

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: SuperValu, Inc., Customer) COURT FILE
Data Security Breach Litigation) NO. 14-MD-2586 (ADM/TNL)
)
)
) Courtroom 13 West
) Tuesday, November 3, 2015
) Minneapolis, Minnesota

HEARING ON

**DEFENDANTS' MOTION TO DISMISS PLAINTIFFS'
CONSOLIDATED CLASS ACTION COMPLAINT**

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

TIMOTHY J. WILLETTE, RDR, CRR, CBC, CCP
Official Court Reporter - United States District Court
1005 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415
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1 (9:00 a.m.)

2 **P R O C E E D I N G S**

3 **I N O P E N C O U R T**

4 THE COURT: Good morning. Please be seated.

5 THE CLERK: The matter before the Court is In Re:
6 SuperValu, Inc. Customer Data Security Breach Litigation,
7 Case Number 14-2586.

8 Counsel, would you please note your appearances
9 for the record.

10 THE COURT: Let's start at the plaintiffs' table.
11 Mr. Barnow?

12 MR. BARNOW: Good morning, Your Honor. Ben Barnow
13 on behalf of Plaintiffs and the putative class.

14 MR. KILPELA: Good morning, Your Honor. Ed
15 Kilpela on behalf of Plaintiffs and the putative class.

16 THE COURT: Back table.

17 MR. McSWEENEY: Good morning, Your Honor. Rhett
18 McSweeney, Plaintiffs.

19 MR. LOCKRIDGE: Good morning, Your Honor. Richard
20 Lockridge for the plaintiffs.

21 MS. RIEBEL: Good morning, Your Honor. Karen
22 Riebel for the plaintiffs.

23 THE COURT: And over here to the defense.

24 Mr. Wolkoff?

25 MR. WOLKOFF: For SuperValu, Your Honor, Harvey

1 Wolkoff.

2 MS. WILHELM: Good morning, Your Honor. Kathryn
3 Wilhelm on behalf of SuperValu.

4 MR. LANDOLFI: Your Honor, on behalf of AB
5 Acquisition and New Albertson's, John Landolfi.

6 THE COURT: Okay. Mr. Al?

7 MR. AL: Your Honor, local counsel Marc Al.

8 THE COURT: Back table. Mr. Safranski?

9 MR. SAFRANSKI: Good morning. Stephen Safranski,
10 Robins Kaplan, for SuperValu.

11 MS. BARRETT WIIK: Good morning, Your Honor.
12 Katherine Barrett Wiik, Robins Kaplan, also for Defendants.

13 THE COURT: All right. Good morning.

14 Before the Court is, of course, the motion to
15 dismiss, very well and extensively briefed for me. And you
16 may have been told I have a 10 o'clock motion, and I think
17 20 minutes per side and whatever time you want to reserve
18 for rebuttal from that would be fine.

19 So I'll hear from you in support of your motion,
20 Mr. Wolkoff.

21 MR. WOLKOFF: Yes, Your Honor. Thank you. Good
22 morning. I would like to reserve, if I may, three minutes.
23 I will be arguing the motion on behalf of all --

24 THE COURT: Okay. I'm going to ask your
25 co-counsel to monitor your time and wave at you so that --

1 MR. WOLKOFF: Yes, Your Honor. Hopefully their
2 watches are accurate.

3 THE COURT: All right.

4 MR. WOLKOFF: Your Honor, I want to address first
5 the issue of standing --

6 THE COURT: All right.

7 MR. WOLKOFF: -- which we spent obviously a
8 considerable amount of time briefing in our briefs. But the
9 plaintiffs' amended complaint just simply doesn't allege
10 facts that demonstrate that they've sustained either an
11 actual injury or that any injury is imminent.

12 Now, obviously because this is jurisdictional,
13 they're the ones who have the burden under the Supreme
14 Court's decision in *Clapper*, and not just the decision in
15 *Clapper*, but the progeny in the data space area. They
16 haven't met their burden. And we spent a good deal of time
17 looking through and reviewing very closely the complaint.
18 And it's striking, Your Honor. There are 16 named
19 plaintiffs here. Fourteen of them, the only thing that they
20 allege is that they monitored their accounts. And that's a
21 prudent thing to do, but it's not cognizable injury and it's
22 not imminent injury.

23 The only one who comes close here to even alleging
24 an injury is David Holmes. He sets forth his allegations in
25 paragraph 31. He's from Illinois. All he says, Your Honor,

1 is that he had one fraudulent charge on a credit card. And
2 what's always very important in these kind of cases -- we
3 have very experienced counsel on the other side. They've
4 pled many of these kinds of complaints. What's always very
5 interesting to look at is what they don't say.

6 So what don't they say? They don't say that the
7 charge was actually paid by Mr. Holmes, that it was
8 unreimbursed. They don't say that Mr. Holmes spent any
9 money to get a new card or that he had any late fees. They
10 don't even allege, Your Honor, paragraph 31, that this
11 fraudulent charge arose from the intrusion, which of course
12 they have to do. They have to demonstrate that it's
13 concrete, particularized, and fairly traceable to the event
14 at issue, and yet they don't even allege that it arose from
15 the intrusion. And very noticeably, Your Honor, they don't
16 even allege that Mr. Holmes shopped during the time period
17 of the intrusions. If he did, we would say they would have
18 alleged it, but they don't, not even that he shopped during
19 the time of the intrusion. So Mr. Holmes' allegations,
20 they're not sufficient, clearly not sufficient to confer
21 standing for a class action here.

