IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 16-62942-Civ-DIMITROULEAS

KERRY ROTH, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant.
_____/

CASE NO. 18-61361-Civ-DIMITROULEAS

MARIANNE JOFFE, DEBBE SCHERTZER, and STEPHANIE RODRIGUEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY and GEICO GENERAL INSURANCE COMPANY,

Defendants.

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED GLOBAL CLASS ACTION SETTLEMENT

Plaintiffs Kerry Roth, Marianne Joffe, Debbe Schertzer, and Stephanie Rodriguez (together "Plaintiffs"), individually and on behalf of the certified classes, respectfully request that the Court preliminarily approve the proposed global class action settlement of related class

actions *Roth v. GEICO General Ins. Co.*, CASE NO. 16-62942-Civ-DIMITROULEAS (S.D. Fla.) ("*Roth*"), and *Joffe, et al. v. GEICO Indemnity Co., et al.*, CASE NO. 18-61361-Civ-DIMITROULEAS (S.D. Fla.) ("*Joffe*"). Defendants do not oppose this motion.

The *Roth* and *Joffe* cases both seek unpaid sales tax and/or title transfer fees on behalf of GEICO insureds who experienced a first-party total loss of a covered leased vehicle. The two cases are identical, except that they cover different GEICO entities, and, different time periods.

On June 22, 2020, the Middle District of Florida entered an Order granting Final Approval of a class action settlement regarding unpaid title and tag transfer fees involving GEICO insureds who experienced a first-party total loss of a covered owned vehicle. *See Cook v. Gov't Emples. Ins. Co.*, 2020 U.S. Dist. LEXIS 111956 (M.D. Fla. Jun. 22, 2020).

The details of the proposed settlement are set out in the Global Class Action Settlement Agreement and exhibits thereto (the "Global Settlement Agreement"), attached as Exhibit A and incorporated herein by reference, and the proposed Order granting preliminary approval of the global settlement, which is attached as Exhibit 1 to the Global Settlement Agreement.

I. CONCISE STATEMENT OF THE RELIEF SOUGHT

Plaintiffs file this motion requesting that the Court preliminarily approve a settlement of two similar class actions. The "Settlement Class" is defined as:

> All Florida policyholders who were insured (1) by GEICO General for private passenger auto physical damage coverage who suffered a first-party loss of a covered leased (i.e., not owned) vehicle at any time from August 31, 2011 through August 1, 2020 whose claims were adjusted by GEICO General Insurance Company as a Total Loss and resulted in payment by GEICO of a covered claim, and who were not paid full Sales Tax and/or full Title and Tag Transfer Fees; and (2) by GEICO Indemnity Company and Government Employees Insurance Company for private passenger auto physical damage coverage who suffered a first-party loss of a covered leased (i.e., not owned) vehicle at any time from June 15, 2013 through August 1, 2020, whose claims were adjusted by GEICO as a Total Loss and resulted in payment by GEICO of a covered claim, and who were not paid full sales tax and/or full Title and Tag Transfer Fees.

This Court previously granted Plaintiffs' Motions for Class Certification in both *Roth* and *Joffe*, and certified classes of Florida policyholders defined identically, in material terms, as the proposed Settlement Class. *See Roth*, Doc. 165; *Joffe*, Doc. 52 (Class Certification

Orders). In other words, the Settlement Class extends the previously certified classes to include additional insureds who sustained a total-loss after the date of the certification Orders and through August 1, 2020.

Plaintiffs respectfully request that the Court preliminary certify the proposed global Settlement Class, and enter an Order of preliminary approval of the proposed Global Settlement Agreement by entry of the Proposed Order. The Global Settlement Agreement is attached as Exhibit A to this Motion, to which the proposed preliminary approval Order is attached as Exhibit 1. The Proposed Order approves the form of notice to be given to the Settlement Class, establishes a schedule and process for submitting objections or requesting exclusion from the Settlement Class, and schedules a fairness hearing to be held by the Court. The parties will request final approval of the Settlement in advance of the fairness hearing.

II. STATEMENT OF THE BASIS FOR THE REQUEST

The Parties reached the Global Settlement Agreement after almost four (4) years of litigation and following several mediations before three (3) different mediators. The Global Settlement Agreement was the product of substantial, multi-day negotiations supervised by mediator Rodney Max, followed by a full-day mediation with Mr. Max on June 8, 2020. *See* McLaughlin on Class Actions § 6:7 (12th ed.) ("A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion."); *City Partnership Co. v. Atlantic Acquisition Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir. 1996) ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement.").

On June 10, 2020, the parties filed a Notice of Settlement in *Joffe* regarding the parties' global settlement of *Roth* and *Joffe*. *Joffe*, Doc. 110. The parties simultaneously moved to stay deadlines and hold summary judgment in abeyance. *Joffe*, Doc. 111. On June 11, 2020, mediator Rodney Max filed a final mediation report with the Court. *Joffe*, Doc. 112. On June 15, 2020, the Court denied the parties' motions for summary judgment without prejudice, and ordered the parties to present a proposed schedule for consolidation of *Roth* and *Joffe* and preliminary approval of the settlement agreement on or before June 25, 2020. *Joffe*, Doc. 113. On June 25, 2020, the parties jointly presented the Court with a proposed schedule for filing a

motion to consolidate, a motion for preliminary approval, and a motion for indicative ruling by July 17, 2020. *Joffe*, Doc. 115.

