

**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

**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 14 day of December, 2015.



Thomas W. Thrash
United States District Judge