

Stephen M. Sohmer
A. Michael Stark
SOHMER & STARK
One Passaic Avenue
Fairfield, NJ 07004-3814
(973) 227-7080 Telephone
(973) 227-5775 Facsimile
ssohmer@sohmerstark.com
astark@sohmerstark.com

Counsel for Plaintiffs and the Putative Class

[Additional Counsel Following Signature Page]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**TRICENTURY BANK, a Kansas
Chartered Bank, GREAT SOUTHERN
BANK, a Missouri Chartered Bank,
on behalf of themselves
and all others similarly situated,**

PLAINTIFFS,

v.

**HEARTLAND PAYMENT SYSTEMS, INC.,
a Delaware Corporation,**

DEFENDANT.

Case No. 3:09-cv-00697-FLW-TJB

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

FIRST AMENDED CLASS ACTION COMPLAINT

1. For their claims against defendant Heartland Payment Systems, Inc. (the “Defendant”), whose principal place of business is 90 Nassau Street, Princeton, New Jersey 08542, the plaintiffs TriCentury Bank and Great Southern Bank (hereinafter “Plaintiffs”), whose principal places of business are 3 Century Center, Simpson, Kansas 67478 (TriCentury) and 1451 E. Battlefield, Springfield, Missouri 65804 (Great Southern), state the allegations averred

below upon personal knowledge as to themselves and their own acts, and upon information and belief based upon the investigation of counsel as to all other matters.

NATURE OF THE ACTION

2. Plaintiffs have brought this civil action on behalf of themselves and on behalf of all other similarly situated financial institutions in the United States that (a) have issued branded credit cards and/or debit cards that operate on the MasterCard and/or Visa networks; (b) have issued one or more such cards that have been compromised by a information security breach that occurred at or in Defendant's payment processing systems or environment (the "Security Breach"), and (c) have been, or will be, required to cancel and/or reissue one or more of the compromised cards as a direct result of the Security Breach. The similarly situated financial institutions (the "Class Members") include, without limitation, banks, savings and loans, credit unions and all other financial institutions which issued one or more cards that were compromised by the Security Breach, whether such institutions are chartered or organized under federal or state law.

3. Plaintiffs bring this action, on behalf of themselves and the Class Members, to recover expenses that have been, or will be, incurred to cancel and/or reissue the compromised cards as a direct and proximate result of the Security Breach. The number of compromised cards is substantial and has been reported to be as large as One Hundred Million (100,000,000) credit cards and/or debit cards. The expenses that will be incurred by the Class Members to cancel and/or reissue the compromised cards will require the Class Members to expend, in the aggregate, millions of dollars to protect their cards and cardholders from card fraud and abuse.

JURISDICTION AND VENUE

4. Plaintiff TriCentury Bank is a state chartered bank incorporated and chartered under the laws of the State of Kansas with its principal place of business in the State of Kansas.

5. Plaintiff Great Southern Bank is a state chartered bank incorporated and chartered under the laws of the State of Missouri with its principal place of business in the State of Missouri.

6. Defendant is a corporation incorporated under the laws of the State of Delaware with its principal place of business in New Jersey.

7. This Court has subject matter jurisdiction over the claims asserted herein pursuant to 28 U.S.C. § 1332(d)(2) because the matter in controversy exceeds Five Million Dollars (\$5,000,000) exclusive of interest and costs, at least one Class Member (including Plaintiffs) have citizenship that is diverse from that of Defendant, and there are more than one hundred (100) Class Members.

8. This Court has personal jurisdiction over Defendant because the principal place of business of Defendant is in New Jersey and the claims asserted herein arise out of the transaction of business by Defendant in New Jersey.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2) because Defendant is subject to personal jurisdiction in the District of New Jersey and because a substantial part of the events giving rise to the claims of Plaintiffs and the Class Members occurred in the District of New Jersey.

10. Defendant may be served with Summons and a copy of the Class Action Complaint by serving its registered agent for service of process which is Corporation Service Company, 830 Bear Tavern Road, West Trenton, New Jersey 08628.

BACKGROUND FACTS

11. Defendant is a payment processor engaged in the business of processing transactions concerning credit cards and debit cards, including cards that operate on national bankcard networks of MasterCard and Visa. In the course of its business, Defendant maintains a

processing system and network for the processing of cards issued by financial institutions using the MasterCard and Visa networks, and provides such system and network to process card transactions and related data for the benefit of the card owners, merchants and financial institutions including the group of financial institutions that are card issuers.

12. Defendant purports to be one of the nation's largest payment processors servicing over 250,000 merchant locations in the United States.

13. Plaintiff TriCentury Bank is a bank and an issuer of debit cards bearing the MasterCard brand. Certain cards issued by TriCentury Bank are subject to card processing and related services provided by Defendant.

