

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE TJX COMPANIES RETAIL  
SECURITY BREACH LITIGATION

Master Docket No. 07-10162-WGY

THIS DOCUMENT RELATES TO:  
FINANCIAL INSTITUTIONS TRACK

**MEMORANDUM OF LAW IN SUPPORT OF**  
**FINANCIAL INSTITUTION PLAINTIFFS'**  
**MOTION FOR CLASS CERTIFICATION**

Dated: October 26, 2007

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## **I. INTRODUCTION**

It is undisputed that the computer system of the TJX Companies, Inc. ("TJX") in Framingham, Massachusetts was breached and that critical information regarding millions of payment cards was removed. Plaintiffs contend that the breach was made possible as a result of TJX's failure to implement and maintain appropriate data security standards. Plaintiffs seek certification pursuant to Rule 23(b)(2) and (3) for claims of breach of contract, unfair and deceptive trade practices, negligence and negligent misrepresentation on behalf of the following class, all of whom have been injured by TJX's conduct:

A nationwide class consisting of all financial institutions who received an alert from MasterCard or Visa related to the security breach of TJX's computer system in Framingham, Massachusetts that identified one or more credit or debit cards issued by the financial institution.

Each requisite of Rule 23 is satisfied in this action.

## **II. FACTUAL BACKGROUND**

### **A. TJX Was Obligated to Comply with Data Security Standards and Safeguard Payment Card Data**

TJX operates more than 2,400 retail stores in the United States. May 23, 2007 Complaint ("C"), ¶40. Its principal place of business, its corporate headquarters, its relevant computer center and its Chief Information officer ("CIO") and his staff are located in Framingham, Massachusetts. Deposition of Paul Butka ("Butka Depo.") at 17-19.<sup>1</sup> TJX is a participating merchant in the Visa and MasterCard networks. C. ¶56. Fifth Third serves as an acquiring bank for TJX, participating in the Visa and MasterCard networks. C. ¶58. Plaintiff banks are members of the Visa and/or MasterCard networks

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<sup>1</sup> Attached to Declaration of William H. Champlin, III ("Champlin Decl.") as Ex. 1.

and are financial institutions who issue MasterCard or Visa payment cards to their customers. C. ¶¶19, 21, 23, 25, and 55.

The contracts between TJX and Fifth Third incorporate the operating regulations of the Visa and MasterCard networks (the “Operating Regulations”). Champlin Decl., Exs. 2 and 3. All participants in these networks are required to comply with the Operating Regulations. Declaration of Joel Lisker (“Lisker Decl.”), ¶¶24-25.<sup>2</sup>

In order to maintain the integrity of customer data and secure the Visa and MasterCard networks for the benefit of the members, the Operating Regulations require that merchants such as TJX must safeguard payment card data and comply with the Payment Card Industry Data Security Standard (the “PCI Standard”). Similar standards of data security were in place for many years prior to the PCI Standard. Lisker Decl. ¶¶24-25, 50; Deposition of Joseph Majka (“Majka Depo.”) at 36.<sup>3</sup>

TJX is a Level 1 merchant processing many millions of payment card transactions annually. Lisker Decl. ¶27. These payment transactions are stored, processed and transmitted centrally through the TJX servers located in Framingham. Report of ATW Dated May 1, 2007 (“ATW Report”) at 11.<sup>4</sup> As a Level 1 merchant, TJX is subject to the strictest set of rules on data security. Lisker Decl. ¶27.

**B. Defendant TJX Failed to Meet PCI Standards, Improperly Stored Confidential Customer Data and Failed to Safeguard Payment Card Data**

TJX's actions caused the largest retail data security breach in United States history. Majka Depo. at 120-121. TJX has admitted its computer systems were

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<sup>2</sup> Joel Lisker is a renowned expert in the field of payment card security, having been the senior security officer at MasterCard International for over ten years.

<sup>3</sup> Attached to Champlin Decl. as Ex. 4. Mr. Majka is a senior officer at Visa USA responsible for payment card security.

