiff has not alleged that he has suffered special damages as a result of a conspiracy that are separate and distinct from the general damages allegedly arising as the proximate result of the acts complained of, the claim for civil conspiracy should be dismissed.

**B. The Plaintiff Fails to State a Claim for Breach of S.C. Code Ann. § 39-1-90.**

Section § 39-1-90 of the South Carolina Code concerns computerized data that contains the personal identifying information (“PII”) of South Carolina residents, and provides two basic notification requirements that might be applicable when there has been a breach of a security system that leads to unauthorized access and acquisition of certain PII. The first requirement, § 39-1-90(A), applies to persons doing business in South Carolina who *own or license* PII that is not encrypted, redacted, or otherwise rendered unusable. With some exceptions, under this requirement, when then owner or licensee of the data discovers or is notified of a breach of the security system housing PII, the person must notify the relevant South Carolina resident(s). The second requirement, § 39-1-90(B), applies to persons doing business in South Carolina who *maintain* (rather than own or license) PII. With certain exceptions, under this requirement, after

discovering a data-security breach, the person maintaining the data must notify the relevant owner(s) or licensee(s) of the PII.

Here, the Plaintiff alleges that the Trustwave Defendants breached both provisions, presumably by their alleged failure to timely notify the Plaintiff about the breach of SCDOR's database.<sup>10</sup> The Plaintiff, however, has failed to plead any facts showing how, if at all, these statutory requirements of disclosure applied to the Trustwave Defendants.

Specifically, the Plaintiff does not and cannot plead that the Trustwave Defendants owned, licensed or maintained<sup>11</sup> the taxpayer data. Am. Compl. ¶¶ 47-51. Therefore, S.C. Code Ann. § 39-1-90 simply does not apply to the Trustwave Defendants and the Plaintiff's claim for violation of the statute should be dismissed for failure to state a claim.

**C. The Plaintiff Fails to State a Claim for Negligence and Negligence *Per Se*.**

To support his negligence *per se* and negligence claims, the Plaintiff must present facts suggesting that the Trustwave Defendants owed him a duty, the Trustwave Defendants breached that duty, and the breach proximately caused him damage. *See, e.g., Bishop v. S.C. Dep't of Mental Health*, 502 S.E.2d 78 (S.C. 1998). Both claims, Counts VI and VII, should be dismissed as a matter of law because they fail to allege facts to support these requisite elements and also because they are barred by the Economic Loss Doctrine.

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<sup>10</sup> In the paragraphs associated with the Plaintiff's statutory breach claim, Claim V, the Amended Complaint does not specifically allege how the Trustwave Defendants' breached these two provisions. The Plaintiff asserts that "upon information and belief, [the Court] should declare that [the Trustwave Defendants] have breached S.C. Code Ann. § 39-1-90." Am. Compl. ¶ 49. However, the Plaintiff "cannot transform an unsupported proposition of law into a statement of fact merely by stating that [he is] informed and believe[s] it to be so." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 635, 699 S.E.2d 699, 705 (Ct. App. 2010).

<sup>11</sup> Moreover, even if the Plaintiff had alleged that the Trustwave Defendants "maintained" the taxpayer data—and they did not—§ 39-1-90(B) does not impose on parties maintaining such data any duty to disclose the data security breach *to the Plaintiff*. In this case, even if the Trustwave Defendants had maintained the data, their only duty under § 39-1-90(B) would have been to *notify the Department of Revenue* of the breach once they discovered it. The Amended Complaint alleges that the South Carolina Division of Information Technology notified the Department of Revenue of the breach on October 10, 2012. There is no allegation in the Amended Complaint that the Trustwave Defendants discovered the breach prior to October 10, 2012, and failed to notify the Department of Revenue.



1. Because the Plaintiff has not alleged a violation of § 39-1-90, his negligence *per se* claim fails as a matter of law.

“Negligence *per se* is established by showing a statute created a duty to the plaintiff and the defendant breached that duty by violating the statute.” *Seals by Causey v. Winburn*, 314 S.C. 416, 418, 445 S.E.2d 94, 96 (1994) (per curiam) (citing *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991)). To show that a defendant owed a duty arising under a statute, a plaintiff must demonstrate two things: “(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.” *Rayfield v. S.C. Dept. of Corrections*, 297 S.C. 95, 100, 374 S.E.2d 910, 914 (Ct. App. 1988), *cert. denied*, 379 S.E.2d 133 (S.C. 1989). The Amended Complaint fails to plead facts sufficient to satisfy the basic elements of a claim for negligence *per se*.

First, as set forth above in Section III.B, the Plaintiff has pled no facts to support an inference that the Trustwave Defendants violated Code Section 39-1-90. Without a statutory violation, by definition there can be no claim for negligence *per se*. See *Seals by Causey* at 416, 445 S.E.2d at 95.

Second, Plaintiff cannot satisfy *Rayfield*’s test because he has not suffered the kind of harm that Section 39-1-90 protects against. On its face, S.C. Code Ann. § 39-1-90 does not impose a duty to protect residents’ personal identifying information from being compromised in a data security breach or to remedy any harm associated with such a breach. The express objective of the statute is to promote timely notification of a data breach so consumers may take steps to protect themselves from potential future identify theft or to mitigate any harm in the event a resident’s information is already being used inappropriately. The Plaintiff tries to avoid this by reading into the statute a duty on the part of persons who own, license or maintain

personal identifying information to encrypt such data. Am. Compl. ¶ 53 (“Defendants owed Plaintiff a duty to comply with S.C. Code Ann. § 39-1-90 by rendering data ‘unusable through encryption, redaction, or other methods.’”). But Section 39-1-90 contains no such obligation. Indeed, Section 39-1-90 only requires a person to disclose the occurrence of a data security breach *if* the compromised personal information “was not rendered unusable through encryption, redaction, or other methods.” S.C. Code Ann. § 39-1-90(A) (Supp. 2010). The statute expressly contemplates that personal identifying information may be maintained in an unencrypted format and does not prohibit it or penalize a party based on it. Thus, the Plaintiff’s negligence *per se* claim, Count VI, should be dismissed.

2. The Plaintiff does not allege a cognizable common law duty to support his negligence claim.

Similarly, the Plaintiff’s negligence claim, Count VII, should be dismissed for failure to plead a cognizable common law duty allegedly breached by the Trustwave Defendants. To state a claim for relief under a negligence theory, the Plaintiff must allege facts demonstrating the occurrence of three distinct elements: a duty of care owed by the defendant; a breach of that duty by negligent act or omission; and damage proximately caused thereby. “An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence. ‘Proof of negligence in the air, so to speak, will not do.’” *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322-23, 548 S.E.2d 854, 857 (2001) (quoting *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99, 99 (1928) (quoting Sir Frederick Pollock). Duty is “the obligation to conform to a particular standard of conduct toward another.” *Hubbard v. Taylor*, 339, S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000) (citation omitted). Under South Carolina law, this obligation must be rooted in a relationship between the parties that is recognized by law—*inter alia*, a statutory duty or the

existence of a special relationship between the parties. *See, e.g., Ravan v. Greenville County*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993); *cf. S.C. State Ports Auth. v. Booz-Allen & Hamilton*, 289 S.C. 373, 377, 346 S.E.2d 324, 326 (1986) (stating that a duty will not arise where the relationship is too attenuated).

Here, the Amended Complaint asserts that “Defendants owed Plaintiff a duty to provide a reasonable standard of care . . . by protecting and securing Plaintiff’s personal identifying information, including, but not limited to, the duty to encrypt . . . and the duty to expeditiously disclose.” Am. Compl. ¶ 58. These allegations, however, constitute little more than a restatement of the alleged statutory duties under S.C. Code Ann. § 39-1-90—disclosure and encryption—that are inapplicable to the Trustwave Defendants. *See supra* Sections III.B and III.C.1. The Plaintiff’s allegations point to no other source for any alleged duty owed him by the Trustwave Defendants. Thus, the Plaintiff’s negligence claim, Count VII, should be dismissed for failure to identify an applicable common law duty or breach thereof.

3. The Plaintiff does not allege a cognizable injury to support his negligence claims.

The Plaintiff has failed to plead facts suggesting that he suffered a cognizable injury under South Carolina law. In his lone factual contention concerning harm, the Plaintiff argues that he has suffered “actual damages and is in imminent danger of suffering further material injury and loss by being placed in a material risk of harm for identity theft.” Am. Compl. ¶ 55; *see also id.* ¶ 60 (same language). Without more, however, the bald allegation of “actual damages” lacks the requisite factual content to show that the Plaintiff can prevail with his negligence claims.

Furthermore, well-established South Carolina law and a recent string of federal court decisions counsel that alleged injury and harm associated with exposure to an increased risk of

identity theft represent the kind of speculative injury that is insufficient to state a claim sounding in negligence. To comply with Rule 8(a), SCRCP, the elements of a plaintiff's alleged damages must be "definitely enumerated." *Ellen v. King*, 227 S.C. 481, 489, 88 S.E.2d 598, 602 (1955). Thus, "[t]he threat of future harm, not yet realized, is not enough" to satisfy the damages requirement in a negligence cause of action. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, § 30, at 165 (5th ed. 1984). "Imposing liability merely for the creation of risk when there are no actual damages drastically changes the fundamental elements of a tort action, [and] makes any amount of damages entirely speculative . . . ." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). Rather, damages are recoverable only if a *present* injury has occurred.

Importantly, courts routinely hold that, with regard to data-security breaches, the increased risk of future harm stemming from a security breach *does not* constitute compensable damages. See, e.g., *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 639 (7th Cir. 2007) (holding that, under Indiana law, exposure to future potential identity theft, by itself, "does not give rise to a legally cognizable injury"); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08-6060, 2010 WL 2643307, at \*2, 9 (S.D.N.Y. June 25, 2010) (same under New York, California, and New Jersey law); *Rowe v. UniCare Life and Health Ins. Co.*, No. 09 C 2286, 2010 WL 86391, at \*6 (N.D. Ill. Jan. 5, 2010) (same under Illinois law); *McLoughlin v. People's United Bank, Inc.*, No. 08-944, 2009 WL 2843269, at \*8 (D. Conn. Aug. 31, 2009) (suggesting the same under Connecticut law); *Kahle v. Litton Loan Servicing, LP*, 486 F. Supp. 2d 705, 712-13 (S.D. Ohio 2007) (concluding the same without specifying governing law); *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006); *Hendricks v. DSW Shoe Warehouse*, 444 F. Supp. 2d 775, 783 (W.D. Mich. 2006) (same under Michigan law). As stated very clearly by the Third Circuit Court of Appeals in a case arising out of a data breach by an unknown hacker:

We conclude that Appellants' allegations of hypothetical, future injury are insufficient to establish standing. Appellants' contentions rely on speculation that the hacker: (1) read, copied, and understood their personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of Appellants by making unauthorized transactions in Appellants' names. Unless and until these conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm.

*Reilly v. Ceridian Corp.*, 664 F.3d 38 (3rd Cir. 2011). In other words, until the Plaintiff is actually injured by virtue of having his personal information misused to his detriment, he cannot maintain an action for negligence.

4. The Plaintiff's negligence claims are barred by the Economic Loss Doctrine.

Counts VI and VII should be dismissed, in the alternative, pursuant to South Carolina's Economic Loss Doctrine, which precludes a negligence action seeking economic damages "where duties are created solely by contract." *Palmetto Linen Serv., Inc. v. U.N.X., Inc.*, 205 F.3d 126 (4th Cir. 2000) (citation and internal quotation marks omitted).<sup>12</sup> As set forth above, the Plaintiff points to no cognizable duty to support his negligence claim and therefore the only duties applicable to Trustwave Holdings with respect to the Department of Revenue are those imposed by contract in connection with the Department of Revenue's purchase of goods or services.

Federal courts considering similar data breach cases have uniformly held that the Doctrine bars a plaintiff's negligence-related claims. *See, e.g., In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 498-99 (1st Cir. 2009) (rendering payment card information worthless was not the result of physical destruction of property); *Sovereign Bank v. BJ's Wholesale Club, Inc.*,

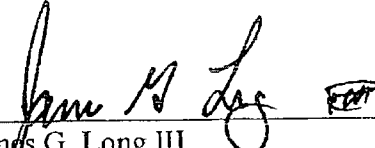
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<sup>12</sup> Although there is an exception to the Doctrine for tort actions that involve a special relationship between the parties that is independent of the contract, this exception is "applicable only in the residential real estate construction context" not at issue here. *Sapp v. Ford Motor Co.*, 687 S.E.2d 47, 51 (S.C. 2009).

533 F.3d 162, 175-77, 180 (3d Cir 2008) (emphasizing that the magnetic strip data on the stolen credit cards was copied, not destroyed); *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, Nos. 11cv2119, 11cv2120, 2012 WL 4849054, at \*11 (S.D. Cal. Oct. 11, 2012) (dismissing negligence claim because of absence of special relationship between parties); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 528-31 (N.D. Ill. 2011) (dismissing negligence claims because plaintiff did not suffer personal injury or property damage). Thus, Plaintiff's negligence *per se* and negligence claims, Counts VI and VII, respectively, are barred by the Economic Loss Doctrine and should be dismissed with prejudice.

#### CONCLUSION

For the reasons set forth herein, the Trustwave Defendants are informed and believe that the Amended Complaint must be dismissed with prejudice.



---

James G. Long III  
Jennifer J. Hollingsworth  
NEXSEN PRUET, LLC  
1230 Main Street, Suite 700 (29201)  
Post Office Drawer 2426  
Columbia, SC 29202  
803.771.8900

Attorneys for Defendants  
Trustwave Holdings Inc. and  
Trustwave Corporation

February <sup>4</sup>, 2013  
Columbia, South Carolina

**CERTIFICATE OF SERVICE**

This is to certify that the foregoing Memorandum in Support of Motion to Dismiss has been served on counsel of record by U.S. Mail postage prepaid addressed as shown below this 4<sup>th</sup> day of February, 2013:

John D. Hawkins, Esquire  
C. Logan Rollins, Esquire  
The Hawkins Law Firm  
Post Office Box 5048  
Spartanburg, SC 29304

Karl S. Bowers, Esquire  
Womble Carlyle Sandridge & Rice, LLP  
1727 Hampton Street  
Columbia, SC 29201

Theodore F. Claypoole, Esquire  
One Wells Fargo Center  
301 South College Street, Suite 3500  
Charlotte, NC 28202-6037

Milton G. Kimpson, Esquire  
South Carolina Department of Revenue  
Post Office Box 12265  
Columbia, SC 29211

Robert E. Stepp, Esquire  
Robert E. Tyson, Jr., Esquire  
Bess J. DuRant, Esquire  
Sowell Gray Stepp & Laffitte  
1310 Gadsden Street  
Columbia, SC 29201

2013 FEB -4 PM 1:17

Sharon A. Werdenie  
Sharon A. Werdenie  
Legal Assistant to James G. Long III  
NEXSEN PRUET, LLC  
Post Office Drawer 2426 (29202)  
1230 Main Street, Suite 700  
Columbia, SC 29201  
(803) 771-8900

# EXHIBIT A



Phillip Morgan

Affidavit of Process Server

Nimrata "Nikki" Harley et al.

ADDCP407331

Being duly sworn, on my oath, I

declare that I am a citizen of the United States, over the age of eighteen and not a party to this action

Service: I served

with the (documents)

Chaundel Sammarco

Trustwave Holdings, Inc.

NAME OF PERSON/ENTITY BEING SERVED

☐ Subpoena with \$ witness fee and mileage

X Letter, Summons and Amended Complaint

by serving (NAME)

Marci Johnson

at ☐ Home

☒ Business

on (DATE)

630 Davis Suite 300 Evanston IL

11/13/12

at (TIME) 3:47pm

Thereafter copies of the documents were mailed by prepaid, first class mail on (DATE)

From (CITY)

(STATE)

Manner of Service:

☐ By Personal Service

☒ By delivering, during office hours, copies at the office of the person/entity being served, leaving same with the person apparently in charge thereof, namely,

Marci Johnson, Secretary, Authorized to Accept Service

☐ By leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the general nature of the papers

☐ By posting copies in a conspicuous manner to the address of the person/entity being served.

Non-Service:

After due search, careful inquiry and diligent attempts at the address(es) listed above, I have been unable to effect process upon the person/entity being served because of the following reason(s):

☐ Unknown at Address

☐ Evading

☐ Other:

☐ Address does not exist

☐ Service cancelled by litigant

☐ Moved, Left no forwarding

☐ Unable to serve in a timely fashion

Service Attempts: Service was attempted on: ( ) ( ) ( ) ( )

DATE TIME

DATE TIME

DATE TIME

( ) ( ) ( ) ( )

DATE TIME

DATE TIME

DATE TIME

DATE TIME

Description:

☐ Male

☒ White Skin

☐ Black Hair

☐ White Hair

☐ 14-20 Yrs.

☐ Under 5'

☐ Under 100 Lbs.

☒ Female

☐ Black Skin

☐ Brown Hair

☐ Balding

☐ 21-35 Yrs.

☐ 5'-5"3"

☐ 100-130 Lbs.

☐ Brown Skin

☒ Blond Hair

☒ 36-50 Yrs.

☒ 5'-8"

☐ 131-160 Lbs.

☐ Glasses

☐ Yellow Skin

☐ Gray Hair

☐ Mustache

☐ 51-65 Yrs.

☐ 5'-9"-6"

☐ 161-200 Lbs.

☐ Red Skin

☐ Red Hair

☐ Beard

☐ Over 65 Yrs.

☐ Over 6'

☐ Over 200 Lbs.

OTHER IDENTIFYING FEATURES:

State of Illinois County of Cook

Subscribed and sworn to before me

A notary public, this 14th day of Nov, 2012

Notary Public



CHRISTOPHER J. MOSS  
MY COMMISSION EXPIRES  
OCTOBER 5, 2014

SERVED BY  
LASALLE PROCESS SERVERS  
ILLINOIS PRIVATE DETECTIVE LICENSE# 117-001432

CHARTER MEMBER NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS

Record on Appeal

# EXHIBIT B

## **AFFIDAVIT OF CHRIS MOSS**

STATE OF ILLINOIS

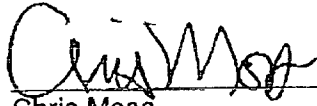
COUNTY OF COOK

Personally appeared before, the undersigned, and, being duly sworn, states the following:

1. My name is Chris Moss. I am over the age of 18 years and otherwise competent to make this affidavit. I am a process server for LaSalle Process Servers, LP in Chicago, Illinois.
2. I was retained by the Hawkins Law Firm to serve Trustwave Holdings Inc. the summons and complaint from a lawsuit filed in South Carolina State Court against Trustwave, a copy of which is attached hereto as **Exhibit A**.
3. According to the Illinois Secretary of State, the registered agent for service of process for Trustwave Holdings Inc. is Eric R. Decator at 70 West Madison Street, Suite 4100, Chicago, Illinois 60602.
4. On November 13, 2012, I attempted to contact Mr. Decator at his registered address of 70 West Madison Street, which is the address for the law firm of Kaye Scholer. I was informed that Mr. Decator was no longer an attorney at Kaye Scholer. I was informed by the Kaye Scholer Law Firm that I could contact Mr. Decator at 847-868-8580.
5. I called Mr. Decator, and informed him that I was serving him a summons and complaint in his capacity as registered agent for the service of process for Trustwave Holdings, Inc.
6. He informed me that his address is Arland Energy, 630 Davis, Suite 300 Evanston, IL and that he would be present only until approximately 4:00 p.m., and, if he should be gone when we arrived, we were to serve the Summons and Complaint upon his secretary.
7. As Evanston, Illinois is outside of my personal service area, I referred the actual service of the Summons and Complaint to Chaundel Sammarco, who specifically serves papers on my behalf in the Evanston area.
8. She informed me of the service upon Marci Johnson, as is indicated in her affidavit of process server attached hereto as **Exhibit B**.

9. By serving the documents as indicated above, I expressly and personally made certain that Eric Decator was the registered agent for service of process for Trustwave Holdings, Inc. and that I had his express, stated, instructions to have the Summons and Complaint delivered to his secretary in the event of his absence.

FURTHER AFFIANT SAYETH NOT

  
Chris Moss

Sworn and subscribed to this

21 day of December, 2012

Notary Public for Illinois  
My Commission Expires:



# EXHIBIT C

PAGE 1



# State of Delaware

SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
P.O. BOX 898  
DOVER, DELAWARE 19903

121395078

9651089  
NEXSEN PRUET, LLC  
1230 MAIN ST STE 700  
COLUMBIA

SC 29201

12-28-2012

ATTN: JAMES G. LONG X

| DESCRIPTION                        | AMOUNT |
|------------------------------------|--------|
| TRUSTWAVE CORPORATION              |        |
| 3786912 8320 Certificate of Filing |        |
| Certification Fee                  | 50.00  |
| Expedite 24 Hr., 1-3 Re-Short      | 40.00  |
| FILING TOTAL                       | 90.00  |
| TOTAL PAYMENTS                     | 90.00  |
| SERVICE REQUEST BALANCE            | .00    |

**RECEIVED**  
DEC 31 2012  
NEXSEN PRUET, LLC

Record on Appeal

# Delaware

PAGE 1

## *The First State*

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THAT THE CERTIFICATE OF INCORPORATION OF "TRUSTWAVE MERGER CORP.", WAS RECEIVED AND FILED IN THIS OFFICE THE SIXTH DAY OF APRIL, A.D. 2004.

AND I DO HEREBY FURTHER CERTIFY THE SAID "TRUSTWAVE MERGER CORP." FILED A CERTIFICATE OF MERGER, CHANGING ITS NAME TO "TRUSTWAVE CORPORATION", ON THE TWELFTH DAY OF APRIL, A.D. 2004, AT 10:14 O'CLOCK P.M.

AND I DO HEREBY FURTHER CERTIFY THAT A CERTIFICATE OF DISSOLUTION OF THE "TRUSTWAVE CORPORATION", WAS RECEIVED AND FILED IN THIS OFFICE THE EIGHTH DAY OF AUGUST, A.D. 2011, AT 6:10 O'CLOCK P.M.

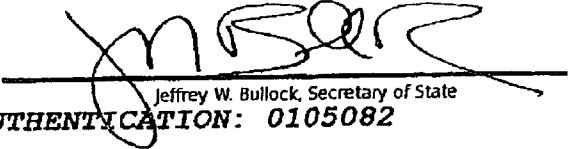
AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION WAS DULY DISSOLVED ACCORDING TO THE LAWS OF THE STATE OF DELAWARE.

3786912 8370

121395078

You may verify this certificate online  
at [corp.delaware.gov/authver.shtml](http://corp.delaware.gov/authver.shtml)



  
Jeffrey W. Bullock, Secretary of State  
AUTHENTICATION: 0105082

DATE: 12-28-12

Record on Appeal

# EXHIBIT D



STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Phillip Morgan,

Plaintiff,

v.

Nimrata "Nikki" Haley, in her Official  
Capacity as Governor of South Carolina, James  
F. Etter, in his Official Capacity as Director of  
The South Carolina Department of Revenue;  
South Carolina Division of State Information  
Technology; Trustwave Corp.; Trustwave  
Holdings, Inc.,

Defendants.

IN THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

Civil Action No. 2012-CP-40-7331

**AFFIDAVIT OF  
ALICE LIN GEENE, ESQUIRE**

I, Alice Lin Geene, Esq., submit this Declaration on behalf of Trustwave Holdings, Inc.,  
and declare as follows:

1. I have personal knowledge of the facts set forth in this declaration, and could  
competently testify to them if called as a witness.

2. I am currently General Counsel for Trustwave Holdings, Inc. ("Trustwave  
Holdings"). Trustwave Holdings is a Delaware Corporation with its principal place of business  
at 70 West Madison Street, Suite 1050, Chicago, IL 60602.

3. I assumed the position of General Counsel in September 2012. Prior to joining  
Trustwave Holdings, I was Group Vice President and Interim General Counsel at Orbitz  
Worldwide, Inc. As General Counsel, I am responsible for all of Trustwave Holdings' global  
legal matters and the company's internal risk and compliance teams.

## Trustwave Corporation

4. As General Counsel and a member of Trustwave Holdings' management, I am familiar with Trustwave Holdings' corporate structure and the corporate entities that have operated within it, including Trustwave Corporation.

5. Trustwave Corporation was incorporated in the State of Delaware, but no longer exists today. Trustwave Corporation and Ambiron, LLC (an Illinois liability company) were previously separate companies in the payment card industry compliance business. In April 2005, Trustwave Corporation and Ambiron, LLC combined their businesses through a transaction under which each company contributed all of its assets to Trustwave Holdings. Following that transaction, Trustwave Holdings became the operating entity for the company comprising the former Trustwave Corporation and Ambiron, LLC businesses. Trustwave Corporation was dissolved by the Delaware Secretary of State on August 8, 2011. Attached as **Exhibit A** is a true and accurate copy of the Certificate of Dissolution of Trustwave Corporation that is on file with the State of Delaware. As a result, Trustwave Corporation has not legally existed since August 8, 2011.

6. I am familiar with the contracts pursuant to which certain Trustwave Holdings' products and services were provided to the South Carolina Department of Revenue. The signatories to these contracts were Ambiron Trustwave and Trustwave Holdings, Inc. For a period of time, Trustwave Holdings, Inc. did business as Ambiron Trustwave. Ambiron Trustwave is not a legal entity distinct from Trustwave Holdings, Inc.

7. Trustwave Corporation was not a party to any contracts related to the provision of Trustwave Holdings' products or services to the South Carolina Department of Revenue. To my knowledge, Trustwave Corporation has not had any contacts or business dealings in the State of South Carolina since at least 2005, if ever.

15. I am not familiar with the address of 630 Davis Street, Suite 300, Evanston, IL 60201, and no authorization was provided by Trustwave Holdings to change the registered address for services of process to that location.

16. The State of Delaware registered agent for service of process for Trustwave Holdings is The Corporation Trust Company, with an address of Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

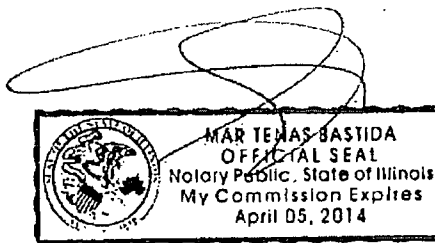
17. I declare under penalty of perjury under the applicable laws that the foregoing is true and correct and that this Declaration was executed December 21, 2012, in Chicago, Illinois.

*Alice Lin Geene*

Alice Lin Geene, Esq.  
General Counsel  
Trustwave Holdings, Inc.

Sworn to and subscribed before me  
This 21<sup>st</sup> Day of December, 2012

*Mar Tenas Bastida*, L.S.  
Notary Public for the State of Illinois  
My commission expires: 4/05/2014



|                                              |   |                                   |
|----------------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                      | ) | IN THE COURT OF COMMON PLEAS      |
|                                              | ) | FIFTH JUDICIAL CIRCUIT            |
| COUNTY OF RICHLAND                           | ) |                                   |
| Phillip Morgan, individually and on          | ) | Civil Action No.: 2012-CP-40-7331 |
| behalf of all similarly situated Plaintiffs, | ) |                                   |
|                                              | ) |                                   |
| Plaintiff,                                   | ) |                                   |
|                                              | ) |                                   |
| vs.                                          | ) |                                   |
|                                              | ) |                                   |
| Nimrata "Nikki" Halcy, Governor of           | ) |                                   |
| South Carolina; James F. Etter, Director     | ) |                                   |
| of the South Carolina Department of          | ) |                                   |
| Revenue; the South Carolina Department       | ) |                                   |
| of Revenue; South Carolina Division of       | ) |                                   |
| State Information Technology; Trustwave      | ) |                                   |
| Corporation; and Trustwave Holdings,         | ) |                                   |
| LLC,                                         | ) |                                   |
|                                              | ) |                                   |
| Defendants.                                  | ) |                                   |

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**DEFENDANT SOUTH CAROLINA DIVISION OF STATE TECHNOLOGY'S  
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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**Introduction**

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant South Carolina Division of State Technology ("DSIT"), expressly reserving all rights under its Motion to Dismiss and without waiving any position asserted therein, submits the following memorandum and authorities in support of its Motion to Dismiss Plaintiff's Amended Complaint. As is established below, Plaintiff fails to state facts sufficient to constitute a cause of action against DSIT entitling Plaintiff to relief on any theory of law. Accordingly, each of Plaintiff's claims against DSIT should be dismissed as a matter of law.

### Procedural History and Facts

Plaintiff commenced this declaratory judgment action<sup>1</sup> with the filing of a Summons and Complaint on October 31, 2012. Plaintiff filed an Amended Complaint on November 5, 2012. According to the allegations of the Amended Complaint, on August 27, 2012, “third parties infiltrated the database of the South Carolina Department of Revenue and acquired approximately 3.6 million Social Security numbers, approximately 387,000 credit and/or debit card numbers, and a yet unknown number of tax returns and other documents containing personal identifying information.” (Am. Compl. ¶ 20.) According to Plaintiff, “Defendants Trustwave and Trustwave Holdings were charged with the duty of securing the personal identifying information.” (*Id.* ¶ 21.) On October 10, 2012, DSIT informed Defendant South Carolina Department of Revenue (“DOR”) and Defendant Nimrata “Nikki” Haley, Governor of South Carolina of the breach.<sup>2</sup> (*Id.* ¶ 22.) Plaintiff further alleges that “the persons whose data had been compromised were not notified by Defendants until October 26, 2012.” (*Id.* ¶ 23.)

The Amended Complaint contains seven causes of action, four of which are directed at DSIT. In his first cause of action, Plaintiff seeks a declaration that DSIT “knowingly and willfully breached” section 1-11-490 of the South Carolina Code of Laws (Supp. 2012). (*Id.* ¶¶ 29, 30.) In his second cause of action, Plaintiff alleges that DSIT “willfully, wantonly, recklessly, and with gross negligence violated and failed to

---

<sup>1</sup> According to the Amended Complaint, “[p]ursuant to S.C. Code Ann. § 15-53-130, this action is declaratory in character, as residents of the State are asking for a determination of whether they are entitled to recover damages in accordance with S.C. Code Ann. § 1-11-490 and S.C. Code Ann. § 39-1-90.” (Am. Compl. ¶ 16.)

<sup>2</sup> In fact, it is undisputed and a matter of public record that DSIT notified DOR of suspicious activity relating to DOR data on August 13, 2012, and provided instructions to DOR as to how to protect its data. See **Exhibit A** attached hereto.

comply with the duties imposed upon [it] to encrypt data and to expeditiously disclose the breach of security in accordance with S.C. Code Ann. § 1-11-490 and [is], therefore grossly, negligent *per se*.” (*Id.* ¶ 34.) In his third cause of action, Plaintiff alleges that DSIT “formed a civil conspiracy” with the other Defendants “for the purpose of harming Plaintiff.” (*Id.* ¶ 38.) Finally, in his fourth cause of action, Plaintiff contends that DSIT owed Plaintiff “a duty to provide a reasonable standard of care under the circumstances by protecting Plaintiff’s personal identifying information” but that DSIT “failed to exercise slight care and [has] willfully, wantonly, recklessly, and with gross negligence breached the standard of care owed to Plaintiff . . . .” (*Id.* ¶¶ 42, 43.)

#### **Legal Standard**

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC must be based “solely on allegations set forth in the complaint.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to “any relief on any theory of the case.” *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). ““The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.”” *Doe*, 373 S.C. at 395, 645 S.E.2d at 247-48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

Under this standard, DSIT is entitled to have all causes of action set forth in Plaintiff’s Amended Complaint dismissed as a matter of law. None of the causes of action can be sustained under existing law in South Carolina under the facts alleged in the Complaint.

## Argument

### I. This Court Should Dismiss Plaintiff's Amended Complaint Because Plaintiff Lacks Standing to Sue.

#### A. The law of standing.

A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) (citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985)). Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Michael P. v. Greenville Cnty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009) (citing *Powell ex rel. Kelley v. Bank of Am.*, 397 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008)). To have standing, a party must therefore have a personal stake in the subject matter of a lawsuit. *Sloan, supra* (citing *Newman v. Richland County Hist. Preserv. Com'n*, 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997)); *Sea Pines Ass'n for the Protection of Wildlife v. South Carolina Dep't. of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "[S]uch imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public." *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992).

To have standing, "[a] plaintiff must allege an actual controversy in which he has a personal stake." *Beaufort Realty Co., Inc.*, 346 S.C. at 301, 551 S.E.2d at 589. Moreover, a party must demonstrate standing for each form of relief sought. *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 185 (2000); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). In *Lujan v. Defenders of*

*Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court articulated the “irreducible constitutional minimum” that standing requires:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 560-61 (citations and internal quotation marks omitted) (alterations in original).<sup>3</sup>

The party seeking to establish standing “carries the burden of demonstrating each of the three elements.” *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 290.

In the present case, Plaintiff has not, as a matter of law, suffered an injury in fact. Accordingly, this Court should dismiss Plaintiff’s Amended Complaint.

**B. As a matter of law, Plaintiff has not suffered an injury in fact.**

Plaintiff lacks standing because he cannot allege that he has or will suffer an injury in fact, or a particularized harm. In order for the injury to be “particularized,” it must affect the plaintiff in a personal and individualized way.” *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292 (citing *Lujan*, 504 U.S. at 651). “Mere interest,” in an issue however, is not enough. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). 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

---

<sup>3</sup> The standard articulated by the United States Supreme Court in *Lujan* has been adopted by and applies with equal force to cases arising under state law. See *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.



‘abstract,’ and the alleged harm must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal citations omitted).

Allegations of ‘possible future injury’ are not sufficient to satisfy Article III. Instead, ‘[a] threatened injury must be certainly impending,’ and ‘proceed 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[.]’ A plaintiff therefore lacks standing if his ‘injury’ stems from an indefinite risk of future harms inflicted by unknown third parties.

*Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (internal citations omitted).

Plaintiff has not pleaded and could never establish that he has suffered an injury that is distinct and palpable or a harm that is actual and imminent. According to Plaintiff, he “has suffered actual damages and is in imminent danger of suffering further material injury and loss.” (Am. Compl. ¶ 44.) However, Plaintiff fails to identify the actual damage he allegedly has suffered. Moreover, “[i]n the identity theft context, courts have embraced the general rule that an alleged increase in risk of future injury is not an ‘actual or imminent’ injury.” *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 689 (S.D. Ohio 2006). “Consequently, courts have held that plaintiffs do not have standing, or have granted summary judgment for failure to establish damages in cases involving identity theft or claims of negligence and breach of confidentiality brought in response to a third party theft or unlawful access to financial information . . . .” *Id.* (citing cases). See *Reilly*, 664 F.3d at 42 (concluding that “[u]nless and until [appellants’] conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm”); *Hammond v. The Bank of New York Mellon Corp.*, No. 08-civ-6060 (RMB) (RLE), 2010 WL 2643307, \*7 (S.D.N.Y. June 25, 2010) (concluding, in a suit for

damages for loss of personal identification information, that “Plaintiffs lack standing because their claims are future-oriented, hypothetical, and conjectural”); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1052-1053 (E.D. Mo. 2009); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 7-8 (D.C.D.C. 2007) (concluding that plaintiffs have failed to allege an injury in fact and thus lack standing since plaintiffs’ allegations “amount to mere speculation that at some unspecified point in the indefinite future they will be the victims of identity theft”); *Kahle v. Litton Loan Servicing, LP*, 486 F. Supp. 2d 705 (S.D. Ohio 2007) (“A complaint alleging the mere potential for an injury does not satisfy Plaintiff’s burden to prove standing.”). *See also Giordano v. Wachovia Sec., LLC*, No. 06-476 (JBS), 2006 WL 2177036, \*4 (D.N.J. July 31, 2006) (“Plaintiff’s allegations that, as a result of Wachovia’s actions, she will incur costs associated with obtaining credit monitoring services in order to prevent identity theft simply does not rise to the level of creating a concrete and particularized injury.”)

The fact that Plaintiff does not allege that as a result of the alleged breach, his personal identifying information has been used by a third party thereby causing injury to Plaintiff in a certain amount is fatal to this case. Plaintiff has not suffered any actual damage. Although Plaintiff alleges that he “has suffered actual damages and is in imminent danger of suffering further material injury and loss . . . .” (Am. Compl. ¶ 35.) such allegations are mere speculation and do not amount to an actual or imminent harm. Plaintiff therefore lacks standing to bring this action, and this Court should dismiss Plaintiff’s Amended Complaint.

**II. This Court lacks subject matter jurisdiction to impose a fine or grant any other relief pursuant to S.C. Code Ann. § 1-11-490(H).**

Section 1-11-490(H) (Supp. 2012) provides that an agency that violates the provisions of section 1-11-490 is subject to an administrative fine, “the amount to be decided by the Department of Consumer Affairs.” To the extent that Plaintiff seeks relief under section 1-11-490(H), *see* Am. Compl. ¶ 11(c), this Court lacks subject matter jurisdiction to impose a fine or grant any other relief pursuant to section 1-11-490(H).

**III. Each Cause of Action Asserted Against DSIT Fails Independently to State a Claim Upon Which Relief Can be Granted and Therefore Should be Dismissed.**

As established above, Plaintiff lacks standing to sue because he has failed to allege that he has suffered an injury that is distinct and palpable or a harm that is actual and imminent. “This is fatal to [his] standing before this Court.” *Hammond*, 2010 WL at \*8. Nonetheless, DSIT will respond to each cause of action asserted against it as follows.

**A. The Amended Complaint fails to state facts sufficient to constitute any cause of action sounding in tort because such claims are barred by the South Carolina Tort Claims Act.**

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (2005),<sup>4</sup> “governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees.” *Smith v. Reg'l Med. Ctr.*, 394 S.C. 110, 114, 713 S.E.2d 656, 658 (Ct. App. 2011) (quoting *Flateau v. Harrelson*, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003)). The Act, which completely restores sovereign immunity, *see* S.C. Code Ann. § 15-78-20(b), sets forth specific waivers and limitations on actions against government entities. *Id.* Thus, “the

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<sup>4</sup> The Tort Claims Act only applies to Plaintiff’s tort claims, but not the statutory cause of action set forth in the Amended Complaint.

Torts Claims Act is a limited waiver of governmental immunity.” *Murphy v. Richland Mem’l Hosp.*, 317 S.C. 560, 563, 455 S.E.2d 688, 690 (1995). Although “[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense.” *Steinke v. S.C. Dep’t of Labor Licensing & Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) (citing *Strange v. S.C. Dep’t of Highways and Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994)), “[p]rovisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability.” *Id.* (citing S.C. Code Ann. § 15-78-20(f) (Supp. 1998) and *Baker v. Sanders*, 301 S.C. 170, 391 S.E.2d 229 (1990)).

The General Assembly granted “the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit *for any tort* except as waived by [the Act].” S.C. Code Ann. § 15-78-20 (b) (emphasis added). Under the Act, a governmental entity is not liable for a loss resulting from, among other things,

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

\* \* \* \*

S.C. Code Ann. § 15-78-60(4).

Thus, construing the Act liberally as this Court must do in favor of limiting liability, it becomes clear that if this case is grounded in tort, Plaintiff’s Amended Complaint must be dismissed on any tort theory of liability Plaintiff advances. Specifically, if Plaintiff’s theory of recovery rests on the allegation that DSIT failed to

enforce section 1-11-490, Plaintiff's Amended Complaint must be dismissed pursuant to section 15-78-60 (4). As such, any claim for damages against DSIT must be dismissed as a matter of law.

**B. Plaintiff's first cause of action fails as a matter of law.**

In his first cause of action, Plaintiff seeks a declaration that DSIT "knowingly and willfully breached" section 1-11-490 and that "pursuant to S.C. Code Ann. § 1-11-490(g)(1), Plaintiff is entitled to institute this suit to recover damages." (Am. Compl. ¶¶ 29, 30.)

Section 1-11-490 of the South Carolina Code of Laws (Supp. 2012) provides, in relevant part, as follows:

(A) An agency<sup>5</sup> of this State owning or licensing computerized data or other data that includes personal identifying information shall disclose a breach of the security of the system following the discovery or notification of the breach in the security of the data to a resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident. The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (C), or with measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

(B) An agency maintaining computerized data or other data that includes personal identifying information that the agency does not own shall notify the owner or licensee of the information of a breach of the security of the data immediately following discovery, if the personal

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<sup>5</sup> "Agency" is defined as "any agency, department, board, commission, committee, or institution of higher learning of the State or a political subdivision of it. S.C. Code Ann. § 1-11-490 (D)(1).

identifying information was, or is reasonably believed to have been, acquired by an unauthorized person.

According to the allegations of Plaintiff's Amended Complaint, "Defendants Trustwave and Trustwave Holdings were charged with the duty of securing the personal identifying information." (Am. Compl. ¶ 21.) Additionally, Plaintiff alleges that on October 10, 2012, DSIT "informed the S.C. Department of Revenue and the Nikki Haley administration of the breach."<sup>6</sup> (*Id.* ¶ 22.) Therefore, whatever duty DSIT has under the statute as an "agency maintaining computerized data" was, by Plaintiff's own admission, performed by DSIT. Accordingly, to the extent that Plaintiff attempts to impose a duty on DSIT other than the duty to notify the Department of Revenue of a breach, Plaintiff's first cause of action must be dismissed.

**C. Plaintiff's second cause of action for gross negligence *per se* fails as a matter of law.**

"A statute can establish a duty to plaintiff." *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001) (citing *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991)). "Negligence *per se* is negligence arising from a defendant's violation of a statute." *Wogan v. Kunze*, 366 S.C. 583, 602, 623 S.E.2d 107, 117 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008). "Negligence *per se* is established by proof that a party violated a statute which has the essential purpose of protecting persons such as the injured party from the kind of harm suffered." *Kennedy v. Griffin*, 358 S.C. 122, 129, 595 S.E.2d 248, 251-52 (Ct. App. 2004) (quoting *Gulledge v. McLaughlin*, 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997)). In order to establish negligence *per se*, "the plaintiff must prove violation

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<sup>6</sup> As noted above, DOR was in fact notified on August 13, 2012 of suspicious activity.

of the statute was causally linked, both in fact and proximately, to the injury.” *Hurst v. Sandy*, 329 S.C. 471, 478, 494 S.E.2d 847, 850 (Ct. App. 1997) (quoting *Whitlaw v. Kroger Co.*, 306 S.C. 51, 55, 410 S.E.2d 251, 253 (1991)); *Seals by Causey v. Winburn*, 314 S.C. 416, 418, 445 S.E.2d 94, 96 (Ct. App. 1994) (“The violation of a statute, while negligence *per se*, will not support a recovery for damages unless such violation proximately caused or contributed to the injury complained of.”) Thus,

[i]t is not enough for a plaintiff to show that the defendant neglected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must also show that his injury was caused by exposure to a hazard which the statute was designed to prohibit.

*Winburn*, 314 S.C. at 419, 445 S.E.2d at 96 (citing *Bell v. Atl. Coast Line R. Co.*, 202 S.C. 160, 24 S.E.2d 177 (1943)).

In his second cause of action, Plaintiff contends that DSIT owed Plaintiff a duty to comply with section 1-11-490 “by rendering data ‘unusable through encryption, redaction, or other methods’ and disclosing any breach of security of personal identifying information ‘in the most expedient time possible and without unreasonable delay.’” (Am. Compl. ¶33.) Plaintiff alleges further that DSIT “willfully, wantonly, recklessly, and with gross negligence failed to comply with the duties imposed in [it] to encrypt data and to expeditiously disclose the breach of security . . . .” (*Id.* ¶ 34.)

Because DSIT does not own or license computerized data or other data that includes personal identifying information, section 1-11-490 imposes no such duty on DSIT. “An agency maintaining computerized data or other data that includes personal

identifying information that the agency does not own,”<sup>7</sup> owes *only* the duty to “notify the owner or licensee of the information of a breach of the security of the data immediately following discovery, if the personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person.” S.C. Code Ann. § 1-11-490(B). The statute does not impose upon any party any obligation to “render data unusable” as alleged in the Amended Complaint. As already noted, to the extent that DSIT even had a duty of notification, it has fully complied with that obligation. *See Cooney v. Chicago Pub. Sch.*, 943 N.E.2d 23, 28 (Ill. App. 2010) (concluding that while plaintiffs are correct that as a data collector, the school board violated the notification act because a breach of security occurred, the act “also codifies the remedy: the data collector must provide timely notice of a security breach to the parties affected,” which the school board did). Therefore, DSIT cannot as a matter of law be liable for negligence *per se*.

Moreover, even if DSIT breached a duty to Plaintiff under section 1-11-490, as established above, Plaintiff has failed to allege that he has suffered an injury that is distinct and palpable or a harm that is actual and imminent that was proximately caused by any failure of DSIT to comply with the statute. Accordingly, DSIT cannot be liable for negligence *per se* and Plaintiff’s second cause of action should be dismissed by this Court. *See Trivelas*, 348 S.C. at 134, 558 S.E.2d at 275 (“The finding of a statutory violation, however, does not automatically lead to the recovery of damages. The plaintiff must prove the violation proximately caused the injury complained of by the injured party.”).

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<sup>7</sup> DSIT does not meet this description with respect to the DOR data that is the subject of this action.



**D. Plaintiff's third cause of action for civil conspiracy fails as a matter of law.**

In his third cause of action, Plaintiff alleges that "Defendants formed a combination to engage in a civil conspiracy for the purpose of harming Plaintiff." (Am. Compl. ¶ 38.) Because Plaintiff fails to adequately plead a cause of action for civil conspiracy, this Court should dismiss Plaintiff's third cause of action.

Under South Carolina law, "the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damages." *Pridgen v. Ward*, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct. App. 2010); *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (setting forth the elements of civil conspiracy). "The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se." *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 10-11, 344 S.E.2d 379, 382 (Ct. App. 1986). "It is essential that the plaintiff prove all of these elements in order to recover." *Pye*, 369 S.C. at 567, 633 S.E.2d at 511 (citing *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938)).

**1. Plaintiff fails to allege that DSIT acted with the intention of harming Plaintiff.**

Specific intent is an essential element of civil conspiracy. *See Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (setting forth the elements of civil conspiracy, including "for the purpose of injuring the plaintiff"). Because Plaintiff failed to allege that DSIT acted with the intention of harming Plaintiff, this Court should dismiss Plaintiff's third cause of action for civil conspiracy.

2. **Plaintiff's civil conspiracy claim fails to allege any separate acts or omissions as a part of the conspiracy.**

"In a civil conspiracy claim, one must plead acts in furtherance of the conspiracy that are separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010).

In the present case, Plaintiff merely alleges that "Defendants formed a combination to engage in a civil conspiracy for the purpose of harming Plaintiff," and as "a direct and proximate result of the conspiracy of the Defendants, Plaintiff has suffered special damages." (Am. Compl. ¶¶ 38, 39.) Nowhere does Plaintiff allege any separate acts or omissions as a part of the alleged conspiracy. Accordingly this Court should dismiss Plaintiff's third cause of action. See *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) ("Because [the third party plaintiff] merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action.").

3. **Plaintiffs' civil conspiracy claim fails because any damages that might be recovered under this cause of action also could be recovered under one or more of the other causes of action in the Amended Complaint.**

"A plaintiff cannot recover damages for a particular act or wrong and likewise recover on a conspiracy to do the act or wrong." *Peoples Fed. Sav. & Loan Ass'n of South Carolina v. Res. Planning Corp.*, 358 S.C. 460, 476, 569 S.E.2d 51, 59 (2004). "Special damages are those elements of damages that are the natural, but not the necessary or usual, consequences of the defendant's conduct." *Hackworth v. Greywood*

at *Hammett, LLC*, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (Ct. App. 2009) (citing *Loeb v. Mann*, 39 S.C. 465, 469, 18 S.E. 1, 2 (1893)). These damages “are not implied at law because they do not necessarily result from the wrong.” *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875. Because the essence of a civil conspiracy claim “is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.” *Pye*, 369 S.C. at 568, 633 S.E.2d at 511; *Kuznik*, 342 S.C. at 610, 538 S.E.2d at 31 (“An action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues.”). As the South Carolina Supreme Court has noted,

‘[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.’

*Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (quoting 15A C.J.S. *Conspiracy* § 33 (1967)), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).

To the extent that Plaintiff can recover the alleged special damages under other causes of action, Plaintiff’s claim fails, and the third cause of action must be dismissed. *See Todd*, 276 S.C. at 293, 278 S.E.2d at 611 (dismissing conspiracy count where plaintiff could recover “no additional damages” on the conspiracy count); *Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (civil conspiracy claim dismissed where “[t]he damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action”); *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875 (“If a plaintiff merely repeats the damages from another claim instead of

specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.”)

In the present case, not only has Plaintiff failed to allege any separate acts that are the basis of the conspiracy claim, Plaintiff has also failed to allege any special damages that resulted from the alleged conspiracy. Indeed, the damages alleged do not appear to be recoverable under any theory of law since Plaintiff lacks standing.

4. Plaintiff's conspiracy claim fails to allege facts sufficient to state a cause of action for civil conspiracy against DSIT on the ground that agencies cannot conspire with each other as a matter of law.

Because two independent parties are a necessity for an actionable conspiracy, a corporation cannot conspire with itself. *Pridgen*, 391 S.C. at 244, 705 S.E.2d at 62; *see also McClain v. Pactiv Corp.*, 360 S.C. 480, 486, 602 S.E.2d 87, 90 (Cl. App. 2004); *Lee*, 289 S.C. at 14, 344 S.E.2d at 383. As a matter of law, a civil conspiracy cannot exist “when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities.” *McMillan v. Oconee Mem’l Hosp.*, 367 S.C. 559, 626 S.E.2d 884 (2006). Moreover, agents of a corporation, acting within the course and scope of their employment, cannot conspire with each other. *Cricket Cove Ventures*, 390 S.C. at 325, 701 S.E.2d at 46 (citing *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (“[A] corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves.”)). “An act is within the scope of a servant’s employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master’s business.” *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006).

As alleged in the Amended Complaint, DSIT “is an agency of the State of South Carolina.” (Am. Compl. ¶ 4.) Consequently, DSIT, as an agency, cannot conspire with other state agencies. In other words, there is no combination of two or more persons, as a matter of law, to support a conspiracy claim. Therefore, this Court should dismiss Plaintiff’s third cause of action.

**E. Plaintiff’s fourth cause of action for gross negligence fails as a matter of law because as a matter of law DSIT owes no duties to Plaintiff.**

In his fourth cause of action for gross negligence,<sup>8</sup> Plaintiff contends that DSIT owed him “a duty to provide a reasonable standard of care under the circumstances by protecting Plaintiff’s personal information” but DSIT “failed to exercise slight care and [has] willfully, wantonly, recklessly, and with gross negligence breached the standard of care owed to Plaintiff by failing to exercise reasonable care under the circumstances in [its] handling of Plaintiff’s personal identifying information[.]” (Am. Compl. ¶¶ 42, 43.)

