

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NEW ALBERTSON’S, INC., an Ohio
corporation, and ALBERTSON’S LLC,
a Delaware limited liability company,

Plaintiffs,

vs.

MASTERCARD INTERNATIONAL,
INC., a Delaware corporation, and
MASTERCARD INCORPORATED, a
Delaware corporation,

Defendants.

Case No. CV01-17-04410

ORDER DENYING MOTION TO COMPEL
AND TO VACATE OR CONTINUE ALL
CASE DEADLINES

Defendants MasterCard International, Inc., and MasterCard Incorporated (“MasterCard”) have filed a Motion to Compel documents and testimony from non-party Supervalu, Inc. (“Supervalu”) and from Plaintiffs New Albertson’s Inc. and Albertson’s LLC (“Albertson’s”). As part of the motion MasterCard asks the Court to vacate and/or continue all case deadlines.¹ The motion was heard by the Court on May 24, 2019, at which time the Court heard oral argument from the parties’ counsel and from counsel for non-party Supervalu. The Court took the matter under advisement at that time to further consider the matter, including

¹ The Court has reviewed all corresponding documents with regard to this Motion, including but not limited to: MasterCard’s Mo. to Compel; MIS of Mo. to Compel; Memo in Opposition to Mo. to Compel Docs. and Testimony and to vacate and/or reset deadlines; Opposition to Defendant’s Mo. to Compel Production of Documents; Declaration of Kim Myrdahl in Opposition to Mo. to Compel; Declaration of David England in Opposition to Mo. to Compel; Declaration of Paul Hofley in Opposition to Mo. to Compel; Declaration of Richard Collison in Opposition to Mo. to Compel; Opposition to Mo. to Compel (Supervalu); Declaration of Seth Harrington in Opposition to Mo. to Compel; MasterCard’s reply to nonparty Supervalu’s opposition to Defendant’s Mo. to Compel Documents and Testimony... ; and Declaration of Audra S. Kerby in support of MasterCard’s Reply to Supervalu’s Opposition to Defendant’s Mo. to Compel.

reviewing *in camera* notes taken by an Albertson's employee during the investigation Supervalu and Albertson's conducted of the intrusion into the IT system that underlies this case.

For the reasons stated below, the Court denies MasterCard's motion to compel. The case deadlines have already been modified by the Court and are addressed in a separate order.

I. BACKGROUND AND STANDARD OF REVIEW

The matter has been the subject of several prior motions before Judge Greenwood and the basic facts of the matter have been well described by him in his rulings. The Court will not repeat those here.

Control of discovery is within the trial court's discretion. *Wechsler v. Wechsler*, 162 Idaho 900, 407 P.3s 214, 223 (2017); *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 360, 956 P.2d 674, 677 (1998). The test to determine whether a trial court has abused its discretion ... consists of three parts asking whether the trial court: "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." *Parks v. Safeco Ins. Co.*, 160 Idaho 556, 562, 376 P.3d 760, 766 (2016) (quoting *Marek v. Lawrence*, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012)).

The legal standards applicable to the discovery motions are stated in the Idaho Rules of Civil Procedure ("IRCP"). The scope of discovery is specifically governed by IRCP 26(b)(1). Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter ... including the existence, description... and

location of ... persons having knowledge of any discoverable matter. For good cause shown, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” IRCP 26(b).

Interpretation of Rule 26(b) is guided by IRCP 1(b). Rule 1(b) provides in part that the rules of civil procedure are to be construed and administered to “secure the just, speedy and inexpensive determination of every action and proceeding.” IRCP 1(b).

MasterCard’s motion to compel addresses Supervalu and Albertson’s objections to certain MasterCard discovery directed to the internal investigation Supervalu and Albertson’s conducted of the intrusion into Supervalu’s IT network in the summer and fall of 2014 independent of the investigation performed by the separately engaged security firm, SecurityMetrics. For purposes of this decision, this investigation will be referred to as the “Internal Investigation.”

The principal specific discovery requests at issue are (1) MasterCard’s August 30, 2018 subpoena duces tecum to Supervalu seeking documents, things and testimony regarding the intrusion and Supervalu and Albertson’s own investigation of it; (2) certain topics identified in MasterCard’s IRCP Rule 30(b)(6) deposition notice directed to Supervalu; and (3) Albertson’s IRCP Rule 30(b)(6) designee’s (Mark Bates) refusal to answer questions at the direction of legal counsel. MasterCard states that the categories of information at issue within the discovery requests are: (1) underlying data regarding the breach; (2) investigation work product; (3) documents concerning the nature, extent and effect of the intrusion; and (4) data

preservation or deletion of information. *See MasterCard Memo In Support of Motion to Compel*, p. 10-11.

