IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Karen RODRIGUEZ, et al., individually and on behalf of other similarly situated persons, Plaintiffs, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendants.	Case No.: 16-cv-60442-COHN/SELTZER

CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND EXPENSES
AND PLAINTIFFS' APPLICATION FOR INCENTIVE AWARDS

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I. INTRODUCTION

In advance of the July 31, 2017 fairness hearing, Class Counsel Kaplan Fox and & Kilsheimer LLP and Wites & Kapetan P.A. hereby respectfully move pursuant to Federal Rule of Civil Procedure 23(h) for an order awarding attorneys' fees and expenses in the amount of $850,000.00 related to the successful prosecution of this class action on behalf of a national class of more than 1.3 million members. Relatedly, Class Representatives Karen Rodriguez, Antonio Rodriguez, Boris Shaykevich and Yelena Shaykevich also move for an order granting incentive awards as follows: $7,500 individually to Karen Rodriguez, $7,500 individually to Antonio Rodriguez, and $7,500 jointly to Boris and Yelena Shaykevich.

After a hard-fought litigation including filing multiple documents under seal (including the initial complaint), the completion of all document discovery, a full motion for class certification and an unusual amount of briefing following a landmark Supreme Court ruling, the Class Representatives achieved substantial recovery for the class, subject to Court approval: an identity theft recovery and restoration benefit; an identity theft insurance product providing each class member with $1,000,000 of coverage; and *independent* third-party verification that the defendant's Lender Verification internet portal uses "industry best" data protection. Defendant also anticipates paying more than $493,000 in class administration expenses to ensure that the class receives actual, direct notice.

Today's motion is accompanied by the declarations of David Straite and Marc Wites detailing the facts summarized below.

II. BACKGROUND OF REQUEST FOR FEES AND EXPENSES

The Settlement Agreement dated January 31, 2017 provides that Class Counsel may apply to the Court for an award of attorneys' fees and actual expenses. D.E. 85-2, § 9.1. Defendant has agreed not to oppose an application for fees and expenses not to exceed $850,000.00 in the aggregate. *Id*. § 9.2. The award is to be paid ***solely*** by defendant (or its cyber liability insurance carrier) and not by any Class Member. Class Counsel request reimbursement of $19,845.71 of actual expenses incurred in the prosecution of this action, as detailed in paragraphs 61 to 66 of the Straite Declaration and paragraphs 6 to 10 of the Wites Declaration. To ensure that the total request for fees and expenses does not exceed $850,000 combined, Class Counsel limit their request for fees to $830,154.29.

In addition to being represented by Class Counsel, Karen Rodriguez was also represented by her personal attorney Andres Montejo in Hialeah, Florida and Mr. and Mrs. Shaykevich were represented by their personal attorney Izidor Mikhli in Brooklyn, New York. These additional counsel acted as liaisons to their clients, assisted in the preparation and final approval of the complaint, located and gathered responsive documents, helped to prepare responses to interrogatories and requests for admission, and prepared their clients for deposition. Mr. Montejo also assisted with Spanish-English translations as needed and appeared at the deposition of Mrs. Rodriguez in January. To avoid even the appearance of duplication of efforts, however, Class Counsel do <u>not</u> request additional reimbursement for fees and expenses of these additional counsel, and any amounts due will be paid exclusively by Kaplan Fox out of its award. Straite Decl. ¶ 59. The lodestar figures discussed below accordingly exclude fees and expenses of additional counsel. *Id*. Defendant has no obligation to pay additional counsel in addition to any fees and expenses awarded to Class Counsel.

III. BACKGROUND OF REQUEST FOR INCENTIVE AWARDS

Subject to Court approval, defendant has agreed to pay incentive awards to Class Representatives not to exceed $7,500 individually to Karen Rodriguez, $7,500 individually to Antonio Rodriguez[1], and $7,500 jointly to Boris and Yelena Shaykevich (husband and wife). D.E. 85-2, § 9.2. If approved, these awards would be paid *solely* by Universal Property and in no way impact any Class benefits.

