

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: Target Corporation Customer
Data
Security Breach Litigation

MDL No. 14-2522 (PAM/JJK)

This Document Relates to:

All Financial Institution Cases

Umpqua Bank, Mutual Bank, Village
Bank, CSE Federal Credit Union, and
First Federal Savings of Lorain,
individually and on behalf of a class of
all similarly situated financial
institutions in the United States,

[REDACTED]

Plaintiffs,

vs.

Target Corporation,

Defendant.

**DECLARATION OF DOUGLAS H. MEAL, ESQ. IN SUPPORT OF
TARGET CORPORATION'S OPPOSITION TO FINANCIAL
INSTITUTION PLAINTIFFS' EMERGENCY MOTION**

I, Douglas H. Meal, Esq. state as follows:

1. I am over the age of eighteen.
2. The information contained in this affidavit is true and correct to the best of my personal knowledge.

3. I am a member of the bar of the Commonwealth of Massachusetts. I am a litigation partner at the law firm of Ropes & Gray LLP, which represents Defendant Target Corporation (“Target”) in the above-captioned action.

The Assessment

4. Target is a publicly held company that does business as a national retailer. On December 19, 2013, Target publicly announced that criminals had infiltrated its computer network, installed malware on certain point-of-sale devices within the network, and potentially stolen guest payment card data by means of that malware (“the Target Intrusion”). See Press Release, *Target Confirms Unauthorized Access to Payment Card Data in U.S. Stores* (December 19, 2013), a true and correct copy of which is attached hereto as Exhibit 1 hereto. The Target Intrusion led to a \$26.6 million assessment being made by MasterCard International Incorporated (“MasterCard”) against the banks that sponsor Target’s participation in the MasterCard-branded payment card network (the “Target Acquirers”). See ECF No. 390-8, Decl. of C. Zimmerman Ex. 8 (“Zimmerman Ex. 8”) (containing copies of Final Acquirer Financial Responsibility Reports from MasterCard to the Target Acquirers).

5. The “MasterCard Operating Regulations” include a series of particularized regulations that acquiring banks are to follow, and must ensure are followed by merchants and processors for which they are responsible, to protect the security of payment card data handled by acquiring banks and their merchants and processors. Moreover, in the event a merchant or a processor is found by MasterCard to have committed a violation of these data security regulations that in turn resulted in a theft of data from a payment card’s magnetic stripe (an “account data compromise event” or “ADC Event”), the MasterCard Operating Regulations include a program (the Account Data Compromise (“ADC”) program) that purports to allow MasterCard to impose monetary assessments on a merchant’s acquiring banks if certain criteria are met. The stated objective of the ADC program is to provide MasterCard issuers with at least partial compensation for operational and fraud losses they incur as a result of an ADC Event. The ADC program is governed by Section 10 of the MasterCard Security Rules and Procedures (the “Rules,” a true and correct copy of which is attached as Exhibit 2 hereto) and explained in detail in the MasterCard Account Data Compromise User Guide (the “User Guide,” a true and correct copy of which is attached as Exhibit 3 hereto), both of which are components of the MasterCard Operating Regulations. The Rules and User Guide are made available to all MasterCard issuing banks and each MasterCard issuing bank agrees to be bound by them. See Rules § 1.1.

6. On September 17, 2014, MasterCard notified the Target Acquirers that MasterCard had completed its investigation of the Target Intrusion and had determined that (i) the Target Intrusion placed over **Redacted** accounts issued by

MasterCard issuers at risk of compromise (the “alerted-on accounts”) and (ii) the Target Acquirers’ alleged liability to MasterCard under the ADC program for operational costs and fraud losses allegedly incurred by MasterCard issuers as a result of the Target Intrusion was [Redacted] and [Redacted] respectively, for a total assessment of [Redacted] (the “Assessment”). *See* Zimmerman Ex. 8.

