UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation This Document Relates to: All Financial Institution Cases	MDL No. 14-2522 (PAM/JJK)

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,

Plaintiffs,

vs.

Target Corporation,

Defendant.

DEFENDANT'S OPPOSITION TO FINANCIAL INSTITUTION PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

REDACTED

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Target Corporation ("Target") respectfully submits this memorandum in opposition to the Financial Institution Plaintiffs' ("Plaintiffs") motion for a preliminary injunction.

I. SUMMARY OF ARGUMENT

The Target-MasterCard settlement that is the subject of Plaintiffs' preliminary injunction motion (the "Settlement") seeks to resolve a claim by MasterCard, on behalf of MasterCard's issuers, for losses those issuers allegedly incurred as a result of the data breach suffered by Target in 2013 (the "Target Intrusion"). The MasterCard claim the Settlement would resolve thus seeks to recover on behalf of MasterCard's issuers the *very same* sorts of damages that Plaintiffs are seeking to recover in this litigation on behalf of those *very same* MasterCard issuers. The overlap between MasterCard's and Plaintiffs' claims on behalf of the MasterCard issuers is the nub of the dispute that underlies Plaintiffs' motion.

MasterCard's claim for reimbursement of issuer losses relative to the Target Intrusion was made pursuant to its ADC program (described in more detail below), which is a contractually-based program that has been in place for years and that purports to allow MasterCard, on behalf of its issuers, to claim from a merchant like Target losses that MasterCard approximates (based on issuer-provided information and public formulas) its issuers to have incurred when the merchant suffers a data breach. Importantly, MasterCard has no guaranteed right to collect from a merchant an amount MasterCard calculates to be due from the merchant under the ADC program. Rather, the precise amount of any given MasterCard assessment under the ADC program may be subject to a

number of legal challenges, as may be the issue of whether any assessment at all is warranted. Indeed, MasterCard's own rules (enforced by contract) permit merchants, through their acquiring banks, to appeal any assessment MasterCard imposes under the ADC program and, if dissatisfied with the outcome of the appeal, to litigate the validity of the assessment in court.

Here, upon receiving MasterCard's issuer-reimbursement assessment under the ADC program, Target vigorously disputed MasterCard's claim, arguing that MasterCard had no contractual basis to impose *any* assessment under the ADC program relating to the Target Intrusion, and that even if some assessment were valid, the amount should be drastically lower than the amount claimed by MasterCard. Target ultimately exercised its right to appeal the assessment and, in so doing, informed MasterCard that should MasterCard reject its appeal, Target would exercise its right to litigate the assessment's validity.

Against this backdrop, MasterCard and Target did what parties routinely do in the context of a pre-litigation contract dispute: they settled. The linchpin of the Settlement is that each and every MasterCard issuer eligible to participate in the Settlement makes its own decision whether or not to do so. Those issuers that choose *to* participate will receive 71.4% of the maximum amount recoverable on the claim MasterCard made against Target on their behalf, and in return they will release Target from any and all claims they have against Target relative to the Target Intrusion, including those claims being asserted on their behalf in this litigation. Those issuers that choose *not to* participate will receive nothing in the Settlement, but all of their existing recovery rights

in regard to the Target Intrusion, including their rights under the ADC program and the claims being asserted on their behalf in this litigation, will be fully preserved notwithstanding the Settlement.

Given the pendency of this litigation, Target had and has every right and reason to, as it did, condition its willingness to settle MasterCard's claim on behalf of any given MasterCard issuer on that issuer's agreeing to a *complete* settlement of its claims against Target relating to the Target Intrusion – *i.e.*, a settlement that would include not only the claims being advanced on the issuer's behalf by MasterCard, but also the overlapping claims being advanced on the issuer's behalf by Plaintiffs in this litigation. Otherwise, by settling MasterCard's claim, Target would not truly have been "settling" at all with any MasterCard issuer because any MasterCard issuer's claims could continue to be asserted by Plaintiffs in this litigation or by the issuer itself after opting out of this litigation.

Significantly, Target is not the first company to have confronted this very same situation of both a card brand, such as MasterCard, and a putative class action, such as this one, simultaneously seeking to recover from the victim of a data breach the very same sorts of damages on behalf of the very same issuers. The TJX Companies ("TJX") and Heartland Payment Systems ("Heartland") each faced this exact same situation following the breaches they suffered. TJX and Heartland each responded to that situation by entering into settlements with MasterCard and Visa having the very same structure as Target's settlement with MasterCard – including the crucial feature that any issuer choosing to participate in the settlement provide a *complete* release of its claims against the breached entity, including the claims being asserted on the issuer's behalf in the

pending MDL. Notably, as discussed below, the TJX MDL judge *applauded* the first card brand settlement that TJX reached, and the Heartland MDL judge summarily *denied* a motion attacking Heartland's first card brand settlement by seeking the very same sort of preliminary injunction that Plaintiffs are asking for here.

This Court should do likewise because there is nothing even remotely unlawful about the Settlement, or about the offers MasterCard made to its issuers pursuant to the Settlement, or about MasterCard's communications to its issuers regarding the Settlement. Plaintiffs' preliminary injunction motion thus is not an effort to *protect* the legal rights of the non-plaintiff MasterCard issuers, all of whom are sophisticated financial institutions perfectly capable of making their own decisions regarding whether and on what terms to settle their claims against MasterCard and Target. Instead, the motion reflects an effort to *prevent* those non-plaintiff MasterCard issuers from exercising their absolute legal right to consider and act upon (or not) MasterCard's settlement offers. To be sure, Plaintiffs (and the non-plaintiff MasterCard issuers as well) have every right to reject any such offer they may receive. But Plaintiffs have *no right* to force their choice to reject those offers on each and every non-plaintiff MasterCard issuer, and, accordingly, have no right to the preliminary injunction they seek.

Plaintiffs' motion flies in the face of two core legal principles. First, the law in the Eighth Circuit is clear that defendants in putative class actions have every right to negotiate settlements with absent members of a prospective, but as-yet uncertified, class. In such circumstances, class counsel has no right to participate in the negotiations, and the court's supervisory role is limited to its authority under Federal Rule of Civil

Procedure Rule 23(d) ("Rule 23(d)") to limit communications that constitute or threaten misconduct of a serious nature. Second, Eighth Circuit law establishes that parties seeking a preliminary injunction *of any kind* must demonstrate all four of the *Dataphase* factors used when a party seeks an injunction under Federal Rule of Civil Procedure 65(a) ("Rule 65(a)"). Here, Plaintiffs ignore these legal realities.

First, Plaintiffs claim that the Court has authority under the All Writs Act to enjoin Target and MasterCard from settling with the non-plaintiff MasterCard issuers. But the All Writs Act permits a court to enjoin another settlement only when that settlement emanates from an *action* that threatens a court's jurisdiction. Here there is no "action" underlying the pre-litigation settlement between Target and MasterCard, much less one involving non-plaintiff MasterCard issuers. There is, therefore, no threat to the Court's jurisdiction that could justify action under the All Writs Act. *See* Part IV.A.1.

Next, Plaintiffs assert that the Settlement must be submitted to and approved by the Court under Federal Rule of Civil Procedure 23(e) ("Rule 23(e)"). But, the plain language of that Rule limits its applicability to "certified class[es]." While Plaintiffs posit that the Court may have approval authority over the Settlement under Rule 23(e) on a *de facto* class action or *quasi* class action theory, they offer no authority for these novel theories, which run directly contrary to the clear language of Rule 23(e). *See* Part IV.A.2.

Plaintiffs fare no better on their arguments regarding Rule 23(d). While Plaintiffs trot out a laundry list of allegedly misleading statements (or omissions from statements) by MasterCard to its issuers about the Settlement, there is, as set forth in detail below, absolutely no support in the record or the case law for Plaintiffs' claims. The same holds

true with respect to Plaintiffs' baseless assertions that MasterCard is coercing its issuers to accept their offers and, thereby, release their claims against Target in this litigation – assertions that MasterCard has denied in a declaration submitted herewith. *See* Part IV.A.3.