22 The only other plaintiff, Your Honor, who says
23 anything is Mr. Hanff, and Mr. Hanff has a classic case of
24 creating his own injury. He says that --

25 THE COURT: Do you remember which paragraph is

1 Mr. Hanff?

2 MR. WOLKOFF: Mr. Hanff is paragraph 18, Your
3 Honor. He says that he closed his checking account, he
4 opened a new one, that he incurred costs in doing that, but
5 again, what he doesn't allege is why he closed the account.
6 He doesn't say anywhere, Your Honor, that this account was
7 compromised, that there are any fraudulent charges, that
8 there was any identity theft, that it wasn't his account.

9 We've cited many cases to Your Honor, **Clapper**, but
10 aside from **Clapper**, the **Reilly** case in the Third Circuit,
11 **SAIC**, where you had 4.7 million military people having their
12 data stolen, the **Onity** case, Your Honor. At the very heart
13 of it, all that Mr. Hanff has done is to create his own
14 injury by closing his checking account. And as I said,
15 other named plaintiffs, they don't allege any injury, having
16 any imminent injury. Half of them, Your Honor, half, they
17 don't allege that they even shopped during the time period
18 at issue.

19 THE COURT: As we talk about the PII, as it's
20 called here, what information is actually on the magnetic
21 stripe? I've been unclear about that in reading the briefs.

22 MR. WOLKOFF: Well, first of all, Your Honor, you
23 know, it's not surprising that -- and I'm going to answer
24 Your Honor's question -- it's not surprising that there
25 aren't any widespread allegations as we see in some cases

1 like **Target** of misuse, because the press releases which are
2 cited in the complaint and are therefore part of this
3 record, they say: We haven't determined that any of this
4 data was stolen, let alone misused. We're being
5 conservative --

6 THE COURT: So what is the data?

7 MR. WOLKOFF: The data, Your Honor -- I was
8 getting to that, sorry -- the data is credit card data. So
9 what is it? It's your name, it's your credit card number,
10 and that essentially -- I'm trying -- the plaintiffs have
11 alleged that it's personally identifying information and not
12 clear about what it is, but it's when you scan your credit
13 card, so it's essentially your credit card number. What it
14 isn't, Your Honor, which again is important from the
15 standpoint of identity theft, there's no allegation about
16 Social Security numbers, for example, none.

17 And, Your Honor, with regard --

18 THE COURT: Does it have any other data on the
19 stripe, like when the card was last used or anything like
20 that, or is it simply the person's name and the credit card
21 number?

22 MR. WOLKOFF: It has what's called metadata, Your
23 Honor.

24 THE COURT: Okay. That's what I'm wondering.

25 MR. WOLKOFF: Yes. So it does have metadata on

1 the stripe. We don't know that that metadata was taken.

2 THE COURT: But what does that metadata code to?
3 I mean, what's the significance of the metadata on there?

4 MR. WOLKOFF: It'll have your authorized number.
5 Typically that's three numbers or four numbers, Your Honor.
6 That typically is what it has.

7 THE COURT: Expiration date or something like that
8 as well?

9 MR. WOLKOFF: Yes, it will have an expiration date
10 as well. So information, if it were taken, if it were going
11 to be used, if it were going to be sold, could it have been
12 used, we don't know because we don't have any evidence that
13 it was used.

14 And you know something, Your Honor? There's
15 something very telling here, and that is, in almost all of
16 these cases you have the plaintiffs seeking reimbursement
17 for credit monitoring.

18 THE COURT: I understand, and none of the
19 plaintiffs here claim they took advantage of, however you
20 want to phrase it, the credit monitoring, at least through
21 the offer made by SuperValu.

22 MR. WOLKOFF: Yes, Your Honor, at least through
23 June. So not only that. I mean, there was free credit
24 monitoring that the company was offering, or the companies
25 were offering, but they also don't say that they went out

1 and purchased credit monitoring themselves, which you see in
2 many of these cases where the plaintiffs themselves believe
3 that they're in imminent danger of an injury, and here
4 there's none of that. They didn't do any of that.

5 Now, you know, Your Honor, we're very cognizant,
6 for example, of the **Target** case which is in this district,
7 but the difference between this case, Your Honor, and the
8 **Target** case, it's an extreme difference. In the **Target** case
9 you had very detailed pleading. You had pleadings from
10 named plaintiffs in 45 out of 50 states, or virtually every
11 state. You had the plaintiffs specifically alleging a whole
12 array of actual and imminent injuries.

13 THE COURT: How is this case different from the
14 **Neiman Marcus** case and what the Seventh Circuit said?

15 MR. WOLKOFF: Well, one of the ways that it's
16 different, Your Honor, and maybe the most striking one, is
17 that in **Neiman Marcus**, the company itself acknowledged that
18 there were no fewer than 9200 fraudulent uses of credit
19 cards. And so again, you had very, very specific
20 allegations by the plaintiffs that they had charges on their
21 credit cards. Once you have 9200 charges on your credit
22 card, arguably maybe it is recoverable, maybe if you
23 monitor your accounts.

