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, Defendant.	Case No.: 16-cv-60442-COHN/SELTZER

PLAINTIFFS' *UNOPPOSED* MOTION
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

In advance of the July 31, 2017 fairness hearing, Class Representatives Karen Rodriguez, Antonio Rodriguez, Boris Shaykevich and Yelena Shaykevich (the "Class Representatives" or "Plaintiffs') respectfully move pursuant to Rule 23(e) for final approval of the Class Action Settlement Agreement dated January 31, 2017 (the "Agreement" or "Settlement Agreement," D.E. 85-2) between the Plaintiffs and defendant Universal Property & Casualty Ins. Co (the "Defendant' or "Universal Property" or the "Company"). The Court has already granted preliminary approval, certified a settlement class, appointed Class Representatives, appointed Class Counsel, and authorized the start of the Notice Program. *See* Order dated February 14, 2017 (the "Preliminary Order," D.E. 87). The Class Representatives now ask the Court to grant final approval and trigger the class relief provided in the Agreement. Today's motion is accompanied by the declaration of Co-Lead Class Counsel David Straite dated May 15, 2017, which in turn attaches the declaration of Liaison Counsel Marc Wites dated May 15, 2017 and the declaration of Jeremy R. Henley, the Vice President of Data Breach Services at ID Experts Corporation, dated May 2, 2017. Defense counsel do not oppose today's motion but do not necessarily adopt Plaintiffs' description of any facts herein.

The Class Representatives achieved three important benefits for the class. First, they obtained important injunctive relief. They originally filed this action to fix what they believed to be a serious vulnerability on the "lender verification" portal on defendant's website, which, in Plaintiffs' view, exposed customer information of potentially hundreds of thousands of customers, including insurance limits for valuable personal property in the home and whether the home was secured by a burglar alarm. Plaintiffs believe their initial actions, taken under seal and under Court supervision, may have prevented a data breach. In the Agreement, pending Court

approval, the defendant has agreed to enhance the security of the portal and more importantly to obtain *independent* third-party verification that the data security meets "industry best practices."

Second, the Agreement provides each class member an identity theft restoration and recovery service from ID Experts Corporation for a period of two years. Third, the Agreement provides each class member identity theft insurance coverage up to $1 million per person (with no deductible) for a period of one year. To be clear, the identity theft restoration and insurance products are not merely "credit monitoring." Instead, Defendant commendably has agreed to provide a more powerful identity "restoration and recovery" service and related insurance product that can help victims of identity theft get their lives back, even if the theft is in no way related to the Universal Property website. Every member of the class also receives the restoration and insurance coverages secured by the Settlement without the need to file a claim form at this time – no one is excluded for missing a class action claim deadline. Coverage is automatic and insureds need only initiate a claim if and when they suffer identity theft.

Finally, the defendant has agreed to pay for 100% of the class notice program approved by the Court in the Preliminary Order, and also agreed to pay all class counsel fees and incentive awards to the Class Representatives (subject to Court approval and a negotiated limitation).[1] In short, the Class Representatives and their counsel have achieved an excellent result for the Class that approaches the best result they could have achieved at trial, and urge final approval.

II. BACKGROUND OF THE LITIGATION BEFORE MEDIATION

As Florida's largest private issuer of homeowners' insurance policies, Universal Property makes certain sensitive customer information available to third-party mortgage lenders, including insurance declaration pages and evidence of insurance (the "Insurance Documents")

[1] A separate motion for counsel fees and service awards accompanies this motion.

through the Lender Verification portal on its website. As alleged in the Complaint, filed March 7, 2016, (D.E. 1), the Insurance Documents contain limits of insurance; riders for additional insurance for personal property, such as jewelry; telephone numbers; complete names of the insured and their addresses; and whether the subject property is secured by a burglar alarm. Plaintiffs discovered that these Insurance Documents had what they considered to be inadequate security, leaving the documents potentially exposed on the website with neither password protection nor encryption. The Complaint pled violations of the Fair Credit Reporting Act, Breach of Contract, and Unjust Enrichment. Given the information's sensitivity, plaintiffs filed the Complaint under seal and proceeded under court supervision. D.E. 3. Defendant agreed that sealing was appropriate and asked that the case remain sealed until at least April 20, 2016; the Court granted the extension. D.E. 21. On April 27, 2016, the case was unsealed (D.E. 27), and on April 29, 2016, after conferring with defendant, plaintiffs filed a public redacted version of the Complaint. D.E. 32.

