UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation, This document relates to all Consumer Cases and all Financial Institution Cases	MDL No. 14-2522 (PAM/JJK)

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO STAY DISCOVERY

Federal courts have broad discretion in matters relating to discovery. Pursuant to Federal Rule of Civil Procedure 26(c), Defendants Target Corporation, Target Brands, Inc., Target Corporate Services, Inc., and Target.com (collectively, "Defendants" or "Target")[1] hereby respectfully request that the Court exercise that discretion to temporarily stay discovery pending a ruling on Defendants' motions to dismiss.

PRELIMINARY STATEMENT

On June 25, 2014, the Court entered Pretrial Scheduling Orders providing that Target's motions to dismiss the consolidated complaints in the Financial Institution and Consumer Cases will be fully briefed by October 22, 2014 and November 20, 2014, respectively. Docket Nos. 93, 94. The experiences of courts and litigants with similar motions to dismiss in data-breach-related class actions

[1] As stated in Defendants' Case Management Statement Pursuant to Pretrial Order Number One, Docket No. 35, Target's position is that Defendants other than Target Corporation are improperly named defendants.

instruct that Target has a substantial likelihood of succeeding in seeking dismissal of all or most of the claims anticipated in the consolidated complaints. Given the burden that discovery regarding potentially moot questions would impose on the parties and this Court, good cause exists for continuing the discovery stay for a few months until the motions to dismiss can be resolved.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In December 2013, Target announced that it had suffered a criminal attack against its computer network (the "Intrusion") and that an intruder or intruders had apparently gained access to certain transaction information, including credit and debit card information. Immediately following the announcement of the Intrusion, plaintiffs, including consumers, issuing banks, and others, began filing class action lawsuits in federal district courts across the country advancing a multitude of claims. Over 100 actions are currently part of this multidistrict litigation ("MDL").

The MDL actions have been divided into two groups – those brought on behalf of individual consumers (the "Consumer Cases") and those brought by banks and credit unions that issue payment cards (the "Financial Institution Cases"). Docket No. 4.

In their underlying complaints, plaintiffs in the Consumer Cases (the "Consumer Plaintiffs") raise the same types of claims that have been dismissed on the pleadings in many similar data security breach cases, including claims for

negligence, breach of contract, violation of state consumer protection statutes, and related claims. The plaintiffs in the Financial Institution Cases (the "Financial Institution Plaintiffs" and, collectively with the Consumer Plaintiffs, "Plaintiffs") likewise raise the types of claims that have been dismissed on the pleadings in similar data breach cases brought by issuing banks, including claims for negligence, negligent misrepresentation or omission, violations of state consumer protection and other related statutes, third-party beneficiary contract claims, and miscellaneous other causes of action. Target believes that it – like the defendants in many prior data security breach litigations – has substantial defenses to the claims likely to be included in the consolidated complaints and intends to seek dismissal.

ARGUMENT

Federal courts have "broad discretion" over how discovery proceeds. *Pavlik v. Cargill, Inc.*, 9 F.3d 710, 714 (8th Cir. 1993) (affirming protective order preventing deposition). Rule 26(c) of the Federal Rules of Civil Procedure allows courts to stay discovery "for good cause," including "to protect a party or person from . . . undue burden or expense." Fed. R. Civ. P. 26(c).

Granting the stay that Target seeks would be consistent with the stated intent that the Federal Rules be construed and applied so as to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. By obviating entirely or limiting in scope discovery in this complex

multidistrict litigation, a temporary stay at this time would allow speedier and more efficient discovery with less burden and expense for all involved as this matter proceeds. Pursuant to their inherent power to ensure that cases on their dockets proceed with "economy of time and effort for [themselves], for counsel, and for litigants," district courts have power to issue stays of discovery where appropriate to achieve those aims. *Twin City Galleries, LLC v. Media Arts Grp., Inc.*, 431 F. Supp. 2d 980, 983 (D. Minn. 2006); *see also Bennett v. Int'l Paper Co.*, No. 05-38, 2005 WL 1459656, at *4 (D. Minn. June 21, 2005) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). This includes district courts' "broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999); *cf. Bredemus v. Int'l Paper Co.*, 252 F.R.D. 529, 534 (D. Minn. 2008) (holding that trial courts have "considerable discretion" to "deny a discovery request that is untimely").

In determining whether to grant a stay of discovery pending a decision on a motion to dismiss, courts often "take a peek" at the merits of the arguments favoring dismissal, consider the "breadth" of discovery that would be sought absent a stay, and weigh any harm or prejudice from delay against the possibility that the dispositive motion will reduce or eliminate the burdens of discovery. *See TE Connectivity Networks, Inc. v. All Sys. Broadband, Inc.*, No. 13-1356, 2013 WL 4487505, at *2 (D. Minn. Aug. 20, 2013); *Riehm v. Engelking*, No. 06-293, 2006 WL 2085404, at *1–2 (D. Minn. July 25, 2006) (affirming order staying

discovery where it was "likely that the Court's ruling on the dispositive motions will narrow the issues in this case and obviate the need for some discovery" and where the "Magistrate Judge concluded that a stay of discovery would result in little, if any, harm to the parties"). These considerations all weigh in favor of granting the temporary stay sought by Target during the pendency of its motions to dismiss.

