

**BEFORE THE JUDICIAL PANEL ON
MULTI-DISTRICT LITIGATION**

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

**DEFENDANT HOME DEPOT U.S.A., INC.’S REPLY
IN SUPPORT OF PLAINTIFFS’ AMENDED MOTION FOR
CONSOLIDATION AND TRANSFER UNDER 28 U.S.C. § 1407**

Defendant Home Depot U.S.A., Inc.¹ (“Home Depot”) respectfully submits this reply brief in support of the amended motion for consolidation and transfer under 28 U.S.C. § 1407 filed by plaintiffs John Solak and Dennis O’Rourke on September 19, 2014 (the “Motion To Transfer”). (Dkt. No. 7.)

The Motion To Transfer sought the consolidation and transfer of all of the putative class actions filed against Home Depot in connection with the criminal intrusion into its payment data system to the Northern District of Georgia. In their responses to the Motion to Transfer, several plaintiffs propose various alternatives to the relief requested by the *Solak* plaintiffs, including: (1) transferring these cases to the Middle District of Florida; (2) transferring these cases to the Northern District of Georgia, but creating separate MDL dockets for the consumer and financial institution cases; and (3) transferring these cases to the specific judge in the Northern District of Georgia that certain of these plaintiffs prefer. As demonstrated below, the Panel should reject each of these alternatives. All of the putative class actions filed in connection with the intrusion into Home Depot’s payment data system should be consolidated in the Northern District of

¹ The complaints in several of the cases at issue here improperly name The Home Depot, Inc. as a defendant. The Home Depot, Inc. is not a retailer and therefore engaged in no transactions with any of these plaintiffs. Rather, The Home Depot, Inc. is the parent company of Home Depot U.S.A., Inc., which is a home improvement retailer.

Georgia because it is the home to the headquarters of the only named defendant, the forum chosen by a majority of the plaintiffs, and well-equipped to handle multi-district litigation. Further, these cases should be consolidated before a single judge to maximize the benefits of centralization, and should be assigned by the Panel in consultation with the Northern District of Georgia, rather than on the basis of certain plaintiffs' attempt to steer these cases to a specific judge.

I. SUMMARY OF RESPONSES

Home Depot and the plaintiffs in nineteen of the putative class actions filed a total of sixteen responses to the Motion To Transfer. (*See* Dkt. Nos. 15, 55-58, 60-61, 63-70, 81.) All of these parties agree that these cases should be consolidated for pretrial proceedings; the only issue in dispute is where the cases should be transferred. (*See id.*) A strong majority of the parties agrees that the Northern District of Georgia is the appropriate transferee forum: Home Depot and thirteen of the plaintiffs support transfer to the Northern District of Georgia (Dkt. Nos. 55-58, 61, 64-68, 81); five plaintiffs propose transfer to the Middle District of Florida (Dkt. Nos. 63, 69-70);² and one plaintiff contends that the cases should be transferred to the Eastern District of Louisiana (Dkt. No. 15).³

Several of the plaintiffs who support transfer to the Northern District of Georgia raise additional arguments that were not at issue when Home Depot filed its response to the Motion To Transfer. Two financial institution plaintiffs support consolidation of all of the putative class

² Counsel for three of the plaintiffs who support transfer to the Middle District of Florida recently filed a new related case in the Northern District of Georgia. *See Eric Petersen v. Home Depot, Inc.*, 1:14-cv-03477-RWS (N.D. Ga. Oct. 29, 2014).