All four Class Representatives participated actively in this litigation. All gathered information during the investigation of claims; assisted with the drafting and approval of the complaint; gathered, reviewed and produced documents; and assisted in drafting responses to interrogatories and requests for admission. Straite Decl. ¶¶ 10, 11, 22, 35, 39, 42, 46, 47. In addition, Karen Rodriguez and Antonio Rodriguez prepared for, traveled to and attended depositions and reviewed the deposition transcripts for errata. *Id.* ¶ 40, 41. For these efforts and for the risk involved in bringing these claims (as discussed more below), Karen and Antonio request incentive awards of $7,500.00 each. While Mr. and Mrs. Shaykevich prepared for scheduled depositions, the parties reached settlement prior to the scheduled date and thus they did not incur additional burdens associated with the day of deposition, and were not required to review and correct any transcripts. They also jointly insure a single property. Therefore Mr. and Mrs. Shaykevich request half as much (i.e., $7,500 jointly).

[1] Karen Rodriguez and Antonio Rodriguez have no known relationship and insure different homes in different counties. Their same last names are just a coincidence.

IV. LEGAL ARGUMENT

A. The Request for Fees and Expenses are Reasonable and Unopposed, and Should Be Approved.

1. *Actual Expenses Incurred were Reasonable and Necessary*

Class Counsel incurred $19,845.71 in actual expenses in the prosecution of this action. Straite Decl. ¶ 62, 68 and Ex. 2 attached thereto; Wites Decl. ¶ 7. Of this amount, $7,692.12 is related to JAMS mediation, Straite Decl. ¶ 68 and Ex. 2 attached thereto, which was conducted pursuant to Court order. D.E. 42. A further $7,305.92 is related to online legal research and PACER charges; the remainder is related to postage, messenger, service of process, duplication and travel. Straite Decl. ¶ 68 and Ex. 2 attached thereto. All flights involved coach fares. *Id*. ¶ 66. Kaplan Fox self-hosts electronic document productions at no cost to the Class, *id*. ¶ 64, and no reimbursement is requested. Likewise, although Kaplan Fox engaged potential experts, no charges were incurred prior to settlement and no reimbursement is needed or requested. *Id*. ¶ 44.

The types of expenses incurred were reasonable and necessary. *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'") (citation omitted); *accord, Sanborn v. Nissan N. Am., Inc.*, No. 0:14-CV-62567, 2017 U.S. Dist. LEXIS 2808, at *4 (S.D. Fla. Jan. 6, 2017) (awarding $348,000 in expenses, finding "Class Counsel's expenses were of the variety typically billed to clients in the normal course of business."). In addition, the total amount comes to less than 4% of the lodestar discussed below, which is facially reasonable. *See, e.g., In re Schering-Plough Corp. Enhance Sec. Litig.*, No. 08-397, 2013 WL 5505744, at *36 (D.N.J. Oct. 1, 2013) ("the ratio of expenses

to the lodestar . . . confirms that expenses are about 6% of the value of time which does not seem out of the ordinary or suggest expenses were too high").

2. *The Requested Fee Award is Appropriate Under 11th Circuit Precedent*

a. Legal Standard

As detailed in the accompanying Motion for Final Approval of Settlement, the Settlement achieved substantial benefit in the form of identity theft recovery and restoration services for the more than 1.3 million members of the class, in the event any class member falls victim to identity theft. ID Experts Corporation represents that this two-year benefit would cost $70.80 per person if obtained at retail. Straite Decl. ¶ 70 and Ex. 4 thereto. The Settlement also obtained an identity theft insurance component (through AIG) providing each class member up to $1,000,000 of coverage without a deductible. ID Experts represents that this one-year benefit would cost $71.40 per person if obtained at retail. *Id*. The Settlement also obtained substantial injunctive relief in the form of an independent privacy audit to confirm "industry best" data protection.

