

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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 )  
 IN RE: TARGET CORPORATION ) Case No. 14-MD-2522 (PAM/JJK)  
 CUSTOMER DATA SECURITY BREACH )  
 LITIGATION )  
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 )  
 ) St. Paul, Minnesota  
 This Document Relates to ) December 11, 2014  
 All Actions ) 10:02 a.m.  
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BEFORE **THE HONORABLE PAUL A. MAGNUSON**  
 UNITED STATES DISTRICT COURT JUDGE AND

**MOTION TO DISMISS PROCEEDINGS**

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

**IN OPEN COURT**

THE HONORABLE JUDGE PAUL MAGNUSON: Good morning, everybody.

ALL COUNSEL: Good morning, Your Honor.

THE HONORABLE JUDGE PAUL MAGNUSON: We have the Target Consumer Case matter, Rule 12 Motion. Mr. McElhinny, do you want to proceed?

MR. McELHINNY: Thank you, Your Honor. Your Honor, on my agenda I have four things that I want to accomplish this morning. One, I would like to answer any questions the Court has.

THE HONORABLE JUDGE PAUL MAGNUSON: Pretty good for that size brief.

MR. McELHINNY: Well, I will just start with West Virginia. We can get into the details on West Virginia law.

THE HONORABLE JUDGE PAUL MAGNUSON: Okay, tell me, what is West Virginia? Okay, go ahead.

MR. McELHINNY: Can I have that read back, please?

Obviously, I want to answer whatever questions the Court has. Two, I want to talk a little bit about the factual background as pleaded in the Complaint, because I want to make sure that we are all -- we are in agreement with the Plaintiffs on the facts, and I want to make sure we are all in agreement.

1           Second, I want to address, take my chance to  
2           address the question, the first question you asked at the  
3           last hearing, which is: Is a motion to dismiss the right  
4           procedural approach to the issues that are before the Court  
5           today? And with my last remaining time I want to talk a  
6           little bit about standing and the Complaint as it is  
7           presently pleaded.

8           So, with that introduction, at least until I hear  
9           questions from you, in the Plaintiff's Complaint, in  
10          Paragraph 2 and Paragraph 180, they plead the factual  
11          background as follows: Which is that there was a breach at  
12          Target, but as part of that breach, the hackers obtained  
13          access to two different kinds of information.

14          The first, which we've talked about, this credit  
15          card information. And as the Complaint alleges, the hackers  
16          were able to obtain credit card data as the card was being  
17          swiped in the point of sale machine. And we know that up to  
18          40 million people may have been -- guests of Target, may  
19          have been impacted by that theft of credit card information.

20          In addition, but separately, we know that the  
21          hackers were able to get into a database that contained what  
22          I would call generally contact information. And that  
23          contact information as it is pleaded in the Complaint, again  
24          in Paragraphs 2 and 180, consisted of names, addresses,  
25          email addresses, contact information. And that database may

1 have affected up to 70 million people who have lost contact  
2 information. And there may be, and in fact likely is, some  
3 overlap between that 40 and 70 million number.

4 So, in terms of the credit card financial, it is  
5 40 million. In terms of names and addresses, it is 70  
6 million, from a different database.

7 The last fact I want to make sure we are clear  
8 about, or two facts, are one: There is no allegation in the  
9 Complaint, and I am not sure there could be an allegation,  
10 that anyone's Social Security number was hacked from Target.  
11 There is no allegation in the Complaint that any guest gave  
12 their Social Security number to Target and there is no  
13 allegation in the Complaint that any Social Security number  
14 was taken from Target.

15 And finally, none of the Plaintiffs in the  
16 Complaint have alleged that they are one of the millions of  
17 people who received actual personal notice from Target  
18 telling them that it was likely that their information was  
19 taken. That is the factual background, that is the 40 and  
20 70 million numbers that people have been playing with.

21 Second, then, I want to address why we think a  
22 motion to dismiss is the correct procedural device to  
23 address the Complaint as it is presently stated. We have  
24 submitted to Your Honor an opinion by Judge Nelson from last  
25 July, an opinion called *U.S. Hotel versus Onity*, O-n-i-t-y.

1 And in that case, Judge Nelson surveyed the evolution of  
2 what she calls the, quote, "lost data cases." And after  
3 doing the survey, the same cases that are before Your Honor,  
4 she concludes that the current state of the law is that most  
5 courts dealing with claims of these lost data cases  
6 dismissed those claims for lack of standing. That was Judge  
7 Nelson's conclusion.

8 We also cited to you a decision, *Sony Gaming* by  
9 Judge Battaglia in San Diego, in which Judge Battaglia goes  
10 out of his way in his opinion to say that he thought it was  
11 appropriate to apply the Motion to Dismiss, the Pleading  
12 Rules with special emphasis in the data breach consumer  
13 cases. And that he thought it was appropriate to do that  
14 before he unleashed the expense and the burden and the time  
15 and the difficulty that is involved in these large class  
16 actions with, as in this case, 114 some Plaintiffs and 353  
17 separate state claims.

18 So, as I was reading these cases, I was asking  
19 myself why is it that these Judges are coming to this  
20 conclusion that the motion to dismiss is the right time to  
21 start looking very carefully at these complaints? And I  
22 think my conclusion is I think there are three reasons why  
23 the Courts are coming to ground on this view.

24 The first of them is that common sense tells us  
25 that most of these claims are not and should not be

1 credible. And the reason for that is because we know that  
2 there is in existence, has been ever since we have been  
3 using credit cards, systems put in place by the banks and by  
4 contract, to ensure that the credit card user is not the  
5 person who bears the risk of loss.

