IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

McGann, et al., Plaintiffs, vs. SCHNUCK MARKETS, INC., a Missouri corporation, Defendant.	)	Cause No. 1322-CC00800 JURY TRIAL DEMANDED

MOTION TO INTERVENE AS A MATTER OF RIGHT AND INITIATE DISCOVERY IN REGARD TO THE CLASS ACTION SETTLEMENT

Applicant Ardis King ("Applicant"), by and through her attorneys, hereby moves pursuant to Rule 52.12 of the Missouri Rules of Civil Procedure to intervene in this action as a matter of right, and in support thereof states as follows:

BACKGROUND

There are four federal class actions currently pending against Schnucks: *Domiano v Schnuck Markets, Inc.*, No. 13-cv-683 (E.D. Mo.); *Akelaitis v. Schnuck Markets, Inc.*, No. 13-cv-50142 (N.D. Ill.); *Rippy v. Schnuck Markets, Inc.*, No. 13-cv-471 (S.D. Ill.); and *Atteberry v. Schnuck Markets, Inc.*, No. 13-cv-2112 (C.D. Ill.). Each of these actions concerns allegations that Defendant Schnucks' inadequate security protocols recklessly allowed unknown persons (the "defrauders") to embed a computer code into Schnucks' payment system that captured the magnetic strip data from customers' credit cards and debit cards, allowing the defrauders to obtain sensitive, private financial information from thousands of Schnucks' customers, who

have been and continue to be subjected to actual damages and the continuing danger of identity theft. Applicant is a named Plaintiff in the *Domiano* action, who became a victim of identity theft as a result of the security breach of Defendant's payment system. Applicant suffered actual damages as the result of fraudulent charges to her credit and/or bank account. The fraudulent charges then led to a lack of funds in her account to pay her utility bills, which resulted in two weeks without electricity in her home.

Each of these federal actions concerns the same series of events and conduct as each other, and as the instant action, and will involve the same evidence and witnesses, except the federal actions make claims under federal laws designed to protect the rights at issue. Judicial economy and the convenience of the parties and witnesses led the federal actions to the Judicial Panel on Multidistrict Litigation, where, as MDL No. 2470, the federal Plaintiffs and Schnucks filed briefs in anticipation of a September 26, 2013 hearing before the MDL panel in Philadelphia, Pennsylvania. Immediately prior to the MDL hearing, on the steps of the courthouse of the United States Court of Appeals for the Third Circuit, the parties to the instant action entered into a putative class action settlement agreement which purports to settle not only the state law claims of the Missouri class members pled in this action, but the claims of Plaintiffs in the federal actions, on behalf of a nationwide class not pled in the instant action, but which is pled in each of the federal actions before the MDL panel.

Efforts by counsel for Plaintiffs in the federal actions to obtain details about the putative settlement from Ben Barnow,[1] counsel for Plaintiffs in this action, were unsuccessful. Counsel for Defendant did give counsel for Applicant a brief overview of the putative settlement:

- the settlement was achieved without the guidance of any third party mediator (e.g., a retired Judge);
- no discovery has been pursued either formally in this case, or even as confirmatory discovery;
- the settlement is capped at $1.3 million for the class, which by Defendant's own estimates numbers approximately 2,400,000 persons, and is available only for class members who provide proof of damages (such as credit card statements) in a claims-made process;
- significantly, however, there is no guarantee that Defendant will pay the class anything, because the $1.3 million is not a fund made available for the benefit of class members and controlled by the Court;
- there is no guarantee that Defendant will do anything to benefit the class, because the settlement contains no injunctive relief requiring an alteration in Defendants' business practices or safeguards (such as a credit monitoring program) on behalf of class members who may not yet have proof of a claim under the settlement, but will release present and

[1] Mr. Barnow was not in Philadelphia to argue before the MDL panel on behalf of any Plaintiff in any case against Defendant, but did use the occasion of the MDL panel hearing to agree to a settlement agreement with Defendant.

future claims of identity theft for which they will have no recourse against Defendant;

- finally, the settlement provides $600,000 in attorneys' fees to Plaintiffs' counsel in the instant action.

Applicant submits that she has an interest in the subject matter of this action, that disposition of this action may impede the ability of the Applicant to protect that interest, and Applicant's interests are not adequately represented by the existing parties. *See* Missouri Rule of Civil Procedure 52.12(a) (providing for intervention as a matter of right).

