IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

John Demsheck, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**Case No. 3:09-CV-335-HLA-TEM**
v.	)	
Ginn Development Company, LLC,	)	
Defendant.	)	

PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND INCORPORATED MEMORANDUM OF LAW

COMES NOW Plaintiff John Demsheck, individually and on behalf of all others similarly situated, and hereby moves the Court to conditionally certify the proposed settlement class and preliminarily approve the proposed settlement and class notice, respectfully showing as follows:

I. INTRODUCTION

After four years of extensive motion practice, discovery and settlement negotiations, Plaintiff has reached an agreement with Defendant Ginn Development Company, LLC ("Ginn") to resolve this case. Plaintiff now seeks entry of an Order that (i) certifies a provisional settlement class (the "Settlement Class"), (ii) grants preliminary approval of the settlement agreement attached as Exhibit 1 (the "Agreement") to Plaintiff's Initial Motion (Dkt. Doc. No. 138) , and (iii) approves the parties' proposed notice to the Settlement Class (Exhibit D to the Agreement, which is attached to Dkt. Doc. No. 138) and attendant claim form (Exhibit B to the Agreement, which is attached to Dkt. Doc. No. 138).

First, the Court should certify the provisional Settlement Class because the four requirements of Fed. R. Civ. P. 23(a) are satisfied. Specifically, the Settlement Class satisfies the numerosity requirement because the number of Settlement Class members here -- likely in the hundreds -- renders joinder impracticable. Commonality is satisfied because the Settlement Class members are pursuing common issues relating to Ginn's alleged failure to provide Plaintiff and the class members with the required property report before they signed a contract relating to their real estate purchases. Typicality is satisfied because Plaintiff's claims arise from the same alleged conduct as the claims of other class members and are based on the same theory, including that Ginn failed to provide Plaintiff and the class members with the required property report before they signed a contract relating to their real estate purchases. Adequacy of representation is satisfied because Plaintiff's counsel are qualified and because Plaintiff does not have any interests antagonistic to those of the Settlement Class. In addition, Rule 23(b)(3)'s predominance requirement is satisfied because the crux of all class members' claims is whether Ginn failed to provide Plaintiff and the class members with the required property report before they signed a contract relating to their real estate purchases, and maintaining this action as a class action is the superior procedural vehicle because it will provide the Settlement Class with prompt, monetary relief in connection with their claims.

Second, the Court should grant preliminary approval of the proposed Agreement because there is a strong public policy favoring settlement of class actions and because the proposed Agreement here is fair, reasonable, and adequate. Specifically, the Agreement is

not the product of fraud or collusion, the litigation is complex and would be lengthy and expensive if it is not settled, the proceedings have advanced sufficiently over the past four years to allow the parties to make a reasonable determination as to the reasonableness of settlement, there are numerous factual and legal obstacles both sides would face in connection with prevailing on the merits, the Settlement Class would face challenges recovering on any judgment that might ultimately be obtained, and the parties and their counsel unanimously agree that settlement is appropriate under the terms set forth in the Agreement.

Finally, the Court should approve the parties' proposed notice to the Settlement Class (including the attendant claim form) because the individual, direct-mail notice proposed by the parties satisfies Rule 23 and is reasonable under the circumstances.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Claims

On or about April 13, 2009, Plaintiff filed this putative class action in this Court. [Doc. 1.] On June 4, 2009, Plaintiff filed its First Amended Class Action Complaint (the "Class Action Complaint"). [Doc. 24.] In the Class Action Complaint, Plaintiff generally alleged Ginn and Lubert-Adler Partners, LP ("Lubert-Adler") (Ginn and Lubert-Adler together as "Defendants") developed, marketed and sold residential real estate, that Plaintiff and the putative class members had purchased real estate in Defendants' developments, and that Defendants circumvented the requirements for the sale of such real estate. [Id.] Plaintiff

alleged that these actions resulted in profits to Defendants and losses sustained by Plaintiff and the putative class members. [Id.]