Finally, apart from their failure to show any possibility of success on the merits of their claims, Plaintiffs fail to meet any of the other requirements for a preliminary injunction, as evidenced by their attempt to avoid such requirements entirely rather than show they have been met. Plaintiffs do not need a preliminary injunction to avoid incurring irreparable harm, as they can preserve the status quo simply by ignoring MasterCard's Offer. *See* Part IV.B. Moreover, because the requested preliminary injunction threatens to deprive Target of settling MasterCard's disputed $26.6 million claim for $19 million, the harm that the proposed injunction threatens to impose on Target far outweighs any possible harm Plaintiffs might incur absent that injunction. *See* IV.C. Finally, Plaintiffs' requested preliminary injunction is not in the public interest because it would potentially inflict harm on non-parties to this action – most notably, the thousands of MasterCard issuers that, combined, would stand to lose $19 million in Settlement funds. *See* Part IV.D.

II. SUMMARY OF PERTINENT FACTS

The MasterCard Operating Regulations include a program (the "ADC program") that purports to allow MasterCard to impose monetary assessments on a merchant (via its acquiring bank) following an "account data compromise event" (an "ADC event") at the merchant if certain criteria are met. Declaration of Douglas H. Meal ("Meal Decl.") ¶ 5,

Exs. 2 & 3.[1] The stated objective of the ADC program is to provide MasterCard issuers with at least partial compensation for operational and fraud losses they may incur as a result of an ADC event. Meal Decl. Ex. 2, § 10.2.5.3. Under the ADC program, on September 17, 2014, MasterCard claimed that the banks that sponsor Target's participation in the MasterCard-branded payment card network (the "Target Acquirers") owed MasterCard approximately $26.6 million under the ADC program for operational and fraud losses allegedly incurred by MasterCard issuers as a result of the Target Intrusion (the "Assessment"). Meal Decl. at ¶ 6.[2]

Target, through the Target Acquirers, vigorously disputed the Assessment, and, as provided for in the MasterCard Operating Regulations, filed an appeal with MasterCard's Appeals Committee, which has not yet rendered a decision. *Id.* at ¶ 7.

In late 2014, MasterCard and Target began negotiations in an attempt to settle their dispute regarding the Assessment. *Id.* at ¶ 13. Those negotiations ultimately led, on April 15, 2015, to the execution of the Settlement now at issue. Declaration of Eileen Simon ("MasterCard Decl.") at ¶ 2. Under the Settlement, MasterCard is to make settlement offer (an "Offer") to each eligible MasterCard issuer (funded by Target), which offer the issuer in question is free to accept or not, as it chooses. *Id.*; Meal Decl. at ¶ 14. Provided that issuers responsible for at least 90 percent of the accounts MasterCard deemed to have been involved in the Target Intrusion accept their Offers, each issuer that

[1] Unless otherwise noted, all exhibits refer to those appended to the Declaration of Douglas H. Meal filed herewith.

[2] Target Acquirers' contracts with Target require Target to indemnify them for the Assessment if MasterCard collects it from them. Meal Decl. at ¶ 7.

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"), calculated according to the rules governing the ADC program, in exchange for a release of its claims against Target, the Target Acquirers, and MasterCard in connection with the Target Intrusion, including any such claims being advanced on the issuer's behalf by Plaintiffs in this litigation. MasterCard Decl. at ¶ 2; Meal Decl. at ¶ 14. Any issuer that does not accept its Offer, on the other hand, will be unaffected by the 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 Plaintiffs – will be fully and completely preserved. MasterCard Decl. at ¶ 2; Meal Decl. at ¶ 14.

The Settlement provides for a communication to be sent from MasterCard to each eligible issuer (the "Issuer Communication") contemporaneous with its Offer. MasterCard Decl. at ¶ 2–3; Meal Decl. at ¶ 20. The Issuer Communication is ten pages long and describes the Settlement, its terms, the issuer's Offer and ARA, the procedure for accepting the Offer, the consequences of doing so, and an explanation that all of the issuer's rights and claims related to the Target Intrusion are preserved should it elect not to accept its Offer. Meal Decl. at ¶¶ 20–21. The Issuer Communication also provides links to the Settlement and to the Consolidated Class Action Complaint for the Financial Institution Cases; and identifies Coordinating Lead Counsel and Lead Counsel for the Financial Institution Cases. *Id.* at ¶¶ 20, 22.

The Settlement and Issuer Communication, as well as the ADC program, are described in greater detail in the Declaration of Douglas H. Meal filed herewith.

III. <u>LEGAL STANDARD</u>

When a party seeks a preliminary injunction, it "may be granted *only if* the moving party can demonstrate (1) a likelihood of success on the merits, (2) that the movant will suffer irreparable harm absent the injunction, (3) that the balance of harms favors the movant, *and* (4) that the public interest favors the movant." *QBE Ams., Inc. v. McDermott*, No. CIV. 14-5020 PAM/TNL, 2015 WL 138082, at *2 (D. Minn. Jan. 9, 2015) (Magnuson, J.) (emphasis added), (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)). These four factors are commonly referred to as the *Dataphase* factors within the Eighth Circuit. The moving party bears the burden of proof with respect to each factor, *Watkins Inc. v. Lewis*, 346 F.3d at 844 (8th Cir. 2003), and the grant of a preliminary injunction is a "a drastic and extraordinary remedy that is not [] routinely granted." *QBE*, 2015 WL 138082, at *2 (internal quotations omitted).

Plaintiffs attempt to avoid the *Dataphase* criteria by arguing that they are not applicable to requests for preliminary injunctions under the All Writs Act. In doing so, however, Plaintiffs rely solely upon authority from other jurisdictions and ignore this Circuit's *own* binding precedent mandating application of the above-stated standard to such claims. In setting forth the standard for its review of a district court's denial of a request for injunctive relief, pursuant to the Court's authority under the All Writs Act, the Eighth Circuit stated in no uncertain terms that "[i]n determining whether injunctive relief is appropriate, we consider the *Dataphase* factors . . . ." *Canady v. Allstate Ins. Co.*, 282 F. 3d 1005, 1020 (8th Cir. 2002) (affirming denial of request for injunctive relief under the All Writs Act because appellants "fail[ed] to satisfy the *Dataphase* criteria"),

overruled in part on other grounds by, *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002); *see also Farm-to-Consumer Legal Defense Fund v. Sebelius*, No. 10-4018-MWB, 2012 WL 219376, at *2 (N.D. Iowa Jan. 23, 2012) (relying on *Canady* in holding that "[e]ntitlement to a preliminary injunction under the All Writs Act requires consideration of the same factors as a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure").[3]

IV. ARGUMENT

Plaintiffs seek preliminary injunctive relief under three separate theories: (i) the All Writs Act, (ii) Rule 23(e), and (iii) Rule 23(d). With respect to each of these theories, however, Plaintiffs fail to demonstrate that any of the *Dataphase* factors has been established, the absence of any one of which elements requires denial of their motion.

A. Plaintiffs Have No Likelihood of Success on the Merits.

1. *The All Writs Act Provides No Basis for Preliminarily Enjoining Consummation of the Settlement.*

The All Writs Act authorizes the federal courts to issue extraordinary writs, "but only to the extent that the issuance of process [is] in aid of the issuing court's jurisdiction." *Arkansas Blue Cross and Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 820 (8th Cir. 2009) (internal quotations omitted). Where the challenged conduct is "not shown to be detrimental to the court's jurisdiction or exercise thereof," the All Writs Act provides no basis for injunctive relief. *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978).

[3] While Plaintiffs nowhere dispute that the *Dataphase* factors apply to their request for a preliminary injunction under Rules 23(e) and 23(d), they nowhere address the application of such factors to their request for relief under those Rules.

