BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT CYBER-SECURITY INCIDENTS	**MDL Docket No. _____**

MEMORANDUM OF LAW IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

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INTRODUCTION

This litigation consists of three cases pending in three different districts alleging identical or similar claims arising out of the same alleged facts: the recent OPM cyber-security incidents. After the public announcement of these cyber-security incidents, three lawsuits were brought in three separate federal districts—the District for the District of Columbia, the District of Kansas, and the Northern District of California.

The claims in the Related Actions are brought by two organizational plaintiffs—the American Federation of Government Employees ("AFGE") and the National Treasury Employees Union ("NTEU")—and five individually named plaintiffs. Two of the Related Actions are putative class actions proposing identical classes. All of the Related Actions name OPM or its former director, Katherine Archuleta, as a defendant.[1] Two of the Related Actions name KeyPoint Government Solutions ("KeyPoint") as a defendant. The claims asserted in the different complaints are identical or similar. Plaintiffs generally allege that, as a result of their personal information being compromised—or in the case of the organizational plaintiffs, the personal information of their members—they have suffered or will suffer various harms. Plaintiffs have pled a variety of legal theories in support of these claims, including against the Federal Defendants for purported violations of the Privacy Act, Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment. Plaintiffs have pled a claim of negligence against KeyPoint. Pursuant to this Panel's Rule 6.1(b)(iv), copies of the complaints and docket sheets filed in each of the Related Actions are submitted herewith.

Transfer and consolidation of the three pending cases is appropriate because consolidation will alleviate the inefficiencies posed by litigating substantially similar cases in

[1] Pursuant to Fed. R. Civ. P. 25(d), Acting OPM Director Beth F. Cobert has been substituted as a defendant in place of former OPM Director Katherine Archuleta.

three different jurisdictions. Actions may be transferred to any district for coordinated or consolidated pretrial proceedings where civil actions pending in different districts involve "one or more common questions of fact" and where doing so will serve the "convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. The Related Actions satisfy these requirements. The pending cases involve two overlapping putative classes, common factual allegations, and assert similar causes of action. The individually named plaintiffs and the affected members of the organizational plaintiffs are subsumed by the two overlapping putative classes. Moreover, consolidation is appropriate because each of the pending cases is in the early stages of litigation.

This Panel has on many occasions recognized the appropriateness of Multidistrict Litigation ("MDL") treatment for litigation flowing from allegations of data breach or data theft, particularly in class action lawsuits. *See In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 870 F. Supp. 2d 1380 (J.P.M.L. 2012); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 588 F. Supp. 2d 1368 (J.P.M.L. 2008); *In re Lending Tree, LLC, Customer Data Sec. Breach Litig.*, 581 F. Supp. 2d 1367 (J.P.M.L. 2008); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 559 F. Supp. 2d 1405 (J.P.M.L. 2008); *In re TJX Cos., Customer Data Sec. Breach Litig.*, 493 F. Supp. 2d 1382 (J.P.M.L. 2007); *In re Dep't of Veterans Affairs Data Theft Litig.*, 461 F. Supp. 2d 1367 (J.P.M.L. 2006). For the reasons set forth below, MDL treatment is also appropriate for the instant cases.

ARGUMENT

I. TRANSFER IS APPROPRIATE BECAUSE THE RELATED ACTIONS INVOLVE COMMON QUESTIONS OF FACT

The Panel has recognized that data breach litigation, and putative class actions in particular, are well-suited for transfer and consolidation because they involve common questions of fact. *See In re SAIC*, 870 F. Supp. 2d at 1381 (finding common questions of fact arising out of "the September 2011 theft of computer tapes containing personally identifiable and protected health information" of active duty and retired service members and their families); *In re Countrywide*, 588 F. Supp. 2d at 1369 (finding that all actions shared factual questions related to defendant's alleged failure to limit access or adequately safeguard customer information); *In re Lending Tree*, 581 F. Supp. 2d at 1367-68 (same); *In re Hannaford Bros.*, 559 F. Supp. 2d at 1406 (finding common questions of fact related to intrusion into defendant's computer network); *In re TJX*, 493 F. Supp. 2d at 1383 (same); *In re Dep't of Veterans Affairs*, 461 F. Supp. 2d at 1368 (transfer warranted where actions shared allegations related to theft of computer equipment from defendant's employee).