<sup>4</sup> Attached to Champlin Decl. as Ex. 5.

compromised and customer data was taken from its computers. TJX Form 10-K, March 28, 2007 (“TJX 10-K”) at 13.<sup>5</sup> Lisker Decl. ¶28. Approximately 100 million separate Visa and MasterCard accounts were affected by this breach. Lisker Decl. ¶46.

TJX subsequently retained forensic investigators, General Dynamics (“GD”) and AmbironTrustWave (“ATW”), to investigate. Lisker Decl. ¶¶29 and 33. Both separately concluded that TJX had serious deficiencies in its systems, including the following:

1. TJX improperly stored Track 2 data on its servers in Framingham.
2. TJX employed a wireless network at its stores that was deficient.
3. TJX had a network that was improperly designed with inadequate segmentation and insufficient firewall protection.
4. TJX failed to maintain adequate intrusion detection systems.
5. TJX used simple non-complex passwords or passwords that matched applicable user names
6. TJX’s IT Department in Framingham was not properly tasked to manage the environment used to store, process or transmit payment card data.

ATW Report at 13-18; Majka Depo. at 110.

Indeed, ATW concluded that of the 12 applicable PCI Standards, TJX only complied with 3 during the time of the intrusion, and continues to violate the PCI Standard and remains at risk of being compromised again. ATW Report at 5, 9 and 35.

The storage of Track 2 data on the Framingham servers was particularly serious because Track 2 data permits a person to create a counterfeit card with a fully functional magnetic stripe. Lisker Decl. ¶48. In view of the risks associated with Track 2 data, merchants have been forbidden to store it, even if encrypted, since the early 1990s. Lisker Decl. ¶50. Over 80% of the compromised account numbers identified by ATW at TJX included improperly stored Track 2 data. ATW Report at 7.

TJX consultants ATW and GD reached similar conclusions as to how the data compromise occurred. Initially, an intruder gained access to the TJX servers in

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<sup>5</sup> Attached to Champlin Decl. as Ex. 6.

Framingham through a TJX wireless system that did not have proper security. ATW Report at 11, 13; GD Report at 000465.<sup>6</sup> Thereafter, the intruder achieved administrative privileges on the TJX Framingham servers, which centrally process customer transactions for the entire United States. ATW Report at 8; GD Report at 000465. Using the internet connection that TJX maintained in Framingham, the unauthorized user copied and transferred data from the servers. These transfers involved approximately 83 gigabytes of information in September and November 2005. ATW Report at 12, 21; GD Report at 000463-000464. This data transfer was undetected by TJX intrusion detection programs or personnel and involved over 40 million payment cards. ATW Report at 39.

In May 2006, a “sniffer” tool was placed on the Framingham servers by an unauthorized person who gained access through the same wireless system. ATW Report at 12-13. From May 2006 to mid-December 2006, this device operated as a tunnel from the TJX servers to capture details of unencrypted customer transactions. ATW Report at 26-28. This “sniffer” tool apparently was not detected by TJX on the Framingham server until late 2006. ATW Report at 28. The "sniffer" captured data related to millions of payment card transactions processed by TJX. ATW Report at 12, 21, 27-28.

TJX was aware of deficiencies in its data security since at least 2004. It failed to aggressively pursue full compliance. CIO Paul Butka regarded data security as one budget concern among many and his biggest priority was serving his customers, "the stores." Butka Depo. at 60-61.

TJX had ample warnings regarding the risks posed by deficient wireless systems. A November 23, 2005 email from Lou Julian to Mr. Butka and others warned: “Saving money and being PCI compliant is important to us, but equally important is protecting

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<sup>6</sup> Attached to Champlin Decl. as Ex. 7.

ourselves against intruders. Even though we have some breathing room with PCI, we are still vulnerable with WEP as our security key. It must be a risk we are willing to take for the sake of saving money and hope that do not get compromised.” Butka Depo. at 130; Champlin Decl. Ex. 12. On December 12, 2005, Richard Ferraioli, a TJX employee, noted an issue with WEP and that TJX was not in compliance with the requirements of PCI. He wrote “this becomes an issue if this fact becomes known and potentially exacerbates any findings should a breach be revealed.” Champlin Decl. Ex. 13.

