

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

JOHN DEMSHECK, individually
and on behalf of others similarly situated,

Plaintiffs,

v.

CASE No. 3:09-CV-335-J-25TEM

**GINN DEVELOPMENT COMPANY, LLC
and LUBERT-ADLER PARTNERS, L.P.,¹**

Defendant.

ORDER

THIS CAUSE is before the Court on Plaintiff's unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. 138) and the attached Exhibits and Plaintiff's unopposed Amended Motion for Preliminary Approval of Class Action Settlement (Dkt. 140).² The Court has reviewed the filings and finds as follows:

I. Background

The parties hereto have entered into a Class Settlement Agreement ("Agreement") that resolves the Plaintiffs' claims under 15 U.S.C. § 1703 (Interstate Land Sales Full Disclosure Act) for Defendant's failure to provide

¹ Lubert-Adler Partners, L.P. was terminated as a party on 08/30/2011.

² Plaintiff's Amended Motion incorporates the Exhibits attached to Dkt. 138.

a property report in advance of the signing of a contract related to real estate purchases and the RICO claims under 18 U.S.C. § 1962 against the Defendant.

This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 15 U.S.C. §1719 and the Class Action Fairness Act of 2005. See 28 U.S.C. § 1332(d).

II. Standard of Review

“For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b).” *Klay v. Humana, Inc.*, 382 F.3d 1241, 1250 (11th Cir. 2004). Rule 23(a) requires a putative class to meet the requirements of numerosity, commonality, typicality, and adequacy of representation. See Fed. R. Civ. P. 23(a); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009).

In this case, Plaintiff seeks certification pursuant to Rule 23(b)(3), which requires two additional findings, specifically: “(1) that common questions of law or fact predominate over questions affecting only individual members (‘predominance’); and (2) that a class action is superior

to other available methods for adjudicating the controversy ('superiority')." *Vega*, 564 F.3d 1256, 1265.

While the Court must not decide the merits of this case at the class certification stage, it "can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Id.* at 1266. Courts may take into account a proposed settlement when deciding a motion to certify a class. See *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 619-20 (1997).

In addition, a settlement will be certified so long as it is "fair, adequate and reasonable and is not the product of collusion between the parties." *Bennett v. Behrine Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The Eleventh Circuit has identified the following factors as relevant to the Court's review of whether a class settlement's terms are fair, reasonable, and adequate:

- (1) the likelihood of success at trial;
- (2) the range of possible recovery;
- (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable;
- (4) the complexity, expense and duration of litigation;
- (5) the substance and amount of opposition to the settlement; and
- (6) the stage of proceedings at which the settlement achieved.

Id.

III. Conclusion

For the reasons stated within Plaintiff's unopposed Amended Motion, the Court finds that the Settlement Class satisfies the four prerequisites for certification under Rule 23(a); the Court certifies the putative class pursuant to Fed. R. Civ. P. 23(b)(3) and preliminarily approves the class settlement.

Accordingly, it is **ORDERED**:

1. Plaintiffs' unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. 138) is **DENIED AS MOOT**.
2. Plaintiffs' unopposed Amended Motion for Preliminary Approval of Class Action Settlement (Dkt. 140) is **GRANTED**.
3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court preliminarily certifies, for purposes of effectuating this settlement only, a settlement class (the "Settlement Class") defined as:

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") 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.")

By way of example, if the purchase contract was signed within the class period, that purchaser would be a member of the Settlement Class even if the sale was closed outside the class period. By way of further example, if the contract was signed outside the class period and the sale was closed within the class period, that purchaser would not be a member of the Settlement Class.

4. The Settlement Class excludes:
 - a. Ginn's employees, officers, directors, agents, and representatives and their family members;
 - b. all entities and natural persons who timely and validly elected to exclude themselves from the Settlement Class;
 - c. all entities and natural persons who have previously executed and delivered to Ginn releases of any claims they may have with respect to their purchase of Ginn Property;
 - d. all entities and natural persons who asserted claims against Ginn 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 Ginn before the deadline for doing so under applicable law; and

e. all entities and natural persons who purchased Ginn Property at the "Ginn Sur Mer" development but did not take title to the property directly from the Ginn Developers (e.g., re-sale purchases of such Ginn Sur Mer property).