The United States Supreme Court and the Eleventh Circuit expressly approve of calculating attorney's fees by applying the "percentage-of-recovery" method (or "common fund" method) to the total monetary value of the settlement. *See, e.g., Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV-GOODMAN, 2016 U.S. Dist. LEXIS 50315, at *53-54 (S.D. Fla. Apr. 13, 2016) (citing *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-96 (11th Cir. 1999)); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). A "common fund" can consist of cash or any non-cash benefit where (like here) a value is ascertainable. *See David v. American Suzuki Motor Corp.*, No. 08-22278-CV-ASG, 2010 WL 1628362, at *8, n.14 (S.D. Fla. Apr. 15, 2010). So, for example, a recent class

action settlement with an insurance company in Florida secured at least $126 million of potential insurance benefit to a class of 2,000 people suffering from Hepatitis C. *See generally Oakes v. Blue Cross and Blue Shield of Florida, Inc*., 16-80028-CV-RLR (S.D. Fla.) (Motion for Final Approval, *Oakes* D.E. 60). Although the class did not receive any cash, the non-cash benefit was capable of valuation and the common-fund method of evaluating counsel's request for $2.2 million of fees was used. *Oakes v. Blue Cross & Blue Shield of Fla., Inc.*, No. 16-80028-CIV, 2016 U.S. Dist. LEXIS 147252, at *16-17 (S.D. Fla. Oct. 21, 2016).

The "percentage of recovery" method is used because it encourages counsel to obtain the maximum recovery at the earliest possible stage and, hence, most fairly correlates counsel's compensation to the benefit achieved. There is no "hard and fast" rule setting a reasonable percentage of the recovery to award "because the amount of any fee must be determined upon the facts of each case." *Camden I*, 946 F.2d at 775.[2] Using the common benefit approach, the benchmark for a reasonable class counsel fee is 25%. *Id.* at 774. This benchmark may be adjusted up or down (generally from 20% to 30%) based on the circumstances of the case, using the factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 448 F.2d 714 (5th Cir. 1974). *See Camden I*, 946 F.2d at 774-75; *Waters*, 190 F.3d at 1294 (applying *Camden I* and affirming fee of 33 1/3% where Court had used a 30% benchmark and adjusted upwards).[3]

[2] In this regard, the Eleventh Circuit expressly noted that "an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded." *Id.* at 774-75.

[3] The *Johnson/Camden I* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the requisite skill to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Camden I*, 946 F.2d at 772 n.3. The Court also may consider the time required to reach

The Eleventh Circuit has also recently confirmed that in a "common fund" analysis, the Court should take into account the value of "any non-monetary benefits conferred upon the class by the settlement," such as injunctive relief, as well as "the economics involved in prosecuting a class action." *Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 628 (11th Cir. 2015); *David*, 2010 U.S. Dist. LEXIS 146073 (S.D. Fla., Apr. 15, 2010). Thus, class counsel fees in a common-fund settlement "shall be based on a reasonable percentage of the total benefit" of the settlement provides to the class. *Poertner*, 618 Fed. Appx. at 628 (citing *Camden I*, 946 F.2d at 774).

b. Application of the *Johnson/Camden I* Factors

i. First Factor: Time and Labor Required

Prosecuting and settling this action demanded considerable time and labor, which began with interviewing insureds and investigating their potential claims. Straite Decl. ¶ 5. By the time the Settlement was reached, Class Counsel had: (i) investigated the factual circumstances underlying the claims against defendants; (ii) filed their complaint under seal and moved to seal the entire case pending resolution of the alleged data security issue; (iii) defeated defendant's motion to dismiss in its entirety involving supplemental briefing following a landmark ruling from the Supreme Court; (iv) completed all document discovery; (v) defeated defendant's motion for reconsideration; (vi) prepped and defended depositions of two Class Representatives; (vii) prepared and filed a motion for class certification under seal; (viii) prepared a mediation statement and participated in an all-day mediation with Hon. Morton Denlow in Chicago; (ix) prepared written responses to interrogatories; (x) served third-party discovery on two additional entities; and (xi) negotiated the specific terms of the Settlement. *Id*. ¶¶ 5, 10-48. Class Counsel