At no point after 2004 did TJX disclose its reports on compliance and deficiencies to issuing banks. Butka Depo. at 142-143. Visa, following its own investigation of the TJX data breach, specifically found that the violations of data security standards were “egregious.” Champlin Decl. Ex. 14.

**C. TJX's Actions and Unfair and Deceptive Practices Caused Financial Loss to Class Members**

After learning of the TJX breach, Visa and MasterCard identified the payment card accounts potentially compromised by the intrusion. Deposition of Thomas Humphrey (“Humphrey Depo.”) at 246-250.<sup>7</sup> The TJX data breach was so massive that Visa alone issued alerts identifying a staggering 96.8 million accounts relating to approximately 65 million unique account numbers. Lisker Decl. ¶46; Majka Depo. at 97. MasterCard issued alerts concerning millions of additional accounts. Lisker Decl. ¶46.

Upon receiving alerts from Visa or MasterCard, Plaintiff banks and class members reissued affected cards and/or monitored accounts for fraudulent activity. Lisker Decl. ¶¶57-61. Each of the named Plaintiffs re-issued and cancelled affected

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<sup>7</sup> Attached to Champlin Decl. as Ex. 15.

cards. Deposition of Henry Capps (“Capps Depo.”) at 55<sup>8</sup>; Declaration of Lars Carlson (“Carlson Decl.”) ¶¶4-6<sup>9</sup>; Declaration of Lawrence Keenan (“Keenan Decl.”) ¶¶4-6<sup>10</sup>; Declaration of Robert Mitchell (“Mitchell Decl.”) ¶¶4-6.<sup>11</sup> A survey of New England banks in 2007 showed 84% of banks responding reissued payment cards as a result of the TJX breach. Forte Decl. ¶7.

The three primary types of losses that payment card issuers have experienced as a result of this type of data breach are (1) costs associated with reissuing new payment cards, (2) costs associated with monitoring open accounts for fraud (with or without reissue), and (3) fraud losses. Lisker Decl. ¶59.

The losses and reissuance costs experienced to date by Plaintiff banks are typical of the experience of financial institutions nationally. Lisker Decl. ¶¶57-61. Visa has begun the process of calculating the national fraud losses associated with this breach. Majka Depo. at 132-147.

The FTC is investigating the data intrusion at TJX for possible violation of the FTC Act.<sup>12</sup> TJX 10-K at 21.

### **III. THE PROPOSED CLASS MEETS ALL OF THE PREREQUISITES FOR CLASS CERTIFICATION**

Under Fed. R. Civ. P. 23(a), the Court should certify a proposed class when the class meets all of the prerequisites of Rule 23(a) and at least one of the conditions of Rule 23(b). The proposed class meets all of these requirements.

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<sup>8</sup> Attached to Champlin Decl. as Ex. 16.

<sup>9</sup> Attached to Champlin Decl. as Ex. 17.

<sup>10</sup> Attached to Champlin Decl. as Ex. 18.

<sup>11</sup> Attached to Champlin Decl. as Ex. 19.

<sup>12</sup> As previously argued to the Court, a breach of the FTC Act by TJX for failing to maintain reasonable data security forms the basis for a violation of Chapter 93A for the same conduct.

**A. The Proposed Class Satisfies the Prerequisites of Rule 23(a)**

Rule 23(a) of the Federal Rules of Civil Procedure requires a party seeking class certification to satisfy four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a). All four prerequisites are satisfied in this case.

**Numerosity:** A proposed class satisfies the numerosity prerequisite if “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Class certification is particularly appropriate when the class members are geographically dispersed. *Wilcox v. Petit*, 117 F.R.D. 314, 317 (D. Me. 1987).

The numerosity requirement is established beyond serious dispute in this case. The members of the proposed class are the financial institutions throughout the United States that issued the credit and debit cards that were compromised as a result of the TJX breach. The Massachusetts Bankers Association alone has more than 200 members in New England. Declaration of Daniel Forte (“Forte Decl.”) ¶4.<sup>13</sup> In all likelihood approximately 100 million cards were compromised. Lisker Decl. ¶46. Moreover, given the nationwide distribution of TJX’s retail outlets, the proposed class includes financial institutions in nearly every state. Plainly, the size and the geographic dispersion of the class make joinder impracticable.