³ Counsel for First NBC Bank, the plaintiff that supports transfer to the Eastern District of Louisiana, recently filed a new related case in the Northern District of Georgia. *See Gulf Coast Bank & Trust Co. v. Home Depot, Inc.*, 1:14-cv-03448-WSD (N.D. Ga. Oct. 27, 2014).

actions, but argue in the alternative that the consumer cases and financial institution cases should be put on separate MDL dockets. (Dkt. Nos. 61, 81.) In addition, six of the plaintiffs seek to have the Panel transfer these cases to a specific judge in the Northern District of Georgia, notwithstanding the fact that the Northern District of Georgia has not yet determined which judge should preside over these related cases based on its own internal operating guidelines. (Dkt. Nos. 58, 60-61, 81.) As demonstrated below, the arguments in favor of alternative jurisdictions lack merit. Rather, the consumer and financial institution cases should be consolidated and transferred to the Northern District of Georgia. Further, pursuant to the plain terms of 28 U.S.C. § 1407, the consolidated consumer and financial institution cases should be assigned by the Panel to a single judge with the consent of the Northern District of Georgia, rather than on the basis of the preferences of certain plaintiffs.

II. ARGUMENT

A. The Northern District of Georgia Is the Best Forum for Consolidated Pretrial Proceedings.

As demonstrated in the Motion to Transfer, Home Depot's response, and the responses of thirteen of the nineteen plaintiffs, the arguments in favor of transfer to the Northern District of Georgia are compelling. Among other things, the Northern District of Georgia is:

- The home to the headquarters of the only named defendant in these cases;
- The location of the majority of witnesses and documents likely to be relevant in these cases;⁴

⁴ The *Chorman*, *Khalaf*, and *O'Brien* plaintiffs argue that courts accord the location of documents and witnesses little weight in light of the prevalence of electronic discovery. (Dkt. No. 63, at 5; Dkt. No. 69 at 5.) This argument ignores numerous recent decisions of the Panel transferring cases to the forum where documents and witnesses are most likely to be located. *See, e.g., In re First Nat'l. Collection Bureau, Inc. TCPA Litig.*, ___ F. Supp. 2d ___, 2014 WL 1364747, at *1 (J.P.M.L. Apr. 8, 2014) (transferring cases to district in which named defendant resided because "relevant documents and witnesses are likely to be located

- The district in which the first and most advanced case was filed;
- The district in which the majority of cases have been filed to date;
- Home to the world's busiest airport, with direct flights from most major cities in the United States;⁵
- A major metropolitan area with public transportation and numerous hotels in close proximity to the courthouse; and
- A forum that the Panel has recognized as well-equipped to handle multi-district litigation.

The Panel routinely transfers cases to the district in which some or all of these factors are present, and has transferred numerous recent data breach cases to the district in which the named defendant has its headquarters on the basis of many of these factors. *See, e.g., In re Target Corp. Customer Data Sec. Breach Litig.*, ___ F. Supp. 2d ___, 2014 WL 1338473, at *1 (J.P.M.L. Apr. 2, 2014) (transferring cases to district in which named defendant's headquarters were located and plurality of actions had been filed and which the Panel found to be easily accessible); *In re Schnuck Mkts., Inc. Customer Data Sec. Breach Litig.*, 978 F. Supp. 2d 1379, 1381 (J.P.M.L. 2013) (transferring cases to district in which named defendant's headquarters were located and relevant witnesses and other evidence would be found); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 802 F. Supp. 2d 1370, 1371 (J.P.M.L. 2011) (transferring cases to district in which named defendant was based and relevant witnesses were likely to be found); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 559 F. Supp. 2d 1405,

there"); *In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig.*, 988 F. Supp. 2d 1377, 1378 (J.P.M.L. 2013) (same).

⁵ The *Chorman*, *Khalaf*, and *O'Brien* plaintiffs also argue that the Hartsfield-Jackson Atlanta Airport will be an inconvenience to the parties because of flight delays. (Dkt. No. 63, at 4-5; Dkt. No. 69 at 4-5.) The mere potential for flight delays in Atlanta does not warrant transferring these cases to Jacksonville, and, in any event, could inconvenience parties travelling to the Middle District of Florida given that flights from many major cities to Jacksonville are routed through Atlanta.