24 THE COURT: Is it a quantum matter to standing, do
25 you think?

1 MR. WOLKOFF: Your Honor, it does matter in the
2 sense that it has to be an imminent harm. If you don't have
3 an actual harm, it has to be imminent, certainly impending.
4 And the fact that nobody is getting -- you know, in these
5 cases, Your Honor, we typically see a groundswell of
6 consumers, we see a groundswell of the issuing banks sue.
7 In **Target** you had many issuing banks sue in a class action
8 because they incurred costs, cancelling their credit cards.
9 You see the card brands like Visa and MasterCard, Your
10 Honor, getting involved and at the minimum bringing
11 administrative actions. We see none of that here, none.

12 So when you have the extreme difference between a
13 case like **Target** where you have many, many particularized
14 allegations of actual harm and imminent harm, you have a
15 case here where the only plaintiff who alleges anything
16 says, "Well, I had one fraudulent charge. I'm not saying
17 whether it was reimbursed and I'm not even telling you that
18 I shopped during the time period." And when we're talking
19 about standing for a class action and the jurisdictional
20 requirement, the plaintiffs have a burden to do more than
21 that, Your Honor, if there were more than that. We suggest
22 they had plenty of time. We were here in the spring. They
23 had filed their four complaints and at the end of last year
24 they filed the consolidated complaint in June. There's just
25 no clamor here, there's no groundswell, there's no action

1 here. And when you combine that with the fact that the
2 company, as it said in its press releases which are appended
3 to our brief, Your Honor, the company hasn't determined that
4 any data was in fact stolen. That explains, Your Honor, I
5 think what's going on here.

6 You know, the plaintiffs themselves, they try to
7 get around the fact that they don't have actual or imminent
8 harm. They try to allege sort of standard things that have
9 been rejected by virtually all of the courts. They say,
10 "Well, our PII has been diminished in value," which of
11 course is routinely rejected by the courts as we've said in
12 our brief, because as is true here, there are no allegations
13 that the plaintiffs attempted to sell their credit card
14 numbers or that they ever would try to sell their credit
15 card numbers or anybody's trying to sell their credit card
16 numbers with any facts that meet *Iqbal* and *Twombly*,
17 certainly.

18 So, you know, ever since *Claridge v. RockYou*,
19 which was a case out in California, a social media site,
20 which said: Well, you know, we're going to accept for
21 purposes of a motion to dismiss this idea that your PII has
22 some value, but we're very skeptical about it. There's a
23 paucity of cases on it the courts said there. Let's see
24 what happens. Well, what's happened, Your Honor, is that
25 every court that has considered it virtually has rejected

1 the idea. Even **Target**, Your Honor, rejected the idea, the
2 concept of a diminishing value.

3 Your Honor mentioned **Neiman Marcus**. The Seventh
4 Circuit referred to loss in PII value was a, quote,
5 "abstract injury," particularly "since the complaint" -- I'm
6 quoting -- quote: "since the complaint does not suggest
7 that the plaintiffs could sell their personal information
8 for value," close quote. There's no suggestion here, Your
9 Honor, in the complaint that they ever made any attempt to
10 try to sell their data.

11 So they also allege the timeworn allegation about,
12 well, we had a lost benefit of the bargain, again something
13 that's been routinely rejected by the courts. We've cited
14 the **Lovell v. P.F. Chang's** case. And even **Neiman Marcus**
15 rejects that where you had fraud because the plaintiffs
16 can't and don't allege that they paid anything more for
17 using credit cards than they would have had they used cash.
18 And, of course, we rely on the **Insulate** case and the **Ferrari**
19 **v. Best Buy** case, because Minnesota and California don't
20 even have a named plaintiff here.

21 So we think, Your Honor, that we begin and end
22 with standing. But even if we were to go to the common-law
23 claims, you know, there have been some courts that have done
24 that which have said, okay, there was standing. **Sony** out in
25 the Southern District of California said under the **Krottner**

1 standard there, which is a credible threat, we would say is
2 different, but in any event, not getting into that, that
3 some courts have said, well, there's standing, but as in the
4 **Sony** case before Judge Battaglia, he said: But there's no
5 cognizable injury. The **Pisciotta** case is one of those
6 cases, **Forbes v. Wells Fargo** here in Minnesota, finding
7 that, okay, we'll find for a motion to dismiss there's
8 standing, which there isn't here clearly. There were much
9 more allegations in those cases. But when they came down to
10 it and analyzed the allegations, they said, you know, for
11 implied covenant, for negligence, even for the consumer
12 protection statutes, you need to have cognizable injury.
13 What's your cognizable injury here? One charge on a credit
14 card that you don't even say arose from the intrusion, that
15 you don't say was unreimbursed that clearly was, because
16 that's why they're not saying it?

17 THE COURT: As long as you brought up the consumer
18 protection statutes and the cause of action and claims under
19 that, tell me your argument with respect to why I shouldn't
20 defer that until class certification.

21 MR. WOLKOFF: Well, Your Honor, because that's a
22 very straightforward argument like a lot of the arguments
23 that we're making. Why defer it to class certification?

