UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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| IN RE: SuperValu, Inc., Customer Data Security Breach Litigation | ) | COURT FILE NO. 14-MD-2586 (ADM/TNL) |
| | ) | Courtroom 13 West |
| | ) | Monday, April 20, 2015 |
| | ) | Minneapolis, Minnesota |

**PRETRIAL CONFERENCE**

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
612.664.5108

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**A P P E A R A N C E S: (Continued)**

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1 (1:28 p.m.)

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

3 **IN OPEN COURT**

4 THE COURT: Good afternoon. Please be seated.

5 THE CLERK: The matter before the Court today is

6 In re: SuperValu Inc., Customer Data Security Breach

7 Litigation, Case Number 14-MD-2586.

8 THE COURT: Well, one of the primary purposes of

9 today's hearing, in fact maybe the primary, since so far

10 it's been pretty smooth sailing at least from the judicial

11 perspective, is to figure out who you are and who represents

12 who, so we're going to do the appearances a little more

13 slowly, starting with Mr. Barnow, to tell me who you are,

14 your law firm, and who your client is in this matter.

15 Mr. Barnow, we will begin with you.

16 MR. BARNOW: Yes, Your Honor. Thank you.

17 My name is Ben Barnow. I represent a number of

18 the plaintiffs, and the case that was filed up here is

19 Hanff, H-A-N-F-F, and other plaintiffs in that case.

20 I'm from Chicago from Barnow and Associates, P.C.,

21 and I have a number of my colleagues here today. They also

22 have their cases.

23 THE COURT: All right.

24 And Mr. Kilpela, is it?

25 MR. KILPELA: Kilpela, yes, Your Honor.

1 My name is Ed Kilpela. I represent plaintiff
2 Mertz in the case that was initially filed, and I'm with the
3 law firm Carlson Lynch Sweet & Kilpela out of Pittsburgh,
4 Pennsylvania. It's an honor to be here today.
5 THE COURT: All right.
6 Mr. Lockridge is well known to me.
7 MR. LOCKRIDGE: Yes, Your Honor. Richard
8 Lockridge from Lockridge Grindal. I'm actually here
9 representing the plaintiffs and Mr. Mertz also, and also
10 sort of substituting for Karen Riebel, who is I believe in
11 court elsewhere today.
12 THE COURT: You do a good Karen Riebel
13 impersonation. That's fine.
14 MR. LOCKRIDGE: Well, thank you, Judge.
15 (Laughter)
16 MR. McSWEENEY: Your Honor, Rhett McSweeney. I
17 represent Hanff, and it's McSweeney/Langevin.
18 THE COURT: And your firm is?
19 MR. McSWEENEY: McSweeney/Langevin.
20 THE COURT: And you're located locally, right?
21 MR. McSWEENEY: I am.
22 THE COURT: All right. Thank you.
23 Mr. Dunn, is it?
24 MR. QUINN: Mr. Quinn, Judge?
25 THE COURT: I'm sorry.

1 Katie, it's your handwriting.
2 (Laughter)
3 MR. QUINN: I work with John Driscoll from The
4 Driscoll Firm in St. Louis, Missouri, and we represent the
5 plaintiffs who brought a lawsuit in the Southern District of
6 Illinois in the ***McPeak*** case.
7 THE COURT: All right. Thank you.
8 And I see one more plaintiffs' representative.
9 MR. BRANDENBURGER: Your Honor, Mark
10 Brandenburger. I'm also with McSweeney/Langevin with
11 respect to the Hanff case.
12 THE COURT: Thank you.
13 Now over here to Mr. -- is it Wolkoff?
14 MR. WOLKOFF: Yes, Your Honor, Harvey Wolkoff.
15 I'm from the law firm of Ropes & Gray in Boston. My client
16 is SuperValu, Inc., one of the defendants here, Your Honor.
17 THE COURT: Mr. Safranski is another very familiar
18 person to me.
19 MR. SAFRANSKI: Good afternoon, Your Honor.
20 Stephen Safranski from Robins Kaplan representing SuperValu,
21 Inc.
22 THE COURT: And Mr. Landolfi?
23 MR. LANDOLFI: Well said, Your Honor, yes. John
24 Landolfi from Columbus, Ohio, the Vorys law firm, Vorys,
25 Sater, Seymour and Pease, and I'm here on behalf of AB