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settlement, the existence of substantial objections from class members, the existence of non-monetary benefits of the settlement, and the economics involved in prosecuting a class action. *Id*. at 775.

also conferred with defense counsel to help implement the notice program and has fielded inquiries from more than a dozen putative class members. *Id*. ¶¶ 50, 53.

In connection with these efforts, Class Counsel expended 1,102.90 hours, not including the additional time that will be required to conclude the matter, implying a lodestar of $681,288.00. Straite Decl. ¶ 58 and Ex. 1 thereto; Wites Decl. ¶ 6. While not required in the Eleventh Circuit, an analysis of the requested fee under the "lodestar/multiplier" approach further supports the reasonableness of the award. *Waters*, 190 F.3d at 1298 ("while we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison").

ii. Second Factor: Novelty and Difficulty

Class Representatives faced all the "multi-faceted and complex legal questions endemic" to cases in the emerging field of data privacy. *See Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992). The record makes clear that this case presents novel and complex questions of law and fact, as was demonstrated in the Court's rulings. Data privacy law is a fairly new (and rapidly evolving) area of law, and the parties and the Court had a thin library of authorities to guide them. The complexity was compounded by the fact that the complaint alleged an ongoing violation that required the case to be sealed in its entirety, and also pursued data protection relief prior to (and in possible prevention of) a known data breach.

iii. Third Factor: Requisite Skill

The quality of the representation by Class Counsel and the standing of Class Counsel are important factors that support the reasonableness of the requested fee, especially when considering the hourly rates of the attorneys. *See Ressler*, 149 F.R.D. at 654; *see also Am. Suzuki Motor Corp.*, 2010 U.S. Dist. LEXIS 146073, at *26-29 n.15 (a court should consider

"the skill and acumen required to successfully investigate, file, litigate, and settle a complicated class action lawsuit such as this one").

Class Counsel have developed a reputation as pioneers in the evolving field of data privacy. *See, e.g., Syran v. LexisNexis Group*, 05-cv-0909 (S.D. Cal.) (Kaplan Fox co-prosecuted early data breach cases to settlement); *In re: LinkedIn User Privacy Litig.*, 12-cv-03088-EJD (N.D. Cal.) (Kaplan Fox court-appointed liaison counsel in data breach class action against LinkedIn, which settled in favor of a class of premium subscribers); *In re Home Depot, Inc. Customer Data Security Breach Litigation*, 1:14-md-02583-TWT (N.D. Ga.) (Kaplan Fox serving on steering committee in financial institution track); *In re Yahoo Mail Litigation*, No. 5:13-cv-04980-LHK, 2016 U.S. Dist. LEXIS 115056 (N.D. Cal. Aug. 25, 2016) (Kaplan Fox court-appointed co-lead counsel, settling "novel" and "complex" issues); *In re: Facebook Internet Tracking Litigation*, No. 5:12-md-02314-EJD (N.D. Cal.) (Co-lead Counsel); *In re Horizon Healthcare Services Inc. Data Breach Litigation*, No. 13-7418 (CCC) (D.N.J.) (Co-Lead Counsel securing precedential standing ruling from Third Circuit related to FCRA claims). Consistent with this background outlined above, Class Counsel prosecuted this case zealously and skillfully and achieved significant rulings on defendant's motion to dismiss and motion for reconsideration. Thereafter, plaintiffs filed their motion for class certification under seal.

