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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

RICARDO MELENDEZ; ANDRES OROZCO; MARTHA LOMELI; and CARLOS CRUZ,

Plaintiffs

vs.

K STREET FINANCE, INC. dba MULLEN FINANCE PLAN; and DOES 1 through 50, inclusive,

Defendants

_____/

Case No. 30-2014-00722412-CU-BT-CXC

CLASS ACTION

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Unlimited Civil Case

Date: June 7, 2019
Time: 9:00 a.m.
Dept: CX104
Hon. William Claster
No Reservation Number Needed per 3/29/19 Minute Order

Assigned for all purposes to Hon. William Claster – Dept. CX104

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I. INTRODUCTION

This motion seeks approval of a proposed class action settlement, arising out of post-repossession notices ("NOI") sent by Defendant K Street Finance Inc. dba Mullen Finance Plan (hereinafter "Mullen Finance" or "Defendant") in connection with the repossession of vehicles in California. Plaintiffs Ricardo Melendez ("Melendez"), Andres Orozco ("Orozco"), Martha Lomeli ("Lomeli"), and Carlos Cruz ("Cruz") (collectively "Plaintiffs" or "Class Representatives") assert claims on their own behalf, and on behalf of a certified 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*. Plaintiffs allege that the Defendant sent post-repossession notices of intent ("NOI")[1] that failed to comply with Civil Code §2983.2(a) and 2983.3(d), and were thus barred from collecting any Deficiency Balance from borrowers after disposition of the vehicles. Plaintiffs assert claims including, but not limited to, violations of the Rees-Levering Act and the Unfair Competition Law, Business & Professions Code §17200, *et seq*. ("UCL").

The Parties have agreed to settle, with specific and substantial benefits to an identifiable Settlement Class. Defendant will waive approximately $2,478,536.74 collectively in alleged deficiency debt for the approximately 1,206 Settlement Class Members. The class data will be verified under penalty of perjury.[2]

The "Settlement Class" is defined as all persons:

(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 a Notice of Intent to Dispose of Motor Vehicle ("NOI") by Mullen Finance from May 5, 2010 through August 4, 2016 that gave the consumer the right to reinstate the loan; and

[1] All references to the Settlement Agreement and Release are abbreviated SAR and paragraph number; e.g., "NOI" is defined in SAR ¶2.13.

[2] Per SAR ¶¶3.05, 3.07, and 3.09, Mullen Finance shall submit a declaration by May 9, 2019 attesting to the final outstanding Deficiency Balances, the amounts collected, and the total number of class members. Settlement Class Counsel shall cause Mullen Finance's declaration to be filed in advance of the hearing on this Motion. Since Mullen Finance has provided extensive verified discovery in this case, the Parties do not expect the declaration's findings to deviate significantly from the data previously provided.

(d) against whose account a Deficiency Balance was assessed.

Excluded from the Class are persons (1) whose account were discharged in bankruptcy, (2) against whom Mullen Finance obtained a judgment in Superior Court, and (3) those consumers who appear on the Stipulation of Parties to Exclude Certain Class Members, filed on January 9, 2019. SAR ¶ 2.17.

The procedural history of this case is voluminous. Following significant motion practice, two writs of mandate denied by the Court of Appeal, multiple rounds of discovery, numerous depositions, and five mediations, the Parties reached a settlement. The settlement is fair, reasonable, and adequate under the circumstances. As more fully discussed below, this case meets all requirements for Settlement Class certification. Code Civ. Pro. §382. Accordingly, the Parties move for Preliminary Approval of the settlement, certification of the proposed Settlement Class, approval of Settlement Class Notice, and the scheduling of a Final Approval hearing.

II. STATEMENT OF THE CASE

A. Parties

Class Representatives Melendez, Orozco, Lomeli, and Cruz are each California residents, consumers, and purchasers of a vehicle that was later repossessed by the Defendant. Each was issued an NOI, was unable to redeem or reinstate, and was later assessed a deficiency.

Mullen Finance is a California corporation in the business of providing financing to purchasers of automobiles, and in debt collection on such accounts. Mullen Finance issued the NOI that are the subject of this action.

