

RULING/ORDERS

**FILED**  
Superior Court of California  
County of Los Angeles

SEP 08 2020

Buckingham v. Automotive Funding, Case No.: BC492394

Sherri R. Carlen, Executive Officer/Clerk  
By:  Deputy  
Pedro Martinez

The Parties' Motion for Preliminary Approval of class action settlement is GRANTED, on the condition that Plaintiff file the executed version of the modified settlement agreement by September 22, 2020.

Non-appearance case management review is set for September 29, 2020, 8:30 a.m., Dept. 9.

The parties must file their Motion for Final Approval of Class Action Settlement by October 8, 2020. The parties are ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

Non-appearance case management review is set for October 16, 2020, 8:30 a.m., Dept. 9.

I.

INTRODUCTION

A. Background

Plaintiff Curtis Buckingham ("Plaintiff" or "Class Representative") asserts claims on his own behalf, and on behalf of a putative settlement class of other consumers, who bought vehicles under retail installment sale contracts governed by the Rees-Levering Automobile Sales Finance Act ("Rees-Levering Act"), Civil Code §2981 et seq. Plaintiff alleges that Defendant Automotive Funding Group, Inc. ("AFG") sent post-repossession notices of intent ("NOI") that failed to comply with Civil Code §§2983.2(a) and 2983.3(d), and was thus barred from collecting any Deficiency Balance from borrowers after disposition of the vehicles. Plaintiff also asserts claims under the Rees-Levering Automobile Sales Finance Act and the Unfair Competition Law, Business & Professions Code §17200, et seq. ("UCL"). The Second Amended Complaint ("SAC"), the operative complaint, added 3<sup>rd</sup> Generation, Inc. as a co-defendant and added causes of action for Fraudulent Conveyance and Resulting Trust.

In February 2018, Defendant AFG filed a petition for Chapter 7 Bankruptcy Protection. Following investigations regarding allegedly fraudulent conveyances from AFG to third parties, the Bankruptcy Trustee was on the eve of filing formal adversary complaints against AFG and 3<sup>rd</sup> Generation CEO and President Corey Leyton, Nadine Leyton (Corey Leyton's mother), Mitchell Leyton (Corey Leyton's brother), and Corey E. Leyton and Lesley A. Leyton as Trustees of the Leyton Family Trust (collectively "the Leyton Parties"). It was at that time that the parties agreed to settle all claims, including the instant class action.

The Bankruptcy Court entered an order approving the settlement on March 10, 2020 and lifted the automatic stay as to this settlement, remanding the action to Superior Court for Preliminary Approval, Class Notice, and Final Approval. The Trustee currently holds the Buckingham Class Action settlement funds in trust pending final approval by the Superior Court. The parties filed the motion for preliminary approval of settlement on May 18, 2020, and a copy of the parties' Settlement Agreement and Release ("Superior Court Settlement") in the Buckingham Action was filed with the Court. On August 7, 2020, the Court called the matter for hearing and issued a checklist to the parties as to deficiencies with the Settlement Agreement and Notice. Counsel subsequently filed revised versions of the Settlement Agreement and Notice with the Court.

Now before the Court is the Plaintiff's motion for preliminary approval of the settlement agreement.

B. Settlement Class Definition

"Settlement Class" means all consumers: (a) who purchased a motor vehicle and, as part of that transaction, entered into an agreement subject to California's Rees-Levering Automobile Sales Finance Act, Civil Code §2981, et seq.; (b) whose motor vehicle was repossessed or voluntarily surrendered; (c) who were issued an NOI by Automotive Funding Group, Inc. dba County Financial Services from October 2, 2010 to February 16, 2018; and (d) against whose account a deficiency balance was assessed. (¶12.18)

"Settlement Class" excludes persons (1) whose accounts were discharged in bankruptcy, and (2) against whom AFG or its agents or assignees obtained a Superior Court judgment. A true and correct list of all Settlement Class members, including primary and co-borrowers, is attached to the Superior Court Settlement as Exhibit D. A true and correct list of all persons excluded

from the Settlement Class is attached to the Superior Court Settlement as Exhibit E. (Ibid.)