14. Plaintiff Great Southern Bank is a bank and an issuer of debit cards bearing the MasterCard brand. Certain cards issued by Great Southern Bank are subject to card processing and related services provided by Defendant.

15. The Class Members are financial institutions and issuers of credit and/or debit cards bearing the brands of MasterCard or Visa. Certain cards issued by the Class Members are subject to card processing and related services provided by Defendant.

16. In the of course of its transaction processing business, Defendant has processed, and will process from time to time, one or more cards issued by Plaintiffs and the Class Members and the data concerning such cards is processed by and crosses through the Defendant's processing systems and network.

17. In 2008, certain cards issued by Plaintiffs and the Class Members were exposed to the Security Breach in the processing systems and networks of Defendant thereby exposing the cards to substantial risk of fraud and abuse.

18. On or about January 20, 2009, Defendant issued a press release and established a website in which Defendant admitted that the Security Breach occurred and disclosed, among

other things, that MasterCard and Visa had notified Defendant of suspicious activity regarding card transactions processed by Defendant and that Defendant had discovered the Security Breach and uncovered malicious software that had compromised data which crossed the Defendant's processing system in 2008.

19. Upon information and belief, the Security Breach compromised the security of about One Hundred Million (100,000,000) credit cards and debit cards, including millions of MasterCard and Visa cards issued by Plaintiffs and the Class Members.

20. The Security Breach occurred as early as May of 2008. Defendant failed to detect the Security Breach for several months. Defendant was placed on notice of suspicious activities by MasterCard and Visa in 2008. Notwithstanding this notice, Defendant failed to timely contain the Security Breach or to timely notify the Plaintiffs and Class Members of the Security Breach until January of 2009.

21. The Security Breach occurred as a result of acts and omissions of Defendant including, without limitation, acts and omissions in permitting the malicious code to infiltrate Defendant's processing systems and network; acts and omissions in failing to properly manage the encryption of data concerning the compromised cards; acts and omissions in failing to detect the intrusion into Defendant's processing systems and network; and acts and omissions in failing to implement, comply with, or audit Payment Card Industry Standards and other industry standards concerning information security of the compromised cards. The Security Breach was magnified by acts and omissions of Defendant including, without limitation, acts and omissions in failing to timely detect the intrusion, contain the intrusion, announce the intrusion, and notify Plaintiffs and the Class Members of the intrusion.

22. Defendant failed to exercise reasonable and prudent care and failed to implement reasonable and prudent measures to prevent, detect, contain, announce, and provide notice of the Security Breach.

23. As a direct and proximate result of the Security Breach, the compromised cards currently are subject to a real and present danger of fraud and abuse with resultant substantial damage to the card owners and card issuers. Plaintiffs and the Class Members are forced, or will be forced, to cancel and reissue the compromised cards.

24. As a direct and proximate result of the acts and omissions of Defendant, Plaintiffs and the Class Members have been harmed and damaged and have sustained pecuniary loss. Among other things, Plaintiffs and the Class Members are required, or will be required, to cancel and reissue the compromised cards. The resultant expenses are significant requiring the expenditure of millions of dollars.

25. To date, Plaintiffs have incurred the time and expense necessary to cancel and reissue MasterCard branded debit cards. Plaintiffs reasonably anticipate that numerous additional cards will be cancelled and reissued by Plaintiffs in the future.

26. Defendant is an expert in the payment card industry, is familiar with the duties and standards regarding information security systems in the payment card industry, and is familiar with the impact of security breaches upon the issuers of cards in the industry. The damages sustained by Plaintiffs and the Class Members, including the damages sought herein, were reasonably foreseeable by Defendant at all relevant times. At all relevant times, Defendant knew that a security breach in its processing systems and network would cause Plaintiffs and the Class Members to sustain the harm and damages described in this Complaint. At all relevant times, Defendant knew that, to the extent Defendant worked with or through an acquiring bank in the

network, the acquiring bank would cause the card transaction data of card issuers to be processed by or through Defendant's processing systems and network.

27. Plaintiffs and the Class Members are entitled to payment by Defendant for the damages sustained by Plaintiffs and Class Members as a result of the Security Breach.

28. Plaintiffs and Class Members are also entitled to injunctive relief requiring Defendant to clearly and accurately identify each card that was subjected to the Security Breach or to provide a reasonably accurate description of the range of cards that were subject to the Security Breach, and requiring Defendant to increase the security of its payment processing systems to contain the Security Breach and otherwise comply with industry standards to protect against similar security breaches in the future.

CLASS ACTION ALLEGATIONS

29. Plaintiffs have brought this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class of similarly situated Class Members (the "Class"):

All financial institutions that (a) have issued MasterCard and/or Visa branded credit cards and/or debit cards in the United States; (b) have issued cards that were subjected to the Security Breach which occurred in the processing systems and network of Defendant; and (c) are or will be required to cancel and/or reissue the cards as a result of the Security Breach.

