UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ROBERT A. SCHREIBER,
individually and on behalf
of all others similarly situated,

Plaintiff(s),

Civil Action No. 1:14-cv-22069

v.

ALLY FINANCIAL INC., *et al.*,

Defendant.

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF CLASS NOTICE AND INCORPORATED MEMORANDUM OF LAW

TABLE OF CONTENTS

Plaintiff respectfully moves, under Rule 23 of the Federal Rules of Civil Procedure, for preliminary approval of a proposed Settlement with Defendant Ally Financial, Inc., preliminary certification of the Class defined in the Settlement, and approval of the proposed notice to the Class.[1] This Settlement, reached after years of extensive discovery and hard-fought litigation, including an appeal to the Eleventh Circuit, will resolve Plaintiff's and Class Members' claims asserted in the above-captioned Action.

INTRODUCTION

This class action centers on a standardized lease contract created and copyrighted by Ally called the "SmartLease." Each SmartLease provided the lessee with an option to purchase the subject vehicle at the end of the lease term for a set price. When Plaintiff Robert Schreiber and Class Members attempted to exercise this purchase option, however, some dealerships that processed the transactions allegedly charged Mr. Schreiber and Class Members additional fees beyond the set price disclosed in their SmartLease agreements. Mr. Schreiber brought this action on behalf of himself and a nationwide class to recover these improper fees, claiming that Ally breached its SmartLease and violated the federal Consumer Leasing Act, 15 U.S.C. § 1667, *et seq*.

After years of litigation, Ally agreed to resolve the claims asserted in this action through a class Settlement with a value of almost $20 million. The Settlement offers Class Members up to 100% of the fees they were charged beyond the set price listed in their SmartLease agreements. The estimated average amount of such fees paid by each Class Member was approximately $238.06.

This is an exceptional result for the Class. It offers Class Members benefits approaching or equivalent to a complete trial victory without the risks, costs, and delay of continued litigation, a trial, and possibly an appeal.

To communicate this Settlement to the Class, the Settlement proposes a straightforward Notice Program that will send direct mail notices to every lessee who had a SmartLease with Ally during the Class Period. This Notice Program exceeds all applicable requirements of law, including Rule 23 and constitutional due process, to apprise Class Members of the pendency of the Action, the terms of the Settlement, and their rights to opt out of, or object to, the Settlement.

[1] Capitalized terms not defined herein shall have the same definitions and meanings ascribed to them in the Settlement.

The proposed Settlement is fair, reasonable, and adequate. It has been reached after extensive arm's-length, intensely fought negotiations aided by an experienced mediator and conducted over the course of almost a year. And the Class defined in the Settlement satisfies all the requirements of Rule 23 for settlement purposes.

Accordingly, Plaintiff seeks preliminary approval of the Settlement and certification of the Class for settlement purposes, and requests, *inter alia*, that the Court order that notice of the Settlement be disseminated to the Class, and that the Court schedule a Final Approval Hearing to determine whether final approval of the Settlement should be granted. A proposed Preliminary Approval Order for the Settlement is attached as an exhibit to this motion.

BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background.

Ally is one of the nation's largest automobile financing companies, originating billions of dollars in automobile leases every year through its standardized lease contract, the "SmartLease." Ally has made its SmartLease agreement available to thousands of dealerships nationwide. Generally, these dealerships independently negotiate and enter into lease agreements for new vehicles with consumers, using Ally's SmartLease form to memorialize the agreement. Ally then purchases these leases and the leased vehicles from the dealerships, who check a box on each SmartLease indicating that they are assigning the lease and selling the vehicle to Ally.

These routine steps were taken with respect to the lease of the vehicle that gave rise to this action. In February 2012, Miami Lakes CJ LLC entered into a two-year SmartLease with non-party Wesley Reid for a new Dodge Challenger, and Miami Lakes CJ checked the box indicating that "it will assign this lease and sell the vehicle to Ally Bank."

A few months later, in November 2012, Mr. Reid chose to assign the SmartLease of the vehicle to Mr. Schreiber. To carry out the assignment, Mr. Reid and Mr. Schreiber executed a Transfer of Lease Obligation document, which required Ally's consent to become effective. On November 19, 2012, Ally approved the assignment by signing the Transfer of Lease Obligation and sending Mr. Schreiber a letter stating that "the lease transfer is now complete." Thus, as of November 19, 2012, Ally and Mr. Schreiber were the only two parties bound by the SmartLease for the Dodge Challenger.

