

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-23352-Civ-COOKE/LOUIS

RAY MOHAMED, individually and
on behalf of others similarly situated,

Plaintiff,

vs.

OFF LEASE ONLY, INC.,
a Florida Corporation,

Defendant.

PRELIMINARY APPROVAL ORDER

THIS MATTER is before me upon Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement ("Motion") (ECF No. 375). The Court having fully considered the Motion, the Parties' arguments and submissions concerning the Motion, and the applicable facts and law, including Fed. R. Civ. P. 23, it is hereby **ORDERED and ADJUDGED** as follows:

I. PRELIMINARY APPROVAL OF SETTLEMENT

1. As used in this Preliminary Approval Order, unless otherwise noted, all capitalized terms shall have the definitions and/or meanings given them in the Parties' Settlement Agreement (the "Agreement").

2. The Court has jurisdiction over the subject matter and the Parties to this proceeding pursuant to 28 U.S.C. § 1332.

3. Venue is proper in this District.

4. It is well established that "[a] class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks omitted). In deciding whether to provisionally certify a settlement class, a court must consider the same factors that it would consider in connection with a proposed litigation class – i.e., all Rule 23(a) factors and at least one subsection of Rule 23(b) must be

satisfied – except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial. *Id.*; *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

5. The Court preliminarily approves the Agreement subject to the Fairness Hearing, the purpose of which will be to decide whether to grant final approval of the Agreement. The Court finds that the Agreement, the Settlement set forth therein, and all exhibits attached to the Motion are fair, reasonable, and adequate, entered into in good faith, free of collusion to the detriment of the Settlement Class and within the range of possible judicial approval to warrant sending notice of the Litigation and the proposed Settlement to the Settlement Class and to hold a full hearing on the proposed Settlement.

II. THE CLASS, REPRESENTATIVE, AND CLASS COUNSEL

6. The Court finds, for settlement purposes only, conditioned upon final certification of the proposed class and upon Final Judgment, that the Federal Rule of Civil Procedure 23 factors are present and that certification of the proposed Settlement Class is appropriate under Rule 23. The Court therefore preliminarily certifies the following class:

all subscribers within the United States (i) who received a text message (ii) on his or her cellular telephone (iii) from InstantCarOffer.com, on behalf of Off Lease Only, Inc., (iv) through the use of the Twilio platform (v) after placing an advertisement on craigslist.org in connection with the sale of a vehicle (vi) from September 4, 2011 to July 12, 2017.

This class specifically excludes persons in the following categories: (A) individuals who are or were during the Class Period officers or directors of Off Lease Only (“OLO”) or any of its respective affiliates; (B) the district judge and magistrate judge presiding over this case, the judges of the United States Court of Appeals for the Eleventh Circuit, their spouses, and persons within the third degree of relationship to either of them; and (C) all persons who file a timely and proper request to be excluded from the Settlement Class in accordance with Section I.JJ of the Agreement.

7. The Court recognizes as more particularly set forth in the agreement that OLO reserves all of its defenses and objections against, and rights to oppose, any request for class certification in the event that the proposed Settlement does not become Final for any reason. OLO also reserves its defenses to the merits of the claims asserted in the event the Settlement does not become Final for any reason.

8. For settlement purposes only, the Court preliminarily appoints Plaintiff Ray Mohamed as Class Representative.

9. For settlement purposes only, the Court appoints the following persons and firms as Class Counsel for the Settlement Class:

Scott D. Owens
SCOTT D. OWENS, P.A.
3800 S. Ocean Dr., Suite 235
Hollywood, Florida 33019

Manuel S. Hiraldo
HIRALDO P.A.
401 E. Las Olas Boulevard, Suite 1400
Fort Lauderdale, Florida 33301

Bret L. Lusskin
BRET LUSSKIN, P.A.
20803 Biscayne Blvd., Suite 302
Aventura, Florida 33180

Seth M. Lehrman
EDWARDS POTTINGER LLC
425 N. Andrews Ave., Suite 2
Fort Lauderdale, Florida 33301

10. At the preliminary approval stage, the Court's task is to evaluate whether the Settlement is within the "range of reasonableness." 4 Newberg on Class Actions § 11.26. "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010). Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See* Manual for Complex Litigation, Third, § 30.42 (West 1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

11. The Court preliminarily approves the Settlement, together with all exhibits thereto, as fair, reasonable and adequate. The Court finds that the Settlement was reached

in the absence of collusion, is the product of informed, good-faith, arm's-length negotiations between the Parties and their capable and experienced counsel. The Court further finds that the Settlement, including the exhibits thereto, is within the range of reasonableness and possible judicial approval, such that: (a) a presumption of fairness is appropriate for the purposes of preliminary settlement approval; and (b) it is appropriate to effectuate notice to the Settlement Class, as set forth below and in the Settlement, and schedule a Fairness Hearing to assist the Court in determining whether to grant Final Approval to the Settlement and enter a Final Approval Order.

