

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

In re: )  
)  
THE HOME DEPOT, INC. SECURITY )  
BREACH LITIGATION ) MDL Docket No.  
)

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
CONSOLIDATION AND TRANSFER UNDER 28 U.S.C. §1407**

John Solak (“Solak”) and Dennis O’Rourke (“O’Rourke”), Plaintiffs in the case styled *Solak v. The Home Depot, Inc.*, United States District Court for the Northern District of Georgia, Atlanta Division, Case No. 1:14-cv-02856-WSD, hereby file this Memorandum of Law in support of their Motion for Consolidation and Transfer of pretrial proceedings under 28 U.S.C. § 1407.

**I. INTRODUCTION**

The actions that Solak and O’Rourke seek to consolidate are purported consumer class action lawsuits against The Home Depot, Inc. (“Home Depot”). Plaintiffs allege violations of various state data breach statutes and common law principles. All of the actions seek certification of a similar class of persons.

Generally, Plaintiffs in these actions allege that Home Depot, the world’s largest home improvement retailer, allowed computer hackers to gain access to its data network in approximately late April or early May, 2014. The data network contained the personal financial information of hundreds of thousands, if not millions, of consumers. The ramifications of this security breach are severe. The thieves can use the financial information to create fake credit and debit cards that can be used to commit fraud and other crimes. The data breach was first reported on September 2, 2014 by a computer security blogger.

Solak and O’Rourke seek the consolidation and transfer of these cases to the United States

District Court for the Northern District of Georgia, Atlanta Division. All of the class actions filed against Home Depot contain common allegations and common questions of fact. Moreover, because Home Depot's actions have received a great deal of publicity, it is almost certain that numerous cases will be filed in the future.

## **II. PROCEDURAL HISTORY**

The involved actions are as follows:

### **A. The Northern District of Georgia Actions**

On September 4, 2014, the case styled *Solak v. The Home Depot, Inc.*, N.D. Georgia, Atlanta Division. Case No. 1:14-cv-02856-WSD (the "*Solak* Action"), was filed in the Northern District of Georgia. The *Solak* Action alleges claims for violations of various state data breach statutes, as well as common law claims including negligence and breach of implied contract. The case seeks certification of separate statewide classes of all individuals whose credit or debit card information and/or personal information was accessed and stolen as a result of the Home Depot data breach first reported on September 2, 2014.

On September 8, 2014, the case styled *Mazerolle v. The Home Depot, Inc.*, N.D. Georgia, Case No. 1:14-cv-02887-WSD (the "*Mazerolle* Action"), was also filed in the Northern District of Georgia. Like the *Solak* Action, the *Mazerolle* Action was assigned to the Honorable William S. Duffey, Jr. The *Mazerolle* Action asserts claims under the Federal Stored Communications Act, 18 U.S.C. § 2702, as well as claims under state data breach statutes and common law claims. The *Mazerolle* Action seeks certification of a nationwide class under the federal act, and separate statewide classes for the state claims.

**B. The Northern District of Illinois Action**

On September 9, 2014, 2014, the case styled *O'Brien v. Home Depot, Inc.*, N.D. Illinois, Eastern Division. Case No. 1:14-06975 (the "*O'Brien* Action"), was filed in the Northern District of Illinois, Eastern Division. The *O'Brien* Action alleges violations of state consumer fraud statutes and common law claims, and seeks to certify a nationwide class.

**III. LEGAL STANDARD**

Actions containing allegations with common questions of fact may be transferred and consolidated under § 1407 if transfer will be for the convenience of the parties and witnesses, and will promote the just and efficient conduct of the transferred cases, 28 U.S.C. § 1407. The Panel typically considers the following four factors in deciding whether to transfer a case under § 1407:

- a. the elimination of duplication in discovery;
- b. the avoidance of conflicting rules and schedules;
- c. the reduction of litigation cost; and
- d. the conservation of the time and effort of the parties, attorneys, witnesses and

courts.

*See*, Manual for Complex litigation (Third) § 31.131 (1995) (citing *In re Plumbing Fixture Cases*, 298 F.Supp. 484 (J.P.M.L. 1968)). Each of these factors favors transfer and consolidation of the cases filed against Defendants.

**IV. ARGUMENT**

**A. The Litigation Satisfies the Requirements for Consolidation and Transfer Under 28 U.S.C. § 1407.**

Pretrial transfer and consolidation under § 1407 is appropriate and necessary. These cases involve the same allegations and legal standards and they will likely be numerous. Unless these cases are consolidated, the parties will incur excessive costs due to duplicative discovery,

and will face the risk of inconsistent rulings on a variety of matters.

**1. The Litigation Involves Common Questions of Fact**

In assessing the appropriateness of consolidation under § 1407, the Panel looks to the pleadings to determine the extent to which common questions of fact are present. The Complaints in these cases clearly present common questions of fact. Each Complaint is based on allegations that Home Depot allowed a massive security breach in violation of various statutes and the common law. In addition, the Complaints generally seek certification of similar classes.

