

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

)	
)	
In Re: The Home Depot, Inc., Customer)	No. 1:14-md-02583-TWT
Data Security Breach Litigation)	
)	
This Document Relates to:)	
All Financial Institution Cases)	

**REQUEST FOR IMMEDIATE HEARING AND DISCOVERY AND
SUPPLEMENTAL RESPONSE TO DEFENDANTS’ MOTION FOR
ENTRY OF ORDER REGARDING COMMUNICATIONS WITH
POTENTIAL MEMBERS OF THE FINANCIAL INSTITUTION
PUTATIVE CLASS**

I. INTRODUCTION

A mere 36 hours after Home Depot filed a brief with this Court claiming to want to be “transparent” and arguing that the request of the Financial Institution Plaintiffs (“FI Plaintiffs”) for a proposed order requiring that class communications be subject to prior review to prevent coercive and misleading statements was based on mere “speculation,” named FI Plaintiffs and putative Class members in this litigation were sent highly misleading and coercive communications regarding a settlement agreement (“Settlement”) reached between Home Depot and MasterCard International Incorporated (“MasterCard”) that, if accepted, purports to release the claims pending in this action. Home Depot – either directly or

indirectly through others acting in concert with it – acted with no prior (or subsequent) notice to Class Counsel and without waiting for resolution of *its own motion* requesting permission to communicate with absent class members. Most tellingly, Home Depot began sending the communications hours before the Thanksgiving holiday, when Class Counsel and putative Class members would be otherwise occupied, requiring putative Class members to take action as soon as December 2, two days hence, without providing even the most basic information regarding the Settlement terms.

FI Plaintiffs file this supplemental response to Home Depot’s Motion for Entry of Order Regarding Communications with Potential Members of the Financial Institution Putative Class, (ECF Nos. 141, 141-1 (“HD Motion”)), to update the Court on the status of the apparent Settlement that purports to release the claims in this action and advise the Court of the misleading and coercive nature of the communications with putative Class members that already have occurred. Given the updated record described in this brief, FI Plaintiffs respectfully request that this Court set an immediate hearing on the HD Motion so that Home Depot can explain its actions, the scope and extent of Class member communications are

revealed, and the Court can rule on the HD Motion before the relief requested is rendered moot.

FI Plaintiffs also request that Home Depot be required to produce within 24 hours of this Court's order: (1) the Settlement (and any other settlement agreements it may have reached involving the release of putative Class members claims in this litigation), including the relevant attachments and underlying documents explaining and describing the recovery amounts and what amount pertains to the Alternative Recovery Offer ("ARO") (for which Home Depot is requesting a release) and what amount, if any, pertains to MasterCard's Account Data Compromise ("ADC") process (which by its own terms, as described in FI Plaintiffs' Response (ECF No. 142) to the HD Motion and admitted by Home Depot, does *not* require a release); (2) all communications regarding the Settlement that have been sent to putative Class members; and (3) a list of all those to whom the communications have been sent.

II. FACTUAL BACKGROUND

Last Monday, November 23, 2015, Home Depot filed its reply brief opposing FI Plaintiffs' position that the Court should oversee Home Depot's and its agents' communications with putative Class members regarding the settlement

or release of any claims in this action. ECF No. 145 (“HD Reply”). Home Depot claimed that FI Plaintiffs could “only speculate that the communications might mislead some putative class members.” *Id.* at 2. Although Home Depot claimed to want to “be transparent” and told this Court that settlement discussions “are underway” (*id.* at 3, 4 n.2), it failed to disclose that the Settlement was imminent, and likely already consummated. Two days later, on the eve of the Thanksgiving holiday weekend, Wednesday, November 25, 2015, third-party payment processors, evidently acting in concert with Home Depot, sent email notifications to putative Class members – including named FI Plaintiffs known to be represented by counsel in this matter – stating that Home Depot and MasterCard had reached a settlement involving the Home Depot data breach. Some of the class communications state that failure to affirmatively opt out of the Settlement will result in a release of all claims pending in this case, without even specifically mentioning the litigation, or even telling the Class members how much they would receive under the Settlement.

FI Plaintiffs are aware of three different email communications that have been received by putative Class members. *See* Exs. A, B, C (attached to the Declaration of Joseph P. Guglielmo filed concurrently herewith). The email

communications were sent by FIS, Fiserv, and Vantiv, which, broadly described, are payment processors serving as intermediaries between financial institutions and MasterCard. These payment processors evidently are working as agents for MasterCard and Home Depot to implement the Settlement. Plaintiffs are unaware of whether other communications have been sent to putative Class members and do not know the identity of all those to whom the communications were sent.

The three communications of which FI Plaintiffs know about are plainly misleading and coercive. For example, the FIS communication consists of a single page notice of the Settlement, stating that each financial institution has received a “time-sensitive” offer giving them the option of receiving “an Alternative Recovery Offer (ARO) in lieu of any other recovery to which the Issuer may be entitled.” Ex. A. It goes on to say that acceptance of the ARO will result in release of any recovery under “the MasterCard standards, which recoveries theoretically could exceed the eligible issuer’s ARO,” and also any recovery from “the putative financial institution class actions described above or any other litigation or proceeding relative to the Home Depot intrusion.” *Id.* The former release confusingly suggests that the ARO is offered in lieu of the ADC recovery, *i.e.* that financial institutions must forego their rights under the ADC recovery

process (which does not require a release) to accept the ARO.¹ As to the latter release, despite what is written, the “putative financial institution class actions” are *not* described or even specifically named anywhere in the communication.