On April 11, 2016, defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) and for lack of standing under Rule 12(b)(1). D.E. 25. Following the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the parties were allowed an additional round of briefing—plaintiffs filed on June 15, 2016 (D.E. 52) and defendant filed on June 27, 2016. D.E. 53. On August 19, 2016, the Court denied defendant's motion to dismiss in its entirety. D.E. 55. Defendant filed its Answer on September 2, 2016. D.E. 56. On September 14, 2016, Defendant moved for reconsideration of the Court's order on its motion to dismiss or alternatively for certification of certain issues for interlocutory appeal (D.E. 57); briefing concluded on that motion on October 5, 2016. D.E. 58, 59. On January 10, 2017, the Court denied defendant's motion. D.E. 72.

Plaintiffs served initial discovery requests on June 22, 2016. Straite Decl. ¶ 23. The parties agreed to a rolling production of documents where defendant would prioritize discovery related to class certification. *Id*. ¶ 24. Plaintiffs received the first batch of documents on September 26, 2016. *Id*. ¶ 25. A second production was made on October 14, 2016. *Id*. On October 25, 2016, plaintiffs filed a motion for class certification under seal. D.E. 60, 61.

III. MEDIATION, RESUMPTION OF DISCOVERY AND SETTLEMENT

On October 27, 2016, the Court granted the parties' joint request to stay the case pending formal mediation, scheduled for December 8, 2016 in Chicago with experienced JAMS mediator, retired United States Magistrate Judge Morton Denlow. D.E. 63. The mediation involved the exchange of written materials concerning the claims raised, conference calls, and an in-person session. Straite Decl. ¶ 32. With the benefit of the prioritized document productions, Plaintiffs were able negotiate on an informed basis.

While the parties did not settle at mediation, it previewed, framed, and clarified many of the issues that were likely to arise. Consistent with Judge Denlow's advice, the parties continued discussions throughout December 2016 and January 2017. In parallel, discovery continued, including interrogatories and requests for admissions, serving third-party discovery on two additional entities, and engaging potential experts. *Id*. ¶¶ 35-39. Defendant also deposed two Class Representatives on Thursday, January 19 and Friday, January 20, 2017. *Id*. ¶¶ 40-41. Two additional Class Representatives were prepared for potential depositions for the week of January 23, 2017. *Id*. ¶ 42.

The parties reached an agreement in principle on Sunday, January 22, 2017, and executed a confidential term sheet on January 22 and 23, 2017. *Id*. ¶ 45. A final class action settlement agreement was executed on January 31, 2017. Plaintiffs withdrew their motion for class

certification (D.E. 82), which was superseded by the unopposed motion for preliminary approval of settlement and certification of a settlement class, filed on February 8, 2017. The Court preliminarily granted approval on February 14, triggering notice to the class. D.E. 87.

IV. THE SETTLEMENT TERMS

A. The Settlement Class

The Settlement Agreement provides relief to current and former customers of Universal Property who insured real property with the company between September 1, 2013 and March 31, 2016. Additionally, where multiple individuals jointly insure real property, all parties are Class Members, even if only one of the individuals holds a mortgage or appears on documents evidencing ownership of the real property. *See* Preliminary Order § 3 (approving class definition). Consistent with this class definition, the claims administrator (discussed more below) reports 1,391,943 class members even though fewer than 700,000 homes were affected. Straite Decl. ¶ 71 and Exhibit 5 thereto.