24 The process here in a class action like this, the
25 process is always the punishment whether or not you ever

1 make it to the class action stage. These cases all involve
2 big dollars and it's incumbent upon the plaintiffs to
3 properly plead their case. And there is no actual economic
4 loss which you need to allege in your complaint for the
5 consumer protection statutes. The exception is Minnesota
6 where they don't have a named plaintiff, but there you can't
7 get damages under the consumer protection statute, as Your
8 Honor is aware. You can only get an injunction. The
9 plaintiffs don't even allege what they would get an
10 injunction against or that they're even seeking an
11 injunction.

12 So I know that the plaintiffs urge, Your Honor, in
13 several instances: Wait, wait, wait. Let us take
14 discovery. But it's what Your Honor said I think in the
15 **Insulate** case, which was followed in **Ferrari**. Why do that
16 when there isn't any cognizable injury? Why put SuperValu
17 and Albertson's through convoluted discovery, take the
18 Court's time with regard to there are bound to be some
19 disputes at a minimum, although we try to get along, with
20 regard to discovery? Why do that when it's so clear that
21 there's no cognizable injury?

22 And there also, Your Honor -- without getting into
23 the weeds, there's several other grounds for the individual
24 consumer protection statutes: reliance, a false
25 communication, that the plaintiffs just don't even allege,

1 Your Honor.

2 THE COURT: Okay. Your time is waning here, but
3 I'd like you to address a few remarks too to the issue of
4 the joinder of the four additional plaintiffs and how I
5 should deal with that.

6 MR. WOLKOFF: I know I said, Your Honor, that I
7 would argue the motion, but Mr. Landolfi actually is the one
8 who briefed that, if I may just -- and then if Your Honor
9 has other questions with regard to the substance, I can
10 stand up again if Your Honor --

11 THE COURT: Well, you'll have your rebuttal
12 chance.

13 MR. WOLKOFF: Thank you, Your Honor.

14 MR. LANDOLFI: Thank you, Your Honor. I'll be
15 quick.

16 As Your Honor knows, this Court's MDL jurisdiction
17 derives from Section 28 U.S.C. 1407, which allows the
18 transfer of those other cases to this Court for MDL pretrial
19 proceedings. As a result, this Court's jurisdiction derives
20 from those cases, those underlying cases' jurisdiction.

21 With respect to those four plaintiffs, Your Honor,
22 they were never part of an underlying case and so there is
23 no jurisdiction over those four plaintiffs. The
24 plaintiffs would argue --

25 THE COURT: Wouldn't the remedy be, though, just

1 to have them refile individual suits and then go to the MDL
2 and get joined --

3 MR. LANDOLFI: That is correct and the plaintiffs
4 have offered to do that, and they suggest it's form over
5 substance.

6 THE COURT: Maybe that goes back to your
7 colleague's remark that the process is the punishment, is
8 that --

9 MR. LANDOLFI: But, Your Honor, we would argue
10 that it's a fundamental component of the MDL process. Not
11 only is it a fundamental component of the MDL process,
12 there's a practical aspect to this, Your Honor, because when
13 the pretrial proceedings are complete and Your Honor is
14 ready to remand the cases back to the underlying transferor
15 courts, there's no court to transfer those plaintiffs to.

16 THE COURT: I was going to say I'm not sure
17 there's a Minnesota case where we've ever sent them back. I
18 know we have to, but usually we've cleaned the house before
19 we -- rather than send them back.

20 All right. I think I understand your argument
21 there. Thank you.

22 All right. Let's go to the plaintiffs' argument
23 and response, Mr. Barnow.

24 And whatever time you have remaining, Mr. Wolkoff,
25 you can use in rebuttal, is that -- or did you want to

1 follow up on --

2 MR. WOLKOFF: No, Your Honor, unless Your Honor
3 has questions, additional questions.

4 THE COURT: No, I think you covered what I was
5 interested in for today.

6 MR. WOLKOFF: Thank you.

7 THE COURT: Mr. Barnow?

8 MR. BARNOW: Thank you, Your Honor.

9 Frankly, I'm taken back by Mr. Wolkoff's arguments
10 and of course I'll address them, and the only reason that
11 I'm taken back is that he too is very experienced in this
12 area. His firm has been counsel on many of these cases,
13 including -- it was one of the early watershed cases, which
14 was **TJX**. He was also, his firm, in **Heartland**, and of course
15 his firm --

16 THE COURT: What is your harm here? Let's get
17 right to it. What gives you standing by harm? Because
18 several of the theories, I think, have been ruled out pretty
19 frequently by courts. So bottom line, what's your best case
20 for harm?

21 MR. BARNOW: Many. First of all, there has been a
22 cognizable loss and the courts have found it. Their papers
23 talk about cases that are earlier. This is an evolving area
24 of the law. Nobody would say otherwise. When you sort out
25 the earlier cases from the current cases, the idea that the

1 vast majority or virtually all the courts have found their
2 way is just absolutely wrong, when you look at **Krottner**,
3 when you look at -- which was earlier -- when you look at
4 **Sony PlayStation**, which I was one of the plaintiffs' counsel
5 in and Mr. Wolkoff was also in there with his firm, when you
6 look at **Adobe**, when you look at the recent case of **Corona**,
7 there's no issue that the trend is turning this way.