Plaintiffs assert that the All Writs Act is implicated here because it provides the Court with the power "to enjoin the defendant from entering into ***a settlement class action*** with another plaintiff in another forum" (ECF No. 389 ("Mem.") at 17 (emphasis added)) and "to protect [its] jurisdiction where an ***action*** threatens to frustrate proceedings and disrupt the orderly resolution of federal litigations" (Mem. at 18 (emphasis added) (internal quotations omitted)). Plaintiffs simply cannot get around the fact, however, that there is no class action settlement or parallel action of any kind at issue here, let alone one that threatens the Court's jurisdiction. Indeed, as Plaintiffs' cited cases make clear, the All Writs Act was "designed for situations where the proposed settlement and release of claims ***in another judicial district*** would interfere with the MDL Court's disposition of those same claims." *In re Checking Account Overdraft Litig.*, 859 F. Supp. 2d 1313, 1322 (S.D. Fla. 2012) (emphasis added).[4] Where there is no such parallel action, and thus no possibility for orders that would be inconsistent with or duplicative of the orders of this Court, there can be no risk to the Court's jurisdiction that would require restraint of a settlement. Nothing in Plaintiffs' Memorandum is to the contrary.

Plaintiffs attempt to compensate for the absence of any parallel action by pointing to the Settlement's forum selection clause. But that provision plainly does not institute

[4] *See, e.g.*, *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1203 (7th Cir. 1996) (finding that All Writs Act empowers federal courts to avoid duplicative rulings such as where "a parallel state court action "would make a nullity of the district court's ruling"); *Baldwin*, 770 F.2d at 337 ("The need to enjoin conflicting state proceedings arises because . . . it is intolerable to have conflicting orders from different courts.") (internal quotations omitted).

any action or "invoke the authority of" any court to approve or otherwise oversee the Settlement (Mem. at 16), much less an action involving claims of absent putative class members. To the contrary, the provision concerns only the appropriate forum for disputes relating to the Settlement itself, and only applies to parties to the agreement: MasterCard and Target. *See* ECF No. 390-1, Decl. of C. Zimmerman Ex. 1 ("Zimmerman Ex. 1"), § 10.11.1. No issuer, whether it accepts its Offer or not, is a party to the Settlement. No issuer that accepts its Offer, therefore, would thereby be bound by the Settlement's forum selection clause. And even if the forum selection clause did bind issuers that accepted their Offer, which plainly is not the case, the clause by its terms does not govern any claim of an issuer relating to the Target Intrusion and could not, therefore, in any way threaten this Court's jurisdiction.

The complete absence of any threat to the Court's jurisdiction by reason of the Settlement is underscored by the line of cases holding that putative class action defendants have a *right* to negotiate settlements with prospective class members, without the involvement of class counsel or the approval of the presiding court, where, as here, no class has yet been certified. *See Baycol Prods. Litig.*, No. MDL 1431MJD/JGL, 2004 WL 1058105, at *3 (D. Minn. May 3, 2004). In holding that this right exists, the court in *Baycol* relied on the fact that it did not have jurisdiction over the absent putative class members at issue. Here, by the same token, since the Court does not even have jurisdiction over the non-plaintiff MasterCard issuers that are eligible to participate in the Settlement, there can be no argument the Offers that have been made to such issuers poses any possible threat to the Court's jurisdiction.

Moreover, even if the Settlement were a class settlement that purported to resolve on a classwide basis claims common to this MDL litigation – which it clearly is not – the mere existence of parallel proceeding involving the same claims does not suffice to enjoin the proceeding under the All Writs Act. *See, e.g.*, *Grider*, 500 F.3d at 331; *Baldwin*, 770 F.2d at 337. Rather, federal courts typically grant injunctions under the All Writs Act with respect to a class action settlement in the enjoined court only where the injunction is necessary to protect a pending or imminent settlement in the enjoining court. *See Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1099-100 (9th Cir. 2008) (finding injunction inappropriate where enjoining court was not approaching settlement).[5] Here, Plaintiffs do not and cannot allege that there is any prospect of an imminent class action settlement. Further, courts commonly deny requests to enjoin settlements under the All Writs Act where, as here, the MDL court has not yet certified a class and the challenged settlement affects only those who opt-in. *See Hinds Cnty., Miss. v. Wachovia Bank*, 790 F. Supp. 2d 125, 132 (S.D.N.Y. 2011) (finding injunction "neither lawful nor appropriate" where MDL court had not certified a class, the agreement sought to be

[5] *See also Grider*, 500 F.3d at 331 (injunction as to settlement in another federal court is particularly meritless "when there is no pending settlement in the enjoining court"); *Baldwin*, 770 F.2d at 338 (finding injunction as to non-settled plaintiffs appropriate only because there was a "substantially significant prospect" of settlement in the near future); *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719, 726 (E.D. La. 2012) (Circuit courts "have been most willing to uphold an injunction pursuant to the 'in aid of jurisdiction' exception in the MDL or complex litigation context when settlement is complete or imminent in the federal court."); *Vallier v. Am. Fid. Assur. Co.*, No. 08-2267-JAR, 2008 WL 4330028, at *4 (D. Kan. Sept. 16, 2008) (rejecting injunction application because "[n]o settlement is 'directly in prospect' or even in the negotiation stage"); *In re Lease Oil Antitrust Litig. II*, 48 F. Supp. 2d 699, 702, 704-05 (S.D. Tex. 1998) (enjoining state court action where global settlement had been filed in the federal consolidated action).

enjoined affected only those who opted in, and the case would continue as to other defendants regardless); *see also In re Life Investors Ins. Co. of Am.*, 589 F.3d 319, 332 (6th Cir. 2009) (finding "no cause to take extraordinary injunctive measures to protect the interests of a class" where class was not yet certified) (internal quotation omitted).

Plaintiffs' attempt to manufacture a supposed exception to these standards, based on cases where the defendant engaged in blatant misconduct to avoid a court's jurisdiction, is similarly unavailing. In *In re Managed Care Litigation*, a case where the enjoining court **had already certified a class**, the MDL court enjoined the settlement of a tag-along action because it found that the defendant had deliberately maneuvered to conceal the tag-along action from the MDL court in order to prevent the action from being consolidated in the MDL as it otherwise would have been. 236 F. Supp. 2d 1336 (S.D. Fla. 2002).[6] Here, Plaintiffs' Memorandum is devoid of any similar allegation that Target maintained a tag-along action or otherwise sought to shift settlement jurisdiction from the MDL to another court – indeed, Plaintiffs' assertion that the Settlement is "without judicial oversight" confirms that is not the case. Mem. at 20. And while Plaintiffs variously accuse Target of "egregious" conduct and proceeding "dishonestly" (Mem. at 19-20), all of these claims boil down to the allegation that Target negotiated with MasterCard (and through MasterCard with non-plaintiff MasterCard issuers) outside

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[6] *See also In re Checking Account Overdraft Litig.*, 859 F. Supp. 2d at 1324 (granting injunction where defendant failed to timely disclose existence of tag-along action to the MDL court); *In re Bank of Am. Wage and Hour Emp't Litig.*, 740 F. Supp. 2d 1207, 1215-1216 (D. Kan. 2010) (enjoining tag-along settlement, where the defendant violated a court order to report related cases).

of Lead Counsel's presence, which, as already shown above, is "entirely proper." *Baycol*, 2004 WL 1058105, at *3.

For these reasons, the All Writs Act provides no basis for granting the relief sought, and Plaintiffs' claim under the Act therefore has no likelihood of success.

2. *Federal Rule of Civil Procedure 23(e) Is Wholly Inapplicable at This Stage of the Litigation.*

"Prior to certification, court approval is not required to compromise the individual claims of potential class members." *Hinds Cnty.,* 790 F. Supp. 2d at 132 (S.D.N.Y. 2011); *see also In re Baycol Prods.*, 2004 WL 1058105, at *3 ("[S]ince no . . . class has yet been certified, Defendants have a right to negotiate settlements with prospective class members."); *Rothe v. Wayzata Nissan LLC.*, No. CIV. 02-3233 ADM/AJM, 2003 WL 21181343, at *1 (D. Minn. May 14, 2003) ("Each prospective plaintiff . . . is[] a free agent who should be entitled to settle with the defendant."); *In re Airline Ticket Comm'n Antitrust Litig.*, No. MDL 1058, 1996 WL 585301, at *2 (D. Minn. Aug. 12, 1996) ("Had these [plaintiffs] wished to . . . seek a private settlement with defendants, they were free to do so prior to expiration of the opt-out period."). Instead, under Eighth Circuit law, a court's authority to disturb defendants' private, pre-certification settlement negotiations is limited to its authority under Rule 23(d) to restrain misleading and coercive statements that threaten misconduct of a serious nature, which, as discussed below, has not occurred here. *See Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 59 F.3d 764, 766 (8th Cir. 1995).

