**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re: The Home Depot, Inc., Customer Data Security Breach Litigation This document relates to: ALL FINANCIAL INSTITUTION CASES	**MDL No. 14-02583-TWT**

MOTION FOR ENTRY OF ORDER REGARDING COMMUNICATIONS WITH POTENTIAL MEMBERS OF THE FINANCIAL INSTITUTION PUTATIVE CLASS

NOW COME Defendants Home Depot U.S.A., Inc. and The Home Depot, Inc. ("Home Depot"),[1] by counsel, and respectfully move the Court, in accordance with Local Rule 23.1(C)(2), to enter the attached Order Regarding Communications With Potential Members of the Putative Class. The bases for this Motion and the supporting authorities are set forth in the contemporaneously filed Memorandum of Law.

[1] The Complaint improperly names The Home Depot, Inc. as a defendant. The Home Depot, Inc. is not a retailer and is therefore not a proper party in this litigation. Rather, The Home Depot, Inc. is the parent company of Home Depot U.S.A., Inc., which is a home improvement retailer.

WHEREFORE, Home Depot moves for entry of its Proposed Order Regarding Communications With Potential Members of the Putative Class.

Respectfully submitted this 23rd day of October, 2015.

By: */s/ Cari K. Dawson*

CARI K. DAWSON
Georgia Bar Number 213490
KRISTINE M. BROWN
Georgia Bar Number 480189
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777
cari.dawson@alston.com
kristy.brown@alston.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on October 23, 2015 with the Court and served electronically through the CM-ECF (electronic case filing) system to all counsel of record registered to receive a Notice of Electronic Filing for this case.

By: */s/ Cari K. Dawson*
CARI K. DAWSON
Georgia Bar Number 213490

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re: The Home Depot, Inc., Customer Data Security Breach Litigation This document relates to: ALL FINANCIAL INSTITUTION CASES	**MDL No. 14-02583-TWT**

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ENTRY OF ORDER REGARDING COMMUNICATIONS WITH POTENTIAL MEMBERS OF THE FINANCIAL INSTITUTION PUTATIVE CLASS

Northern District of Georgia Local Rule 23.1 allows the Court to enter an order limiting communications between the parties and putative class members only when, "[b]ased on the record before the court, . . . a failure to so limit communications would likely result in imminent and irreparable injury to one of the parties." At the outset of this case, the financial institution Plaintiffs (the "FI Plaintiffs" or the "Banks") agreed with Home Depot U.S.A., Inc. and The Home Depot, Inc. ("Home Depot")[1] that no order limiting communications with putative

[1] The Complaint improperly names The Home Depot, Inc. as a defendant. The Home Depot, Inc. is not a retailer and is therefore not a proper party in this litigation.

class members is necessary or warranted. *See* Case Management Order No. 3 (Dkt. No. 66 at 2).

Various "Card Brands," e.g., VISA and MasterCard, have contacted Home Depot pursuant to their respective Card Brand Recovery Processes and notified Home Depot of proposed financial assessments against Home Depot to compensate the Banks for certain alleged losses due to fraudulent transactions and operating expenses arising out of the data breach. This contractual process is a routine part of the business operations of any company that accepts debit and credit cards and has experienced a data breach. Under this process, Banks are informed of their proposed allocation of the assessment, asked to accept the proposed allocation as full resolution of their rights under the Card Brand Recovery Process, and given the opportunity to accept funds beyond the allocation to release all claims related to the data breach. Home Depot accordingly submitted a Proposed Order to govern the communication of a settlement offer and release to the Banks through the Card Brand Recovery Process. FI Plaintiffs' counsel rejected the Proposed Order and have demanded that they and the Court have input into and approve any settlement offers before they are presented to the Banks through the Card Brand Recovery Process.

Rather, The Home Depot, Inc. is the parent company of Home Depot U.S.A., Inc., which is a home improvement retailer.

