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 PRELIMINARY APPROVAL OF SETTLEMENT, CERTIFICATION OF CLASS AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

Plaintiffs Karen Rodriguez, Antonio Rodriguez, Boris Shaykevich and Yelena Shaykevich, on behalf of themselves and the proposed Settlement Class (as defined below), have reached a proposed settlement of the above-captioned data privacy class action lawsuit (the "Action" or the "Litigation"). If approved, the proposed Settlement will resolve all claims in the Action on behalf of certain current and former customers of defendant Universal Property & Casualty Ins. Co. ("Universal Property" or the "Company") (the proposed "Settlement Class"), as set forth below in Section V.

Plaintiffs therefore respectfully move the Court for an order pursuant to Fed. R. Civ. P. 23(e) preliminarily approving the Settlement and approving the form and manner of providing notice of the Settlement to the Settlement Class. Plaintiffs also move pursuant to Rules 23(a), 23(b)(2) and 23(b)(3) for provisional certification of the Settlement Class for settlement purposes only, and move for the provisional appointment of class representatives and class counsel pursuant to Rule 23(g)(1). Plaintiffs also request that the Court set a hearing date at which the Court will consider final approval of the Settlement and proposed Class Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses. Defense counsel have advised that defendant does not oppose this Motion.

I. INTRODUCTION

As set forth in the Settlement Agreement dated January 31, 2017 ("Agreement"), attached as Exhibit 1 to the Declaration of David A. Straite in support of plaintiffs' motion dated February 7, 2017 ("Straite Declaration"), the Settlement, if approved, will resolve all claims against defendant and certain related parties. Plaintiffs' principal reason for bringing this Action under seal and under Court supervision was to fix what they believed to be a vulnerability on the "lender verification" portal on defendant's website, which, in plaintiffs' view, exposed customer

information (considered highly sensitive by plaintiffs) potentially affecting more than 600,000 homeowners. After the filing of the lawsuit, defendant re-designed its lender verification portal. Plaintiffs believe their actions were important to *prevent* a data breach and to materially improve defendant's data security.

The plaintiffs have also secured significant injunctive and financial benefit for the Settlement Class, subject to Court approval. First, defendant agreed to undergo an independent privacy audit to verify the security of its redesigned lender verification portal. Second, plaintiffs secured two forms of financial benefit for the class (credit restoration and recovery services, and identity theft reimbursement insurance). All class members would qualify for these benefits at no charge and without the need to file a claim form; also, neither benefit is predicated on proving a data breach of defendant's website specifically. Defendant has also agreed to administer a direct notice program at its own expense. And of course any class member retains the right to opt out of the financial benefit portion of this Settlement and pursue his or her own claim for damages.

The Settlement is an excellent result for the Settlement Class especially when considered against the significant risk of additional motion practice, the uncertainty inherent in a trial of the Action and/or prolonged litigation necessary for the completion of any subsequent appeals. The Settlement was reached after almost a year of extensive litigation, including two rounds of document production; several rounds of briefing and post-*Spokeo* supplemental briefing on defendant's motion to dismiss; additional briefing on the motion for reconsideration of the decision on the motion to dismiss, and petition for interlocutory appeal; a full-day mediation before retired United States Magistrate Judge Morton Denlow in Chicago; two plaintiff depositions; and prolonged, arms'-length settlement negotiations following mediation. As a

result, plaintiffs and Lead Counsel had a thorough understanding of the relative strengths and weaknesses of the claims asserted at the time the Settlement was reached. Lead Counsel, who have substantial experience prosecuting data privacy class actions, believe that the Settlement is in the best interests of the Settlement Class.

At the final approval hearing (the "Final Approval Hearing"), the Court will have before it more extensive motion papers submitted in support of the Settlement, and will be asked to make a final determination as to whether the Settlement is fair, reasonable, and adequate under all of the circumstances surrounding the Action. At this juncture, plaintiffs request only that the Court grant preliminary approval of the Settlement so that notice of the Settlement may be disseminated to the Class and the Final Approval Hearing may be scheduled.

