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**

HOME DEPOT U.S.A., INC. AND THE HOME DEPOT, INC.'S RESPONSE IN OPPOSITION TO THE FINANCIAL INSTITUTION PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

The Financial Institution Plaintiffs (the "Banks") have moved for the extraordinary remedy of an injunction pursuant to the All Writs Act, 28 U.S.C. § 1651, that would require the Court to undertake the following:

- Supervise communications and negotiations between Home Depot,[1] non-party MasterCard ("MC"), and some of the nation's largest, most sophisticated financial institutions that are separately represented by counsel

[1] Home Depot U.S.A., Inc. and The Home Depot, Inc. shall be referred to collectively herein as "Home Depot." Home Depot reserves the right, however, to move for summary judgment on the improper joinder of The Home Depot, Inc. as a defendant in this lawsuit.

(and allow the Banks to conduct discovery on those communications and negotiations);

- Order entities that are not parties to this MDL to provide purported "curative notices"; and
- Enjoin Home Depot from entering into a settlement with MC (the "MC Settlement") that the issuing banks are free to accept or reject.

See Banks' Motion for Injunctive Relief ("Motion"), ECF No. 149.

The Banks argue that this relief is warranted because certain communications are allegedly improper and the potential settlement threatens the Court's jurisdiction. None of these arguments has merit.

First, there is no basis for granting the Banks' request that the Court oversee and supervise communications (and order discovery thereon). Home Depot's communications with non-party MC and some of the nation's largest financial institutions are proper and expressly authorized by the operative Case Management Order. (*See* Case Management Order No. 3 ("CMO No. 3"), ECF No. 66). Moreover, these financial institutions are not represented by Lead Plaintiffs' Counsel but have retained their own counsel for the express purposes of settling their claims with Home Depot outside of this litigation. Lead Plaintiffs' Counsel's only hook for seeking to interfere with commercial entities attempting to negotiate

resolutions to a dispute is their formulation of an overly broad class definition that is rife with significant conflicts of interest and the lack of a procedural mechanism for these financial institutions to opt-out of this improper and uncertified class.

Second, there is no basis for granting the Banks' request that the Court order Home Depot to distribute "curative notices." As Home Depot has made clear to the Banks on countless occasions, but which the Banks refuse to acknowledge, the communications that they identify in their Motion were neither authorized nor sent by Home Depot. Those communications were sent by or on behalf of a sponsoring bank to another sponsored bank (the "Sponsoring Communications") – i.e., *from a putative class member to a putative class member* – such that the injunction would necessarily have to be directed to the very financial institutions that Lead Plaintiffs' Counsel purports to represent.

Moreover, the Banks have not met their high burden of showing that any of the Sponsoring Communications are coercive or misleading. At best, the Banks have alleged some confusion. But confusion is a far cry from coercion and misinformation, and, to the extent any recipient is confused, there are ample resources (including the identification of contact persons who can provide additional information) available to address those concerns. *See, e.g.*, Stewart Decl., ECF 149-9, at 2.

Third, there is no basis for the Court to enjoin the conditional MC Settlement or any future settlements. The Banks have not met their burden under the All Writs Act of showing that the conditional MC Settlement presents a risk to this Court's jurisdiction. The facts and posture of this MDL are also inapposite to cases where courts have exercised their authority under the All Writs Act. Those cases involved parallel proceedings that threatened to disrupt an actual or imminent settlement in the enjoining court, which thereby threatened the enjoining court's jurisdiction. That situation does not exist here. Moreover, the Court does not have jurisdiction over the vast majority of absent putative class members and cannot prevent commercial entities, informed by their own counsel, from acting in what they believe is the best manner for resolving their claims.

I. BACKGROUND

Although not articulated clearly in their Motion, the Banks challenge Home Depot's communications with MC, communications with 27 of the largest financial institutions in the country, all of whom have their own counsel, and various communications between and among absent class members, with which Home Depot had no involvement.