The Fiserv communication includes a lengthier – though vague and confusing – description of the release, but still does not mention this litigation. *See* Ex. B. Finally, the Vantiv communication provides only a cursory statement that “[b]y participating in the Alternative Recovery Program, you will release MasterCard, Home Depot USA, Inc. and its acquiring banks and processors from all claims related to the Home Depot breach.” Ex. C. Once a bank clicks through to the form they are asked to fill out, the release language is included in miniscule print at the bottom of the page, where it finally mentions the class litigation, but no detail as to the claims or consequences of exiting the class action. *See* Ex. C.²

¹ Because Home Depot has not provided Class Counsel or putative Class members with a copy of the settlement agreement, it is unclear whether the ARO amount is in addition to or in lieu of the standard ADC amount to which the Class members are entitled. However, given Class Counsel’s understanding that the ADC recovery is automatic, FI Plaintiffs assume the ARO is being provided in addition to the ADC recovery amount.

² Furthermore, the FIS and Fiserv releases appear to release any claims that a MasterCard issuing bank could have against Home Depot relating to Visa-branded cards (*see* Exs. A, B); the Vantiv release includes a carve out for non-MasterCard-branded cards. *See* Ex. C.

Importantly, despite the fact that Home Depot seeks a release of the claims in this action, in all cases financial institutions are asked to act quickly *without access to the Settlement*. Financial institutions are not provided a total settlement amount or information about whether they are entitled to their standard ADC recovery if they reject the ARO. And the FIS and Fiserv communications do not even inform Class members the amount that each would receive if they participate in the Settlement. *See* Exs. A, B. All that a financial institution can discern from the communications is that a financial institution must act expeditiously by either December 2 (three business days after receiving the communications) or December 7 (six business days), and for at least the FIS communication, that failure to affirmatively opt out of the Settlement will result in a release of any and all claims against Defendants. Neither the FIS nor the Fiserv communication even references this case in the description of the release. *Id.* And, although the Vantiv communication references this case in its mention of the release, it provides no further details regarding the claims in the litigation and the consequences of releasing those claims. *See* Ex. C.

This lack of information, coupled with the extremely abbreviated deadline to respond, is likely to mislead putative Class members into believing that the

Settlement is their best (and perhaps only) avenue for recovery and coerce them to accept the recovery on an expedited basis and without knowledge of critical facts for fear of losing out. To illustrate how misleading this is, compare Home Depot's statement in the HD Reply – "Should putative class members choose not to accept any Card Brand settlement offers, they could still receive all that they would be entitled to under the Card Brand rules and continue litigating their claims in this lawsuit." – with the class communications described above. HD Reply at 14. However, in contrast to this statement made to the Court, the communications suggest that Class members who do not participate in the Settlement will receive nothing, foregoing money that under MasterCard's regulations they are entitled to receive without releasing their claims against Home Depot.

Under the cover of the MasterCard ADC program that never was intended to fully reimburse financial institutions' losses in the first place, Home Depot attempts to extinguish the putative Class members' claims against it, despite the fact that Home Depot's direct exposure to the financial institutions likely is much greater than what is available under the Settlement, but which is impossible to tell without actually seeing the terms of the Settlement and knowing what individual Class members would receive under it. Thus, FI Plaintiffs and putative Class

members are easily led to believe that the release is a required part of the standard ADC process and that this Settlement “covers” losses associated with the Home Depot data breach when, in fact, numerous losses are not even considered.

Despite Home Depot’s threshold claim that financial institutions are sophisticated corporate entities that cannot be misled (HD Motion at 4; HD Reply at 2), FI Plaintiffs’ counsel have received numerous contacts from confused Class members over the holiday, seeking advice and asking for clarification. The communications are so deficient, misleading, and coercive that based on the communications themselves *no financial institution* could make an informed decision as to whether to participate in the Settlement and thereby waive its legal rights in this action.

Finally, these communications, made days after briefing on the HD Motion was completed, do not even meet the requirements of Home Depot’s own proposed order that *it moved this Court to enter*. For example, Home Depot thought it appropriate in its briefing and proposed order that any settlement communication “provide details about the pending class action lawsuit, including the nature of the allegations” and “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 this litigation.” HD Reply at 7. But none of the class communications to date include anything near that level of disclosure. Home Depot also promised to provide those disclosures “within 24 hours of the written settlement offer and release being provided to the absent class members.” *Id.* at 7 n.4. FI Plaintiffs have received nothing from Home Depot and learned about the communications only through Class members’ receipt of the offers. Finally, Home Depot claimed that Class members would “have ample time to review the offers.” *Id.* at 8. Home Depot cannot possibly claim that 3-6 business days is ample time to determine whether to exclude oneself from this action, particularly when those days fall immediately after a major holiday.

III. ARGUMENT

What is clear from the timing and substance (or lack thereof) of the communications is that Home Depot, the other parties to the Settlement, and those acting in concert with them do not want to make public the full details of the Settlement and to provide financial institutions the necessary information to make an *informed* decision as to whether to participate in the Settlement. Home Depot’s actions require immediate Court intervention. Specifically, FI Plaintiffs request a

hearing on the HD Motion, an order directing Home Depot immediately to provide to FI Plaintiffs the Settlement and all communications that already have occurred with putative class members, and an order governing future class communications as FI Plaintiffs have requested based on the record as supplemented by this filing.

A. The Settlement Communications Are Coercive

As an initial matter, the urgent, time-sensitive nature of the communications *sent during the Thanksgiving holiday* is coercive, as a financial institution must act within three to six business days of dissemination of the notice by **December 2** (for those receiving the November 25 Vantiv notice) (*see* Ex. C) or **December 7** (for those receiving the November 25 FIS notice and the November 27 Fiserv notice) (*see* Exs. A, B). With regard to those receiving the Vantiv notice, a financial institution's failure to act by December 7 results in automatic enrollment in the Settlement. *See* Ex. C. This would automatically waive a financial institution's rights in this action – not that a financial institution would be aware of that. The communications are plainly intended to cause Class members to make a rushed decision without the benefit of time and information, gutting the claims in this litigation, and allowing Home Depot to shield itself from liability at the expense of Class members' recovery.