“Gross negligence is defined as ‘the failure to exercise slight care.’” *Berberich v. Jack*, 392 S.C. 278, 287, n.1, 709 S.E.2d 607, 612, n.1 (2011) (quoting *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007), quoting in turn *Steinke v. S.C. Dep’t of Labor, Licensing & Reg.*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999)). “Gross negligence ‘is a relative term, and means the absence of care that is necessary under the circumstances.’” *Id.* “A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing.” *Hamilton v. Charleston County Sheriff’s Dep’t*, 399 S.C. 252, 255, 731 S.E.2d 727, 728 (Ct. App. 2012) (quoting *Jackson v. S.S. Dep’t of Corrs.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989)). However, “[f]or negligent conduct to

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<sup>8</sup> This action, grounded in tort, is barred by the South Carolina Tort Claims Act.

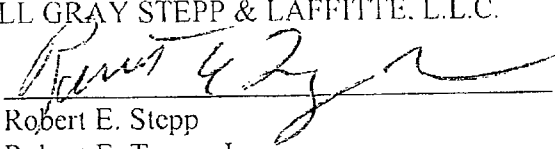
become actionable, it must violate some specific legal duty owed to the plaintiff.” *Rice v. Sch. Dist. of Fairfield*, 317 S.C. 87, 93, 452 S.E.2d 352, 354 (Ct. App. 1995) (citing *Foster v. Greenville Cnty. Med. Soc’y*, 295 S.C. 190, 367 S.E.2d 468 (Ct. App. 1988)). “In the absence of a legal duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability.” *Id.*

As noted above, the only duty DSIT owed was to “notify the owner or licensee of the information of a breach of the security of the data immediately following discovery, if the personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person.” S.C. Code Ann. § 1-11-490(B). For purposes of this statute, the owner or licensee of the data is DOR, not Plaintiff. DSIT does not owe Plaintiff any duty as matter of law. Therefore, DSIT cannot be liable to Plaintiff for gross negligence, and this Court should dismiss Plaintiff’s fourth cause of action as a matter of law.

### Conclusion

For all of the reasons set forth above, this Court should grant DSIT’s Motion to Dismiss.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

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Information Technology*

Columbia, South Carolina

February 4, 2013

Lee, Kim

From: MacDougall, James R.  
Sent: Monday, October 29, 2012 2:45 PM  
To: Earley, Jimmy; Lee, Kim  
Subject: Security Operation Center

RT

Managed-BY: RT 4.0.5 (<http://www.bestpractical.com/rt/>)  
Subject: [SOC #4203] \*\*SC ISAC Notification - Virus / Trojan / Downloader(Multi-stage dropper)\*\* - SC Department of Revenue - State / 2012-08-13  
MIME-Version: 1.0  
Date: Mon, 13 Aug 2012 15:34:44 -0400  
RT-Ticket: SOC #4203  
References: <RT-Ticket-4203@SCISAC>  
Precedence: bulk  
Message-ID: <rt-4.0.5-20439-1344886484-1900.4203-50-0@SCISAC>  
Content-Type: multipart/alternative; boundary="-----=\_1344886484-20439-8"  
Reply-To: [correspondence@sc.isac.gov](mailto:correspondence@sc.isac.gov)  
To: [securityalerts@scisac.org](mailto:securityalerts@scisac.org)  
X-RT-Loop-Prevention: SOC  
Content-Transfer-Encoding: 8bit  
From: SOC <[correspondence@sc.isac.gov](mailto:correspondence@sc.isac.gov)>  
RT-Originator: [rt@scisac.org](mailto:rt@scisac.org)

RT-Attach Message: Yes  
Content-Type: text/plain; charset="utf-8"  
From: SOC <[correspondence@sc.isac.gov](mailto:correspondence@sc.isac.gov)>  
Subject: \*\*SC ISAC Notification - Virus / Trojan / Downloader(Multi-stage dropper)\*\* - SC Department of Revenue - State / 2012-08-13  
Reply-To: [correspondence@sc.isac.gov](mailto:correspondence@sc.isac.gov)  
To: [securityalerts@scisac.org](mailto:securityalerts@scisac.org)  
X-RT-Original-Encoding: utf-8

The SC-ISAC is contacting you because systems on your network appear to be exhibiting behavior consistent with a Virus / Trojan / Downloader(Multi-stage dropper).

This information was received during daily monitoring of your network by the SC-ISAC.

Please see details below. Note: Many forms of malware carry payloads capable of capturing keystrokes, screen images and confidential information etc. Avoid logging into the system with administrative permissions.

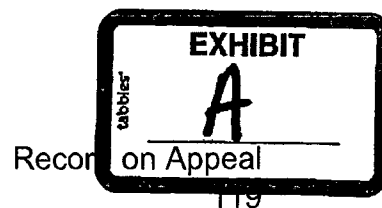
S.C. law (S.C. Code Ann. § 1-11-490) requires that any reasonably believed un-authorized access to Personal Identifying Information (PII) must be reported to the individuals affected.

Link to SC Law at URL: <http://www.scstatehouse.gov/code/t1c1m14.htm>

The SC-ISAC recommends investigating this incident further to determine the extent that this machine is infected or compromised.

This is a Response Level Tier-3.

\* Interrupt the user.

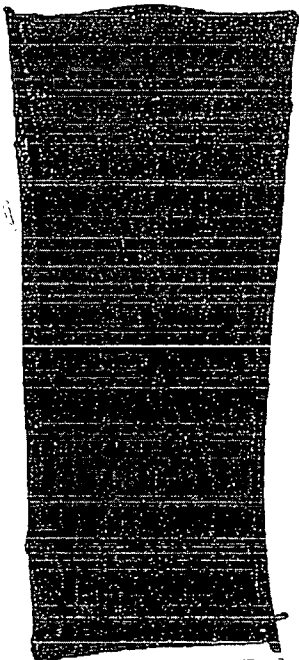


- \* Determine if there is any access to PII from the affected system.
- \* Escalate to Tier-2 response procedures if PII is involved.
- \* Don't let them close anything or have any more interaction with the workstation.
- \* Run a volatile memory preservation script/utility while machine is still on the network.
- \* Do not proceed to forensic/mitigation without authorization from Designated Approval Authority.
- \* Unplug the machine and initiate chain of custody procedures.
- \* Link to Unauthorized Access Procedures:  
[https://sc-isac.sc.gov/sites/default/files/visio-incident\\_response\\_procedures\\_2\\_page\\_2.png](https://sc-isac.sc.gov/sites/default/files/visio-incident_response_procedures_2_page_2.png)

Please let the SC-ISAC know the results of your investigation.

----- Notification Details -----

The following machines have downloaded malware constructed with the Blackhole Exploit Kit. The level of compromise is not known at this time. Recommend implementation of Incident Response Procedures on the following IP addresses:



----- End Notification Details -----

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SC-ISAC Contact Information Email: [SC-ISAC@cio.sc.gov](mailto:SC-ISAC@cio.sc.gov)

SC-ISAC security line: (803)896-1650 24-hour hot line: (803)896-0001

Fax: (803)896-0375

Postal address: SC-ISAC DSIT Budget and Control Board

4430 Broad River Road

Columbia, S.C. 29210



SC-ISAC is available via security line 08:00 17:00 EST(GMT-5) / EDT(GMT-4)  
Monday through Friday.

Using Encryption We strongly urge you to encrypt sensitive information sent by email.

Our public PGP key is available from: <https://sc-isac.sc.gov/public-key>

NO WARRANTY Any material furnished by SC-ISAC is furnished on an "as is" basis. SC-ISAC makes no warranties of any kind, either expressed or implied as to any matter including, but not limited to, warranty of fitness for a particular purpose or merchantability, exclusivity or results obtained from use of the material.

SC-ISAC does not make any warranty of any kind with respect to freedom from patent, trademark, or copyright infringement.

Content-Type: text/html; charset="utf-8"

X-RT-Original-Encoding: utf-8

The SC-ISAC is contacting you because systems on your network appear to be exhibiting behavior consistent with a

Virus / Trojan / Downloader(Multi-stage dropper)

This information was received during daily monitoring of your network by the SC-ISAC.

Please see details below. Note: Many forms of malware carry payloads capable of capturing keystrokes, screen images and confidential information etc. Avoid logging into the system with administrative permissions.

S.C. law (S.C. Code Ann. §sect. 1-11-490) requires that any reasonably believed unauthorized access to Personal Identifying Information (PII) must be reported to the individuals affected.

Link to SC Law at URL: <http://www.scstatehouse.gov/code/t01c01.htm>

The SC-ISAC recommends investigating this incident further to determine the extent that this machine is infected or compromised.

This is a Response Level Tier-3

- 

- 

Interrupt the user.

- 
- 

Determine if there is any access to PII from the affected system.

- 
- 

Escalate to Tier-2 response procedures if PII is involved.

- 
- 

Don't let them close anything or have any more interaction with the workstation.

- 
- 

Run a volatile memory preservation script/utility while machine is still on the network.

- 

Do not proceed to forensic/mitigation without authorization from Designated Approval Authority.

- 
- 

Unplug the machine and initiate chain of custody procedures.

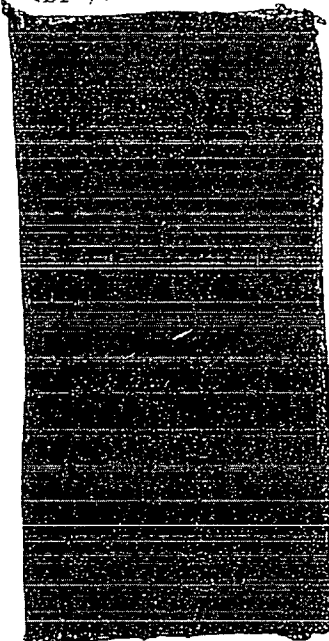
- 
- 

Link to Unauthorized Access Procedures: <https://sc-isac.sc.gov/sites/default/files/visio>

[incident\\_response\\_procedures\\_2\\_page\\_2.png](https://sc-isac.sc.gov/sites/default/files/viaic/incident_response_procedures_2_page_2.png)

Please let the SC-ISAC know the results of your investigation.

The following machines have downloaded malware constructed with the Blackhole Exploit Kit. The level of compromise is not known at this time. Recommend implementation of Incident Response Procedures on the following IP addresses:



----- End Notification Details -----

SC-ISAC Contact Information Email: [SC-ISAC@cio.sc.gov](mailto:SC-ISAC@cio.sc.gov)

SC-ISAC security line: (803)896-1650 24-hour hot line: (803)896-0001  
Fax: (803)896-0375

Postal address: SC-ISAC DSIT Budget and Control Board  
4430 Broad River Road  
Columbia, S.C. 29210

SC-ISAC is available via security line 08:00-17:00 EST (GMT-5) / EDT (GMT-4) Monday through Friday.

Using Encryption We strongly urge you to encrypt sensitive information sent by email.

Our public PGP key is available from: [https://sc-isac.sc.gov/public\\_key](https://sc-isac.sc.gov/public_key)

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) IN THE FIFTH JUDICIAL CIRCUIT

Phillip Morgan, ) Civil Action No. 2012-CP-40-7331  
Individually, and on behalf of )  
all similarly situated Plaintiffs. )

Plaintiffs, )

vs. )

Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina Department )  
of Revenue; South Carolina Division of )  
State Information Technology; Trustwave )  
Corporation; and Trustwave Holdings, )  
L.L.C. )

Defendants. )

# CERTIFICATE OF SERVICE

I, the undersigned Paralegal of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant South Carolina Division of State Information Technology do hereby certify that I have served all counsel in this action with a copy of the document specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

**Pleadings:** Defendant South Carolina Division of State Technology's Memorandum in Support of Motion to Dismiss

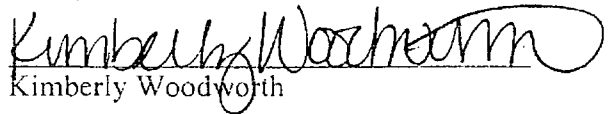
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Kimberly Woodworth

Columbia, South Carolina  
February 4, 2013

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) |                                  |
| COUNTY OF RICHLAND                       | ) | FOR THE FIFTH JUDICIAL CIRCUIT   |
|                                          | ) |                                  |
| Phillip Morgan,                          | ) |                                  |
|                                          | ) |                                  |
| Individually, and on behalf of           | ) | <b>PLAINTIFF'S MEMORANDUM OF</b> |
| all similarly situated Plaintiffs,       | ) | <b>LAW FOR ALL MOTIONS</b>       |
|                                          | ) |                                  |
| v.                                       | ) | Civil Action No. 2012-CP-40-7331 |
|                                          | ) |                                  |
| Nimrata "Nikki" Haley, Governor of       | ) |                                  |
| South Carolina; James F. Etter, Director | ) |                                  |
| of the South Carolina Department of      | ) |                                  |
| Revenue; the South Carolina              | ) |                                  |
| Department of Revenue; South Carolina    | ) |                                  |
| Division of State Information            | ) |                                  |
| Technology; Trustwave Corporation;       | ) |                                  |
| and Trustwave Holdings, Inc.             | ) |                                  |
|                                          | ) |                                  |
| Defendants.                              | ) |                                  |
|                                          | ) |                                  |

**A. TRUSTWAVE DEFENDANTS' MOTION TO SET ASIDE DEFAULT**

Rule 4(d)(3) of the South Carolina Rules of Civil Procedure provides that service is effected,

Upon a corporation [ . . . ] by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

In Schenk v. Nat'l Health Care, Inc., 322 S.C. 316, 471 S.E.2d 736 (1996), the plaintiff "attempted to serve the registered agent of the [defendant] at the address designated by the company to the Secretary of State, but the registered agent had retired: "Apparently, [the defendant] had not notified the Secretary of State of this circumstance and had not changed its registered agent [ . . . ]" Id. at

319, 737. The Court stated, "although we agree with the conclusion of the trial judge that the [plaintiff] should not be penalized for the [defendant's] failure to update its records with the Secretary of State [ . . . ] [t]he only issue on appeal is whether service was improper because it was not made upon the registered agent." *Id.* At 319, 737 (emphasis added). Because the plaintiff could not locate the (absent) named registered agent, Schenk served the office manager. The Court stressed that "*she assured the process server that she was duly authorized to accept service of process.*" *Id.* At 320, 738. The Court stated that "one can serve any 'authorized agent' even though the company has a specific 'statutory agent'." *Id.* Hence, for an agent to be "authorized," that agent must be authorized according to agency principles, not by express appointment of the corporation.

Trustwave Defendants cite Hamilton v. Davis 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990) in support of their position that Plaintiff's serving of their registered agent's personal secretary was insufficient to effect service. Hamilton deals with S.C.R.C.P. 4(d)(1) service upon "individuals," i.e., natural persons, and is thus inapposite. At any rate, it involved a case in which the plaintiff sued a man who had physically assaulted her, as well as the persons who hired him to maintain the premises where the plaintiff lived—and where the assault occurred. The defendants who hired the man who committed the assault were purportedly served when the man who committed the assault was served. They were not personally served. In addition, they "denied receiving notice of the suit until the matter was already in default [ . . . ]" *Id.* At 414, 299.

Trustwave Defendants also cite Brown v. Carolina Emergency Physicians,

P.A., 348 S.C. 569, 560 S.E.2d 624 to stand for the proposition that "service must be made on an actual agent." In Brown, the Court of Appeals relied on Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996), which held

[t]he courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority.

Moore at 523, 67. In both Brown and Moore, the party asserting proper service had served a secretary that the admittedly proper party for service did not specifically authorize for service. What the Court concluded, however, is that ordinary agency principles apply to the service of a Summons and Complaint for a corporate party. The relevant rules of agency under South Carolina law are longstanding:

Generally agency may be implied or inferred and may be circumstantially proved by the conduct of the *purported agent exhibiting a pretense of authority with the knowledge of the alleged principal*.

The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority.

and they in turn deal with the agent based on that assumption.

Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 427 (1982) (emphasis added).

In the case at bar, Plaintiff mailed two copies of the Summons and Complaint to the Registered Agent of Service for Trustwave Corporation and Trustwave Holdings, Eric R. Decator at 70 West Madison Street, Suite 1050, Chicago, Illinois 60602. Plaintiff also retained a process server to serve the Complaint upon Mr. Decator at the address Trustwave Defendants had registered with the Illinois Secretary of State. The letter, sent to the official address Trustwave Defendants maintain is correct (See **Exhibit D**), was either never received or was ignored. Counsel for Plaintiff also retained a process server to personally serve Mr. Decator at the address listed with the Illinois Secretary of State (70 West Madison St., Suite 4100, Chicago, Illinois 60602) (See **Exhibit C**). Upon attempting to serve Mr. Decator at the listed address (which is the address of the Kaye Scholer Law Firm), the process server was informed that Mr. Decator had left the firm and was now at Arland Energy, 630 Davis, Suite 300, Evanston, Illinois. The process server was also given Mr. Decator's cellular phone number. Upon calling Mr. Decator, the process server was informed that, should Mr. Decator be absent from the Evanston address at the time the server arrived, the Summons and Complaint were to be given to Mr. Decator's personal secretary, Marci Johnson. When the process server arrived, Mr. Decator had gone for the day, and the process server duly provided the Summons and Complaint to Marci Johnson after Ms. Johnson's assurances that she was authorized to accept service of the Summons and Complaint on behalf of Mr. Decator (See **Exhibit A and B**). As is noted upon the



envelope addressed to Eric R. Decator, 70 West Madison St., Suite 4100, Chicago, Illinois 60602, "no longer at firm Kaye Scholer," it was literally impossible for Plaintiff to serve Defendant by serving Mr. Decator at the address listed for Trustwave Defendants with the Illinois Secretary of State (**Exhibit G**).

It should go without saying that when a defendant appoints a registered agent for the service of process it "intended to confer such authority" as was necessary for the defendant to be served in accordance with the wishes of its appointed agent. That is, Eric Decator's actions are Trustwave's actions. Trustwave Defendants maintain that a defendant must, on a case by case basis, instruct its registered agent for service of process regarding the method by which he should accept the complaint, including the proper address at which he must receive the complaint. This line of reasoning undermines the very purpose of having a registered agent. Trustwave Defendants do not deny that Eric Decator instructed Marci Johnson to receive the Complaint in his absence. Neither do they deny that Marci Johnson stated that she was so authorized when service was perfected. Even if Ms. Johnson lacked actual authority to accept the Complaint, she without doubt had apparent authority to accept it. As noted by the process server: "[Eric Decator] informed me [ . . . ] we were to serve the Summons and Complaint upon his secretary [Marci Johnson]" (See **Exhibit B**).

Further, Trustwave Defendants admit that Eric Decator, an attorney, is their officially denominated agent for service of process. His listed address is 70 West Madison St, Ste. 4100 (*not* Suite 1050, as Trustwave Defendants allege would have been the proper address for service) (See **Exhibits C and D**). Under South Carolina law, "Any communication failure or mistake on the part of an attorney is directly

attributable to his client." Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244. As he was an attorney serving as Trustwave Defendants' registered agent of process, if Mr. Decator wrongly designated Marci Johnson to accept the Summons and Complaint in his absence, that error is nevertheless attributable to Trustwave Defendants themselves by attorney-client principles in addition to agency principles. When Mr. Decator instructed that service of the Summons and Complaint be completed upon Marci Johnson, Trustwave instructed that service be completed upon Marci Johnson.

According to **Exhibit E**, Eric Decator is a licensed attorney in the State of Illinois with malpractice coverage. If Trustwave Holdings and Trustwave Corp. ("Trustwave Defendants") allege that he failed to communicate the service of Plaintiff's Summons and Complaint, or that he did not have their permission to designate Marci Johnson, their recourse is against Mr. Decator, and they should not be allowed to use a purported technicality in the law to the detriment of Plaintiff, who has had to incur expenses locating and serving the person Trustwave Defendants named as their agent. Trustwave states that, for service to be effectual, Eric Decator should have been served at 70 West Madison Street, Suite 1050, Chicago, IL. Eric Decator was not at that address at the time of service, and he is not at that address now. Eric Decator could not be served at that address because he is no longer an attorney at the firm located there. Instead, Trustwave Defendants Registered Agent for Service is an employee of Arland Energy Systems at 630 Davis, Ste. 300 in Evanston IL, and that is where he was served (**Exhibits A and H**). Trustwave Defendants ask the court to require Plaintiff to have served Trustwave by going to the Kaye Scholer Law Firm in Chicago and placing the Complaint directly in the hands of Eric Decator, attorney for Trustwave at Kaye

Scholer, 70 West Madison Street, after Mr. Decator had left both the address and the position, never to return. What the Trustwave Defendants do not explain why this Court should adopt as a rule of law that which is not possible as a rule of physics.

Unlike the counsel in Schenk, in the case at bar, Plaintiff emphatically urges the court not to reward the Trustwave Defendants' failure to make the registered agent's identity and whereabouts known or knowable. The purpose of a corporation having a registered agent for the service of process, apodictically, is for that person to receive the service of process. Plaintiff served the person identified as the registered agent for Trustwave by following his express instructions to serve Marci Johnson, who expressly stated that she was authorized to accept service. Most importantly of all, Trustwave Defendants *do not deny that they actually received the Complaint*. In fact, Trustwave Defendants publicly stated "Trustwave policy is not to comment on pending legal matters" (Exhibit F). The rules developed for service of process create a practical procedural mechanism to ensure, as reliably as possible, that a Defendant timely receives the Summons and Complaint. It appears that Trustwave Defendants did timely, *actually* receive the Summons and Complaint. The substantive purpose of the service rules has been accomplished (i.e., Trustwave Defendants actually received the Summons and Complaint). They now play a shell game with the Court and elevate literal adherence to the form of the Rule (which, as noted above, they made impossible) above the substantive purpose of the rule (i.e., their actual timely receipt of the Summons and Complaint), a purpose that was actually accomplished.

At the very least, Plaintiff requests that the Court allow discovery for the limited purpose of determining the precise nature of the relationships involved between Trustwave and its agent and whether service was proper because “[q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship.” Fernander v. Thigpen, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (emphasis in original). Plaintiff should be given the opportunity to determine whether Trustwave Defendants actually received the Complaint. Fundamentally, the purpose of service is to give notice to the opposing party, as such it must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 315 (1950). If the Trustwave Defendants actually received the Complaint, which all facts in the possession of Plaintiff indicate, Plaintiff would respectfully request that the Court not rule in favor of arguments Trustwave Defendants have presented to the Court with unclean hands.

#### **B. TRUSTWAVE DEFENDANTS’ MOTION TO DISMISS**

When a party moves to dismiss under Rule 12(b)(6), “[t]he motion cannot be sustained if facts alleged in the complaint *and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.*” Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697, (1984) (emphasis added) (citations omitted). In addition, “[i]n determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid South Management Co.,

Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

The Brown Court stated:

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides in pertinent part that: "[I]f on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, *matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*" [Emphasis in original].

[. . .] It is our view the language of the Rule is clear, and it states plainly that the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings *if* the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure.

Brown, at 366-67, 698.

Hence, if a party asks the court to consider materials other than the Complaint to make its determination, the party purportedly seeking a 12(b)(6) dismissal of the action, in fact, converts its 12(b)(6) motion into a motion for summary judgment, regardless of its appellation. The Supreme Court of South Carolina has held

Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." [ . . . ]("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.

Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E. 2nd 537, 543. (internal Citations Omitted). In Baughman, the Court reversed the trial court's granting of partial summary judgment because of the Plaintiffs "acted with due diligence" in acquiring an expert and propounding discovery to the Defendants. The Court concluded that the Defendants could renew their motions "once Plaintiffs have been afforded an adequate opportunity to complete discovery [ . . . ]" Id. at 114, 545.

As to Trustwave Defendants, a timely Affidavit of Default and Motion for Damages Hearing have been filed and served as to each Trustwave Defendant (See **Exhibit G**), as noted above. Accordingly, their Motions to dismiss are premature unless the default has been set aside. Even if the purported 12(b)(6) motion were relevant, by supplementing the motion with affidavits, the Trustwave Defendants make a motion for summary judgment, which cannot be granted, in accordance with the above analysis, until the parties have had the opportunity to engage in discovery. Accordingly, Trustwave Defendants' 12(b)(6) Motion should be denied.

**C. DEFENDANTS HALEY'S, ETTER'S, DEPARTMENT OF  
REVENUE'S AND DIVISION OF STATE  
INFORMATION AND TECHNOLOGY'S MOTIONS TO DISMISS**

Defendants move to dismiss on three colorable grounds. First, they assert that

the Court lacks subject matter jurisdiction. Second, they assert that Plaintiff's claims are barred by the Tort Claims Act. Third, they assert that Plaintiff has failed to establish a cognizable claim for damages.

### **1. SUBJECT MATTER JURISDICTION**

As in the case at bar, in Ward v. State, 343 S.C.14, 538 S.E.2d 245 (2000), the Defendant State moved to dismiss for lack of subject matter jurisdiction pursuant to Rule 12 (b)(1) on the ground that the Revenue Procedures Act created exclusive jurisdiction in the Administrative Law Court. The State's motion was based on language from the Revenues Procedures Act providing, "If a taxpayer brings an action covered by this chapter in circuit court, other than an appeal of an Administrative Law Judge decision or DMV hearing officer decision, the circuit court shall dismiss the case without prejudice." Following the language of this statute, the circuit court dismissed the action. The South Carolina Supreme Court, upon review, held, "this issue does not involve subject matter jurisdiction." Instead, the Court reiterated that the "doctrine of exhaustion of administrative remedies is generally considered a rule of 'policy, convenience and discretion rather than one of law, and is not jurisdictional'." Id. at FN 5. (Citations omitted). The Court explained that there are only "two types of exhaustion of remedies: judicially imposed and statutorily mandated." Id. at 19.

Defendants seek to have this Court infer a statutory exhaustion of remedies mandate from S.C. Code Ann § 1-11-490 (H), which reads, in its entirety, "An agency that knowingly and wilfully violates this section is subject to an administrative fine up to one thousand dollars for each resident whose information was accessible by reason of

the breach, the amount to be decided by the Department of Consumer Affairs.” It is a well-settled principle of South Carolina law that “[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature’s language [ . . . ] Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction.” Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 24-25 579 S.E.2d 334, 337 (citations omitted). The plain meaning of §1-11-490 provides only that the “amount” of the “administrative fine” is “to be decided by the Department of Consumer Affairs” in the event of an agency being found to have “knowingly and wilfully” in violation of the statute.

More importantly, the statute expressly provides, “a resident of the state who is injured by a violation of the section, in addition to and cumulative of all other rights and remedies available at law, may: (1) Institute a *civil action* to recover damages”. Hence, the statute expressly allows for a “civil action” in order to determine liability and provides only that “the amount [of the fine for a knowing violation is] to be decided by the Department of Consumer Affairs.” Finally, as a matter of law, the Administrative Law Court “has no authority to decide civil matters or to award monetary damages in cases.” South Carolina Dept. of Consumer Affairs v. Foreclosure Specialists, Inc. 390, S.C. 182, 187, 700 S.E. 2d 468, 470. (*quoting* Randolph R. Lowell, South Carolina Administrative Practice and Procedure, 152 (2d ed. 2008). Therefore, the statute, on its face and by its plain meaning, requires that the breach of this statute be decided, as a matter of fact, by the circuit court in the “civil action” for which the statute provides, and, only if the



breach is determined to be knowing and willful, the amount of the compulsory fine that results from that violation is to be determined by the Department of Consumer Affairs. The circuit court still retains exclusive control over determining the fact of the breach, as well as the legal *damages* resulting from the breach. The *amount* of the *fine* alone, an entirely separate issue, and the only one within the scope of its jurisdiction conferred by the statute, is to be determined by the Department of Consumer Affairs.

## **2. TORT CLAIMS ACT DEFENSES**

With respect to Plaintiff's negligence claims, Defendants presumably will argue that Defendants' actions fell within the scope of their public duties, but South Carolina law allows statutory exceptions to public-duty based immunity:

A plaintiff may prevail against a public duty defense if the statute not only concerns the duties of a public office, but also has the essential purpose of protecting identifiable individuals from a particular kind of harm. In such cases, the statute creates a special duty which may give rise to a negligence suit against an officer for failure to perform his duties properly.

Arthurs v. Aiken, 338 S.C. 253, 265 (citations omitted).

In Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), the Court of Appeals articulated a six-part test for determining whether a statute creates a special duty to an individual member of the public:

- (1) an essential purpose of the statute is to protect against a particular kind of harm;
- (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;

- (3) the class of persons the statute intends to protect is identifiable before the fact;
- (4) the plaintiff is a person within the protected class;
- (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and
- (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Clearly, the purpose of S.C. Code Ann. § 1-11-490 and §39-1-90 is (1) to protect against breach of "personal identifying information." The statutes (2) impose a duty on state agencies "owning or licensing computerized data or other data that includes personal identifying information." The (3) class of identifiable individuals protected by S.C. Code Ann. § 1-11-490 and §39-1-90 consists of every "resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person." As a South Carolina resident and taxpayer, Plaintiff (as well as the proposed class) (4) fall within the protected class. Clearly, the Defendants knew that criminals possessing personal identifying information could cause (5) harm to members of the class and the State (6) had the authority to act (or not act) with regard to preserving the security of the data.

Although it is not clear from their Motion, Defendants will likely also contend that discretionary immunity applies. South Carolina law, as articulated by the South Carolina Supreme Court, holds that the "correct approach, when a governmental entity asserts various exceptions to the waiver of immunity, is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the

standard.” Duncan v. Hampton Co. School Dist. #2 335 S.C. 535, 517 S.E.2d 449 (1999). Accordingly, if Defendants contend discretionary immunity applies, “the performance of discretionary duties does not give rise to immunity if the public official acted in a grossly negligent manner. Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 332, 566 S.E. 2d 536, 345 (2002). See also Jackson v. South Carolina Dep’t of Corr. 301 S.C. 125, 390 S.E.2d 467 (Ct.App.1989) *aff’d*, 302 S.C. 519, 397 S.E.2d 377 (1990). Therefore, since the issue is whether the Defendants have been grossly negligent, the question is one that should be decided by a jury: “In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury.” Faile at 332, 345.

To the extent that Defendants argue that some other immunity applies, such an assertion could neither be made nor denied apart from the parties’ engaging in discovery. Plaintiff has a statutory right to bring a civil suit for damages, and, regardless of the limitations on liability adduced by Defendants, Plaintiff has at least one theory of liability sufficient, with all reasonable inferences taken in his favor, upon which relief could be granted. S.C. Code Ann. § 1-11-490 allows for a “civil action,” and, “[w]hile provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit liability, we also must presume in construing a statute that the Legislature did not intend to perform a futile thing. We are constrained to avoid a construction that would read a provision out of a statute, and must reconcile conflicts if possible.” Proctor v. Dept. of Health and Environ. Control, 368 S.C. 279, 311, 628 S.E.2d 496, 513-14 (Ct. App. 2006). Accordingly, the Court should deny Defendants’ 12(b)(6) motion based on their Tort Claims Act theories.

### **3. DAMAGES**

Assuming, *arguendo*, the absence of the statutory bases upon which Plaintiff brought this suit, Plaintiff concedes that a jurisdictional split over whether a plaintiff has asserted cognizable damages exists under *similar* (not identical) circumstances. Nevertheless, some jurisdictions have regarded the cost of insurance against identity theft as damages by way of "mitigation," in particular when it is reasonably certain that other persons whose information was disclosed from the same breach has been used. In Anderson v. Hannaford Bros. Co., 659 F.3d 151 (2011), the First Circuit Court of Appeals found

It was foreseeable [ . . . ] that a customer, knowing that her credit or debit card data had been compromised and that thousands of fraudulent charges had resulted from the same security breach, would replace the card to mitigate against misuse of the card data. It is true that the only plaintiff to allege having to pay a replacement card fee [ . . . ] do not allege that they experienced any unauthorized charges to their account, but the test for mitigation is not hindsight. Similarly, it was foreseeable that a customer who had experienced unauthorized charges to her account [ . . . ] would reasonably purchase insurance to protect against the consequences of data misuse.

Id. at 164-65. Counsel for Plaintiff is unaware of any South Carolina jurisprudence addressing the issue.

Under South Carolina Law,

As a general rule, the evidence should be such as to enable the court or

jury to determine the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established. Proof of the amount of loss with absolute or mathematical certainty is not required, and *it does not matter that the determination of damages depends to some extent on the consideration of contingent events*. So, it had been held sufficient if a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances and which will permit a reasonably close estimate of the loss.

Proctor at 317, 516-17. (emphasis added) (internal citations and quotations omitted). Hence, under South Carolina's damages analysis, in which damages may be awarded based, to some degree, on "contingent events." South Carolina law should allow a cognizable legal claim for the cost of credit monitoring services. The person or persons who obtained the information in this breach, by the fact that the actions undertaken to acquire that information were criminal, are known to be cyber criminals. The likelihood that they will *not* use the information they obtained (or sell it to persons who will) lies somewhere between slim and nonexistent, and the single year of credit monitoring the State has offered to its residents is clearly insufficient to adequately protect South Carolina Residents (See **Exhibit I**, Affidavit of Hoyt L. Kesterson).

Even if South Carolina law did not allow for damages predicated upon the need for credit monitoring, Plaintiff's Complaint could be amended and restructured to provide for classes of individuals in tiers based on the identifiable material loss they have suffered by having their identities stolen, e.g., those with consequentially depleted bank

accounts and false charges in determinable amounts. See, e.g. Resnick v. AvMed, Inc., 693 F.3d 1317 (11<sup>th</sup> Cir. 2013). Indeed, Plaintiff's counsel have been inundated with calls from South Carolina residents (who have diligently protected their personal identifying information and never had reason to suspect identity theft before this breach) who can readily demonstrate the tangible losses they have already suffered since the breach that is the subject of this suit.

Nevertheless, because the Legislature has enacted S.C. Code Ann. § 1-11-490 and § 39-1-90, it has created a novel (and innovative) definition of what constitutes an "injury" and "damages" when a South Carolina resident's personal identifying information not "rendered unusable" through "encryption" or "redaction" has been breached. In S.C. Code Ann. § 1-11-490(D)(2), "Breach of the security system" is defined to have occurred "when illegal use of the information has occurred or *is reasonably likely to occur or use of the information creates a **material risk of harm to the consumer.***" (in essence, the very definition of damages the First Circuit adopted in a similar context) (emphasis added). By this statute, South Carolina creates a right of action, consistent with the Tort Claims Act, for an injury ("illegal use of the information has occurred or is reasonably likely to occur") causing damages ("material risk of harm to the consumer") that could arguably otherwise not be compensable in an ordinary tort analysis. In effect, therefore, S.C. Code Ann. §1-11-490 and 39-1-90 create the mechanism through which South Carolina residents may bring claims against State agencies and private individuals responsible for maintaining the integrity and security of the personal identifying information of South Carolina residents.

In the only response yet received to Plaintiff's Interrogatories, Requests for

Production, and Requests to admit to all State parties, the Department of Revenue admits that credit monitoring services have been afforded to the proposed plaintiff class as a result of this breach. Accordingly, the argument that no damages have occurred has no merit—unless the State of South Carolina has spent \$12,000,000.00 for “speculative” harm (See **Exhibit I**).

As to Defendants’ motion to stay the action because of the “ongoing law enforcement investigation,” Plaintiff would argue that the doctrines of waiver and estoppel prevent Defendants from simultaneously asserting that their delay in notifying the public was reasonable, and the notification occurred as soon as the need for law enforcement investigation had ended (i.e., to the extent it prevents this suit) while asserting that the need for law enforcement investigation is ongoing (i.e., to the extent it prevents this suit). In addition, the Confidentiality Order proposed to Defendants by Plaintiff (**Exhibit L**) should prevent any concerns with the law enforcement investigation being impeded from having any weight.

#### **D. PLAINTIFF’S MOTION TO AMEND COMPLAINT**

Finally, Plaintiff argues that if the 12(b)(6) motion is granted, it should be granted without prejudice. Defendants can articulate no reason for granting their motions with prejudice. Plaintiff has compelling reasons to request that the motion should be granted without prejudice so that he can amend his Complaint. Accordingly, he would request that he be given leave to amend his Complaint pursuant to Rule 15, SCRPC to further clarify any alleged deficiencies in his Complaint.

Rule 15 states that a party may amend his pleading by leave of the court “and leave shall be freely given when justice so requires and does not prejudice any other

party." Furthermore, "[t]he prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E. 2d 711, 286,717. An example of a prejudicial lack of notice that does not allow the opponent to refute the new allegation is outlined in Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529, 313, 535. The Plaintiff in Harvey sought to amend his complaint to add new allegations while the jury was in the middle of deliberations. The Supreme Court found that, "[g]iven that the jury was in the process of deliberating at the time counsel moved to amend, we find no abuse of discretion in the trial court's refusal of the amendment." Id.

Clearly, as Defendants' 12(b)(6) motions show, they are well aware of the allegations being brought by Plaintiff. In addition, the only discovery yet conducted in the case has been a single set of Interrogatories and Requests for Production propounded by Plaintiff, and the only response received by Plaintiff is attached as **Exhibit J**. No depositions have been taken. It is, therefore, impossible that any defendant Party could suggest any prejudice, much less prejudice of the Harvey level that would warrant the Court's denying the Plaintiff leave to amend his Complaint.

#### **E. DSIT'S MOTION FOR A PROTECTIVE ORDER**

DSIT's motion for a protective order is governed by the scope of discovery outlined in South Carolina Rule of Civil Procedure 26(b)(1), which states,

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, *including the existence, description,*



*nature, custody, condition and location of any books, documents, or other tangible things [...]. It is not ground for objection that the information sought would be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*

DSIT does not claim that Plaintiff's request is for privileged information. Accordingly, the only issue is whether the information Plaintiff has requested is "relevant to [...] a claim or defense of the party seeking discovery."

The necessary analysis under Rule 26(b)(1) requires two steps. First, the Court must determine whether the party refusing to comply with the request can articulate a "particularized harm" that the discovery request threatens. Rule 26(c), SCRCP; Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498. (Citations omitted). Second, if, and only if, "a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is relevant and necessary to the case." Id. (Citations omitted). In addition, the Court must "determine whether there are reasonable alternatives available to discover the information." Id. Finally, assuming the defendant has articulated a particularized harm and the plaintiff has thereafter established the relevance of the information, the Court must "weigh the factors of whether the information sought is 'relevant and necessary' evidence against any particularized harm the opposing party may suffer." Id. (Citations omitted).

In the instant case, DSIT has not met its burden of establishing any particularized harm. The entirety of DSIT's opposition to Plaintiff's request is that it is burdensome. DSIT is not able to articulate specifically how it is burdensome to maintain

and produce the relatively limited requests made by Plaintiff. As of the date of the writing of this Memorandum, DSIT has stated what it intends to preserve without responding to Plaintiff's requests for clarification. (See Exhibit K). Plaintiff has basically requested, without response from DSIT, that the following three categories of information be preserved for production by DSIT:

(1) The first category includes all documents (to the extent such documents are in DSIT's possession, custody or control) of all contracts between the Trustwave and any state agency, the Trustwave Report on Compliance, and any communications, or records/logs of any in person visit or between DSIT and Trustwave during the relevant time period.

(2) The second category includes all evidence of a full and accurate description of the physical and/or technological resources shared by DSIT and DOR, or to which both DOR and DSIT had access or permission to access during the relevant time period. This includes (but is not limited to) firewalls, ports, shared internet access, network cage facility access, etc.

(3) The third category of disclosure is a representation that accurately and truthfully reflects whether and to what extent defendant Trustwave, as required by either its contracts with the State or by its obligations pursuant to PCI-DSS standards, inspected, audited, made inquiry into or monitored any physical or technological resources shared by DSIT and DOR, or to which both DOR and DSIT had access or permission to access during the

relevant time period.

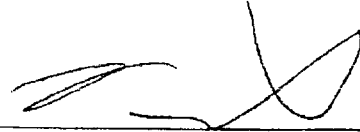
DSIT has not articulated how preservation and production of the above information is even burdensome, and it certainly has not articulated any particularized harm caused by requiring it to preserve the information for production. Accordingly, at a minimum, DSIT should be ordered to maintain the information outlined above and in **Exhibit K**.

Plaintiff has provided proposed Consent Protective Orders that, by any analysis, is exhaustive with regard to any confidentiality or unintended disclosure concerns the Defendant may have. Plaintiff provided this proposed order to Defendants on December 19, 2012. A copy of the proposed Order is attached as **Exhibit L**.

#### **CONCLUSION**

For the foregoing reasons, The Trustwave Defendants' Motion to Quash and Set Aside the Default should be denied, and Defendants' 12(b)(6) Motions should also be denied. Finally, Plaintiff respectfully requests that the Court Order Defendant DSIT to maintain and produce the documents as outlined in Plaintiff's **Exhibit K**. In the alternative, if the Motions are granted, Plaintiff should be given leave to amend his Complaint to clarify any alleged deficiencies.

[SIGNATURE PAGE FOLLOWS]



John Hawkins  
Logan Rollins  
The Hawkins Law Firm  
P.O. Box 5048  
Spartanburg, SC 29304  
(864) 574-8801  
(864) 574 8810 Fax  
[John@hawkinslawsc.com](mailto:John@hawkinslawsc.com)  
[Logan@hawkinslawsc.com](mailto:Logan@hawkinslawsc.com)

Spartanburg, South Carolina  
February 7, 2013

# **EXHIBIT A**



# HAWKINS LAW FIRM

EXPECT MORE

John D. Hawkins  
john@hawkinslawsc.com

Richard J. Smith\*  
richard@hawkinslawsc.com

C. Logan Rollins  
logan@hawkinslawsc.com

November 5, 2012

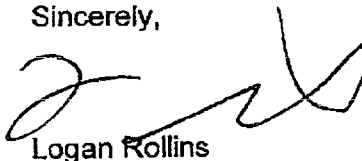
Eric R. Decator  
Registered Agent of Service  
Trustwave Holdings, Inc.  
Trustwave Corporation  
70 West Madison Street, Suite 1050  
Chicago, IL 60602

Re: Phillip Morgan v. Nimrata "Nikki" Haley, in her Official Capacity as Governor of South Carolina; James F. Etter, in his Official Capacity as Director of The South Carolina Department of Revenue; The South Carolina Department of Revenue; South Carolina Division of State Information Technology; Trustwave Corporation; and Trustwave Holdings, Inc.  
Case Number: 2012-CP-40-7331

Dear Mr. Decator:

Pursuant to Rule 4 of the South Carolina Rules of Civil Procedure, enclosed are two copies of the Summons and Amended Complaint that has been filed in the above-referenced matter. One copy is being served upon you as registered agent for Trustwave Holdings, Inc., and the other copy is being served upon you as registered agent for Trustwave Corporation. Enclosed also is a letter relating to the preservation of evidence in this case.

Sincerely,



Logan Rollins

LR/arm

Enclosures

Spartanburg Office:  
5506 Reidville Road  
Moore, SC 29369  
(864) 574-8801

Greenville Office:  
420 River Street  
Greenville, SC 29601  
(864) 312-9999

Mailing Address:  
P.O. Box 5048  
Spartanburg, SC 29304  
(888) HAWKLA

Fax: (864) 574-8810  
Email: info@hawkinslawsc.com  
www.hawkinslawsc.com  
Additional office in Asheville, NC

*\*licensed in North and South Carolina*

Record on Appeal  
150



# HAWKINS LAW FIRM

EXPECT MORE

John D. Hawkins  
john@hawkinslawsc.com

Richard J. Smith\*  
richard@hawkinslawsc.com

C. Logan Rollins  
logan@hawkinslawsc.com

November 5, 2012

Eric R. Decator  
Registered Agent of Service for Trustwave Holdings, Inc.  
Trustwave Holdings, Inc.  
70 West Madison Street, Suite 1050  
Chicago, IL 60602

George Crouch, System Administrator  
Division of State Information Technology  
4430 Broad River Rd.  
Columbia, SC 29210

Re: Phillip Morgan v. Nimrata "Nikki" Haley, in her Official Capacity as Governor of South Carolina; James F. Etter, in his Official Capacity as Director of The South Carolina Department of Revenue; The South Carolina Department of Revenue; South Carolina Division of State Information Technology; Trustwave Corporation; and Trustwave Holdings, Inc.

Case Number: 2012-CP-40-7331

To the Defendants Listed Above:

Now that this action has been officially filed and served upon you, we would like to take this opportunity to inform you about your duty to preserve evidence related to this case. We would also ask that you turn this letter over to your attorneys immediately upon receipt. Of course, we request that any paper documents that have no corresponding electronic counterpart be maintained without alteration, including any handwritten notations, drawings, highlightings, redactions, and "sticky notes" or other addenda to the documents. We also request that any and all printed versions of any electronic data be maintained, including any handwritten notations, drawings, highlightings, redactions, and "sticky notes" or other addenda to the documents.

Given the nature of this case, we specifically make this request regarding electronic information. Rules 26 and 34 of the South Carolina Rules of Civil Procedure

Spartanburg Office:  
5506 Reidville Road  
Moore, SC 29369  
(864) 574-8801

Greenville Office:  
420 River Street  
Greenville, SC 29601  
(864) 312-9999

Mailing Address:  
P.O. Box 5048  
Spartanburg, SC 29304  
(888) HAWKLAW

Fax: (864) 574-8810  
Email: info@hawkinslawsc.com  
www.hawkinslawsc.com  
Additional office in Asheville, NC

*\*Licensed in North and South Carolina*

Record on Appeal

(as well as the corresponding Federal Rules) and their interpreting case law all hold that electronic data is discoverable in civil actions, and the Rules apply to electronic data in the same manner in which they apply to more tangible forms of evidence. We therefore request that you retain all digitally stored information in its unaltered state to preserve all data, including metadata, in the condition in which it now exists.

As you probably know, even "deleted" files on storage media can be recovered and are discoverable under the Rules of Civil Procedure. Because electronic documents and the storage media on which they are located contain discoverable information beyond that which may be readily apparent on their printed "equivalent," we request that the digital media be retained intact even if a paper copy of the same file exists, as we will consider destruction or alteration of the original media storage (whether hard drives, discs, flash drives, email accounts, etc.) spoliation.

We request that you preserve, in particular:

- Digital communications (e.g., e-mail, voice mail, instant messaging);
- Word processed documents (e.g., Word or WordPerfect documents and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data files);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound Recordings (e.g., .WAV and .MP3 files);
- Video and Animation (e.g., .AVI and .MOV files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, Yahoo, blog tools);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies);
- Presentations (e.g., PowerPoint, Corel Presentations)
- Network Access and Server Activity Logs;
- Project Management Application Data;
- Computer Aided Design/Drawing Files; and,
- Back Up and Archival Files (e.g., Zip, .GHO)
- All logs of computer activity on computer systems that may have been used to process or store any information, including all log in identifications and passwords;
- Any touch points that monitor any IP address;
- Any ingress or egress gateways to the DOR infrastructure as well as the state shared data infrastructure;
- Any network appliance on any network tap;
- Any and all formal or informal process backups as well as policies and procedures associated with them;
- Any record related to SC-ISAC and its constituents including, but not limited to, any record of any communication to or from MS-ISAC, DHS, or any other entity;
- Any and all NetWitness boxes.

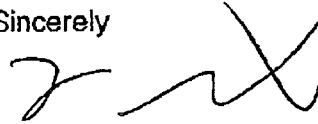


Page 3 of 3  
November 5, 2012

The foregoing list is by no means to be considered either exhaustive or exclusive. It is merely representative of the information that we will seek by discovery as this litigation progresses. We appreciate your attention to this matter.

With kindest regards, I remain

Sincerely

A handwritten signature in black ink, consisting of a stylized 'L' followed by a series of loops and a final flourish.

Logan Rollins

LR/arm

Phillip Morgan

Affidavit of Process Server

Plaintiff/Petitioner  
Defendant/Respondent

Nimrata Nikki Haley et al.

00ACPY407331

Being duly sworn, on my oath, I declare that I am a citizen of the United States, over the age of eighteen and not a party to this action

Service: I served

Chavandel Sammarco

Trustee Holdings, Inc.

with the (document(s))

Subpoena with  
Letter Summons and Amended Complaint

by serving (NAME)

Marci Johnson

at a Home

Business

on (DATE)

630 Davis Suite 300 Evanston IL

11/13/12

at (TIME) 3:47 PM

Thereafter copies of the documents were mailed by prepaid, first class mail on (DATE)

From (CITY)

Manner of Service:

By Personal Service

By delivering, during office hours, copies at the office of the person/entity being served, leaving same with the person apparently in charge thereof, namely, Marci Johnson, Secretary Authorized to Accept Service

By leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the general nature of the papers

Non-Service:

After due search, careful inquiry and diligent attempts at the address(es) listed above, I have been unable to effect process upon the person/entity being served because of the following reason(s):

- Unknown at Address
- Address does not exist
- Moved, Left no forwarding
- Evading
- Service cancelled by litigant
- Unable to serve in a timely fashion
- Other:

Service Attempts: Service was attempted on: ( )

DATE TIME DATE TIME DATE TIME DATE TIME

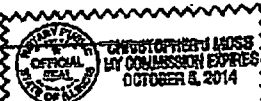
Description: Male Female White Skin Black Skin Brown Skin Yellow Skin Red Skin Black Hair Brown Hair Blond Hair Gray Hair Red Hair White Hair Balding 14-20 Yrs. 21-35 Yrs. 36-50 Yrs. 51-65 Yrs. Over 65 Yrs. Under 5' 5'-5'3" 5'4"-5'6" 5'7"-5'9" Over 6' Under 100 Lbs. 100-130 Lbs. 131-160 Lbs. 161-200 Lbs. Over 200 Lbs.

OTHER IDENTIFYING FEATURES:

State of Illinois County of Cook

Subscribed and sworn to before me  
A notary public, this 14th day of Nov. 2012

Notary Public



SERVED BY  
LASALLE PROCESS SERVERS  
ILLINOIS PRIVATE DETECTIVE LICENSE# 117-001432

CHARTER MEMBER NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS

# **EXHIBIT B**

**AFFIDAVIT OF CHRIS MOSS**

**STATE OF ILLINOIS**

**COUNTY OF COOK**

Personally appeared before, the undersigned, and, being duly sworn, states the following:

1. My name is Chris Moss. I am over the age of 18 years and otherwise competent to make this affidavit. I am a process server for LaSalle Process Servers, LP in Chicago, Illinois.

2. I was retained by the Hawkins Law Firm to serve Trustwave Holdings Inc. the summons and complaint from a lawsuit filed in South Carolina State Court against Trustwave, a copy of which is attached hereto as Exhibit A.

3. According to the Illinois Secretary of State, the registered agent for service of process for Trustwave Holdings Inc. is Eric R. Decator at 70 West Madison Street, Suite 4100, Chicago, Illinois 60602.