The Global Settlement Agreement provides payment of sales tax and title transfer fees in the full amount alleged to be owed in the respective operative Complaints, plus an additional $4.60 in tag transfer fees, to members of the Settlement Class who submit a valid claim. This Court previously granted summary judgment in favor of Plaintiff Roth and the certified *Roth* class, and awarded (1) sales tax calculated as 6% of the value of the respective vehicle plus applicable local tax, and (2) $75.25 in title transfer fees (the minimum amount of title transfer due on the purchase of a replacement vehicle). *Roth*, Doc. 247 (Summary Judgment Order). On November 20, 2018, the Court entered a judgment for $5,878,259.95 in damages and prejudgment interest, *Roth*, Doc. 281, and on March 26, 2019 the Court entered a second judgment (pertaining to additional class members) for $657,427.52 for damages and prejudgment interest, *Roth*, Doc. 287. On June 13, 2019, the Court entered an Order granting taxable costs of $16,363.99 in favor of Plaintiff Roth. *Roth*, Doc. 294, 303. On January 10, 2020, the Court entered an Order granting attorneys' fees in the amount of $6,352,178.10. *Roth*, Doc. 333. On May 4, 2020, the Court entered an Order awarding prejudgment interest on the attorneys' fees award in the amount of $340,120.34 and postjudgment interest at 2.45%. *Roth*, Doc. 341, 344.

GEICO appealed these Orders and judgments, which involved issues of first impression. The appeal is pending before the Eleventh Circuit Court of Appeals.

With respect to the *Joffe* class, both parties moved for summary judgment. *Joffe*, Doc. 59, 63. The Court denied all motions without prejudice as currently moot following the Parties' submission of the Joint Notice of Settlement. *Joffe*, Doc. 110, 114.

As set forth below in greater detail, the Global Settlement Agreement provides Plaintiffs and the members of both Settlement Class greater than 100% of the relief requested by Plaintiffs in their respective *Roth* and *Joffe* operative complaints, including tag fees as an additional component of relief, additional interest for the *Roth* class, a larger *Roth* class with approximately 450 additional claims, a larger *Joffe* class over longer periods of time, and significant prospective relief benefitting all Florida GEICO insureds in the future.

III. MEMORANDUM OF LEGAL AUTHORITY

A. Background.

These cases involve allegations that GEICO breached insurance policies ("Policy") issued to Plaintiffs and similarly-situated Florida insureds who leased their insured vehicles by failing to include the full amount of taxes and title fees necessary to replace a vehicle in the State of Florida. *See Roth*, Doc. 1-2, *Joffe*, Doc. 1. Plaintiffs alleged GEICO's Policy required payment of actual cash value ("ACV") upon the total loss of a covered auto, and defined ACV as the "replacement cost of the auto" less depreciation. Plaintiffs alleged that the requested taxes and fees are necessary costs to replace an auto in the State of Florida, and are therefore components of ACV and required to be paid by GEICO to their insureds. Exhibit B ("Phillips Decl.") at ¶ 4-5. GEICO's practice and procedure in Florida was to generally not include full taxes and fees in calculating and issuing ACV payments to insureds following the total loss of a covered leased auto. *Id*. at ¶ 6. GEICO's practice and procedure was to cover a leased vehicle based on what GEICO believed to be the cost to replace a leased vehicle. These two class actions were filed to recover such unpaid taxes and fees from GEICO on behalf of insureds.

B. Litigation and Discovery History.

These two class actions have been contested at every stage. Motion practice included a motion to dismiss, motions to exclude expert testimony, competing motions for summary judgment, motions to compel, and motions for class certification. The parties took 31 depositions, including class representatives, corporate representatives, GEICO employees, third parties, and expert witnesses. Plaintiffs reviewed over 50,000 pages of documents produced by Defendants and over half a billion data inputs. The parties served over 20 sets of written discovery, including 17 sets of discovery served by the Plaintiffs. *Id*. at ¶ 10. Multiple rounds of Class notice has been completed relating to over 13,000 claims. Phillips Decl. at ¶ 12.

Currently, the *Roth* matter is on appeal before the Eleventh Circuit. Phillips Decl. at ¶ 16. In those appeals, GEICO challenges class certification, the summary judgment order,

and the attorneys' fee order. *Id*. at ¶ 17. The appealed *Roth* class certification and summary judgment issues have been fully briefed by both sides. *Id*. at 16.