As discussed more fully below, the outcomes of similar motions in other multidistrict litigation arising out of data breaches indicate that many, if not all, of Plaintiffs' claims can be resolved by the motions to dismiss, rendering discovery on those claims unnecessary. In similar circumstances, several district courts have stayed or postponed discovery pending their rulings on motions to dismiss. *See* Order, *Willingham v. Global Payments, Inc.*, No. 12-CV-01157 (N.D. Ga. June 1, 2012) (Ex. A)[2] (postponing Rule 26(f) conference pending motion to dismiss); Order, *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, No. 11-MD-02258 (S.D. Cal. Feb. 23, 2012) (Ex. B) (same); Order, *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, No. 09-MD-02046 (D. Me. July 25, 2008) (Ex. C) (staying all discovery).

[2] Exhibits referenced herein are attached to the Affidavit filed contemporaneously with this Memorandum.

I. DISPOSITION OF THE MOTIONS IS LIKELY TO OBVIATE THE NEED FOR DISCOVERY.

A. Precedent Indicates That The Consumer Claims Will Not Survive A Motion To Dismiss.

Many of the underlying complaints in the Consumer Cases allege negligence, negligence per se, negligent misrepresentation or omission, contractual claims, state statutory unfair or deceptive acts and practices law violations, breach notification law violations, and miscellaneous other common law and statutory claims. A review of recent consumer cases in the data security breach context suggests that Target will have strong arguments that all such alleged claims should be dismissed.

In *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1147 (2013), the Supreme Court held that future harm must be "certainly impending" before it can form the basis of Article III standing. This holding has substantial implications in data breach cases brought by consumers, where most consumer plaintiffs are unable to allege anything more than the possibility that their data *might* be misused in a way that could cause injury to the consumer at some point in the future. In the data breach context, district courts have held that consumer plaintiffs could not clear the bar for Article III standing that *Clapper* set. A district court in Illinois, for example, recently dismissed all claims brought by consumers following a data security breach involving stolen payment card data because the consumer plaintiffs' alleged injuries, such as the alleged increased risk of identity theft or fraud, were insufficient to show injury for standing purposes.

In re Barnes & Noble Pin Pad Litig., No. 12-cv-8617, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013) (holding that consumers lacked standing to bring claims for breach of contract, invasion of privacy, and under various consumer protection and data breach notification statutes); *see also Galaria v. Nationwide Mut. Ins. Co.*, No. 13-cv-00118 slip op., 2014 WL 689703, at *11 (S.D. Ohio Feb. 10, 2014) (relying on the standard set forth in *Clapper* to dismiss claims for negligence, bailment, and violation of the Fair Credit Reporting Act in a data breach case involving stolen social security numbers and dismissing state statutory invasion of privacy claim on other grounds).

Even before the Supreme Court issued its decision in *Clapper*, numerous courts had similarly dismissed consumer claims resulting from data breaches because the consumers lacked standing. *See, e.g.*, *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (finding "allegations of an increased risk of identity theft resulting from a security breach . . . insufficient to secure standing" in case arising from breach of payroll processor's computer system); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08 CV 6060, 2010 WL 2643307, at *7 (S.D.N.Y. June 25, 2010) (finding plaintiffs' claims "future-oriented, hypothetical, and conjectural" and thus insufficient to establish standing); *Allison v. Aetna, Inc.*, No. 09-2560, 2010 WL 3719243, at *5 (E.D. Pa. Mar. 9, 2010) (same); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1050, 1053 (E.D. Mo. 2009) (same); *Ponder v. Pfizer, Inc.*, 522 F. Supp. 2d 793, 798 (M.D. La. 2007) (same); *Bell v. Acxiom Corp.*, No. 06-cv-00485, 2006 WL 2850042, at *3 (E.D. Ark. Oct. 3, 2006)

(same); *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 689–90 (S.D. Ohio 2006) (same); *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 708–13 (D.C. 2009) (same).

Here, none of the named plaintiffs in the underlying complaints alleges that she has incurred present, out-of-pocket costs as a result of the Intrusion.[3] As the court in *Nationwide* explained, allegations regarding time or costs incurred to prevent misuse of potentially stolen data are premised on the "future misuse" theory that the Supreme Court rejected in *Clapper* and are, therefore, insufficient to confer standing. 2014 WL 689703, at *8. Like the defendant in *Nationwide*, Target offered free credit monitoring to all guests who shopped at its stores during the relevant time period (including a free credit report, daily credit monitoring, and identity theft insurance), thereby making any claims of future harm even more speculative. *See Nationwide*, 2014 WL 689703, at *5.