1406 (J.P.M.L. 2008) (transferring cases to district in which named defendant's headquarters were located and large majority of actions had been filed); *In re TJX Cos. Customer Data Sec. Breach Litig.*, 493 F. Supp. 2d 1382, 1383 (J.P.M.L. 2007) (transferring cases to district in which named defendant's headquarters were located and many actions were already pending).

Notwithstanding the fact that the applicable factors overwhelmingly support transfer to the Northern District of Georgia, five plaintiffs contend that these cases should be transferred to the Middle District of Florida, which has essentially no connection to this litigation.⁶ The central argument these plaintiffs make in favor of the Middle District of Florida—that it has more favorable docket conditions than the Northern District of Georgia—does not withstand scrutiny.⁷

First, although the Northern District has three more pending MDL proceedings than the Middle District of Florida, there are ten or fewer active individual actions in four of the six MDL proceedings in the Northern District.⁸ Second, even though the Northern District of Georgia has four fewer judgeships than the Middle District of Florida, the Middle District of Florida has a heavier civil caseload per judgeship.⁹ Based on the latest available statistics, the Middle District

⁶ Three additional plaintiffs assert that the Northern District of Georgia is the most appropriate forum, but that the cases should be transferred to the Middle District of Florida if the Panel does not transfer the cases to the specific judge in the Northern District of Georgia that these plaintiffs prefer. (Dkt. No. 60.)

⁷ First NBC Bank's equally unconvincing arguments in support of transfer to the Eastern District of Louisiana are addressed in Home Depot's response to the Motion To Transfer. (Dkt. No. 56, at 8-10.)

⁸ U.S. Judicial Panel on Multidistrict Litigation, MDL Statistics Report – Distribution of Pending MDL Dockets at 2 (Oct. 15, 2014), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-15-2014.pdf (last visited Oct. 31, 2014).

⁹ The *Murphy*, *Hernandez*, and *O'Brien* plaintiffs note that four of the Northern District's judgeships are currently vacant, (see Dkt. No. 60, at 6), but fail to recognize that the Senate

of Florida has 565 civil cases pending per judgeship, whereas the Northern District of Georgia has 465.¹⁰ More importantly, the Northern District of Georgia manages its cases efficiently: the median interval from filing to disposition in civil cases in the Middle District of Florida is 7.7 months; the corresponding figure for the Northern District of Georgia is 6.5 months.¹¹ Given the overall caseload and median time to disposition in the two jurisdictions, the docket conditions in the Northern District of Georgia are at least equally as favorable as in the Middle District of Florida, if not more so. Because the other applicable factors heavily favor the Northern District of Georgia as well, the Panel should transfer these cases to the Northern District of Georgia.

B. All of the Related Cases Should Be Consolidated and Transferred for Pretrial Proceedings Before a Judge Assigned by the Panel and the Northern District of Georgia.

1. The Consumer and Financial Institution Cases Should Be Consolidated Before a Single Judge.

Plaintiffs Southern Chatauqua Federal Credit Union and Cattaraugus County School Employees Federal Credit Union agree that all of these cases should be consolidated in the Northern District of Georgia, but argue in the alternative that the consumer and financial institution cases may need to be assigned to separate MDL dockets because “[e]ach set of cases involves different legal theories of liability, different classes seeking certification, and different

Judiciary Committee has approved the nominations of three new judges and placed them on the Senate Executive Calendar for a vote. *See* United States Senate Committee on the Judiciary, List of Judicial Nominations, available at http://www.judiciary.senate.gov/nominations/judicial?PageNum_rs=3& (last visited Oct. 31, 2014).

¹⁰ A comparison of the statistical profiles of the district courts within the Eleventh Circuit as of June 30, 2014 is available at: <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2014/comparison-districts-within-circuit-june-2014.pdf&page=11> (last visited Oct. 31, 2014).

¹¹ *See id.*

damages.” (Dkt. No. 61, at 5; Dkt. No. 81, at 5.) These considerations do not warrant creating separate MDL dockets.