C. The Proposed Settlement.

In the Global Settlement Agreement, GEICO agreed to pay to each Plaintiff and member of the Settlement Class who submit a timely claim: (1) unpaid ACV Sales Tax; (2) unpaid Title and Tag Transfer Fees up to $79.85; and (3) prejudgment interest calculated at the applicable rate set by the State of Florida from the salvage close date or, if there is no salvage close date, 30 days after the claim's date of the loss, including any changes in the rate during the time period since that date until 60 days after the preliminary approval Order is entered. Additionally, GEICO agrees to include sales tax calculated as 6% (plus applicable local surtax) of the adjusted vehicle value (irrespective of the sales tax amount paid, if any, during the lease and irrespective of sales tax paid, if any, to replace the vehicle), title transfer fees of (at minimum) $75.25, and tag transfer fees of $4.60, in Total Loss Claim Payment(s) to leased-vehicles Florida policyholders, unless and until: (a) GEICO implements a change in their Florida private passenger auto insurance policies to explicitly exclude sales tax and/or title and tag transfer fees; (b) the Eleventh Circuit or a Florida appellate court issues a decision holding taxes and/or fees are not owed to leased-vehicle insureds under Policies utilizing language substantially similar to GEICO's; or (c) Florida statutes are amended to clarify sales tax and/or title and tag transfer fees are not owed to total-loss insureds. Phillips Decl. at ¶ 22-23.

1. Approximate $71 Million Monetary Value and Greater Than 100% Recovery.

Plaintiffs calculate that the monetary value of all claims under the terms of the Global Settlement Agreement for sales tax, title and tag transfer fees, and prejudgment interest is approximately $79 million, which includes: (1) approximately $30.75 million in cash available for claimants; (2) $40.25 million in prospective relief from GEICO's change in practice over a five-year period; and (3) $8,700,000 million in attorneys' fees and $350,000 in costs if approved by the Court. Ex. C ("Martin Decl.") at ¶ 7. According to Plaintiffs' calculations, the average value per claim is over $1,600. *Id.* at ¶ 6.

2. Final Resolution of Cases While Issues Pending Before Eleventh Circuit and With Conflicting Case Law.

This global settlement provides final resolution and greater than 100% of the relief requested in the respective Complaints, concerning claims for relief the viability of which there is presently a split among courts. While some courts in Florida have denied motions to dismiss claims substantially similar to Plaintiffs' claims, others have granted motions to dismiss (no state court has yet reached summary judgment on the claims, and no appellate court has addressed the claims). Phillips Decl. at ¶ 15. For example, in *Schenck v. Windhaven Ins. Co.*, No. 16-2018-CA-000023 (Fla. Cir. Ct. Duval Cty. May 17, 2019), a Florida court granted the defendant insurance company's motion to dismiss claims for title and license transfer fees. Likewise, in *Sigler v. GEICO Casualty Co.*, No. 1:18-cv-01446, 2019 WL 2130137, at **3-4 (C.D. Ill. May 15, 2019), a federal district court in Illinois granted GEICO's motion to dismiss claims for title and tag transfer fees, as well as sales tax, and the Fifth Circuit Court of Appeals affirmed denial of similar claims against a different insurance company. *Singleton v. Elephant Ins. Co.*, 953 F.3d 334 (5th Cir. 2020). Plaintiffs believe these cases were wrongly decided, or are distinguishable as applying different state's laws and/or different policy language. But Plaintiffs admit that the authority on the question central to this case is split and uncertain.

Moreover, GEICO appealed the *Roth* judgments, arguing that its Policy does not cover sales tax or title transfer fees for leased vehicles, which remains pending. Phillips Decl. at ¶ 12. Should the Eleventh Circuit agree with GEICO's position, this Court's decision in *Roth* would be overturned, which would likewise be outcome-determinative in *Joffe*, and the success Plaintiffs have secured in these cases to date would be reversed. This risk is significant and strongly supports the proposed global settlement (which includes an obligation to pay greater than 100% of the alleged damages to all Settlement Class members who submit timely claims). Phillips Decl. at ¶¶ 15-19. For this reason, the settlement includes the requirement that judgment in Orders from the *Roth* litigation be vacated, and is more than justified, particularly given that the case relates to the application of state law to a specific policy. *See Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1336 (11th Cir. 2016); *Cook v. Gov't Emples. Ins. Co.*, 2020 U.S. Dist. LEXIS 111956 (M.D. Fla. Jun. 22, 2020).

3. The Global Settlement Provides an Expanded Class.

The proposed Settlement Class expands the time period previously applicable to the *Roth* and *Joffe* classes. The *Roth* certified class against GEICO General Insurance Company runs from five (5) years prior to the date the original complaint was filed through that filing date (i.e., August 31, 2011 through August 30, 2016). The *Joffe* certified class, as to Government Employees Insurance Company and GEICO Indemnity Company, runs from five (5) years prior to the date the complaint was filed through class certification (i.e., June 15, 2013 through July 31, 2019), and as to GEICO General Insurance Company, runs from August 31, 2016 through class certification (i.e., July 31, 2019).

As to each GEICO entity, the global settlement extends the class-period cut-off by approximately one year – from July 31, 2019 to through August 1, 2020. The expanded class period provides relief for over 3,600 additional claims and approximately $6.8 million in settlement funds. Martin Decl. at ¶ 7.

The global settlement also provides for additional *Roth* claims identified based on data not produced in *Roth,* but produced in the similar case, *Cook v. Gov't Emples. Ins. Co.*, 2020 U.S. Dist. LEXIS 111956 (M.D. Fla. Jun. 22, 2020). Class counsel has identified over 450 additional claims with damages of over $750,000 covered by the *Roth* class period but identified based on *Cook* data. Martin Decl. at ¶ 7. GEICO has agreed to review those additional claims and include all such leased vehicle total loss claims in the global settlement.