C. Terms of Settlement Agreement

The essential terms are as follows:

- The Buckingham Settlement Amount ("BSA") is \$795,829.89, non-reversionary. (¶2.06)
- From the BSA, the following payments will be issued:
  - \$655,000 to Class Counsel for attorneys' fees and costs, including the cost of settlement administration (¶2.06);
  - \$15,000 to Class Representative as a Service Award (Ibid.);
  - \$110,525.42 in Restitution to Class Members for payments made toward Deficiency Balances (Ibid.); and
  - \$15,304.47 to cy pres. (Kemnitzer Decl. ¶43, fn.4; Third Supplemental Declaration of Kristin Kemnitzer ¶5)
- Class Members do not need to submit a claim form in order to receive restitution for payments towards their alleged deficiency balance. (¶5.02.b)
- Cessation of Collection: Upon execution of this Agreement, AFG, 3rd Generation, and/or their assignees, including, but not limited to debt collectors PCX and UAB, shall be enjoined from commencement, or cease, as applicable, all attempts to collect Deficiency Balances from Settlement Class members, including accomplishing the following: recall the accounts of Settlement Class members from any internal collection departments; recall the accounts of any Settlement Class members that were assigned to any outside collection agencies; recall any accounts of Settlement Class members that have been assigned to legal counsel; and dismiss any pending legal action against any Settlement Class member. (¶3.03)
  - Corey Leyton, on behalf of AFG affirms that there are approximately 3,378 members of the Settlement Class, inclusive of cosigners, whose Deficiency Balances total approximately \$12 million, and that AFG collected a total of \$110,525.42 in alleged deficiency balances from Settlement Class Members. Buckingham contends that the outstanding Deficiency Balances are in excess of \$21,000,000, based upon the June 30, 2017 Declaration of Corey Leyton submitted to the Court on Amount of Deficiencies filed in this action. (¶5.01)
- Leyton Declaration: Attached to the Superior Court Settlement as Exhibit F is a declaration by Corey Leyton, individually, and in his capacity as Chief Executive Officer of AFG, affirming the following: the method utilized by Corey Leyton on behalf of AFG to identify the Settlement Class; the number of Settlement Class members; the total amount of

Deficiency Balances assessed against Settlement Class; the amount of all payments made by each Settlement Class member towards the Deficiency Balances on his or her account following disposition of the Motor Vehicles; the total number of Settlement Class member accounts sold and/or assigned to any debt collector, including, but not limited to, PCX and UAB; Debtor has ceased all collection of deficiency balances from all Settlement Class members, and has provided proof in the form of a letter from Corey Leyton to all debt collectors, including PCX and UAB, to cease all collection efforts against all Settlement Class members accounts from PCX, UAB or any other assignee; that sufficient means exist to identify Settlement Class Members in order to implement the terms of this Agreement. (§3.09)

- Response Deadline. Written objections, requests for exclusion, and payment disputes must be postmarked to the administrator within 45 calendar days following the initial mailing of the notice. (§§ 3.08, 3.11, 3.12)

- Monetary Relief to Settlement Class Members. Ten (10) business days after Final Approval, the Bankruptcy Trustee, on behalf of AFG, agrees to remit to the Settlement Class Administrator the Buckingham Settlement Amount. On the Distribution Date, the Settlement Class Administrator shall issue checks to eligible Settlement Class members who paid any amount towards their alleged Deficiency Balance using the same address that the Settlement Class Administrator has on file from Settlement Class Notice. Each Settlement Class member who paid any amount towards their alleged Deficiency Balance will receive a check in the amount of 100% of all amounts paid by the Settlement Class member toward his or her Deficiency Balance. (§5.02.b)

- o Distribution Date is defined as 10 days after Final Judgment. (§2.09)

- o Final Judgment is defined as 61 days after Final Approval, or if an appeal is taken, when the judgment is final after all appeals are exhausted. (§2.11)

- Additional Relief to Settlement Class Members. Corey Leyton, on behalf of AFG, shall provide the following relief to Settlement Class members within fifteen (15) days of Final Approval: (a) identify the accounts for Settlement Class members where a Deficiency Balance was assessed, and change those account records to reflect a zero balance for each such account. (b) to the extent it has not already done so, take all steps necessary to cease all efforts to collect the Deficiency Balances of Settlement Class members. This includes, but is not limited to, recalling all Settlement Class member accounts from outside agencies, recalling all such accounts that have been assigned to legal counsel, and dismissing all pending legal

actions to collect a Deficiency Balance on any such account. (c) instruct Trans Union, Equifax, and Experian to delete all Settlement Class members' trade lines with respect to their AFG accounts. If at any time following sixty (60) days after such instruction, any Settlement Class member notifies either of the Parties or the Settlement Class Administrator that this information has not been deleted from his or her credit report, Corey Leyton, on behalf of AFG, will again request the deletion of the trade line from the Settlement Class member's credit history. The Parties agree that AFG, the Leyton Parties and/or 3rd Generation shall not be liable for any failure by any credit reporting agency to act on such request, and that a Settlement Class member's sole remedy for any such failure shall be to make a second request as set forth above. (§5.03)