6 So, we have this system that, if it is working,  
7 makes sure that you or I when we use our credit cards, if  
8 something goes wrong there, we are not going to be the ones  
9 who pay.

10 And so, if that system has worked correctly in  
11 this case, common sense tells us that there should not be  
12 consumers who are injured. They are not supposed to get  
13 injured. So, that is the first reason, I think.

14 The second reason is these cases hold up huge  
15 risks of double recovery and multiple liability against  
16 Target. And Your Honor sees that. And Your Honor knows  
17 from the Financial Institutions Case that there is in place  
18 a contractual, through the card issuers and Target, a  
19 contractual basis for allocating risk and loss from these  
20 unauthorized transactions.

21 Your Honor also knows that in the Financial  
22 Institutions Case, what we now have is classes of financial  
23 institutions who are seeking to recover for those same  
24 losses outside of that contract through direct tort and  
25 their own individual claims. And that is what is preceding



1 the Financial Institutions Case.

2 But, we are still talking about the same group of  
3 injuries, the same group of unauthorized charges, the same  
4 charges from replacing cards. And what we have here now is  
5 consumers who are seeking their own class action, but they  
6 are also seeking the same body of injuries. They are  
7 claiming the same injuries, the same expenses that the banks  
8 have already told you in the pleadings that they have paid  
9 for. That is one risk of double recovery.

10 The other risk of double recovery that we know  
11 about is we now know that the same time that the Target hack  
12 was going on, there were at least 40 other publicly-reported  
13 data breaches in progress in the United States. We know  
14 that J.P. Morgan has reported one. We know that Neiman  
15 Marcus reported one. We know American Express, Sears, even  
16 Goodwill Industries, all of those companies were being  
17 hacked at the same time that Target was being hacked.

18 But, there is nothing in the Complaint, of any of  
19 these complaints, that contributes their use of this credit  
20 card only to Target. There is no way to trace that charge,  
21 where their cards got hacked, because they haven't told us  
22 enough facts in the Complaint to tie their alleged injury to  
23 a Target breach, as opposed to any of these others that were  
24 going on at the same time. So, I think courts are concerned  
25 about this issue of multiple recovery.

1           THE HONORABLE JUDGE PAUL MAGNUSON: Counsel, if  
2           you are going to even start to comply with Rule 1 or Rule 8  
3           on a short plain statement, we have got 121 pages of a  
4           brief -- or of the Complaint here. It seems to me that you  
5           are pretty well placed on notice. I can't see why they  
6           should have to go down to individuals on these things.

7           MR. McELHINNY: Let me finish up and get there,  
8           because I mean that's what I am -- I may not be doing it  
9           successfully, but I want to -- I'm trying to explain to Your  
10          Honor why other courts are in fact going beyond a short  
11          complaint and requiring Plaintiffs to actually prove the  
12          allegations that show that they have standing, that they  
13          have actually suffered an injury. And that is the standing  
14          test that an injury occurred. And to use, you know, the  
15          Supreme Court's language that it is fairly traceable to the  
16          breach that they are alleging.

17          And just the third point, Your Honor, about why  
18          courts are doing this is that these motions to dismiss in  
19          these data breach cases have been effective in reducing the  
20          cases. It turns out because of these reasons, because of  
21          the way the system works, that if you do put them to the  
22          test, they can't plead an actual injury. That is what has  
23          happened in all of these other cases that Judge Nelson  
24          surveyed when the courts didn't simply presume the facts  
25          necessary; but said, I want to see it in a pleading. The

1 end result is the cases go away because the injuries -- they  
2 are not supposed to be there, and at the end of the day they  
3 really aren't there.

4 And Your Honor stole my punch line; that is Rule  
5 1. I mean, the reason we have a motion to dismiss is  
6 because if in fact the claims -- the injuries aren't real,  
7 if they can't be traced to the breach, at the pleading stage  
8 is the most efficient and it's the most effective and it is  
9 the most cost effective way of producing a fair and accurate  
10 result. And that is what is happening in all of the cases  
11 that we cited to Your Honor.

12 THE HONORABLE JUDGE PAUL MAGNUSON: Well, that  
13 isn't happening in all of them. There are lots of people  
14 that have data breach cases that disagree with the  
15 conclusion of Judge Nelson.

16 MR. McELHINNY: And I agree with that. That is  
17 her survey. I mean, Your Honor has read the cases. You  
18 will form your own conclusion. I am not going to tell you  
19 what the law is. But, it appears under Judge Nelson's  
20 conclusion that the way the courts are tending and trending  
21 is to this approach, particularly focusing on standing, and  
22 focusing on the tests that the Supreme Court has issued, and  
23 which --

24 THE HONORABLE JUDGE PAUL MAGNUSON: Well, you  
25 know, admittedly, these cases are hard; that's the bottom

1 line.

2 And admittedly, I can understand both a damages  
3 argument and a standing argument as it relates to -- as it  
4 relates to a lot of potential people in one of these things.  
5 But, at the same token, we have pleadings here of people  
6 that have honest-to-goodness hurt. They have been injured  
7 by what happened.

8 Now, it is for another day whether or not that is  
9 Target's fault. But, we have allegations that people are  
10 honestly hurt. And for me to simply sit up here and say,  
11 well, there are people that are really hurt in this thing,  
12 but I don't think there is that much there, because the  
13 majority maybe don't have much there. That is not fair.

