

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation) File No. MDL 14-2522
Customer Data Security Breach) (PAM/JJK)
Litigation,)

) Saint Paul, Minnesota
This transcript relates to all) July 14, 2015
actions.) 10:00 a.m.
)
)
)

BEFORE THE HONORABLE PAUL A. MAGNUSON
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

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IN OPEN COURT

IN OPEN COURT

THE COURT: Good morning, everyone. Welcome. Well, we're here again on a status report. You sent an agenda. I'm going to regurgitate it and say the same thing back to you now. So here we are. We might as well lead off by having some discussion on discovery.

And I should also tell you that Judge Keyes is out of town. He has had a personal matter that came up and so that's why I'm here alone struggling away today.

But what do we have to talk about on the world of discovery? Mr. Zimmerman.

MR. ZIMMERMAN: Good morning, your Honor. Before
I begin --

THE COURT: You almost look like a tennis player today.

MR. ZIMMERMAN: It's in honor of Wimbledon.

THE COURT: Okay.

MR. ZIMMERMAN: The consumer lead counsel is here today, in case you want to have any discussion with him. Vince is in the courtroom.

THE COURT: I think we will. We'll pick it up a little bit later. Start with an addition of what you might want to do.

1 MR. ZIMMERMAN: So what I'd like to do, your
2 Honor, is give you a breakdown of what discovery we have
3 completed. There's an item on here regarding the 30(b)(6)s
4 under item B which I think we will have some more lengthy
5 discussion on. But let me go through what discovery has
6 been completed, where we are with all of the other discovery
7 items, and then we can focus on the 30(b)(6) discussion
8 briefly because that just occurred the last few days.

9 So taking it from the top, your Honor, subpoenas
10 issued. To date, Plaintiffs have issued a total of 98
11 subpoenas or notices of depositions. Fourteen of that 98
12 have been issued on current or former Target employees. Ten
13 have been issued for 30(b)(6) depositions of Target on a
14 variety of topics, and 74 have been to such parties as
15 Cybersecurity and the large payment card processors and
16 issuing banks and payment card networks like Visa,
17 MasterCard, American Express, and Diners.

18 One of the payment card processors, you should
19 know, just filed a Motion to Quash in the Eastern District
20 of Wisconsin. They filed that on July 10th, and Judge
21 Pamela Pepper of that Court has set a status conference on
22 their Motion to Quash for 3:00 p.m. tomorrow, which I
23 believe we will all be covering with various people from
24 each side.

25 THE COURT: Okay.

1 MR. ZIMMERMAN: So that's sort of the subpoenas.

2 Now the depositions. Plaintiffs have taken fact
3 depositions of seven current or former Target employees.
4 Seven more former and current Target employees will be taken
5 over the next two months, or what remains of July and all of
6 August. The next of these depositions in fact will take
7 place on Friday and -- it will be Melissa Seebeck, the
8 former senior group manager of Target Information Protection
9 Group. So the deposition of formers are well underway and
10 we have a good schedule and it's been working.

11 We have also taken eight 30(b)(6) depositions of
12 Target with two more currently scheduled. So we've taken
13 eight and there's two more on the schedule. And of the --
14 all five of the class representatives' depositions under
15 30(b)(6) have been taken and they have been completed.

16 Late last week we received 32 30(b)(6) depositions
17 from the Defendants who have 32 banks or credit -- financial
18 institutions with regard to a series of depositions they
19 want to take of the 32 banks that they have picked. We're
20 going to be discussing that separately.

21 THE COURT: Counsel, I didn't take time to go back
22 and look. Are there 32 banks involved?

23 MR. ZIMMERMAN: These are 32 banks that are not
24 class representatives but just members of the class.

25 THE COURT: Yes. Okay. Are there more? Any

1 actions that were filed in this matter?

2 MR. ZIMMERMAN: Well, there are more banks that
3 have filed, but these aren't necessarily people that have
4 filed cases. These are just 32 banks that the Defendants
5 have picked.

6 THE COURT: I understand that.

7 MR. ZIMMERMAN: Right. And I don't know if they
8 are going to want more than that after they complete the 32,
9 which is going to be the subject of currently discussion
10 we're going to have with the Court because there's some
11 scheduling issues that have arisen as a result of that.

12 THE COURT: Sure. Okay.

13 MR. ZIMMERMAN: Let me move then to document
14 production and we'll come back to these 32 30(b)(6)s.

15 Defendants recently provided us with their
16 twenty-first rolling production of documents bringing the
17 total number of documents produced to date to 392,000
18 documents, or about 1 million pages of documents. And on
19 July 2nd, which is just right after -- right before the July
20 4th holiday, obviously, the most recent production occurred
21 which was 395,000 pages. So of the million pages, just
22 recently on July 2nd we got about 400,000 or about 40
23 percent of the million pages.

24 There's an ongoing privilege log issue that's out
25 there. We have a large number of documents on the privilege

1 log and we're reviewing the privilege log to determine
2 what -- how exactly we're going to address disputes that may
3 exist with regard to privilege log with regard to these
4 turnover of documents. We will have a discussion later
5 about confidentiality and de-designation and
6 reclassification which Karl is going to respond to later in
7 the agenda, but that has nothing to do with this privilege
8 log issue which we're working our way through.

9 Defendants have represented to us that their
10 document production is largely completed but for the
11 privilege log issue.

12 We met and conferred yesterday with Target with
13 regard to challenges to the privilege log and there -- we're
14 working cooperatively to try and come up with a process to
15 address that. I don't think yet today we're prepared to
16 decide where we are and what, if any, Court intervention
17 we're going to need in that process. So the meet and confer
18 process with regard to privilege log is simply going on
19 right now and we're going back.

