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FILED
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

2007 JAN 29 P 4:21

AMERIFIRST BANK,
Individually and on behalf of a class
similarly situated entities,

Plaintiffs,

vs.

TJX COMPANIES, Inc.,
TJ MAXX,
FIFTH THIRD BANCORP and
FIFTH THIRD BANK,

Defendants.

U.S. DISTRICT COURT
DISTRICT OF MASS.

MAGISTRATE JUDGE Alexander

Case referred
Alexander

Civil Action No.

07 CA 10169 JLT

Class Action Complaint

The Plaintiffs, individually and on behalf of a class of similarly situated persons,
complain against the Defendants as follows:

Introduction

1. Plaintiffs bring this action individually and on behalf of a class of
similarly situated class members for injuries suffered as a result of Defendants' wrongful
conduct. In what has recently been described as potentially the largest retail security
breach to have ever occurred in the United States, the Defendant TJX Companies, Inc.
(hereinafter TJX) announced on January 17, 2007 that an outside consultant had detected
an unauthorized intrusion into its computer systems that process and store information
related to customer transactions. This intrusion involved portions of TJX's computer
network that handles credit card, debit card, check and merchandise return transactions
for customers of its T.J. Maxx, Marshalls, HomeGoods, Bob's Stores and A.J. Wright

stores in the United States and Puerto Rico. According to TJX's press release, the intrusion involved credit and debit card transactions occurring in 2003 and most recently for the period from mid-May through December, 2006. Additionally, what makes the intrusion into the TJX computer system particularly alarming is that the breach involved customer information such as drivers' license and checking accounts linked to transactions for returned merchandise and was not limited to credit and debit card information.

2. Though Defendants apparently learned of the intrusion in mid-December, 2006, they delayed announcing the matter for approximately one-month. The delay in announcing the intrusion exposed the Plaintiff and class members to further harm arising from fraudulent transactions.

3. This case arose because the Defendants have both statutory and common law duties to adequately protect their customers' non-public and private financial information. The Defendants breached the duties owed to its customers by failing to maintain adequate computer data security. Moreover, the Defendant TJX likely retained customer information for a longer period of time than allowed under current payment system industry standards. The current standard is that once the transaction has been completed, the merchant and/or acquiring bank are supposed to purge the information from their system. Given the well-publicized breaches in 2005 involving CardSystems Solutions, the Defendants should have undertaken adequate measures to thwart and/or detect intrusions into their computer systems.

Parties & Venue

4. The plaintiff AmeriFirst Bank has its principal place of business in the State of Alabama. It's main offices are located in Union Springs, Alabama.

5. The defendant TJX, Inc. is incorporated in the State of Massachusetts. TJX is an off price retailer of apparel and home fashions. TJX regularly transacts business throughout the United States, including the State of Alabama.

6. The defendants Fifth Third Bancorp and Fifth Third Bank (hereinafter Fifth Third Bank) are chartered in the State of Ohio. Upon information and belief, Fifth Third Bank is the sponsoring bank that handled TJX's credit card accounts. Fifth Third Bank is the nation's fourth largest credit card processor. The Defendant Fifth Third Bancorp is the parent of Fifth Third Bank.

7. The defendant TJ MAXX is incorporated in the State of Massachusetts. TJ MAXX is an off price retailer of apparel and home fashions. TJ MAXX regularly transacts business throughout the United States, including the State of Alabama.

Jurisdiction

8. This Court has diversity jurisdiction over the claims asserted in the complaint. The amount in controversy exceeds \$75,000 and there exists complete diversity with respect to the named parties. Additionally, the Court has jurisdiction under the Class Action Fairness Act because this class has more than 100 hundred persons and the amount at issue exceeds five (5) million dollars.

Factual Allegations

9. On January 17, 2007, TJX announced that its computer system had been compromised and that the intrusion resulted in the theft of private financial data related customer transactions. TJX further stated that it has identified customer information that has been stolen from its systems. Other than the initial announcement TJX has provided very little information about the scope and extent of the security breach. TJX has stated that it does not know the full extent of the intrusion and has refused to say how many customers had their data stolen or accessed by the breach. However, according to Visa the number of cards accessed in this case could exceed the forty (40) million cards exposed in a 2005 breach of computers at payment processor CardSystems Solutions.

10. The Plaintiff AmeriFirst Bank (AmeriFirst) is a retail bank, offering traditional financial services to its customers, including commercial, mortgage and consumer installment lending. As a result of the TJX intrusion, AmeriFirst has identified 150 customers with compromised credit/debit cards. It will have to reissue cards to these customers at an approximate cost of \$20.00 per card.

11. Upon information and belief, Fifth Third Bank processed credit card and debit card transactions for TJX. Fifth Third Bank served in the capacity as the acquiring bank (or the merchant acquirer). As the merchant acquirer, Fifth Third Bank takes the credit card transactions from TJX and transmits them to the bank issuing the card. Once the cardholder bank (the issuing bank) authorizes payment, Fifth Third Bank credits TJX's merchant account with the purchase price minus transactions fees.

12. Although U.S. retailers who accept credit cards and the merchant acquirers are required to abide by card-industry regulations governing credit card

17. Numerosity: The class is composed of thousands of financial institutions the joinder of which would be impracticable. The individual identities of the class members are ascertainable through Defendants' records or by public notice.