14 MR. McELHINNY: I don't disagree -- well, I don't  
15 disagree with the principle that Your Honor is putting -- I  
16 don't do this job -- I am not standing up in front of you to  
17 ask for injustice. That is not what I am here for. And I  
18 am not really here even yet to talk about whose fault any of  
19 this is.

20 THE HONORABLE JUDGE PAUL MAGNUSON: But you are  
21 here to say that these people don't have standing.

22 MR. McELHINNY: I am, Your Honor.

23 THE HONORABLE JUDGE PAUL MAGNUSON: And as you are  
24 saying that the people who are here don't have standing, you  
25 are essentially saying they don't have standing because they

1 weren't hurt.

2 MR. McELHINNY: Well, let me turn directly -- I'm  
3 sorry, I don't mean to interrupt you.

4 THE HONORABLE JUDGE PAUL MAGNUSON: That's all  
5 right.

6 MR. McELHINNY: Let me turn directly to standing  
7 and be clear about what I am saying about standing, okay?  
8 First of all, there are some things that I think everybody  
9 agrees about, and here is one of them.

10 I think under the law, each one of the 114 named  
11 Plaintiffs has to allege facts that show that each one of  
12 those people has standing. So, in this motion, we challenge  
13 the standing of each of those 114 people.

14 So, it is not enough -- we will get to Your  
15 Honor's point, but it is not enough that if there is one or  
16 two -- if you look at the four that they like to talk about,  
17 if Your Honor agrees with them about the four, that doesn't  
18 say that the rest of those people -- each one of them has to  
19 demonstrate standing on their own. That is Judge Anderson's  
20 opinion in *Insulate SB*. The Court has to look at whether  
21 each one of these Plaintiffs has standing.

22 And even then it would be significant if Your  
23 Honor decided that only four of them had pled injury,  
24 because in order to plead all of these state claims, they  
25 have to have a resident from each of the various states.

1 And so, if we end up with only four, we end up with a much  
2 smaller lawsuit with many fewer claims; and, you know, an  
3 issue about standing until you decide it down the road.  
4 But, it is important to look at each of these Plaintiffs  
5 individually, because that is what the law requires.

6 And as Your Honor I think just pointed out, there  
7 is a broad -- each one of these alleged Plaintiffs have a  
8 completely different story, and the stories vary  
9 tremendously. Over half of the named Plaintiffs don't  
10 allege that they have ever had anyone try to do anything  
11 unusual with their account. Nothing has happened to their  
12 account. That is over half of the 114 people that they  
13 named. But those people, we submit, can't possibly have  
14 standing.

15 But, let me -- there is one issue that crosses  
16 everywhere. And it is not just the damages issue, but we  
17 think it is really important and we would hope that Your  
18 Honor does, as well, which is that in the Complaint, the  
19 Plaintiffs have defined the breach period as running from  
20 November 15th to December 15th. That is their definition of  
21 when the breach period.

22 And the only allegation that they make for each  
23 one of the Plaintiffs, is that that Plaintiff used his or  
24 her credit card sometime during the breach period. So, the  
25 only allegation that you have in the Complaint is that the

1 credit card was used sometime between November 15th and  
2 December 15th. But, they also allege -- and I am not  
3 arguing the facts with them, this is in their Complaint;  
4 that the software, the malware that actually took credit  
5 card information did not go into effect until November 30th.  
6 So, we do not have an allegation from any of these  
7 Plaintiffs that they used their credit card during the  
8 period when the malware was in effect.

9 An argument can be made -- I mean, you get to  
10 decide how you want to approach this, obviously. You can  
11 assume they meant it during the right time period, but I  
12 suggest that there's three reasons why you shouldn't do  
13 that.

14 THE HONORABLE JUDGE PAUL MAGNUSON: Okay?

15 MR. McELHINNY: One, this is data breach case  
16 number 50. I mean, these Plaintiffs who are, you know, some  
17 of the best Plaintiffs in this line of work in the country  
18 know what they have to allege. And they didn't allege it  
19 here.

20 Two, they just filed a First Amended Complaint.  
21 They just filed it on December 1st. They were holding our  
22 Motion to Dismiss in their hands. They knew this issue  
23 would be argued this morning. And they corrected one  
24 problem, they got a South Carolina thing because they got a  
25 South Carolina Plaintiff, but they did not fix this problem.

1       So --

2                   THE HONORABLE JUDGE PAUL MAGNUSON: I didn't --  
3 maybe I better back-up with you. I understood -- because I  
4 quite honestly have not taken any serious look at that  
5 Amended Complaint that came in -- that is, that they just  
6 added a couple of Plaintiffs and everything else is the  
7 same.

8                   MR. McELHINNY: That is correct. But, my point is  
9 they added the Plaintiffs because they were trying to deal  
10 with this -- we need -- they wanted somebody to reach it,  
11 as well. I don't know, they didn't tell me why they added  
12 the Plaintiffs. But, they had that problem. We brought in  
13 somebody from South Carolina. But, they know that we were  
14 focused on this issue, as well, and they didn't fix this  
15 problem.

16                   And third, we know that when they moved from the  
17 Original Complaint to the Consolidated Complaint, 156  
18 Plaintiffs just simply disappeared. And what I suggest is,  
19 we are not at the beginning, here. I mean, this is not the  
20 first data breach case. It is not people who don't know  
21 what they are doing. I don't think it is burdensome -- what  
22 I think is not going to be important -- to require them to  
23 plead that if somebody is going to claim an injury from a  
24 data breach, that they used their card when the breach was  
25 happening. And you do not have that allegation from any of



1 the Plaintiffs in this case.