20 Plaintiff document production. Production of the
21 five class representatives have been completed. I do not
22 have the total number of documents. I'm not sure it's
23 important, but I don't think we have a dispute that those
24 documents have been completely turned over for the five
25 financial institutions who are class representatives.

1 Additional documents are being produced and I
2 don't believe there's a large dispute about these additional
3 documents that are coming forward, unless I'm mistaken on
4 that.

5 Brian, you have the most recent information on the
6 five class representatives documents.

7 MR. GUDMUNDSON: I can get them.

8 Your Honor, yesterday we received a letter from
9 defense counsel not -- I don't think it was even 24 hours
10 ago now -- setting forth the number of proposed or supposed
11 deficiencies in Plaintiffs' interrogatory responses,
12 document production, certain technical glitches, some issues
13 with some documents that have come up in depositions and
14 things like that. We are addressing those right now. We
15 don't have a full report, although we've got many people
16 working on rounding up the answers to those.

17 I can tell you that some of them are of no moment
18 because the documents have been produced. There are some
19 technical glitches that we're obviously working very hard to
20 get those straightened away. We will be addressing those in
21 due course with the Defendant.

22 THE COURT: Thank you.

23 MR. ZIMMERMAN: So that's sort of the general
24 report. Obviously you can see, your Honor, we're all
25 working hard. We're getting things produced and we're

1 working hard on the deposition program.

2 We do have an issue we do want to discuss with you
3 that I want to handle separately which is these recent 32
4 30(b)(6) motions. We were notified that they wanted to take
5 them last Monday. We requested, because it's under
6 30(b)(6), we requested the topics, because all we knew is
7 they picked 32 banks that they wanted to take 30(b)(6)
8 depositions on.

9 On Wednesday of last week I got the topics that
10 they want to address in these 32 30(b)(6) depositions. And
11 we also learned that they want to take these in an effort to
12 defend the class certification motion.

13 Let me briefly outline to the Court, so you have a
14 context, what the topics of investigation or the topics of
15 examination are, because I think it will help the Court
16 understand what we're facing with regard to the next 32 and
17 why we're here to have some discussion about it today.

18 So I asked defense counsel to please provide the
19 topics. They told us last Monday, These are the 32. I
20 said, We really can't start scheduling until we have the
21 topics. The topics were received last Wednesday, less than
22 a week ago, and here are the topics.

23 "With regard to each bank," of the 32, "what of
24 your cards were the subject of a payment card network alert
25 issued in response to the intrusion?" In other words, what

1 cards, if any, were the subject of a payment card network
2 alert issued as a result of the breach.

3 Then the next question is: "Your response, if
4 any, to the intrusion, including, but not limited to,
5 whether you reissued any alerted on cards or any cards as a
6 result of the alert. To the extent you did reissue, when
7 and why you made the decision to reissue; whether you
8 suffered any fraud losses and, if so, the date, type and
9 amount of each alleged fraudulent transaction; any action
10 taken by the bank to prevent or mitigate fraud losses; and
11 any other losses that you allege that occurred as a result
12 of this intrusion or what we call data breach."

13 That's the topics that they want to go over. And
14 they now told us they want to start this program on July
15 27th, which is I guess 13 days from now. We have no
16 objection to them starting the program. They say they want
17 to do it by telephone to each of the banks. We are not sure
18 that that's the right approach because we have to deal with
19 each bank and find out do they want their counsel there, do
20 they want -- do they have any objection, do they want -- are
21 we going to be able to discuss these issues with them so
22 they understand at least where the Plaintiffs are coming
23 from with regard to these issues.

24 So we know that in each of these 32 banks have a
25 list of questions that they have to address, they have to

1 designate a witness to be prepared to answer those
2 questions. We want to be present to examine, or
3 cross-examine in this case, with regard to these questions
4 because they are central to the case.

5 And they say we want -- defense says, Target says,
6 that we're just going to do these by telephone and we can do
7 two or three a day. We say we're not sure that's really the
8 right approach. In fact, we don't think we should do it
9 that way. The protocol says we have at least four hours if
10 we need for these depositions. And, frankly, until we know
11 what answers are elicited, we're not sure how long the
12 depositions will take.

13 But we're not comfortable with our putative class
14 members necessarily having it by telephone. They may take
15 it by telephone, but we may want to be there depending on
16 what their general counsel says, what their individual
17 lawyers say, and what advice and counsel we have between us.

18 And so although we're not objecting to their right
19 to take these 32, we just don't think we can do these in a
20 period of time where they are saying we can do three or four
21 a day for the next couple of weeks. We just need to roll
22 these out in a time frame that's appropriate under the
23 protocol.

24 Okay. The rub becomes, of course, and you'll hear
25 from them, that they want to get these in before the class

1 certification. And that's their problem. They can do
2 whatever they want. I don't know if they can get them in or
3 not. We're certainly not here to stand in the way. All
4 we're here to do is to make sure that our clients' right and
5 our putative class members' rights are properly protected
6 and that these answers to these questions are done in an
7 appropriate fashion.

8 So they may want to be heard on this topic. We're
9 trying to cooperate. We had a very friendly phone call
10 yesterday where we talked about we don't think you can do
11 this three, four a day in a telephonic way. But we're happy
12 to work with them on every way we worked with them in the
13 past on 30(b)(6)s which is set the dates, agree on the
14 dates, have people present, do the preparation, get the
15 deposition completed; just as we've done for all the other
16 30(b)(6)s that we've had in this case to date. That's where
17 we sit on the 30(b)(6)s. The 32 30(b)(6)s.

18 THE COURT: Okay.

19 MR. ZIMMERMAN: So I think that maybe, Doug, if
20 your team wants to address the 30(b)(6)s? If not, it's an
21 update and we're happy to work with you on the dates, times
22 and schedules.