1 Acquisition, LLC, and New Albertsons, Inc.
2 THE COURT: All right. And Mr. Al is someone also
3 I know well.
4 MR. AL: Thank you, Your Honor. Marc Al from the
5 Stoel Rives law firm in Minneapolis appearing on behalf of
6 AB Acquisition, LLC, and New Albertsons, Inc.
7 THE COURT: And Ms. Barrett Wiik?
8 MS. BARRETT WIIK: Barrett Wiik, Your Honor. Nice
9 to see you. Katherine Barrett Wiik, Robins Kaplan, LLP,
10 also for defendant SuperValu.
11 THE COURT: All right. I think our agenda is
12 largely going to track the letter that I sent you in
13 responding to the Court's requests, and one of the first
14 things I asked you is whether there would be additional
15 cases. I take it we pretty much think we have collected the
16 -- is it four or five -- four cases and don't anticipate
17 others.
18 Is that a fairly certain -- anybody wish to
19 disagree with that?
20 MR. BARNOW: I do not wish to disagree. In fact,
21 I agree.
22 THE COURT: All right. The leadership counsel, I
23 have received a proposed order today and have reviewed the
24 resumes and backgrounds.
25 I've been around long enough to know it's usually

1 not a good idea to drive a wedge between consenting parties,
2 but I take it that there are -- this is the combined effort
3 of plaintiffs' counsel and there are no objections from this
4 side of the courtroom on that leadership structure.
5 MR. BARNOW: That is correct, Your Honor.
6 THE COURT: How many cases do you have that are
7 currently pending, Mr. Barnow, in which you're lead counsel?
8 I see quite a list of things, but I had a little trouble
9 figuring out which ones are pending.
10 MR. BARNOW: Well, I have the ***Sony PlayStation***,
11 but the good news there is, as my learned colleague
12 Mr. Wolkoff will indicate, it's already been preliminarily
13 approved. Final approval is set for I believe May 3rd.
14 There are no objections, so my task in that will mainly be
15 to appear at the final fairness hearing.
16 THE COURT: So that's in the wind-up phase,
17 hopefully?
18 MR. BARNOW: Yes. I'd even like to think it's the
19 wound-up phase, but we're getting there. With no
20 objections, it's pretty certain. Frankly, it's an excellent
21 settlement and it should proceed without issue.
22 THE COURT: All right.
23 MR. BARNOW: As to others, I'm also a lead counsel
24 in a case in Illinois regarding Petco, which has to do with
25 the storage of a product from fracking, et cetera. And I'm

1 not sole lead counsel. There's two others.
2 And let me see here. It's likely that I may be in
3 a few others. I'll have to take a moment to think about it.
4 THE COURT: All right.
5 MR. BARNOW: But that is one of the more active
6 ones. I have other -- many other class actions, a number of
7 other class actions pending, and each one would most likely
8 have other attorneys in it.
9 In terms of an actual appointment letter, I'm not
10 sure that many of those cases -- I forget -- oh, there is
11 another. There's another data breach case, ***Barnes & Noble***,
12 which is taken under advisement on a motion to dismiss for a
13 number of months now in Chicago, Illinois. The motion is
14 fully briefed, was actually dismissed once, it came back
15 with some amended pleadings.
16 And also lead counsel -- although the case will be
17 on appeal because we just made a decision to take an
18 appeal -- on a data breach case, ***Horizon Hospital*** out in
19 New Jersey, but I have three other co-lead counsel with me
20 in that case as well as other attorneys, so the work there
21 is well-delegated.
22 I'm also lead counsel in a case which was just
23 argued in the Seventh Circuit, big surprise, another data
24 breach case, so we'll wait for the Seventh Circuit opinion
25 on that.

1 And that pretty much does the waterfront. There
2 may be some others out there, but that would be -- oh, and
3 also lead counsel on an antitrust case. Let me see. That
4 one's in Wisconsin.
5 THE COURT: What assurance do I have that you will
6 treat my MDL as your favorite MDL in terms of getting
7 attention?
8 MR. BARNOW: Well, as we go through life, I've
9 always felt you need more than one favorite. It's a
10 category that's a very high rank. And realistically, I
11 think -- even though that may have sounded like a
12 substantial number, because of the division of work within
13 those cases and quite frankly because of my expertise -- I
14 pat myself on the back (indicating) with my rubber arm
15 here -- the issues are not that complicated for me, although
16 they can be sophisticated; for instance, whether or not FCRA
17 applies in a particular situation. But they're isolated in
18 the media and I get a lot of help on them.
19 One assurance you'll get is -- I hope the Court
20 takes it as an assurance -- are the opinions of other judges
21 that have gone through cases where I was the lead counsel;
22 for instance, the ***MP3*** power laser case, again Mr. Wolkoff;
23 ***TJX***, again Mr. Wolkoff on the other side; the ***Certegy*** data
24 breach case --
25 THE COURT: Don't have him on too many other sides