4. On November 13, 2012, I attempted to contact Mr. Decator at his registered address of 70 West Madison Street, which is the address for the law firm of Kaye Scholer. I was informed that Mr. Decator was no longer an attorney at Kaye Scholer. I was informed by the Kaye Scholer Law Firm that I could contact Mr. Decator at 847-868-8580.

5. I called Mr. Decator, and informed him that I was serving him a summons and complaint in his capacity as registered agent for the service of process for Trustwave Holdings, Inc.

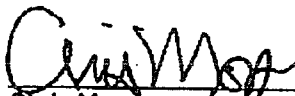
6. He informed me that his address is Ariand Energy, 630 Davis, Suite 300 Evanston, IL and that he would be present only until approximately 4:00 p.m., and, if he should be gone when we arrived, we were to serve the Summons and Complaint upon his secretary.

7. As Evanston, Illinois is outside of my personal service area, I referred the actual service of the Summons and Complaint to Chaundel Sammarco, who specifically serves papers on my behalf in the Evanston area.

8. She informed me of the service upon Marci Johnson, as is indicated in her affidavit of process server attached hereto as Exhibit B.

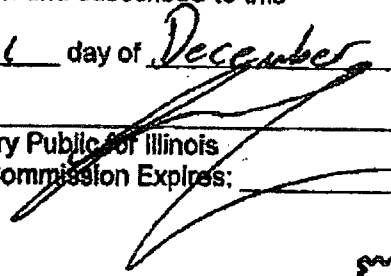
9. By serving the documents as indicated above, I expressly and personally made certain that Eric Decator was the registered agent for service of process for Trustwave Holdings, Inc. and that I had his express, stated, instructions to have the Summons and Complaint delivered to his secretary in the event of his absence.

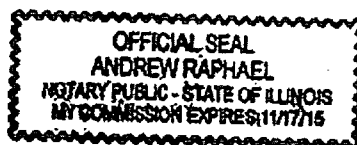
FURTHER AFFIANT SAYETH NOT

  
Chris Moss

Sworn and subscribed to this

21 day of December, 2012

  
Notary Public for Illinois  
My Commission Expires: \_\_\_\_\_



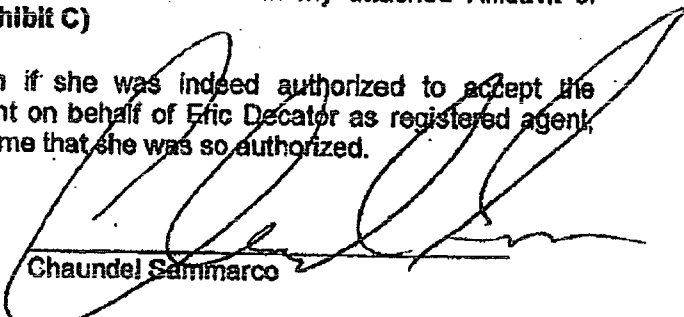
**AFFIDAVIT OF CHAUNDEL SAMMARCO**

**STATE OF ILLINOIS**

**COUNTY OF COOK**

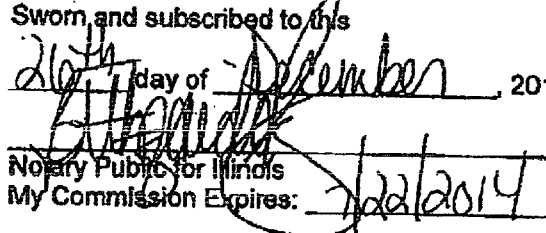
Personally appeared before me, the undersigned, being duly sworn, and says the following.

1. My name is Chaundel Sammarco. I am over the age of 18 years and otherwise competent to make this Affidavit.
2. I was engaged by Chris Moss of LaSalle Process Servers to personally serve the Summons and Complaint upon Eric Decator as the registered agent for Trustwave Holdings, Inc., or in his absence, to serve those papers upon his secretary.
3. I was instructed to serve the Summons and Complaint upon Mr. Decator at Arland Energy, 630 Davis, Suite 300 Evanston, Illinois
4. When I arrived at the above address, Mr. Decator was absent. The time was approximately 3:47 p.m.
5. As instructed, I served the papers upon Marci Johnson, his secretary and authorized to accept service as attested to in my attached Affidavit of Service of Process. (Exhibit C)
6. I asked Marci Johnson if she was indeed authorized to accept the Summons and Complaint on behalf of Eric Decator as registered agent, and she specifically told me that she was so authorized.

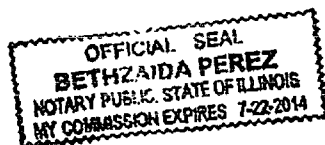
  
Chaundel Sammarco

Sworn and subscribed to this

20th day of December, 2012

  
Notary Public for Illinois

My Commission Expires: 7/22/2014



# **EXHIBIT C**

WWW

ILLINOIS.COM

**JESSE WHITE**  
 SECRETARY OF STATE



### CORPORATION FILE DETAIL REPORT

|                              |                             |                          |                                                        |
|------------------------------|-----------------------------|--------------------------|--------------------------------------------------------|
| Entity Name                  | TRUSTWAVE HOLDINGS, INC.    | File Number              | 65383062                                               |
| Status                       | ACTIVE                      |                          |                                                        |
| Entity Type                  | CORPORATION                 | Type of Corp             | FOREIGN BCA                                            |
| Qualification Data (Foreign) | 04/04/2007                  | State                    | DELAWARE                                               |
| Agent Name                   | ERIC R DECATOR              | Agent Change Date        | 05/16/2008                                             |
| Agent Street Address         | 70 WEST MADISON ST STE 4100 | President Name & Address | ROBERT MCCULLEN 70 W MADISON ST STE 1050 CHICAGO 60602 |
| Agent City                   | CHICAGO                     | Secretary Name & Address | JUSTIN CHOI 70 W MADISON ST STE 1050 CHICAGO 60602     |
| Agent Zip                    | 60602                       | Duration Date            | PERPETUAL                                              |
| Annual Report Filing Date    | 04/24/2012                  | For Year                 | 2012                                                   |

[Return to the Search Screen](#)
[Purchase Certificate of Good Standing](#)

(One Certificate per Transaction)

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# **EXHIBIT D**

James G. Long III  
Member  
Admitted in SC

December 19, 2012

VIA E-MAIL

John D. Hawkins, Esquire  
C. Logan Rollins II, Esquire  
The Hawkins Law Firm  
P.O. Box 5048  
Spartanburg, SC 29304

Re: Phillip Morgan, Individually, and on behalf of all similarly situated  
Plaintiffs v. Nimrata "Nikki" Haley, Governor of South Carolina,  
James F. Etter, Director of the South Carolina Department of  
Revenue; the South Carolina Department of Revenue, South Carolina  
Division of State Information Technology, Trustwave Corporation,  
and Trustwave Holdings, Inc.  
Civil Action No. 2012-CP-40-7331

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Dear John and Logan:

I spoke with Logan yesterday. First, I want to confirm that Nexsen Pruet represents Trustwave Holdings in the above referenced case. Trustwave Holdings is located at the address identified in the Complaint which is 70 West Madison Street, Suite 1050, Chicago, IL. Trustwave has not been served with the Morgan complaint. As shown in the affidavit of service, the Complaint was served on Marci Johnson at 630 Evans Street, Suite 300, in Evanston, IL. Ms. Johnson is an employee of Arland Energy Systems and Arland's office is located at 630 Evans Street, Suite 300 in Evanston. Attached to the letter are two internet yellow page cites showing Arland Energy Systems located at this address in Evanston, IL. In addition, I have confirmed that Marci Johnson was an employee of Arland Energy Systems in November 2012 and that Arland Energy has no relationship with Trustwave Holdings or Trustwave Corporation.

With this new information, it is clear that service was deficient and therefore, the affidavit of default is not proper. I would hope we could agree that you would withdraw the affidavit of default and motion for damages. I will accept service of the Complaint on behalf of Trustwave. Because it involves default, I cannot let this

1230 Main Street  
Suite 700 (29201)  
PO Drawer 2426  
Columbia, SC 29202  
www.nexsenpruet.com

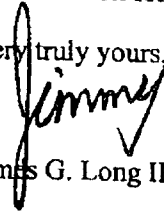
T 803.253.8224  
F 803.727.1480  
E JLong@nexsenpruet.com  
Nexsen Pruet, LLC  
Attorneys and Counselors at Law

John D. Hawkins  
Logan Rollins  
December 19, 2012  
Page 2

linger so I need a prompt response. My phone number is 803-253-8224 and my email address is [jlong@nexsenpruet.com](mailto:jlong@nexsenpruet.com).

I look forward to working with you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jimmy", with a checkmark at the end.

James G. Long III

JGL/saw

Enclosures

# **EXHIBIT E**

|                                                                                                                                                                                          |                                                                                                                                                                                                                                     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION<br>WEBSITE INFORMATION   SEARCH SITE   HOME |                                                                                                                                                                                                                                     |
| Lawyer Search                                                                                                                                                                            | <b>LAWYER SEARCH: ATTORNEY'S REGISTRATION AND PUBLIC DISCIPLINARY RECORD</b><br><br>ARDC Individual Attorney Record of Public Registration and Public Disciplinary and Disability Information as of February 1, 2013 at 1:08:16 PM: |
| Lawyer Registration                                                                                                                                                                      |                                                                                                                                                                                                                                     |
| How to Submit a Request For Investigation                                                                                                                                                |                                                                                                                                                                                                                                     |
| Rules and Decisions                                                                                                                                                                      |                                                                                                                                                                                                                                     |
| Ethics Inquiry Program                                                                                                                                                                   |                                                                                                                                                                                                                                     |
| Publications                                                                                                                                                                             |                                                                                                                                                                                                                                     |
| New Filings, Hearing Schedules and Clerk's Office                                                                                                                                        |                                                                                                                                                                                                                                     |
| Client Protection Program                                                                                                                                                                |                                                                                                                                                                                                                                     |
| Resources & Links                                                                                                                                                                        |                                                                                                                                                                                                                                     |
| ARDC Organizational Information                                                                                                                                                          |                                                                                                                                                                                                                                     |

|                                                                                                              |                                                                                      |
|--------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|
| <b>Full Licensed Name:</b>                                                                                   | Eric Richard Decator                                                                 |
| <b>Full Former name(s):</b>                                                                                  | None                                                                                 |
| <b>Date of Admission as Lawyer by Illinois Supreme Court:</b>                                                | May 7, 1987                                                                          |
| <b>Registered Business Address:</b>                                                                          | Arland Energy Systems, LLC<br>630 Davis Street, Suite 300<br>Evanston, IL 60201-4480 |
| <b>Registered Business Phone:</b>                                                                            | (847) 868-8580                                                                       |
| <b>Illinois Registration Status:</b>                                                                         | Active and authorized to practice law - Last Registered Year: 2013                   |
| <b>Malpractice Insurance: (Current as of date of registration; consult attorney for further information)</b> | In annual registration, attorney reported that he/she has malpractice coverage.      |

**Public Record of Discipline and Pending Proceedings:** None

Check carefully to be sure that you have selected the correct lawyer. At times, lawyers have similar names. The disciplinary results displayed above include information relating to any and all public discipline, court-ordered disability inactive status, reinstatement and restoration dispositions, and pending public proceedings. Investigations are confidential and information relating to the existence or status of any investigation is not available. For additional information regarding data on this website, please contact ARDC at (312) 565-2600 or, from within Illinois, at (800) 826-8625.

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# **EXHIBIT F**



## Class-action lawsuit expands in SCDOR hacking case

Posted: Nov 05, 2012 10:22 AM EST

Updated: Dec 03, 2012 10:49 AM EST

By Casey Vaughn - email

GREENVILLE, SC (FOX Carolina) - An Upstate law firm has expanded its class-action lawsuit to include two new defendants, another state agency along with a data security corporation, in connection with a hacking case that resulted in theft of 3.6 million Social Security numbers.

The Hawkins Law Firm filed the initial suit Oct. 31 in Richland County against South Carolina Gov. Nikki Haley and the state Department of Revenue, accusing Haley and the state tax agency of failing to protect the citizens of South Carolina and violating a state law that requires prompt disclosure of breaches.

On Monday, the suit was expanded to include defendants' private corporation Trustwave, a Delaware-based company, and the Department of State Information Technology (DSIT).

Attorney John Hawkins said as more information was made known Friday that the tax agency used Trustwave for its security monitoring services in lieu of DSIT, more people needed to be held responsible because the case was no longer just about suing state government.

Hawkins said the lawsuit against Trustwave shows that not only did their company fail to protect public data, but it failed to notify the public immediately as required by state statute. He told FOX Carolina that DSIT served as the "back bone" of the revenue's system, which Trustwave was to protect.

"The public is forced with threat of jail to pay taxes and give their personal information to SCDOR, and yet SCDOR took only the flimsiest steps to protect this private data, leaving South Carolina the most vulnerable target for hackers of any state in the Union," Hawkins said.

According to the revenue department, they used Trustwave because DSIT's program did not audit PCI compliance, which is required for use with credit card numbers. According to Hawkins, PCI compliance does not apply to social security numbers and is not an excuse for the tax agency to use more robust and readily available security systems, like those offered by DSIT.

FOX Carolina received the following statement from Trustwave about the lawsuit: "Trustwave policy is not to comment on pending legal matters."

Haley, along with Department of Revenue Director James Eiter and State Law Enforcement, announced Oct. 26 that an international hacker had breached tax records.

As a result of the hack, approximately 3.6 million Social Security numbers and 387,000 credit and debit card numbers were accessed along with tax information for thousands of South Carolina businesses.

According to Eiter's initial release, investigators discovered that a hacker attempted to access the system several times in August and September. The statement said it is believed the hacker successfully obtained data for the first time in mid-September.

The statement said "the vulnerability in the system" was secured to the best of the department's knowledge Oct. 20. According to a letter from DSIT released Friday, the revenue department began using their network monitoring services Oct. 20.

The state has set up a year of daily monitoring of the three credit bureaus and a lifetime of over-the-phone help on resolving identity theft after it happens. People are asked to visit [protectmyid.com/scdor](http://protectmyid.com/scdor) and enter code SCDOR123 or call 1-866-578-5422 to determine if their Social Security number was accessed.

Haley said Wednesday that Dun and Bradstreet Credibility Corp. will offer free credit-monitoring service to any businesses affected by the hacking case. She said the businesses can sign up for the service at [dandb.com/sc](http://dandb.com/sc) or by calling 800-279-9881 beginning at 8 a.m. Friday.

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# HAWKINS LAW FIRM

EXPECT MORE

John D. Hawkins  
john@hawkinslawsc.com

Richard J. Smith\*  
richard@hawkinslawsc.com

C. Logan Rollins  
logan@hawkinslawsc.com

December 21, 2012

(VIA EMAIL ONLY)

James G. Long III  
Nexsen Pruet  
1230 Main Street Suite 700  
PO Draw 2426  
Columbia South Carolina 29202

Re: Phillip Morgan v. Nimrata "Nikki" Haley, in her Official Capacity as Governor of South Carolina; James F. Etter, in his Official Capacity as Director of The South Carolina Department of Revenue; The South Carolina Department of Revenue; South Carolina Division of State Information Technology; Trustwave Corporation; and Trustwave Holdings, Inc.  
Case Number: 2012-CP-40-7331

Dear Jimmy:

I received your letter of December 19, 2012. It contains a partial recitation of the particulars of our service upon Trustwave. As you will note from the first attached document, Eric R. Decator at 70 West Madison Street, Suite 4100, Chicago Illinois 60602 is listed as the current registered agent for service of process for Trustwave. He was recently employed by Kaye Scholer, a law firm located at the above address. When our process server was informed that Mr. Decator was no longer at Kaye Scholer, he spoke personally to Mr. Decator to find his current location.

Accordingly, the Summons and Complaint were served in Evanston, Illinois, where Mr. Decator was. After being expressly instructed by Mr. Decator to do so, the Summons and Complaint was served upon Marci Johnson, Mr. Decator's secretary. Affidavits in support of the service of the Summons and Complaint will be forthcoming. Under similar facts, our appellate courts have held that lower courts did not err for refusing to set aside defaults. See generally Schenk v. Nat'l Health Care, 322 S.C. 316, 471 S.E. 2d 736 (Ct. App. 1996).

If you have any other basis upon which your clients wish you to contend that service was ineffectual, I would be happy to take it into consideration.

Spartanburg Office:  
5506 Reidville Road  
Moore, SC 29369  
(864) 574-8801

Greenville Office:  
420 River Street  
Greenville, SC 29601  
(864) 312-9999

Mailing Address:  
P.O. Box 5048  
Spartanburg, SC 29304  
(888) HAWK LAW

Fax: (864) 574-8810  
Email: info@hawkinslawsc.com  
www.hawkinslawsc.com  
Additional office in Asheville, NC

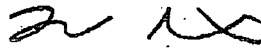
\*Licensed in North and South Carolina

Record on Appeal

James G. Long, III  
December 21, 2012  
Page 2 of 2

With kindest regards I remain

Sincerely,

A handwritten signature in black ink, appearing to read 'Logan Rollins', written in a cursive style.

Logan Rollins

LR/arm

Enclosures



# HAWKINS LAW FIRM

EXPECT MORE

John D. Hawkins  
john@hawkinslawsc.com

Richard J. Smith\*  
richard@hawkinslawsc.com

C. Logan Rollins  
logan@hawkinslawsc.com

December 21, 2012

**Via Email & Certified Mail Return Receipt Requested**

James G. Long III  
Nexsen Pruet  
1230 Main Street Suite 700  
PO Draw 2426  
Columbia South Carolina 29202

**Via Certified Mail Return Receipt Requested**

Eric R. Decator  
70 West Madison St., Suite 4100  
Chicago, Illinois 60602

**Via Certified Mail Return Receipt Requested**

Eric R. Decator  
Arland Energy  
630 Davis St. Suite 300  
Evanston, Illinois 60201

Re: Phillip Morgan v. Nimrata "Nikki" Haley, in her Official Capacity as Governor of South Carolina; James F. Etter, in his Official Capacity as Director of The South Carolina Department of Revenue; The South Carolina Department of Revenue; South Carolina Division of State Information Technology; Trustwave Corporation; and Trustwave Holdings, Inc.  
Case Number: 2012-CP-40-7331

Dear Jimmy:

You stated that you were authorized to accept service on behalf of Trustwave. Accordingly, please sign the enclosed Acceptance of Service for our Motion for Damages Hearing in the above-captioned matter, and return it to me in the enclosed, self-addressed, stamped envelope. I have also sent this motion by certified mail, return receipt requested, with restricted delivery to Eric R. Decator, 70 West Madison St., Suite 4100, Chicago, Illinois 60602 and to 630 Davis St., Suite 300, Evanston, IL 60201 to

Spartanburg Office:  
5506 Reidville Road  
Moore, SC 29369  
(864) 574-8801

Greenville Office:  
420 River Street  
Greenville, SC 29601  
(864) 312-9999

Mailing Address:  
P.O. Box 5048  
Spartanburg, SC 29304  
(888) HAWK LAW

Fax: (864) 574-8810  
Email: info@hawkinslawsc.com  
www.hawkinslawsc.com  
Additional office in Asheville, NC

*\*licensed in North and South Carolina*

Record on Appeal

171

James G. Long, III  
Eric Decator  
December 21, 2012  
Page 2 of 2

ensure full compliance with the service requirements of the South Carolina Rules of Civil Procedure.

With kindest regards, I remain

Sincerely,

*Logan Rollins*  
*By George Taylor*  
Logan Rollins

LR/arm

Enclosures

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

## ACCEPTANCE OF SERVICE

Civil Action No. 2012-CP-40-7331

v.

**Defendants.**

The undersigned hereby certifies that he is the attorney for Defendant, Trustwave, and that on \_\_\_\_\_ day of \_\_\_\_\_, 2012, he accepted service of the Motion for Damages Hearing on behalf of the above-named Defendant in the above-captioned matter, and that he is duly authorized by said Defendant to accept said service.

James G. Long, III, Esquire  
Attorney for Defendant Trustwave

Sworn and subscribed to this

\_\_\_\_\_ day of \_\_\_\_\_, 2012

Notary Public of South Carolina  
My Commission Expires:

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Phillip Morgan,

Individually, and on behalf of  
all similarly situated Plaintiffs,

v.

Nimrata "Nikki" Haley, Governor of  
South Carolina; James F. Etter, Director  
of the South Carolina Department of  
Revenue; the South Carolina  
Department of Revenue; South Carolina  
Division of State Information  
Technology; Trustwave Corporation;  
and Trustwave Holdings, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

**CERTIFICATE OF SERVICE**

Civil Action No. 2012-CP-40-7331

The undersigned certifies that she served a copy of the Motion for Damages Hearing upon the attorney for the Defendant via email and by placing a copy of the same in the United States Mail on the date listed below with the proper postage attached thereto, addressed to:

James G. Long, III  
Nesen Pruet, LLC  
1230 Main Street, Suite 700  
Columbia, SC 29202  
[JLong@nexsenpruet.com](mailto:JLong@nexsenpruet.com)



April Million  
Paralegal to John Hawkins & Logan Rollins  
The Hawkins Law Firm  
PO Box 5048  
Spartanburg, SC 29304  
864-574-8801  
864-574-8810 (Fax)

December 21, 2012

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| Return Receipt Fee<br>(Endorsement Required)      |          |                  |
| Restricted Delivery Fee<br>(Endorsement Required) |          |                  |
| Total Postage & Fees                              | \$       |                  |

Sent To **Eric Decator**  
 Street, Apt. No.,  
 or PO Box No. **630 Davis St., Suite 300**  
 City, State, ZIP+4<sup>®</sup> **Evanston, IL 60201**

PS Form 3800, August 2005 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
**Eric Decator**  
**630 Davis St. Suite 300**  
**Evanston, IL 60201**

2. Article Number  
 (Transfer from service label)

**7012 1640 0000 3262 9937**

PS Form 3811, February 2004

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
**Eric R. Decator**

B. Received by (Printed Name)  
**Eric R. Decator**

C. Date Received  
**12/2/07**

D. Is delivery address different from item 1? ☐ Yes ☒ No  
 If YES, enter delivery address below:

3. Service Type  
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☒ Registered ☒ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☒

Domestic Return Receipt

102595-02-M-15

ROCKLAND COUNTY  
 FILED  
 2013 JAN -9 AM 9:30  
 JENNIFER W. MCBRIDE  
 C.C.P. & G.S.

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|---------------------------------------------------|----------------|------------------|
| Postage                                           | \$ 1.30        | Postmark<br>Here |
| Certified Fee                                     | 1.05           |                  |
| Return Receipt Fee<br>(Endorsement Required)      | 1.25           |                  |
| Restricted Delivery Fee<br>(Endorsement Required) | 1.00           |                  |
| <b>Total Postage &amp; Fees</b>                   | <b>\$ 3.60</b> |                  |

Sent To: **James G. Long, III**  
 Street, Apt. No., or PO Box No.: **1230 Main St, Suite 700**  
 City, State, ZIP+4: **Columbia, SC 29202**

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| SENDER: COMPLETE THIS SECTION                                                                                                                                                                                                                                                                                              |  | COMPLETE THIS SECTION ON DELIVERY                                                                                                                                                                                                                                                                                                                                                                                                   |  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul> |  | <p>A. Signature<br/> <input checked="" type="checkbox"/> <i>Si [Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Address</p> <p>B. Received by (Printed Name)<br/> <b>Louis Stortz</b></p> <p>C. Date of Delivery<br/> <b>DEC 8 2004</b></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No<br/>         If YES, enter delivery address below:</p> |  |
| <p>1. Article Addressed to:<br/> <b>James G. Long III</b><br/> <b>P.O. Drawer 2426</b><br/> <b>Columbia, SC 29202</b></p>                                                                                                                                                                                                  |  | <p>3. Service Type<br/> <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail<br/> <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise<br/> <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>                                                                                                                                    |  |
| <p>2. Article Number<br/>         (Transfer from service label)<br/> <b>7012 1640 0000 3262 9920</b></p>                                                                                                                                                                                                                   |  | <p>4. Restricted Delivery? (Extra Fee) <input checked="" type="checkbox"/> Yes</p>                                                                                                                                                                                                                                                                                                                                                  |  |

PS Form 3811, February 2004 Domestic Return Receipt 102585-02-M-11

FILED  
 2004 JAN -9 AM 9:30  
 CHARLOTTE W. MCBRIDE  
 C.C.P. & C.S.





## Eric Decator

**Managing Partner at Eric R. Decator, LLC**  
Greater Chicago Area | Law Practice

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**Gordon Paulson**  
Corporate Counsel and Assistant...



**BRIAN LAPERRIERE**



**Thierry Delfosse**  
Chef d'entreprise, Hotellerie de plein...



**Craig Davis**  
Attorney at Jackson Walker LLP



**Jonathan Gaynin**  
Of Counsel at Duane Morris LLP



**Michelle Huhnke**  
Partner at Sugar Felsenthal Grais &...



**Bryan Jenkins**



**Faith Spencer**  
Partner, Parts & Spencer Ltd.,...



**Todd Peterson**  
Edwards Wildman Palmer LLP

### Eric Decator's Overview

|             |                                                                                                                                               |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| Current     | <b>General Counsel and Director of Corporate Development at Arland Energy Systems, LLC</b><br><b>Managing Partner at Eric R. Decator, LLC</b> |
| Past        | Counsel at Kaye Scholer LLC<br>Partner at Sonnenschein Nath & Rosenthal<br>First Assistant Attorney General at Colorado Department of Law     |
| Education   | University of Colorado School of Law<br>Northwestern University; Kellogg School of Management<br>University of Michigan                       |
| Connections | 61 connections                                                                                                                                |
| Websites    | Company Website                                                                                                                               |

### Eric Decator's Experience

#### General Counsel and Director of Corporate Development Arland Energy Systems, LLC

October 2012 – Present (5 months) | Evanston, Illinois

Responsible for all legal services and general corporate strategy, including mergers and acquisitions and financings, for this renewable energy company.

#### Managing Partner

##### Eric R. Decator, LLC

October 2012 – Present (5 months) | Barrington, Illinois

Eric R. Decator, LLC is a small corporate practice specializing in mergers and acquisitions, debt and equity financings, corporate restructurings, formation and operation of investment funds, joint ventures and providing general corporate advice.

#### Counsel

##### Kaye Scholer LLC

Partnership; 1001-5000 employees; Law Practice industry

April 2007 – September 2012 (5 years 6 months)

#### Partner

##### Sonnenschein Nath & Rosenthal

Partnership; 1001-5000 employees; Law Practice industry

December 1995 – March 2007 (11 years 4 months)

#### First Assistant Attorney General

##### Colorado Department of Law

1991 – 1995 (4 years)

### Eric Decator's Skills & Expertise

|                      |                |                       |                   |
|----------------------|----------------|-----------------------|-------------------|
| Corporate Governance | Joint Ventures | Private Equity        | Venture Capital   |
| Corporate Law        | Securities     | Restructuring         | Mergers           |
| debt issuances       | Equity raises  | Business acquisitions | Corporate Finance |

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## Eric Decator's Education

### University of Colorado School of Law

JD, Law  
1980 – 1983

### Northwestern University; Kellogg School of Management

MBA, Hospital and Health Services Management  
1978 – 1980

### University of Michigan

BA, Economics  
1974 – 1976

## Eric Decator's Additional Information

Websites: 

- Company Website

## Contact Eric for:

- new ventures
- expertise requests
- reference requests
- job inquiries
- business deals
- getting back in touch

## View Eric Decator's full profile to...

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## Arland Energy Systems LLC

630 Davis St  
Evanston, IL 60201

(847) 868-8575

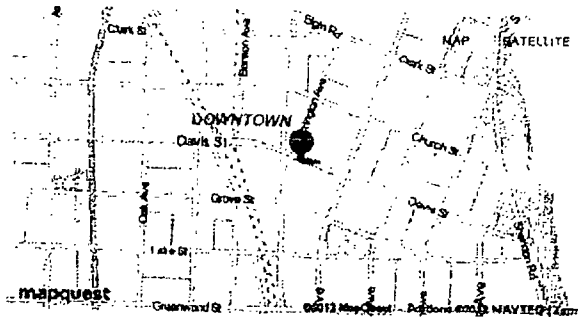
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## Arland Energy Systems LLC

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630 Davis St, Ste 300, Evanston, IL 60201  
(847) 868-8575

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# **EXHIBIT I**

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) |                                  |
| COUNTY OF RICHLAND                       | ) | FOR THE FIFTH JUDICIAL CIRCUIT   |
|                                          | ) |                                  |
| Phillip Morgan,                          | ) |                                  |
|                                          | ) |                                  |
| Individually, and on behalf of           | ) |                                  |
| all similarly situated Plaintiffs,       | ) |                                  |
|                                          | ) |                                  |
| v.                                       | ) | Civil Action No. 2012-CP-40-7331 |
|                                          | ) |                                  |
| Nimrata "Nikki" Haley, Governor of       | ) |                                  |
| South Carolina; James F. Etter, Director | ) |                                  |
| of the South Carolina Department of      | ) |                                  |
| Revenue; the South Carolina              | ) |                                  |
| Department of Revenue; South Carolina    | ) |                                  |
| Division of State Information            | ) |                                  |
| Technology; Trustwave Corporation;       | ) |                                  |
| and Trustwave Holdings, Inc.             | ) |                                  |
|                                          | ) |                                  |
| Defendants.                              | ) |                                  |
|                                          | ) |                                  |

**AFFIDAVIT OF HOYT L. KESTERSON II**

HOYT L. KESTERSON II, being over the age of 21, hereby declares under penalty of perjury that the following is true to the best of my knowledge and belief:

1. I am a Senior Security Architect at Terra Verde Services, an information security consulting and services company in Scottsdale, Arizona. I have been retained as a consultant and expert on information security and on compliance to the Payment Card Industry's Data Security Standard. I have over forty years experience in Information security. I have designed user-authentication and encryption systems. I am a PCI Qualified Security Assessor (QSA) and have audited the security of systems holding credit card information and PII, including one of the largest identity theft prevention companies in the US. I've given many talks on these topics at conferences. More details are in my CV in Appendix B.
2. I have studied the statements of the State of South Carolina's Department of Revenue concerning the type and amount of information exfiltrated by unknown and unauthorized individuals. I have also examined the guidance the state has published for the use of individuals and businesses whose information may have been compromised.
3. The state has posted a webpage at [www.sctax.org/security.htm](http://www.sctax.org/security.htm) describing the types and amounts of information that was exposed to unauthorized and unknown people. The page informs individuals and businesses that they may

enroll in free credit monitoring services. The page also contains pointers to several documents such as Frequently Asked Questions (FAQs) and a chronology of the events leading up to the data breach.

4. Some of the statements in the FAQs provide additional clarity on the types of information that was exposed:

— The 2 November 2012 document titled *Frequently Asked Questions Regarding SC DOR Security Breach* states "...information that would be found on the front of a check like bank account and routing numbers may have been exposed."

— The 13 November 2012 document titled *Frequently Asked Questions Regarding SCDOR Security Breach* states "...any information on tax returns could have been compromised."

5. The only solution that the state is offering to mitigate the effect of this exposure is free registration for a year of credit monitoring for individuals and businesses. However this event was not a simple breach of credit card account numbers or even Social Security numbers. A very large number of income tax returns were exposed. The extensive amount of personal information in those returns will enable criminals to perform much more elaborate identity theft schemes for a longer period of time.

Prudent individuals and businesses will need to subscribe for credit monitoring services for an additional five or ten years. For renewing a subscription with Experian this at a minimum will cost each individual \$190 per year and each business \$129 per year.

6. The types of information that have been exposed enable much more than simple identity theft. The state's own FAQ gives an example of another kind of possible misuse.

— In response to the question "Will hackers be able to redirect Social Security checks since they have Social Security Numbers and bank routing/account information?" the 13 November FAQ states "The answer depends on whether the information compromised was enough to circumvent the authentication processes of your bank and the Social Security Administration."

This is not an event that credit monitoring services would detect.

7. The exposure of returns that include social security numbers, the amount of money earned, and the amount of refund expected will allow criminals to fraudulently file state and federal returns to misdirect refunds. A data breach in Florida has exposed its citizens to a large number of these attacks.

— The article in Appendix A, *Tampa tops nation in income tax fraud* states that not only is the federal and state government defrauded but that "The IRS only detects problems later, sometimes years later, through audits. Then it goes after

taxpayers to collect money due the government, along with penalties and interest. The trouble is that by this time, thieves are long gone and the agency sometimes chases innocent victims of identity theft seeking repayment."

8. Income tax returns can contain many kinds of data that can be misused. For example:

—the identification of banking account numbers for individuals and businesses can enable those criminals specializing in fraudulent electronic funds transfer to drain those accounts. For businesses, these losses have sometime amounted to hundreds of thousands of dollars.

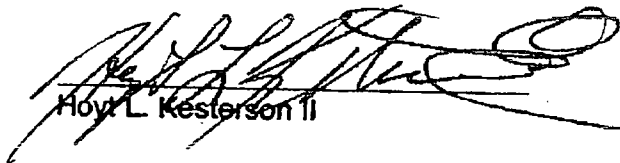
—Other sources of income such as investments are also exposed, again enabling criminals to attempt to access those funds.

—Names of dependents often give hints to the additional security questions asked by online financial services.

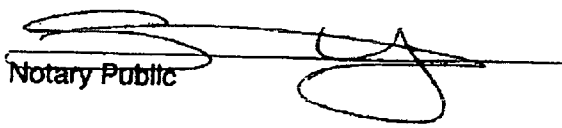
9. These types of attacks cause loss of funds. Even if some is recovered, the time that the funds are unavailable can negatively affect an individual's quality of life and a business's ability to operate. In addition, individuals and businesses will likely have to pay for legal representation to resolve the issues. None of the services put in place by the State of South Carolina address these types of attacks on individuals and businesses.

10. For those attacks against which credit monitoring does provide protection, that protection should be much longer than one year due to the egregious nature of the exposure, probably five to ten years. In my opinion the illegal use of the information, both personal and business related, that was exfiltrated in the data breach is highly likely to occur and creates a material risk of harm to those whose information was exposed.

I hereby declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

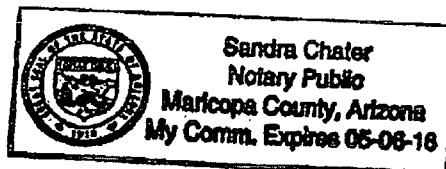
  
Hoyt L. Kesterson II

Sworn to before me this  
04 day of February, 2013

  
Notary Public

My Commission Expires: 05-06-16

[SEAL]





<http://www2.tbo.com/news/news/2012/aug/03/5/tampa-tops-nation-in-tax-refund-fraud-ar-451455/>



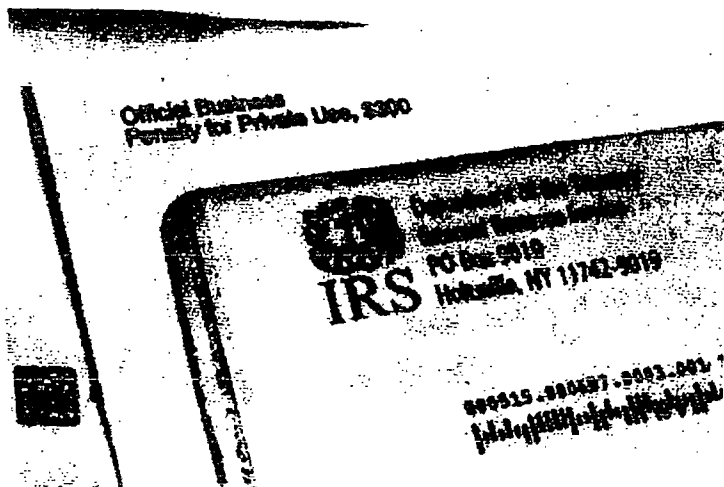
## Appendix A

Published: August 03, 2012  
Updated: August 03, 2012 - 6:34 AM

[Home](#) / [news](#) / [local](#) /

# Tampa tops nation in tax-refund fraud

By Elaine Silvestrini



Tampa leads the nation in income tax-refund fraud, racking up more than the next three cities combined, according to a new report by a federal watchdog agency.

The study by the Internal Revenue Service's inspector general examined tax filings from 2011 and concluded that the IRS fails to catch billions of dollars in fraudulent tax returns.

"Undetected tax refund fraud results in significant unintended federal outlays and erodes taxpayer confidence in our nation's tax system," the report says.

The IRS failed to detect more than \$5.2 billion in potentially fraudulent tax refunds last year and could end up issuing another \$21 billion in fraudulent refunds nationwide if it fails to make changes, the report says.

The potential fraud estimate – described by the report as conservative — it doesn't count the \$6.5 billion the IRS says it managed to detect and stop.

The report identified the five cities with the highest number of potentially fraudulent tax returns, led by Tampa with more than nearly 89,000 returns amounting to \$468 million.

U.S. Sen. Bill Nelson, a Florida Democrat, chaired subcommittee hearings on the crime and requested the audit to help gauge the scope of the fraud. "I never cease to be shocked when I hear the extent of this," Nelson said.

Local law enforcement officials said they weren't shocked at all.

"These numbers are staggering," said U.S. Attorney Robert E. O'Neill of Tampa. "Not surprising, but staggering."

"I'd like to say it's a surprise, but it's not," said Tampa Police spokeswoman Andrea Davis. "It's something we have been talking about for going on three years and felt like no one was listening. Now, hopefully, this will be what actually makes people listen and maybe some changes happen."

The IRS says it has made changes in its efforts to prevent income tax fraud, but Davis insists the crime continues.

"It's not died down," she said. "It's growing every year. ... We have not seen a slowdown in our community."

The IRS has established a new task force of local, federal and state law enforcement agencies from Hillsborough, Pasco, Pinellas, Hernando and Polk counties, said James Robnett, who heads the IRS Tampa criminal investigations office.

"The task force has a number of active investigations targeting suspects of this crime, and IRS Agents have mobilized to area law enforcement offices as a reactionary team," Robnett said in an email to the Tribune.

"We don't control who gets these refunds, however you have my commitment for IRS and the commitment of Tampa area law enforcement to move as fast as

we can to put these criminals in jail."

Nelson and Sen. Tom Coburn, an Oklahoma Republican, have introduced legislation aimed at curbing tax refund fraud. The measure would limit access to Social Security numbers and other information on the deceased, remove Social Security numbers from Medicare cards, and improve coordination between the IRS and local law enforcement.

But the bill does not address a recommendation to increase the IRS' access to a national database of new hires, which the inspector general says would help the agency check tax returns for fraud. A spokesman for Nelson said the senator is considering adding this as well as a provision addressing tax refunds given via debit cards.

Currently, the IRS does not have access to wage information until well after tax season is under way. This means that when people file tax returns, the IRS generally assumes the numbers to be accurate because it lacks any means to verify them.

The agency simply sends out the designated refunds.

The IRS only detects problems later, sometimes years later, through audits. Then it goes after taxpayers to collect money due the government, along with penalties and interest.

The trouble is that by this time, thieves are long gone and the agency sometimes chases innocent victims of identity theft seeking repayment.

"Once the money goes out the door, it's almost impossible to get back," said Michael Phillips, acting principal inspector general for audits.

The IRS has proposed a "real-time" tax system with access to employers' wage data it could use at the time an income tax return is filed. The taxpayer would get notice immediately about any problems, potentially heading off large penalties for innocent mistakes. This system could detect fraud quicker, too.

The report calls it "key to stopping the issuance of fraudulent tax refunds."

But the report also says the IRS does have access to income information for people receiving Social Security benefits and, until recently, failed to make use of it in catching fraud. If it had, the agency could have stopped \$232 million in potentially fraudulent refunds — including about \$1.8 million in Tampa.

The report also criticized the IRS for not using data collected from identity theft cases to identify and prevent more fraud.

Local law enforcement has long been frustrated at this, detecting on its won the kids of patterns the IRS should spot. For example, multiple filings that originate from single addresses.

"For example," the report stated, "we found that \$8.1 million in potentially fraudulent tax refunds involved tax returns filed from one of five addresses."

One address in Lansing, Mich., was the source of more than 2,100 tax returns, the report stated. More than 500 tax returns were sent from an address in Tampa, but officials said it is a post office and it's not clear if returns were sent from multiple boxes.

Most often, identities were stolen from people who had died. Other common victim groups included older people; citizens of Puerto Rico, the Virgin Islands and other U.S. possessions; children and people who don't earn enough to file an income tax return.

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## Appendix B

**HOYT L. KESTERSON II**  
**SENIOR SECURITY ARCHITECT**  
**TERRA VERDE SERVICES**

7400 EAST PINNACLE ROAD, SUITE 100  
SCOTTSDALE, ARIZONA 85255

(602) 316-1985  
hozt.kesterson@TERRAVERDESERVICES.COM

### SUMMARY

I am well versed in distributed applications including major components — operating systems, communication protocols, messaging, EDI, distributed TP & database architectures, and security. I have designed security protocols, specified security policies, and have performed security audits. I chaired the international committee responsible for defining the X.500 Directory standard, including X.509 for digital signature. I also participate in the American Bar Association's work on legal aspects of digital signature in electronic commerce and on the discovery of electronically stored information (ESI) and its use as evidence. I have been a testifying expert in a dispute on trade secret, a Markman hearing for patent infringement, and two hearings on spoliation of digital evidence, including one due to loss of the encryption key. Although I have been programming computers since 1961, my professional focus in the last twenty-five years has been the various aspects of security, including cryptography, and their influence on legal activities such as IP, business transactions including signing contracts, discovery, and evidence in a digital world.

### AREAS OF EXPERTISE

- Certified as a PCI Qualified Security Assessor. Performed an FTC-ordered security audit on a large identity theft prevention company.
- Chaired the International committee responsible for defining the OSI Directory standard, X.500, and its associated Authentication Framework, X.509 from 1986 to 2007. X.509 is the digital signature certificate standard used in many areas, e.g. SSL for web browsers and the IETF Public Key Infrastructure (PKIX).
- A member of the American Bar Association's Information Security Committee since its inception in the early 90's and a significant contributor to its Digital Signature and PKI Assessment Guidelines.
- Co-chair and founding member of the American Bar Association's Electronic Discovery and Digital Evidence Committee.
- A lecturer on data breach at the ABA Annual meeting and on electronic discovery and evidence at the Florida Bar Association's annual and mid-year meetings. A faculty member of a live audio webcasts—on spoliation of digital evidence, on retention and preservation, and bench decisions concerning disputes on commercially reasonable security—offered by the American Law Institute and the American Bar Association. Presented in twenty sessions in the legal tracks of twelve RSA conferences. Attendees at each of the events earned Continuing Legal Education (CLE) credits. Attributed contributor to a book on digital discovery, a book on digital data and the rules of evidence, and a book on data breach and encryption, all published by the American Bar Association.
- Nationally recognized speaker at conferences, universities, and companies on technology and its use. The conferences have not only been technical but also on the potential legal impacts and uses, e.g. its use to meet regulatory requirements such as HIPPA and Sarbanes-Oxley.
- Invited participant to the first National Science Foundation / Association of Community Colleges conference on cyber-security education (2002).
- Created a risk assessment tool for a large technology company.

- Assessed the security plans for, among others, a very large county school system, a European country's large Social Services organization, two state agencies, and several US financial institutions.
- Participated in "customer teaming" defining key customers' enterprise IT strategies, and focusing on networking, distributed applications (e.g. workflow and data warehouse), and security. Brought a large software company's development process to SEI and ISO 9000 guidelines, including code inspection.
- Performed security audits and gap analyses for a variety of sectors, e.g. education, financial, business, technology (e.g., a web-hosting company, a electronics R&D company). Evaluated data breach prevention implementations, including database encryption. Designed key management and data encryptions services for several businesses.
- Performed several Sarbanes-Oxley, Visa CISP, and PCI audits. Each of the CISP audits and gap analysis covered a different segment of the industry—a large merchant, a merchant services company, and a card-issuer services organization. Also performed several financial controls technical audits of a bank and a large ISP.
- Researched prior art, submitted expert's reports, advised counsel on technical aspects, and testified as an expert witness in litigations on patent infringement, on trade secret issues, and on spoliation of digital evidence.
- Advised companies on technical product strategy and security. Wrote an extensive evaluation of company's security products and capabilities and made recommendations for a marketing and product strategy for security.
- Advised a company on what companies it should acquire to broaden its portfolio of eDiscovery services and products.
- Developed technical strategies for interconnecting multi-vendor products, from enterprise to desktop.
- Designed components for electronic commerce - security, messaging, EDI, and distributed TP and database architectures.
- Worked on in a variety of systems designing and writing code that responds at the interrupt level of the operating system to handle events in a real-time fashion. These systems have included fast parallel-processing scientific computers, large-scale data processing computers, communication front-ends, and vector-graphic workstations.
- Reversed-engineered communication protocols for which documentation was not available.
- Developed and taught courses on Security, Directory, and ASN.1 for open seminars, as well as internal classes for various companies, government agencies, and organizations.
- Designed Distributed Application Architecture for intercommunication aspects including models, communication protocols, TP/DB paradigms, security, and naming and addressing.
- Encouraged and shepherded patent applications as member of company patent committee.
- Significant contribution to the specification of US name registration procedures (which served as the base for other countries' procedures), to the definition of the OSI Application Layer and CC&R (the TP commitment protocol) architectures (head of US delegation), and to various security standards.
- Lectured on security at Arizona State University in 2001, 2002, and 2003.

#### PROFESSIONAL EXPERIENCE

|                                                                                                                                                                |             |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Terra Verde Services, Glendale, Arizona                                                                                                                        | 2010 –      |
| Consultant, Glendale, Arizona                                                                                                                                  | 2000 – 2009 |
| BULL HN Information Systems Inc., Phoenix, Arizona                                                                                                             | 1976 – 2000 |
| <u>Fellow — Systems Engineer and Architect</u>                                                                                                                 |             |
| Responsible for the major components of electronic commerce, i.e. Security, Messaging, EDI, and distributed Transaction Processing and Database Architectures. |             |
| Manager/developer for communication front-end to a large transactional database system                                                                         |             |

## AFFILIATIONS

Led the International Standards group responsible for defining the OSI Directory Standard, X.500 including X.509, from 1985 thru 2006. Other activities were the ISO and national committees that defined the standards for Naming and Addressing and for Registration Authorities, participated in the definition of the Commitment, Concurrency, and Recovery protocols to support transaction processing, chaired the ISO effort on the OSI presentation layer standards and on ASN.1, head of US delegation to the work on the OSI Upper Layers.

Associate member, American Bar Association - Helped produce the ABA's *Digital Signature Guidelines with Model Legislation* document. Contributor to the *PKI* (public key infrastructure) *Assessment Guidelines*. Co-authored an article on digital signatures and EDI for the ABA's Spring 1998 issue of *Jurimetrics: Journal of Law, Science, and Technology*. Contributed attributed content to the book *The Discovery Revolution: E-Discovery Amendments to the Federal rules of Civil Procedure* by George Paul and Bruce Nearon (ABA Publishing, 2005). Worked extensively with George Paul in the development of his book, *Foundations of Digital Evidence* (ABA Publishing, 2008).

Faculty member for CLE seminars conducted by the American Law Institute CLE and by the American Bar Association:

- Live audio webcast of a seminar titled *Spoliation of Digital Evidence: The Aftermath of Qualcomm v. Broadcom*, 2008 ([more info here](#))
- Live video webcast of a seminar titled *Digital Evidence: Generation, Admissibility and Weight Considerations: An Advanced Course for Sophisticated Litigators*, 2008 ([more info here](#))
- Live video webcast of a seminar titled *Spoliation of Digital Evidence: Ethics & Case Law Update—New Forensics & Emerging Standards for Discovery & Abuse*, 2009 ([more info here](#))
- Live audio webcast of a seminar titled *Ethics in E-Discovery*, 2009 ([more info here](#))
- First Annual American Bar Association Electronic Discovery and Digital Evidence Practitioners' Workshop, 2010 ([more info here](#))
- Second American Bar Association Electronic Discovery and Digital Evidence Practitioners Workshop, 2011
- Live video webcast of a seminar titled *Litigation Holds! The Increasing Scope of Preservation Burdens*, 2011 ([more info here](#))
- Live video webcast of a seminar titled *Whose Fault Is It That I Didn't Know It Wasn't You—How to Represent Your Client in a Cyber Authentication Case*, 2011 ([more info here](#))
- Third American Bar Association Electronic Discovery and Digital Evidence Practitioners Workshop, 2011 ([more information here](#))
- Live video webcast of a seminar titled *ESI Retention vs. Preservation, Privacy and the Cloud*, 2012 ([more information here](#))
- American Bar Association The 2013 E-Discovery and Information Governance National Institute ([more information here](#))

Participated in Open Systems Foundation's development of the DCE (Distributed Computing Environment) architecture and protocols, including Kerberos. Participated in development of the CBEMA (the US computer industry lobby organization now called ITI) response to the US government's Clipper initiative and the US government's encryption policy. Acted as representative to Key Recovery Alliance.

## AWARDS

Honeywell H. W. Sweatt Engineer-Scientist Award, 1984

Patent 6,067,579 Method for reducing message translation and traffic through intermediate applications and systems in an Internet application

## CONFERENCE PRESENTATIONS

2013 eFraud Global Forum, a panel *Whose Fault Is It That I Didn't Know It Wasn't You—commercially reasonable security, a court rules what it is not*, February 2013.