B. Facts

1. The Purchase and Repossession of the Melendez Vehicle

Class Representative Ricardo Melendez ("Melendez") purchased a 2007 BMW 328i in or around October 2012 from a dealer in Huntington Beach, California. The dealer arranged financing for the purchase, and assigned the Conditional Sale Contract to Mullen Finance. The Conditional Sale Contract is regulated by the Rees-Levering Automobile Sales Finance Act. On or about February 3, 2014, Mullen Finance repossessed Melendez's vehicle and mailed a statutory NOI to Melendez. However, that NOI did not comply with the Rees-Levering Act, Civil Code §2983.2. Melendez was unable to recover his vehicle, and Mullen Finance then sold

Melendez's vehicle, and assessed a Deficiency Balance against him, which it was barred from doing due to its noncompliance with the Rees-Levering Act.

2. The Purchase and Repossession of the Orozco Vehicle

Class Representative Andres Orozco ("Orozco") purchased a 2003 Honda Accord in or around August 2007 from an auto dealer in Westminster, California. The dealer arranged the financing for the purchase, and assigned the Conditional Sale Contract to Mullen Finance. The Conditional Sale Contract is regulated by the Rees-Levering Automobile Sales Finance Act. On or about December 11, 2010, Mullen Finance repossessed Orozco's vehicle and mailed a statutory NOI to Orozco. However, that NOI did not comply with the Rees-Levering Act, Civil Code §2983.2.

Orozco was unable to recover his vehicle, and Mullen Finance then sold Orozco's vehicle, and assessed a Deficiency Balance against him, which it was barred from doing due to its noncompliance with the Rees-Levering Act.

3. The Purchase and Repossession of the Lomeli/Cruz Vehicle

Class Representatives Martha Lomeli and Carlos Cruz ("Lomeli" and "Cruz") purchased a 2007 Toyota Corolla Sport in or around 2012 from a dealer in California. The dealer arranged the financing for the purchase, and assigned the Conditional Sale Contract to Mullen Finance. In or about May 2013, Mullen Finance repossessed Lomeli and Cruz's vehicle, and mailed them a statutory NOI. However, that NOI did not comply with the Rees-Levering Act, Civil Code §2983.2.

Lomeli and Cruz were unable to recover their vehicle, and Mullen Finance then sold Lomeli and Cruz's vehicle, and assessed a Deficiency Balance against them. Mullen Finance then falsely represented to Lomeli and Cruz that they owed a Deficiency Balance which it was barred from doing due to its noncompliance with the Rees-Levering Act.

III. PROCEDURAL HISTORY

Plaintiff Melendez filed the putative class action on May 5, 2014. The Parties attended three mediations prior to class certification. the Court granted class certification in February 2017. Plaintiffs then obtained a preliminary injunction against Mullen Finance, enjoining

Defendant from filing collection actions against class members. Mullen Finance filed a Motion to Clarify the Class Definition, contending that small claims judgments obtained against class members were subject to res judicata. The Court denied the motion. Mullen Finance then filed a writ of mandate. The Court of Appeal summarily denied the writ. Settlement Class Administrator Kurtzman Carson Consultants ("KCC") mailed class notice in September 2017. Not one single class member opted out. The Court denied Plaintiffs' Motion for Summary Adjudication in January 2018. Based upon the Court's ruling, the Parties stipulated to limit the class definition to exclude certain consumers who received an NOI that the Court found complied with the Rees-Levering Act. Plaintiffs filed a First Amended Complaint on June 20, 2018 to add Orozco, Lomeli, and Cruz as Class Representatives. The Parties attended a fourth mediation in November 2018. The case did not settle. The Court denied Mullen Finance's Motion for Summary Judgment in January 2019. Mullen Finance sought a second writ of mandate. The Court of Appeal summarily denied the writ. The Parties settled the matter at a fifth mediation in February 2019. The March 4, 2019 trial date was vacated. Since the case commenced, Class Counsel have taken three sets of depositions, and have served five sets of requests for production of documents and four sets of special interrogatories. Mullen Finance's Counsel took Melendez's deposition and served three sets of requests for admission, four sets of form interrogatories, two sets of special interrogatories, and one set of requests for production of documents.

IV. THE SETTLEMENT AGREEMENT AND RELEASE

A. Certification of a Settlement Class

The Parties seek to resolve the case in a way that will provide relief to all Settlement Class members who received the subject NOI issued by Defendant. To that end the Parties seek to certify a Settlement Class for purposes of settlement only, defined as all persons:

(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 a Notice of Intent to Dispose of Motor Vehicle ("NOI") by Mullen Finance from May 5, 2010 through August 4, 2016 that gave the consumer the right to reinstate the loan; and

(d) against whose account a Deficiency Balance was assessed.