8 Why? The law is a living body to a degree and
9 reacts to society recognizing things. And duty gets
10 created, as I know the Court knows, is when there is a group
11 that is within a vision of harm. As these data breaches
12 rolled out, the scienter of corporate America and those who
13 would take this private information grew, they knew it, and
14 they accepted a duty.

15 THE COURT: Okay. But now we're a year out from
16 the data breach in this case, even the second one, I think,
17 of the time period -- yes, September 14th -- and other than
18 Mr. Holmes, no one has seen any suspicious charges on their
19 SuperValu credit card, isn't that right?

20 MR. BARNOW: Well, I don't know if they have or
21 haven't at this point, and here's what else I don't know: I
22 don't know what the defendants are keeping under their belt.
23 You know, they have a pretty loose --

24 THE COURT: But you know from your named
25 plaintiffs certainly what the situation is with regard to

1 their --

2 MR. BARNOW: Well, here's what I do know: I do
3 know that certainly in the context of the **Neiman Marcus** case
4 and others that they have taken time and spent time. And
5 while I don't recall if it was specifically in the opinion,
6 I did list in the oral argument and it's patent and clear
7 that the consumers' time is worth money too, just like the
8 lawyers, and to the extent that they have taken certain
9 other prophylactic measures, if we take a look at what
10 **Hannaford** found, those are also recoverable. It doesn't
11 have to just be that they went out and purchased credit
12 monitoring or identity theft. The fact that they have to
13 have this heightened degree of care, why is it? Because
14 they're at high risk and they're subject to what these
15 thieves have done. This all relates back to are they in
16 harm's way or not, as I see it, and they clearly are.

17 I think we all know, in a recent example, where
18 the Office of Personnel Management, federal government, was
19 hacked, and what did the federal government do? They went
20 out and got a contract I think with Experian for 132 or
21 \$133 million to give federal employees coverage. I don't
22 know the exact amount of years. It was three or five, but
23 certainly more than one. Why? Because the Government
24 recognizes the harm, the courts recognize the harm in these
25 recent cases.

1 THE COURT: Do any of the plaintiffs allege that
2 they purchased private or different --

3 MR. BARNOW: Credit monitoring or identity theft?

4 THE COURT: -- Credit monitoring?

5 MR. BARNOW: No --

6 THE COURT: Okay.

7 MR. BARNOW: -- they have not. But again, it
8 doesn't mean that they haven't or that other members of the
9 class haven't.

10 I think it's really important here to separate
11 this case from a scenario where the defendant can nit and
12 pick on a particular individual, particularly where they
13 have all the information.

14 Judge, they've cited a lot of cases in their
15 papers supporting their proposition. To a degree I'm a bad
16 guy to do that to, because a lot of them that they cite are
17 mine. And just briefly, for instance, let's -- they're not
18 concluded cases.

19 Let's take **Barnes & Noble**, that they say, well,
20 that was thrown out. Wrong. We had leave to amend. We did
21 amend. There is a pending motion to dismiss, about a year
22 and a half, but it's far from over.

23 And with **Neiman Marcus** in the Seventh Circuit, I'm
24 not in the predicting business, but I would hope I would
25 win, and we have one plaintiff in there that alleged that

1 she had a fraudulent charge.

2 Other -- **Zappos**, for instance. They cite **Zappos**
3 for their proposition. Well, what the judge actually said
4 in **Zappos**, federal district court in Nevada, was that if you
5 have members of the class that were harmed, you can amend,
6 and we did and the defendants' response is due on
7 November 6. So strip that away from their alleged
8 authority. It just isn't there.

9 The **Horizon** case, also mine, that's on appeal in
10 the Third Circuit. It's not final. In that case the lower
11 court was trapped, bound to the **Ceridian** opinion.

12 THE COURT: Okay. I think it would really be more
13 helpful if you could focus me a little bit on what's alleged
14 in this complaint, though, that you think --

15 MR. BARNOW: Fair enough, Judge.

16 THE COURT: -- standing, and particularly under
17 which theory, and I'd also like you to talk a little bit
18 about the consumer protection statutes.

19 MR. BARNOW: Fair enough, Judge. I think we have
20 alleged that these people have been impacted by the loss of
21 their information. I also think that the impact includes
22 the time they have spent, as well as the time they will have
23 to spend. I think it's incorrect to say that each --

24 THE COURT: Monitoring their accounts --

25 MR. BARNOW: Absolutely. Calling up, checking

1 into their website to see their half-hearted, inadequate,
2 temporary, intermediate informational statement, which quite
3 frankly sets these people wondering: When is this company
4 that had their information going through going to tell the
5 world whether or not this act, this information, was indeed
6 taken? They can't live in a cloud of: We don't know, but
7 we're going to warn and tell you.

8 And what else did they do? They tell these people
9 to do the very things they have done. If these people
10 hadn't done those things and there was a damage, what are
11 they going to say? They didn't mitigate their loss?

12 The **Neiman Marcus** case pointed out that the reason
13 these companies give this information -- of course, they're
14 bound to do so; that's another issue -- and give the credit
15 monitoring is, they recognize the need for it and they
16 recognize the harm. When they give one year, it's
17 recognizing a duty. And respectfully, I don't think the one
18 year is enough. I think they fall short the same way that
19 their security fell short.