1 or I'm going to be convinced there's some conspiratorial
2 relationship here.
3 (Laughter)
4 MR. BARNOW: You'll see him and there's none of
5 that. The ***Certegy*** case was 35 million, which was Reed Smith
6 -- there you go -- was not his firm. And ***Countrywide*** was
7 Reed Smith again, Judge Russell.
8 I think the positive statements that the courts
9 made at the conclusions of those cases I think weigh heavily
10 regarding my ability to complete a case.
11 There's one story I like to tell --
12 THE COURT: I don't know that I want the story at
13 this point because I have several other things that I have
14 in mind to ask. But what is your intention with regard to
15 how much of this work you delegate to others in your firm?
16 MR. BARNOW: In my firm?
17 THE COURT: Mm-hm.
18 MR. BARNOW: I'm a hands-on firm that -- I don't
19 think there's any brief that goes out that I don't see,
20 certainly not significant ones. One of the reasons,
21 particularly in data breaches, I've been around in the area
22 so long, my people do know the area really well --
23 THE COURT: That doesn't seem like an area that's
24 been around long. When did the first data breach happen?
25 MR. BARNOW: Well, the first -- well, the first is

1 hard to say, but I would say the first monumental one was
2 ***TJX***.
3 THE COURT: What year was that? Ten years ago?
4 MR. BARNOW: No, I don't think it was that long
5 ago. I'll look to Mr. Wolkoff.
6 I'd say about six or seven years, yes?
7 He has a cold. Let's not pick on him.
8 MR. WOLKOFF: My recollection is, Your Honor, it
9 was nine years ago, 2006.
10 MR. BARNOW: There you go.
11 THE COURT: Sounds like a pretty sharp
12 recollection.
13 MR. WOLKOFF: Seems like yesterday.
14 THE COURT: All right.
15 MR. BARNOW: And they went on from that.
16 So I guess -- well, the assurance is easy. I keep
17 my assurances.
18 THE COURT: All right.
19 MR. BARNOW: I wouldn't have filed this case if I
20 didn't think I could do it and I assure the Court I will.
21 THE COURT: All right. Similar questions, I
22 guess, to you, Mr. Kilpela. Tell me what you've got going
23 on by way of other MDLs and then what assurance I have that
24 you'll give this one if not the front burner, close to the
25 front burner.

1 MR. KILPELA: Sure. I'll answer the easy question
2 first, Your Honor. I'm not currently serving as lead
3 counsel with any MDL anywhere in the country. I currently
4 have executive committee and committee appointments in
5 several pending MDLs, both in the data breach and consumer
6 fraud areas. Then I have a number of other class actions
7 that I work on where no counsel has been appointed, whether
8 it's because we're the only lawyers involved or the case is
9 in its nascent stages.
10 But, you know, our law firm is very involved in
11 data breach cases from, you know, ***Target*** to ***Home Depot*** and a
12 couple others, and I'm here because our firm is committed to
13 this case as well as this area, and you have my assurance
14 that it will be certainly my front-burnered MDL, because I'm
15 seeking to be appointed lead counsel and my law firm is as
16 well.
17 THE COURT: How do you think you'll be able to get
18 along with Mr. Barnow? The situations where these have gone
19 bad have often been when co-lead counsel don't get along and
20 when it gets to the -- so that I'm aware of that, obviously
21 it's serious.
22 MR. KILPELA: That's a great question, Your Honor.
23 I've known Ben for a little while, not a long time. He's
24 impossible not to love, but I think we have a strong group
25 of lawyers that were appointed to an executive committee as