Excluded from the Class are persons (1) whose account were discharged in bankruptcy, (2) against whom Mullen Finance obtained a judgment in Superior Court, and (3) those consumers who appear on the Stipulation of Parties to Exclude Certain Class Members, filed on January 9, 2019. SAR ¶ 2.18.

B. <u>The Terms of the Settlement Are Fair and Reasonable</u>

The full text of the Parties' Settlement Agreement is attached as Exhibit A to the Declaration of Bryan Kemnitzer (hereinafter "Kemnitzer Decl."). In summary, the primary points are these:

1. Size of Settlement Class and Manner in Which Size was Determined

After a diligent investigation of its records, Mullen Finance affirms that there are 1,206 members of the Settlement Class, whose outstanding Deficiency Balances total approximately $2,478,536.74, including a total outstanding Deficiency Balance on Small Claims Actions of approximately $1,631,183.62. The total Deficiency Balance collected is approximately $945,644.80, and the total collected from Small Claims Actions is approximately $758,115.26. The total collected from Settlement Class members other than from Small Claims Actions is approximately $187,529.54. See, SAR ¶5.01.[3]

2. No Claims Made

Relief to the Settlement Class will be automatic, without the need for any claims process. SAR ¶ 5.02. Instead, evert Settlement Class Member automatically receives approximately 50% of what they paid, plus the other class benefits.

3. Value of Settlement to Settlement Class

This settlement provides significant and substantial benefit to the Settlement Class. First of all, Mullen Finance has agreed to settle this matter on a class-wide basis. Mullen Finance shall identify the accounts for Settlement Class members where a Deficiency Balance was assessed, and shall change those account records to reflect a zero balance for each such account. ¶5.03(a). Further, Mullen Finance shall take all steps necessary to cease all efforts to collect Deficiency Balances of Settlement Class members. ¶5.03(b). This includes dismissing all pending legal

[3] The forthcoming Mullen Finance declaration will verify this data.

actions against any Settlement Class member, and filing an acknowledgement of satisfaction of judgment in every Small Claims Action against any Settlement Class Member. The value of the alleged outstanding Deficiency Balances waived is approximately $2,478,536.74. Settlement Class members receive 100% relief for unpaid balances. SAR ¶5.02, 5.03.

In addition to ceasing all collection efforts on all outstanding Deficiency Balances, Mullen Finance will refund a total of $475,000.00, including the Service Awards to Class Representatives. ¶¶5.02, 5.06. Thus, the amount to be refunded to the Settlement Class members, after the distribution of Service Awards is thus $467,000.00, i.e., the class fund. From this amount, distribution to Settlement Class Members shall be made on a pro-rata basis, calculated by the total amount the Settlement Class Member paid to Mullen Finance following the sale of the Motor Vehicle and Mullen Finance's assessment of a Deficiency Balance, including such payments made pursuant to small claims court judgments.

Furthermore, Mullen Finance shall instruct the Credit Reporting Agencies to which it has reported to delete the trade lines for all Settlement Class members' Accounts. SAR ¶5.03(c).

Moreover, Mullen Finance will not file IRS Form 1099-C in connection with the discharge of Deficiency Balances unless subsequently required to do so as set forth in SAR ¶5.04. This forbearance in in parc because for purposes of the Settlement Agreement and Release, Mullen Finance admits that the NOI sent to Settlement Class Members did not comply with California law. *Id.*

4. Scope of Release

Defendants receive a release in the form provided in ¶¶ 5.09 and 5.10, for the Settlement Class Members and Class Representatives respectively. The releases are each expressly tailored to the facts and claims in this action.

5. Proposed Service Awards

Settlement Class counsel will request reasonable Service Awards at the time of Final Approval, based upon evidence provided by the Settlement Class Representatives as to their role in the proceedings and the scope of their releases. The Settlement Agreement provides for a service award of $5,000.00 for Melendez, and $1,000.00 each for Orozco, Lomeli, and Cruz,

subject to approval by this Court. SAR ¶5.06. See Declarations of Ricardo Melendez, Andres Orozco, Martha Lomeli, and Carlos Cruz, filed herewith.