Moreover, the appropriateness of Class Counsel's fee is underscored by the defendant's choice of counsel. The quality of opposing counsel is important in evaluating the quality of Class Counsel's work and the reasonableness of the requested fee. *See, e.g., In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001); *Ressler*, 149 F.R.D. at 654. Defendant was represented by experienced lawyers from Sidley Austin LLP in Washington, D.C., widely recognized as a top national firm. The case was led by the head of the firm's data privacy

practice. Defendant also had the benefit of Akerman LLP, an Am Law 100 firm which was named a "Florida Powerhouse" by Law360. "Defendants retained both a highly experienced Florida law firm and a [national] law firm for their defense. It would be unreasonable to preclude the Class from also selecting the counsel of their choice." *Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-cv-20880-UU, 2016 U.S. Dist. LEXIS 144133, at *22 (S.D. Fla. Oct. 14, 2016).

iv. Fourth Factor: Preclusion of Other Employment

If counsel were precluded from taking on other cases, that fact can be a factor in supporting the fee application. *See Montoya*, 2016 U.S. Dist. LEXIS 50315, at *57 (finding as a factor in support of fee that "the law firms prosecuting the case are of small size . . . and thus the time devoted to the class action precludes other employment."). Here, however, Class Counsel concede that this case did not preclude other employment and the fourth *Johnson* factor is not applicable. Kaplan Fox is approaching 30 attorneys and has the necessary resources to handle additional cases.

v. Fifth Factor: Customary Fee

The "customary fee" in a class action lawsuit of this nature is a contingency fee (discussed more in the Sixth Factor below) because no individual class member possesses a sufficiently large stake in the litigation to justify paying attorneys on an hourly basis. *See Ressler*, 149 F.R.D. at 654, *see also Norman v. Hous. Auth. Of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). The Court should therefore give substantial weight to the contingent nature of Class Counsels' fees when assessing the fee request. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). "The percentage method of awarding fees in class actions is consistent with, and is intended to mirror, practice in

the private marketplace where attorneys typically negotiate percentage fee arrangements with their clients." *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1340 (S.D. Fla. 2007).

In individual cases, attorneys typically contract with clients for contingent fees between 30 and 40 percent. These percentages are the prevailing market rates throughout the United States for contingent representation. *See Pinto*, 513 F. Supp. 2d at 1341 (citing, *inter alia*, *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986)). In making a determination of what constitutes a fair percentage fee, this Court should be guided by those market rates and this Circuit's benchmark standard. *See, e.g., Gutter v. E.I. Dupont De Nemours & Co*., No. 95-2152-CIV-GOLD, 2003 U.S. Dist. LEXIS 27238 (S.D. Fla. May 30, 2003) (33-1/3 %); *Waters*, 190 F.3d (affirming 33-1/3%); *Tapken v. Brown*, No. 90-691-CIV-MARCUS, 1992 U.S. Dist. LEXIS 11744 (S.D. Fla. Mar. 13, 1992) (33%)

The requested fee here is far below the market rate for class actions when viewed in the context of the financial benefits achieved for this 1.3 million member class: identity theft restoration and recovery services valued at $70.80 per class member if priced on an individual retail basis (see Straite Decl. ¶ 70 and Ex. 4 attached thereto), identity theft insurance valued at $71.40 per class member if priced on an individual retail basis, *id*., and more than $493,000 of class administration expenses (see Straite Decl. ¶ 55). These non-cash benefits have an ascertainable basis for valuation – indeed, a public declaration made under oath – implying a class benefit well in excess of $100 million. By any measure, the requested fee of $830,154.29 plus expenses is but a small fraction of the achieved common benefit.

vi. Sixth Factor: Whether the Fee is Fixed or Contingent

Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in determining the award of fees, and that skilled counsel should be encouraged to

undertake this risk. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1364 (S.D. Fla. 2011) ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."); *Pinto*, 513 F. Supp. 2d at 1339 ("attorneys' risk is 'perhaps the foremost factor' in determining an appropriate fee award"); *Behrens*, 118 F.R.D. at 548 ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees"). A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the outlay of out-of-pocket expenses by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high. *See e.g.*, *Pinto*, 513 F. Supp. 2d at 1339. This factors weighs strongly in favor of awarding Class Counsel the requested fee.