Albertson's and Supervalu object to the discovery at issue, alleging the information requested is subject to attorney/client and work product privileges and is not reasonably calculated to lead to the discovery of admissible evidence. They further contend that all original source data regarding the breach has been produced and was available to SecurityMetrics. They contend that any data not available was attributable to the inherent functionality of the system, not due to any failure to preserve information. The Court addresses each of these categories below.

II. DISCUSSION

A. Supervalu and Albertson's Have Established the Internal Investigation Was Privileged.

Supervalu and Albertson's claim the Internal Investigation was conducted at the direction of legal counsel. They assert they held a common interest in the investigation as such term is used in IRE Rule 502(b). They assert the conduct, communications within the Internal Investigation and the resultant reports are protected from discovery under the work product and attorney/client privileges. They further claim that their contractor, Dell Secureworks (Dell), is a non-testifying expert under IRCP 26(b)(4)(D).

The record reflects that Supervalu's internal investigation of the intrusion commenced on July 14, 2014. On July 24, 2014, Supervalu management retained Dell. On July 28, 2014, Dell reported that samples of the malware showed capability of targeting payment card data. This was a new and significant finding, causing Supervalu to retain legal counsel experienced in data breach response. On July 29, 2014, Supervalu retained Seth C. Harrington of the

Boston firm Ropes and Gray (Mr. Harrington later joined the Boston office of Orrick, Harrington and Sutcliffe). Thereafter, the Internal Investigation was directed by Mr. Harrington and his law firm colleagues. Supervalu terminated its prior direct engagement of Dell and Mr. Harrington's firm in turn immediately retained Dell.

On August 1, 2014, Supervalu provided notice directed to MasterCard (through an intermediary named First Data) of the intrusion. MasterCard Rules required a merchant that discovered an intrusion to retain a "PFI"² to conduct a complete investigation of the intrusion on behalf of the Card Brands and provide a report to MasterCard. On August 5, 2014, MasterCard in fact requested that Supervalu retain the required PFI to conduct an investigation on behalf of the Card Brands. Dell was not qualified as a PFI. On August 11, 2014, Supervalu retained SecurityMetrics (which was and is a PFI) to conduct an investigation for the benefit of the Card Brands. The SecurityMetrics retention agreement provided that the investigation would not be controlled or directed in any way by Supervalu. The SecurityMetrics investigation lasted for more than a year and resulted in a report specific to Albertson's that was hundreds of pages in length. MasterCard's assessments on Albertson's at issue in this case were based on the SecurityMetrics reports.

On August 18, 2014, Supervalu and Albertson's signed a joint interest agreement documenting their common interest in the intrusion which had affected both Supervalu and Albertson's stores.³ By way of this letter, they purported to document August 1, 2014 as the commencement date for their Common Interest Agreement.

² A "PFI" is a firm approved to perform data breach investigations by the Payment Card Industry Security Standards Council known as a PCI.

³ As of 2014, Supervalu provided numerous IT services for Albertson's. As of 2014, Albertson's and Supervalu both had independent retail operations. The intrusions at issue therefore had implications for Supervalu both as an operator and as a service provider to Albertson's.

MasterCard argues that under these facts, Albertson's and Supervalu cannot claim a work product or attorney/client privilege over the Dell investigation. MasterCard maintains that the Dell investigation had an independent business purpose distinct from any anticipation of potential litigation. MasterCard argues Albertson's and Supervalu cannot provide a privilege cloak over an investigation that they would have done regardless of the threat of litigation.

Whether a privilege is properly claimed is a fact intensive, case-by-case inquiry. Based on this Court's careful review of the extensive record submitted for review, the Court finds that Supervalu and Albertson's retention and work with Dell after August 1, 2014 is protected by the work product and attorney/client privileges. Supervalu and Albertson's knew of the high potential for litigation as of late July. They acted diligently and carefully to document and honor the privileges from that point forward. The Court is mindful that a party cannot protect an otherwise discoverable fact from discovery by retrospectively (or as a matter of pretext) claiming privilege. Based on the Court's review of the record, the Court finds that Supervalu and Albertson's properly claimed and observed the privileges with respect to the Dell retention and that Supervalu and Albertsons acted under a common interest as defined by IRE 502(b) after August 1, 2014 with respect to the Dell retention and discussions with Dell.