B. The Settlement Communications Provide Insufficient Information Regarding the Settlement and the Release

The notices do not even provide the most basic information – the aggregate settlement amount, the manner in which an issuer’s recovery amount was calculated, whether there are two components to the settlement (the ADC component and the ARO component), that a release is not even required to receive the ADC component – to enable financial institutions to make an informed decision. For instance, the email from Vantiv disseminating notice, which states, “Each participating issuer will be compensated for the amount due to such issuer as calculated under MasterCard’s ADC standards,” (Ex. C), is confusing at best and misleading in suggesting the offered amount is the amount due to the issuer without providing any information about the actual calculation under the ADC standards (and the fractional portion of the losses being compensated under those standards). The FIS and Fiserv notices do not even specifically advise putative class members that participation in the Settlement will release the claims in this case. *See* Exs. A, B. The notices also do not advise that this action seeks broader relief than can be obtained through MasterCard’s ADC limited reimbursement process, or explain that one can recover under the ADC process without accepting the ARO. This information is necessary to enable a financial institution to make an

informed decision as to whether to participate in the Settlement and forego its rights in this case.

C. The Settlement Communications Are Contradictory

The communications also are contradictory. One requires action by December 2, the others by December 7. *See* Exs. A, B, C. FIS requires a financial institution to *affirmatively opt out* of the Settlement to preserve its rights in this action (*see* Ex. A), whereas Vantiv requires that a financial institution *must affirmatively opt in* to participate in the Settlement. *See* Ex. C.

D. Good Cause Exists to Order Home Depot to Provide the Requested Documents

Good cause to require Home Depot to produce the requested documents – or if it fails to do so to allow expedited limited discovery so that the FI Plaintiffs can otherwise obtain them – exists here as the settlement communications not only are misleading and coercive, but require a financial institution’s immediate action to preserve its legal rights in this action, without the benefit of full information. Indeed, for those receiving the Vantiv notice, a financial institution’s failure to act by December 7 results in *automatic* waiver of its legal rights in this case. *See* Ex. C. Home Depot disseminated these communications through third parties on November 25, the day before Thanksgiving, and November 27, the day after

Thanksgiving, requiring putative Class members to act within three to six business days. Notwithstanding all of the other issues raised herein and in FI Plaintiffs' forthcoming Motion for Preliminary Injunction, ordering Home Depot to produce the requested documents or allowing limited expedited discovery is appropriate under these circumstances.

In *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. 05-cv-1175, 2005 WL 4813532 (N.D. Cal. Nov. 17, 2005), the court dealt with a similar situation where a defendant had misleading pre-certification communications with putative class members. The defendant had contacted class members for interviews to serve as the basis of declarations to use against class plaintiffs, misleading the class members as to the nature of the class action and without informing the class members that if the class action was successful, they might be able to recover damages. *Id.*, at *1. Based on the misleading nature of the communications, the court ordered the defendant to provide a complete list of all potential class members that had been contacted and allowed plaintiff to take discovery of those class members to determine the content of defendant's communication with the class members. *Id.*, at *6-7.

Likewise, in *Jones v. Jeld-Wen, Inc.*, cited by Home Depot throughout its briefing, the court ordered limited expedited discovery of defendant's communications to class members to "allow Plaintiffs' counsel to analyze whether the communications appear to interfere with the integrity of the class action." 250 F.R.D. 554, 565 (S.D. Fla. 2008). Cf. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1123-33 (7th Cir. 1979) (when a classwide settlement was reached without the permission of all class counsel, the Seventh Circuit found abuse of discretion in trial court's refusal to permit discovery of settlement negotiations to determine fairness).

Because the misleading and coercive settlement communications jeopardize putative Class members' legal rights, good cause is shown for an order requiring Home Depot to produce the requested documents or, alternatively, allowing limited discovery to proceed so that Class Counsel and the Court can determine the extent to which Home Depot and those with whom it is acting in concert have interfered with the integrity of the class action, and so that Class Counsel can provide accurate advice to their clients and other Class members. As such, FI Plaintiffs request that the Court order Home Depot to provide: (1) the Settlement, including any attachments, and any summaries, calculations, or analysis of the

ARO and ADC amounts; (2) any communications Home Depot has caused to be sent to Class members; and (3) a list of all those to whom the communications have been sent. Alternatively, FI Plaintiffs request that the Court allow them to pursue limited discovery into these subjects.

E. FI Plaintiffs Are Entitled to an Order Governing Class Communications

As briefed in FI Plaintiffs' Response to Defendants' Motion Regarding Class Member Communications, pursuant to Rule 23(d) and its inherent equitable authority, the Court has discretion to regulate communications with potential class members, based on a clear record reflecting the need for such limitations. *See generally* ECF No. 142 ("Plaintiffs' Response"). Home Depot's briefing was entirely premised on its argument that there was no record of misleading communications, so an order governing class communications was premature. *See* HD Motion at 8, 13; HD Reply at 3-4. Home Depot and those with whom it is acting in concert to implement the Settlement have now created the very record Home Depot argued was necessary, making it appropriate for the Court to order the limitations on class communications requested here.

Because Rule 23 protects class members from "misleading communications from the parties or their counsel," *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843,

846 (2d Cir. 1980), this Court has the authority to issue orders governing such communications. As Judge Pauley has 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.

In re Currency Conversion Fee Antitrust Litigation, 361 F. Supp. 2d 237, 252 (S.D.N.Y. 2005) (citing *In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988)). 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 and remedies.