2 THE HONORABLE JUDGE PAUL MAGNUSON: Now, let me  
3 come back on this malware situation.

4 MR. McELHINNY: Yes, Your Honor?

5 THE HONORABLE JUDGE PAUL MAGNUSON: It is my  
6 understanding that the Complaint is that people were  
7 using -- they used their credit cards. But, the malware  
8 comes into play because of Target Corporation -- the  
9 allegation is that Target Corporation retained a bunch of  
10 stuff that permitted that information to come in there.

11 MR. McELHINNY: I can give you the specific  
12 complaints, but I don't think I am going to have a dispute  
13 with Mr. Esades on this. But, the Financial Institution  
14 Cases make that allegation, but that is not what we are  
15 addressing here.

16 Here the question is, they allege that the hackers  
17 got into the system in November 15th. And between November  
18 15th and November 30th, they did a bunch of things in the  
19 system that they needed to do in order to make the hack  
20 work. But, the hack, itself, this is in their Complaint as  
21 they allege it, didn't start until November 30th. So, no  
22 one who used a credit card before November 30th was  
23 influenced by the credit card stuff at all. Because they  
24 also allege that the theft from the credit card, happened as  
25 the card was being swiped in the machine, simultaneously.

1 In the Financial Institutions Case, Your Honor is right,  
2 that they then allege that the hackers took this information  
3 and stored it in the Target system before they exfiltrated  
4 it, and that is where they get their storage. But, there is  
5 no allegation that this system -- that the credit card  
6 information, as opposed to -- that is why I started with the  
7 contact database. The contact database was stored. But,  
8 that is just names, email addresses and phone numbers.

9 The credit card information was not stored in the  
10 Target system. They took it in real time as the card was  
11 swiped. They then stored it before they exfiltrated it.  
12 But, there is no way -- you can ask Mr. Esades this, but I  
13 don't think he is going to disagree with this. There is no  
14 way under the facts as alleged in the Complaint that anyone  
15 who used their card at Target prior to November 30th could  
16 have been impacted. Because the software that steals it  
17 didn't start until November 30th. And there was no prior  
18 credit card information stored at Target.

19 I'm sorry, I've got to make the salient point.  
20 This is what they need to be proving. I mean, this is -- if  
21 they are going to plead an injury and make it directly  
22 traceable to the event, as *Clapper* says -- I mean, as  
23 *Clapper* says, you know, you couldn't assert a problem under  
24 a particular statute because you didn't know that was the  
25 statute that authorized the wiretap, you had to be able to

1       plead in order to challenge, which wiretap statute resulted  
2       in the issuance of the wiretap. That is the specificity of  
3       the allegation that is required. Here we are not asking for  
4       that.

5               For this part, we are just simply saying, let's  
6       start by limiting the class of Plaintiffs to people who  
7       actually used their credit cards, and for some reason the  
8       Plaintiffs refused to do that. They have the information.  
9       They knew it was challenged. They filed an Amended  
10      Complaint, they are not changing it.

11             And if these people that they named didn't use it,  
12      it obviously knocks them out of the case. How much time?  
13      Where am I?

14             THE CLERK: Fifteen minutes.

15             MR. McELHINNY: Left?

16             THE CLERK: Yes.

17             MR. McELHINNY: Thank you. I am not going to  
18      waste your time and go through the rest of it. But, the  
19      other types of injuries they allege, spending money in order  
20      to avoid future fraud, even though they didn't have it,  
21      being without their cards for a week or two, all of these  
22      kinds of alleged injuries are ones that have been rejected  
23      by courts because they don't fit under the standing, they  
24      don't fit under the principle of allowing someone to  
25      generate their own standing.

1           But then to come back to the point, I don't know  
2           who Your Honor has in mind about people who actually  
3           suffered real injuries, but there are people who allege: I  
4           used my card, people attempted to make false charges -- I'm  
5           sorry, that reminds me of another point.

6           None of the Plaintiffs alleges whether or not the  
7           false charges that were made were reimbursed by their banks.  
8           That failure to plead that has been held "failed" in three  
9           cases. The Plaintiffs know that. Again, they knew we were  
10          raising that point and they haven't corrected it, because  
11          they want to give the implication, although we know it can't  
12          be true, that somehow they paid those costs when in fact we  
13          know that they didn't. And requiring to allege that those  
14          charges were un-reimbursed will cut through whether or not  
15          we really have serious injury here, or whether or not we  
16          don't.

17          And then finally, there is a group of people, and  
18          I think this is who Your Honor -- who allege there were  
19          fraudulent charges made. I lost my card. And while I lost  
20          my card, I missed payments and I had to pay late fees.

21          But again, those people, even the ones who allege  
22          that kind of un-reimbursed expense, they don't allege who  
23          cancelled their card. Because if they cancelled their card,  
24          we are talking about a different kettle of fish here. The  
25          injury may be real, but whether or not they have a claim

1       that can go forward against Target, is not -- it can't.  
2       Because it falls into this kettle of -- you know, some of  
3       the people allege that they bought credit monitoring  
4       insurance.

5               Well, there are a bunch of cases that say you  
6       can't generate insurance by doing this. But, we also know  
7       that Target bought credit monitoring insurance for everybody  
8       in the world who wanted to sign up. So, whether or not --  
9       in order to discuss with Your Honor whether or not there is  
10      somebody here who suffered real injury, you really have to  
11      pick out a plaintiff and talk about that one particular  
12      person. And I can do that if Your Honor has a specific one.

13             So, the point -- just for the record, I was going  
14      to say we also briefed our 12(b)(6) motion that suggested  
15      350 some individual state cause of actions. I am not going  
16      to take the time right now to discuss each of those unless  
17      Your Honor has a question about it.