- Tax Consequences: The Parties believe that no "identifiable event" has occurred within the meaning of Treasury Regulations section 1.6050P-1(b)(2) as a result of this Agreement, and as a result the Leyton Parties and 3rd Generation, on behalf of AFG, and AFG, will not issue IRS Forms 1099 to any Settlement Class member in connection with the settlement. (§5.04)

- Handling of Unclaimed Funds. The residue of any uncashed checks distributed pursuant to the terms of the Agreement shall be paid to the approved cy pres recipient(s). Specifically, the Parties will request that the Court order that members of the Settlement Class who are issued settlement checks shall have one hundred eighty (180) calendar days from the date of issuance of the checks to negotiate the checks. After 180 calendar days, the checks shall become null and void (the "Stale Date"). Within thirty (30) calendar days of the Stale Date, Class Counsel shall report to the Court via declaration the total amount that was actually paid to the class members. The Settlement Class Administrator declaration shall notify the Settlement Class counsel in writing of: the number of Settlement Class members, the number of Settlement Class members sent checks, the total dollar amount of the checks, and the total dollar amount of any uncashed checks. The Court shall thereafter amend the judgment to direct the Class Administrator to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to the cy pres recipient as designated in the Final Approval Order. (§5.07)

- o Settlement Class Counsel proposes Public Counsel as a cy pres recipient pursuant to CCP §384. (§4.01) Counsel represents that no attorney at its firm holds any governance position at Public Counsel. (Second Supplemental Declaration of Kristin Kemnitzer §10) Counsel also represents that the Class Representative has no interest or involvement in Public Counsel. (Third Supplemental Declaration of Kristin Kemnitzer §9)

- KCC, LLC will act as administrator for the settlement. (¶2.19)
- Notice of final judgment will be posted on - [www.afgsettlement.com](http://www.afgsettlement.com) (Notice pg. 3)
- Participating class members and the named Plaintiff will release certain claims against Defendants. (See further discussion below)

## II. DISCUSSION

### A. Does a Presumption of Fairness Exist?

1. Was the settlement reached through arm's-length bargaining? Yes. Class Counsel represents that the Parties mediated the action with Hon. Peter Lichtman in May of 2017 but were unable to reach a settlement. The Parties then had numerous settlement discussions through the bankruptcy trustee from 2018 until early 2020. (Declaration of Kristin Kemnitzer ¶¶ 72-73.) In January of 2020, the Bankruptcy Trustee prepared formal adversary complaints against the Leyton Parties, seeking avoidance and recovery of fraudulent transfers in accordance with 11 U.S.C. § 548(a)(1)(A), 548(a)(1)(B), 544, 551, California Civil Code § 3439 et seq. and California Corporations Code §§ 2009 et seq. (Id. at ¶35.) To avoid the filing of the adversary complaints, the Leyton Parties entered into a settlement agreement and release in Bankruptcy Court. The Bankruptcy Court settlement including the resolution of the instant class action. (Id. at ¶36)

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. An extensive discussion of the discovery and motion practice conducted in this action is provided in paragraphs 19-39 and 59-68 of the Declaration of Kristin Kemnitzer.

3. Is counsel experienced in similar litigation? Yes. (Id. at ¶¶ 97-108.)

4. What percentage of the class has objected? This cannot be determined until the fairness hearing. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 14:139.18, ["Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing."].)

The Court concludes that the settlement is entitled to a presumption of fairness.

B. Is the Settlement Fair, Adequate, and Reasonable?

1. Strength of Plaintiff's case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.)

Here, Class Counsel asserts that the outstanding Deficiency Balance of the approximately 3,378 class members is approximately \$12 million. Defendant has collected approximately \$110,525.42 from class members in payment on these alleged Deficiency Balances. Class Counsel represents that these figures are based upon discovery in this case and Corey Leyton's representations which have been verified by the Leyton declaration, attached to the Settlement Agreement and Release as Exhibit F. (Kimnitzer Decl. ¶43.)

2. Risk, expense, complexity and likely duration of further litigation. Given the nature of the class claims, the case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members.