Even in those cases where district courts have found that consumer plaintiffs had standing to bring their claims, courts have significantly narrowed or dismissed data breach cases at the pleading stage. *See, e.g.*, *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, No. 11-MD-02258, 2014 WL 223667 (S.D. Cal. Jan. 21, 2014) ("*Sony II*") (dismissing 45 of 53 claims arising from data breach without leave to amend). Many of these cases, moreover, were

[3] The vast majority of the underlying complaints fail to allege that the named plaintiffs themselves suffered any particular harm at all. A few assert that the accounts of named plaintiffs were subject to fraudulent charges, but most admit that, consistent with their card agreements, they were not liable for those charges, and no named plaintiff alleges that she was actually required to pay the fraudulent charges.

decided pre-*Clapper* and, thus, may not even have reached these issues if decided again today. Included in those dismissals are claims for negligence,[4] negligence per se,[5] and negligent misrepresentation.[6] Privacy claims have also failed at the pleading stage in many prior data breach cases,[7] as have claims for breach of third-party contracts,[8] violation of state data breach notification laws,[9] and violation of

[4] *In re Google Android Consumer Privacy Litig.*, No. 11-MD-02264, 2013 WL 1283236 (N.D. Cal. Mar. 26, 2013) (dismissing negligence claims under California law); *Amburgy*, 671 F. Supp. 2d at 1054 (dismissing negligence claims under Missouri law).

[5] *See, e.g.*, *Worix v. MedAssets, Inc.*, 869 F. Supp. 2d 893, 898 (N.D. Ill. 2012); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 531 (N.D. Ill. 2011).

[6] *See, e.g., Sony II*, 2014 WL 223667, at *18–21. To survive dismissal, Plaintiffs' negligent misrepresentation claims must be pleaded with sufficient particularity to satisfy the more stringent requirements of Federal Rule of Civil Procedure 9(b). *Christensen v. Pennymac Loan Servs., LLC*, No. 12-CV-02995, 2013 WL 6729142, at *5 (D. Minn. Dec. 19, 2013); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549–50 (8th Cir. 1997) (requiring plaintiffs to plead the "who, what, when, where, and how: the first paragraph of any newspaper story" for claims sounding in fraud). Plaintiffs' generic allegations of misrepresentation fall well short of the required particularity.

[7] *See, e.g., McNeil v. Best Buy Co.*, No. 13CV1742, 2014 WL 1316935, at *3–4 (E.D. Mo. Apr. 2, 2014) (dismissing invasion of privacy claim); *In re Google Android Consumer Privacy Litig.*, 2013 WL 1283236, at *10–11 (same); *Burrows v. Purchasing Power, LLC*, No. 12-cv-22800, 2012 WL 9391827, at *6 (S.D. Fla. Oct. 18, 2012) (same); *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1128 (N.D. Cal. 2008) (same).

[8] *See, e.g.*, *Willingham v. Global Payments, Inc.*, No. 12-CV-01157, 2013 WL 440702, at *19–20 (N.D. Ga. Feb. 5, 2013); *Katz v. Pershing, LLC*, 672 F.3d 64, 73 (1st Cir. 2012).

[9] *See Sony II*, 2014 WL 223667, at *51–53 (dismissing data breach notification claim for damages). Moreover, many notification statutes require notice to consumers within a reasonable time following a security breach, "consistent with the legitimate needs of law enforcement . . . or any measures necessary to determine the scope of the breach, prevent further disclosures, and restore the reasonable integrity of the data system." *See, e.g.*, La. Rev. Stat. § 51:3074. No

unlawful and deceptive acts and practices (UDAP) laws.[10] Only after the Court makes these threshold determinations can the scope of any needed discovery be effectively framed and tailored.

The result in *Global Payments* is especially instructive here. In that case, consumer plaintiffs brought claims for negligence and federal and state statutory violations, and also brought third-party beneficiary and implied contractual claims, following the defendant's announcement of a data breach involving the theft of payment card data. A magistrate judge recommended dismissing all claims with prejudice, leading the parties to stipulate to dismissal of the action. *Willingham v. Global Payments, Inc.*, No. 12-cv-01157, 2013 WL 440702 (N.D. Ga. Feb. 5, 2013). Because the court in that case had issued an order staying discovery pending a ruling on Global Payments' motion to dismiss, all parties were able to avoid burdensome discovery that would have been entirely unnecessary had the court permitted it to proceed. *See* Order, *Willingham v. Global Payments, Inc.*, No. 12-CV-01157 (N.D. Ga. June 1, 2012) (Ex. A).[11]

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court could fairly conclude that the short time period between Target's discovery of the breach and its notification was unreasonable.

[10] *See, e.g.*, *Sony II*, 2014 WL 223667, at *29–53 (dismissing claims under eight state UDAP laws); *In re Google Android Consumer Privacy Litig.*, 2013 WL 1283236, at *7–9; *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 965 (S.D. Cal. 2012) ("*Sony I*"); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d at 525.

[11] The likely resolution of *In re Sony Gaming Networks & Customer Data Security Breach Litigation* illustrates the merits of discovery stays even when a small number of claims survive a motion to dismiss. After the court dismissed 45 of 53 claims arising from that data breach without leave to amend, the parties entered a settlement agreement, under which Sony agreed to reimburse actual out-of-pocket

B. Precedent Indicates That The Financial Institution Claims Will Not Survive A Motion To Dismiss.

The Financial Institution Plaintiffs' claims similarly include a number of negligence-based claims, breach of contract claims, and claims brought under state and federal statutes, including state statutory unfair or deceptive acts claims. Again, similar claims brought by financial institutions have been dismissed on the pleadings in other cases, and the Court should reach the same result here.

