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

IN RE THE HOME DEPOT, INC. SHAREHOLDER DERIVATIVE LITIGATION	LEAD CASE NO. 1:15-CV-2999 TWT

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SHAREHOLDER DERIVATIVE SETTLEMENT AND MEMORANDUM OF LAW IN SUPPORT

Plaintiffs Mary Lou Bennek ("Bennek") and Cora Frohman ("Frohman") (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby submit this memorandum of law in support of their unopposed motion for preliminary approval of the settlement (the "Settlement") of the above-captioned shareholder derivative action (the "Action") brought on behalf of The Home Depot, Inc. ("Home Depot" or the "Company").

I. INTRODUCTION

After extensive, arm's-length negotiations, the parties to the Action have agreed to the Stipulation, which fully resolves and settles the Released Claims.[1] Plaintiffs believe the settlement embodied in the Stipulation provides substantial benefits to Home Depot and Current Home Depot Shareholders. It provides corporate governance reforms, as discussed herein at Section III, that were negotiated with the assistance of a highly regarded third-party mediator and cybersecurity experts. The cybersecurity-focused corporate governance practices embodied in the Stipulation are designed to address deficiencies Plaintiffs believe

[1] All capitalized terms not defined herein shall have the same definitions as set forth in the Settlement and Release Agreement dated April 21, 2017 ("Agreement" or "Settlement Agreement" or "Stipulation") and filed concurrently herewith as Exhibit 1).

existed at Home Depot regarding the Board's oversight and responsibility for data security prior to the Data Breach.

The reforms to which the parties have agreed require the Board to: (i) document the duties and responsibilities of the Chief Information Security Officer ("CISO"); (ii) periodically conduct Table Top Cyber Exercises[2]; (iii) monitor and periodically assess key indicators of compromise on computer network endpoints; (iv) maintain and periodically assess the Company's partnership with a dark web mining service to search for confidential Home Depot information; (v) maintain an executive-level committee focused on the Company's data security; (vi) receive periodic reports from management regarding the amount of the Company's IT budget and what percentage of the IT budget is spent on cybersecurity measures; (vii) maintain an Incident Response Team and an Incident Response Plan; (viii) maintain membership in at least one Information Sharing and Analysis Center (ISAC) or Information Sharing and Analysis Organization (ISAO); and (ix) retain their own IT, data and security experts and consultants as they deem necessary. These provisions make data security a corporate focus and improve the Company's ability to prevent and respond to future attacks.

[2] Table Top Exercises are used to validate the Company's processes and procedures, test the readiness of its response capabilities, raise organizational awareness and train its personnel, and create remediation plans for issues and problem areas.

The Settlement constitutes an appropriate resolution of this litigation of substantial complexity and is well within the range of possible approval, thereby satisfying the test courts typically employ in reviewing a settlement for preliminary approval. Accordingly, Plaintiffs respectfully request that the Court: (i) preliminarily approve the Settlement set forth in the Settlement Agreement; (ii) approve the form of the Notices, and direct the publication and posting of the Notices as contemplated by the Settlement Agreement; and (iii) schedule a hearing to entertain any objections by Current Home Deport Shareholders and consider final approval of the Settlement (the "Settlement Hearing").

II. PROCEDURAL HISTORY

On September 30, 2014 and April 20, 2015, Plaintiffs Frohman and Bennek, respectively, issued written demands to Home Depot's Board demanding inspection of certain corporate books and records related to the September 2014 breach of the Company's payment data systems (the "§ 220 Demands"). The Company produced documents to the § 220 Demands and additional documents to Plaintiff Frohman after she instituted a § 220 proceeding in Delaware Chancery Court on June 15, 2015.