20 And with regard to the allegations, Mr. Wolkoff
21 made a comment -- of course, he picked paragraph 18 and 31,
22 I believe -- where some of the plaintiffs -- and some
23 didn't -- list the specific dates they shopped. Well, so
24 what? What they also went on to state -- some did, many of
25 them did.

1 THE COURT: Quite a few don't say that they
2 shopped in that period at all.

3 MR. BARNOW: They don't use the specific dates,
4 but here's what they do say: They say that their
5 information was included in that breach. It's axiomatic
6 that if their information was included in that breach, they
7 shopped during the relevant period, that they didn't have
8 records at the time this pleading was prepared to give up
9 the exact dates or that they just didn't want to get into a
10 guesstimate estimate. They didn't have to. They didn't
11 have to because they knew they were in the time frames, and
12 to nail a particular date is just whole cloth. They have
13 the records, they surely must, unless they burned them. Why
14 didn't they come in with a specific statement and say:
15 "These people didn't shop on these dates"? Because they
16 don't even tell you what the research, the results to date
17 are as to whether or not this information has been used.

18 There has been no discovery. He talks about
19 **Neiman Marcus** with the 9200 people that were impacted. I
20 don't know. We haven't had that discovery. How did that
21 come out? You think Neiman Marcus' lawyers, Sidley Austin,
22 called up and said, "Hey, I got good news for you"? I don't
23 think so.

24 THE COURT: My understanding was that the Neiman
25 Marcus press release said that. Is that not true?

1 MR. BARNOW: I'm not sure, frankly, I'm not sure,
2 but at least they said it. It would be nice if they said it
3 here. Maybe it was premature. They don't have the
4 information.

5 I do know in the *Zappos* case, for instance, it was
6 very difficult to find that information out. We did have
7 discovery, it was protracted, and we eventually got that
8 information as to people that had sent in complaints. Where
9 is the complaints they got? I don't know if they have them
10 or not. We don't have that information yet. But when the
11 information is solely in the hands of a defendant, for them
12 to stand up and suggest that we can't plead on information
13 and belief does not comport with the law.

14 And the loss we have is real, the loss is
15 continuing, and the loss is recognized. It's recognized in
16 case after case. They can stand on old cases, but the
17 current cases clearly support us. The idea that *Krottner*
18 somehow suggested a heightened element of risk is wrong. I
19 was in *Krottner*. The *Krottner* case had to do with a stolen
20 laptop. That is not a heightened risk when thieves come in.
21 I think the Court knows this, these lawyers know this.

22 In *TJX*, for instance, Mr. Wolkoff --

23 THE COURT: Again, I think it's more helpful to
24 talk about what's in this complaint and this cause of
25 action.

1 MR. BARNOW: Fair enough.

2 THE COURT: So I'd like to move you, please, to
3 talking about the common-law claims and how -- let's assume
4 standing and you get over that hurdle. Tell me about the
5 statement of a claim, whether there's been a failure to
6 state a claim with regard to each of the common-law
7 theories.

8 MR. BARNOW: Your Honor, I think what we've said
9 covers every one of the common-law theories.

10 For instance, the negligence, there's a duty,
11 there's a recognizable group, there's no issue, but that at
12 this point in time after close to nine years, I think, since
13 **TJX**, that people know that if you take this personal
14 information from your consumers, that is protectable.

15 For instance, Judge, when you go to a grocery
16 store, SuperValu, where you swipe your card is hidden from
17 the cashier person. It's secretive, if you will, and they
18 recognize the confidentiality. They recognize the duty.
19 They recognize by law and the cases and the liability that
20 has occurred to date that they're supposed to take care of
21 it. So you have a duty, clear duty, and it develops from
22 the general duty that every citizen owes every other person,
23 reasonable care and caution. We say they breached it. We
24 say the cases say they breached it, cases like **Adobe**,
25 et cetera, so we think that satisfies those.

1 Negligence per se, the law to me is clear that
2 when you have a statutory provision that's violated, that
3 assumes duty and damages, and that's what they did. The FTC
4 thinks that way in the *Wyndham* case. And many of the
5 consumer fraud statutes in a number of states, including
6 Illinois, I might add -- at least it used to, I think it
7 does, I know it does -- provides that if you violate a
8 statutory provision, that's a violation of your consumer
9 fraud statute. Some states recognize negligence per se as a
10 stand-alone separate count.

11 And of course we're allowed to plead in the
12 alternative, which leads us into our other points. Implied
13 contract, they say there's no implied contract. Of course
14 there is. Of course there is. They know they're taking
15 your private information. They know the damage that can be
16 caused. They show you they're protecting it from the
17 inception and they know you're counting on it. And to say
18 there's no implied contract, implied contract, sure, it's
19 not a written contract, but they know what you expect and
20 they know what you're entitled to, and the fact that they
21 don't follow through is a common-law count that we can
22 proceed on and I believe has been upheld.