ARGUMENT

I. APPLICANT'S CLAIMS AND INTEREST IN THE SUBJECT MATTER

The first prong of Missouri Rule of Civil Procedure 52.12(a) permits intervention as a matter of right by a person who has an interest in the subject matter of the litigation. *Ring v. Metropolitan St. Louis Sewer Dist.*, 41 S.W.3d 487, 491 (Mo.App. 2000). This requires that the applicant be concerned in the outcome or result because she has a legal right that will be directly affected thereby. *Prentzler v. Carnahan*, 366 S.W.3d 557, 561-62 (Mo.App. 2012).

The class definition proposed in the instant action is:

> All Missouri residents who made an unauthorized in-store purchase using a credit or debit card at a Schnucks store in Missouri during the period of time that Schnucks' computer systems were compromised.

By this definition, Applicant is a class member: she is a resident of Missouri who made in-store purchases at Schnucks stores in Missouri using her debit or credit

card during the period of time that Schnucks' computer systems were compromised. As a class member, Applicant has legal rights that will be directly and unescapably affected by the instant action and, necessarily, the class-wide settlement.

An "interest" necessary for intervention as a matter of right does not include a mere, consequential, remote, or conjectural possibility of being affected as a result of the action, but must be a direct claim upon the subject matter such that the intervenor will either gain or lose by direct operation of judgment; thus, to intervene as a matter of right, the proposed intervenor's interest in the action must be a direct and immediate claim to, and have its origin in, the demand made or the proceeds sought or prayed by one of the parties to the original action. *Id.* (internal citations and quotations omitted). Not only does Applicant have a direct and immediate claim to the demands made in this action as an absent class member, but Applicant is a Plaintiff in an action pending in federal court in Missouri that has its origin in the same occurrences and operative facts as this action.

Furthermore, the settlement to be proposed does not accurately reflect the benefits to which Applicant feels she is entitled, therefore the settlement's approval will directly harm Applicant's economic interests in this action.

II. THE ACTION MAY IMPEDE APPLICANT'S ABILITY TO PROTECT HER INTERESTS.

If the settlement is approved, Applicant will be economically harmed because the principles of *res judicata* would operate to bar her claims and the claims of others in the federal actions before those claims can be adjudicated. Furthermore, the due process rights of absentee class members may be implicated if they are

bound by a final judgment in a suit where the named plaintiff inadequately represented them. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735-36 (Mo. 2004).

In a class action, it should be ensured that "all diversified class interests and points of view be represented and that those parties that are named represent a truly adverse interest so that issues are actually litigated without collusion." *City of O'Fallon v. Bethman*, 569 S.W.2d 295, 299 (Mo.App. 1978). The rush to settle this action impedes Applicants' ability to protect their interests, as the issues have not been actually litigated, and the circumstances of the settlement leave little doubt that the pursuit of the federal actions before the MDL panel was the driving force behind the putative settlement here. "The rights of absent class members must be protected." *Id.* As Plaintiffs and class members, including Applicant, have had no chance to take discovery and assess the merits of this action, the settlement agreement impedes Applicant's ability to protect their interests. Intervention so that Applicant may initiate discovery and truly protect her rights and the rights of absent class members is therefore necessary, particularly given the obvious lack of third party supervision of the settlement process and the complete lack of effort made by Plaintiffs' counsel to determine the value of the claims sought to be released by the class.

"Because Missouri's Rule 52.08 regarding class actions parallels Federal Rule 23 on class actions, federal interpretations of Rule 23 may be considered in interpreting Rule 52.08." *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142

S.W.3d 729, 736 n. 5 (Mo. 2004); *see also Koehr v. Emmons*, 55 S.W.3d 859, 864 n. 7 (Mo.App. 2001); *Ring v. Metropolitan St. Louis Sewer Dist.*, 41 S.W.3d 487, 490-91 (Mo.App. 2000); *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 378 (Mo.App. 1997). Similarly, "[t]he Federal Rule 24 is essentially the same our Rule 52.12." *Frost v. White*, 778 S.W.2d 670, 673 (Mo.App. 1989) (looking to the federal rule to decide on a motion for intervention). It has been held under Rule 24 that "[b]ecause only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." *Crawford v. Equifax Payment Servs., Inc.,* 201 F.3d 877, 881 (7th Cir. 2000). Denying Applicants' motion for intervention, then, would also impede Applicants' ability to protect their interests. *See Toombs v. Riley*, 591 S.W.2d 235, 236 (Mo.App. 1979) ("The Interest for intervention under amended Rule 52.12(a)(2), therefore, is a practical direction for the disposition of litigation to encompass as many presumptively affected persons as may be compatible with the avoidance of multiple suits and the demands of due process.").