All of the negligence-based claims depend on the Financial Institution Plaintiffs being able to establish that Target owed them a legally cognizable duty. This is a threshold issue that these Plaintiffs cannot clear. No court has found that under Minnesota law a merchant like Target owes a common-law duty to financial institutions to prevent the payment card information included on the payment cards that the financial institutions issued from being stolen. Other courts that have considered this same issue of first impression under the laws of other states, however, have concluded that no such duty exists. *See Digital Fed. Credit Union v. Hannaford Bros.*, No. BCD-CV-10-4, 2012 WL 1521479, at *4 (Me. B.C.D. March 14, 2012) (concluding that "relevant policy considerations," including the scope of the contractual arrangements that govern payment card transactions, "militate against the imposition of a duty upon a merchant for the benefit of an

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damages up to a total of $1 million and to pay attorneys' fees of $2.75 million. *See* Motion for Preliminary Approval of Class Action Settlement, *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, No. 11-MD-02258 (S.D. Cal. June 13, 2014) (Ex. D). Notably, the cost of unrestricted discovery in that case would have far exceeded those values, just as the cost of discovery absent a stay here could well exceed the amount of a settlement should the parties reach an early resolution.

issuing bank"); *see also BancFirst v. Dixie Restaurants, Inc.*, No. CIV-11-174, 2012 WL 12879, at *3 (W.D. Okla. Jan. 4, 2012) (dismissing negligence claims where issuing bank failed to allege the "special relationship" necessary to establish a duty of care where the alleged injury is caused by "the intentional and criminal acts of a third person"); *CUMIS Ins. Soc., Inc. v. Merrick Bank Corp.*, No. 07-374, 2008 WL 4277877, at *11–12 (D. Ariz. Sept. 18, 2008) (dismissing negligence claims despite plaintiff's assertion that defendant owed issuing banks a duty of care).[12, 13]

[12] Target is aware of only one case where a court found that a merchant owed an issuing bank a common-law duty of care under state law (namely, Pennsylvania). *See Sovereign Bank v. BJ's Wholesale Club, Inc.*, 395 F. Supp. 2d 183, 193–95 (M.D. Pa. 2005). In that case, the negligence claim was subsequently dismissed under the economic loss doctrine, 427 F. Supp. 2d 526, 534 (M.D. Pa. 2006), and the ruling as to the duty of care was thus never appealed. For at least the following reasons, the decision in *BJ's Wholesale Club* is not instructive here. In stark contrast to the court in *Digital Federal Credit Union v. Hannaford Bros.*, the court in *BJ's Wholesale Club* expressed no "reticen[ce] to recognize new common law duties of care," *Hannaford Bros.*, 2012 WL 1521479, at *3, and found that the contractual nature of the payment card regime provided no support for an argument that no duty existed, *compare BJ's Wholesale Club*, 395 F. Supp. 2d at 195, *with Hannaford Bros.* 2012 WL 1521479, at *3. As discussed below, the Minnesota Supreme Court, like the *Hannaford* court and unlike the *BJ's Wholesale Club* court, has consistently stated that courts should be reluctant to impose new duties between businesses. *See infra* pp. 13–14. In stark contrast to the court in *Dixie Restaurants*, moreover, the court in *BJ's Wholesale Club* determined that the heightened "no duty to protect" standard, which requires a court to find that a "special relationship" exists before finding that a duty exists, did not apply because the case did not involve physical harm. *Compare BJ's Wholesale Club*, 395 F. Supp. 2d at 196, *with Dixie Restaurants, Inc.*, 2012 WL 12879, at *3. Again, controlling Minnesota court decisions are inconsistent with the result in *BJ's Wholesale Club*. Minnesota courts not only have applied the heightened standard outside of the physical harm context, but have held that courts should be even more reluctant to find that a duty exists when the plaintiff and the defendant are both business enterprises. *See United Prods. Corp. of Am., Inc. v. Atlas Auto Parts, Inc.*, 529 N.W. 2d 401, 404 (Minn. App. 1995); *see also RKL*

The reluctance of courts to find new duties under Minnesota law, moreover, suggests that this Court is highly unlikely to make the groundbreaking duty ruling sought by the Financial Institution Plaintiffs and thus underscores the likelihood that Target's motion to dismiss their negligence-based claims will succeed. The Supreme Court of Minnesota has consistently stated that "[a]s to business enterprises generally, the law has been cautious and reluctant to impose [the type of] duty to protect" that the Financial Institution Plaintiffs are alleging Target owed them. *Erickson v. Curtis Inv. Co.*, 447 N.W. 2d 165, 168 (Minn. 1989); *cf. Funchess v. Cecil Newman Corp.*, 632 N.W. 2d 666, 674 (Minn. 2001) (confirming that courts should be "generally cautious and reluctant to impose a duty to protect" between business entities). This guidance is especially applicable in regard to the business institutions that are before the Court here, because MasterCard and Visa have published detailed regulations that are designed to

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Landholding, LLC v. James, No. A12-1739, 2013 WL 2149979, at *3 (Minn. App. May 20, 2013) (applying the "no duty to protect" standard in a case involving alleged harm to real property).