5. Plaintiff John Demsheck is hereby designated as the Class Representative for the Settlement Class.

6. The following counsel are designated and authorized to act as Settlement Class Counsel: Joe R. Whatley, J. Preston Strom, Jr., Mario A. Pacella, Douglass Chunn, and Bryant McCulley. Correspondence to Class Counsel may be made to Mario A. Pacella,, Strom Law Firm, LLC, 2110 Beltline Blvd., Columbia, South Carolina 29204.

7. In light of the agreement to settle the Action and in connection with preliminarily certifying the Settlement Class, the Court finds that the prerequisites to class certification requirements of Rule 23 of the Federal Rules of Civil Procedure are satisfied, to-wit:

a. The Settlement Class satisfies the numerosity requirement because the number of Settlement Class members likely in the hundreds, renders joinder impracticable;

b. 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;

c. 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;

d. Adequacy of representation is satisfied because Plaintiff's counsels are experienced in complex litigation and have the ability to fairly and adequately protect the interests of the Settlement Class;

e. 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.

8. The preliminary certification of this action as a class action is for settlement purposes only and the appointment of counsel for the Settlement Class Members shall be terminated and without further force or

effect and without prejudice to any party in connection with any future proceedings in the Lawsuit, including any future motion with respect to class certification, if:

a. The Court does not give final approval to the Agreement and enter the Final Order and Judgment substantially in the form attached to the Agreement, or;

b. This Court's approval of the Agreement and/or entry of the Final Order and Judgment are reversed on appeal.

9. The terms and conditions set forth in the Agreement place the Agreement within the range of fair and reasonable settlements, making further consideration at a hearing held pursuant to notice the Settlement Class appropriate. The Court therefore preliminarily approves the Settlement Agreement and directs the parties to perform and satisfy the terms and conditions of the Settlement Agreement that are thereby triggered.

10. This determination permitting notice to the Settlement Class Members is not a final finding that the Agreement is fair, reasonable and adequate, but simply a determination that there is probable cause to disseminate Class Notice to the Settlement Class Members and hold a hearing on final approval of the proposed settlement.

11. The Court approves and finds fair and reasonable the administrative mechanism to which the Parties have agreed in connection with receiving requests from Settlement Class Members to exclude themselves from the Settlement Class. Specifically, any Settlement Class Member who wishes to be excluded from the settlement class must submit a request for exclusion ("Request for Exclusion") via first-class U.S. mail, to Plaintiff's counsel, post-marked within forty-five (45) days of the initial mailing of Notice. The exclusion request shall include:

a. the Settlement Class Member's full name, address, and telephone number;

b. the tax identification number for each piece of Ginn Property purchased by the objector and the county(ies) and state(s) in which the Ginn Property is located;

c. a clear statement that the Settlement Class Member desires to be excluded from the Settlement Class; and

d. be individually and personally signed by the Settlement Class Member (and, if the Settlement Class Member is represented by counsel, by such counsel for the Settlement Class Member).

12. Class Members who fail to submit a timely, valid and complete Request for Exclusion, sent to the proper address, shall be subject to and

bound by the Parties' Agreement in the event it is approved by the Court and becomes effective, and by any Orders and judgments subsequently entered in the Action, whether favorable or unfavorable, regardless of whether they submit a Claim Form to the Claims Administrator.

13. Any purported Request for Exclusion that is ambiguous or internally inconsistent with respect to the Settlement Class Member's desire to be excluded from the settlement class will be deemed invalid unless determined otherwise by the Court.

14. Plaintiff's counsel will receive purported Requests for Exclusion and review each request to ensure that it contains the aforementioned information. Any communications from Settlement Class Members (whether styled as an exclusion request, an objection, or a comment) as to which it is not readily apparent to Plaintiff's counsel whether the Settlement Class Member meant to exclude himself or herself from the settlement class will be resolved by the Court. Plaintiff's counsel shall maintain a list of all Requests for Exclusion it receives, forward each such request to Ginn's counsel within three (3) days of receipt of same, and report the names and addresses of all such entities and natural persons requesting exclusion to the Court seven (7) days prior to the Final Hearing. The list of entities and natural persons deemed by the Court to have excluded

themselves from the settlement class will be attached as an exhibit to the Final Order and Judgment.

