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Fulton County Superior Court Judge

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IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

WILLIAM BUTLER and MANDY BUTLER, individually and on behalf of all others similarly situated,	)	CIVIL ACTION FILE NO. 2017CV295644
Plaintiffs,	)	
v.	)	Bus. Case Div. 3
EQUIFAX, INC.,	)	
Defendant.	)	

ORDER STAYING CASE

The above styled matter is before the Court on Defendant Equifax, Inc.'s ("Equifax") Motion to Dismiss or, in the Alternative, to Stay ("Motion"). Having considered the Motion and argument of counsel, the Court finds as follows:

SUMMARY OF FACTS

Plaintiffs William Butler and Mandy Butler, individually and on behalf of all others similarly situated, bring this putative class action seeking to recover damages arising from a data breach at Equifax.

According to Plaintiffs' First Amended Class Action Complaint, on September 7, 2017, Equifax announced it had suffered a nationwide data breach which Equifax now estimates affected over 145.5 million consumers who utilize their credit reporting system. The exposed information consists of names, birth dates, Social Security numbers, addresses, driver's license numbers, certain credit card numbers, and other personal identifying information.

Equifax acknowledged it discovered the data breach on July 29, 2017, and thereafter initiated an investigation which concluded the unauthorized access occurred from mid-May, 2017, through July, 2017. It affected not only Equifax customers, but also anyone whose information had been gathered by Equifax during credit checks and similar compilations of data. Plaintiffs allege the data breach occurred because Equifax failed to implement adequate security measures to safeguard consumers' personal information and it ignored known weaknesses in its data security, including prior hacks into its information systems.

It is undisputed that within days of the announcement of the data breach multiple individual and putative class actions were filed against Equifax in federal and state courts across the country. The federal cases were consolidated into the Multi-District Litigation ("MDL") pending in the Northern District of Georgia and currently being presided over by the Honorable Thomas Thrash, Jr.

Several cases were also filed in Fulton County courts. Specifically, on September 13, 2017, a putative class action was filed against Equifax in the Superior Court of Fulton County by Stefan Kircher and William Slaughter[1] and a separate action was initiated by David Bergeron[2]. On September 22, 2017, another putative class action was brought by LaShondra Lee, Amy Cooper Smith, Robert Chaplin, Sr., and Robert Chaplin, Jr. in the State Court of Fulton County that was ultimately transferred to the Superior Court on December 19, 2017.[3] Finally, on September 22, 2017, after the Lee case was filed, the Butlers filed the instant action in Fulton Superior Court.

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[1] Stefan Kircher and William Slaughter, individually and on behalf of all others similarly situated, v. Equifax, Inc., No. 2017CV295174, Superior Court of Fulton County.

[2] David Bergeron, individually and on behalf of all others similarly situated, No. 2017CV295186, Superior Court of Fulton County.

[3] LaShondra Lee, Amy Cooper Smith, Robert Chaplin, Sr., and Robert Chaplin, Jr., No. 2018CV300642, Superior Court of Fulton County.

The first three cases were transferred to the Business Case Division by joint motion of the parties and have since been consolidated under one Joint Amended Class Action Complaint (hereafter, the "Consolidated Action"). Thereafter, this action was transferred to the Business Case Division as a related case pursuant to Georgia's Uniform Superior Court Rule 3.2. ("When practical, all actions involving substantially the same parties, or substantially the same subject matter, or substantially the same factual issues, whether pending simultaneously or not, shall be assigned to the same judge").

ANALYSIS AND CONCLUSIONS OF LAW

Equifax asks the Court to dismiss this action, asserting dismissal is warranted under Georgia's abatement statutes due to the three substantially similar putative class actions previously filed in Fulton Courts and now being pursued jointly in the Consolidated Action, which arise from the same data breach at issue in the case at bar. Alternatively, Equifax moves to stay this action pending resolution of the prior-filed cases.

A. Abatement/Prior Pending Action Doctrine

Generally, "when there are two lawsuits involving the same cause of action and the same parties that were filed at different times but that both remain pending in Georgia courts, the later filed suit must be dismissed." Sadi Holdings, LLC v. Lib. Props., Ltd., 293 Ga. App. 23, 24 (2008). This principle, often referred to as the prior pending action doctrine, is codified at O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). *See* Doctors Hosp. of Augusta, LLC v. Georgia Dep't of Cmty. Health, 344 Ga. App. 583, 583, 811 S.E.2d 64, 65 (2018).

O.C.G.A. §9-2-5(a) provides:

> No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute. If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter.

O.C.G.A. §9-2-44(a), in turn, states:

> A former recovery or the pendency of a former action for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a good cause of abatement. However, if the first action is so defective that no recovery can possibly be had, the pendency of a former action shall not abate the latter.