23 THE COURT: Well, undoubtedly there will be a
24 little response, but why don't you go ahead and finish up
25 and then we can hear from them.

1 MR. ZIMMERMAN: Okay. The issues regarding
2 Plaintiffs' document production and interrogatory responses,
3 I'm not sure where that --

4 MR. CAMBRONNE: It's been answered.

5 MR. ZIMMERMAN: That one has been, I believe,
6 handled. So with regard to the first Roman numeral
7 discovery, your Honor, that's the completion of my remarks
8 from the Plaintiffs' side on discovery. Karl is going to
9 address the second item which is confidentiality. I'm going
10 to address the third with regard to their *Daubert* request
11 with regard to class certification and what our suggestion
12 is for handling that. So if you want to go on to Karl's
13 presentation on classification, or do you want to do
14 something else?

15 THE COURT: Go ahead. You're up, Karl.

16 MR. CAMBRONNE: Thank you, your Honor. Karl
17 Cambronne representing the putative class here.

18 And this item II is really just to sort of give
19 you a head's up as to what may be lurking out there. We
20 have been approached by a number of the largest banks in the
21 nation, really, who are monitoring this matter on an ongoing
22 basis. And although they know we filed a class
23 certification brief, their access to that brief is in the
24 redacted form which essentially does not give a fulsome
25 understanding of the facts giving rise to liability and the

1 like that I know the Court has access to but others do not.

2 And what we may have to do, and this would
3 probably be addressed to Magistrate Keyes in the first
4 instance, is, A, we'd like to share the information in a
5 more public fashion, or at least in a limited fashion with
6 these banks. We have -- and this happens, it seems, all the
7 time in these cases -- there's sort of a shroud placed over
8 factual information.

9 THE COURT: Sure.

10 MR. CAMBRONNE: And that is cumbersome in the
11 sense of filing briefs under seal and the like; but it's
12 also, I think, not consistent with the openness of courts.
13 So we have an issue of can we provide that sort of
14 information, for instance. And it's about eight pages in
15 our class certification brief to obviously putative class
16 members who may have a stake in this litigation.

17 And there is the methodology that we have adopted
18 here in this case to perhaps bring this to the attention of
19 the magistrate and you today. For purposes of this hearing
20 I'm only here to say that this issue is lurking and it will
21 continue to lurk now that the parties have developed a
22 factual record. And they want to know, and because of the
23 -- I don't mean to sound pejorative here -- but the
24 knee-jerk reaction that everything is confidential and
25 cannot go beyond counsel is not the right way to proceed.

1 And we intend to make that in a formal fashion a motion
2 unless you have some ideas on how we might resolve it
3 otherwise. That's the whole thing.

4 THE COURT: Okay. Thank you.

5 Do you want to talk about *Daubert*?

6 MR. ZIMMERMAN: Yes. We were recently notified, I
7 think it was this week or maybe late last week, that the
8 defense, that Target, wants to file a motion and propose a
9 *Daubert* hearing and/or motion practice with regard to the
10 class certification issues and most likely the reports we
11 have put in with regard to the ascertainability of damages
12 and things like that that's in our class certification brief
13 which was filed the first week in July.

14 All I'm saying to your Honor is two things. One,
15 we don't think that's the law of this district to have a
16 *Daubert* hearing, *Daubert* hearing, I guess there's a T at the
17 end and I don't always pronounce it right.

18 THE COURT: I have no idea.

19 MR. ZIMMERMAN: The French way or the English way.
20 I call it *Daubert* and my partners always correct me.

21 THE COURT: If you can figure out how to pronounce
22 it in Swedish, then it will be right.

23 MR. ZIMMERMAN: Right. But certainly at the class
24 certification stage, the Court's customary gatekeeping role
25 is sidelined because the main purpose of *Daubert* is to keep

1 things that are unreliable from the jury. But certainly
2 that doesn't apply to judges, and it doesn't apply to
3 things, because we're not trying to protect the jury from
4 anything that may be inadmissible under the Federal Rules of
5 Civil Procedure.

6 But the point here is this. We don't think a
7 *Daubert* hearing is necessary or required in the class
8 certification stages. And I think *Zurn* from the Eighth
9 Circuit has told us that and has told us that in pretty
10 uncertain terms. It said where the judge is the decision
11 maker, this is a quote, your Honor, where the judge is the
12 decision maker, "there's less need for the gatekeeper to
13 keep the gate when the gatekeeper is keeping the gate only
14 for himself." And "the usual concerns of the *Daubert* rule -
15 keeping unreliable expert testimony from the jury - are not
16 present."

17 I think Judge Frank had a similar opinion.

18 I think if the Court is interested in having a
19 *Daubert* hearing, if there's some reason why you think we
20 should or you're convinced by the Defendant that they make a
21 case that there might be a need for one, I guess we would
22 very much like to brief it. But we think it doesn't need to
23 go that far because the Eighth Circuit law tells us that
24 it's not necessary.

25 THE COURT: Well, but, counsel, I understand what

1 you're saying with respect to the idea that protecting the
2 jury from, you know, information. But at the same token, in
3 a class certification decision process, what underlines the
4 people that are making the statements goes into
5 consideration. And it's kind of -- you know, it's just like
6 building any other house. You start with your foundation
7 and then you keep going.

8 And somehow or other it seems to me that it would
9 make sense to let this be briefed and let a motion come
10 through, because in making the class certification decision
11 I could then use that as a part of the building block that
12 gets into it. I guess that's what I'm really trying to get
13 down to. And whether you call it *Daubert* or whether you
14 call it preliminary motion, I don't care.