The same considerations apply here. All of the Related Actions involve the same OPM cyber-security incidents. The two class action lawsuits describe the putative classes in virtually identical terms using the same factual allegations.[2] *Compare* AFGE Corr. Compl. ¶ 109, docket sheet and complaint attached as Exhibit 1 ("All current, former, and prospective employees and contractors of the United States whose [personally identifiable information ("PII")] was compromised as a result of the data breach that the OPM first announced on June 4, 2015."), *with* Woo Compl. ¶ 103, docket sheet and complaint attached as Exhibit 3 ("All persons whose PII was

[2] Although, when compared to each other, the Related Actions include a number of overlapping factual allegations, that does not mean that plaintiffs will be able to satisfy the requirements for class certification under Fed. R. Civ. P. 23. The Federal Defendants expressly reserve their right to oppose class treatment.

compromised as a result of the data breaches announced by the OPM on June 4, 2015 and July 9, 2015"). The organizational plaintiffs similarly use these same factual allegations in an attempt to establish their standing in the case. *See* AFGE Corr. Compl. ¶ 17 ("AFGE members have been impacted by the OPM Breach. Multiple members have received notifications from the OPM that their PII may have been compromised in the OPM Breach."); NTEU Compl. 2, docket sheet and complaint attached as Exhibit 2 ("On June 4, 2014, the Office of Personnel Management (OPM) announced that it had become aware of a breach in its data systems, resulting in unauthorized access to the personal information of more than four million (4,000,000) current and former federal employees, including numerous NTEU members."). The individually named plaintiffs also rely on these same facts. *See* AFGE Corr. Compl. ¶¶ 18, 19; Woo Compl. ¶ 17; NTEU Compl. ¶ 66.[3] Thus, the Related Actions share "common questions of fact" as required under 28 U.S.C. § 1407.

II. TRANSFER OF THE RELATED ACTIONS SERVES THE CONVENIENCE OF THE PARTIES AND WITNESSES AND ENSURES THE JUST AND EFFICIENT CONDUCT OF THE ACTIONS

Transfer and consolidation will also serve the convenience of the parties and witnesses and will conserve judicial resources. As indicated, all of the Related Actions involve the same

[3] In its notice of the pendency of other actions, filed in the District Court for the Northern District of California on July 17, 2015, NTEU recognizes that the "three cases likely involve common questions of fact related to the OPM data breach." *NTEU v. Cobert*, No. 3:15-cv-3114-WHO, ECF No. 18 (N.D. Cal. June 17, 2015). NTEU nevertheless argues that transfer pursuant to 28 U.S.C. § 1407 is not warranted because its cause of action is advanced under a different legal theory. *Id.* This panel, however, has repeatedly rejected the argument that the presence of different legal theories precludes consolidation. *See In re Bank of N.Y. Mellon Corp. Foreign Exch. Transactions Litig.*, 857 F. Supp. 2d 1371, 1372-1373 (J.P.M.L. 2012) ("Where common factual issues exist, however, the presence of different legal theories among the subject actions is not a bar to centralization."); *In re Aircraft Acci. at Barrow*, 474 F. Supp. 996, 999 (J.P.M.L. 1979) ("The presence of different legal theories in some of the actions with regard to the alleged liability of each defendant does not negate the existence of common questions of fact…."); *In re M3Power Razor Sys. Mktg. & Sales Practices Litig.*, 398 F. Supp. 2d 1363, 1364 (J.P.M.L. 2005) ("The presence of differing legal theories is outweighed when the underlying actions, such as the actions here, arise from a common factual core.").

essential factual allegations concerning OPM cyber-security incidents. Thus, in the event the cases proceed beyond dispositive motions[4], any discovery of the defendants is likely to focus on the same core set of facts, witnesses, and documents, many of which will likely be located in the Washington, D.C. metropolitan area, where the incidents were discovered and where the Federal Defendants are headquartered.[5] Without consolidation, each case may subject the parties to the same or similar discovery, require duplicative testimony from the same witnesses, and raise the potential for the same discovery disputes. In addition, each case will involve adjudicating, through motions practice, the same threshold defenses.

Plaintiffs in the Related Actions have pursued similar legal theories against the Federal Defendants and KeyPoint. Two of the three cases assert identical causes of action against the Federal Defendants—alleged violations of the Privacy Act and the Administrative Procedure Act—and the same negligence claim against KeyPoint. The third case asserts a constitutional informational privacy claim against defendant Cobert which is similar to the Privacy Act claim in the other two cases. The Plaintiffs in the Related Actions seek similar remedies of damages, injunctive relief, declaratory relief, and attorney's fees. *See* AFGE Corr. Compl. 58-59 (request for relief seeking statutory damages under the Privacy Act against the Federal Defendants along with appropriate injunctive and declaratory relief and damages from KeyPoint for negligence); Woo Compl. 54-55 (request for relief seeking the same remedies as AFGE); NTEU Compl. 20 (request for relief seeking lifetime credit monitoring for its members, a declaration that the

[4] Absent consolidation, the Federal Defendants intend to file Rule 12 motions in each of the Related Actions. Transfer and consolidation would serve the convenience of the parties and courts by allowing for the litigation of one motion instead of three, thereby conserving judicial resources and preventing conflicting rulings.