2013 RSA Data Security Conference, *Your Honor, It Was Self Defense—a Mock Hearing* and a follow-on panel; a presentation *Everything We're Doing With Passwords Is Wrong*, February 2013

Vanguard Security & Compliance 2012 conference, *ESI in the Cloud—the legal implications arising from the technical possibilities* and *Whose fault is it that I didn't know it wasn't you? a discussion of commercially reasonable security* June 2011

2012 Rocky Mountain Security Conference, *Whose Fault Is It That I Didn't Know It Wasn't You—a discussion of commercial security*, May 2012

Internet Technology Basics for Judges, *ESI in the Cloud—the legal implications arising from the technical possibilities*, organized by the CLIP, Center on Law and Information Policy and the Federal Judicial Center, Fordham Law School, 3–4 May 2012

2012 RSA Data Security Conference, *Just Because They're Authenticated Doesn't Mean You Should Trust Them—a Mock Hearing* and a panel, *Whose Fault Is It That I Didn't Know It Wasn't You—an Update*, February 2012

Contact Center Conference Fall 2011, *Your Employee from Home—Managing Security for a Virtual Call Center*, October 2011

Presentation to the Arizona Bankers Association Fraud and Security Seminar, *Whose Fault Is It That I Didn't Know It Wasn't You*, September 2011

Presentation to the ISACA® Phoenix Chapter, *PCI—A Different Point of View*, September 2011

Third American Bar Association Electronic Discovery and Digital Evidence Practitioners' Workshop, *Emerging Technologies—Real Technology Addressing Real Problems and Mock 26(f) Meeting and 16(b) Hearing* New York, August 2011

Vanguard Security & Compliance 2012 conference, *Cloud Control—Assurance in a Massively Scalable World* and *ESI in the Cloud—the legal implications arising from the technical possibilities*, June 2011

2011 Cornerstones of Trust Conference, *Being an Expert Witness—Preparing for Trial, Depositions, and Testifying at Trial*, June 2011

ISSA Web Conference, *InfoSec Meets Legal—Business Records to ESI to Digital Evidence*, February 2011

Second American Bar Association Electronic Discovery and Digital Evidence Practitioners' Workshop, *Emerging Technologies—Real Technology Addressing Real Problems and Mock 26(f) Meeting and 16(b) Hearing* San Francisco, February 2011

2011 RSA Data Security Conference, *Whose Fault Is It That I Didn't Know It Wasn't You—a Mock Hearing* and a panel, *More on Judicial Response to Authentication Methods*, February 2011

Presentation on key management to Phoenix and Denver Chapters of the ISSA—*To Protect the Kingdom, One Must Protect the Key*, January and February 2011

Presentation to Phoenix Chapter of the ISSA—*Business Records to ESI to Digital Evidence*. July 2010

2010 Annual Florida Bar Convention, *Electronic Everything 2010: Litigating Computer Forensics Evidence Issues*

First Annual American Bar Association Electronic Discovery and Digital Evidence Practitioners' Workshop, *Emerging Technologies—Real Technology Addressing Real Problems, Plenary I—Mock 26(f) Meeting, and Plenary II—Mock Spoliation and Discovery Abuse Hearing*, Chicago, May 2010

2010 RSA Data Security Conference, *Technology Experts Go to Court –The Federal Rule 26f eDiscovery Conference, Technology Experts Go to Court II – Rule 16(b) eDiscovery Mock Hearing, Digital Evidence Life Cycle Management – Generating Robust Evidence Early, and Digital Forensics vs. Security & Encryption*

2009 Annual Florida Bar Convention, *Electronic Everything 2009: Technology's accelerating influence on today's practice of law and what lawyers need to know*



2009 MER (Managing Electronic Records) Conference, *Authentication and Admissibility of Digital Evidence: The "Shotgun Marriage" of Law and Technology* and a keynote address, *The Legal/Regulatory Revolution Goes Digital: Identifying and Addressing Needed Operational Changes in Your ERM System*  
 2009 RSA Data Security Conference, *Mock Trial — Authentication and Admissibility of Digital Evidence*  
 Information Security Compliance & Risk Management Institute 2008 Conference, *Authentication and Admissibility of Digital Evidence*  
 American Bar Association's 2008 Annual Meeting, *Protection of Sensitive Information Is Every Lawyer's Business—Practical Solutions to Avoid Data Breaches*  
 2008 RSA Data Security Conference, *Mock Trial — Authentication and Admissibility of Digital Evidence* and *Which "Which" Is Which? Sources of digital content & its authenticity*  
 Florida Bar Association's 2008 annual and mid-year meetings, *Electronic Everything: Technology's accelerating influence on today's practice of law and what lawyers need to know*  
 2007 RSA Data Security Conference, *Mock trial: Handling Testimony of InfoSec Expert Witnesses and Metadata Mining: An Ethical Minefield for Attorneys*  
 2006 RSA Data Security Conference, *Mock trial: Challenging a Digitally Signed Legal Documents in Court, X.509—the new and improved 5th edition, and The sky isn't falling—legal effects of the failure of the hash algorithm*  
 2005 RSA Data Security Conference, *Forensics / Digital Evidence* (a panel in the legal Policy Track)  
 2004 RSA Data Security Conference, *Time and Content Authentication To Enhance Authentication* (a panel in the Privacy, Law, and Policy Track on the requirements of Sarbanes-Oxley and others)  
 2003 RSA Data Security Conference, *The 5<sup>th</sup> edition of X.509 and Can protocol convey a legal constraint?* (a panel organized by me for the Law and Policy Track)  
 Lockheed Martin Information Technology Trends Conference, 2002, *I support standards—but my problem is different*  
 2002 RSA Data Security Conference, *The American Bar Association's New PKI Assessment Guidelines*  
 2001 RSA Data Security Conference, *Legal intent to digitally sign* (a panel in the legal track organized by me) and *Update on X.509*  
 2000 RSA Data Security Conference, *Attribute Certificates*  
 COMDEX 99, Panel Chair, *Directory Services and PKI*  
 NETSEC 99 Conference, *X.509 Attribute Certificate*  
 Stanford University, Stanford Computer Industry Project, *Building Trust on the Internet*, 1999  
 DISA EC/EDI Seminar Series, *Digital Signatures and Enterprise Internet EDI*  
 Network Security Framework Forum, *Access Control*  
 SmartCard Forum, *PKI and SmartCards*  
 IEEE Aerospace Conferences - 1997, Organized and chaired 1998 Security Session  
 IEEE International Performance, Computing, and Communications Conference, 1999, full day tutorial *Digital Signatures—Whom do you trust?*  
 National Information Systems Security Conference, 1995 & 1997  
 Worldwide Electronic Commerce Law, Policy, Security and Controls Conferences, 1992 & 1995  
 Networld Conference, Panel on Directory, 1990

# **EXHIBIT J**

State of South Carolina  
Department of Revenue  
Office of General Counsel for Litigation  
300A Outlet Pointe Blvd. (29210), P.O. Box 12265, Columbia, South Carolina 29211  
Telephone (803) 898-5130 FAX (803) 896-0171

**SENT ELECTRONICALLY AND USPS**

January 18, 2013

John Hawkins, Esquire  
Logan Rollins, Esquire  
Hawkins Law Firm  
PO Box 5048  
Spartanburg, SC 29304

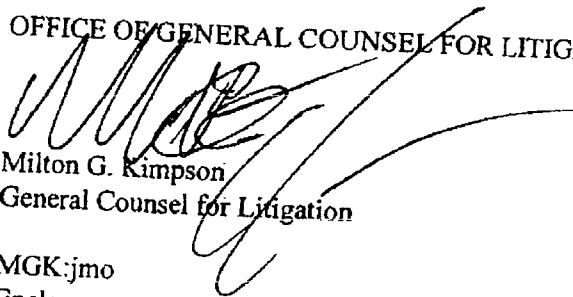
Re: Phillip Morgan, individually and on behalf of all similarly situated Plaintiffs v. Nimrata  
"Nikki" Haley, in her Official Capacity as Governor of South Carolina, et al.,  
Civil Action No. 2-12-CP-40-7331

Dear Mr. Hawkins and Mr. Rollins:

Enclosed please find the Department of Revenue's Responses to Plaintiff's First Requests to Admit in the above-referenced matter. Also enclosed is a Proof of Service.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

  
Milton G. Kimpson  
General Counsel for Litigation

MGK:jmo  
Enclosures

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Phillip Morgan, individually and on )  
behalf of all similarly situated Plaintiffs, )  
Civil Action No. 2012-CP-40-7331

Plaintiffs, )  
vs. )  
DEPARTMENT OF REVENUE'S  
RESPONSES TO PLAINTIFF'S  
FIRST REQUESTS TO ADMIT

Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina Department )  
of Revenue; South Carolina Division of )  
State Information Technology; )  
Trustwave Corporation; and Trustwave )  
Holdings, Inc., )  
Defendants. )

---

TO: JOHN HAWKINS and LOGAN ROLLINS, ATTORNEYS FOR PLAINTIFF

Comes now, the South Carolina Department of Revenue and James F. Etter, its former Director, (collectively "Department") and provide the following responses to Plaintiff's First Requests to Admit to Defendants James F. Etter and the Department of Revenue:

1. Admit that South Carolina residents whose personal identifying information has been disclosed by the security breach that is the subject of this suit, as a proximate result of the security breach; have had credit monitoring services made available to the them at the expense of the State of South Carolina.

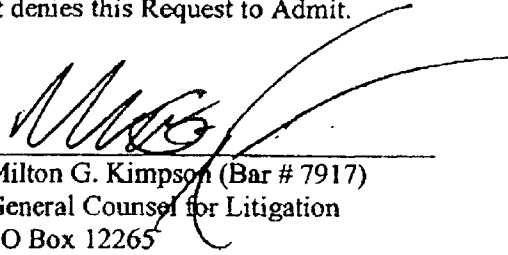
**Answer:** The Department denies this Request to Admit inasmuch as "proximate result" seeks a legal conclusion. Credit monitoring services have been provided to South Carolina taxpayers residing in the State.

2. Admit that persons of South Carolina whose information has been breached have suffered; as a proximate result of the breach that is the subject of this suit; loss, detriment, or injury to their persons, their property, or rights.

**Answer:** The Department denies this Request to Admit.

3. Admit that the credit monitoring services the State of South Carolina has thus far offered to the persons of South Carolina whose personal identifying information has been breached do not provide the full extent of protection that is available in the open market to said persons.

**Answer:** The Department denies this Request to Admit.

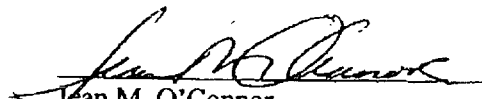


Milton G. Kimpson (Bar # 7917)  
General Counsel for Litigation  
PO Box 12265  
Columbia, SC 29211  
Phone: 803-898-5130  
Fax: 803-896-0171  
Attorneys for Defendant  
South Carolina Department of Revenue

Columbia, South Carolina  
January 18, 2013

**PROOF OF SERVICE**

I, Jean M. O'Connor, do hereby affirm that I have caused to be mailed, by United States Postal Service, postage prepaid, Defendant, South Carolina Department of Revenue's Responses to Plaintiff's First Requests for Admit in Phillip Morgan, individually and on behalf of all similarly situated Plaintiffs v. Nimrata "Nikki" Haley, in her Official Capacity as Governor of South Carolina, et al, Case No. 2012-CP-40-7331, to John Hawkins, Esquire and Logan Rollins, Esquire, Hawkins Law Firm, PO Box 5048, Spartanburg, SC 29304, this 18<sup>th</sup> day of January, 2013

  
Jean M. O'Connor

# **EXHIBIT K**

January 28, 2013

**VIA U.S. MAIL AND E-MAIL:**

John D. Hawkins, Esquire  
Logan Rollins, Esquire  
The Hawkins Law Firm  
Post Office Box 5048  
Spartanburg, South Carolina 29304

Steven Teppler, Esquire  
Kirk Pinkerton, PA  
240 South Pineapple Ave., 6th Floor  
Sarasota, Florida 34236

Re: Phillip Morgan, et al. v. SC Division of State Information Technology, et al.  
Civil Action No.: 2012-CP-40-7331  
SGS&L File No.: 6508/1500

Dear Counsel:

I am writing to address the issues that we have discussed regarding the litigation hold letter dated November 5, 2012 and DSIT's motion for protective order relating thereto. I appreciate the opportunity to have discussed our concerns with you and to have received more guidance from you as to your discovery expectations as to DSIT. I especially appreciate the email from Steven Teppler setting out what you want us to hold with specificity. A copy of this email is attached for reference. I have now consulted with DSIT and we agree to preserve the information set out in Steven's email. We will no longer preserve any other information that was the subject of the November 5, 2012 letter.

In our conference call on January 14, you posed several questions that we undertook to investigate and report back to you. Here is what we have determined in response to each:



1. Are the DOR computers in the DSIT data center locked, and if so who has access?

The DOR computers are housed in a locked cage in the data center. DSIT does not have a key that it is authorized to use to access the equipment in the DOR cage. DSIT is in possession of an emergency key that it is authorized to release only to persons specified by DOR. I am enclosing herewith a copy of the hosting agreement between DSIT and DOR for your review. This agreement accurately describes the relationship between DSIT and DOR with respect to the DOR's use of the DSIT facilities.

2. Has Trustwave entered the datacenter and if so, do we have a log of its visit?

DSIT doesn't know whether Trustwave has entered the datacenter or not. If so, they would have come in the company of DOR personnel and would not have reported to anyone at DSIT. DSIT does not hold credit card information and therefore is not subject to PCI requirements. To the extent that visitor logs still exist, we will preserve them, but we have not reviewed them to determine whether they reflect a visit by Trustwave or not.

3. Are the DOR servers in the datacenter on the same network with DSIT physically and/or logically?

DSIT has some network components in common with DOR in connection with the Metronet communication network, but they are logically separated. DSIT does not have access to DOR data that is transmitted over the network.

4. Does DSIT have access to DOR switches and firewalls?

No. All such switches and firewalls are in the cage to which DSIT does not have access. The configuration of the DOR network, switches, and firewalls are not within DSIT's control. We do not believe that we have access to any logs relating to firewall setting changes, but will confirm this to you.

5. Does DSIT back up data from DOR servers?

No.

I believe this addresses the issues that you raised in our conference call. Please let me know if there is any other information that you requested that I did not provide.

I would appreciate you confirming our agreement that our litigation hold responsibilities are limited to the categories of things set out in Steven's email. By agreeing to preserve this information, DSIT is not agreeing that it is necessarily relevant or discoverable, and DSIT is not waiving any other objections that might be made to its production.

I appreciate your willingness to resolve our concerns as expressed in the pending motion for protective order, and look forward to hearing from you.

Very truly yours,

  
Robert E. Stepp

Enclosures

Cc: Office of General Counsel  
Robert E. Tyson, Esquire

**Stepp, Robert E.**

**From:** Steven Teppler [STeppler@kirkpinkerton.com]  
**Sent:** Thursday, January 24, 2013 11:58 AM  
**To:** Stepp, Robert E.; 'Logan Rollins'; Tyson, Rob  
**Cc:** John Hawkins; Bryan Snow; April Million  
**Subject:** RE: Morgan v. Haley et al.--Steve Teppler

Hi Rob and Bobby:

When we last spoke during our conversation in which our tech expert Hoyt Kesterson provided input, you indicated that you would check with your tech expert and get back to us in connection with the production of the following items and information, which in turn would comprise, at least at this point, most of the information we seek from DSIT. Of course, we reserve the right to request further information referenced in DSIT's disclosures, but we will also strive to focus our discovery requests.

We want to stress our intent and goal that this process be as easy as possible for you, and also to limit your preservation burden. With that goal in mind, here is what we again request that you preserve (and produce) to the extent that any of the following is in your custody control, control or possession:

1. All versions of any Report of Compliance generated by Trustwave, together with any associated evidence referenced in that report or reports.
2. The unredacted Mandiant report (including any drafts thereof) submitted in connection with the data breach.
3. Unredacted copies of any contracts with Mandiant or Trustwave to which any state entity is a party.
4. All the records collected by DSIT or DOR (including any audit data and reports) in connection with software and services provided by or deployed by Trustwave to any state entity.
5. Records of any onsite inspection by Trustwave.
6. Any documents and ESI, including any communications, in connection with the data security incident in your custody control or possession. Where such information is electronically generated, we would require ESI production in native format.

We also would appreciate your client's response to our request in connection with the DSIT's and DOR's firewalls and routers (including maintenance and inspection records).

We look forward to your response.

Best regards,

Steven

Steven W. Teppler

**Kirk•Pinkerton, P.A.**  
240 So. Pineapple Avenue  
Sarasota, FL 34236  
Direct: 941.364.2410  
G-Voice: 941.487.0050  
[steppler@kirkpinkerton.com](mailto:steppler@kirkpinkerton.com)

---

**From:** Stepp, Robert E. [rstepp@sowellgray.com]  
**Sent:** Friday, January 18, 2013 3:29 PM  
**To:** 'Logan Rollins'; butch.bowers@wcsr.com; kevin.hall@wcsr.com; todd.carroll@wcsr.com;

1/28/2013

Record on Appeal  
203

tclaypoole@wcsr.com; jlong@nexsenpruet.com; Tyson, Rob; Milton Kimpson  
**Cc:** Steven Teppler; John Hawkins; Bryan Snow; April Million  
**Subject:** RE: Morgan v. Haley et al.--Steve Teppler

No objection to pro hac admission from us.

Bobby

---

**From:** Logan Rollins [mailto:logan@hawkinslawsc.com]  
**Sent:** Friday, January 18, 2013 3:29 PM  
**To:** butch.bowers@wcsr.com; kevin.hall@wcsr.com; todd.carroll@wcsr.com; tclaypoole@wcsr.com;  
jlong@nexsenpruet.com; Tyson, Rob; Stepp, Robert E.; Milton Kimpson  
**Cc:** Steven Teppler <STeppler@klrkpinkerton.com> (STeppler@klrkpinkerton.com); John Hawkins; Bryan Snow;  
April Million  
**Subject:** Morgan v. Haley et al.--Steve Teppler

All,

Steve Teppler is an attorney from Sarasota, Florida who is going to be helping us out on this case. First, I wanted to let you know that he will be contacting you in the near future to discuss arranging for your preservation and production of documents. We have already discussed our litigation hold letter with counsel for DSIT, and Steve, in conjunction with our technology expert Hoyt Kesterton, will be able to constrict the scope of that letter so that the burden to each party is as minimal as possible.

Second, could someone respond for each party to let me know if you would consent to Steve's being admitted *pro hac vice*? I believe he meets all the requirements, and I think you will find him at least tolerable to deal with after you speak to him. Let me know. Hope everybody has a good weekend. Thanks.

Logan

Logan Rollins  
The Hawkins Law Firm  
P.O. Box 5048  
Spartanburg, SC 29304  
[logan@hawkinslawsc.com](mailto:logan@hawkinslawsc.com)  
(864) 574-8801 (phone)  
(864) 574-8810 (fax)

1/28/2013

Record on Appeal  
204

Steven Teppler <STeppler@kirkpinkerton.com>

January 31, 2013 7:45 PM

To: Rob Tyson <Rtyson@sowellgray.com>, "Robert E. Stepp" <rstepp@sowellgray.com>

Cc: John Hawkins <john@hawkinslawsc.com>, Logan Rollins <logan@hawkinslawsc.com>

Responses

Dear Rob and Bobby:

We have reviewed your letter in response to our requests (and discussions) and appreciate your responses. Those responses, while helpful, need to be clarified to address the following points.

As a preliminary matter, the following items would have been required to be audited by Trustwave (and necessarily involved some personnel at DSIT). FYI, I've also attached relevant portions of the PCI-DSS audit requirements that Trustwave must have followed in order to be in carry out an audit in compliance with those standards.

1. DSIT possesses a "key" to the DOR cage room, even though it need authorization to access --- That was required to have been picked up in any PCI audit for reasons stated below.
2. If the servers in the DOR cage hold PCI, and DSIT provides physical protection, these should have been part of, and included in the PCI audit
3. The firewall and router configuration response is unclear for purposes of PCI audit standards. A logical configuration would have to have been verified by the PCI QSA audit. In other words, some router and configuration controls separated represent data crosses between DSIT and DOR, and should have been audited.
4. There may be switches and firewalls in the cage, but once it leaves the cage it mixes (i.e., there is a merge) with DSIT's traffic. Further, "logical" in this instance means that DSIT and DOR actually share the same physical hardware and data paths but that software keeps them isolated... that should have been audited.

DSIT should have been aware of a PCI audit from Trustwave for the above reasons (including general access logs and video recordings where available), and the observations below probably warrant a further telephone discussion with the appropriate DSIT representative with knowledge sufficient to respond. That said, if DSIT is certain that no Trustwave personnel ever appeared in the DSIT facility, we should discuss the option of having your client prepare an affidavit (or agreeing in a very short deposition) to that effect.

All of this also underscores the need to get the unredacted contracts, ROC and Mandiant reports. If your client has copies of these reports, we would appreciate your providing them to us, or informing us by affidavit that they do not either possess or have access to them.

I look forward to discussing this with you at your earliest convenience.

Best,  
Steven

\*\*\*\*\*

Relevant PCI Requirements:

**Requirement 9: Restrict physical access to cardholder data**

Any physical access to data or systems that house cardholder data provides the opportunity for individuals to access devices or data and to remove systems or hardcopies, and should be appropriately restricted. For the purposes of Requirement 9, "onsite personnel" refers to full-time and part-time employees, temporary employees, contractors and consultants who are physically present on the entity's premises. A "visitor" refers to a vendor, guest of any onsite personnel, service workers, or anyone who needs to enter the facility for a short duration, usually not more than one day. "Media" refers to all paper and electronic media containing cardholder data.

**PCI DSS Requirements**

**9.1** Use appropriate facility entry controls to limit and monitor physical access to systems in the cardholder data environment.

**9.1.1** Use video cameras and/or access control mechanisms to monitor individual physical access to sensitive areas. Review collected data and correlate with other entries. Store for at least three months, unless otherwise restricted by law.

**Note:** "Sensitive areas" refers to any data center, server room or any area that houses systems that store, process, or transmit cardholder data. This excludes the areas where only point-of-sale terminals are present, such as the cashier areas in a retail store.

**9.1.2** Restrict physical access to

publicly accessible network jacks.

For example, areas accessible to visitors should not have network ports enabled unless network access is explicitly authorized.

**Testing Procedures**

9.1 Verify the existence of physical security controls for each computer room, data center, and other physical areas with systems in the cardholder data environment.

☐ Verify that access is controlled with badge readers or other devices including authorized badges and lock and key.

☐ Observe a system administrator's attempt to log into consoles for randomly selected systems in the cardholder environment and verify that they are "locked" to prevent unauthorized use.

9.1.1.a Verify that video cameras and/or access control mechanisms are in place to monitor the entry/exit points to sensitive areas.

9.1.1.b Verify that video cameras and/or access control mechanisms are protected from tampering or disabling.

9.1.1.c Verify that video cameras and/or access control mechanisms are monitored and that data from cameras or other mechanisms is stored for at least three months.

9.1.2 Verify by interviewing network administrators and by observation that network jacks are enabled only when needed by authorized onsite personnel. Alternatively, verify that visitors are escorted at all times in areas with active network jacks.

**In Place**

**Not In Place**

**Target Date/ Comments**

October 2010 Page 51

*PCI DSS Requirements and Security Assessment Procedures, Version 2.0 Copyright 2010 PCI Security Standards Council LLC* PCI DSS Requirements

9.1.3 Restrict physical access to wireless access points, gateways, handheld devices, networking/communications hardware, and telecommunication lines.

9.2 Develop procedures to easily distinguish between onsite personnel and visitors, especially in areas where cardholder data is accessible.

9.3 Make sure all visitors are handled as follows:

9.3.1 Authorized before entering areas where cardholder data is processed or maintained.

9.3.2 Given a physical token (for example, a badge or access device) that expires and that identifies the visitors as not onsite personnel.

9.3.3 Asked to surrender the physical token before leaving the facility or at the date of expiration.

**Testing Procedures**

9.1.3 Verify that physical access to wireless access points, gateways, handheld devices, networking/communications hardware, and telecommunication lines is appropriately restricted.

9.2.a Review processes and procedures for assigning badges to onsite personnel and visitors, and verify these processes include the following.

**In Place**

**Not In Place**

**Target Date/ Comments**

October 2010 Page 52

☐ ☐ ☐

Granting new badges, Changing access requirements, and

Revoking terminated onsite personnel and expired visitor badges

9.2.b Verify that access to the badge system is limited to authorized personnel.

9.2.c Examine badges in use to verify that they clearly identify visitors and it is easy to distinguish between onsite personnel and visitors.

9.3 Verify that visitor controls are in place as follows:

9.3.1 Observe the use of visitor ID badges to verify that a visitor ID badge does not permit unescorted access to physical areas that store cardholder data.

9.3.2.a Observe people within the facility to verify the use of visitor ID badges, and that visitors are easily distinguishable from onsite personnel.

9.3.2.b Verify that visitor badges expire. 9.3.3 Observe visitors leaving the facility to verify visitors are

asked to surrender their ID badge upon departure or expiration.

*PCI DSS Requirements and Security Assessment Procedures, Version 2.0 Copyright 2010 PCI Security Standards Council LLC*

#### **PCI DSS Requirements**

**9.4** Use a visitor log to maintain a physical audit trail of visitor activity. Document the visitor's name, the firm represented, and the onsite personnel authorizing physical access on the log. Retain this log for a minimum of three months, unless otherwise restricted by law.

**9.5** Store media back-ups in a secure location, preferably an off-site facility, such as an alternate or back-up site, or a commercial storage facility. Review the location's security at least annually.

**9.6** Physically secure all media.

**9.7** Maintain strict control over the internal or external distribution of any kind of media, including the following.

**9.7.1** Classify media so the sensitivity of the data can be determined.

**9.7.2** Send the media by secured courier or other delivery method that can be accurately tracked.

**9.8** Ensure management approves any and all media that is moved from a secured area (especially when media is distributed to individuals).

**9.9** Maintain strict control over the storage and accessibility of media.

**9.9.1** Properly maintain inventory logs of all media and conduct media inventories at least annually.

#### **Testing Procedures**

**9.4.a** Verify that a visitor log is in use to record physical access to the facility as well as for computer rooms and data centers where cardholder data is stored or transmitted.

**9.4.b** Verify that the log contains the visitor's name, the firm represented, and the onsite personnel authorizing physical access, and is retained for at least three months.

**9.5.a** Observe the storage location's physical security to confirm that backup media storage is secure.

**9.5.b** Verify that the storage location security is reviewed at least annually.

**9.6** Verify that procedures for protecting cardholder data include controls for physically securing all media (including but not limited to computers, removable electronic media, paper receipts, paper reports, and tapes).

**9.7** Verify that a policy exists to control distribution of media, and that the policy covers all distributed media including that distributed to individuals.

**9.7.1** Verify that all media is classified so the sensitivity of the data can be determined.

**9.7.2** Verify that all media sent outside the facility is logged and authorized by management and sent via secured courier or other delivery method that can be tracked.

**9.8** Select a recent sample of several days of offsite tracking logs for all media, and verify the presence in the logs of tracking details and proper management authorization.

**9.9** Obtain and examine the policy for controlling storage and maintenance of all media and verify that the policy requires periodic media inventories.

**9.9.1** Obtain and review the media inventory log to verify that periodic media inventories are performed at least annually.

\*\*\*\*\*

Steven W. Teppler

#### **Kirk-Pinkerton, P.A.**

240 So. Pineapple Avenue

Sarasota, FL 34236

Direct: 941.364.2410

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[steppler@kirkpinkerton.com](mailto:steppler@kirkpinkerton.com)

# **EXHIBIT L**



|                                          |   |                                         |
|------------------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS            |
|                                          | ) |                                         |
| COUNTY OF RICHLAND                       | ) | FOR THE FIFTH JUDICIAL CIRCUIT          |
|                                          | ) |                                         |
| Phillip Morgan,                          | ) |                                         |
|                                          | ) |                                         |
| Individually, and on behalf of           | ) |                                         |
| all similarly situated Plaintiffs,       | ) |                                         |
|                                          | ) |                                         |
| v.                                       | ) | <b>Civil Action No. 2012-CP-40-7331</b> |
|                                          | ) |                                         |
| Nimrata "Nikki" Haley, Governor of       | ) |                                         |
| South Carolina; James F. Etter, Director | ) |                                         |
| of the South Carolina Department of      | ) |                                         |
| Revenue; the South Carolina              | ) |                                         |
| Department of Revenue; South Carolina    | ) |                                         |
| Division of State Information            | ) |                                         |
| Technology; Trustwave Corporation;       | ) |                                         |
| and Trustwave Holdings, Inc.             | ) |                                         |
|                                          | ) |                                         |
| Defendants.                              | ) |                                         |
|                                          | ) |                                         |

**CONSENT PROTECTIVE ORDER REGARDING  
CONFIDENTIALITY OF DISCOVERY MATERIALS**

Whereas, the Parties have stipulated that certain discovery material be treated as confidential, and upon good cause appearing, IT IS HEREBY ORDERED:

**Proceedings and Information Governed.**

1. This Order and any amendments or modifications hereto ("Protective Order") shall govern any document, information (including electronically stored information), or other thing furnished by any Party, to any other Party, and includes non-parties who receive a subpoena and who produce discovery responses or testimony in connection with this action. The information protected includes, but is not limited to, answers to interrogatories, answers to requests for admission, responses to requests for production of documents, deposition transcripts and videotapes, deposition exhibits,

compiled or uncompiled source code, and other records or writings or things produced, given, or filed in this action that are designated by a Party as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" in accordance with the terms of this Order, as well as any copies, excerpts, abstracts, analyses, summaries, descriptions, or other forms of recorded information containing, reflecting, or disclosing such information ("Discovery Materials"). Plaintiffs and Defendant, as well as their officers, directors, employees, agents, and legal counsel, are referred to as the "Parties" for the purposes of this Order. Plaintiffs' technology expert, Hoyt L. Kesterson II, Inc., is referred to as "Designated Expert," a copy of his curriculum vitae is attached hereto as Exhibit B, and signed Acknowledgement and Agreement to be Bound is attached hereto as Exhibit C.

**Designation and Maintenance of Discovery Materials as Confidential.**

2. For purposes of this Protective Order, (a) the "Confidential" designation may be used when Discovery Materials contain or constitute sensitive personal information; trade secrets; commercial research, development, or information; pricing and financial information, contractual obligations/agreements, lists or names of vendors and business plans or other information required by law or agreement to be kept confidential; and (b) the "Confidential – Attorneys' Eyes Only" designation may be used when Discovery Materials contain or constitute information the producing Party deems especially sensitive.

3. Discovery Materials produced or disclosed during the course of this litigation within the scope of paragraph 2 may be designated by the producing Party as containing confidential information by placing on each page and each thing, in a manner

that will not interfere with its legibility, the legend: "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY."

4. Except for documents produced for inspection, designation of confidential Discovery Materials shall be made before, or at the time of, production or disclosure. In the event that documents are produced for inspection, such documents may be produced for inspection before being marked "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY." Once specific documents have been designated for copying, any documents containing confidential information will then be marked "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" after copying. There will be no waiver of confidentiality by the inspection of confidential documents before they are copied and marked "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" pursuant to this procedure.

5. A Party may designate information disclosed at a deposition as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" by requesting the reporter to so designate the transcript or any portion thereof at the time of the deposition. If no such designation is made at the time of the deposition, any Party may thereafter designate the deposition or portions thereof as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" as long as such designation is made in writing and presented to the other Parties and to the court reporter within a reasonable time. Each Party and the court reporter shall attach a copy of any final and timely written designation notice to the transcript and each copy thereof in its possession, custody, or control, and the portions designated in such notice shall

thereafter be treated in accordance with this Protective Order. Any testimony that describes a document that has been designated as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" shall also be deemed to be designated as such.

**Inadvertent Failure to Designate.**

6. The inadvertent failure to designate Discovery Materials as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" will not be deemed to waive a later claim as to their confidential nature, or to stop the producing Party from so designating such Discovery Materials at a later date in writing and with particularity. Notwithstanding anything herein to the contrary, any Discovery Materials received by a Party that have not been designated as confidential shall not be considered confidential until such time as the receiving Party receives notice in writing from the producing Party within a reasonable time of the change in the designation.

**Disclosure and Use of Confidential Discovery Materials.**

7. All Discovery Materials produced in this litigation may only be used for purposes of this lawsuit and not used for any other purpose. Discovery Materials designated as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" may only be shown to others as set forth in this Order.

8. The Parties shall not disclose or permit the disclosure of any Discovery Materials designated as "CONFIDENTIAL" under this Order to any other person or entity, except that disclosure may be made in the following circumstances:

- a. Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the

limited purpose of making photocopies. Before disclosure to any such court reporter or person engaged in making photocopies, such person must agree to be bound by the terms of this Order.

- b. Disclosure may be made to in-house and outside counsel and employees of counsel to whom disclosure is reasonably necessary for this litigation.
- c. Disclosure may be made to the named Plaintiffs.
- d. Disclosure may be made to consultants, investigators, or experts (collectively, "experts") employed by the Parties to assist in the preparation and trial of the lawsuit. Before disclosure to any expert, the expert must be informed of and agree in writing to be subject to the provisions of this Order requiring that the Discovery Materials received be held in confidence, and must execute the "Acknowledgement and Agreement to be Bound," attached hereto as Exhibit A.
- e. The author or recipient of Discovery Materials or a custodian or other person who possessed or had knowledge of the Discovery Materials.
- f. During depositions, witnesses in the action when disclosure is reasonably necessary and who have signed the "Acknowledgement and Agreement to be Bound," unless otherwise agreed by the designating Party or ordered by the Court.

9. The Parties shall not disclose or permit the disclosure of any Discovery Materials designated as "CONFIDENTIAL – ATTORNEYS' EYES ONLY" under this Order to any other person or entity, except that disclosures may be made in the following circumstances:

- a. Disclosure may be made to in-house and outside counsel and employees of counsel to whom disclosure is reasonably necessary for this litigation.
- b. Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies. Before disclosure to any such court reporter or person engaged in making photocopies, such person must agree to be bound by the terms of this Order.
- c. Disclosure may be made to consultants, investigators, or experts (collectively, "experts") employed by the Parties to assist in the preparation and trial of the lawsuit. Before disclosure to any expert other than **the Designated Expert**, the identity of the expert and the expert's curriculum vitae must be disclosed in writing to the producing Party. The producing Party shall have 9 days from the receipt of the foregoing disclosure to object to the expert being shown "CONFIDENTIAL – ATTORNEYS' EYES ONLY" materials. The Parties agree to meet and confer as to whether and what materials may be shown to the expert. If the Parties cannot reach agreement on the materials to be shown

to the expert, or the expert's identity itself, either Party may bring the issue to the Court for resolution and "CONFIDENTIAL – ATTORNEYS' EYES ONLY" materials may not be disclosed to the expert unless and until the issue is resolved and disclosure is permitted by the Court. Prior to any disclosure, the expert must also be informed of and agree in writing to be subject to the provisions of this Order requiring that the Discovery Materials be held in confidence, and must execute the "Acknowledgement and Agreement to be Bound," attached hereto as Exhibit A.

10.

11. The Parties shall keep all Discovery Materials designated as "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" that are received under this Order secure within their exclusive possession and shall take reasonable efforts to place such Discovery Materials in a secure area and appropriately identified so as to allow access to such information only to such persons and under such terms as is permitted under this Order.

12. All copies, duplicates, pleadings, extracts, summaries, or descriptions of Discovery Materials designated as confidential under this Order, or any portion thereof, shall be immediately affixed with the legend "CONFIDENTIAL" or "CONFIDENTIAL – ATTORNEYS' EYES ONLY" if that legend does not already appear.

13. Confidential Discovery Materials may be disclosed to a person, not already allowed access to such information under this Order if: (a) the Discovery

Materials were written or were previously received by the person; (b) the Discovery Materials were written or received by a director, officer, employee or agent of the entity for which the person is testifying as a Rule 30(b)(6) designee; or (c) counsel for the Party designating the Discovery Materials agrees in writing or otherwise on the record that the materials may be disclosed to the person. Disclosure of Discovery Materials pursuant to this paragraph shall not constitute a waiver of the confidential status of the materials so disclosed.

**Challenging Designations.**

14. A receiving Party may, in good faith, challenge a producing Party's designation at any time. The burden of proving confidentiality remains with the Party asserting such confidentiality.

15. Any receiving Party disagreeing with a designation shall request in writing that the producing Party change the designation. That writing shall provide sufficient identification so that the producing Party can identify the Discovery Materials whose designation is being challenged. If the Discovery Materials being challenged are documents having identification numbers, the documents shall be identified by those numbers.

16. A Party that elects to initiate a challenge to a designating Party's confidentiality designation must do so in good faith and must begin the process by conferring directly (in voice-to-voice dialogue; other forms of communication are not sufficient) with counsel for the designating Party within seven calendar days of a discovery dispute arising. In conferring, the challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the



designating Party an opportunity to review the designated Discovery Materials, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet-and-confer process first.

17. If the Parties are unable to reach agreement, the receiving Party may thereafter seek a Court Order to alter the confidential status of the designated Discovery Materials. Said motion should identify the materials that are the subject of the challenge and set forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet-and-confer requirements imposed in the preceding paragraph and that sets forth with specificity the justification for the confidentiality designation that was given by the designating Party in the meet and confer dialogue.

18. Until the Court rules on the challenge, all Parties shall continue to afford the Discovery Materials in question the level of protection to which it is entitled under the designating Party's designation. The Parties are encouraged to bring any unresolved disputes to the Court's attention as they arise.

**Non-Party Discovery Materials.**

19. The existence of this Order shall be disclosed to any person producing documents, tangible things, or testimony in this action who may reasonably be expected to desire confidential treatment for such Discovery Materials. Any such person may designate Discovery Materials confidential pursuant to this Order.

**Inadvertent Disclosure of Privileged Discovery Materials.**

20. Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of any Discovery Materials that would be protected from disclosure pursuant to the attorney-client privilege; the work product doctrine; state or federal law, rule, or regulation; confidentiality requirements; agreement of the Parties; or any other applicable privilege or doctrine will not constitute a waiver of the applicable privilege, agreement, or doctrine.

21. If any such Discovery Materials are inadvertently produced, the recipient of the Discovery Materials agrees that, upon discovery or notification of such a disclosure, it will: (a) promptly return the Discovery Materials and all copies of the Discovery Materials in its possession in physical form; (b) permanently delete any electronic versions of the Discovery Materials from any data source, or any database it maintains; (c) retrieve all paper copies of the Discovery Materials provided to any third parties, including experts; (d) retrieve from third parties all electronic copies contained on physical storage media where practicable, or if not, direct that any such electronic versions be permanently deleted; (e) destroy any notes that reveal the substance of the protected information; and (f) make no use of the information contained in the Discovery Materials.

22. Within a reasonable time, but in no event later than twenty-one days after the discovery of the inadvertent disclosure, the Producing Party will provide a log that describes the basis for the claim that the Discovery Materials are privileged or otherwise protected from disclosure. The Party returning such Discovery Materials shall have the right to apply for an order that such Discovery Materials are not protected from disclosure by any privilege, law, or doctrine. The person returning such Discovery

Materials may not, however, assert as a ground for such motion the fact or circumstances of the inadvertent production or reveal the protected contents of the materials.

23. The Party to whom any inadvertently produced Discovery Materials were returned shall retain the returned materials until the end of the case, including any appeals. If the substance of the protected Discovery Materials is discussed in a deposition or pleading before discovery or notification of the inadvertent disclosure, the Parties agree that such testimony or discussion will be stricken and may not be used for any purpose.

24. If this Court determines that, a disclosing Party has inadvertently produced or disclosed Discovery Materials in connection with this adversary action that are privileged or otherwise protected from disclosure, such inadvertent production or disclosure shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or protection that the disclosing Party would be entitled to assert with respect to the disclosed Discovery Materials in this Court or in any other Federal or State court proceeding. Instead, any such Discovery Materials and their subject matter shall be treated as if there had been no disclosure.

**Statement Pursuant to the Court's Standing Order Regarding Confidential Information.**

25. The Parties shall follow the applicable South Carolina court rules and decisional authority regarding the procedure for submitting confidential information to the Court. Counsel for the Parties are ordered to retain copies of all documents containing confidential information which are provided in discovery under the protective

order. Documents containing confidential information shall be submitted to the Court UNDER SEAL. The producing Party shall maintain the original documents intact for any further review. Where appropriate, any pleading, motion, or other document with confidential information submitted to the Court for the record shall be redacted to leave an identified designated blank space in the pleading, motion, or other document.

**Conclusion of Litigation.**

26. Within sixty (60) calendar days after final judgment in this action, including the exhaustion of all appeals, or within sixty (60) calendar days after dismissal pursuant to a settlement agreement, all Discovery Materials not received in evidence – whether treated as confidential under this Order or not – shall be destroyed or returned to the originating Party. The Clerk of the Court may return to counsel for the Parties, or destroy, any sealed material at the end of the litigation, including any appeals. Notwithstanding this provision, counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain protected material. Any such archival copies that contain or constitute protected material remain subject to this Protective Order.

**No Prejudice.**

27. Producing or receiving confidential information, or otherwise complying with the terms of this Order, shall not (a) operate as an admission by any Party that any particular confidential information contains or reflects trade secrets or any other type of confidential or proprietary information; (b) prejudice the rights of a Party to object to the production of information or material that the Party does not consider to be within the

scope of discovery; (c) prejudice the rights of a Party to seek a determination by the Court that particular materials be produced; (d) prejudice the rights of a Party to apply to the Court for further protective orders; or (e) prevent the Parties from agreeing in writing to alter or waive the provisions or protections provided for herein with respect to any particular information or material.

**Other Proceedings.**

28. If a receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any Discovery Materials, the receiving Party must so notify the designating Party in writing (by email, if possible, as well as by overnight courier) immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order. The receiving Party also must immediately inform in writing the Party who caused the subpoena or order to issue in the other litigation that the material covered by the subpoena or order is the subject of this Protective Order. In addition, the receiving Party must deliver a copy of this Protective Order promptly to the Party in the other action that caused the subpoena or order to issue.

29. The purpose of imposing these duties is to alert the interested Parties to the existence of this Protective Order and to afford the designating Party an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued. The designating Party shall bear its own fees and the expenses of seeking protection in that court of its Discovery Materials -- and nothing in these provisions should be construed as authorizing or encouraging a receiving Party in this action to disobey a lawful directive from another court.

PURSUANT TO STIPULATION, IT IS SO ORDERED

DATED: \_\_\_\_\_

\_\_\_\_\_  
Circuit Judge

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan,  
Individually, and on behalf of  
all similarly situated Plaintiffs,

v. )

Nimrata "Nikki" Haley, Governor of  
South Carolina; James F. Etter, Director  
of the South Carolina Department of  
Revenue; the South Carolina  
Department of Revenue; South Carolina  
Division of State Information  
Technology; Trustwave Corporation;  
and Trustwave Holdings, Inc. )

Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

EXHIBIT "A"

Civil Action No. 2012-CP-40-7331

**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

I, [name] \_\_\_\_\_, of [address] \_\_\_\_\_ hereby affirm,  
agree, and acknowledge that information, including documents and things, designated  
as "Confidential," "Confidential – Attorneys' Eyes Only," or "Highly Confidential – Source  
Code" pursuant to the Consent Protective Order Regarding Confidentiality of Discovery  
Materials entered in the above-captioned action (hereinafter "Protective Order"), is  
being provided to me pursuant to the terms and restrictions of the Protective Order. I  
have been given a copy of and have read the Protective Order. I am familiar with the  
terms of the Protective Order and I agree to comply with and to be bound by such  
terms. I submit to the jurisdiction of this Court for enforcement of the Protective Order.  
I hereby also consent to accept service of process in connection with this action or any  
proceedings related to enforcement of the Protective Order by certified letter, return

receipt requested, at my principal residence, in lieu of personal service or other methods of service.

I agree not to use any confidential Discovery Materials disclosed to me pursuant to the Protective Order except for purposes of the above-captioned litigation and not to disclose any such materials to persons other than those specifically authorized by said Protective Order, without the express written consent of the Party who designated the materials as confidential or by order of this Court. I also agree to notify any stenographic, clerical, or technical personnel who are required to assist me of the terms of this Protective Order and of its binding effect on them and me.

I understand that I am to retain all documents or materials designated as or containing Confidential Information in a secure manner, and that all such documents and materials are to remain in my personal custody until the completion of my assigned duties in this matter, whereupon all such documents and materials, including all copies thereof, and any writings prepared by me containing any Confidential Information are to be returned to counsel who provided me with such documents and materials.

Date: \_\_\_\_\_

City and State where sworn and signed:

\_\_\_\_\_

Printed name: \_\_\_\_\_ [printed name]

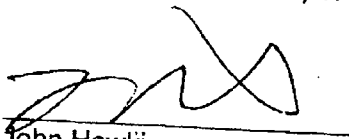
Signature: \_\_\_\_\_



**Unauthorized Disclosure of Protected Discovery Materials.**

30. If a receiving Party learns that, by inadvertence or otherwise, it has disclosed protected Discovery Materials to any person or in any circumstance not authorized under this Consent Protective Order, the receiving Party must immediately (a) notify in writing the designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the protected materials, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

  
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Logan Rollins  
The Hawkins Law Firm  
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Spartanburg, SC 29304  
(864) 574-8801  
(864) 574-8810 Fax  
Attorneys for Plaintiffs

DATED: 1/30, 2013

\_\_\_\_\_  
DATED: \_\_\_\_\_, 2013

\_\_\_\_\_  
Milton G. Kimpson  
P.O. Box 12265  
Columbia, SC 29211  
(803) 898-5131  
Attorney for Director James F. Etter & SC DOR

DATED: \_\_\_\_\_, 2013

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan, )

Individually, and on behalf of )  
all similarly situated Plaintiffs, )

v. )

Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina )  
Department of Revenue; South Carolina )  
Division of State Information )  
Technology; Trustwave Corporation; )  
and Trustwave Holdings, Inc. )

Defendants. )

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

**CERTIFICATE OF SERVICE**

Civil Action No. 2012-CP-40-7331

The undersigned certifies that he served a copy of the Plaintiff's Memorandum of Law for All Motions upon the Court and attorneys for the Defendants via email and by placing a copy of the same in the United States Mail on the date listed below with the proper postage attached thereto, addressed to:

**The Honorable G. Thomas Cooper**  
PO Box 192  
1701 Main Street, Room 323  
Columbia, SC 29202-0192  
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February 4<sup>th</sup>, 2013

|                                              |   |                                  |
|----------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                      | ) |                                  |
|                                              | ) | IN THE COURT OF COMMON PLEAS     |
| COUNTY OF RICHLAND                           | ) | FIFTH JUDICIAL CIRCUIT           |
| Phillip Morgan, individually and on          | ) | Civil Action No. 2012-CP-40-7331 |
| behalf of all similarly situated plaintiffs, | ) |                                  |
|                                              | ) |                                  |
| Plaintiffs,                                  | ) |                                  |
|                                              | ) |                                  |
| vs.                                          | ) |                                  |
|                                              | ) | <u>MEMORANDUM IN SUPPORT OF</u>  |
| Nikki R. Haley, Governor of South            | ) | <u>GOVERNOR HALEY AND THE</u>    |
| Carolina; James F. Etter, Director of the    | ) | <u>DEPARTMENT OF REVENUES</u>    |
| South Carolina Department of Revenue;        | ) | <u>MOTION TO DISMISS</u>         |
| the South Carolina Department of             | ) |                                  |
| Revenue; South Carolina Division of          | ) |                                  |
| State Information Technology;                | ) |                                  |
| Trustwave Corporation; and Trustwave         | ) |                                  |
| Holdings, Inc.,                              | ) |                                  |
|                                              | ) |                                  |
| Defendants.                                  | ) |                                  |

This case arises out of the taxpayer data that was unlawfully accessed by computer hackers. While those criminal acts were absolutely deplorable, they do not give rise to any civil liability with respect to the State, its officials, or its agencies. As explained below, courts across the country have uniformly dismissed numerous "data breach" cases postured exactly like this one. Respectfully, the Court should follow this unbroken line of authority and grant this Motion.

### BACKGROUND

The circumstances surrounding this case have been heavily publicized, including numerous press releases from the Plaintiff's counsel.<sup>1</sup> To summarize, in the Fall of 2012,

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<sup>1</sup> The South Carolina Rules of Evidence fully authorize this Court to take judicial notice of this well-documented situation, on which both chambers of the South Carolina General Assembly have already held hearings and taken numerous hours of testimony. See Rule 201(b), SCRE (explaining that courts can take judicial notice of facts that are

foreign hackers illegally accessed taxpayer information in a Department of Revenue database. Federal law enforcement notified the State of South Carolina about the breach and, at a time when such an announcement would not impair any criminal investigation, the United States Secret Service and the State Law Enforcement Division notified the public about the breach. Following discovery of the breach, the State of South Carolina has taken steps to mitigate any potential issues associated with the breach, including purchasing credit monitoring services and fraud counseling services for its citizens.

In the wake of the breach, the Plaintiff filed a putative class action against Governor Haley; the State Department of Revenue and its Director; the Division of State Information Technology; and Trustwave, a vendor of data-security services. The Plaintiff has not pled any facts unique to himself, nor does he allege any injury beyond being “placed in a material risk of harm for identify theft.” (Am. Compl. ¶ 35.)

Despite not pleading any particular facts and not alleging any actual harm suffered, the Plaintiff asserts four claims against the public defendants:

- A violation of South Carolina Code § 1-11-490, which requires public notification of a breach of secure data unless such notice would compromise a law enforcement investigation;
- Gross negligence;
- Gross negligence *per se*; and
- Civil conspiracy.

Regarding the three common law claims, the Plaintiff does not allege anything beyond generically reciting the elements of these causes of action. (Am. Compl. ¶¶ 32–45.)

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“not subject to reasonable dispute”); *id.* 201(f) (“Judicial notice may be taken at any stage of the proceeding.”); *State v. Squires*, 311 S.C. 11, 15, 426 S.E.2d 738, 740 (1992) (taking judicial notice “that the infrared spectroscopy process utilized by [an infrared breath-testing device] has gained general acceptance in the scientific community”).

## STANDARD OF REVIEW

### **I. Subject Matter Jurisdiction**

Rule 12(b)(1), SCRCP, directs the Court to dismiss a case when it lacks subject matter jurisdiction. Before a court can ever address the merits of a case, it must have jurisdiction to do so, as subject matter jurisdiction is the sole source of a court's power. *Hamilton v. Fulgham*, 385 S.C. 632, 637, 686 S.E.2d 683, 685–86 (2009). Accordingly, “[l]ack of subject matter jurisdiction constitutes the strongest possible defense in an action.” as recognized in Chief Justice Toal’s treatise. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 3 (2d ed. 2002).

When considering a motion under Rule 12(b)(1), the Court may consider evidence beyond the pleadings without converting the motion into one for summary judgment. See *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (holding that “the presentation of such evidence [outside of the pleadings] does not convert the motion to dismiss [for lack of subject matter jurisdiction] into one for summary judgment”).

### **II. Failure to State a Claim**

Rule 12(b)(6), SCRCP, tests the legal sufficiency of a complaint. Under this rule, the Court should dismiss a claim if it fails “to state facts sufficient to constitute a cause of action.” *Id.* When evaluating a motion under this rule, the Court is not to read unalleged facts into the pleadings, *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005), nor need it credit the claimant’s legal conclusions or predicate act labels, *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 512, 563 S.E.2d 352, 358 (Ct. App. 2002).

## ARGUMENTS AND AUTHORITIES

In cases arising out of breached databases in which plaintiffs have asserted similar theories for relief, courts have uniformly dismissed such claims, either for lack of standing (due to the absence of an injury in fact) or for lack of recoverable damages (due to the absence of a concrete harm). This Court should not hesitate to follow this consistent authority, dismiss this case, and allow the State of South Carolina to leave its undivided focus on securing its databases and prosecuting those who breached them.

**I. The Court lacks jurisdiction over this case, as the Plaintiff does not have standing to assert his claims, and they are moot in any event.**

**A. Plaintiff lacks standing to bring this suit due to the absence of an injury in fact, as the only harm alleged is a risk of future injury.**

This is not the first time that litigation has arisen from a breached database containing secure information. Time after time, courts across the country have dismissed cases postured exactly like this one due to a lack of standing by the plaintiff.