3. Risk of maintaining class action status through trial. Even if a class is certified, there is always a risk of decertification. (See Weinstat v. Dentsply Intern., Inc. (2010) 180 Cal.App.4th 1213, 1226 ["Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate."].)

4. Amount offered in settlement. Here, Class Counsel have obtained a settlement in which Class Members will receive automatic and immediate relief from their alleged debts and will receive automatic credit repair relief. In addition, Defendant has agreed to refund 100% of all payments made by Class Members towards their alleged Deficiency Balances. (Kimnitzer Decl. ¶43.) Class Counsel asserts that this is "essentially 100% of the relief [Class Members] would receive following a successful trial." (Id. at ¶44.) Class Counsel has further provided the following chart:

Best Possible Trial Outcome	Current Settlement
Waiver of 100% of outstanding Deficiency Balances.	Waiver of 100% of outstanding Deficiency Balances.
Stop all collection activity on class member accounts.	Stop all collection activity on class member accounts.
Instruct credit reporting companies to delete trade line.	Instruct credit reporting companies to delete trade line.
Refund 100% collected on class member Deficiency Balances	Refund 100% collected on class member Deficiency Balances
AFG to pay service award to Buckingham, separate and apart from class member recovery.	AFG to pay \$15,000 service award to Buckingham, separate and apart from Class Member recovery
Attorneys' fees and costs paid by Corey Leyton on behalf of AFG, separate and apart from class recovery.	Attorneys' fees and costs paid by Corey Leyton on behalf of AFG, separate and apart from class recovery

(Id. at ¶46.)

5. Extent of discovery completed and stage of the proceedings. As indicated above, at the time of the settlement, Class Counsel had conducted sufficient discovery.

6. Experience and views of counsel. The settlement was negotiated and endorsed by Class Counsel who, as indicated above, is experienced in class action litigation, including securities class actions.

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object, opt-out and/or submit claim forms. This factor becomes relevant during the fairness hearing.

The Court concludes that the settlement can be preliminarily deemed "fair, adequate, and reasonable."

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C. Scope of the Release

Satisfaction by Judgment of All Class Claims. All Settlement Class members who do not request exclusion as set forth herein shall and hereby do release any and all claims, liens, demands, causes of action, obligations, damages, and liabilities, known or unknown, that they have or may have against AFG and/or 3<sup>rd</sup> Generation, that have been or could have been asserted in the Action based on the facts asserted on their behalf in the Action, including but not limited to any claims, liens, demands, causes of action, obligations, damages and liabilities, known or unknown, arising out of AFG's sending of an NOI, the content of that NOI, the assertion of a Deficiency Balance following repossession, the collection or attempted collection of the Deficiency Balance, and the reporting to Credit Reporting Agencies of the amounts remaining on the account after repossession. (§5.09)

"Related Parties" means (a) AFG, the Leyton Parties, and/or 3<sup>rd</sup> Generation, and any parent, affiliated and/or subsidiary companies, and any of their present and former officers, inside and outside directors, attorneys, accountants, agents, representatives, employees, heirs, successors and assigns, as well as each of their predecessors, successors, parents, subsidiaries, affiliates, and assigns, and (b) the past, present and future officers, directors, trustees, employees, shareholders, investors, owners, representatives, controlling persons, partners, associates, attorneys, accountants, service providers, agents, consultants, insurers, reinsurers and subrogees of each person or entity mentioned in clauses (a) or (b) of this section. (§2.16)

D. May Conditional Class Certification Be Granted?

1. Standards

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified (Amchem Products, Inc. v. Winsor (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases. (Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1807 fn. 19.) Finally, the Court is under no "ironclad requirement" to conduct an evidentiary hearing to consider whether the prerequisites for class

certification have been satisfied. (Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 240, disapproved on another ground in Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260.)

## 2. Analysis

a. Numerosity. The class consists of approximately 3,378 Class Members. (Kemnitzer Decl. ¶43.) This element is met.

b. Ascertainability. The proposed class is defined above. The class definition is "precise, objective and presently ascertainable." (Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 919.) Further, Class Members are identifiable from Defendant's records. (Kemnitzer Decl. ¶69; Superior Court Settlement ¶3.05 and Ex. D.)

c. Community of interest. "The community of interest requirement involves three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.) Regarding typicality, Class Counsel asserts that Settlement Class Representative is typical of the class members because both Class Representative and all other Class Members purchased a car in California, entered into a Conditional Sale Contract subject to the Rees Levering Act, the Conditional Sale Contract was assigned to AFG, AFG repossessed the vehicle, AFG issued a NOI, Plaintiff did not reinstate or redeem the contract, and AFG sold the vehicle and assessed a Deficiency Balances against them. (Kemnitzer Decl. ¶70.)

d. Adequacy of class counsel. As indicated above, Class Counsel has shown experience in class action litigation, including wage and hour class actions.

e. Superiority. Given the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members.