A. Home Depot's Negotiations with Non-Party MC.

As a result of the criminal cyberattack against Home Depot that targeted certain customers' payment card information, MC asserted claims against Home Depot in the form of significant assessments. Under MC's assessment process, any amounts paid by Home Depot to MC would be distributed to MC issuers on a pro rata basis. Home Depot, however, has the right to dispute, litigate, and appeal any assessment, which could result in years of protracted proceedings and possibly no payment by Home Depot to MC at all.

As an alternative to this process, Home Depot has been negotiating with both MC and Visa over the past several months. *See* Ex. A, Declaration of Michael Williams ("Williams Decl."), ¶ 3. Home Depot and MC have now reached a tentative settlement, under which Home Depot and MC have made offers to some of the largest issuers of MC-branded payment cards (including most of the largest financial institutions in the United States) that issued more than 80 percent of the potentially affected MC-branded payment cards. *See id.* at ¶ 4. The offer provides for payment of an amount equal to the full amount these banks could recover as a result of the assessment plus a 10% premium, provided that banks accounting for at least 65% of the potentially affected MC-issued accounts opt into the settlement and release their claims against Home

Depot. *See* Decl. of Menza Dudley, Ex. 1, ECF No. 149-7, at p. 12. If accepted and the terms are met, Home Depot would waive any right to appeal the MC assessment.

B. The Communications At Issue

1. Home Depot's Communications with Non-Party MC Are Proper.

MC is not a party to this MDL. Home Depot's communications with MC are therefore entirely proper, and there is no justification for the Court granting any relief with respect to these communications.

2. Home Depot's Communications with Represented Absent Putative Class Members Are Proper.

Home Depot, as part of negotiating a settlement with MC, has also communicated regarding a settlement offer with some of the nation's largest financial institutions. Many of the banks have accepted the offer while others have declined. In this process, several of the banks have, through their counsel, communicated with Home Depot regarding the offer and to negotiate specific settlement terms.

Those communications are entirely proper under the operative CMO No. 3, which expressly permits the types of communications with absent putative class members at issue here. CMO No. 3, at ¶ 2. The Banks' argument that the

pendency of Home Depot's Motion for Entry of Order Regarding Communications with Potential Members of the Financial Institution Putative Class ("Communications Motion") (ECF No. 141) in some way renders communications with absent class members improper is simply wrong. Home Depot has consistently maintained that an order is not required for the types of communications at issue. After the Banks rejected Home Depot's offer to enter a stipulation modifying CMO No. 3, Home Depot filed the Communications Motion as a good faith effort to be as transparent as possible and to assuage concerns raised by the Banks – not because an order was necessary to authorize communications with class members that are already authorized by CMO No. 3. Moreover, the Banks' own conduct reveals the falsity of their premise. Reportedly, just this past Monday, December 7, Lead Plaintiffs' Counsel hosted a telephonic "town hall" meeting ***with absent putative class members*** to discuss the proposed conditional MC settlement. *See* http://news.cuna.org/articles/108685-conference-call-today-for-home-depot-plaintiffs-re-mastercard.

3. Home Depot Did Not Authorize or Send the Sponsoring Communications Identified by the Banks in Their Motion.

Lead Plaintiffs' Counsel continues to insist that Home Depot played a role in the Sponsoring Communications. *See* Memorandum of Law In Support of Banks' Motion for Injunctive Relief ("Memo."), ECF 149-1, at 14 (seeking injunction

"directing Home Depot and those acting in concert with it to stop any further communication"). They are wrong. Home Depot has repeatedly explained that it neither authorized nor sent these communications and has submitted affirmative evidence supporting its representations. *See* Williams Decl., ¶ 7; Sur-Reply in Support of Communications Motion ("Sur-reply"), ECF No. 147, at 3-4; Declaration of Cari Dawson ("Dawson Decl."), ECF No. 147-1, at ¶ 5.