By reason of the rule laid down by the Eighth Circuit in *Great Rivers*, defendant settlements with absent putative class members, without the involvement of putative class counsel or the court, are a common pre-certification occurrence that courts in this district recognize as routine. For instance, in *Baycol*, the Plaintiffs' Steering Committee sought both notice of, and the right to participate in, settlement negotiations between (1) defendants and absent putative class members and (2) defendants and one plaintiff that had filed a class action complaint and joined the Steering Committee's motion for class certification. *Baycol*, 2004 WL 1058105, at *1-3. The court rejected this bid for unprecedented, "extraordinary relief," and refused to allow the Steering Committee to participate. Although a motion for class certification was pending, and the court apparently agreed that the settlement negotiations had the potential to affect the MDL, the court nevertheless declined to oversee the settlement process or "needlessly interfere with these . . . helpful communications." *Id.* at *5, *8 ("[T]he Court is loath to discourage private discussions which can lead to settlements, something which this District's policies have long promoted."). Likewise, in *Rothe*, the court refused "to regulate [defendant]'s contact with [putative class members] and attempts to settle before a class has been certified," despite the named plaintiff's demands for nullification of releases, a communications ban, and curative notice. *Rothe*, 2003 WL 21181343, at *2.

The sole case that Plaintiffs cite in support of their assertion that this Court can exercise authority over the Settlement under Rule 23(e) is *Kahan v. Rosenstiehl*, 424 F.2d 161 (3d Cir. 1970). *Kahan*, however, was decided in 1970, and has since been superseded by an amendment to Rule 23(e) designed to clarify that a court's authority

and obligation to approve settlements under Rule 23(e) is limited to the context where the claims of a *certified class* are released. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a *certified class* may be settled, voluntarily dismissed, or compromised only with the court's approval." (emphasis added)); *see also Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 576 & n.3 (N.C. Ct. App. 2008) (citing the Third Circuit's decision in *Kahn* as one that was superseded when Congress resolved the circuit split regarding whether Rule 23 applied to pre-certification settlements by amending Rule 23 to clearly limit it to certified classes). As the advisory committee explained, the 2003 amendment "resolve[d] the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of 'a class action.' That language could be--and at times was--read to require court approval of settlements with putative class representatives that resolved only individual claims. The new rule requires approval only if the claims, issues, or defenses of a *certified class* are resolved by a settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23 advisory committee notes (emphasis added).

Plaintiffs cite no case in which any court has found a pre-certification, "*de facto* class action settlement" (Mem. at 21) to be subject to Rule 23(e). Lacking case law, Plaintiffs resort to suggesting that the Settlement is "no different" (Mem. at 22) from an opt-out class action settlement. They argue that, because the Settlement appears to possess some features of a Rule 23(e) class action settlement, the Court should treat it as one. Such labels do nothing to alter the fact that, as expressly clarified by the 2003 amendments, a court only has power under Rule 23(e) in the context of an *actual* certified class. Indeed, the Supreme Court has held that, if there were such a thing as a "*de facto*

class action," such an action would *not* be subject to Rule 23. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (finding that the protections of Rule 23 could "be circumvented" if a plaintiff was allowed to "create *de facto* class actions").[7]

The idea that a court has authority under Rule 23(e) to approve or disapprove a settlement with absent members of a non-certified class is additionally implausible in light of the fact that court does not even have jurisdiction over such absent putative class members. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 798 (1985) (finding personal jurisdiction over absent class members *after* certification of class and opportunity to opt out); *see also Baycol*, 2004 WL 1058105, at *3 (finding no personal jurisdiction over absent class members in a putative class). But even if the non-plaintiff MasterCard issuers *were* subject to the Court's jurisdiction, each issuer's decision to accept its Offer and to settle its individual claims has no effect on any other issuer.[8] The Settlement is thus clearly not a class action settlement, *de facto* or otherwise, to which Rule 23(e) could ever apply. The Eighth Circuit has unequivocally stated that "[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23" and an opt-in class action. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975) (adopting 5th

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[7] The Supreme Court's concern with the possibility of "*de facto* class actions" in *Taylor* emanated from the possibility that a non-party could be bound by a settlement that such non-party did not willfully participate in. That concern is entirely inapplicable here, where no issuer that does not affirmatively accept its Offer will be affected in any way by the Settlement. Meal Decl. ¶ 14.

[8] Plaintiffs are simply incorrect in suggesting that the Settlement "*mandates* MasterCard issuers representing 90% of all accounts subject to the deal to provide a full release of all claims against Target." Mem. at 22. Each issuer is free to accept its Offer or not, as it chooses. If the 90% threshold is not met and MasterCard and Target do not waive the condition, all parties will simply remain at the status quo ante in all respects.

Circuit's holding that "Rule 23(c) provides for 'opt out' class actions. FLSA § 16(b) allows as class members only those who 'opt in.' These two types of class actions are mutually exclusive and irreconcilable."); *see also Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir 1986) (declaring statutory opt-in class action to be "unlike the class action procedures of Rule 23, where parties are automatically included in the class unless they opt out"); *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 265 (D. Minn. 1991) (finding Rule 23's notice provisions inapplicable to opt-in age discrimination class action). Because the Settlement will not bind any issuer that does not affirmatively accept its Offer, the Settlement clearly could never be governed by Rule 23(e), which exists to address "due process concerns for absent class members that exist in 'opt out' classes," where those absent class members might see their claims resolved without their consent or even their knowledge. *Lipnicki v. Meritage Homes Corp.*, No. 10-CV-605, 2014 WL 923524, at *13 (S.D. Tex. Feb. 13, 2014).

Plaintiffs' attempts to cast their litigation as a "quasi-class action" notwithstanding its uncertified nature are likewise unavailing. First, Plaintiffs cite no controlling authority for the proposition that it would ever be appropriate for an MDL court to treat an uncertified putative class action as a "quasi-class action" for any purpose under Rule 23. The few district court decisions Plaintiffs cite, moreover, are limited to the context of attorney fee disputes in MDLs involving only individual plaintiffs. Mem. at 24. Thus, even if it were appropriate for a court to rely on a "quasi-class action" theory in order to allocate attorneys' fees in cases involving a collective settlement of a large number of *individual* claims, that theory would have no bearing in the case of a *putative class action*,

such as this. This action is and will remain a *putative* class action unless and until it becomes a *certified* class action, and under the express wording of Rule 23(e) itself, Rule 23(e) will not begin to apply to this action unless and until certification occurs. "*Quasi*-class action" is not a third alternative nor is it an avenue for Plaintiffs to skip past certification to avoid the fact that Rule 23, as amended, plainly *rejects* judicial approval of pre-certification settlements. Plaintiffs' "quasi-class action" theory is also directly at odds with the line of cases in this District establishing that defendants are free to negotiate settlements with absent putative class members.[9]

3. *Plaintiffs' Claim That MasterCard's Communications with Issuers Were Misleading and Coercive Cannot Succeed on the Merits.*

While Plaintiffs apparently concede that they can succeed on their Rule 23(d) claim only if MasterCard's communications with its issuers regarding the Settlement were misleading or coercive,[10] Plaintiffs understate their burden of establishing that court action under Rule 23(d) is justified and point to no statement (or action) by MasterCard (or Target for that matter) that comes anywhere close to meeting the relevant standard. Under Rule 23(d), a court may only limit communications that constitute or threaten "misconduct of a serious nature," based on "a clear record and specific findings that

[9] To the extent that Plaintiffs are trying to suggest that the Settlement itself constitutes a quasi-class action, that argument would fail for the same reasons as their *de facto* class action theory.