B. Injunctive Relief

The core of this case is an alleged vulnerability in defendant's data protection system—which the Defendant has *already* acted to address. As part of the Settlement Agreement, Defendant agreed to an independent third-party privacy audit within 50 days of the Effective Date following final approval, ensuring that the Lender Verification portal meets industry best practices. *See generally* Settlement Agreement § 4. In consultation with Class Counsel, Defendant selected Kroll, Inc., one of the world's leading corporate investigations, electronic data recovery and security consulting companies. Straite Decl. ¶ 51. Class Counsel did not and does not object to the selection of Kroll. If the auditor cannot verify "industry best data

protection," defendant is obligated to cure the deficiency and to keep Lead Class Counsel, as well as this Court, apprised of the status.

C. Financial Benefit

The injunctive relief described above provides prospective relief to the class. As additional relief, Defendant will provide the class with the following non-cash financial benefits:

1. Managed Recovery and Restoration Services

For a period of two (2) years, commencing on the Effective Date of the Settlement, Class Members will have access to "managed recovery and restoration services" from ID Experts if any become victims of identity theft. Importantly, this benefit does not require the identity theft to be linked to Defendant's alleged website vulnerability, nor is there a temporal requirement for when the theft occurred. ID Experts was recently retained by the Defense Department to help 21.5 million federal workers and others whose personal information was stolen from the federal Office of Personnel Management. This product is not "credit monitoring" or credit protection, which simply alerts users of a breach; it is a powerful recovery service that will actively assist Class Members who may experience identity theft. The services, as discussed in Section 5 of the Agreement, include: (a) damage assessment plan following an identity theft; (b) instructions on how to file an identity theft police report; (c) use of limited power of attorney to work on behalf of the affected victim; and (d) disputing and resolving any bills or collections resulting from fraudulent activities. These post-theft services are not typically provided by credit monitoring services, and are described in a brochure on the Settlement Website and attached to the Straite Declaration as Exhibit 6. ID Experts has proffered that the fair market value for this product would be $70.80 per Class Member if purchased individually at retail. Straite Decl. ¶ 70 and Ex. 4 attached thereto.

2. Identity Theft Reimbursement Insurance

For a period of one (1) year commencing on the Effective Date, ID Experts will also provide an identity theft reimbursement insurance group policy for the Settlement Class through American International Group, Inc. ("AIG"), an A.M. Best "A-rated" carrier, to act as a complement to the managed recovery and restoration services discussed above. This insurance provides reimbursement Class Members' expenses associated with restoring identity if compromised, providing up to $1,000,000 of coverage with no deductible. Similarly, this benefit does not require any proof that the identity theft was related to Defendant's website. The insurance product is further described in the ID Experts brochure attached as Exhibit 6 to the Straite Declaration. ID Experts has proffered that the fair market value for this product would be $71.40 per Class Member if purchased individually at retail. Straite Decl. ¶ 70 and Ex. 4 attached thereto.

D. Class Counsel Fees and Expenses and Class Representative Incentive Award

Class Counsel are contemporaneously moving for an award of attorneys' fees and expenses. If approved, the award would be paid *solely* by Universal Property (and/or its cyber liability insurance carrier) and in no way impacts any class member benefits. Likewise, subject to Court approval, Defendant has agreed to pay incentive awards to the Class Representatives who actively participated in the litigation. If approved, the awards would be paid *solely* by Universal Property (and/or its cyber liability insurance carrier) and in no way impacts any class member benefits. The request for incentive awards appears in the motion for attorneys' fee and expenses, which as noted above, is being filed separately. The parties negotiated the attorneys' fee and service award provisions only after finalizing class relief, and the Settlement Agreement

is not conditioned on defendant's agreement to support (or the Court's award of) attorneys' fees and incentive awards; they are not material terms of the Agreement. *Id*. ¶ 45.

V. INTERIM REPORT ON CLASS NOTICE

Notice to class members of a settlement satisfies Rule 23(e) and due process where it fairly apprises "members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005); *accord, Borcea v. Carnival Corp*., 238 F.R.D. 664, 677 (S.D. Fla. 2006) ("the Court finds that the notice fairly apprises the prospective class members of the proposed settlement terms and of the options that are open to them."). Notice need not be perfect nor received by every class member, but instead should be reasonable under the circumstances. *See* Fed. R. Civ. P 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal."); *Morgan v. Pub. Storage*, No. 14-cv-21559, 2016 U.S. Dist. LEXIS 54937, at *55-57 (S.D. Fla. Mar. 9, 2016) (citing cases); *Visa*, 396 F.3d at 114. Here, the Settlement provides for a robust direct notice program including email notice, U.S. Mail notice, and internet publication notice. Because all class members are either current or former customers of a residential property insurance company, the parties have the unusual benefit of actual contact information for almost the entire class. *See also Morgan*, 2016 U.S. Dist. LEXIS 54937, at *54 (granting final approval, stating that "email notice in class actions is becoming the preferred method of [notice]").

