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)

DEFENDANT'S OPPOSITION TO FINANCIAL INSTITUTION PLAINTIFFS' MOTION TO UNSEAL CERTAIN DOCUMENTS CITED IN AND ATTACHED TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[REDACTED]

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Target Corporation ("Target") respectfully submits this memorandum in opposition to the Financial Institution Plaintiffs' ("Plaintiffs") Motion to Unseal Certain Documents Cited in and Attached to Plaintiffs' Motion for Class Certification (the "Motion to Unseal").

I. PRELIMINARY STATEMENT

Ironically, in a case in which their core complaint is that Target failed to take steps that may have prevented the criminal attack on Target's computer network that is the subject of this litigation (the "Target Intrusion"), Plaintiffs, through their Motion to Unseal, invite this Court to issue an order that would put Target at greater risk of a future attack and the future harm that would accompany such an attack. Indeed, according to their theory of the case, an order granting Plaintiffs' Motion to Unseal would put Plaintiffs themselves at greater risk of future harm.

[redacted]

[1] Unless otherwise stated, all Exhibit references herein are to the Exhibits to the Declaration of J. Gordon Rudd, Jr. (ECF No. 465).

[2] Plaintiffs' Motion to Unseal additionally sought to unseal Exhibits E, F, G, I, K, L, M, V, CC, NN, but the parties were able to resolve their disputes as to those documents during the meet and confer process, as described below.

[redacted] Such information fits squarely within the protections offered under Rule 26(c).

Certain of the Information Security Documents additionally contain Target's proprietary and commercially sensitive information with respect to its extensive information security policies and voluminous third party information security assessments, as well as the confidential and proprietary information of the third party assessors themselves, the unsealing of which provide an impermissible windfall to competitors under Rule 26(c).

Moreover, Plaintiffs' Motion to Unseal is defective and should be denied for the independent reason that it ignores the process and page limits set forth explicitly in the Court's scheduling order for discovery disputes such as this.

II. SUMMARY OF PERTINENT FACTS

On June 25, 2014, the Court entered a protective order in this case[3] (ECF No. 92, the "Protective Order"), which states in relevant part:

> "Confidential Information" means information that may reveal a trade secret or other confidential research, development, financial, or other information, ***including data security information***, that is commercially sensitive or information that reveals personally identifiable information ("PII"). . . . "Confidential Information" also means and includes any derivations, abstracts, excerpts, summaries, compilations or analyses of Confidential Information.

Protective Order at 1 (emphasis added). The Protective Order further provides:

[3] The Protective Order was amended on February 4, 2015 (ECF No. 309), but not in relevant part.

> Any party may request a change in the designation of any information designated as "Confidential" or "Highly Confidential." Any Stamped Confidential Documents shall be treated as designated until the change is completed. If the requested change in designation is not agreed to, the party seeking the change may move the Court for appropriate relief, providing notice to any third party whose designation of produced documents as "Confidential" or "Highly Confidential" may be affected. 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 to ask whether Target would consent to Plaintiffs filing their Memorandum Supporting Class Certification and the accompanying exhibits as unsealed documents, "without any redactions for any cited documents designated as confidential or highly confidential by Target." *See* Declaration of David M. Cialkowski (ECF No. 508, the "Cialkowski Decl."), Ex. 2. In response, Target sent Plaintiffs a letter on July 13, 2015, declining to consent to Plaintiffs' request, but noting "[t]o the extent that you believe that any particular document was not properly designated [as Confidential or Highly Confidential] and provide us sufficient information to understand your good faith basis for making such contention, we would be willing to meet and confer with you to discuss your concerns." *See* Cialkowski Decl., Ex. 3.

Rather than take Target up on its willingness to meet and confer to discuss Plaintiffs concerns, on July 24, 2015, Plaintiffs filed the instant motion seeking to unseal their Memorandum Supporting Class Certification and exhibits thereto, which were filed under seal pursuant to the Protective Order based on Target's designation of information as "Confidential" or "Highly Confidential."

[redacted]

[redacted] Target has designated documents it has produced to Plaintiffs in this case as "Confidential" or "Highly Confidential" where there was a good faith basis to do so, as assessed by attorney review on a document by document basis.[5] *See* Declaration of Emily Cobb ("Cobb Decl."), at ¶¶ 2-3.