6. Notice

The proposed Settlement Class Notice is Exhibit B to the Settlement Agreement. SAR ¶¶2.19, 3.10. It was drafted and negotiated by experienced counsel for all Parties, over the course of several months after the face-to-face mediations. SAR ¶6.05, 5.01, Kemnitzer Decla., ¶¶8, 31. Since this case is based upon repossession of the Settlement Class members' vehicles and post-repossession NOI sent to those same Settlement Class members, Defendant has a current database for the Settlement Class. SAR ¶¶3.05, 3.07, 5.01. The Settlement Class Administrator will update the Settlement Class Member addresses from the database, and effect notice pursuant to detailed instructions in the Settlement Agreement. SAR ¶¶3.05 – 3.07.

7. Class Administration Costs to Be Subject to Reimbursement by Class Counsel Out of the Residue

Class Counsel shall engage Kurtzman Carson Consultants LLC as the Settlement Class Administrator. The fees, costs and expenses of the Settlement Class Administrator shall be subject to reimbursement from the residue. SAR ¶¶3.05, 5.07.

8. Proposed Attorneys' Fees Provision

Subject to approval of attorneys' fees and costs by this Court at the time of the final hearing, the Parties have included the following provision in the Settlement Agreement:

> (a) MULLEN FINANCE agrees that the Class Representatives and the Settlement Class are prevailing parties for purposes of an award of fees and costs. Subject to approval by the court, MULLEN FINANCE agrees to pay Class Counsel the sum of $475,000.00 in attorneys' fees and costs (plus an amount up to $75,000 from the residue after distribution as set forth in ¶ 5.07). Class Counsel agrees that they shall not be entitled to and will not seek attorneys' fees and costs or expenses in the Action which exceeds this amount. In the event that Class Counsel seeks a fee and cost award that does not exceed the amount stated herein, MULLEN FINANCE agrees not to negatively comment, oppose, or appeal Class Counsel's application for fees and costs. Class Counsel agree that such an award shall compensate them for all legal work in the Action up to and including the date of the Final Judgment, as well in connection with the distribution and compliance proceedings as ordered by the Court.
>
> (b) MULLEN FINANCE agrees that the attorneys' fees and costs shall be made in four (4) annual payments to Settlement Class Counsel in the

> amount of $118,750.00. The first installment of $118,750.00 shall be made on the Distribution Date. The remaining three payments shall be made on or before January 5th of the subsequent year. I.e. if the Distribution Date is in 2019, the second payment shall be due on or before January 5, 2020, the third payment shall be due on or before January 5, 2021, and the fourth and final payment shall be due on or before January 5, 2022.
>
> (c) Should MULLEN FINANCE fail to make a payment on or before the scheduled payment date, MULLEN FINANCE shall pay a penalty of $1,000 per day that the payment is late.
>
> (d) George Hurley, as President and CEO of MULLEN FINANCE, in consideration of the execution of this Settlement Agreement, hereby personally guarantees the terms of this Settlement Agreement, including reasonable attorneys' fees and legal expenses incurred herein for the enforcement of the terms of the Settlement Agreement. George Hurley hereby unconditionally and personally guarantees and promises to pay or perform on demand any and all debts, obligations and liabilities of MULLEN FINANCE under or arising out of this Settlement Agreement and shall execute the personal guarantee attached hereto as Exhibit D incorporated herein.

SAR ¶5.08. Exhibit D to the Settlement Agreement and Release represents a personal guarantee that George Hurley executed in order to ensure compliance with the yearly attorneys' fees payments.

Further, as discussed *supra*, Settlement Class Counsel shall seek reimbursement of up to $75,000.00 in costs from the residue, subject to Court approval.

> Class Counsel shall pay all fees, costs, and expenses concerning the Class Notice to the Settlement Class, and costs related to providing relief to the Settlement Class, subject to the approval of the Court at the time of the final approval hearing, the residue of any uncashed checks distributed pursuant to the terms of this Agreement shall be paid to Class Counsel as reimbursement for costs and expenses up to $75,000.00, as set forth in ¶5.07.

SAR ¶5.05.

Class Counsel will submit an application to the Court for attorneys' fees and costs, separate from class recovery. Also separate from the class recovery is the cost of notice and administration, which Class Counsel has agreed to advance, subject to any reimbursement from the residue. Neither Class Counsel's fees, nor the costs of administration, diminish recovery to the Class. There is no reverter. In short, this Settlement Agreement represents substantial benefit to the Class and should be preliminarily approved and Settlement Notice disseminated to the

Class.