15 MR. ZIMMERMAN: Yeah.

16 THE COURT: You know, let's face it. If your
17 expert is going to determine their damages because the
18 expert is a second grade teacher, it might be worth having a
19 little discussion about that. I don't suspect that that's
20 true; but nevertheless, the Defendants have got a right to
21 take a look at that. And then there's a quid pro quo to
22 that, too. It might be the other way around, too.

23 MR. ZIMMERMAN: And I understand that, your Honor.
24 And that's why I said to the Court that the general rule is
25 we don't really need it. The Eighth Circuit and Judge Frank

1 and this Court I think has said --

2 THE COURT: Well, frankly --

3 MR. ZIMMERMAN: But in the event -- - --

4 THE COURT: -- I don't know the teachings of the
5 *Zurn* case. Maybe I better start reading it before I start
6 making announcements on it.

7 MR. ZIMMERMAN: All I'm saying is that if you feel
8 it would be helpful to the Court to have the reliability of
9 the expert report a matter of record for the Court, I think
10 we should brief what the scope and nature of that should be
11 and then we will play within those rules.

12 THE COURT: Sure.

13 MR. ZIMMERMAN: I'm just saying the burden is
14 really on them to say, Hey, we think there's real questions
15 here. We think there's a second grade teacher and we should
16 have the hearing, and we'd like to just brief the question
17 and determine what the rules of engagement for that hearing
18 will be, and we'll go there. We're not opposed to the
19 notion that we want the class certification record and we
20 want the ruling to be on sound ground.

21 THE COURT: Yeah.

22 MR. ZIMMERMAN: So that all of us can proceed
23 accordingly.

24 THE COURT: As long as I'm tossing advisory things
25 out here -- and again, I'll hear from the Defendants

1 shortly.

2 MR. ZIMMERMAN: Okay.

3 THE COURT: I'm not terribly sure I want one of
4 these *Daubert* hearings where you're sitting and listening to
5 testimony. I question whether or not that would be
6 necessary. Again, I'm painting a pretty broad brush there
7 and there might be something that would cause one to --

8 MR. ZIMMERMAN: And we shall know that in advance
9 so we know what to prepare and not to prepare. They are
10 suggesting on August 3rd that Target file its brief and
11 supporting documents; that August 24 a Plaintiffs' response
12 is due; and that their reply is due on August 31, all in
13 preparation for the September 10 hearing on class
14 certification. And all we're saying is if the Court is
15 inclined to want to test the liability for the reasons you
16 have stated, I think we should lay it out and find out
17 exactly what the scope is, find out if there's going to be
18 testimony or briefs, and then engage in it so that the Court
19 has what it needs at the time to make the call it needs to
20 make.

21 THE COURT: Again, I have kind of a preliminary
22 comment here. I would like to see that briefing schedule
23 advanced at least a week and maybe even two. And I'll let
24 you folks work with one another because I realize a
25 briefing -- it does take time and how much time is needed

1 for each of these elements of it is fine. But I've got to
2 have some time with this. You see, we're getting down to on
3 August 31 final briefing day, and then you're going to ask
4 me to do something. And then I'm supposed to have something
5 done by the 10th of September. And we've got Labor Day in
6 between and all the rest of the things that go on at the
7 start of school and whatnot, doesn't affect me, but...

8 MR. ZIMMERMAN: So the hearing you have is on the
9 10th. The decision is certainly -- but, yes, I understand.

10 THE COURT: I'll just leave that with you folks to
11 see if you can't push that up a little bit.

12 MR. ZIMMERMAN: Okay. That's my discussion of
13 *Daubert*.

14 The next topic is the shareholder action. We have
15 nothing to report on that is my understanding.

16 THE COURT: Tell you what. Let's break at this
17 point, hear from the Defense, and we will have just a moment
18 on the shareholder on the consumer class case.

19 MR. ZIMMERMAN: Very good.

20 MR. MEAL: Good morning, your Honor.

21 THE COURT: Good morning.

22 MR. MEAL: Douglas Meal on behalf of Target. How
23 are you today?

24 THE COURT: I'm fine.

25 MR. MEAL: Okay. So why don't I sort of go in the

1 same sequence that Mr. Zimmerman did.

2 First of all, give you kind of an overview from
3 our perspective of where we're at on discovery. They pretty
4 much aligned with what Mr. Zimmerman said in his comments.
5 From the Target perspective, in terms of our discovery that
6 we're seeking, yes, we have taken the depositions of the
7 five named Plaintiffs. Just completed those last week. We
8 had hoped to complete them earlier than that but we got them
9 done. So those are done, as Mr. Zimmerman reported.

10 In terms of document discovery and interrogatory
11 answers, you'll recall that Judge Keyes had ordered
12 additional interrogatory answers be provided. When we
13 finished, which we did last week, the depositions of five
14 named Plaintiffs, we kind of took stock of where we were
15 coming out of those depositions in regard to document
16 production. During the depositions a number of issues came
17 up about document production, which is not unusual.

18 Also we took stock of where we were in terms of
19 the supplemental interrogatory answers that had been
20 ordered. And as was reported to you, yesterday we sent
21 Plaintiffs sort of a -- I guess I would call it an Omnibus
22 letter laying out what's still missing, from our
23 perspective, in regard to documents and interrogatories.

24 The report that you heard from Plaintiffs is that
25 they are reviewing that letter and were going to get back to

1 us shortly. It will be great, from our perspective, if we
2 can just work all of that out and get the additional
3 documents and additional interrogatory answers. We're not
4 interested in bringing that issue to Magistrate Judge Keyes;
5 but I guess I will say at the same time that if we don't get
6 that resolved quickly, we will need to bring it to
7 Magistrate Judge Keyes because we need these documents and
8 those interrogatory answers for our class certification
9 opposition brief which is due August 3rd.

