UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation This Document Relates to: All Financial Institutions Cases	MDL No. 14-2522 (PAM/JJK) **FINANCIAL INSTITUTION PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION TO ENJOIN RELEASES AGAINST TARGET AND TO LIMIT AND CURE MISLEADING AND COERCIVE COMMUNICATIONS WITH PUTATIVE CLASS MEMBERS**

[REDACTED]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Umpqua Bank, Mutual Bank, Village Bank, CSE Federal Credit Union, and First Federal Savings of Lorain (collectively, "Plaintiffs"), individually and on behalf of a class of all similarly situated financial institutions in the United States ("Financial Institutions" or "issuing banks"), request that the Court: (1) enjoin the enforcement of any release of Defendant Target Corporation by any issuing bank who agrees to the proposed settlement between Target and MasterCard, and (2) enjoin or otherwise limit the misleading and coercive communications made in connection with Target's proposed settlement with MasterCard, among other requests for appropriate relief.

While Target is plainly free to negotiate and consummate an agreement to define, finalize, and receive a release from *its* liabilities to *MasterCard*, the proposed settlement between Target and MasterCard goes much further than that. It extinguishes claims that currently exist and which are wholly outside the scope of Target's liability exposure to MasterCard. This is because issuing banks already have the right to participate in the Account Data Compliance ("ADC") Program *without agreeing to a release*. Moreover, in an attempt to garner support for the agreement, Mastercard and Target have materially misrepresented the extent of putative class members' costs and losses and the nature of the settlement. Accordingly, Plaintiffs respectfully request that the Court grant their motion.

I. FACTUAL BACKGROUND

A. Target Is Attempting to Use MasterCard's Limited ADC Program to Completely Release Class Claims.

On April 15, 2015, Target Corporation ("Target") and MasterCard International Incorporated ("MasterCard") entered into a purported settlement agreement (the "Proposed Settlement"), that is designed to settle claims pending in this MDL without the involvement, review or approval of this Court or the Court-appointed counsel for the Financial Institutions Class (the "FI Class"). *See* Ex. 1, Proposed Settlement Agreement ("PSA")[1]; *see also* Order, ECF No. 64 at 4 (May 15, 2014) (appointing Lead Counsel). Target has surreptitiously been at work using MasterCard's ADC Program as a foil to achieve a global release of issuers' claims against Target. Through the prism of a third party reimbursement program that never had the capacity to fully reimburse financial institutions' losses in the first place, Target's "settlement" with MasterCard conspires to extinguish the financial institutions' claims against Target for extremely low amounts, despite the fact that Target's direct exposure to the financial institutions is much greater than what MasterCard's ADC Program and Security Rules create.

When Target's counsel informed the Court of its settlement discussions with MasterCard, Counsel understood that such discussions might lead to a settlement and release of MasterCard's claim against Target's acquiring banks (which are indemnified by Target), and that if amounts were made available by MasterCard to issuing banks via the network's ADC process, Target might even be entitled to an offset against putative

[1] All exhibits (e.g. Ex. 1) referenced within this memorandum are attached to the Declaration of Charles S. Zimmerman filed contemporaneously.

class members' final award. But Target has now included the requirement of a *full release* of all issuers' claims *against Target*. Target, with MasterCard acting in concert, attempts to impose this release despite the fact that:

- Minnesota's Plastic Card Act expressly provides only for an offset of "any amounts recovered from a credit card company by a financial institution," not a full release (Minn. Stat. § 325E.64, subd. 3.);

- MasterCard's ADC Program only "enables an Issuer to *partially* recover costs incurred in reissuing Cards" and "to recover *partial* incremental … counterfeit fraud losses" (Ex. 7, MasterCard Security Rules and Procedures § 10.2.5.3);

- Target has *no* privity with financial institution issuers through MasterCard's Security Rules or ADC Program; and

- MasterCard operating rules, regulations, or procedures do not anywhere contemplate a full release as part of any reimbursement program; the release sought by MasterCard and Target here was artificially added to try to eliminate the pending MDL and the jurisdiction of this Court.

Had Target or MasterCard disclosed to Lead Counsel and the Court that they were negotiating a settlement that would completely *eliminate* class action liability against Target, Lead Counsel would have asked to participate in the negotiations in the hope of obtaining a global settlement, or would have immediately brought this issue to the Court.

B. The Proposed Settlement Strips This Court and the JPML of Jurisdiction.

Target attempts to reassign the authority of this Court to another court to enforce the nullification of class members' claims. The Proposed Settlement provides that all issues regarding the Agreement, and consequently the data breach claims underlying the Agreement, be addressed by a New York state court in Manhattan or the United States District Court for the Southern District of New York. PSA at §§ 10.11.1 & 10.11.2. These provisions are obviously nothing more than forum shopping and an improper attempt to strip jurisdiction from both this Court and the Judicial Panel on Multidistrict Litigation.

C. The Proposed Settlement Is Designed to Release All of Target's Liability to Class Members with MasterCard Accounts.

The Proposed Settlement makes clear that Target intends to undermine this MDL and settle claims asserted by the FI Class. For example, the preamble to the Proposed Settlement defines the term "MDL" to mean this litigation, and goes on to state:

> WHEREAS, some or all of said MasterCard Issuers[2] have asserted or may assert claims, including those in … the MDL, to recover directly from the Target Acquirers and/or Target amounts representing losses and costs allegedly incurred by them in connection with the Target Intrusion; and
>
> WHEREAS, in order to settle claims and resolve other disputes among Target and the Target Acquirers, on the one hand, and MasterCard and certain MasterCard Issuers, on the other hand, with respect to the possible rights of MasterCard and MasterCard Issuers described above, and the actual and potential associated claims by MasterCard and MasterCard Issuers asserting such possible rights and other possible rights, Target and MasterCard have entered into this Settlement Agreement.

PSA at p. 2; *see also id.*, Exhibit 3 at 1 ("[t]he objective of the settlement is to resolve … claims that might be asserted by MasterCard issuers in any litigation or other proceeding in connection with the Target Intrusion.").