The Court approved the Notice Program in the Preliminary Order. D.E. 87, §§ 9, 11 and 12. At the direction of Defendant and in consultation with Class Counsel, the class administrator (Heffler Claims Group in Philadelphia) reports that it commenced Notice on March 15, 2017, using the Notice and Summary Notice forms approved by the Court in the Preliminary Order.

Straite Decl. ¶ 70 and Ex. 4 attached thereto. Heffler reports that it provided direct email notice where email addresses were known. This included 277,993 emails. *Id*. Heffler also reports that it sent hard-copy notice via U.S. Mail to those class members for whom email addresses were not known or otherwise bounced back. This included 665,079 U.S. Mail notices. *Id*. If two class members jointly insured the same home (for example, a married couple), Heffler only sent one notice to the couple consistent with the contact information provided by the customers.

The Notice and Summary Notice advised Class Members of the principal terms of the Settlement and described the procedure for objecting, as well as provided specifics regarding the date, time and place of the Settlement Hearing. It also advised that if the Settlement is ultimately approved, Class Counsel intended to apply to the Court for an award of attorneys' fees, and for reimbursement of their expenses, totaling up to, but not more than, $850,000, incurred in prosecuting the case, and would seek incentive awards of $7,500 individually to Karen Rodriguez and Antonio Rodriguez and $7,500 jointly to Boris and Yelena Shaykevich. The Notice further informed the class that if the Settlement is approved, the Court will thereafter hold a hearing to consider the Fee Application and any objections thereto. In addition to the direct notice program, defendant created and maintained a dedicated settlement website, identified in the Notice and Summary Notice (the "Settlement Website") at *http://www.insuranceclassactionsettlement.com/*. The Settlement Website provides access to copies of the Notice, Summary Notice, Settlement Agreement, and other important documents filed with the Court, as well as the dates and deadlines regarding the Settlement, including the deadline for submitting objections and the date of the Settlement Hearing.

The deadline for exclusions, objections and comments is June 14, 2017, and a final report on Notice is not yet possible. Plaintiffs expect to provide a final report to the Court in

consultation with Defendant and Heffler on or before the July 15, 2017 deadline to file Replies to any objections. To date, however, Heffler reports receiving 160 requests for exclusion, 398 paper inquires, 509 internet inquiries, and 136 requests for notice – but only one objection. *See* Straite Decl. ¶ 71 and Exhibit 5 thereto. Plaintiffs intend to address any objections more fully in their Reply due July 15, 2017, but it appears the current objection relates to a prior coverage dispute with defendant that would not be affected by the Settlement. *Id*. ¶ 54.

Defense counsel also reports that full class administration is expected to cost $493,393, of which $225,943 has been billed so far. *Id*. ¶ 55. As noted above, class administration is being paid by Defendant, not by the Class. A full final report on administration expenses will be provided to the Court on or before the July 15, 2017 deadline to Reply to objections.

VI. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standard

Negotiated resolution of complex class action litigation is favored public policy and such settlements contribute to the efficient use of judicial resources and the speedy resolution of justice. *Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV, 2016 U.S. Dist. LEXIS 50315, at *26 (S.D. Fla. Apr. 13, 2016) (internal citation and quotations omitted)[2]; *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Complex litigation—like the instant [class action] case—can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive. Accordingly, the Federal Rules of Civil Procedure authorize district courts to facilitate settlements."). Therefore, "[t]here exists an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex." *Montoya*, 2016 U.S. Dist. LEXIS 50315,

[2] All internal citation and quotations omitted unless otherwise noted.

at *26-27; *Bennett v. Behring Corp.*, 96 F.R.D. 343, 348 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984) ("[Settlements [of class actions] are 'highly favored in the law and will be upheld whenever possible.'").