Section 9 of the SmartLease provided Mr. Schreiber with "an option to buy the vehicle at the end of the lease term for $25,889.70, plus official fees and taxes." The agreement defined

"official fees and taxes" to include "all government license, title, registration, testing, and inspection fees for the vehicle" and "all taxes on the lease or the vehicle that the government levies."

In February 2014, as his SmartLease was nearing expiration, Mr. Schreiber communicated to Ally that he wished to exercise his option under Section 9 to purchase the car for $25,889.70, plus official fees and taxes. Ally, however, claimed that it was unable to sell the vehicle to Mr. Schreiber under Florida law because it does not hold a dealer's license in Florida. Ally, therefore, directed Mr. Schreiber to purchase the car through a dealership, and recommended that Mr. Schreiber do so from Miami Lakes AM, LLC, a non-party dealership that originated the SmartLease.

On March 23, 2014, Mr. Schreiber entered into a Retail Buyer's Order with Miami Lakes AM to purchase the car, under which Miami Lakes AM charged him $25,389.70 as the cash price for the vehicle, a $799.99 pre-delivery service fee, and a $100 documentation fee, in addition to various governmental fees and taxes. Thus, Mr. Schreiber was required to pay $26,289.69, plus official taxes and fees, which was $399.99 more than the purchase option price listed in the SmartLease agreement Mr. Schreiber had with Ally. Neither the pre-delivery service fee nor the documentation fee was disclosed on the SmartLease agreement.

Evidence collected through discovery indicates that this was not an isolated incident. Tens of thousands of lessees who purchased vehicles when their SmartLease agreements expired may have been charged improper fees, such as documentation and pre-delivery service fees, by dealerships executing the transactions. The amount of such fees varied, ranging from less than $50 to more than $1,000, with an estimated average of $238.06.

Evidence provided in discovery also revealed that Ally could not programmatically query its database to determine whether most lessees were charged dealership fees or the amount of fees charged. Rather, for most lessees, it is necessary to individually examine transactional records transmitted to and stored by Ally to determine whether such fees were charged and their amount. Additionally, for some lessees, particularly those who financed their lease-end purchases through other financing companies or paid cash for their vehicles, Ally may not be in possession of any transactional documents that would contain fee information, and such documentation would solely be in the possession of the dealerships and the lessees.

B. Course of Proceedings.

Mr. Schreiber filed a two-count action against Ally, on behalf of himself and a putative class of similarly situated automobile purchasers, on June 4, 2014. His first claim asserted that Ally violated the federal Consumer Leasing Act, 15 U.S.C. § 1667, et seq., by failing to disclose that he would be required to purchase the vehicle from a dealer and that he would be required to pay additional fees to the dealer. Mr. Schreiber's second claim asserted that Ally breached its SmartLease with him by refusing to sell the vehicle to him at the price stated in the contract.

On July 21, 2014, Ally filed a Motion to Compel Arbitration and Dismiss or, Alternatively, Stay Litigation. Ally argued that, under Florida's equitable estoppel doctrine, it was entitled to compel Mr. Schreiber to arbitrate his claims against it based on an arbitration provision in the Miami Lakes AM Buyer's Order, to which Ally was not a party. After hearing oral argument, the Court granted Ally's motion. Mr. Schreiber then appealed the Court's decision to the Eleventh Circuit, which reversed the Order compelling arbitration and remanded the case for further proceedings.

Following the Eleventh's Circuit decision, Ally answered the complaint and the Parties engaged in extensive discovery. Over the past two years, Ally has produced hundreds of thousands of pages of documents, including massive spreadsheets with lease data for more than 125,000 lessees. To analyze the data produced by Ally, Plaintiff's Counsel retained a data expert, developed a unique data and document review platform, and dedicated a team of several attorneys to the laborious work of reviewing these documents and data. Plaintiff's Counsel also deposed eleven fact witnesses, and Ally deposed the Plaintiff.