Indeed, the Proposed Settlement releases claims in this litigation, stating that any "Accepting Issuer" that participates in the Proposed Settlement shall irrevocably waive its right to assert against Target, and shall release Target from, any claim, recovery or other relief "in any litigation or other proceeding (including without limitation the

[2] "MasterCard Issuer" is defined in the Proposed Settlement as "an issuer of a MasterCard account," or financial institution that has issued a payment card bearing the MasterCard symbol. PSA at § 5.

pending putative class action proceedings consolidated under" [the MDL])." PSA at § 3.3; *see also* PSA, Exhibit 3 at 7 ("Eligible issuers must release all claims in their capacity as MasterCard Issuers against Target … including claims that are being or could be asserted in pending class action litigations, including *In re: Target Corporation Customer Data Security Breach Litigation*, MDL No. 14-2522 (PAM-JJK)"); *id.* at 8 ("any issuer that accepts the [settlement offer] will … give up its … rights to participate in, or recover amounts in, the putative financial institution class actions described above."). As discussed below, this type of release is not required of a financial institution under the terms of MasterCard's ADC Program. Thus, the release Target seeks here is clearly intended to thwart this Court's jurisdiction, impede the aggregation of class claims, and circumvent this Court's May 15 Order appointing Lead Counsel and this Court's oversight of the resolution of the class's claims. *See* Order, ECF No. 64 at 4 (May 15, 2014) (Lead Counsel cannot "enter binding agreements *except* to the extent expressly authorized").

D. The Proposed Settlement's Mandatory Participation Requirement Is Tantamount to a "Private" Class Settlement.

Further evidencing Target's intention to settle with financial institutions in the proposed class exclusively on a collective basis, the Proposed Settlement includes a mandatory-participation condition stating that the settlement only becomes effective if it covers and releases claims of at least 90% of the MasterCards compromised in the Breach – *i.e.*, if it eliminates nearly all of the MasterCard-related claims in the putative class. *See* PSA at § 4.1 ("This Settlement Agreement shall become void … in the event the

Unsatisfied Threshold Event occurs and the Opt-In Threshold Condition is not waived"); *id.* at p. 7 (defining "Opt-In Threshold Condition" to mean that the participants in the settlement "in the aggregate, comprise at least 90% of the Qualified Accounts of all Eligible Issuers").

E. Target and MasterCard Made Deceptive Statements and Omitted Relevant Information about the MDL in Their Communications with the FI Class.

The Proposed Settlement provides certain information to card-issuing financial institutions about this litigation and the claims for which Target seeks release. The Proposed Settlement includes as an exhibit a short purported description of this case. *See* PSA, Exhibit 3 at Ex. D. This description, however, omits several material facts, including, most notably, the fact that this case is scheduled for trial in just over ten months, on March 1, 2016, and that the claims and damages class members are required to release are much broader than the narrower relief obtainable through MasterCard. This supplemental information, provided during conference calls and via email, is designed to mislead putative class members into believing that the Proposed Settlement is their best (and perhaps only) avenue for recovery.

First, MasterCard sent an email to its issuing banks last week regarding the settlement agreement. In the email, MasterCard indicated:

> Under the agreement, Target will make up to $19 million in alternative recovery offers to eligible banks and credit unions across the globe to settle claims for operational costs and fraud-related losses on MasterCard-branded cards believed to have been affected by the data breach. *Each issuer will be compensated for 71.4 percent of these costs,* as calculated under MasterCard's ADC standards.

Ex. 3 (emphasis added). To the contrary, the settlement agreement provides for 71.4%, not of actual operational costs and fraud losses, but rather of an arbitrary "amount" calculated by MasterCard under the ADC Program. Ex. 4 at 1, 2, 5; PSA § 3.2.

For example, the actual costs associated with reissuing cards are substantially higher than the MasterCard and Target "offer" to one financial institution of $1.40 per card. The Independent Community Bankers of America has recently reported that it costs community banks approximately $10 - $15 per card for cards that have to be reissued because of fraud. Ex. 5. Similarly, the American Bankers Association's July 2014 Target Breach Impact Study reported that average conservative baseline reissue costs were $9.72 for debit cards and $8.11 for credit cards depending on bank size. Ex. 6 at 12. For banks with assets less than $1 billion, the average conservative baseline reissue costs were $11.02 for debit cards and $12.75 for credit cards. *Id* at 11. Larger banks had lower costs.

Moreover, the total losses actually suffered by card-issuing financial institutions are astronomically higher than the $19 million offered under the Proposed Settlement. MasterCard's own documents in fact support a reimbursement amount of *at least* [redacted]. MasterCard has identified approximately 8.8 million accounts affected by the Target Data Breach. Ex. 4 at 11; *see also* Ex. 8 (Alert_Summaries). Using an operational reimbursement figure ranging from [redacted] depending on the type of card, MasterCard estimates the gross reimbursement amount to be [redacted] (assuming 100% replacement of compromised cards). Ex. 8 (MC_000768; MC_000785);

see also Ex. 2 at 6-3, 6-4. MasterCard has also identified [redacted] in fraudulent transactions attributable to the Target Data Breach. Ex. 8 (Fraud Data).

MasterCard further deceived card-issuing financial institutions with respect to the size of the settlement in comparison to overall losses in a conference call held with financial institutions. When asked on conference calls with issuers to market the Proposed Settlement whether it had "quantified the total dollar amount of fraud losses associated with the Target data breach," MasterCard's representative responded "I don't believe that we have, we are really reliant on you, our issuing customers to submit fraud that you believe is attributable to the Target Data Breach to us." Ex. 4 at 14. This false statement had a purpose: if MasterCard had told the truth, that the fraud losses related to MasterCard accounts had, indeed, been quantified to the penny [redacted], then the issuing banks on the call would instantly have seen that the claimed 71.4% recovery was grossly exaggerated. MasterCard's offer of $19 million represents [redacted], at best, of the operational and fraud costs suffered by its customers, not the 71.4% that MasterCard claims.