South Carolina has adopted the United States Supreme Court's familiar three-part test for standing. First, the plaintiff must have suffered an injury in fact that is "concrete and particularized," rather than hypothetical. Second, the injury must be fairly traceable to the defendant's alleged conduct. Finally, the Court must be able to redress the injury. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195–96, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Here, the Plaintiff does not allege that he has suffered any actual identity theft as a result of the breach of the State's database. At most, he alleges that he has been "placed in a material risk of harm for identity theft." (Am. Compl. ¶ 35.) Nowhere in the pleadings does the Plaintiff suggest that he has suffered any other injury.

This “risk” of a future harm is not enough to invoke the Court’s jurisdiction. When faced with this precise situation, courts around the country have dismissed data-breach cases due to lack of a concrete injury in fact. *See, e.g., Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (affirming dismissal and holding that “if the hacker attempts to use the information, and if he does so successfully, only then will Appellants have suffered an injury”) (emphasis supplied by the *Reilly* court); *Hammond v. Bank of N.Y. Mellon Corp.*, Case No. 08 Civ. 6060 (RMB) (RLE), 2010 U.S. Dist. LEXIS 71996, at \*6–7 (S.D.N.Y. June 25, 2010) (“[T]his Court concludes that Plaintiffs here do not have Article III standing (*i.e.*, there is no ‘case or controversy’) because they claim to have suffered little more than an increased risk of future harm from the loss (whether by accident or theft) of their personal information.”); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1053 (E.D. Mo. 2009) (dismissing case because the “plaintiff’s asserted claim of ‘increased-risk-of-harm’ fails to meet the constitutional requirement that a plaintiff demonstrate harm that is ‘actual or imminent, not conjectural or hypothetical’” (quoting *Lujan*, 504 U.S. at 560)); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 8 (D.D.C. 2007) (“Plaintiffs’ claims that they are subject to an increased risk of identity theft and inconvenience as a result of the burglary [of laptop computers containing unencrypted data of retirement-plan participants] therefore fail to allege an injury in fact.”).<sup>2</sup>

Because the absence of standing precludes the Court’s exercise of subject matter jurisdiction, the Court should dismiss this case as it relates to Governor Haley, the Department of Revenue, and the agency’s Director.

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<sup>2</sup> Other data-breach cases that have been dismissed for lack of standing are numerous and are identified in the attached Appendix.



**B. This case is moot because the State of South Carolina has already undertaken efforts to mitigate any future injury.**

The absence of a concrete injury is further highlighted by the fact that the State of South Carolina has already taken steps to mitigate the potential for any future injury. As noted above, the State has obtained credit monitoring services and fraud counseling services for those whose data may have been exposed. For individuals, this includes one year of credit monitoring from Experian and, for adults, fraud resolution services that will never expire. For businesses, this includes business credit alert services from Dun & Bradstreet and similar services from Experian. The State also engaged a consultant to identify and close the data security gaps, and it sent correspondence to 3.8 million individuals to notify them about these services. These steps taken by the Executive Branch have mooted this lawsuit.

A keystone of any court's subject matter jurisdiction is that there must be an ongoing controversy between the parties, as courts are forbidden from ruling on "academic questions" or from "mak[ing] an adjudication where there remains no actual controversy." *Fabian's Uptown Charleston, Inc. v. S.C. Tax Comm'n*, 247 S.C. 164, 166, 146 S.E.2d 608, 608 (1966). A case is moot and should be dismissed "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." *Mathis v. S.C. State Hwy. Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

Where one branch of government has already mitigated the injury (or, as in this case, the future injury) claimed by a plaintiff, the mootness doctrine compels dismissal. *See, e.g., Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25–26, 630 S.E.2d 474, 477–78 (2006) (affirming dismissal of a FOIA suit as moot where the public body voluntarily provided the plaintiff with records he sought to obtain through litigation).

*Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208 (10th Cir. 2012), is particularly instructive on this point. There, the plaintiff sought to represent a class of Toyota owners who had purchased Corollas with defective engine components, and she sought a court order creating “an equitable fund to pay for repairs.” *Id.* at 1209. During the course of litigation, Toyota began a nationwide recall of those same Corollas that was overseen by the United States Department of Transportation. *Id.* The *Winzler* court dismissed the case as moot, finding that the plaintiff had already been provided relief sufficient to remedy her alleged injury. In so holding, the court recognized the dangers associated with allowing the case to proceed:

[A]ffording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process and the duplicative expenditure of finite public resources. It risks, too, the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court.

*Id.* at 1211. The *Winzler* court summarized its ruling: “[O]nce the plaintiff has a remedial promise from a coordinate branch in hand, we will generally decline to add the promise of a judicial remedy to the heap. While deciding the lawsuit might once have had practical importance, given the assurances of relief from some other department of government it doesn’t any longer.” *Id.* at 1210.

This reasoning is squarely applicable here. The Plaintiff has not yet suffered any harm recognized by law, and the State of South Carolina has secured services designed to mitigate any future injury associated with the data breach. Given the State’s efforts to head-off any future harm before it even occurs, there is no additional, duplicative remedy available to the Plaintiff. Accordingly, his claims are moot, and this case should be dismissed for this second jurisdiction-based reason.

II. Even if the Court has subject matter jurisdiction, the Plaintiff's claims fail on their merits.

A. The Plaintiff's statutory claim is barred by the very "law enforcement" exception identified in the statute itself.

The Plaintiff's first claim against Governor Haley and the Department of Revenue is for an alleged violation of South Carolina Code § 1-11-490. That statute requires "[a]n agency of this State owning or licensing computerized data or other data that includes personal identifying information" to disclose a breach of its database when (a) "unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person"; and (b) that information has been "illegal[ly] use[d]," such illegal use is "reasonably likely to occur," or "use of the information creates a material risk of harm to the resident." *Id.* § 1-11-490(A) (emphasis added).<sup>3</sup>

Importantly, while this statute requires disclosure to be "made in the most expedient time possible and without unreasonable delay," it directs such disclosure to be made (a) "consistent with the legitimate needs of law enforcement" and (b) consistent with "measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system." *Id.* In other words, publicly disclosing a breach of a database should not come before law enforcement confirms that such an announcement will not put an investigation at risk.

The General Assembly confirmed this preeminent deference to law enforcement's investigative efforts elsewhere in the statute:

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<sup>3</sup> There is nothing in law or in fact to suggest that the Office of the Governor "own[s] or licens[es]" the database that was breached in this case. Therefore, the Plaintiff's statutory claim against Governor Haley necessarily fails, as her office has no obligations under this law.

The notification required by this section may be delayed if a law enforcement agency determines that the notification impedes a criminal investigation. The notification required by this section must be made after the law enforcement agency determines that it no longer compromises the investigation.

*Id.* § 1-11-490(C).

Here, the Plaintiff alleges that the State of South Carolina improperly delayed from October 10th until October 26th in notifying the public about the breach of the taxpayer database. (Am. Compl. ¶¶ 22–23.) He does not allege that he was harmed in any way by this delay. (*Id. passim.*) This omission is fatal to his claim, as South Carolina Code § 1-11-490(G)(1) only permits one “who is injured by a violation of this section” to bring suit.

Even if the Plaintiff had made such an allegation, his claim still fails, as the October 26th notification was explicit that the short delay was the result of efforts by both federal and state law enforcement agencies to investigate the source and scope of the breach and to pursue the perpetrator. That notification was made at a press conference, which is available in its entirety at [http://www.youtube.com/watch?v=0Dax66JFzVs&list=UULY6xT8hpjx\\_uyXYQ2hXwMg&index=39](http://www.youtube.com/watch?v=0Dax66JFzVs&list=UULY6xT8hpjx_uyXYQ2hXwMg&index=39).<sup>4</sup> During the October 26th press

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<sup>4</sup> The Court may consider information incorporated into a complaint by reference, such as the October 26th announcement of the data breach (Am. Compl. ¶ 23), without converting a motion to dismiss into one for summary judgment, even if the referenced material is not attached to the complaint. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.”).

Additionally, the Court should not ignore matters that are in the public record and may take judicial notice of such information without converting a motion to dismiss into one for summary judgment. *See, e.g.*, Rule 201(f), SCRE (explaining that judicial notice “may be taken at any stage of the proceeding”); *Sec’y of State for Defence v. Trimble*

conference, multiple law enforcement officials explained that delaying the announcement was necessary in order to protect their investigatory efforts:

- Mark Keel, the Chief of the South Carolina Law Enforcement Division, explained the extent of the investigation and the steps that law enforcement had taken to that point, and stated that “[b]ecause this is an ongoing and very sensitive investigation, no further information regarding specifics of the investigation will be released at this time.” (Chief Keel’s comments at the 3:13 mark of the video.)
- Mike Williams, Special Agent with the United States Secret Service, further explained that the law enforcement agencies required “key benchmarks” in their investigation to be met before they could “release this information and come forward with this information in a timely manner.” (Special Agent Williams’s comments at the 4:22 mark of the video.)
- In responding to a question about delays in public notification, Special Agent Williams reiterated: “Again, the nature of the investigation, we had certain benchmarks that we needed to meet. And in order to meet and hit those benchmarks, we needed time. So we asked for that time, because again we are pursuing a very sensitive criminal investigation. So with that request, we needed to be able to hit those benchmarks in order to have a successful prosecution. Again, this is a criminal case, and the ultimate goal is to have a final adjudication for the individuals or individual who was involved in this breach.” (Special Agent Williams’s comments at the 14:00 mark of the video.)
- Chief Keel elaborated on those benchmarks and the need for delaying the public announcement: “The other thing we need to remember as well is when this breach occurred and it was discovered, experts were brought in to determine what this breach entailed. It took awhile for them, one, to determine how much data had actually been compromised. And so, again, that is a reason, or part of it. As he said, again, we have in our investigative efforts, it was important that we have the time to work through our investigation so that we would be able to have evidence that we would need in the future to have a prosecution against someone.” (Chief Keel’s comments at the 14:40 mark of the video.)

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*Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”); *Odom v. McMaster*, Case No. 2:10-cv-873-MBS, 2010 U.S. Dist. LEXIS 80566, at \*14 (D.S.C. Aug. 6, 2010) (“This court has routinely allowed reference to public records in 12(b)(6) motions to dismiss.”). In this regard, this Court may rely on federal case law when interpreting the State’s procedural rules. *See, e.g., Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“Since our Rules of Procedure are based on the Federal Rules, where this no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”).

This unambiguous, undisputed basis for delaying the announcement is entirely consistent with the General Assembly's directive that an agency should not publicly announce a data breach until the appropriate law enforcement agencies authorize the disclosure. S.C. Code Ann. §§ 1-11-490(A) & -490(C). The Plaintiff's statutory claim against Governor Haley, the Department of Revenue, and its Director fails accordingly.

**B. Courts across the country have uniformly dismissed negligence claims in data-breach cases due to an absence of any injury suffered.**

The Plaintiff's second and fourth causes of action against the public defendants are for gross negligence and gross negligence *per se*. In South Carolina, a party alleging negligence must prove three elements: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; and (3) the plaintiff suffered actual damages as a result of the breach. *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). The Plaintiff's negligence claims fail to allege these basic elements and should be dismissed, as he has not plead any judicially cognizable injury.

As explained above in Section I, the Plaintiff's only claimed damages are associated with an increased "material risk of harm for identity theft." (Am. Compl. ¶ 35.) South Carolina law, however, refuses to impose liability "merely for the creation of risk when there are no actual damages" because to do so would "drastically change[] the fundamental elements of a tort action" and "make[] any amount of damages entirely speculative." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). In short, a claim cannot survive dismissal when damages are speculative. *See, e.g., Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." (quoting *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971))).

Applying this same standard—that damages must be concrete rather than speculative—courts around the country have dismissed claims arising out of breached databases when, as here, the plaintiff seeks damages allegedly attributed to an increased risk for identity theft. *See, e.g., Krottner v. Starbucks Corp.*, 406 F. App'x 129, 131 (9th Cir. 2010) (affirming dismissal of negligence claim under Washington law because the plaintiff's allegations about a risk of future harm associated with the theft of unencrypted data did “not establish[] a cognizable injury”); *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629, 639–40 (7th Cir. 2007) (affirming dismissal of claims brought under Indiana law arising from a “sophisticated, intentional and malicious” hack of a database because “[w]ithout more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy”); *Holmes v. Countrywide Fin. Corp.*, Case No. 5:08-CV-00205-R, 2012 U.S. Dist. LEXIS 96587, at \*17 (W.D. Ky. July 12, 2012) (“The unfavorable legal precedent from Kentucky, New Jersey, and other states prompts the Court to reject a naked claim of increased risk of identity theft. Plaintiffs must offer additional damages for a cognizable injury under either state's law.”); *Hammond*, 2010 U.S. Dist. LEXIS 71996, at \*34–35 (dismissing a negligence claim arising out of stolen unencrypted data because, as a matter of New York law, “a heightened fear of having th[e plaintiffs'] identities stolen in the future” does not amount to a cognizable injury).<sup>5</sup>

This case law—dismissal for either lack of standing, as discussed above in Section I, or dismissal for lack of a cognizable injury—is uniform across the country. As one court observed: “It is an understatement to say that courts are skeptical of litigants’

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<sup>5</sup> As indicated in the attached Appendix, numerous other courts have rejected common law claims arising out of breached databases for lack of cognizable damages.

claims for risk of future identity theft.” *Holmes*, 2012 U.S. Dist. LEXIS 96587, at \*14. Another has noted that “every court” has dismissed claims based on a risk of identity theft associated with a breach of unencrypted data. *Hammond*, 2010 U.S. Dist. LEXIS 71996, at \*4. One court even remarked that “[t]his dismissal trend is nationwide,” and it summarized the state of the law as follows:

In summary, the string of dismissals is unbroken. No court has allowed a similar case to go to trial. . . . [T]he court is unaware of a similar case where a plaintiff has gotten past the dismissal stage.

*Slaughter v. Aon Consulting, Inc.*, Case No. 10C-09-001 FSS CCLD, 2012 Del. Super. LEXIS 91, at \*9–10 (Del. Super. Ct. Jan. 31, 2012). So uniform are courts on this issue that one federal court deemed a suit postured identically to this one to be “frivolous” and dismissed it *sua sponte*. *Hinton v. Heartland Payment Sys., Inc.*, Case No. 09-594(MLC), 2009 U.S. Dist. LEXIS 20675, at \*2–4 (D.N.J. Mar. 16, 2009).

Based on this unbroken line of nationwide authority, coupled with South Carolina law forbidding damages based on an alleged “creation of risk,” the Plaintiff’s claims for gross negligence and gross negligence *per se* should be dismissed for failure to state a cognizable injury.

**C. The Plaintiff’s civil conspiracy claim should be dismissed because he does not actually allege any facts that support this cause of action.**

The final claim against the State defendants is for civil conspiracy, which requires proof that two or more persons joined for the purpose of injuring the claimant. *Peoples Fed. Sav. & Loan Ass’n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56–57 (2004). The Plaintiff’s complaint entirely fails to plead facts that would support any element of this cause of action, no doubt because no such facts could possibly exist.



First, the complaint does not allege anything beyond a bald, generic claim that unspecified defendants “formed a combination” to “harm[]” the Plaintiff. (Am. Compl. ¶ 38.) Such an allegation is empty on its face and falls far short of the requirement of South Carolina law. *See Pye v. Estate of Fox*, 369 S.C. 555, 567–68, 633 S.E.2d 505, 511–12 (2006) (outlining the various methods that a plaintiff can prove a conspiracy, none of which appear in this Plaintiff’s pleadings).

Second, South Carolina courts closely scrutinize civil conspiracy claims to ensure that they only capture true agreements to harm a party, and that the conduct and damages attributed to a conspiracy are not also encompassed by other causes of action. Accordingly, a plaintiff may not simply re-allege facts from other claims in support of a civil conspiracy; instead, he must assert that the purported conspirators committed separate acts in furtherance of the conspiracy. *See, e.g., Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) (holding that a plaintiff “was not entitled to maintain his conspiracy cause of action” because he “merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy”). The Plaintiff fails to satisfy this second fundamental requirement of any civil conspiracy claim. (Am. Compl. ¶¶ 37–40.)

Third, South Carolina courts require a claimant to have incurred damages that are unique to the alleged conspiracy and do not permit re-alleging damages that are associated with other claims. *See, e.g., Pye*, 369 S.C. at 568, 633 S.E.2d at 512 (“Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.”). The Plaintiff fails to meet this fundamental requirement as well. (Am. Compl. ¶¶ 37–40.)

Finally, a claim for civil conspiracy fails when the plaintiff has not suffered a legally cognizable injury. *See, e.g., Pye*, 369 S.C. at 567–68, 633 S.E.2d at 511 (“The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement of combination per se.”). However, the Plaintiff does not indicate how he was harmed by the alleged conspiracy, and as explained above in Sections I and II.B, the Plaintiff has not been damaged in any way recognized by law. Accordingly, his civil conspiracy claim is facially deficient for this fourth reason, and it should be dismissed as a result.

**III. The General Assembly has prohibited class-action litigation against the Department of Revenue.**

To the extent the Plaintiff purports to represent a putative class, his suit cannot lawfully be maintained against the Department of Revenue and its Director, and dismissal of the agency is warranted for this additional reason. South Carolina Code § 12-60-80(C) expressly prohibits class actions against the Department:

Notwithstanding subsections (A) and (B), a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Judge Division or any court of law in this State, and the department, political subdivisions, or their instrumentalities may not be named or made a defendant in any other class action brought in this State.

*Id.* (emphasis added).<sup>6</sup>

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<sup>6</sup> Of course, the General Assembly is free to restrict the use of class actions and has done so in several other contexts. *See, e.g.,* S.C. Code Ann. § 9-21-40 (“A claim [for recovery under the Retirement Systems Code] may not be prosecuted on behalf of a class.”); *id.* § 37-23-50(A) (“No borrower may bring a class action for a violation of this article [of the Consumer Protection Code].”); *id.* § 39-5-140(a) (providing that a claim for actual damages under the Unfair Trade Practices Act may not be brought “in a representative capacity”); *id.* § 40-39-160(1) (granting pledgors certain rights against pawnbrokers, but authorizing suit for recovery “in an action other than a class action”).

“The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.” *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). Irrespective of whether a case brought against the Department is a tax case or any other type of case, Section 12-60-80(C) unambiguously prohibits plaintiffs from suing the Department in a class action. See *Drummond v. State*, 378 S.C. 362, 370 n.5, 662 S.E.2d 587, 591 n.5 (2008) (holding that a class could not be certified against the Department for a declaratory judgment regarding an agency regulation (quoting S.C. Code Ann. § 12-60-80(C))).

While this Plaintiff’s case is not a suit demanding a refund of taxes, the statute bars “any other class action brought in this State” against the Department. S.C. Code Ann. § 12-60-80(C).<sup>7</sup> The Plaintiff’s lawsuit certainly falls within this broad statutory prohibition. Accordingly, to the extent the Plaintiff seeks class certification, his case is barred by statute and should be dismissed as to the Department and its Director.

### CONCLUSION

The breach of South Carolina’s database was deplorable and criminal, but it did not give rise to any civil liability with respect to the State. Courts across the country have

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<sup>7</sup> The *Drummond* Court recognized this principle. There, the plaintiff sued the Department seeking to recover allegedly wrongfully collected sales taxes and for a declaration that a Department regulation was invalid under South Carolina Code § 1-23-150. 378 S.C. at 365–69, 662 S.E.2d at 589–90. The Court upheld the circuit court’s dismissal of all claims seeking a return of taxes paid for failure to exhaust administrative remedies under the Revenue Procedures Act. *Id.* at 368–69, 662 S.E.2d at 590. However, the Court did allow the plaintiff’s request for a declaration that a Department regulation was invalid to proceed. *Id.* at 369–70, 662 S.E.2d at 590–91. Stripped of any claim for a refund of taxes, the *Drummond* plaintiff’s suit was no longer a case about taxes but instead was about regulatory interpretation, which could not be brought as a class action inasmuch as the Department “may not be named or made a defendant in any other class action brought in this State” pursuant to Section 12-60-80(C). Indeed, the Court specifically held that Section 12-60-80(C) prevented the case from being certified as a class action. *Id.* at 370 & n.5, 662 S.E.2d at 591 & n.5.

routinely dismissed claims precisely like those presented by the Plaintiff in this case. This Court should follow this uniform, unbroken line of authority and dismiss the Plaintiff's claims against Governor Haley, the Department of Revenue, and its Director.<sup>8</sup>

Respectfully submitted,

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February 4, 2013  
Columbia, South Carolina

*APPENDIX OF CASES DISMISSING CLAIMS ARISING  
FROM DATA BREACHES ON FOLLOWING PAGES*

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<sup>8</sup> The case caption identifies James F. Etter as the Director of the South Carolina Department of Revenue. Mr. Etter is no longer the Director of this agency, and he has been succeeded by William M. Blume, Jr., as the Director. Pursuant to Rule 25(d)(1), SCRCF, Mr. Blume should be substituted for Mr. Etter as the real party in interest.

**Appendix: Cases Dismissing Claims Arising from Data Breaches**

|    | Case                                                                                                            | Basis for Dismissal |                 | Cause of Breach                       |
|----|-----------------------------------------------------------------------------------------------------------------|---------------------|-----------------|---------------------------------------|
|    |                                                                                                                 | Lack of Standing    | Lack of Damages |                                       |
| 1  | <i>Reilly v. Ceridian Corp.</i> , 664 F.3d 38 (3d Cir. 2011)                                                    | √                   |                 | Hacker                                |
| 2  | <i>Krottner v. Starbucks Corp.</i> , 406 F. App'x 129 (9th Cir. 2010)                                           |                     | √               | Stolen computer                       |
| 3  | <i>Pisciotta v. Old Nat'l Bancorp.</i> , 499 F.3d 629 (7th Cir. 2007)                                           |                     | √               | Hacker                                |
| 4  | <i>Pisciotta v. Old Nat'l Bancorp.</i> , 2012 U.S. Dist. LEXIS 160878 (S.D. Ind. 2012)                          |                     | √               | Hacker                                |
| 5  | <i>Holmes v. Countrywide Fin. Corp.</i> , 2012 U.S. Dist. LEXIS 96587 (W.D. Ky. 2012)                           |                     | √               | Data stolen by employee               |
| 6  | <i>Worix v. MedAssets, Inc.</i> , 857 F. Supp. 2d 69 (N.D. Ill. 2012)                                           |                     | √               | Stolen computer                       |
| 7  | <i>Hammond v. Bank of N.Y. Mellon Corp.</i> , 2010 U.S. Dist. LEXIS 71996 (S.D.N.Y. 2010)                       | √                   | √               | Stolen computer                       |
| 8  | <i>Amburgy v. Express Scripts, Inc.</i> , 671 F. Supp. 2d 1046 (E.D. Mo. 2009)                                  | √                   | √               | Hacker                                |
| 9  | <i>McLoughlin v. People's United Bank, Inc.</i> , 2009 U.S. Dist. LEXIS 78065 (D. Conn. 2009)                   |                     | √               | Stolen computer                       |
| 10 | <i>Ruiz v. Gap, Inc.</i> , 622 F. Supp. 2d 908 (N.D. Cal. 2009)                                                 |                     | √               | Stolen computer                       |
| 11 | <i>Belle Chasse Auto. Care, Inc. v. Advanced Auto Parts, Inc.</i> , 2009 U.S. Dist. LEXIS 25084 (E.D. La. 2009) |                     | √               | Hacker                                |
| 12 | <i>Hinton v. Heartland Payment Sys., Inc.</i> , 2009 U.S. Dist. LEXIS 20675 (D.N.J. 2009)                       |                     | √               | Hacker                                |
| 13 | <i>Pinero v. Jackson Hewitt Tax Serv., Inc.</i> , 594 F. Supp. 2d 710 (E.D. La. 2009)                           |                     | √               | Failed to shred discarded tax returns |
| 14 | <i>Shafran v. Harley-Davidson, Inc.</i> , 2008 U.S. Dist. LEXIS 22494 (S.D.N.Y. 2008)                           |                     | √               | Stolen computer                       |
| 15 | <i>Ponder v. Pfizer, Inc.</i> , 522 F. Supp. 2d 793 (M.D. La. 2007)                                             |                     | √               | Hacker                                |
| 16 | <i>Kahle v. Litton Loan Servicing LP</i> , 486 F. Supp. 2d 705 (S.D. Ohio 2007)                                 |                     | √               | Stolen computer                       |

|    | Case                                                                                        | Basis for Dismissal |                 | Cause of Breach                                     |
|----|---------------------------------------------------------------------------------------------|---------------------|-----------------|-----------------------------------------------------|
|    |                                                                                             | Lack of Standing    | Lack of Damages |                                                     |
| 17 | <i>Randolph v. ING Life Ins. &amp; Annuity Co.</i> , 486 F. Supp. 2d 1 (D.D.C. 2007)        | √                   |                 | Stolen computer                                     |
| 18 | <i>Bell v. Axiom Corp.</i> , 2006 U.S. Dist. LEXIS 72477 (E.D. Ark. 2006)                   | √                   |                 | Hacker                                              |
| 19 | <i>Key v. DWS Inc.</i> , 454 F. Supp. 2d 684 (S.D. Ohio 2006)                               | √                   |                 | Hacker                                              |
| 20 | <i>Giordano v. Wachovia Sec., LLC</i> , 2006 U.S. Dist. LEXIS 52266 (D.N.J. 2006)           | √                   |                 | Missing package containing printouts of information |
| 21 | <i>Hendricks v. DSW Shoe Warehouse Inc.</i> , 444 F. Supp. 2d 775 (W.D. Mich. 2006)         |                     | √               | Hacker                                              |
| 22 | <i>Forbes v. Wells Fargo Bank, N.A.</i> , 420 F. Supp. 2d 1018 (D. Minn. 2006)              |                     | √               | Stolen computer                                     |
| 23 | <i>Paul v. Providence Health Sys.-Or.</i> , 273 P.3d 106 (Or. 2012)                         |                     | √               | Stolen computer                                     |
| 24 | <i>Randolph v. ING Life Ins. &amp; Annuity Co.</i> , 973 A.2d 702 (D.C. 2009)               |                     | √               | Stolen computer                                     |
| 25 | <i>Slaughter v. Aon Consulting, Inc.</i> , 2012 Del. Super. LEXIS 91 (Del. Super. Ct. 2012) |                     | √               | Posted on public website                            |
| 26 | <i>Jones v. Ohio Bureau of Workers' Comp.</i> , 2011 Ohio 1855 (Ohio Ct. Cl. 2011)          | √                   |                 | Employee distributed information                    |

State of South Carolina

Court of Common Pleas

County of Richland

2012-CP-40-7331

Phillip Morgan, Individually :  
and on behalf of all :  
similarly situated Plaintiffs :

-VS-

: TRANSCRIPT OF RECORD  
:  
:

Nimrata "Nikki" Haley, :  
Governor of South Carolina, :  
James F. Etter, Director of the: :  
S.C. Department of Revenue, the: :  
S.C. Department of Revenue, :  
S.C. Division of State :  
Information Technology, :  
Trustwave Corporation and :  
Trustwave Holdings, Inc. :

February 7, 2013  
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Judge.

A P P E A R A N C E S:

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Logan Rollins, Esquire  
Attorneys for the Plaintiffs

James G. Long, Esquire  
Attorney for the Defendant Trustwave

Rob Tyson, Esquire  
Robert Stepp, Esquire  
Bess Durant, Esquire  
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Karl Bowers, Esquire  
Todd Carroll, Esquire  
Attorneys for Defendant Governor Haley

Milton Kimpson, Esquire  
Attorney for Defendant Etter and  
the S.C. Department of Revenue

Daphne D. Helms  
Circuit Court Reporter



1       **The Court:** All right. Be seated. Thank you. Good  
2 morning, counsel. They loaded up on you, didn't they?

3       **Mr. Hawkins:** Yes, sir, Judge. I hope this isn't going  
4 to get decided on who has more lawyers.

5       **The Court:** Yeah, well, that's what we tell the jury:  
6 Don't count the witnesses. Let me just get organized here  
7 for a minute. All right. I have reviewed the complaint,  
8 reviewed all memoranda, and what I'd like to do to begin  
9 with, if it suits the parties, is to resolve the issue of  
10 who's in this lawsuit, who are the parties, and I only say  
11 that because of Trustwave. Either Trustwave is in or  
12 Trustwave is out, and I think I'd like to address that issue  
13 first. Then we can go on to the common issues of all  
14 parties, all remaining parties. So with that in mind, I need  
15 -- who is Mr. Long?

16       **Mr. Long:** I am, Your Honor.

17       **The Court:** All right. Mr. Long, I assume that that  
18 puts you on first.

19       **Mr. Long:** Yes, Your Honor. We talked among ourselves.  
20 That's what I assumed. So we're ready to go whenever Your  
21 Honor is.

22       **The Court:** I'm ready.

23       **Mr. Long:** Okay. Thank you, Your Honor. Your Honor,  
24 I'm Jimmy Long. I represent Trustwave Holdings and Trustwave  
25 Corporation. Alice Geene is here today in the courtroom with

1 me, and she's the general counsel of Trustwave. She flew  
2 down yesterday from Chicago to get a little warmer weather  
3 with us and to be here this morning.

4 **The Court:** She might get some heat.

5 **Mr. Long:** Maybe, Your Honor. And Trustwave is, like I  
6 said, a private company. We're headquartered in Chicago. We  
7 did have contracts with the South Carolina Department of  
8 Revenue and, of course, we have two motions here today, but  
9 mostly both of them were resolved---

10 **The Court:** Just out of -- just out of general  
11 information, what did you do for the Department of Revenue?

12 **Mr. Long:** Well, our company does really two things  
13 generally. We provide products and services to other  
14 companies and governments to help them comply with the  
15 standards that the payment card or credit card industry  
16 requires. So, in other words, they have certain  
17 requirements, and you have to maintain as a business or a  
18 government to be able to accept a credit card like Visa or  
19 whatever. We help them -- we sell them products and services  
20 to help them meet those standards. And then the other thing  
21 that we do is we do provide products and services to clients  
22 to kind of augment their network security, so... And that's  
23 part of what governments and businesses can contract with us  
24 to perform, Judge.

25 **The Court:** All right. Well, the incident which is the

1 basis of this lawsuit, did that involve -- just for the  
2 record, that did not involve just credit card accounts, did  
3 it?

4 Mr. Long: I don't believe so, Your Honor, but to be  
5 honest with you, I think standing here as Trustwave, we -- we  
6 don't totally understand the circumstances of exactly what  
7 happened, and our position will be certainly in this lawsuit  
8 that our role with the Department of Revenue had nothing to  
9 do with this, but really that's part of this issue. Most of  
10 the data or the information as to exactly what happened will  
11 be really under the control of the Department of Revenue.

12 The Court: Well, then, go to the second part of your  
13 answer where you said -- you described your credit card  
14 services and then you said to augment---

15 Mr. Long: We augment---

16 The Court: ---the security search---

17 Mr. Long: ---network security, so we do provide  
18 services and products---

19 The Court: In this case? With this client?

20 Mr. Long: We did provide some services for the  
21 Department of Revenue under those contracts.

22 The Court: Do you know what---

23 Mr. Long: That would more---

24 The Court: Do you know what they would---

25 Mr. Long: ---relate---

1           **Court Reporter:** I'm sorry. Could you speak up? And I  
2 know y'all are interrupting each other.

3           **Mr. Long:** Yeah, we're starting to talk...

4           **The Court:** All right. I'm sorry. What services were  
5 those? If you can...

6           **Mr. Long:** It's hard for me to do it without a kind of a  
7 short answer, but I would say there are a number of different  
8 services that we have that -- I think one of the things that  
9 we did was a data penetration. I didn't bring all of my, you  
10 know, notes here for the different areas, but, Your Honor,  
11 there were certain things that basically the Department of  
12 Revenue purchased from us where we would either do some  
13 testing. They would basically be able to go -- our network  
14 would conduct these tests either quarterly to determine what  
15 was happening in the network.

16           We also provide security for people that are coming  
17 outside like for hackers or people that come outside, but  
18 this situation -- this data breach was a little bit different  
19 because this was what they call a fishing data breach where  
20 somebody got the password apparently of the Department of  
21 Revenue and forwarded it and used that to get inside the  
22 network as opposed to a more external kind of just attack.

23           **The Court:** Okay.

24           **Mr. Long:** But I would have to say, Your Honor, this --  
25 I'm new. This case is just starting for us, and all of these

1 lawyers are going to learn a lot about this really very  
2 technical area of our life as we move forward. So my  
3 knowledge at the moment is very general.

4 **The Court:** All right. Address the issue of Trustwave  
5 Corporation.

6 **Mr. Long:** Yes, Your Honor. Trustwave Corporation was  
7 never served with the complaint at all. Trustwave  
8 Corporation is a predecessor. As we set out in our memo,  
9 it's a defunct corporation. It was originally a Delaware  
10 corporation. It's really been defunct. We've attached the  
11 articles of -- from Delaware. It's attached to Ms. Geene's  
12 affidavit. And when you look at the service of process, when  
13 you look at the original process server's affidavit, the  
14 affidavit of service, it just says Trustwave Holdings on it.

15 What we would say is Trustwave Corporation has no  
16 business being in this lawsuit. Trustwave Holdings,  
17 Incorporated, is the entity that is the -- that would have  
18 the contracts with the Department of Revenue.

19 **The Court:** Is there any issue with that, Mr. Hawkins,  
20 or...

21 **Mr. Rollins:** I think we're very unclear -- I'm sorry,  
22 Your Honor. I'm Logan Rollins.

23 **The Court:** Mr. Rollins.

24 **Mr. Rollins:** I work with Mr. Hawkins. I think we're  
25 very unclear about what Trustwave Corporation is. When I

1 spoke to our process server, I believe his understanding was  
2 Eric Decator who is the registered agent -- well, he's the  
3 registered agent for both Trustwave Holdings and Trustwave  
4 Corporation, and he wouldn't accept, I believe -- I'm not  
5 certain. He wouldn't accept the service upon Trustwave  
6 Corporation because it was his position, as Jimmy has said,  
7 that it doesn't exist anymore.

8 So basically that's the big problem with their  
9 arguments. They say that we're supposed to serve somebody --  
10 they're basically creating an impossible service scenario.  
11 It's the same thing with Trustwave Corporation. If it  
12 doesn't exist, how do we serve it? We serve its last known  
13 registered agent.

14 **The Court:** Well, I understand that. Was the  
15 corporation ever dissolved or is there -- is there---

16 **Mr. Long:** It's been dissolved, Your Honor. If you look  
17 at Ms. Geene's affidavit that's attached as Exhibit B. to the  
18 motion to dismiss, the first motion that Trustwave filed a  
19 few days after the affidavit of default, she has -- in  
20 Paragraphs 4 through 7 she goes through and explains the  
21 history and why Trustwave Corporation is a corporation that  
22 doesn't exist anymore. Your Honor, we're not creating an  
23 impossible situation for them. I'm just stating that  
24 Trustwave Corporation---

25 **The Court:** No, no---

1       Mr. Long: ---doesn't exist.

2       The Court: What I'm seeking is some sort of---

3       Mr. Long: Yeah.

4       The Court: ---recognition by the plaintiff that it does  
5 not exist.

6       Mr. Long: Your Honor, our proposal for the Court and  
7 for the plaintiffs would be that if Your Honor quashes the  
8 default, which we certainly hope you will under the  
9 circumstances, that Trustwave Holdings will continue in the  
10 lawsuit. Trustwave Corporation would be dismissed because  
11 there's just no reason for that entity to be there, and there  
12 won't be any sort of gap with the Department of Revenue  
13 contracts or with Trustwave Holdings.

14       The Court: All right. Well, let's proceed with the  
15 issues before the Court today, the service of process.

16       Mr. Long: Yes, Your Honor. Thanks. And I just want  
17 to -- we have filed a motion to dismiss for improper service,  
18 to quash the affidavit of default and/or to set aside if Your  
19 Honor determines that the service was not proper. However, I  
20 would say, Your Honor, that the service was not proper in  
21 this case.

22       I'll just give you a couple of the dates on a timeline.  
23 On November 5th Trustwave was added as a party to the lawsuit  
24 in the amended complaint. On December 18th the plaintiff  
25 filed this affidavit of default. When we saw the affidavit

1 of default, I called Mr. Hawkins' office and spoke to Mr.  
2 Rollins that very day. I wrote him a letter the next day.  
3 We filed our motion on the 21st to dismiss with an affidavit  
4 saying that the service was improper, and then on January 3rd  
5 we filed our motion to quash the affidavit and to set aside  
6 the default. And as we stand here today, Your Honor, the  
7 clerk has still not entered the default. It has still not  
8 been entered by the clerk.

9 Now, in regards to the service, based on the affidavits  
10 of the process servers, Your Honor, it's clear that the  
11 service wasn't proper. All right. Basically Mr. Eric  
12 Decator is the registered agent for Trustwave Holdings before  
13 the Illinois Secretary of State website. One thing that's  
14 interesting from our perspective, looking at the amended  
15 complaint: In the amended complaint, they identify the  
16 corporate headquarters for Trustwave correctly as being in  
17 Chicago.

18 They also identify C.T. Corporation in Delaware as being  
19 the registered agent, and that's correct. Either one of  
20 those two entities could have been served with this lawsuit,  
21 but they weren't. Instead, they tried to serve Eric Decator  
22 who was listed on the Illinois Secretary of State website.  
23 Mr. Decator's address for the acceptance of service is the  
24 law firm of Kaye Scholer where he used to be a partner there,  
25 but apparently right shortly before this lawsuit was brought,



1 Mr. Decator left Kaye Scholer and went to work for another  
2 company, Arlen (phonetic) Energy, in Evanston, Illinois. The  
3 process servers say that they basically contacted Mr. Decator  
4 and that he told them where he was. They went to Evanston,  
5 tried to serve the person there, and served a lady named  
6 Marcy Johnson who is a secretary.

7 So the issue for the Court is whether Ms. Marcy Johnson  
8 has authority to accept service and, Your Honor, in Roberson  
9 versus Southern Finance case, the Supreme Court clearly dealt  
10 with this issue, and they actually said in that case -- it's  
11 a 2005 Supreme Court decision, and they said, "Whether  
12 apparent authority can suffice to show authority to accept  
13 service under Rule 4 is an unsettled question," and then they  
14 proceeded to answer the question. And what they said in the  
15 case very clearly is is that the defendant, Trustwave, is the  
16 only entity that can create or manifest or create the  
17 apparent authority for the person to accept service.

18 We have to hold that person out as an agent for us to  
19 accept service. Mr. Decator and Ms. Johnson cannot create  
20 the apparent authority. In Roberson it's a very similar  
21 factual situation to hear. It involved a lawyer here in  
22 Columbia. They -- the plaintiff served that defendant on --  
23 he was the registered agent. They mailed it to him by  
24 certified mail. The secretary signed the card in the law  
25 office and returned it, and the question was whether the

1 service was proper because the secretary signed for it  
2 instead of the lawyer who was the actual registered agent.  
3 And the Court and the Supreme Court said, no, that's not good  
4 enough service because that client never said that that  
5 secretary was their agent, and that's what has to happen for  
6 there -- for that to extend to Ms. Johnson.

7 And so, you know, from our position, Your Honor, I mean  
8 I don't think there's any question that we never authorized  
9 Marcy Johnson to be -- to accept service for Trustwave. We  
10 didn't even know who she was. She works at another company  
11 in another town many miles away. No one ever spoke to her,  
12 and the process server affidavits themselves clearly say that  
13 they never talked to anybody at Trustwave.

14 They absolutely could have served this any number of  
15 ways. When they went to Kaye Scholer looking for Mr.  
16 Decator, had they gotten on the elevator and ridden the  
17 elevator up to the Trustwave office and handed the papers to  
18 a managing agent, that would have been proper service. They  
19 didn't do that, and so the service is improper.

20 A couple of other cases I want to talk about, Your Honor  
21 -- one thing I want to point out. In their memorandum, Your  
22 Honor, they don't even address the Roberson case. They don't  
23 even mention it, and they actually make the argument, which  
24 is exactly what the Court rejected in Roberson, which is is  
25 that Mr. Decator and Ms. Johnson can create the apparent

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23 even mention it, and they actually make the argument, which  
24 is exactly what the Court rejected in Roberson, which is is  
25 that Mr. Decator and Ms. Johnson can create the apparent

1 to serve the emergency room doctors, talks to the manager of  
2 the emergency department who says, "I can accept the papers  
3 for them." She's an employee of the hospital.

4 On appeal the appellate court goes out of their way to  
5 say, oh, just as another sustaining ground of the decision,  
6 we -- based on the affidavits below from the doctors saying  
7 that this woman did not have authority to accept service for  
8 them, they said service is improper against those doctors,  
9 even though clearly they were in the location where they  
10 were. And, again, it was a person who was not an agent  
11 saying that they had the authority, and the Court said that's  
12 not good enough. You've got to talk to the actual principal  
13 themselves. They have to be the person to give the  
14 authority.

15 So based on these cases, Your Honor, we think clearly  
16 that the service was improper and that -- and that if the  
17 service is improper, the affidavit of default is void. Now,  
18 also, Your Honor, I do make the argument in there to set  
19 aside the default which is under the Wham factors. I would  
20 also point out to the Court that if Your Honor determines---

21 **The Court:** Let's don't go -- let's don't go there yet.

22 **Mr. Long:** Okay.

23 **The Court:** Mr. Rollins or Mr. Hawkins? Tell me why  
24 your service is good.

25 **Mr. Rollins:** All of these cases that Jimmy cites in

1 support of his contention deal with facts in which a C.E.O.  
2 or actual employee of a company is a registered agent, and  
3 then being unable to find that employee of the company, the  
4 servers serve a lower person, usually a secretary of the  
5 company. We're dealing with different facts here. We're  
6 dealing with an attorney, and there's an assumption of  
7 sophistication when somebody---

8       **The Court:** And a registered agent.

9       **Mr. Rollins:** I'm sorry?

10       **The Court:** And a registered agent.

11       **Mr. Rollins:** An attorney who is a registered agent.

12 Different facts. It's frankly a novel issue. There aren't  
13 decisions that deal with when -- with that exact  
14 relationship, but what the Court should look at is typical  
15 agency principals. And by making an attorney, who is not an  
16 employee of a company, a registered agent, they gave him  
17 authority to denominate the method by which they wanted to be  
18 served.

19       Expressly he says -- and they admit that he is a  
20 registered agent. They admit that we should have served him  
21 at the Kaye Scholer law firm. Look at Exhibit C. and D. I  
22 sent that complaint to that address, and it was returned to  
23 me because he's not there anymore. The envelope says  
24 returned, and they're saying we should -- we should serve him  
25 at Kaye Scholer law firm. We might as well have made Jimmy

1 Hoffa their agent of service. It's not possible. We served  
2 the person we could have. We had apparent authority because  
3 we based it on Mr. Decator's express instructions to our  
4 process server to serve Marcy Johnson, his personal  
5 secretary.

6 Ignore all of that. Rule 4 is a procedural mechanism to  
7 ensure substantive service. Jimmy relies on proper, quote --  
8 proper, quote, service. Those are technicalities. The  
9 purpose of the rule is for them to get the complaint. The  
10 incredible thing about this case is they have not once denied  
11 that they actually had the complaint the day we gave it to  
12 Mr. Decator. I don't know how they can argue there's  
13 prejudice when apparently they had the complaint.

14 Jimmy did call me the day the default affidavit was  
15 filed, after it was filed. So he apparently knew that the  
16 default was filed but didn't ask me not to file it. He came  
17 to me afterwards and said: Now let us out.

18 They had the complaint. I asked him -- asked him if he  
19 had the complaint or not. I mean, that's what it comes down  
20 to. They had the complaint; they ignored it. Now they're  
21 asking for... And they actually publicly admitted -- we've  
22 got a news article in here from December in which Trustwave  
23 publicly stated: We don't comment on pending litigation.

24 **The Court:** What's the date of that?

25 **Mr. Rollins:** The date I think is December 6th. It's

1 Exhibit F. "Trustwave's policy is not to comment on pending  
2 legal matters." And the other issue that they ignore and  
3 which I've hinted at is that he is an attorney. If he did  
4 not give them the complaint, there are recourses against him.  
5 It shouldn't be against the people of South Carolina who had  
6 their information compromised.

7 The Court: Mr. Long?

8 Mr. Long: Your Honor, he's just ignoring the Roberson  
9 case. I mean, the Roberson case -- this is not a novel  
10 issue. The Roberson case is almost an identical factual  
11 situation, and it says that basically the focus has to be on  
12 the defendant, and unless we designate Marcy Johnson as our  
13 agent, then she's not our agent. Then the service is  
14 improper. And whether we knew about the complaint or whether  
15 somebody told us about the complaint, all of that is  
16 irrelevant. It's also irrelevant as to what Mr. Decator  
17 says. It's irrelevant to what Ms. Johnson says.

18 The Court: Wait. You designated Mr. Decator.

19 Mr. Long: Why did we designate him?

20 The Court: I said you did.

21 Mr. Long: We did designate him.

22 The Court: Yeah.

23 Mr. Long: But as the -- but also in the Roberson case,  
24 the defendant designated the lawyer, Mr. Brooks, as their  
25 registered agent, and Mr. Brooks had his secretary sign the

1 card, and the Court said that's not good enough. Mr. Brooks  
2 -- and the Court even goes further in Roberson because one of  
3 the arguments by the plaintiff in Roberson was, well, she had  
4 done it before. So basically past conduct could be apparent  
5 authority, and the Court said it doesn't matter about the  
6 past conduct. It has to be for that particular case. There  
7 has to be some affirmative designation of her by the  
8 defendant, not by the lawyer or by the registered agent.

9 **The Court:** Isn't that -- let me see Roberson. For some  
10 reason I don't have it.

11 **Mr. Long:** I have a copy here for you, Your Honor.

12 **The Court:** Mr. Rollins, how about the Behr (phonetic)  
13 case? I mean, I see some factual differences. First, it was  
14 done by registered mail in the Roberson case.

15 **Mr. Rollins:** And---

16 **The Court:** Certified mail, return receipt. Comes to an  
17 office and a clerical employee accepts it. Brooks, who was  
18 the agent, says he never saw it, which I assume Decator never  
19 saw it either.

20 **Mr. Rollins:** And that is the big distinction. These  
21 are -- again, these are technicalities. The rule and its  
22 interpretations exist to ensure the substantive purpose of  
23 the rule. Mr. Decator had this complaint. They knew about  
24 it and they sat on it. Why is there a rule that allows for  
25 default if it's not to force defendants to act when they're



1 served with complaints? I mean, there's nothing that we  
2 could have -- there's no other way that we could have served.  
3 If Eric Decator was the registered agent and he instructed us  
4 to serve this complaint upon Marcy Johnson, what else is  
5 apparent authority but if it is not our acting upon the  
6 insistence of the registered agent? And that's what apparent  
7 authority is. It's acting reasonably under the  
8 circumstances, and our process server followed his  
9 instructions, did the only thing he could have done. And as  
10 I said, I sent a letter to that address where Eric Decator  
11 was purported to have been and it was returned.

12 What we need -- these facts as alleged, what Jimmy is  
13 saying is that he's not exactly sure what Mr. Decator knew or  
14 what he didn't know. We would just ask for discovery for the  
15 limited purpose of -- discovery at their expense preferably  
16 for them to get Mr. Decator, Marcy Johnson, and perhaps if we  
17 could also depose Ms. Geene to find out what they knew and  
18 let the Court make an informed decision instead of on the  
19 representations that are vague at best.

20 **The Court:** All right. Mr. Long?

21 **Mr. Long:** Your Honor, one thing he said a couple of  
22 times that I made mention earlier that I disagree with: They  
23 had plenty of other methods to serve Mr. Decator. They  
24 weren't -- that's one of the things the Schenck case stands  
25 for is that you're not limited to just serving your

1 registered agent.

2 The Court: Well, I understand that.

3 Court Reporter: Can you spell that Schenck case?

4 Mr. Long: It's S-C-H-E-N-C-K.

5 The Court: Why would they have -- you're saying C.T.  
6 was also a registered agent?

7 Mr. Long: True.

8 The Court: So you have two registered agents.

9 Mr. Long: Right. C.T. is in Delaware. It's a  
10 Delaware---

11 The Court: I know. I know where -- I know where -- I  
12 know where -- C.T. is in Columbia, too.

13 Mr. Long: And they're in Chicago.

14 The Court: All right. What's your motion, Mr. Long?

15 Mr. Long: Well, our motion is to quash the affidavit  
16 for improper service on the -- because improper service means  
17 the default is void..

18 The Court: All right.

19 Mr. Long: Quash the affidavit of default---

20 The Court: That motion is denied.

21 Mr. Long: Okay. Your Honor, then we move to our motion  
22 to set aside the default under the Wham factors which as --  
23 Your Honor, we've set out in our brief -- you know, this is a  
24 Rule 55 situation, Your Honor, not a Rule 60. Our Supreme  
25 Court in recent cases has clarified that the standard that

1 the Court is supposed to use when they're looking at default  
2 -- the more rigorous excusable neglect standard is  
3 appropriate for Rule 60. That's not the case here. In this  
4 situation we're under Rule 55, so it's good cause.

5 Your Honor, there's three factors that the Court is  
6 going to look at, and all of them have been met here easily.  
7 This is exactly the kind of case I would suspect is why we  
8 have the Wham factors, and I would point out to the Court  
9 that they didn't even brief in their memorandum any response  
10 to us in regards to the Wham factors and I would suggest the  
11 reason is because they know we meet them.

12 Here are the three factors and why we meet them. The  
13 first is the timing of the motion for relief. Your Honor, we  
14 could not have been more timely in our response. We called  
15 them the day of the affidavit of default, filed our first  
16 motion on December 21st, filed another motion on January 3rd.  
17 Your Honor, I'd point out for the Court there are two  
18 holidays in between that two-week period and eight days that  
19 the courthouse was closed. So basically we brought this  
20 issue to the Court and to the plaintiffs right away, and as  
21 we stand here today, default has still not been entered by  
22 the clerk of court. So obviously this is -- our response is  
23 extremely timely.

24 The second factor to look at is meritorious defenses.  
25 Your Honor, we have numerous meritorious defenses in the

1 case. Improper service. As Your Honor has just ruled on,  
2 the statutes they sued us under don't apply to us. They've  
3 not pled any facts or any basis to allege a civil conspiracy.  
4 There's no negligence because the duties they identified in  
5 the complaint---

6 The Court: Excuse me.

7 Mr. Long: I'm sorry.

8 The Court: You say 39-1-90 does not apply to you?

9 Mr. Long: It does not, Your Honor.

10 The Court: Well, I'll hear from you on that. Go ahead.

11 Mr. Long: We do not own, license, or maintain the data.  
12 That statute 39-1-90 requires in both Section A. and D. that  
13 the defendant or the companies that would be under that are  
14 -- have to either own, license, or maintain the data. They  
15 don't even plead that in their complaint. It's just very  
16 confusing in their memorandum because they also -- under the  
17 statute that the Department of Revenue has been sued under  
18 which applies to state agencies, they have to either own,  
19 license, or maintain the data.