10 So that's what we've done to date.

11 In regard to the 30(b)(6) depositions that we're
12 noticing of putative class members, Mr. Zimmerman reported
13 to you that we -- a week ago Monday, July 6th, provided
14 notice to Plaintiffs that we've identified 32 putative class
15 members that we wanted to take 30(b)(6) depositions of. The
16 timing there was driven by the fact that we received
17 Plaintiffs' class certification papers, as you know, late on
18 the day on July 1; reviewed them over the 4th of July
19 weekend, and by the following Monday had determined based on
20 what was in those papers. And significantly what we saw in
21 those papers was the theory of injury that Plaintiffs'
22 expert is relying upon, number one; and equally important,
23 the class definition that the Plaintiffs have finally landed
24 upon which is different from the class definition that's in
25 the consolidated amended complaint.

1 So having reviewed both the Plaintiffs' expert's
2 report and theory of injury and also the class definition
3 and the effort of Plaintiffs' expert to make the theory of
4 injury work with that class definition, we determined that
5 we want to take -- which actually is a limited number. It's
6 as many as we felt we could do in the time frame that we
7 have available to us between now and August 3rd -- a limited
8 number of depositions of putative class members.

9 You asked sort of earlier, I think, and I heard
10 questions of Mr. Zimmerman about that number. There are, I
11 think there's no disagreement, there are probably 10 to
12 20,000 absent class members, putative class members out
13 there ranging from CitiBank and other large banks all the
14 way down to very, very small banks that issued very few of
15 the cards that are at issue here. So these 32 is a tiny
16 slice of the overall class, numerically speaking.

17 It should not be -- Mr. Zimmerman read the topics
18 to you. It should not be a significant burden for any of
19 these banks to provide the deposition testimony we're
20 looking for and it shouldn't take very much time to do any
21 of the depositions. The 32 banks, based on the information
22 we have, each issued only a handful of cards that were
23 alerted on in the context of the Target intrusion. So it
24 won't take anybody very long when we're talking about, for
25 example, two or three or four cards total for a bank to have

1 someone figure out what those cards are and what they did,
2 if anything.

3 THE COURT: Well, that's kind of what I was -- I
4 haven't looked at the details of this -- but, you know, we
5 keep picking on Karl's bank client here, who may have a
6 relatively small number of cards and so forth that may be
7 involved in it. So it's one thing for them to respond to
8 it. But then you start talking about Citibank and Wells
9 Fargo and all the rest of those folks, those start to get to
10 be some pretty big numbers. How much of that they've got at
11 just on the tip of their tongue in a computer model right
12 now, I don't know. But I could see where there could be
13 quite a divergence between the various kinds of banks.

14 MR. MEAL: There could absolutely. And just to
15 clarify, the 32 that we have identified, none of them are in
16 the Citibank range or anything like that. The 32 that we've
17 identified are at the other end of the spectrum. We're
18 talking about each bank a very, very small number of cards.

19 And it goes basically to their expert theory.
20 Their expert is basically going to present to you a theory
21 that if you had a card that was compromised in the Target
22 intrusion, you were harmed. Period. That's the theory. So
23 we have a right to test that theory. And we're going to
24 test that theory by taking some depositions of some banks
25 that had cards that allegedly were compromised in the Target

1 intrusion to see if they were in fact harmed.

2 And if those banks weren't in fact harmed, which
3 we think these depositions will show, that will blow a
4 gigantic hole in their expert's theory. So that's why we're
5 doing it.

6 THE COURT: Okay.

7 MR. MEAL: And what, you know, in terms of the
8 timing here, I get it. I get it. I get it that the timing
9 is tight. That's because the briefing schedule is tight.
10 That's because we only have about, what is it, 33 days
11 between their brief and our brief. We acted very, very
12 quickly. Two business days after we got their papers, with
13 the 4th of July weekend in between, we zeroed in on the 32
14 that we wanted to depose. We gave them notice of the 32 a
15 week ago Monday on the 6th.

16 It has not been the practice in this case in terms
17 of the five-day period to agree upon dates that the -- in
18 the 30(b)(6) context that the topics would be provided.
19 That's never been done by the Plaintiffs when they have
20 started the five-day clock running for determining dates.
21 And if the Plaintiffs had agreed to the schedule we proposed
22 when we proposed it on July 6th, we could have done these --
23 started these actually on July 20th. We could have given
24 the notice immediately and had a longer period of time to do
25 depositions.

1 We understand, though. I'm not -- we understand
2 that to try to squeeze that amount of depositions into this
3 period of time is a challenge, even if it had been done on
4 our originally proposed schedule or if it were to be done
5 based on the schedule that we're working under now.

6 So we think we have a right to do the depositions.
7 We have a good faith basis for seeking to do the
8 depositions. Plaintiffs, to their credit, aren't suggesting
9 otherwise. It's just a question of what can we do to get
10 the depositions done in time to use the results of the
11 depositions in our briefing.

12 So we -- there's two -- basically there's two
13 approaches, your Honor, and we're amenable to either. We
14 think these depositions will be very short. We think they
15 can be done telephonically. We think the information that
16 we're seeking to elicit is very targeted, so to speak,
17 forgive me. And we think actually each deposition would
18 take about an hour. That's our expectation.

19 On the other hand, we respect what Mr. Zimmerman
20 is saying in terms of their wanting to be able to attend the
21 depositions in person. However, if that were to be the
22 case, there just is no way to do the depositions and hold
23 the briefing schedule. We discussed in our meet and confer
24 yesterday, well, what if we moved the briefing schedule? I
25 think in fairness what Plaintiffs said is, Well, that's

1 really for Judge Magnuson to decide.

