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	MDL Docket No. 2583 1:14-md-02583-TWT
This Document Relates to: All Financial Institution Cases	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

On the day before Thanksgiving and before this Court ruled on Home Depot's motion to authorize solicitation of releases from financial institutions of their claims arising out of its 2014 data breach (*see* ECF No. 141), absent Class members began to receive communications asking them to do just that.[1] Because the communications are inconsistent and fail to disclose key information (the exact issue about which Plaintiffs' Counsel were concerned (*see* ECF No. 142)),

[1] Home Depot's attorney Cari Dawson claims Home Depot did not review these communications or authorize them (Declaration of Cari Dawson ("Dawson Dec."), ECF No. 147-1), but it is unfathomable that no one at Home Depot knew the processors would be reaching out to Class members (and named Class representatives) in order to effectuate the proposed settlement. Whether or not it was done with Home Depot's explicit knowledge, it was certainly done at Home Depot's request as Home Depot is the only entity who benefits from and sought a release of claims.

Plaintiffs currently do not know exactly what Home Depot and MasterCard are attempting to do. It appears, however, that they have hijacked the card recovery process. Under MasterCard's rules, this process provides partial compensation for certain losses financial institutions have incurred as a result of data breaches and does not require a release of financial institutions' claims. Home Depot and MasterCard instead have sought to turn the card recovery process into a pseudo-class settlement that releases all the claims in this litigation. In the meantime, Class members have received misleading and coercive messages about what is happening and are being told they must act immediately or lose their rights. In fact, the deadline for some absent Class members to act already has passed.

Last Monday, in a supplemental response to Home Depot's motion regarding communications with Class members, Plaintiffs informed the Court that such communications already have begun, requested Home Depot be directed to produce all such communications and the settlements with MasterCard, and sought an immediate hearing on the pending motion. *See* ECF No. 146. Plaintiffs now move separately for injunctive relief to redress the improper conduct that has occurred and preclude it from happening again. In particular, Plaintiffs seek an order: (1) vacating any releases obtained as a result of any coercive and misleading communications; (2) requiring a curative notice to be sent to Class

members undoing the impact of such communications and re-opening the period during which Class members must make decisions regarding any settlements after more fulsome information has been provided to them; and (3) preventing implementation of any settlements between Home Depot and MasterCard that interfere with the orderly resolution of this litigation. Plaintiffs request the Court schedule a hearing on this motion and, pending the hearing, afford Plaintiffs an opportunity to conduct discovery. Further, Plaintiffs ask the Court to order that efforts to implement any settlements that release the claims in this litigation cease in order to preserve the status quo.

This Court has authority to provide the relief Plaintiffs seek. Under the All Writs Act, 28 U.S.C. §1651, a court may enjoin a party and those acting in concert with it from implementing a class action settlement and order other corresponding relief to ensure the proper administration of justice and the orderly resolution of this litigation. *See, e.g.*, *In re: Managed Care Litig*., 236 F. Supp. 2d 1336, 1339-41 (S.D. Fla. 2002). Further, as the previous briefing before this Court makes clear, under Rule 23(d), the Court is empowered to control communications with class members, especially when such communications seek to affect class members' remedies. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252-54 (S.D.N.Y. 2005). Here, Home Depot can be directed to

prevent processors (through whom Home Depot is seeking Class member releases) to stop sending misleading and deceptive communications and to take further action to ensure Home Depot does not jeopardize this Court's jurisdiction over the claims in this action.

I. FACTUAL BACKGROUND

Home Depot appears to have reached one or more settlements with MasterCard, certain payment card processors, and potentially others of whom Plaintiffs are unaware. *See*, *e.g.*, Declaration of Menza Dudley ("Dudley Dec."), Ex. 1 (12/1/15 e-mail to Class member attaching undated, unsigned draft settlement agreement ("Settlement Agreement") between Home Depot, MasterCard, and Jack Henry & Associates ("JHA")). Because Home Depot has not informed the Court or Class counsel about what it is doing, the only information available to Plaintiffs must be gleaned from the incomplete, misleading communications Class members have received. Plaintiffs asked Home Depot for further information, to no avail. Instead, Home Depot referred to Plaintiffs' requests for more information as "Draconian." ECF No. 147 at 2.[2]