Since the Parties have agreed that Settlement Class Counsel are entitled to fees, Plaintiffs will file a fee petition prior to the deadline to object or opt out, and prior to their Motion for Final Approval. Settlement Class Counsel will support their request for costs and fees with declarations and evidence of the lodestar, along with points and authorities, in seeking Court approval. Fees were negotiated separate from class remedies, and none of the fees come out of the settlement recovery but are in addition to all the relief afforded the Settlement Class. The Settlement Class Notice adequately informs the Settlement Class of this provision. Kemnitzer Decl., ¶ 10, SAR Exh. B.

9. Court Retains Jurisdiction

Finally, the Settlement Agreement provides that the Court is to retain authority and jurisdiction over the settlement to ensure compliance with its terms. SAR ¶ 5.12.

V. STATEMENT OF LAW

A. Policy Supporting Settlement of Class Actions

The law favors settlement, particularly in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See*, 4 Newberg on Class Actions (4th ed. 2002) §11.41 (and cases cited therein). Judicial proceedings have led to a defined procedure and specific criteria for settlement approval in class action settlements, described in the Manual for Complex Litigation, Third (Fed. Judicial Center 1995) (the "manual") §30.41, which is consistent with California Rule of Court 3.769. The manual describes three distinct steps:

(1) Preliminary approval of the proposed settlement at a hearing (also, CRC 3.769(c))

(2) Dissemination of mailed and/or published notice of the settlement to all affected Class members (also CRC 3.769(f)); and

(3) A "formal fairness hearing," or final settlement approval hearing, at which Class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented (also CRC 3.769(f))

This procedure endorsed by the leading commentator, Herbert Newberg, safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests. See, Newberg §11.22, *et seq.*; CRC Rule 3.769.

The purpose of the preliminary evaluation of class action settlements is to determine the existence of an ascertainable class and whether the proposed settlement is within the range of possible approval, and thus whether notice to the Settlement Class, and the scheduling of a formal fairness hearing, is appropriate and worthwhile. 4 Newberg §11.25. At the Preliminary Approval stage, this Court needs only to find that the settlement falls within "the range of reasonableness." 4 Newberg §11.25. As the manual explains:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice . . . be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

As shown below, this proposed Settlement falls well within the range of reasonable outcomes.

B. <u>The Common Legal Basis for this Class Action</u>

1. The Rees-Levering Act

This lawsuit arises out of the mandatory notice and provisions of the Rees-Levering Act, Civil Code §2981, *et seq*., which provide statutory protection for consumers buying vehicles on credit. The purpose of the Act, including its post-repossession notice provisions, is to provide more comprehensive protections for the unsophisticated motor vehicle consumer. *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889, 901; *Salenga v. Mitsubishi Motors Credit of America, Inc.* (2010) 183 Cal.App.4th 986, 998; *Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 69-70. That statute has, for nearly fifty years, represented California's strong interest in consumer protection. Effective 1962, the Rees-Levering Act replaced the 1945 Automobile Sales Act, "and was designed to provide a more comprehensive protection for the unsophisticated motor vehicle consumer." *Id.*, at 69-70. The Rees-Levering Act was enacted to eliminate any doubt about the legislature's broad consumer protection intent. *Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 607-609. The statute has been amended numerous times, always

increasing consumer protections.

The public policy underlying the Rees-Levering Act recognizes the importance of vehicles to individuals. "The sale of automobiles is particularly important because of the very size, for the great majority of families, of the economic decision involved in the purchase of an automobile. Such a purchase is second in importance to a family only to the purchase of a home." Final Report of the Assembly Interim Comm. on Finance and Insurance, at p. 7, 1 App.to Journal of the Assembly (1961 Reg. Sess.) Thus, to promote these important public policies, courts do not hesitate to strictly enforce the statutory requirements of the Rees-Levering Act. Substantial compliance is not a defense to a Rees-Levering claim. *Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997. "[T]he rule and requirement are simple. If the secured creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law, he may not have his deficiency judgment." *Bank of America v. Lallana* (1998) 19 Cal.4th 203, 215.