[10] Because, as discussed below, courts lack power under Rule 23(d) to affect the *substance* of private, pre-certification settlements, Plaintiffs' objections to the terms of the Settlement and the Offers made to non-plaintiff MasterCard issuers thereunder are entirely irrelevant to their Rule 23(d) claim. *See Hinds Cty.*, 790 F. Supp. 2d at 133 ("[S]ince a district court may not prevent an extrajudicial settlement prior to class certification, there would be no point in conducting a full-blown inquiry into the fairness of such a private settlement or the process by which such a settlement was negotiated.").

reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Great Rivers*, 59 F.3d 764 at 766 (citing *Gulf Oil v. Bernard*, 452 U.S. 89, 101 (1981)). Under this standard, the fact "[t]hat a statement 'appears' 'in certain respects' to be 'somewhat misleading' is not sufficient." *Id.* The bar for limiting a defendant's ability to communicate with absent class members about a potential settlement where a class has not been certified is, moreover, significantly higher than when a class has been certified. *Rothe*, 2003 WL 21181343, at *2 ("This highlights another very important factor here—that no class has been certified. Therefore, the limits on communications with putative class members are diminished . . . .").

Courts in this district therefore have consistently interpreted *Great Rivers* to limit a court's ability to restrain communications with absent class members under Rule 23(d)—including by ordering corrective disclosures related to such communications—to those instances where the communication involves serious misconduct, such as egregious misrepresentations. *See, e.g.*, *In re Lutheran Bhd. Variable Ins. Prods. Co.*, No. 99-MD-1309PAMJGL, 2002 WL 1205695, at *2 (D. Minn. May 31, 2002) (Magnuson, J.) (holding that a *post-certification* attorney advertisement, which "contain[ed] no fewer than three egregious misrepresentations" about the class action, "present[ed] the sort of 'misconduct of a serious nature' that necessitate[d] a restraint on his speech"); *In re Airline Ticket Comm'n Antitrust Litig.*, 1996 WL 585301, at *2-3 (enjoining defendants' counsel from negotiating with members of a *certified* class without class counsel's permission after defendants' counsel, in the guise of court-ordered discovery, "knowingly suborned" the judicial process by engaging in settlement negotiations with class members

without notice to class counsel). Cases where courts have taken action to foreclose communications illustrate the extreme level of misconduct or risk of coercion that must exist before courts may restrain speech, in stark contrast to cases, like this one, involving accurate, non-coercive communications. *See Rothe*, 2003 WL 21181343, at *1 (refusing to limit defendant's letter to putative class member customers, which contained case background and a settlement offer, because the letter was neither misleading nor deceptive).

In re Potash Antitrust Litigation, 896 F. Supp. 916 (D. Minn. 1995), a case cited by Plaintiffs (Mem. at 26), underscores the level of actual or threatened misconduct that must be present before a court restrains speech under Rule 23(d). In that case, which involved a certified class and, therefore, a lower standard for court action under Rule 23(d) than applies here, the defendant sent a communication to potential class members in response to the distribution of the notice of pendency of class action, in which the defendant blatantly asserted its belief in its innocence. *In re Potash Antitrust Litigation*, 896 F. Supp. at 919. Even though the court found that the expression of innocence "pushe[d] the envelope of proper comment," it declined to order the remedies plaintiffs sought – including corrective notice at the defendant's expense – because the communication was "not coercive, abusive, or fundamentally misleading."[11] *Id.* at 920.

[11] Because a class had been certified, the court did order that written communications with the class "since the certification of the class," and written communications going forward, be provided to the court and class counsel, noting that "[o]nce a class is certified, the rules governing communications apply as through each class member is a client of class counsel." *Id.* at 920-21.

Rather than squarely address the above cases, Plaintiffs rely on a series of cases outside of the District of Minnesota and the Eighth Circuit. In doing so, however, they fail to mention the single case in any district that is directly on point here. In *In re Heartland Payment Systems, Inc. Data Security Breach Litigation*, Heartland, Heartland's acquiring banks, and Visa entered a settlement that was structured almost exactly like the Settlement at issue here and involved an issuer communication that closely parallels the Issuer Communication here. *See* Meal Decl. ¶ 17, Ex. 7; Zimmerman Ex. 1. The settlement resolved Visa's claims against Heartland's acquiring bank under the Visa equivalent to MasterCard's ADC program, was condition on issuers of 80% of eligible cards opting in to the settlement, and called for such accepting issuers to release all claims relating to the network intrusion that Heartland suffered, including all claims asserting in the pending putative class action. Meal Decl. Ex. 7, at §§ 4.1, 19.1. Like Plaintiffs here, the *Heartland* named plaintiffs challenged the issuer communication under Rule 23(d). Meal Decl. ¶ 19. The *Heartland* court rejected the challenge, ruling that the communication was neither misleading nor coercive. *Id.*; Exs. 11 & 12 In particular, the *Heartland* court noted approvingly that potential class members received a written settlement offer from Visa, which contained an accurate description of the pending putative class action, a link to the master complaint, and information about plaintiffs' counsel. Ex. 12 at 37. These elements are also present in the Issuer Communication, which is likewise accurate and non-coercive. [12]

[12] Heartland and MasterCard subsequently entered a settlement that also was, in all respects relevant to Plaintiffs' instant motion, similar to the Settlement here, (MasterCard

(a) Plaintiffs Cannot Show that the Issuer Communication or MasterCard's Statements About the Settlement Were Misleading

Plaintiffs fail to identify any misleading conduct here, nor could they.[13] Contrary to Plaintiffs' assertions, the straightforward Issuer Communication and MasterCard's statements accurately describe the Settlement, the Offers, and the right of any issuer receiving an Offer to accept it or not, as it chooses, with all of the issuer's rights and claims in this litigation and elsewhere being fully preserved and protected should it elect not to accept its Offer.[14]

Decl. at ¶ 4), which was not challenged. Meal Decl. at ¶ 16, Ex. 5. Notably, the structure of the Settlement and the terms of the Offers also follow the structure and terms that Visa and MasterCard used to reach settlements with TJX in 2007–2008, including an issuer release of all claims in the putative class action then-pending regarding that intrusion. *See* MasterCard Decl. at ¶ 4; Meal Decl. at ¶¶ 16–17. The court in that MDL took no issue with TJX's card brand settlements. To the contrary, upon being advised of TJX's settlement with Visa, Judge Young extensively praised Visa, TJX, and TJX's acquirer for reaching 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. Ex. 10 at 28.

[13] In their Memorandum, Plaintiffs resort to statements made by the press to support their claims that MasterCard's and Target's statements about the Settlement were misleading. *See* Mem. at 8-9. Such statements, of course, cannot be attributed to MasterCard or Target, and Target, therefore, does not address them here.

[14] In particular, the Issuer Communication references the Target Intrusion and related MasterCard case numbers, (Zimmerman Ex. 1 at 37), the status of MasterCard's claim under the ADC program on behalf of MasterCard issuers based on the Target Intrusion, (*id.* at 38, 41, 45), the Settlement and MasterCard's reasons for entering into it, (*id.* at 37-45), the terms and conditions of the issuer's Offer, (*id.* at 38-43), the amount of the issuer's ARA and the percentage that amount represents of the maximum potential amount that the issuer could be awarded under the ADC program, (*id.* at 42, 56), the timing for acceptance of the Offer and payment of the ARA, (*id.* at 40-47), the consequences (or lack thereof) of accepting or not accepting the Offer, (*id.* at 43-45, 59-60), and the procedure for accepting the Offer, (*id.* at 42-44).