[13] In the most recent federal court decision to consider a company's common-law negligence liability to a financial institution for allegedly failing to protect against the theft of information contained in payment cards issued by the institution, the Fifth Circuit ruled that the New Jersey economic loss doctrine did not bar such liability, but it left it for the district court to decide on remand all other issues related to the company's alleged liability in negligence, including the threshold question of the existence of a duty. *Lone Star Nat. Bank v. Heartland Payment Sys., Inc.*, 729 F.3d 421, 426–27 (5th Cir. 2013) (reversing order dismissing financial institutions' negligence claims only insofar as the order found that New Jersey's economic loss doctrine barred those claims as a matter of law at the motion-to-dismiss stage, and as to all other issues, declining "to decide these complex issues as they are better addressed by the district court in the first instance").

determine ***through contract*** how costs will be allocated amongst issuing banks such as the Financial Institution Plaintiffs and (through their acquiring banks) merchants such as Target in the event of a payment card breach. *See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 834 F. Supp. 2d 566, 587 (S.D. Tex. 2011), *aff'd in part, rev'd in part, sub nom. Lone Star Nat. Bank v. Heartland Payment Sys., Inc.*, 729 F.3d 421 (5th Cir. 2013); *see also* note 12 *supra*).

Cognizant, no doubt, of the substantial duty issue that stands in the way of their negligence-based claims, the Financial Institution Plaintiffs attempt to evade that issue by relying on a theory of negligence per se. That theory is defective, however. The Financial Institution Plaintiffs' negligence per se claims are based on conclusory allegations that Target failed to comply with the Payment Card Industry Data Security Standards ("PCI DSS"), with the Fair Credit Reporting Act, with the Red Flag Rules, and with the Minnesota Plastic Card Security Act. Because the PCI DSS is an industry standard, not a law or an administrative regulation, an alleged failure to comply with it cannot form the basis of a negligence per se claim. *See Mervin v. Magney Constr. Co.*, 416 N.W. 2d 121, 124–25 (Minn. 1987), *aff'g* 399 N.W. 2d 806. As a merchant, moreover, Target is not subject to the Fair Credit Reporting Act or the Red Flag Rules. *See* 15 U.S.C. § 1681; *see also* 16 C.F.R. § 681.1 (2012). Those federal provisions, therefore, similarly cannot form the basis of a negligence per se claims. *See A&L Superior Quality Sod, Inc. v. Lino Lakes*, No. CO-94-5365, 1996 WL 279009, at *15 (Dist.

Ct. of Minn. May 8, 1996). Finally, the Financial Institution Plaintiffs offer only conclusory allegations that Target failed to comply with the Minnesota Plastic Card Security Act that amount to no more than reciting the provisions of the statute. Such allegations are insufficient to survive a motion to dismiss, since federal pleading standards call for "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombley*, 550 U.S. 554, 555 (2007).

The Financial Institution Plaintiffs' negligent misrepresentation and negligent omission claims are similarly likely to fail, since they have not alleged, nor could they plausibly allege, that they made a decision to "join[], remain[] in, or withdraw[] from the Visa [or] MasterCard networks" as a result of any statement made by Target. *Heartland Payment Sys.*, 834 F. Supp. 2d at 592–94 (concluding that plaintiffs had failed to allege actionable misrepresentations and reliance on them).[14] Further, for claims where the "gravamen of the complaint is fraud," the heightened pleading requirements of Federal Rule 9(b) apply. *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 964 (D. Minn. 2000) (dismissing

[14] In *TJX*, the First Circuit did uphold the district court's denial of TJX's motion to dismiss negligent misrepresentation claims, but only after suggesting that "the district court might well have granted the motion" had it been decided after a Massachusetts state court issued an opinion analyzing negligent misrepresentation claims in another case, and describing the claims as "on life support" given the current state of law. *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 495 (1st Cir. 2009). In *TJX*, notably, the district court found that the negligent misrepresentation claims could not be pursued in a class setting prior to the appeal to the First Circuit, *id.* at 500, and the case was resolved shortly after it was remanded.

complaint consisting of "sweeping conclusory allegations of fraudulent conduct . . . without any semblance of . . . particularity"). The Financial Institution Plaintiffs have not, and cannot, meet those heightened pleading requirements here.