In order to protect consumers' valuable interests in financed vehicles, the Rees-Levering Act, Civil Code §2983.2(a)(1)-(9), details what the NOI must provide to buyers whose vehicles have been repossessed. The disclosures are intended to afford buyers a full opportunity to make an informed decision as to whether to exercise their statutory right, under most circumstances, to reinstate the contract by bringing the loan current, or to redeem the contract by paying off the full contract price. Either way, the borrower is entitled to precise information as to the full amount due, the exact place and manner in which it must be paid, and the date by which such payment must be made in order to get the vehicle. *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889. If any one of the mandated disclosures is missing, or does not strictly comply with the law, the lender is <u>absolutely</u> <u>barred</u> from collecting from the borrower any deficiency remaining after resale of the vehicle. Civil Code §§2983.2, 2983.8. Substantial compliance is not sufficient. *Rojas, supra.* Either the NOI conforms to all of the requirements of the statute, or it is legally defective. *Bank of America v. Lallana* (1998) 19 Cal.4th 203, 215.

The theory of this case is that the NOI that Mullen Finance mailed to the Settlement Class Members violated the express terms of the statute in several ways. Any one of the alleged violations set forth in detail above is a violation of the statute (Civil Code §2983(a)(1)-(9)). Since

it is alleged that all of the NOI sent class members were defective, the "absolute bar rule" applies to all. Moreover, violation of the Rees-Levering Act establishes the unlawful prong for violation of the UCL, Bus & Prof. Code §17200.

2. Mullen Finance May Not Collect Deficiencies if the NOI Does Not Strictly Comply with the Rees-Levering Act

Plaintiffs allege that the post-repossession NOI that Defendant sent to members of the Settlement Class failed to comply with applicable California law in several specific ways, and that any one of these alleged defects is sufficient to trigger liability under the Rees-Levering Act. Under California law, when a creditor repossesses collateral under a secured loan transaction, the borrower is liable for a deficiency, (i.e., the difference between the outstanding balance on the loan and the proceeds from the sale of the collateral), ***only if*** the creditor has provided the post-repossession notice in full and complete compliance with the law. This "absolute bar" rule has been firmly embedded in the California Uniform Commercial Code for decades. *See*, Commercial Code §9514; *Union Safe Deposit Bank v. Floyd* (1999) 76 Cal.App.4th 25, 30-31. It has also been part of the Rees-Levering Act since it was first enacted in 1962. *Atlas Thrift v. Horan* (1972) 27 Cal.App.3d 999, 1009; *Canadian Comm. Bank v. Ascher Findley Co.* (1991) 229 Cal.App.3d 1139, 1149. Indeed, Civil Code §2983.2(a) explicitly provides that, after the repossession or voluntary surrender of a vehicle, the borrower will be liable for a deficiency *only if* timely post-repossession notice is given containing *all of* the disclosures mandated by the statute. Civil Code §2983.2(a).

Courts have explicitly rejected any defense of "substantial compliance" and any suggestion that some reliance, proof of damages, or loss to the borrower is a prerequisite to application of the rule. By the explicit terms of the statute, if *any* disclosure required by §2983.2(a) is omitted or deficient, the borrower is not liable for any deficiency following disposition of vehicle. Civil Code §2983.2(a). "The rule and requirement are simple. If the secured creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law, he may not have his deficiency judgment." *Bank of America v. Lallana, supra,* 19 Cal.4th at 215; see also *Union Safe Deposit Bank, supra,* 76 Cal.App.4th at 29-30.

Plaintiffs' allege that Defendant's NOI does not comply with the law. Therefore, it is not entitled to collect any Deficiency Balance from any Settlement Class Member.

C. The Court Certified the Class on February 3, 2017, and the Court Should Certify the Proposed Settlement Class

Plaintiffs request that the Court certify the proposed Settlement Class (defined in SAR ¶3.01), because the Settlement Class meets the requirements for class certification. The Court certified the class on February 3, 2017. The original class definition consisted of all persons:

(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 a Notice of Intent to Dispose of Motor Vehicle ("NOI") by Mullen Finance from May 5, 2010 through August 4, 2016 that gave the consumer the right to reinstate the loan; and

(d) against whose account a Deficiency Balance was assessed.