Plaintiffs badly misread the Issuer Communication and MasterCard's statements in a futile attempt to identify misleading content. First, Plaintiffs claim that MasterCard falsely stated that the Offers "accounted for 71.4% of issuing banks' [total] costs and losses," (Mem. at 29) but point to nothing in support of this claim. To the contrary, their only allegations that are remotely on point illustrate that MasterCard made clear that the 71.4% referenced in the Issuer Communication and MasterCard statements was the percentage an issuer's ARA represented of its maximum recovery under the ADC program, and not the percentage the ARA represented of the issuer's actual losses from the Target Intrusion. Indeed, the excerpt from a MasterCard email that Plaintiffs quote in advancing this argument (Mem. at 6) expressly states that issuers would "be compensated for 71.4 percent of these costs, *as calculated under MasterCard's ADC standards*" (emphasis supplied). *See also* MasterCard Decl. at ¶ 10. Thus, it is clear what recovery denominator the percentage applies to – the maximum amount assessed by MasterCard.

Second, Plaintiffs point to an excerpt from one of the conference calls with issuers where the MasterCard representative stated that "MasterCard's formula represents an attempt to reimburse issuers *partially*" and "is *not a complete* reimbursement for every cost that you may have incurred," (Mem. at 11) and claim that MasterCard elsewhere misrepresented that the ADC program provided full and complete reimbursement for issuer losses stemming from an ADC event. But Plaintiffs never identify this supposed misrepresentation, and could not possibly do so, because the MasterCard Security Rules and User Guide that are available to all MasterCard issuers, (MasterCard Decl. at ¶ 6) and

to which the MasterCard representative repeatedly referred call participants to during the issuer conference calls (*see* ECF No. 390-4, Decl. of C. Zimmerman Ex. 4 ("Zimmerman Ex. 4"), at 4-5, 9) make clear that calculations of operational reimbursement and fraud recovery under the ADC program are designed and intended to provide partial recovery of an issuer's operational and fraud losses related to an ADC event and thus do not necessarily reflect any given issuer's total actual costs from such an event. Meal Decl. at ¶ 8, Ex. 2.

Third, Plaintiffs contend that MasterCard deceived issuers "with respect to the size of the settlement in comparison to overall losses in a conference call held with issuers" when the MasterCard representative indicated that she did not believe that MasterCard had "quantified the total dollar amount of fraud losses associated with the Target data breach," noting that MasterCard "is really reliant on you, our issuing customers to submit fraud that you believe is attributable to the Target Data Breach to us." Mem. at 15. Plaintiffs contend that this statement was false, asserting that MasterCard produced documents in this litigation suggesting MasterCard quantified such losses to the penny, at Redacted *Id.* The MasterCard affidavit submitted herewith ("MasterCard Decl.") conclusively demonstrates the invalidity of Plaintiffs' contention. *See* MasterCard Decl. at ¶¶ 8–9.

Fourth, citing a statement by MasterCard to the effect that issuers "may receive more or less than the amounts reflected in their Offers or may be awarded nothing at all on their claims, depending on the outcome of any litigation that Target has threatened," Plaintiffs contend that MasterCard thereby misleadingly conflated the ADC program with

recoveries that might be obtained in this MDL. Mem. at 10, 29. MasterCard, in fact, accurately contrasted the Offers available to issuers under the Settlement with the process by which non-accepting issuers retain all their rights to pursue recovery not only in this MDL, but also pursuant to the ADC program. The Issuer Communication and MasterCard call accurately described the legal right of Target and the Target Acquirers to litigate the outcome of the ADC program, and the possibility that any award to issuers pursuant to the ADC program could ultimately be "eliminated entirely" if this legal challenge were successful. Zimmerman Ex. 1 at 41, 45[15]; Zimmerman Ex. 4 at 2 ("Target and its acquiring banks have challenged MasterCard's right to reimburse issuers through our account data compromise process at the original calculated amounts. They've threatened to litigate the matter . . . .").[16] In context, any reasonable MasterCard issuer would have understood that MasterCard here was referring to recoveries under the ADC program, and not recoveries pursuant to the MDL.

Fifth, in regard to the release to be provided by any issuer that accepts its Offer and the relationship of that release to available recovery through the ADC program, Plaintiffs claim that MasterCard "failed to disclose" that (1) MasterCard "must" provide benefits to issuers under the ADC program, (2) issuers need not release their claims against Target to participate in the ADC program, and (3) the release was designed to prevent class members from recovering more than ADC benefits. Mem. at 29-30. But, as accurately described in the Issuer Communication, recovery under the ADC program

[15] Page references to Zimmerman Ex. 1 are to ECF pagination.
[16] Such litigation would not be unprecedented. *See Genesco, Inc. v. Visa U.S.A. Inc.*, No. 3:13CV202, 2013 WL 3790647 (M.D. Tenn. July 18, 2013).

is *not* guaranteed; Target, through the Target Acquirers, has vigorously disputed and appealed the Assessment and Target has the right and fully intends to challenge the ruling on that appeal through litigation if the ruling is not favorable to Target. Zimmerman Ex. 1 at 41; Meal Decl. at ¶ 7. The Issuer Communication similarly makes clear that an issuer's continued participation in the ADC program is not conditioned on the issuer's release of claims against Target: "Non-accepting issuers . . . will reserve their ability to receive whatever MasterCard determines they are entitled to . . . under the MasterCard Standards, subject to Target's appeal and any subsequent litigation regarding such determination." Zimmerman Ex. 1 at 45. Finally, the Issuer Communication in no uncertain terms informs issuers that any issuer's acceptance of an Offer requires the issuer to release all other claims, including claims in the MDL, relating to the Target Intrusion. *Id.* at 57-58 ("**Any issuer that accepts the optional Alternative Recovery Offer will waive and release any right such issuer would otherwise have had to obtain any recovery from Target . . . by reason of the Target Intrusion from or in either the putative Financial Institution Track class action litigation . . . or any other litigation or other proceeding.**").

Sixth, Plaintiffs allege that MasterCard "failed to" disclose a number of purported facts about the MDL. In particular, Plaintiffs allege that MasterCard "failed to" (i) provide the Consolidated Class Action Complaint; (ii) provide contact information for Plaintiffs' Counsel; (iii) include information about the full "scope of liability" that Target faces in the MDL; and (iv) inform issuers that "a hearing on a motion for class

certification is imminent"[17] and that the case is scheduled for trial on March 1, 2016. Mem. at 6, 29-30. As an initial matter, many of these assertions are flatly inaccurate. The Issuer Communication describes the MDL, including the pending counts that survived Target's motion to dismiss (Zimmerman Ex. 1 at 57), names Plaintiffs' counsel (*id.*), and includes a hyperlink to a copy of the Complaint (*id.* at 44), which of course provides the contact information for Plaintiffs' counsel and allows Plaintiffs to decide for themselves the scopes of the various potential liabilities claimed in the MDL. Such disclosures satisfy any obligation that Target and MasterCard may have had to disclose information about the MDL, particularly in light of the sophisticated nature of the MasterCard issuers that received these communications. *See* Meal Decl. Ex. 12 at 37 ("The cases that have been presented with similar communications have emphasized whether communications adequately identify the existence of the putative class action litigation and provide an opportunity for the recipient of the offer to contact the lawyers in that case and learn more about the potential for recovery in that litigation. And at this stage, we have precisely that situation."). As was the case in *Heartland*, issuers "have been advised that this litigation is pending[,] they have been given information about this litigation that no one challenges as inaccurate; and they have been given a link to a copy of the master complaint with the full contact information about the lawyers in this case." *Id.* Such disclosures are all that is required under Rule 23(d). *See id.* at 37, 40; *see also*

[17] Plaintiffs are factually incorrect in asserting that a class certification hearing is "imminent," as no motion for class certification has even been filed yet and the hearing is months away. *See* Pretrial Scheduling Order, ECF No. 341.

Bublitz, 196 F.R.D. at 549 (requiring only that plaintiffs provide a written offer, notice of the putative class action, and time to consider the offer).

Seventh, Plaintiffs contend that Target and MasterCard were required to state that Plaintiffs "were excluded" from Target's private negotiations with MasterCard and that Plaintiffs did not approve the settlement, but there is no reason for sophisticated parties to think that Plaintiffs would have been involved in negotiating a private settlement with non-party MasterCard, particularly in light of governing law suggesting that Plaintiffs' counsel have no right to participate in any such negotiation. *Bublitz*, 196 F.R.D. at 549. ("Plaintiffs have no right to participate in the presentation of the settlement proposal and related communications, nor do they have the right to analyze it before hand."); *In re Baycol*, 2004 WL 1058105, at *5 (denying "extraordinary relief" sought by Plaintiffs' Steering Committee to participate in private negotiations).