C. Settlement Negotiations.

Parallel with this hard-fought litigation, preliminary settlement discussions began in the spring of 2017, between Plaintiff's Counsel and Ally's counsel. After several preliminary discussions, the Parties met for an in-person mediation conducted by former Circuit Court Judge Ellen L. Leesfield in July 2017. Although the Parties made significant progress during the in-person mediation, it concluded without a resolution. The Parties continued to negotiate a potential resolution over the next several months. During the negotiations, the Parties discussed their views of the law and facts and potential relief for the proposed Class and exchanged a series of counter-proposals for key conceptual aspects of a potential settlement. The Parties ultimately reached an agreement in principle in early December 2017. During the next several months, the Parties

drafted and negotiated the precise terms of the attached Settlement agreement and exhibits, and Ally completed an extended analysis of dealership fees paid by lessees to finalize the value of the Settlement. At all times, negotiations were adversarial, non-collusive, and at arm's length.

TERMS OF THE SETTLEMENT

The terms of the Settlement are detailed in the Agreement, attached hereto as Exhibit 1. The following is a summary of the material terms of the Settlement.

A. The Settlement Class.

The Class is an opt-out class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The Class is defined as:

> all persons nationwide who leased a motor vehicle pursuant to a SmartLease Agreement that was assigned to Ally Financial Inc. (or a predecessor in interest or affiliated company, including General Motors Acceptance Corporation, GMAC LLC, GMAC Inc., GMAC Automotive Bank, Ally Bank, Ally Bank Lease Trust or Ally Financial Lease Trust), and who subsequently purchased the leased vehicle between June 4, 2009 and the Preliminary Approval Date pursuant to the purchase option provision in the SmartLease Agreement and were required to pay a Documentary or Dealer Fee not disclosed in the SmartLease Agreement when purchasing the vehicle.

Exhibit 1 (§ 2.bb).

B. Settlement Relief.

Each Settlement Class Member will be given an opportunity to submit a claim for repayment of 100% of the Documentary or Dealer Fee that was charged in connection with a lease-end transaction pursuant to the purchase-option in his or her SmartLease. Exhibit 1 (§§ 12, 18). A "Documentary or Dealer Fee" is broadly defined to include any "unofficial documentary, dealer, or similar fee not disclosed in the SmartLease Agreement that was charged and not refunded to a Settlement Class Member in connection with the purchase of a leased vehicle by the Settlement Class Member pursuant to the purchase option price set forth in the SmartLease Agreement." Exhibit 1 (§ 2.m).

The process for submitting a claim is exceedingly simple and straightforward. The claim form, which can be submitted online or by mail, is just a page-and-a-half long. Exhibit 1 (§§ 14; Exhibit B to Settlement). It requires Class Members to provide basic biographical information (i.e., name, telephone number, address, and email), and either submit a document showing that the Class Member was charged a Documentary or Dealer Fee, or check a box stating that the Class

Member believes he or she was charged such a fee, which then requires the Claims Administrator to conduct a reasonable search of records provided by Ally and Plaintiff's Counsel for documents showing that the Class Member was charged a Documentary or Dealer Fee. Exhibit 1 (§§ 14, 15; Exhibit B to Settlement). To assist the Claims Administrator in conducting such a search for records and increase the likelihood of identifying supportive documentation, Plaintiff's Counsel will provide the Claims Administrator with access to the review platform that Plaintiff's Counsel developed in discovery and a computerized search tool, which will enable the Claims Administrator to locate transactional records for a Class Member simply by entering the Class Member's name.

Because of the manner in which Ally maintains its records and because Ally does not possess transactional records relating to every single sale of a leased vehicle during the Class Period, it was not possible for the Parties to calculate the precise value of Documentary and Dealership Fees paid by every Class Member, and as a result, the total value of Documentary and Dealership Fees paid by the Class as a whole, without individually reviewing hundreds of thousands of documents and obtaining, through thousands of subpoenas, additional documents from thousands of dealerships, if such documents are even available. Unquestionably, such an exercise would be impractical and cost prohibitive. Fortunately, a more practical and efficient solution was available: developing a reliable estimate of the total value of Documentary and Dealership Fees paid by Class Members, based on a review of the records that Ally does possess. To that end, Plaintiff's Counsel and Ally independently analyzed the transactional records that dealerships had sent Ally in connection with the sale of leased vehicles. After reviewing thousands of such records, which represented a statistically significant sample, the Parties agreed that $19,717,222 constituted a reliable estimate of the total value of Documentary and Dealership Fees paid by the Class. Accordingly, consistent with the objective of repaying 100% of such fees to Class Members, Ally agreed to make $19,717,222 available to Class Members, inclusive of an incentive award for Plaintiff and attorneys' fees and costs awarded by the Court, but exclusive of administration and notice costs. Exhibit 1 (§ 19). If the total amount due to Class Members, together with the incentive award and attorneys' fees and costs awarded by the Court, exceeds $19,717,222, Class Members will be compensated on a *pro rata* basis. Exhibit 1 (§ 18).