Approval of a class action settlement "is committed to the sound discretion of the district court." *U.S. Oil & Gas*, 967 F.2d at 493. However, "the Court must not try the case on the merits." *Access Now, Inc. v. Claire's Stores, Inc.*, No. 00-14017-CIV-MOORE, 2002 U.S. Dist. LEXIS 28975, at *12 (S.D. Fla. May 7, 2002) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). Rather, courts give counsel's judgment significant weight, as absent fraud, collusion, or the like, a court "should be hesitant to substitute its own judgment for that of counsel." *Id.*; *see also Warren v. City of Tampa*, 693 F. Supp. 1051, 1060 (M.D. Fla. 1988), *aff'd*, 893 F.2d 347 (11th Cir. 1989) (affording "great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation"). Further, in evaluating fairness, the Court should consider that "compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might be gained." *Morgan*, 2016 U.S. Dist. LEXIS 54937, at *16 (S.D. Fla. Mar. 9, 2016). "Above all, the court must be mindful that inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Id.*

To approve a settlement under Rule 23(e), a district court must determine that: "there is no fraud or collusion in reaching the settlement" and that "the settlement is fair, adequate and reasonable." *Warren*, 693 F. Supp. at 1054. In making this two-part determination, the Eleventh Circuit has identified six factors to be considered in the evaluation:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and

> the amount of discovery completed; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

In re Checking Account, 830 F. Supp. 2d 1330, 1345 (S.D. Fla. 2011) (citing *Leverso v. Southtrust Bank*, 18 F.3d 1527, 1530 n.6 (11th Cir. 1994)); *accord, Greco v. Ginn Dev. Co., LLC*, 635 F. App'x 628, 632 (11th Cir. 2015). Each of these six factors is addressed in turn.

B. The Six Factors

1. FIRST FACTOR: The Settlement is the Product of Good Faith, Informed, and Arm's Length Negotiations Among Experienced Counsel

At the outset, the Court must consider whether the settlement was obtained in good faith. Courts begin with a presumption of good faith in the negotiating process. *See Montoya*, 2016 U.S. Dist. LEXIS 50315, at *28 ("the courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement"); *Newberg on Class Actions*, § 11.51 at 11.88 (4th ed. 1992). Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion. *Id.* (quoting *Saccoccio v. JPMorgan Chase Bank, N.A.*, 297 F.R.D. 683, 692 (S.D. Fla. 2014)).

There is no hint of collusion in this settlement, which was achieved after almost a year of hard-fought litigation, some of it under seal. The parties also negotiated counsel fees only after reaching terms of a class settlement – counsel also agreed that fees are not a material term of the Settlement so that even if the Court approves a different amount, the Settlement remains undisturbed. Straite Decl. ¶ 45. This is the definition of a non-collusive settlement.

The parties also participated in a full day mediation before experienced JAMS mediator, retired United States Magistrate Judge Morton Denlow. While the parties did not reach settlement during the mediation, they continued communications, negotiating first the terms of

an initial memorandum of understanding and then a final settlement agreement. Judge Denlow, who has significant experience mediating complex commercial suits to resolution, offered advice even after mediation concluded, *id*. ¶ 34, which weighs in favor of approval. *See, e.g.*, *Montoya*, 2016 U.S. Dist. LEXIS 50315, at *29 (use of mediator weighs in favor of approval); *Braynen v. Nationstar Mortg., LLC*, No. 14-CV-20726-GOODMAN, 2015 U.S. Dist. LEXIS 151744, at *31-32 (S.D. Fla. Nov. 9, 2015) ("Parties colluding in a settlement would hardly need the services of a neutral third party to broker their deal.").

The parties' extensive negotiations were also informed by necessary and important discovery. Plaintiffs refused to schedule mediation prior to receiving Defendant's document production, and similarly Defendant refused to settle until it had the opportunity to depose two of the four class representatives – the parties were appropriately informed of the facts before reaching settlement. Straite Decl. ¶¶ 25, 40-41.