As these plaintiffs acknowledge, avoiding duplicative discovery and promoting judicial efficiency are two of the central objectives of consolidation and transfer under Section 1407. (See Dkt. No. 61, at 3; Dkt. No. 81, at 3.) Because the consumer and financial institution cases are based on the same underlying allegations concerning the intrusion into Home Depot’s payment data system, document discovery and depositions inevitably will overlap to a significant degree. There is only one defendant in these cases—Home Depot—and discovery should be coordinated to minimize the disruption of the defendant’s business. Moreover, centralization in front of a single judge will be more efficient than requiring two judges to become familiar with the underlying facts.

Southern Chatauqua and Cattaraugus County School Employees do not and cannot dispute that the consumer and financial institution cases are based on the same core allegations. Instead, they argue that because class-based and damages discovery may differ and the consumer and financial institution plaintiffs assert different legal theories, “the typical benefits of common discovery would likely be few.” (See Dkt. No. 61, at 6; Dkt. No. 81, at 6) (quoting *In re: BP p.l.c. Sec. Litig.*, 734 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010)). This argument glosses over the significant overlap in discovery relating to Home Depot’s alleged responsibility for the attack on its payment data system, and the chief authority on which these plaintiffs rely is inapposite.

In *In re BP p.l.c. Securities Litigation*, the Panel declined to consolidate securities litigation filed against BP and its executives with a separate MDL proceeding involving claims of wrongful death, personal injury, and property damage against several different defendants arising from the Deepwater Horizon disaster. 734 F. Supp. 2d at 1377-78 & n.3. The Panel

found that the benefits of common discovery would be limited because the wrongful death and personal injury actions would focus on the responsibility of BP and the other defendants for the Deepwater Horizon incident, whereas the securities litigation would “focus on BP alone, its safety record over at least the past five years, and, in particular, the alleged duty of BP officials to recognize and disclose the likelihood that a calamity such as this might occur.” *Id.* at 1378. Here, by contrast, Home Depot is the only defendant in both the consumer and financial institution cases, and Home Depot’s alleged responsibility for the attack on its payment data system is the focus of both sets of cases. Thus, the distinctions Southern Chatauqua and Cattaraugus County School Employees attempt to draw between the financial institution and consumer cases arising from the same attack against the same defendant do not warrant sacrificing the practical benefits of consolidating all of the cases before a single judge.

Indeed, the Panel recently consolidated both consumer and financial institution cases before a single judge under virtually identical circumstances in the Target data breach litigation. *See In re Target Corp. Customer Data Sec. Breach Litig.*, __F. Supp. 2d __, 2014 WL 1338473, at *1 (J.P.M.L. Apr. 2, 2014); *In re Target Corp. Customer Data Sec. Breach Litig.*, Conditional Transfer Order, Dkt. No. 193 (J.P.M.L. Apr. 4, 2014). The Northern District of Minnesota judge assigned to the Target litigation ultimately entered separate scheduling orders for the consumer and financial institution cases that establish different tracks for issues such as dispositive motions. *See In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522, C.A. No. 14-md-02522-PAM, Dkt. Nos. 93-94 (D. Minn. Jun. 25, 2014). The Panel should follow the same procedure here and consolidate all of the putative class actions against Home Depot before a single judge, which will allow that judge to determine how to maximize the benefits of centralization while taking into account any issues that may warrant separate treatment.