[2] After Plaintiffs' filing last Monday, Ms. Dawson sent a letter to Plaintiffs demanding it be withdrawn. *See* Declaration of Joseph P. Guglielmo ("Guglielmo Dec."), Ex. 1. Plaintiffs responded the next day and requested more information, including copies of any settlement agreements that had been or were on the verge

Based upon the information currently available, Home Depot apparently is attempting to fashion a *de facto* class settlement designed to end or severely limit the scope of this multi-district litigation proceeding, one that will take effect only if it covers 65% of the MasterCards compromised by the breach, similar to many class action settlements that contain a "blow provision." *See*, *e.g.*, Dudley Dec., Ex. 1 at 2. Evidently, MasterCard must inform Home Depot whether sufficient financial institutions have accepted (or are otherwise determined to be bound by) the settlement to reach the 65% threshold by December 12, less than one week from now. *Id*., Settlement Agreement at 4, ¶3. While Home Depot may claim it had nothing to do with these communications, this deadline is a result of Home Depot's actions given the settlement and contemplated release.

Significantly, the apparent settlement between Home Depot and MasterCard is designed to avoid the protections afforded Class members when their rights are collectively settled. Class members have not been given the basic information that Rule 23 requires and are being told they must act based on incomplete, misleading, and coercive communications that are inconsistent with this Court's local rules and

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of being reached, identification of the parties, any communications about the settlements, who initiated the communications, and whether the communications "were contemplated, implicitly or expressly, by any of the agreements to which Home Depot is a party." *Id*., Ex. 2. Home Depot has not responded.

Rule 23 in general. Further, the apparent settlement is designed to avoid this Court's oversight, which would ensure that the information received by the Class is appropriate and that the settlement is fair, adequate, and reasonable. And, by negotiating the settlement with MasterCard rather than the entities that were injured (*i.e.*, the parties in this case), Home Depot is acting in disregard of this Court's order appointing leadership for the Class, which grants to Co-Lead Counsel sole authority to discuss settlement on behalf of financial institutions. ECF No. 62 at 3.

The apparent effort at a pseudo-class settlement, moreover, is being carried out under the guise that MasterCard is implementing the process mandated by its regulations under which financial institutions automatically recover limited compensation for injuries sustained as a result of a data breach. Under those regulations, and in particular MasterCard's Account Data Compliance ("ADC") program, MasterCard is authorized to investigate whether a data breach was caused by the merchant's failure to comply with data security requirements, assess a penalty against an offending merchant, and distribute the penalty to the affected financial institutions, who are not required to release their legal claims to receive compensation. *See* Guglielmo Dec., Ex. 3, ADC User Guide. MasterCard has not yet released the results of its investigation regarding whether Home Depot failed to

have required data security measures, announced whether it has assessed a penalty against Home Depot, or told financial institutions how much, if anything, they will receive under the ADC program.

To date, Plaintiffs are aware of at least four different communications that have been sent out to Class members. These communications – which are attached at ECF Nos. 146-2 to 146-4 and Dudley Dec., Ex. 1 – contain a dearth of information about the apparent settlements and are misleading and coercive.

A. Class Members Have Been Provided with Inadequate Information

Three out of the four known communications with absent Class members were not even accompanied by a copy of a settlement agreement. Plaintiffs only obtained an unsigned draft copy of one settlement for the first time on December 1. *See* Dudley Dec., Ex. 1. And given that the agreement is not finalized, it could still change in substantive ways.

Not only are many Class members evidently being asked to release their rights without a final settlement agreement (through communications that fail to even mention this issue), they have not been afforded other critical information, including the following:

- Some, if not most, Class members have not even been told how much they will receive under the settlement. No Class members have been told the method used to determine the amount of their payment.

- Class members have not been told whether any payments will be made under the ADC program if they do not participate in the settlement.

- Class members have not been told the amount of any Alternative Recovery Offer ("ARO") payments that will be made, precluding them from determining precisely what they would get in exchange for a release.

- Class members have not been furnished any information regarding the strength of the liability case against Home Depot.

