UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation This Document Relates to: All Financial Institutions Cases	MDL No. 14-2522 (PAM/JJK) **MEMORANDUM OF LAW IN SUPPORT OF FINANCIAL INSTITUTION PLAINTIFFS' MOTION TO UNSEAL CERTAIN DOCUMENTS CITED IN AND ATTACHED TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (REDACTED)**

TABLE OF CONTENTS

Page

As set forth below, Financial Institution Plaintiffs ("Plaintiffs") hereby move this Court to enter an Order unsealing the Memorandum of Law in Support of Financial Institution Plaintiffs' Motion For Class Certification and For Appointment of Class Representatives and Class Counsel and exhibits A, B, C, D, E, F, G, H, I, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, II, JJ and NN thereto (ECF Nos. 465 & 474) (collectively, the "Class Certification Documents") filed under seal based on Defendant Target Corp. ("Target" or the "Company")'s designation of matter cited therein as "Confidential" or "Highly Confidential."

I. PRELIMINARY STATEMENT

The facts underlying this litigation regarding Target's 2013 data breach and the disclosure of sensitive financial data concerning approximately 40 million payment card accounts (the "Breach") have garnered widespread media coverage across the United States. Indeed, given the Breach's status as one of the "biggest retail hack[s] in U.S. history,"[1] many of the basic facts underlying this case are well-known. Nonetheless,

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[1] *See* Exhibit 1 to the Declaration of David M. Cialkowski in Support of Financial Institution Plaintiffs' Memorandum Of Law In Support Of Motion To Unseal Certain Documents Cited In And Attached To Plaintiffs' Motion For Class Certification ("Cialkowski Decl.") (Michael Riley, "Missed Alarms and 40 Million Stolen Credit Card Numbers: How Target Blew It," *Bloomberg Businessweek* (Mar. 13, 2014) ("The biggest retail hack in U.S. history wasn't particularly inventive, nor did it appear destined for success")); *id.* ("For some reason, Minneapolis didn't react to the sirens. *Bloomberg Businessweek* spoke to more than 10 former Target employees familiar with the company's data security operation, as well as eight people with specific knowledge of the hack and its aftermath, including former employees, security researchers, and law enforcement officials. The story they tell is of an alert system, installed to protect the bond between retailer and customer, that worked beautifully. But then, Target stood by as 40 million credit card numbers—and 70 million addresses, phone numbers, and other pieces of personal information—gushed out of its mainframes.").

Target has taken the position that ***every*** document it has ever produced in this case is "Confidential" or "Highly Confidential" and should be concealed. Target's blanket confidentiality designation is absolute, and improper. The Company has thus far rejected Plaintiffs' invitation to narrow the scope of its confidentiality designation for the evidence presented to this Court in the Class Certification Documents. Rather, Target takes the absurd position that ***Plaintiffs*** are required to make the case for de-designating ***Target's*** blanket designations on a document-by-document basis.[2] The law demands the exact opposite. *See Healey v. I-Flow, LLC*, 282 F.R.D. 211, 214 (D. Minn. 2012) ("[t]he Eighth Circuit has described the right to public records as ***presumptively attaching*** absent '***compelling reasons*** [to] justify non-disclosure.'"). Eighth Circuit law and the Protective Order unambiguously place the ***burden on Target*** to "***prove***" the appropriateness of its designations, not vice versa. *Compare id.* & ECF No. 94 at 6 ("The party asserting that the material is Confidential shall have the ***burden of proving*** that the information in question is within the scope of protection afforded by Fed. R. Civ. P. 26(c)"); *with* Cialkowski Decl., Exhibit 3 (7/13/2015 Meal Ltr.).

Target's desire to shift the burden of proof and to veil events occurring more than one and half years ago based on nothing more than its say-so necessitates the instant motion. Despite Target's unsupported claims of confidentiality, the information in the Class Certification Documents does not rise to the level of deserving Rule 26(c)

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[2] *See* Cialkowski Decl., Exhibit 2 (7/10/2015 Letter from Charles S. Zimmerman, Esq. to Douglas H. Meal, Esq.) ("7/10/2015 Zimmerman Ltr."); Cialkowski Decl., Exhibit 3 (7/13/2015 Letter from Douglas H. Meal, Esq. to Charles S. Zimmerman, Esq.) ("7/13/2015 Meal Ltr.").

concealment. Target has not limited its boilerplate designations to "trade secrets" or "commercial information" as is required, *see* ECF No. 94 at 6, and Target does not articulate any specific harm if the Court were to unseal the Class Certification Documents. Moreover, the information subject to this motion will form the basis of the Court's ruling on class certification and will be relied upon by this Court to assess whether Target's liability can be established through proof common to all Class members. Thus, respectfully, this Court should grant the instant motion and unseal Plaintiffs' Class Certification Documents.