C. Release.

Upon entry of a Final Approval Order, Class Members agree to give a standard, broad release to the "Released Parties," defined essentially as Ally and all related entities and persons, of all claims "arising from Documentary or Dealer Fees charged to Class Members in connection with a Class Member's exercise of the purchase option set forth in his or her SmartLease Agreement during the Class Period . . . based upon the allegations set forth in the Complaint." Exhibit 1 (§§ 2.z, 2.aa). In addition, the Settlement assigns to Ally any claims against dealerships for charging impermissible fees on behalf of Class Members who receive a Settlement Payment. This assignment will enable Ally to seek indemnification from the dealerships that received and often kept the improper fees, if Ally so chooses. Exhibit 1 (§ 53). At the same time, Ally agrees to indemnify Settlement Class Members from claims asserted by dealerships that may arise out of Ally pursuing such indemnification rights. Exhibit 1 (§ 53).

D. Notice Program.

The Settlement contains a robust Class Notice Program designed to satisfy all applicable laws, including Rule 23 and constitutional due process. Notifying Class Members of the Settlement will be accomplished primarily through direct mail notices, substantially in the form attached as Exhibit A to the Settlement. Exhibit 1 (§ 30; Exhibit A to Settlement). The direct mail notice informs potential Class Members of the Class definition; material terms of the Settlement; the claims process; the scope of the Release; Class Members' rights to opt out of or object to the Settlement; the date of the Final Approval Hearing; and the various ways they can obtain additional information regarding the Settlement. Exhibit 1 (§ 30; Exhibit A to Settlement).

Ally will provide the Claims Administrator with an updated database containing the last known contact information for all SmartLease lessees during the Class Period, which necessarily includes all Settlement Class Members. Exhibit 1 (§ 32). Ally already possesses this information from servicing the lessees' SmartLease agreements. The Claims Administrator will be directed to mail the notices, via first class mail, within thirty (30) days of the Court's Preliminary Approval Order, or as soon as reasonably practicable. Exhibit 1 (§ 33). The Claims Administrator must also re-mail any notices returned by the U.S. Postal Service with a forwarding address and, for returned mail without a forwarding address, research better addresses and promptly re-mail copies of the applicable notice to any better addresses.

The Claims Administrator will also establish a Settlement website, which will make available for download relevant documents and forms, including the operative Complaint, the Class Notice, the Settlement Agreement, and the Claim Form. Exhibit 1 (§ 36). The Settlement website will also allow Class Members to submit questions regarding the Settlement and to submit Claim Forms online or complete an online version of the form. Exhibit 1 (§ 36). In addition, the Claims Administrator will establish a toll-free interactive voice response telephone system with script recordings of information about the Settlement. Exhibit 1 (§ 35).

To comply with the Class Action Fairness Act, the Claims Administrator will also send to each appropriate State and Federal official the materials specified in 28 U.S.C. § 1715 and otherwise comply with its terms. Exhibit 1 (§ 38). The identities of such officials and the content of the materials shall be mutually agreeable to the Parties, through their respective counsel. Exhibit 1 (§ 38).

E. Settlement Administration.

The Claims Administrator is charged with administering the Settlement, including the Claims Process and the Notice Program. Exhibit 1 (§ 2.f). The Parties agree that Heffler Claims Group should serve as Claims Administrator. Exhibit 1 (§ 2.f). A resume detailing the Heffler Claims Group's extensive experience administering class action settlements is attached as Exhibit 2.