**Commonality:** A proposed class satisfies the commonality prerequisite if “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). This requirement is satisfied if *some* issues of law or fact are common to the class; all such issues need not be common. *See, Mass. Ass’n. of Older Ams. v. Spirito*, 92 F.R.D. 129, 131 (D. Mass. 1981).

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<sup>13</sup> Attached to Champlin Decl. as Ex. 20.

The commonality requirement is also easily satisfied given the numerous questions of law and fact which are common to the class.<sup>14</sup>

**Typicality:** A proposed class satisfies the typicality prerequisite if “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Claims are typical if (1) the representative plaintiffs’ injuries arise from the same course of conduct as do the injuries that form the basis of the class claims, and (2) the representative plaintiffs’ claims are based on the same legal theory as the class claims. *Modell v. Eliot Sav. Bank*, 139 F.R.D. 17, 22 (D. Mass. 1991).

The injuries of the representative plaintiffs are typical of the proposed class. TJX’s failure to safeguard payment card data caused the same categories of injuries to the representative Plaintiffs as the absent class members, including card reissuance costs, monitoring costs, and fraud losses. Lisker Decl. ¶59.

Second, Plaintiffs’ claims are based on the same legal theories available to the absent class members: negligence, breach of contract, negligent misrepresentation, and violation of Chapter 93A.

**Adequacy of Representation:** A proposed class satisfies the adequacy prerequisite if “the representative parties will fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(a)(4). This analysis has three parts: (1) the representative plaintiffs’ interests conflict with those of absent class members, (2) whether the proposed plaintiffs are credible and (3) whether the proposed plaintiffs are

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<sup>14</sup> The questions include the following: 1. Whether TJX had an obligation to secure cardholder information in its possession or control; 2. Whether TJX failed to safeguard cardholder information adequately; 3. Whether TJX impermissibly stored customer data on its servers in Framingham, Massachusetts; 4. Whether TJX owed class members a duty or a contractual obligation which it breached; 5. Whether TJX’s conduct constituted an actionable breach of its duties or contractual obligations; 6. Whether TJX’s conduct violated Chapter 93A of Massachusetts General Laws; and 7. Whether class members suffered injury as a result of TJX’s conduct.

knowledgeable and actively involved. *Danny Attenborough, et al., v. Constr. and Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (SDNY 2006).

The representative Plaintiffs here have no conflict with members of the class. The representative Plaintiffs and each member of the proposed class have a strong common interest in establishing TJX's liability and receiving fair compensation. The proposed class plaintiffs are credible. The representative Plaintiffs have demonstrated knowledgeable of the case and are actively involved with a commitment of management time and expense to this litigation. In fact, the banking associations and their members have raised approximately \$500,000 for the expenses of this litigation. Forte Decl. ¶6. See Declaration of Lindsey Pinkham, ¶¶4-6;<sup>15</sup> Declaration of Chris Pinkham, ¶¶4-6.<sup>16</sup> Plaintiffs' claims are aligned with the interests of the absent members of the class and the claims will be prosecuted with diligence and without conflicts.

There is no issue as to the adequacy of class counsel. Under Rule 23g, jointly serving class counsel for the representative Plaintiffs have extensive experience in prosecuting class actions and in representing financial institutions such as the representative Plaintiffs and the class members. Champlin Decl. Ex. 23-24.

**B. Certification is Warranted under Rule 23(b)(3)**

Once the requirements of 23(a) are satisfied, Rule 23(b)(3) permits the maintenance of a class action if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently

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<sup>15</sup> Attached to Champlin Decl. as Ex. 21.

<sup>16</sup> Attached to Champlin Decl. as Ex.22.

adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Both requirements of Rule 23(b)(3) are satisfied in this action.

**1. Common Issues Predominate**

“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2250, 38 L.Ed. 2d 689, 712 (1997). “Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.” *Smilow v. S.W. Bell Mobile Sys.*, 323 F.3d 32, 39 (1<sup>st</sup> Cir. 2003). The common issues need not be dispositive of the entire litigation.