Around the same time that Plaintiff Frohman made her initial § 220 demand, Berel Rosenfeld, as Trustee of the LR Trust ("Rosenfeld," and collectively with the

Plaintiffs, the "Shareholders") on September 22, 2014, made a formal written demand on the Board to investigate the Data Breach and to "institute claims on behalf of the Company against any person responsible for causing damage to the Company" (the "Investigation Demand"). The Board created a Demand Review Committee (the "DRC") to oversee responding to the Investigation Demand. The DRC retained outside counsel to review the issues raised by LR Trust and to provide recommendations for how to proceed in regards to the demand ("DRC counsel"). The Investigation Demand also would be resolved by approval of the Settlement.

On August 25, 2015, Plaintiff Bennek filed a Verified Shareholder Derivative Complaint captioned *Bennek v. Ackerman, et al* (Civil Action No. 15-CV-2999). On October 15, 2015, Plaintiff Frohman filed a separate Verified Shareholder Derivative Complaint captioned *Frohman v. Bousbib, et al* (Civil Action No. 15-CV-3650). Both actions alleged that certain members of Home Depot's Board disregarded the substantial and foreseeable risk of a cyberattack by deliberately allowing the Company to operate without adequate cybersecurity procedures, which ultimately lead to the Data Breach.

On January 20, 2016, this Court granted Plaintiffs' Motion to Consolidate the *Bennek* and *Frohman* actions into a single action, captioned *In re The Home*

Depot, Inc. Shareholder Derivative Litigation (the "Consolidated Action"). Plaintiffs Bennek and Frohman were appointed Co-Lead Plaintiffs. Faruqi & Faruqi LLP and Shubert Jonckheer & Kolbe LLP were appointed Co-Lead Counsel, and Holzer & Holzer, LLC was appointed Liaison Counsel.[3]

On February 29, 2016, Plaintiffs filed a Verified Consolidated Shareholder Derivative Complaint (the "Complaint"). The Complaint alleged that the Individual Defendants[4] breached their fiduciary duties to the Company, wasted corporate assets, and violated §14(a) of the Securities Exchange Act of 1934 in connection with the Company's 2014 and 2015 proxy statements. Plaintiffs sought monetary damages and corporate governance reforms.

On April 14, 2016, the Individual Defendants and the Company (the "Defendants") filed a Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 23.1(b)(3) (the "Motion to Dismiss"). Defendants argued that the Complaint should be dismissed because Plaintiffs failed to make a pre-suit demand on the Company's Board or plead that demand was futile, and

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[3] Kenneth B. Hodges, III acted as additional counsel for Plaintiff Bennek.

[4] The "Individual Defendants" include Francis S. Blake, Mathew A. Carey, Craig A. Menear, Ari Bousbib, Gregory D. Brenneman, J. Frank Brown, Albert P. Carey, Armando Codina, Helena B. Foulkes, Karen L. Katen, Mark Vadon, Bonnie G. Hill, and F. Duane Ackerman.

because the Complaint failed to state a claim. On June 30, 2016, Plaintiffs filed their Opposition to Defendants' Motion to Dismiss the Consolidated Action.

On November 8, 2016, the Court held oral argument on the Motion to Dismiss. On November 30, 2016, the Court granted Defendants' Motion to Dismiss. On December 28, 2016, Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit.

III. SETTLEMENT NEGOTIATIONS

In order to attempt to reach an amicable conclusion to both the Consolidated Action and the Investigation Demand, on August 23, 2016, a meeting was held to discuss potential settlement. The meeting was attended by Shareholder Counsel and their cybersecurity expert consultants, the Company's Chief Information Security Officer, its Senior Director of Information Security, and its Director of Information Security. The various constituents met for several hours and discussed the Company's ongoing cybersecurity policies and procedures.

Subsequently, on September 8, 2016 and September 22, 2016, Shareholder Counsel and their cybersecurity expert consultants and Defendants, along with Company representatives, mediated the Consolidated Action and Investigation Demand with the assistance of an experienced mediator, Ralph Levy, Esq.

Despite two full days mediating with Mr. Levy, the parties were unable to reach agreement to resolve the Consolidated Action and Investigation Demand. Settlement discussions continued, however, between the parties with the periodic involvement of Mr. Levy. Counsel thereafter exchanged e-mails and engaged in telephone conferences for several more months before reaching agreement on all material terms of the Settlement, including an award of attorneys' fees and expenses, which were negotiated only after all substantive terms of the Settlement had been agreed upon.