And while at least one settlement agreement itself mentions this case and acknowledges that Class members may be entitled to greater recovery through the litigation that they are waiving by virtue of accepting the settlement, that crucial information is not being conveyed in the settlement communications. Without such information, financial institution cannot make an informed decision as to whether to accept a settlement, particularly one that has not even been finalized.

B. The Communications Have Been Coercive and Misleading

The communications received by absent Class members are the epitome of coercive, having been sent out on the eve of or during the Thanksgiving holiday, giving Class members but a few days to take action, lacking essential information needed to make an informed decision, and, in some cases, telling financial institutions that they would be included in the settlement unless they affirmatively

opted out.[3] Under the circumstances, it is hard to imagine that such communications were not intentionally designed to pressure financial institutions into accepting the settlement for fear that they would miss out on any compensation for their injuries.

The coercive impact of the communications is enhanced by the fact that the communications are inherently misleading. *See* Plaintiffs' Supplemental Response at 18-19 (listing ways in which the communications are deceptive). For example, by failing to tell financial institutions whether an ADC payment will be made to them if they do not participate in the settlement, specify the amount of any such payment, or mention that a release is not required to obtain an ADC payment, the communications leave the impression that the only compensation available to them is from the settlement. The communications also do not disclose how the amount of settlement compensation was determined, whether MasterCard acted under a

[3] In her declaration, Ms. Dawson claims, "It is Home Depot's understanding that certain contracts between sponsored and sponsoring banks allow sponsoring banks to release claims on behalf of sponsored banks who do not affirmatively opt-out or, in other instances, without even consulting the sponsored banks." Dawson Dec. ¶5. It is not clear what the basis for this statement is, but Plaintiffs are unaware of any agreements between their clients and processors that allow sponsoring banks to release financial institutions' claims unless they affirmatively opt out. Further, Home Depot claims the communications were sent out by absent Class members. However, the Class only includes issuing financial institutions, not processors, and regardless, the processors are acting to benefit Home Depot by soliciting releases.

conflict of interest based upon the fact that it is to be released from liability, or whether the amount of compensation was substantially reduced due to threats of legal action by Home Depot to challenge the legality of the ADC program.

The communications relating to the JHA Settlement Agreement illustrate the problem with this entire process. Nothing in the cover e-mail explains whether an ADC amount will be paid to those not covered by the settlement, or the amount of any such payment. In fact, the communication suggests that a Class member who opts out will receive nothing: "If your financial institution chooses to Opt-Out . . . MasterCard will not pass along your financial institutions [sic] share of the Home Depot payout to JHA so you will not receive any funds distributed by JHA." Dudley Dec., Ex. 1 at 5. The cover e-mail also states, "In an effort to quickly settle the breach, ***Home Depot has volunteered to pay a 110% premium of their financial liability*** . . ." *Id*. at 4 (emphasis added). The framing of this payment is plainly misleading. Any financial institution reading the agreement would be justified in believing that it is getting a good deal – 110% of ***damages*** – but that is ***not*** what it would be getting. Home Depot evidently has only agreed to pay a nominal 10% above an amount determined by MasterCard as the ADC amount – which is ***required and automatic***, does not require a release, and only covers a small subset of actual damages, not all of Home Depot's financial liability.

Even if a financial institution understood that the ADC amount is not the same as the full amount of its damages, there is no information about the size of the ADC amount or the factors that were used in determining it. To the contrary, Home Depot and MasterCard evidently affirmatively decided to conceal that information from financial institutions because the settlement agreement has a confidentiality provision prohibiting disclosure of the settlement amount and any numerical information used to derive it. *Id.* at 13, ¶8. Such secrecy would not be allowed in a class action settlement where under Rule 23 class members and the Court must be informed about all facets of any proposed settlement.