F. Attorneys' Fees and Incentive Award for Class Representative.

Plaintiff's Counsel did not begin to negotiate attorneys' fees and expenses until after agreeing to the principal terms set forth in the Settlement Agreement. The Settlement Agreement provides that Class Counsel agree to limit their request to the Court for attorneys' fees and expenses to no more than $2.95 million.[2] Exhibit 1 (§ 27). Likewise, Ally agrees not to oppose

[2] This amount, which represents approximately 15% of the Settlement Value, is in keeping with prevailing law and practice in this Circuit. *See, e.g., Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1365-66 (S.D. Fla. 2011); *Almanazar v. Select Portfolio Servicing, Inc.*, No. 14-cv-22586-FAM, 2016 WL 1169198, at *4 (S.D. Fla. Mar. 25, 2016).

such a request. Exhibit 1 (§ 27). Attorneys' fees and expenses awarded to Class Counsel for work done on behalf of the Class will be paid by Ally. Exhibit 1 (§ 27).

The Parties agreed that the Court's resolution of the issue of attorneys' fees and expenses shall have no bearing on the Settlement Agreement. Exhibit 1 (§ 27). In particular, an Order relating to attorneys' fees or expenses shall not operate to terminate or cancel the Settlement Agreement or affect or delay its Effective Date. Exhibit 1 (§ 27).

Finally, Plaintiff's Counsel may petition the Court for an incentive award of up to $5,000 for the Class Representative, Robert Schreiber, in order to compensate Plaintiff for his efforts on behalf of the Class.

MEMORANDUM OF LAW

A. The Legal Standard for Preliminary Approval.

Rule 23(e) requires judicial approval for the compromise of claims brought on a class basis. "Although class action settlements require court approval, such approval is committed to the sound discretion of the district court." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g., Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) (citing cases).

The purpose of the preliminary evaluation of a proposed class action settlement is to determine whether the settlement is within the "range of reasonableness." 4 NEWBERG § 11.26; *Almanazar v. Select Portfolio Servicing, Inc.*, No. 14-cv-22586-FAM, 2015 WL 10857401, at *1 (S.D. Fla. Oct. 15, 2015). "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. Wm. Wrigley Jr. Co.*, No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). "Settlement negotiations that involve arm's length,

informed bargaining with the aid of experienced counsel support a preliminary finding of fairness." *Almanazar*, 2015 WL 10857401, at *1. *See* MANUAL FOR COMPLEX LITIGATION, Third, § 30.42 (West 1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

When determining whether a settlement is ultimately fair, adequate, and reasonable, courts in this Circuit have looked to six factors, commonly called the *Bennett* factors: "(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 the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986. Courts have, at times, engaged in a "preliminary evaluation" of these factors to determine whether the settlement falls within the range of reason at the preliminary approval stage. *See, e.g.*, *Smith*, 2010 WL 2401149, at *2.

An order granting Preliminary Approval will allow all Class Members to receive notice of the Settlement's terms, and of the date and time of the Final Approval Hearing at which Class Members may be heard and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented by the Parties. *See* MANUAL FOR COMPL. LITIG., §§ 13.14, 21.632.

Neither formal notice nor a hearing is required at the preliminary approval stage; the Court may grant such relief upon an informal application by the Parties without a hearing or may conduct any hearing in court or in chambers, at the Court's discretion. *Id.* § 13.14.

B. The Settlement Satisfies the Criteria for Preliminary Approval.

Each of the relevant factors weighs in favor of Preliminary Approval of the Settlement. First, the Settlement was reached in the absence of collusion and is the product of good-faith, informed, and arm's-length negotiations by competent counsel. Furthermore, a preliminary review of the factors related to the fairness, adequacy, and reasonableness of the Settlement demonstrates that the Settlement fits well within the range of reasonableness, such that Preliminary Approval is appropriate.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiff maintains that the claims

asserted are meritorious, that any motion for class certification would prove successful, and that Plaintiff would prevail if this matter proceeded to trial. Ally, however, maintains that Plaintiff's claims are unfounded and cannot be maintained as a class action. Ally denies any potential liability and has shown a willingness to litigate Plaintiff's claims vigorously.

The Parties have concluded that the benefits of settlement in this case outweigh the risks attendant to continued litigation, which include, but are not limited to, the time and expenses associated with proceeding to trial, the time and expenses associated with appellate review, and the countless uncertainties of litigation, particularly in the context of a complicated class action.

