UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE: HANNAFORD BROS. CO. CUSTOMER DATA SECURITY BREACH LITIGATION	MDL Docket No. 2:08 – MDL- 1954 ALL CASES

PLAINTIFFS' MOTION FOR RECONSIDERATION OF DECISION AND ORDER ISSUED MARCH 20, 2013 WITH SUPPORTING MEMORANDUM OF LAW

Representative Plaintiffs Maureen Johnson, Mel Nevells, Benjamin Redmond and Lori Valburn (Plaintiffs) hereby move pursuant to Maine District Court Local Rule 7(g) for reconsideration of this Court's Decision and Order on Plaintiffs' Revised and Supplemented Motion for Class Certification dated March 20, 2013 ("the Order") to the extent and on the grounds set forth below.

In the Order, this Court determined that Plaintiffs have satisfied all of the requirements of Rules 23(a) and (b)(3) for certification of a class as described in Plaintiffs Revised and Supplemented Motion for Class Certification except for the "predominance" requirement of Rule 23(b)(3). Thus, this Court has found that "the number of Hannaford customers who incurred these fees as a result of the breach is sufficient to satisfy Rule 23(a)(1)" (Order, p. 7), that "there are questions of law and fact common to the class and the commonality requirement [Rule 23(a)(2)] is satisfied" (Order, p. 10), that the "named plaintiffs' claims of injury [are] typical of the class" (Rule 23(a)(3) (Order, p. 14), and that "Since the named plaintiffs meet both parts of the adequacy of representation test, Rule 23(a)(4) is satisfied." Order, p. 16. This Court also

found under Rule 23(b)(3) that "All four [of the factors listed in Rule 23(b)(3)] lead to the conclusion that a class action is the superior method for adjudicating this controversy" (Order, p. 24) and that "the difficulties of managing the class action . . . are then manageable." Order, p. 24.[1]

This Court declined to find that the "questions of law or fact common to class members predominate over any questions affecting only individual members" on the ground that Interim Class Counsel's assertions about how Plaintiffs plan to provide evidence from which a jury can determine the collective damage suffered by the class were not supported by testimony or other evidence from an expert witness.

The Court is requested to reconsider this ruling on the ground that based on the existing state of the law and the facts in this case, it has not hitherto been clear that expert testimony is required to show that the common issues will predominate over individual issues. Given the unsettled state of the law on this issue at the class certification stage, Plaintiffs suggest that it would be manifest error for the Court to deny class certification without first providing Plaintiffs an opportunity to present expert witness evidence in

[1] Interim Class Counsel acknowledge the Court's concern that any recovery in behalf of the class in this case may reach only a small fraction of the persons harmed. Order, pp. 7-9. However, this case, offers an opportunity for the use of contemporary technology to ensure a very wide and complete distribution of the proceeds of any judgment or settlement directly to the persons harmed. Based on class certification discovery, it appears that the identity of each Class Member and the amount of his/her mitigating expenditure is recorded in electronic form by each of the card-issuing banks. In the event of a judgment or settlement, the recovery can be paid pro-rata to the banks, which can then electronically pro-rata credit the accounts of the Class Members, subject to a recipient's right to reject the credit and opt out at the time of distribution. This can all be done without disclosure of the actual identity of any bank customer. It is hard to imagine that a card-issuing bank would not cooperate in a process that would provide cash benefits to its customers. Interim Class Counsel submit that this case offers the opportunity for pragmatic and creative use of current technology to validate the class action process, at least in certain case profiles.

support of their position on the aggregation of damages and the predominance of common issues over individual as the case will in fact be presented at trial.

It has been the belief of Interim Class Counsel that based on the information generated by the limited pre-certification discovery to date, Plaintiffs' plan for proof is reasonable as a matter of common sense and experience, and is in fact, the only feasible method to present proof at a trial in this case. This is not a case in which presentation of any large number of individual claims is an alternative to aggregate proof. If Plaintiffs are unable to prove aggregate costs of mitigation sustained by identifiable groups of Hannaford-impacted cardholders, the class action will fail.

Common sense and experience suggest that it will be possible to establish a valid connection between the announcement of the Hannaford breach and actual mitigation expenditures of large groups of affected cardholders. Interim Class Counsel also believe that, once the fact record has been developed in discovery, Class Counsel will be able to obtain standard statistical evidence to refine and more precisely quantify these inferences and connections that are fundamentally founded on common sense and experience.

Under these circumstances, Plaintiffs respectfully request the Court to suspend the Order for 60 days to permit Interim Class Counsel to obtain and tender to the Court appropriate expert evidence in support and refinement of the common-sense inferences discussed below.