7. The Target Acquirers and Target (which is required under its contracts with the Target Acquirers to indemnify the Target Acquirers for the Assessment if collected) vigorously disputed the Assessment. As part of that dispute, on October 17, 2014, the Target Acquirers (supported by Target) exercised their right under the MasterCard Operating Regulations to appeal the Assessment to MasterCard’s appeals committee (the “Appeals Committee”). In those appeals (the “Acquirer Appeals”), the Target Acquirers and Target asserted that under the MasterCard Operating Regulations and applicable law they had no liability for the Assessment and alternatively that, even if an assessment in some amount were valid, that amount should be far less than the amount of the Assessment. The Appeals Committee has not yet rendered a decision.

The MasterCard ADC Program

8. The MasterCard Rules and User Guide provide that, in the event of an occurrence that results, directly or indirectly, in the unauthorized access to or disclosure of MasterCard account data (an “ADC Event”), MasterCard has the authority to impose assessments on responsible acquiring banks, for ADC operational reimbursement and ADC fraud recovery, as those terms are defined and explained in the Rules and User Guide, which MasterCard then distributes, according to the Rules and User Guide, to the MasterCard issuers that issued the MasterCard accounts that were compromised in the ADC Event. As set forth in the Rules, “operational reimbursement enables an Issuer to partially recover costs incurred in reissuing Cards and for enhanced monitoring of compromised and/or potentially compromised MasterCard Accounts associated with an ADC Event,” and “fraud recovery enables an Issuer to recovery partial incremental . . . counterfeit fraud losses associated with an ADC Event.” Rules, § 10.2.5.3.

9. MasterCard’s calculation of the operational reimbursement portion of an issuer’s recovery under the ADC program is explained in the Rules and User Guide. *See* Rules § 10.2.5.4; User Guide, pp. 6-2–6-9. Operational reimbursement under the ADC program seeks to compensate an issuer for the operational costs it incurs in reissuing cards for, and/or monitoring, accounts involved in an ADC Event. An issuer’s ADC operational reimbursement recovery amount is calculated by (i) assigning the issuer to a tier based on its portfolio size, (ii) identifying the type of technology embedded in the cards involved in the ADC Event in question that the issuer issued, and (iii) multiplying the reimbursement

amount associated with the tier and technology type in a chart provided in the User Guide by the number of cards of that type. User Guide, pp. 6-2–6-4. The result is then reduced by a fixed deductible of forty percent to account for anticipated card expirations and accounts published in previous MasterCard Alerts – *i.e.*, accounts involved in the ADC Event that, due to other circumstances, would not have been reissued or monitored by the issuer, and thus would not have imposed any operational costs on the issuer, as a result of the ADC Event in question. User Guide, p. 6-4. The amount is then increased by a fixed deductible of three percent to adjust for cards reissued with the same account numbers but different expiration dates and CVC2 codes. *Id.* at 6-5. The sum of these calculations for each issuer – the Net Eligible Reimbursement Amounts – yields the maximum aggregate operational reimbursement amount for the ADC Event. MasterCard represented that it followed this methodology in the Rules and the User Guide and calculated the maximum aggregate operational reimbursement recovery of MasterCard issuers as a result of the Target Intrusion to be Redacted. *See* Zimmerman Ex. 8.

10. MasterCard’s calculation of the fraud recovery portion of an issuer’s recovery under the ADC program is likewise detailed in the Rules and User Guide. *See* Rules § 10.2.5.5; User Guide, pp. 6-9–6-14. The steps involved in the calculation of the fraud recovery portion of an issuer’s recovery under the ADC program are as follows:

a. Total counterfeit fraud (A) for all issuers and at-risk accounts specific to an ADC Event as reported during the at-risk time frame is reduced by baseline counterfeit fraud (B)¹ that MasterCard estimates would typically have been reported on those accounts in the same at-risk time frame even if they had not been involved in the ADC Event in question. Thus, for any ADC Event, total counterfeit fraud (A) minus baseline counterfeit fraud (B) equals net incremental fraud (C) (*i.e.*, $A - B = C$). User Guide, p. 6-10.

b. The net incremental fraud (C) is reduced by duplicate fraud (D)² reported in the previous six months; increased by the charge for “soft

¹ The baseline fraud amount is calculated based on the average counterfeit fraud before the at-risk time frame associated with the ADC Event.¹ User Guide, p. 6-10. For the Target Intrusion, based on the number of at-risk accounts, the at-risk time frame was defined as 365 days before the date of the first MasterCard Alert issued through 60 days after that date. User Guide, p. 6-11.