1. The Settlement is the product of good-faith, informed, and arm's-length negotiations.

A class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton*, 559 F.2d at 1330; *see also Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1318-19 (S.D. Fla. 2005) (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

The Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of these cases. With the assistance of an experienced mediator, the Parties engaged in extensive, adversarial negotiations for several months, exchanging countless proposals while the litigation continued on a parallel track. These negotiations were conducted in the absence of collusion.

Furthermore, counsel for each party is particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Counsel zealously represented their clients' interests through protracted litigation before this Court for well over two years.

In negotiating this Settlement in particular, Class Counsel had the benefit of years of experience and a familiarity with the facts of this Action. Class Counsel conducted a thorough investigation and analysis of Plaintiff's claims and Ally's defenses and engaged in extensive formal discovery with Ally. Class Counsel's review of that extensive discovery enabled them to gain an understanding of the evidence related to central questions in the case, and prepared counsel for well-informed settlement negotiations. *See Francisco v. Numismatic Guar. Corp. of Am.*, 2008 WL 649124, at *11 (S.D. Fla. Jan. 31, 2008) (stating that "Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation"

where counsel conducted two 30(b)(6) depositions and obtained "thousands" of pages of documentary discovery).

2. The facts support a preliminary determination that the Settlement is fair, adequate, and reasonable.

As noted, this Court may conduct a preliminary review of the *Bennett* factors to determine whether the Settlement falls within the "range of reason" such that notice and a final hearing as to the fairness, adequacy, and reasonableness of the Settlement is warranted.

(a) Likelihood of success at trial.

While Plaintiff and Class Counsel are confident in the strength of their case, they are also pragmatic in their awareness of the various defenses available to Ally, and the risks inherent to litigation. Ally has claimed that dealerships are at fault for charging Class Members improper fees and that it cannot be held liable for their misconduct. Ally also has raised a jurisdictional challenge to the claims of non-Florida plaintiffs and has made clear that it will vigorously contest the certification of a litigation class. Based on the discovery that has been conducted to date, Plaintiff and Class Counsel believes that they could prevail in a litigated class certification battle. Still, even if Plaintiff was successful, Ally would inevitably seek interlocutory review of a class certification ruling via Rule 23(f) in the Court of Appeals, delaying the progress towards trial.

The success of Plaintiff's claims in future litigation turns on these and other questions that are certain to arise in the context of motions for class certification and summary judgment and at trial. Protracted litigation carries inherent risks that would necessarily have delayed and endangered Class Members' monetary recovery. Even if Plaintiff prevailed at trial against Ally, any recovery could be delayed for years by an appeal. *See Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

This Settlement provides substantial relief to Class Members without further delay. The fact is that the Settlement will provide substantial benefits to Class Members far sooner than a litigated outcome. Under the circumstances, Plaintiff and Class Counsel appropriately determined that the Settlement reached with Ally outweighs the risks of continued litigation.

(b) Range of possible recovery and the point on or below the range of recovery at which a settlement is fair.

When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for

the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.*

Courts have determined that settlements may be reasonable even where plaintiffs recover only part of their actual losses. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate."). "The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable." *Lipuma*, 406 F. Supp. 2d at 1323.

Class Counsel have a thorough understanding of the practical and legal issues they would continue to face litigating these claims against Ally. In this case, Plaintiff faces a number of challenges, including class certification and summary judgment. The approximately $20 million made available to the Class is an outstanding result given the complexity of the Action and the significant barriers that stand between the present juncture of the litigation and final judgment: *Daubert* challenges to damage experts' methodologies; class certification; interlocutory Rule 23(f) appeal of class certification; motions for summary judgment; trial; and post-trial appeals. Indeed, the approximately $20 million value of the Settlement represents the Parties' estimate of ***100%*** of Plaintiff's and Class Members' damages recovery.

In addition, the Eleventh Circuit has approved the use of a simple, straightforward claims process indistinguishable from the process proposed here. *See Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir. 2015) ("[W]hile monetary relief was available to only those class members who submitted claims, the use of a claims process is not inherently suspect."). The claims process, moreover, is necessary, because Ally cannot programmatically query its database to determine whether all Class Members were charged Documentary or Dealership Fees and the amount of such fees, and Ally does not even possess transactional records for the sale of some Class Members' leased vehicles.

