

**BEFORE THE UNITED STATES  
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION**

**In re: GEICO DATA BREACH  
LITIGATION**

**MDL Docket No. 3013**

**RESPONSE IN OPPOSITION TO MOTION TO TRANSFER AND CENTRALIZE  
RELATED ACTIONS FOR CONSOLIDATION OR COORDINATION OF PRETRIAL  
PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407**

Plaintiffs Mark Edward Vennerholm II & Reanna Ann Vennerholm (collectively “Plaintiffs”) in *Vennerholm II, et. al. v. Geico Casualty Company, et al.*, Case No. 21CV806 GPC BLM (S.D. Cal. Apr. 23, 2021), by and through their counsel, pursuant to Rule 6.1(c) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, respectfully submit this response in opposition to the motion of Defendants/Movants, Government Employees Insurance Company, GEICO Indemnity Company, GEICO Casualty Company and GEICO General Insurance Company (collectively, “GEICO”) for an order transferring and centralizing all currently filed related actions concerning the data breach incident that occurred on GEICO’s website.

**INTRODUCTION**

The Panel should deny Geico’s motion as to the proposed transferee class action case pending in the United States District Court, Southern District of California, styled *Vennerholm II, et. al. v. Geico Casualty Company, et al.*, Case No. 21CV806 GPC BLM (“*Vennerholm II*”) because it does not share certain facts material to the other proposed transferee class actions.<sup>1</sup> Specifically, *Vennerholm II* is the only proposed transferee class action case which includes a

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<sup>1</sup> A copy of the Complaint in *Vennerholm II* is attached hereto as **Ex. A**.

California Subclass, consisting of California residents whose personal information was stolen in a data breach of Geico's online sales system (the "Data Breach"), alleging a claim against Geico for violation of the California Consumer Privacy Act, Civ. Code § 1798.150 *et seq.* ("CCPA"). Unlike the plaintiffs' general claims alleged against Geico in the other proposed transferee class action cases, Plaintiffs and the members of the California Subclass in *Vennerholm II* have alleged claims against Geico under the CCPA, which allows them to recover statutory damages in an amount not less than \$100 and not greater than \$750 per consumer per incident if Geico does not timely cure the Data Breach in the manner set forth under the CCPA. Thus, unlike the plaintiffs' general claims alleged against Geico in the other proposed transferee class action cases, the California Subclass in *Vennerholm II* must allege and prove unique material facts, uncommon to the material facts which must be proved in the transferee cases, to recover statutory damages.

### **BACKGROUND**

Geico proposes to transfer five proposed national class actions brought on behalf of persons alleging they were impacted by fraudsters' unauthorized access to Geico's online sales systems between January 21, 2021 and March 1, 2021 ("Data Breach")<sup>2</sup> to the Eastern District of New York or, in the alternative, the District of Maryland, or such other district the Panel may deem suitable, for consolidated or coordinated pretrial proceedings as a Multidistrict Litigation

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<sup>2</sup> "[T]hree of the proposed national class actions are pending in the Eastern District of New York, one action is pending in the Southern District of California, and one action is pending in the District of Maryland, Southern Division." Geico's Motion to Transfer and Centralize, at ¶ 3. GEICO proposes to transfer these cases "to the Eastern District of New York or, in the alternative, the District of Maryland, or such other district the Panel may deem suitable, for consolidated or coordinated pretrial proceedings as a Multidistrict Litigation ("MDL") pursuant to 28 U.S.C. § 1407 and Rule 7.2(a) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation." *Id.*, at 1.