20 So they've got a situation going here where they're  
21 saying that we own, maintain, or license. We do under one  
22 statute. Then they say the department does under another  
23 statute, and it's never clear in their memorandum or in the  
24 complaint as to what they're talking about.

25 The Court: Let's get back to the Wham---

1       **Mr. Long:** We believe there's clearly a meritorious  
2 defense.

3       **The Court:** Wham factors.

4       **Mr. Long:** Like I said, we have a meritorious defense on  
5 the civil conspiracy. Your Honor, they don't have any  
6 damages. There's no standing. Courts from all over the  
7 country have dismissed these data breach cases. We don't  
8 think class cert is appropriate. So there are a number of  
9 defenses and issues in this case that are meritorious that we  
10 have raised for the Court.

11       And then finally, Your Honor, there's no prejudice.  
12 There's no prejudice at all to the plaintiffs in the case.  
13 This is the first thing that has been done in the case is to  
14 argue these motions to dismiss. We still have not had an  
15 answer from any defendant in the case, just motions to  
16 dismiss.

17       **The Court:** All right. Let me hear from Mr. Rollins.

18       **Mr. Rollins:** So the underlying purpose of the rule, as  
19 stated in the rule itself, is to promote justice. They had  
20 the complaint. They sat on it. They didn't act, and they  
21 come here and rely on technicalities, basically equitable  
22 arguments. One who requests equity must do equity. They sat  
23 on it---

24       **The Court:** You think they did not meet the Wham  
25 factors? Assume -- assume they're in default. They're in

1 default. The question then becomes: Can they seek relief  
2 from the default under the Wham factors?

3 Mr. Rollins: Well, they can seek it, but again the  
4 underlying purpose of these factors -- what is the purpose of  
5 allowing a default if it's not to keep someone in default who  
6 sits on his rights? And that's what they've done here.

7 The Court: Well, I think---

8 Mr. Rollins: There's -- there is no excuse for their  
9 not responding.

10 The Court: I think -- I think they have met their  
11 burden and should be entitled to relief from default. So  
12 I'll grant your motion, Mr. Long, on relief from default.

13 Mr. Long: Thank you, Your Honor.

14 The Court: And also there's a, just for the record --  
15 there's a motion for damages which I don't believe requires  
16 much argument based on my ruling on the service of process  
17 and relief from default, but for the record I deny the  
18 plaintiffs' motion for damages on the default. Now---

19 Mr. Bowers: Your Honor?

20 The Court: Yes, sir.

21 Mr. Bowers: Pardon my interruption. May it please the  
22 Court? I'm Butch Bowers---

23 The Court: Yes, sir.

24 Mr. Bowers: ---here on behalf of the Governor's Office  
25 and the Department of Revenue. With me is my law partner,

1 Todd Carroll. In this preliminary phase of the hearing while  
2 we're determining the denomination of the parties, I would  
3 like to ask the Court to dismiss from the lawsuit Governor  
4 Haley in her individual capacity and also Jim Etter, the  
5 former director of the Department of Revenue.

6 It's sort of buried in our motion. It's in Paragraph 3  
7 of our motion to dismiss under the headline, "Need for more  
8 definite statement." And this doesn't have anything to do  
9 with the merits or even our motion to dismiss but just the  
10 denomination. The only reason that I'm aware of to name them  
11 in their individual capacity would be an eleventh amendment  
12 argument if they were in federal court. That's obviously not  
13 an issue here. And under the Tort Claims Act, the agency  
14 should be named as the defendant as opposed to the  
15 individuals. So we would ask the Court to dismiss Governor  
16 Haley in her individual capacity and Mr. Etter in his  
17 individual capacity.

18 The Court: What say the plaintiff?

19 Mr. Rollins: We have a civil conspiracy claim which I  
20 think each defendant has briefed strenuously against, but  
21 without discovery---

22 The Court: Has what?

23 Mr. Rollins: I think each defendant has strenuously  
24 briefed against our civil conspiracy claim, but that would go  
25 beyond---

1       **The Court:** Other than the face of your complaint, what  
2       -- what's the basis for the conspiracy claim involving the  
3       individuals?

4       **Mr. Rollins:** We don't know exactly what happened with  
5       the delayed notification process. So until we have  
6       discovery, we don't know enough details and we would just ask  
7       to be allowed to engage in discovery so we can determine the  
8       legitimacy of that cause of action and by---

9       **The Court:** I'm not -- we're not talking about  
10      necessarily the cause of action. Doesn't the Tort Claims Act  
11      provide that you don't name the head of the department of  
12      prisons when you sue the prison system or any state agency?  
13      What -- I mean, your relief is from the State. It's not from  
14      the individual.

15      **Mr. Rollins:** That's correct.

16      **The Court:** All right. I grant your motion, Mr. Bowers.

17      **Mr. Bowers:** Thank you, Your Honor.

18      **The Court:** Not a big -- not a big win.

19      **Mr. Bowers:** Judge, I'll take what I can get.

20      **The Court:** All right. Now, how do you wish to proceed  
21      with the motions to dismiss? There's a commonality of  
22      positions with both the Department of Revenue and the  
23      Department of Information Technology. And Trustwave, for  
24      that matter, raises several issues. But I don't need -- we  
25      don't need duplicative arguments from each party. Have you



1 talked about how you wish to proceed in terms of addressing  
2 the issues?

3 Mr. Bowers: Your Honor, we have not. Jimmy and Rob and  
4 Bobby and I have talked, but we haven't talked about who  
5 would go first or who would lead off. We're happy to do it  
6 however Your Honor would...

7 (An off-the-record discussion takes place between the  
8 attorneys.)

9 Mr. Bowers: Okay. Your Honor---

10 The Court: Let's start with the issue of standing.

11 Mr. Bowers: Let's start with the issue of standing.

12 The Court: All right.

13 Mr. Bowers: I'll handle that. Thank you, Judge.

14 The Court: All right.

15 Mr. Bowers: Again, I'm Butch Bowers. I'm here on  
16 behalf of the Governor's Office and the Department of Revenue  
17 and---

18 The Court: Tell me one thing. Why does the statute not  
19 grant him standing?

20 Mr. Bowers: Because there's no injury, Your Honor.

21 The Court: Well, that's -- that's a separate issue, but  
22 standing in and of itself, he has standing under the statute  
23 if he meets the... I mean, the statute says any -- where is  
24 it?

25 Mr. Bowers: Correct.

1       **The Court:** A resident of this state who is injured.

2       **Mr. Bowers:** Correct.

3       **The Court:** An injury is the basis of your standing  
4 argument?

5       **Mr. Bowers:** Yes, sir. Absolutely.

6       **The Court:** Okay.

7       **Mr. Bowers:** There is no injury and, Your Honor, we --  
8 with our motion we submitted a litany of cases and, in fact,  
9 we handed up this morning our handy dandy booklet of all of  
10 our cases all in one place that show that -- that there's no  
11 injury in fact, i.e., no damages sufficient to provide  
12 standing to the plaintiff. Judge, it's quite simple---

13       **The Court:** You can't -- you can't allege prospective  
14 injury---

15       **Mr. Bowers:** No, sir.

16       **The Court:** ---as a basis for standing.

17       **Mr. Bowers:** That's correct. An allegation of future  
18 harm based on the uniform cases that we've seen. And, Judge,  
19 there may be cases out there that say otherwise, but we  
20 haven't found them. The one case, if I'm not mistaken, that  
21 the plaintiffs rely on in their brief, the damages had  
22 already occurred. The injury had occurred. It's not  
23 prospective. Here it's prospective. If you read the  
24 complaint, it's all prospective, and the allegation of future  
25 harm quite simply is insufficient to provide standing.

1 There's no case in controversy over an increased risk of  
2 future harm from the theft of their personal information.

3 **The Court:** I see the legislature is even considering---

4 **Mr. Bowers:** They have, Your Honor.

5 **The Court:** ---providing something like ten years'  
6 protection in---

7 **Mr. Bowers:** I pulled it off this morning. It's Bill  
8 S-334. Just ran across the desk and sent it yesterday.

9 **The Court:** Right.

10 **Mr. Bowers:** They're looking to add ten years' worth of  
11 protection, and, Judge, this sort of bleeds over into my  
12 mootness argument. I think -- in addition to the lack of  
13 standing, I think the plaintiffs' claims are moot. I mean,  
14 the State has spent in excess of \$12 million to remedy any  
15 prospective harm. No harm has occurred as of yet, but to  
16 remedy any prospective harm and the -- and the General  
17 Assembly in general has clearly taken up the issue to try to  
18 take care of---

19 **The Court:** Well, we can't rely on the General Assembly  
20 doing anything, but at least it's worth putting on the record  
21 that it's being considered.

22 **Mr. Bowers:** It's being considered; correct. And I make  
23 no representation that this will become law. I just -- the  
24 only thing I bring up is that they are considering it, and it  
25 demonstrates that -- on the standing issue that or confirms,

1 rather, on the standing issue that no injury has occurred,  
2 and it also again -- it bleeds over into, I believe, my  
3 mootness argument that this case is moot because any damages  
4 that the plaintiffs may be entitled to have already -- have  
5 already been handled and are prospectively going to be  
6 handled.

7 I mean, this is not a case, Your Honor, obviously where  
8 the government is saying, no, this didn't happen, and this is  
9 not a case where the government is saying, well, we're not  
10 going to do anything because we don't believe that any future  
11 damage may occur. Quite the opposite. The government -- the  
12 government, in this case the Department of Revenue and by  
13 extension the Governor's Office, have stood up and said:  
14 Look, this happened and we're going to do everything within  
15 our power to ensure that the citizens of South Carolina are  
16 protected.

17 And, Your Honor, the case that we cite in our brief -  
18 it's the tenth circuit case just from last year, 2012,  
19 Winzler versus Toyota Motor Sales - I think is instructive  
20 here. And this is -- again, this goes to the mootness  
21 argument. I apologize for bleeding into that, but in that  
22 case the plaintiff sought the representative class of Toyota  
23 owners who had purchased Corollas with defective engine  
24 components and they were looking for an order creating an  
25 equitable fund to pay for repairs. And during the course of

1 litigation, Toyota began a nationwide recall that was  
2 overseen by the United States Department of Transportation.  
3 And so the Court in the tenth circuit, in that tenth circuit  
4 case, dismissed the case as moot, finding that the plaintiff  
5 had already been provided relief sufficient to remedy her  
6 injury, her alleged injury. And the summary of the ruling  
7 from the Court is, and I quote, "Once the plaintiff has a  
8 remedial promise from a coordinate branch in hand, we will  
9 generally decline to add the promise of a judicial remedy to  
10 the heap. While deciding the lawsuit might once have had  
11 practical importance, given the assurances of relief from  
12 some other department of government, it doesn't any longer."

13 So, Judge, not only does the plaintiff have no standing  
14 because of the 20 some-odd cases that confirm that the future  
15 damages are not sufficient in data breach cases -- and, by  
16 the way, all the cases that we cited and we submitted here  
17 this morning, Your Honor, are data breach cases. So the  
18 prospective harm is not a damage. Cost of credit monitors is  
19 not a damage sufficient to provide standing, and there are  
20 several other things such as the time spent monitoring  
21 credit, the burden of closing old accounts and opening new  
22 ones. None of those things provides Article 3 standing  
23 sufficient to survive a motion to dismiss.

24 The Court: All right. Mr. Rollins, standing.

25 Mr. Rollins: Your Honor, the standing and damages

1 issues are tied closely together. There's a case - and I  
2 think it's one of the ones cited by the defendant - that  
3 outline the standing argument. As of 2009, the jurisdictions  
4 were split about 50/50. I think on balance now the majority  
5 of jurisdictions do find that there's standing.

6 In the most recent decisions -- well, one thing you'll  
7 notice is that the opinions they rely on are from 2007, 2009,  
8 and 2010. The opinions we rely on are from late 2011 and  
9 early 2013, this very year. The trend I think is certainly  
10 toward finding standing.

11 More importantly, the trend is toward establishing  
12 damages. They're asking for the damages argument, that the  
13 Court override the legislature's express instruction that  
14 damages are when a consumer resident of this state is placed  
15 in a material -- a material risk of harm to the consumer.  
16 All of these cases are factually driven.

17 For example, if you've got a case where a computer that  
18 has a Social Security number on it disappeared, somewhere we  
19 don't know, there's a low risk that that's going to cause  
20 imminent harm that would need to be acted on by way of  
21 mitigation including purchasing insurance or some other data  
22 protection such as what the State has provided.

23 In this case it's the tax return of over three million  
24 -- around four million South Carolina residents that have  
25 been compromised. We got a call in our office I think

1 yesterday from somebody who had already had a fraudulent tax  
2 return filed.

3       **The Court:** Maybe that should be your plaintiff.

4       **Mr. Rollins:** That's -- and we can -- and that's one of  
5 our alternative basis of theories is that we should be  
6 allowed to add plaintiffs who actually have had that done,  
7 but that's an ongoing process. People are just now starting  
8 to file their taxes, and I'm sure we'll be inundated with  
9 people who have had that occur. But the first circuit  
10 opinion, what it states is, "It is foreseeable that a  
11 customer knowing that he---"

12       **The Court:** What are you referring to?

13       **Mr. Rollins:** And I'm on page 16 of my memorandum. It's  
14 Anderson v. Hannaford Brothers.

15       **The Court:** All right. I have -- I see.

16       **Mr. Rollins:** "It was foreseeable that a customer,  
17 knowing that the credit or debit card data had been  
18 compromised and that thousands of fraudulent charges has  
19 resulted from the same security breach, would replace the  
20 card to mitigate against misuse. It's true that the only  
21 plaintiff to allege having to pay a replacement card fee does  
22 not allege that they experienced any unauthorized charges,  
23 but the test for mitigation is not hindsight."

24       The State has spent \$12 million. They're arguing they  
25 spent it for nothing. That seems to be what he's arguing,

1 that they spent it for nothing. As you can see from our  
2 affidavit of Hoyt Kesterson, what the State has provided---

3 The Court: Which exhibit?

4 Mr. Rollins: It is Exhibit I.

5 Court Reporter: Can you repeat the name? Excuse me.

6 Repeat the name.

7 Mr. Rollins: Hoyt Kesterson. K-E-S-T-E-R-S-O-N.

8 The Court: He's your expert?

9 Mr. Rollins: He's our expert. One year of credit  
10 monitoring is not sufficient as the legislature -- as Butch  
11 has said, the legislature is just recommending ten. Hoyt  
12 recommends ten as a minimum, and there are other programs  
13 such as LifeLock that will protect against this harm, but  
14 more importantly these are tax documents.

15 Somebody called our office that already had a fraudulent  
16 tax return filed. No remedy even suggested by the State  
17 protects against that, not one. There's nothing that you can  
18 do. That's what distinguishes this -- distinguishes this  
19 case in kind from the multitude of jurisdictions that they  
20 have cited, and what all the courts look at in a factor of an  
21 analysis is probability.

22 What we have in this case is a criminal -- and as they  
23 admit in their memorandum, a criminal infiltrated and spent  
24 apparently several days on our server exfiltrating  
25 information. The likelihood that it's not going to be used



1 is non-existent, and any reasonable person would take actions  
2 including more credit monitoring than what has been provided  
3 by the State to prevent that harm.

4 So we think that we not only have standing. We have  
5 established damages and that the remedy provided by the State  
6 -- again, it's an inconsistent position to say there's no --  
7 there are no damages when we spent \$12 million to repair the  
8 damage that's been done already.

9 Mr. Hawkins: Judge, I just -- if I can add one thing.

10 The Court: Yes, sir.

11 Mr. Hawkins: The key is to understand what Experian  
12 does and what LifeLock does. Credit monitoring service  
13 provided by the State for one year would not guard against  
14 the fraudulent appropriation of someone's tax returns.  
15 Experian tells you when somebody opens up a credit account in  
16 your name or a bank account in your name, but now this  
17 criminal has everybody's tax returns, information. They have  
18 a reasonable facsimile of their signature. They can  
19 expropriate that person's identity, get that person's refund.

20 So when he talks about one year, ten years or a hundred  
21 years, that will never, ever stop the majority of what here  
22 -- this case -- all the experts have told us this: What  
23 makes this case so unique, number one, is the -- is the  
24 amazing number of records that were taken but also the fact  
25 that the tax records were taken and that's what sets this

1 apart from this other line of cases that he talks about is  
2 that never before in the history of this nation on such a  
3 scale has so many peoples' actual tax returns and data that  
4 went on those tax returns been stolen.

5 The Court: How do you know that?

6 Mr. Hawkins: Because it's in the record of the Senate  
7 Committee and the House Committee. I mean, it's basically  
8 admitted that they got the tax return information. Is that  
9 what you're asking?

10 The Court: Yeah. What's the -- you tell me that, but  
11 what's the source of that information?

12 Mr. Hawkins: Well, we have an expert in Exhibit I.,  
13 Hoyt Kesterson, who actually advises LifeLock and is an  
14 expert in this area.

15 The Court: I'm just asking for information.

16 Mr. Hawkins: Yes, sir.

17 The Court: Does the hacker have your tax return?

18 Mr. Hawkins: Absolutely, and yours.

19 The Court: Even though you didn't pay for it with a  
20 credit card.

21 Mr. Hawkins: It doesn't matter. If you -- if you file  
22 electrically, then the hacker has it. So -- and D.O.R.---

23 The Court: But you have no -- is that speculation?

24 Mr. Hawkins: No, sir. No, sir. The---

25 The Court: What's the basis for it?

1       **Mr. Hawkins:** The basis is Mandiant that the State hired  
2 to investigate this has given a report to the committee and  
3 has testified before the---

4       **The Court:** Mandiant?

5       **Mr. Hawkins:** Yes, sir. Mandiant is an internet  
6 security company that the State hired to come in and say what  
7 happened here, and Mandiant has come forward and said not  
8 only was this P.C.I. data -- the P.I. data the first  
9 identifying information but also the electronic form of  
10 everybody's tax returns. And however that data was stored in  
11 the D.O.R. computers, that was exfiltrated as well. That's  
12 why this is the mother of all hackings because our personal  
13 information is already out there. There are services right  
14 now I can go to and get your Social Security number---

15       **The Court:** I understand that.

16       **Mr. Hawkins:** ---and where you ever lived, but never  
17 before has your actual tax return and all the information on  
18 there, your income data -- and they know who to go and get  
19 refunds from and to appropriate their information.

20       **The Court:** Do they know I'm a judge?

21       **Mr. Hawkins:** If you put your information on your 1040,  
22 they do.

23       **The Court:** Doesn't scare them?

24       **Mr. Hawkins:** I don't think they were scared by anything  
25 but...

1           The Court: Go ahead.

2           Mr. Hawkins: So, anyway, I'm just trying to basically  
3 draw a distinction between, you know, lumping this in with  
4 the other cases where peoples' name, address, and Social  
5 Security number has been taken. That's been done. All our  
6 information is out there already. It was before this hack as  
7 well. D.O.R. opened this up to having all our tax returns  
8 taken, and the ability now to go in and actually file  
9 fraudulent returns in our name, it's going to happen.

10          The Court: All right. Mr. Bowers.

11          Mr. Bowers: Thank you, Your Honor. Briefly, to address  
12 one of the things Mr. Rollins said about did they spend \$12  
13 million for nothing? Well, obviously not. What the State  
14 spent \$12 million on was to prevent future harm, and that  
15 gets back to what we were talking about at the outset and I'm  
16 going to try to bring it back because a lot of what I heard  
17 Mr. Hawkins say is not found anywhere in the complaint, and  
18 it -- so in terms of their standing, it's all -- what the  
19 State did was to try to prevent future harm.

20          In terms of -- and this again goes to standing. The  
21 cases that they cite in their brief, in both of them bad  
22 stuff had already happened to the plaintiffs. In the  
23 Anderson case which is from 2011, 1800 fraudulent charges had  
24 been made.

25          The Court: I saw that.

1       **Mr. Bowers:** Sir?

2       **The Court:** I saw that.

3       **Mr. Bowers:** And in the resident case, the 2012 case,  
4 bank accounts had been opened and credit cards had been  
5 opened. The home address had been trailed with the post  
6 office. So a lot of stuff had already happened which gave  
7 the plaintiff standing. Here, there's no allegation in the  
8 complaint of anything happening. I've heard about telephone  
9 calls from people who have had things happen, but that's not  
10 in the complaint. And so the plaintiff here is the one at  
11 issue. The plaintiff has no standing based on the plain face  
12 of the complaint.

13       **The Court:** All right. Anything further on this issue?

14       **Mr. Rollins:** It is accurate that actual breaches had  
15 occurred in the cases that we cite. Actual breaches have  
16 occurred here, and they're in our office. The plaintiffs in  
17 those cases who had not actually had their information  
18 breached also had both standing and damages in those opinions  
19 based on the fact that damages had occurred to other people,  
20 and it was reasonable in all probability that they also would  
21 suffer similar harm, and that's exactly what we've got in  
22 this case.

23       **The Court:** Okay. All right. I want to move ahead to  
24 the other defenses in the motions to dismiss.

25       **Mr. Bowers:** I'm sorry, Your Honor?

1       **The Court:** I said I want to move ahead to the other  
2 defenses. Now, you did not -- Mr. Bowers, you did not raise  
3 the Tort Claims Act in your memorandum, but Mr. Stepp did.

4       **Mr. Bowers:** Correct. Your Honor, it's in our motion,  
5 but we did not address it in our brief. You're correct.

6       **The Court:** So maybe Mr. Stepp knows more about it --  
7 more about it---

8       **Mr. Bowers:** Mr. Stepp can address it.

9       **The Court:** He knows more about it than you do.

10       **Mr. Stepp:** I doubt that seriously, Your Honor, but I do  
11 think that the Tort Claims Act -- the Tort Claims Act comes  
12 into play. We're on 12(b) and I understand that and to --  
13 and to determine whether these exceptions apply or not may  
14 require some factual inquiry, and I understand you're limited  
15 to the allegations of the complaint. But I do think it's  
16 important to realize that in the Tort Claims Act the State  
17 has set out some express limitations on the liability of the  
18 State or its agencies to respond to plaintiffs under tort  
19 theories.

20       Now, in this case we've got against my client -- I'm  
21 Bobby Stepp. I represent the Department of State Information  
22 Technology. My client is sued on four causes of action: One  
23 under this statute, 111-4-90, then for gross negligence,  
24 gross negligence per se, and conspiracy. I'm not directing  
25 any argument under the Tort Claims Act to the statutory cause

1 of action, just that that statute creates a cause of action.  
2 So I'm not going to stand here and tell you that on the one  
3 hand the General Assembly has created a cause of action and  
4 then on the other hand it has taken away. I'll save that for  
5 another judge.

6 But it is clear that regardless -- that the Tort Claims  
7 Act either bars these other claims that are sounding in tort  
8 or limits them, limits the amount of recovery, limits  
9 punitive -- that bars punitive damages, limits prejudgment  
10 interest. Now, the complaint I'm looking at against my  
11 client doesn't reflect any of those limitations, and, you  
12 know, I would concede that I don't think you can make a  
13 decision today about whether the claim is barred in its  
14 entirety by the Tort Claims Act. But I do think you can make  
15 the decision that punitive damages claims are barred and that  
16 the recoverable actual damages, if any, are limited and the  
17 complaint ought to be amended to reflect those limitations to  
18 the extent that any of these claims persist.

19 Now, I would say - and I'm not going to reargue this -  
20 but damages is an essential element or damages are an  
21 essential element of each one of these tort claims  
22 themselves. And so to the extent these plaintiffs don't have  
23 or the plaintiff, as putative class representative, has not  
24 suffered an injury, not only is it a matter of standing but  
25 it's also a failure with respect to an essential element of

1 each one of these claims. So there's no negligence claimed  
2 or gross negligence claimed if he hasn't suffered an injury,  
3 and there's no gross negligence per se claimed if he hasn't  
4 suffered an injury, and there's no conspiracy claim if he  
5 hasn't suffered not just an injury but special damages  
6 relating to the conspiracy. So that issue carries over and  
7 we think affects all the tort claims, and then the overlay on  
8 top of that is that the Tort Claims Act itself would limit or  
9 either bar or limit the relief and those limitations are not  
10 reflected in the complaint.

11 The Court: Mr. Rollins? Mr. Hawkins?

12 Mr. Rollins: Since he brought up standing - I hate to  
13 beat a dead horse - but there is one---

14 The Court: Well, it's not dead.

15 Mr. Rollins: Well, obviously.

16 The Court: Yet.

17 Mr. Rollins: One additional argument: Some courts  
18 liken this to future medical costs, and as far as the  
19 standing issue goes, Heirs versus Johnston is a Supreme Court  
20 -- United States Supreme Court case, 538 U.S. 135. Basically  
21 the -- it's again a probability-based analysis. The  
22 probability that exposure to asbestos materials would lead to  
23 asbestos gives standing. So I think that's -- these are  
24 similar facts.

25 As far as the Tort Claims Act issues, the code we rely



1 on as applied to the State is 111-4-90. It's premature, and  
2 I think Bobby more or less admits it's premature. We need  
3 facts. We need some discovery to determine the application  
4 of the Tort Claims Act to these allegations, but the statute  
5 gives us a statutory remedy that would go beyond that. I'm  
6 sure what he's getting at is the statutory caps under the  
7 Tort Claims Act. So I just think it's premature to need  
8 discovery to engage---

9 The Court: There are exceptions to the---

10 Mr. Rollins: There are exceptions to the Tort Claims  
11 Act, and I think we'll get more into the gross negligence  
12 issues when we talk about DSIT's motion for a protective  
13 order. But I just think it's premature at this point, any  
14 discovery, to determine exactly what happened, and the  
15 statute gives us a ground upon which relief can and should be  
16 granted.

17 The Court: All right. Mr. Long? I'm sorry. Mr.  
18 Tyson, do you have anything you want to add?

19 Mr. Tyson: No, sir, Your Honor.

20 The Court: Mr. Long?

21 Mr. Long: Your Honor, I won't address those issues.  
22 They are briefed in our memo. We did raise the standing --  
23 the issues in our motion to dismiss and also -- and, of  
24 course, the Tort Claims Act doesn't apply to us. But the --  
25 I would like to address the civil conspiracy claim which is

1 shared by all of us. Your Honor, I think that claim should  
2 be clearly dismissed today. In the complaint he makes no  
3 allegation or any fact that would support a civil conspiracy.  
4 It's like three paragraphs in the amended complaint, and he  
5 just lays out the elements. I mean, he just says -- he just  
6 lays out the three elements of a civil conspiracy and then  
7 says he has a claim for civil conspiracy.

8 I can't even imagine how we would have special damages  
9 which is required in a civil conspiracy. There's not one  
10 single fact that there was a conspiracy between us. The  
11 agencies are all part of the executive branch, how trust --  
12 and there's nothing about Trustwave and how it entered into  
13 any sort of conspiracy. I think that cause of action just  
14 blatantly fails on its face based on how the complaint is  
15 drafted and should be dismissed, and we have fully briefed  
16 that in our memorandum.

17 Your Honor, this issue which I raised earlier in the  
18 issue before when we were -- when I was talking about the  
19 Wham factors, he does have this inherent inconsistency in his  
20 complaint as to who maintains or licenses the data and he  
21 can't have it both ways, I don't think. It's got to be one  
22 or the other, and so that means if it's the Department of  
23 Revenue, then we're out under the statute. And if he's going  
24 to claim that we own it, well, we'll deal with that at  
25 summary judgment, but the Department of Revenue's case,

1 they're going to be out under the statute.

2 I don't see how they can pursue a lawsuit that's  
3 basically one statute is for agencies, one statute is for  
4 private companies, and they both require that the defendant  
5 own, license, or maintain the data.

6 **The Court:** All right. You also have a motion to stay.  
7 Nobody has addressed that issue.

8 **Mr. Long:** Your Honor---

9 **The Court:** The ongoing criminal investigation.

10 **Mr. Long:** Well, we actually didn't file that motion,  
11 Your Honor. It was actually filed, I think, by the  
12 department. We filed our memorandum. I think we were the  
13 only ones who actually filed a memorandum. Our position---

14 **The Court:** All right. You've got a memorandum in  
15 support of the motion to stay.

16 **Mr. Long:** Right. I mean, our position on the  
17 memorandum, Your Honor, was that if the Court was going to  
18 stay - and I don't know if the department will continue to  
19 pursue that today or not - that the entire case should be  
20 stayed. We didn't think that the Department of Revenue --  
21 the portion of the case against the Department of Revenue  
22 should be stayed while the other defendants were sued. So  
23 either the case against the State in its entirety -- should  
24 be stayed in its entirety if the stay is appropriate. That's  
25 our position.

1       **The Court:** What's the issue involving the criminal  
2 investigation? Is that the basis for your stay motion?

3       **Mr. Bowers:** That's the primary basis; yes, Your Honor.  
4 And the issue is so that the law enforcement can conduct  
5 their investigation to finalize everything they're doing to  
6 ensure that the bad guys are brought to justice without  
7 interference from this litigation. I mean, that's the long  
8 and short of it.

9       **The Court:** And that's the State Law Enforcement  
10 Division and federal authorities?

11       **Mr. Bowers:** Yes, sir. The Secret Service is involved  
12 in this.

13       **Mr. Hawkins:** Your Honor?

14       **The Court:** Yes, sir.

15       **Mr. Hawkins:** Can I respond to that?

16       **The Court:** Yeah. Absolutely.

17       **Mr. Hawkins:** If they want to stay civil litigation,  
18 they have to come in here with something a little more  
19 definite and concrete than we want it stayed because there's  
20 a criminal investigation going on at the same time.

21       **The Court:** Doesn't the statute provide for that?

22       **Mr. Hawkins:** It doesn't provide for a stay.

23       **The Court:** It doesn't provide for a stay, but what's  
24 the language?

25       **Mr. Hawkins:** Are you talking about -- I think you may

1 be thinking about the delay, unreasonable delay---

2       **The Court:** Unreasonable delay consistent with the  
3 legitimate needs of law enforcement---

4       **Mr. Hawkins:** And the statute requiring notice, which we  
5 think people are just now getting their letter a pretty long  
6 time after the actual breach before people got notified. But  
7 setting that aside for a minute, the notion to stay the  
8 lawsuit because of the criminal investigation, the burden on  
9 them - and I would submit it would be a very high burden - is  
10 to come in here with affidavits of law enforcement and say:  
11 This will impede somehow the investigation, but I fail to see  
12 how, when the State has already held press conferences saying  
13 the breach took place, how what we do in this lawsuit could  
14 somehow impede from, quote, catching the bad guys, whoever  
15 they may be. We will do anything to impede their  
16 investigation.

17       What we intend on doing is taking depositions and  
18 gathering information to support our claims. To the extent  
19 something comes up that is problematic, then they can move --  
20 the State can move for a protective order at that time and  
21 bring it within the purview of confidentiality of the  
22 protective order. There's no basis for staying this lawsuit.

23       That's like saying a car -- if there's a car wreck and  
24 somebody runs a red light that you can't sue the person that  
25 ran the red light because there's a criminal investigation

1 going on. If you take it to its conclusion, it's absurd.

2 **The Court:** Yes, sir. Mr. Bowers.

3 **Mr. Bowers:** Thank you, Your Honor. Briefly in response  
4 to that: This is not like a car wreck. This involves  
5 3.8 million taxpayers whose data has been breached. And as  
6 evidenced by the wide-ranging discovery requests that the  
7 plaintiffs have submitted, it's clear that they want to get  
8 into every detail of what the Department of Revenue's systems  
9 involve, DSIT's systems. I mean, they want to get into a  
10 whole bunch of stuff through discovery that absolutely would  
11 impede and impair the criminal investigation.

12 Judge, we believe that the case should be dismissed for  
13 a whole bunch of other reasons and -- but if it's the wisdom  
14 of Your Honor to deny our motion to dismiss, we do think the  
15 stay is absolutely warranted given the -- given the ongoing  
16 criminal investigation by both state and federal authorities.

17 **The Court:** Mr. Stepp, you also filed a motion to  
18 protect -- motion for a protective order.

19 **Mr. Stepp:** The motion for a protective order has been  
20 resolved, Your Honor. I appreciate the cooperation of  
21 plaintiffs' counsel to get those issues squared away. We  
22 have an agreement that's memorializing the exchange, so I  
23 don't think we need any other order as far as I'm concerned  
24 on that. Your Honor, before -- before -- I would like to be  
25 heard just one more minute on the motion to dismiss---

1           The Court: Sure.

2           Mr. Stepp: ---whenever that would be convenient for  
3 you.

4           The Court: Yes, sir.

5           Mr. Stepp: Well, thank you. I appreciate the way we've  
6 proceeded; it's efficient. But I wanted to sort of spend a  
7 minute talking about my client in this case.

8           The Court: That's a good idea.

9           Mr. Stepp: The State Information Technology. You know,  
10 we don't think we're really a player here, and I understand  
11 Your Honor has asked for a lot of background information.  
12 I'm going to give you some that's not within the four corners  
13 of the complaint. But DSIT is a division of the Budget and  
14 Control Board, and it's there to provide services to other  
15 government agencies.

16          The Court: But not all government agencies.

17          Mr. Stepp: Not all government agencies and not to the  
18 public. That's the most important point I wanted to make.  
19 We've raised in our motion to dismiss with respect to the  
20 tort claims that DSIT doesn't have any duty that would give  
21 rise to an obligation that's actionable in tort with respect  
22 to this plaintiff or any other member of the public. To the  
23 extent we have any duties here, those are duties that would  
24 have been owed over to the Department of Revenue, and we're  
25 prepared factually at the right moment to show the Court that

1 we've fully discharged those duties. We've---

2 The Court: Is your relationship with D.O.R. by  
3 contract?

4 Mr. Stepp: Yes, sir. Exactly. And we've provided---

5 The Court: And the Department of Agriculture and...  
6 You cite several agencies in your brief.

7 Mr. Stepp: That's right, and we provided the plaintiff  
8 with a copy of our contractual relationship with D.O.R., but  
9 we basically host their computer system on our physical  
10 premises and we've exchanged some information about what  
11 access DSIT actually has or doesn't have either to the  
12 physical computers themselves or to the data that's housed in  
13 those computers, and essentially it is non-existent. We  
14 don't have any access to them, but that's probably for  
15 another day.

16 But in terms of where we come out today on the motion to  
17 dismiss, I just kind of want to summarize that for the Court.  
18 We don't think we're liable in tort because we don't owe any  
19 duties to the public, and I think Your Honor can take notice  
20 of our limited responsibility by looking at the enabling  
21 legislation in our information on our website and what we do  
22 and how we operate.

23 With respect to the statutory claims, we don't think  
24 we've got any liability because we don't think the plaintiffs  
25 have been damaged. If Your Honor disagrees with that, I



1 understand, but then we're going to come right back and say  
2 we don't license, own, or maintain the data and to the extent  
3 the statute imposes any duty on DSIT, it was only a duty to  
4 notify, not the plaintiff, a duty to notify D.O.R. and we're  
5 going to show you that we did that. So we're here on  
6 12(b) ---

7       **The Court:** I think you did. I think that's in your  
8 brief that you did notify.

9       **Mr. Stepp:** Yes, sir. Yes, sir, we did it. So, I mean,  
10 I realize that's not something I'm asking you to determine  
11 factually today. We'll be back on that if we have to, but I  
12 am asking you today to consider whether any of these tort  
13 claims can proceed against DSIT given that we don't have any  
14 duties to the public and given our limited role and ask you  
15 to consider whether the statutory claim could go forward  
16 because of the absence of damages. So that's the summary of  
17 our position on those.

18       **The Court:** Just as a factual matter, what do you  
19 maintain in your mainframes or databanks?

20       **Mr. Stepp:** Not our mainframes, not our databanks. We  
21 provide floor space basically, a warehouse.

22       **The Court:** Floor space.

23       **Mr. Stepp:** Yes, sir. Now, we do some monitoring of a  
24 communications network, but with respect to where all this  
25 data was stored and housed, there are a bunch of D.O.R.

1 servers in a locked cage on our physical premises to which we  
2 don't have a key to the cage and we don't have any ability to  
3 control what goes on within those servers. So we really are  
4 sort of like a landlord with respect to this data. And so---

5       **The Court:** But the name -- the name of your agency  
6 suggests that you're the I.T. guy for the State.

7       **Mr. Stepp:** Well, I think that was perhaps a little  
8 euphemistic naming of the agency, Your Honor, and maybe  
9 that's where we're headed. But whatever -- whatever role we  
10 have, it's limited and, you know, as you say -- as I say, if  
11 you think they've pleaded enough damages to go forward on the  
12 statute, fine. We'll address that on the merits which we  
13 think we can do in pretty short order. But with respect to  
14 these nonstatutory claims, we just don't think we hit the  
15 mark at all, and so we'd ask you to consider that. Thank  
16 you, Your Honor.

17       **The Court:** Mr. Rollins?

18       **Mr. Rollins:** Your Honor, the statute provides for  
19 liability for people who license, own, or maintain which are  
20 all different ways of saying control which is a factor of an  
21 inquiry. This is -- I hinted earlier that our gross  
22 negligence claim rests on DSIT's control and maintenance of  
23 all of this data, and this is really the most scandalous  
24 aspect of the suit. The reason we were having issues with  
25 what needed to be maintained for discovery purposes --

1 basically what we're trying to get at is: The first tier is  
2 Trustwave was supposed to have sent somebody by law to  
3 inspect what was on DSIT's premises. From what I can tell,  
4 they don't even have a record of those visits from  
5 Trustwave's personnel which means if there's no record of who  
6 goes in, anybody off the street could have walked in and  
7 said, "I'm here to inspect." There's no log of that person's  
8 entry into their physical location.

9 The Court: How do you know that?

10 Mr. Rollins: That's what our expert tells us. It's  
11 P.C.I. compliance of law, and it's in our Exhibit K. We've  
12 actually -- we're in the process of having Steven Teppler, an  
13 attorney in Sarasota, being admitted pro hac vice because  
14 he's a discovery expert and he outlines relevant P.C.I.  
15 requirements in our Exhibit J. The physical premises must be  
16 inspected by Trustwave. They don't have any record of any  
17 inspection by Trustwave. After that, Mandiant, by law, had  
18 to physically inspect DSIT premises. There's no record of  
19 that from what we can tell. So that's -- it's not just  
20 negligence. It's gross negligence if there were no  
21 inspections, and certainly there were no records of those  
22 inspections.

23 So it's pretty clear cut; it's a technical issue. It  
24 requires discovery, and it requires experts to explain  
25 exactly how all this works. I frankly don't know. That's

1 why we've associated Mr. Teppler because we don't understand  
2 those details.

3       **The Court:** All right. Mr. Stepp?

4       **Mr. Stepp:** Thank you, Your Honor. What we've said is  
5 that if we have any of that stuff, what was argued, we're not  
6 -- we're not aware of whether these inspections took place or  
7 not. We're certainly not sitting on information. We're  
8 going to respond, unless we're dismissed, to discovery  
9 requests, and if we have anything about that, we have it.  
10 But whether Trustwave or Mandiant did whatever they were  
11 supposed to do has got nothing to do with whether we have any  
12 responsibility under these statutes or whether we have any  
13 duty to the public at common law.

14       **The Court:** Mr. Long, do you have any other issues?

15       **Mr. Long:** I don't think so, Your Honor. I think we've  
16 addressed all the motions.

17       **Mr. Bowers:** Your Honor?

18       **The Court:** Yes.

19       **Mr. Bowers:** If I may, at the appropriate time I would  
20 like to be heard on a couple of other issues very briefly on  
21 the motion to dismiss.

22       **The Court:** Go right ahead.

23       **Mr. Bowers:** Thank you, Judge. First -- and, of course,  
24 I'm talking about my clients now, the Department of Revenue  
25 and the Office of the Governor, and I want to talk about the

1 statutory claim first. Even if you find that they have  
2 damages sufficient to provide standing and even if you find  
3 that the case is not moot, 111-4-90 is a notice statute, and  
4 at the outset it requires the agency of the State to either  
5 own, license, or license the data.

6 The Court: Well, now, address that issue.

7 Mr. Bowers: The Department of Revenue, they own it.  
8 It's theirs. So there's no -- I'm not talking about that in  
9 here. The Office of the Governor does not own or maintain  
10 the data that was taken. And so just as a threshold matter,  
11 111-4-90 does not apply. There is no statutory  
12 responsibility of the Governor's Office and, therefore, this  
13 statutory claim must fail on its merits as to the Governor's  
14 Office because they don't own or maintain or license the  
15 information.

16 The Court: Let me see what the plaintiff says about  
17 that narrow issue.

18 Mr. Bowers: Yes, sir.

19 Mr. Rollins: The narrow issue of the definition of own  
20 and maintain?

21 The Court: No. The issue of whether the Governor's  
22 Office -- now, I've dismissed the personal Governor. I have  
23 not dismissed the Office of the Governor. Mr. Bowers says  
24 that the Office of the Governor does not own or license  
25 computerized data.

1       **Mr. Rollins:** I think what the statute is getting at  
2 with own and license is control and, again, that's a fact-  
3 driven inquiry. I think the Court can take judicial notice  
4 that the Office of the Governor can certainly make  
5 representations that it is empowered now to prevent this from  
6 occurring again, and by those assertions---

7       **The Court:** Is that -- is that political hyperbole or...

8       **Mr. Rollins:** Well, it may or may not be, but they have  
9 -- they certainly allege now that they have control over this  
10 data. Exactly whether that means own or maintain, we don't  
11 know until we find out some more information about exactly  
12 what happened. We don't know what their relationship with  
13 this information was, whether they controlled it or not, but  
14 they say they can fix the problem now.

15       **Mr. Hawkins:** Judge, I think that the -- this is a  
16 cabinet agency. The director of the D.O.R. answers to the  
17 Governor. The Governor fired the head of the D.O.R. after  
18 this happened. So, by extension, the Governor's Office does  
19 own and maintain this information, and the fact that she is  
20 the C.E.O. of the State -- this is one of her cabinet  
21 agencies under her direct control, and if she could have  
22 given them any direction with regard to the disposition of  
23 this data by executive order, which clearly she could have,  
24 she de facto owned and maintained it under the statute. And  
25 these are all issues -- under 12(b)(6) these are all issues

1 that we should be entitled to pursue discovery to find out.

2 Now, maybe summary judgment if the -- if the information  
3 isn't there, maybe then it's appropriate for dismissal. But  
4 it's at this early premature stage that we'd ask that you  
5 leave these claims in place against this defendant.

6 The Court: All right. Mr. Bowers.

7 Mr. Bowers: Your Honor---

8 The Court: How about that? She's at the top of the  
9 pyramid.

10 Mr. Bowers: She is.

11 The Court: From a -- not just from a political  
12 standpoint but from an executive branch responsibility  
13 standpoint. Can y'all hear me?

14 Mr. Bowers: Yes, sir.

15 The Court: My equipment, for some reason, is turned off  
16 up here. Go ahead.

17 Mr. Bowers: I can hear you loud and clear, Judge. Let  
18 me correct the factual misstatement that Mr. Hawkins just  
19 made. The Governor did not fire Mr. Etter; Mr. Etter  
20 resigned. She did not fire him.

21 The Court: Okay.

22 Mr. Bowers: So I just want to make the record clear on  
23 that. Secondly, she has political authority; there's no  
24 question about that. She's at the top of the pyramid. She  
25 is the chief executive officer of the State. However, the

1 statute is clear: She doesn't own or license the Office of  
2 the Governor -- and I want to make it the office and not the  
3 individual. The Office of the Governor does not own or  
4 license the data that was breached. That's the Department of  
5 Revenue. So I'm not saying the Department of Revenue doesn't  
6 own it because they do, but the Office of the Governor does  
7 not.

8 I mean, you heard -- the key word that I heard from Mr.  
9 Hawkins was by extension and de facto. Well, the statute is  
10 clear. It doesn't say own or license or, you know, by  
11 extension or de facto. It says own or license, and there's  
12 been no allegation in the complaint that says that the Office  
13 of the Governor owns or licenses this data that was breached.

14 **Mr. Hawkins:** Since this has happened, she -- the  
15 Governor's office -- she has issued an executive order, one  
16 or more, directing that certain activities be undertaken with  
17 regard to her cabinet agencies and this data. If she did not  
18 have the control over said instrumentalities, she would not  
19 have the power to issue said executive orders.

20 **Mr. Bowers:** Your Honor, she has control over her  
21 cabinet agencies. That doesn't mean she owns or licenses the  
22 data housed in those agencies. And moreover to his point,  
23 if, in fact, she did own or license this information, then I  
24 doubt the Senate would have taken up this bill yesterday to  
25 make the office more responsible, to make the Office of the



1 Governor the point person of this kind of thing.

2 Mr. Hawkins: Judge, having served in the Senate,  
3 anybody can introduce any bill on any subject. You can  
4 introduce a bill to -- on Santa Claus if you want to. That  
5 bill means nothing.

6 The Court: It means nothing as to the issues here  
7 today.

8 Mr. Hawkins: Yes, sir.

9 The Court: I agree. Now, Mr. Long, how about this  
10 issue of own or license computerized data?

11 Mr. Long: Your Honor, that's why the statute that we've  
12 been sued under doesn't apply to us because he just said that  
13 the Department of Revenue owns the data. They do own the  
14 data. So, I mean, that means 39-1-90 doesn't apply to  
15 Trustwave. And I think these statute -- that you should read  
16 them kind of together. One of them is about State agencies.  
17 One of them is about private corporations, but the idea is is  
18 that---

19 The Court: But the language is the same. The language  
20 is almost the same.

21 Mr. Long: Almost identical.

22 Mr. Stepp: Your Honor, if I might, I would point out if  
23 Mr. Bowers takes ownership of that data from D.O.R., then  
24 that leaves my client out, too.

25 The Court: All right.

1       **Mr. Rollins:** Your Honor, if I could briefly...

2       **The Court:** Sure.

3       **Mr. Rollins:** Subsection B. of the statute also states  
4 that an agency maintaining computerized data... I think it's  
5 a stretch by any imagination to say that -- if the  
6 defendants' argument is that all of these agencies don't in  
7 some respect maintain the integrity of that data... And the  
8 same remedy under Subsection G. is the right to institute a  
9 civil action and recover damages, and that encompasses the  
10 maintenance of the data.

11       **The Court:** Well, Mr. Bowers says that the only person  
12 who would fall under the statute would be the Department of  
13 Revenue. That's his position.

14       **Mr. Hawkins:** That's to be determined by the discovery.  
15 We don't know -- at this point we're getting -- they can't  
16 even decide amongst themselves who had this data and where it  
17 was and who had responsibility for it. That's why we should  
18 be able to get into discovery and find out exactly where the  
19 data was, how it was stored. I mean, this information is so  
20 complex that there are different kinds of data that can be  
21 stored in the same partition of a hard drive, in a different  
22 partition of a different hard drive.

23       Nobody has given a straight answer in terms of where the  
24 data was. To put it all on the D.O.R., that may be true.  
25 They may be the ones that had it all, but until we can get in

1 discovery on a 12(b)(6), clearly we're entitled at this point  
2 facially to move forward with a discovery process. If we go  
3 through discovery and we realize DSIT had nothing to do with  
4 it and, you know, that Trustwave had nothing to do with it --  
5 but obviously Trustwave has already admitted here on the  
6 record in open court today that they had instrumentalities  
7 and machinery. It's called an Intrusion Protection System  
8 and Intrusion Detection System which is simply a type of  
9 computer that monitors what's going on at D.O.R., and it  
10 reports back to Trustwave. And Trustwave offers -- they call  
11 it 24/7 monitoring where they have a live individual who is  
12 supposed to be watching this code come down and in the  
13 process of that determine if there's something untoward  
14 that's happening. They had a direct responsibility for  
15 maintaining this data, and to say otherwise simply goes  
16 against what they've already said.

17 **The Court:** All right. Anything -- you had something  
18 else in the grounds for your motion to dismiss?

19 **Mr. Bowers:** Yes, I did, Your Honor, but if I may very  
20 briefly address Mr. Hawkins' last argument. I believe I gave  
21 a straight answer a moment ago. This is the Department of  
22 Revenue's data, and this -- this is not directly on point,  
23 but I do think it's instructive that under the Freedom of  
24 Information Act and the public records law, the custodian of  
25 records -- this is Section 30-1-20. The custodian of records

1 for an agency is identified as the chief administrative  
2 officer of any agency or subdivision of a public body in  
3 charge of public records.

4 So -- and look. The Governor is not -- does not own the  
5 information or documents that is contained in every agency of  
6 the State of South Carolina. That's just not the province of  
7 the Office of the Governor. And, Your Honor, if I may  
8 continue -- thank you, Judge.

9 The Court: You're on the record.

10 Mr. Bowers: Thank you, Your Honor. As a result of that  
11 -- and I'm speaking on behalf of the Office of the Governor  
12 now only. As a result of the fact that 111-4-90 doesn't  
13 apply to them and so, therefore, the statutory claim must  
14 fail, well, their negligence claims must also necessarily  
15 fail. But because of that lack of ownership, then there was  
16 no duty owed by the Office of the Governor to protect or  
17 preserve that information. I just want to make sure that's  
18 clear for the record.

19 Now, Judge, speaking only about the Department of  
20 Revenue, I just said that under 111-4-90 this information is  
21 theirs, but they should be dismissed for at least two  
22 reasons. One is the law enforcement exception. We've talked  
23 about that; we've briefed it. There's -- there was a very  
24 short window of time between when the department learned of  
25 the breach, which was October 10th, and then when it was

1 publicly disclosed, October 26th. And as our brief makes  
2 clear, it was on the instruction and advice from both  
3 S.L.E.D. and the Secret Service to not publicly disclose it  
4 so as to allow them time to identify who the perpetrator was.

5 And so for 16 days -- and that clearly fits in with the  
6 law enforcement exception of 111-4-90. So for that reason,  
7 Judge, we think that the department has not violated that  
8 statute, and they should be dismissed from the case.

9 Moreover, separate and apart from that, there's a whole  
10 'nother statute: 12-60-80. Mr. Hawkins referenced the fact  
11 that he was a former senator. I thank him for his service.  
12 He was -- he was in the Senate when this bill was passed,  
13 when this legislation was passed, and 12-60-80 expressly  
14 prohibits the Department of Revenue from being named as a  
15 defendant in any class action brought in this state.