Second, the misleading language Target and MasterCard designed and disseminated caused media outlets to repeat them in their reporting, which Target encouraged. For example, USA Today reported that the settlement "covers banks' costs when they reissued credit and debit cards after the breach, as well as fraudulent charges on those cards." Ex. 9. Similarly, Reuters published an article indicating that the amount under this settlement "covers costs that banks incurred to reissue credit cards and debit cards to customers as a result of the breach." Ex. 10. Thus, Plaintiffs and putative class members have been led to believe that the Proposed Settlement "covers"—rather than penuriously compromises—losses associated with the Target breach. Other articles indicate that Target and MasterCard settled this class action, settled lawsuits over the breach, or settled a lawsuit with MasterCard. Exs. 11-13. Contributing to the confusion, no lawsuit between MasterCard and Target relating to this settlement even exists.

Third, MasterCard and Target's statements caused multiple articles about the settlement to reference the MDL leadership and its representation of financial institutions in a manner falsely suggesting that the MDL leadership participated, endorsed, or at least knew about this proposed settlement. Exs. 14-16. Instead, Target inappropriately used MasterCard as an intermediary to communicate with and to *counsel and advise* financial institutions in order to avoid liability in this action. This is not only misleading, it is coercive. MasterCard has a clear conflict of interest, as it is using the strength of issuers' losses to leverage a settlement of Target's liability to *it*, while at the same time pressuring issuers to release their claims against Target in complete disregard of their broader scope. It is difficult, at a *minimum*, to view this deal as anything but potentially collusive and not in the best interest of the issuing banks, which is precisely why the protections of both MDL consolidation and Rule 23(e) exist.

MasterCard has unabashedly carried Target's water to suit itself at the banks' expense. As Al Saikali, Shook Hardy & Bacon LLP data security and privacy practice co-chair, indicated, "*I also think there may be pressure from MasterCard on the issuing banks to agree*, so all parties can begin to resolve the dispute." Ex. 15. He was prescient. Marie Russo, the MasterCard employee responsible for overseeing the ADC Program, stated on its April 16, 2015 conference calls announcing the settlement that MasterCard "believe[s] it *is in our customers' best interest to accept the settlement* and we recommend that you do so." Ex. 4 at 2 (emphasis added).

Fourth, on the same calls, MasterCard also failed to explain that if a financial institution opts out of the settlement, MasterCard will still attempt to resolve the claims pursuant to its internal processes. *See generally* Exs. 4 and 17. Thus, Plaintiffs and putative class members are likely left thinking that this settlement offer is "it." Simon also stated:

> Please note that a failure to timely respond will be deemed an opt out. Issuers that opt out may receive more or less than the amounts reflected in their alternative recovery offers or may be awarded nothing at all on their claims, depending on the outcome of any litigation *that Target has threatened*. Issuers that opt out may not receive any compensation during the duration of such litigation which could take years to conclude.

Id. at 3 (emphasis added). Thus, MasterCard expressly and deceptively conflates the ADC process benefits with issuing banks' "claims" against Target. Additionally, threatening issuers about a potential lawsuit brought by Target is absurd, as such a suit would have no impact on issuers' rights in the MDL.

Finally, Exhibit 3 to the Settlement Agreement is also a veiled threat by MasterCard that it could rule for Target on the appeal Target submits for claims of non-participating financial institutions in the MasterCard process. PSA Exhibit 3 at 4-5. This is extremely coercive.

F. The Proposed Settlement Misleads Putative Class Members about Their Claims Against Target Because It Is Based on ADC-Defined Benefits, Not on True Losses Target Caused.

The Proposed Settlement arises from a contractual arrangement that exists between MasterCard, Acquirer banks and issuing banks. That process is now described in more detail here. This arrangement sets forth a process, controlled by MasterCard, for determining liability and shifting the financial burden for data breaches that compromise MasterCard accounts, called the ADC process. As part of the ADC process, MasterCard allows financial institutions to recover certain, limited portions of their losses from data breaches if numerous criteria are met. *However, MasterCard does not, under any circumstances, provide for payments that would make a financial institution whole on its losses from a data breach*. In the words of Eileen Simon, MasterCard's Chief Franchise Integrity Officer:

> MasterCard's formula represents an attempt to reimburse issuers *partially* for operating costs incurred with re-issuing cards and also for fraud losses. It is *not a complete* reimbursement of every cost that you may have incurred but it is an attempt to achieve equilibrium and to apportion cost and risk and losses appropriately.

Ex. 17 at 5 (emphasis added). This base formula, of course, occurs *before* a further compromised reduction takes place. The base formula, therefore, never represents issuing banks' true costs or losses to begin with.

MasterCard's process for investigating and then calculating any reimbursements for a data breach are governed by the MasterCard Security Rules and the ADC Guide. Ex. 2, ADC Guide at 1-1. The ADC Guide defines an ADC Event as an occurrence that results in the unauthorized access to or disclosure of MasterCard account data. *Id*. at 10-

2. When an ADC Event or Potential ADC Event occurs, the Acquirers and card-issuing financial institutions must notify MasterCard (*id.* at 2-2), complete a report and submit it to MasterCard. MasterCard then investigates the ADC Event. *Id.* at 2-2 through 2-12. The Customer – the Acquirer bank or the card-issuing financial institution, as applicable[3] – also investigates the ADC Event and submits a report on the investigation. *Id.* at 3-3. The Customer must further report, within a specified period of time, counterfeit fraud transactions into the System to Avoid Fraud Effectively ("SAFE"). *Id.* at 5-1. Once MasterCard's investigation is complete, it unilaterally determines whether any recovery is appropriate. Financial Institutions have the right to participate in MasterCard's ADC process without releasing any other claims against a merchant or entity that was responsible for the breach. *See generally id.* (describing rights and obligations as between MasterCard and issuing banks without any reference to participation contingent upon releasing entity responsible for breach); *see also* Minn. Stat. § 325E.64, subd. 3 (Plastic Card Act remedies are "cumulative and *do not* restrict any other right or remedy") (emphasis added).