Plaintiffs therefore respectfully request that this Court enter the proposed Order Preliminarily Approving Settlement, Providing for Notice and Scheduling Hearing ("Preliminary Approval Order"), which has been agreed upon by the Parties, a copy of which is attached as Exhibit 1-C to the Straite Declaration. The Preliminary Approval Order will, if granted: (i) preliminarily approve the Settlement set forth in the Agreement; (ii) approve the form and manner of giving notice to the Class; (iii) provisionally certify a Settlement Class for the purposes of Settlement only; (iv) provisionally appoint Class Counsel and Class Representatives; and (v) set a date for the Final Approval Hearing at which the Court will consider final approval of the Settlement and Class Counsel's application for attorneys' fees and expenses.

II. DESCRIPTION OF THE LITIGATION[1]

On March 7, 2016, plaintiffs filed a class action complaint alleging violations of the Fair Credit Reporting Act, Breach of Contract and Unjust Enrichment against Universal Property (the

[1] Although defendant does not oppose this motion, it does not adopt this section. This section represents plaintiffs' positions as to the factual background.

"Complaint", D.E. 1). As Florida's largest private issuer of homeowners' insurance policies, defendant makes certain sensitive customer information available to third-party mortgage lenders, including insurance declaration pages and evidence of insurance (the "Insurance Documents") through the Lender Verification portal on defendant's website. As alleged in the Complaint, the Insurance Documents contain limits of insurance, riders for additional insurance for jewelry or other personal property in the home, telephone numbers, actual names of the insureds, the addresses of the insured property, and whether the subject property is secured by a burglar alarm. Plaintiffs discovered that the documents had what they considered to be inadequate security, leaving the documents potentially exposed on the website without password protection or encryption.

Given the sensitivity of the information, 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. The case was unsealed on April 27, 2016. D.E. 27. Plaintiffs filed a public redacted version of the Complaint on April 29, 2016 after conferring with defendant. 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 decision in the unrelated case of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the parties were allowed two additional rounds of briefing – plaintiffs filed their *Spokeo* brief on June 15, 2016 (D.E. 52) and defendant filed on June 27, 2016. D.E. 53. The Court denied defendant's motion to dismiss in its entirety on August 19, 2016. D.E. 55. Defendant filed its Answer on September 2, 2016. D.E. 56. Defendant moved for reconsideration of the order on its motion to dismiss on

September 14, 2016 (D.E. 57), and briefing concluded on that motion on October 5, 2016. *See* D.E. 58 & 59.

Plaintiffs served discovery on June 22, 2016. The parties agreed to a rolling production of documents. Defendant agreed to prioritize discovery related to class certification, and plaintiffs received the first batch of documents on September 26, 2016. A second production was made on October 14, 2016. On October 25, 2016, plaintiffs filed their motion for class certification under seal. D.E. 60, 61.

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 retired United States Magistrate Judge Morton Denlow (now with JAMS). D.E. 63. The documents produced by defendant enabled plaintiffs to negotiate on an informed basis.

Although the parties did not reach an agreement on December 8, the mediation helped to frame and clarify issues. Consistent with Judge Denlow's advice, the parties continued negotiations. Discovery continued through this period, including depositions of two plaintiffs on Thursday, January 19 and Friday, January 20, 2017. The parties reached an agreement to settle on a classwide basis in principle on Sunday, January 22, 2017, and executed a confidential term sheet on January 23 and 24, 2017. A final class action settlement agreement was executed on January 31, 2017. Plaintiffs provided a courtesy copy of the agreement to the Court on the same day, and withdrew their October 25, 2016 motion for class certification, see D.E. 82, which has been superseded by today's unopposed motion.

III. THE PROPOSED SETTLEMENT

A. Injunctive Relief

Upon Court approval, the Settlement obligates defendant to submit to an independent privacy audit. *See generally* Settlement Agreement § 4. The auditor must be mutually agreed, and the auditor must submit an audit report to Lead Counsel within fifty (50) business days of the Effective Date of the Settlement. If the auditor cannot verify "industry best data protection," defendant is obligated to cure the deficiency and to keep Lead Counsel (and the Court) apprised.

B. Additional Settlement Consideration

Defendant also agreed to provide the following financial benefits to the Settlement Class:

1. Managed Recovery and Restoration Services

For a period of two (2) years commencing on the Effective Date of the Settlement, defendant has agreed to provide Class Members "managed recovery and restoration services" from "ID Experts" if any become victims of identity theft, regardless of whether the identity theft was related to defendant's website. 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 by a suspected Chinese-government-linked hacker. The product is not traditional "credit monitoring" or credit protection, but rather a powerful recovery service that assists those Class Members who experience an identity theft. The services are discussed in detail in Section 5 of the Agreement, but in sum 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 usually covered by credit monitoring services.