4. The Global Settlement Provides Additional Recovery to Class Members.

The global settlement provides greater recovery to Settlement Class Members than the damages alleged in the respective Complaints or awarded by this Court in the *Roth* Summary Judgment Order. All class members will receive an additional $4.60 in tag fees. All class members will receive prejudgment interest to run until 60 days after the preliminary approval Order. Martin Decl. at ¶ 8. The current *Roth* postjudgment interest rate (which is less than prejudgment interest achieved in the global settlement) commenced on November 21, 2018 (*Roth* Doc. 281), and March 26, 2019 (*Roth* Doc. 287).

5. The Global Settlement Provides Valuable Prospective Relief.

The global settlement requires that GEICO change its business practices in Florida and begin paying ACV Sales Tax, Title Fees, and Tag Transfer Fees on first-party total loss claims for leased vehicles until and unless the law is clearly established permitting GEICO to withhold such costs or GEICO modifies its Policy language to explicitly exclude such costs. The value of this relief over a five-year period is $40.25 million. Martin Decl. at ¶ 9. The value of this prospective relief over a one-year period is $6.8 million. *Id*.

6. The Global Settlement Provides a Narrow Release.

The Global Settlement Agreement provides a limited and narrowly-tailored release of claims, and clarifies that the *res judicata* effect of this case is limited *only* to the specific ACV Sales Tax, Title Fees, and Tag Transfer Fees at issue. The Global Settlement Agreement preserves all claims based on ACV or property damage that may be asserted by class members except to the extent such claims seek the specific ACV Sales Tax, Title Fees, and Tag Transfer Fees alleged in the Complaints and Released by the Global Settlement Agreement. Phillips Decl. at ¶ 25.

7. The Global Settlement Provides for Robust Notice and Simple and Easy Claims Procedure.

The global settlement provides a robust and substantive Notice plan. The Settlement Administrator will initiate two separate direct mail notices during the notice period. Both notices by mail will include simple, easy-to-understand, detachable claim forms, and such claim forms will have prepaid return postage. In addition to the two mail notices, the Settlement Administrator will initiate two separate email notices, both of which will enable class members to "click through" to the settlement website to make a claim. Phillips Decl. at ¶ 24. Members of the Settlement Class can request exclusion from the Settlement Class or object to the Settlement. *Id*. at ¶ 25; *see Braynen v. Nationstar Mortg.*, LLC, 2015 WL 6872519, at *18 (S.D. Fla. Nov. 9, 2015) (robust notice plan is evidence that the terms of settlement are fair and reasonable).

The Parties also agreed to a streamlined, simple, and straightforward claims process. For the convenience of members of the Settlement Class in submitting claims, Defendants will extract information from its claim records to pre-fill information on the claim forms. *Braynen*,

2015 WL 6872519, at *18; *see* Global Settlement Agreement at Exhibits 2-8. No additional documentation is required other than each Settlement Class Member's declaration that the information is correct to the best of their knowledge, and affirming they were a GEICO insured who, to the best of their knowledge, suffered a total-loss during the Settlement Class period and did not receive the full ACV Sales Tax, Title Fees, or Tag Transfer Fees. Phillips. Decl. at ¶ 24. The pre-filled mailed claim forms need only be signed and placed in the mail (the claim forms are addressed with postage prepaid). In sum, the claims process requires only the submission of a simple, almost entirely pre-filled form – and nothing else – for the Settlement Class member to receive payment of an easily calculated amount from the defendant entity with whom the member of the Settlement Class will be familiar and quickly recognize. *See Wilson v. Everbank*, 2016 WL 457011, at *9 (finding significant that class members need not submit any additional evidence or documentation beyond merely "checking a box" which "should take no more than a few minutes for the average claimant to complete."). Members of the Settlement Class can also access a pre-filled electronic claim form on the website by providing a claim ID (which is provided in all mailed and email notices). This will allow members of the Settlement Class to electronically submit their claims with relative ease.

This type of settlement structure is regularly approved by courts in this Circuit. *See, e.g.*, *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233 (11th Cir. 2011); *Montoya v. PNC Bank, N.A.*, 2016 WL 1529902 (S.D. Fla. Apr. 13, 2016); *Braynen v. Nationstar Mortg., LLC*, 2015 WL 6872519 (S.D. Fla. Nov. 9, 2015); *Hall v. Bank of Am., N.A.*, 2014 U.WL 7184039 (S.D. Fla. Dec. 17, 2014); *Bastian v. United Servs. Auto. Ass'n*, 2017 U.S. Dist. LEXIS 180757 (M.D. Fla. Nov. 1, 2017) (approving similar claims-made settlement in class action concerning total-loss vehicles); *Bd. of Trs. of Lake Worth Employees' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2012 WL 12906569 (M.D. Fla. July 30, 2012); *Poertner v. Gillette Co.*, 618 Fed. Appx. 624 (11th Cir. 2015); *Cook, et.al. v. Government Employees Insurance Company, et. al.,* 2020 U.S. Dist. LEXIS 111956 (M.D. Fla. Jun. 22, 2020) (granting similar claims-made settlement involving unpaid tag and title transfer claims).