Based on these allegations, the Class Action Complaint contained causes of action against Defendants for violations of 15 U.S.C. §§ 1703 and 1707 (The Interstate Land Sales Full Disclosure Act ("ILSA")) and violations of 18 U.S.C. §§ 1962(c) and (d) (Racketeer Influenced and Corrupt Organizations Act ("RICO")). [Id.]

B. The Parties Have Engaged in Extensive Motion Practice.

On June 24, 2009, Ginn filed a Motion to Dismiss the Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). [Doc. 34.] That same day, Lubert-Adler also filed a Motion to Dismiss the Class Action Complaint pursuant to Rule 12(b)(6). [Doc. 35.] Lubert-Adler subsequently filed an amended motion on June 29, 2009. [Doc. 40.] These motions were fully briefed by the parties. [Docs. 42, 43, 61, 62.]

On December 9, 2009, the Court denied Ginn's Motion, and granted Lubert-Adler's Motion. [Doc. 63.] In connection with granting Lubert-Adler's Motion, the Court dismissed Plaintiff's ILSA claim under 15 U.S.C. § 1707 as to both Lubert-Adler and Ginn with prejudice. [Id.] It also dismissed the ILSA claim under 15 U.S.C. § 1703 as to Lubert-Adler with prejudice, and dismissed the RICO claims pursuant to 18 U.S.C. §§ 1962(c) and (d) against Lubert-Adler without prejudice. [Id.] Plaintiff did not seek to file amended RICO claims against Lubert-Adler within the time allotted by the Court after it dismissed those claims against Lubert-Adler without prejudice.

Ginn filed a Motion for Reconsideration with respect to the Court's Order on February 12, 2010 (Doc. 81), which Plaintiff opposed. [Doc. 73.] This Court denied Ginn's Motion for Reconsideration on February 12, 2010. [Doc. 81.]

Ginn filed its Answer to the Class Action Complaint on January 15, 2010, in which it generally denied Plaintiff's allegations. [Doc. 75.] On June 27, 2012, Ginn filed a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). [Doc. 110.] That Motion has been fully briefed by the parties (Docs. 123, 127), and currently is pending before the Court.

C. The Parties Have Participated in Significant Discovery.

During the three years that this case has been pending, the parties have participated in and exchanged a significant amount of discovery, including:

- the filing by the parties of their Initial Disclosures;
- the service by Plaintiff of interrogatories and document requests on Ginn;
- the service by Plaintiff of interrogatories and document requests on Lubert-Adler;
- the service of responses by Ginn to Plaintiff's interrogatories and document requests;
- the service of responses by Lubert-Adler to Plaintiff's interrogatories and document requests;
- the service by Ginn of interrogatories and document requests on Plaintiff;
- the service of responses by Plaintiff to Ginn's interrogatories and document requests;
- the service by Plaintiff of amended document requests on Ginn;

- the service by Ginn of responses to Plaintiff's amended document requests;

- the production of documents by Plaintiff in response to Ginn's document requests;

- Ginn organizing and making available to Plaintiff and Plaintiff's counsel for their inspection hundreds of thousands of pages of documents relating to the various real estate properties at issue in the Litigation; and

- Ginn and Plaintiff filing responses to the Court's December 14, 2009 Interrogatories.

D. The Parties Have Engaged in Numerous Settlement Negotiations.

Plaintiff and Ginn have conducted numerous, extensive arm's-length negotiations over the past three years regarding the validity of the parties' claims and defenses, as well as the substance and procedure of a possible class settlement, prior to entering into the Agreement. These settlement negotiations included multiple sessions involving the parties, their counsel, the parties' insurers, and mediator Jonathan Marks, including no less than four separate in-person mediation sessions.