1 well. I think to the extent Ben and I can't find agreement
2 on issue, which hasn't happened yet, we've always been able
3 to talk through the issues, leaning on Ben's experience, my
4 experience and my firm's experience, and then we also speak
5 with the other lawyers. I think between those lawyers we
6 shouldn't have any problem.
7 THE COURT: He seems like a fairly quiet, reserved
8 fellow. Do you think you can draw him out?
9 (Laughter)
10 MR. KILPELA: I will do my best.
11 THE COURT: All right. You seem to be up to the
12 task.
13 Mr. Lockridge, my questions for you are --
14 obviously would be better directed if Karen were here and I
15 understand you're here in her stead.
16 I've always had excellent communications with your
17 firm and have not had any disappointments with regard to
18 prompt attention. And obviously when things go wrong, I'm
19 most likely to -- the first call is probably going to be
20 your office.
21 Tell me what she's got going on now, since I
22 understand this will kind of be -- she'll be taking the lead
23 on this.
24 MR. LOCKRIDGE: Yes. From our firm, Your Honor,
25 she will be taking the lead. She has worked with these two

1 gentlemen quite a bit for the last -- at least a couple or
2 three years anyway, and I know that she and I also have the
3 highest regard for them and we're exceedingly comfortable
4 recommending them as co-lead counsel. She is in several
5 other data breach cases. She is obviously in the ***Target***
6 case, Your Honor, before Judge Magnuson, very extensively.
7 She also was recently named --
8 THE COURT: Let me stop you there.
9 Mr. Kilpela, you're also on the ***Target*** file, are
10 you not?
11 MR. KILPELA: Yes, Your Honor, I am.
12 THE COURT: I knew one of you was.
13 MR. LOCKRIDGE: She was just recently named
14 co-lead counsel in the ***Community Health*** case down in I
15 believe it's Birmingham, Alabama, and she's in two or three
16 other cases. And so she's developed quite an expertise, if
17 you will, in the data breach cases, but I can assure you
18 that when the case is in our hometown, we give it high
19 priority, Your Honor, so we will do that, Your Honor.
20 THE COURT: All right. Well, I don't see any
21 significant problems or concerns in that regard. I don't
22 think the defendants really have a role in this, but if
23 anyone wants to speak to that issue.
24 (No response)
25 THE COURT: There doesn't seem to be anyone that

1 has anything to say, so I intend to -- I'm going to redo
2 this to put it in -- denominated as Pretrial Order No. 1
3 consistent with the practice. As I think you probably all
4 know, we've established a website here and we'll post all
5 orders on the website and follow the usual practice of MDLs
6 in this district in that regard and I don't anticipate any
7 changes to that.
8 That gets us to next steps. The next order is
9 usually the preliminary case management order. I take it
10 that you're going to use the fortuity of having all
11 plaintiffs' counsel present to continue to talk after
12 today's formal hearing about next steps to the case.
13 And is it your intent to file a proposed
14 preliminary case management order next? Is that where we
15 are or do we need to talk about the issue of discovery
16 first?
17 MR. BARNOW: Respectfully, Your Honor, it might be
18 a good idea to talk a little bit about discovery. I think
19 it's one of the few things on the list that we haven't
20 reached agreement on. We tried, but I think with the
21 Court's guidance it might help a bit.
22 THE COURT: All right. Let's see. Before we get
23 to that issue, which is the only thing I saw that you
24 weren't together on, you've established a deadline for the
25 filing of the consolidated class action complaint 45 days

1 after the appointment of leadership, so I guess that would
2 begin to run now and you'd file it in 45 days.
3 And the deadlines for the defendants to file the
4 answer as proposed in the March 17th letter are appropriate,
5 I take it Mr. Wolkoff?
6 MR. WOLKOFF: Yes, your Honor. It's almost
7 certainly the case that we would be filing a motion to
8 dismiss. I think that's true both about SuperValu and also
9 the Albertson defendants, so we've asked for 45 days from
10 the filing of the complaint, the consolidated amended
11 complaint, to file that motion to dismiss.
12 We did not work out dates for an opposition to
13 that motion or a reply. We instead left it up to the Court
14 with regard to that.
15 THE COURT: Okay. All right. But that would
16 probably be addressed in the pretrial scheduling order
17 rather than today.
18 MR. WOLKOFF: Yes, Your Honor.
19 THE COURT: All right.
20 MR. WOLKOFF: I think we took the liberty of
21 trying to progress things --
22 THE COURT: Okay. That's fine.
23 MR. WOLKOFF: -- in that way.
24 THE COURT: All right. So, are there any other
25 matters that we need to address, in your view, other than