The Financial Institution Plaintiffs' contract-based claims likewise are doomed to dismissal, as attempts by financial institutions to bring third-party beneficiary or implied contract claims following payment card data breaches have consistently failed. In *Heartland Payment Systems*, for example, the court dismissed the issuing banks' third-party beneficiary contractual claims because the acquiring bank contracts to which the plaintiffs pointed evidenced no "intent to convey any enforceable right to the Financial Institution Plaintiffs or to any class to which they belong." 834 F. Supp. 2d at 579; *see also TJX*, 564 F.3d at 499 (affirming dismissal of the third-party beneficiary claims against TJX brought by issuing banks); *CUMIS Ins. Soc., Inc. v. BJ's Wholesale Club, Inc.*, No. 051158, 2005 WL 6075375, at *2 (Mass. Super. Ct. Dec. 7, 2005) (dismissing third-party beneficiary claims where contract stated intent to preclude such claims and "plaintiffs provided no facts that would allow a reasonable inference of an intent to create third-party beneficiary status").[15] In its motion to dismiss, Target will show that the documents that the Financial Institution Plaintiffs are relying on here similarly evidence no such intent. The *Heartland Payment Systems* court also granted the defendants' motion to dismiss the plaintiffs' implied contractual claims, on the ground that there was no "direct contractual relationship that would

[15] The plaintiffs in *TJX* and *BJ's* did not bring implied contract claims.

plausibly suggest the mutual assent necessary for an implied contract." 834 F. Supp. 2d at 582 (dismissing without prejudice only if plaintiffs could plead direct contractual relationship with Heartland). This reasoning would apply with equal force to any implied contractual claims the Financial Institution Plaintiffs might try to assert against Target.

In *Heartland Payment Systems*, the court also rejected the vast majority of the financial institution plaintiffs' attempts to bring claims under state consumer protection laws. *See id.* at 609 (dismissing claims under the consumer protection laws of California, Colorado, Illinois, New Jersey, New York, Texas, and Washington). And the only state consumer protection law claims that survived the Rule 12(b)(6) motion – under Florida law – were dismissed with prejudice by stipulation shortly after Heartland indicated its intention to seek judgment on the pleadings on those claims based on various legal deficiencies that had not been considered at the motion to dismiss stage. Stipulation of Dismissal of Florida Claims, *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, No. 09-MD-02046 (S.D. Tex. Sept. 12, 2012) (Ex. E); Order, *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, No. 09-MD-02046 (S.D. Tex. Sept. 30, 2012) (Ex. F) (dismissing Florida claims with prejudice). Any state consumer protection law claims the Financial Institution Plaintiffs might raise against Target here would suffer from the very same deficiencies that doomed such claims in *Heartland Payment Systems*.

C. Target's Substantial Likelihood Of Prevailing On Its Motions To Dismiss Creates A Strong Argument For A Stay Of Discovery.

A stay of discovery is appropriate where a defendant has "substantial arguments for dismissal of many, if not all," of the claims asserted. *See Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (granting motion to stay while motion to dismiss was pending). As shown, Target has compelling defenses against the claims anticipated to be included in the consolidated complaints. Given the potential for these defenses to succeed, including on such threshold issues as standing and actionable harm, discovery should be stayed until the Court determines whether any claims can survive. *See DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2008 WL 4812440, at *2 (N.D. Ill. Oct. 28, 2008) (noting that "stays are granted with some frequency," especially when threshold issues may be resolved); *Von Drake v. Nat'l Broad. Co., Inc.*, No. 04-CV-0652, 2004 WL 1144142, at *2 (N.D. Tex. May 20, 2004) (discovery stay appropriate where "a cursory review of the motion reveals that defendants have substantial arguments for dismissal of many, if not all, of plaintiff's claims"). Allowing discovery to proceed would be "premature and an unnecessary expenditure of the parties' time and resources." Order, *Willingham v. Global Payments, Inc.*, No. 12-CV-01157, (N.D. Ga. June 1, 2012) (Ex. A) (granting parties' motion to extend Rule 26(f) deadline in a data breach litigation context).[16]

[16] In that case, the court was correct that discovery would be premature and unnecessary, since the complaint was dismissed in its entirety following a

II. AT A MINIMUM, DISPOSITION OF THE MOTIONS TO DISMISS WILL NARROW THE ISSUES PRESENTED AND ALLOW DISCOVERY TO PROCEED MORE EFFICIENTLY.

As discussed above, there is a strong chance that all the Consumer Plaintiffs' and Financial Institution Plaintiffs' claims will be dismissed. But even if the Court grants Target's motions to dismiss only in part, the rationale for a stay is compelling. At the very least, the Court's rulings on the motions are likely to narrow significantly the claims presented and clarify which, if any, of Plaintiffs' theories of recovery are potentially viable. In turn, the appropriate scope and duration of discovery will depend on which claims, if any, Plaintiffs are entitled to pursue. With the benefit of the Court's ruling, any discovery required will proceed in a more targeted fashion, tailored to the surviving claims and with an eye toward the particular issues those claims may present for class certification. *See Riehm*, 2006 WL 2085404, at *1–2 (affirming order staying discovery where it was "likely that the Court's ruling on the dispositive motions will narrow the issues in this case and obviate the need for some discovery").[17]

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magistrate judge's recommended ruling on a Rule 12(b)(6) motion. *Willingham v. Global Payments, Inc.*, No. 12-CV-01157, 2013 WL 440702 (N.D. Ga. Feb. 5, 2013).