23 THE COURT: All right. Unjust enrichment.

24 MR. BARNOW: Well, unjust enrichment I think
25 applies in all 50 states. It seems to me that it clearly is

1 here. I know that there's been --

2 THE COURT: Wasn't this overcharge theory pretty
3 much rejected in the **Target** opinion?

4 MR. BARNOW: Well, I think to a degree it was, but
5 here's the reason it was:

6 You know, a lot of stuff is thrown at lawyers,
7 courts and litigants, and I thought a great deal about that
8 one because I happen to believe it, and I'll tell you why.

9 Just because you have some people paying by credit
10 card and some people paying by cash does not mean that the
11 people that pay by credit card that are entitled to
12 something that's a part of that deal don't get it. Why?
13 Because the assumption that the defendant or any corporation
14 does not spread its costs across the board is just wrong.
15 There's no evidence of that. I think this is an issue that
16 should go to a jury, it's factually intensive, and to get
17 into their records and how they calculate their prices. It
18 could be noneconomical for any defendant to say, "You know
19 what? We're just going to charge the credit card people an
20 extra percent or two. We're not going to charge the cash
21 people." It sets up a bifurcation of their customers, it
22 looks like they're preferring one over the other, but you
23 know what? We have this charge. Let's just spread it
24 across all our goods. Because when a guy goes and picks up
25 his cucumber, or his pepper, or pickles or whatever, they

1 don't want to have differences between their customers, but
2 it doesn't mean they don't spread the cost. And the reality
3 is that when they save this money, which they undoubtedly
4 did if they didn't meet the required standards, that's
5 something that they are unjustly enriched by. I think the
6 only reason that it's been rejected is the idea that some
7 people pay cash and some people pay by credit card, yet
8 there's no showing in the record that that savings is not
9 spread across the board. That gets into how they do their
10 pricing and nobody has satisfied that. So our allegation I
11 think stands yet to be proven otherwise.

12 THE COURT: All right. Talk to me, please, about
13 the four additional plaintiffs and then the personal
14 jurisdiction over the defendants AB Acquisition and
15 Albertson's.

16 MR. BARNOW: I heard the Court's comment and I
17 have to share the view. It's kind of interesting somebody
18 coming up and claiming that, you know, "Oh, my God, we got
19 to litigate here," and then they want more litigation. We
20 put in our papers if they really want us to go back and do
21 that, I suppose we could, but the reality, these people are
22 class members, and we're going to hopefully get to the point
23 where we get the class certification and we can deal with
24 that issue in another manner at that time. Frankly, I would
25 hope that they have better things to do than to say they

1 want to have four more pleadings filed in different cases.
2 But if that's what people think is necessary -- I don't --
3 this is an MDL. There's a lot of different things that go
4 on in an MDL. The idea is efficiency, order, organization,
5 do all your discovery. So quite frankly, it's much ado
6 about nothing as I see it, but I understand the importance
7 of technicalities.

8 THE COURT: Well, it might be and it might not be.
9 If it gets to the point of sending things back, then I have
10 four orphans, I guess.

11 MR. BARNOW: Well, let's deal with that, because I
12 think we can find a home for them in that situation.

13 One thing is, depending on how long the litigation
14 takes, if it, you know, goes to trial or fruition, I don't
15 think that we're coming up against a wall on the statute of
16 limitations. However, you know, counsel here, if they
17 really wanted to be efficient and worried about their
18 clients' costs could agree to a tolling agreement, and if
19 this thing sets up where it does go back, we could file
20 cases at that time when it was necessary as opposed to an
21 interim means of making work for people who don't really
22 want to have it, or burdens to a court, filing system, file
23 it in these states, do a tagalong with the MDL. I just
24 don't get it.

25 THE COURT: How about personal jurisdiction over

1 AB Acquisition and New Albertson's?

2 MR. BARNOW: Well, Judge, they've chosen to deal
3 with a company that's located here. It's obviously a very
4 significant contract. I'm going to guess that they've had
5 negotiations back and forth over that contract. They allow
6 information to come under the touch of a Minnesota defendant
7 and I'm not so certain that people in Minnesota haven't
8 utilized their stores in other states on different
9 occasions. So I think in the context of an --

10 THE COURT: Is that your theory? I thought your
11 theory was more of the continuous contacts, business
12 contacts and expectations rather than Minnesota customers --

13 MR. BARNOW: It is. I just thought about that
14 one, frankly. People travel around with food, but it's
15 mainly the contacts, Your Honor. They had their information
16 database protection service, or whatever they want to call
17 it, organization, right here. They chose that partner, they
18 chose that organization, and they're part of it as they sit
19 here today part of it, so I think that's sufficient to have
20 them here. Again, it's an MDL. If they really believe in
21 efficiency and they want to get all their issues in one
22 place, that's what the MDL process is for. I don't recall
23 them opposing the MDL. I think they all got together with
24 regard to that and I think they've kind of picked their
25 position. It's a good position for them, really, if they

1 want to save all the time and money they say they do.

2 THE COURT: All right. Thank you.

3 MR. BARNOW: Thank you, Judge.

4 THE COURT: Mr. Wolkoff?

5 MR. WOLKOFF: Yes, Your Honor. Thank you.

6 Your Honor, in quick reply, when Mr. Barnow is
7 focusing on his complaint as opposed to the many others that
8 exist out there where, to the extent that standing has been
9 found in any of them, the facts were strikingly different
10 than here, Mr. Barnow said alternatively, "I don't know
11 about the injury." Then he said that the defendants have
12 all of the information. Well, he needs to know about the
13 injury. He's invoking the jurisdiction of this Court and
14 the plaintiffs have the burden.