By any reasonable measure, the recovery provided in the Settlement is a significant achievement given the obstacles that Plaintiff faced and continues to confront in the litigation. Given the substantial benefits that the Settlement provides to Class Members, the Settlement is fair and represents a reasonable recovery for the Class in light of Ally's defenses and the challenging and unpredictable path of litigation Plaintiff would have faced absent a settlement.

(c) Complexity, expense, and duration of litigation.

Ongoing litigation would involve substantial, expensive expert discovery, complex pretrial proceedings in this Court and the appellate courts, and ultimately a trial and appeal. Absent the Settlement, the Action could continue for two or three more years, if not longer. The Settlement is the best vehicle for Class Members to receive the relief to which they are entitled in a prompt and efficient manner.

(d) Stage of the proceedings.

Courts consider the stage of proceedings at which settlement is achieved "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324.

Plaintiff settled the Action with the benefit of hundreds of thousands of pages of documents produced thus far in discovery, eleven depositions of fact witnesses, and extensive discussions with experts and consultants. As noted, review of those documents and depositions positioned Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiff's claims and prospects for success at class certification, summary judgment and trial. *Id.*; *see also Numismatic Guar. Corp.*, 2008 WL 649124, at *11.

* * *

Because all the relevant *Bennett* factors demonstrate that this Settlement is fair, adequate, and reasonable, the Court should grant Preliminary Approval of the Settlement.

C. Preliminary Certification of the Settlement Class Is Appropriate.

For settlement purposes, Plaintiff respectfully requests that the Court certify the Settlement Class defined above and in the Agreement. "A class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks and citation omitted). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Preliminary certification of a nationwide class for settlement purposes permits notice of the proposed Settlement to issue to the Class to inform Class Members of the existence and terms of the proposed Settlement, of their right to be heard on its fairness, of their right to opt out, and

of the date, time and place of the Final Approval Hearing. *See* MANUAL FOR COMPL. LITIG., §§ 21.632, 21.633. For purposes of this Settlement only, Ally do not oppose class certification. For the reasons set forth below, certification is appropriate under Rules 23(a) and (b)(3).

Certification under Rule 23(a) requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Under Rule 23(b)(3), certification is appropriate if the questions of law or fact common to the members of the class predominate over individual issues of law or fact and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The numerosity requirement of Rule 23(a) is satisfied because the Settlement Class consists of tens of thousands of people throughout the United States, and joinder of all such persons is impracticable. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Transp.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area").

"Commonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (internal quotation marks omitted); *see also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001) (same). Here, the commonality requirement is satisfied because there are many questions of law and fact common to the Settlement Class, including those that center on the identical terms of Ally's standardized SmartLease; Ally's alleged conduct in encouraging Class Members to purchase leased vehicles from dealerships; Ally's alleged knowledge that dealerships charged Class Members improper fees; Ally's alleged failure to disclose dealership fees in the SmartLease; and whether Ally's alleged conduct breached the SmartLease and violated the Consumer Leasing Act. *See In re Checking Account Overdraft Litig.*, 275 F.R.D. 666 (S.D. Fla. 2011).

For similar reasons, Plaintiff's claims are reasonably coextensive with those of the absent Class Members, such that the Rule 23(a)(3) typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class

where they "possess the same interest and suffer the same injury as the class members"). Plaintiff's claims are typical of absent Class Members' claims because they all were subjected to the same alleged conduct from Ally and have suffered the same harm, and because they will equally benefit from the relief provided by the Settlement.

Plaintiff also satisfies the adequacy of representation requirement. Adequacy under Rule 23(a)(4) relates to (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. *Fabricant*, 202 F.R.D. at 314. The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Emp. Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiff's interests are coextensive with, and not antagonistic to, the interests of the Class, because Plaintiff and absent Class Members have an equally great interest in the relief offered by the Settlement, and absent Class Members have no diverging interests. Further, Plaintiff is represented by qualified and competent counsel with extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Class Counsel have devoted substantial time and resources to vigorous litigation of the Action from inception through the date of the Settlement.