The litigation was also adversarial, and in the eleven months during which the claims were pending, the parties advocated their positions zealously, briefing significant motions. D.E. 2, 6, 14, 16-17, 21, 25, 27-29, 33, 39, 43-46, 48-55, 57-63, 72, 74, 77. The parties not only briefed defendant's motion to dismiss (D.E. 25, 45-46), but provided the Court with additional briefing regarding Article III standing after the Supreme Court's landmark decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (D.E. 48-54), as well as defendant's motion for reconsideration of the Court's order on its motion to dismiss or alternatively to certify certain issues for interlocutory appeal. D.E. 57-59. Plaintiffs had also filed their motion for class certification. D.E. 60, 74. The contentious nature of the proceedings confirm the absence of fraud or collusion. *See, e.g., Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001)

(there was "no doubt that th[e] case ha[d been] adversarial, featuring a high level of contention between the parties"); *accord Checking Account*, 830 F. Supp. 2d. at 1345.

2. SECOND FACTOR: The Issues Presented Were Highly Complex, and Settlement Approval Will Save the Class Years of Costly Litigation

This case involves complex legal claims and defenses brought on behalf of 1,391,943 class members, Straite Decl. ¶ 71 and Exhibit 5 thereto, and included claims for complex federal law violations and common law contractual and equitable claims in the emerging field of data privacy. D.E. 1. Litigating these claims, which included questions of first impression in this Court, would have likely required expert evidence regarding cyber security best practices and consumed significant time, money, and judicial resources. The Court should consider the significant burden this case would have imposed if it went to trial. *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992).

Had this case continued, defendant would have also vigorously opposed class certification, which may or may not have been granted. Assuming Plaintiffs prevailed, the parties would have incurred additional expense in completing discovery, filing motions for summary judgment, and preparing for trial. Even if Plaintiffs ultimately prevailed (which Defendant contests), that success would likely have borne fruit for the Class only after years of trial and appellate proceedings and the expenditure of millions of dollars by both sides. *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005). ("settlement will alleviate the need for judicial exploration of these complex subjects, reduce litigation cost, and eliminate the significant risk that individual claimants might recover nothing."); *In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d 891, 932 (E.D. La. 2012), *aff'd*, 739 F.3d 790 (5th Cir. 2014) ("Even assuming litigation could obtain the results that this Settlement provides, years of

litigation would stand between the class and any such recovery. Hence, this second [] factor weighs strongly in favor of granting final approval to the Settlement Agreement."). By contrast, the settlement provides immediate and substantial relief to the Settlement Class especially in the form of immediate and independent third-party verification of data security on the Lender Verification portal.

These benefits come without the expense, uncertainty, and delay of continued and indefinite litigation. In light of the costs, uncertainties, and delays of litigating through trial—to say nothing of appeal—"the benefits to the class of the present settlement become all the more apparent." *See Ressler*, 822 F. Supp. at 1555; *see also Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *15 (S.D. Fla. Oct. 4, 2013) (noting risk in that "Plaintiff has advanced a novel claim with little jurisprudence."); *Fresco v. Auto. Directions, Inc.*, No. 03-CIV-61063, 2009 U.S. Dist. LEXIS 125233, at *19 (S.D. Fla. Jan. 16, 2009) (approving settlement, noting the risk of litigating "unsettled elements in the construction of the [Driver's Privacy Protection Act]"). This factor thus supports approval.

3. THIRD FACTOR: The Factual Record was Sufficiently Developed

The purpose of considering the stage of the proceedings is to ensure that Plaintiffs had sufficient information to evaluate the case. *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 544 (S.D. Fla. 1988); *see also Morgan*, 2016 U.S. Dist. LEXIS 54937, at *21. While *some* discovery is favored, it is not necessary, however, to complete all fact discovery prior to settlement. "The law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required. . . ." *Ressler*, 822 F. Supp. at 1555; *Checking Account*, 830 F. Supp. 2d at 1349; *see also Oakes v. Blue Cross & Blue Shield of Fla., Inc.*, No. 16-80028-CIV, 2016 U.S. Dist. LEXIS 147252, at *5-6 (S.D. Fla. Oct. 21, 2016).