As set forth above, class members’ claims involve numerous common issues of law and fact. The overriding issues in this litigation – TJX’s obligations to protect nonpublic personal data and TJX’s failure to fulfill its obligations as well as the unfair and deceptive character of TJX’s tortious conduct – are common to each and every class member. The common issues of liability and the legal remedies available to class members overwhelmingly dominate this action.

The laws governing class members’ claims do not create the type of individual issues that would negate predominance. Likewise, predominance is not defeated by any individualized determinations regarding damages.

**a. The Legal Principles Governing Class Members’ Claims Do Not Create Individual Issues That Destroy Predominance**

In determining the applicable law, this Court must apply the conflict of law rules of Massachusetts. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477, 1480 (1941). Massachusetts utilizes a “functional choice-of-law approach”. *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631, 473 N.E.2d

662, 668 (Mass. 1985). The First Circuit has held, “Massachusetts’ approach to choice of law is ““explicitly guided by the Restatement (Second) of Conflicts of Laws (1971).”” *First Marblehead Corp. v. House*, 473 F.3d 1, 9 (1<sup>st</sup> Cir. 2006) quoting *Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 74 (1<sup>st</sup> Cir. 2006)(quoting *Clarendon Nat. Ins. Co. v. Arbella Mut. Ins. Co.*, 60 Mass.App.Ct. 492, 496, 803 N.E.2d 750, 752 (Mass.App.Ct. 2004).

Section 6 contains two alternative provisions, the first of which directs that “[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.” The second provision enumerates the relevant factors where no statutory directive exists.<sup>17</sup>

**(1) Because only one state’s law applies to the breach of contract claim, common issues predominate regarding the breach of contract claims**

The contracts at issue consist of the two Merchant Agreements between TJX and Fifth Third, which incorporate the Operating Regulations of Visa and MasterCard. Each of these contracts will be interpreted under only a single state’s law. Further simplifying this analysis, Massachusetts recognizes choice of law provisions. *See Stagecoach Transp., Inc. v. Shuttle, Inc.*, 50 Mass.App.Ct. 812, 818, 741 N.E.2d 862, 867 (Mass.App. Ct. 2001). Here, with the exception of the Visa Operating Regulations, the relevant agreements contain choice of law clauses: the Merchant Agreements (Ohio) and the MasterCard Operating Regulations (New York). Champlin Decl. Ex. 25.

The Visa Operating Regulations, which control over the Merchant Agreements, do not have a choice of law provision. “In the absence of an effective choice of law by

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<sup>17</sup>The factors are (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; and (f) certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied.

the parties,” the following factors should be considered “in applying the principles of § 6 to determine the law applicable to an issue:”

(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Restatement (Second) of Conflict of Laws § 188 (1971). This Court discussed these factors at length in *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 188 F.Supp.2d 115, 120-22 (D.Mass 2002):

Among these factors, the place of negotiating and place of contracting are the least significant....

In the Court’s view, the dispositive factor in this case is the place of performance. Here, as previously discussed, Daynard was to provide services in Massachusetts. No matter where the parties were when they negotiated and concluded the contract, it must have been assumed that Daynard would work in Massachusetts....

The needs of a system of interstate commerce include flexibility, predictability, and certainty, as well as fairness of interpretation, in contracting.... Looking to the law of the place where services are to be provided, instead of the place where the contract was formed, better meets the needs of an interstate system because where the services are provided bears a closer relationship to the totality of the parties’ expectations than does the merely fortuitous location of execution.

Id. at 120-22.

To the extent a choice of law provision does not control, the Restatement factors counsel the application of Massachusetts law. TJX has its headquarters in Massachusetts, the servers from which cardholder data were accessed were located in Massachusetts, and TJX’s compliance or noncompliance with the agreements occurred in Massachusetts.<sup>18</sup>

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<sup>18</sup> Should the Court determine that the laws of the subject states apply to class members’ breach of contract claims, common questions would still predominate and the breach of contract claim should be certified. See *Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 694 (N.D. Ga. 1983).