1 the issue of whether discovery should commence?
2 MR. WOLKOFF: It would just be, Your Honor, the
3 date for the plaintiffs' filing of an opposition to the
4 motion to dismiss and a reply brief.
5 THE COURT: Okay. Usually 30 to 45 days. Does
6 that create a problem for you, something in that
7 neighborhood?
8 MR. BARNOW: We'd take 45, Your Honor. That would
9 be fine.
10 THE COURT: All right. Forty-five days sounds
11 pretty --
12 MR. WOLKOFF: And 20 days for a reply, Your Honor?
13 THE COURT: Yes, I think that's fine.
14 MR. WOLKOFF: Thank you.
15 THE COURT: And you can incorporate that in the
16 pretrial order.
17 All right. Let's see. Other than the issue of
18 discovery which I'm going to take up separately, I have one
19 brief matter that I'd like to talk to Mr. Lockridge and
20 Mr. Safranski about at side bar, and we'll do that off the
21 record just briefly up here. It's a tangential issue to
22 this case.
23 (Discussion at the bench off the record)
24 IN OPEN COURT
25 THE COURT: All right. Having cleared the decks

1 of the issue -- and the concern, in case you're curious, is
2 because I have SuperValu as another MDL in the ***Wholesale***
3 ***Groceries.*** I didn't see that there was any conflict or
4 concern, totally different kinds of cases, antitrust versus
5 security breach, but I wanted to make sure that that was not
6 an issue from either side and I think we've cleared the
7 decks on that.
8 So, how do you want me to deal with the issue of
9 what my thoughts are on discovery? Obviously, there's not a
10 real motion in front of me. Do you want to argue it? Do
11 you want me to tell you what my inclinations are? What do
12 you propose to do? Do you want to give me five minutes
13 apiece or --
14 MR. BARNOW: Maybe less.
15 THE COURT: Okay.
16 MR. BARNOW: On behalf of Plaintiffs, Your Honor,
17 my view is discovery should start immediately and I think
18 that's the preferred pattern for a lot of reasons.
19 One, it's not the type of situation where whatever
20 harm is done is done. It's the type of situation where
21 whatever harm has occurred continues and therefore the
22 rights of the plaintiffs or the members of the putative
23 class are --
24 THE COURT: Wait a second. Back up and explain
25 that to me. I thought that there was a finite period that I

1 have read in one of the submissions from you as to when -- a
2 window when the data breach occurred.
3 MR. BARNOW: That's true, Your Honor, but it's the
4 impact of it. The fact that the information of consumers is
5 out there, the consumers are at risk.
6 THE COURT: But the breach has been closed, so
7 it's a finite number of individuals that have been
8 identified.
9 MR. BARNOW: That's my understanding of the
10 situation and that's what's been published, that's correct.
11 But the information is out there and therefore the very
12 rights that we want to have protected and always wanted to
13 have protected and we would say should have been protected
14 continue to be at risk, if not worse.
15 The other thing is, it's not a situation where it
16 is a great burden on the defendant. Two reasons.
17 One, most of the -- all of the plaintiffs' counsel
18 in this case are experienced in the area. We're committed
19 as officers of the court to tender up -- serve reasonable
20 discovery, and if we serve something that was unreasonable
21 or excessive, which is not in our interest, these lawyers
22 would know it. They would call us, we'd work it out. We're
23 under a duty to do that. The quicker we get this
24 information going, the quicker rights of everybody,
25 Defendants and Plaintiffs, get resolved. I think it should

1 proceed. The pattern is there. There's no reason to slow
2 it down. That's Plaintiffs' view.
3 THE COURT: Tell me specifically, please, what
4 type of discovery you would seek for starters.
5 MR. BARNOW: I would want what the company -- what
6 the defendants did, whichever one had control of the
7 information, which I believe was SuperValu, subsequent to,
8 for instance, the Target data breach and other data
9 breaches, or whether or not they sat there. Why? Because
10 you're dealing with the issues of culpability at different
11 levels. I would also like to know exactly what the
12 relationship is between SuperValu and other companies whose
13 information was stored, because then you get into
14 notification issues and we're allowed to find out whether or
15 not the right people have been notified and whether or not
16 the communications that are already publicized are accurate.
17 The other thing we would want to know is the
18 amount of information and type of information. I'm not
19 suggesting that they didn't do a good job of trying to tell
20 the truth to the universe with all these press releases and
21 things, but we don't know that. And we're not talking about
22 an intentional misstatement or misrepresentation, but it's
23 our duty to check that which was said. Obviously we want to
24 know whether or not it's been cured and fixed and that
25 should be an easy thing. They have to have reports on it.