II. PROCEDURAL BACKGROUND

On June 25, 2014, the Court entered a Protective Order, which permits the parties to designate certain materials produced in discovery as "Confidential" or "Highly Confidential." ECF No. 92 at 1-3. The Protective Order also provides for the similar designation of deposition testimony. *Id.* at 7. The designation of documents and testimony as "Confidential" or "Highly Confidential" prevents it from being filed on the Court's electronic filing system, and requires the clerk and the parties to take the extraordinary steps of filing all briefs and exhibits under seal, in paper form.

In discovery to date, as has become a disturbing trend in recent years, Target has issued a blanket designation of confidentiality declaring that virtually every document it has produced is confidential (in fact counsel has not been able to locate a single document produced by Target that has not been designated as confidential by the Company). Target has thus endeavored to prevent the disclosure of any discovery

material related to the Breach across the board, contrary to the good cause requirement in Rule 26(c) or to the good faith requirement in the Protective Order.

On July 1, 2015, Plaintiffs filed their motion for class certification. In compliance with the Protective Order and Target's sweeping designations under its auspices, Plaintiffs were forced to file the Class Certification Documents under seal. The Class Certification Documents include key evidence improperly designated by Target as confidential. The Protective Order provides a process for the de-designation of such information:

> Any party may request a change in the designation of any information designated as "Confidential" or "Highly Confidential." ... If the requested chance in designation is not agreed to, the party seeking the change may move the Court for appropriate relief ... The party ***asserting that the material is Confidential shall have the burden*** of ***proving*** that the information in question is within the scope of protection afforded by Fed. R. Civ. P. 26(c).

Id. at 6.

On July 10, 2015, Plaintiffs reached out to Target requesting that the Class Certification Documents filed under seal due to its blanket confidentiality designations be de-designated and unsealed, as they were being used as key evidence supporting this dispositive motion. *See* Cialkowski Decl., Exhibit 2 (7/10/2015 Zimmerman Ltr.). Target dismissed Plaintiffs' effort to comply with the strict limitations of Rule 26(c), and thus to allow putative class members to access information upon which this Court has

been asked to publicly decide a major issue in this case: the propriety of class certification. *See* Cialkowski Decl., Exhibit 3 (7/13/2015 Meal Ltr.).[3]

Target's demonstrated and ongoing efforts to settle the claims of putative Class members through outside agreements with card brands, such as MasterCard, make it especially important that the putative Class be allowed to see the Class Certification Documents. Such review will permit putative Class members to fairly evaluate the strength of this case and Plaintiffs' class certification motion. In April 2015, Target and MasterCard International Corporation ("MasterCard") entered into a proposed settlement agreement ("Agreement") under which Target would pay MasterCard up to $19 million to resolve MasterCard's Breach-related claims against Target under MasterCard's Account Data Compliance ("ADC") Program. Critically, (i) the Agreement would be consummated only if financial institutions responsible for 90% of the MasterCards compromised in the Breach opted in, and (ii) the Agreement required financial institutions opting in to release not just their ADC Program claims, but ***all*** of their claims

[3] In its meet and confer letter, Target incorrectly stated, "In your letter you did not point us to any particular document that you have a good faith basis to believe was not properly designated as 'Confidential' or 'Highly Confidential' under the Protective Order governing this litigation." *Id.* Plaintiffs clearly stated they sought Target's consent to file (1) the brief, and (2) its exhibits, as unsealed. Cialkowski Decl., Ex. 2. Furthermore, it is ***Target*** that needs to establish a good faith basis for extraordinary protection; it is not for Plaintiffs to prove the negative. Under the protective order, Target had an absolute obligation to review and de-designate the challenged documents as appropriate. Despite Target's stated "comfort" (Cialkowski Decl., Ex. 3) that all its designations meet the Rule 26(c) standard, it has (1) failed to address a single particular document expressly challenged by Plaintiffs and (2) has improperly attempted to shift the burden to Plaintiffs of establishing good cause and good faith, resulting in the necessity of this motion. Target's inexplicable invitation to further "meet and confer" so that Plaintiffs could identify "any particular document" and "[Plaintiffs] good faith basis" for de-designation clearly signaled the end of any good faith effort to resolve the issues. Cialkowski Decl., Ex. 3.