As Home Depot has explained and the Banks' own evidence shows, the source of the Sponsoring Communications are entities that operate as "members" of MC and "sponsor" smaller financial institutions, allowing them to issue MC-branded payment cards. *See* Williams Decl., ¶ 7; Sur-Reply at 3-4; Dawson Decl., at ¶ 5. More to the point, these are communications sent on behalf of *putative class members* to *other putative class members*. *See, e.g.*, Sweet Decl., ECF No. 149-11 at 4. Enjoining Home Depot will do nothing to affect the prevalence or content of these communications, which Home Depot had nothing to do with.

Lead Plaintiffs' Counsel refuse to acknowledge these obvious facts. They are left making the illogical allegation that the Sponsoring Communications were "certainly done at Home Depot's request" regardless of whether Home Depot has "explicit knowledge" of the communications. (Memo. at 1, n.1.) There is no

evidence to support this contention. The facts here are that Home Depot was unaware of and had no involvement with the Sponsoring Communications.

There is no evidence of any kind before the Court that Home Depot is responsible for any abusive communications with putative class members. Thus, the Banks have failed to satisfy their burden of demonstrating that they are entitled to the relief requested.[2]

C. Lead Plaintiffs' Counsel Are Attempting to Frustrate the MC Settlement and Are Acting Contrary to the Interests of the Financial Institutions They Purport to Represent.

To the extent Home Depot has communicated with absent class members to date, it has only done so with respect to the nation's largest issuing banks. But these are sophisticated entities represented by separate counsel in connection with their individual settlement discussions. Although Home Depot questions Lead Plaintiffs' Counsel's entire contention that any of the putative class members – all financial institutions involved in the payment card market – are unsophisticated and thus "cannot make an informed decision as to whether to accept a settlement,"[3]

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[2] As set out previously, "the Court's analysis turns on whether the record reflects ***clear and specific evidence*** that the type of communications engaged in ***by the defendants*** has been abusive and threatens this litigation." *Ojeda-Sanchez v. Bland Farms*, 600 F. Supp. 2d 1373, 1379 (S.D. Ga. 2009) (emphasis added).

[3] This is not the first time a settlement process like this has been proposed. Rather, most if not all of these same absent class members were presented with similarly

(Memo. at 8), their arguments are particularly specious when cast toward the largest of financial institutions with which Home Depot seeks to communicate.

These large issuing banks have their own in-house and outside counsel and are not represented by Lead Plaintiffs' Counsel. In other words, they are represented by counsel focused on their individualized interests. Their only connection to this litigation is that they fall into the Banks' overly broad putative class definition and have no ability to extract themselves from this litigation because, unless and until a class is certified, there is no ability to opt out. *See In re Matter of: Bridgestone/Firestone, Inc., Tires Prod. Liability Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) (member of putative class may not "opt out of the *certification*, a decision necessarily made on a class-wide, all-or-none basis.") (emphasis added). Lead Plaintiffs' Counsel are seeking to leverage this procedural nuance to interject themselves into negotiations where they are neither wanted, needed, nor permitted. Lead Plaintiffs' Counsel cannot advantage themselves by purporting to represent the self-interest of institutions that have obtained separate counsel to do exactly

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structured offers in the *Target* litigation. *See In re Target Corp. Customer Data Sec. Breach Litig.,* MDL No. 14-2522, 2015 WL 2165432 (D. Minn. May 7, 2015). There, the Visa deal received sufficient support to go through while the MC deal was initially rejected, further evidencing that absent class members are fully capable of making their own informed decisions. *See* http://www.reuters.com/article/us-target-mastercard-settlement-idUSKBN0O71TD20150522.

that and have determined that the settlements that the Banks seek to enjoin are in their individual best interests.