15 And it's just not so that the defendants have the
16 information. The plaintiffs have the information. They're
17 the ones who get their credit card receipts. They're the
18 ones who get their monthly statements, not the defendants,
19 and they haven't alleged anything to support standing in
20 this complaint.

21 Even with regard to when they shopped, Your Honor,
22 we're not asking for precise dates. They've done this many
23 times. If the plaintiffs know that they've shopped during
24 the time period, that they've used credit cards, they just
25 have to go on the Internet and look back at what dates did I

1 use my credit card. It's very simple. They don't have to
2 say precise dates, but they do have to say, we would submit,
3 Your Honor: "We shopped during the time period of the
4 intrusions." They know that and they don't say a word about
5 it. And it's a very important issue, the issue of standing,
6 jurisdiction. You can't treat it lightly. I'm not
7 suggesting they don't, but there's a reason why they don't
8 say when they shopped, that they shopped during the
9 intrusion, Your Honor.

10 To answer one of the questions, it is true that
11 Neiman Marcus in its press release, Your Honor, acknowledged
12 the date it was stolen, which is the opposite of here, and
13 it acknowledged 9200 fraudulent charges. That's a lot of
14 fraudulent charges. And the cases are clear. You know, you
15 can possibly recover for time spent monitoring when there
16 are so many unauthorized charges out there, but **SAIC**,
17 **Clapper**, the **Nationwide** case, they all say you can't recover
18 for your time if there hasn't been any misuse that you can
19 point to.

20 And I know the plaintiffs make the argument that
21 when SuperValu and Albertson's did the responsible thing and
22 said: "Look, we don't know even know if data's been stolen,
23 but we'll offer you a year of credit monitoring," they said,
24 "Well, that's an admission." Well, two things about that.

25 Nobody's going to offer the credit monitoring if

1 the courts deem it to be an admission, and the policy should
2 be that companies should offer credit monitoring even if
3 it's in doubt, Your Honor.

4 THE COURT: Did customers of SuperValu take
5 advantage or utilize the credit monitoring service? I know
6 it's not alleged in the complaint that any of the plaintiffs
7 did, but were there individuals that did?

8 MR. WOLKOFF: There were very few, Your Honor.

9 THE COURT: Very few.

10 MR. WOLKOFF: Very few. What happens is, what you
11 typically find in these cases is a groundswell where the
12 unauthorized charges come very quickly and the issuing banks
13 bring their cases, and you just find a wave of unauthorized
14 use and you find consumers exercising the option to get or
15 use the credit monitoring, for example, in **Sony**. Mr. Barnow
16 and I are well aware of that. There were many customers in
17 **Sony** --

18 THE COURT: Typically, does that happen fairly
19 shortly after the breach?

20 MR. WOLKOFF: Yes, Your Honor. Yes, Your Honor.
21 You find people signing up for the credit monitoring because
22 the unauthorized charges happen very quickly, fairly soon
23 after the breach, and so they want the credit monitoring.

24 And, you know, the **Galaria v. Nationwide** case
25 which I did as well as Mr. Barnow did, the court said that,

1 you know, when you point to credit monitoring, that should
2 reduce the imminence of the injury, not create a claim that
3 we have standing. It's mitigation by the company, Your
4 Honor.

5 I don't know if Your Honor has questions about the
6 common-law claims at all.

7 THE COURT: Well, I think any I may have are
8 well-addressed in the briefs which were very thorough, I
9 thought, and I think will be helpful as I drill down a
10 little deeper.

11 MR. WOLKOFF: Okay.

12 THE COURT: But I don't want to preclude anything
13 you want to make sure I know.

14 MR. WOLKOFF: Well, Your Honor, nothing specific.

15 You know, I just mention with regard to the unjust
16 enrichment, Judge Magnuson in **Target**, again, a very
17 different case, he said, well, maybe you can have unjust
18 enrichment if you properly allege that you wouldn't have
19 shopped if you had known about this. As we point out in our
20 brief, the plaintiffs continued to shop. There was the
21 first intrusion and many of them say they kept shopping at
22 SuperValu and Albertson's. It completely undermines the
23 idea, (A), that they were in fear of imminent injury, but
24 also unjust enrichment, that they wouldn't have shopped,
25 because they did continue to shop.

1 So I just wanted to point that out, Your Honor,
2 unless Your Honor has any additional questions.

3 THE COURT: I don't think so.

4 MR. WOLKOFF: Thank you very much, Your Honor.

5 THE COURT: Thank you, counsel. We'll take this
6 under advisement and try to get you an order fairly soon.

7 All right. Thank you. Court is in recess.

8 (Proceedings concluded at 9:42 a.m.)

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11 **C E R T I F I C A T E**

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13
14 I, **TIMOTHY J. WILLETTE**, Official Court Reporter
15 for the United States District Court, do hereby
16 certify that the foregoing pages are a true and
17 accurate transcription of my shorthand notes,
18 taken in the aforementioned matter, to the best
19 of my skill and ability.

20
21 */s/ Timothy J. Willette*

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