In response to Plaintiffs' Motion to Unseal, Target informed Plaintiffs that their over thirteen-page supporting brief, "far exceeds the limits set forth in the Scheduling Order for discovery disputes such as this,"[6] and that "Plaintiffs also violated the Scheduling Order by unilaterally setting a hearing date on the motion, when the Scheduling Order gives Magistrate Judge Keyes the discretion to decide whether to hold

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[4] The Section of the Maiorino Declaration is broader than the list included in this memorandum, because it was finalized prior to Plaintiffs agreeing to drop their challenge as to the confidentiality of Exhibits E, F, G, V, and NN.

[5] Indeed, Plaintiffs' assertion that they "ha[ve] not been able to locate a single document produced by Target that has not been designated as confidential" could only be accurate if they conducted only a very limited search – Target has produced more than 13,000 such documents in this litigation. *See* Cobb Decl. at ¶ 4.

[6] The "Scheduling Order" referred to herein is the Amended Pretrial Scheduling Order in this action (ECF No. 341), which provides, under the heading "Merits Discovery and Non-Dispositive Motions," that "[d]iscovery disputes shall be resolved through letter briefing . . . [whereby] the moving party may file via ECF a letter of ***no more than three pages***, single-spaced with 13-point font, setting forth the dispute and providing relevant legal authority." *Id.* at 2.

a hearing."[7] *See* Email chain between Gordon Rudd and Michelle Visser, dated July 29, 2015 with Subject: Motion to Unseal/Failure to Comply with Scheduling Order, a copy of which is attached as Exhibit 1 to the Declaration of Michelle Visser ("Visser Decl."). Accordingly, Target asked Plaintiffs to withdraw their motion and supporting papers, and if they desired, file a letter brief on the issue in accordance with the Scheduling Order. *See id.* Plaintiffs contend that they have not filed the present motion and supporting papers in violation of the Scheduling Order because the relevant provision from the Scheduling Order "relates to discovery disputes and motion practice under Rule 37." They contend that "[t]his is not a discovery dispute. It is a motion under Rule 26(c) regarding the treatment of evidence by the Court, and the only order governing it is the protective order. This is not about the failure to produce or answer discovery." *Id.*

Nonetheless, Target made further attempts to resolve this dispute through the meet and confer process, and the parties subsequently agreed to a stipulation that extended the deadline of Target's opposition to August 5, 2015 and Plaintiffs' reply to August 7, 2015, so as to allow for additional discussions to narrow the issues. *See* ECF No. 514. On August 3, 2015, Target informed Plaintiffs that it had agreed to de-designate five of the documents that Plaintiffs had moved to unseal (Exhibits I, K, L, M and CC) and additionally agreed to de-designate additional portions of all of the deposition transcripts of current and former Target employees at issue (Exhibits A, B, D, P, Q, R, U, W, II). *See* Email chain between Gordon Rudd, Michelle Visser, and David Cialkowski, copying

[7] Scheduling Order at 2 (following the filing of letter briefs by both parties, "[t]he Magistrate Judge may then hold an in-person or telephonic hearing, or rule without a hearing.").

Daniel M. Routh, Naumon Amjed, and Ethan Barlieb, dated August 5, 2015 with Subject: Target – Motion to Unseal, a copy of which is attached as Exhibit 2 to the Visser Decl. On that same day, the parties met and conferred telephonically, during which time Target provided, on a document-by-document basis, the reasons that each of the Information Security Documents and the Memorandum Supporting Class Certification required protection against disclosure. On August 4, 2015, Plaintiffs indicated that they would be willing to withdraw the Motion to Unseal, but only if Target agreed to a stipulation "to unseal the [Memorandum Supporting Class Certification] in its entirety, without redactions as to statements supported by documents and testimony supplied by Target," which, for the reasons stated herein, Target could not agree to do. Visser Decl., Ex. 2. On August 5, 2015, at approximately 9 a.m. Central Time, Plaintiffs notified Target's counsel that it was dropping their challenge as to the confidentiality of Exhibits E, F, G, V, and NN. *See id.*

III. LEGAL STANDARD

Federal Rule of Civil Procedure 26 affords courts with authority to issue protective orders pursuant to which confidential information may be sealed. Fed. R. Civ. P. 26(c)(1)(G) (providing in relevant part that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way"). The default rule is that protection under Rule 26 is appropriate where the party asserting that the material is confidential has established "good cause" for

maintaining its confidentiality. *Id.*; *Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781 SRN/JSM, 2015 WL 224705, at *6 (D. Minn. Jan. 15, 2015).