A. PLAINTIFFS' PLAN FOR PROVING COLLECTIVE DAMAGES IS SUPPORTED BY REASON AND COMMON SENSE.

Plaintiffs' plan for proving the damages sustained by the class as a whole by

reason of Hannaford's negligence and breach of implied is relatively simple and is based on common sense and experience. Pre-certification discovery has shown that the various card issuers can document which of their cardholders were Hannaford victims, and which of the Hannaford victims in turn paid card cancellation fees or purchased credit security products in the days, weeks and months preceding and following disclosure of the Hannaford breach. Their records also show how many and which of their non-Hannaford cardholders paid these fees and purchased these products on a daily, weekly and monthly basis before, during and after the Hannaford security breach. So, for instance, Discover's records show that, in the months before the breach was known, 39-58 members of the group of its cardholders whose data was exposed by Hannaford purchased a credit security product known as Identity Theft Protection (ITP) each month. In March 2008, the month in which the announcement of the Hannaford breach was made, the number of members of this group who bought ITP jumped to 235. Declaration of Peter M. Murray, Exhibit A (ECF No. 161-11). In April 2008, 289 Hannaford-compromised Discover cardholders purchased ITP. Declaration of Peter M. Murray, Exhibit A (ECF No. 161-11).

We also know that Mel Nevells and Lori Valburn were in the group of Hannaford–impacted Discover customers who bought credit security products immediately following announcement of the Hannaford breach, and they purchased the insurance in order to mitigate threatened harm to them from the consequences of the Hannaford breach.[2] That

[2] Ms. Valburn had already been a victim of fraudulent activity that she associated with the Hannaford breach. Mr. Nevells was aware that fraudulent activity had taken place but had not

card cancellation and purchase of credit security products are appropriate and reasonable responses to exposure to the consequences of data theft is certainly well known as a matter of common experience, and should not require expert testimony. As the First Circuit stated,

> "In was foreseeable, on these facts, that a customer, knowing that her credit or debit card data had been compromised and that thousands of fraudulent charges had resulted form the same security breach, would replace the card to mitigate against misuse of the card data. . . . . Similarly, it was foreseeable that a customer who had experienced unauthorized charges to her account, such as plaintiff Lori Valburn, would reasonably purchase insurance to protect against the consequences of data misuse."

Anderson v. Hannaford Bros. Co., 659 F.3d 151, at 164-165 (2011).

The evidence adduced in pre-certification discovery on card cancellations is similar. For example, the records of Key Bank disclose that, of the group of its cardholders whose confidential data was compromised in the Hannaford breach, an average of about 500 cancelled and replaced their cards each month preceding announcement of the breach in March, 2008. Declaration of David Sanderson, Exhibit A (ECF No. 161-4). In the two weeks following announcement of the breach, the number of Key debit cards cancelled spiked to 6,549 and remained unusually high during the months of April, May, and June. Declaration of David Sanderson, Exhibit A (ECF No. 161-4).

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yet been victimized. Both bought the insurance to protect them against future losses from this exposure. Plaintiffs agree that the correct reading of the First Circuit decision in *Anderson v. Hannaford Bros. Co*., 659 F.3d 151, 164-165 (2011) would support the reasonableness of expenditures made by class members not yet themselves subject to fraudulent charges to forestall harm of the kind befalling thousands of others similarly situated as a result of Hannaford's failure to protect their information.

There is also evidence that two of the Representative Plaintiffs, Maureen Johnson and Benjamin Redmond cancelled their Key debit cards in order to prevent anticipated harm from fraudulent transactions and that the fees charged them were not fully reversed. The inference that a large portion of the cancellations following the Hannaford breach announcement were for the same reason lies very close as a matter of common sense.

The question is, how many of the cancellations or purchases of insurance that took place in the demonstrated spikes following the announcement of the Hannaford breach were for the same reason that the Representative Plaintiffs took these steps? In the absence of any other likely reason for the dramatic increase in insurance purchases and card cancellations, it is reasonable to infer that a large portion of these purchases and cancellations were efforts by the respective cardholders and their financial institutions to do the same thing that the Plaintiffs did, namely mitigate the effects of the breach on them. Hannaford has certainly had the opportunity to demonstrate that there were other explanations for dramatically increased insurance purchases or card cancellations for this particular customer group during these time periods and has failed to do so.

There is also evidence that, in individual cases, the Hannaford breach caused affected customers reasonably to cancel their cards and to purchase credit security products to protect themselves against harm arising from the breach. Right after the breach became known, large numbers of other similarly situated customers for no apparent other reason also cancelled their cards and purchased credit security products. It is conceivable that there may be some other reason for the evident spikes in card cancellations and purchases. However, based on reason and common sense, customer

efforts to mitigate the harm of which they had just become aware is the most likely reason for the unusually large number of cancellations and credit security purchases that took place in the time frame right after announcement of the Hannaford breach.

Plaintiffs submit that expert testimony is not necessarily needed to make the connection between the breach, its announcement, and the card cancellations and purchases of credit security products. That is a matter of common sense inference. Expert testimony of a statistical nature can, however, provide the fact finder with a more precise idea of the number of mitigating cardholders associated with these spikes in purchases and cancellations at various levels of statistical confidence. So, for instance, if the magnitude of a specified activity (in this case purchases of insurance or cancellation of cards) following an apparent triggering event (announcement of the Hannaford breach) exceeded the baseline of activity in a given period by, say, a factor of 2, an expert statistician can opine on the amount of the excess that is likely associated with the triggering event to a given level of confidence. Such testimony can enable the fact finder to determine the likely amount of card cancellation fees and the amount of insurance purchases that were caused by announcement of the breach with a higher level of precision than can pure common sense.