1. MasterCard Account Data Compromise Process – Operational Reimbursement

Operational Reimbursement refers to the reimbursement that may be made available to a card-issuing financial institution for costs associated with replacing its

[3] The ADC Guide provides instructions that MasterCard "customers, merchants, and their agents" must strictly abide by in the event of an "Account Data Compromise". The MasterCard Security Rules refer to financial institutions as "Customers" and differentiates between "Customers" (financial institutions) and "Consumers" (cardholders). *See* Ex. 7, at 126 & 131.

compromised cards. Ex. 2 at 6-2. The ADC process for calculating the Operational Reimbursement, however, *does not* compensate a financial institution for the actual cost of replacing each card. *See generally id.* at 6-1 through 6-14 (providing a detailed explanation of the various deductibles, subtractions, and fees applied to the customers' recovery). Instead, MasterCard calculates the per card amount to be reimbursed using a matrix based on the gross dollar volume of the card-issuing financial institution's portfolio and the type of card compromised. *Id.* at 6-2 through 6-7. The per card amount may be further reduced based on the type of account information that was compromised (which is determined by MasterCard).[4] *Id.* at 6-4. MasterCard then multiplies the type of card by the dollar amount designated by MasterCard, again subject to MasterCard's discretion. *See* Ex. 2 at 6-2 through 6-5.

The Operational Reimbursement is then reduced by the application of several deductibles and reductions. In particular, MasterCard subtracts 3% for cards reissued with the same account number but with a new expiration date and CVC code and then subtracts a Fixed Deductible of 40% from the gross eligible reimbursement amount. *See Id*. at 6-4 & 6-5. Once the final Operational Reimbursement amount is determined, MasterCard has the discretion to cap the award, further reducing the amount that card-issuing financial institutions actually receive. *See Id*. at 6-7. The MasterCard Security Policies and Procedures further provide that MasterCard will halve the Operational Reimbursement under certain conditions. *See* Ex. 7 at 85-86. Accordingly, under

[4] The Preface to the Account Data Compromise User Guide, provides that "All pricing set forth herein is subject to change at the discretion of MasterCard." Ex. 2, ADC Guide at 1-1.

MasterCard's process, a financial institution will only be able to recover a fraction of its card replacements costs, and the Proposed Settlement (at 71.4% of the reimbursements under the ADC Program) does not come close to recouping actual card-reissuance costs.

2. MasterCard Account Data Compromise Process – Fraud Recovery Calculation

The ADC Guide also provides for the recovery of unauthorized, fraudulent charges, but like the Operational Reimbursements, a financial institution will not be able to fully recover its losses. First, MasterCard determines the "at-risk time frame" for each particular card member that MasterCard determines to have suffered an ADC Event. Ex. 2 at 6-11. Second, MasterCard calculates the "incremental fraud" attributable to the ADC Event "by parent ICA then reduc[es] the total counterfeit fraud by the average counterfeit fraud experienced by the issuing parent ICA before the at-risk time frame." *Id.* at 6-10 & 6-12. In other words, MasterCard reduces the amount of fraud the financial institution actually suffers from the ADC Event by its own determination of the "average" fraud the particular issuer suffers for some unstated period of time prior to the at-risk time frame. *Id.* Third, MasterCard reduces the aforementioned "incremental fraud" amount to exclude "duplicate accounts," which the ADC Guide defines as "the amount of counterfeit fraud on unique at-risk accounts published in MasterCard Alerts during the prior six months." *Id.* at 6-12. Last, although MasterCard adjusts the reduced incremental fraud amount by adding back three percent for re-issuing cards with the same account number, it subtracts a 13% chargeback reduction based on the "issuers' ability to charge back transactions." *Id*. The remaining amount is the Fraud Recovery.

MasterCard, once again at its own discretion, applies an "Acquirer Responsibility Cap" that further reduces the Fraud Recovery amount. *Id.* at 6-14. Additionally, the MasterCard Security Rules provide that MasterCard will halve the Fraud Recovery if certain conditions are met. *See,* Ex. 7 at 87. Thus, it is clear that a card-issuing financial institution can recover only a fraction of its fraud losses under the MasterCard process, yet Target and MasterCard portray these as banks' total "losses," which is a why release of remedies otherwise available under Minnesota law is both misleading and coercive. *See* Minn. Stat. § 325E.64, subd. 3.

II. STANDARD OF CONSIDERATION

Normally, when a party seeks preliminary injunctive relief based on a substantive legal theory pursuant to Federal Rule of Civil Procedure 65(a), courts consider: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013) (quoting *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)). However, where, as here, "the relief Plaintiffs are seeking does not relate to the merits of the case, but rather the jurisdiction in which those merits will be decided[,] … the type of injunction requested … does not fall within the scope of the typical Rule 65 injunction, [and] Plaintiffs do not have to meet the Rule 65 requirements." *In re Managed Care Litig.*, 236 F. Supp. 2d 1336, 1344 (S.D. Fla. 2002); *see also In re Baldwin-United Corp.*, 770 F.2d 328, 338-39 (2d Cir. 1984) ("there is a difference between the power to enjoin an unrelated non-party pursuant to the All-

Writs Act and the narrower authority delineated by Rule 65(d), which confines the application of injunctions to parties, 'their officers, agents, servants, employees, and attorneys, and to those persons in active concert or participation with them who receive actual notice of the order'"); *In re Checking Account Overdraft Litig.*, 859 F. Supp. 2d 1313, 1324 (S.D. Fla. 2012). Instead, in order to abide by the JPML's mandate, this Court may issue any order preventing a party from proceeding with a settlement to protect its jurisdiction over claims being released where "necessary from the standpoint of the proper administration of justice." *In re Managed Care,* 236 F. Supp. 2d at 1343.

In addition, with regard to misleading and coercive communications with and actions toward putative class members, the Court has discretion to regulate communications with potential class members pursuant to both Rule 23(d) and its inherent equitable authority, based on a clear record reflecting the need for such limitations. *Gulf Oil v. Bernard,* 452 U.S. 89, 101 (1981); *see also Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 425 F. Supp. 145, 150 (D. Minn. 1977) ("[A] court has the inherent equitable power to supervise communications with class members.").

III. ARGUMENT

A. The Court Should Enjoin the Aggregate Release of the FI Class's Claims Because the Releases Threaten the Court's Ability to Serve the Fair Administration of Justice.

