

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE: THE HOME DEPOT, INC. CUSTOMER DATA))	
SECURITY BREACH LITIGATION,))	MDL DOCKET NO. 2583
)	
)	

**PLAINTIFF CATTARAUGUS COUNTY SCHOOL EMPLOYEES FEDERAL CREDIT
UNION’S INTERESTED PARTY RESPONSE IN SUPPORT OF TRANSFER
OF RELATED ACTIONS TO THE NORTHERN DISTRICT OF GEORGIA
FOR CONSOLIDATED PRE-TRIAL PROCEEDINGS**

Cattaraugus County School Employees Federal Credit Union (“CCSEFCU”), plaintiff in *Cattaraugus County School Employees Federal Credit Union v. Home Depot U.S.A., Inc.*, Civ. Ac. No. 1:14-cv-03244-SCJ (N.D. Ga.) (the “CCSEFCU Action”), hereby files this Interested Party Response in Support of the Motion to Transfer of Related Actions to the Northern District of Georgia for Consolidated Pre-Trial Proceedings.¹

I. Background

The *CCSEFCU* Action was filed in the Northern District of Georgia on October 9, 2014, alleging that Plaintiff, a not-for-profit, member-owned, financial cooperative who issues payment cards (i.e., debit and/or credit cards), and a class of similarly situated financial institutions, suffered damages as a result of the breach of customer data at Defendant Home Depot stores (“Defendant”) beginning in April 2014 and continuing through September 2014. As a result of the data breach, CCSEFCU and other financial institutions (“Financial Institution Plaintiffs”) have suffered damages including, but limited to, costs associated with replacing

¹ The *CCSEFCU* Action was filed after the Motion for Consolidation and Transfer and thus was not listed in the Motion. The *CCSEFCU* Action was designated as a related action on October 16, 2014. [Dkt. No. 72].

credit and debit cards, covering fraudulent charges, notifying customers of the data breach, handling customer service inquiries, and closing accounts.

On September 15, 2014, Plaintiffs John Solak and Dennis O'Rourke filed a Motion for Consolidation and Transfer under 28 U.S.C. § 1407. Dkt. No. 1 and amended at Dkt. No. 7 ("*Solak* Motion"). Plaintiffs Solak and O'Rourke are consumers who claim that they were affected by the data breach as well, alleging damages relating to the exposure of their personal financial information and the increased threat of identity fraud and theft. *Solak* Complaint, ¶ 21. Plaintiffs Solak and O'Rourke seek to represent a class of similarly situated consumers ("Consumer Plaintiffs"). Currently, there are more than 23 pending Consumer and Financial Institution cases across the country, with a majority pending in the Northern District of Georgia.

The *Solak* Motion seeks to consolidate and transfer both the Consumer and Financial Institution cases to the Northern District of Georgia, Atlanta Division. Plaintiff CCSEFCU agrees that consolidation is appropriate and that the Northern District of Georgia is an appropriate venue. Plaintiff CCSEFCU assert, however, that should the Panel choose to consolidate all the Consumer and Financial Institution cases together, the cases should be consolidated in front of the Honorable Judge Amy Totenberg, who currently presides over a plurality of the Home Depot data breach cases pending in the district. In the alternative, given the dissimilarities between the Financial Institution cases and Consumer cases, Plaintiff CCSEFCU respectfully suggests that the Panel create two MDL dockets in the Northern District of Georgia for the cases to proceed on separate tracks, with the Financial Institution cases proceeding in front of Judge Totenberg.

II. Consolidation of the Financial Institution Cases in Appropriate

Consolidation of multiple federal civil actions is appropriate when the actions involve common questions of fact and transfer of all actions to a single court for consolidated pretrial proceedings would “be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407. Here, consolidation of the Financial Institution cases is appropriate under § 1407 because all of the Financial Institution cases allege a similar or identical class asserting claims arising from the exact same 2014 data breach at Home Depot. All actions involve similar theories of damages and will presumably face the same defenses from Defendant. Furthermore, consolidation of these actions for pre-trial proceedings will promote judicial efficiency, avoid duplicative discovery, and prevent inconsistent rulings on facts specific to the Financial Institution cases.