Where "judicial records" are at issue, such documents are afforded some presumption of public access, *Krueger*, 2015 WL 224705, at *4 (quoting *Krueger v. Ameriprise Fin., Inc.*, 11-CV-02781 SRN/JSM, Doc. No. 506 at 26 (D. Minn. Oct. 14, 2014), a copy of which is attached as Exhibit 3 to the Visser Decl.), but the Eighth Circuit has explicitly rejected the "strong presumption" standard followed by certain other Circuits. *See U.S. v. McDougal*, 103 F.3d 651, 657 (8th Cir. 1996) (citing *Webster Groves Sch. Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1376 (8th Cir.1990)); *Krueger*, 2015 WL 224705, at *3 ("[T]he right to public access to judicial records is not absolute, and courts may weigh the parties' interests in determining whether to unseal a document.") (citing *Krueger*, Doc. No. 506 at 17, Visser Decl., Ex. 3). Rather, the presumption is overcome where the party asserting that the material is confidential presents "compelling reasons to keep the information secret—i.e., that it is likely that public disclosure of the information will harm the party." *Healey v. I-Flow, LLC*, 282 F.R.D. 211, 215 (D. Minn. 2012); *see also Krueger*, Doc. No. 506 at 19, Visser Decl., Ex. 3 (noting that while the "Eighth Circuit has not explicitly defined what constitutes 'judicial records' . . . . a survey of the decisions of this jurisdiction supports the notion that the presumption of public access (and concomitant need to articulate a compelling reason for non-disclosures) attaches to documents filed with the court in support of merits-based motions").

IV. ARGUMENT

A. Plaintiffs' Motion Should Be Denied for Failure to Comply with the Scheduling Order.

At the outset, Plaintiffs' Motion to Unseal should be denied because Plaintiffs failed to comply with both the page limit and procedures set forth in the Scheduling Order with regard to the resolution of discovery disputes.

The Court has authority to deny Plaintiffs' Motion to Unseal as a sanction for Plaintiffs' failure to comply with the Scheduling Order. *See Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995) (finding no abuse of discretion where the district court limited expert testimony to the content of an affidavit as a sanction for "failure to comply with the district court's Scheduling Order"); *Pena v. Taylor Farms Pacific, Inc.*, 2:13-CV-01282-KJM-AC, 2014 WL 2987651, at *2 (E.D. Cal. July 1, 2014) (striking multiple motions for partial summary judgment that were filed by defendants in an attempt to circumvent established page limits). Plaintiffs' filing of a supporting brief that is over thirteen pages long, where the Scheduling Order calls for at most a three-page letter brief, and unilateral setting of a hearing date on the motion, when the Scheduling Order leaves the decision of whether to hold a hearing to the discretion of the Court, should not be excused.

Plaintiffs' contention that the Scheduling Order's procedures for resolving discovery disputes is limited to those brought under Rule 37 is without basis. The Scheduling Order makes no mention of Rule 37, but rather states that the relevant procedures apply to "[d]iscovery disputes." Plaintiffs' unsupported argument that

motions brought pursuant to Rule 26(c) are not discovery motions is simply not accurate. "Rule 26(c) is a *discovery rule* that allows a court to enter a protective order 'for good cause shown' to protect a party during the discovery process from several harms . . . ." *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 1:05CV01031, 2008 WL 451568, at *1 (M.D.N.C. Jan. 16, 2008) (emphasis added) (issuing an order to show cause in response to a motion seeking to file a motion for summary judgment supporting papers under seal).

B. Plaintiffs' Motion to Unseal Should Be Denied on the Merits.

1. *Plaintiffs' Motion to Unseal Is Governed by the "Good Cause" Standard.*

The documents at issue were filed in connection with a motion for class certification. "[T]here has been no pronouncement in the Eighth Circuit regarding how to treat class certification documents in the context of a motion to unseal or de-designate." *Krueger*, Doc. No. 506 at *23 n.8, Visser Decl., Ex. 3. While Plaintiffs point to Local Rule 7.1(c)(6)(C) as categorizing a motion to certify a class action as a dispositive motion for purposes of the applicability of its *procedural* requirements, the *only* decision that Target was able to locate in this District to address the issue adopted the reasoning of *Rich v. Hewlett-Packard Co.*, 2009 WL 2168688, at *1 (N.D. Cal. July 20, 2009), which held that class certification documents are not considered to bear on the merits of a case for purposes of triggering the presumption of public access where "*the contested issues* in plaintiffs' motion for class certification relate[] only to the procedural requirements of Fed R. Civ. P. 23, and only tangentially to the underlying merits of plaintiffs' claims."