18             I don't think you will be stunned to hear this. I  
19      don't think we are being unreasonable to say in a case this  
20      large, with 114 Plaintiffs, 353 causes of action, that the  
21      cost of which, the cost of defense of which is likely to be  
22      a factor higher than any possible recovery.

23             Given the fact that there has been so much history  
24      in these breach cases, and the courts have addressed them so  
25      thoroughly, we don't think it is unreasonable to require

1       these Plaintiffs to make the showing -- this is Your Honor's  
2       Rule 1 about the full notice.

3               They have read *Sony Gaming*. They have read all of  
4       the cases from the Northern District of Illinois. They know  
5       what the courts are looking for. They don't have to guess  
6       about this. And we think it is fair. We don't think it is  
7       unreasonable. We think it is fair. We think it is  
8       efficient, we think it is good management, we think it is  
9       cost effective for Your Honor to simply say to these best  
10      lawyers in the world: You know what you have to plead.  
11      Give it to me in a complaint.

12             Thank you, Your Honor. I am going to save my  
13      remaining time for rebuttal.

14             THE HONORABLE JUDGE PAUL MAGNUSON: Okay. There  
15      are two things here that I just want to mention to you.  
16      This is applicable to both sides. One is when you get into  
17      the negligence side, I am trying to figure out what states  
18      bar negligence recovery because of the Economic Loss Rule.  
19      Both of you talk about it, but I can't find the list of  
20      where it is.

21             MR. McELHINNY: I can resubmit -- we submitted an  
22      appendix --

23             THE HONORABLE JUDGE PAUL MAGNUSON: You sure did  
24      and that was going to be my next statement to you.

25             MR. McELHINNY: I think we had permission to do

1       that.

2               THE HONORABLE JUDGE PAUL MAGNUSON:  Oh, yeah, I am  
3       sure you did.  But what I want to get to -- I want to get to  
4       that appendix business.

5               MR. McELHINNY:  Yeah.

6               THE HONORABLE JUDGE PAUL MAGNUSON:  And this is  
7       just looking at -- internally for us.  I know that briefs  
8       are written because of these funny word limitations or page  
9       limitations.  We have gone through all of those machinations  
10      over the years.  And they are there for good reasons,  
11      because there are people in this world who will abuse it.

12              But, I have also said all of the time that good  
13      lawyers don't need rules.  Bad lawyers don't follow them.  
14      So --

15              MR. McELHINNY:  Yeah, but you are talking to the  
16      guy who is now on a timer because he was the second guy down  
17      the trail.

18              THE HONORABLE JUDGE PAUL MAGNUSON:  Okay.  Now,  
19      what I actually was going to get to, in the future with  
20      respect to the briefing, you are going to get page  
21      limitation extensions all over the place from me.  And know  
22      that, because just the very thing you have been arguing  
23      about all this time, just what we are involved in.

24              And it is really difficult to try to figure out as  
25      you read from briefing here, and then try to figure out

1 where we are in the appendix, the attachments, et cetera.  
2 So, it is just a question for the future that -- go ahead,  
3 ask for the extensions, and if they don't give it to you,  
4 call me.

5 MR. McELHINNY: Your Honor knows. You are the one  
6 who has to deal with all of this. We are in the business of  
7 presenting it to you in the way that makes it the most  
8 helpful to you.

9 THE HONORABLE JUDGE PAUL MAGNUSON: And I am not  
10 critical of what happened, because what happened is kind of  
11 a traditional way of doing it. But, I just happen to think  
12 it is easier if you just read it in one stretch.

13 MR. McELHINNY: Thank you, Your Honor.

14 THE HONORABLE JUDGE PAUL MAGNUSON: It's sort of  
15 like my other forewarning, Judges don't read footnotes in  
16 briefs, so -- thank you.

17 MR. McELHINNY: That is where all of the good  
18 stuff is. Thank you, Your Honor.

19 THE HONORABLE JUDGE PAUL MAGNUSON: Mr. Esades?

20 MR. ESADES: Good morning, Your Honor. Vincent  
21 Esades for the concerned Plaintiffs. I think I will attempt  
22 to follow Harold's organization at my own peril. I will not  
23 be repetitive of the briefing and a lot of this ground was  
24 covered in the brief.

25 We are not here today because Target's systems



1       were hacked. No system is hacker-proof. I think you see  
2       that reflected in some of the case law where claims are  
3       simply brought against companies where they have been  
4       hacked. We are here because of Target's conduct and the  
5       conduct that is detailed in the Complaint: The failure to  
6       stop it from happening; the ignoring of repeated warnings;  
7       and the failure to provide timely notice.

8               And as a result of these things independent  
9       agencies, the DOJ, linked the fraud that was flooding the  
10      black market right back to Target, and came and told Target:  
11      You have been breached because we are seeing it all over the  
12      place. And it remains on the market.

13             Now, products and breach cases, it is  
14      interesting -- I understand that they want to have a  
15      discussion of sort of the evolving area of case law, and  
16      that is actually important, because they really fall in two  
17      camps when you read through privacy breach cases regardless  
18      of the time frame.

19             The first thing is that there is cases involving  
20      stolen data where there is no fact evidencing that it has  
21      actually been stolen, meaning -- sometimes we call it a  
22      laptop out of the back seat of a car type case, where data  
23      has been stolen, but there is no indication it has actually  
24      been accessed. And there is no actual evidence or facts  
25      plead, rather, that it has been misused. And also, those

1 cases, many of them, fail to allege very specific  
2 allegations as to damages.