This attempt is part of a broader conflict that Lead Plaintiffs' Counsel have created among their own class members. Through their Motion and related deluge of filings, Lead Plaintiffs' Counsel are attempting to frustrate the ability of their own class members to voluntarily, and while represented by sophisticated counsel, enter into settlement agreements. The intra-class conflict Lead Plaintiffs' Counsel have created is highlighted by the fact that the result of the requested "curative notices" would be to require absent class members to provide other absent class members with curative notice. Likewise, their demand for discovery regarding the Sponsoring Communications would seemingly require them to depose certain absent class members on behalf of other class members, as it is the former who sent the communications or caused them to be sent. These facts not only reflect the impropriety of Lead Plaintiffs' Counsel's efforts here, but also demonstrate that the class is improperly defined and includes massive conflicts of interest that prohibit compliance with Rule 23.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The Target Court Rejected Virtually Identical Arguments.

Although the arguments in the Banks' Motion are without support, they are not untested. The court in the *In re Target Corp. Customer Data Security Breach Litigation* ("*Target*") rejected virtually identical arguments made by the financial institution plaintiffs in that case in the wake of Target's announcement that it had reached a tentative settlement with MC. MDL No. 14-2522 (PAM/JKK), 2015 WL 2165432, at *1 (D. Minn. May 7, 2015). Here, the Banks – represented by many of the same attorneys as in *Target* – make an identical run at derailing the good-faith negotiations between Home Depot and MC. The Banks all but ignore the *Target* court's directly on-point ruling, presumably hoping for a different result. But the result should be the same here as it was in *Target*; the Banks' Motion should be denied in its entirety.

B. The Banks Are Not Entitled to Relief Under the All Writs Act.

The Banks miss their mark by seeking relief under the All Writs Act. The Banks devote the majority of their discussion to generic recitations of the goals and relief available under the All Writs Act. (*See, e.g.*, Memo. at 14-17.) The Banks spend very little of their Memorandum, however, attempting to meet their burden of showing that the conditional MC Settlement threatens this Court's jurisdiction.

The reason is simple. It does not, and none of the case law that the Banks cite supports the relief they seek in their Motion.

1. The Facts and Posture of this MDL Do Not Support the Court Invoking the All Writs Act.

The facts and posture of this MDL are inapposite to the case law wherein courts have invoked the All Writs Act to issue an injunction. The All Writs Act is "designed for situations where the proposed settlement and release of claims ***in another judicial district*** would interfere with the MDL Court's disposition of those same claims." *In re Checking Account Overdraft Litig.*, 859 F. Supp. 2d 1313, 1322 (S.D. Fla. 2012) (emphasis added) (enjoining identical class action in another federal court that had been filed without notifying the MDL court of its existence and one day before submitting a motion for approval of a class settlement that provided for recovery that was far less than the one the same defense counsel had been negotiating with the MDL plaintiffs). Likewise, the All Writs Act empowers federal courts to avoid duplicative rulings such as where a parallel state court action "would make a nullity of the district court's ruling. . . ." *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996); *see In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (in multidistrict litigation, "[t]he need to enjoin conflicting state proceedings arises because . . . it is intolerable to have conflicting orders from different courts"). The Banks cannot avoid the fact that there is no

class action settlement or parallel action of any kind at issue here, let alone one that threatens the Court's jurisdiction. On the contrary, each offer was made on an individual basis arising from each bank's unique circumstances. Each individual bank then made its own determination whether or not to accept the offer.