"Indeed, vast formal discovery need not be taken." *Wilson v. EverBank*, No. 14-CIV-22264-BLOOM/VALLE, 2016 U.S. Dist. LEXIS 15751, at *26 (S.D. Fla. Feb. 3, 2016).

Prior to mediation, the defendant produced two rounds of document discovery allowing plaintiffs to confirm all relevant aspects of the company's development of the Lender Verification portal and its data security, and importantly also included certain key documents dated after the date the complaint was filed. Straite Decl. ¶ 25. These later-dated documents gave Plaintiffs vital insight into the Company's response to the under-seal complaint and significantly enhanced the chances of settlement. Defendant also produced all documents related to the Class Representatives and deposed two of them. *Id*. ¶¶ 40-41. Additionally, the parties engaged in extensive presentations at mediation, vetting the evidence and setting out their positions on the facts and the application of the law thereto; new confidential facts were also disclosed at mediation that later facilitated settlement. *Id*. ¶¶ 32-33.

In sum, Plaintiffs had a strong understanding of the strengths and weaknesses of their case, and thus have an ample basis for making an informed judgment that the settlement is fair, adequate, and reasonable. Thus, this factor favors approval. *See In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001) (because the "case had progressed to a point where each side was well aware of the other side's position and the merits thereof[,] [t]his factor weighs in favor of the Court finding the proposed settlement to be fair, adequate, and reasonable"); *Behrens*, 118 F.R.D. at 544.

4. FOURTH FACTOR: Plaintiffs Would Have Faced Significant Obstacles

"[T]he likelihood and extent of any recovery from the defendants absent . . . settlement" must be considered in assessing the reasonableness of a settlement. *See In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 314 (N.D. Ga. 1993); *see also Ressler*, 822 F. Supp. at

1555 ("a court is to consider the likelihood of the plaintiffs' success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise"); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1323-24 (S.D. Fla. 2007).

Class Counsel and Plaintiffs believe they have a compelling case, but also recognize that their case is a bit cutting-edge and raises some questions of first impression to which defendant raised non-frivolous defenses. In Class Counsel's view, these defenses would have likely failed, but there are no guarantees in an area of law developing as rapidly as this one. *See also Fresco*, 2009 U.S. Dist. LEXIS 125233, at *16-17 (factor favors settlement where "success at trial is not certain for Plaintiffs"); *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-MDL-1317-SEITZ/KLEIN, 2005 U.S. Dist. LEXIS 13992, at *36-37 (S.D. Fla. July 8, 2005) ("the Court finds that the outcome of a trial on the merits was by no means certain"). As there was no certainty of winning, this factor favors approval.

5. FIFTH FACTOR: The Benefits Provided by the Settlement are Fair, Reasonable, and Adequate When Considered Against the Possible Range of Recovery

The fifth factor requires the Court to determine the possible range of recovery and then determine the minimum fair, reasonable, and adequate settlement within that range. *Lipuma*, 406 F. Supp. 2d at 1322. The Court must evaluate the settlement "in light of the attendant risks with litigation." *Checking Account*, 830 F. Supp. 2d at 1350. Courts emphasize that settlement is compromise and requires "an abandoning of highest hopes." *Id.* As explained above, the settlement offers significant injunctive relief, as well as two forms of non-cash financial benefit and separately paid attorneys' fees and class representative awards:

> In ascertaining whether a settlement falls within the range of possible approval, courts will compare the settlement amount to the relief the class could expect to

> recover at trial. The fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate. This is because settlements must be evaluated in light of the attendant risks with litigation. As discussed, Plaintiff faced significant hurdles on the merits of each of his claims, in certifying a class, and in collecting any judgment. No amount of recovery would be guaranteed by litigating these claims through trial.

Carter v. Forjas Taurus S.A., No. 1:13-CV-24583-PAS, 2016 U.S. Dist. LEXIS 96054, at *33 (S.D. Fla. July 22, 2016).