There is ample evidence that Class members are indeed confused and are being coerced and misled by these communications. *See* Dudley Dec.; Declaration of Laurie Stewart ("Stewart Dec."); Declaration of George Sweet ("Sweet Dec.") (collectively, "Class Declarations"). Class members describe uncertainty regarding what they are entitled to with and without the settlement, including confusion as to whether the settlement includes or precludes recovery under MasterCard's ADC program and how the payment amount was derived. Dudley Dec. ¶7; Stewart Dec. ¶7; Sweet Dec. ¶6. Class members also were not told what amount above that to which financial institutions already are entitled to under the ADC rules is being paid for the release. Dudley Dec. ¶9; Stewart Dec. ¶8; Sweet

Dec. ¶8. Class members report confusion as to whether they are required to provide a release to obtain *any* funds, including ADC recovery. DudleyDec. ¶9; Stewart Dec. ¶9. Without this crucial and relevant information, Class members cannot make an informed decision as to whether to accept the settlements. Dudley Dec. ¶11; Stewart Dec. ¶12; Sweet Decl. ¶10. And other Class members have not even received any communications about the apparent settlements. Declaration of Traci R.E. Carpenter ("Carpenter Dec.") ¶4.

In sum, Home Depot has sown chaos. The releases being sought by Home Depot are clearly intended to thwart this Court's jurisdiction, impede the aggregation of class claims, circumvent the order appointing Co-Lead Counsel (*see* ECF No. 62), and avoid this Court's oversight. What is clear from the timing and substance (or lack thereof) of the communications (sent as a result of Home Depot's deadline and desire for releases not otherwise required in the ADC program) is that Home Depot does not want to make public the full details of the apparent settlements and that financial institutions are being kept from obtaining the information needed to make an informed decision as to whether to participate.

II. ARGUMENT

Under the All Writs Act, the Court has the power to enjoin Home Depot and those acting in concert with it from pursuing any settlement that implicates the

claims in this litigation without this Court's express approval and involvement. Moreover, under Rule 23, the Court has supervisory authority over a pseudo-class action and also has the power to regulate communications that threaten the choice of legal remedies available to Class members. Because Home Depot attempts to divest this Court of jurisdiction to effectuate a *de facto* class action settlement, any settlements must comport with the requirements of Rule 23(e) and the Court, ***at a minimum***, should exercise supervisory oversight to ensure putative Class members have sufficient information regarding the rights that they are being asked to waive.

Accordingly, Plaintiffs respectfully request that the Court issue appropriate injunctive relief to: (1) remedy the impact of the improper conduct that has occurred, including vacating any releases that were obtained, requiring a curative notice to be disseminated, and providing Class members with sufficient time and information to evaluate any proposed settlement; (2) protect Class members from any further misleading and coercive tactics; and (3) prevent implementation of any pseudo-class settlements that interfere with the orderly resolution of this litigation. In order that the Court may act based upon an appropriate record, Plaintiffs further request that the Court allow them to conduct immediate discovery related to the apparent settlements and the communications that have occurred and schedule a hearing to consider the resulting evidence. Pending the hearing, Plaintiffs request

that the Court preserve the status quo by directing Home Depot and those acting in concert with it to stop any further communication with absent Class members and cease any efforts to implement any settlements that involve releases of the claims in this litigation.

A. The All Writs Act Empowers this Court to Enjoin Home Depot, and Those Acting in Concert with It, from Pursuing the Settlement Without the Court's Express Approval

The All Writs Act vests in this Court the power to "issue all writs necessary or appropriate in aid of [its] respective jurisdiction[]." 28 U.S.C. §1651(a); *U.S. v. New York Tel. Co.*, 434 U.S. 159, 171-73 (1977). This power "extends, under appropriate circumstances, to persons who, ***though not parties to the original action or engaged in wrongdoing***, are in a position to frustrate the implementation of a court order or the proper administration of justice." *Id.* at 174 (emphasis added).[4] An order under the All Writs Act "must be [] directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). Thus, this Court may issue any order preventing a party from proceeding with a settlement to protect its

[4] Unless otherwise noted, all emphasis is added and internal citations are omitted.

jurisdiction over claims being released where "necessary from the standpoint of the proper administration of justice." *Managed Care*, 236 F. Supp. 2d at 1343.[5]

Home Depot's settlement efforts are tantamount to "maneuvers to avoid a[n] MDL Court's jurisdiction" over the claims of plaintiffs and class members. *Managed Care*, 236 F. Supp. 2d at 1340. An MDL court charged by the JPML with conducting pretrial proceedings and "concomitantly directing the appropriate resolution of all claims," *In re Humana Inc. Managed Care Litig.*, No. MDL-1334 et al., 2000 WL 1925080, at *3 (J.P.M.L. Oct. 23, 2000), has the "power to enjoin the defendant from entering into a settlement class action with another plaintiff in another forum, at least without notice to the court and its approval." *Managed Care*, 236 F. Supp. 2d at 1340.