1 All of this should basically be done and in their
2 possession, and to leave it in their hands subject to
3 perhaps loss, destruction, confusion, makes no sense.
4 THE COURT: All right. Thank you.
5 Mr. Wolkoff?
6 MR. WOLKOFF: As Mr. Barnow has alluded to, Your
7 Honor, we've been involved in these data breach cases, some
8 against each other, for quite some time. And one thing I
9 can assure you is that the discovery, once it gets started,
10 becomes very extensive and it becomes extraordinary in its
11 cost, and that will be the case here. In fact, weighing the
12 balance here, I know that there will be an extraordinary
13 cost on the company for discovery. What we don't know, we
14 don't know at all, is what kind of injury, if in fact there
15 has been any injury, that any of the plaintiffs have
16 sustained.
17 This is not a case -- this is a quiet case. This
18 is not a case like ***Target***. When one goes through --
19 THE COURT: Excuse me.
20 MR. WOLKOFF: Bless you, Your Honor. I have a
21 cold as well, terrible cold.
22 When one goes through the four complaints here,
23 there isn't any cognizable injury that's been stated. You
24 know, there's the typical we may have to spend money, we may
25 have to spend some time guarding against identity theft in

1 the future, we would have paid less for our groceries, which
2 is a theory that has been rejected, very similar theory, in
3 a number of different cases.
4 What strikes one reading these four complaints is
5 that in the world now of ***Iqbal*** and ***Twombly*** and ***Clapper***,
6 which of course requires either that there be an actual
7 injury that has occurred or that there's an injury that's
8 certainly impending, that's right down the road that we know
9 is coming, there's nothing like that alleged.
10 You know, Judge Magnuson, he had a case in which
11 it was easy to find injury because the plaintiffs alleged
12 all kinds of unauthorized charges, that their bank accounts
13 had been blocked, that they'd been restricted, that they had
14 late payments, et cetera, et cetera. Here, Your Honor,
15 maybe it's the case that the plaintiffs are going to be able
16 to allege injury, cognizable injury. They haven't so far,
17 but we haven't even seen the complaint.
18 So we know on one side, our side, that the costs
19 of the discovery will be extraordinary. What we don't know
20 and won't know until we see a complaint that's filed is
21 whether or not there is any cognizable injury at all on
22 their side.
23 You know, I harken back to Judge Kyle in the
24 ***Medtronic*** case. He had a case there also where the
25 plaintiffs hadn't yet filed their amended complaint and they

1 wanted discovery immediately, and he rejected that, and
2 here's what he said. He said:
3 "Plaintiffs are seeking" -- and I'm quoting --
4 "Plaintiffs are seeking to put the proverbial cart before
5 the horse. A plaintiff must adequately plead a claim before
6 obtaining discovery, not the other way around. Simply
7 stated, discovery is not to be used 'to find a cause of
8 action.'"
9 And I'm not accusing the plaintiffs of doing that.
10 What I am saying is that their complaints are rote and
11 they're very sparse and they stand in extraordinary contrast
12 to what was alleged, for example, in ***Target***. And there's
13 another thing, Your Honor.
14 Your Honor in the ***Insulate*** case and in the ***Sony***
15 case that I have against Mr. Barnow, Judge Battaglia out in
16 San Diego recognized that the named plaintiffs can sue in a
17 data breach case -- the ***Sony*** case was a data breach case,
18 obviously ***Insulate*** was not -- but the plaintiffs can sue
19 under the laws of their own states, but not other states.
20 And so what do we have here? Again, we stand in
21 marked contrast to the ***Target*** case, which had I believe it
22 was 124 named plaintiffs. They were from 45 states. What
23 we have here, Your Honor, we don't even have a plaintiff who
24 resides in Minnesota. We have plaintiffs who reside only in
25 Illinois and Missouri, so we're talking about two states.