[5] *See* https://www.opm.gov/about-us/contact-us/

Federal Defendant unconstitutionally failed to protect NTEU members' information, and injunctive relief requiring OPM to correct deficiencies).

Consolidation is also particularly appropriate because plaintiffs in two of the cases seek certification of overlapping classes. AFGE Corr. Compl. ¶ 109; Woo Compl. ¶ 103. The Plaintiffs in the third complaint are a large sub-set of that class, consisting of approximately 150,000 members. NTEU Compl. ¶ 3. Absent consolidation, there is a possibility of inconsistent rulings on class certification and other class-related issues. *See In re TJX*, 493 F. Supp. 2d at 1383 ("Centralization under Section 1407 is necessary in order to eliminate duplicative discovery; [and] prevent inconsistent pretrial rulings, especially with respect to class certification[.]"). Consolidation brings the benefit of having the actions "before a single judge who can structure pretrial proceedings to accommodate all parties' legitimate discovery needs while ensuring that common parties and witnesses are not subjected to discovery demands that duplicate activity that will or has occurred in other actions."[6] *In re Dep't of Veterans Affairs*, 461 F. Supp. 2d at 1368-69.

Finally, transfer and consolidation are appropriate because the Related Actions are in the early stages of litigation. The first Complaint (*AFGE*) was filed in the District Court for the District of Columbia on June 29, 2015[7], the second (*NTEU*) was filed in the Northern District of California on July 8, 2015, and the third (*Woo*) was filed in the District of Kansas on July 15, 2015. Answers and dispositive motions have not been filed in any of the Related Actions nor has there been any exchange of discovery. As a result, no party has expended significant

[6] Moreover, if additional actions are filed against the defendants, tag-along actions could be transferred to the transferee court, avoiding the inconvenience and inefficiency of litigating similar cases in different districts. *See* J.P.M.L. R. 7.1 & 7.2 (regarding tag-along actions).

[7] AFGE filed a corrected Complaint, Exhibit 1, a day later, on June 30, 2015.

resources litigating in any jurisdiction and no prejudice or inconvenience will result from transfer and consolidation at this time.

III. TRANSFER TO THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IS APPROPRIATE

Transfer to the District Court for the District of Columbia is appropriate for numerous reasons. The Federal Defendants in all Related Actions are headquartered in the Washington, D.C. metropolitan area. KeyPoint, as a large provider of investigative and risk management service to the government, conducts a substantial part of its business in the Washington, D.C. metropolitan area and has offices in Fairfax, Virginia, near Washington, D.C.[8] The high likelihood that witnesses and discovery would be located nearby supports transfer to the District of Columbia. *See, e.g.*, *In re TJX*, 493 F. Supp. 2d at 1383 (finding appropriate to transfer to district where defendant's headquarters are located and documents and witnesses are likely to be found). The two organizational Plaintiffs—AFGE and NTEU—are also headquartered in Washington, D.C. NTEU Compl. ¶ 3; AFGE Corr. Compl. ¶ 16. Further, the District of Columbia is the district of universal venue in the Privacy Act, 5 U.S.C. §552a(g)(5), the statute upon which two of the cases primarily rely. AFGE Corr. Compl. ¶¶ 112-125; Woo Compl. ¶¶ 119-132. The District of Columbia is therefore the district most experienced in handling these kinds of actions. Finally, according to the Panel's most recent listing of pending multi-district litigations,[9] only five MDL actions are currently pending in the District Court for the District of Columbia, none of which is before the Court assigned to hear *AFGE*. *See, e.g.*, *In re Lending*

[8] *See* http://www.keypoint.us.com/AboutUs

[9] http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2015.pdf

Tree, 581 F. Supp. 2d at 1368 (considering a transferee district's capacity to handle the docket in ordering transfer).

CONCLUSION

For the foregoing reasons, the Federal Defendants respectfully request that the Related Actions be transferred for consolidated or coordinated pretrial proceedings in the United States District Court for the District of Columbia.

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Respectfully submitted,

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