Target's attempts to invoke the authority of another court – the Southern District of New York or New York State Court – to enforce the nullification of class members' claims are tantamount to "maneuvers to avoid an MDL Court's jurisdiction" over the claims of plaintiffs and class members. *In re Managed Care,* 236 F. Supp. 2d at 1340.

An MDL court charged by the JPML with conducting pretrial proceedings and "concomitantly directing the appropriate resolution of all claims," (*In re Humana Inc. Managed Care Litig.*, No. MDL-1334 et al., 2000 WL 1925080, at *3 (J.P.M.L. Oct. 23, 2000)), has the "power to enjoin the defendant from entering into a settlement class action with another plaintiff in another forum, at least without notice to the court and its approval" (*In re Managed Care*, 236 F. Supp. 2d at 1340 (quoting *In re Lease Oil Antitrust Litig.*, 38 F. Supp. 2d 699, 706 (S.D. Tex. 1998))). An MDL court's authority to issue such orders is rooted in the "extraordinary powers" authorized by the All Writs Act, 28 U.S.C. § 1651(a), which extends to "consolidated multidistrict litigation" and to situations where the court must protect its jurisdiction over the adjudication of claims before it. *In re Managed Care*, 236 F. Supp. 2d at 1341 (quoting *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996)).

The All Writs Act vests in this Court the power to "issue all writs necessary or appropriate in aid of [its] respective jurisdiction[]." 28 U.S.C.A. § 1651(a); *U.S. v. New York Tel. Co.*, 434 U.S. 159, 171-73 (1977). This power "extends under appropriate circumstances, to persons who, *though not parties to the original action or engaged in wrongdoing*, are in a position to frustrate the implementation of a court order or the proper administration of justice." *New York Tel. Co.*, 434 U.S. at 174 (emphasis added). An order under the All Writs Act "must be directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to its natural conclusion." *ITT Community Dev. Corp.*, 569 F.2d 1351, 1359 (5th Cir. 1978) (internal quotations and citations omitted).

Although Target has used third-party MasterCard's special relationship with issuing banks as the improper foil instead of another plaintiff, the results are the same as those prevented by the court in *Managed Care* and other courts—a class-sized settlement with aggregate relief, enforced by *another forum*: here, the U.S. District Court for the Southern District of New York. PSA at §§ 10.11.1 & 10.11.2. "A principal purpose of § 1407 is to allow one judge to take control of complex proceedings . . . ." *In the Matter of Orthopedic Bone Screw Prods. Liab. Litig.*, 79 F.3d 46 (7th Cir. 1996). MDL courts are specially enabled to issue orders to protect their jurisdiction where an "action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigations." *Winkler*, 101 F.3d at 1202; *see also In re Checking Account Overdraft Litig.*, 859 F. Supp. 2d at 1322-24 (enjoining settlement prior to certification); *In re Bank of Am. Wage and Hour Employment Litig.*, 740 F. Supp. 2d 1207, 1217-18 (D. Kan. 2010) (MDL court prevented settlement in other federal district courts); *In re Lease Oil Antitrust Litig.*, 48 F. Supp. 2d 699, 704 (S.D. Tex. 1998) (MDL court prevented settlement in state court).

Congress created "a Judicial Panel for the very *purpose* of consolidating proceedings and promoting judicial efficiency. Furthermore, class settlements are subject to a rigorous review of their fairness because of their impact on many parties." *In re Managed Care*, 236 F. Supp. 2d at 1342 (emphasis in original). In the *Managed Care* MDL case, defendant CIGNA arranged with a single, state court plaintiff to remove to Illinois federal court, settle, and release claims at issue in the MDL, without the knowledge or approval of the MDL judge. Even in the absence of any showing that the settlement was unreasonable, the Court enjoined it, concluding,

> The JPML has ordered that all cases relating to the improper payment to physicians be consolidated in this Court pursuant to § 1407. To allow another federal court sitting in another Circuit to settle this entire action against one of the Defendants in the consolidated proceeding would effectively render the JPML's decisions and existence moot. This cannot be the correct interpretation of the law.

Id. at 1345. The court enjoined not only the defendant, but "*any party acting in concert*" with the defendant, from proceeding in any manner with the proposed settlement … without the express approval of this Court, and from contacting in any way the members of the class[.]" *Id.* MDL Judge Moreno was unwilling to "turn a blind eye to the underhanded maneuvers that Cigna took to obtain this settlement. Cigna snookered both [the Florida MDL Court and Southern District of Illinois] in an obvious attempt to avoid the [Florida MDL Court's] jurisdiction" and that the injunction was necessary for the proper administration of justice. *In re Managed Care Litig.*, 236 F. Supp. 2d at 1342-43. Clearly, this Court has the power, and should, enjoin not only Target, but MasterCard as well.[5]

The procedure by which Target and MasterCard are attempting to extinguish the Financial Institution Plaintiffs' claims is more egregious than the circumstances in

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[5] Even if the four *Dataphase* factors for determining whether a Rule 65 preliminary injunction were to apply, they are easily met in the context of this motion. *See In re Managed Care*, 236 F. Supp. 2d at 1344-45 ("likelihood of success" on jurisdictional question established by court's prior analysis that it should enjoin defendant from proceeding with settlement of class members' claims; "irreparable harm" established because cheap settlement threatened to set standard for claims related to other entities, would impede mediation already contemplated by court in this case, and would eliminate the purpose of MDL consolidation; "balance of hardships" factor favored granting injunction because, had defendant proceeded properly, any proposed settlement would already be pending before the MDL court anyway; and "public interest" factor favored injunction to ensure fairness of the settlements reached).

Managed Care. In *Managed Care*, the settlement would have at least undergone judicial review. Here, Target and MasterCard attempt to settle and release the Financial Institution Plaintiffs' claims in this case *without* judicial oversight and *without* inviting *any* Financial Institution Plaintiffs to the negotiating table. This is a blatant attempt by Target and MasterCard to usurp the Court's authority to resolve claims under the multidistrict litigation rules and the class action procedures governed by Federal Rule Civil Procedure 23.