In connection with these discussions, the parties reiterated their belief regarding the strengths of their respective claims and defenses, but also acknowledged various issues indicating that settlement was a more reasonable approach to resolving this case than continued litigation, including without limitation:

- the expenses and length of continued proceedings that would be necessary to prosecute the claims through trial and appeals;

- the exorbitant amount of expense associated with electronic discovery in an expansive and geographically diverse class action such as this one;

- the importance of providing timely relief to the putative class members, most of whom made their real estate purchases a number of years ago;

- the uncertain outcome and the risk of any litigation, especially in complex actions such as this one;

- the fact that the ILSA claims against Lubert-Adler have been dismissed with prejudice and that the RICO claims against Lubert-Adler have been dismissed without prejudice;

- the fact that Ginn currently is not an operating business entity and has little or no assets available to satisfy any judgment that may ultimately be entered against Ginn;

- the fact that any recovery against Ginn would therefore flow from certain limited insurance policies that provide coverage to Ginn;

- the fact that such policies currently are eroding as a result of other litigation pending against Ginn and its affiliates, including the defense costs associated with same;

- the fact that Ginn's insurers have raised various coverage defenses under the insurance policies, including the exclusion of coverage for RICO claims under the policies; and

- the inherent problems of proof under, and possible defenses to, the claims set forth in the Class Action Complaint.

Ultimately, the parties' extensive negotiations resulted in an agreement in principle to settle this case. The parties informed the Court of their agreement in principle shortly thereafter, and jointly worked to prepare the settlement materials.

III. THE PROPOSED AGREEMENT

The principal terms of the Agreement are set forth below.

A. Definition of the Settlement Class

The Settlement Class consists of:

> All entities and natural persons that took title to real estate (e.g., undeveloped land, a condominium, a townhome, etc.) in a development operated or developed by Ginn or any of Ginn's past or present subsidiaries, divisions, related or sister or affiliated entities (collectively, the "Ginn Developers") directly from the Ginn Developers in connection with a purchase contract that was fully executed between April 13, 2006 and April 13, 2009. (As used herein, each such parcel of real estate shall be referred to as "Ginn Property.")

(Ex. 1 at Section I(A).)

The Settlement Class excludes: (a) all entities and natural persons who did not take title directly from the Ginn Developers, including without limitation resale purchases of Ginn Property; (b) all federal court judges or magistrate judges who have presided over this case and their spouses and anyone within three degrees of consanguinity from those judges and their spouses; (c) the Ginn Developers' past or present employees, officers, directors, agents, attorneys, and representatives and their family members, as well as any entities created or controlled by any of the aforementioned persons; (d) all entities and natural persons who timely and validly elected to exclude themselves from the Settlement Class; (e) all entities and natural persons who have previously executed and delivered to one or more of the Ginn Developers releases of any claims they may have with respect to their purchase of Ginn Property; and (f) all entities and natural persons who have asserted claims against one or more of the Ginn Developers related to their purchase of Ginn Property and whose claims

have been (i) dismissed with prejudice and/or (ii) dismissed without prejudice but who have not re-asserted those claims against one or more of the Ginn Developers before the deadline for doing so under applicable law.

B. Settlement Consideration

In consideration for the releases by the Settlement Class and the dismissal of this action with prejudice, Ginn has agreed to cause to establish a $700,000 settlement fund in connection with (i) resolving the claims of the Settlement Class Members, (ii) compensating the claims administrator for reasonable fees and expenses incurred in connection with administering the settlement in accordance with the terms of the Agreement, (iii) compensating Plaintiff's counsel for its fees and expenses (in an amount not to exceed $200,000 and $75,000, respectively), and (iv) providing an incentive award to the class representative in the amount of $15,000. The parties intend to retain the Klok Law Firm of Mount Pleasant, South Carolina for a flat fee of $25,000. The net funds available should the Court approve Plaintiff's fee petition and class respresentive incentive award for Class Members to claim will be $385,000.

The Settlement will be a claims made settlement, requiring Class Members to file a claim form. The following grid will be used to adjudicate claims:

Category One: "Still Own Property" (6 points)

- Settlement Class members who still own their Ginn Property.

Category Two: "Sold Property at a Loss" (4 points)

- Settlement Class members who sold their Ginn Property for less than they originally paid to purchase it.