15. In conjunction with moving for final approval, Plaintiff's counsel may apply to the Court for an award of attorneys' fees and expense reimbursement covering all legal services provided to Plaintiff and the Settlement Class Members in connection with the Lawsuit and settlement of the Lawsuit (the "Fee and Expense Application"). The Fee and Expense Application shall be filed by November 22, 2013, and shall seek no more than \$200,000 in attorneys' fees, \$75,000 in expenses, and a class representative incentive award of \$15,000.

16. Pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1715(d), a hearing (the "Fairness Hearing") shall be held on **Tuesday, February 18, 2014 at 10:00 a.m.** before Judge Henry Lee Adams, Jr. of the U.S. District Court for the Middle District of Florida, in courtroom No. 10A, Bryan Simpson United States Courthouse, 300 North Hogan Street, Jacksonville, FL 32202 for the purpose of finally determining whether the proposed Agreement is fair, reasonable, and adequate and should be approved by the Court via entry of the Final Judgment and Order attached to the Agreement and, if so, what amount of

reasonable attorneys' fees and expenses should be awarded to counsel for the Settlement Class Members.

17. Any Settlement Class Member who intends to appear at the Fairness Hearing must provide written notice no later than January 10, 2014, to the Court and the Parties, identifying his or her full name, address, and telephone number, a summary of the issues he, she or it intends to raise at the Fairness Hearing, and the name, address, and telephone number of any witnesses he or she intends to call. If represented by counsel, the Settlement Class Member must also provide the name, address, and telephone number of counsel. Any Settlement Class Member who does not submit timely notice of his or her intent to appear at the Fairness Hearing or who fails to otherwise comply with the requirements of this paragraph shall be foreclosed from seeking any adjudication or review of this settlement by appeal or otherwise.

18. Approval is hereby given to the form of the Class Notice (and attendant claim form), attached to the Agreement as Exhibit D. The Court finds that the Class Notice reasonably informs the Settlement Class Members of the material terms of the Agreement and their rights and responsibilities in connection with the Agreement, and, once distributed pursuant to the plan of distribution detailed below, constitutes valid, due,

and sufficient notice to Settlement Class Members in compliance with the requirements of applicable law, including the Due Process Clause of the United States Constitution and Rule 23 of the Federal Rules of Civil Procedure. The fees and expenses of the claims administrator associated with administering the settlement notice to the Settlement Class Members shall be paid from the Settlement Fund established by Ginn. In addition, Ginn shall pay the reasonable postage and mailing expenses associated with the notice provided by the claims administrator to the Settlement Class Members, and these expenses shall not be paid from the Settlement Fund (or the Class Distribution), but shall be paid by Ginn separate and apart from those sources.

19. On or before December 2, 2013, Plaintiff's counsel shall cause the claims administrator to deliver by United States Postal Service first-class mailing, postage prepaid, copies of the Class Notice (and attendant claim form) containing the language in Exhibit D to the Agreement to the current address of each Settlement Class Member for whom the Parties and the Claims Administrator can reasonably obtain an address. Plaintiff's counsel shall also cause the Claims Administrator to deliver this same information via email to each Settlement Class Member for whom the Parties and the Claims Administrator can reasonably obtain an email

address. The Claims Administrator also shall mail copies of the Notice to any other potential Class Members that request copies or that otherwise come to its attention.

20. If they have not done so already, Plaintiff's counsel shall provide to the Attorney General of the United States and the attorneys general of all of the U.S. states the information specified in 28 U.S.C. § 1715 by the deadline established in that statute. Ginn shall be responsible for the reasonable postage and mailing expenses associated with providing this notice to the attorneys general, which amounts shall be paid by Ginn from a source other than the Settlement Fund.