Even if the MC Settlement were a class settlement that purported to resolve on a classwide basis claims common to this MDL litigation – which it clearly is not – the mere existence of parallel proceedings involving the same claims does not suffice to enjoin proceedings under the All Writs Act. The issuance of an injunction under the All Writs Act is the extraordinary – not the ordinary – case. And an injunction is generally issued only where there is a settlement or a settlement is imminent in the enjoining court. *See Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F. 3d 1091, 1099-100 (9th Cir. 2008) (finding injunction inappropriate where enjoining court was not approaching a settlement); *see also Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 331 (3d Cir. 2007) (injunction as to settlement in another federal court is particularly meritless "when there is no pending settlement in the enjoining court"); *Baldwin*, 770 F.2d at 338 (finding injunction as to non-settled plaintiffs appropriate only because there was a "substantially significant prospect" of settlement in the near future); *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719, 726 (E.D. La. 2012) (circuit courts "have

been most willing to uphold an injunction pursuant to the 'in aid of jurisdiction' exception in the MDL or complex litigation context when settlement is complete or imminent in the federal court"). Here, the Banks do not and cannot allege that there is any prospect of an imminent class settlement.[4]

The complete absence of any threat to the Court's jurisdiction by reason of the conditional MC Settlement is also underscored by case law standing for the proposition that defendants have a right to negotiate settlements with absent class members, without involvement of class counsel or the approval of the presiding court, where, as here, no class has been certified. *See Baycol Prods. Litig.*, No. MDL 1431MJD/JGL, 2004 WL 1058105, at *3 (D. Minn. May 3, 2004).[5] In holding that this right exists, the court in *Baycol* relied on the fact that it did not

[4] The absence of a certified class further highlights that there is no risk to the Court's jurisdiction. Indeed, courts routinely deny requests to enjoin settlements under the All Writs Act where, as here, the MDL court has not yet certified a class and the challenged settlement affects only those who opt-in. *See Hinds Cnty., Miss. v. Wachovia Bank*, 790 F. Supp. 2d 125, 132 (S.D.N.Y. 2011) (finding injunction "neither lawful nor appropriate" where MDL court had not certified a class, the agreement sought to be enjoined affected only those who opted in, and the case would continue as to other defendants regardless); *see also In re Life Investors Ins. Co. of Am.*, 589 F.3d 319, 332 (6th Cir. 2009) (finding "no cause to take extraordinary injunctive measures to protect the interests of a class" where class was not yet certified).

[5] Indeed, the Banks admit that Home Depot may negotiate settlements with absent class members on an individual basis. (Memo. at 19.)

have jurisdiction over the absent putative class members at issue. Here, by the same token, because the Court does not even have jurisdiction over the non-plaintiff MC issuers that are eligible to participate in the MC Settlement, there can be no argument that offers that have been made to such issuers pose any threat to the Court's jurisdiction.

2. In re Managed Care Litigation *Does Not Support Granting The Banks' Motion.*

The Banks' efforts to analogize the facts here to those in the *In re Managed Care Litigation*, 236 F. Supp. 2d 1336 (S.D. Fla. 2002), fall flat. (*See* Memo. at 16.) The Banks even go so far as to characterize Home Depot's legitimate negotiations with a non-party as "more egregious" than the conduct in that case. (*Id.* at 17.) But even a cursory review of *In re Managed Care Litigation* shows that it is readily distinguishable. Specifically, in that case, the enjoining MDL court had already certified a class and proceeded to enjoin the settlement of a tag-along action because it found that the defendant had deliberately maneuvered to conceal the tag-along action from the MDL court in order to prevent the action from being consolidated in the MDL. 236 F. Supp. 2d at 1338-39.[6] Here, the

[6] *See also In re Checking Account Overdraft Litig.*, 859 F. Supp. 2d at 1324 (granting injunction where defendant failed to timely disclose existence of tag-along action to the MDL court); *In re Bank of Am. Wage and Hour Emp't Litig.*,

Banks' Motion is devoid of any similar allegation that Home Depot maintained a tag-along action or otherwise sought to shift settlement jurisdiction from the MDL to another court. And while the Banks variously accuse Home Depot of "egregious" conduct and other improprieties, all of these claims boil down to the allegation that Home Depot negotiated with MC (and through MC with non-plaintiff MC issuers) outside of Lead Plaintiffs' Counsel's presence, which, as already shown above, is "entirely proper." *Baycol*, 2004 WL 1058105, at *3.