"These Code sections have been construed together to mean that when two civil actions involving the same cause of action and the same parties remain pending, but are filed at different times, the later-filed action is abated and must be dismissed." Odion v. Varon, 312 Ga. App. 242, 244, 718 S.E.2d 23, 26 (2011). *See* Huff v. Valentine, 217 Ga. App. 310, 311, 457 S.E.2d 249, 250 (1995) ("O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) are closely related in effect and are to be considered and applied together") (citing Jones v. Rich's, Inc., 81 Ga. App. 841, 844, 60 S.E.2d 402, 404 (1950)).

B. Competing Class Actions

Although it appears the abatement statutes have never been applied in Georgia in the class action context, the Court finds them instructive in addressing the problem presented by competing putative class actions. Notably, "[t]he purpose of the doctrine embodied in the[] [abatement] statutes 'is to ensure judicial economy, to avoid inconsistent judgments, and to prevent harassment of the parties through multiple proceedings.'" Doctors Hosp. of Augusta, LLC, 344 Ga. App. at 583 (quoting Brock v. C & M Motors, 337 Ga. App. 288, 290 (1), 787 S.E.2d 259 (2016)); Jenkins v. Crea, 289 Ga. App. 174, 176, 656 S.E.2d 849, 851 (2008).

Similarly, class actions help to avoid "[i]nconsistent or varying adjudications", promote judicial economy, and may be maintained when the court finds "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." O.C.G.A. §9-11-23(b)(1)(A), (3). *See* Schorr v. Countrywide Home Loans, Inc., 287 Ga. 570, 572, 697 S.E.2d 827, 828 (2010) (quoting Baldassari v. Public Finance Trust, 369 Mass. 33, 337 N.E.2d 701, 707(5) (1975)) ("The modern class action is 'designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions'"); Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987), abrogated on other grounds by Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002) ("A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits"). *See also* 7A Fed. Prac. & Proc. Civ. § 1751 (3d ed.), History and Purpose of the Class Action. *Cf.* Parker v. Stone, 333 Ga. App. 638, 641, 773 S.E.2d 793, 796 (2015) ("'The doctrine of priority jurisdiction provides that where different tribunals have concurrent jurisdiction over a matter, the first court to exercise jurisdiction will retain it'...[T]he policy behind the doctrine of priority jurisdiction is to reduce litigation, by avoiding duplicative suits, and to avoid inconsistent, competing rulings on an issue") (citing Stanfield v. Alizota, 294 Ga. 813, 815, 756 S.E.2d 526 (2014); In re J.C.W., 315 Ga. App. 566, 572, 727 S.E.2d 127, 131 (2012)).

Given these similar policy rationales, it is not surprising several states have drawn from abatement principles, jurisdictional doctrines, and principles of comity to manage situations where multiple putative class actions are filed arising out of the same transaction or occurrence. The majority of those courts apply a "first to file" rule, allowing the first filed action to proceed, while staying or dismissing without prejudice the latter action pending class certification. *See*

e.g., Ex parte AmSouth Bank, 735 So. 2d 1151, 1154 (Ala. 1999) (holding that a latter filed state court class action should be placed on administrative hold until the federal court presiding over a prior filed class action determines issue of class certification, finding if the federal court certifies a class that includes state plaintiffs' claims, the state action must be abated, but otherwise the stay may be lifted and it can proceed as a class action or an individual action); Ex parte Speedee Cash of Alabama, Inc., 806 So. 2d 389, 394 (Ala. 2001) (staying a latter filed class action pending determination of class certification in a prior filed class action involving substantially the same claims); Div. Six State ex rel. James J. Lindsay, Gretchen Chaney, Debra A. Carmody, Kenneth P. Merritt v. Honorable John C. Brackman, Circuit Judge, Circuit Court of Franklin Cty., Missouri, No. 68651, 1996 WL 2043, at *2–3 (Mo. Ct. App. Jan. 2, 1996) (where two competing, substantially related class actions were filed in different state circuits, finding the trial court should have granted a motion to abate the latter filed action because the court in the first action was vested with exclusive jurisdiction of the subject matter at issue in the two cases and such would serve the principal function behind class actions, preventing multiplicity of suits); Jones v. Educ. Testing Serv., No. MER-L-1977-04, 2005 WL 975337, at *3, *8 (N.J. Super. Ct. Law Div. Feb. 7, 2005) (where multiple, related putative class actions were filed in different state and federal courts, dismissing without prejudice the latter filed action citing principles of comity, judicial economy, and avoiding multiplicity of suits); Derdiger v. Tallman, 773 A.2d 1005, 1013, 1018 (Del. Ch. 2000) (staying a latter filed putative class action in favor of an earlier-file class action "[t]o preserve the resources of the courts and the parties, avoid duplication of efforts, and also to avoid...a palpable risk of inconsistent findings and results")