against Target related to the Breach, ***including their claims in this litigation.***[4] Thus Target, in its proposed MasterCard settlement, has asked the vast majority of these putative Class members to release their claims through a singular mechanism in this case once already. To the extent Target again attempts to engineer a card brand settlement that similarly aims to obtain for Target, outside of the Court's supervision, a full release of its potential liabilities related to the Breach, including through this litigation, financial institutions should be permitted to evaluate what they are being asked to give up. The instant motion seeks to afford them and the public this opportunity.

III. ARGUMENT

A. Legal Standard for Blocking Access to Court Filed Documents

Federal Rule of Civil Procedure 26 contemplates that, in appropriate circumstances, trade secrets or other confidential information may be sealed by the court. In pertinent part, Rule 26 provides that:

> [a court] may, for good cause, issue [a protective] order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.

FED. R. CIV. P. 26(c)(1).

[4] Indeed, MasterCard sent materials concerning the proposed settlement to all potentially eligible financial institutions – all of which are putative Class members herein – that expressly stated that "[t]he objective of the settlement is to resolve ... claims that might be asserted by MasterCard issuers in any litigation or other proceeding in connection with the Target Intrusion." *See* Cialkowski Decl., Exhibit 4 (Proposed Settlement Agreement between MasterCard and Target) exhibit 3 to the Agreement, at 1. Financial institutions rejected the proposed settlement and it was not consummated.

When evaluating the appropriateness of Rule 26 protection, "courts are reminded that there is a common-law right of access to judicial records." *Healey v. I-Flow, LLC*, 282 F.R.D. 211, 214 (D. Minn. 2012) (Keyes, J.) (citing *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.,* 898 F.2d 1371, 1376 (8th Cir. 1990)); *see also Pemberton v. Republic Services, Inc.*, No. 14-1421, 2015 WL 4134258, at *2 (E.D. Mo. July 8, 2015) ("The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents"). "The Eighth Circuit has described the right to public records as presumptively attaching ***absent 'compelling reasons [to] justify non-disclosure.***'" *Pemberton,* 2015 WL 4134258, at *2 (quoting *In re Neal,* 461 F.3d 1048, 1053 (8th Cir. 2006) (emphasis added)).

The party seeking confidentiality has the burden of showing "good cause" for the protective order. *See Healey*, 282 F.R.D. at 214; *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 245 F.R.D. 632, 636 (D. Minn. 2007); *see also Pemberton*, 2015 WL 4134258, at *2 ("The presumption in favor of access places the burden on the party seeking to maintain confidentiality to establish sufficient grounds for prohibiting public access to the record") (citations omitted). The Protective Order entered by the Court accords with this case law, requiring that the "***[t]he party asserting*** that the material is Confidential shall have the ***burden of proving*** that the information in question is within the scope of protection afforded by Fed. R. Civ. P. 26(c)." ECF No. 92 at 6. Moreover, courts in this District apply a "heightened burden" on parties seeking confidentiality where information supporting "merits-based motions" is at issue. *Healey*, 282 F.R.D. at 214; *In re Guidant Corp.*, 245 F.R.D. at 636.

A court has supervisory power over its own records, and the decision to seal a file is within the court's discretion. *See Webster Groves*, 898 F.2d at 1376. "Whether trade secrets are involved or not, and whether their revelation will cause damage to someone, are questions of fact, to be decided [by the court] after receiving evidence." *In re Iowa Freedom of Info. Council,* 724 F.2d 658, 663 (8th Cir. 1983). Courts should not simply take the representations of interested counsel on faith, but should instead conduct a limited *in camera* review of documents alleged to contain confidential information. *Id.*; *see also* ECF No. 92 at 6. Courts may deny access to records that are "sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). "However, the fact that business documents are secret or that their disclosure might result in adverse publicity does not automatically warrant a protective order." *In re Parmalat Sec. Litig.*, 258 F.R.D. 236, 244 (S.D.N.Y. 2009).