[17] While the court in *TE Connectivity* referred only to the possibility that a motion to dismiss be "likely to resolve the entire litigation," the decision did not foreclose the possibility that a court could conclude that a motion to stay would be appropriate if that court determined that a motion to dismiss may well resolve a substantial portion of the claims. 2013 WL 4487505, at *2. The facts here, in any event, are distinguishable from those in *TE Connectivity* because, in addition to showing a substantial likelihood that all or most of the claims in the Consumer and Financial Institution Cases will be dismissed, Target has shown that discovery here would result in "unusual[] burden[]" not present in that case. *Id.*; *see infra* Part III, for a discussion on burden.

Results in prior class actions involving data breaches are instructive. In *TJX*, for example, no stay of discovery was entered pending the court's ruling on TJX's motion to dismiss. When the court ruled on that motion, it eliminated the most broadly cast claims, such as for negligence and breach of contract, such that the surviving causes of action focused only on affirmative representations made by the defendant and – only following reversal on appeal of the district court's dismissal of a state consumer protection statute claim – whether there was evidence of specific conduct "egregious" enough to violate the statute or of practices identified in relevant Federal Trade Commission guidance. *See TJX*, 564 F.3d at 501–02. Had a discovery stay been entered prior to the ruling, the parties could have conducted discovery only on the narrow issues presented by the few remaining claims. Instead, the parties engaged in substantial discovery on all claims prior to the dismissal ruling and, as a result, spent substantial resources on discovery that was never used.

In *Heartland Payment Systems*, by contrast, discovery was not permitted pending the court's decision on the defendant's motion to dismiss. Case Management Order at 6, 12, *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, No. 09-MD-02046 (S.D. Tex. Aug. 28, 2009) (Ex. G).[18] As discussed above, the only claim that survived the motion to dismiss were two

[18] The court's Case Management Order pointed to the agreement between the parties that if the stay were granted, discovery would await a ruling on the motion to dismiss, and if the stay were denied, discovery would proceed according to the Federal Rules. The court never ruled on the motion to stay and discovery did not commence, leaving the stay in effect.

claims under Florida's consumer protection statute, which could only be maintained by issuing banks in Florida and which the plaintiffs voluntarily dismissed. The plaintiffs in that case appealed only the district court's ruling on their negligence claim. Although the ruling on that claim was reversed and remanded, *Lone Star Nat'l Bank*, 729 F.3d 421, it remains subject to dismissal on, among others, choice of law grounds. To reduce the burden on the parties, the district court there has initially limited discovery to only those issues necessary to decide an upcoming motion to dismiss, or, in the alternative, motion for summary judgment: choice of law and the existence (or lack thereof) of certain contracts. Minute Entry, *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, No. 09-MD-02046 (S.D. Tex. Mar. 14, 2014) (Ex. H). Should the defendant there prevail on its upcoming motions, the entire case would be disposed of without the type of broad-based discovery that Plaintiffs here seek. So too here, if claims are dismissed prior to the commencement of discovery, there may be entire topics on which Plaintiffs intend to serve discovery requests and take depositions that can be omitted because they are no longer relevant. With the Court's guidance as to what claims have been adequately stated and what facts will thus be at issue as this case progresses, the parties will be able to engage in discovery in a more efficient and streamlined manner than they can at this time.

Focusing on discovery of Plaintiffs, if, as occurred in *Heartland* and, in large part, in *Sony II*,[19] the only claims that remain following the Court's decision on Target's motions to dismiss are claims under certain state consumer protection statutes, certain named plaintiffs may no longer have any claims to assert. As a result, Target would have no need to seek written discovery from these plaintiffs or to depose them. Alternatively, as occurred in *Heartland*, if only certain state consumer protection statute claims remained, Plaintiffs may determine the cases are not worth pursuing and voluntarily dismiss those claims, eliminating any need for the parties to incur discovery expenses.

III. A STAY IS PARTICULARLY JUSTIFIED IN A CASE AS COMPLEX AS THIS ONE, WHERE DISCOVERY IS LIKELY TO BE BURDENSOME.

While a stay of discovery is within the Court's discretion and may be justified in any case, it can be especially beneficial in a multidistrict litigation like this one, where the litigation is complex and discovery is likely to be complicated, extensive, and costly. *See TE Connectivity Networks*, 2013 WL 4487505, at *2 (breadth of discovery sought is a relevant factor when determining if good cause exists for a stay); *see also Spencer Trask Software*, 206 F.R.D. at 368.

Here, Plaintiffs have already made clear that they intend to seek extremely broad discovery. In particular, while the parties in the Financial Institution Cases are continuing to meet and confer regarding discovery limits, the Financial

[19] In *Sony II*, the plaintiffs' claim for partial performance and breach of the covenant of good faith and fair dealing also survived. That claim, however, was based on the defendants' alleged failure to negotiate certain outstanding terms of a settlement agreement that they had executed and is, accordingly, not at issue here.

Institution Plaintiffs' initial proposal permitted them and Target to serve 100 written interrogatories, to serve 100 requests for admission, and to take 50 depositions. These proposed limits represent a four-fold increase on the number interrogatories permitted under the Federal Rules, and a five-fold increase on the number of depositions permitted thereunder. *See* Fed. R. Civ. P. 30(a)(2)(A), Fed. R. Civ. P. 33(a)(1).