(“MDL”) pursuant to 28 U.S.C. § 1407 and Rule 7.2(a) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

Geico publicly acknowledged the Data Breach and, on April 15, 2021, Geico filed a notice (“Notice”) with the California Office of the Attorney General revealing that its customers’ personal information was subject to a data security breach between January 21, 2021 and March 1, 2021.<sup>3</sup> More specifically, in its Notice, Geico revealed that fraudsters used information about Geico’s customers to hack into Geico’s online sales system and access their driver’s license number. Geico further stated in its Notice that it believed the fraudsters could use the stolen information to fraudulently apply for unemployment benefits in the names of Geico’s customers. In its Notice, Geico advised its customers to carefully review any mail they receive from state unemployment agencies or departments and to contact that agency or department if there is any chance fraud is being committed. Geico further advised its customers to “be vigilant for incidents of fraud or identity theft by reviewing your account statements and credit reports for any unauthorized activity.”<sup>4</sup>

In their Complaint, Plaintiffs allege that as a result of Geico’s failure to maintain adequate security measures, Geico’s customers’ personal and private information has been compromised and remains vulnerable.<sup>5</sup> Moreover, in their Complaint, and unlike the complaints in the other proposed transferee cases, Plaintiffs allege a violation of the CCPA, a statute that protects the “personal information”<sup>6</sup> of “consumers.” A consumer, in turn, is defined as “a

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<sup>3</sup> Notice of Data Breach (Apr. 9, 2021), [https://oag.ca.gov/system/files/DL3\\_IndNoticeLtr\\_CA\\_Redacted.pdf](https://oag.ca.gov/system/files/DL3_IndNoticeLtr_CA_Redacted.pdf), attached hereto as **Ex. B**.

<sup>4</sup> *Id.*

<sup>5</sup> **Ex. A**, ¶ 8.

<sup>6</sup> “Personal information includes, but is not limited to, the following if it identifies, relates to, describes, is reasonably capable of being associated with, or could be reasonably linked, directly

natural person who is a California resident.” Cal. Civ. Code § 1798.140(g). The CCPA provides consumers with the right to institute a civil action where the consumers’ “nonencrypted and nonredacted personal information” was the subject of “an unauthorized access and exfiltration, theft, or disclosure as a result of the business’s violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information.” Cal. Civ. Code § 1798.150(a)(1).

Unique under the CCPA, a consumer injured as a result of a violation of the CCPA may recover damages in an amount not less than \$100 and not greater than \$750 per consumer per incident or actual damages, whichever is greater. Cal. Civ. Code § 1798.150(a)(1)(A). “In assessing the amount of statutory damages, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant’s assets, liabilities, and net worth.” Cal. Civ. Code § 1798.150(a)(2). However, “prior to initiating any action against a business for statutory damages on an individual or class-wide basis, a consumer provides a business 30 days’ written notice identifying the specific provisions of this title the consumer alleges have been or are being violated.” Cal. Civ. Code § 1798.150(b). “In the event a cure is possible, if within the 30 days the business actually cures the noticed violation and provides the consumer an express written statement that the violations have been cured and that no further violations shall occur, no action for individual statutory damages or class-wide statutory damages may be initiated against the

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or indirectly, with a particular consumer or household: (A) Identifiers such as... driver's license number, ....” Cal. Civ. Code § 1798.140(o)(1)(A).

business.” *Id.* On the other hand, if a business continues to violate the CCPA in breach of the express written statement provided to the consumer, “the consumer may initiate an action against the business to enforce the written statement and may pursue statutory damages for each breach of the express written statement, as well as any other violation of the title that postdates the written statement.” *Id.*

## **ARGUMENT**

### **I. The Panel Should Not Transfer *Vennerholm II*.**

Transfer under 28 U.S.C. §1407 is authorized where three requirements are met: (1) the actions share common issues of fact; (2) transfer must be for the convenience of the parties and witnesses; and (3) transfer must advance the just and efficient conduct of the actions. 28 U.S.C. §1407; *see also* Multidistrict Lit Man § 5:3. Statutory criteria for transfer—The language of the statute (May 2021 Update). The overarching goal of such transfers is to “assure the ‘just and efficient’ conduct of such actions.” *In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978). “[T]o demonstrate that the just and efficient conduct of the litigation would be promoted by transfer where only a minimal number of actions are involved, the moving party bears a strong burden to show that the common questions of fact are so complex and the accompanying discovery so time-consuming as to overcome the inconvenience to the party whose action is being transferred and its witnesses.” *In re Interstate Medicaid Patients at Good Samaritan Nursing Ctr.*, 415 F. Supp. 389, 391 (J.P.M.L. 1976)