8. Attorneys' Fees are Reasonable and Below the Eleventh Circuit Benchmark.

The proposed Global Settlement Agreement resolving both class actions provides that Class Counsel may apply for attorneys' fees not to exceed $8,700,000 and costs not to exceed $350,000. *See* Global Settlement Agreement at ¶ 42.[1] The attorneys' fees are 21.9% of the benefit to the class (not including prospective relief), 18.7% of the benefit to the class when including only one year of prospective relief, and 10.9% of the benefit to the class when including five years of prospective relief. *See Mahoney v. TT of Pine Ridge, Inc.*, 2017 WL 9472860, at **10-11 (S.D. Fla. Nov. 20, 2017) (court considers benefit to class as maximum settlement cash fund value and injunctive relief when applying benchmark attorneys' fees percentage); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1342–43 (S.D. Fla. 2007) (same); *see also* Martin Decl. at ¶9 ("The percentage of the benefit as attorneys' fees is: 21.9% not including prospective relief; 18.7% including only one year of prospective relief; and 10.9% including 5 years of prospective relief."). These percentages fall within the Eleventh Circuit benchmark for attorneys' fees, which is 20-25% of the benefit to the class. *See Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1242 ("[T]his Court has often stated that the majority of fees in these cases are reasonable where they fall between 20-25% of the claims.") (citations and quotations omitted).[2] Any fees and costs approved by the Court will be paid separately by GEICO and will not reduce the amount recoverable by Settlement Class Members, nor impact their recovery in any way. Phillips Decl. at ¶ 28.

9. The Settlement Provides Reasonable Service Awards.

The proposed Global Settlement Agreement also provides that class counsel may make an application for incentive awards to the named Plaintiffs as compensation for their service as class representatives, not to exceed $10,000 per class representative. Global Settlement Agreement at ¶ 42. Any incentive awards approved by the Court will be paid separately by

[1] The Parties negotiated settlement of the merits claims first, and only after agreement was reached began discussion of the question of attorneys' fees, costs, and incentive award. Ex. D, Declaration of Mediator Rodney Max ("Max Decl.") at ¶ 13.

[2] Numerous decisions recognize that fees paid separately by a defendant are included in the class benefit. *See, e.g., Poertner v. Gillette Co.,* 618 Fed. Appx. 624, 628 (11th Cir. 2015); *Johnston v. Comerica Mtg. Corp.,* 83 F.3d 241, 245-46 (8th Cir. 1996); *In re Managed Care Lit.,* 2003 WL 22850070 at *6 (S.D. Fla. Oct. 24, 2003); *David v. American Suzuki Motor Corp.,* 2010 WL 1628362 at *8 n.14 (S.D. Fla. Apr. 15).

GEICO. Phillips Decl. at ¶ 28; *see also, e.g.*, *Swift v. BancorpSouth Bank*, 2016 WL 11529613, at *13 (N.D. Fla. Jul. 15, 2016) (approving service award of $10,000 and noting numerous cases approving awards of similar amounts and up to $300,000); *Cook*, 2020 U.S. Dist. LEXIS 111956 (approving service award of $ 10,000); *Rodriguez v. Mears Destination Servs.*, 2018 WL 8061811 (M.D. Fla. Sep. 4, 2018) (same).[3] Each of the named plaintiffs sat for a lengthy deposition, answered extensive discovery, responded to requests for production requiring locating numerous documents, participated in multiple mediations during (and after) which they provided input to counsel relating to settlement negotiations, consistently followed up with counsel on major issues and pleadings, requested updates, sought to understand all legal and factual issues, and stayed up-to-date on relevant rulings and orders. Phillips Decl. at ¶ 35.

D. Certification of the Settlement Class Is Warranted.

Plaintiffs seek to certify a Settlement Class defined as set forth supra pgs. 1-2.[4] Excluded from Settlement Class are:

(1) GEICO, all present or former officers and/or directors and/or employees of GEICO, the Neutral Evaluator, Class Counsel, and a Judge of this Court;

(2) Claims for which GEICO received a valid and executed release;

(3) Claims relating to non-leased vehicles;

(4) Individuals who requested exclusion from the pre-settlement *Roth* Class that was mailed notice on June 1, 2018 and/or supplemental notice of January 24, 2019; and from the pre-settlement *Joffe* Class that was mailed notice on May 1, 2019;

(5) Claims where GEICO paid full Title and Tag Transfer Fees and Sales Tax; and

(6) Individual claims for first-party property damage for which the individual process of appraisal or arbitration or litigation has been completed or initiated at the time this Settlement Agreement is filed.

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[3] Plaintiffs' counsel reviewed the docket entry attachment for this *Rodriguez* order (Doc. 285-1) and confirmed the incentive awards of up to $10,000.

[4] GEICO stipulates to certification for settlement purposes only, and without prejudice to their rights to appeal the previously-certified classes in the event the Court does not approve settlement. While GEICO agrees to certification for settlement purposes only, GEICO does not agree with Plaintiffs' interpretation of Rule 23 nor with Plaintiffs' specific assertions in this Motion.