Such a demand goes far beyond what is necessary or legally permissible. To date, Home Depot has not contacted any putative class members regarding the terms of a final settlement and release, and the FI Plaintiffs have not identified any actual evidence of misleading or harmful communications necessitating such an extreme order. The Eleventh Circuit rule, consistent with the local rule, is that orders restricting contacts with putative class members must "'be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.'" *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1985) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981)). There is no such record here, and an order is accordingly unnecessary. Nevertheless, Home Depot sought a compromise with the FI Plaintiffs and proposed the attached Order to allow their counsel to review certain aspects of any settlement offers to putative class members. The Plaintiffs rejected this Order, necessitating this motion. Because Home Depot's Proposed Order is consistent with Supreme Court and Eleventh Circuit precedent and the First Amendment, Home Depot respectfully submits that it should be entered and the FI Plaintiffs' proposed order, if any, rejected.

I. Background

As stated above, it is Home Depot's position that no order limiting either the parties or counsel in communicating with putative class members is necessary or warranted. In this case, in contrast to many of the class actions in which an order governing communications with absent class members has been entered, the putative class members are financial institutions, not individual consumers. Included among these financial institutions are some of the largest banks in the country, such as Bank of America and Citibank. These absent class members are sophisticated business entities, most if not all of whom have their own counsel separate and apart from the Lead Plaintiff Class Counsel in this MDL.

As explained in Home Depot's Memorandum in Support of its Motion to Dismiss and Reply Brief (Dkt. Nos. 114-1 and 134), key contracts govern the claims that the Banks assert here – such as contracts between the Card Brands and the Banks and contracts between the Card Brands and acquiring banks – and the Card Brands' operative regulations also apply to the Banks. These operative regulations expressly contemplate that events may occur that compromise payment card data. These regulations also include procedures for the Banks to be reimbursed for certain overhead expenses and fraudulent charges arising from such events – i.e., the Card Brand Recovery Process. *See, e.g.*, *Pa. State Emps. Credit Union v. Fifth Third*

Bank, No. 1:CV-04-1554, 2006 WL 1724574, at *4-*5 (M.D. Pa. June 16, 2006). The Banks entered into these risk allocating agreements with the Card Brand Networks and are familiar with and have, in the past, participated in the Card Brand Recovery Process. As part of this process, the Card Brands will seek to levy financial assessments against Home Depot in order to compensate the Banks for alleged losses due to fraudulent transactions and certain operating expenses.

The Card Brand Recovery Process and resulting settlement offers to financial institutions are far from a novelty. On the contrary, this process plays out any time there is a criminal data breach like the one committed against Home Depot, and the FI Plaintiffs' counsel is familiar with it from other data breach litigation. Involvement in the Card Brand Recovery Process is contractually required and part of the day-to-day operations of any business that accepts debit and credit cards and experiences a data breach. At this time, Home Depot and certain Card Brands are engaging in settlement negotiations as part of the Card Brand Recovery Process, negotiations that were initiated by the Brands making demand on Home Depot. Allowing the Banks – who stand to benefit from the Card Brand Recovery Process – to interject themselves into this part of the process would result in direct interference with Home Depot's rights to continue its day-to-day business operations

during the pendency of this litigation, including its negotiations with the various Card Brands.

The settlement negotiations that are part of the Card Brand Recovery Process are legally permissible (see pages 6-11, *infra*). The fact that these negotiations are taking place has been disclosed to Lead Counsel for the FI Plaintiffs. While no order governing the communications with absent class members is required, to address any concerns of the Court or the Plaintiffs, Home Depot will consent to entry of the Proposed Order attached hereto. The Proposed Order addresses certain communications with financial institution putative class members by both sides regarding settlement offers and release of the claims asserted in this litigation. Prior to filing this Motion and Proposed Order, counsel for Home Depot sought the FI Plaintiffs' counsel's consent and approval of the Order, but it was not given.

II. Home Depot's Proposed Order goes above and beyond what is legally required.

The United States Supreme Court has confirmed that a court has a limited ability to restrict a party's communications with third parties, including putative class members in a class action. "[A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil,* 452 U.S. at 101. "[S]uch a

weighing – identifying the potential abuses being addressed – should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." *Id.* at 102. Consistent with the caution urged by the *Gulf Oil* court, the Eleventh Circuit has held that orders restricting a party's communications with putative class members should be "issued with a 'heightened sensitivity' for first amendment concerns." *Kleiner*, 751 F.2d at 1205. Local Rule 23.1(C) is likewise consistent with Supreme Court precedent. Before an order limiting communications may be entered, the Court must determine, based upon the record before it, that "a failure to so limit communications would likely result in imminent and irreparable injury to one of the parties." L.R. 23.1(C)(2).