Krueger, Doc. No. 506 at *23-24 n.8, Visser Decl., Ex. 3 (emphasis added). The *Krueger* court reasoned that this rule was "consistent with the Eighth Circuit's instruction in *IDT Corp*[*v. eBay*, 709 F.3d 1220 (8th Cir. 2013)] that the court focus its analysis on the relationship of the documents to the court's adjudicatory duties to determine whether the presumption of public access has been triggered and the weight to be given to the presumption." *See id.*

[redacted]

Accordingly, because the Information Security Documents do not relate to any contested issue in plaintiffs' motion for class certification – and, therefore, have no bearing on the Court's adjudicatory duties relating to Plaintiffs' motion for class certification – the good cause standard applies to whether the information at issue should remain under seal.

2. *No Matter Which Standard Applies, the Court Should Deny Plaintiffs' Motion to Unseal.*

Regardless of which standard applies to the Motion to Unseal, there is ample and sufficient basis for the continued classification of the Information Security Documents as Confidential Information in accordance with Fed. R. Civ. P. 26(c) and pursuant to the

Protective Order, which includes in its definition of Confidential Information "information that may reveal a trade secret or other confidential research, development, financial, or other information, ***including data security information***, that is commercially sensitive or information that reveals personally identifiable information." *Id.* (emphasis added).

(a) *Risks to Target's Information Security.*

The protection Rule 26 affords to trade secrets and confidential commercial information "is broad enough to include a wide variety of business information." *Id*; *see Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, Inc., CIV 04-4048 DWF/FLN, 2006 WL 3079410, at *5-8 (D. Minn. Oct. 24, 2006) (holding that a multitude of business information should remain under seal for bases that included: "Contract with confidentiality clause," "Trade secret pricing information," "Commercial harm if disseminated," "Proprietary and commercially sensitive," "customer negotiation strategy," "Testimony regarding specific customer negotiations," "Internal proprietary market research," "Information protected by confidentiality agreement").

That protection extends to "the confidentiality of Information Technology ('IT') security information, the public disclosure of which poses a risk to the security of Defendants' IT systems and may expose . . . data housed on th[ose] systems to unauthorized access, loss or harm." *Cobell v. Norton*, 1:96-cv-01285-TFH-GMH, Doc. No. 2937 at 1 (D.D.C. Apr. 22, 2005), a copy of which is attached as Exhibit 4 to the Visser Decl.; *see also In re Google Inc. Gmail Litig.*, 13-MD-02430-LHK, 2013 WL 5366963, at *3 (N.D. Cal. Sept. 25, 2013) (granting request to seal documents relating to

the security of gmail while crediting Google's concern that its "ability to combat spammers, hackers, and others who propagate these unwanted or harmful materials would be impaired if those individuals had visibility into Google's defenses"). And for good reason: "[t]o successfully execute an attack against an organization, the attacker must first perform reconnaissance to gather as much intelligence about the organization as possible." BRETT HARDIN ET AL., *HACKING: THE NEXT GENERATION* (2009), *available at* https://www.safaribooksonline.com/library/view/hacking-theext/9780596806309/ch01.html (last accessed on Aug. 5, 2015), a copy of which is attached at Exhibit 6 to the Visser Decl.; [redacted] Various industry resources cite court records as a source that criminals mine during that reconnaissance phase to gain information about their targets. Tom Bowers, *How hackers find their targets*, EXPERIAN, (Sept. 6, 2011), *available at* http://www.experian.com/blogs/data-breach/2011/09/06/how-hackers-find-their-targets (last accessed on Aug. 5, 2015), a copy of which is attached as Exhibit 7 to the Visser Decl. ("The hacker fills out the map with a complete intelligence database on your company, ***perhaps using public sources such as government databases, financial filings and court records***. Attackers want to understand such details as how much you spend on security each year, other breaches you've suffered, and whether you're using LDAP or federated authentication systems." (emphasis added)); THOMAS WILHELM & JASON ANDRESS, *NINJA HACKING: UNCONVENTIONAL PENETRATION TESTING TACTICS AND TECHNIQUES* (2011), 251-53, *available at* https://books.google.com/books?id=aVnA8pQmS54C&printsec=frontcover