C. A Stay of this Action is Warranted

Applying the foregoing principles and the prior pending action doctrine to the case at bar, the Court finds the requirements of our abatement statutes are substantially satisfied. When applying O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) to determine whether or not the cases at issue involve the same cause of action, Georgia courts consider whether or not the claims are born out of the same transaction or occurrence. Odion v. Varon, 312 Ga. App. 242, 244 (2011). Importantly, "minor differences" between two complaints "[will] not controvert the fact that they both involve the exact same subject matter." Sadi Holdings, 293 Ga. App. at 25. Indeed, our courts have cautioned against construing the abatement statutes too narrowly:

> The requirement that the two cases be of "the same cause of action" is founded on the doctrine that "no one should be twice harassed, if it appear to the Court that it is for one and the same cause." (Emphasis supplied.) Rogers v. Hoskins, 15 Ga. 270, 273 [1854]. To that end, a too technical reading of the provision regarding "the same cause of action, between the same parties" would be ill-conceived. (See, Rogers, supra, p. 273.) The plea in abatement has been held good even where the causes of action are, technically speaking, legally disparate and rest in opposite parties, if they arise out of the same transaction and if the second suit would resolve the same issues as the first pending suit and would therefore be "unnecessary, and consequently oppressive. See Hood v. Cooledge, 39 Ga. App. 476, 479, 147 S.E. 426; Rogers, supra, p. 274.

Schoen v. Home Fed. Sav. & Loan Ass'n of Atlanta, 154 Ga. App. 68, 69-70, 267 S.E.2d 466, 468 (1980).

First, here, it is undisputed the cases joined in the Consolidated Action were filed prior to this action. Although the Butlers assert their case is more advanced than the Consolidated Action, the Court is not persuaded as both actions remain in the preliminary stages of litigation. Further, the Court finds this action and the prior filed cases which were joined in the Consolidated Action all arise from the same transaction or occurrence, the 2017 Equifax data breach. Although the Butlers assert there are substantial differences between the claims asserted

in these cases, the Court discerns no such material differences. Rather, as evidenced by the chart below, all of the claims asserted in the Butler's First Amended Class Action Complaint are also being pursued in the Consolidated Action and the putative classes sought to be certified in the two cases are substantially the same such that the cases involve the same cause of action. O.C.G.A. §9-2-5(a); Schoen, 154 Ga. App. at 69; Odion v. Varon, 312 Ga. App. At 243.

Case Name	Class Action Claims Asserted	Proposed Class
Williams Butler and Mandy Butler v. Equifax, Inc. (Case No. 2017CV295644)	(1) Violation of Ga. Personal Identity Protection Act (O.C.G.A. §10-1-912); (2) Negligence (O.C.G.A. §§ 51-1-2, 51-1-4); (3) Negligence per se for violation of Ga. Personal Identity Protection Act (O.C.G.A. §10-1-912); (4) Violation of Ga. Uniform Deceptive Trade Practices Act (O.C.G.A. §10-1-370); and (5) Attorney fees and expenses.	"All citizens of the State of Georgia whose Personal Information was acquired, or is in danger of being acquired, by unauthorized persons in the data breach announced by Equifax in September 2017 wherein Equifax's own Records reflect that such Personal Information may have been impacted by said Data Breach." (First Amended Class Action Complaint, ¶50)
In re: Equifax Data Security Breach Litigation (Case No. 2017CV295174)	(1) Negligence; (2) Negligence per se for violation of Ga. Personal Identity Protection Act (O.C.G.A. §10-1-912); (3) Breach of fiduciary duty; (4) Invasion of privacy—intrusion upon seclusion; (5) Breach of contract; (6) Breach of implied contract; (7) Unjust enrichment; (8) Computer theft/invasion of privacy (O.C.G.A. §16-9-93); (9) Violation of Ga. Uniform Deceptive Trade Practices Act (O.C.G.A. §10-1-370); (10) Declaratory judgment; (11) Punitive damages; and (12) Attorney fees and expenses (O.C.G.A. §13-6-11).	"All persons who are citizens of the State of Georgia and whose personally identifiable information (PII) was acquired, or is in danger of being acquired, by unauthorized persons in or as a result of the data breach announced by Equifax in September 2017." (Joint Amended Class Action Complaint, ¶85)

However, given the current procedural posture of these cases and the procedural issues unique to class actions, the question of whether the same plaintiffs are present in both cases presents a more challenging question as different plaintiffs essentially seek to represent the same proposed class through competing putative class actions.[4] The Butlers urge, as the named class representatives in this case, they do not hold the same status in the Consolidated Action where they would only be putative class members. *See* Bedingfield v. Bedingfield, 248 Ga. 91, 92, 281 S.E.2d 554, 555 (1981) ("In order for [abatement] to be applicable, however, the parties must occupy the same status in both suits") (citing Tinsley v. Beeler, 134 Ga. App. 514(1), 215 S.E.2d 280 (1975)).