IV. THE SETTLEMENT

As discussed above, the parties engaged in good-faith and protracted arm's-length negotiations to resolve the Consolidated Action and Investigation Demand. Their diligence and extensive discussions culminated in the Agreement, which was fully executed on April 21, 2017. The Shareholders believe the Agreement provides meaningful corporate governance reforms that address the underlying corporate shortcomings that led to the Data Breach, while improving the Company's overall compliance capabilities.

To address the deficiencies identified by Shareholders and Shareholder Counsel, the terms of the Agreement include, *inter alia*: (i) greater oversight and transparency of the duties of the CISO; (ii) periodic Table Top Cyber Exercises to

validate the Company's processes and procedures, test the readiness of its response capabilities, raise organizational awareness, train its personnel and create remediation plans for issues and problem areas; (iii) monitoring and periodically assessing key indicators of compromise on computer network endpoints; (iv) maintaining and periodically assessing Home Depot's partnership with a dark web mining service to search for Home Depot information; (v) maintaining the executive-level "Data Security and Privacy Governance Committee" or a comparable executive-level committee focused on the Company's data security; (vi) Board receipt or periodic reports from management regarding the amount of the Company's IT budget and what percentage of the IT budget is spent on cybersecurity measures; (vii) maintaining the Incident Response Team and the Incident Response Plan to address crises or disasters and periodically re-evaluate the Plan; (viii) maintaining membership in at least one ISAC or ISAO; and (ix) authorizing the Board and Audit Committee to retain their own IT, data and security experts and consultants, as they deem necessary .

The corporate governance reforms embodied in the Agreement define clear roles and responsibilities over data security, which Shareholders contend were absent prior to the Data Breach. The provisions also call for the Company to proactively monitor external sources, share information about potential threats and

maintain a response plan, all of which increases accountability and oversight over the Company's data security systems. As a result, Shareholders believe that the terms of the Settlement are fair, reasonable, and adequate, have and will continue to significantly benefit Home Depot, and warrant preliminary approval.

V. ARGUMENT

A. Preliminary Approval Is the First Step In Evaluating A Shareholder Derivative Settlement

Federal Rule of Civil Procedure 23.1(c) requires the Court to evaluate the adequacy of a proposed shareholder derivative settlement before the action may be dismissed or compromised. "The role of the court and the criteria to be considered in evaluating the adequacy and fairness of a derivative settlement are substantially the same as in a class action." 7 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §22.110 (4th ed. 2009); *Sterling v. Stewart*, 158 F.3d 1199, 1203-04 (11th Cir. 1998). The two-step procedure for preliminary and then final review of a proposed settlement in a class action is well established:

> District court review of a class action settlement proposal is a two-step process. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." This hearing is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Manual for Complex Litigation* §1.462 at 53-55 (West 1977). If the district court finds a settlement proposal "within the

> range of possible approval," it then proceeds to the second step in the review process, the fairness hearing. Class members are notified of the proposed settlement and of the fairness hearing at which they and all interested parties have an opportunity to be heard. The goal of the fairness is to adduce all information necessary to enable the judge intelligently to rule on whether the proposed settlement is "fair, reasonable, and adequate."[5]

Armstrong v. Bd. Of Sch. Dirs., 616 F.2d 305, 314 (7th Cir. 1980) *overruled on other grounds by Felzen v. Andreas,* 134 F.3d 873 (7th Cir. 1998); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981).[6]

"Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re NASDAQ Market-Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *see also Corrugated Container*, 643 F.2d at 205; *Manual for Complex Litigation* (Third), §30.41 (West 1995).

In considering the fairness of a settlement, the "trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a

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[5] Here, as throughout, all emphasis is deemed added and citations and footnotes are deemed omitted unless otherwise noted.