Target simply cannot agree with a third party to create and impose a global release, require 90% participation, and seek to strip this Court's jurisdiction over those claims by unilaterally vesting another federal court with such jurisdiction. Target's decision to conduct all negotiations outside the presence of the financial institutions' Lead Counsel—duly appointed by this MDL Court—also deprives the issuer class members of the ability to participate with the counsel of attorneys who know the most about the scope and merits of *their* claims. *See* Order, ECF No. 64 at 4 (May 15, 2014) ("The duties of Coordinating Lead Counsel and group cases Lead Counsel shall include … [c]onduct[ing] settlement negotiations on behalf of Plaintiffs or group of Plaintiffs[.]"). It is impossible for either the Court or Lead Counsel to carry out their duties when Defendant and MasterCard conduct secret negotiations to exercise a mandatory, aggregate release campaign.

Target does not even come by its MDL-jurisdiction-stripping actions honestly. When it was faced with dozens of class action lawsuits filed across the country, Target eagerly sought transfer of all cases to this District, an action "essential to avoid the risk of conflicting rulings." *In re: Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 2522, ECF No. 90 at 1 (J.P.M.L. Jan. 30, 2014). "The District of Minnesota," Target argued, "is the superior forum for these cases. Target is headquartered in the district, … a majority of witnesses and documents common to all cases are located there, … and the cases pending in the District of Minnesota have already been assigned to Judge Magnuson as related cases." *Id.* at 1-2. Target urged the JPML that "transfer will promote the *just* and efficient conduct of the actions," and that "the actions can be more efficiently and *fairly litigated* in a single forum." *Id*. at 3 & 4 n.5 (emphasis added). Apparently now Target believes the justice and fairness it once urged to be served by this Court are no longer expedient for its purposes.

However, it is simply too late for Target to re-bake its cake. Target wanted *all claims* related to the breach centralized before this Court. The JPML ordered such consolidation and bound all claims to the jurisdiction of this Court. Because this Court is bound to oversee the resolution of all claims entrusted to it, the Court should not countenance the release of those claims accomplished in secret, brazenly outside the Court's purview.

B. Target's Agreement with MasterCard and Release of Class Members' Claims Constitutes a *De Facto* Class Settlement That Must Be Submitted to and Approved by This Court, in Light of the Requirements of Rule 23(e).

Target may attempt to analogize its actions to cases where courts have permitted defendants to settle on an individual basis with some absent class members. Target's actions here, however, come nowhere near such facts, as it has created a *de facto* class action settlement outside the boundaries of Rule 23(e), and the Target settlement must go through the preliminary approval, notice, and final approval process, required by the Federal Rules and the Due Process Clause, before Target can receive its mandatory, aggregate release. In fact, the mandatory participation by definition is a full-throated *rejection* of settlement on an individual basis, which the law requires to be negotiated at arms' length. A take-it-or leave-it deal that the Defendant negotiated with a non-party outside the presence of the issuer is not an arms' length negotiation with the issuer.

Although window-dressed as an "opt-in" settlement, Target's agreement *mandates* MasterCard issuers representing 90% of all accounts subject to the deal to provide a full release of all claims against Target. This is no different from an opt-out class with a 10% blow provision, which is very typical of class action settlements. *See In re Prudential Sec. Inc. Ltd P'ships Litig.*, 164 F.R.D. 362 (S.D.N.Y. 1996) (explaining function of blow provision in context of opt-out class settlement); Newberg on Class Actions § 13:6 (5th ed.) ("[A] settling defendant fears a large group of high dollar opt-outs could threaten to augment significantly the amount of money it is already paying to the *class*. A blow up provision insures against that outcome by enabling it to withdraw from the settlement if this worst case scenario develops.") (emphasis added). Of course, if these were truly individual settlements as Target will likely claim, there would be no use for minimum mandatory participation or a blow provision.

Furthermore, minimum mandatory participation cannot be labeled as "opt-in." There is simply no "opt" at all, save for a maximum of 10% of issuers who chose to exclude themselves from the aggregate settlement. This Court must look to the substance of the rights and obligations, not the labels cleverly inscribed in a defendant-drafted document. *See W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 62 (1935) ("What controls our judgment at such times is the underlying reality rather than the form or label"); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.2d 981, 989 (9th Cir. 2014) (holding that contract labeling workers "independent contractors" not dispositive where substance of rights and obligations showed they were employees).

In *Kahan v. Rosenstiehl*, the defendant faced a class action brought by minority shareholders alleging misrepresentations in connection with a tender offer. *Kahan v. Rosenstiehl*, 424 F.2d 161, 163 (3d Cir. 1970). Before certification, defendant sought to end run Rule 23 by raising its stock offer directly to minority shareholders, thus resolving the class claims. Defendant did not consult plaintiff, his counsel, or the court, thus in plaintiff's words, 'brazenly ignoring Rule 23(e),' which guides the consummation of formal class settlements. *Kahan*, 424 F.2d at 168. The circuit court remanded the case to the district court, indicating its displeasure with potential circumvention of Rule 23(e) and noted that defendant's attempt to circumvent Rule 23, if true, would be "flagrant." *Id.* at 168.

The current agreement has all the hallmarks of a class resolution (an aggregate settlement award, a direct-mail notice program, a minimum, mandatory participation threshold, and 10% blow provision), but none of the protections (court approval, advice and experience of class counsel, neutral notice). Even more flagrantly than in *Kahan*, Target negotiated, arranged, and publicized a global settlement negotiated with a third party without consulting Plaintiffs' counsel or the Court, and should not be permitted to ignore the formal class settlement mechanism of Rule 23(e) in resolution of the class claims. Target cannot avoid the approval process simply by failing to ask the Court to certify a settlement class.