2 We talked internally on our side about what it
3 would mean if we moved the briefing schedule. The way we
4 look at it in terms of the schedule for the rest of the
5 case, summary judgment, complete the fact discovery --

6 THE COURT: Um-hum.

7 MR. MEAL: -- none of that really hinges on the
8 briefing schedule staying as it is and the hearing date
9 staying on September 10th.

10 So I want to be clear. We're prepared to do these
11 depositions, get them done and keep the briefing schedule.
12 We will do that on the schedule we proposed. I want to be
13 clear on that. But at the same time, if the Plaintiffs
14 would like to do these depositions on a time frame that had
15 them go into August, and your Honor were amenable to moving
16 the briefing schedule and the hearing on class certification
17 to accommodate that, we're willing to do that as well.

18 So those are the only two approaches that we can
19 see for cracking this nut and we're prepared to do either.
20 But I want to underscore, we are prepared to live with the
21 briefing schedule we signed up for, but we will need to then
22 work really hard to get those depositions done in that time
23 frame.

24 THE COURT: The one concern that I continue to
25 raise on these depositions is that, as you say, taking --

1 you can take these depositions and you can do them in an
2 hour, and probably absolutely right with the people that are
3 in this room. The whole problem that gets involved is,
4 generally speaking, these banks have their own counsel. And
5 when they start seeing subpoenas for depositions, lawyers do
6 their work and they are not so familiar with this. And that
7 gives me some concern just to accommodate the mechanical
8 side of the bank's individual counsel.

9 MR. MEAL: Understood. And there is an aspect of
10 that that presents a challenge, absolutely.

11 THE COURT: Yeah.

12 MR. MEAL: And really all I'm saying is I
13 understand it's a big lift to get those done within the time
14 frame. I'm telling you we're prepared to do that lift --

15 THE COURT: You can do it.

16 MR. MEAL: -- if that's what seems to be the
17 appropriate outcome. We're also prepared to, again, clearly
18 subject to your Honor's views on this, and it goes without
19 saying obviously. But if your Honor were amenable to
20 changing the briefing schedule -- and it sounded from our
21 meet and confer yesterday that the Plaintiffs were amenable
22 if your Honor were to moving the briefing schedule -- we
23 would be willing to do that in order to accommodate these
24 depositions occurring on something more like what
25 Mr. Zimmerman was describing.

1 But we do really want and feel like we have an
2 absolute right to take these depositions and we feel like
3 we've acted diligently to do that and diligently as we
4 possibly could have under the circumstances so that we
5 shouldn't be deprived of that right.

6 So we're open to try to do that lift that I was
7 describing or we're open to adjusting the briefing schedule
8 to accommodate what Mr. Zimmerman was describing.

9 THE COURT: Okay.

10 MR. MEAL: So that's where that ends.

11 THE COURT: Okay. Very well.

12 MR. MEAL: In terms of point C on the agenda, I
13 think we've talked about that. That's an allusion, your
14 Honor, as was pointed out, to the letter we sent yesterday
15 following up on interrogatories --

16 THE COURT: Sure.

17 MR. MEAL: -- and document requests.

18 In terms of the issue that Mr. Cambronne was
19 highlighting for you, I guess I don't have a lot to say to
20 that because it isn't really formed at this point. I mean,
21 we do have a protective order in place. We have designated
22 items "confidential" in accordance with the protective order
23 that was agreed to by the Plaintiffs and entered by your
24 Honor. We don't think there's any question that has been
25 raised with us as to the propriety of any particular

1 designation that we've made. We haven't seen that in
2 anything that's been proffered to us.

3 This is an uncertified class. If and when a class
4 is certified, at that point the banks that are absent class
5 members, including the banks that Mr. Cambronne alluded to,
6 will receive notice in accordance with the federal rules of
7 the proceeding and that will provide them with the
8 information that they are entitled to to help them decide
9 whether they are going to opt in or opt out. So I'm not
10 really hearing any legal reasons, at least, why at this
11 point an absent class member would have any legal
12 justification for wanting to see information that has been
13 properly designated as confidential.

14 So I'm not -- this issue isn't really before you
15 today but just to get my oar in the water on this, I'm not
16 really seeing where there's a basis for the relief that
17 Mr. Cambronne is suggesting that might be sought here.

18 THE COURT: Well, there maybe is and there maybe
19 isn't. It strikes me that both of you are essentially
20 saying that you're just apprising the Court that there's a
21 potential issue out there.

22 MR. MEAL: Yes.

23 THE COURT: And let's leave it in that category
24 and let you look at it in a very practical way. There may
25 be something that comes along with respect to a given bank

1 and a given matter that presents a pretty sound argument, or
2 at least argument that as a practical matter you just
3 think -- both sides would think, okay, we can release as to
4 this. You can't. And let's just see what comes up.

5 MR. MEAL: That's fair. Absolute fair. I just
6 wanted to give you kind of a brief preview of what our --

7 THE COURT: I appreciate that.

8 MR. MEAL: On the *Daubert* issue, we take a
9 different read of *Zurn*. I think when you read *Zurn* you'll
10 see that *Zurn* instructs that there actually is to be a
11 *Daubert*-like inquiry at class cert stage. *Zurn* says that.
12 *Zurn* says it's not full-on *Daubert*. It's sort of a modified
13 *Daubert*. By the way, I do say *Daubert*. I have never done
14 *Daubert*. I'm going to stick with *Daubert* because that's
15 what I've always used. But *Zurn* says that there is to be a
16 *Daubert* inquiry.