Additionally, all Financial Institution cases (and indeed, all the Home Depot data breach cases) are in the initial stages of litigation; Defendant has not yet filed an answer in any of the pending cases. This is another factor that supports centralization in order to avoid duplicative discovery and prevent inconsistent pre-trial rulings. *In re: BRCA1- & BRCA2-Based Hereditary Cancer Test Patent Litig.*, 999 F. Supp. 2d 1377, 1378—79 (J.P.M.L. 2014); *see also In re Canon U.S.A. Inc., Digital Cameras Prods. Liab. Litig.*, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006) (consolidation warranted in class actions so as to avoid disparate class certification decisions). Here, Plaintiff CCSEFCU alleges a class of similarly situated financial institutions that have suffered damages resulting from Defendant’s alleged negligence and negligent misrepresentations. Similar to all other pending cases arising from the 2014 Home Depot Data Breach, there has been minimal activity in the action’s docket. Consolidation of all such

Financial Institution actions at this early stage will indeed avoid the risk of any disparate or duplicative rulings.

III. The Northern District of Georgia is the Appropriate Venue for Transfer and Consolidation of all Financial Institution Actions.

Plaintiff CCSEFCU agrees that the Northern District of Georgia is the appropriate venue for consolidation of the Financial Institution cases. Relevant factors for analyzing the appropriate venue include: (1) the district where the largest number of cases are pending; (2) the district of the occurrence of common facts; and (3) the district where critical documents and witnesses are located. *In re Stryker Rejuvenate, ABG II Hip Implant Prods. Liab. Litig.*, 949 F. Supp. 2d 1378, 1380 (J.P.M.L. 2013) (district where plurality of cases pending was appropriate transferee court); *In re TJX Cos., Inc., Customer Data Sec. Breach Litig.*, 493 F. Supp. 2d 1382, 1383 (J.P.M.L. 2007) (district where defendant was located and many cases had already been filed was appropriate transferee court); *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (the district most convenient to the parties and witnesses was appropriate transferee court); Manual for Complex Litigation (Fourth) § 20.131.

Defendant Home Depot, the only defendant named in the related actions, is headquartered in Atlanta, GA (within the Northern District of Georgia), meaning Atlanta will likely be the center of gravity for the alleged misconduct and therefore much of the discovery in the MDL proceedings. *See In re: Cast Iron Soil Pipe & Fittings Antitrust Litig.*, 999 F.Supp.2d 1368, 1369 (J.P.M.L. 2014) (the center of gravity of litigation is where defendants are located and thus where primary witnesses and documentary evidence will be found); *In re HSBC Bank USA, N.A., Debit Card Overdraft Fee Litig.*, 949 F.Supp.2d 1358, 1359 (J.P.M.L. 2013) (same); *In re: Mun. Derivatives Antitrust Litig.*, MDL1950, 2008 WL 2425553, 1387 (J.P.M.L. 2008) (same). The majority of related Financial Institution cases have also been filed in the Northern

District of Georgia, including Plaintiff CCSEFCU's action, as well as at least four other Financial Institution cases. Furthermore, Defendant supports the Northern District of Georgia as the appropriate forum for consolidation. Dkt. No. 56. Taken together, these factors support the consolidation of all related matters in the Northern District of Georgia for consolidated pre-trial proceedings.

IV. Plaintiff CCSEFCU Supports the Creation of Separate Dockets for Financial Institution and Consumer Cases, Should the Panel Deem Separation Appropriate.

The Financial Institution cases and the Consumer cases arise from the same Home Depot data breach but involve different legal claims and defenses. Each set of cases involves different legal theories of liability, different classes seeking certification, and different damages that may warrant separate litigation to address these disparate issues without bogging down or delaying the other group.