Despite the fact that no order is necessary, out of an abundance of caution and with the goal of being as transparent as possible, Home Depot presented the FI Plaintiffs' counsel with its Proposed Order Regarding Communications With Potential Members of the Financial Institution Putative Class submitted with this Motion. This Proposed Order strikes the appropriate balance between restricting communications that will frustrate the policies and purpose of Rule 23 of the Federal Rules of Civil Procedure and allowing communications protected by the First Amendment. It is also consistent with orders entered in *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 564 (S.D. Fla. 2008) and *Cox Nuclear Medicine v. Gold Cup Coffee*

Servs., Inc., 214 F.R.D. 696, 699 (S.D. Ala. 2003), where district courts from this circuit recognized that a defendant has the right to communicate individual settlement offers to putative class members provided that the communications are not misleading. Although the request and need for such an order is premature given the complete absence of any evidence of harm or coercion, Home Depot is willing to agree to an order that places restrictions on any lawful settlement offers made to putative class members. As the Proposed Order shows, Home Depot is willing to take steps sufficient to satisfy any concerns the FI Plaintiffs' counsel may have.

The *Kleiner* decision does not support entry of any order allowing the Banks a voice in determining the language used in settlement offers to putative class members. The *Kleiner* case involved a factual scenario far different from any that exists in this case. The oral communications at issue took place after a class had been certified for certain claims, when class members were theoretically represented by counsel. *Kleiner*, 751 F.2d at 1196. At the forefront of the dispute in *Kleiner*, a case between a defendant bank and small borrower customers of that bank, was a concern that "unilateral contacts by the [defendant] before the close of the exclusion period would intimidate eligible members, many of whom would be very worried about their credit ratings and their ability to borrow in the future." *Id*. "Neither the court nor opposing counsel were alerted to the telephone campaign" conducted by

the defendant with the explicit goal of reducing class size post-certification. *Id*. at 1197. The defendant bank convinced 2800 out of 3000 class members to exclude themselves from the class without compensation of any kind. *Id.* at 1198. And the defendant and its counsel were cited for contempt for ignoring the court's prior rulings. *Id.* at 1208. None of the circumstances that motivated the drastic order in *Kleiner* exists here.

This case is also in stark contrast to other cases in this Court where orders limiting putative class communications were entered. The court in *Maddox v. Knowledge Learning Corp.,* 499 F. Supp. 2d 1338, 1344 (N.D. Ga. 2007) required the plaintiffs to correct "factually inaccurate, unbalanced, or misleading" statements previously placed on a website. In *Abdallah v. Coca-Cola Co.,* 186 F.R.D. 672, 678-79 (N.D. Ga. 1999), the court was concerned about prior statements Coca-Cola attorneys had made to class members and about attempts by Coca-Cola "to mislead its employees and coerce them into non-participation in [the] case." And *Wilson v. Regions Fin. Corp.,* No. 2:14–CV–0105-RWS, 2015 WL 615528 (N.D. Ga. Feb. 9, 2015) similarly involved concerns that communications could mislead class members into believing that their employment could be terminated. In that case, the court required the defendant to include many of the same items in its

communications to putative class members that Home Depot has already agreed to do in its Proposed Order.

The fact that communications orders were entered on the unique facts and records in those cases does not require a similar order here and most certainly does not support the type of order sought by the FI Plaintiffs. Put simply, there are no facts and nothing in the record that indicate that Home Depot has done anything inappropriate or run afoul of Local Rule 23.1(C). Home Depot's First Amendment rights should not be trampled based upon unfounded accusations and assumptions. "Courts have been mindful not to run afoul of [the parties] and their lawyers' free speech rights in their restrictions of pre-notice communications." *Maddox,* 499 F. Supp. 2d at 1343.

Though the facts and circumstances differ here, Home Depot anticipates the FI Plaintiffs may attempt to mischaracterize what is occurring here and what occurred in the *Target* MDL. In that case, the plaintiffs attempted to enjoin Target from settling with financial institution class members before class certification. Despite explicitly disapproving of the settlement terms negotiated through the Card Brand Recovery Process, the *Target* court conceded that "Plaintiffs' lead counsel's issues with the settlement are understandable, but they are also not susceptible of a legal remedy." *In re Target Corp. Customer Data Security Breach Litig.*, MDL No.