1 So we have to resolve not only the scope of the
2 complaint, but also under whose laws can these plaintiffs
3 sue. They purport to sue under -- as a nationwide class.
4 Well, we're going to have a much different case here, Your
5 Honor, if the complaint doesn't allege cognizable injury or
6 if there are only plaintiffs from two states, or, you know,
7 the motion to dismiss, even if it's not granted in whole,
8 and I think it will be based on the allegations so far. But
9 we have questions, serious questions, about the legal status
10 of a number of the claims, the Stored Communications Act,
11 for example. So again, without having a complaint which
12 sets the guidelines of the discovery, the breadth and the
13 scope of it, we're really dealing blind here.
14 So what we would suggest is much like Your Honor
15 did in ***TE Connectivity***. There was a case in which Your
16 Honor denied a motion to stay discovery, but what Your Honor
17 did do -- and I don't presume to tell Your Honor what you
18 did, but what Your Honor did do in the opinion was, you
19 looked at the complaint, and you looked at it for a couple
20 of reasons at least: one, the scope of the discovery, but
21 also, is this a complaint which on its face appears strong
22 or not so strong, so I'm going to weigh the cost of the
23 discovery against the strength of the complaint.
24 And that's what we would ask you to do here, Your
25 Honor, the same thing you did in ***TE Connectivity***, that we

1 take a look at the complaint. By agreement it's going to be
2 filed in 45 days, so we're not talking a long time from now.
3 That we look at the complaint and then we either have
4 another conference or we can decide here we file a motion
5 for protective order or the plaintiffs move for some
6 discovery. It might be better if they move to take
7 discovery so that we knew -- actually they put down in paper
8 what they intend to seek.
9 However, I was standing up before to say I'd like
10 to hear Your Honor's inclinations rather than argue this,
11 because, you know, I think at a minimum we need the
12 complaint, and once we have that, Your Honor can review it
13 and maybe we make a motion for a protective order, maybe we
14 have another conference to discuss the discovery issue.
15 I do think that to run willy-nilly into discovery
16 at this point is just grossly unfair and it's not an
17 appropriate way of dealing with it with all due respect to
18 the plaintiffs. It's going to cost us a lot of money. You
19 know, we've agreed to a fast track, relatively fast track
20 about the motion to dismiss, so there's not going to be any
21 harm to the plaintiffs to wait and see about the strength of
22 the motion to dismiss, which so far given what's been
23 alleged in the underlying complaints I think is going to be
24 quite strong, Your Honor.
25 THE COURT: You heard Mr. Barnow outline the

1 categories of discovery for me. Were there any of those
2 that you find less intrusive or -- you've sort of used cost
3 as the barometer of what's appropriate here -- but perhaps
4 less costly that we could get started with early? I can
5 understand some of the more intrusive things in terms of
6 data searches and such could be postponed.
7 Did you hear any particular categories of
8 discovery that you thought given your druthers -- I know
9 you'd like there to be no discovery for awhile -- but that
10 are more acceptable to you than others? For example, the
11 corporate structure or connections between --
12 MR. WOLKOFF: Yeah. I was going to suggest that
13 one, Your Honor, that we could give the plaintiffs a good
14 and accurate picture of who the defendants are and what the
15 relationship is with them. Right now I think in the
16 complaint it's a little murky about who was responsible for
17 the data security. We could give them information with
18 respect to that certainly.
19 We could give them information on when the breach
20 occurred as best as we can tell. We might even be able to
21 give them some guesstimate on the number of cards that were
22 affected and possibly whether anything was actually taken,
23 what's called extruded. So those kinds of things we could
24 do.
25 THE COURT: Tell me what extruded means --

1 MR. WOLKOFF: Extruded -- what often happens, Your
2 Honor, is that a hacker will come into the system and will
3 explore, but there often is no evidence that anything was
4 actually taken or that, if taken, that it was used.
5 So you have, for example, the ***Ceridian*** case in the
6 Third Circuit where there was evidence that a hacker had
7 come in, but there was never any evidence that anything had
8 been taken. It's kind of like something that some on the --
9 THE COURT: Burglar leaves his footprints on your
10 carpet, but you can't find what's missing.
11 MR. WOLKOFF: It's like what I think the kids
12 refer as tagging, Your Honor, you know, putting a mark on
13 something, and that way everybody knows that you did it,
14 that you can do it, but you're not in the habit of
15 fraudulently using credit cards.
16 You know, the question is whether or not there's a
17 human cry from the banks. For example, in ***Target*** there was.
18 Here, I refer to this case as a very quiet case. That is,
19 we haven't had a human cry. We haven't had 50 cases filed.
20 THE COURT: You didn't hear my scream when they
21 called and asked me I'd take it, but --
22 (Laughter)
23 MR. WOLKOFF: Well, yes, that kind of cry, Your
24 Honor. But typically the cry is from the banks. You know,
25 often you have conjoined with the consumer cases, you have