The 2018 amendments to Fed. R. Civ. P. 23 clarify that to preliminarily approve a proposed settlement and thus send Notice to Settlement Class Members, courts must be provided information sufficient to find it will likely be able to certify a class in issuing final judgment on the Settlement. Fed. R. Civ. P. 23(e)(1)(B)(ii). However, the advisory committee notes that in cases seeking preliminary approval after a class is certified through litigation, class counsel need only provide information necessary to explain any changes between the previously-certified class and the proposed settlement class. Fed. R. Civ. P. 23(e)(1) Committee Notes on Amendment – 2018 ("If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted.").

The proposed Settlement Class definition is substantively identical to the classes previously certified by this Court (*see Roth* Doc. 165; *Joffe* Doc. 52) – only larger. Rather than a class period that ends on the date of the *Joffe* certification as to each GEICO entity (which, as to GEICO General, essentially extended the class period from the *Roth* filing date), the Settlement Class now extends through August 1, 2020.

Thus, as explained by the advisory committee, the only changes to the proposed Settlement Class – extending the relevant time period through preliminary approval – has absolutely no impact on the substantive Rule 23 analysis, and this Court's previous Orders (*Roth*, Doc. 165) (*Joffe*, Doc. 52) apply equally to the proposed Settlement Class. Extending the Class Period does not impact the threshold requirements of Article III standing and a class that is adequately defined and clearly ascertainable. The Rule 23(a) numerosity requirement is still easily met (and has in fact been enlarged). Phillips Decl. at ¶30; Martin Decl. at ¶6 (approximately 18,000 claims). The claims asserted are the same, and thus the commonality, typicality, predominance, and superiority requirements are still satisfied. Phillips Decl. at ¶¶32-34. And finally, as Class Counsel's declaration shows and as this Court previously held, the class representatives have adequately and zealously represented the class and have no conflicts of interest, *id*. at ¶¶35-39; *see also See Roth* Doc. 165 at 8; *Joffe* Doc. 52 at 69 (finding Plaintiffs and Class Counsel are adequate in each case), and thus adequacy is also established.

E. Preliminary Approval Is Warranted.

Preliminary approval is not binding, and "[a] proposed settlement should be preliminarily approved if it is 'within the range of possible approval' or, in other words, [if] there is 'probable cause' to notify the class of the proposed settlement." *Fresco v. Auto Data Direct, Inc.*, 2007 U.S. Dist. LEXIS 37863, at *4 (S.D. Fla. 2007) (internal citations omitted). This is because preliminary approval is to ensure the proposed settlement appears sufficiently fair and reasonable to justify notifying Class Members and provide an opportunity to be heard prior to a full analysis at final approval. Fed. R. Civ. P. 23(e)(1) (preliminary analysis of settlement is to "determine whether to give notice of the proposal to the class," which is proper if it is demonstrates "the court will likely be able to" approve the settlement). Such requirements are readily satisfied here, as demonstrated above and in the exhibits hereto. *City of L.A. v. Bankrate, Inc.*, 2016 U.S. Dist. LEXIS 115071, *14-15 (S.D. Fla. Aug. 24, 2016) (granting preliminary approval of proposed class action settlement where "the proposed settlement was made after mediation was conducted," "[t]he negotiations appear to have been made in good faith and there do not appear to be any obvious deficiencies," and the settlement amount "appears to be within the range of reasonableness").

As will be set forth in greater detail in the Motion for Final Approval – and as demonstrated by the attached Global Settlement Agreement – all six factors used by courts to evaluate the fairness and adequacy of a class action settlement strongly support approval here. *See Leverso v. Southtrust Bank*, 18 F.3d 1527, 1530 n.6 (11th Cir. 1994) (outlining the six factors). First, there was no fraud or collusion in the settlement. To the contrary, the settlement negotiations were conducted at arm's length, and settlement was only reached following lengthy negotiations with assistance of an experienced and well-respected mediator, Rodney Max.[5] Max Decl. at ¶ 12; Phillips Decl. at ¶ 20.

[5] *See, e.g.*, *Brna v. Isle of Capri Casinos Inc.*, 2018 U.S. Dist. LEXIS 26662, at *4-5 (S.D. Fla. Feb. 20, 2018) (Rodney Max's involvement "serves to reject any notion that a resulting settlement was the product of collusion."); *Lee v. Ocwen Loan Servicing, LLC*, 2015 WL 5449813, at *11 (S.D. Fla. Sept. 14, 2015) (recognizing Rodney Max as "probably one of the top mediators in the country."); McLaughlin on Class Actions § 6:7 (12th ed.) ("A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion.").

Second, the complexity, expense, and likely duration (given Defendants' current *Roth* appeal, and further intention to appeal *Joffe*) support the settlement. The legal issues presented in both class certification and merits questions in this case were enormously complex, and the parties have undergone and will continue to undergo enormous expense if litigation were to continue through appeal and any remand.

Third, the stage of the proceedings and amount of discovery completed support settlement. Plaintiffs propounded and Defendants responded to extensive discovery in this case. The Parties engaged in sophisticated data analysis, relied upon numerous expert witnesses, and Plaintiffs deposed corporate representatives and other company witnesses concerning the claims processes, procedures, and data systems. In short, Plaintiffs fully litigated the case, and gained a complete understanding of all issues in this litigation. Phillips Decl. at ¶¶ 8-12.