3 The other cases are where there is a coordinated  
4 cyber criminal theft of data and credit card information,  
5 where that data immediately is used and misused and  
6 continues to be misused.

7 And if you look at that simple factual  
8 differentiation, you will see the cases kind of cleave down  
9 the middle. So, doing a survey on them, what this tells me  
10 is there have been a lot of poorly-pled cases and a lot of  
11 cases where the data has never been misused or the  
12 allegations weren't there because the class reps that were  
13 litigating the class didn't have those allegations.

14 So, we turn to the facts of this case, which was  
15 Harold's, I believe his second point. The first point was  
16 questions which I am obviously available for. The second  
17 was facts, that 40 million may have been stolen.

18 Well, Target's own public disclosures told us that  
19 they actually were stolen. There is no allegation that this  
20 may have happened to these people. Everyone that used it  
21 during the breach period suffered the theft of the customer  
22 name, credit card data number, and the card's expiration  
23 date and CVV. That is from Target and that is in the  
24 Complaint.

25 Target also announced that the PIN data was

1 removed, as well, on December 27th. And on January 10th  
2 they announced the names, mailing addresses, phone numbers,  
3 and email addresses of an additional 70 million people were  
4 stolen.

5 Now, with respect to that data, we have no  
6 temporal idea when that was given to them. As a result, we  
7 can't really be a hundred percent certain who the class  
8 members are. Target is in possession of that information.  
9 They are the ones that have it.

10 Harold referred to this as contact information. I  
11 think the more appropriate term is personally identifiable  
12 information. There is a reason the hackers stole it. They  
13 are not looking to send a mailer out to everyone. They use  
14 this information to commit identity fraud. And it is  
15 important to them and it is extremely valuable and this is  
16 sold on the internet.

17 Now, we didn't plead Social Security numbers were  
18 stolen. We don't know what any other data may have been  
19 stolen. We can only plead what we know at this point. And  
20 that goes to the second point, which I want to address right  
21 now, which is the issue of the timing.

22 Here is what we do know, we know that hackers  
23 gained access on November 15th. We don't know precisely  
24 what they were up to, but based on public reports that we  
25 have thus far, we know that they stole customer information,

1 credit card information.

2 Now, discovery may come forward that shows us that  
3 it was only taken from a time period where the public  
4 documents would show that it was Black Friday, from that  
5 point on; but, we don't know that for sure. So, when we  
6 plead a complaint, we are not just taking information that  
7 has been gleaned from the public, probably we are a little  
8 bit cautious to be overly specific in a notice pleading.

9 Now, I can tell you that they will be able to  
10 depose, and they have already started to depose our class  
11 representative, who will tell them exactly when they made  
12 charges, exactly where else they used their cards, and  
13 exactly why they fairly traced their injury to the Target  
14 breach.

15 With respect to the survey of, one, why these  
16 cases get dismissed, I think it is important that, as I  
17 said, they turn on the facts of the case. And when you look  
18 at the facts that have been pled by the Plaintiffs in this  
19 case, we have a lot of specific examples of actual injury.  
20 And I would suggest that the multiple forms of injury that  
21 we have alleged across the board with each class  
22 representative cannot be compartmentalized and pull one out  
23 and attack it and pull the others out.

24 If you look at the allegations across the board,  
25 there were approximately 42 Plaintiffs who suffered

1        unauthorized charges and late paying fees. There were at  
2        least 57 who lost access to their own accounts for a period  
3        of time.

4                Now, it doesn't matter who cancelled the card. If  
5        I use my card at Target, and Target tells me that card has  
6        been compromised, and I cancelled that, and I don't have  
7        access to funds -- because some of these accounts were  
8        linked to bank accounts, as you can see from the  
9        allegations. People lost access to funds they needed. Not  
10       everybody can weather the storm of a couple of weeks without  
11       money that they need. And it is a cognizable injury.

12               When Harold talks about -- when Mr. McElhinny  
13        talks about cases where these claims have been dismissed,  
14        they have been dismissed on standing grounds, which I have  
15        already addressed, which is that the class members in this  
16        case have already articulated this data was stolen, this  
17        data was misused.

18               If your data was misused, and one of the reps that  
19        they have already deposed right after he discovered the  
20        fraudulent charges, we don't buy credit monitoring before  
21        Target even offered it.

22               Now, Courts have held that that mitigation cost is  
23        absolutely recoverable in a case where you know it has been  
24        misused, or you know that the retailer has told you it has  
25        been stolen by criminals who intend to use it.

1           With respect to the double recovery argument, I  
2           was at the other hearing. I don't think anyone is arguing  
3           that we are asking for money that has been reimbursed to be  
4           paid a second time. To the extent reimbursements don't  
5           occur, and many of these late fees and un-reimbursed late  
6           fees from missing payments because there is no way to access  
7           accounts, we believe is recoverable; and that is not double  
8           recovery.

9           And unless they are conceding that they are going  
10          to be reimbursing the banks, which I know from, based on the  
11          hearings, they have no intention of doing that -- they are  
12          still seeking to dismiss them -- there is no double recovery  
13          situation in any event.

14          When consumers are definitely not claiming the  
15          same injuries, you can look at paragraph 261 for the list of  
16          the ten specific injuries they are claiming and the each  
17          individual paragraphs from the Plaintiffs.