2. Identity Theft Reimbursement Insurance

For a period of one (1) year commencing on the Effective Date, defendant has agreed to provide an identity theft reimbursement insurance policy for the Settlement Class to act as a complement to the managed recovery and restoration services discussed above. This insurance will reimburse Class Members for expenses associated with restoring a Class Member's identity if compromised, providing up to $1,000,000 of coverage with no deductible. Class Members will be covered by the policy regardless of whether the identity theft was related to defendant's website. Defendant has discretion in the selection of an insurance carrier, subject to two conditions: first, it must be selected promptly to comply with all relevant deadlines in the Settlement Agreement (and in advance of the Fairness Hearing), and second, defendant must select an A.M. Best "A-rated" carrier. *See* Section 6 of the Agreement for additional detail.

3. Actual, Direct Class Notice

Defendant is responsible to provide individual direct email Notice to Class Members for whom defendant has email contact information, and hard copy U.S. Mail Notice of the Settlement to Class Members for whom email Class Notice is undeliverable or unavailable. *See* Settlement Agreement, § 8.

4. Incentive Awards

Subject to Court approval, defendant has agreed to pay awards of up to (but no more than) $7,500 individually to Karen Rodriguez, $7,500 individually to Antonio Rodriguez, and $7,500 jointly to Boris and Yelena Shaykevich. *See* Settlement Agreement, § 9.2.

5. Attorneys' Fees and Expenses

The Agreement is not conditioned on defendant's agreement to support (or the Court's award of) any attorney's fee application. However, defendant has agreed not oppose any fee

application to the extent Class Counsel request up to (but not more than) $850,000 in fees and expenses. *Id*. §§ 9.1 and 9.2.

IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL AS WITHIN THE RANGE OF FAIR, ADEQUATE, AND REASONABLE

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. *See In re: U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). However, Federal Rule of Civil Procedure 23(e) requires judicial approval for the compromise of class claims, consisting of two steps: preliminary approval and a subsequent fairness hearing. At preliminary approval, the standards are more relaxed than those applied upon a motion for final approval. *See, e.g., Fresco v. Auto Data Direct, Inc.*, No. 03-61063-CIV-MARTINEZ, 2007 WL 2330895 (S.D. Fla., May 14, 2007). "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. William Wrigley Jr. Co.*, No. 09-60646-CIV-COHN, 2010 WL 2401149, at *2 (S.D. Fla., Jun. 15, 2010); *see also* MANUAL FOR COMPLEX LITIGATION, THIRD § 30.41, at 237 (1995) ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies … and appears to fall within the range of possible approval," the Court should grant preliminary approval and direct notice and schedule a final approval hearing).

Plaintiffs here request that the Court take the first step in the settlement approval process and grant preliminary approval of the Settlement so that notice of the Settlement can be given to the Settlement Class. As summarized below, and as will be detailed further in a subsequent motion for final approval of the Settlement, a preview of the factors considered by courts in granting final approval of class action settlements demonstrates that the Settlement is well "within the range of reason" and that preliminary approval should be granted.

Courts presume that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations between well-informed, experienced counsel, a presumption that is further strengthened when negotiations are assisted by an experienced, neutral mediator, as was the case here. *See, e.g.*, *Morgan v. Public Storage*, No. 14-21559-CV-UNGARO, 2016 U.S. Dist. LEXIS 54937, at *17 (S.D. Fla., Mar. 10, 2016) (internal citations omitted). In addition, mediation did not even commence until after plaintiffs reviewed all documents produced by defendant to ensure that negotiations were conducted on an informed basis. Defendant likewise took the depositions of two of the four plaintiffs before agreeing to settle. *See* Straite Decl. ¶ 4.

Further, in determining the good faith of this settlement proposal, the Court can consider the judgment of Lead Counsel. *See Morgan*, 2016 U.S. Dist. LEXIS 54937, at *27-28; *Smith*, 2010 WL 2401149, at *2, n.1. As noted below, Lead Counsel have significant experience in the emerging field of data privacy litigation, and respectfully submit that their judgment should be given weight. Consequently, the Court has ample evidence that the Settlement was negotiated in good faith by well-informed counsel, and was not the product of collusion. *See also Smith*, 2010 WL 2401149, at *2 ("Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient.") (internal citations omitted).