Fourth, the Plaintiffs' probability of ultimate success on the merits supports settlement. The outcome of this case has been uncertain from the outset, and remains uncertain today. Indeed, Magistrate Judge Snow's Report and Recommendation regarding attorneys' fees and costs in the *Roth* case observed that "success was unlikely at the outset," and this Court agreed and approved the recommended multiplier on attorneys' fees. *Roth*, Doc. 328 at 26, 333. The *Roth* judgments are presently pending on appeal before the Eleventh Circuit, involve issues of first impression, and consequently the hard-fought successes in these uncertain cases are at risk.[6] GEICO's appeal is supported by two Amicus Curiae briefs filed on behalf of the U.S. Chamber of Commerce, the American Property and Casualty Insurance Association, and the Personal Insurance Federation of Florida. Should GEICO prevail in the *Roth* appeal, it will reverse or prevent all relief for the previously-certified classes in the *Roth* and *Joffe* cases and for the Settlement Class.

Moreover, as set forth above, some courts have found taxes and/or fees are not owed under an ACV policy. For example, in *Schenck*, (Fla. Cir. Ct. Duval Cty. May 17, 2019), a Florida court granted the insurance company's motion to dismiss claims for title and license

[6] On appeal, a summary judgment Order is subject to *de novo* review. *See Curves, LLC v. Spalding County*, 685 F.3d 1284, 1288 (11th Cir. 2012).

transfer fees. As another example, in *Sigler*, 2019 WL 2130137, at *3 (C.D. Ill. May 15, 2019), the court granted GEICO's motion to dismiss claims for title transfer fees. Plaintiffs believe *Schenck* and *Sigler* were wrongly decided, and note that *Sigler* applied Illinois law. The authority, however, on the question central to this case is split, and the risk that the Eleventh Circuit could disagree with this Court's holdings is real and strongly supports the proposed global settlement.

Fifth, the range of possible recovery supports the settlement. As noted, the Global Settlement Agreement provides for greater than 100% of the relief requested, including prejudgment interest. Each Settlement Class Member who submits a valid claim will be paid full ACV Sales Tax, Title Fees, and Tag Transfer Fees. This represents greater than 100% of the relief requested in the two cases; it is not a compromise amount that reduces the recovery to any member of the Settlement Class making a valid claim. In fact, the amount of ACV Sales Tax, Title Fees, and Tag Transfer Fees set out in the Global Settlement Agreement is higher than the amount of such taxes and fees granted in this Court's Order granting summary judgment in *Roth*. *See* Doc. 247. Finally, the Global Settlement Agreement requires GEICO to change their practice and procedure in Florida and begin paying full Sales Tax, Title Fees, and Tag Transfer Fees going forward, such that future Florida insureds will receive the benefit of this settlement by receiving these additional payments in the event of a total loss of their covered leased auto. *See Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 693 (S.D. Fla. 2014) (finding significant that settlement afforded more relief than likely would have been secured at trial).

Sixth, the opinions of the Class Counsel and the class representatives support settlement.[7] It is the reasoned opinion of Class Counsel, experienced in complex class action litigation, that settlement is in the interest of the previously certified classes and the Settlement Class, and eliminates the risk of proceeding with litigation. Phillips Decl. at ¶¶ 70-73. Based on their evaluation, Plaintiffs and Class Counsel have determined that the terms and conditions of the Global Settlement Agreement are fair, reasonable, and in the best interests of Plaintiffs,

[7] The sixth factor includes analysis of the substance and amount of opposition, which is irrelevant until after Notice and the opportunity to request exclusion or object is provided.

the previously certified classes, and the Settlement Class. Likewise, the class representatives agree that the certainty of settlement at greater than 100% value for all claims made and the future benefit to Florida insureds through Defendants' change in business practice significantly outweigh the risk of continued litigation.

It is well-settled in this Circuit and District that a claims-made structure does not impact the "fairness, reasonableness, or adequacy of proposed settlement." *See, e.g., Hamilton v. SunTrust Mortg. Inc.*, 2014 WL 5419507, at *6 (S.D. Fla. Oct. 24, 2014) (quotations omitted). Defendants asserted and confirmed they would not settle the cases absent the claims made structure. Global Settlement Agreement at ¶ 84. Courts find a defendant's refusal to settle absent a claims-made structure to be a critical factor in determining whether a claims-made settlement is fair and reasonable. *See, e.g.*, *Casey v. Citibank, N.A.*, 2014 WL 4120599, at *2 (N.D. N.Y. Aug. 21, 2014) (while direct payment may have resulted in more class members receiving some payment, "there is no reason to believe the defendants would agree to such terms" and thus the feasibility of direct payment "is irrelevant") (*citing Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 986 (7th Cir. 2002) (because the inquiry into a proposed settlement structure "is limited to whether the settlement is lawful, fair, reasonable and adequate[,] . . . [an objector] must do more than just argue that she would have preferred a different settlement structure")); *Montoya v. PNC Bank, N.A.*, 2016 WL 1529902, at *14 (S.D. Fla. Apr. 13, 2016) (claims-made settlement offered the best and "only real relief" possible in settlement because defendants "would not have agreed" to direct-pay structure).[8]