2. The Transferee Judge Should Be Selected in Consultation with the Northern District of Georgia.

The *Solak* action was filed in the Northern District of Georgia on September 4, 2014 and was assigned to Judge William S. Duffey, Jr. (Dkt. No. 1-4.) Four days later, the *Mazerolle* plaintiffs filed suit in the Northern District of Georgia and designated their case as related to the first-filed *Solak* action. (Dkt. No. 1-5.) *Mazerolle* was assigned to Judge Duffey as well. (*Id.*) Home Depot has moved to dismiss the *Solak* and *Mazerolle* complaints.¹² The next plaintiff to file suit in the Northern District of Georgia, however, did not identify the first-filed *Solak* action as a related case, and the *First Choice Federal Credit Union* case was assigned to Judge Amy Totenberg.¹³ (Dkt. No. 7-11.) The plaintiff in a subsequent Northern District of Georgia case, *Southern Chatauqua Federal Credit Union*, also failed to identify the first-filed *Solak* action as a related case, but instead identified *First Choice Federal Credit Union* as related, and *Southern Chatauqua* was assigned to Judge Totenberg as well. (Dkt. No. 10-3.) Of the twenty-one related putative class actions that are currently pending in the Northern District of Georgia, four have been assigned to Judge Duffey, five to Judge Totenberg, four to Chief Judge Thomas W. Thrash,

¹² The *Solak* plaintiffs' opposition to Home Depot's motion to dismiss is due on November 17, 2014. The *Mazerolle* plaintiffs and Home Depot have filed a joint motion for a stay pending the Panel's resolution of the Motion To Transfer.

¹³ The Northern District of Georgia's Internal Operating Procedures define a case as "related whenever the later-filed case involves: ... (2) [t]he same issue of fact or arises out of the same event or transaction included in an earlier numbered pending suit." *Frazier v. Williams Fund Private Equity Grp.*, 2006 WL 898178, at *2 (N.D. Ga. Apr. 5, 2006) (quoting N.D. Ga. IOP Rule 905-2). Given that the financial institution and consumer cases arise out of the same event, *i.e.*, the alleged data breach, they are clearly related within the meaning of the Northern District of Georgia's Internal Operating Procedures and should have been so identified.

Jr., three to Judge Steve C. Jones, two to Judge Richard W. Story, one to Senior Judge Willis B. Hunt, Jr, and two to Senior Judge Charles A. Pannell, Jr.¹⁴

Section 1407 contemplates that the Panel will assign consolidated cases to a specific judge in consultation with the district in which the judge serves. *See* 28 U.S.C. § 1407(b) (“With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district.”). Six of the plaintiffs contend that the Panel should transfer these cases to Judge Amy Totenberg in the Northern District of Georgia. This request contradicts the procedure outlined in 28 U.S.C. § 1407 and would subvert the Northern District of Georgia’s strong interest in managing the caseloads of its judges in accordance with its own internal guidelines and in the best interests of the District as a whole. Accordingly, Home Depot respectfully submits that the Panel should consult with the Northern District of Georgia concerning the appropriate judge to oversee these cases based on any factors the Northern District and the Panel deem relevant, such as certain plaintiffs’ failure to identify the first-filed *Solak* action as related under the relevant local rules, the fact that the first-filed *Solak* action is more procedurally advanced than the other cases, the caseloads of the Northern District judges, and the experience of these judges with MDL proceedings. The Panel should reject certain plaintiffs’ improper attempt to judge shop, and the assignment of these cases should be left to the Panel and the Northern District of Georgia as required by statute.

¹⁴ Several of these cases were originally assigned to Senior Judge Clarence Cooper, Senior Judge Orinda D. Evans, and Senior Judge Marvin H. Shoob. Judges Cooper, Evans, and Shoob either recused themselves or declined the assignments, and the cases were reassigned to the judges listed above.

III. CONCLUSION

For all of the foregoing reasons, Home Depot supports the *Solak* Plaintiffs' motion to transfer these actions to the Northern District of Georgia for consolidated pretrial proceedings and opposes the alternative relief requested in the responses of several plaintiffs.

Respectfully submitted this 3rd day of November, 2014,

/s/ S. Stewart Haskins

Phyllis B. Sumner

S. Stewart Haskins II

J. Andrew Pratt

KING & SPALDING LLP

1180 Peachtree Street, NE

Atlanta, Georgia 30309

Telephone: (404) 572-4600

Facsimile: (404) 572-5100

psumner@kslaw.com

shaskins@kslaw.com

apratt@kslaw.com

*Counsel for Defendants Home Depot
U.S.A., Inc. and The Home Depot, Inc.*