

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**IN RE BARNES & NOBLE PIN PAD
LITIGATION**

This Document Relates To:

ALL CASES

Case No. 1:12-cv-08617

CLASS ACTION

Honorable Andrea Wood

**BARNES & NOBLE, INC.'s RESPONSE
TO NOTICE OF SUPPLEMENTAL AUTHORITY**

Barnes & Noble, Inc. responds to Plaintiffs' Notice of Supplemental Authority (Dkt. No. 123) concerning the Sixth Circuit's not-recommended-for publication, 2-1 opinion in the consolidated appeal of *Galaria v. Nationwide Mutual Insurance Company*, Case No. 15-3386 and *Hancox v. Nationwide Mutual Insurance Company*, Case No. 15-3387 (collectively, *Galaria*).

Galaria does not support standing for the Plaintiffs here. That case involved claims that computer hackers stole a broad range of the personal insurance information of more than one million individuals, including the named plaintiffs, and what the majority believed was an acknowledgment by the defendant that the plaintiffs were at risk. *Galaria Op.* at 2, 6.

Significantly, *not one* of the four Plaintiffs before this Court alleges facts demonstrating *they* were among those impacted by the skimming incident at all, and certainly no acknowledgement by Barnes & Noble that the named Plaintiffs' data was at risk. (*Compare Galaria Op.* at 6.)

Three of the four Plaintiffs (Clutts, Honor and Dieffenbach) allege nothing whatsoever happened to them or their information. One of the four Plaintiffs (Winstead) alleges that her bank alerted her to a potentially fraudulent use of her credit card, but she offers no allegation or evidence that that use (for which she incurred no liability) was connected to the Barnes & Noble incident,

other than a temporal coincidence. To the contrary, Winstead alleges that she subscribed to an “identity protection monitoring service” *prior* to the incident at issue in this case. (Second Amended Complaint ¶18.) Plaintiffs’ suggestion that *Galaria* supports standing based on “the imminent threat of injury” (Dkt No. 123 at 2) is plainly implausible when it has now been nearly *four years* since Barnes & Noble announced in the fall of 2012 that it was the victim of the alleged security incident, and still no Plaintiff has alleged that they have been impacted by the incident at all. By failing to identify any injury in nearly four years, Plaintiffs fall far short of satisfying the recent mandate of the Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which made clear that the Constitutional requirement of “injury-in-fact” demands a showing of a “concrete” injury—one that must “actually exist” and be “‘real,’ and not ‘abstract.’” *Id.* at 1548 (citations omitted).

The absence of any demonstrated instances of fraudulent misuse connected to the PIN pad incident also make this case distinguishable from *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015), on which the *Galaria* majority relied, where it was undisputed that 9,200 credit cards had been used fraudulently and it was those facts that led the Seventh Circuit to conclude that certain plaintiffs had standing.¹ But even beyond its distinguishing facts, both *Neiman Marcus* and the Seventh Circuit’s opinion in *Lewert v. P.F. Chang’s China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016) (which in turn relied heavily on *Neiman Marcus*) were wrongly decided because they both applied an “objectively reasonable likelihood” standard that the Supreme Court *expressly rejected* in *Clapper v. Amnesty Int’l USA*, — U.S. —, 133 S. Ct. 1138, 1147 (2013)—an error that the majority in *Galaria* itself noted. *See Galaria Op.* at 8 n.2.

¹ Barnes & Noble has previously explained why the facts of *Neiman Marcus* are distinguishable from the case here (*see* Dkt. No. 110) and that neither it nor the subsequent case of *Lewert v. P.F. Chang’s China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016) support Plaintiffs’ standing (*see* Dkt. No. 118).

Finally, *Galaria* presents various statutory and common law claims, only one of which— invasion of privacy—is alleged by Plaintiffs here. The plaintiffs in *Galaria* did not appeal the district court’s Rule 12(b)(6) dismissal of the invasion of privacy claim where plaintiffs did not allege that their information had been disclosed or publicized as required to state a claim, arguments that similarly support dismissing Plaintiffs’ claims here. (See Dkt. No. 60 at 6 n.4; Dkt. No. 44 at 11-12; Dkt. No. 49 at 12.) Although Barnes & Noble continues to believe that the case is properly dismissed on standing grounds alone, it may be prudent for the Court to rule on the 12(b)(6) portion of Barnes & Noble’s motion to dismiss as well, which provides ample, independent bases to dismiss this case with prejudice.

Dated: September 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter V. Baugher, an attorney, certify that the foregoing **Barnes & Noble, Inc.'s Response to Notice Of Supplemental Authority** was filed electronically with the Clerk of the Court using the CM/ECF system, which automatically provides notification of such filing to all registered users on this 14th day of September, 2016.

/s/ Peter V. Baugher _____