14–2522, 2015 WL 2165432, at *1 (D. Minn. May 7, 2015). "The law permits a defendant or a non-party to communicate with and to settle with putative class members at any time before class certification without Court approval or input as long as those communications are not misleading or coercive." *Id*. (citing Fed. R. Civ. P. 23 advisory committee's notes (2003 amendments) (noting that Rule 23(e)'s language was amended to make clear that court approval is necessary "only if the claims, issues, or defenses of a certified class are resolved by settlement . . . .")). Here, as in the *Target* case, there is no evidence of danger of the putative class members being misled by any offers of settlement communicated to them by the Card Brands. And as in *Target*, "[t]he statements [to be] communicated to the putative class are not misleading. And the record is bereft of any evidence of coercion. Plaintiffs' lead counsel has proffered not a single affidavit from a bank that it fears losing . . . business if it does not accept [a settlement] offer, for example. Absent evidence such as this, the Court cannot infer coercion." *Id.*

III. The Banks' proposed order goes far beyond what is allowed under the law.

Dissatisfied with Home Depot's proposed compromise, the Banks offered a competing order that requires Home Depot to obtain not only FI Plaintiffs' counsel's approval but also the Court's approval before doing what the law and First Amendment allow in making settlement offers to financial institution putative class

members. Specifically, the Banks demand, "Before any mass offer of settlement and request for release of claims is made to absent or putative members of the class, the proposed communication containing the information set forth in the preceding paragraph must be furnished to opposing counsel for review and approval. To the extent the Parties cannot agree on the content of a communication under this paragraph, the communication must be provided to the Court for approval prior to dissemination to absent class members." The Banks have provided no authority showing that such approval is necessary or even appropriate. Such a demand for essentially prior restraint goes far beyond what the First Amendment allows and what courts approved in *Jeld-Wen,* 250 F.R.D. at 564 and *Cox Nuclear Medicine*, 214 F.R.D. at 699, both of which allowed the defendant to proceed with settlement offers in a manner consistent with what Home Depot proposes here. In *Jeld-Wen*, the court also astutely noted that "[p]laintiffs do not have a right to participate directly in the presentation or terms of a settlement proposal by" a defendant. 250 F.R.D. at 564, n.6.

In confirming a court's limitations to enter such an order, the Eleventh Circuit in *Kleiner* recognized that a showing of "good cause" is required and stated, "In ascertaining the existence of good cause, four criteria are determinative: the severity and the likelihood of the perceived harm; the precision with which the order is

drawn; the availability of a less onerous alternative; and the duration of the order." Not only is the Banks' request unsupported by the law, it is also premature. There is nothing in the record to raise any of the red flags that the *Kleiner* court identified because there is no harm or likely injury, perceived or otherwise.

Home Depot's Proposed Order ensures that financial institution putative class members will be fully informed about the status of this litigation, their rights to participate in the case, and what they would be giving up if they agreed to settle and release their claims with the Card Brands and the Home Depot. Home Depot's Proposed Order, similar to that in *Jeld-Wen*, requires Home Depot to provide the FI Plaintiffs' counsel, within 24 hours of the settlement offer being made, memos summarizing the settlement terms provided to putative class members as well as portions of the settlement offer reflecting the fact that Home Depot (1) provided details about the pending class action lawsuit, including the nature of the allegations, (2) disclosed the putative or absent class members' rights to participate and recover in the lawsuit or not, and (3) explained to the putative class members that the settlement offer represents a lesser recovery than they may potentially recover if they remain parties in the class action and are successful in that litigation.

Because FI Plaintiffs' counsel will not consent to Home Depot's Proposed Order, Home Depot is filing the current Motion. For the reasons set forth herein,

Home Depot requests that this Court enter the attached Proposed Order Regarding Communications With Potential Members of the Financial Institution Putative Class.

Respectfully submitted this 23rd day of October, 2015.

By: */s/ Cari K. Dawson*

CARI K. DAWSON
Georgia Bar Number 213490
KRISTINE M. BROWN
Georgia Bar Number 480189
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777
cari.dawson@alston.com
kristy.brown@alston.com

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1D, the undersigned certifies that the foregoing complies with the font and point selections permitted by L.R. 5.1B. This Memorandum was prepared on a computer using the Times New Roman font (14 point).