16 I don't know how more clear you can get than that, Your  
17 Honor. This is a putative class action. They've named the  
18 department, and 12-60-80 expressly prohibits that. So,  
19 Judge, for all of these reasons we believe that both the  
20 Department and the Office of the Governor should be  
21 dismissed, and to avoid redundancy, I'll just adopt and  
22 incorporate the arguments that Mr. Long and Mr. Stepp have  
23 made. Thank you, Judge.

24 **The Court:** Plaintiff.

25 **Mr. Rollins:** It's certainly premature. We're not here

1 on class certification, but the statute cited specifically  
2 addresses only suits brought for tax purposes. This suit  
3 only deals with tax returns. That's just not relevant, and  
4 that was not the purpose for which that statute was enacted  
5 and it's premature---

6 The Court: I've read it.

7 Mr. Bowers: Judge, if I may on that statute, I know  
8 you've read it, but that's just factually inaccurate. It is  
9 a tax statute, but then it goes on to say, "And the  
10 department, political subdivisions or their instrumentalities  
11 may not be named or made a defendant in any other class  
12 action brought in this state." It's a clear prohibition on  
13 any class action against the department, Judge. Thank you.

14 The Court: All right. Anything further?

15 Mr. Stepp: One point, if I may, Your Honor. In all  
16 this discussion about who owns what and who maintains what, I  
17 thought I would look at the complaint to see exactly what  
18 they allege my client either owned or maintained, and  
19 actually they don't allege that my client owned or maintained  
20 anything. They allege we violated the statute, but they  
21 don't allege the predicate fact that we owned, maintained, or  
22 licensed any of this data. So that would be an additional  
23 ground for our motion to dismiss.

24 The Court: All right. Based on what I have already  
25 ruled on, Mr. Long, will you provide me proposed orders with

1 respect to the service issue and the fact that that matter --  
2 that motion was denied but granting your client relief from  
3 the default?

4 Mr. Long: Yes, Your Honor.

5 The Court: Now, with reference to the motions to  
6 dismiss, let me ask you to prepare, both the plaintiff and  
7 defendants, proposed orders within ten days. Now, the issue  
8 about the Governor's Office owning or not owning the data may  
9 require a separate order. Do you understand? Is that clear?

10 Mr. Bowers: Yes, Your Honor.

11 The Court: The protective order is not in front of me.  
12 The motion to stay needs to be addressed at a separate time.  
13 It does not need to be addressed at this stage of the  
14 proceedings. If your motion to dismiss is not granted, then  
15 the issue of the stay becomes relevant. So we need not  
16 address that issue in any proposed orders. Is there anything  
17 else that either side thinks this Court needs to decide?

18 Mr. Hawkins: Nothing.

19 The Court: Other issues?

20 Mr. Hawkins: Nothing from the plaintiff.

21 The Court: All right.

22 Mr. Long: Your Honor, just one question for the  
23 defendants. Would it be helpful for the Court for us to  
24 present a joint proposed order on the standing issue and the  
25 injury issue? We are dealing with different statutes. I'm a

1 different statute than they are. I didn't know whether you  
2 wanted that in one order that we would try to work on  
3 together or do you want three proposed orders on the motion  
4 to dismiss?

5 The Court: I'm just thinking about the record, the  
6 appellate record. It may be better to have separate --  
7 separate orders.

8 Mr. Long: Okay.

9 The Court: Mr. Stepp has got different issues than you  
10 do, and Mr. Bowers has different issues than you do. So, I  
11 mean, I like the idea, but I think from an appellate review  
12 standpoint it probably is not a good idea.

13 Mr. Long: Okay.

14 The Court: Now -- yes, sir?

15 Mr. Bowers: I just want to ask for clarification on the  
16 dismissal of the individual Governor and Mr. Etter. Do you  
17 want us to draw the order on that?

18 The Court: I want a separate order on that.

19 Mr. Bowers: We'll provide it to Your Honor.

20 The Court: Yes. And now I need to ask if Mr. Kimpson  
21 has anything he wishes to offer as the general counsel for  
22 the Department of Revenue.

23 Mr. Kimpson: Nothing, Your Honor. Thank you.

24 The Court: I worked you too hard yesterday.

25 Mr. Kimpson: You did, Your Honor. Thank you.



1           The Court: All right. Anything further?

2           Mr. Stepp: No, Your Honor.

3           The Court: You know, the clerk set aside the whole day  
4 for this argument. I'll have to find something else to do.  
5 All right. Thank you very much, counsel.

6           (Whereupon, the proceedings were concluded. There were  
7 no exhibits introduced.)

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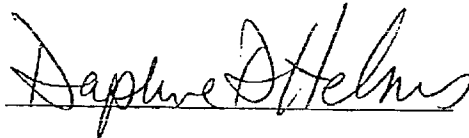
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25

I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 7th of February, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 19, 2013

A handwritten signature in cursive script that reads "Daphne D. Helms". The signature is written in dark ink and is positioned above the printed name.

Daphne D. Helms, court reporter

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-40-07331

Philip Morgan

Nimrata Nikki Haley, et.al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC; ☐ Vol. Nonsuit; ☐ Other ☐ Dismissed without prejudice ☐ Rule 43(k), SCRPC (Settled);
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motion to Dismiss Governor Haley and Mr. Etter as defendants: GRANTED

Defendants' Motions to Dismiss (by Trustwave, DOR, DSIT): proposed orders being sent w/in 10 days

Motions for Protective Order: Resolved

Motion to Quash Service of Process: DENIED.

Motion to Grant Relief from Default Judgment: GRANTED

Motion for Default Damages: DENIED

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

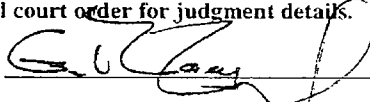
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge



Judge Code 2126

Date 2-7-13

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

John David Hawkins

ATTORNEY(S) FOR THE PLAINTIFF(S)

Matthew Carroll, Milton Kimpson, Robert Stepp, James Long

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

SCRPC Form 4C (10/2011)



Record on Appeal

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Phillip Morgan, Individually and on behalf of  
all similarly situated Plaintiffs,

Plaintiff,

vs.

Nimrata "Nikki" Haley, Governor of South  
Carolina; James F. Etter, Director of the South  
Carolina Department of Revenue; the South  
Carolina Department of Revenue; South  
Carolina Division of State Information  
Technology; Trustwave Corporation and  
Trustwave Holdings, Inc.,

Defendants.

IN THE CIRCUIT COURT

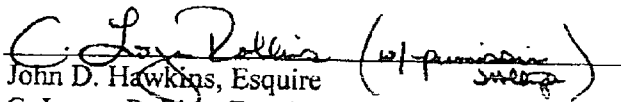
Case No. 2011-CP-40-7331

**STIPULATION OF DISMISSAL  
WITHOUT PREJUDICE  
AS TO TRUSTWAVE CORPORATION**

FILED  
2013 FEB 20 AM 9:22  
JEANETTE W. MORRIS  
C.C.P. & G.S.

Pursuant to Rule 41(a)(1)(B), SCRCF, the Plaintiff hereby stipulates to the dismissal without prejudice of Trustwave Corporation as a defendant in this action. In the event that facts are discovered through discovery in this lawsuit indicating that Trustwave Corporation is a proper party to this action, the Plaintiff reserves his right to file a motion to add Trustwave Corporation as a party defendant.

SO STIPULATED.

  
John D. Hawkins, Esquire  
C. Logan Rollins, Esquire  
The Hawkins Law Firm

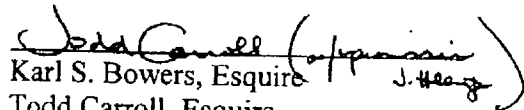
Attorneys for Plaintiff

February 20, 2013  
Columbia, South Carolina

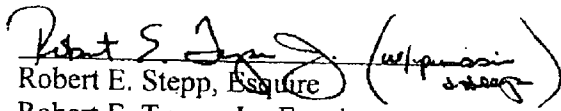
WE CONSENT:

  
James G. Long, III, Esquire  
Jennifer J. Hollingsworth, Esquire  
Nexsen Pruet, LLC

Attorneys for Trustwave Holdings, Inc. and  
Trustwave Corporation

  
Karl S. Bowers, Esquire  
Todd Carroll, Esquire  
Womble Carlyle Sandridge & Rice, LLP

Attorneys for the Office of the Governor and  
the Department of Revenue

  
Robert E. Stepp, Esquire  
Robert E. Tyson, Jr., Esquire  
Bess J. DuRant, Esquire  
Sowell Gray Stepp & Laffitte

Attorneys for the South Carolina Division of  
State Information Technology

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007331

Phillip Morgan

South Carolina Dept of Revenue

Office of the Governor of the State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);  
☐ Rule 43(k), SCRCP (Settled); ☐ Other: \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☒ Other \_\_\_\_\_
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

## INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | S                              |
|                                           |                                       | S                              |
|                                           |                                       | S                              |

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_

Judge Code \_\_\_\_\_

Date \_\_\_\_\_

## For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 28 February 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John David Hawkins

Robert E. Stepp  
Matthew Todd Carroll

Milton Gary Kimpson  
James Grant Long III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

*Jeanette W. McBride*

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) FIFTH JUDICIAL CIRCUIT

Phillip Morgan, individually and on ) Civil Action No. 2012-CP-40-7331  
behalf of all similarly situated plaintiffs, )  
 )  
Plaintiffs, )

vs. )

South Carolina Department of Revenue; )  
South Carolina Division of State )  
Information Technology; Office of the )  
Governor for the State of South )  
Carolina; Trustwave Corporation; and )  
Trustwave Holdings, Inc., )  
 )  
Defendants. )

ORDER GRANTING MOTION TO  
DISMISS THE DEPARTMENT OF  
REVENUE AND THE OFFICE OF  
GOVERNOR

FEB 21 PM 4:12  
C. J. & G. S.

Before the Court is a motion by the State Department of Revenue and the Office of the Governor to dismiss this matter pursuant to Rules 12(b)(1) and 12(b)(6), SCRPC. For the reasons stated herein, the Court grants this motion and dismisses this action with prejudice as to these defendants.

#### FACTUAL BACKGROUND

This case arises out of the taxpayer data that was unlawfully accessed by computer hackers. The circumstances surrounding that breach have been heavily publicized and have been the subject of several legislative hearings before both chambers of the South Carolina General Assembly.

To summarize, in the Fall of 2012, foreign hackers illegally accessed taxpayer information in a Department of Revenue database. Federal law enforcement notified the State of South Carolina about the breach and, after reaching certain "benchmarks" in the criminal investigation, the United States Secret Service and the State Law Enforcement

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Division notified the public about the breach. According to the Amended Complaint, that notification was provided via a press conference held on October 26, 2012. (Am. Compl. ¶ 23.) Following discovery of the breach, the State of South Carolina has taken steps to mitigate potential issues associated with the breach, including purchasing credit monitoring services and fraud counseling services for affected taxpayers.

None of the parties has objected to the Court taking judicial notice of these background facts. In fact, all parties repeatedly drew on them when presenting their written and oral arguments on this motion. In any event, the Court may take judicial notice of a matter in the public record that is not subject to reasonable dispute. See Rule 201(b), SCRE (explaining that courts can take judicial notice of facts that are “not subject to reasonable dispute”); id. 201(f) (“Judicial notice may be taken at any stage of the proceeding.”); Sec’y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007) (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”).

### **PROCEDURAL HISTORY**

In the wake of the breach, the Plaintiff filed a putative class action against Governor Haley; the State Department of Revenue and its Director; the Division of State Information Technology; and Trustwave Corporation and Trustwave Holdings, Inc., which are vendors of data-security services. The Plaintiff has not pled any facts that are unique to himself, instead generally pleading facts that are in the public record regarding the breach. Nor has the Plaintiff alleged that he has suffered any injury beyond being “placed in a material risk of harm for identity theft.” (Am. Compl. ¶ 35.)



With respect to the State defendants, the Plaintiff has asserted four claims: (1) a violation of South Carolina Code § 1-11-490, (2) gross negligence, (3) gross negligence *per se*, and (4) civil conspiracy. (Am. Compl. ¶¶ 25-45.)

On December 6, 2012, Governor Haley, the South Carolina Department of Revenue, and the Director of the South Carolina Department of Revenue moved to dismiss the Amended Complaint on a variety of grounds. Both the Plaintiff and these defendants filed briefs regarding that motion. On February 7, 2013, the Court heard oral arguments from the parties on this motion, as well as other dispositive and procedural motions filed by the remaining defendants, which are addressed in other orders.

Also at the February 7th hearing, the Court orally granted a motion to dismiss Governor Haley and former Director Etter as individual defendants from this suit, which was memorialized in a written order dated February 13, 2013. Accordingly, the Court treats the instant motion as one to dismiss the claims against the South Carolina Department of Revenue and the Office of the Governor of the State of South Carolina.

The Court has reviewed and considered all filings and materials submitted by the parties, all arguments presented by counsel, and all relevant procedural rules and governing authorities. After full consideration, the Court grants this motion and dismisses all claims against the Department of Revenue and the Office of the Governor.

### **STANDARD OF REVIEW**

#### **I. Subject Matter Jurisdiction**

Rule 12(b)(1), SCRCP, directs the Court to dismiss a case when it lacks subject matter jurisdiction. Before a court can ever address the merits of a case, it must have jurisdiction to do so, as subject matter jurisdiction is the sole source of a court's power.

*GR # 3*

Hamilton v. Fulgham, 385 S.C. 632, 637, 686 S.E.2d 683, 685–86 (2009). Accordingly, the absence of jurisdiction “constitutes the strongest possible defense” in a case. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss. Appellate Practice in South Carolina 3 (2d ed. 2002).

When reviewing a motion under Rule 12(b)(1), the Court may consider evidence beyond the pleadings without converting the motion into one for summary judgment. See Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (holding that “the presentation of such evidence [outside the pleadings] does not convert the motion to dismiss [for lack of subject matter jurisdiction] into one for summary judgment”).

## **II. Failure to State a Claim**

Rule 12(b)(6), SCRCP, tests the legal sufficiency of a complaint. Under this rule, the Court should dismiss a claim if it fails “to state facts sufficient to constitute a cause of action.” Id. When evaluating a motion under this rule, the Court is not to read unalleged facts into the pleadings. Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005), nor need it credit the claimant’s legal conclusions or predicate act labels. Builder Mart of Am., Inc. v. First Union Corp., 349 S.C. 500, 512, 563 S.E.2d 352, 358 (Ct. App. 2002).

## **DISCUSSION**

### **I. Subject Matter Jurisdiction**

The Department of Revenue and the Office of the Governor have raised two objections to the Court’s subject matter jurisdiction over the whole case. First, they argue that the Plaintiff lacks standing to bring suit, as he has not suffered an injury in fact. Second, they argue that the case is moot, as all parties concede that the State of South

Carolina has already taken steps to mitigate any future injury that may occur. The Court analyzes each basis for dismissal in turn.

**A. Standing**

**1. Constitutional Standing**

It is fundamental that before the Court can exercise jurisdiction over a case, the party bringing suit must have standing to do so. Anders v. S.C. Parole & Cmty. Corr. Bd., 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983). South Carolina has adopted the United States Supreme Court's familiar three-part test for constitutional standing. First, the plaintiff must have suffered an injury in fact that is "concrete and particularized," rather than hypothetical. Second, the injury must be fairly traceable to the defendant's alleged conduct. Finally, the Court must be able to redress the injury. ATC South, Inc. v. Charleston County, 380 S.C. 191, 195–96, 669 S.E.2d 337, 339 (2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

This is not the first time that litigation has arisen from a breached database containing secure information. In this case, though, the Plaintiff does not allege that he has suffered any actual losses attributable to identity theft as a result of the breach of the State's database. At most, he alleges that he has been "placed in a material risk of harm for identity theft." (Am. Compl. ¶ 35.)

When a plaintiff has not alleged anything beyond an increased risk of future harm resulting from a data breach, courts around the country have regularly held that the plaintiff lacks standing to bring suit due to the absence of an injury in fact that is concrete and definite. See, e.g., Reilly v. Ceridian Corp., 664 F.3d 38, 43 (3d Cir. 2011) (affirming dismissal and holding that "if the hacker attempts to use the information, and

*if* he does so successfully, only then will Appellants have suffered an injury") (emphasis supplied by the Reilly court); Hammond v. Bank of N.Y. Mellon Corp., Case No. 08 Civ. 6060 (RMB) (RLE), 2010 U.S. Dist. LEXIS 71996, at \*6-7 (S.D.N.Y. June 25, 2010) ("[T]his Court concludes that Plaintiffs here do not have Article III standing (*i.e.*, there is no "case or controversy") because they claim to have suffered little more than an increased risk of future harm from the loss (whether by accident or theft) of their personal information.").

The Court agrees with these cases that the prospect of some harm potentially occurring in the future is insufficient to satisfy the injury-in-fact requirement of standing. On the facts presented in the complaint, there is no injury that the Court can currently remedy, as no actual harm has been alleged. Accordingly, the Court finds that the Plaintiff does not have standing, and the Court therefore lacks subject matter jurisdiction over this case.

In response to this analysis, the Plaintiff has identified two cases that he asserts distinguish withstanding the absence of actual losses attributable to identity theft, Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012), and Anderson v. Hannaford Brothers Co., 559 F.3d 151 (1st Cir. 2011). The Court disagrees that these cases change the analysis above.

In both cases cited by the Plaintiff, the plaintiffs were victims of actual identity theft and suffered losses stemming from that theft, including fraudulent credit card charges and fraudulent activity on their bank accounts. See Resnick, 693 F.3d at 1322 ("Bank of America accounts were opened in Curry's name, credit cards were activated, and the cards were used to make unauthorized purchases. Curry's home address was also

changed with the U.S. Postal Service. . . . [A]n account was opened in Moore's name with E\*Trade Financial, and in April 2011, Moore was notified that the account had been overdrawn."); Anderson, 659 F.3d at 164 ("Here, there was actual misuse [of lost data], and it was apparently global in reach. . . . The data was used to run up thousands of improper charges across the globe to the customers' accounts."). This is fundamentally distinguishable from the facts alleged by the Plaintiff here, which do not include any indicia that he has been the victim of any actual identity theft. Accordingly, the cases cited by the Plaintiff do not support his argument in favor of constitutional standing.

## 2. Statutory Standing

The Court recognizes that even in the absence of constitutional standing, a statute can vest a plaintiff with standing. ATC South, Inc., 380 S.C. at 195, 669 S.E.2d at 339. The Plaintiff asserts that South Carolina Code § 1-11-490 gives him standing to bring his claims here. For several reasons, the Court disagrees.

For one, South Carolina Code § 1-11-490 is strictly a notice statute. It only requires an agency that "own[s] or licens[es] computerized data or other data that includes personal identifying information" to timely notify the public if that data has been compromised under circumstances outlined in the statute. Id. § 1-11-490(A). On its face, the statute is silent as to the methodology an agency can or should use when maintaining that data.

However, the Plaintiff's common law claims against these defendants allege that the State was negligent in storing and maintaining taxpayer data. Of course, a notice statute cannot provide standing for claims that are based on something other than inadequacy of notice. Accordingly, South Carolina Code § 1-11-490 does not give the

Plaintiff standing for anything other than a claim arising under that very statute, including common law claims against the Department of Revenue and the Office of the Governor.

With respect to the Plaintiff's claimed violation of South Carolina Code § 1-11-490, the statute itself requires a claimant to have been "injured by a violation of this section" in order to have standing. Id. § 1-11-490(G). The Amended Complaint is void of any allegation that this Plaintiff was harmed in any way by the timing of law enforcement's public announcement of the data breach. Therefore, the lack of an injury is also fatal to the Plaintiff's argument that he has standing under South Carolina Code § 1-11-490.

Because the Plaintiff does not have standing as a constitutional matter or under the applicable statute, the Court lacks subject matter jurisdiction over his claims.

**B. Mootness**

Alternatively, the Court finds that it lacks subject matter jurisdiction here because the Plaintiff's claims are moot, as he has already been provided a remedy by a coordinate branch of state government. A keystone of any court's subject matter jurisdiction is that there must be an ongoing controversy between the parties, as courts are forbidden from ruling on "academic questions" or from "mak[ing] an adjudication where there remains no actual controversy." Fabian's Uptown Charleston, Inc. v. S.C. Tax Comm'n. 247 S.C. 164, 166, 146 S.E.2d 608, 608 (1966). A case is moot and should be dismissed "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." Mathis v. S.C. State Hwy. Dep't. 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

Here, the parties have made the Court aware, and the Court accordingly takes judicial notice, that the State has obtained credit monitoring services and fraud

counseling services for those whose data may have been exposed. For individuals, this includes one year of credit monitoring from Experian and, for adults, fraud resolution services that will never expire. For businesses, this includes business credit alert services from Dun & Bradstreet and similar services from Experian. The State has also sent correspondence to 3.8 million individuals to notify them about these services, which are provided free of charge to taxpayers.

The Court finds that these steps taken by the Executive Branch have mooted this lawsuit. Where one branch of government has already mitigated the alleged injury—or, as in this case, the potential for future injury—the mootness doctrine compels dismissal. See, e.g., Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 25–26, 630 S.E.2d 474, 477–78 (2006) (affirming dismissal of a FOIA suit as moot where the public body voluntarily provided the plaintiff with records he sought to obtain through litigation).

The Court believes that the Tenth Circuit's recent decision in Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208 (10th Cir. 2012), is instructive on this issue. There, a plaintiff sought to represent a class of Toyota owners who had purchased Corollas with defective engine components, and she sought a court order creating "an equitable fund to pay for repairs." Id. at 1209. During the course of litigation, Toyota began a nationwide recall of those same Corollas that was overseen by the United States Department of Transportation. Id. The Winzler court dismissed the case as moot, finding that the plaintiff had already been provided relief sufficient to remedy her alleged injury. In so holding, the court recognized the separation-of-powers and judicial-economy dangers associated with allowing the case to proceed:

[A]ffording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the

execution of the remedial process and the duplicative expenditure of finite public resources. It risks, too, the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court.

Id. at 1211. The Winzler court summarized its ruling: “[O]nce the plaintiff has a remedial promise from a coordinate branch in hand, we will generally decline to add the promise of a judicial remedy to the heap. While deciding the lawsuit might once have had practical importance, given the assurances of relief from some other department of government it doesn’t any longer.” Id. at 1210.

The Court finds this reasoning applicable here. Based on the allegations of the Amended Complaint, the Plaintiff has not yet suffered any actual harm, and the State of South Carolina has already secured services designed to mitigate any future injury associated with the data breach. Given the State’s efforts to head-off any future harm before it even occurs, the Court does not believe that there are any additional, duplicative remedies available to the Plaintiff. Accordingly, the Court finds that this case is moot, and it lacks subject matter jurisdiction for this alternative reason.

## **II. Failure to State a Claim**

The Court is aware that some courts reviewing claims arising out of data breaches have dismissed cases based on both a lack of standing and after review under Rule 12(b)(6) standards, see, e.g., Hammond, 2010 U.S. Dist. LEXIS 71996, at \*7 (“The opinion goes on to stay that even if, *arguendo*, Plaintiffs had demonstrated standing, their claims properly would be dismissed.”), while others have been resolved on Rule 12(b)(6) grounds, e.g., Holmes v. Countrywide Fin. Corp., Case No. 5:08-cv-00205-R, 2012 U.S. Dist. LEXIS 96587, at \*13–30 (W.D. Ky. July 12, 2012). For the reasons explained below, the Court finds that even if the Plaintiff here has standing and his claims were not

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moot, his claims against the Department of Revenue and the Office of the Governor must still be dismissed pursuant to Rule 12(b)(6).

**A. Violation of South Carolina Code § 1-11-490**

The Plaintiff's first claim against the Department of Revenue and the Office of the Governor is for an alleged violation of South Carolina Code § 1-11-490. As explained above, this notice statute requires "[a]n agency of this State owning or licensing computerized data or other data that includes personal identifying information" to disclose a breach of its database when two contingencies exist:

- (1) "unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person"; and
- (2) that information has been "illegal[ly] use[d]." such illegal use is "reasonably likely to occur," or "use of the information creates a material risk of harm to the resident."

Id. § 1-11-490(A) (emphasis added). If a resident of South Carolina is "injured" by a delay in announcing a data breach, South Carolina Code § 1-11-490(G) authorizes him or her to file suit for violation of the statutory notice requirement.

Importantly, while this statute requires notice to be provided "in the most expedient time possible and without unreasonable delay," it directs such notice to be made "consistent with the legitimate needs of law enforcement" and consistent with "measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system." Id. § 1-11-490(A). In other words, publicly announcing a breach of a database should only come after law enforcement confirms that such an announcement will not put an investigation at risk.

The General Assembly confirmed this preeminent deference to law enforcement's investigative efforts elsewhere in the statute:

The notification required by this section may be delayed if a law enforcement agency determines that the notification impedes a criminal investigation. The notification required by this section must be made after the law enforcement agency determines that it no longer compromises the investigation.

Id. § 1-11-490(C).

Based on the allegations of the Amended Complaint, the Court finds that there are several defects with the Plaintiff's claim under Section 1-11-490. First, the Office of the Governor does not "own[] or licens[e]" the database that was breached, nor are there any allegations in the Amended Complaint that it does. As a result, this statute is facially inapplicable to the Office of the Governor, and that office has no obligations under this statute.

Second, the Plaintiff alleges that the State of South Carolina improperly delayed from October 10th until October 26th in notifying the public about the breach of the taxpayer database. (Am. Compl. ¶¶ 22-23.) But, as explained above, he does not allege that he was harmed in any way by the fact that the State waited sixteen days before notifying the public of the breach. This omission is fatal to his claim, as South Carolina Code § 1-11-490(G) only permits one "who is injured by a violation of this section" to bring a claim.

Third, even if the Court were to construe the Amended Complaint to allege an injury arising from the sixteen-day time period, the claim still fails due to the law enforcement exception codified at both Section 1-11-490(A) and Section 1-11-490(C). When the State publicly announced the breach at the October 26th press conference, Mark Keel, Chief of the South Carolina Law Enforcement Division, and Mike Williams, Special Agent with the United States Secret Service, were explicit that the short time

ETC 12

period before announcing the breach was necessary to allow federal and state law enforcement agencies to investigate the source and scope of the breach and to pursue the perpetrator. Throughout that press conference, these law enforcement personnel explained the sensitivity of their investigation and how they were required to meet certain benchmarks in the investigation before the breach could be announced publicly.<sup>1</sup>

The Plaintiff incorporated this notification by reference into the Amended Complaint. (Am. Compl. ¶ 23.) Accordingly, the Court may consider these public statements, the veracity and authenticity of which have not been disputed by any party, without converting a motion to dismiss into one for summary judgment. See Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.”); see also Rule 201(f), SCRE (explaining that judicial notice “may be taken at any stage of the proceeding”); Sec’y of State for Defence, 484 F.3d at 705 (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”)

The State’s basis for delaying the announcement is consistent with the General Assembly’s directive that an agency should not publicly announce a data breach until the appropriate law enforcement agencies authorize the disclosure. S.C. Code Ann. §§ 1-11-

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<sup>1</sup> The parties have made the Court aware that this announcement can be viewed in its entirety at [http://www.youtube.com/watch?v=0Dax66JEzVs&list=UULY6xT8hpjx\\_uyXYQ2hXwMg&index=39](http://www.youtube.com/watch?v=0Dax66JEzVs&list=UULY6xT8hpjx_uyXYQ2hXwMg&index=39). The comments referenced in the text above are found beginning at the 3:13 mark in the video (comments of Chief Keel), the 4:22 mark (comments of Special Agent Williams), the 14:00 mark (comments of Special Agent Williams), and the 14:40 mark (comments of Chief Keel).

62 13

490(A) & -490(C). Therefore, the Plaintiff's statutory claim against the Department of Revenue and the Office of the Governor fails for this additional reason.

**B. Common Law Claims**

In addition to his statutory claim, the Plaintiff alleges three common law claims against the Department of Revenue and the Office of the Governor: gross negligence, gross negligence *per se*, and civil conspiracy. Each is addressed below.

**1. Tort Claims Act**

As a general defense, the Department of Revenue and the Office of the Governor have asserted that the Tort Claims Act gives them immunity to the Plaintiff's common law claims. The Tort Claims Act reinstated sovereign immunity in South Carolina except in limited circumstances identified within the statute itself. S.C. Code Ann. § 15-78-20(b). In particular, it shields from liability government employees and entities when they are enforcing or complying with any law or policy, *id.* § 15-78-60(4), and when they are exercising discretion or judgment when performing their official duties, *id.* § 15-78-60(5). The General Assembly has directed that these provisions "must be liberally construed in favor of limiting the liability of the State." *Id.* § 15-78-20(f).

The Court finds that the Tort Claims Act immunizes the Department of Revenue and the Office of the Governor from the Plaintiffs' tort claims. To the extent the Plaintiff alleges that the State agencies failed to properly follow a statute, the agencies are immune pursuant to Section 15-78-60(4). To the extent the Plaintiff alleges that the State agencies failed to properly exercise their discretion when protecting data, the agencies are immune pursuant to Section 15-78-60(5). Accordingly, the Court finds that the Plaintiffs' tort claims fail under the Tort Claims Act.

GC 14

## 2. Common Law Claims Individually

Alternatively, the Court finds that the Plaintiffs common law claims individually fail on their merits as to these defendants.

### a. Gross Negligence and Gross Negligence *Per Se*

The Plaintiff's second and fourth causes of action against the Department of Revenue and the Office of the Governor are for gross negligence and gross negligence *per se*. In South Carolina, a party alleging negligence must prove three elements: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; and (3) the plaintiff suffered actual damages as result of the breach. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000).

With respect to the Office of the Governor, the Court finds that these claims fail for a lack of a duty owed. There are no allegations in the Amended Complaint that the Office of the Governor had any particular responsibilities with respect to the database that was breached, nor is the Court aware of any.

The Plaintiff argues that the Office of the Governor, as the head of the Executive Branch, has ultimate control over everything that happens within any cabinet agency, and thus had a duty with respect to the database at issue here. The Court disagrees, as South Carolina law generally treats all agencies as independent entities with respect to preserving and maintaining their own records and materials. See generally S.C. Code Ann. §§ 30-1-10 *et seq.* (treating each agency within the Executive Branch as a separate entity for purposes of the Public Records Act); *id.* §§ 30-4-10 *et seq.* (same with respect to the Freedom of Information Act). The Plaintiff's expansive argument would require the Office of the Governor to be a party in litigation involving, for instance, the

 15

Department of Corrections, the Department of Juvenile Justice, or the Department of Social Services. The Court is not aware of any authority that would dictate such a sweeping result, and the Court declines to create such a rule in this case. See generally Kobe v. Haley, Case No. 3:11-1146-TMC, 2012 U.S. Dist. LEXIS 112425, at \*18 (D.S.C. Aug. 10, 2012) (“While Defendant Haley as the Governor of South Carolina has the power to appoint and general supervisory authority, neither appointment power nor general supervisory power over persons responsible for enforcing a challenged provision will subject an official to suit.”).

With respect to both the Department of Revenue and the Office of the Governor, the Court finds that the Plaintiff's gross negligence claims fail because he has not pled any judicially cognizable injury. As explained above, the Plaintiff's only claimed damages are associated with an increased “material risk of harm for identity theft.” (Am. Compl. ¶ 35.) South Carolina law, however, refuses to impose liability “merely for the creation of risk when there are no actual damages” because to do so would “drastically change[] the fundamental elements of a tort action” and “make[] any amount of damages entirely speculative.” Sapp v. Ford Motor Co., 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). In short, a claim cannot survive dismissal when damages are speculative. See, e.g., Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) (“Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” (quoting Gray v. S. Facilities, Inc., 256 S.C. 558, 570–71, 183 S.E.2d 438, 444 (1971))).

Applying this same standard—that damages must be concrete rather than speculative—courts around the country have dismissed claims arising out of breached

67-16

databases when, as here, the plaintiff seeks damages allegedly attributed to an increased risk for identity theft. See, e.g., Krottner v. Starbucks Corp., 406 F. App'x 129, 131 (9th Cir. 2010) (affirming dismissal of negligence claim under Washington law because the plaintiff's allegations about a risk of future harm associated with the theft of unencrypted data did "not establish[] a cognizable injury"); Pisciotta v. Old Nat'l Bancorp., 499 F.3d 629, 639-40 (7th Cir. 2007) (affirming dismissal of claims brought under Indiana law arising from a "sophisticated, intentional and malicious" hack of a database because "[w]ithout more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy"); Holmes, 2012 U.S. Dist. LEXIS 96587, at \*17 ("The unfavorable legal precedent from Kentucky, New Jersey, and other states prompts the Court to reject a naked claim of increased risk of identity theft. Plaintiffs must offer additional damages for a cognizable injury under either state's law."); Hammond, 2010 U.S. Dist. LEXIS 71996, at \*34-35 (dismissing a negligence claim arising out of stolen unencrypted data because, as a matter of New York law, "a heightened fear of having th[e plaintiffs'] identities stolen in the future" does not amount to a cognizable injury).

Because the Plaintiff's only alleged damages arise from a claimed increased risk of future harm, the Court finds that the Plaintiff's claims for gross negligence and gross negligence *per se* fail to state a cognizable injury. The absence of this essential element renders the Plaintiff's gross negligence and gross negligence *per se* claims against the Department of Revenue and the Office of the Governor facially deficient, and they are dismissed with prejudice.

17

**b. Civil Conspiracy**

The Plaintiff's final claim against the Department of Revenue and the Office of the Governor is for civil conspiracy. This claim requires proof that two or more persons joined for the purpose of injuring the claimant. Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp., 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004).

After reviewing the Amended Complaint in its entirety, and viewing every inference arising therefrom in favor of the non-moving party, the Court finds that the Plaintiff has failed to plead facts that would support this cause of action. Indeed, at oral argument, counsel for the Plaintiff conceded that there were no known facts to support the civil conspiracy claim. Nevertheless, the Court analyzes this claim against the required elements.

South Carolina courts closely scrutinize civil conspiracy claims to ensure that they only capture true agreements to harm a party, and that the conduct and damages attributed to a conspiracy are not also encompassed by other causes of action. Accordingly, a plaintiff may not simply re-allege facts from other claims in support of a civil conspiracy; instead, he must assert that the purported conspirators committed separate acts in furtherance of the conspiracy. See, e.g., Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) (holding that a plaintiff "was not entitled to maintain his conspiracy cause of action" because he "merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy"). The Amended Complaint fails to satisfy this fundamental requirement of any civil conspiracy claim, as it does not allege a single act in furtherance of any purported conspiracy.





Similarly, South Carolina courts require a claimant to have incurred special damages that are unique to the alleged conspiracy, and they do not permit re-alleging damages that are associated with other claims to support a claim of civil conspiracy. See, e.g., Pye v. Estate of Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 512 (2006) ("Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action."). The Amended Complaint does not identify any special damages that the Plaintiff alleges are unique to the purported conspiracy, causing this claim to fail for this additional reason.

Additionally, a claim for civil conspiracy fails when the plaintiff has not suffered a legally cognizable injury. See, e.g., id. at 567–68, 633 S.E.2d at 511 ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement of combination per se."). However, the Plaintiff does not indicate how he was harmed by the alleged conspiracy, and as explained above, the Court finds that the Plaintiff has not been damaged in any way recognized by law. As a result, the Court finds that the civil conspiracy claim is facially deficient for this additional reason.

In sum, the Court finds that the Amended Complaint fails to allege facts sufficient to support at least three elements of the Plaintiff's claim for civil conspiracy. Accordingly, it is dismissed.

**C. Class Action Against the Department of Revenue**

As an additional basis for dismissal, the Department of Revenue argues that, as a matter of law, it cannot be sued in a class action, which is how the Plaintiff has styled the Amended Complaint. The Court agrees with the agency.

GL 19

South Carolina Code § 12-60-80(C) states as follows:

Notwithstanding subsections (A) and (B), a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Judge Division or any court of law in this State, and the department, political subdivisions, or their instrumentalities may not be named or made a defendant in any other class action brought in this State.

Id. (emphasis added).<sup>2</sup> By its plain terms, this statute's broad language expressly bars class actions against the Department of Revenue.

In opposing this outcome, the Plaintiff argues that this statute is only limited to classes of plaintiffs seeking tax refunds. The Court finds that the Plaintiff's argument overlooks the plain language of the statute itself, which prohibits class actions both "for the refund of taxes" and "in any other class action." Id. "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). Accordingly, irrespective of whether a case brought against the Department is a tax case or any other type of case, Section 12-60-80(C) unambiguously prohibits suing the Department in a class action. See Drummond v. State, 378 S.C. 362, 370 n.5, 662 S.E.2d 587, 591 n.5 (2008) (holding that a class could not be certified

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<sup>2</sup> Of course, the General Assembly is free to restrict the use of class actions and has done so in several other contexts. *See, e.g.*, S.C. Code Ann. § 9-21-40 ("A claim [for recovery under the Retirement Systems Code] may not be prosecuted on behalf of a class."); *id.* § 37-23-50(A) ("No borrower may bring a class action for a violation of this article [of the Consumer Protection Code]."); *id.* § 39-5-140(a) (providing that a claim for actual damages under the Unfair Trade Practices Act may not be brought "in a representative capacity"); *id.* § 40-39-160(1) (granting pledgors certain rights against pawnbrokers, but authorizing suit for recovery "in an action other than a class action").

AND IT IS SO ORDERED.



\_\_\_\_\_  
The Honorable G. Thomas Cooper, Jr.  
Circuit Court Judge

Z-27, 2013  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007331

Phillip Morgan

South Carolina Dept of Revenue

Office of the Governor of the State of South Carolina  
DEFENDANT(S)

PLAINTIFF(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Consent);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award: ☐ Other \_\_\_\_\_
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

## INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_

Judge Code \_\_\_\_\_

Date \_\_\_\_\_

## For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 28 February 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John David Hawkins

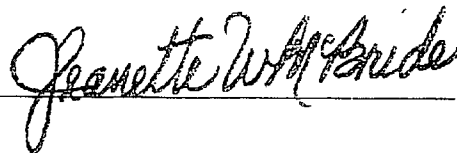
Robert E. Stepp  
Matthew Todd CarrollMilton Gary Kimpson  
James Grant Long III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court



STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Phillip Morgan, individually and on  
behalf of all similarly situated Plaintiffs,

Civil Action No.: 2012-CP-40-7331

Plaintiff,

vs.

**Order Granting the South Carolina  
Division of State Information  
Technology's Motion to Dismiss**

South Carolina Department of Revenue;  
South Carolina Division of State  
Information Technology; the Office of the  
Governor of the State of South Carolina;  
Trustwave Corporation; and Trustwave  
Holdings, Inc.,

Defendants.

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FILED  
CLERK OF COURT  
SOUTH CAROLINA

This matter came before me on February 7, 2013 upon motion of Defendant South Carolina Division of State Information Technology ("DSIT") for an order granting its Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. John D. Hawkins and C. Logan Rollins, II of the Hawkins Law Firm appeared on behalf of Plaintiff, and Robert E. Stepp, Robert E. Tyson, Jr., and Bess J. DuRant of Sowell Gray Stepp & Laffitte, LLC appeared on behalf of DSIT.<sup>1</sup> After a thorough review of DSIT's motion, the prevailing case law, and arguments from counsel, this Court grants DSIT's motion for the reasons stated hereafter.

<sup>1</sup> Also appearing at the hearing were James G. Long, III of Nexsen Pruet, LLC on behalf of Defendants Trustwave Corporation and Trustwave Holdings, LLC, and Karl S. Bowers and M. Todd Carroll of Wornble Carlyle Sandridge & Rice, PLLC on behalf of the remaining Defendants. Resolution of these Defendants' motions to dismiss is addressed by separate orders of this Court.

GR 1

### Facts and Procedural History

Plaintiff commenced this action with the filing of a Summons and Complaint on October 31, 2012. Plaintiff filed an Amended Complaint naming DSIT as a Defendant on November 5, 2012. The facts taken from Plaintiff's Amended Complaint are as follows. In August and September of 2012, third parties infiltrated the database of the South Carolina Department of Revenue and acquired approximately 3.6 million Social Security numbers, approximately 387,000 credit and/or debit card numbers, and a yet unknown number of tax returns and other documents containing personal identifying information. Plaintiff contends that Defendants Trustwave and Trustwave Holdings are charged with the duty of securing the personal identifying information. Plaintiff contends that on October 10, 2012, DSIT informed Defendant South Carolina Department of Revenue ("DOR") and Defendant Nimrata "Nikki" Haley, Governor of South Carolina of the database breach. Plaintiff further alleges that "the persons whose data had been compromised were not notified by Defendants until October 26, 2012."

The Amended Complaint contains seven causes of action, four of which are directed at DSIT. In his first cause of action, Plaintiff seeks a declaration that DSIT "knowingly and willfully breached" section 1-11-490 of the South Carolina Code of Laws (Supp. 2012). In his second cause of action, Plaintiff alleges that DSIT "willfully, wantonly, recklessly, and with gross negligence violated and failed to comply with the duties imposed upon [it] to encrypt data and to expeditiously disclose the breach of security in accordance with S.C. Code Ann. § 1-11-490 and [is], therefore grossly, negligent *per se*." In his third cause of action, Plaintiff alleges that DSIT "formed a civil conspiracy" with the other Defendants "for the purpose of harming Plaintiff." Finally, in



his fourth cause of action, Plaintiff contends that DSIT owed Plaintiff "a duty to provide a reasonable standard of care under the circumstances by protecting Plaintiff's personal identifying information" but that DSIT "failed to exercise slight care and [has] willfully, wantonly, recklessly, and with gross negligence breached the standard of care owed to Plaintiff . . . ."

### Legal Standard

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCR must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007); *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Doe*, 373 S.C. at 395, 645 S.E.2d at 247-48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

### Law / Analysis

#### **I. Plaintiff Lacks Standing to Sue.**

##### **A. Plaintiff has not suffered an injury-in-fact.**

The Court finds and concludes that Plaintiff lacks standing to sue because while Plaintiff has alleged that his personal identifying information was stolen, he has not alleged a present injury. Instead, his claims are based on hypothetical, future events. Thus, Plaintiff has not suffered a present injury-in-fact as a matter of law. Accordingly,

57-3

the Court grants DSIT's motion to dismiss all claims set forth in Plaintiff's Amended Complaint.

A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) (citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985)). Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Michael P. v. Greenville Cnty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009) (citing *Powell ex rel. Kelley v. Bank of Am.*, 397 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008)). To have standing, a party must therefore have a personal stake in the subject matter of a lawsuit. *Sloan, supra* (citing *Newman v. Richland County Hist. Preserv. Com'n.* 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997)); *Sea Pines Ass'n for the Protection of Wildlife v. S.C. Dep't. of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "[S]uch imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public." *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992).

To have standing, "[a] plaintiff must allege an actual controversy in which he has a personal stake." *Beaufort Realty Co., Inc.*, 346 S.C. at 301, 551 S.E.2d at 589. Moreover, a party must demonstrate standing for each form of relief sought. *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 185 (2000); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court articulated the "irreducible constitutional minimum" that standing requires:



First, the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 560-61 (citations and internal quotation marks omitted) (alterations in original).<sup>2</sup>

The party seeking to establish standing “carries the burden of demonstrating each of the three elements.” *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 290.

In the present case, the Court finds that Plaintiff lacks standing because he has failed to plead an injury in fact. 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.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal citations omitted). Allegations of possible future injury are not enough to survive a motion to dismiss.

Allegations of ‘possible future injury’ are not sufficient to satisfy Article III. Instead, “[a] threatened injury must be certainly impending,” and “proceed 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[.]” A plaintiff therefore lacks standing if his ‘injury’ stems from an indefinite risk of future harms inflicted by unknown third parties.

*Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (internal citations omitted).

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<sup>2</sup> The standard articulated by the United States Supreme Court in *Lujan* has been adopted by and applies with equal force to cases arising under state law. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

The Court finds that Plaintiff has alleged no current misuse of Plaintiff's personal information, and therefore, no current judicially cognizable injury. According to Plaintiff, he "has suffered actual damages and is in imminent danger of suffering further material injury and loss." However, Plaintiff fails to identify the actual damage he allegedly has suffered as a result of the breach of the DOR's database. At most, Plaintiff alleges he has been "placed in a material risk of harm for identity theft." However, the Court finds that South Carolina law imposes no liability "merely for the creation of risk when there are no actual damages" because to do so would "drastically change[] the fundamental elements of a tort action" and "make[] any amount of damages entirely speculative." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). In other words, a claim cannot survive dismissal when damages are speculative. *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.").

Moreover, the Court finds that Plaintiff has not pleaded a distinct and palpable injury or an actual and imminent harm. "The requirement of an actual or imminent injury ensures that the harm has either happened or is sufficiently threatening; it is not enough that the harm might occur at some future time." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (citing *Lujan*, 504 U.S. at 560, n.1). The Court finds that "[i]n the identity theft context, courts have embraced the general rule that an alleged increase in risk of future injury is not an 'actual or imminent' injury." *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 689 (S.D. Ohio 2006). "Consequently, courts have held that plaintiffs do not have standing, or have granted summary judgment for failure to establish damages in cases involving identity theft or claims of negligence and breach of confidentiality brought in



response to a third party theft or unlawful access to financial information . . . .” *Id.* (citing cases). See *Reilly*, 664 F.3d at 42 (concluding that “[u]nless and until [appellants’] conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm”); *Hammond v. The Bank of New York Mellon Corp.*, No. 08-civ-6060 (RMB) (RLE), 2010 WL 2643307, \*7 (S.D.N.Y. June 25, 2010) (concluding, in a suit for damages for loss of personal identification information, that “Plaintiffs lack standing because their claims are future-oriented, hypothetical, and conjectural”); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1052-53 (E.D. Mo. 2009); *Hinton v. Heartland Sys., Inc.*, No. 09-594 (MLC), 2009 WL 704139 (D.N.J. Mar. 16, 2009) (dismissing plaintiff’s complaint because, among other things, plaintiff’s allegations of injuries “amounts to nothing more than speculation”); *Pinero v. Jackson Hewett Tax Serv., Inc.*, 594 F. Supp. 2d 710, 714-16 (E.D. La. 2009) (concluding that the possibility that personal information was put at an increased risk did not constitute actual injury); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 7-8 (D.C.D.C. 2007) (concluding that plaintiffs have failed to allege an injury in fact and thus lack standing since plaintiffs’ allegations “amount to mere speculation that at some unspecified point in the indefinite future they will be the victims of identity theft”); *Kahle v. Litton Loan Servicing, LP*, 486 F. Supp. 2d 705 (S.D. Ohio 2007) (“A complaint alleging the mere potential for an injury does not satisfy Plaintiff’s burden to prove standing.”). See also *Giordano v. Wachovia Sec., LLC*, No. 06-476 (JBS), 2006 WL 2177036, \*4 (D.N.J. July 31, 2006) (“Plaintiff’s allegations that, as a result of Wachovia’s actions, she will incur costs associated with obtaining credit monitoring

627

services in order to prevent identity theft simply does not rise to the level of creating a concrete and particularized injury.”).

In his brief to this Court, Plaintiff contends that “some jurisdictions have regarded the cost of insurance against identity theft as damages by way of ‘mitigation,’ in particular when it is reasonably certain that other persons whose information was disclosed from the same breach has been used.” However, Plaintiff’s reliance on *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011) is unavailing. In *Anderson*, a third party breached defendant’s electronic payment processing system, resulting in 1,800 unauthorized charges to defendant’s customer accounts. The First Circuit, applying Maine law, found that the stolen data “was used to run up thousands of improper charges across the globe to the customers’ accounts. The card owners were not merely exposed to a hypothetical risk, but to a real risk of misuse[.]” 659 F.3d at 164, and therefore plaintiffs “had a reasonable basis for purchasing identity theft insurance to avoid further damage.” *Id.* at 166.

Unlike *Anderson*, the Court finds that Plaintiff does not allege that his personal identifying information has been used by a third party as a result of the alleged breach. Nor has Plaintiff alleged that he has purchased or incurred identity theft insurance costs. Contrary to Plaintiff’s assertion, the overwhelming trend in recent years has been to find that Plaintiffs in identity theft cases do not have standing. The principal factor in cases that have found that a plaintiff has standing is the existence of “persons involved in [the] breach [that] have acted on the ill-gotten information.” *Katz*, 672 F.3d at 80. Indeed, the analysis of the court in *Katz*, another First Circuit case decided a year after *Anderson*, is directly on point for the present case:

 8

In this case, the plaintiff purchased identity theft insurance and credit monitoring services to guard against a possibility, remote at best, that her nonpublic personal information might someday be pilfered. Such a purely theoretical possibility simply does not rise to the level of a reasonably impending threat.

[Plaintiff's] cause of action rests entirely on the hypothesis that at some point an unauthorized, as-yet unidentified, third party might access her data and then attempt to purloin her identity. The conjectural nature of this hypothesis renders the plaintiff's case readily distinguishable from cases in which confidential data actually has been accessed through a security breach and persons involved in that breach have acted on the ill-gotten information. *Cf. Anderson v. Hannaford Bros.*, 659 F.3d 151, 164-65 (1st Cir. 2011) (holding purchase of identity theft insurance in such circumstances reasonable in negligence context). Given the multiple strands of speculation and surmise from which the plaintiff's hypothesis is woven, finding standing in this case would stretch the injury requirement past its breaking point.

*Id.* at 80-81.

The Court concludes that the failure of Plaintiff to allege an actual misuse of his personal identifying information is fatal to this case. *Worix v. MedAssets, Inc.*, 857 F. Supp. 2d 699, 705 (D. Ill. 2012) (granting defendant's motion to dismiss because plaintiff "does not allege that his data has been misused. Thus *Anderson* does not help his case"). Plaintiff has not suffered any actual damage. Plaintiff's allegations of possible future loss is mere speculation and does not amount to an actual or imminent harm. Without an actual or imminent harm, Plaintiff lacks standing to bring this action.

**B. Section 1-11-490 does not confer standing.**

According to Plaintiff, section 1-11-490 "create[s] the mechanism through which South Carolina residents may bring claims against State agencies and private individuals responsible for maintaining the integrity and security of the personal identifying

6029

information of South Carolina residents.” (Pl’s Mem. 18.) The Court finds and concludes that while section 1-11-490 creates a right to sue, it does not create standing to sue.

Standing can be created by statute. *E.g., Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) (observing that the FOIA “contains a specific standing provision allowing any citizen of South Carolina to seek a declaratory judgment or injunctive relief to enforce the Act’s requirements”). Section 1-11-490(G) provides that “[a] resident of this State *who is injured* by a violation by a violation of this section, in addition to and cumulative of all other rights and remedies available at law, may: (1) institute a civil action to recover damages . . . .” (Emphasis added). Thus, the Court finds that while section 1-11-490 provides a right to sue, a necessary prerequisite to exercising that right is that the party instituting such an action must be “a resident of this State who is injured by a violation of this section . . . .” As demonstrated above, Plaintiff has not alleged a judicially cognizable present injury. Accordingly, the Court concludes that Plaintiff does not have standing under section 1-11-490.