Category Three: "Foreclosure" (2 points)

- Settlement Class members whose Ginn Property was foreclosed upon.

Category Four: "Sold Property at a Profit" (1 point)

- Settlement Class members who sold their Ginn Property for the same amount or more than they originally paid to purchase it.

In addition to causing to establish the Settlement Fund, Ginn also has agreed to cause to be paid the reasonable postage, printing, and mailing expenses associated with the notice provided by the claims administrator to the Settlement Class Members, as well as the reasonable postage, printing, and mailing expenses associated with providing notice to the various attorneys general pursuant to 28 U.S.C. § 1715. These expenses will be paid separate and apart from the Settlement Fund.

C. Withdrawal From Agreement

The parties have agreed that if certain circumstances materially affect the terms of the Agreement or the benefits they anticipate receiving thereunder, they have the right to withdraw from the Agreement and render it null and void.

D. Releases

Once the Agreement becomes effective, members of the Settlement Class will release all claims/defenses/counterclaims against Defendants that the Settlement Class members

asserted or could have asserted against Defendants in this or any action based upon their purchase of Ginn Property during the aforementioned time period.

E. Plaintiff's Attorneys' Fees and Expenses

As noted above, Ginn agrees not to oppose any award to Plaintiff's counsel of up to $200,000 in fees, $75,000 in expenses and a class representative incentive award of $15,000, to be paid from the Settlement Fund. The amount of attorneys' fees ultimately awarded will be in the Court's discretion, and any appeal of the attorneys' fee award will not affect the validity or finality of the Agreement.

IV. THIS COURT SHOULD CONDITIONALLY CERTIFY THE PROPOSED SETTLEMENT CLASS AND PRELIMINARILY APPROVE THE PROPOSED SETTLEMENT AND CLASS NOTICE.

A. The Proposed Settlement Class Should Be Conditionally Certified.

Approval of a settlement in a class action requires the Court to determine whether the proposed class meets the four prerequisites of Rule 23(a) and one of the three requirements of Rule 23(b). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-15 (1997). The Rule 23(a) requirements are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a). Here, the applicable Rule 23(b) prerequisite is Rule 23(b)(3) -- "issues of law and fact predominate over issues unique to individual class members, and maintaining the class action is the superior procedural vehicle." Fed. R. Civ. P. 23(b)(3). The proposed Settlement Class here meets each of these requirements.

1. Numerosity -- Rule 23(a)(1)

The Settlement Class satisfies the numerosity requirement because the number of class members renders joinder impracticable. Generally, joinder is impracticable in any class consisting of more than forty members. Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266-67 (11th Cir. 2009) (citing Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir.1986)).

Here, based on the records available to it, Plaintiff estimates that the Settlement Class consists of hundreds of members. Thus, the numerosity requirement is easily satisfied.

2. Commonality -- Rule 23(a)(2)

Commonality requires that there be at least one issue whose resolution will affect "all or a significant number of the putative class members." James D. Hinson Elec. Contracting Co., Inc. v. BellSouth Telecommunications, Inc., 275 F.R.D. 638, 642 (M.D. Fla. 2011).

Commonality is satisfied here because all members of the Settlement Class are pursuing the common issues of whether Ginn failed to provide them with the required property report before they signed a contract relating to their real estate purchases, and thus violated ILSA and RICO as a result of same. See generally Doc. 24.

3. Typicality -- Rule 23(a)(3)

A plaintiff satisfies the typicality requirement by showing that its claims arise from the same event, practice, or course of conduct as the claims of other class members and that those claims are based on the same legal theory. Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1356-57 (11th Cir. 2009).

Here, Plaintiff and the members of the Settlement Class all assert the same facts and legal propositions in connection with their efforts to recover damages that they suffered as a result of Ginn's aforementioned alleged actions. See Doc. 24 at ¶ 91. Moreover, Ginn acted in the same way toward the Plaintiff and the members of the Settlement Class. Id.