The proposed Settlement achieves the primary goal of this Action: to obtain independent confirmation that the defendant's Lender Verification protocol now protects sensitive customer data consistent with industry best practices to ensure compliance with federal law and contractual obligations. The settlement also provides additional financial benefit to the Class in the form of identity theft protection and a separate insurance product covering up to $1 million per Class Member for certain consequential damages related to an identity theft. Defendant has agreed to provide a market value of these benefits in advance of the Final Approval Hearing.

V. THE PROPOSED CLASS MEETS THE PREREQUISITES FOR PROVISIONAL CLASS CERTIFICATION UNDER FED. R. CIV. P. 23

The plaintiffs seek provisional certification of the following proposed nationwide settlement class for settlement purposes only:

> *All current and former customers of defendant Universal Property & Casualty Insurance Company who insured real property with defendant between September 1, 2013 and March 31, 2016.*
>
> *Excluded from the proposed class are defendant, its past or current officers, directors, affiliates, legal representatives, predecessors, successors, assigns and entities in which any of them have a controlling interest. Also excluded is defendant's indirect ultimate parent entity, and any entity in which any of them have a controlling interest, directly or indirectly. The proposed class also excludes all judicial officers assigned to this case as defined by 28 U.S.C. § 455(b), and their immediate families.*

"Courts often certify classes for settlement purposes, and it is not uncommon for courts to certify settlement classes on a preliminary basis, at the same time as the preliminary approval of the fairness of the settlement, solely for the purpose of settlement, deferring final certification of the class until after the fairness hearing." *In re Take Two Interactive Secs. Litig.*, No. 06 Civ. 803 (RJS), 2010 U.S. Dist. LEXIS 143837, at *16 (S.D.N.Y. June 29, 2010). Pursuant to Fed. R. Civ. P. 23, a class may be certified if plaintiffs demonstrate that each of Rule 23(a)'s four prerequisites of numerosity, commonality, typicality and adequacy are met, and that the matter also qualifies under one of the requirements of Rule 23(b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The requirements for approving certification of a settlement class are lower than those for a litigated class. *Id.*

A. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). The Court may "make common sense assumptions in

order to find support for numerosity." *Evans v. United States Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983); *accord*, *Agan v. Katzman & Korr*, 222 F.R.D. 692, 696-97 (S.D. Fla. 2004). In this case, defendant has admitted that the proposed class as defined above exceeds 500,000 members, see Answer, D.E. 56, ¶ 3, far exceeding the number where numerosity is presumptively met.

Under Rule 23(a)(1), joinder must only be impractical, not impossible. *Fuller v. Becker & Poliakoff, P.A.*, 197 F.R.D. 697, 699 (M.D. Fla. 2000). "When the class is large, numbers alone are dispositive." *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986). Where the class numbers 25 or more, joinder is usually impracticable. *Amstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986) (25 sufficient). In this case, joinder of a half-million class members is a practical impossibility, and so numerosity is met.

B. Commonality

Commonalty, the second requirement under Rule 23(a), is met if plaintiffs' grievances share a common question of law or fact. Complete commonality is not required. Rather, the moving party need only show at least one issue common to the class. *Hicks v. Client Services, Inc.*, No. 07-61822-CIV, 2008 U.S. Dist. LEXIS 101129, at *13 (S.D. Fla. Dec. 11, 2008); *Armstead*, 629 F. Supp. at 280. In addition, plaintiffs need only show that a common question is susceptible to a common answer, not that the common question will be answered in their favor. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

As set forth in the Complaint, this action satisfies the commonality element, as there is at least one common question of law or fact. "A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." *Kornburg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). "The commonality element is generally satisfied when a plaintiff

alleges that 'defendants have engaged in a standardized course of conduct that affects all class members.'" *Drossin v. National Action Financial Services, Inc.*, 255 F.R.D. 608, 615 (S.D. Fla. 2009) (quoting *In re Terazosin Hydrochloride*, 220 F.R.D. 672, 687 (S.D. Fla. 2004)). Here, lead plaintiffs allege that defendant created a database of sensitive Insurance Documents without legally sufficient data protection. These facts are common to all class members.