Even if the agreement did not constitute a *de facto* class settlement, it is still subject to this Court's supervision and approval. In addition to requiring judicial approval where a settlement seeks to resolve class action claims through dismissal or compromise, courts from a variety of jurisdictions also routinely exercise judicial supervision of settlements in "quasi-class action" MDLs where no class is certified, but where claims are aggregated for settlement purposes. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); *see also In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554 (E.D. La. 2009) ("While an MDL is distinct from a class action, the substantial similarities between the two warrant the treatment of an MDL as a quasi-class action. . . . Accordingly, this Court found that the Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness.") (internal quotations omitted); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05–1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (relying on the quasi-class action nature of an MDL proceeding and the court's equitable authority to implement a reasonable cap on contingent fees). As the court noted in *In re Zyprexa*:

> While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court. The *large number of plaintiffs subject to the same settlement matrix* approved by the court; the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement;

> the court's order for a huge escrow fund; and other interventions by the court, reflect a degree of court control supporting its imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses.

424 F. Supp. 2d at 491 (citations omitted; emphasis added). Courts therefore retain authority to exercise judicial oversight and approval where settlements result in compromise or dismissal of class action claims, and in quasi-class action litigation where courts exercise their equitable powers under Rule 23.

Because this Court has jurisdiction over the claims sought to be released on a mandatory, aggregate basis, the Court should void the issuing banks' release of Target and the Proposed Settlement's jurisdiction-reassignment clause.

C. The Court Should Limit and Cure Target's and MasterCard's Misleading and Coercive Communications.

Pursuant to Rule 23(d) and its inherent equitable authority, the Court also has discretion to regulate communications with potential class members, based on a clear record reflecting the need for such limitations. *Gulf Oil,* 452 U.S. at 101; *see also Vernon J. Rockler & Co.*, 425 F. Supp. at 150. Restrictions to preclude a defendant from soliciting entities to opt out of class litigation "will sometimes be justified." *Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 59 F.3d 764, 766 (8th Cir. 1995) (citing *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985)); *Ahle v. Veracity Research Co.*, 663 F. Supp. 2d 713 (D. Minn. 2009). The district court's role in limiting communications "furthers the Federal Rules' dual policy of protecting the interests of absent class members while fostering the fair and efficient resolution of numerous claims involving common issues." *In re School Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988).

The Court's authority includes the power to limit settlement communications that are potentially misleading or coercive. *Great Rivers Co-op*, 59 F.3d at 766 (indicating that "misrepresentation and the likelihood of serious abuses" should be shown to justify court intervention); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1139 (7th Cir. 1979) (determining, "The danger that the offer to settle individual claims would create is the possible misleading of class members *about the strength and extent of their claims* and the alternatives for obtaining satisfaction of those claims.") (emphasis added); *Kleiner*, 751 F.2d at 1202-03 (contrasting the need for "objective, neutral information about the nature of the claim and the consequence of proceeding as a class" with a "unilateral communications scheme," which "is rife with potential for coercion"); *see also In re Potash Antitrust Litig.*, 896 F. Supp. 916, 920 (D. Minn. 1995) (recognizing authority forbidding "coercive, abusive, or fundamentally misleading" communications).

The Court's power to restrict communications between parties and potential class members applies before a class is certified. Manual for Complex Litigation (4th), § 21.12 ("Rule 23(d) authorizes the court to regulate communications with potential class members, even before certification."); *see also Friedman v. Intervet Inc.*, 730 F. Supp. 2d 758, 765 (N.D. Ohio 2010) ("[N]umerous cases have approved of court limitations on communications prior to class certification"); *Bublitz v. E.I. duPont de Nemours and Co.*, 196 F.R.D. 545, 549 (S.D. Iowa 2000) (although no class had been certified, court limited defendants' communication with putative class members); *see also Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 678 (1999) ("Regardless of whether these communications occur before or after class certification, the effect is still the same[.]"); *Burrell v. Crown Cent. Petroleum, Inc.*, 176 F.R.D. 239, 243 (E.D. Tex. 1997) ("[W]here . . . certification has not yet been decided, a court may issue a limitation on ex parte contact under Rule 23, if it is clear the defendant is attempting to engage in conduct which would undermine the purposes of the rule."); *Jenifer v. Delaware Solid Waste Authority*, No. 98-cv-270, 1999 WL 117762, at *2 (D. Del. Feb. 25, 1999) ("[T]he Court does have the requisite authority to limit contacts with putative class members[,]" despite the fact that "[t]he class has not been certified."); *Westerfield v. Quizno's Franchise Co.*, No. 06-C-1210., 2007 WL 1062200, at *3 (E.D. Wis. Apr. 6, 2007) ("[T]he holding of *Gulf Oil*, as well as a court's power to restrict communications between parties and potential class members, applies even before a class is certified.").

1. Misleading Communications and Coercive Relationships

"In view of the tension between the preference for class adjudication and the individual autonomy afforded by exclusion, it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action." *Kleiner*, 751 F.2d at 1202. The Court should limit "the possible misleading of class members about the strength and extent of their claims and the alternatives for obtaining satisfaction of those claims." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d at 1139. Misleading statements and conduct come in many forms, such as offering an amount that "may be so unrealistically low that the consideration itself tends to mislead class members about the strength and extent of their claims." *Id.* at 1140 n.60. Also, "[a] defendant's failure to mention even an uncertified class action in securing settlements or releases from putative class members may be 'misleading.'" *Friedman v. Intervet Inc.*, 730 F. Supp. 2d 758, 762 (N.D. Ohio 2010). Courts have held that the failure to state that "the individuals may wish to consult with an attorney regarding their settlement agreement/release" constituted a misleading omission. *Id.* at 766; *Westerfield*, 2007 WL 1062200 at *3. And defendants are not at liberty to comment upon the merits of a class action. *In re Potash Antitrust Litig.*, 896 F. Supp. at 921.

Similarly, any unilateral communications scheme engineered by the defendant to a class action, or its partner acting in concert, is rife with potential for coercion, particularly in the context of an ongoing business relationship. *See Kleiner*, 751 F.2d at 1202 ("[I]f the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive."). In addition, advice regarding the claims provided by a party interested in the class action lawsuit is "rife with the potential for confusion and abuse." *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630 (N.D. Tex. 1994). This is because "[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable." *Kleiner*, 751 F.3d at 1203 (citing *Zarate v. Younglove*, 86 F.R.D. 80, 90 n.13 (C.D.Cal. 1980)).