An MDL court's authority to issue such orders is rooted in the "extraordinary powers" authorized by the All Writs Act, which extends to "consolidated multidistrict litigation" and to situations where the court must protect its jurisdiction over the adjudication of claims before it. *Id.* at 1341 (quoting *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996)). MDL

[5] Federal Rule of Civil Procedure 65 does not apply to injunctions issued under the All Writs Act. *Managed Care*, 236 F. Supp. 2d at 1344. As a result, Plaintiffs need not demonstrate the customary requirements for injunctive relief, such as irreparable injury and a likelihood of success on the merits.

courts are specially enabled to issue orders to protect their jurisdiction where an "action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." *Winkler*, 101 F.3d at 1202; *see also In re Checking Account Overdraft Litig.*, 859 F. Supp. 2d 1313, 1322-24 (S.D. Fla. 2012) (MDL court prevented settlement; MDL court had not yet certified a class). This authority extends to orders against third parties as well as to enjoining any activities that impact the Court's jurisdiction. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG), 2014 WL 4966072, at *31-35 (E.D.N.Y. Oct. 3, 2014) (permanently enjoining third-party claims-filing companies that made false and misleading statements to class members from engaging in claims-filing services relating to the settlement); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985) ("An important feature of the All-Writs Act is its grant of authority to enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction.").

Congress created "a Judicial Panel for the very ***purpose*** of consolidating proceedings and promoting judicial efficiency. Furthermore, class settlements are subject to a rigorous review of their fairness because of their impact on many parties." *Managed Care*, 236 F. Supp. 2d at 1342 (emphasis in original). In the

Managed Care MDL case, defendant CIGNA arranged with a single, state court plaintiff to remove to Illinois federal court, settle, and release claims at issue in the MDL, without the knowledge or approval of the MDL judge. Even in the absence of any showing that the settlement was unreasonable, the Court enjoined it. *Id.* at 1345. The court enjoined not only the defendant, but "any party acting in concert with [the defendant], from proceeding in any manner with the proposed settlement … without the express approval of this Court, and from contacting in any way the members of the class." *Id.* MDL Judge Moreno was unwilling to "turn a blind eye to the underhanded maneuvers CIGNA took to obtain this settlement agreement. CIGNA snookered both [the Florida MDL Court and Southern District of Illinois] in an obvious attempt to avoid [the Florida MDL Court's] jurisdiction," making an injunction necessary for the proper administration of justice. *Managed Care* at 1342-43. Clearly, this Court has the power to, and should, enjoin Home Depot and those acting in concert with it.

Here, where Home Depot has used third-party MasterCard's special relationship with issuing banks to effectuate a pseudo-class action settlement with aggregate relief, the Court can similarly enjoin such efforts. Indeed, the procedure by which Home Depot is attempting to extinguish Plaintiffs' claims is even more egregious than the circumstances in *Managed Care*. In *Managed Care*, the

settlement would have at least undergone judicial review. Here, Home Depot attempts to settle and release the Plaintiffs' claims in this action ***without*** judicial oversight and ***without*** inviting ***any*** Plaintiffs to the negotiating table. This is a blatant attempt by Home Depot to usurp the Court's authority to resolve claims under the multidistrict litigation rules and the class action procedures in Rule 23.

Home Depot's decision to conduct all negotiations without the Co-Lead Counsel – duly appointed by this MDL Court – also deprives the putative Class members of the ability to participate with the advice of attorneys who know the most about the scope and merits of ***their*** claims. *See* ECF No. 62. It is impossible for either the Court or Co-Lead Counsel to carry out their duties when Home Depot conducts secret negotiations to exercise a mandatory, aggregate release campaign and then cloaks such agreements under further confidentiality.[6]

Because this Court is bound to oversee the resolution of all claims entrusted to it, the Court should not countenance the release of those claims accomplished in

[6] When it was faced with dozens of class action lawsuits filed across the country, Home Depot eagerly sought transfer of all cases to this District, an action essential to avoid inconsistent rulings. *See In re Home Depot, Inc. Customer Data Sec. Breach Litig.*, MDL No. 2583, ECF No. 56, at 6-7. Home Depot set forth a number of reasons to support that "transfer will promote the just and efficient conduct of the putative class actions[.]" *Id.* at 5. Apparently now Home Depot believes the justice it once urged to be served by this Court is no longer expedient for its purposes.

secret negotiations, brazenly outside the Court's purview.