For example, Consumer Plaintiffs face drastically different standing issues from the outset than do the Financial Institution Plaintiffs. As previously discussed, the Financial Institution Plaintiffs have alleged damages related to the tangible costs associated with, but not limited to, replacing cards, covering fraudulent charges, and other costs associated with customer service in the wake of the Home Depot data breach. By contrast, the Consumer Plaintiffs have alleged harm faced by “having [their] financial and personal information compromised and fac[ing] the ... threat of future additional harm from the increased threat of identity theft and fraud ...” *Solak* Complaint, ¶ 21. A clear example of the disparate positions of the Financial Institutions' claims versus those of the Consumers is liability for fraud losses arising from the data breach; Consumers are generally not responsible for paying for such fraud losses because Financial Institutions are responsible to do so. The nature of the Consumer Plaintiffs' potential

damages, as compared to the concrete damages alleged by the Financial Institution Plaintiffs, will result in different legal defenses by Defendant, and indeed different briefing at the Motion to Dismiss stage.

Each group of cases alleges a different class of plaintiffs, and will result in different class-based discovery, separate expert reports and briefing, and separate damages discovery and calculations. The cases are also premised on different law. The Consumer cases are based on various state consumer protection laws and the Gramm-Leach-Bliley Act, a federal statute. The Panel has previously found that, where “the typical benefits of common discovery would likely be few,” there are grounds for providing separate dockets even where the underlying occurrence or transaction was the same. *See In re: BP p.l.c. Sec. Litig.*, 734 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010) (holding that creation of separate MDLs for securities and tort actions was appropriate); *In re Penn Cent. Sec. Litig.*, 325 F. Supp. 309, 311 (J.P.M.L. 1971) (holding that where legal claims are different, even where there may be overlap in the investigation of facts, efficiencies may “be outweighed by the need for separate treatment of the major portion of the cases and the difficulty which any transferee judge would face in attempting to meet such needs in an unduly large and complex group of cases.”). Indeed, the Manual for Complex Litigation contemplates a situation where a single action “may contain claims relating to more than one multidistrict docket ...” § 20.131. Here, the disparate claims and defenses may warrant consolidation in separate MDL dockets.

V. The Honorable Judge Amy Totenberg is the Appropriate Judge for the Consolidated Cases

Whether all of the Home Depot data breach cases are consolidated together, or the Panel chooses to create separate tracks for the Consumer cases and the Financial Institution cases, Plaintiff CCSEFCU requests that the Panel consider assigning the Home Depot data breach

MDL to the Honorable Judge Amy Totenberg of the Northern District of Georgia. Judge Totenberg, a well-respected jurist, has already been assigned not less than four cases arising out of the Home Depot data breach, including Financial Institution cases. Among the factors to be considered in determining which judge should be designated by the Panel are the location of currently pending cases and a given judge's current caseload. *See* Manual for Complex Litigation (Fourth) § 20.131. Thus, since Judge Totenberg is the assigned judge for more Home Depot data breach cases in the Northern District of Georgia than any other judge, it would be entirely appropriate for the Panel to designate her as the judge for the consolidated Home Depot data breach cases. Furthermore, other judges in the district who are currently assigned Home Depot data breach cases have already been assigned to other MDLs. By contrast, Judge Totenberg has none.² Specifically, Chief Judge Thomas W. Thrash Jr., who has two Home Depot data breach cases, is currently assigned to five MDLs, and Judge William S. Duffey Jr., who has three Home Data breach cases (including the *Solak* Action), is currently assigned to one MDL. Therefore, given that Judge Totenberg is currently assigned to no MDLs, she is the most appropriate choice.

Alternatively, should the Panel decide to transfer the Financial Institution cases and the Consumer cases into separate consolidated actions, Judge Totenberg is the appropriate judge for the Financial Institution cases for the same reasons outlined above and also because no judge in the district currently has more Financial Institution cases pending than Judge Totenberg. Plaintiff CCSEFCU takes no position on the appropriate judge for the Consumer cases.

² *See* Pending MDLs by District as of September 15, 2014, J.P.M.L., *available at* http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-September-15-2014.pdf.

Respectfully submitted,

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