Any unilateral communications scheme engineered by the defendant to a class action, or its partner acting in concert, is rife with potential for coercion, particularly in the context of an ongoing business relationship. *See Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202 (11th Cir. 1985) (“[I]f the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive.”). This is because

“[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable.” *Kleiner*, 751 F.2d at 1203. *See also* 3 Newberg on Class Actions §8.42 (4th ed.).

Financial institutions like the putative Class members in this case are in a particularly vulnerable situation, both because they depend on MasterCard’s sophisticated network to serve their customers and because they do not have the specialized knowledge of the ADC Program and Security Rules that MasterCard has regarding its own intricate policies or the defined scope of benefits and liabilities. Here, the communications about the Settlement are both misleading and coercive where the communications, among other things:

- Failed to disclose that the ADC program does not require issuing banks to release any claims against Home Depot in order to participate in the ADC component, as these benefits are offered, and must be provided, by MasterCard without such strings attached;
- Failed to disclose that releases are not contemplated by the MasterCard operating regulations and that a release was included in this program solely to stop class members from getting more than the limited ADC defined benefits;
- Failed to provide putative class members with a copy of the Settlement or any settlement-related documents;

- Failed to disclose to putative class members that Home Depot has a narrower scope of liability to MasterCard than it has to issuing banks;
- Failed to disclose to putative class members that MasterCard has a narrower scope of liability to issuing banks than Home Depot does;
- Failed to disclose to putative class members the full scope of liability Home Depot faces by virtue of the direct claims made against it in the complaint via these processes or the difference between such recoveries and those that could be obtained by participating in this action;
- Capitalized on issuing banks' understanding of MasterCard as an entity with specialized knowledge in the intricacies of its own ADC process and Security Rules; and
- Used MasterCard's influential, trusted, and ongoing relationship with issuing banks to leverage unconscionably broad releases from issuing banks, who have claims against Home Depot that exceed the narrow scope of MasterCard's ADC process.

As a result of these misleading and coercive communications, the Court should limit future communications (whether directly by Home Depot or through third parties acting to implement Home Depot's settlement) with putative class members by means of the proposed order governing class communications requested by FI Plaintiffs in their response to the HD Motion. *See* ECF No. 142-1.

IV. CONCLUSION

Based on the foregoing points and authorities, FI Plaintiffs respectfully request that the Court: 1) set a hearing on the HD Motion; 2) order Home Depot to

provide the documents and information about the Settlement and communications with Class members described above, or, alternatively, allow FI Plaintiffs to conduct limited expedited discovery of the Settlement, attachments, and related analysis of ARO and ADC amounts, as well as any communications caused to be sent to class members about the Settlement; and 3) enter the proposed order request by FI Plaintiffs at ECF No. 142-1.³

DATED: November 30, 2015

Respectfully Submitted,

/s/ Joseph P. Guglielmo
Joseph P. Guglielmo
Erin Green Comite
SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
405 Lexington Avenue, 40th Floor
New York, New York 10174
Telephone: 212-594-5300
jguglielmo@scott-scott.com
ecomite@scott-scott.com
Co-lead Counsel

/s/ Kenneth S. Canfield
Kenneth S. Canfield
Georgia Bar No. 107744

³ Plaintiffs may also seek further relief to redress what has occurred as a result of the communications referenced here, including but not limited to a preliminary injunction precluding Home Depot and those acting in concert with Home Depot from implementing the Settlement or enforcing any releases that have been provided to date by Class members.

**DOFFERMYRE SHIELDS CANFIELD
& KNOWLES, LLC**

1355 Peachtree St., NE, Suite 1600
Atlanta, Georgia 30309-3238
Telephone: 404-881-8900
kcanfield@dsckd.com
Co-lead Counsel

/s/ Gary F. Lynch

Gary F. Lynch
Jamisen Etzel

**CARLSON LYNCH SWEET &
KILPELA, LLP**

PNC Park, Suite 210
115 Federal Street
Pittsburgh, Pennsylvania 15212
Telephone: 412-322-9343
glynch@carlsonlynch.com
jetzel@carlsonlynch.com
Co-lead Counsel

W. Pitts Carr

**W. PITTS CARR AND
ASSOCIATES, PC**

4200 Northside Parkway, NW Building 10
Atlanta, Georgia 30327
Telephone: 404-442-9000
pcarr@wpcarr.com
Co-liaison Counsel

Ranse M. Partin

CONLEY GRIGGS PARTIN, LLP

1380 West Paces Ferry Rd., NW, Suite 2100
Atlanta, Georgia 30327
Telephone: 404-467-1155
ranse@conleygriggs.com

Co-liaison Counsel

Plaintiffs' Steering Committee

James H. Pizzirusso
Swathi Bojedla
HAUSFELD, LLP
1700 K. Street, NW, Suite 650
Washington, DC 20006
Telephone: 859-225-3731
jpizzirusso@hausfeldllp.com
sbojedla@hausfeldllp.com
Plaintiffs' Steering Committee Chair

Joseph Hank Bates III
CARNEY BATES & PULLIAM
17 Washington Ave., N., Suite 300
Minneapolis, MN 55401
Telephone: 501-312-8500
jbates@cbplaw.com

Bryan L. Bleichner
CHESTNUT CAMBRONNE, PA
17 Washington Ave. North, Suite 300
Minneapolis, MN 55401
Telephone: 612-339-7300
bbleichner@chestcambronne.com

Brian C. Gudmundson
ZIMMERMAN REED, PLLP
1100 IDS Center
80 South 8th Street
Minneapolis, MN 55042
Telephone: 612-341-0400
Brian.gudmundson@zimmreed.com

Robert N. Kaplan
KAPLAN FOX & KILSHEIMER
850 Third Ave., 14th Floor
New York, New York 10022
Telephone: 212-687-1980
rkaplan@kaplanfox.com