Excluded from the Class are persons (1) whose account were discharged in bankruptcy, and (2) against whom Mullen Finance obtained a judgment in Superior Court. Subsequently, but prior to dissemination of class notice, the Parties stipulated to limit the timeframe of the class from May 5, 2010 to August 4, 2016. Following the Court's denial of Plaintiffs' Motion for Summary Adjudication, the Parties further stipulated to limit the class definition by excluding those consumers who appear on the Stipulation of Parties to Exclude Certain Class Members, filed on January 9, 2019. SAR ¶ 2.17.

Whenever "the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court…" Code Civ. Proc. §382; *see Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1078 [NOI litigation]; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458; *Brinker Restaurant Corporate v. Superior Court* (2012) 53 Cal.4th 1004, 1021. "Community of interest" involves the following 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. *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287; *Sav-On Drug Stores v. Superior Court* (2004) 34 Cal.4th 319. The determination of whether a class should be certified is a procedural question and does not include weighing the legal or factual merits. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438-439.

"Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." *Hicks v. Kaufman & Broad Home Corp*. (2001) 89 Cal.App.4th 908, 914. Ascertainability is determined "by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." *Richmond v. Dart Industries, Inc*. (1984) 29 Cal.3d 462, 478; *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271. Defendant has identified the Settlement Class members from its databases in the settlement process. SAR ¶3.05, 3.07. The ascertainability requirement is satisfied.

The "community of interest" requirement is also clearly met. Common questions of law and fact predominate when "'the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits.'" *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810. A representative's claim is typical if it arises from the same event, practice or course of conduct that gives rise to the other class members' claims and if his claims are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46; *Sav-On Drug Stores, supra*, at 333. The predominant question here is whether Defendant's post-repossession NOI violates the Rees-Levering Act's strict requirements. Given that the notices are forms and the alleged defects are uniform, the common question of the sufficiency of the forms predominates. The common legal issues were determined at the time of Class Certification.

Adequacy of representation is established if the class representatives are willing to protect the interests of absent class members and is represented by counsel qualified to conduct the litigation on behalf of the class. *Richmond, supra*, 29 Cal.3d at 478-79; 450; *Sav-On, supra*. Given the substantial breadth of Class Counsel's experience, and the factual circumstances of the Settlement Class Representatives as set forth in their Declarations, filed herewith, the adequacy

prong of representation is clearly satisfied.

Lastly, a Settlement Class of approximately 1,206 members is indisputably numerous.

In light of the fact that common questions of law and fact predominate, and the number of affected consumers is substantial, a class action is clearly the superior method for fair and efficient settlement of this particular dispute. *Reyes, supra*, at 1279-1280.

D. The Court Should Preliminarily Approve the Proposed Class Settlement Because it is Fair, Adequate, and Reasonable

In this case, the proposed Settlement Agreement warrants Preliminary Approval. It is a fair and reasonable resolution of the claims asserted, achieving substantial benefits for the Class. Every Class Member will receive a pro-rated portion of the $467,000.00 restitution amount, after the Service Awards are deducted, equal to approximately 50% of the amount of deficiency paid to Mullen Finance. SAR ¶5.02(c). Additional benefits to the Settlement Class were discussed in Section IV.B.3, *supra.*

1. The Settlement is Within the Range of Reasonableness

For years, the Parties explored the scope of relief and considered the possible range of outcomes for the Class. Kemnitzer Decl., ¶¶19-24. The procedural history of the case, including numerous mediations and settlement conferences, together with the Parties having engaged in substantial discovery, demonstrates that the Parties had an opportunity to consider the range of possible outcomes. Kemnitzer Decl., ¶¶19-29.

The Parties took into consideration a number of aspects of the case when exploring settlement, including that Plaintiff may lose at trial and that Mullen Finance threatened to appeal a judgment in favor of the Class. Kemnitzer Decl., ¶46. If the Court had ruled in favor of Mullen Finance, or Mullen Finance had appealed a judgment, the Class could have received nothing. Even a meritless appeal could have injected years of delay into the case, unnecessarily stalling the relief to the class.

Further, even if Plaintiffs were successful at trial, resulting in Mullen Finance being required to disgorge its profits, Mullen Finance would not have had insurance coverage for its loss, which likely would have resulted in Mullen Finance having to file for bankruptcy.

Kemnitzer Decl., ¶¶46-48. As unsecured creditors, the Class could have recovered nothing in a bankruptcy.

