

**UNITED STATES JUDICIAL PANEL**  
**on**  
**MULTIDISTRICT LITIGATION**

**IN RE: PAYMENT CARD INTERCHANGE FEE AND  
MERCHANT DISCOUNT ANTITRUST LITIGATION**

MDL No. 1720

**TRANSFER ORDER**

**Before the Panel:**\* Defendants Visa Inc., Visa U.S.A. Inc., and Visa International Service Association (together, Visa) and MasterCard Incorporated and MasterCard International Incorporated (together, MasterCard) move under 28 U.S.C. 1407(c) for transfer of the action listed on Schedule A (*Home Depot*) to the Eastern District of New York for inclusion in MDL No. 1720. Plaintiffs The Home Depot, Inc., and The Home Depot U.S.A., Inc. (together, The Home Depot) oppose the motion for transfer. The actions in MDL No. 1720 involve allegations that Visa and MasterCard have engaged in anticompetitive conduct with respect to interchange fees imposed on credit and debit card transactions and rules governing merchants' acceptance of such payment cards that allegedly facilitate supracompetitive fees.

The Home Depot acknowledges that its complaint sets forth allegations concerning interchange fees which overlap with (1) the merchant actions in the MDL; and (2) a declaratory judgment action brought by Visa against The Home Depot in 2014, which also is in the MDL.<sup>1</sup> But The Home Depot opposes transfer on the ground that, in addition to the shared issues, its action presents unique factual questions concerning defendants' implementation of "chip-and-signature" payment card verification practices that allegedly strengthen defendants' hold over the credit and debit card markets. The Home Depot further argues that, unlike the MDL actions, *Home Depot* covers conduct up to the present, in contrast to the more limited time period (2004 to 2012) in the MDL.

We are not persuaded that these arguments warrant vacatur. The *Home Depot* action in Schedule A alleges the same anticompetitive conduct concerning the establishment and maintenance of interchange fees and associated rules as the actions in MDL No. 1720. The interchange fee allegations in *Home Depot* are not only substantial, but they are also central to the complaint.<sup>2</sup> *Home*

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\* Judge Lewis A. Kaplan took no part in the decision of this matter.

<sup>1</sup> See *Visa U.S.A., Inc. v. Home Depot, Inc.*, No. 14-00261 (E.D.N.Y. filed Jan. 14, 2014).

<sup>2</sup> As defendants note, extensive passages in the *Home Depot* complaint make the same allegations concerning defendants' interchange fee practices as other merchants in the MDL. See Defs.' Br., Doc. No. 334, at 11-14. In addition, the complaint headings in *Home Depot* are telling, asserting for example: "The default Interchange Fee rules are unlawful horizontal agreements on

-2-

*Depot* thus overlaps extensively with the MDL actions and, in particular, the Visa declaratory judgment action against The Home Depot. The addition of new factual allegations concerning chip-and-signature technology does not warrant exclusion of *Home Depot* from the MDL, nor does the allegedly longer involved time period.<sup>3</sup> Transfer does not require a complete identity of factual issues, and the presence of additional facts or differing legal theories is not significant when, as here, the actions arise from a common factual core.<sup>4</sup> See, e.g., *In re: Blue Cross Blue Shield Antitrust Litig.*, 908 F. Supp. 2d 1373, 1376 (J.P.M.L. 2012).

The Home Depot's remaining arguments concerning alleged inefficiencies from transfer are not supported by the record. In particular, it argues that the MDL proceedings will be inefficient as a result of complexities arising from the recent reversal of a nationwide class settlement.<sup>5</sup> But as defendants point out, the transferee court is actively managing the proceedings, and common discovery in the MDL is ongoing, including a year-long period of depositions that is scheduled to begin within a few months. The Home Depot, which undeniably has an interest in this discovery, will benefit from these coordinated proceedings. Even if there is some delay to *Home Depot* from transfer, as the Panel often has observed, transfer of a particular action often is necessary to further the expeditious resolution of the litigation taken as a whole. See, e.g., *In re: Crown Life Ins. Premium Litig.*, 178 F. Supp. 2d 1365, 1366 (J.P.M.L. 2001).

The Home Depot's suggestion that informal coordination is preferable to transfer is not tenable. There are over 90 actions in this docket and hundreds of parties, and the factual and legal issues in this antitrust litigation are numerous and complex. Moreover, discovery has been, and continues to be, voluminous. Indeed, defendants have represented that the parties expect to take

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price,” and “Defendants’ Interchange Fee Cartels Are Naked Restraints of Trade Without Justification.” See *Home Depot* Compl. at 34, 69.

<sup>3</sup> It bears noting that some complaints in the MDL allege that the conduct is ongoing to the present. In addition, the transferee court record indicates certain plaintiffs recently advised the court that they intend to amend their complaints to seek relief up to the date of judgment. Thus, the time period at issue in *Home Depot* does not appear to differ materially from the period in the MDL.

<sup>4</sup> In support of the argument that defendants’ card verification practices are not encompassed by the MDL, The Home Depot cites other actions involving these practices that are proceeding in separate districts. But those actions are not instructive on the extent of overlap between *Home Depot* and the actions in MDL No. 1720, with respect to the interchange fee practices – the central issue in the MDL.

<sup>5</sup> See *In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016).

-3-

hundreds of depositions during the year-long deposition period.<sup>6</sup> In these circumstances, informal coordination is not a practicable alternative to transfer.

After considering the argument of counsel, we find that this action shares questions of fact with the actions previously transferred to MDL No. 1720, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Moreover, transfer is warranted for the reasons set out in our order directing centralization. In that order, we held that the Eastern District of New York was an appropriate forum for actions arising out of allegations “that the imposition of a no-surcharge rule and/or the establishment of the interchange fee causes the merchant discount fee to be set at supracompetitive levels in violation of the federal antitrust laws.” *See In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 398 F. Supp. 2d 1356, 1358 (J.P.M.L. 2005). This action involves substantially similar factual allegations, and thus falls squarely within the subject matter of the MDL.

IT IS THEREFORE ORDERED that this action is transferred to the Eastern District of New York and, with the consent of that court, assigned to the Honorable Margo K. Brodie for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



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Sarah S. Vance  
Chair

Marjorie O. Rendell  
Ellen Segal Huvelle  
Catherine D. Perry

Charles A. Breyer  
R. David Proctor

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<sup>6</sup> *See In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-md-1720, Joint Status Conference Statement, Doc. No. 6638, at 11 (E.D.N.Y. Aug. 2, 2016).

**IN RE: PAYMENT CARD INTERCHANGE FEE AND  
MERCHANT DISCOUNT ANTITRUST LITIGATION**

MDL No. 1720

**SCHEDULE A**

Northern District of Georgia

THE HOME DEPOT, INC., ET AL. v. VISA INC., ET AL., C.A. No. 1:16-01947