17 And in terms of the practice in the district, and
18 if it gets to this we'll give you these cases, but we've got
19 cases both from Judge Frank and Judge Montgomery in the last
20 couple of years where --

21 THE COURT: You know me and you know them, and
22 sometimes we agree and sometimes we don't.

23 MR. MEAL: Sure, absolutely. But when we
24 suggested that we were trying to identify what the practice
25 was under *Zurn* and the practice in the district, and that is

1 to file a *Daubert* motion that's going to challenge class
2 certification experts contemporaneous with filing your
3 opposition. So that's why we proposed August 3 as the date
4 for our class certification *Daubert* motion.

5 THE COURT: Counsel, I think I've already kind of
6 said my piece and that's just simply that I don't think it
7 hurts at all to have this nature of motion before the Court,
8 because it is a part of a building of the whole class issue.

9 I do have a little bit of concern over the
10 briefing schedule just simply because you got to give me a
11 little time to digest.

12 MR. MEAL: I totally get that. Let me just talk
13 about that for a second.

14 THE COURT: Quite frankly, if -- when we get done
15 today before you get out the door, I think you guys can
16 figure out an amended schedule.

17 MR. MEAL: We might. I will say, though, that in
18 terms of just so we're clear, August 3 is a big lift for us
19 to even hit that date. I mean, we're not taking the
20 deposition of one of their experts until tomorrow and the
21 other expert the deposition is scheduled for the 20th.
22 We're going to be doing these depositions of the class --
23 the absent class members that we think are going to be very
24 relevant to the validity of the expert's theory which is
25 what the *Daubert* motion will be all about.

1 So it's -- I hear you in terms of can you get that
2 briefing in earlier. I just don't see how we can, given the
3 timing. We're doing all of our class cert discovery in
4 anticipation of having that motion ready to go on the 3rd.
5 Now this may tie into, though, the other issue.

6 THE COURT: It could.

7 MR. MEAL: So in a world where the class cert
8 briefing would change, then that briefing might change in a
9 way that would address the concern you raised giving
10 yourself enough time to review the briefs. I think if I'm
11 remembering correctly, the class certification briefing is
12 supposed to be completed right around August 31. Am I
13 remembering that right? So there's not much time even on
14 the class certification briefing.

15 Then, as you said, you have the *Daubert* brief that
16 you kind of stack on top of that. So that's a big amount of
17 briefing that will come in right around the end of August
18 against the September 10 hearing date that's sitting there.
19 So I concede, yes, there could be an ability to complete the
20 *Daubert* briefing further in advance of the hearing in a
21 situation where the hearing gets moved back because the
22 class cert briefing has been moved back. That could work,
23 yes.

24 THE COURT: Okay.

25 MR. MEAL: I think that covers the issues that we

1 had on the agenda, unless your Honor has other questions.

2 THE COURT: No, I don't think so. I think we're
3 at the place here where we do need to deal with these
4 30(b)(6) notices and motions. And I'm going to be just a
5 little bit arbitrary. But it seems to me that for the
6 purpose that you talked about, that there's nothing magical
7 about 32. And it strikes me that if you cut that down to
8 15, you could get the 15 done, or get very close to having
9 them done.

10 There's another factor that comes into this. On
11 the 5th of August we have a -- another status conference
12 scheduled. To be very candid, I have had something come up
13 just in the last couple of days that is really going to take
14 me out of town, but Judge Keyes will be around. And
15 depending on what you get done by the 3rd, you can talk to
16 Judge Keyes on the 5th. And what's going to happen on the
17 5th is going to be a discussion of whether or not there will
18 be a slight adjustment on the briefing schedule across the
19 board.

20 And I would not be -- I'm not wedded to the 10th
21 particularly other than that whole concept, you know, it's
22 my job to keep your feet to the fire to produce a case as
23 soon as one can get it ready. But, you know, I know and you
24 know that a few days at that period of time is not going to
25 cause the case to fall apart in any way, shape or form.

1 It's just a true reality that you look at. You try to stay
2 on a schedule that you've more or less arbitrarily drawn
3 when you started. You can't always keep it there because
4 it's good for all of us to know what we've got ahead. But
5 once in a while things kind of fall aside. And if it turns
6 out that they did, and they will here, I'm not that tied to
7 that date. But I'm not going to -- rest assured, there will
8 not be much of an extension.

9 MR. MEAL: That's understood, your Honor. So just
10 logistically, so I'm understanding, so if we wait until the
11 5th to address the briefing schedule, our brief is due on
12 the 3rd of August.

13 THE COURT: Yeah.

14 MR. MEAL: So we won't be adjusting --

15 THE COURT: Well, I'm not real sure. But what I'm
16 sort of saying to you, let's just move that briefing
17 schedule to the 5th so that that becomes a critical day for
18 you to then have the discussion with Judge Keyes if it's
19 necessary.

20 MR. MEAL: Okay. Understanding that, I -- I mean,
21 I appreciate that very much, your Honor. But I won't be --
22 I won't be able to wait until the 5th. I have to have a
23 brief ready to file on the 5th, basically.

24 THE COURT: A, you've got to have a brief ready to
25 file. But, B, you got something else that's going on. I've

1 limited you on the number of depositions to be taken and
2 you've told me the purpose of those depositions and I don't
3 see anything magical about 32, to be candid with you.

4 MR. MEAL: That's fair.

5 THE COURT: When you get as many of those
6 depositions taken as can be taken, and from that you can put
7 together the information that you need in order to go into
8 this exercise that you're going into, if for one reason or
9 another that is such a problem for you that it -- you know,
10 you just feel it can't be done, then it's a matter of
11 notifying Judge Keyes.

12 MR. MEAL: Okay. I got you.

13 THE COURT: And then we go in to deal with it.
14 But a critical date that I'm not going to change is that
15 there will be the conference with Judge Keyes to deal with
16 non-dispositive issues on the 5th.