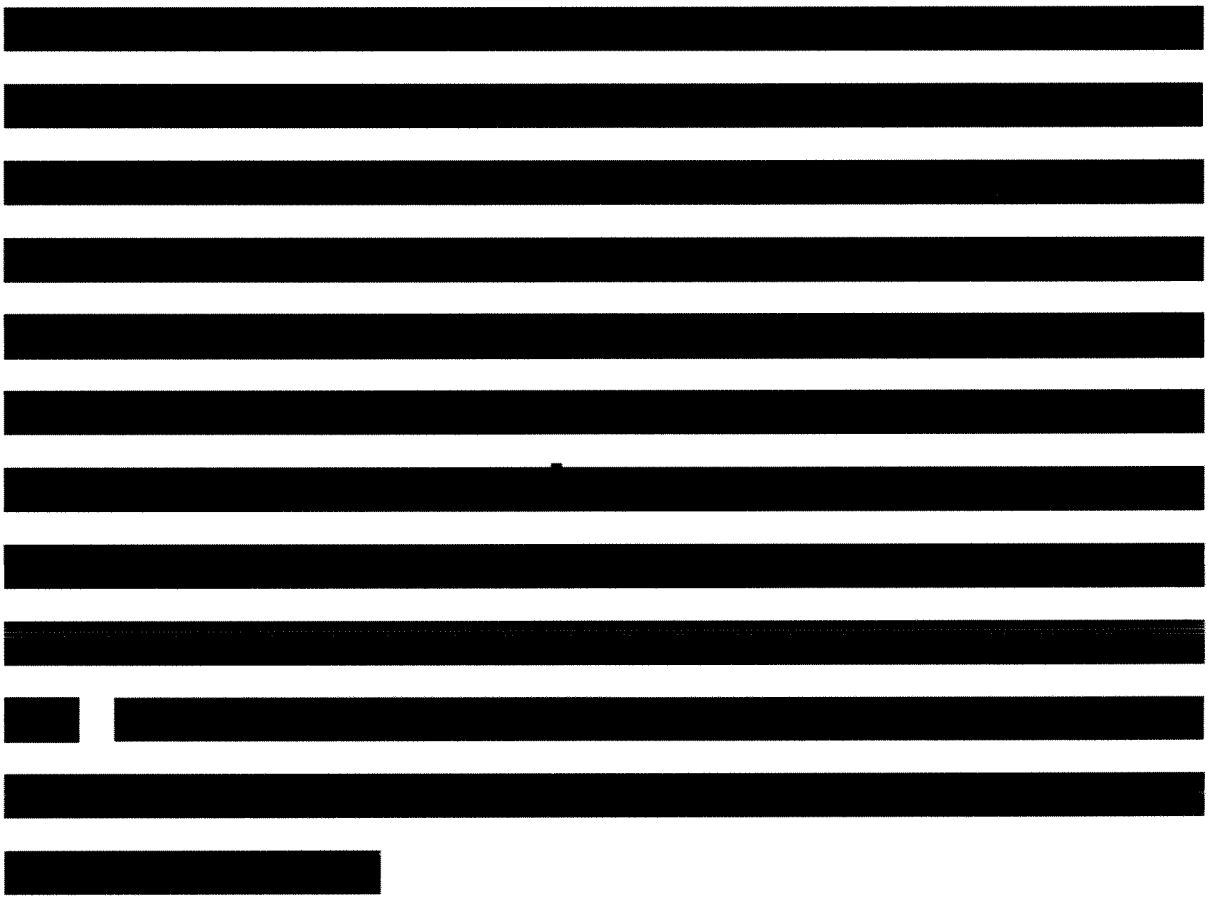
&dq=ninja+hacking&hl=en&sa=X&ved=0CCwQ6AEwAGoVChMIpYXwtZSOxwIViTQ-Ch3A-wNr#v=onepage&q=ninja%20hacking&f=false (last accessed on Aug. 5, 2015) (stating that PACER and EDGAR "can be a wealth of information when researching a target"); *cf.* HACKING: THE NEXT GENERATION ("Many traditional methods for gaining intelligence about targets still work today, such as dumpster diving, ***querying public databases***, and querying search engines" (emphasis added)); Securities and Exchange Commission Division of Corporate Finance, CF Disclosure Guidance: Topic No. 2 – Cybersecurity (October 13, 2011), *available at* https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm (last accessed on Aug. 5, 2015), a copy of which is attached as Exhibit 8 to the Visser Decl. (explaining that detailed disclosures regarding information security are not necessary after noting that the SEC was "mindful of potential concerns that detailed disclosures could compromise cybersecurity efforts -- for example, by providing a 'roadmap' for those who seek to infiltrate a registrant's network security . . . ."). As set forth below, the information that typically can be gleaned from such records pales in comparison (from a hacker's perspective, that is) to the veritable treasure trove of information contained in the Information Security Documents and citations thereto, which include detailed information about Target's IT infrastructure, Target's information security controls, and information about Target's information security policies and procedures.