18. Commonality: There is a well-defined community of interest in the questions of law and fact involved affecting the members of the class. The questions of law and fact common to the class predominate over questions affect only individual class members, and include, but are not limited to, the following:

a. Whether Defendants TJX and First Third Bank breached a duty and were negligent in failing to keep card members' account, transactions, and other non-public information secure and/or by failing to comply with payment card industry standards;

b. Whether all Defendants, or any of them, breached duties and/or were negligent in failing to inform directly or indirectly in a timely fashion the financial institutions that issued credit/debit cards (the security of whose accounts or other non-public information was compromised) of the occurrence of such a compromise of security;

c. Whether the class is entitled to notice as to whether the security of their credit/debit card account or other non-public information was compromised as a result of a breach of security at TJX;

d. Whether the class is entitled to remedies such as covering the cost of replacing cards on account of the breach of duties of Defendants, or the losses resulting from fraudulent transactions;

e. Whether the class is entitled to declaratory relief;

- f. Whether the class is entitled to injunctive relief; and,
- g. Whether the class is entitled to an award of reasonable attorneys' fees and costs of suit.

19. Typicality and Adequacy: Plaintiffs are adequate representatives of the class because their interests do not conflict with the interests of the class members they seek to represent and they are similarly situated with members of their class. Plaintiffs will fairly and adequately represent and protect the interests of the class, and Plaintiffs' interests are not antagonistic to the class. Plaintiffs have retained counsel who are competent and experienced in the prosecution of class action litigation.

20. Predominance: Common questions of fact or law predominate over individualized issues. Because this case centers on the Defendants' failure to adequately secure non-public financial information (i.e. credit and debit card information), the facts surrounding the Defendants' practices will clearly predominate over any individualized issues. A class action is superior to other available means for the fair and efficient adjudication of Plaintiffs' and class members' claims. Plaintiffs and the members of the class have suffered irreparable harm as a result of Defendants unfair, deceptive and unlawful conduct. Defendants continue to deny wrongdoing and to engage in the unfair, unlawful, and deceptive conduct that is the subject of this complaint.

COUNT I

(Negligence)

21. The Plaintiffs incorporate by reference and restate the factual allegations in the preceding paragraphs.

22. The Defendants came into possession of private financial information and had a duty to adequately protect it from theft. The Defendants did not exercise reasonable care in safeguarding such information. Defendants did not comply with industry standards designed to protect credit and debit card information from theft and/or prevent others from gaining access to such information.

23. The Defendants negligently delayed disclosure of the security breach thus unreasonably exposing the plaintiffs and/or class members to harm and injury.

24. Plaintiffs and the class have been injured as a proximate result of these breaches and Defendants' conduct constitutes negligence.

COUNT II

(Breach of Contract)

25. The Plaintiffs incorporate by reference and restate the factual allegations in the preceding paragraphs.

26. The plaintiffs, class members and defendants were parties to a contract that required the defendants to adequately protect credit card, debit card and other personal information from theft or unauthorized disclosure.

27. Alternatively, the plaintiffs and class members were third party beneficiaries to contracts and/or agreements that the defendants entered into with credit card associations/networks. These agreements required the defendants to adequately safeguard credit card, debit card and/or other personal information from theft or unauthorized disclosure.

28. The defendants breached their agreements with the plaintiffs and/or class members by failing to adequately safeguard plaintiffs and class members' private financial information.

29. Plaintiffs and the class have been injured as a proximate result of these breaches and Defendants' conduct constitutes a breach of the duties arising from the common law bailment.

COUNT III

NEGLIGENCE PER SE

30. The Plaintiffs incorporate by reference and restate the factual allegations in the preceding paragraphs.

31. Defendants had a duty pursuant to the Graham-Leach-Bliley Act to protect and keep customer information confidential. For example, 15 U.S.C.A. § 6801 provides:

(a) Privacy obligation policy:

It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information.

(b) Financial institutions safeguards

In furtherance of the policy in subsection (a) of this section, each agency or authority described in section 6805(a) of this title shall establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards--

- (1) to insure the security and confidentiality of customer records and information;
- (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and
- (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

In addition to these requirements, 15 U.S.C.A. § 6809 also provides as follows:

(4) Nonpublic personal information

(A) The term "nonpublic personal information" means personally identifiable financial information--

(i) provided by a consumer to a financial institution;

(ii) resulting from any transaction with the consumer or any service performed for the consumer; or

(iii) otherwise obtained by the financial institution.

(B) Such term does not include publicly available information, as such term is defined by the regulations prescribed under section 6804 of this title.

(C) Notwithstanding subparagraph (B), such term--

(i) shall include any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information; but

32. The Defendant Fifth Third Bank failed to comply with the requirements of Section 6801 by not providing for adequate safeguards in its handling of nonpublic personal information.

33. Additionally, the Defendants were obligated to comply with credit card industry regulations that prohibit, among other things, storage of unprotected credit and/or debit card information.

34. The failure to comply with Section 6801 and/or industry regulations with respect to consumer credit and/or debit card transactions constitutes negligence *per se*.

35. Plaintiffs and the class have been injured as a proximate result of these breaches and Defendant's conduct constitutes negligence *per se*.

Prayer for Relief

36. Wherefore premises considered, the Plaintiffs, individually and on behalf of the class, respectfully request that the Court enter an order:

- (1) requiring the defendants to make whole any losses suffered by the plaintiffs and class as a result of their misconduct, including but not limited to the cost of replacing cards and/or the losses attributable to fraudulent transactions connected to and/or arising from the security breach;
- (2) enjoining the defendants from further actions which place the class at risk of future security breaches and requiring them to comply with industry standards;
- (3) requiring the defendants to pay plaintiffs and class members a reasonable attorney's fee and costs of litigation and;
- (4) providing for such other legal and/or equitable relief as the cause of justice requires.

Jury Demand

The Plaintiffs request a trial by struck jury.



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