C. Typicality

Rule 23(a)(3) requires that the claims of the named plaintiffs be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). A named plaintiff's claim is typical if it arises from the same practices that give rise to the claims of other class members and the claims are based on the same legal theory. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985); *Kornburg*, 741 F.2d at 1337; *Agan*, 222 F.R.D. at 698-99. The typicality element is satisfied for the same reasons that the commonality requirement is satisfied. As the Supreme Court has explained, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge" because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel. Co. v. Falcon*, 457 U.S. 147, 163 n.13 (1982). In the instant case, typicality is inherent in the class definition, as all class members' sensitive information was available through the lender verification portal. Discovery also confirms that all four proposed class representatives were policy holders during the proposed class period.

D. Adequacy

Finally, Rule 23(a)(4) requires that the class representatives will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Under this criterion, the named plaintiffs must ensure that (1) no conflict of interest exists between them and the putative class

members and that (2) the action will be vigorously prosecuted." *Israel v. Avis Rent-A-Car Sys.*, 185 F.R.D. 372, 380 (S.D. Fla. 1999). Here, the proposed Class Representatives are individual policy holders. Each purchased a home insurance policy from defendant. No class member has unique claims antagonistic to the class. No Class Representative is pursuing unique claims related to identity theft, personal injury or other individualized claim. Perhaps most importantly, plaintiffs have actively participated in the Action by, *inter alia*, consulting with Class Counsel and participating in discovery (including document production and attending depositions). Finally, as discussed in Section VI below, Class Representatives have retained counsel qualified to conduct the litigation.

E. Injunctive Relief: Defendant Has Acted on Grounds Generally Applicable to the Class as Whole

"An action may be certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Wal-Mart*, 131 S. Ct. at 2557 (holding that certification under Rule 23(b)(2) is appropriate "when a single injunction or declaratory judgment would provide relief to each member of the class."). The Supreme Court has said that "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all the class members or as to none of them." *Wal-Mart*, 131 S. Ct. at 2557 (citation omitted).

Pursuant to Rule 23(b)(2) and pursuant to agreement with defendant, plaintiffs seek an injunction on behalf of the proposed class requiring defendant to retain an independent privacy auditor to verify that the Lender Verification portal conforms to industry best data security

practices. Here, not only could the proposed injunction apply to the entire class, it is difficult to envision how such an injunction would not apply to the entire class.

F. Financial Benefit: Common Questions of Law Predominate and a Class Action is the Superior Method of Adjudication

The "predominance" prong of Rule 23(b)(3) provides that an action is maintainable as a class action if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Under Rule 23(b)(3) it is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004); *accord*, *Carter v. West Publ. Co.*, No. 97-2537-CIV, 1999 WL 376502, at *7 (M.D. Fla. May 20, 1999). "The court's inquiry is typically focused on 'whether there are common liability issues which may be resolved efficiently on a class-wide basis.'" *Drossin*, 255 F.R.D. at 616 (quoting *Brown v. SCI Funeral Servs. of Fla.*, 212 F.R.D. 602, 606 (S.D. Fla. 2003)). It is not a requirement that all elements of plaintiffs' claims be "susceptible to classwide proof," but only that common questions predominate over any questions affecting only individuals. *Amgen*, 133 S. Ct. at 1196. Here, according to the Complaint, all elements of the claims are susceptible to common proof in part because all Class Members were equally affected by the security lapse on the Lender Verification portal, and thus common questions predominate.

"The superiority issue is whether a class action is superior to other available methods for fair and efficient adjudication of the controversy." *Carter*, 1999 WL 376502, at *21. Efficiency is the primary focus in determining whether the class action is the superior method for resolving the controversy presented. "[T]he class action procedure allows for the efficient and economical litigation of a question potentially affecting every class member." *Kelly v. Sabertech Inc.*, No. 97-1718-CIV, 1999 U.S. Dist. Lexis 15445, at **8-9 (S.D. Fla. July 19, 1999).

The class members' interests in individually controlling the prosecution of separate actions is minimal – proposed class counsel is not aware of any active related case. Furthermore, because statutory damages are set at only $100 per class member (and contract damages and unjust enrichment damages are likely to be even less per class member), individual cases are impossible as a practical matter. Thus, the certification of this action as a class action would not only be "superior to other available methods for fair and efficient adjudication of the controversy[,]" *Carter*, 1999 WL 376502, at *21, but it unquestionably appears to be the sole method "for the efficient and economical litigation of a question potentially affecting every class member." *Kelly*, 1999 U.S. Dist. Lexis 15445, at **8-9.