Supervalu did retain Dell initially on July 24, 2014 before it had retained outside counsel. Once counsel was retained five days later, Supervalu and its outside counsel acted promptly to continue the investigation under the direction of outside counsel. It is noteworthy that outside counsel is experienced in data breach cases and did take on an active role in directing the ongoing investigation. The record reflects that Supervalu's decision to retain

outside counsel was based on gaining knowledge of a new and material fact on July 28, 2014. Supervalu engaged outside counsel the next day for the purpose of assisting it in conducting an investigation knowing of the likelihood of litigation not only with one or more of the Card Brands, but also with class action lawsuits by cardholders. The record, as a whole, does not support a contention that Supervalu engaged outside counsel to shield otherwise discoverable facts or principally for a business purpose.

B. MasterCard Has Not Established Substantial Need.

Where a work product privilege is claimed, a party can gain access to information protected by the privilege upon a showing of substantial need. See IRCP Rule 26(b)(3)(A) and 26(b)(4)(D). As noted above, MasterCard suggest it needs access to four categories of information that are implicated in Supervalu's and Albertson's claim of privilege as follows: (1) underlying data regarding the breach; (2) investigation work product; (3) documents concerning the nature, extent and effect of the intrusion; and (4) data preservation or deletion of information. For the reasons noted above, Supervalu's and Albertson's investigation work product on and after August 1, 2014 is privileged. The Court will now address the other three categories.

With regard to categories (1) and (4) above, MasterCard suggests Dell (the contractor first retained by Supervalu and then by legal counsel) may have had access to Supervalu and/or Albertson's information technology systems not enjoyed by SecurityMetrics (the PFI firm that performed the analysis MasterCard used in imposing the Assessments). MasterCard points to what appears to be an isolated comment in the SecurityMetrics report that "Security Event logs are not available on the re-created ePO system prior to September 17, 2014 07:21:15 MDT.

Security Event logs are not available on the DB system prior to September 18, 2014 at 05:17:34 MDT. As a result, it is impossible to determine if any systems made successful network logins to the ePO or DB systems during the time that the centralized malware log existed on the systems... .” See April 12, 2019 Dempsey Declaration, Exh. 10.

In isolation, this reference could be interpreted to suggest that Dell had more access to Supervalu systems than did SecurityMetrics or that Supervalu inappropriately lost meaningful data. The record does not support either suggestion. The record reflects that SecurityMetrics had the same or greater access to Supervalu’s systems than did Dell and that SecurityMetrics received all of the information and access it requested (*See e.g., deposition of Eric Lake attached to Harrington Declaration*, Exh. 1, (1:19-25, 216: 4-24; 295: 15-21). The security logs at issue were not available on the imaged system provided to Dell and SecurityMetrics because they were not maintained on the native system as a matter of routine; they were not lost or deleted as a matter related to this litigation or the intrusions. The Court cannot find anything sinister in the fact these logs were not available.

Moreover, Supervalu has provided detailed declarations establishing that all such source data has been provided. In addition, as noted above, the deposition of the lead investigator on the SecurityMetrics team (Eric Lake) reveals that Security Metrics received all of the information they requested.

As a result, the Court does not find cause to allow MasterCard full discovery of the Supervalu and Albertson’s otherwise privileged Internal Investigation on or after August 1, 2014 based on the assertion that Dell might have had access to information not

available to Security Metrics or that critical data was lost or not properly preserved (MasterCard's category 4 information).

As to category 3 information,⁴ the Court is again mindful that a party cannot shield an otherwise discoverable fact from discovery by cloaking it with privilege. Albertson's contends (and Supervalu agrees) that MasterCard calculated and imposed the Assessments based solely upon the Security Metrics report. Albertson's argues that one of the reasons the Assessments were improper is because SecurityMetrics found no evidence of exfiltration of customer card data. Albertson's argues MasterCard having made the Assessments knowing of this finding, MasterCard cannot now seek to justify the Assessments based on actual (but currently unknown) evidence of exfiltration. Albertson's therefore argues that MasterCard is not entitled to discovery of the Supervalu/Albertson's/Dell investigation to see if that investigation revealed evidence of exfiltration not discovered by Security Metrics.