Most importantly, the agreements in this case likely are governed by the legal principles of a single state. There are only three possible states that could apply (Massachusetts, Ohio, or New York), and these laws do not differ materially for the purposes of Plaintiffs' breach of contract claim. *See, e.g., Rae v. Air-Speed, Inc.*, 435 N.E.2d 628, 632-33 (Mass. 1982) (adopting Restatement (Second) of Contracts § 302); *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 521 N.E.2d 780, 784 (Ohio 1988)(same); *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 485 N.E.2d 208, 211-12 (N.Y. 1985) (same). Accordingly, issues regarding TJX's obligations under the agreements, TJX's breach of these agreements, and class members' right of recovery predominate over any other issues.

**(2) Massachusetts Law Governs the Unfair and Deceptive Trade Practices, Negligence and Negligent Misrepresentation Claims**

**(a) Massachusetts Has Directed the Application of Chapter 93A**

The Massachusetts legislature has defined the range of application of Section 11 of 93A:

No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth.

Chapter 93A of the General Laws of Massachusetts is not limited to intrastate activities. Rather, Ch. 93A applies to out of state defendants whose conduct injures Massachusetts residents as well as to the conduct of instate defendants who injure those who reside outside of Massachusetts. *See, e.g., Clinton Hosp. Ass'n v. the Corson Group, Inc.*, 907 F.2d 1260, 1264-66 (1<sup>st</sup> Cir. 1990); *Makino, U.S.A., Inc. v. Metlife Capital Credit Corp.*, 25 Mass.App.Ct. 302, 309-11 518 N.E.2d 519, 522-24 (Mass. App. Ct.

1988). Chapter 93A “is a comprehensive statute for the regulation of consumer and business transactions” which “creates...substantive rights and provides...procedural devices for the enforcement of those rights.” *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 766, 407 N.E.2d 297, 301 (Mass. 1980), quoting *Stanley v. Westwood Auto, Inc.* 366 Mass. 688, 693, 322 N.E. 2d 768 (1975). The fundamental purpose of this statute is to protect the public and businesses from deceptive or unfair trade practices and to provide compensation for injuries resulting from those wrongful acts.

In this case, TJX’s principal place of business is located in Framingham, Massachusetts. The TJX corporate data center is likewise in Framingham. The TJX servers, which are located in the corporate data center, are the central computers where all store transactions are processed. TJX stores connect via satellite to the TJX corporate data center to transmit credit card transaction information to the servers. ATW Report at 24. The attackers likewise connected to the TJX servers located in Framingham. ATW Report at 11. As a result of TJX’s conduct, data was taken in Massachusetts which immediately caused the destruction or diminution of class members’ property interests. Lisker Decl. ¶¶52-53. The destruction or diminution of class members’ property interest occurred in Massachusetts and, accordingly, class members’ injuries were sustained there. Based on these facts, the unfair and deceptive acts of TJX took place and had effect primarily and substantially within the Commonwealth of Massachusetts. *Kuwaiti Danish Computer Co. v. Digital Equip. Corp.*, 438 Mass. 459, 473-74, 781 N.E.2d 787, 799 (Mass. 2003).

**(b) The Factors in Section 6(2) of the Restatement (Second) of Conflict of Laws Likewise Point to Massachusetts Law**

The factors set forth in the Restatement (Second) of Conflicts of Laws also indicate that Massachusetts law should be applied to the Ch.93A, negligence, and negligent misrepresentation claims. Because the conduct at issue occurred in Massachusetts, and class members were injured in Massachusetts,<sup>19</sup> the law of Massachusetts necessarily governs the unfair trade practice, negligence and negligent misrepresentation claims. As the Restatement notes, “a state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there.” Restatement (Second) of Conflicts of Laws § 145 cmt. d (1971) “Subject only to rare exceptions, the local law of the state where conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor’s conduct was entitled to legal protection.” *Id.* No factor compels application of any other state’s laws.