² Duplicate fraud (D) is the amount of counterfeit fraud on unique at-risk accounts that were published in MasterCard Alerts in the prior six months. User Guide, p. 6-12.

reissues” (E)³ where a card is reissued with the same account number but new expiration date and CVC2 code; and decreased by a standard deductible (F)⁴ that reflects chargeback recoveries on fraudulent transactions made using at-risk accounts, in order to determine the net amount eligible for fraud recovery (G). Thus, net incremental fraud (C) minus duplicate fraud (D) plus soft reissues (E) minus the standard deductible for chargeback recoveries (F) equals net amount eligible for fraud recovery (G) (i.e., $C - D + E - F = G$). *Id.*

11. MasterCard may choose to cap the ADC fraud recovery amount at five percent of a merchant’s sales volume for the previous year. User Guide, p. 6-14. In the case of the Target Assessment, however, no such cap was applied. With respect to the amount of incremental counterfeit fraud that MasterCard attributed to the Target Intrusion, MasterCard represented that it followed the methodology summarized above and calculated the maximum aggregate fraud recovery amount of MasterCard issuers as a result of the Target Intrusion to be [Redacted] See Zimmerman Ex. 8.

12. In the process of negotiating the settlement, MasterCard discovered minor calculation errors in its determinations of ADC operational reimbursement and ADC fraud recovery in the Assessment. MasterCard therefore adjusted the operational reimbursement estimate from [Redacted] to \$10,996,597.70 and the fraud recovery estimate from [Redacted] to \$15,616,203.57. Combining the corrected maximum aggregate operational reimbursement amount of \$10,996,597.70 and the corrected maximum aggregate fraud recovery amount of \$15,616,203.57, MasterCard represented to Target in the Settlement Agreement discussed below that MasterCard determined Target’s corrected Assessment to be \$26,612,801.27, which also represents the maximum potential ADC liability for the Target Intrusion. See ECF No. 390-1, Decl. of C. Zimmerman Ex. 1 (“Zimmerman Ex. 1”), § 8.1.1.3.

The Settlement of the Assessment

13. In late 2014, before the Appeals Committee had ruled on the Acquirer Appeals, MasterCard and Target began negotiations to settle their dispute regarding the Assessment. Those arm’s length negotiations continued through April 2014 and ultimately culminated with the execution of a settlement agreement on April 15, 2015 (the “Settlement Agreement,” a copy of which was filed by Plaintiffs as Zimmerman Ex. 1).

³ The “soft reissue” charge is estimated as three percent of the net incremental fraud. User Guide, p. 6-12.

⁴ The standard deductible (F) for chargeback recoveries is a thirteen-percent deduction in incremental fraud. User Guide, p. 6-12.