4. Adequacy of Representation—Rule 23(a)(4)

Whether the adequacy prong is satisfied involves two questions: (1) whether Plaintiff's attorneys are qualified, experienced, and generally able to conduct the proposed litigation; and (2) whether the Plaintiffs have interests that are antagonistic to the class. Griffin v. Carlin,755 F.2d 1516, 1533 (11th Cir. 1985).

Here, Plaintiff is represented by a team of lawyers who have extensive class action experience, including experience prosecuting complex RICO class actions like this one. See Doc. 44 at Exs. 6-9 (firm resumes of Plaintiff's counsel). The efforts of Plaintiff's counsel over the past four years that this case has been pending, including the extensive motion practice, the significant amount of discovery undertaken by the parties, and the numerous settlement negotiations, reflect Plaintiff's counsel's commitment to the vigorous prosecution of this action and the possession of the requisite skill and ability to do so.

In addition, Plaintiff has no claims antagonistic to or conflicting with other class members. Plaintiff, like the other class members, purchased Ginn Property from the Ginn Developers between April 2006 and April 2009. Plaintiff, like the other class members, alleges that Ginn violated ILSA and RICO in connection with this sale of property. There has been no showing of any personal or employment relationship between Plaintiff and Ginn,

and no showing that Plaintiff has any interest outside those of the members of the Settlement Class.

5. Predominance and Superiority -- Rule 23(b)(3)

Rule 23(b)(3) requires that (a) common questions "predominate" and (b) the "class action [be] superior ... for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. Rule 23(b)(3).

With respect to the first requirement, common issues predominate where the issues in the class action that are subject to generalized proof predominate over those issues that are subject only to individualized proof. Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997). Here, common issues of law and fact predominate because the crux of all class members' claims is whether Ginn circumvented the requirements for the sale of real estate to Plaintiff and the Settlement Class members. Because these allegations are at the heart of Plaintiff's claims, and would have to be re-proven by every plaintiff in separate trials, these common questions predominate over the individual issues in this case. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986) ("[i]n order to 'predominate,' common issues must constitute a significant part of the individual cases").

With respect the second requirement, Rule 23(b)(3) identifies four factors that should be examined by the courts to determine whether class treatment would be fair and efficient:

> (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

Here, these factors collectively militate in favor of certifying the settlement class. Given the significant expense associated with prosecuting claims relating to the purchase of Ginn Property through trial, as well as the relatively small amount of damages associated with each claim that each individual plaintiff might stand to recover if successful at trial, the vast majority of the Settlement Class is unlikely to receive any relief at all unless these claims are settled collectively in this action. Moreover, given that the parties are requesting the Court to certify the class as a settlement class, as opposed to a class in connection with trying this case, there are unlikely to be any significant management problems.

B. This Court Should Preliminarily Approve the Proposed Settlement.

Federal law recognizes an overriding public policy in favor of settlement of class actions. In re U.S. Oil & Gas Litig., 967 F.2d 489, 493 (11th Cir. 1992) ("public policy strongly favors the pretrial settlement of class action lawsuits.").

To settle a class action, Rule 23(e) requires Court approval. See Fed. R. Civ. P. 23(e). Whether to grant such approval is committed to the Court's discretion. Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984); see also U.S. v. Alabama, 271 Fed. Appx. 896 (11th Cir. 2008) (district court did not abuse its discretion in approving class action settlements).

Obtaining such approval is a two-step process. In the first step (which is the one at issue in this Motion), the Court determines whether the proposed settlement should be preliminarily approved. Fresco v. Auto Data Direct, Inc., No. 0361063CIV-MARTINEZ,

2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007) (citing David F. Herr, Annotated Manual for Complex Litigation § 21.632 (4th ed. 2004)). In the second step, following appropriate notice to the proposed settlement class and after hearing from any potential objectors, the Court makes a final decision as to whether to approve the proposed settlement. Id.

In connection with the first step, the Court is required to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." Id. A proposed settlement should be preliminarily approved if it is "within the range of possible approval." Id. In determining whether a settlement is fair, reasonable and adequate, courts generally consider six factors: (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members. U.S. v. Alabama, 271 Fed. Appx. at 900. Here, each of these six factors weighs in favor of preliminarily approving the parties' proposed settlement.