vii. Seventh Factor: Time Limitations

Upon discovering the extent of the alleged vulnerability in defendant's Lender Verification portal, the circumstances required plaintiffs to act with urgency. The Court also held the parties to a tight case schedule requiring approximately one year to proceed from complaint to trial. D.E. 41. Under these circumstances, it was appropriate to incur the fees on the pace incurred.

viii. Eighth Factor: Results

At bottom, the result achieved for the class is the most important factor in assessing the reasonableness of a requested fee award. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Pinto*, 513 F. Supp. 2d at 1342; *Behrens*, 118 F.R.D. at 547-48 ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."); *Ressler*, 149 F.R.D. at 655 ("It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained."). The result achieved here is exemplary, as the Settlement achieves the precise injunctive relief

sought as well as substantial additional non-cash financial benefit, both of which are relevant in the evaluation of a fee request. *See Poertner*, 618 Fed. Appx. at 628; *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360 (S.D. Fla. 2007); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005); *In re Managed Care Litig.*, Nos. 1334, 00-1334-MD-MORE, 2003 U.S. Dist. LEXIS 27228 (S.D. Fla. Oct. 24, 2003).

The Settlement also provides for benefits to Class Members now, without delay, which is a factor courts may consider in an evaluation of a fee request. "[M]uch of the value of a settlement lies in the ability to make [benefits] available promptly." *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985). As no claim form is required, Class Members can receive all benefits *immediately* upon Court approval. D.E. 85-2, § 12.

ix. Ninth Factor: Experience, Reputation and Skill of Counsel

Lead Class Counsel Kaplan Fox was founded more than 62 years ago, making it one of the most established litigation firms in the country. The firm is also an early leader in the emerging practice of data privacy litigation. The firm has court-appointed leadership roles in class action litigation against Facebook, Google, LinkedIn and other technology and insurance companies. Recently, Kaplan Fox (as co-lead class counsel) settled a cutting-edge data privacy case against Yahoo, which Judge Lucy Koh in the Northern District of California noted was "novel" and "complex" in her order granting final approval. *In re: Yahoo Mail Litig.*, 2016 U.S. Dist. LEXIS 115056, at *19-21. Kaplan Fox partner David Straite was also called "something of a pioneer" in data privacy litigation by M.I.T. Technology Review magazine in 2012. And just last month, Kaplan Fox (with co-counsel) secured an important victory in the Third Circuit on an issue echoed in this Action: whether plaintiffs have standing post-*Spokeo* to assert claims under FCRA absent proof of misuse of the unprotected data. *See generally In re: Horizon Healthcare*

Svcs., Inc. Data Breach Litig., No. 15-2309, 2017 WL 242554 (3d Cir., Jan. 20, 2017). A full firm biography accompanies the motion for preliminary approval filed with this Court on February 8, 2017 (D.E. 85-4).

Liaison Counsel Marc Wites's experience in Florida class action and complex litigation is exemplary, as demonstrated by his firm's biography also accompanying the motion for preliminary approval. Mr. Wites has been litigating class action lawsuits since 1994 in Florida's federal and state courts, and has been appointed as Class Counsel on numerous occasions. Most recently, he was appointed as Class Counsel in *Leidel v.Project Investors, Inc., d/b/a Crypsty*, Case No.: 9:16-cv-80060-MARRA, which is pending in this District before United States District Court Judge Kenneth Marra, involving the cutting edge issue of cryptocurrencies. Also, Mr. Wites is the author of the well-known Florida law practice guides, Florida Causes of Action and The Florida Litigation Guide.