18          Now, with respect to the same time the Target  
19          breach was occurring, we are being told there were 40 other  
20          breaches. They can certainly bring those to light, but  
21          certainly the J.P. Morgan breach was not credit card  
22          information. There's no evidence that any of the  
23          information from the J.P. Morgan breach has been used by  
24          anyone or is in the hands -- some people suggested that that  
25          was just a foreign government showing that they could get

1       into our most protected institution, just to show they could  
2       breach them. But, it's nothing -- throwing up red herrings  
3       that there is other stuff going on in the world doesn't mean  
4       that our Plaintiffs haven't sufficiently pled that they used  
5       their card and that the card was compromised.

6               That the Motions to Dismiss are effective in  
7       reducing cases, I think, is certainly true; that if you  
8       dismiss a case, there are less cases. It reduces the cases.  
9       I can't argue with that. But, I would argue that reducing  
10      the cases has certainly not made retailers take more  
11      attention and more care with respect to the process they are  
12      putting in place for security. And one of the reasons this  
13      case is going forward right now is that until retailers are  
14      held more accountable for lax security, that these cases  
15      will continue and dismissing them does not solve that  
16      problem.

17             Your Honor, I can address the negligence loss rule  
18      if you would like me to at this time.

19             THE HONORABLE JUDGE PAUL MAGNUSON: All I was  
20      really -- I think I understand the negligence -- the  
21      Economic Loss Rule. The problem I couldn't figure out is  
22      what states are you admitting that that's prohibited, versus  
23      what states it is not.

24             The subject was argued in your brief --

25             MR. ESADES: Yeah, Target had --

1           THE HONORABLE JUDGE PAUL MAGNUSON: But I didn't  
2       devise from attachments, et cetera, who, where -- and  
3       Counsel, I have got to tell you, I emphasize with you,  
4       because I empathize with myself trying to figure out these  
5       pigeonhole areas of law, and then to sit there and compare  
6       50 states plus D.C.; that is not easy. I know that.

7           MR. ESADES: It isn't. And I think both sides  
8       really attempted, and I think there was a real attempt to  
9       try and sift through those claims.

10          THE HONORABLE JUDGE PAUL MAGNUSON: Well, there is  
11       no doubt about that.

12          MR. ESADES: And it did prove extremely difficult,  
13       because in some -- you know, taking the Economic Loss Rule  
14       as an example, there were 20 states that Target argued  
15       didn't permit the claim to go forward. Our argument to them  
16       was in every one of those states, and it is well-settled law  
17       in our opinion across the country where a claim is based on  
18       an independent duty, separate and apart from contract,  
19       independent of any contract you can go forward with a  
20       negligence claim.

21          Now, you will find cases that sort of inartfully  
22       apply this. But, if you dig down deep enough into the  
23       cases, and that is what we tried to show in our briefing on  
24       this; but, if you dig down deep, every one of those cases  
25       find that there is otherwise an independent duty. Separate



1 and apart from a contract, you can go forward with a  
2 negligence claim. And with respect to an independent duty,  
3 we have briefed that, and I won't get into the allegations  
4 on independent duty that is owed.

5 I mean, even the *Sony* case that Harold has  
6 mentioned several times said that it is common sense that a  
7 retailer is going to owe a duty in negligence to someone who  
8 comes in and pays with a credit card; that they are going to  
9 have security measures and not allow that to be shared with  
10 a third party. And we have pled this independent duty in  
11 all of the states.

12 Your Honor, we attempted to -- you know, we are  
13 very careful in our pleading not to overstate when we didn't  
14 have the detailed enough facts, and to put in as much  
15 factual detail as we could given Rule 8. We did not plead  
16 every single class plaintiff in this claim.

17 I know that Mr. McElhinny mentioned that 156  
18 Plaintiffs disappeared. You know, we are in front of the  
19 Court. We also have an administrative duty to this Court to  
20 try not to bring in 500 class representatives, if everyone  
21 has got to worry about discovery and we have to worry about  
22 collecting their documents. We simply tried to give it a  
23 basic number, as broadly as we could.

24 And with respect to the standing argument, the  
25 standing argument that has been made by Target essentially

1 relates to, in our opinion, a class certification question.  
2 And I will explain that. There is a difference between  
3 Article III standing and class standing.

4 And it is clear from the cases we cited that  
5 previous settlements have been done where there is one  
6 plaintiff for multiple states, that is a class question that  
7 gets sorted out when you decide who do you need, what is the  
8 claim going forward, and what class representative do you  
9 need from that particular state, if at all, because some can  
10 be grouped, and they are frequently grouped.

11 Now, they claim those are settlement classes and  
12 they don't count. But, settlement classes are no different  
13 than litigation classes except with respect to  
14 manageability. That is the only thing they don't have to be  
15 the same on. So, that is absolutely good law and continues  
16 to be done. But, if they have any arguments about the  
17 standing, there is nothing fundamentally unfair about  
18 applying those state laws to Target on behalf of those  
19 residents. If they want to make a class standing argument,  
20 we will have that debate when the parties have a chance to  
21 fully brief those issues on class certification.

22 Your Honor, I would just suggest that if you look  
23 at the individual class allegations for each one of the  
24 class representatives, and the overall allegations and  
25 injury, that these Plaintiffs have standing. And allowing

1 the case to go forward, that will allow them to prove their  
2 damages in court, is the reason this motion should be  
3 rejected.

4 THE HONORABLE JUDGE PAUL MAGNUSON: Okay.

5 MR. ESADES: Thank you.

6 THE HONORABLE JUDGE PAUL MAGNUSON: I thank you  
7 very much.

8 Mr. McElhinny?

9 MR. McELHINNY: I am unclear on the rule here,  
10 Judge. Do I get a new 40 minutes? In answer to Your  
11 Honor's question --

12 THE HONORABLE JUDGE PAUL MAGNUSON: I will go back  
13 to the old statement: Good lawyers don't need rules. Bad  
14 lawyers don't follow them. So, I don't know what category I  
15 want to put you in.