The factors enumerated in Section 6(2) likewise point to the application of Massachusetts law. The general purposes and policies underlying the Massachusetts’ unfair and deceptive trade practice, negligence and negligent misrepresentation principles support application of Massachusetts law. As noted in the preceding section, Chapter 93A “is a comprehensive statute for the regulation of consumer and business transactions” which “creates...substantive rights and provides...procedural devices for the enforcement of those rights.” *Purity*, 380 Mass. at 766, 407 N.E.2d at 301. No other state has the same as or a superior interest to Massachusetts in requiring TJX to provide

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<sup>19</sup> Even if class members’ injuries had occurred in the state of their principal place of business, Massachusetts would still have the most compelling interest. As the Restatement makes clear, an economic injury rather than an injury to person -- where the State may ultimately bear the burden of loss -- lessens the weight afforded this factor. See Restatement (Second) of Conflict of Laws § 145 cmt. E-f.

adequate data security. Causes of action based on tort law generally, including negligence and negligent misrepresentation, seek to both deter tortious conduct and to provide compensation for injured victims. *See* Restatement (Second) of Conflict of Laws § 145 cmt. c (1971). Application of Massachusetts law permits protection of its interest in deterring wrongful conduct in Massachusetts, which is also an important purpose underlying Chapter 93A. These principles will not frustrate or conflict with the aims of any other state in providing such protection and compensation.<sup>20</sup>

The location of each class member's principal place of business or state of incorporation is simply background information with no significant relationship to the class member's claims. Massachusetts – the State where the Defendants' wrongful conduct occurred and where class members suffered injury -- has the most significant interest in the claims for unfair and deceptive trade practices, negligence and negligent misrepresentation claims at issue in this case. Applying Massachusetts law will be as easy or easier than applying any others state's laws and will best promote certainty, predictability and uniformity of result.

This Court may constitutionally apply Massachusetts law to class members' claims because Massachusetts has a "significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S.Ct. 633, 640 (1981). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22, 105 S. Ct. 2965, 2979 (1985). Massachusetts has a compelling interest in the outcome of this litigation.

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<sup>20</sup> To the extent TJX had expectations regarding the law to be applied to its negligence and unfair practices, they would have expected or would at least not be unfairly surprised by the application of Massachusetts law.

Given the multiplicity of common factual and legal questions and the applicability of Massachusetts law to class members' unfair trade practice, negligence and negligent misrepresentation claims, common issues predominate as to each of these claims.

**b. Individual Issues Relating to Damages Would Not Defeat Predominance**

As set forth above, common questions clearly predominate regarding liability issues. While there may be some individual issues regarding proof of damages, "First Circuit precedent counsels strongly against denying certification merely because damages may vary." *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 (D. Me. 2006). When "common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." *Smilow*, 323 F.3d at 40. *See also Relafen*, 221 F.R.D. at 279; *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) cert. denied, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed. 2d 791 (1978) ("[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate.").

As set forth in Visa's testimony and report, a methodology for calculating fraud damages is available to calculate damages on an aggregate basis<sup>21</sup>. The opinion of Plaintiffs' Expert Lisker also demonstrates that the costs for reissuance and/or monitoring can be determined for all class members. Lisker Decl. ¶¶62-63. Accordingly, all of the

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<sup>21</sup> The Court in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 (D. Me. 2006) recently addressed the appropriateness of aggregate damage awards:

[Under an aggregate award] approach, the jury determines the entire damage to the class without deciding how much each individual class member is to receive. Allocation of the award is made later, administratively, upon the submission of claims, and often according to a formula. *See generally* 3 *Conte & Newberg*, *supra*, § 10:17. Judge Weinstein recently canvassed the authorities on this approach and found it permissible. *Schwab v. Philip Morris USA, Inc.*, No. CV 04-1945, 2005 WL 3032556, at \*5-9 (E.D.N.Y. Nov. 14, 2005).

categories of damage incurred by the class members as a result of TJX's wrongful conduct can be quantified on an aggregate basis.