[8] Moreover, even if Defendants had been willing to settle on a direct-pay model (they were not), this would surely have meant significantly less payment amount per class member than under a claims-made model in which greater than 100% of requested damages are paid for each claim made. Plaintiffs and Class Counsel believe such a diminished settlement would not have been fairer to class members. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 250-51 (3d Cir. 2001) (explaining why a defendant can offer a higher percentage recovery in a claims-made class settlement). As this court cogently explained, "[n]egotiating for a smaller amount to go to Class Members would…unfairly reward some Class Members for their own indifference at the expense of those who would take the minimal step of returning the simple Claim Form to receive the larger amount." *Lee v. Ocwen Loan Servicing, LLC*, 2015 WL 5449813, at *18 (S.D. Fla. Sep. 14, 2015). Plaintiffs' and Class Counsel have insisted that all members of the Settlement Class receive *multiple* notices and repeated opportunities and multiple avenues to submit a claim. Accordingly, it makes no sense to send a significantly

The question is not whether a claims made settlement compares favorably to a hypothetical settlement, but rather whether the Settlement is fair and reasonable on its own terms. *See Casey*, 2014 2014 WL 4120599, at *3 ("[The] Court does not have the authority to impose a preferred payment structure upon the settling parties"); *Lee*, 2015 WL 5449813, at *25 ("a claims-made structured settlement is fair, reasonable, and adequate on its own terms"). Here, the elimination of significant risk in favor of payment of full damages is fair and reasonable.

The Global Settlement Agreement removes the risk that class members will recover nothing due to an unfavorable ruling on appeal. In exchange for removing such risk entirely, far from accepting a concomitant reduction in the potential damages, the Global Settlement Agreement provides *more* relief than awarded at summary judgment. *Id*. (providing near-complete relief on a claims-made basis is "extraordinary" result); *Wilson*, 2016 WL 4570011, at *9 (same). For these reasons, and as will be more fully briefed in the Motion for Final Approval, Plaintiffs respectfully submit that the Global Settlement Agreement is fair and reasonable.

Finally, to the extent the textual factors outlined in Rule 23(e) do not overlap with the factors prescribed by the Eleventh Circuit in *Leverso*, such factors also weigh in favor of justifying providing Notice of the proposed Settlement to Settlement Class Members. *Cook*, 2020 U.S. Dist. LEXIS 111956, at *16 (explaining that "Rule 23(e)(2) was amended in 2018" to focus on the "core concerns" of Rule 23 but not to "displace…governing law on approval of class action settlements.") (citing Fed. R. Civ. P. 23(e)(2) Committee Notes on Amendment – 2018). Specifically, Rule 23(e)(2)(A)'s "adequacy" requirement, which is "meant to address whether the class representatives possessed sufficient information and knowledge of the claims, issues, and defenses," *id*. at *18, is satisfied for the same reasons as the *Leverso* "stage of proceedings" factor outlined above – the Class Representatives extensively litigated the claims and defenses at issue over a lengthy period of time such that they had full and detailed knowledge prior to engaging in settlement discussions. Moreover, the Fed. R. Civ. P.

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smaller amount to all class members, including those who are insufficiently incentivized even by the availability of full damages, at the expense of those willing to take a few minutes (at most) to check a box and submit a simple claim. Phillips Decl. at ¶ 72-73.

23(e)(2)(C)(iii) attorneys' fees analysis, which is distinct from Rule 23(h) and instead "addresses if and how the attorneys' fees impacted the terms of the Settlement," *id*. at *24, weighs in favor of preliminary approval because attorneys' fees and costs have absolutely no impact on the full damages to which Settlement Class Members are entitled. Phillips Decl. at ¶28. Finally, because Settlement Class Members are treated identically under the terms of the Settlement, Fed. R. Civ. P. 23(e)(2)(D) weighs in favor of settlement as well. *Id*. at *25 (finding this factor was satisfied because, as here, "Settlement Class Members are treated identically insofar as it relates to Notice, Claim Forms, damages, and…the scope of the release.").

As further support for the propriety of granting preliminary approval of this global settlement, Plaintiffs respectfully note that in the Middle District of Florida, Judge Byron very recently granted Final Approval of a class action settlement regarding unpaid title transfer fees involving GEICO insureds who experienced a first-party total loss of a covered owned vehicle. *Cook*, 2020 U.S. Dist. LEXIS 111956. The allegations by "owned" vehicle insureds against GEICO in *Cook* are very similar to the allegations by "leased" vehicle insureds against GEICO here in *Roth* and *Joffe* (except that the latter include sales tax as well as fees). Judge Byron granted preliminary approval, presided over notice and a period for opt outs and objections, and ultimately granted final approval of the *Cook* settlement, which included very similar terms as the global settlement proposed here. The detailed and well-reasoned analysis in *Cook* provides further support that the terms of the Global Settlement Agreement proposed here is also fair and reasonable. *Id*.

CONCLUSION

Plaintiffs respectfully request that the Court grant Preliminary Approval of the proposed global settlement, and enter an Order of preliminary approval including the substantive content of the proposed Order attached as Exhibit 1 to the Global Settlement Agreement. The proposed Order approves the form of notice to be given to the class, establishes a schedule and process for the submission of any objections or requests for exclusion from the class, and provides for a fairness hearing to be held by the Court. Plaintiffs will request final approval of the settlement in advance of the fairness hearing.

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Respectfully submitted,

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