Financial institutions are in the business of banking and do not have the specialized knowledge of the ADC Program and Security Rules that MasterCard has regarding its own intricate policies or the defined scope of benefits and liabilities. They also depend on Masterard's sophisticated network to serve their customers. It is therefore particularly coercive when a behemoth, specialized entity like MasterCard begins doling out statements about what financial institutions' damages are, and that class members are advised to agree to it. "Business customers or purchasers have a reluctance to [participate in the class] for fear that they are biting the hand that feeds them or supplies them with needed goods or materials," and "[t]he possibility of such improper communications is more likely when there is a close commercial relationship between class members and the defendant company because of the implicit threat of economic sanctions or retaliation on the part of a supplier of scarce or unique goods. . . ." 3 Newberg on Class Actions § 8.42 (4th ed.).

Target and MasterCard's statements and omissions about the settlement are both misleading and coercive. Target, acting in concert with MasterCard, has:

- Misrepresented that the settlement offer accounted for 71.4% of issuing banks' costs and losses when in fact the ADC Program offers far less, necessarily misleading banks about the extent of their claims;

- Failed to disclose to putative class members that Target has a narrower scope of liability to MasterCard than it has to issuing banks;

- Failed to disclose to putative class members that MasterCard has a narrower scope of liability to issuing banks than Target does;

- Conflated the scope of issuing banks' direct claims against Target with MasterCard's benefits;

- Failed to disclose that the ADC Program does not require issuing banks to release their claims against a merchant in order to participate, as these benefits are offered, and must be provided, by MasterCard without such strings attached;

- Offered such low amounts to class members that the offers themselves tend to mislead class members about the strength and extent of their claims;

- Failed to disclose to putative class members that a hearing on a motion for class certification is imminent;

- Identified MDL Lead Counsel, but misleadingly failed to disclose that both counsel and financial institutions were excluded from MasterCard and Target's secret negotiations and have not agreed to or approved of the settlement;

- Failed to provide putative class members with a copy of the Consolidated Class Action Complaint or contact information for Lead Counsel;

- Failed to disclose to putative class members the full scope of liability Target faces by virtue of the direct claims made against it in the complaint;

- Capitalized on issuing banks' understanding of MasterCard as an entity with specialized knowledge in the intricacies of its own ADC Program and Security Rules;

- Included a mandatory 90% participation provision, giving MasterCard a huge, improper financial incentive to pressure banks to release their broader claims against Target;

- Used MasterCard's influential, trusted, and ongoing relationship with issuing banks to leverage unconscionably broad releases from issuing banks, who have claims against Target that exceed the narrow scope of MasterCard's ADC Program;

- Used MasterCard to counsel issuing banks, advising them to take the deal and release their claims; and

- Failed to disclose that releases are not contemplated by the MasterCard operating regulations and that a release was included in this program solely to stop class members from getting more than the limited ADC defined benefits.

D. The Court Should Enjoin All Other Jurisdictions from Enforcing the Adjudication of Claims Belonging to Putative Class Members, Enjoin the Releases Sought by the Target Settlement, and Limit and Cure Target's and MasterCard's Misleading Statements and Conduct.

"[T]he degree of judicial review should be concomitant with the potential for abuse that such communications create." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d at 1139. "If class members have received inaccurate precertification communications, the judge can take action to cure the miscommunication and to prevent similar problems in the future." Manual for Complex Litig. (4th), § 21.12; *see also Friedman*, 730 F. Supp. at 766-67 (ordering curative notice in wake of misleading conduct and statements); *In re Potash Antitrust Litig.*, 896 F. Supp. at 921 (requiring all communications to be filed with the court); *In re Lutheran Brotherhood Variable Ins. Prods. Co. Sales Practices Litig.*, No 99-MD-1209 PAM-JGL, 2002 WL 1205695, *3 (D. Minn. May 31, 2002) (requiring future communications to be submitted to the Court for review prior to dissemination); *Westerfield*, 2007 WL 1062200 at *3 (requiring curative notice). Based on the concerted actions and communications of Target and MasterCard, and on the powers articulated in the discussion above, Plaintiffs request that the Court issue an order granting the following relief:

1) Holding that any release attributable to any financial institution falling within the definition of the putative class is void absent approval by this Court;

2) Declaring that Defendant and MasterCard's agreement to invoke the jurisdiction of any court, other than this Court, to enforce the compromise of any claim asserted in this case is void;

3) Requiring that Defendant and MasterCard provide the Court and Lead Counsel all written and oral statements made publicly or privately to any issuing bank

regarding the ADC Program and any proposed settlement related to the Target breach, including when such statements were made, by whom, and to whom;

4) Directing Defendant and MasterCard not to communicate with putative class members about this case or claims asserted in this case without first seeking approval from this Court;

5) Requiring a *curative* notice—made necessary by Target's and MasterCard's misleading and coercive acts—specifically advising absent class members: 1) of the pendency of the putative class action, 2) the fact that the damages and liabilities alleged in the action are broader than any damages and liabilities available under the ADC Program, 3) that the ADC Program does not permit MasterCard to make benefits contingent upon releasing Target of its direct liability to issuing banks, 4) that Defendant and MasterCard's public statements characterizing the ADC benefits as a percentage of issuing banks "damages," "costs," or "losses" is not true, 5) that any aggregate settlement amount setting minimum participation requirements is subject to the jurisdiction and approval of this Court, 6) that the Court has denied Target's motion to dismiss the Financial Institutions' claims under the Minnesota Plastic Card Act and negligence tort law, which permit *full* recovery of reissue costs and fraud losses, and 7) of MasterCard's actual calculation of issuers' losses as reflected in their internal documents;

6) With the curative notice issued by this court, providing a copy of the Consolidated Class Action Complaint; and

7) Suspending any deadline to file an amended complaint or add parties so that Lead Counsel may add MasterCard as a Defendant, if appropriate, in the current action pending the outcome of discovery efforts now directed at these issues.

IV. CONCLUSION

Based on the foregoing points and authorities, Plaintiffs respectfully request that the Court grant the relief requested above.

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