Eighth, Plaintiffs contend that the Offers reflect "such low amounts to class members that the offers themselves tend to mislead class members about the strength and extent of their claims." Mem. at 30. But there is no support in the record for Plaintiffs' assertion that the ARA's reflect "such low amounts,"[18] and Target contests any assertion that Plaintiffs' claims are strong. As discussed above, such statements about the supposed merits of the claim being asserted in a putative class action are outside the scope of required disclosures, and Plaintiffs cite no cases to the contrary.

[18] The unsubstantiated estimates that Plaintiffs cite are not evidence of any actual harm resulting from the Target Intrusion. *See* Mem. at 7.

Ninth, Plaintiffs' invalidly assert that MasterCard's communications were misleading because they failed to disclose that "Target has a narrower scope of liability to MasterCard than it has to issuing banks" (Mem. at 29) and that "MasterCard has a narrower scope of liability to issuing banks than Target does," *id.* As the Court is well aware, Target has *not* been found liable to any issuing bank, and Plaintiffs' claim that Target has such liability is currently nothing more than an unsubstantiated allegation. The Court should therefore reject Plaintiffs' idea that *Target*, which disputes Plaintiffs' allegation that it is liable to issuing banks pursuant to Plaintiffs' claims in this MDL, must convey to issuing banks *Plaintiffs'* views on the scope of Target's liability on those claims. Neither MasterCard nor Target is required to serve as a mouthpiece for Plaintiffs' counsel. *Cf. E.E.O.C. v. McDonnell Douglas Corp.*, 948 F. Supp. 54, 55 (E.D. Mo. 1996) (ruling that communication to former employees in which defendant "adamantly protest[ed its] innocence and speculate[d] as to the [lawsuit's] ultimate chance of success" were "not misleading or coercive" but "contain[ed] pertinent and accurate information that may assist the aggrieved parties in deciding whether to accept the Defendant's settlement offer"). That idea is especially ill-conceived where, as here, the recipients of the communication are highly sophisticated financial institutions that are perfectly capable of making their own judgments as to both the amount and the strength of their alleged claims arising from the Target Intrusion and that, in the event they would like Plaintiffs' counsel's view on those issues, can use the information provided in the Issuer Communication to contact them.[19]

[19] In fact, based on the Plaintiffs' counsel's press release and reported conversations with

Finally, separate and apart from the points made above, Plaintiffs' failure to present a single affidavit from a named plaintiff or absent putative class member, describing how, exactly, they were deceived or misled by any of the allegedly misleading statements described above is independently fatal to Plaintiffs' ability to meet their burden of establishing a clear record that allows the Court to make the requisite specific findings to enter an order restraining speech under Rule 23(d).

(b) Plaintiffs Also Cannot Show that the Issuer Communication or MasterCard's Statements Represent Coercive Conduct

Nor is there any support in the record for Plaintiffs' speculation that MasterCard will leverage its knowledge, size, and influence to strong-arm issuers into accepting their Offers. *See* Mem. at 30.

First, there was nothing coercive about statements in the Issuer Communication indicating that MasterCard could grant Target's appeal of the Assessment. *See* Mem. at 10. To the contrary, this disclosure provided issuers accurate information about a legitimate risk that issuers may want to consider when deciding whether to accept their Offers. *See* Meal Decl. at ¶ 7.

Nor did the Offers "capitalize[] on issuing banks' understanding of MasterCard as an entity with specialized knowledge in the intricacies of its own ADC Program and Security Rules." Mem. at 30. As stated above, the MasterCard issuers are sophisticated financial institutions who are subject to MasterCard's rules and have ample access to MasterCard's publicly available rules regarding the ADC program, (MasterCard Decl. at

press outlets, Plaintiffs' counsel have already communicated their view to issuers. *See, e.g.*, Ex. 18.

¶ 6), as well as the ability to consult with counsel about their legal rights and obligations under those rules.

Plaintiffs further lack grounds for asserting that the Settlement's "mandatory 90% participation provision" gives MasterCard an "improper financial incentive to pressure banks to release their broader claims against Target."[20] *Id.* To being with, MasterCard has denied that it has engaged or will engage in any attempt to "pressure banks to release their . . . claims against Target," (MasterCard Decl. at ¶ 12) and Plaintiffs have cited no record evidence to the contrary.

Plaintiffs' assertion that Target and MasterCard "[u]sed MasterCard's influential, trusted ongoing relationship with issuing banks to leverage unconscionably broad releases from issuing banks" (Mem. at 30) fails for these same reasons. As recognized by the federal district judges presiding over the TJX and Heartland MDLs, banks that issue payment cards are sophisticated businesses that are fully capable of declining settlement offers such as the Offers if they so desire. Ex. 10 at 28 (statement by court that private dispute resolution "works when you have entities of more or less equal bargaining power,"

[20] Elsewhere, Plaintiffs wrongly claim that the 90% participation provision would necessarily "eliminate[]nearly all of the MasterCard-related claims in the putative class," Mem. at 5. As the Issuer Communication clearly states, issuers are not required to accept their alternative recovery offers, and the Settlement will become effective if issuers that issued at least 90% of *qualified accounts* choose to accept the alternative recovery offers. Zimmerman Ex. 1 at 40. Given the distribution of accounts across MasterCard issuers, the 90% threshold could be met even if the vast majority of MasterCard issuers decided not to opt in. *See* MasterCard Decl. ¶ 3 ("Based on MasterCard's calculartions, the 90% opt-in threshold for the Settlement Agreement to become effective could be reached if as few as the 45 largest MasterCard issuers . . . accept their [Offers]."). In the TJX and Heartland settlements with MasterCard, fewer than 90% of the eligible issuers accepted their Offers. MasterCard Decl. at ¶ 5. There is no reason to think the same thing would not occur here.

such as "large retailers" on one side and "*banks on the other*") (emphasis added); *see also* Ex. 12 at 40 (statement by the court that "this is a group of sophisticated financial entities themselves who have every ability, in a very practical sense, to read the information and make a decision as to whether they want to [click] on the links, pick up the phone and talk to the lawyers who draft the master complaint in this case and who are proceeding with the litigation."). The Issuer Communication itself emphasizes as much: "[u]ltimately, of course, the decision of whether to participate in this Settlement is left to each eligible issuer and, where applicable, each covered sponsored issuer." Zimmerman Ex. 1 at 42. In short, if any MasterCard issuer receiving an Offer prefers to seek recovery of its alleged losses due to the Target Intrusion through this litigation, other litigation, and/or the ADC program, the issuer need only throw its Offer in the wastebasket and it will be fully capable of doing so.

The context in which the Offers were provided is thus a far cry from contexts – such as employer-employee relationships – that courts have found to create a risk of coercion. *See Bublitz*, 196 F.R.D. at 548. Plaintiffs' reliance on cases such as *Kleiner* and *Hampton Hardware*, moreover, is misplaced, as both cases involved situations, not present here, of lopsided bargaining power, in which the parties with the stronger positions sought not settlements, but non-participation. *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985); *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994). Furthermore, *Kleiner* has been criticized in the District of Minnesota as "not applicable to precertification contact with potential plaintiffs." *Rothe*, 2003 WL 21181343, at *2. Even in *Bublitz*, moreover, where the court determined that

risk of coercion was high due to the employer-employee relationship, the court permitted the defendant-employer to engage in settlement communications with its current, at-will employees, alleviating the risk of coercion by requiring written communications to be filed with the court, along with a list of recipients, and at least 10 days to accept the offer. *See Bublitz*, 196 F.R.D. at 548-50. Here, issuers have already been given substantially more than 10 days to decide whether to accept their Offers and the Issuer Communication has been provided to the Court.