1. The proposed settlement is not the product of fraud or collusion.

There is no evidence of fraud or collusion in this proposed settlement. To the contrary, all of the evidence reflects that the settlement was the product of extensive, arm's length negotiations over the past four years. As noted above, the parties reached a settlement after engaging in considerable motion practice and exchanging a significant amount of discovery. Bennett v. Behring Corp., 737 F.2d 982, 987 (11th Cir. 1984) ("In sum, the court

has determined that the settlement has been achieved in good faith through arms-length negotiations and is not the product of collusion between the parties and/or their attorneys. There is no evidence of unethical behavior, want of skill or lack of zeal on the part of class counsel.")

2. This litigation involves complex issues that would require an incredible amount of additional time and expenses to resolve through litigation.

The complexity, expense, and duration of this litigation also favor preliminary approval of the proposed settlement. If this matter were to continue, numerous complex issues of law would have to be resolved in connection with resolving Plaintiff and the putative class members' ILSA and RICO claims, as well as Ginn's defenses to same.

With respect to the ILSA claim, Plaintiff and the putative class members would be required to demonstrate, *inter alia*, that Ginn is a developer within the meaning of 15 U.S.C. § 1701, that Plaintiff and the putative class members are purchasers within the meaning of 15 U.S.C. § 1701, that Ginn sub-divided its lots within the meaning of 15 U.S.C. §1701, that the sales at issue in this litigation are not exempt under 15 U.S.C. §1702, that Ginn violated 15 U.S.C. § 1703 by using instruments of transportation or communications in interstate commerce including the U.S. mail service, that Ginn employed schemes to defraud Plaintiff and the putative class members, that Ginn made misrepresentations to Plaintiff and the putative class members, that Ginn violated 15 U.S.C. § 1703 by failing to provide Plaintiff and the putative class members with a property report in advance of their signing of a contract in Ginn's developments, that Ginn's actions (as opposed to the nationwide real

estate crash) actually caused Plaintiff and the putative class members to incur damages, and the amount of any such damages (which Ginn argues would vary based on the unique characteristics of each piece of property purchased).

In addition, a determination would need to be made as to Ginn's host of defenses with respect to each of these issues -- again, as to both Plaintiff and the hundreds of class members.

The resolution of Plaintiff and the class members' RICO claims (and Ginn's defenses to same) would likely be even more complex, as plaintiff and the putative class members would have to establish (1) conduct (2) of a RICO enterprise (3) through a pattern (4) of racketeering activity. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 470, 496 (1985). Each of these elements also has various sub-elements that must be proven. For example, in this case, where Plaintiff attempts to predicate the RICO claim on acts of mail and wire fraud (Doc. 24 at ¶¶ 75-83), Plaintiff and the class members would be required to demonstrate:

> (1) that the defendant intentionally participated, (2) in a scheme to defraud, (3) the plaintiff of money or property, (4) by means of material misrepresentations, (5) using the mails or wires, (6) that the plaintiff relied on a misrepresentation made in furtherance of the fraudulent scheme, (7) that such misrepresentation would have been relied upon by a reasonable person, (8) that the plaintiff suffered injury as a result of such reliance, and (9) that the plaintiff incurred a specifiable amount of damages.

Sikes v. Teleline, Inc., 281 F.3d 1350, 1360-61 (11th Cir. 2002), modified on other grounds, Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008).

In addition, Plaintiff and the class members would have to prove proximate cause. Hemi Group, LLC v. N.Y.C., 130 S. Ct. 983, 989 (2010) ("To state a claim under civil

RICO, the plaintiff is required to show that a RICO predicate offense 'not only was a 'but for' cause of his injury, but was the proximate cause as well."). Here, given that Plaintiff and the vast majority of the class members purchased their property during an unprecedented housing bubble, Ginn claims that the same causation and damages challenges noted above in connection with resolving the ILSA claims would also be present in connection with resolving the RICO claims. And, again, Ginn argues that a determination would need to be made as to Ginn's defenses with respect to these claims -- both as to Plaintiff and each of the hundreds of class members.