#### **A. The Commonality Requirement Is Not Met As to *Vennerholm II*.**

As noted, the CCPA applies only to the California Subclass in *Vennerholm II* -- the only proposed transferee case alleging this unique claim designed to protect California residents’ personal information. Thus, facts material, indeed dispositive, to whether California consumers

are entitled to statutory damages in *Vennerholm II*, which may not be material to the claims in the proposed transferee cases and are thus uncommon to the claims alleged in the other proposed transferee cases, include the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth. And, of particular significance here, in order to recover statutory damages under the CCPA, Plaintiffs in *Vennerholm II*, unlike plaintiffs in the other proposed transferee cases, must establish that Geico failed to cure the breach within 30 days of receipt of written notice identifying the data breach, and continues to violate the CCPA in breach of the express written statement provided to the consumer. Cal. Civ. Code § 1798.150(a)(2)(b). Although Plaintiffs in *Vennerholm II* must prove these facts to recover statutory damages under the CCPA, the claims alleged by plaintiffs in the other proposed transferee cases do not require plaintiffs to allege or prove these facts. Thus, these material -- indeed, dispositive -- facts that Plaintiffs must establish in *Vennerholm II* to recover statutory damages under the CCPA are not common facts.

Although this case does present some common issues, *viz.*, the Data Breach, the Panel should nevertheless attempt to gauge the balance between common issues and those unique to individual actions. Multidistrict Lit Man § 5:31. Factors militating against transfer—Factors opposing transfer generally (May 2021 Update) (citing *In re Table Saw Prods. Liab. Litig.*, 641 F. Supp. 2d 1384 (J.P.M.L. 2009) (common issues “overshadowed by non-common ones”); *In re Victoria's Secret Undergarments/Intimate Apparel Prods. Liab. Litig.*, 626 F. Supp. 2d 1349 (J.P.M.L. 2009); *In re Tyson Foods, Inc., Meat Processing Facilities Fair Labor Standards Act (FLSA) Litig.*, 581 F. Supp. 2d 1374 (J.P.M.L. 2008) (noting that discovery likely to be specific to each plant of defendant). And if the Panel concludes that the common issues are not

sufficiently complex compared with the noncommon issues, it may deny transfer. *Id.* (citing *In re S.C. Johnson & Son, Inc., Greenlist Label Mktg. & Sales Practices Litig.*, 626 F. Supp. 2d 1317, 1318 (J.P.M.L. 2009) (common issue in two actions “relatively uncomplicated”); *In re Dorel Juvenile Grp., Inc., Stroller (MODEL 834) Prods. Liab. Litig.*, 598 F. Supp. 2d 1365 (J.P.M.L. 2009) (transfer denied where only two actions were pending and common issues viewed not sufficiently complex).

Notably, the California Subclass’s CCPA claim, unlike the claims alleged in the proposed transferee cases, is also unique in that it will assist plaintiff in overcoming any argument by Geico that plaintiffs lack standing because the California Subclass members are entitled to statutory damages if they make the requisite showing under the CCPA, discussed *supra*. See, e.g., Cal. Prac. Guide Privacy Law Ch. 2-C, *Data Breach Litigation*, §2:601 Standing to Assert Data Breach Claims in Federal Court (June 2021 Update) (“Standing is one of the most commonly disputed issues in federal court data breach litigation, particularly at the motion to dismiss stage” and discussing standing tests for data breach cases in federal courts.).

Here, in view of the California Subclass’s unique CCPA claim requiring facts uncommon to the claims in the other proposed transferee cases, coordination without transfer or consolidation, rather than transfer and consolidation under § 1407, is preferable when it is feasible -- as it certainly is in the case of *Vennerholm II*. See *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (concluding that “voluntary cooperation between [a proposed transferor court] and the transferee court on matters of overlapping concern will result in a prompt and efficient disposition of the entire litigation without transfer”). Indeed, the Panel has “emphasized that centralization under § 1407 should be the last solution after considered review of all other options.” *In re Express Courier Int’l Inc.*

*Fair Labor Standards Act (FLSA) and Wage and Hour Litig.*, 326 F. Supp. 3d 1376, (J.P.M.L. 2018) (quoting *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011)). Here, if MDL consolidation is approved as to the proposed transferee cases not alleging claims under the CCPA, the Southern District of California court presiding over *Vennerholm II* could coordinate case management and discovery in connection with the claims against Geico, to the extent necessary, with the discovery directed in the transferee court relating to these other transferee cases in the MDL, if the Panel authorizes one.