[6] The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). The very object of a compromise "is to avoid the determination of sharply contested and dubious issues." *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

While federal courts are required to scrutinize proposed class action settlements, courts doing so have frequently recognized that settlements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Republic Nat'l Life Ins. Co.,* 559 F.2d 426, 428 (5th Cir. 1977) (quoting *Pearson v. Ecological Sci. Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)). Moreover, "settlements of shareholder derivative actions are particularly favored because such litigation is 'notoriously difficult and unpredictable.'" *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *see also Cotton,* 559 F.2d at 1331 (explaining that in representative actions, "there is an overriding public interest in favor of settlement," because such suits "have a well deserved reputation as being most complex"); *Zimmerman v. Bell*, 800 F.2d 386, 392 (4th Cir. 1986) (stating that "[s]ettlement here is favored for the reasons that settlements generally are favored: disputes are resolved; the resources of

litigants and courts are saved; and, in the case of a derivative action, management can return its attention and energy from the courtroom to the corporation itself").

The Agreement before this Court satisfies all of the criteria for preliminary – and ultimately final – approval. The Agreement was achieved after well-informed, arm's-length negotiations assisted by a respected mediator, well-renowned cybersecurity experts and capable legal counsel on both sides. Further, the benefits conferred by the Agreement are substantial and fall squarely within the range of reasonableness, thereby warranting notice to Current Home Depot Shareholders informing them of the Agreement and the date of the Settlement Hearing.

B. Consideration of the Relevant Factors Strongly Support Preliminary Approval of the Settlement

Courts in the Eleventh Circuit regularly consider, *inter alia*, the following five factors when reviewing a proposed settlement for approval:

1. the absence of collusion between the parties;
2. the stage of the proceedings at which settlement was achieved;
3. the likelihood of success at trial;
4. the range of possible recovery; and
5. the complexity, expense, and likely duration of the litigation.

See Cotton, 559 F.2d at 1330; *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Analysis of the Agreement under these five criteria demonstrates that preliminary approval is warranted here.[7]

1. Collusion Is Absent From the Settlement

The absence of collusion is a factor weighing heavily in favor of preliminary approval. *See Bennett*, 737 F.2d at 986. As described above, the Settlement is free of collusion and, instead, is the result of extensive arm's-length negotiations between experienced counsel knowledgeable about the strengths and weaknesses of the claims made and the potential defenses to them. Further, the parties were assisted in the negotiations by an independent mediator, Ralph Levy, of JAMS.

In the absence of collusion, courts assessing the merits of a settlement have long relied on the judgment of competent counsel. *See Reed v. Gen. Motors Corp*., 703 F.2d 170, 175 (5th Cir. 1983) (stating that "the value of the assessment of able counsel negotiating at arm's length cannot be gainsaid"); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981) ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight"). Here,

[7] Courts also consider "the substance and amount of opposition to the settlement" before granting final approval (*see Id.*), but the factor is only properly considered after notice and its terms is provided to shareholders.

Shareholders are represented by counsel with many years of experience in litigating shareholder derivative (and other representative) actions who have negotiated many other derivative settlements that have been approved by courts throughout the country.[8] Defendants are represented by counsel with a local and national reputation for the tenacious defense of complex civil matters.

Courts have held that under such situations a strong initial presumption is created that the compromise is fair and reasonable. *See In re Smith*, 926 F.2d 1027, 1028 (11th Cir.1991) ("the Court 'should be hesitant to substitute ... her own judgment for that of counsel.'"); *U.S. v. Tex. Educ. Agency*, 679 F.2d 1104, 1108 (5th Cir. 1982); *Wal-Mart Stores Inc., v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (applying initial presumption of fairness of a proposed settlement where the settlement was negotiated at arm's length by experienced counsel); *In re Warfarin Sodium Antitrust Litig*., 391 F. 3d 516, 535 (3d Cir. 2004) (attaching presumption of fairness to a settlement when its negotiation resulted from arm's-length negotiations between experienced counsel). Accordingly, the adversarial nature of the parties' negotiations, guided by an independent neutral, supports a strong presumption that the Agreement is fair, reasonable and adequate.