B. Target Is Subject to a "Heightened Burden"

Because the Class Certification Documents were filed in connection with a case dispositive motion, *see* D. Minn. L.R. 7.1(c)(6)(C), Target must overcome a "heightened burden" to rebut the presumption of public access. *See Healey*, 282 F.R.D. at 214 ("[Defendant] has a heightened burden to overcome the presumptive right of the public access to the briefs and supporting documents at issue because the documents in issue were filed with the Court in connection with a merits-based motion. . . ."); *In re Guidant Corp.*, 245 F.R.D. at 636 (applying a "heightened burden" on the parties objecting to the unsealing of briefs and documents concerning summary judgment). Here, the documents

at issue were filed in connection with a motion deemed dispositive under the Local Rules. *See* D. Minn. L.R. 7.l(c)(6)(C). Moreover, the information referenced in the Class Certification Documents is vital to resolving Plaintiffs' motion, as it demonstrates whether Plaintiffs have established, for example, predominance under Rule 23(b)(3). In particular, the information referenced in the Class Certification Documents shows that common issues predominate as to Target's liability under both the Minnesota Plastic Card Security Act, Minn. Stat. §325E.64, and negligence theories. Accordingly, a "heightened burden" is required to prevent access to the Class Certification Documents. *See also Grove Fresh Distribs, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) (stating that the common law right of access applies to all "judicial decisions and the documents which comprise the bases of those decisions"). Target makes no serious effort to meet this burden. *See* Cialkowski Decl., Exhibit 3 (7/13/2015 Meal Ltr.).

C. The Information Referenced in the Class Certification Documents Does Not Concern Confidential Trade Secrets or Commercial Information.

The Class Certification Documents designated "Confidential" and "Highly Confidential" concern, on a general level, the substantial and repeated historical failures by Target that led to the Breach. More specifically the Class Certification Documents include the categories of documents set forth below, most or all of which concern events and circumstances in 2012-2014.[5] Importantly, Target makes no effort to explain how disclosure of these historical documents prejudices its present operations:

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[5] *See* ECF No. 92 at 6.

Documents Concerning Target's Cybersecurity Team in 2013: The Class Certification Documents include information regarding Target's cybersecurity team, including deposition testimony on the general structure of the team ***in 2013***, its location and [redacted]. *See* ECF No. 465, Exs. A, B, D, W.

Target's Cybersecurity Procedures in 2012-2013: The Class Certification Documents also refer to Target's cybersecurity and information protection procedures in 2012-2013. This includes deposition testimony and internal documents related to [redacted] ***in 2012***, [redacted]. It also includes [redacted] ***in 2013***, months before the Breach. *See* ECF No. 465, Exs. A, B, C, D, F, G, T, U, V, NN.

Warnings Target Received Prior to the Breach in 2013: Plaintiffs also refer to internal emails, threat assessments and reports [redacted]. *See* Exs. I, K, M, N.

Target's Failures in 2013 that Caused the Breach: Similarly, Plaintiffs rely on deposition testimony and internal Target communications, which occurred around the time of the Breach and which reveal the numerous failures by Target that allowed the Breach to occur. These include, but are not limited to, [redacted]

[redacted]. *See* Exs. A, N, O, P, Q, R, T, U, V, X, Y, Z, AA.

Target's Post-Breach Investigation in 2013-2014: Plaintiffs further cited internal Target emails identifying [redacted]. *See* Exs. E, H, S, BB, DD, JJ.

Miscellaneous Documents Regarding the Breach's Impact: Finally, Plaintiffs cite to information regarding the impact of the Breach. This includes deposition testimony about [redacted]. *See* Exs. L, CC, II.

Clearly, none of the categories described above concern confidential trade secrets or commercial information – the type of information that may be protected under Rule 26. Instead, the Class Certification Documents simply highlight Target's ineptitude in 2012-2013 with respect to cybersecurity and the Breach.

D. The Court Should Unseal the Class Certification Documents.

Courts in this District have consistently held that trade secret or proprietary information may be protected from disclosure only when the party seeking to protect the documents can show a likelihood of harm if the information is disclosed. For example, in

Healey, 282 F.R.D. 211, the court had entered a protective order under which parties could designate materials "Confidential" or "Trade Secret." The plaintiff moved to amend the complaint and attached under seal certain documents that had been designated by the defendants, and the defendants requested the court to keep the designated documents under seal. *Id.* at 213. Judge Keyes reviewed the documents at issue for "good cause" under Rule 26 and weighed the "competing interests regarding the common-law right of access to judicial records." *Id.* at 215. The court concluded that the defendants "have not sustained the burden of showing the Court that [certain] documents or testimony contain trade secrets or other proprietary information, the disclosure of which would likely cause harm." *Id.* These documents were thus unsealed. The court maintained the confidentiality of only those documents where the defendants made "a compelling argument as to the proprietary interests involved." *Id.* at 216. In particular, the documents which remained under seal concerned sensitive information relevant to defendants' competitors – defendants' "minimum purchase requirements, royalty payments, and price terms in its distribution agreements[.]" *Id.*