For these reasons the All Writs Act provides no basis for granting the relief sought, and the Banks' Motion should be denied in its entirety.

C. The MC Settlement is NOT a "De Facto" Settlement Subject to Court Oversight Pursuant to Rule 23(e) And Is Not Coercive.

The Banks acknowledge – as they must – that Home Depot may negotiate settlements with absent class members on an individual basis. (Memo. at 19.) Nonetheless, the Lead Plaintiffs' Counsel insist that they are entitled to interject themselves into the process because the conditional MC Settlement amounts to a purported "de facto" class action settlement and is therefore subject to court supervision pursuant to Fed. R. Civ. P. 23(e). The Banks also allege that the

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740 F. Supp. 2d 1207, 1215-16 (D. Kan. 2010) (enjoining tag-along settlement, where the defendant violated a court order to report related cases).

potential MC settlement is a ruse designed to extract unfair concessions from putative class members. The Banks are wrong on both fronts.

The Banks cite no authority in which a court has found a pre-certification, "de facto" class action settlement – which this is not – to be subject to Rule 23(e). The sole case that the Banks cite in support of their assertion that this Court can exercise authority over the conditional MC Settlement under Rule 23(e) is *Kahan v. Rosenstiehl*, 424 F.2d 161 (3d Cir. 1970). (Memo. at 19-20.) *Kahan*, however, was decided in 1970 and has since been superseded by an amendment to Rule 23(e) designed to clarify that a court's authority and obligation to approve settlements under that rule is limited to the context where the claims of the ***certified class*** are released. *See* Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a ***certified class*** may be settled, voluntarily dismissed, or compromised only with the court's approval.") (emphasis added); *see also Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 576 & n.3 (N.C. Ct. App. 2008) (citing the Third Circuit's decision in *Kahan* as one that was superseded when Congress resolved the circuit split regarding whether Rule 23 applied to pre-certification settlements by amending Rule 23 to clearly limit it to certified classes). As the advisory committee explained, the 2003 amendment "resolve[d] the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of 'a class action.' That

language could be – and at time was – read to require court approval of settlements with putative class representatives that resolved only individual claims. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23 advisory committee notes (citation omitted). *See Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (holding that if there were such a thing as a "de facto class action," such an action would not be subject to Rule 23).

Moreover, the idea that a court has authority under Rule 23(e) to approve or disapprove a settlement with absent class members of a non-certified class is also implausible in light of the fact that the court does not even have jurisdiction over such absent class members. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 798 (1985) (finding personal jurisdiction over absent class members after certification of class and opportunity to opt out); *Baycol*, 2004 WL 1058105, at *3 (finding no personal jurisdiction over absent class members in a putative class).

The conditional MC Settlement is not coercive or nefarious. The banks to whom Home Depot made an offer are advised by their own counsel. These banks are free to accept or reject the MC Settlement, accept funds under MC's recovery process, and retain their claims against Home Depot. There is no claimed confusion among the banks to whom Home Depot made an offer. To the extent

there is any claimed confusion by any sponsored entities, that confusion again results from communications by and among class members in which Home Depot did not participate. In any event, for any such supposed confusion, there is also a remedy. The putative class member can pick up the phone and call a representative of the sponsoring entity for more information or attend one of the "town hall" teleconferences that Lead Plaintiffs' Counsel themselves reportedly have held to answer absent putative class members' questions regarding the MC Settlement.