[redacted]

8 [redacted]

Even if the information contained in the Information Security Documents could be considered stale – which Target strongly disputes – courts have recognized that "old business data may be extrapolated and interpreted to reveal a business' current strategy, strengths, and weaknesses." *Zenith*, 529 F. Supp. at 890-91. [redacted]

[redacted]



Notably, one of the documents that Plaintiffs rely on heavily in both their Consolidated Class Action Complaint (*see* ECF No. 163, at ¶¶ 15, 51–52, 58–59, 78) and Memorandum Supporting Class Certification (*see id.* at 7, 38, 41) is the "Kill Chain" Analysis of the 2013 Target Data Breach published by the United States Senate's Committee on Commerce, Science and Transportation (Exhibit J, the "Senate Kill Chain Report"). The Senate Kill Chain Report relies on a KrebsOnSecurity article to criticize Target for allegedly making public the simple the fact that Fazio was an HVAC vendor for Target, as well as a file that allegedly would have allowed the intruders to determine a

[9] Moreover, Exhibit T is the confidential third party deposition of Daniel Mitsch, Vice President of Fazio Mechanical Services, Inc., which Target has no authority to de-designate. *See infra*, at 22-23.

single Target user name, and the name of a single Target system. *See* Senate Kill Chain Report at 7-8 ("Target could have limited the amount of publicly available vendor information."); Brian Krebs, *Email Attack on Vendor Set Up Breach at Target*, KREBSONSECURITY (Feb. 12, 2014), *available at* http://krebsonsecurity.com/2014/02/email-attack-on-vendor-set-up-breach-at-target/ (last accessed on Aug. 5, 2015), a copy of which is attached as Exhibit 5 to the Visser Decl. (describing public vendor information as a "potential gold mine of information for an attacker"). The Senate Kill Chain Report goes on to assert that this limited amount of publicly available information allowed the attackers to move past the reconnaissance phase of the "Intrusion Kill Chain" to the weaponization phase. To be clear, Target denies that any public disclosure of the information discussed in the KrebsOnSecurity article and the Senate Kill Chain Report would supports a claim of negligence against Target. [redacted]

[redacted]

(b) *Disclosure of Information Likely to Unduly and Adversely Impact Target*

As set forth above, sufficient cause exists to protect *both* the Information Security Documents and the Memorandum Supporting Class Certification from public disclosure in order to protect Target from the increased security risks that would result from such disclosure. [redacted] Rule 26(c) expressly provides that a court "may, for good cause, issue an order to protect a party or person from annoyance [or] embarrassment." Here, good cause exists because Plaintiffs' Memorandum Supporting Class Certification egregiously mischaracterizes the underlying Information Security Documents and, given the media attention surrounding the Target Intrusion in general and this case in particular, (*see* Cialkowski Decl., Ex. 1; Nicole Perlroth, "Banks' Lawsuits Against Target for Losses Related to Hacking Can Continue," *The New York Times* (Dec. 4, 2014), *available at* http://bits.blogs.nytimes.com/2014/12/04/banks-lawsuits-against-target-for-losses-related-to-hacking-can-continue/ (last accessed on Aug.