W. Daniel Miles, III
Andrew E. Brasher
Leslie L. Pescia
BEASLEY ALLEN CROW
MEHTVIN PORTIS & MILES
P.O. Box 4160
218 Commerce Street
Montgomery, Alabama 36103
Telephone: 334-269-2343
Dee.Miles@beasleyallen.com

Arthur M. Murray
MURRAY LAW FIRM
650 Poydras Street, Suite 2150
New Orleans, Louisiana 71030
Telephone: 505-525-8100
amurray@murray-lawfirm.com

Karen H. Riebel
LOCKRIDGE GRINDAL NAUEN
100 Washington Ave., So., Suite 2200
Minneapolis, MN 55401
Telephone: 612-339-6900
khriebel@locklaw.com

Vincent J. Esades
David R. Woodward
HEINS MILLS & OLSON, PLC
310 Clifton Avenue
Minneapolis, MN 55403
Telephone: 612-338-4605
vesades@heinsmills.com
dwoodward@heinsmills.com

Andrew N. Friedman
**COHEN MILLSTEIN SELLERS
TOLL**
1100 New York Ave., NW
East Tower, 5th Floor
Washington, DC 20005
Telephone 202-408-4600
afriedman@cohenmilstein.com

Thomas A. Withers
GILLEN WITHERS & LAKE
8 E. Liberty Street
Savannah, Georgia 31401
Telephone: 912-447-8400
twithers@gwllawfirm.com

Counsel for the Financial Institution Plaintiffs

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.

/s/ Joseph P. Guglielmo
Joseph P. Guglielmo
SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
405 Lexington Avenue, 40th Floor
New York, New York 10174
Telephone: 212-594-5300
jguglielmo@scott-scott.com
Co-lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I served all parties by causing a true and correct copy of the foregoing Request for Immediate Hearing and Discovery and Supplemental Response to Defendants' Motion for Entry of Order Regarding Communications with Potential Members of the Financial Institution Putative Class 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.

/s/ Joseph P. Guglielmo
Joseph P. Guglielmo
SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
405 Lexington Avenue, 40th Floor
New York, New York 10174
Telephone: 212-594-5300
jguglielmo@scott-scott.com
Co-lead Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re: The Home Depot, Inc.,)	
Customer Data Security Breach)	No. 1:14-md-02583-TWT
Litigation)	
)	
This document relates to:)	
All Financial Institution Cases)	

DECLARATION OF JOSEPH P. GUGLIELMO

I, Joseph P. Guglielmo, pursuant to 28 U.S.C. §1746, state as follows:

1. I am a partner with the law firm of Scott+Scott, Attorneys at Law, LLP (“Scott+Scott”), Co-lead Counsel for the Financial Institution Plaintiffs (“FI Plaintiffs”). I am an attorney duly licensed to practice before all courts of the State of New York, Commonwealth of Massachusetts and admitted *pro hac vice* to practice before this Court.

2. I make this declaration in support of FI Plaintiffs’ Request for Immediate Hearing and Discovery and Supplemental Response to Defendants’ Motion for Entry of Order Regarding Communications with Potential Members of the Financial Institution Putative Class. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

3. Attached as Exhibit A is a true and correct copy of a notice from FIS Global dated November 25, 2015 with subject “IMPORTANT NOTICE – Home Depot Settles with MasterCard – DEC. 7 ACTION DATE” and with Opt Out Form.

4. Attached as Exhibit B is a true and correct copy of an email from Fiserv Card Services dated November 27, 2015 with subject “**FW: Fiserv FYI 15225| MasterCard – Home Depot Settlement RESPONSE REQUIRED BY DECEMBER 7, 2015**” with an attachment dated November 27, 2015 titled “Re: MasterCard/Home Depot Settlement.”

5. Attached as Exhibit C is a true and correct copy of a notice from Vantiv titled “MasterCard Home Depot Settlement” with a true and correct copy of the linked form titled “Home Depot Settlement Program.”

I declare under penalty of perjury and under the laws of the United States of America that the foregoing is true and correct.

DATED: New York, New York
November 30, 2015



JOSEPH P. GUGLIELMO
*Co-Lead Counsel for Financial Institution
Plaintiffs*

Exhibit A

North American Retail Payments

Immediate Attention

REVIEW ACTION ITEMS

Date: November 25, 2015
Bulletin: 20151125.01
From: North American Retail Payments
To: EFT Services – Norcross Clients
Subject: IMPORTANT NOTICE – Home Depot Settles with MasterCard – DEC. 7 ACTION DATE

MasterCard® and Home Depot® recently entered into a Settlement Agreement with regard to the 2014 Home Depot Intrusion (MasterCard Alert Series [ADC 3868-14](#), [ADC3869-US-14](#), [ADC 3870-14](#), [ADC 3871-14](#), [ADC 3872-14](#), and [ADC 3870-CAN-14](#)).

This time-sensitive offer gives each eligible Issuer the option of electing to receive an Alternative Recovery Offer (ARO) in lieu of any other recovery to which the Issuer might be entitled.

The settlement will become effective if, among other things, eligible Issuers submit to MasterCard fully-executed acceptances together with their sponsored Issuers and 65% of all qualified accounts accept the settlement. Eligible Issuers that accept an ARO will be notified if and when the settlement contingency has been met or waived.



You are receiving this communication because your BIN contains accounts affected by the Home Depot Intrusion. If you participate in a shared BIN, your individual institution may not be impacted. Refer to the MasterCard Alert Series referenced above to determine your institution's affected accounts and if the below action is necessary.