In sum, particularly in light of MasterCard's unrebutted and unequivocal denial that it has engaged or will engage in any improper behavior in an attempt to "pressure banks to release their . . . claims against Target" (*cf.* MasterCard Decl. ¶ 12), Plaintiffs' unsupported claims of potential coercion by MasterCard fail to justify any action by the Court under Rule 23(d).

B. Plaintiffs Have Not Shown They Will Incur Any Harm, Let Alone Irreparable Harm, Absent a Preliminary Injunction.

Plaintiffs' motion is additionally defective because they have not shown, and cannot show, they would incur any irreparable harm absent the preliminary injunction they seek. *See Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 420 (8th Cir. 1987) ("Once a court determines that the movant has failed to show irreparable harm absent an injunction, the inquiry is finished and the denial of the injunctive request is warranted."). Under the Settlement, MasterCard issuers who do not accept their Offers will retain whatever rights they have to recover losses related to the Target Intrusion under the MasterCard rules, through litigation, or otherwise. Zimmerman Ex. 1, §§ 3.3.1, 3.3.3.

Thus, to the extent that any Plaintiff either receives an Offer directly or is covered as a "sponsored issuer" by an Offer received by another MasterCard issuer, that Plaintiff can preserve the status quo and protect itself against any harm resulting from the Settlement by simply ensuring the Offer is not accepted – it has no need for a preliminary injunction to achieve that end.[21]

C. <u>Plaintiffs Have Not Shown a Balance of Harms That Favors Them.</u>

In weighing the balance of harms, the Court may take into consideration the potential for "serious financial harm" to a defendant where injunctive relief may result in the termination of an agreement. *See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. CIV. 06-363DWFAJB, 2006 WL 763212, at *6 (D. Minn. Mar. 24, 2006) (declining to grant an injunction based on balance of harms where defendant's merger agreement not only "would likely be delayed" as a result of the requested injunction but "could be scrapped").

Here, the Settlement may be terminated (i) automatically if by May 20, 2015 if the Offers have not been accepted by issuers comprising at least 90% of the *accounts* MasterCard deemed to have been involved in the Target Intrusion, unless MasterCard

[21] Plaintiffs cite to *In re Managed Care Litigation* to claim irreparable harm from (i) setting a standard for claims related to other entities, (ii) impeding mediation, and (iii) loss of efficiencies of MDL consolidation (Mem. at 19 n.5). But none of the factors cited in that case are applicable here: (i) there are no other defendants here; (ii) no mediation will be impeded by the Settlement; and (iii) the Settlement in no way increases the likelihood that *other actions* will be filed that could defeat such efficiencies. *In re Managed Care*, 236 F. Supp. 2d at 1344-45. And it is sheer speculation to suppose that any of them, even if they did arise, would irreparably harm Plaintiffs. *See Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986) ("Bare allegations of what is likely to occur are of no value . . . [; there must be] proof indicating that the harm is *certain* to occur in the near future.").

and Target agree to waive the 90% threshold requirement (Zimmerman Ex. 1, § 4.1); (ii) by written notice from either party at any time after August 18, 2015, if Settlement has not been consummated by that date (*id.* at § 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 is held to be invalid or unenforceable by a court of competent jurisdiction (*id.* at § 10.6). Therefore, Court's entry of the preliminary injunction sought by Plaintiffs could well result in the termination of the Settlement.

Termination of the Settlement would threaten Target with substantial harm. Under the Settlement, Target is to be released from up to the entire maximum Assessment amount ($26.6 million) in exchange for a payment of no more than $19 million. *See* Meal Decl. ¶ 14. Thus, if the Settlement is terminated, Target will once again be exposed to the full amount of the Assessment. While Target will have preserved its right to contest the Assessment and believes its defenses are strong, Target has no guarantee that those defenses will prevail. Accordingly, termination of the Settlement could cost Target up to $7.6 million. Because the injunctive relief requested by Plaintiffs creates a substantial risk of causing the Settlement to terminate, it therefore creates a substantial risk of subjecting Target to a $7.6 million loss. That exposure far outweighs any potential harm that Plaintiffs might suffer were their motion denied.

Plaintiffs' only argument to the contrary is to rely on the reasoning in *In re Managed Care Litigation* to make the conclusory assertion that the balance of hardships weighs in their favor because "had [Target] proceeded properly, any proposed settlement would already be pending before the MDL court anyway." Mem. at 19 n.5. But that

statement is both unsupported in the record and irrelevant, as it does not even purport to balance the relative harms of the two parties. In *In re Managed Care Litigation*, the court declined to balance hardships in light of the defendant's lack of "clean hands" in concealing the tag-along action where the separate settlement was reached, despite its legal obligation to report such actions. Here, there is no basis for Plaintiffs to argue that Target wrongfully concealed a separate action because there is no separate action to conceal. Additionally, the reasoning of the court in *In re Managed Care Litigation* runs contrary to Eighth Circuit's holding that courts must consider all four *Dataphase* factors. *See Watkins*, 346 F.3d at 844.

D. The Proposed Preliminary Injunction Harms the Public Interest.

Plaintiffs also have not shown that their requested preliminary injunction would benefit to the public interest, since it instead threatens to harm the interests of non-parties, most notably the thousands of MasterCard issuers who, if the Settlement is consummated, would have obtained a certain, speedy resolution of their claims arising from the Target Intrusion. *See, e.g., MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 357 (7th Cir. 1997) (public interest prong measures "the effect that granting or denying the injunction would have on third parties."); *Platt v. City of Dayton Dep't of Urban Dev*., 859 F.2d 922 (6th Cir. 1988) (including "whether the injunction could harm third parties" as a consideration in appellate review of district court grants of injunctions); *Doe v. Colautti*, 592 F.2d 704, 706 n.5 (3d Cir. 1979) ("A district court should also consider, when they are relevant, the possibility of harm to third parties from the injunction and the effect of the injunction on the public interest."). MasterCard issuers are slated to receive up to $19 million under

the Settlement and can anticipate receiving their Offer amounts (if they accept their Offers) within fifteen business days of the Settlement's consummation. Zimmerman Ex. 1, § 5. However, as is detailed above, granting Plaintiffs' requested injunction could well crater the Settlement. In that event, those MasterCard issuers who otherwise would have accepted their Offers could well wind up recovering nothing on their claims under the ADC program or in this or any other litigation, as opposed to the more expedient 71.4% recovery that the Settlement currently guarantees each eligible issuer on the maximum amount of its potential recovery under the ADC program.[22]

E. Plaintiffs Must Post an Injunction Bond to The Extent Their Request for Injunctive Relief Is Granted.

A court may issue a preliminary injunction "*only if* the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c) (emphasis added); *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976). This security "is intended to secure against possible as well as certain costs," such that "district courts should err on the high side" when calculating the bond. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 459 (7th Cir. 2010).

As referenced above, the injunctive relief requested by Plaintiffs creates a substantial risk that the Settlement will be terminated, and therefore creates a risk that Target will suffer a loss of up to $7.6 million. *See* Part IV.C. In addition, Plaintiffs'

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[22] Plaintiffs state that the public interest factor "favor[s] injunction to ensure fairness of the settlements reached" (Mem. at 19 n.5), but that assertion merely restates their argument as to the merits, and fails to account for the substantial harm MasterCard issuers would face if the requested injunction caused the Settlement to be terminated.

request for injunctive relief seeks to void any release that any MasterCard issuer might execute as part of the Settlement, such that the MasterCard issuers are also among those that would be "restrained." Fed. R. Civ. P. 65(c) (bond applies to "costs and damages sustained by *any* party found to have been wrongfully enjoined or restrained." (emphasis added). As to such MasterCard issuers, the substantial risk that the Settlement will be terminated if the requested injunction is entered creates a substantial risk that such issuers will not receive the anticipated payment under the Settlement of up to $19 million dollars, which losses such issuers may not be able to recoup through the ADC program or otherwise. *See* Part IV.D. Because the exposures to Target and the MasterCard issuers offset – each is dependent on an alternate outcome of the Assessment and any litigation related to the Target Intrusion – the appropriate amount of the bond would be $19 million.

V. CONCLUSION

Accordingly, Target respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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