This is not like a medical causation case, where the causative relationship between exposure to a particular substance and subsequent medical harm must be established by expert testimony. The connection between apprehension of harm from compromised card access information and card cancellation and credit security product purchase is established by both the direct testimony of the Representative Plaintiffs and common

sense. So far, the only reason advanced why an unusually large number of compromised cardholders cancelled their cards and bought credit security products right after becoming aware of the Hannaford breach is that they did so for the same reasons the Plaintiffs did, to mitigate the dangers of harm from fraudulent charges. Expert testimony will enable a degree of refinement and precision in the estimates, but is not required to establish the connection.

Either Plaintiffs will prove their case collectively, or they will not prove it at all. There is no middle ground. There is no trial plan under which this Court will be asked to consider the individual circumstances of a large number of individual cardholders. If Plaintiffs are unable to prove aggregate harm by a means similar to that outlined above, they will not be able to prove damages at all. There is no risk that this Court will face a trial with a myriad of individual issues. In whatever trial ultimately takes place, the common issues will predominate as a matter of necessity.

B. THE INTERESTS OF JUSTICE WILL BE SERVED IF THE COURT GIVES INTERIM CLASS COUNSEL REASONABLE OPPORTUNITY TO OBTAIN AND TENDER EXPERT EVIDENCE SUPPORTING PLAINTIFFS' PLAN FOR PROVING COLLECTIVE DAMAGES.

Interim Class Counsel failed to present to the Court expert evidence connecting large increases in credit insurance purchases and card cancellations right after announcement of the Hannaford breach to mitigation efforts of the cardholders and their banks, because, in light of the strong common-sense connection, Interim Class Counsel

did not believe such evidence to be necessary at the class certification stage.[3] It is Interim Class Counsel's belief that social statisticians with knowledge of the debit and credit card industry are available to serve as experts, and, once complete data is made available, can testify to the number of card cancellations or credit security purchases in the days, weeks and months after the Hannaford breach that can be considered mitigation efforts of the effects of that breach with various degrees of certainty.

Although the Plaintiffs bear the burden of showing Rule 23(b)(3) predominance, "[t]he class certification prerequisites should be construed in light of the underlying objectives of class actions. . . . . .The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation." *Smilow v. Southwestern Bell Mobile Systems., Inc.* 323 F.3d 32, 41 (1st Cir. 2003). If the Plaintiffs are not permitted to proceed as a class in this case, Hannaford's negligence and breach of contract will go wholly un-redressed. It will

[3] It is true that, as the Court noted in the Order (p. 23), that "generally in those cases [that support plaintiffs' lump sum jury verdict procedure], the plaintiffs already had an expert who had looked at the data and stated his/her ability to testify what the total damages would be." However the connection between defendant's misconduct and the damages sustained by the victims in those cases was nowhere near as apparent as a matter of common sense and experience as in the case at bar. See, e.g., *In re Pharm. Industry Average Wholesale Price Litig.*, 230 F.R.D. 651 (D.Mass 2005). In that case, expert testimony was necessary to even understand the recondite pricing processes of the prescription drug industry. See also, *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F. 3d 32 (1st Cir. 2003). There the First Circuit noted that a key issue was "whether plaintiffs could use a computer program to extract from Cellular One's computer records information about individual damages." 323 F. 3d at 40. In this case, it has already been demonstrated that the computer programs for records maintenance at Discover, Key Bank, Bank of America, among others can extract information about individual expenditures for mitigation in the wake of the Hannaford debacle. The Order does not cite any appellate decision that explicitly requires expert testimony at class certification stage in a case in which the plaintiffs' theory is patent, reasonable and understandable as a matter of ordinary common sense and experience.

escape scot-free. Those of its customers who expended their own out of pocket funds to mitigate the consequences of Hannaford's negligence will be left holding the bag.

In the interests of justice, Plaintiffs request that the Court suspend the Order and allow them a period of time up to 60 days to obtain expert evidence on the likely relationship of the documented spikes in card cancellations and purchases of credit security products to the announcement of the Hannaford breach and the jeopardy in which the breach placed all cardholders affected.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court suspend the Order and allow Plaintiffs 60 days to provide expert evidence in support of Plaintiffs' proposed plan of submission of proof of aggregate damages.

Dated: April 3, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2013, the foregoing was electronically filed with the United States District Court for the District of Maine using the Court's ECF/CM filing system, which will serve all registered users identified on the Notice of Electronic Filing. I further certify that a paper copy of the foregoing Memorandum in Opposition to Motion to Dismiss will be sent today via United States First Class Mail to any non-registered users identified in the Notice of Electronic Filing.

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