x. Tenth Factor: "Undesirability" of Taking the Case

When Class Counsel filed this case, they understood the risks associated with filing a cutting-edge data privacy case (under seal) in the absence of a developed body of law. Plaintiffs also knew that the Supreme Court had already granted certiorari in a case with direct ramifications in this case – the sands were shifting beneath their feet. As it turns out, the law has recently moved a bit in a pro-privacy direction on a number of fronts, but counsel did not have the advantage of foreknowledge last year. So while Class Counsel views this case as distinctly desirable, peer firms might have eschewed this case on uncertainty grounds, which should support the fee application under the tenth *Johnson* factor.

xi. Eleventh Factor: Relationship with Client

None of the four Class Representatives have ever retained Lead Counsel Kaplan Fox before nor were any of them even known to the firm before this case. Class Representative Antonio Rodriguez retained Marc Wites in an unrelated litigation approximately 10 year ago. The other three Class Representatives have personal counsel who referred them to Kaplan Fox. The representation of these four individuals do not impact Lead Counsel's or Liaison counsel's other cases. Class Counsel therefore concede that this factor is likely not relevant here.

xii. Twelfth Factor: Awards in Similar Cases

As discussed in sections 5 and 6 above, Class Counsel's request for only $830,154.29 is a lower fee than would be customarily appropriate on a percentage-of-recovery "common fund" basis. The reasonableness of counsel's request is also borne out by comparing fee awards in similar cases. For example, in a recent data privacy case involving Godiva, counsel was awarded $2.1 million even without the additional injunctive relief that was achieved here. *See Muransky v. Godiva Chocolatier, Inc*., 15-cv-60716-WPD (S.D. Fla.). The requested fee is also similar to the $750,000 awarded in a data breach case against Avmed. *See Curry v. Avmed, Inc*., 10-cv-24513-JLK (S.D. Fla.). The fee is also less than half of the $2.1 million fee award in the *Florida Blue* settlement which involved a similarly large aggregate non-cash insurance benefit obtained for the class. *Oakes v. Blue Cross & Blue Shield of Fla., Inc.*, No. 16-80028-CIV, 2016 U.S. Dist. LEXIS 147252 (S.D. Fla. Oct. 21, 2016).

c. Lodestar Cross-Check

Where a settlement creates a common fund, courts of this circuit do not require a lodestar method for calculating class counsel fees, even as a "cross-check" on the reasonableness of a percentage fee. *Checking Account Overdraft*, 830 F. Supp. 2d at 1362 ("the lodestar approach

should not be imposed through the back door via a 'cross-check.'" (internal citations omitted)). "Under *Camden I*, courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all." *Id*. at 1363 (citation omitted). However, where (as here) a settlement also achieves non-monetary relief, a lodestar analysis to assess reasonableness of requested fees can be appropriate. *See Poertner v. Gillette Co*., No. 6:12-cv-803-Orl-31DAB, 2014 U.S. Dist. LEXIS 116616, at *14 (M.D. Fla. Aug. 21, 2014), *aff'd* 618 Fed. Appx. 624 (11th Cir. 2015) (using lodestar analysis, finding request for fees reasonable due to injunctive relief); *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800-UNGARO/ TORRES, 2013 U.S. Dist. LEXIS 189397, at *23 (S.D. Fla. Oct. 4, 2013) (applying lodestar method).

While not necessary here, if the Court were to choose to perform a lodestar cross-check, the requested attorney's fee would be reasonable. Class Counsel incurred $681,288.00 of lodestar in the prosecution of this case, see Straite Decl. ¶ 58 and Ex. 1 attached thereto, Wites Decl. ¶ 6, which as noted above does not include the lodestar of the personal attorneys of three of the Class Representatives. The requested fees of $830,154.29 imply a multiplier of only 1.22, lower than the typical range recognized in this district under similar circumstances. *Pinto v. Princess Cruise Lines, Ltd*., 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (noting lodestar multiples "in large and complicated class actions" range from 2.26 to 4.5, while "three appears to be average" and "most lodestar multiples awarded in cases like this are between 3 and 4"). The implied multiplier will also decrease over time as Class Counsel incurs additional non-reimbursable time in finalizing and concluding the matter. *See* Settlement Agreement, D.E. 85-2, § 9.1 (Class Counsel not permitted to apply for fees incurred after today's date).