When valuing the total recovery obtained, this Court has repeatedly emphasized the value of important injunctive relief. *See, e.g., Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 154762, at *12-13 (S.D. Fla. Oct. 24, 2014) ("The Court first finds that the significant injunctive relief provided under the Settlement Agreement is not illusory, but constitutes important changes . . . . the injunctive changes provided . . . are important and have significant value to the class members"); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1381 (S.D. Fla. 2007) (describing important injunctive relief in discussing range of possible recovery); *Lipuma*, 406 F. Supp. 2d at 1323 (S.D. Fla. 2005) (valuing injunctive relief as part of "significant relief" made available to class and determining that settlement was fair, adequate, and reasonable). The injunctive relief received here is two-fold: *first*, defendant represents that it has ***already*** addressed the alleged vulnerability while the case remained under seal in its entirety (a fact observed by the Class Representatives), and *second*, Defendant has agreed to submit to an independent third-party privacy audit to ensure its systems meet industry best practices.

In addition to the paramount injunctive relief achieved, defendant will offer two forms of non-cash financial relief, valued together at more than $140 per class member at retail if obtained on an individual basis. Straite Decl. ¶ 70 and Ex. 4 thereto. This value exceeds the $100 statutory recovery available under the Plaintiffs' primary FCRA claim. 15 U.S.C. § 1681n.

These benefits also require no claim form to be a member of the class – coverage is automatic immediately upon the Effective Date of the Settlement unless a class member requests exclusion. "[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).

The Class Representatives faced significant hurdles in litigating their claims to resolution. Each class member will receive real and important identity theft protection from ID Experts and AIG as a result of the settlement, and, more importantly, Kroll will independently confirm the use of industry best practices to protect the portal. These results fall at the very top end of the range of reasonableness. This factor thus weighs in favor of approval.

6. SIXTH FACTOR: The Opinions of Class Counsel and the Class Representatives, and the Reaction of Class Members, Strongly Favor Settlement Approval

A court should give deference to the recommendations of counsel, given their considerable experience in this type of litigation. *Montoya*, 2016 U.S. Dist. LEXIS 50315, at *52 (quoting *Warren*, 693 F. Supp. at 1060); *see also Family Med. Pharm., LLC v. Trxade Grp., Inc.*, No. 15-0590-KD-B, 2017 U.S. Dist. LEXIS 38637, at *14 (S.D. Ala. Mar. 17, 2017). Class Counsel are highly regarded in the emerging field of data privacy, see D.E. 85-4 (firm biography) and fully support the Settlement. Straite Decl. ¶ 6. Class Counsel has helped develop the law through the prosecution of novel and complex cases. *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

representing a proposed class of financial institutions impacted by data breach); *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.); *In re Horizon Healthcare Services Inc. Data Breach Litigation*, No. 13-7418 (CCC) (D.N.J.) (Kaplan Fox co-lead counsel obtaining recent precedential ruling from Third Circuit regarding *Spokeo* standing to assert FCRA claim).

The overwhelmingly positive reaction of class members to a proposed settlement is a also significant factor, and the absence of significant objections "is excellent evidence of the settlement's fairness and adequacy." *Ressler*, 822 F. Supp. at 1556; *Access Now*, 2002 U.S. Dist. LEXIS 28975, at *20 ("The fact that no objections have been filed strongly favors approval of the settlement"). Although the deadline for objections has not yet come, the fact that only one objection has been filed from over one million class members (in a direct notice program) speaks volumes. *See Saccoccio*, 297 F.R.D. at 694 ("a low number of objections suggests that the settlement is reasonable, while a high number of objections would provide a basis for finding that the settlement was unreasonable."). And as will be elaborated in more detail on or before the July 15, 2017 deadline to Reply to objections, it is not entirely clear that the current objection is actually an objection to this settlement, see Straite Decl. ¶ 54, and the true number of current objections might be zero. Viewed either independently or taken together, the above factors confirm that the settlement is fair, reasonable, and adequate.

VII. CONCLUSION

Class Representatives respectfully request the Court enter an order granting final approval of the Settlement.

Dated: May 15, 2017

Respectfully submitted,

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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