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[8] *See* Firms résumés attached to the Motion to Consolidate Related Actions, Appoint Co-Lead Plaintiffs and Approve Counsel with Memorandum of Law in Support Thereof, as Exhibits A, B and C. [Dkt No. 31].

2. The Stage of the Proceedings

In evaluating whether to approve a settlement, the Court should also consider the "stage of proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986. This case has been litigated extensively, and Plaintiffs' Counsel is well positioned to assess the merits of the case after having pursued the matter since September 2014. Plaintiffs believe that settling the litigation now will allow Home Depot to enjoy the material benefits of improved corporate governance and eliminate the substantial risks and expense of continued litigation. Rosenfeld is in agreement.

Before commencing litigation, Plaintiffs' Counsel conducted extensive investigation into the Individual Defendants' alleged misconduct and the corresponding damages to the Company. Plaintiffs' Counsel reviewed publicly available information, including U.S. Securities and Exchange Commission filings, media reports and academic literature on cybersecurity. Plaintiffs' Counsel also reviewed hundreds of pages of non-public corporate records and minutes produced in response to Plaintiffs' §220 Demands. The review included an in-person inspection of approximately 40 pages of highly sensitive information regarding the Company's data security with the telephonic assistance of Plaintiffs' cybersecurity expert consultant.

Plaintiffs then filed a detailed and lengthy Complaint, and the parties engaged in motion practice that culminated in the Court granting Defendants' Motion to Dismiss, which Plaintiffs appealed. Shareholder Counsel received and reviewed additional documentation about the Board's response to the Investigation Demand and another litigation demand prior to executing the Agreement.

This extensive investigation and vigorous pursuit of the Consolidated Action and Investigation Demand for more than two years uniquely positioned Shareholder Counsel to understand the strengths and weaknesses of the claims and to negotiate and obtain a settlement that provides meaningful relief to the Company. Accordingly, this factor supports preliminary approval of the settlement embodied by the Agreement. *See Cotton*, 559 F.2d at 1332 (finding that based upon informal discovery and investigation, plaintiffs "achieved the desired quantum of information necessary to achieve a settlement"); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) ("[f]ormal discovery is not a necessary ticket to the bargaining table" where the parties have sufficient information to make an informed decision about settlement).

3. The Likelihood of Success at Trial

As in every complex case of this kind, Plaintiffs faced formidable obstacles to recovery. *See, e.g., Maher*, 714 F.2d at 461 (affirming approval of derivative

settlement where further recovery "was problematical" and "did not outweigh the costs, both legal and otherwise"). The obstacles are particularly formidable here given the Court granted Defendants' Motion to Dismiss without leave to amend. While Plaintiffs have appealed that decision and believe their appeal has merit, success is far from certain and a failure to achieve reversal of this Court's order would end this litigation without any corporate benefit being obtained at all.

Even if the appeal proves successful, many challenges to recovery would remain. *See In re Pac. Enters. Sec. Lit.*, 47 F.3d 373, 378 (9th Cir. 1995) ("the odds of winning [a] derivative lawsuit [are] extremely small"). The Individual Defendants have denied, and continue to deny, any liability or wrongdoing with respect to any and all claims and contentions alleged in the Action. If the case is remanded, Plaintiffs would undoubtedly face motions for summary judgment; witnesses could suddenly become unavailable or be unable to recall critical information; or the trier of fact could react to the evidence in unfavorable ways. In these circumstances, "it is prudent to eliminate the risks of litigation to achieve specific certainty though admittedly it might be considerably less (or more) than were the case fought to the bitter end." *Fla. Trailer & Equip. Co. v. Deal*, 284 F.2d 567,573 (5th Cir. 1960).

The relief obtained through the settlement is significant by any measure, and particularly so since the Complaint has already been dismissed by the Court. Continued litigation creates a substantial risk of shareholders obtaining no recovery at all, while the settlement provides immediate, material benefits to Home Depot. S*ee Cohn v. Nelson*, 375 F. Supp. 2d 844, 855 (E.D. Mo. 2005) ("[i]n assessing the Settlement, this Court must balance the benefits accorded to [the company] and its stockholders, and the immediacy and certainty of a substantial recovery for them, against the continuing risks of litigation"). For these reasons, this Court should preliminarily approve the Settlement.