The predominance requirement of Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks and emphasis omitted). Plaintiff's claims satisfy the predominance requirement because liability questions common to all Class Members substantially outweigh any possible issues that are individual to each Settlement Class Member. The salient evidence necessary to establish Plaintiff's claims is common to both Plaintiff and all members of the Class—they would all seek to prove that unofficial, undisclosed dealership fees were improper, that Ally breached the SmartLease, and that Ally violated the Consumer Leasing Act. And the evidentiary presentation changes little if there are 100 Class Members or 15,000,000: in either instance, Plaintiff would present the same evidence of the indistinguishable terms of Ally's SmartLease, Ally's alleged failure to disclose that dealerships would charge additional fees, and the alleged charging of improper fees by dealerships. *Klay v. Humana, Inc.*, 382 F.3d 1241,

1255 (11th Cir. 2004) ("[I]f common issues truly predominate over individualized issues in a lawsuit, then 'the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.'") (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 322 (5th Cir. 1978)).

Furthermore, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). For these reasons, the Court should certify the Class defined in the Settlement.

D. The Court Should Approve the Proposed Notice Program Because It Is Constitutionally Sound.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPL. LITIG., § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* MANUAL FOR COMPL. LITIG., § 21.312 (listing relevant information).

The proposed Notice Program satisfies all of these criteria. As recited in the Settlement and above, the Notice Program will inform Class Members of the substantive terms of the Settlement, will advise Class Members of their options for opting-out or objecting to the Settlement, and will direct them where to obtain additional information about the Settlement. Therefore, the Court should approve the Notice Program and the form and content of the notice included as Exhibit A of the Settlement Agreement.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the Settlement approval process is a Final Approval Hearing, at which the Court will hear all evidence and argument necessary to make its final evaluation of the Settlement. Proponents of the Settlement may explain the terms and conditions of the Settlement and offer argument in support of final approval. The Court will determine at or after the Final Approval

Hearing whether the Settlement should be approved; whether to enter a final order and judgment under Rule 23(e); and whether to approve Class Counsel's application for attorneys' fees and reimbursement of costs and expenses and the request for an Incentive Award for the Class Representative.

Plaintiff requests that the Court schedule the Final Approval Hearing during the week of October 8, 2018, or thereafter, if that is convenient for the Court. Plaintiff and Class Counsel will file their motion for final approval of the Settlement, and Class Counsel will file their Fee Application and request for an Incentive Award for the Class Representative, no later than 45 days prior to the Final Approval Hearing.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order that:

1. Grants preliminary approval to the Settlement;
2. Preliminarily certifies the proposed Class defined in the Settlement, pursuant to Rule 23(b)(3) and (e), for settlement purposes only, and appoints Robert Schreiber as Class Representative for Class;
3. Approves (a) the Notice Program set forth in the Settlement, (b) the form and content of the notice as set forth in the form attached to the Settlement as Exhibit A thereto, and (c) the Claim Form attached as Exhibit B thereto;
4. Approves and orders the opt-out and objection procedures set forth in the Settlement;
5. Stays Plaintiff's claims asserted in the Action against Ally;
6. Appoints as Class Counsel Podhurst Orseck, P.A. and Baron & Budd, P.C.;
7. Schedules a Final Approval Hearing during the week of October 8, 2018, or thereafter, subject to the Court's availability and convenience; and
8. Addresses the other related matters pertinent to the preliminary approval of the Settlement.

Dated: June 15, 2018
Miami, Florida

Respectfully submitted,

PODHURST ORSECK, P.A.

/s/ Matthew P. Weinshall
Peter Prieto (FBN 501492)
John Gravante (FBN 617113)
Matthew P. Weinshall (FBN 84783)
Alissa Del Riego (FBN 99742)
SunTrust International Center
One S.E. Third Ave., Suite 2300
Miami, Florida 33131
Phone: (305) 358-2800
Fax: (305) 358-2382
Email: pprieto@podhurst.com
jgravante@podhurst.com
mweinshall@podhurst.com
adelriego@podhurst.com

BARON & BUDD, P.C.
Daniel Alberstone (SBN 105275)
dalberstone@baronbudd.com
Roland Tellis (SBN 186269)
rtellis@baronbudd.com
Jonas P. Mann (SBN 263314)
jmann@baronbudd.com
15910 Ventura Boulevard,
Suite 1600
Encino, California 91436
Telephone: (818)839-2333
Facsimile: (818)986-9698

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed via CM/ECF and served on all counsel of record via electronic notices generated by CM/ECF on June 15, 2018.

By: */s/ Matthew P. Weinshall*
Matthew P. Weinshall