5, 2015)), a copy of which is attached as Exhibit 10 to the Visser Decl.; Jim Finkle and Susan Heavey, "Target says it declined to act on early alert of cyber breach," *Reuters* (Mar. 13, 2014), *available at* http://www.reuters.com/article/2014/03/13/us-target-breach-idUSBREA2C14F20140313 (last accessed on Aug. 5, 2015), a copy of which is attached as Exhibit 11 to the Visser Decl.; [redacted] such mischaracterizations would likely be widely published, resulting in undue annoyance, embarrassment, and reputational damage to Target.

The examples of Plaintiffs' mischaracterizations of evidence include, but are not limited to:

[redacted]

[redacted]

Plaintiffs cite no case from the Eighth Circuit or from this District for the proposition that – despite the plain language of Rule 26(c) permitting courts to enter protective orders to prevent annoyance or embarrassment – the court cannot consider the likelihood of adverse publicity when deciding a motion to unseal, much less the likelihood of baseless adverse publicity likely to receive significant media coverage. The out-of-Circuit cases that plaintiffs cite, moreover, do not stand for the proposition that such a possibility is not relevant to the analysis; they merely state that adverse publicity "does not *automatically*" warrant a protective order. *In re Parmalat Securities Litig.*, 258 F.R.D. 236, 244 (S.D.N.Y. 2009) (emphasis added). Here, the issue is not simply adverse publicity; it is false adverse publicity. Especially under the good cause standard that governs this dispute and the plain language of Rule 26(c), the likelihood of such false adverse publicity in and of itself provides a sufficient justification to deny Plaintiffs' Motion to Unseal as to the Memorandum Supporting Class Certification. Of course, the Court need not decide that issue because, as set forth above, additional good cause exits to keep the Memorandum Supporting Class Certification under seal.

(c) *Disclosure of Target's Proprietary and Commercially-Sensitive Information.*

Apart from risks to Target's information security, disclosure of certain of the Information Security Documents – Exhibits C, B, D, and U – would also result in commercial and competitive harms to Target by allowing a "windfall to competitors in the form of free analysis." *Krueger*, 2015 WL 224705, at *7-9; *see also Cardiac*, 2006

WL 3079410, at *5–*8 (recognizing that information that would cause "commercial harm if disseminated" or is "proprietary and commercially sensitive" should remain under seal); *see also* Protective Order at 1 (defining "Confidential" information as including "trade secret" and "commercially sensitive information").

[redacted]

(d) *Disclosure of the Confidential and Proprietary Information of a Third Party.*

In addition to disclosing *Target's* confidential and proprietary information, certain of the Information Security Documents additionally disclose the confidential and proprietary information of *third parties*, which provides a separate and independent basis

for protecting them from disclosure under Rule 26 and the Protective Order. *See Network Appliance, Inc. v. Sun Microsystems Inc.*, C-07-06053 EDL, 2010 WL 841274, at *2 (N.D. Cal. Mar. 10, 2010) (granting sealing request as to certain documents "in light of the confidential nature of the information and the *competitive harm to third parties* if the confidential information were disclosed") (emphasis added).

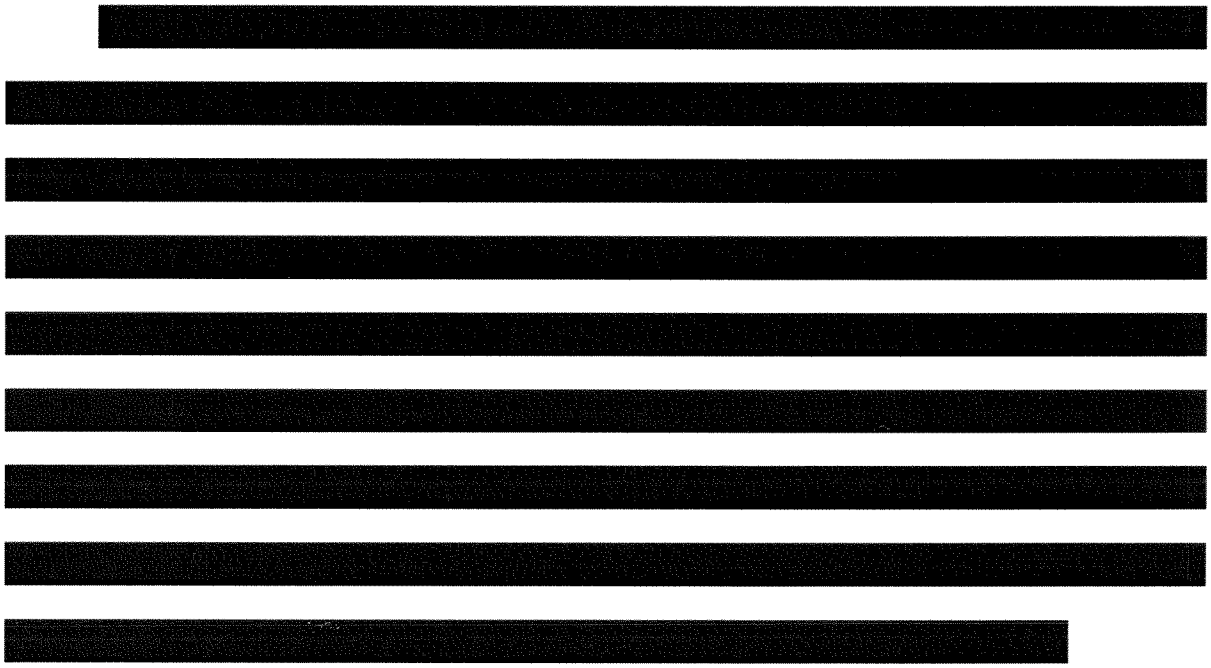
[redacted]