14. Under the Settlement Agreement, MasterCard is to make an alternative recovery offer (its “Alternative Recovery Offer” or “Offer”) to each eligible MasterCard issuer that issued one or more of the 8,843,029 alerted-on accounts upon which the Assessment was based, which Offer the issuer in question is free to accept or not, as it chooses. Provided that issuers responsible for at least 90% of the accounts MasterCard deemed to have been involved in the Target Intrusion accept their Offers, each issuer that accepts its Offer will be entitled to receive 71.4% of its maximum potential recovery under the ADC program (its “Alternative Recovery Amount” or “ARA”), Zimmerman Ex. 1, § 3.2, which MasterCard has represented was calculated according to the MasterCard Operating Regulations, in exchange for a release of its claims against Target, Target’s acquiring banks, and MasterCard in connection with the Target Intrusion, including any such claims being advanced on the issuer’s behalf by Plaintiffs in this litigation, *see* Zimmerman Ex. 1, §§ 3.3.1–3.3.3. Any issuer that does not accept its Offer will be unaffected by the Target-MasterCard settlement and all of its claims relative to the Target Intrusion – including the claims being asserted in this litigation on the issuer’s behalf by the Plaintiffs – will be fully and completely preserved. If consummated, Target must pay MasterCard up to \$19 million to fund the ARAs of those MasterCard issuers that accept their Offers, and accordingly will be released from up to the entire \$26.6 million Assessment, with the exact amount of the payment and release dependent on how many of the MasterCard accounts in question are represented by the issuers that accept their Offers. Zimmerman Ex. 1, § 5.

15. The Settlement Agreement provides that eligible issuers will receive their Offers from MasterCard by no later than April 29, 2015 and will have through May 20, 2015 to accept those offers, unless MasterCard elects to extend the acceptance deadline to May 27, 2015 in certain limited circumstances. Zimmerman Ex. 1, §§ 3, 7.1. In addition, the Settlement Agreement calls for accepting eligible issuers to be paid their ARAs within 15 business days of the settlement being consummated. *Id.* § 5. The Settlement Agreement also provides one or more of the parties with a right to terminate the agreement in the event certain events contemplated by the Settlement Agreement do not occur by a specified date. *Id.* § 7.2. In particular, the Settlement Agreement may be terminated (i) automatically by May 20, 2015 if the Offers have not been accepted by eligible issuers comprising at least 90% of the 8,843,029 alerted-on accounts issued by the eligible issuers, unless (a) MasterCard takes affirmative action to extend the deadline to May 27, 2015 (assuming that eligible issuers comprising 80% of the accounts have opted in), *id.* § 7.1, or (b) both MasterCard and Target agree to waive the 90% threshold requirement, *id.* § 4.1, (ii) by written notice from either party at any time after August 18, 2015, if the settlement contemplated by the Settlement Agreement has not been consummated, *id.* § 7.2.2, or (iii) by written notice from either party in the event that a term or provision of, or

document delivered pursuant to, the Settlement Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, *id.* § 10.6.

16. The structure of the Settlement Agreement and the terms and timing of the Offers mirror the structure, terms, and timing that MasterCard used (i) in 2007 to reach a settlement with The TJX Companies, Inc. (“TJX”) of MasterCard’s claims arising from the data security breach announced by TJX in late 2006 and (ii) in 2010 to reach a settlement with Heartland Payment Systems, Inc. (“HPS”) of MasterCard’s claims arising from the data security breach announced by HPS in early 2009. Like the Settlement Agreement, the TJX and HPS settlements included provisions that called for alternative recovery offers and an accompanying communication to be provided by MasterCard to eligible MasterCard issuers, that gave the eligible MasterCard issuers at least 10 business days to act on those offers, that required issuers accepting the alternative recovery offers to release their intrusion-related claims while preserving all legal rights of those issuers who chose not to accept the offers, and that conditioned the settlement on the alternative recovery offers being accepted by eligible MasterCard issuers representing not less than 90% of the eligible MasterCard issuers’ alerted-on accounts for TJX and not less than 80% of the eligible MasterCard issuers’ alerted-on accounts for HPS. *Compare* Settlement Agreement *with* Settlement Agreement dated April 2, 2008 by and among MasterCard International Incorporated and The TJX Companies, Inc. (a true and correct copy of which is attached as Exhibit 4 hereto) *and* Settlement Agreement dated May 19, 2010 by and among MasterCard International Incorporated and Heartland Payment Systems, Inc. (a true and correct copy of which is attached as Exhibit 5 hereto). The TJX settlement offered financial institutions an average of \$0.92 per eligible account, and the HPS settlement offered financial institutions an average of \$1.05 per eligible account. Financial institutions representing more than 99.5% of the eligible accounts accepted the alternative recovery offers under the TJX settlement, and financial institutions representing more than 99% of the eligible accounts accepted the alternative recovery offers under the HPS settlement. *See* Press Release, *The TJX Companies, Inc. Completes Previously Announced MasterCard Settlement; Acceptance Rate Exceeds 99%* (May 14, 2008), Declaration of Eileen Simon, Ex. 1; Press Release, *MasterCard Announces Opt-in Threshold Met Regarding Issuer Acceptance of Alternative Recovery Offers Under the Heartland Payment Systems Settlement Agreement*, Declaration of Eileen Simon, Ex. 2.