30. Upon information and belief, the Security Breach compromised up to One Hundred Million (100,000,000) credit cards and/or debit cards issued by hundreds of Class Members. The Class is so numerous that joinder of all Class Members is impracticable.

31. Defendant's conduct in failing to prevent, detect, contain, and announce the Security Breach is identical and/or uniform across the Class resulting in questions of law and fact that are common to the Class as a whole. These common questions of law and fact do not vary among Class Members and may be judicially determined without regard to the individual

circumstances of the Class Members. The common legal and factual questions, include, but are not limited, to the following:

- a. Did the Security Breach occur?;
- b. Did Defendant commit the alleged acts and omissions that resulted in or magnified the Security Breach?;
- c. What were the legal duties owed by Defendant to the Class with respect to the Security Breach?;
- d. Did Defendant breach the legal duties owed by Defendant to the Class with respect to Security Breach?;
- e. Were the Class Members damaged by the Security Breach?;
- f. Can the Class Members recover damages for the expenses they will incur to cancel and reissue the compromised cards?; and
- g. What is the amount of the expense per card that the Class Members will incur to cancel and/or reissue the cards?

32. The only question requiring inquiry specific to individual Class Members may be the calculation of the exact amount of damages to which each Class Member is entitled.

33. The common questions of law and fact predominate over any questions affecting only individual members of the Class.

34. Plaintiffs' claims are typical of the claims of the Class Members. As issuers of cards that operate on the bankcard networks, Plaintiffs and the Class Members are identically situated with respect to harm and damage that result from security breaches in the processing systems and networks used in the payment card industry, including the Security Breach which occurred in the systems and network of Defendant.

35. As representatives of the Class, Plaintiffs will fully and adequately protect the interests of the Class Members. Plaintiffs have retained class counsel who are experienced and qualified in prosecuting class actions. Plaintiffs and their counsel do not have interests which are contrary to, or in conflict with, the interests of the Class.

36. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for reasons which include, without limitation, the following:

- a. The Class can be readily determined and managed and the Class Members are readily identifiable and are subject to manageable notices.
- b. This action should present no difficulties in management as a class action.
- c. The prosecution of claims as a class action will enhance judicial economy and eliminate the possibility of duplicative litigation.
- d. The disposition of these claims will provide substantial benefits to the Class and the prosecution of claims as a class action will provide a remedy for small claims that may not be economically advanced in individual litigation.
- e. The prosecution of claims as a class action will provide for a uniform and expeditious method of containing and remedying the Security Breach.

37. This action should be certified as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

WHEREFORE, Plaintiffs respectfully requests that the action be certified as a class action under Rule 23(b)(3), that Plaintiffs be designated as Class Representatives, and that Plaintiffs' counsel be appointed as counsel for the Class.

COUNT I – BREACH OF CONTRACT

38. The allegations in the previous paragraphs are incorporated by reference as if restated in full herein.

39. As a processor in the payment card industry, Defendant is a party to one or more contracts with one or more acquiring banks and merchant clients. Under the contracts, Defendant uniformly was required to observe payment card industry standards and the regulations of MasterCard and Visa governing the processing of cards that operate on the MasterCard or Visa networks. Plaintiffs and Class Members are intended third party beneficiaries to these contracts.

40. With respect to the cards compromised by the Security Breach, Defendant breached these contracts by acts or omissions which included, without limitation, the failure to timely prevent, detect, contain, and provide notice of the Security Breach.

41. As a direct and proximate result of the breach of contract by Defendant, Plaintiffs and the Class Members have been damaged. The damages sustained by Plaintiffs and Class Members include, without limitations, the expenses that Plaintiffs and the Class Members will be required to incur to cancel and/or reissue the compromised cards.

42. Plaintiffs and the Class Members are also entitled to injunctive relief requiring Defendant to clearly and accurately identify each card that was subjected to the Security Breach or to provide a reasonably accurate description of the range of cards that were subject to the Security Breach; and requiring Defendant to increase the security of its payment processing systems to contain the Security Breach and otherwise comply with industry standards to protect against similar security breaches in the future. Plaintiffs and the Class Members are entitled to such injunctive relief because money damages, by themselves, are insufficient to adequately provide the equitable relief requested herein.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class Members, respectfully request that the Court enter judgment in their favor and against Defendant (a) affirming the certification of this action as a class action; (b) awarding actual damages to Plaintiffs and the Class

Members along with appropriate pre-judgment interest, post-judgment interest, and the attorney's fees reasonably incurred by Plaintiffs to the extent recoverable by law; (c) granting Plaintiffs and the Class Members injunctive relief; (d) awarding Plaintiffs the costs incurred in prosecuting this action; and (e) granting such other relief as the Court may deem just and proper.