The Court concludes that the class may be conditionally certified since the prerequisites of class certification have been satisfied.

### E. Is the Notice Proper?

1. Content of class notice. A copy of the proposed notice to class members is attached to the Bankruptcy Settlement Agreement as Exhibit 1-C. Its content appears to be acceptable. It includes information such as: a summary of the litigation;

the nature of the settlement; the terms of the settlement agreement; the proposed deductions from the gross settlement amount (attorney fees and costs, enhancement awards, and claims administration costs); the procedures and deadlines for participating in, opting out of, or objecting to, the settlement; the consequences of participating in, opting out of, or objecting to, the settlement; and the date, time, and place of the final approval hearing.

2. Method of class notice. Settlement Class Counsel shall provide the Settlement Class member information to the Settlement Class Administrator promptly after the Superior Court grants Preliminary Approval. (§3.07) Within ten (10) days after Preliminary Approval, the Settlement Class Administrator shall send the Settlement Class Notice by first-class mail to all Settlement Class members. Before mailing the Settlement Class Notice, the Settlement Class Administrator shall update the addresses contained in the Settlement Class information provided by Corey Leyton on behalf of AFG, attached to the Settlement as Exhibit D, with a National Change of Address Registry (NCOA) search and update as appropriate. If any Settlement Class Notices are returned by the Postal Service, they will be re-mailed if (1) additional address information is provided by the Postal Service or (2) if no additional address information is provided by the Postal Service, the Settlement Class Administrator is able to obtain additional address information via skip-tracing. (§3.10)

3. Cost of class notice. As indicated above, claims administration costs are included in class counsel's fees and costs request, totaling \$655,000. (§2.06) Prior to the time of the final fairness hearing, the claims administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

#### F. Attorney Fees and Costs

California Rule of Court, rule 3.769(b) states: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action."

Ultimately, the award of attorney fees is made by the court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. (PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095-1096; Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615, 625-626; Ketchum III v. Moses (2000) 24 Cal.4th 1122, 1132-1136.) Despite any agreement by the parties to the contrary, "the court ha[s] an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable." (Garabedian v. Los Angeles Cellular Telephone Company (2004) 118 Cal.App.4th 123, 128.)

The question of whether Class Counsel is entitled to \$655,000 in attorney fees will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees. Class counsel must provide the court with billing information so that it can properly apply the lodestar method, and must indicate what multiplier (if applicable) is being sought as to each counsel.

G. Incentive Award to Class Representative

The Settlement Agreement provides for an enhancement award of up to \$15,000 for the class representative, Curtis Buckingham. (¶2.06.) In connection with the final fairness hearing, the named Plaintiffs must submit declarations attesting to why they should be entitled to an enhancement award in the proposed amount. The named Plaintiffs must explain why they "should be compensated for the expense or risk he has incurred in conferring a benefit on other members of the class." (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 806.) Trial courts should not sanction enhancement awards of thousands of dollars with "nothing more than pro forma claims as to 'countless' hours expended, 'potential stigma' and 'potential risk.'" Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit . . . .' (Id. at 806-807, italics and ellipsis in original.)

The Court will decide the issue of the enhancement award at the time of final approval.

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III.

CONCLUSION

Based upon the foregoing, the Court orders that:

1) The Parties' Motion for Preliminary Approval of class action settlement is GRANTED, on the condition that Plaintiff file the executed version of the modified settlement agreement by September 22, 2020.

2) Non-appearance case management review is set for September 29, 2020, 8:30 a.m., Dept. 9.

3) The parties must file their Motion for Final Approval of Class Action Settlement by October 8, 2020. The parties are ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

40 Non-appearance case management review is set for October 16, 2020, 8:30 a.m., Dept. 9.

CLERK TO GIVE NOTICE TO ALL PARTIES.

IT IS SO ORDERED.

DATED: September 8, 2020



YVETTE M. PALAZUELOS

YVETTE M. PALAZUELOS  
JUDGE OF THE SUPERIOR COURT