The Consumer Plaintiffs have not given specific estimates, but have made clear that they anticipate seeking discovery in excess of the usual limits of 10 depositions and 25 written interrogatories. Consumer Actions 26(f) Report at 3–4.

In prior instances of multidistrict litigation in this District, stays of discovery have been found particularly justified during the pendency of motions to dismiss because of the nature of such cases. Concerns over allowing discovery before determining the viability of a complaint "are particularly apt in a multidistrict litigation like this one, involving hundreds of cases, thousands of plaintiffs, and millions of dollars – the cost of the discovery on the horizon is substantial and the potential for abuse is great." *In re Medtronic, Inc. Sprint Fidelis Leads Prod. Liability Litig.*, No. 08-md-01905, 2009 WL 294353, at *2 (D. Minn. Feb. 5, 2009) (staying discovery and scheduling hearing on motion to dismiss five months from date of order); *see also* Preliminary Case Management Order, *In re Wholesale Grocery Prod. Antitrust Litig.*, No. 09-md-02090, at *2 (D. Minn. Dec. 15, 2009) (Ex. I) (staying "[a]ll discovery and other pre-trial

proceedings" pending decision on motion to dismiss).[20] Only when a court has made the threshold inquiry as to whether a complaint states a viable claim should a plaintiff be allowed to obtain voluminous and burdensome discovery.

It would, moreover, be no answer for Plaintiffs to now limit their requests to any documents that Target produced to federal or state agencies investigating the Intrusion in an effort to escape Target's arguments in favor of continuing the discovery stay. Where, as here, Plaintiffs have not yet filed their consolidated complaints and it is likely that a motion to dismiss can resolve the case, "Plaintiffs are seeking to put the proverbial cart before the horse. A plaintiff must adequately plead a claim before obtaining discovery, not the other way around." *Medtronic*, 2009 WL 294353, at *2; *see also Twombley*, 550 U.S. at 558 (pleading standards help to ensure that claims with no chance of success "be exposed at the point of minimum expenditure of time and money by the parties and the court"); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (filing a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). Regardless of "the incremental cost to produce a duplicate set to plaintiffs' counsel . . . the compelled act of turning records over to the government pursuant to [a] subpoena does not mean that everyone else has an equal right to rummage through the same records." *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417, 2007 WL 2127577, at * 5 (N.D. Cal. July 24, 2007) (staying discovery

[20] After the December 2009 stay of discovery, the case was dismissed on defendants' motion in July 2010.

pending decision on motion to dismiss where the only discovery sought was documents previously produced to the government).

IV. A TEMPORARY STAY WILL NOT UNFAIRLY PREJUDICE DEFENDANTS.

Any potential prejudice to Plaintiffs from the brief stay sought by Target would be dwarfed by the benefit of postponing discovery until the motions to dismiss have been resolved and the surviving claims have been identified. A stay is appropriate where, as here, it "would result in little, if any, harm to the parties" and any harm "would be substantially outweighed" by the possibility that a motion to dismiss could obviate discovery. *Riehm*, 2006 WL 2085404, at *1–2; *see also Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 4 (D.D.C. 2001) (noting that courts "inevitably must balance harm produced by a delay in discovery" against likelihood of success on motion to dismiss).

Target does not seek an indefinite or exceedingly long stay of discovery in this case, and any resulting prejudice to Plaintiffs would be minimal. *See Marrese v. Am. Acad. of Orthopedic Surgeons*, 706 F.2d 1488, 1493 (7th Cir. 1983) ("[A]n order merely postponing a particular discovery request should be granted more freely than an order denying the request altogether."). Pursuant to the Pretrial Scheduling Orders, briefing on the motions to dismiss in the Financial Institution and Consumer cases will be completed in October 2014 and November 2014. In addition, the parties have already negotiated a protective order and an ESI protocol, and have committed to attempting to reach agreement on the scope and limitations of both preservation and production in this case, in the event such

scope is not limited by an order from this Court on Target's motion to dismiss. If the Court's orders on Target's motions to dismiss do not eliminate or limit the scope of discovery in these actions, all parties will be prepared to commence discovery immediately upon the Court's ruling.

Plaintiffs have offered no "compelling need for prompt discovery," such as the impending death of a key witness or a need for provisional relief, or any other explanation as to why the temporary stay Target seeks would be unduly prejudicial. *See DSM Desotech*, 2008 WL 4812440, at *2. Where a defendant has filed a motion to dismiss and seeks a short stay that will not prejudice the plaintiff, that can constitute good cause for a stay of discovery. *Spencer Trask Software*, 206 F.R.D. at 368. Given the likelihood of success on the merits of the motions to dismiss, the voluminous discovery requests Plaintiffs have announced their intention to propound, and the relatively small prejudice, if any, to Plaintiffs that a temporary stay would cause, the balance of considerations in this case counsels in favor of granting the requested stay.

CONCLUSION

For the foregoing reasons, Target respectfully requests that the Court stay discovery pending disposition of Target's motions to dismiss.

Respectfully submitted,

Date: July 3, 2014

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