1 bank cases where banks have had to, you know, cancel
2 millions and millions of cards. That hasn't happened here.
3 So the real question's about cognizable injury,
4 but we could work with the plaintiffs to give them some of
5 the basic information that would help them know who's
6 involved and how many cards there are and whether or not
7 anything in our view has been taken, how many cards were
8 affected, just those basic things.
9 But there were a number of things that Mr. Barnow
10 mentioned which sound simple, but having been involved in
11 this before -- and I don't ascribe any ill intent to him,
12 but saying things like, you know, "We'd like to know what
13 happened and we'd like to know what the cure is" and things
14 like that, those are things that are still being studied,
15 that are expert work, that involve questions of work
16 product, attorney-client privilege. They're very involved.
17 They involve custodians, lots of e-mails going back and
18 forth as you might imagine. It would be extraordinarily,
19 extraordinarily costly to produce those now.
20 THE COURT: All right. Thank you.
21 MR. WOLKOFF: Thank you, Your Honor.
22 THE COURT: Mr. Landolfi or Mr. Al --
23 MR. LANDOLFI: I don't have anything to add, Your
24 Honor.
25 THE COURT: Mr. Al, anything from your client?

1 MR. AL: No, Your Honor.
2 THE COURT: Well, here's I think what makes most
3 sense to me.
4 I don't think there should be any discovery until
5 such time as the plaintiff has first filed their
6 consolidated amended complaint. I think it makes sense to
7 get the consolidated amended complaint and the framework for
8 the lawsuit set.
9 I will then look at it and ask that no discovery
10 be filed prior to the expiration of the time for the
11 defendants' answer to the lawsuit, but at that time, which
12 is now -- is that 45 days we agreed to for their answer?
13 MR. WOLKOFF: It's 90 days from --
14 MR. BARNOW: Forty-five and 45.
15 THE COURT: So that would be 90 days from now.
16 MR. WOLKOFF: Yes, Your Honor.
17 THE COURT: The plaintiffs may serve discovery on
18 the first category that I understand is least intrusive,
19 that is, the corporate relationship of the defendants, sort
20 of who the defendants are and actions taken at the time of
21 discovery. The areas that -- the two that you indicated
22 were the least controversial.
23 I take it, Mr. Barnow, you know of what I speak in
24 terms of the areas?
25 MR. BARNOW: I do.

1 THE COURT: I think discovery should start on
2 those.
3 What I see as the more expensive and intrusive
4 sort of discovery will await the reply brief and my decision
5 on the motion to dismiss, but I want to get it going. I
6 want to jump-start this, get as many issues as we can out of
7 the way early on so I can figure out the configuration of
8 the lawsuit and where we go. I think any discovery that
9 relates to damages and falling within that area should await
10 my ruling on the motion to dismiss. So I'd like the
11 pretrial order to incorporate those deadlines in it when we
12 file the second pretrial order.
13 Does that give you the clarification you need, or
14 am I being fuzzy?
15 MR. WOLKOFF: Thank you, Your Honor.
16 THE COURT: You understand?
17 MR. BARNOW: You were not fuzzy and we thank you
18 for the consideration.
19 THE COURT: All right. Is there anything further
20 we can accomplish today?
21 MR. BARNOW: Plaintiffs are okay.
22 MR. WOLKOFF: I don't think so from the
23 defendants' perspective, Your Honor.
24 THE COURT: All right. Very good.
25 I don't anticipate any problems. It looks like

1 it'll be a pleasant chore. You know, the only way you'll
2 get crossways with me is lack of communication or sudden
3 surprises, but as long as we're all talking to each other
4 and we keep communicating, I don't foresee any problems.
5 All right?
6 MR. WOLKOFF: Thank you very much, Your Honor.
7 THE COURT: See you soon.
8 (Proceedings concluded at 2:10 p.m.)
9 * * * * *
10
11 **C E R T I F I C A T E**
12
13 I, **TIMOTHY J. WILLETTE**, Official Court Reporter
14 for the United States District Court, do hereby
15 certify that the foregoing pages are a true and
16 accurate transcription of my shorthand notes,
17 taken in the aforementioned matter, to the best
18 of my skill and ability.
19
20
21 ***/s/ Timothy J. Willette***
22
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