However, this presumes the Butlers will be approved to serve as class representatives in this action. There is no inherent right to represent a class. Rather, a plaintiff bringing a putative class action has the burden of establishing the right to class certification. UNUM Life Ins. Co. of Am. v. Crutchfield, 256 Ga. App. 582, 582, 568 S.E.2d 767, 768 (2002) (citing Jones v. Douglas County, 262 Ga. 317, 324, 418 S.E.2d 19 (1992)). This includes the burden of showing the representative parties "will fairly and adequately protect the interests of the class." O.C.G.A. §9-11-23(a)(4). "[C]olloquially referred to as the adequacy requirement," this is a prerequisite to class certification and is a question generally considered in the broader context of class certification taking into account "the ability of the plaintiff(s) to represent the class", "the forthrightness and vigor with which [they] can be expected to assert and defend the interests of the [class] members", and "whether [the] plaintiffs' interests are antagonistic to those of the class", among other considerations. Lewis v. Knology, Inc., 341 Ga. App. 86, 90, 799 S.E.2d 247, 250 (2017), reconsideration denied (Mar. 29, 2017), cert. denied (Sept. 13, 2017).

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[4] Equifax, Inc. is the named Defendant in both actions.

Consequently, the Butlers are currently parties with individual claims against Equifax who seek to be representatives of a putative class and who are members of a class proposed in a prior filed putative class action. *See* Bishop's Prop. & Investments, LLC v. Protective Life Ins. Co., 463 F. Supp. 2d 1375, 1377 (M.D. Ga. 2006) ("[U]ntil a class is certified it is the plaintiff's individual claim that provides the controversy"). The Butlers' ultimate status as litigants pursuing claims against Equifax, whether individually or on behalf of a class, remains to be determined. Ultimately abatement of the Butlers' putative class action claims may be warranted if a class is eventually certified in a prior filed action that incorporates the Butlers' claims.

However, given the above and because the question of whether or not a class will be certified in the federal MDL or in the prior filed Consolidated Action remains pending, the Court finds dismissal would be premature and may undermine the Butlers' ability to later pursue class claims if no class is certified in those prior filed actions.[5] Thus, a stay of this case is warranted.

> A stay in proceedings is merely a suspension of further proceedings, as distinguished from an abatement on the one hand or a continuance on the other. [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.' Landis v. North American Company, 299 U.S. 248, 254, 57 S.Ct. 163, 166, 81 L.Ed. 153 [1936].

Bloomfield v. Liggett & Myers, Inc., 230 Ga. 484, 484, 198 S.E.2d 144, 145 (1973) (staying state court proceedings pending determination of prior filed federal action arising out of same transaction and occurrence, finding stay effectuated policy of both state and federal courts to avoid multiplicity of suits).

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[5] *See generally* China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018), ____ L. Ed. ____ (2018) (holding that upon denial of class certification, a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, may not commence a class action anew beyond the time allowed by the applicable statute of limitations).

Here, in light of the relatedness between the Butlers' claims and those asserted in the Consolidated Action, and because they stem from the same operative facts, purport to serve the interests of the same class, will involve the same questions of law, and involve the same discovery, the Court finds a stay of this action pending resolution of the class certification issue in the federal MDL or Consolidated Action will best serve principles of judicial economy and justice, conserve the resources of the parties, and avoid multiplicity of suits. A stay will not prejudice any legal rights as suggested by the Butlers, but rather preserves the Butlers' right to timely attempt to pursue the class claims if a class is not certified in the prior filed actions, or to pursue their individual claims if they so choose.

CONCLUSION

Given all of the above, Defendants' Motion to Dismiss this action is DENIED, however, the alternative motion to stay is GRANTED. Accordingly, this case is hereby STAYED pending further order of this Court. If a class is ultimately not certified in the federal MDL or in the Consolidated Action, the Butlers may file an appropriate motion seeking to lift the stay.

SO ORDERED, this 26th day of July, 2018.

MELVIN K. WESTMORELAND, JUDGE
Metro Atlanta Business Case Division
Fulton County Superior Court
Atlanta Judicial Circuit

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Attorneys for Plaintiffs	Attorneys for Defendants
Henry A. Turner TURNER LAW OFFICES, LLC 403 W. Ponce de Leon Avenue, Suite 207 Decatur, Georgia 30030 **Dana M. Campbell** FERGUSON BRASWELL FRASER KUBASTA, P.C. 2500 Dallas Parkway, Suite 600 Plano, Texas 75093	**David Balser, Esq.** KING & SPALDING LLP 1180 PEACHTREE STREET NE Atlanta, Georgia 30309