17. The structure of the Settlement Agreement and the terms and timing of the alternative recovery also closely resemble the structure, terms, and timing that Visa Inc. used to reach settlements with TJX and HPS of Visa’s claims arising from the same data security breaches that led to the settlements between TJX and HPS and MasterCard. *See* Settlement Agreement dated November 29, 2007 by

and among Visa U.S.A. Inc., Visa Inc, The TJX Companies, Inc., and Fifth Third Bank (a true and correct copy of which is attached as Exhibit 6 hereto) and Settlement Agreement dated January 7, 2010 by and among Visa U.S.A. Inc., Visa International Service Association, Visa Inc., Heartland Payment Systems, Inc., Heartland Bank, and Keybank National Association (a true and correct copy of which is attached as Exhibit 7 hereto). Like the Settlement Agreement, the Visa settlements included provisions that called for alternative recovery offers and an accompanying communication to be provided by Visa to eligible Visa issuers, that gave the eligible Visa issuers at least 10 business days to act on those offers, that required issuers accepting the alternative recovery offers to release their intrusion-related claims while preserving all legal rights of those issuers who chose not to accept the offers, and that conditioned the settlement on the alternative recovery offers being accepted by eligible Visa issuers representing not less than 80% of the eligible Visa issuers' alerted-on accounts. Financial institutions representing more than 95% of the eligible accounts accepted the alternative recovery offers under the Visa-TJX settlement and financial institutions representing more than 97% of the eligible accounts accepted the alternative recovery offers under the Visa-HPS settlement. See Press Release, *The TJX Companies, Inc. Announces Acceptance Rate Over 95% for Visa Settlement Agreement* (Dec. 20, 2007) (a true and correct copy of which is attached as Exhibit 8 hereto); Press Release, *Heartland Payment Systems and Visa Inc. Announce Acceptance Rate of Over 97 Percent for Data Security Breach Settlement Agreement* (Feb. 4, 2010) (a true and correct copy of which is attached as Exhibit 9 hereto).

18. Judge William G. Young of the District of Massachusetts, who presided over the centralized putative financial institution class actions that were filed against TJX as a result of its data security breach, took no issue with the Visa-TJX settlement or with the fact that the settlement involved a communication by Visa with members of the putative class of the sort that plaintiffs are challenging here. To the contrary, upon being advised of the TJX settlement Judge Young extensively praised Visa, TJX, and TJX's acquirer for taking what he characterized as a "bold, innovative, and . . . important" step in resolving disputes of this sort with minimal transaction costs for the financial institutions involved. Transcript of Motion Hearing, Doc. No. 300, *In re TJX Cos. Retail Security Breach Litig.*, 07-10162-WGY, 27-29 (D. Mass. Dec. 11, 2007) (a true and correct copy of which is attached as Exhibit 10 hereto).

19. Judge Lee H. Rosenthal of the Southern District of Texas, who presided over the centralized putative financial institution class actions that were filed against HPS as a result of its data security breach, likewise took no issue with the Visa-HPS settlement or with the communication by Visa with members of the putative class of the sort that plaintiffs are challenging here. Financial institution plaintiffs in that multidistrict litigation filed an emergency motion requesting

discovery regarding the Visa-HPS settlement and asking the court to stay notification of the Visa issuers, which the court denied. Order, Doc. No. 66, *In re Heartland Payment Sys., Inc. Data Security Breach Litig.*, No. H-09-MD-02046 (S.D. Tex. Jan. 19, 2010) (a true and correct copy of which is attached as Exhibit 11 hereto). A true and correct copy of the Transcript of the Motion Hearing held on January 14, 2010 before Judge Rosenthal is attached hereto as Exhibit 12.