Just as in *Healey*, Target cannot demonstrate – nor has it even attempted to – that the information in the Class Certification Documents concerns "trade secrets or other proprietary information, the disclosure of which would likely cause harm." *See also Krueger v. Ameriprise Financial, Inc.*, No. 11-2781, 2015 WL 224705, *7-9 (D. Minn. Jan. 15, 2015) (holding on the plaintiff's motion for the re-designation and unsealing of documents marked "confidential" that only where the defendants provided "specific examples of harm," such as "a windfall to competitors in the form of free analysis, and

loss of negotiating leverage," were the documents appropriately sealed); *In re Guidant Corp.*, 245 F.R.D. at 636 (on a third-party motion to unseal summary judgment papers, only documents concerning trade secrets, proprietary information and confidential medical or other personal identifying information should remain sealed).

Critically, the fact that the information in the Class Certification Documents, which primarily concerns Target's many cybersecurity blunders and shortcomings, may be embarrassing is not a sufficient reason to maintaining extraordinary confidentiality under Rule 26(c). *See In re Parmalat Sec. Litig.*, 258 F.R.D. at 244 (stating that "the fact that ... disclosure might result in adverse publicity does not automatically warrant a protective order."); *see also Salomon Smith Barney, Inc. v. HBO & Co.*, No. 98-8721, 2001 WL 225040, at *2 (S.D.N.Y. Mar. 7, 2001) (denying motion to remove documents from the public record where "[the movant's] real concern is the possibility of public embarrassment"). Given the nature of the information in the Class Certification Documents, Plaintiffs' Motion should be granted.

IV. CONCLUSION

Based on the foregoing points and authorities, Plaintiffs respectfully request that the Court grant their Motion, unsealing Plaintiffs' Memorandum of Law in Support of Financial Institution Plaintiffs' Motion For Class Certification and For Appointment of Class Representatives and Class Counsel and exhibits A, B, C, D, E, F, G, H, I, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, II, JJ and NN.

Dated: July 24, 2015

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation This document relates to all Financial Institution cases	MDL No. 14-2522 (PAM/JJK) **PLACEHOLDER FOR MEMORANDUM OF LAW IN SUPPORT OF FINANCIAL INSTITUTION PLAINTIFFS' MOTION TO UNSEAL CERTAIN DOCUMENTS CITED IN AND ATTACHED TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This document is a place holder for the following item(s) which are filed in conventional or physical form with the Clerk's Office:

MEMORANDUM OF LAW IN SUPPORT OF FINANCIAL INSTITUTION PLAINTIFFS' MOTION TO UNSEAL CERTAIN DOCUMENTS CITED IN AND ATTACHED TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

If you are a participant in this case, this filing will be served upon you in conventional format. This filing was not e-filed for the following reason(s):

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X Item Under Seal pursuant to a court order* (Pursuant to Protective Order: Dkt. No. 92, Document number of redacted version 507)

___ Item Under Seal pursuant to the Fed. R. Civ. P. 5.2 and Fed. R. Crim. P. 49.1

___ Other (description): * Filing of these items requires Judicial Approval.

Dated: July 24, 2015

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation This Document Relates to: All Financial Institutions Cases	MDL No. 14-2522 (PAM/JJK) **CLASS ACTION**

LOCAL RULE 7.1 CERTIFICATE OF COMPLIANCE FOR FINANCIAL INSTITUTION PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO UNSEAL CERTAIN DOCUMENTS CITED IN AND ATTACHED TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Charles S. Zimmerman, certify that the accompanying Financial Institution Plaintiffs' Memorandum Of Law In Support Of Motion To Unseal Certain Documents Cited In And Attached To Plaintiffs' Motion For Class Certification complies with Local Rule 7.1(f) & (h).

I further certify that Microsoft Word 2010 was used to prepare the memorandum and when applied specifically to include all text, including headings, footnotes and quotations, generated a word count of 3,650 words in 13-point Times New Roman font.

Dated: July 24, 2015

Respectfully submitted,

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