16 MR. McELHINNY: In answer to Your Honor's  
17 question, Appendix C to our opening brief, and then it was  
18 repeated, I believe, in our reply brief. It deals with the  
19 negligence law and goes state by state as to what the  
20 Economic Loss Rule is, and it cites authorities for that.

21 In their opposition for the first time, the  
22 Plaintiffs tried to get around this by alleging a special  
23 relationship. We have dealt with that in our reply brief,  
24 but we have also noted that they did not plead any special  
25 relationships in their Complaint. So, that is the

1 negligence issue.

2 Let me note that in his time, Mr. Esades did not  
3 correct my statement to the Court. There is no disagreement  
4 that no credit card information was stolen prior to November  
5 30th. In terms of what was in the 70 million, I refer you  
6 to paragraph 180 of their Complaint where they say  
7 approximately 70 million customer names, mailing addresses,  
8 phone numbers and email addresses were also stolen in the  
9 data breach.

10 In paragraph 152 is where they allege that the  
11 first credit card information was stolen on November 30th.

12 On this last standing issue, the question of  
13 whether or not you defer constitutional standing to the  
14 class certification was squarely addressed by Judge Anderson  
15 in the *Insulate SB* case where she points out that the courts  
16 that have done that have misread Supreme Court cases, and in  
17 fact individual constitutional standing should be decided on  
18 a 12(b)(1) motion. We cited that case to Your Honor.

19 In closing, I just want to make this point. The  
20 people around the Plaintiffs' table, and the 800 lawyers  
21 behind them are fabulous lawyers. And they are -- I may  
22 change my mind about this, but they are hugely ethical  
23 lawyers. And I want to say exactly what Mr. Esades just  
24 said, which is that they were extremely careful not to plead  
25 anything in this Complaint that they -- they didn't want to

1 be embarrassed, they didn't want to come in here and have  
2 pled stuff they couldn't prove. And so they were  
3 conservative and they pleaded what they could prove. And  
4 frankly, I applaud them for that.

5 But, that is why you can do this motion, and it is  
6 why it so notable that they didn't plead that people used  
7 their cards after the malware started, because they don't  
8 know that. If they had known that, they would have pleaded  
9 it.

10 It is why it is so notable that they didn't plead  
11 that these charges were not reimbursed. Because if they  
12 could have pled that, that would have been a good fact for  
13 them; but, it is not in the Complaint. And so the facts of  
14 these various cases differ.

15 But, the concept, and Mr. Esades just said it to  
16 you. He said we don't know what information was stolen. We  
17 don't know how Target may have gotten some of this  
18 information. Discovery will answer those questions. But,  
19 that is where times have changed. This is a 12(b)(1)  
20 Standing Motion.

21 Plaintiff's have the burden of pleading and  
22 proving an injury, an actionable injury, or one that is  
23 certainly impending. And we have people here who -- it has  
24 now been over a year and no charges have ever been made to  
25 their account, and they have to be able to plead facts that

1 link it fairly traceable to the Target breach.

2 And what Mr. Esades just told you, honestly, was  
3 that you have in this Complaint the best they were able to  
4 do on the facts that they know. And under Judge Nelson's  
5 survey and where all of the other cases are, that that  
6 doesn't make it to 12(b)(1). Thank you.

7 THE HONORABLE JUDGE PAUL MAGNUSON: Okay, thank  
8 you very much.

9 Mr. Esades?

10 MR. ESADES: Your Honor, I just want to be clear  
11 about the point that Mr. McElhinny was making about the use  
12 of the cards.

13 What I believe I said is I don't know when and how  
14 much information the hackers took after they gained access  
15 on November 15. And just to be candid, we vetted all of our  
16 class representatives with the idea of making sure that they  
17 used their cards during the exact time period where we  
18 absolutely knew. But, that is a different question than how  
19 you plead it, okay? And that is why I think we are having a  
20 little bit of disconnect right now.

21 We know the hackers got in by the 15th. And we  
22 know for sure based on what Target said by Black Friday they  
23 were taking them out. Maybe this isn't Target's statement  
24 but it's the public reports.

25 Virtually every class representative -- and there

1        may be a few exceptions, I don't want to say everybody, used  
2        their card, Black Friday or after. And we didn't plead that  
3        because we don't know for sure that there wasn't something  
4        happening prior to that point when the hackers had access.  
5        That is all I am saying is I don't know. And it would be  
6        unfair to us to conclude that we should exclude people that  
7        may have been impacted when we don't absolutely have those  
8        facts. That is all. Thank you, Your Honor.

9                THE HONORABLE JUDGE PAUL MAGNUSON: Thank you very  
10       much. Counsel, as usual, I will take it under advisement.

11               We will let you know as soon as we can. I will  
12       step out for a minute and we will get another chair in here  
13       and come back in for a status conference.

14               We do have some agendas here that I think  
15       everybody got electronically, but in any circumstance,  
16       Jackie, I will let you pass these out to people.

17               In a minute we will be right back in.

18               (Recess.)

19               (Whereupon the motion was adjourned. The status  
20       conference followed and was prepared and filed under  
21       separate cover.)

\* \* \*

I, Jeanne M. Anderson, certify that the foregoing  
is a correct transcript from the record of proceedings in  
the above-entitled matter.

Certified by: s/ Jeanne M. Anderson  
Jeanne M. Anderson, RMR-RPR  
Official Court Reporter