B. The Settlement Constitutes a *De Facto* Class Settlement That, at a Minimum, Must Be Subject to This Court's Supervisory Oversight

Home Depot may attempt to analogize its actions to cases where courts have permitted defendants to settle on an individual basis with some absent Class members (a process which the Plaintiffs do not challenge as long as it is done honestly and in a non-coercive manner). Home Depot, however, has essentially created a pseudo-class action settlement outside the boundaries of Rule 23(e).

The apparent mandatory participation required under the settlement – akin to a blow provision in a standard class settlement – means these are not settlements on an individual basis. Home Depot's agreement with MasterCard states that "65% of the total Qualified Accounts" agree to release all claims against Home Depot for the settlement to be effective. *See* Dudley Dec., Ex. 1 at 2. This type of required participation is typical of class action settlements. *See* Newberg on Class Actions § 13:6 (5th ed.). If this was truly a non-class settlement, there would be no use for minimum mandatory participation or a blow provision.

In *Kahan v. Rosenstiel*, the defendant faced a class action brought by minority shareholders alleging misrepresentations in connection with a tender offer. *Kahan v. Rosenstiel*, 424 F.2d 161, 163 (3d Cir. 1970). Before certification,

defendant sought an end run around Rule 23 by raising its stock offer directly to minority shareholders, thus resolving the class claims. Defendant did not consult plaintiff, his counsel, or the court, thus in plaintiff's words, "brazenly ignoring Rule 23(e)," which guides the consummation of formal class settlements. *Id.* at 168. The circuit court remanded the case to the district court, indicating its displeasure with potential circumvention of Rule 23(e) and noted that defendant's attempt to circumvent Rule 23, if true, would be "flagrant." *Id*. ("[I]f a court ultimately decides that a plaintiff created substantial benefit for others, it could find it inequitable to deprive plaintiff of counsel fees, merely because defendants prevented the physical creation of the fund by flagrantly ignoring Rule 23."). Thus, the court held that unilateral, aggregate settlements cannot escape the protections of Rule 23.

The current agreement has all the hallmarks of a class resolution (an aggregate settlement award, a notice program (albeit misleading), a minimum, mandatory participation threshold, and blow provision), but none of the protections (court approval, advice and experience of class counsel, neutral notice). Even more flagrantly than in *Kahan*, Home Depot negotiated and arranged a global settlement with a third party without consulting Plaintiffs' counsel or the Court (and while its motion (ECF No. 141) to allow such communications was pending).

Home Depot should not be permitted to ignore the formal class settlement mechanism of Rule 23(e) for resolution of class claims simply by failing to ask the Court to certify a settlement class.

Even if the agreement did not constitute a *de facto* class settlement, it is still subject to this Court's supervision and approval. Courts from a variety of jurisdictions also routinely exercise judicial supervision of settlements in "quasi-class action" MDLs where no class is certified, but where claims are aggregated for settlement purposes. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554 (E.D. La. 2009) ("While an MDL is distinct from a class action, the substantial similarities between the two warrant the treatment of an MDL as a quasi-class action. … Accordingly, this Court found that 'the Vioxx global settlement may properly be analyzed as occurring in a quasi-class action . . . .'"); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05–1708 (DWF/AJB), 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (relying on the quasi-class action nature of an MDL proceeding and the court's equitable authority to implement a reasonable cap on contingent fees). As noted in *In re Zyprexa*:

> While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court; . . . . The ***large number of plaintiffs subject to the same settlement matrix*** approved by the court . . . reflect[s] a

> degree of court control supporting its imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses.

In re Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006). Courts therefore retain authority to exercise judicial oversight and approval where settlements result in compromise or dismissal of class action claims and in quasi-class action litigation where courts exercise their equitable powers under Rule 23.