4. The Range of Possible Recovery

Courts agree that determination of a "reasonable" settlement does not mean "'establishing success or failure to a certainty.'" *Corrugated Container*, 643 F.2d at 212; *Fla. Trailer & Equip. Co.*, 284 F.2d. at 571. Rather, a "just result is often no more than an arbitrary point between competing notions of reasonableness." *Id.* Here, the Agreement consists of substantive corporate governance reforms that provide significant benefits to Home Depot and Current Home Depot Shareholders, demonstrably falling within the range of "reasonableness." *See Maher*, 714 F.2d at 454 (affirming settlement of derivative action where the lawsuit was a contributing factor in several beneficial changes to the company

including the implementation of corporate governance reforms); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1311 (3d Cir. 1993) ("[d]espite the difficulties they pose to measurement, nonpecuniary benefits to the corporation may support a settlement"); *Cohn*, 375 F. Supp.2d at 853 (explaining that "[c]ourts have recognized that corporate governance reforms such as those achieved here provide valuable benefits to public companies").

Home Depot, and Current Home Depot Shareholders, will benefit from the settlement because the negotiated corporate governance reforms enable proper monitoring of the Company's data security systems and provide greater oversight by the Board through periodic reports from management regarding the Company's cybersecurity practices. The Settlement obligates the Company to define the duties of the CISO, maintain an executive-level data security committee to routinely assess the Company's security systems, and maintain an Incident Response Team and an Incident Response Plan to quickly and efficiently react in the event of a future cybersecurity incident. The Company will also benefit from its involvement in ISACs or ISAOs, as required by the Agreement, which provide industry-specific best practices to minimize security threats.

The Agreement eliminates the expense and distraction of continued proceedings necessary to prosecute the Consolidated Action and/or any action

arising out of the Investigation Demand. Further, inherent uncertainties and risks in continued litigation are obviated by the Agreement. The Agreement, on the other hand, provides the certainty of a known benefit for Home Depot in the form of substantial corporate governance enhancements.

5. The Complexity, Expense, and Likely Duration of the Action

Another reason for counsel to recommend, and for a court to approve, a settlement is the complexity, duration, and risks of further litigation. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (holding that a court must consider, *inter alia*, "the complexity, expense, and likely duration of such litigation"); *Corrugated Container II*, 659 F.2d at 1325 (noting immediate benefit of settlement and avoidance of costly and lengthy litigation). Here, several factors are present making it more likely that, absent the Agreement, the Consolidated Action would require additional expenditures and lengthy litigation, with the significant risk that Home Depot could obtain results less beneficial than the ones provided by the settlement - or no recovery at all.

Defendants already have obtained dismissal of the Complaint on both procedural and substantive grounds. Absent the Agreement, the parties would expend substantial time and resources briefing the appeal. Then, if Plaintiffs are

successful in their appeal, complicated discovery would be required. The Defendants undoubtedly would file additional dispositive motions that Plaintiffs would have to withstand, and a trial alleging breaches of fiduciary duty in connection with the Data Breach would rely heavily on experts to opine on matters such as cybersecurity and damages. This doesn't even take into account the additional litigation that the Investigation Demand would encompass, which also would undoubtedly involve complex motion practice and likely appeals.

Further, any future trial judgment in the Consolidated Action would still be subject to the continuing risks and vicissitudes of litigation, through possible appeals. Even very large judgments, recovered after lengthy litigation and trial, can be greatly reduced or lost post-trial or on appeal. *See, e.g.*, *Johansen v. Combustion Eng'g, Inc*., 170 F.3d 1320, 1340 (11th Cir. 1999) (affirming reduction of $45 million damages award to $4.35 million); *Gregg v. U.S. Indus., Inc*., 887 F.2d 1462, 1477 (11th Cir. 1989) (affirming reduction of $18.5 million damages award to $2 million). The settlement embodied in the Agreement, on the other hand, provides immediate benefits to Home Depot and preserves the resources of the parties and the Court.