ACTION REQUIRED BY December 7, 2015

You are receiving this notice because you are an FIS sponsored MasterCard Issuer. **FIS will accept the ARO for MasterCard Issuers unless we receive the attached opt-out form signed by an authorized signer by December 7, 2015. Please e-mail completed opt-out forms to compromised.cards@fisglobal.com.**

If the Settlement Agreement is consummated, any issuer that accepts the ARO will:

- Give up its and its accepting sponsored issuers' rights to obtain any other recoveries based on the Home Depot intrusion under the MasterCard standards, which recoveries theoretically could exceed the eligible issuer's ARO.
- Give up its and its accepting sponsored issuers' rights to participate in, or recover amounts in, the putative financial institution class actions described above or any other litigation or proceeding relative to the Home Depot intrusion.

Additional communication related to disbursement of settlement funds will be provided at a later date, assuming the 65% participation threshold is met and the settlement takes effect. If the 65% threshold is not met, FIS will contact you with next steps.

Questions?

If you have any questions about this communication, please call Client Relations at **770.209.8700, Option 7**, or e-mail FIS.ICPT.EFT.CustomerService@fisglobal.com.

Opt Out Form

Home Depot Settlement with MasterCard

Please e-mail completed forms to compromised.cards@fisglobal.com by Dec. 7, 2015.

Institution/Bank Name: _____

City: _____ State: _____

Please provide ONE of the following identifiers:

Corp ID _____

AIMs Bank _____

EFT # _____

Entity ID _____

FDIC # _____

NCUA # _____

The undersigned officer certifies that they have read and fully understand the risk outlined in the Settlement Agreement by and between Home Depot® and MasterCard®. Further, they desire to opt-out of said settlement, and will abide by the resolution of their claims by MasterCard.

Signature: _____

Name: _____

Officer Title: _____

Date: _____

Please e-mail completed forms to compromised.cards@fisglobal.com by Dec. 7, 2015.



Exhibit B




From: Fiserv Card Services [<mailto:eft.distribution@fiserv.com>]

Sent: Friday, November 27, 2015 3:06 PM




Subject: Fiserv | FYI 15335 | MasterCard—Home Depot Settlement | RESPONSE REQUIRED
BY DECEMBER 7, 2015



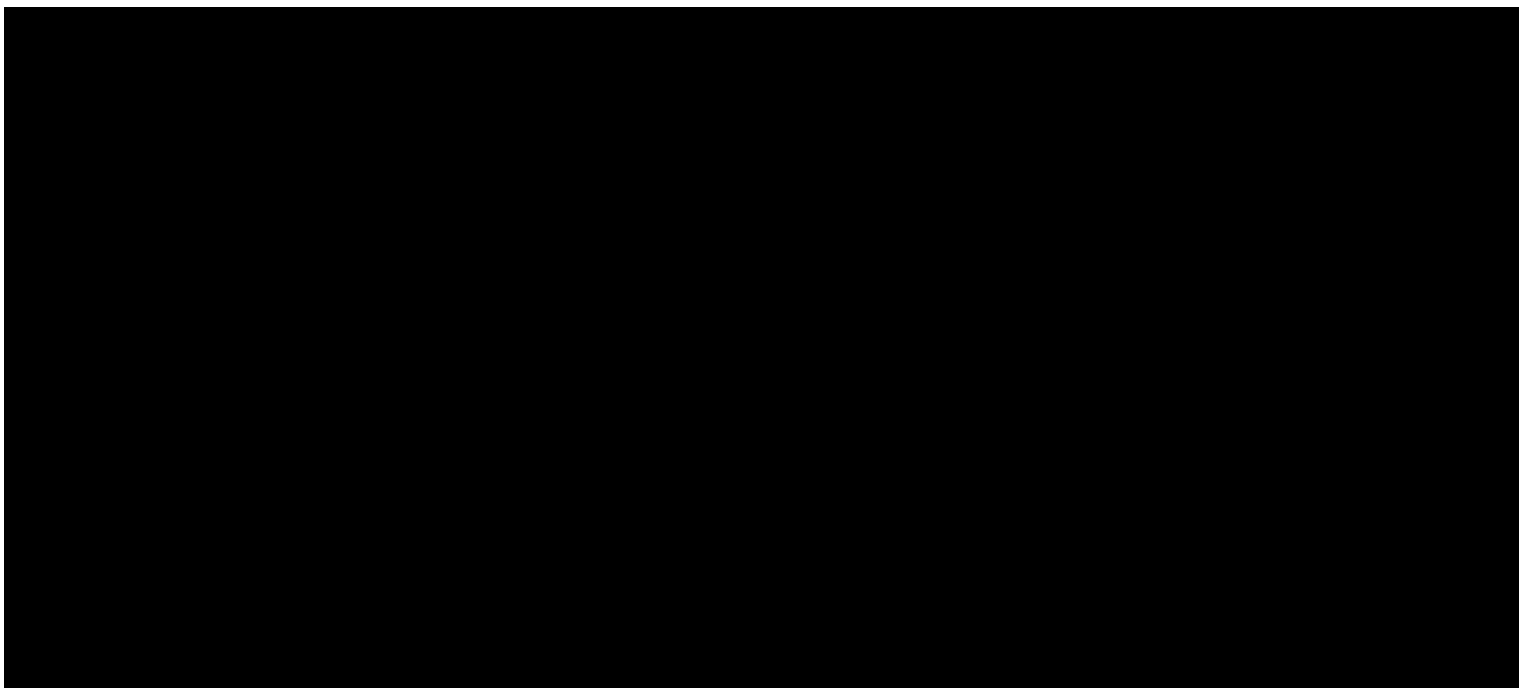
Immediate Action Required – Please respond by December 7, 2015

The attached communication explains a new settlement agreement between MasterCard International and Home Depot U.S.A., Inc. in connection with the computer system intrusion confirmed by Home Depot on September 8, 2014.