**2. The Parties Face Duplicative Discovery Absent Transfer and Consolidation**

Because the allegations of all the cases are essentially the same, the parties face duplicative discovery if the cases are not consolidated and transferred. This is an important consideration for the panel in that transfer and consolidation “ensure[s] that the actions are supervised by a single judge who, from day-to-day contact with all aspects of the litigation, will be in the best position to design a pretrial program that will prevent duplicative discovery...and substantially conserve the time and efforts of the parties, the witnesses and the federal judiciary.” *Resource Exploration Inc. Sec. Litig.*, 483 F.Supp. 817, 821 (J.P.M.L. 1980).

The parties in these actions will necessarily engage in duplicative discovery. All Plaintiffs will be seeking the same documentation from Home Depot and will likely request to depose the same parties. In response, Home Depot will raise the same class certification objections and discovery objections, seek the same protective orders and assert the same privileges in each case. However, if the Panel consolidates and transfers the cases, the parties will coordinate their efforts and thus save all parties time and money.

**3. Transfer and Consolidation Will Prevent Inconsistent Pretrial Rulings**

The Panel considers the possibility of inconsistent rulings on pretrial issues because of the possible res judicata or collateral estoppel effects on other cases. *See In re Enron Securities Derivative & ERISA Litig.*, 196 F.Supp.2d 1375, 1376 (J.P.M.L. 2002) (granting a transfer in part to prevent inconsistent pretrial rulings, particularly with respect to questions of class certification). Because of the similarity of the allegations in the Complaints, and the likelihood that future filed actions will contain the same, the possibility of inconsistent rulings on pretrial motions is substantially increased.

Home Depot is likely to present the same pretrial motions in each action and assert the same discovery objections and privileges. As an example, Plaintiffs anticipate that Home Depot will file motions to dismiss and/or for summary judgment. Inconsistent rulings on those dispositive motions would pose a serious problem, in that the purported Class is currently, and likely will remain, generally the same in each action. In addition, because of the similarity in the allegations, Home Depot will assert the same defenses in opposition to Plaintiffs' claims, creating a real risk of inconsistent pretrial rulings. In light of this risk, it would be in the best interests of all involved – the parties, the witnesses and the Court – to consolidate and transfer these actions.

**4. There is Sufficient Numerosity to Support Transfer and Consolidation**

As stated above, while there are currently three cases pending, two in the Northern District of Georgia and one in the Northern District of Illinois, Plaintiffs contend that this will not be the case for long. This is a huge case that has already received a great deal of pretrial publicity, and numerous actions will likely be filed against Home Depot in a multitude of

districts, making transfer and consolidation essential.

In any event, the Panel has routinely ordered transfer and consolidation of three or fewer cases. See *In re Wireless Telephone Replacement Protection Programs Litig.*, 180 F.Supp.2d 1381, 1382 (J.P.M.L. 2002) (granting transfer and centralization of three consumer protection cases and determining that pending motions can be presented to and decided by the transferee judge); *In re Philadelphia Life Ins. Co. Sales Practices Litig.*, 149 F.Supp.2d 937, 938 (J.P.M.L. 2001) (granting transfer of two deceptive insurance sales cases and finding that such transfer would promote the just and efficient conduct of the litigation); *In re Amoxicillin Patent & Antitrust Litig.*, 449 F.Supp. 601, 603 (J.P.M.L. 1978) (granting transfer of three cases involving patent and antitrust issues); *In re Alodex Corp.*, 380 F.Supp. 790, 791 (J.P.M.L. 1974) (granting transfer of three securities actions). As a result, there is sufficient authority for the transfer and consolidation of the actions against Home Depot without more.

**B. The Northern District of Georgia, Atlanta Division, is the Appropriate Transferee Forum**

An analysis of the applicable facts indicates that the Northern District of Georgia, Atlanta Division, is the preferable court for consolidation of pretrial proceedings. As stated above, two of the three filed case are pending in that court before the same Judge. Defendant Home Depot maintains its principal place of business in Georgia and regularly conducts business in Georgia. As a result, many of the witnesses would likely be present in Georgia. In addition, all parties would have easy access to Atlanta through Hartsfield-Jackson Atlanta International Airport, which is the busiest and most accessible in the country. Consolidation of these proceedings in the Northern District of Georgia, Atlanta Division, is convenient for all parties and witnesses and is the appropriate forum.

**V. CONCLUSION**

Based upon the foregoing, Plaintiffs John Solak and Dennis O'Rourke's Motion for Consolidation and Transfer Under § 1407 should be granted and these related actions, as well as any subsequently filed actions containing similar allegations, should be transferred to the United States District Court for the Northern District of Georgia, Atlanta Division.

Dated: September 15, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing document have been served on all parties specified below on this 15<sup>th</sup> day of September, 2014.

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