III. APPLICANT IS NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES.

Missouri courts have held that Applicants demonstrating the third standard, that the applicant may be inadequately represented, should support mandatory intervention. *See Alsback v. Bader*, 616 S.W.2d 147, 151 (Mo. App. 1981). The determination of whether a proposed intervenor's interest is adequately represented by an original party to an action usually turns on whether there is an identity or divergence between the proposed intervenor and the party. *Id.*

In this instance, while the Applicant clearly has an interest in the subject matter of this action and the settlement, there exists a divergence between the Applicant and the Plaintiffs in the instant action; their interests are not identical. *See Ring*, 41 S.W.3d at 492 (denying motions to intervene when the court determined unnamed class members' interests and the interests of the named class members were identical).

While the motions to intervene in *Ring* were denied, the case provides a good basis for allowing Applicant to intervene in this instance. The court in *Ring* only evaluated the third requirement for intervention: that the applicant's interests are not adequately represented by the existing parties. *Id.* at 492. In analyzing that requirement, the court assessed whether the named class members adequately represented the class in arriving at the settlement, and then looked to whether the settlement was fair, reasonable and adequate under Missouri law. *Id.*

When determining if a settlement is fair, reasonable, and adequate the court must consider: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members. *Id.*, *citing State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 378 n.6 (Mo.App. 1997).

In *Ring*, the court noted that class counsel had pursued litigation since 1992 (*Ring* was decided in 2000). There was little likelihood, therefore, that the

settlement was produced due to fraud or collusion, as the parties had been vigorously opposed for years. Similarly, the complexity and expense of the litigation weighed in favor of the settlement. In contrast, nothing whatsoever has occurred in the instant action. No answer or response to the complaint has been filed. The parties have not have not initiated discovery. There has been no litigation, no dispute. An inference of collusion or at least the lack of an arm's-length, good faith negotiation is warranted under these circumstances, particularly where Defendant acknowledges a complete lack of third party oversight with regard to the settlement negotiations. Applicant has an interest in initiating discovery and fully litigating her claims, which is clearly divergent from the interest of the Plaintiff here. In the federal action, Applicant has filed a motion for class certification, a motion for appointment as interim class counsel, a motion to restrict Schnucks' communications with class members and sought to expedite the discovery process, as well as initiating, briefing and arguing the consolidation of this litigation before the federal Judicial Panel on Multidistrict Litigation. Schnucks has consistently advocated delay, via filed oppositions to both the motions to appoint interim class counsel and to restrict class member communications, as well as claiming before the MDL panel that there was no need for consolidation due to the imminent settlement in this Court. This Court should find that the existing parties do not adequately represent Applicant's interests.

IV. THE PURPOSE FOR INTERVENTION

Again, because Missouri's Rule 52.08 parallels Federal Rule 23, federal interpretations of Rule 23 may be considered in Missouri actions. "The portions of

Rule 23(d) pertaining to intervention in class actions are intended to strengthen the adequacy of representation of the class." *Sanders v. Jogn Nuveen & Co., Inc.*, 463 F.2d 1075, 1081 (7th Cir. 1972). Rule 52.08(d)(2) likewise permits courts to allow for intervention for the protection of the members of the class or otherwise for the fair conduct of the action. *See State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3 483, 495 n. 11 (Mo. 2003); *State ex rel. Byrd v. Chadwick*, 956 S.W.2d at 383. It appears from every angle that the class is not being adequately represented in this action. Applicant desires to remedy that by intervening and ensuring that class members' claims are fully adjudicated.

As the existing parties in this action do not adequately represent Applicant's interests, it is of the utmost importance that the Court allow her to intervene in order to take discovery in regard to the class action settlement and object to the preliminary approval of the same. A "court should not even give tentative approval to a settlement which is patently unfair or if the court suspects collusion in the negotiation of the settlement." S*tate ex. Rel. Byrd v. Chadwick*, 596 S.W.2d 369, 383 (Mo.App. 1997) (requiring a preliminary examination of the record in order to make a preliminary determination as to whether it appears a settlement class should be tentatively certified). In this instance, because there is no record for the court to examine, it is imperative that discovery be taken in regard to the proposed class action settlement.

WHEREFORE, Applicant requests that this Court enter an order granting the Motion to Intervene and granting leave to Initiate Discovery, and for any such other and further relief as this Court deems appropriate.

Submitted: September 27, 2013

Respectfully Submitted,

ARDIS KING

By: /s/ Matthew H. Armstrong

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CERTIFICATE OF SERVICE

Pursuant to Rule 43.01(c)(1) of the Missouri Rules of Civil Procedure the undersigned hereby certifies that a true and accurate copy of this document was served on all known counsel for all parties in this action via email on September 27, 2013:

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