In order to receive your pro rata share of the settlement funds currently calculated as \$ , you must grant Fiserv the right to accept the settlement offer on your behalf.

Please review and follow the attached instructions.

If we do not receive a response from you by 11:59 p.m. ET on December 7, 2015, we will deem you to have declined acceptance of your share of the settlement funds.



Card Services



To: Primary/Executive Fiserv Contact
Re: MasterCard/Home Depot Settlement
Date: November 27, 2015

Immediate Action Required – Please respond by December 7, 2015

MasterCard and Home Depot have provided Fiserv a proposed settlement and release agreement (the "**Settlement and Release Agreement**") related to the Home Depot computer system intrusion (the "**Home Depot Intrusion**"). In the event MasterCard, Home Depot, and Fiserv finalize and execute the Settlement and Release Agreement, and in order to receive your institution's pro rata share of the settlement funds offered under the Settlement and Release Agreement, which are currently calculated as the amount indicated in the e-mail to which this document is attached, you must grant Fiserv the right to accept the settlement offer on your behalf. To do so, please check the box marked "**Yes**" on the following page and return the form, signed by an authorized representative of your institution, to Fiserv **NO LATER THAN 9:00 p.m. Eastern Time on December 7, 2015**. You must send your response via fax or email as indicated in the instructions below, and please remember to include the name of your institution and your FIID/LOGO on the signed form to avoid any confusion.

- By selecting the box marked "**Yes**" on the following page, you hereby irrevocably (1) authorize Fiserv to execute the Settlement and Release Agreement on your institution's behalf; (2) waive any right to assert against, and release the following entities: Home Depot U.S.A., Inc., Bank of America N.A., Banc of America Merchant Services LLC, First Data Canada Ltd., and Wells Fargo Financial Corporation Canada, in each of their capacities as acquiring banks or providers of transaction processing services for Home Depot in the MasterCard payment network; MasterCard; and the affiliates of all of these entities; the release applies to any claim or right you might be entitled to assert and any monetary recovery or other relief that you might be entitled to seek or receive, by reason of the Home Depot Intrusion, in your capacity as an issuer of MasterCard cards under the ICA assigned to Fiserv as sponsor; (3) release Fiserv and its parent and affiliated companies (collectively, "**Fiserv Affiliates**") from any and all claims arising from or related to Fiserv's execution of the Settlement and Release Agreement or the Home Depot Intrusion; and (4) indemnify and hold harmless Fiserv and its Affiliates from any and all damages, losses, liabilities, fines, penalties, and expenses (including reasonable attorneys' fees) incurred or suffered by Fiserv or the Fiserv Affiliates in connection with any actions undertaken by Fiserv prior to or in connection with its execution of the Settlement and Release Agreement.
- If you elect instead to decline the settlement offer, please select the box marked "**No**" and return the signed form to Fiserv by the December 7 deadline.
- To accommodate recipients of this communication which, for whatever reason, are unable to complete and return the signed form below by the December 7, deadline, Fiserv will deem your lack of response to have the same effect as your selection of the box marked "**No**" and your refusal to consent to Fiserv's acceptance of the Settlement and Release Agreement on your behalf.

Issuer to complete and return by December 7, 2015:

Yes, I authorize Fiserv to accept the settlement offer based on the terms hereof.

No, I do not authorize Fiserv to accept the settlement offer.

LOGO/FIID _____

Institution _____

Contact Name _____

Authorized Signature on Behalf of Institution _____

Title _____

Date _____

Please fax to 973-451-8847 or email a scanned copy to Network_Survey@Fiserv.com by 9:00 p.m. Eastern Time on December 7.

Exhibit C



MasterCard Home Depot Settlement

Hello,

MasterCard and Home Depot USA, Inc are working on a settlement to provide settlement funds to MasterCard Issuers through the Alternative Recovery Program. The funds designated for the Alternative Recovery Program, are to settle claims for operational costs and fraud related losses on MasterCard branded cards believed by MasterCard to have been impacted by the Home Depot data breach. Each participating issuer will be compensated for the amount due to such issuer as calculated under MasterCard's ADC standards.

If you wish to participate in the Alternative Recovery Program, [please fill out and submit the form here](#) by December 2, 2015.

By participating in the Alternative Recovery Program, you will release MasterCard, Home Depot USA, Inc. and its acquiring banks and processors from all claims related to the Home Depot data breach.* Don't forget -- [you must submit the form here](#) no later than **December 2, 2015!**

Best,
Vantiv Communications
communications@vantiv.com



Vantiv is committed to protecting customer information. Avoid transmitting personal or financial information through email, a link in an email, or on a web site that you are not sure is genuine. If you have concerns regarding the solicitation of information contained in this message or the authenticity of a link or a web site purporting to be associated with Vantiv or its affiliated companies, contact Vantiv Security at security.investigations@vantiv.com immediately.

© Copyright 2015 Vantiv, LLC. All rights reserved. © indicates USA registration.

vantiv.com



Home Depot Settlement Program

Thanks for visiting our page. Please fill out the form below to register for the Home Depot Settlement program.