When considering the aforementioned possibilities, the $475,000.00 (including service awards) to be distributed to the Class Members, Mullen Finance's waiver of outstanding deficiency balances, cessation of all further collection activity, deletion of tradelines, and acknowledgement of satisfaction of judgment in every Small Claims Action, together with the payment of Class Counsel's fees,[4] represents a reasonable recovery to the Class. Kemnitzer Decl., ¶40.

Based on the declarations filed herewith and the history of the case, the Court can "independently satisfy itself that the consideration being received for release of class members' claims is reasonable." *Kullar v. Footlocker Retail, Inc*. (2008) 168 Cal.App.4th 116, 129.

2. The Settlement is a Product of Informed Arms-Length Negotiation

As demonstrated from the procedural history in Section III, *supra*, the Parties engaged in extended arms-length negotiations, following substantial discovery, in arriving at the Settlement. *Hanlon v. Chrysler Corp*. (9th Cir. 1998) 150 F.3d 1011, 1027. The negotiations included five separate mediations.

3. The Settlement Meets the Criteria for Final Approval

For the reasons set forth herein, the Settlement meets the criteria for Final Approval.

VI. PROPOSED SCHEDULE

The Settlement Agreement provides a detailed schedule for approval hearings, notice, distribution, judgment, and final resolution of the litigation. The following is an outline of the schedule provided for in the Settlement Agreement, assuming Preliminary Approval by the Court at the hearing on this motion:

1.	Preliminary Approval Order approved by the Court	June 7, 2019
2.	Settlement Class Notice to be Sent by Settlement Class Administrator (¶3.10) (Preliminary Approval Order + 14 days)	June 21, 2019
3.	Motion for Attorneys' Fees and Costs (¶5.08) (10 days prior to the expiration of the deadline for Settlement Class members to object)	July 26, 2019

[4] Class Counsel is taking a substantial discount with respect to the payment of its fees and costs.

4.	Exclusion from the Settlement Class postmarked by (¶3.11) (Mailing of Settlement Class Notice + 45 days)	August 5, 2019
5.	Objection from the Settlement Class postmarked by (¶3.12) (Mailing of Settlement Class Notice + 45 days)	August 5, 2019
6.	Motion for Final Approval filed by (¶4.01) (CCP §1005) (16 Court days prior to hearing date)	TBD
7.	MULLEN FINANCE response, if any, regarding Final Approval (¶4.01) (9 Court days prior to hearing date)	TBD
8.	Class Administrator Declaration (¶3.06(xi)) (10 days prior to hearing date)	TBD
9.	Final Approval Hearing (¶ 4.01)	TBD

VII. CONCLUSION

For the foregoing reasons this motion should be granted, allowing the matter to proceed to Notice to the Settlement Class in the manner provided in ¶3.10 and Exhibit B to the Settlement Agreement, and thereafter to Final Approval before this Court.

Dated: May 6, 2019

KEMNITZER, BARRON & KRIEG, LLP

By: _____

KRISTIN KEMNITZER
Attorneys for Plaintiffs and the certified class

PROOF OF SERVICE

Re: ***Melendez v. Mullen Finance Plan, et al.***
Orange County Superior Court Case No. 30-2014-00722412-CU-BT-CXC

I, Sean R. Barry, certify that I am not a party to the proceeding herein, that I am and was at the time of service over the age of 18 years old, and a resident of the State of California. My business address is 354 Pine St., 5th Floor, San Francisco, CA 94104.

On May 7, 2019, I served the following:

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

DECLARATION OF CARLOS CRUZ IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

DECLARATION OF BRYAN KEMNITZER IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

DECLARATION OF MARTHA LOMELI IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

DECLARATION OF RICARDO MELENDEZ IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL

DECLARATION OF ANDRES OROZCO IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[PROPOSED] ORDER CERTIFYING CLASS SETTLEMENT, GRANTING PRELIMINARY APPROVAL OF SETTLEMENT

by depositing true copies thereof, enclosed in separate, sealed envelopes, each of which was addressed respectively to the person(s) and address(es) shown below, for collection and processing for mailing following this business' ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with the postage thereon fully prepaid, in the United States mail at San Francisco, California.

//

Michael J. Trotter
David P. Pruett
CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY
111 West Ocean Blvd., 14th Floor
P.O. Box 22636
Long Beach, CA 90801
Attorneys for Defendant K STREET FINANCE, INC. dba MULLEN FINANCE PLAN

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 7, 2019

Sean R. Barry