17 MR. MEAL: Okay. And that's another thing I
18 wanted to ask because currently we have significant
19 depositions scheduled on the 5th. So -- but I hear you that
20 this is going to take priority so we're going to need to
21 move that deposition that's scheduled on the 5th.

22 THE COURT: Well, yeah, I thought that the 5th of
23 August had always been a --

24 MR. MEAL: No, I think this is the first day we
25 saw it. The first we saw the 5th?

1 MR. CAMBRONNE: It was suggested at the last
2 hearing.

3 MR. MEAL: Okay. My mistake then.

4 THE COURT: Yeah. I don't know. Is the
5 deposition in town?

6 MR. MEAL: It is, but it's an all-day deposition.
7 I'm slated to defend it. So -- but we can move it, your
8 Honor. Absolutely we'll move it.

9 THE COURT: I think you should.

10 MR. MEAL: Okay. We will.

11 THE COURT: Okay. Very well.

12 MR. MEAL: Okay. So basically what I'm hearing is
13 we've got leave to take 15 between now and the 5th?

14 THE COURT: Yep.

15 MR. MEAL: And our brief is due the 5th.

16 THE COURT: Yes.

17 MR. MEAL: Subject to anything we want to seek
18 from Judge Keyes.

19 THE COURT: And you guys in your response are cut
20 short two days.

21 MR. ZIMMERMAN: I'm sorry? I didn't hear what you
22 said.

23 THE COURT: I said for you, your briefing, you're
24 cut short two days and that's tough. That's the way it
25 goes.

1 Let's just briefly mention the shareholder action.
2 I received the 30-day letter which is coming in a normal
3 form on it. And as far as I know, there is actually no
4 action whatsoever to take at this point. People are
5 performing according to their job and that's where we are.

6 MR. ARROYO: I have nothing to add to that, your
7 Honor.

8 MS. WILDUNG: I agree, your Honor.

9 THE COURT: Okay.

10 MR. ARROYO: If I may be of assistance, your
11 Honor, as to the pronunciation of *Daubert*. I actually
12 wrestled with this, and I hate to do this to you guys, but I
13 actually spent a lot of time researching it once. And as it
14 turns out, Jason Daubert, that's the way he pronounces it
15 and his family pronounces it. But if you look at the
16 Supreme Court or you listen to the audio or look at folks
17 who studied the audio, apparently the Justices adopted
18 Daubert as the way to pronounce it.

19 So the law professor at Georgetown -- I think his
20 name is Mathieson or something like that, it's notable. He
21 decided not to correct the Justices. So Jason Daubert
22 pronounces it Daubert, but the Justices pronounced it
23 Daubert. So it's an open question about how to pronounce
24 it.

25 THE COURT: Well, I think the bottom line is I

1 don't care how you pronounce it.

2 MR. ARROYO: Thank you.

3 THE COURT: The consumer class. There I do have a
4 bit of a concern. We've gotten a motion from you for the
5 usual stuff of attorney's fees and whatnot that go with it.
6 I have two questions. Number one, is there any opposition?

7 MR. ESADES: Good morning, your Honor. My name is
8 Vincent Esades for the consumer plaintiffs.

9 The timing of these motions is sort of a creature
10 of objectors, meaning we need to get our fee brief in and
11 all of our backup in so that there's an opportunity for
12 would-be objectors to review everything that would give them
13 what we're requesting. So the objection -- technically the
14 objection period for fees, even though that number hasn't
15 changed from the notice, is July 31.

16 THE COURT: Okay.

17 MR. ESADES: So we're going to hear on July 31 if
18 there's any additional objections.

19 THE COURT: Okay.

20 MR. ESADES: Now, to this point there's been only
21 one objection since all the notices have gone out. And
22 those were completed by the beginning of June and then all
23 the publication notice went out in June. So the 97 million
24 plus class members have already been notified of the amount
25 and have been notified we will be seeking it. To date only

1 one has objected out of those numbers. I fully expect, as
2 is the case in these types of cases, there will be
3 objections on the 31st. My prediction is there will be a
4 certain number of professional objectors that will show up
5 at that time.

6 THE COURT: Sure.

7 MR. ESADES: Which I'm familiar with. But that's
8 the deadline.

9 THE COURT: Okay. Well, fine. And that's fine
10 and we'll proceed with it. And I think the reality is, if I
11 recall correctly in cases of this nature, the blessing from
12 me comes at the time of final approval.

13 MR. ESADES: Yes. All that will happen after the
14 November 10th hearing. So we'll give an update to the
15 Court, I think it's October, as to where we stand with
16 objections, where we stand with all the details of the
17 claims process, which has been going very well. We're
18 working very well with Target and they are coming in at a
19 good rate and we're working with class members to sort out
20 any last-minute issues because the claims deadline is also
21 at the end of this month as well.

22 THE COURT: Okay. Anything else on the consumer
23 from anybody? If not, thank you very much.

24 MR. ESADES: Thank you.

25 THE COURT: With that we'll continue to Judge

1 Keyes on the 5th of August. As of today, we keep the 10th
2 of September as an inviolate day. But just a minute. I
3 have a calendar here. I hadn't looked beyond that. If it
4 becomes a different day, we'll deal with it. Okay.

5 MR. MEAL: Thank you, your Honor.

6 THE COURT: Thank you very much.

7 MR. ZIMMERMAN: Thank you, your Honor.

8 (Court adjourned at 11:00 a.m.)

9 * * *

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11
12 I, Carla R. Bebault, certify that the foregoing is
13 a correct transcript from the record of proceedings in the
14 above-entitled matter.

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16
17 Certified by: s/Carla R. Bebault
18 Carla Bebault, RMR, CRR, FCRR
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