For these reasons, the Agreement deserves the Court's preliminary - and ultimately final – approval. The Court should set a date for the Settlement Hearing

and direct the parties to provide notice to Current Home Depot Shareholders advising them of their right to be heard on the adequacy of the settlement embodied by the Agreement.

VI. NOTICE

The Agreement provides for publication of (1) the Notice, as set forth in Exhibit C to the Settlement Agreement, on a Home Depot-maintained website and certain of Plaintiffs' Counsel websites, and (2) the Summary Notice, as set forth in Exhibit B of the Settlement Agreement (collectively, "Notices"), to be published one time in *Investor's Business Daily*. This method of publication has been found by numerous other courts to be sufficient to ensure adequate notice to shareholders.

Unlike for class actions, Fed. R. Civ. P. 23.1(c) does not require individual notice of a shareholder derivative settlement, but rather provides for notice only "in the manner that the court orders." Because no individual claims are at stake, and because a direct notice program would be so costly as to swallow up the benefits of many derivative settlements, notice of dismissal of derivative settlements under Rule 23.1 by publication only is appropriate.

The proposed substance of the Notices is also sufficient. The Notices provide information relating to: (i) the settlement terms; (ii) the date of the Settlement Hearing; and (iii) the protocol for Current Home Depot Shareholders to

follow to comment upon the proposed settlement. This ensures Current Home Depot Shareholders have the opportunity to be heard about the sufficiency of the settlement, if they choose.

Thus, the form and manner of the proposed Notice to Current Home Depot Shareholders constitutes the best notice practicable under the circumstances and satisfies the requirements of Rule 23.1, due process, and any other applicable law. *Carlough v. Amchem Prods., Inc*., 158 F.R.D. 314, 323 (E.D. Pa. 1993) ("notice by publication may be the principal means for informing [shareholders] of their ... rights") (citing Manual Complex Litigation (Third), supra, §30.211, at 221).

VII. SCHEDULE OF EVENTS

Plaintiffs' Counsel proposes the following schedule for the publication and posting of the proposed Notices, the filing of submissions in support of final approval of the Settlement, Current Home Depot Shareholder objections and any response thereto, and the Settlement Hearing. This schedule is similar to those used and approved by courts in derivative action settlements and provides due process to Current Home Depot Shareholders with respect to their rights concerning the Settlement.

Event	**Time for Compliance**
Deadline for posting the Notice on a Home Depot website and certain of Plaintiffs' Counsel websites, and publishing the Summary Notice once in *Investor's Business Daily*	Not later than fifteen (15) business days following the entry of the Preliminary Approval Order
Deadline for serving and filing of affidavit of posting of Notice by Defendants and Plaintiffs and publication of Summary Notice by Defendants	Not later than twenty-eight (28) calendar days prior to the Settlement Hearing
Deadline for filing of papers in support of the final approval of settlement	At least twenty-five (25) calendar days prior to the Settlement Hearing
Deadline that any objections to the settlement must be filed with the Court	At least twenty-one (21) calendar days prior to the Settlement Hearing
Deadline for filing of any response to objections, if any, and/or in further support of settlement by Current Home Depot Shareholders	At least seven (7) calendar days prior to the Settlement Hearing
Settlement Hearing date	At least sixty (60) calendar days after entry of the Preliminary Approval Order, or later at the Court's convenience

VIII. CONCLUSION

Given the substantial benefits the Settlement provides to Home Depot and Current Home Depot Shareholders, Plaintiffs respectfully request the Court enter

the proposed Order Preliminarily Approving Settlement, as Exhibit A, which: (i) preliminarily approves the proposed settlement; (ii) approves the form and manner of the proposed Notices and directs the publication and posting of the Notices; and (iii) schedules the Settlement Hearing.

Dated: April 28, 2017

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