VI. KAPLAN FOX & KILSHEIMER LLP AND WITES & KAPETAN P.A. SHOULD BE APPOINTED CLASS COUNSEL PURSUANT TO RULE 23(g)

A. Standard for Appointment of Class Counsel

Lead plaintiffs respectfully request that the Court provisionally appoint Kaplan Fox & Kilsheimer LLP as Lead Counsel and Wites & Kapetan P.A. as Liaison Counsel. Pursuant to Rule 23(g), a court that certifies a class must appoint class counsel, who must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Under this Rule, the court evaluates counsel according to (1) their work in identifying and investigating plaintiffs' claims, (2) their experience in similar litigation, (3) their knowledge of applicable law, and (4) the resources they will commit to prosecuting the action. Fed. R. Civ. P. 23(g)(1)(C)(i). These criteria are met by both proposed class counsel firms, Wites & Kapetan P.A. and Kaplan Fox & Kilsheimer LLP. Full firm resumes for Wites & Kapetan and Kaplan Fox accompany this motion. *See* Straite Decl., Exs. 2 and 3.

B. The First Factor: Kaplan Fox and Wites & Kapetan Have Spent Significant Time and Devoted Substantial Resources to This Action

The attorneys and other professionals in this case have invested substantial time and effort identifying and investigating claims against defendant on behalf of the putative class. Before filing the Complaint, attorneys at both firms investigated the allegations, researched the relevant legal principles and drafted the Complaint, among other pre-filing activities. Kaplan Fox was assisted by the efforts of its in-house Certified Fraud Examiner. Counsel have engaged in substantial motion practice before and after the Supreme Court issued its opinion in *Spokeo*, sealed and unsealed the case, reviewed two rounds of document production, participated in a full-day mediation, and spent more than six weeks after mediation negotiating a final resolution, during which time discovery continued and two of the four plaintiffs were deposed.

C. The Second Factor: Proposed Class Counsel's Experience Qualifies the Firms to Serve as Class Counsel

The second factor also supports the appointment of Wites & Kaptan and Kaplan Fox as class counsel. Proposed Lead 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 praised as "novel" and "complex" in her order granting final approval. *In re: Yahoo Mail Litig*., 13-cv-4980, 2016 WL 4474612, at *6 (N.D. Cal., Aug. 25, 2016). Kaplan Fox attorney David Straite was also called "something of a pioneer" in data privacy litigation by M.I.T. Technology Review magazine in 2012, and in less than two weeks he will be speaking on a *Spokeo*/Cybersecurity

panel with Dean Erwin Chemerinsky and the Hon. Lorna Schofield at the Federal Bar Council's winter meeting. 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 is attached as Ex. 3 to the Straite Decl.

Plaintiffs also propose Wites & Kapetan act as liaison counsel. Marc Wites' experience in Florida class action and complex litigation is exemplary, as demonstrated by his firm's bio attached as Ex. 2 to the Straite Decl. 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 the matter styled *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.

D. The Third Factor: Proposed Class Counsel Have Proven Knowledge of the Applicable Law

The third factor to be considered similarly supports the appointment of Wites & Kapetan and Kaplan Fox as class counsel. Both firms have experience in representing plaintiffs in complex class actions generally. *See, e.g., In re Bank of America Corp. Sec., Deriv. and ERISA Litig.*, 258 F.R.D. 260, 271 (S.D.N.Y. 2009) (Chin, J.) (appointing Kaplan Fox as co-lead class counsel; counsel found to be "highly experienced in prosecuting class actions") ($2.425 billion recovered for the class). In addition, as noted above, proposed Lead Counsel is an early leader in the emerging field of complex data privacy litigation specifically. *See generally In re Terzaosin*

Hydrachloride, 220 F.R.D. at 702 (counsel's "experience in, and knowledge of, applicable law in this field" in the "most persuasive" factor in connection with the appointment of lead counsel); *In re: Yahoo Mail Litigation*, 2016 WL 4474612 at *6 (noting the "Settlement is further strengthened by the fact that the instant action raises several novel legal issues.").