B. The Requested Incentive Awards Are Appropriate

Incentive awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Checking Account Overdraft*, 830 F. Supp. 2d at 1357 (granting service awards of $5,000 per class representative). Courts determine service awards by looking at "(1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation." *Id.* Courts in this district commonly authorize service awards. *Pinto*, 513 F. Supp. 2d at 1344 ($7,500 per plaintiff). Courts in this District have routinely authorized substantial payments to lead plaintiffs whenever requested settlements were approved. *See, e.g., City Pension Fund for Firefighters & Police Officers in the City of Miami Beach v. Aracruz Cellulose S.A.*, No. 08-23317-CIV-LENARD/TUR, D.E. 201 at 8 (S.D. Fla. Jul. 7, 2013) ($40,000); *Fuller v. Imperial Holdings, Inc.*, No. 9:11-cv-81184-KAM, D.E. 95 at 15 (S.D. Fla. Sept. 16, 2013) ($10,000).

The requested awards here are appropriate. The Class Representatives expended substantial efforts on behalf of the Class, and without their contributions, there would have been no case, and the Class's sensitive data may have remained unprotected. They gathered information during the investigation of claims; assisted with the drafting and approval of the complaint; gathered, reviewed and produced documents; and assisted in drafting responses to interrogatories and requests for admission. Straite Decl. ¶¶ 10, 11, 22, 35, 39, 42, 46, 47. In addition, Karen Rodriguez and Antonio Rodriguez prepared for, traveled to and attended depositions and reviewed the deposition transcripts for errata. *Id.* ¶¶ 40, 41. In instituting and prosecuting this matter under seal, each acted as a private attorney general in seeking a remedy

for a public wrong. *See Pinto*, 513 F. Supp. at 1344 (Private class actions are a primary weapon in the enforcement of laws that protect the public).

The Class Representatives also incurred substantial risk of retaliation (in the form of termination of the customer relationship) which could have been misinterpreted by other insurance companies as a denial of coverage. As it turns out, the defendant here acted in good faith and agreed to a provision in the Settlement Agreement forbidding retaliation, see D.E. 85-2, § 7, but the Class Representatives had no way to predict this outcome at the outset. Finally, it bears repeating that the requested service awards (if approved) will be paid entirely by defendant and have no effect on class benefits.

V. CONCLUSION

For the forgoing reasons, the Court should approve the application for fees, expenses and service awards.

Dated: May 15, 2017

Respectfully submitted,

WITES & KAPETAN P.A.

/s/ Marc Wites

Marc Wites
4400 North Federal Highway
Lighthouse Point, FL 33064
mwites@wklawyers.com
Tel: 954.526.2729
Fax: 954-354-0205

Liaison Class Counsel

KAPLAN FOX & KILSHEIMER LLP
David A. Straite (admitted *pro hac vice*)
Frederic S. Fox (admitted *pro hac vice*)
850 Third Avenue
New York, NY 10022
dstraite@kaplanfox.com
Tel. (212) 687-1980
Fax (212) 687-7714

-and-

Laurence D. King (admitted *pro hac vice*)
Mario M. Choi (admitted *pro hac vice*)
350 Sansome Street, Suite 400
San Francisco, CA 94104
Tel: 415.772.4700
Fax: 415.772.4707

Lead Class Counsel

CERTIFICATE OF SERVICE

I, David Straite, hereby certify that I caused the foregoing to be served on all counsel of record by filing the same with the Court using the CM/ECF system, which will send electronic notice of the filing to all registered counsel.

Dated: May 15, 2017

/s/ David Straite
David A. Straite