Because each claim in Plaintiff’s Amended Complaint requires damages in order to confer standing or as an element of the claim, the Court grants DSIT’s Motion to Dismiss Plaintiff’s Amended Complaint.

**II. DSIT has Complied With its Duty Under Section 1-11-490 and Therefore the Court Dismisses Plaintiff’s Statutory Claim Against DSIT.**

Even if the Court were to conclude Plaintiff has standing, independent grounds exist to grant DSIT’s motion as to each cause of action set forth in Plaintiff’s Amended Complaint.

GC 10

In his first cause of action, Plaintiff seeks a declaration that DSIT “knowingly and willfully breached” section 1-11-490 and that “pursuant to S.C. Code Ann. § 1-11-490(g)(1), Plaintiff is entitled to institute this suit to recover damages.”

Section 1-11-490 of the South Carolina Code of Laws (Supp. 2012) provides, in relevant part, as follows:

(A) An agency<sup>3</sup> of this State *owning or licensing computerized data* or other data that includes personal identifying information *shall disclose a breach of the security of the system* following the discovery or notification of the breach in the security of the data to a resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident. *The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement*, as provided in subsection (C), or with measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

(B) An agency *maintaining computerized data* or other data that includes personal identifying information that the agency does not own *shall notify the owner or licensee of the information of a breach of the security of the data immediately following discovery*, if the personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person.

(Emphasis added.)

The Court finds that section 1-11-490 is a notification statute. It imposes no duty to encrypt data. An agency that maintains the computerized data must “notify the owner

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<sup>3</sup> “Agency” is defined as “any agency, department, board, commission, committee, or institution of higher learning of the State or a political subdivision of it.” S.C. Code Ann. § 1-11-490 (D)(1).

or licensee" of a breach immediately following discovery. S.C. Code Ann. § 1-11-490(B), while an agency owning or licensing the computerized data must notify residents of the State affected by the breach. S.C. Code Ann. § 1-11-490(A).

DSIT does not concede that it fits within the statutory categories. Nor does Plaintiff allege that DSIT owned, licensed, or maintained the computerized data. Indeed, at the hearing, DOR averred that it owned and licensed the data. Moreover, Plaintiff's own allegations support the fact that DOR, not DSIT, owns, licenses, and maintains the data. In his Amended Complaint, Plaintiff alleges that "[u]pon information and belief, on or about August 27, 2012, third persons infiltrated *the database of the South Carolina Department of Revenue* . . . ." Therefore, because Plaintiff failed to allege that DSIT owns, licenses, or maintains the data, his claim for violation of section 1-11-490 fails.

Even if Plaintiff pled that DSIT owns, licenses, or maintains the breached data, Plaintiff's statutory claim still fails because section 1-11-490 is only a notification statute. As alleged by Plaintiff, DSIT provided the requisite notice. In his Amended Complaint, Plaintiff alleges that on October 10, 2012, DSIT "informed the S.C. Department of Revenue and the Nikki Haley administration of the breach."<sup>4</sup> The Court therefore concludes that any duty DSIT theoretically could have under the statute was, by Plaintiff's own admission, performed by DSIT. Accordingly, on the face of the Amended Complaint, the Court concludes that DSIT is not liable for breach of this statutory claim.

### **III. Plaintiff's Remaining Common Law Claims Fail as a Matter of Law.**

#### **A. Plaintiff's second cause of action for negligence *per se* fails as a matter of law and therefore is dismissed.**

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<sup>4</sup> As noted above, DOR was notified, in fact on August 13, 2012 of suspicious activity.

GT 12



Plaintiff alleges in his second cause of action that DSIT has a statutory duty to render data "unusable through encryption". The Court disagrees and therefore Plaintiff's second cause of action fails as a matter of law.

"A statute can establish a duty to plaintiff." *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001) (citing *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991)). "Negligence *per se* is negligence arising from a defendant's violation of a statute." *Wogan v. Kunze*, 366 S.C. 583, 602, 623 S.E.2d 107, 117 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008). "Negligence *per se* is established by proof that a party violated a statute which has the essential purpose of protecting persons such as the injured party from the kind of harm suffered." *Kennedy v. Griffin*, 358 S.C. 122, 129, 595 S.E.2d 248, 251-52 (Ct. App. 2004) (quoting *Gulledge v. McLaughlin*, 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997)). In order to establish negligence *per se*, "the plaintiff must prove violation of the statute was causally linked, both in fact and proximately, to the injury." *Hurst v. Sandy*, 329 S.C. 471, 478, 494 S.E.2d 847, 850 (Ct. App. 1997) (quoting *Whitlaw v. Kroger Co.*, 306 S.C. 51, 55, 410 S.E.2d 251, 253 (1991)); *Seals by Causey v. Winburn*, 314 S.C. 416, 418, 445 S.E.2d 94, 96 (Ct. App. 1994) ("The violation of a statute, while negligence *per se*, will not support a recovery for damages unless such violation proximately caused or contributed to the injury complained of.") Thus,

[i]t is not enough for a plaintiff to show that the defendant neglected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must also show that his injury was caused by exposure to a hazard which the statute was designed to prohibit.

62-13

*Winburn*, 314 S.C. at 419, 445 S.E.2d at 96 (citing *Bell v. Atl. Coast Line R. Co.*, 202 S.C. 160, 24 S.E.2d 177 (1943)).

In his second cause of action, Plaintiff contends that DSIT owed Plaintiff a duty to comply with section 1-11-490 "by rendering data 'unusable through encryption, redaction, or other methods' and disclosing any breach of security of personal identifying information 'in the most expedient time possible and without unreasonable delay.'" Plaintiff alleges further that DSIT "willfully, wantonly, recklessly, and with gross negligence failed to comply with the duties imposed in [it] to encrypt data and to expeditiously disclose the breach of security . . . ."

The Court finds that because DSIT does not own or license computerized data or other data that includes personal identifying information, section 1-11-490 imposes no such duty on DSIT.<sup>5</sup> "An agency maintaining computerized data or other data that includes personal identifying information that the agency does not own," owes *only* the duty to "notify the owner or licensee of the information of a breach of the security of the data immediately following discovery, if the personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person." S.C. Code Ann. § 1-11-490(B). To the extent that Plaintiff has alleged any injury, it is theft, not the failure to notify. As already noted, to the extent that DSIT even had a duty of notification, it has fully complied with that obligation. *See Cooney v. Chicago Pub. Sch.*, 943 N.E.2d 23, 28 (Ill. App. 2010) (concluding that while plaintiffs are correct that as a

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<sup>5</sup> Additionally, as previously discussed, Plaintiff failed to plead that DSIT owns, licenses, or maintains the breached data, and therefore, Plaintiff fails to sufficiently plead a cause of action against DSIT under section 1-11-490. Consequently, Plaintiff also fails to plead a cause of action for negligence *per se* because there is no cognizable claim for a statutory violation by DSIT.

*GA 14*

data collector, the school board violated the notification act because a breach of security occurred, the act “also codifies the remedy: the data collector must provide timely notice of a security breach to the parties affected,” which the school board did). Therefore, the Court concludes that DSIT cannot as a matter of law be liable for negligence *per se* and Plaintiff’s second cause of action is dismissed.

Moreover, the Court finds that even if DSIT breached a duty to Plaintiff under section 1-11-490, Plaintiff has failed to allege that he has suffered an injury that is distinct and palpable or a harm that is actual and imminent that was proximately caused by any failure of DSIT to notify. Accordingly, DSIT cannot be liable for negligence *per se* and Plaintiff’s second cause of action is dismissed. *See Trivelas*, 348 S.C. at 134, 558 S.E.2d at 275 (“The finding of a statutory violation, however, does not automatically lead to the recovery of damages. The plaintiff must prove the violation proximately caused the injury complained of by the injured party.”).

**B. Plaintiff’s third cause of action for civil conspiracy fails as a matter of law and therefore is dismissed.**

Plaintiff fails to plead adequately a cause of action for civil conspiracy. Therefore, the Court grants DSIT’s motion to dismiss Plaintiff’s third cause of action.

**I. Plaintiff fails to allege that DSIT acted with the intention of harming Plaintiff.**

Under South Carolina law, “the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damages.” *Pridgen v. Ward*, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Cl. App. 2010); *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (setting forth the elements of civil conspiracy). “The gravamen of the tort is the damage

GR 15

resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.” *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 10-11, 344 S.E.2d 379, 382 (Ct. App. 1986). “It is essential that the plaintiff prove all of these elements in order to recover.” *Pye*, 369 S.C. at 567, 633 S.E.2d at 511 (citing *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938)).

Specific intent is an essential element of civil conspiracy. *See Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (setting forth the elements of civil conspiracy, including “for the purpose of injuring the plaintiff”). In the present case, the Court finds that Plaintiff failed to allege that DSIT acted with the intention of harming Plaintiff. As a result, Plaintiff’s claim fails, and the third cause of action for civil conspiracy is dismissed.

2. **Plaintiff’s civil conspiracy claim fails to allege any separate acts or omissions as a part of the conspiracy.**

“In a civil conspiracy claim, one must plead acts in furtherance of the conspiracy that are separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.” *Cricketer Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010).

In the present case, the Court finds that Plaintiff merely alleges that “Defendants formed a combination to engage in a civil conspiracy for the purpose of harming Plaintiff,” and as “a direct and proximate result of the conspiracy of the Defendants, Plaintiff has suffered special damages.” Nowhere does Plaintiff allege any separate acts or omissions as a part of the alleged conspiracy. Accordingly, Plaintiff’s third cause of action is dismissed. *See Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) (“Because [the third party plaintiff] merely realleged the prior acts

 12

complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action.”).

3. **Plaintiffs’ civil conspiracy claim fails because any damages that might be recovered under this cause of action also could be recovered under one or more of the other causes of action in the Amended Complaint.**

“A plaintiff cannot recover damages for a particular act or wrong and likewise recover on a conspiracy to do the act or wrong.” *Peoples Fed. Sav. & Loan Ass’n of South Carolina v. Res. Planning Corp.*, 358 S.C. 460, 476, 569 S.E.2d 51, 59 (2004). “Special damages are those elements of damages that are the natural, but not the necessary or usual, consequences of the defendant’s conduct.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (Ct. App. 2009) (citing *Loeb v. Mann*, 39 S.C. 465, 469, 18 S.E. 1, 2 (1893)). These damages “are not implied at law because they do not necessarily result from the wrong.” *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875. Because the essence of a civil conspiracy claim “is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.” *Pye*, 369 S.C. at 568, 633 S.E.2d at 511; *Kuznik*, 342 S.C. at 610, 538 S.E.2d at 31 (“An action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues.”). As the South Carolina Supreme Court has noted,

‘[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.’

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17

*Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (quoting 15A C.J.S. *Conspiracy* § 33 (1967)), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).

In the present case, the Court finds that not only has Plaintiff failed to allege any separate acts that are the basis of the conspiracy claim, but Plaintiff has also failed to allege any special damages that resulted from the alleged conspiracy. Indeed, the damages alleged do not appear to be recoverable under any theory of law since Plaintiff lacks standing. Accordingly, Plaintiff's third cause of action is dismissed. *See Todd*, 276 S.C. at 293, 278 S.E.2d at 611 (dismissing conspiracy count where plaintiff could recover "no additional damages" on the conspiracy count); *Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (civil conspiracy claim dismissed where "[t]he damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action"); *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875 ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.")

4. **Plaintiff's conspiracy claim fails to allege facts sufficient to state a cause of action for civil conspiracy against DSIT on the ground that agencies cannot conspire with each other as a matter of law.**

Because two independent parties are a necessity for an actionable conspiracy, a corporation cannot conspire with itself. *Pridgen*, 391 S.C. at 244, 705 S.E.2d at 62; *see also McClain v. Pactiv Corp.*, 360 S.C. 480, 486, 602 S.E.2d 87, 90 (Ct. App. 2004); *Lee*, 289 S.C. at 14, 344 S.E.2d at 383. As a matter of law, a civil conspiracy cannot exist "when the alleged acts arise in the context of a principal-agent relationship because by

41 78

virtue of the relationship such acts do not involve separate entities.” *McMillan v. Oconee Mem’l Hosp.*, 367 S.C. 559, 626 S.E.2d 884 (2006). Moreover, agents of a corporation, acting within the course and scope of their employment, cannot conspire with each other. *Cricket Cove Ventures*, 390 S.C. at 325, 701 S.E.2d at 46 (citing *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (“[A] corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves.”)). “An act is within the scope of a servant’s employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master’s business.” *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006).

As alleged in the Amended Complaint, DSIT “is an agency of the State of South Carolina.” Consequently, the Court finds that DSIT, as an agency, cannot conspire with other state agencies. In other words, there is no combination of two or more persons, as a matter of law, to support a conspiracy claim. Therefore, the Court concludes that Plaintiff’s civil conspiracy claim against DSIT fails as a matter of law, and Plaintiff’s third cause of action is dismissed.

**C. Plaintiff’s fourth cause of action for gross negligence fails as a matter of law because as a matter of law DSIT owes no duties to Plaintiff.**

In his fourth cause of action for gross negligence, Plaintiff contends that DSIT owed him “a duty to provide a reasonable standard of care under the circumstances by protecting Plaintiff’s personal information” but DSIT “failed to exercise slight care and [has] willfully, wantonly, recklessly, and with gross negligence breached the standard of care owed to Plaintiff by failing to exercise reasonable care under the circumstances in [its] handling of Plaintiff’s personal identifying information[.]”

62 19

“Gross negligence is defined as ‘the failure to exercise slight care.’” *Berberich v. Jack*, 392 S.C. 278, 287, n.1, 709 S.E.2d 607, 612, n.1 (2011) (quoting *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007), quoting in turn *Steinke v. S.C. Dep’t of Labor, Licensing & Reg.*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (199)). “Gross negligence ‘is a relative term, and means the absence of care that is necessary under the circumstances.’” *Id.* “A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing.” *Hamilton v. Charleston County Sheriff’s Dep’t*, 399 S.C. 252, 255, 731 S.E.2d 727, 728 (Ct. App. 2012) (quoting *Jackson v. S.S. Dep’t of Corrs.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989)). However, “[f]or negligent conduct to become actionable, it must violate some specific legal duty owed to the plaintiff.” *Rice v. Sch. Dist. of Fairfield*, 317 S.C. 87, 93, 452 S.E.2d 352, 354 (Ct. App. 1995) (citing *Foster v. Greenville Cnty. Med. Soc’y*, 295 S.C. 190, 367 S.E.2d 468 (Ct. App. 1988)). “In the absence of a legal duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability.” *Id.*

As noted above, the only duty DSIT owed was to “notify the owner or licensee of the information of a breach of the security of the data immediately following discovery, if the personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person.” S.C. Code Ann. § 1-11-490(B). For purposes of this statute, the owner or licensee of the data is DOR, not DSIT. DSIT does not owe Plaintiff any duty as matter of law. Therefore, the Court concludes that DSIT cannot be liable to Plaintiff for gross negligence, Plaintiff’s fourth cause of action is dismissed.

GA 20



### Conclusion

DSIT's motion to dismiss is granted as to all causes of action set forth in Plaintiff's Amended Complaint.

**IT IS SO ORDERED.**



G. Thomas Cooper Jr.  
Presiding Judge

Columbia, South Carolina

2-27, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGE: \_\_\_\_\_ IN A CIVIL CASE

CASE NUMBER: 2012CP4007331

Phillip Morgan

South Carolina Dept of Revenue

PLAINTIFF(S)

Office of the Governor of the State of South Carolina  
DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);  
☐ Rule 43(k), SCRCP (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 28 February 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John David Hawkins

Robert E. Stepp  
Matthew Todd Carroll

Milton Gary Kimpson  
James Grant Long III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Phillip Morgan, Individually and on behalf of  
all similarly situated Plaintiffs,

Plaintiff,

vs.

Nimrata "Nikki" Haley, Governor of South  
Carolina; James F. Etter, Director of the South  
Carolina Department of Revenue; the South  
Carolina Department of Revenue; South  
Carolina Division of State Information  
Technology; Trustwave Corporation and  
Trustwave Holdings, Inc.,

Defendants.

IN THE CIRCUIT COURT

Case No. 20<sup>12</sup>~~11~~-CP-40-7331

**ORDER GRANTING  
TRUSTWAVE DEFENDANTS'  
MOTION TO DISMISS**

2013 FEB 27 PM 4:12  
CLERK OF COURT  
C.C.P. & G.S.

This matter was before the Court for hearing on the Defendants Trustwave Corporation and Trustwave Holdings, Inc.'s ("Trustwave Defendants") Motion to Dismiss. Present and appearing on behalf of the Plaintiff was John D. Hawkins, Esq., and C. Logan Rollins, Esq., and for the Trustwave Defendants, James G. Long, III, Esq., General Counsel for Trustwave Holdings, Inc., Alice Geene, Esq., was also present.

Having heard the arguments of counsel and reviewed the briefing of both parties, and based on the record before me, I make the following findings:

1. The Plaintiff has commenced a lawsuit in response to the "data breach" that occurred at the South Carolina Department of Revenue. The Plaintiff has sued the Governor of South Carolina, the South Carolina Department of Revenue and its former director, Mr. Etter, the South Carolina Division of State Information Technology, and these Defendants, Trustwave Holdings, Inc. and Trustwave Corporation. The Trustwave Defendants are the only non-South

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Carolina Defendants and are sued because according to the allegations in the Amended Complaint, the Trustwave Defendants "were charged with the duty of securing the personal identifying information."

2. The Plaintiff asserts four causes of action against the Trustwave Defendants: civil conspiracy, violation of S.C. Code Ann. § 39-1-90, negligence *per se*, and negligence.<sup>1</sup> Unlike the federal counterpart, South Carolina's Rules of Civil Procedure require the pleading of facts as opposed to simply stating a claim for a complaint to be sufficient. *See* Notes to Rule 8(a), SCRCP. Failure of a plaintiff to plead facts sufficient to constitute a cause of action against a defendant warrants a dismissal under Rule 12(b)(6), SCRCP. This Court "must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." *Hambrick v. GMAC Mortgage*, 370 S.C. 118, 122, 643 S.E.2d 5, 7 (Ct. App. --- 2006). "A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003).

3. The elements of civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage." *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 D.E.2d 871, 874 (Ct. App. 2009). In addition to alleging facts to support each element, the Plaintiff must allege special damages that must "go beyond the damages alleged in other causes of action." *Id.* Other than the statement setting forth a legal conclusion that "Defendants formed a combination to engage in a civil conspiracy for the purpose of harming Plaintiff," the Amended Complaint lacks any factual allegations to support the claim of a civil conspiracy. A "plaintiff's obligation to provide

<sup>1</sup> The Trustwave Defendants also moved to have this action dismissed as to Trustwave Corporation under Rule 12(b)(5), SCRCP. The parties have resolved this issue by separate stipulation filed with the Court.

the grounds of his entitle[ment] to relief require more than labels and conclusion, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (quotations omitted). I find that the allegations set forth on the face of the Amended Complaint fail to state facts sufficient to constitute a cause of action for civil conspiracy against the Trustwave Defendants.

4. I further find that the Plaintiff has not alleged damages arising from the alleged civil conspiracy that are separate or distinct from the damages arising from his other causes of action, as all of his causes of action arise from the same set of facts and seek the same or similar relief. *See Hackworth* at 117, 692 S.E.2d at 875 (holding a civil conspiracy claim must be dismissed where a plaintiff merely repeats damages arising from other claims); *see also AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167-68, 708 S.E.2d 218, 222-23 (Ct. App. 2011). “While general damages are the immediate, direct, and proximate result of the tortfeasor’s conduct, special damages are the natural, but not the necessary or usual, consequence of the tortfeasor’s conduct. Moreover, dismissal of a claim for civil conspiracy is appropriate when a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim.” *Benedict College v. Natl. Credit Systems, Inc.*, 400 S.C. 538, \_\_\_, 735 S.E.2d . 518, 522 (Ct. App. 2012) (internal quotations omitted). Items of special damage claimed must be “specifically stated.” Rule 9(g). SCRCP. As a result, the Plaintiff’s claim for civil conspiracy is hereby dismissed for the reasons set forth in Findings three and four.

5. The Plaintiff asserts two separate claims arising from the Trustwave Defendants’ alleged breach of South Carolina Code Section 39-1-90.<sup>2</sup> The Amended Complaint makes no

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<sup>2</sup> The provision by its terms applies to “[a] person conducting business in this State, and owning or licensing computer data or other data” . . . and “[a] person conducting business in this State and maintaining computerized data or other data that includes personal identifying information that the person does not own . . . .” S.C. Code Ann. § 39-1-90(a)-(b).

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allegation that the Trustwave Defendants either "own or license computer data" or "maintain computerized data." S.C. Code Ann. § 39-1-90(a)-(b). The only allegation made as to the Trustwave Defendants is that "[u]pon information and belief. Defendants Trustwave and Trustwave Holdings were charged with the duty of securing the personal identifying information." *Id.* at ¶ 21. I find that this sole factual allegation is an insufficient basis to infer that the Trustwave Defendants own, license or maintain the personally identifying information at issue.

6. At the hearing, counsel for the South Carolina Department of Revenue stated that the SCDOR "owned" the data at issue.<sup>3</sup> Further, counsel for the South Carolina Division of State Information Technology asserted that SCDSIT physically "houses" the data, acting as a "landlord." As to the owning, licensing or maintenance of the computerized data by the Trustwave Defendants, it is insufficient for the Plaintiff to simply assert that "upon information and belief, [the Court] should declare that [the Trustwave Defendants] have breached S.C. Code Ann. § 39-1-90 . . . . *Id.* at ¶ 49. The Plaintiff "cannot transform an unsupported proposition of law into a statement of fact merely by stating that [he is] informed and believe[s] it to be so." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 635, 699 S.E.2d 699, 705 (Ct. App. 2010). If the Trustwave Defendants do not own, license or maintain the data, the statute does not apply to them. In light of the allegations on the face of the Amended Complaint and the arguments at the hearing, there is no basis on which the Court could infer that the Trustwave Defendants are subject to the provisions of S.C. Code Ann. § 39-1-90, much less that the same have been breached. Therefore, I find that the Amended Complaint fails to state facts sufficient to constitute a cause of action for breach of Code Section 39-1-90 against the Trustwave

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<sup>3</sup> The Amended Complaint appears to acknowledge that the Department of Revenue owned the data. *See* Am. Compl. ¶ 49 (stating that "third parties infiltrated the database of the South Carolina Department of Revenue").

512

Defendants. As a result, I find that the Plaintiff's cause of action for breach of S.C. Code Ann. § 39-1-90 is hereby dismissed.

7. "Negligence *per se* is established by showing a statute created a duty to the plaintiff and the defendant breached that duty by violating the statute." *Seals by Causey v. Winburn*, 314 S.C. 416, 418, 445 S.E.2d 9496 (Ct. App. 1994). Because the Plaintiff has not alleged facts sufficient to evidence or infer that the Trustwave Defendants violated S.C. Code Ann. § 39-1-90, the claim for negligence *per se* fails to state facts sufficient to constitute a cause of action against the Trustwave Defendants. Further, Plaintiff has not alleged violation of any other statute except S.C. Code Ann. § 39-1-90. As a result, I find the Plaintiff's cause of action for negligence *per se* is hereby dismissed.

8. The Plaintiff's claim for negligence asserts only a legal conclusion that the Trustwave Defendants "owed Plaintiff a duty to provide a reasonable standard of care under the circumstances by protecting and securing Plaintiff's personal identifying information . . . ." To state a claim for relief under a negligence theory, the Plaintiff must allege facts demonstrating the occurrence of three distinct elements: a duty of care owed by the defendant; a breach of that duty by negligent act or omission; and damage proximately caused thereby. "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence. 'Proof of negligence in the air, so to speak, will not do.'" *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322-23, 548 S.E.2d 854, 857 (2001) (quoting *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99, 99 (1928) (quoting Sir Frederick Pollock). Other than the statutory provision underlying the causes of action addressed above, the Amended Complaint does not plead any



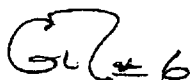
facts to support a finding of a duty owed by the Trustwave Defendants to the Plaintiff. As a result, I find that the cause of action for negligence is hereby dismissed.

9. In the alternative to the rulings herein under Rule 12(b)(6), SCRCP, on the individual causes of action alleged, I find that the Plaintiff is barred from any recovery as sought by the Amended Complaint because he has not alleged any physical harm or damage to property and therefore the economic loss rule bars his recovery. "Imposing liability merely for the creation of risk when there are no actual damages drastically changes the fundamental elements of a tort action, [and] makes any amount of damages entirely speculative . . . ." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). Because the economic loss rule prevents recovery in tort of the purely economic losses contemplated (though not alleged) in the Amended Complaint, the entire action must be dismissed for failure to allege damages cognizable by the Court.

10. In the alternative to the rulings herein under Rule 12(b)(6), SCRCP, on the individual cause of action alleged, I find that the Plaintiff does not and cannot allege a cognizable injury and, therefore, the Plaintiff lacks standing to initiate this lawsuit. As stated succinctly in the Third Circuit Court of Appeals in a case arising out of a data breach from an unknown hacker:

We conclude that Appellants' allegations of hypothetical, future injury are insufficient to establish standing. Appellants' contentions rely on speculation that the hacker: (1) read, copied, and understood their personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of Appellants by making unauthorized transactions in Appellants' names. Unless and until these conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm.

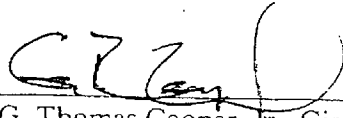
*Reilly v. Ceridian Corp.*, 664 F.3d 38 (3rd Cir. 2011). As a result, I find that the entire action must be dismissed.





ACCORDINGLY, based on the findings set forth herein, it is hereby ORDERED that the Plaintiff's Complaint against Trustwave Holdings, Inc. is DISMISSED with prejudice.

IT IS SO ORDERED.

  
\_\_\_\_\_  
G. Thomas Cooper, Jr., Circuit Court Judge  
Fifth Judicial Circuit

February 27, 2013  
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Phillip Morgan  
Individually, and on behalf of all similarly  
situated Plaintiffs.

Plaintiff.

vs.

Nimrata "Nikki" Haley, Governor of  
South Carolina; James F. Etter, Director  
of the South Carolina Department of  
Revenue; the South Carolina  
Department of Revenue; South Carolina  
Division of State Information  
Technology; Trustwave Corporation;  
and Trustwave Holdings, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-40-7331

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:

John Hawkins

Logan Rollins, Bar No. 05891

Address:

P.O. Box 5048 Spartanburg, SC 29303

Phone: 864-574-8801 Fax 864-574-8810

E-mail: John@hawkinslawsc.com Other:

Defendant's Attorney:

N/A. Bar No. \_\_\_\_\_

Address:

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration

Estimated Time Needed: 1 Hour

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

Date submitted 3/8/13

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

☐ Other: \_\_\_\_\_

Record on Appeal

370

|                                                                                                                            |                                     |
|----------------------------------------------------------------------------------------------------------------------------|-------------------------------------|
| <b>JUDGE'S SECTION</b>                                                                                                     |                                     |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____ | JUDGE CODE _____<br><br>Date: _____ |
| <b>CLERK'S VERIFICATION</b>                                                                                                |                                     |
| Collected by: _____ Date Filed: _____                                                                                      |                                     |
| <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____                                                                    |                                     |
| <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____                                                                  |                                     |

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan,  
Individually, and on behalf of  
all similarly situated Plaintiffs,

v. )

Nimrata "Nikki" Haley, Governor of  
South Carolina; James F. Etter, Director  
of the South Carolina Department of  
Revenue; the South Carolina  
Department of Revenue; South Carolina  
Division of State Information  
Technology; Trustwave Corporation;  
and Trustwave Holdings, Inc.,

Defendants. )

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

**MOTION FOR RECONSIDERATION**

**Civil Action No. 2012-CP-40-7331**

FILED  
MAR 13 2013  
CLERK OF COURT  
FIFTH JUDICIAL CIRCUIT  
SOUTH CAROLINA

Plaintiff, Philip Morgan, by and through undersigned counsel, hereby moves pursuant to SCRCP 59(e), and/or SCRCP 52 for an Order revising, altering, or amending the judgment filed on February 28, 2013 and received by Plaintiff's counsel on March 1, 2013. The grounds for this motion are that the trial court erred in dismissing Plaintiff's Complaint with prejudice without giving Plaintiff leave to amend his Complaint *in lieu* of dismissal, and Plaintiff specifically requests that the Honorable Court amend its Orders in this matter to be without prejudice if it does not alter its judgment. When a party moves to dismiss under Rule 12(b)(6), "[t]he motion cannot be sustained if facts alleged in the complaint *and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.*" Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697, (1984) (emphasis added) (citations omitted). In addition, "[i]n determining whether any triable issues of fact exist, the evidence and all

inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid South Management Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). In addition, “[t]he complaint should not be dismissed merely because the court doubts that plaintiff will prevail in the action.” Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E. 2d 8, 9 (1987).

The Brown Court stated:

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides in pertinent part that: “[I]f on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, *matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*” [Emphasis in original].

[ . . . ] It is our view the language of the Rule is clear, and it states plainly that the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings *if* the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure.

Brown at 366-67, 698.

Furthermore, South Carolina precedent is clear on the liberality with which motions to amend must be granted:

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881(2006) Citing Foman v. Davis 371 U.S. 17: "The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman at. 181-82.

In the instant case, Plaintiff's Complaint as to Trustwave Defendants was dismissed, in large part, because "[t]he only allegation made as to the Trustwave Defendants is that '[u]pon information and belief, Defendants Trustwave and Trustwave Holdings were charged with the duty of securing the personal identifying information' instead of the Complaints stating, literally, 'Trustwave Defendants own, license or maintain the personally identifying information at issue.'" Order Granting Trustwave Defendants' Motion to Dismiss at ¶ 5. At the hearing for this matter, counsel for Plaintiff argued that the issue of what constitutes ownership and maintenance of the data was a question of fact to be determined through discovery. Similarly, the Order dismissing DSIT finds that DSIT did not own, maintain, or license the data (in spite of counsel for DSIT's concession that DSIT was the "landlord" for said data). The fact that Plaintiff's Complaint stated that the Defendants in this suit "secured" or controlled the data clearly articulates the role Plaintiff alleges the Defendants had, and Plaintiff clearly invoked both S.C. Code Ann. § 1-11-490 and S.C. Code Ann. § 39-1-90 when requesting relief. The mere fact that Plaintiff did not use the words "maintain" or "own" does not warrant dismissal of the action with prejudice when such a semantic distinction can be easily amended since "[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed." Cole Vision Corp. v. Hobbs, 394 S.C. 144, 714 S.E. 2d 537 (2011).

The Court also erred by considering improper matters—matters outside the four corners of the Complaint, in its Orders dismissing this action, and by elaborating on the underlying factual basis upon which this suit was brought when the parties had engaged in no discovery, and Plaintiff had not stipulated to any matter of fact as alleged at the

hearing for this matter by Defendants. Under South Carolina law, "where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record." Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589, FN 2.

With respect to Trustwave Defendants, the Court made a finding of fact "that SCDSIT 'houses' the data" and found that "[i]f the Trustwave Defendants do not own, license, or maintain the data, the statute does not apply to them" when no concession that Trustwave Defendants did not maintain or own the data was made, and such a determination that Trustwave Defendants could not have been made apart from the Court's relying on the bare assertions to that effect by counsel for Trustwave. The Orders as to the Office of the Governor and DSIT also found, as a matter of fact, that neither Defendant owed a statutory duty because they did not own, license, or maintain the data when no such fact exists apart from the parties' counsels' bare assertions of fact made at the hearing for this matter. Finally, in spite of the fact that SCDOR conceded that it did, in fact, "own" the data, SCDOR was dismissed without any elaboration as to why it was not liable to Plaintiff for owning the breached data.

Plaintiff further alleges that the Court erred as a matter of law in finding that Plaintiff lacked standing, that Plaintiff suffered no legally cognizable damages, and that Defendants owed no duties to Plaintiff, as well as by finding, as a matter of law, that S.C. Code Ann. §1-11-490 and S.C. Code Ann. § 39-1-90 are mere "notice" statutes under which Defendants could not be found liable to Plaintiff.



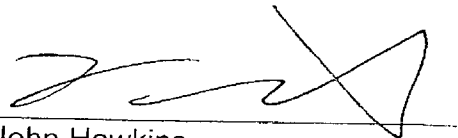
This Motion is supported by the applicable law, and may be amended or supplemented with documents, including memoranda, as well as by Counsel's arguments that shall be made at the hearing of this Motion.

Given the nature of this Motion, consultation with counsel for the Defendants is not required pursuant to South Carolina Rules of Civil Procedure.

WHEREFORE, Plaintiff Philip Morgan respectfully requests that this Court grant the following relief:

- a. That the Court amend, revise, or alter its previously filed Orders granting Defendants' Motions to Dismiss or that the Court enter an order against Defendants' motions to dismiss.
- b. That the Court grant such other and further relief of the nature of Plaintiff's cause may require.

Respectfully submitted,

By: 

John Hawkins  
Logan Rollins  
The Hawkins Law Firm  
P.O. Box 5048  
Spartanburg, SC 29304  
(864) 574-8801  
FAX: 574-8810  
Attorneys for Plaintiff

Date 3/8/13

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Phillip Morgan

Individually, and on behalf of all similarly  
situated Plaintiffs,

Plaintiff, )

vs. )

Nimrata "Nikki" Haley, Governor of  
South Carolina; James F. Etter, Director  
of the South Carolina Department of  
Revenue; the South Carolina  
Department of Revenue; South Carolina  
Division of State Information  
Technology; Trustwave Corporation;  
and Trustwave Holdings, Inc.,

Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-40-7331

**MOTION AND ORDER INFORMATION**

**FORM AND COVERSHEET**

Plaintiff's Attorney:

John Hawkins

Logan Rollins, Bar No. 05891

Address:

P.O. Box 5048 Spartanburg, SC 29303

Phone: 864-574-8801 Fax 864-574-8810

E-mail: John@hawkinslawsc.com Other:

Defendant's Attorney:

N/A, Bar No. \_\_\_\_\_

Address:

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)  
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)  
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

**SECTION I: Hearing Information**

Nature of Motion: Amended Motion for Reconsideration

Estimated Time Needed: 1 Hour

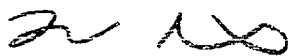
Court Reporter Needed: ☒ **YES** ☐ **NO**

**SECTION II: Motion/Order Type**

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for ☒ Plaintiff ☐ Defendant

3/11/2013

Date submitted

**SECTION III: Motion Fee**

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT.**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court: or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

☐ Other: \_\_\_\_\_

Record on Appeal

378

|                                                                                                                                                             |                                     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|
| <b>JUDGE'S SECTION</b>                                                                                                                                      |                                     |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                  | JUDGE CODE _____<br><br>Date: _____ |
| <b>CLERK'S VERIFICATION</b>                                                                                                                                 |                                     |
| Collected by: _____ Date Filed: _____<br><input type="checkbox"/> MOTION FEE COLLECTED: \$ _____<br><input type="checkbox"/> CONTESTED AMOUNT DUE: \$ _____ |                                     |

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
Phillip Morgan, )  
Individually, and on behalf of )  
all similarly situated Plaintiffs, )  
v. )  
Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina )  
Department of Revenue; South Carolina )  
Division of State Information )  
Technology; Trustwave Corporation; )  
and Trustwave Holdings, Inc., )  
Defendants. )

---

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

**AMENDED MOTION FOR  
RECONSIDERATION**

Civil Action No. 2012-CP-40-7331

Plaintiff, Philip Morgan, by and through undersigned counsel, hereby moves pursuant to SCRCP 59(e), and/or SCRCP 52 for an Order revising, altering, or amending the judgment filed on February 28, 2013 and received by Plaintiff's counsel on March 1, 2013. The grounds for this motion are that the trial court erred in dismissing Plaintiff's Complaint with prejudice without giving Plaintiff leave to amend his Complaint *in lieu* of dismissal, and Plaintiff specifically requests that the Honorable Court amend its Orders in this matter to be without prejudice if it does not alter its judgment. When a party moves to dismiss under Rule 12(b)(6), "[t]he motion cannot be sustained if facts alleged in the complaint *and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.*" Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697, (1984) (emphasis added) (citations omitted). In addition, "[i]n determining whether any triable issues of fact exist, the evidence and all

Furthermore, South Carolina precedent is clear on the liberality with which motions to amend must be granted:

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Foman at. 181-82.

In the instant case, Plaintiff's Complaint as to Trustwave Defendants was dismissed, in large part, because "[t]he only allegation made as to the Trustwave Defendants is that '[u]pon information and belief, Defendants Trustwave and Trustwave Holdings were charged with the duty of securing the personal identifying information' instead of the Complaints stating, literally, 'Trustwave Defendants own license or maintain the personally identifying information at issue.'" Order Granting Trustwave Defendants' Motion to Dismiss at ¶ 5. At the hearing for this matter, counsel for Plaintiff argued that the issue of what constitutes ownership and maintenance of the data was a question of fact to be determined through discovery. Similarly, the Order dismissing DSIT finds that DSIT did not own, maintain, or license the data (in spite of counsel for DSIT's concession that DSIT was the "landlord" for said data). The fact that Plaintiff's Complaint stated that the Defendants in this suit "secured" or controlled the data clearly articulates the role Plaintiff alleges the Defendants had, and Plaintiff clearly invoked both S.C. Code Ann. § 1-11-490 and S.C. Code Ann. § 39-1-90 when requesting relief. The mere fact that Plaintiff did not use the words "maintain" or "own" does not warrant dismissal of the action with prejudice when such a semantic distinction can be easily amended since "[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed." Cole Vision Corp. v. Hobbs, 394 S.C. 144, 714 S.E. 2d 537 (2011).

The Court also erred by considering improper matters—matters outside the four corners of the Complaint, in its Orders dismissing this action, and by elaborating on the underlying factual basis upon which this suit was brought when the parties had engaged in no discovery, and Plaintiff had not stipulated to any matter of fact as alleged at the

hearing for this matter by Defendants. Under South Carolina law, "where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record." Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589, FN 2.

With respect to Trustwave Defendants, the Court made a finding of fact "that SCDSIT 'houses' the data" and found that "[i]f the Trustwave Defendants do not own, license, or maintain the data, the statute does not apply to them" when no concession that Trustwave Defendants did not maintain or own the data was made, and such a determination that Trustwave Defendants could not have been made apart from the Court's relying on the bare assertions to that effect by counsel for Trustwave. The Orders as to the Office of the Governor and DSIT also found, as a matter of fact, that neither Defendant owed a statutory duty because they did not own, license, or maintain the data when no such fact exists apart from the parties' counsels' bare assertions of fact made at the hearing for this matter. Finally, in spite of the fact that SCDOR conceded that it did, in fact, "own" the data, SCDOR was dismissed without any elaboration as to why it was not liable to Plaintiff for owning the breached data.

Plaintiff further alleges that the Court erred as a matter of law in finding that Plaintiff lacked standing, that Plaintiff suffered no legally cognizable damages, that Defendants owed no duties to Plaintiff, and that the South Carolina Department of revenue is not subject to a class action suit, as well as by finding, as a matter of law, that S.C. Code Ann. §1-11-490 and S.C. Code Ann. § 39-1-90 are mere "notice" statutes under which Defendants could not be found liable to Plaintiff.

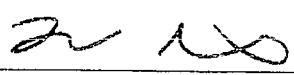
This Motion is supported by the applicable law, and may be amended or supplemented with documents, including memoranda, as well as by Counsel's arguments that shall be made at the hearing of this Motion.

Given the nature of this Motion, consultation with counsel for the Defendants is not required pursuant to South Carolina Rules of Civil Procedure.

WHEREFORE, Plaintiff Philip Morgan respectfully requests that this Court grant the following relief:

- a. That the Court amend, revise, or alter its previously filed Orders granting Defendants' Motions to Dismiss or that the Court enter an order against Defendants' motions to dismiss.
- b. That the Court grant such other and further relief of the nature of Plaintiff's cause may require.

Respectfully submitted,

By: 

John Hawkins  
Logan Rollins  
The Hawkins Law Firm  
P.O. Box 5048  
Spartanburg, SC 29304  
(864) 574-8801  
FAX: 574-8810  
Attorneys for Plaintiff

Date 5/11/15



STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan, )

Individually, and on behalf of )  
all similarly situated Plaintiffs, )

v. )

Nimrata "Nikki" Haley, Governor of )  
South Carolina; James F. Etter, Director )  
of the South Carolina Department of )  
Revenue; the South Carolina )  
Department of Revenue; South Carolina )  
Division of State Information )  
Technology; Trustwave Corporation; )  
and Trustwave Holdings, Inc. )

Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

**CERTIFICATE OF SERVICE**

Civil Action No. 2012-CP-40-7331

FILED  
2012 JUL 19 AM 11:49  
CLERK OF COURT

The undersigned certifies that she served a copy of the Plaintiff's Amended Motion for Reconsideration upon the attorneys for the Defendants via email and by placing a copy of the same in the United States Mail on the date listed below with the proper postage attached thereto, addressed to:

**The Honorable Jeanette W. McBride**  
**Richland County Clerk of Court**  
**P.O. Box 2766**  
**Columbia, SC 29202**

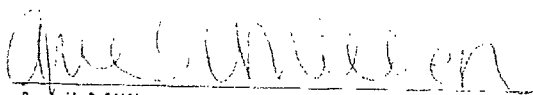
**Robert Tyson and Bobby Stepp**  
**Sowell Gray Stepp & Laffitte, LLC**  
**1310 Gadsden St**  
**Columbia, SC 29211**  
**rtyson@soweelgray.com**  
**rsteoo@sowellgray.com**

**M. Todd Carroll, Theodore Claypoole and Butch Bowers**  
**1727 Hampton Street**  
**Columbia, SC 29201**  
**Todd.carroll@wcsr.com**

Butch.bowers@wcsr.com  
tclaypoole@wcsr.com

Milton G. Kimpson  
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Columbia, SC 29211  
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Jennifer Hollingsworth and Jimmy Long  
Nexsen Pruet  
1230 Main Street Suite 700  
PO Draw 2426  
Columbia, SC 29202  
JHollingsworth@nexsenpruet.com  
jlong@nexsenpruet.com



April Million  
Paralegal to John Hawkins & Logan Rollins  
The Hawkins Law Firm  
PO Box 5048  
Spartanburg, SC 29304  
864-574-8801  
864-574-8810 (Fax)

March 11, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007331

Phillip Morgan

Trustwave Corporation

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- ☐ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration awards; ☐ Other \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF SELF CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 18 April 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John David Hawkins

Matthew Todd Carroll

James Grant Long III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Janette W. McBride*

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Phillip Morgan, individually and on )  
behalf of all similarly situated Plaintiffs, )

Plaintiff, )

vs. )

South Carolina Department of Revenue; )  
South Carolina Division of State )  
Information Technology; the Office of the )  
Governor of the State of South Carolina; )  
Trustwave Corporation; and Trustwave )  
Holdings, Inc., )

Defendants. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-40-7331

Order Denying Plaintiff's  
Motion to Reconsider

RICHLAND COUNTY  
FILED  
2013 APR 16 PM 1:40  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

This matter comes before the Court by way of Plaintiff Phillip Morgan's Motion to Reconsider pursuant to Rule 59(e) SCRCF and/or Rule 52 SCRCF. Specifically, Plaintiff asks this Court to reconsider its Order of February 27, 2013 dismissing Plaintiff's Complaint with prejudice without giving Plaintiff leave to amend his Complaint in lieu of dismissal.

This Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRCF to reconsider this Court's Order of February 27. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

April 16, 2013  
Columbia, South Carolina

  
G. Thomas Cooper, Jr.  
Judge, Fifth Judicial Circuit

RECEIVED  
JAN 22 1993

John David Hawkins  
PO Box 5048  
Spartanburg, SC 29304

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY  
Court of Common Pleas

Circuit Court Judge

Case No. 2012-CP-40-7331

Nimrata "Nikki" Haley, Governor of South Carolina; James F. Etter, Director of the South Carolina Department of Revenue; the South Carolina Department of Revenue; South Carolina Division of State Information Technology; Trustwave Corporation; and Trustwave Holdings, Inc. .... Respondents,

v.

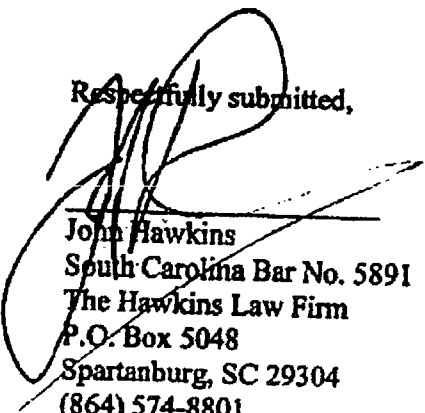
Phillip Morgan, Individually, and on behalf of all similarly situated  
Plaintiffs. .... Appellant

NOTICE OF APPEAL

Phillip Morgan, identified in the caption as Phillip Morgan, Individually, and on behalf of all similarly situated Plaintiffs, appeals the Orders of the Honorable G. Thomas Cooper, denying Plaintiff's Amended Motion for Reconsideration. Appellant received written notice of entry of this Order on April 23, 2012.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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(864) 574-8801

Logan Rollins  
South Carolina Bar No. 78395  
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(864) 574-8801

ATTORNEYS FOR APPELLANT

May 3, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM THE RICHLAND COUNTY  
Court of Common Pleas

Circuit Court Judge

Case No. 2012-CP-40-7331

---

Nimrata "Nikki" Haley, Governor of South Carolina; James F. Etter, Director of the South Carolina Department of Revenue; the South Carolina Department of Revenue; South Carolina Division of State Information Technology; Trustwave Corporation; and Trustwave Holdings, Inc.....Respondents,

v.

Phillip Morgan, Individually, and on behalf of all similarly situated  
Plaintiffs.....Appellant

---

**CERTIFICATE OF SERVICE**

---

I do hereby certify, on this 3<sup>rd</sup> day of May, 2013, that a copy of the foregoing Appellant's Notice of Appeal was served by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to counsel of record as follows:

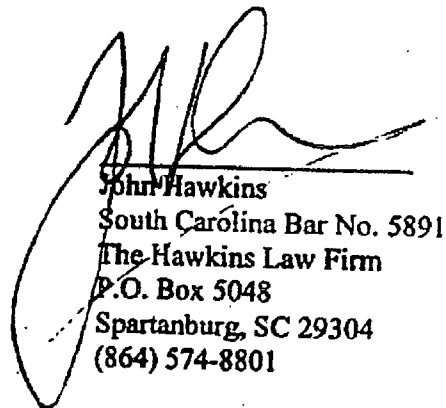
**Robert Tyson and Bobby Stepp  
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1310 Gadsden St  
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**M. Todd Carroll, Theodore Claypoole and Butch Bowers  
1727 Hampton Street**



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Jennifer Hollingsworth and Jimmy Long  
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ATTORNEYS FOR APPELANT

May 3, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

Phillip Morgan

CASE NUMBER: 2012CP4007331

Trustwave Corporation

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(e), SCRPC; ☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(g), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 18 April 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John David Hawkins

Matthew Todd Carroll

James Grant Long III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

SCRPC Form 4C (10/2011)

RECEIVED

Record on Appeal

394

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Phillip Morgan, individually and on  
behalf of all similarly situated Plaintiffs,

Plaintiff,

vs.

South Carolina Department of Revenue;  
South Carolina Division of State  
Information Technology; the Office of the  
Governor of the State of South Carolina;  
Trustwave Corporation; and Trustwave  
Holdings, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-40-7331

Order Denying Plaintiff's  
Motion to Reconsider

RICHLAND COUNTY  
FILED  
2013 APR 16 PM 1:40  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

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AND IT IS SO ORDERED.

April 16 2013  
Columbia, South Carolina

  
G. Thomas Cooper, Jr.  
Judge, Fifth Judicial Circuit

SCANNED

Record on Appeal

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY  
Court of Common Pleas

Circuit Court Judges

Case No. 2013-001096

**RECEIVED**

DEC 20 2013

**SC Court of Appeals**

Phillip Morgan, Individually and on Behalf of All Similarly Situated  
Plaintiffs,.....Appellant

v.

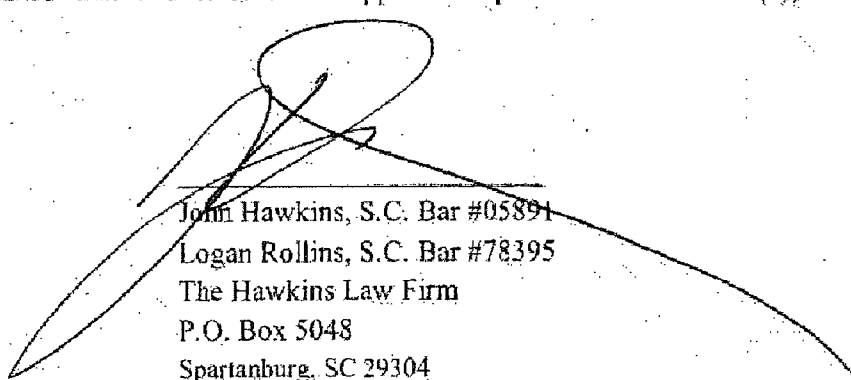
Office of the Governor, South Carolina Department of Revenue, South Carolina Division of  
State Information Technology, and Trustwave Holdings,  
Inc.,.....Respondents.

**CERTIFICATE OF COUNSEL**

The undersigned certified that this Record on Appeal complies with Rule 211(b),

SCACR.

January 7, 2014.



John Hawkins, S.C. Bar #05891  
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ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2013-001096

Phillip Morgan, Individually and on Behalf of All Similarly Situated  
Plaintiffs,.....Appellant,

v.

Office of the Governor, South Carolina Department of Revenue, South Carolina Division of  
State Information Technology, and Trustwave Holdings,  
Inc.,.....Respondents.

**PROOF OF SERVICE**

I CERTIFY THAT I HAVE SERVED THE Record on Appeal on Respondents,  
Office of the Governor, South Carolina Department of Revenue, South Carolina Division of  
State Information Technology, and Trustwave Holdings, by depositing a copy of the same in the  
United States Mail, postage prepaid, on December 17, 2013, to their attorneys of record as  
follows:

Robert Tyson and Bobby Stepp  
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**RECEIVED**  
DEC 20 2013  
**SC Court of Appeals**

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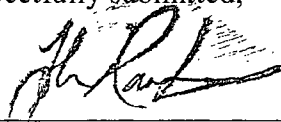
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[jlong@nexsenpruet.com](mailto:jlong@nexsenpruet.com)

The Honorable Jenny Abbott Kitchings  
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Respectfully submitted,



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ATTORNEYS FOR APPELLANT

December 17, 2013