COUNT II - NEGLIGENCE

43. The allegations in the previous paragraphs are incorporated by reference herein as if restated in full herein.

44. With respect to the cards issued by Plaintiffs and Class Members that were subject to processing by Defendant in Defendant's processing systems and network, Defendant owed a duty to Plaintiffs and the Class Members to use reasonable care to prevent security intrusions and breaches with respect to the cards; to prevent unauthorized access to card numbers; to timely detect security intrusions and breaches to its processing systems and network; to timely contain security intrusions and breaches when they occur; to timely notify Plaintiffs and the Class Members of security intrusions and breaches to its processing systems; and to maintain the information security of the cards of Plaintiffs and the Class Members when the cards were processed by or crossed through Defendant's processing systems and network.

45. Defendant breached this duty by failing to use reasonable care to prevent security intrusions and breaches with respect to the cards; to prevent unauthorized access to card information; to timely detect security intrusions and breaches to its processing systems and network; to timely contain security intrusions and breaches when they occur; to timely notify Plaintiffs and the Class Members of security intrusions and breaches to its processing systems; and to maintain the information security of the cards of Plaintiffs and the Class Members when the cards were processed by or crossed through Defendant's processing systems and network.

46. In breaching the duty and failing to exercise reasonable care, Defendant negligently handled the cards of Plaintiffs and Class Members when the cards were processed by or crossed through Defendant's processing systems and network.

47. Defendant failed to comply with one or more applicable payment card industry standards and/or industry regulations which are designed to protect cards from information security breaches like the Security Breach and to protect cards owners and card issues including Plaintiffs and the Class Members. By such failure to comply, Defendant was negligent per se in its handling of the cards of Plaintiffs and the Class Members when the cards were processed by or crossed through Defendant's processing systems and network

48. As a direct and proximate result of the negligence of Defendant, Plaintiffs and the Class Members have been damaged. The damages sustained by Plaintiffs and the Class Members include, without limitations, the expenses that Plaintiffs and the Class Members will be required to incur to cancel and/or reissue the compromised cards.

49. Plaintiffs and the Class Members are also entitled to injunctive relief requiring Defendant to clearly and accurately identify each card that was subjected to the Security Breach or to provide a reasonably accurate description of the range of cards that were subject to the Security Breach; and requiring Defendant to increase the security of its payment processing systems to contain the Security Breach and otherwise comply with industry standards to protect against similar security breaches in the future. Plaintiffs and the Class Members are entitled to such injunctive relief because money damages, by themselves, are insufficient to adequately provide the equitable relief requested herein.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class Members, respectfully request that the Court enter judgment in their favor and against Defendant (a) affirming the certification of this action as a class action; (b) awarding actual damages to Plaintiffs and the Class

Members along with appropriate pre-judgment interest, post-judgment interest, and the attorney's fees reasonably incurred by Plaintiffs to the extent recoverable by law; (c) granting Plaintiffs and the Class Members injunctive relief; (d) awarding Plaintiffs the costs incurred in prosecuting this action; and (e) granting such other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs respectfully demand a trial by jury on all matters and claims in this action that are triable to a jury.

Respectfully submitted,

Date: 2/23/2009

By: s/ Stephen M. Sohmer
Stephen M. Sohmer
SOHMER & STARK

**ATTORNEYS FOR PLAINTIFFS
TRICENTURY BANK, GREAT SOUTHERN
BANK, AND THE PUTATIVE CLASS**

CERTIFICATION AND AFFIDAVIT PURSUANT TO RULE 11.2

It is hereby certified pursuant to Local Civil Rule 11.2 that the matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding and that I, the undersigned affiant, verify the following: (1) I am the attorney of record who is a member of the bar of this Court with the authority to sign this Certification on my client's behalf; and (2) I, the attorney of record, hereby sign this Certification on behalf of the Plaintiff because same is a corporate entity with its principal place of business outside this jurisdiction and with whom direct contact for purposes of signing this Certification is impracticable.

Date: 2/23/2009

By: s/ Stephen M. Sohmer
Stephen M. Sohmer
SOHMER & STARK

**ATTORNEYS FOR PLAINTIFFS
TRICENTURY BANK, GREAT SOUTHERN
BANK, AND THE PUTATIVE CLASS**

ADDITIONAL COUNSEL:

Phillip C. Rouse
R. Douglas Gentile
John W. Witten
DOUTHIT FRETS ROUSE GENTILE & RHODES, LLC
903 E. 104th Street, Suite 610
Kansas City, Missouri 64131
(816) 941-7600 Telephone
(816) 941-6666 Facsimile
prouse@dfrglaw.com
dgentile@dfrglaw.com
jwitten@dfrglaw.com