**2. A Class Action is Superior to Individual Adjudication**

**(a) Superiority is Present**

Resolution of the claims in this case on a class-wide basis is far “superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). There is no feasible alternative for trying class member claims that is superior to a class action. Here many banks simply would not have the economic incentive to litigate claims against TJX. If these cases were tried separately, the same evidence on liability would have to be presented numerous times, resulting in judicial inefficiency and excessive expenses. As Wright and Miller explain: “[I]f a comparative evaluation of other procedures reveals no other realistic possibilities, this portion of Rule 23(b)(3) has been satisfied.” C. Wright, A Miller, Federal Practice 3d. §1779 (2005).

Absent the class procedure, most class members would be effectively foreclosed from pressing their claims; individual litigation would not be cost effective. As this Court previously noted in *Mowbray*, the operative inquiry is not whether class members could afford individual litigation:

I do not agree that Rule 23(b)(3) class actions are available only to the poor or in the circumstances where numerous small claims would otherwise go unredressed. They are available whenever the prerequisites of Rule 23(a) are met, common issues predominate, and individual actions would be unduly burdensome on either the courts or the parties.

*Mowbray v. Waste Mgmt. Holdings, Inc.*, 189 F.R.D. 194, 201 (D. Mass. 1999)(quoting *Fulco v. Continental Cablevision, Inc.*, CIV. A. No. 89-1342-S, 1990 WL 120688, at \*4 1990 U.S. Dist. Lexis 11393, \*9 (D. Mass. June 19, 1990)). The Court refused “to deny

certification simply because the prospective plaintiffs could afford individual litigation.”

*Id.* Class litigation will result in more efficient and less costly resolution of this controversy and is, accordingly, far superior to individual litigation, which would be unduly burdensome on the Courts and the parties.

**(b) Trial of the Class Claims Would Be Manageable**

Defendants’ liability is amenable to common, class-wide proof. There are no difficulties likely to be encountered in the management of this case that cannot be resolved or that outweigh the clear benefit of maintaining this case as a class action.

Should any management difficulties arise, “[t]here are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action....” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001), cert. denied, 576 U.S. 917, 122 S.Ct. 2382, 153 L.Ed. 2d 201 (2002).<sup>22</sup> This Court has concluded in *In re Relafen Antitrust Litig.*, 221 F.R.D. at 288, that “any damages-related difficulties could be more appropriately dealt with as they arose,” citing *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1<sup>st</sup> Cir. 1972) and *Visa Check/MasterMoney*, 280 F.3d at 140-41.

**C. Certification For Injunctive Relief is Also Warranted under Rule 23(b)(2)**

Plaintiffs including the Bank Associations seek certification pursuant to Rule 23(b)(2) for injunctive relief. A class can be certified pursuant to Rule 23(b)(2) where “the party opposing the class has acted or refused to act on grounds that apply generally

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<sup>22</sup>These management tools include: “(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.” *In re Visa Check*, 280 F.3d at 141. See also *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11<sup>th</sup> Cir. 2004) cert. denied 544 U.S. 1061, 125 S.Ct. 2523, 161 L.Ed. 2d 114 (2005) (citing *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 699 n.28 (N.D. Ga. 2003)(quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001)); *Tardiff v. Knox County*, 365 F.3d 1, 6-7 (1<sup>st</sup> Cir. 2004)

to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” TJX has acted in precisely the same manner toward all class members and each class member will benefit from injunctive relief. The Bank Associations are acting in a representative capacity for their members in seeking injunctive relief. As investigators have determined, TJX remains at risk for additional security breaches. Therefore, the threat of injury to class members continues. The injunctive relief sought is common to all class members. Accordingly, certification pursuant to 23(b)(2) is appropriate.

#### **IV. NOTICE TO THE CLASS**

Class members can be identified through the data readily available. Lisker Decl. ¶ 67. Notice to the class can therefore be achieved by mail or other means of communication to each member of the class and supplemented by publication to address any issues created by incorrect or incomplete data and other similar issues

#### **V. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for class certification.

MASSACHUSETTS BANKERS ASSOCIATION AMERIFIRST BANK  
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MAINE ASSOCIATION OF COMMUNITY  
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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on October 26, 2007.

/s/ William S. Fish, Jr.  
William S. Fish, Jr.