Given the obvious complexities of this case, the time (and thus the expense) associated with litigating this case to its completion would be significant -- not only for the parties, but also for the Court. Indeed, the case has already been pending for three years and the parties are still engaging in motion practice. While the parties have undertaken a considerable amount of discovery to date, it would likely take upwards of two years to complete this discovery, given the size of the putative class and the geographical scope of the sales of the Ginn Property. Following discovery, the parties would likely file motions for summary judgment, and would also brief Plaintiff's motion to certify the class for trial. Preparing for and attending trial would further increase the costs.

In sum, it would require an inordinate amount of money -- and years of continued, protracted litigation for the parties and the Court -- before this matter would be finally resolved.

3. The proceedings in this case have advanced sufficiently over the past four years so as to allow the parties to evaluate the strengths and weaknesses of their case.

As set forth in detail above, the parties have engaged in vigorous motion practice, participated in significant discovery, and have conducted numerous arm's length settlement negotiations. This is not a case where a plaintiff files a putative class action and the parties agree to settle the case shortly after the case was filed. Rather, this case has been pending for over four years, during which time the parties have extensively analyzed the strengths and weaknesses of their respective claims and defenses, as well as the advantages and disadvantages of settlement. The parties and their counsel unanimously believe that settlement is in the best interest of the parties and the Settlement Class.

4. Both sides face factual and legal obstacles in connection with prevailing on the merits.

As set forth above in sub-section (2), the legal and factual issues in this case are exceptionally complex, and both sides face challenges in connection with prevailing on the merits in this case. For example, Ginn has already argued in its Motion for Judgment on the Pleadings (Doc. 110) that all of Plaintiff's remaining claims should be dismissed for, inter alia, the same reasons that this Court previously dismissed those claims against Lubert-Adler, and the Court in a similar case dismissed comparable allegations against Ginn. See, e.g., Lawrie v. The Ginn Cos., LLC, No. 3:09-cv-446-J-32JBT, 2010 WL 3746725 (M.D. Fla. Sept. 21, 2010) (Corrigan, J.). Ginn also argued in its Motion that Plaintiff's claims fail for a host of other reasons. See generally Doc. 110. While Plaintiff disagrees with Ginn's

arguments, as evidenced in Plaintiff's Opposition to Ginn's Motion (Doc. 123), Plaintiff recognizes that there is risk in connection with proceeding on the merits.

In addition, the class certification issue has not yet been litigated on the merits. Ginn has indicated that it would oppose certification of this class for purposes of trial on the grounds that, among other things, the size of the class and complexity of the issues present manageability concerns, and that liability would depend on individual issues related to each putative class member's purchase of Ginn Property, including what information was provided to each class member in connection with each purchase, whether the class member reasonably relied on the particular statements by Ginn or its representatives associated with each transaction, whether each class member can prove that the alleged actions by Ginn in connection with each purchase actually caused the class member to incur damages, the amount of any such damages (which, as noted above, would vary based on the unique characteristics of each piece of property), and so on.

Thus, there is obvious risk that, if the certification issue were to be litigated, the Court would find that the proposed class could not be certified for trial purposes. By contrast, there is also risk to Ginn if the Court were to certify the class, in that Ginn would then face a very large class of plaintiffs and exponentially increased potential liability.

5. Plaintiff and the class members would face challenges in connection with recovering any damages.

As noted above, Lubert-Adler has been dismissed from this case, and Ginn has asserted numerous substantive defenses to the claims being asserted by Plaintiff and the

putative class members. Ginn also has indicated that it intends to oppose certification of a class in this case for trial purposes.