This result is particularly compelling here where the CCPA was just recently enacted and, thus, the court will be presented with unsettled areas of law. *See Cagle v. Cooper Cos.*, No. 91 CIV. 6996 (HB), 1996 WL 345771, at \*9 (S.D.N.Y. June 24, 1996). In *Cagle*, a case involving transfers under 28 U.S.C. § 1404(a), the court held that the transfer of cases may facilitate resolution of state-law issues by courts most familiar with the governing state law. *Id.* The court observed that it was plausible to assume that some of the legal issues to be decided would involve questions not fully settled in the states in which the plaintiffs were injured. *Id.* “In such circumstances, and all other factors being equal, it is generally preferable that such issues be addressed by courts most familiar with the evolving law of the state that will supply the rules of decision.” *Id.* The court observed that “[a] number of courts have noted that our courts are capable of researching and interpreting the laws of other states.” *Id.* at 9 n.9. However, the court held that “[a]s a general proposition, that observation is generally correct, but it has less force when we are faced with unsettled issues of law.” *Id.*

Here, consistent with the reasoning in *Cagle*, the Panel should not transfer *Vennerholm II*, but instead should allow the court in that case, who is more familiar with the evolving CCPA law, to address the issues involving the CCPA. *See also In re Long-Distance Tel. Serv. Fed.*



*Excise Tax Refund Litig.*, 469 F. Supp. 2d 1350 (transferring several cases, but excluding a California state law claim that was unique and therefore was not transferred for MDL proceedings).

**B. Efficiency and Convenience Weigh Against Consolidating *Vennerholm II*.**

Nor should the Panel accept Geico's unsupported assumption that transfer and consolidation necessarily will support the statutory objectives of promoting just and efficient resolution of claims, or serving the convenience of witnesses and the parties. As the Second Circuit has cautioned and explained, "[t]he systemic urge to aggregate litigation must not be allowed to trump [the courts'] dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (citation omitted). Here, as noted above, there are dispositive case-specific issues arising only in the California Subclass's CCPA claims. It would be far more efficient to allow the Southern District of California court presiding over *Vennerholm II* to coordinate case management and discovery in connection with the claims against Geico with the discovery directed in the transferee court relating to these other transferee cases in the MDL, if the Panel authorizes one.

**CONCLUSION**

For all of the foregoing reasons, Plaintiffs Mark Edward Vennerholm II & Reanna Ann Vennerholm respectfully request that the Panel deny Geico's motion to transfer and consolidate, at a minimum, as to *Vennerholm II*.

Dated: July 21, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Michael D. Murphy, Esq., counsel for Plaintiffs Mark Edward Vennerholm II and Reanna Ann Vennerholm in *Vennerholm II, et al. v. Geico Casualty Company, et al.*, No. 3:21-cv-00806 (S.D. Cal.), hereby certifies that on July 21, 2021, I caused to be filed a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO MOTION TO TRANSFER AND CENTRALIZE RELATED ACTIONS FOR CONSOLIDATION OR COORDINATION OF PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407 electronically using the Court's electronic case filing (CM/ECF) system, which automatically generated and sent a notice of electronic filing to the e-mail addresses of all counsel of record:

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	<p><i>Vennerholm II, et al. v. GEICO Casualty Company, et al.</i> No. 3:21-cv-00806-GPC-BLM (S.D. Cal.)</p> <p><i>Connelly, et al. v. Berkshire Hathaway, Inc., et al.</i> No. 8:21-cv-01152-TDC (D. Md.)</p>
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*s/Michael D. Murphy*  
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