While Plaintiffs ultimately withdrew their challenges as to these underlying Exhibits, they refused to withdraw their challenge as to the statements in Plaintiffs' Memorandum Supporting Class Certification that are allegedly supported by these Exhibits. But, to the extent they are accurate, these statements reveal the content of these third parties' documents.

[redacted]

(e) *Plaintiffs Fail to Show that De-Designation Serves the Public's or Class Members' Interests.*

As set forth above, even if the Information Security Documents were "judicial records" as to which a presumption of public access applied – which Target disputes, *see supra* Part IV.B.1 – that presumption is overcome where the "potential harm that unsealing may cause" outweighs the party seeking declassification's "and the public's need for disclosure." *Healy*, 282 F.R.D. at 216.



In contrast, Plaintiffs do not explain how unsealing the documents at issue is in the public's interest. As noted above, the Information Security Documents do not relate to any issue that is in dispute in Plaintiffs' motion for class certification. They are, therefore, wholly unnecessary "to permit putative Class members to fairly evaluate . . . Plaintiffs' class certification motion." Memorandum of Law in Support of Plaintiffs' Motion to Unseal (ECF No. 507) at 5.

Plaintiffs, moreover, make no effort to explain why de-designation of the information at issue is needed to allow putative class members to evaluate "the strength of this case," other than to suggest that the information would be useful to issuing banks if Target again attempts to settle claims outside of the class context. *Id.* In denying Plaintiffs' Motion for Preliminary Injunction to Enjoin Releases Against Target and to Limit and Cure Misleading and Coercive Communications with Putative Class Members (ECF No. 387), however, Judge Magnuson found that the disclosures to issuers in connection with the MasterCard settlement that was not ultimately consummated complied with Rule 23(d). *See* Order Denying Motion for Preliminary Injunction (ECF No. 414), at 2-3. No more would be needed if other settlement opportunities were made available to issuing banks. Indeed, by Plaintiffs' own account, the putative Class members appeared perfectly able to evaluate and reject the proposed MasterCard settlement without having access to the confidential material that is presently at issue. In any event, Plaintiffs' invitation to "evaluate the strength of this case" is premature, as no class has yet been certified and there is no motion for summary judgment pending or other basis to claim that the underlying merits of Plaintiffs' claims are now at issue. *See Krueger*, Doc. No. 506 at *23-24 n.8, Visser Decl., Ex. 3.

In addition, Plaintiffs' reliance on *Healey* is particularly misplaced, since in that case the court specifically noted that the public had a "strong interest in access" given that "the health and safety of the public [was] at issue." *Healey*, 282 F.R.D. at 216. Here, there is no such risk to the health and safety of the public – to the contrary, it is the

attempted *release* of the Information Security Documents that threatens to put the public at risk by making their consumer information more vulnerable to attack.

Thus, regardless of what standard applies, there is ample basis for maintaining the confidentiality of the Information Security Documents, and Plaintiffs provide no compelling argument to the contrary.

V. CONCLUSION

Accordingly, Target respectfully requests that the Court deny Plaintiffs' Motion to Unseal the Memorandum Supporting Class Certification and the Information Security Documents.

Respectfully submitted,

Date: August 5, 2015

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