<input type="text" value="First Name *"/>	<input type="text" value="First Name *"/>
<input type="text" value="FI Name *"/>	<input type="text" value="Email Address *"/>
<input type="text" value="ACRO *"/>	<input type="checkbox"/> Do you wish to opt in to the MasterCard

SUBMIT

Issuer Release

The Fifth Third Bank (the "Issuer"), on its own behalf, on behalf of each of the Covered Sponsored Issuers listed on Schedule I attached to this Issuer Release, and on behalf of its and their Affiliates (collectively with Issuer and its Covered Sponsored Issuers, the "Issuer Releasing Entities") irrevocably waives any right of any of the Issuer Releasing Entities to assert against Home Depot; Bank of America N.A., Banc of America Merchant Services LLC, First Data Canada Ltd. and Wells Fargo Financial Corporation Canada in their capacities as acquiring banks or providers of transaction processing services for Home Depot in the MasterCard payment card network (the "Home Depot Acquirers"); MasterCard; and the Affiliated Persons of each of them (each, a "Releasee"), and fully and finally releases each and every Releasee from, any claim or right any of the Issuer Releasing Entities might be entitled to assert and any monetary recovery or other relief that any of the Issuer Releasing Entities might be entitled to seek or receive, by reason of the Home Depot Intrusion: (i) in any litigation or other proceeding, whether currently pending, hereafter commenced, or hereafter amended (including without limitation the pending putative class action proceedings consolidated under the caption entitled In re: The Home Depot, Inc. Customer Data Security Breach Litigation, MDL No. 14-2583-TWT pending in the United States District Court for the Northern District of Georgia), (ii) under any applicable laws, rules or regulations, or (iii) pursuant to any other contractual or legal theory, in connection with any injury or harm the Issuer

Releasing Entities may have incurred or may in the future incur in its capacity as an issuer of MasterCard-branded payment cards (whether or not the matter, occurrence, or event that forms the basis for such claim or right is known to the Issuer Releasing Entity in question as of this date) (collectively, the "Released Issuer Claims").

Notwithstanding anything to the contrary in the preceding paragraph, the Released Issuer Claims shall not include (i) any claim or right any of the Issuer Releasing Entities might be entitled to assert, or any monetary recovery or other relief that any of the Issuer Releasing Entities might be entitled to seek or receive, in its capacity as an issuer of payment cards other than MasterCard-branded payment cards; (ii) any claim or right relating to or arising under this Release or the accompanying Settlement Agreement; or (iii) any claim or right of recovery that any Accepting Sponsored Issuer of the Issuer may have with respect to Qualified Accounts, if any, that the Accepting Sponsored Issuer in question issued under the MasterCard ICA of an Eligible Issuer other than the Issuer.

The Issuer represents and warrants that (i) this Release has been duly authorized, executed and delivered by the Issuer; (ii) no assignment to another person or entity has been made of, and no other person or entity has become subrogated to or otherwise acquired any interest in any right or claim that is, was, or otherwise would be a Released Issuer Claim; (iii) Schedule I hereto contains a complete and accurate list of the Issuer's Sponsored Issuers, and the Issuer has accurately identified on Schedule I hereto which of its Sponsored Issuers are Covered Sponsored Issuers; (iv) the Issuer is authorized to execute and deliver this acceptance on behalf of its Covered Sponsored Issuers; (v) none of Issuer's Qualified Accounts were issued by any of the Issuer's Sponsored Issuers other than the Issuer's Covered Sponsored Issuers; and (vi) the Issuer has received and reviewed the information attached hereto as Schedule II.

The Issuer agrees to indemnify each Releasee against and shall hold each of them harmless from any and all damage, loss, liability, fines, penalties and expense (including reasonable expenses of investigation and reasonable attorneys' fees and expenses in connection with any action, suit or proceeding whether involving a third-party claim or a claim solely between or among the Parties hereto) incurred or suffered by such Releasee arising out of any misrepresentation or breach of warranty made by the Issuer in this Issuer Release or any breach of any covenant or agreement made or to be performed by the Issuer Releasing Entities pursuant to this Issuer Release.

This Issuer Release, the rights of any person or entity hereunder, and any action arising hereunder, will be governed by and construed in accordance with the substantive laws of the State of New York, without giving effect to any choice or conflict of law provision that would cause the application of the laws of any other jurisdiction.

**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

No. 14-md-02583-TWT

**ORDER REGARDING HOME DEPOT'S COMMUNICATIONS WITH
POTENTIAL MEMBERS OF THE PUTATIVE CLASSES**

This matter comes before the Court on Financial Institution Plaintiffs' Request for Immediate Hearing and Discovery and Supplemental Response to Home Depot's Motion for Entry of Order Regarding Communications with Potential Class Members of the Financial Institution Putative Class. Having considered the supplemental response, as well as Home Depot's Motion for Entry of Order Regarding Communications with Potential Class Members of the Financial Institution Putative Class, Financial Institution Plaintiffs' response thereto, Home Depot's reply thereto, and all attached exhibits, and good cause shown, IT IS HEREBY ORDERED:

1. The parties will appear before the Court for a hearing on Home Depot's Motion for Entry of Order Regarding Communications with Potential Class Members of the Financial Institution Putative Class on December __, 2015;
2. Within 24 hours of the date of this Order, Home Depot shall produce to Lead Class Counsel for the Financial Institution Plaintiffs a copy of any of the following documents that are in Defendants' possession, custody, or control:
 - a. The settlement agreement between Home Depot USA, Inc. and MasterCard International, Inc. ("Settlement") (and any other settlement agreements Home Depot may have reached involving the release of putative Class members claims in this litigation), including all exhibits and attachments;
 - b. Documents sufficient to show how the Settlement amount was calculated;
 - c. Documents sufficient to show how the Alternative Recovery Amount ("ARO") was calculated;
 - d. Documents sufficient to show the proposed ARO amount for each putative Class member;

- e. Documents sufficient to show the calculation of any amount owed by Home Depot to Mastercard under MasterCard's Account Data Compromise ("ADC") program;
- f. Documents sufficient to show the proposed ADC amount for each putative Class member;
- g. Any analysis of the difference between the Class members' recovery under the ARO and ADC;
- h. Any communications to putative Class members, whether from Home Depot or a third party, discussing or describing the Settlement, including responses from those Class members; and
- i. A list of all those to whom the communications have been sent.

SO ORDERED, this ___ day of December, 2015.

Thomas W. Thrash
United States District Judge