D. The MC Settlement is NOT a "Quasi-Class Action" Subject to Court Oversight Pursuant to Rule 23(e).

Finally, the Banks' attempts to cast their litigation as a "quasi-class action" notwithstanding its uncertified nature are likewise unavailing. (Memo. at 21.) The Banks do not cite any controlling authority for the proposition that it would be appropriate for an MDL court to treat an uncertified putative class action as a "quasi-class action" for any purpose under Rule 23. The few district court decisions the Banks cite, moreover, are limited to the context of attorney fee disputes in MDLs involving only individual plaintiffs. (Memo. at 21-22.) Thus, even if it were appropriate for a court to rely on a "quasi-class action" theory in order to allocate attorneys' fees in cases involving a collective settlement of a large number of individual claims, that theory would have no bearing in the case of a

putative class action, such as this. This action is and will remain a putative class action unless and until it becomes a certified class action. "Quasi class action" is not a third alternative nor is it an avenue for the Banks to skip past certification to avoid the fact that Rule 23, as amended, plainly rejects judicial approval of pre-certification, individual settlements.

E. The Sponsoring Communications At Issue Do Not Warrant Court Intervention.

1. Home Depot's Communications Are Authorized and Proper.

For the reasons set forth in Section I.B, *supra*, Home Depot's communications with non-Party MC and absent class members are proper.

2. Home Depot Did Not Authorize or Send the Sponsoring Communications.

The Banks request for injunctive relief against Home Depot should be summarily denied to the extent it is premised on the complained of Sponsoring Communications for the reason that Home Depot neither authorized nor sent those communications as discussed above.

3. The Communications Are Neither Coercive Nor Misleading.

The Banks have failed to meet the high evidentiary standard necessary to demonstrate that a communication is either coercive or misleading. Courts in the Eleventh Circuit will not restrict contacts with putative class members unless there

is "'a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.'" *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1985) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981)); *see also Ojeda-Sanchez*, 600 F. Supp. 2d at 1379 ("[T]he Court's analysis turns on whether the record reflects ***clear and specific evidence*** that the type of communications engaged in ***by the defendants*** has been abusive and threatens this litigation.") (emphasis added). The Banks have not established a clear record.

As set forth by the Court in *Target*, "[t]he Court has almost no authority to oversee such settlements" unless the parties' communications show an "actual or threatened misconduct of a serious nature." *Target*, 2015 WL 2165432, at *2. Specifically, a court will only intervene if there is a "clear record and specific findings" that the communications were misleading or coercive. *Id*. And this bar is even higher when, like here, the communicating party sought to be enjoined is a non-party. *Id.* ("That the standard for restraining the speech of non-parties is even greater than that necessary to restrain the speech of parties goes without saying.").

Under the *Target* standard, the Banks fail to show that the communications were misleading. Specifically, the Banks have come forward with no evidence showing that Sponsoring Communications are materially different from the

communications in *Target*, which the Court found were "not misleading." *Id*. at *1. The *Target* communications concerned nearly identical subject-matter – they relayed information about the data breach, offered to pay a fixed percentage of the MC estimate, conditioned participation in the settlement on releasing claims against Target, and set a defined timeframe to respond. *Id*. The Dudley Declaration – the Banks' only specific evidence of a single putative class member supposedly misled – states only that this one individual was "extremely confus[ed]," after reading what is admittedly a highly technical document, like all settlement agreements are. (*See* Dudley Decl. 149-6, ¶ 11.) But a confused reader is not the same as a misled one and does not evidence "misconduct of a serious nature." *See Target*, 2015 WL 2165432, at *2.

Similarly, the Banks provide no evidence that the behavior was coercive. The *Target* court suggested the communications would be coercive if they led the putative class members to believe they would lose MC's business if they did not accept the offer. *Id*. The Banks' proffered affidavit offers no evidence of coercion of the sort the *Target* court described as necessary for intervention, and gives no alternative basis for coercion. (*See* ECF No. 149-6.)

III. CONCLUSION

For the reasons set forth above, the Court should deny the Banks' Motion in its entirety.

Respectfully submitted this 11th day of December, 2015.

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

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted, this 11th day of December, 2015.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on December 11, 2015 with the Court and served electronically through the CM-ECF (electronic case filing) system to all counsel of record registered to receive a Notice of Electronic Filing for this case.

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