Respectfully submitted, this 23rd day of October, 2015.

By: */s/ Cari K. Dawson*
CARI K. DAWSON
Georgia Bar Number 213490

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on October 23, 2015 with the Court and served electronically through the CM-ECF (electronic case filing) system to all counsel of record registered to receive a Notice of Electronic Filing for this case.

By: */s/ Cari K. Dawson*
CARI K. DAWSON
Georgia Bar Number 213490

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re: The Home Depot, Inc., Customer Data Security Breach This document relates to: ALL FINANCIAL INSTITUTION CASES	**MDL No. 14-02583-TWT**

[PROPOSED] ORDER REGARDING COMMUNICATIONS WITH POTENTIAL MEMBERS OF THE FINANCIAL INSTITUTION PUTATIVE CLASS

Local Rule 23.1(C)(2) requires the Court to determine whether proper management of the case or the interests of the putative class members requires entry of an order limiting the Parties' communications with putative class members. The Court recognizes that any order limiting communications with putative or absent members of the class "should be based on a clear record and specific finding that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 101 (1981). "In addition, such a weighing – identifying the potential abuses being addressed – should result in a carefully drawn order that limits speech as little as

possible, consistent with the rights of the parties under the circumstances." *Id.* at 102.

In this case, in contrast to many of the class actions in which an order governing communications with absent class members is entered, the putative class members are financial institutions, not individual consumers. Included among these financial institutions are some of the largest banks in the country, such as Bank of America and Citibank. These absent class members are sophisticated business entities, most if not all of whom have their own counsel separate and apart from the Lead Plaintiff Class Counsel in this MDL.

Nevertheless, while not required, an order governing certain communications with putative class members by both sides regarding settlement offers and release of the claims asserted in this litigation is appropriate moving forward. This Order strikes the appropriate balance between restricting communications that will frustrate the policies and purpose of Rule 23 of the Federal Rules of Civil Procedure and allowing communications protected by the First Amendment.

IT IS THEREFORE ORDERED THAT:

1. The Parties and/or their counsel may communicate with putative or absent members of the class regarding offers of settlement – including

any offers of settlement in connection with the "Card Brand Recovery Process," which provides for the reimbursement of certain fraud and operating expenses in the event of a data breach. Given the dynamic, fluid and highly individualized nature of settlement negotiations among businesses in connection with the Card Brand Recovery Process, nothing in this Order shall require disclosure to or approval by a Party and/or its counsel of communications made during the course of settlement negotiations.

2. Nevertheless, except when otherwise agreed to by counsel for the Parties, an offer of settlement and request for release of claims to absent or putative members of the class, once it has been fully and finally negotiated by Home Depot and a Card Brand, including final agreement on all terms and conditions of settlement, must (1) be in writing; (2) provide details about the pending class action lawsuit, including the nature of the allegations; (3) disclose the putative or absent class members' rights to participate and recover in the lawsuit or not; and (4) explain to the putative or absent class members that the settlement offer represents a lesser recovery than they may potentially recover if they remain parties in the class action and are successful in that litigation. The

portions of the settlement offer reflecting the disclosures required by (2), (3), and (4) and any memos summarizing the settlement terms provided to issuing banks will be provided to opposing counsel within 24 hours of the written settlement offer and release being provided to the absent class members.

3. This Order applies equally to both Plaintiffs and Defendants and their counsel. Any communication from Plaintiff Class Counsel to absent class members regarding any written offer of settlement and release referenced in Paragraph 2 above must be reduced to writing, and a copy of that response must be provided to opposing counsel within 24 hours of being provided to the absent class members.
4. The Parties shall meet and confer and undertake all reasonable efforts to resolve any disputes concerning the provisions of this Order. Nothing in this Order shall be interpreted or construed to lessen either Party's burden to make an evidentiary showing of actual or threatened abuse by a party sought to be restrained, and the Parties shall avoid any effort to restrain expression or compel speech in violation of the First Amendment.
5. Nothing in this Order shall be interpreted or construed to negate or render inapplicable the provisions of Local Rule 23.1(C)(3).

SO ORDERED, this ___ day of _____________, 2015.

____
Thomas W. Thrash
United States District Judge