The Issuer Communication

20. The Settlement Agreement calls for MasterCard to provide a communication in the form of Exhibit 3 to the Settlement Agreement to each eligible issuer (the “Issuer Communication”) contemporaneously with its Offer. Zimmerman Ex. 1, at 37–58.⁵ The Issuer Communication is over ten pages long (excluding exhibits) and attaches via hyperlink the 30-page Settlement Agreement. *Id.* at 37.

21. The Issuer Communication describes the Target Intrusion, Zimmerman Ex. 1, at 37, the status of the Assessment, *id.*, the Settlement Agreement and MasterCard’s and Target’s reasons for entering into it, *id.* at 38–42, the terms and conditions of the issuer’s Offer, *id.* at 42–44, the timing and procedure for acceptance at the Offer, *id.* at 42–43, the consequences of accepting the Offer, *id.* at 43–44, the lack of consequences of not accepting the Offer, *id.* at 44–45, and the amount of the issuer’s Offer and what percentage that amount is of the maximum amount that the issuer would recover under the ADC program if the Assessment were upheld in full, *id.* at 56.

22. The Issuer Communication also expressly notes the pendency of this litigation and provides via hyperlink a one-page description of the events to date in the case and a copy of the plaintiffs’ Consolidated Class Action Complaint for the Financial Institution Cases. Zimmerman Ex. 1, at 41, 43–44. The description of the pending class litigation identifies the class of financial institutions on whose behalf the action purports to be brought, and it specifies each claim that plaintiffs have asserted. *Id.* at 57. The same description also expressly notes that the Court has appointed Attorney Karl C. Cambronne of Chestnut Cambronne PA as Coordinating Lead Counsel for plaintiffs and Attorney Charles S. Zimmerman of Zimmerman Read, PLLP as Lead Counsel for the Financial Institution Cases. *Id.*

23. On April 16, 2015, I sent by email a copy of the Settlement Agreement and its exhibits, including the Issuer Communication and Offer, to Coordinating Lead Counsel, Attorney Charles Zimmerman, Esq., also copying Lead Counsel for the Financial Institution Cases, Attorney Karl Cambronne, Esq.

⁵ Page references to Zimmerman Ex. 1 are to ECF pagination.

24. A true and correct copy of the Letter from Douglas Meal to Attorney Zimmerman, dated April 16, 2015, is attached hereto as Exhibit 13.

25. On April 16, 2015, I sent the Court by email a copy of the Target and MasterCard press releases regarding the Settlement Agreement, copying Attorney Zimmerman and Attorney Cambronne. Later that same day, following a conference call with the Court and Attorney Zimmerman and Attorney Cambronne regarding the Settlement Agreement, I sent the Court by email a copy of the Settlement Agreement, copying Attorney Zimmerman and Attorney Cambronne.

26. True and correct copies of the Letters from Douglas Meal to the Court dated April 16, 2015 are attached hereto as Exhibits 14 and 15, respectively.

27. On April 17, I sent the Court by Fedex a hard copy of the Settlement Agreement, per the Court's request.

28. A true and correct copy of the Letter from Douglas Meal to the Court, dated April 17, 2015, is attached hereto as Exhibit 16.

29. A true and correct copy of Press Release, *Financial Institutions Speak Out Against Target's Settlement with MasterCard, Through Court-Appointed Lead Counsel Zimmerman Reed and Chestnut Cambronne* (April 16, 2015), is attached hereto as Exhibit 18.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 24th day of April, 2015

/s/Douglas H. Meal

Douglas H. Meal, Esq.