Because this Court has jurisdiction over the claims sought to be released on a mandatory, aggregate basis, the Court should take appropriate action to protect its jurisdiction and the interests of the Class members by granting Plaintiffs the right to conduct discovery as they have requested, holding a hearing to determine what has occurred, fashioning a remedy to redress improper conduct, and setting the ground rules by which the clams in this action may be settled.

C. The Court Is Empowered to Regulate Communications with Putative Class Members and Ensure They Are Not Subjected to Coercive and Misleading Tactics

As Plaintiffs previously briefed in their responses to Home Depot's motion for an order regarding Class member communications (*see* ECF Nos. 142, 146), pursuant to Rule 23(d) and its inherent equitable authority, the Court also has discretion to regulate communications with Class members, based on a record

reflecting the need for such limitations. *In re Currency Conversion Fee Antitrust Litigation* is directly on point. As Judge Pauley explained:

> ***Communications that threaten the choice of remedies available to class members are subject to a district court's supervision***: A district court's duty and authority under Rule 23(d) to protect the integrity of the class and the administration of justice generally is not limited only to those communications that mislead or otherwise threaten to create confusion and to influence the threshold decision whether to remain in the class. ***Certainly communications that seek or threaten to influence the choice of remedies are ... within a district court's discretion to regulate***.

Id., 361 F. Supp. 2d at 252 (quoting *In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988)). *See also Keystone Tobacco Co., Inc v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002) ("[T]he Court rejects defendants' position that it has no authority to limit communications between litigants and putative class members prior to class certification."). Thus, Rule 23 gives the Court the authority to issue orders to protect absent Class members and allows the Court the ability to oversee this Settlement as it clearly will affect putative Class members' rights.

Unlike *In re Target Corp. Customer Data Security Breach Litig.*, MDL No. 14-2522 (PAM/JJK), 2015 WL 2165432, at *2 (D. Minn. May 7, 2015), where the court refused to enjoin Target because no evidence of misleading communications was offered, Plaintiffs have provided evidence that Home Depot's statements and

omissions about the settlement are both misleading and coercive. *See* ECF No. 146 at 5-7; Class Declarations.

The Court, at a minimum, not only should limit Home Depot's future communications (whether direct or through third parties) with Class members, as requested by Plaintiffs in their prior briefing (*see* ECF No. 142-5), but also should now require curative notice. *See, e.g.*, *Friedman v. Intervet, Inc.*, 730 F. Supp. 2d 758, 766-67 (N.D. Ohio 2010) (ordering curative notice in wake of misleading conduct and statements); *In re Potash Antitrust Litig.*, 896 F. Supp. 916, 921 (D. Minn. 1996) (requiring all communications to be filed with the court); *In re Lutheran Brotherhood Variable Ins. Prods. Co.*, No. 99-MD-1309 PAM-JGL, 2002 WL 1205695, at *3 (D. Minn. May 31, 2002) (requiring future communications to be submitted to the Court for review prior to dissemination); *Westerfield v. Quizno's Franchise Co., LLC*, No. 06-C-1210, 2007 WL 1062200, at *3 (E.D. Wisc. Apr. 6, 2007) (requiring curative notice).

Exercising its inherent authority, its discretion under Rule 23, and pursuant to the Local Rules authorizing a prohibition on misleading and coercive communications with putative Class members, this Court should hold a hearing to determine the relevant facts and, at the hearing, fashion an appropriate order to redress what has occurred and set the rules for how any settlement efforts will

proceed. Meanwhile, the Court should preclude any further communications with Class members and direct Home Depot and those acting in concert with it to cease efforts to implement its apparent settlements with MasterCard.

III. CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court issue an order granting the relief requested.

DATED: December 8, 2015

Respectfully Submitted,

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CERTIFICATION

The Undersigned hereby certifies, pursuant to Local Civil Rule 7.1D, that the foregoing document has been prepared with one of the font and point selections (Times New Roman, 14 point) approved by the Court in Local Civil Rule 5.1C.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, I served all parties by causing a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Injunctive Relief to be filed with the clerk of court using the CM/ECF system, which automatically sends a copy to all counsel registered to receive service.

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