21. The Klok Law Firm of Mount Pleasant, South Carolina is designated and authorized to serve as Claims Administrator.

22. Class Members who do not request exclusion may submit an objection to the Settlement Agreement or other Settlement-related matters within forty-five (45) days of the date of the initial mailing of Notice. Any member of the Settlement Class who intends to object to the fairness of the Agreement (including Plaintiff's counsel's Fee and Expense Application) must, (1) file such objection with the Clerk of the U.S. District Court for the Middle District of Florida, and (2) serve such objection upon Mario Pacella of The Strom Law Firm, 2110 Beltline Blvd., Columbia, South Carolina

29204 (Plaintiff's Counsel) and Robert P. Alpert, Morris, Manning & Martin, LLP, 1600 Atlanta Financial Center, 3343 Peachtree Road, NE, Atlanta, GA 30326 (Ginn's counsel). Any objection to the Agreement must be individually and personally signed by the Settlement Class Member (if the Settlement Class Member is represented by counsel, the objection additionally must be signed by such counsel), and must include:

a. the Settlement Class Member's full name, address, and telephone number;

b. the tax identification number for each piece of Ginn Property to which the Settlement Class Member took title, the county(ies) and state(s) in which the Ginn Property is located, and proof that the purchase contract associated with the Ginn Property was fully executed between April 13, 2006 and April 13, 2009;

c. a written statement of all reasons for the Settlement Class Member's objection accompanied by any legal support;

d. copies of any papers, briefs, or other documents on which the objection is based;

e. a list of other cases in which the Settlement Class Member (or his/her/its counsel) have filed or in any way participated in

financially or otherwise objections to a class settlement in the preceding five years;

f. the name, address, email address, and telephone number of all attorneys representing the Settlement Class Member; and

g. a statement indicating whether the Settlement Class Member (or his/her/its counsel) intends to appear at the Fairness Hearing.

23. Any member of the Settlement Class who does not properly file a timely written objection to the settlement and notice of his, her or its intent to appear at the Fairness Hearing shall be subject to and bound by the Parties' Agreement in the event it is approved by the Court and becomes effective, and by any Orders and judgments subsequently entered in this Action and shall be foreclosed from seeking any adjudication or review of the settlement by appeal or otherwise.

24. On or before December 20, 2013, the Parties shall file any memoranda or other materials in support of final approval of the Agreement, including in response to any timely and properly filed objection to the Agreement. Such materials shall be served on Plaintiff's Counsel, Ginn's counsel, and on any Settlement Class Member (or his/her/its counsel, if represented by counsel) to whose objection to the Agreement the memoranda or other materials respond.

25. At least thirty (30) days prior to the Fairness Hearing, counsel for Defendants and Settlement Class Counsel shall jointly file with the Court an affidavit from a representative of the Claims Administrator confirming that the plan for disseminating the Notice and the Summary Notice has been accomplished in accordance with their notice obligations, which shall include: (a) their best estimate of the total number of Settlement Class Members, (b) a sample copy of the as-mailed Class Notice, (c) the process by which the claims administrator obtained a mailing list (and emailing list) for the Class Notice, (d) the number of Class Notices mailed and emailed and the range of dates within which such Notices were mailed and emailed, and (e) the number of Class Notices returned.


26. Following the Fairness Hearing, and based upon the entire record in this matter, the Court will decide whether the Agreement should be finally approved and, if so, what amount of reasonable fees and expenses should be awarded to Plaintiff's counsel. If the Court determines the Agreement is reasonable, fair, and adequate, the Court will issue a Final Order and Judgment memorializing its decision in the form contemplated by Exhibit C of the Agreement. The Court will also issue an Order awarding reasonable fees and expenses to Plaintiff's Counsel.

27. During the Court's consideration of the Settlement Agreement and pending further order of the Court, all proceedings in this Action, other than proceedings necessary to carry out the terms and provisions of the Settlement Agreement, or as otherwise directed by the Court, are hereby stayed and suspended. All members of the Settlement Class are hereby enjoined from prosecuting or initiating any claims, counterclaims, lawsuits or actions against Ginn relating to the subject matter of the Agreement pending a final determination by this Court as to whether to approve the proposed Agreement.

28. To the extent any of the Parties exercise their right under the Agreement to withdraw from the Agreement, this Order shall be vacated and rendered null and void immediately upon the withdrawal of any party from the Agreement.

29. The Court retains jurisdiction over this action, the Parties, and all matters relating to the Settlement Agreement. All pending motions are **MOOT**.

DONE AND ORDERED this 30th day of September, 2013.


HENRY LEE ADAMS, JR.
United States District Judge

Copies to: Counsel of Record