In addition to these challenges, even if Plaintiff and the putative class members did prevail on their claims and obtained a judgment against Ginn, they would still face significant challenges in connection with recovering on that judgment. This is because Ginn currently is not an operating business entity, and it has little or no assets available to satisfy any judgment that may ultimately be entered against it. Instead, any recovery against Ginn would flow from certain limited insurance policies that provide coverage to Ginn, which policies currently are eroding as a result of other litigation pending against Ginn and its affiliates, including the defense costs associated with same. Moreover, Ginn's insurers have expressed to Plaintiff's counsel that they have raised a number of defenses to coverage under Ginn's insurance policies, including the fact that RICO claims are excluded thereunder.

In stark contrast to the above, a settlement agreement would provide prompt, monetary compensation directly to Plaintiff and the other members of the Settlement Class.

6. All of the participants favor class settlement.

As noted above, Plaintiff and his counsel, as well as Ginn, Ginn's counsel and Ginn's insurer unanimously favor settlement. Warren v. City of Tampa, 693 F. Supp. 1051, 1060 (M.D. Fla. 1988) *aff'd*, 893 F.2d 347 (11th Cir. 1989) ("The Court is affording great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation.").

To the extent there are any members of the Settlement Class who wish to object to the Agreement, they will be afforded an opportunity to express those concerns to the Court at the Fairness Hearing.

C. This Court Should Preliminarily Approve the Proposed Class Notice.

Rule 23 requires that the class receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23. Here, the notice program in the parties' Agreement requires the claims administrator to send a detailed notice of the settlement, in the form Exhibit D to the Settlement Agreement (Dkt. Doc. No. 138, Exhibit 1), by first-class U.S. mail to each class member at the class member's last-known address. It also requires the claims administrator to attempt to notify the class members via email, if possible. If any notices are returned as undeliverable, the claims administrator will then perform a reasonable search for a more current address and/or email address and re-send the notice.

This individual, direct-mail notice amply satisfies Rule 23, and is reasonable under the circumstances. See Brunson v. La.-Pac. Corp., 818 F. Supp. 2d 922, 926 (D.S.C. 2011) (approving notice program including direct-mail notice under Rule 23 and the Due Process Clause of the United States Constitution).

V. CONCLUSION

For the reasons stated above, the Court should certify the class for settlement purposes, grant preliminary approval of the settlement, and approve the form of the proposed settlement notice.

CERTIFICATION PURSUANT TO LOCAL RULE 3.01(g)

I hereby certify pursuant to Local Rule 3.01(g) that before filing the enclosed Motion, I conferred with counsel for Defendant regarding the issues raised in this motion, and that opposing counsel consents to the relief sought herein.

Respectfully submitted this 16th day of September, 2013.

Joe R. Whatley, Jr.
Edith M. Kallas
Whatley Drake & Kallas, LLC
380 Madison Avenue, 23rd Floor
New York, NY 10017
Tel.: (212) 447-7070
Fax: (212) 447-7077
Email: jwhatley@wdklaw.com
Email:ekallas@wdklaw.com

Charlene P. Ford
Whatley Drake & Kallas, LLC
2001 Park Place North, Suite 1000
P O Box 10647
Birmingham, AL 35203
Tel: (205) 328-9576
Fax: (205) 328-9669
Email: cford@wdklaw.com

/s/Mario A. Pacella
J. Preston Strom, Jr.
Mario A. Pacella
John R. Alphin
Strom Law Firm, LLC
2110 Beltline Boulevard, Suite A
Columbia, SC 29204
Tel: (803) 252-4800
Fax: (803) 252-4801
Email: petestrom@stromlaw.com
Email: mpacella@stromlaw.com
Email: jalphin@stromlaw.com

Douglas D. Chunn
Fl. Bar. No. 172586
Douglas D. Chunn, P.A.
One Independent Drive, Suite 3201
Jacksonville, FL 32202
Tel: (904) 355-8800
Fax: (904) 355-8860
Email: dchunn@chunnlaw.com

R. Bryant McCulley
Fl. Bar No. 2115
McCulley McCluer PLLC
One Independent Drive, Suite 3201
Jacksonville, FL 32202
Tel: (904) 482-4073
Fax: (904) 354-4813
Email: bmcculley@mcculleymccluer.com