The Court notes that Albertson's seeks to be equitably subrogated to the defenses Citicorp may have had to the Assessments. As a part of such claim, Albertson's would have to show that it would be inequitable for MasterCard to retain funds it charged to Citicorp (as Citicorp passes on to Albertson's). Actual evidence of exfiltration might have some relevance to this claim (at least at the discovery stage), notwithstanding that MasterCard did not know of any such evidence when it imposed the Assessments. Moreover, the Court is of the opinion that if Supervalu or Albertson's had evidence of the fact of actual exfiltration and did not disclose this to SecurityMetrics, Supervalu could not automatically refuse to disclose such fact

⁴ Documents concerning actual or potential exfiltration of payment card data, the capabilities of the malware, the types and extent of data captured or potentially captured by malware, and the ability of the data captured or potentially captured by the malware to be used in subsequent fraudulent transaction or to otherwise create counterfeit cards. *MasterCard Brief* at p. 9-10.

by asserting privilege. In this regard, the Court tries to distinguish between protected analysis of facts and the underlying facts being analyzed. Given the complexity of the technology issues presented, the Court is not comfortable precluding all discovery into the Internal Investigation if that investigation identified a material fact regarding exfiltration.

The Court therefore finds itself in the position of exercising its discretion to balance a number of facts. Unless the information is a specific event or fact (rather than an analysis of or an opinion of an expert regarding the potential existence of a fact or circumstance), the information is privileged. The information is potentially relevant to Albertson's equitable claim, but only tangentially so because MasterCard's calculation of Assessments is not being challenged based on unknown information, but based on the information used by MasterCard (i.e., the SecurityMetrics report). In addition, it would appear unlikely that discovery will actually lead to discovery of such a fact when there is currently no evidence of such fact in the record notwithstanding the thorough SecurityMetrics review and otherwise extensive discovery in this case. In addition, the Court must consider the fact that this matter is only now being brought to the Court's attention although the dispute has been known for months.⁵

In balancing all of the issues presented, this Court concludes that MasterCard has not established a substantial need for the information. If the privileges did not apply, this Court would have some concern regarding the discoverability of the information based on the fact that MasterCard imposed the Assessments based on SecurityMetrics assessment. If this case were in the early stages and the privileges did not apply, the Court would likely allow some

⁵ The Court notes that this issue arose in Mark Bates' deposition taken on September 26, 2018, yet it was not been raised with the Court until April 15, 2019, ninety days prior to trial. On the other hand, the Court notes that Mastercard was pursuing an interlocutory appeal with the approval of Judge Greenwood for the first couple of months of 2019.

discovery into these issues. Because, however, the information at issues is privileged, the standard is “substantial need” not “reasonably calculated to lead to” and thus, the Court will not allow the discovery.

Notwithstanding this finding, this Court would be concerned if Supervalu and Albertson’s know of significant exfiltration and have not disclosed it. Based on the extensive record, the Court believes this is unlikely. As an intermediate measure, the Court did order that Albertson’s produce for *in camera* review notes taken by Albertson’s chief information officer, Mark Bates, during the almost daily calls among Supervalu, Albertson’s and Dell. MasterCard deposed Mr. Bates and he was instructed by counsel not to answer questions addressing the Internal Investigation. Albertson’s has also asserted Mr. Bates’ notes are privileged and do not contain relevant information (for the reasons noted above).

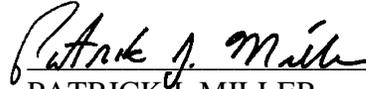
After the hearing on April 24, Albertson’s produced Mr. Bates’ notes for *in camera* inspection. The Court has reviewed those notes. Though containing technical terms and being in summary form (as one would expect of “notes”), the notes do reflect the action involved of legal counsel. The notes do not reflect the existence of facts suggesting exfiltration has occurred. In other words, the notes do not contain any obvious suggestion that Supervalu or Albertson’s has undertaken to assert privilege over facts to cloak them from the light of day.

III. CONCLUSION

For the reasons stated herein, the Court denies MasterCard’s Motion to Compel. The Court, in the exercise of its discretion, based on a detailed review of the record, finds the requested information has either been produced or is privileged. On the facts presented,

MasterCard has not established substantial need to overcome the privilege or that the privilege has been waived.

DATED: Signed: 5/31/2019 04:27 PM



PATRICK J. MILLER
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the May 31, 2019 day of June, 2019, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

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By PHIL MCGRANE
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