E. The Fourth Factor: Proposed Class Counsel Have The Resources Necessary to Represent the Proposed Class

Finally, Wites & Kapetan and Kaplan Fox have the ability and commitment to devote substantial resources to representing plaintiffs and the proposed class. Wites & Kapetan and Kaplan Fox have a history of committing ample resources to class action litigation, and will do the same in litigating this case.

VII. THE PROPOSED FORM AND METHOD OF NOTICE TO THE CLASS SHOULD BE APPROVED

A. The Form of the Proposed Notice

If the Court preliminarily approves the Settlement, notice will be provided to the proposed Settlement Class of current and former Universal Property customers as defined in Section V by: (1) providing direct email notice where the email addresses are known; (2) sending hard-copy notice via U.S. Mail to those class members for whom email addresses are not known; and (3) setting up and maintaining a dedicated settlement website to be identified in the Notice and Summary Notice (the "Settlement Website"). The Notice Program is described in more detail in Section 8 of the Settlement Agreement.

The Notice and Summary Notice, attached as Exhibits to the Settlement Agreement, will advise Class Members of the principal terms of the Settlement, and they each will specify the Settlement Website address to consult for information regarding the Settlement. They will also describe the procedure for objecting to the Settlement and provide specifics regarding the date,

time and place of the Settlement Hearing. The Settlement Website will provide access to copies of the Notice, Summary Notice, Settlement Agreement and important documents filed with the Court, and will also provide dates and deadlines regarding the Settlement, including the deadline for submitting objections and the date of the Settlement Hearing.

The Notice will also advise the proposed Settlement Class that if the Settlement is approved, Class Counsel intend 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 (the "Fee Application"). The Notice will inform the proposed Settlement Class that if the Settlement is approved, the Court will thereafter hold a hearing to consider the Fee Application and any objections thereto, and that information regarding the Fee Application and such hearing will be made available on the Settlement Website.

B. The Notice Program Comports with Due Process

Rule 23(e) requires that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval" and as a part of the approval process, the "court must direct notice in a reasonable manner to all class members." Rule 23(e)(1). Similarly, the standard for determining the adequacy of a settlement notice under either the Due Process Clause or the Federal Rules is *reasonableness*, which means the "best notice that is practicable under the circumstances." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Here, defendant regularly communicates with its customers in the ordinary course of business, and there are no known proposed members of the Settlement Class for whom defendant does not have current or recently current contact information, and defendant is therefore able to conduct an actual notice program and need not turn to the less reliable "publication" notice method. For those proposed members of the Settlement Class whose email addresses are current, defendant will send notification via email. Because defendant already

communicates with its customers via email, the chances of the Notice being caught in a recipient's spam filter are far lower than if the recipient did not already have a relationship with the sender. For those customers who cannot be notified via email (either because the email address is unknown, or the email is bounced back), defendant will send notice via U.S. Mail. This combination of U.S. Mail and email comports with substantive due process without the need for less reliable publication notice. *See, e.g., Stickle v. SCI W. Mkt. Support Ctr., L.P.*, No. 08-083-PHX-MHM, 2009 U.S. Dist. LEXIS 97735 (D. Ariz. Sep. 30, 2009).

VIII. PROPOSED SCHEDULE

Upon preliminary approval, the parties defer to the Court's discretion with respect to the final approval schedule, but respectfully suggest the following:

Event	Suggested Date
Deadline to Select Independent Auditor	10 business days after entry of Preliminary Approval Order
Deadline for sending Notice to the Class ("Notice Date")	30 business days after entry of Preliminary Approval Order
Filing of briefs in support of final approval of Settlement and Lead Counsel's fee and expense request	60 days after Notice Date
Receipt deadline for objections and requests to opt out of Class	90 days after Notice Date
Filing of reply memoranda in support of final approval of Settlement and Lead Counsel's fee and expense request, including response to any objectors	120 days after Notice Date
Final Approval Hearing	135 days after Notice Date

IX. CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement and enter the accompanying proposed Preliminary Approval Order, certify this action as a Class Action under Rule 23(b)(2) and (b)(3) and appoint Class Counsel and Class Representatives under Rule 23(g). Plaintiffs conferred with defendant regarding this motion and defendant does not oppose.

Dated: February 8, 2017

WITES & KAPETAN P.A.

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CERTIFICATE OF SERVICE

I, Marc Wites, hereby certify that I caused the foregoing to be filed with the Court using the CM/ECF system, and served the same on all counsel of record in this case as follows:

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