III. NOTICE TO CLASS MEMBERS

12. Upon entry of this Order, the Parties shall designate the Settlement Administrator.

13. The Settlement Class is comprised of 29,015 individuals who have been identified pursuant to Section III of the Agreement and will be placed on the Settlement Class List by the Administrator pursuant to the terms of the Agreement.

14. The Settlement Class Notice Program shall be effectuated as follows:

- a. Each Class Member on the Settlement Class List shall be given a unique numerical identifier to be used in the Claims process as more particularly set forth herein.
- b. The Administrator shall then utilize appropriate reverse look-up services based on the Settlement Class List and the National Change of Address database to determine the mailing addresses for the Settlement Class Members, for the implementation and effectuation of Class Notice, processing Claim Forms, receiving and maintaining on behalf of the Court any correspondence regarding requests for exclusion and/or objections to the settlement, administering Claim Settlement Payments, and providing all other related support, reporting, and administration as further stated in this Agreement. The Parties may direct the Administrator to assist with various additional administrative tasks in implementing the Settlement as the Parties agree is appropriate.

- c. No later than forty-five (45) Days after the entry of this Order, the Settlement Administrator will mail the Mail Notice to all such members of the Settlement Class whose addresses were derived as part of the process described in the Paragraph above. To the extent that additional notice through publication is determined to be necessary to satisfy due process and Class Notice under the Agreement, such notice will also be made no later than forty-five (45) Days after entry of this Order.
- d. The Settlement Administrator shall maintain the Settlement Website until at least sixty (60) days following the Claim Deadline.
- e. The Settlement Administrator will file proof of compliance with the Settlement Class Notice Program at or before the Fairness Hearing.

15. The form and content of the Class Notice are fair, reasonable, and adequate, and Class Notice shall be disseminated to the Settlement Class in accordance with the Agreement and as due process and Rule 23 of the Federal Rules of Civil Procedure require.

16. The Court finds that the Settlement Class Notice Program is reasonably calculated, under the circumstance, to apprise the Settlement Class: (a) of the pendency of the Litigation and the essential terms of the Settlement; (b) of the procedures for allocating the Settlement Fund; (c) of any requested amounts for an Attorneys' Fee Award and an Incentive Payment; (d) of right of members of the Settlement Class to exclude themselves from the Settlement Class and the proposed Settlement; (e) that any judgment, whether favorable or not, will bind all members of the Settlement Class who do not request exclusion; (f) that any member of the Settlement Class who does not request exclusion may object to the Settlement, the request for an Attorneys' Fee Award and/or an Incentive Payment and, if he or she desires, enter an appearance personally or through counsel; (g) the time and place of the Final Approval Hearing; and (h) prominently display the address of Class Counsel and the Settlement Administrator as well as the procedure for making inquiries. The Court further finds that the Class Notice is written in plain English and is readily understandable by members of the Settlement Class.

17. The Court finds the Settlement Class Notice Program: (i) is the best practicable notice; (ii) is reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Litigation and of their right to object to or to

exclude themselves from the proposed Settlement; (iii) is reasonable and constitutes due, adequate and sufficient notice to all Persons entitled to receive Class Notice; and (iv) meets all requirements of applicable law.

18. No later than ten (10) days before the Fairness Hearing, the Settlement Administrator shall file a declaration with the Court attesting to the: (a) completion of the Settlement Class Notice Program; and (b) number of valid claims, opt-outs, and objections.

19. At least ten (10) days prior to the Final Approval Hearing, the Administrator shall provide Class Counsel and Counsel for Off Lease Only with a list of all timely Requests for Exclusion along with copies of such Requests for Exclusion.

IV. CLAIM FORM

20. The Court adopts the Claim Deadline and approves the Claim Form in substantially the same form as the Claim Form attached to the Agreement. Any member of the Settlement Class who wishes to receive benefits under the Agreement must file a complete and timely Claim Form in compliance with the process set forth in the Agreement, and such Claim Form shall be received by the Administrator no later than ninety (90) days after the entry of this Order. Any Settlement Class Member who does not file a complete and timely Claim Form in compliance with the Agreement shall not be entitled to any benefits under the Settlement, but nonetheless shall be barred by the release provisions of the Agreement and the Final Judgment and shall be deemed to have released the Released Parties from the Released Claims.

V. EXCLUSION REQUESTS

21. Any member of the Settlement Class who wishes to opt-out or exclude himself or herself from the Settlement Class must file an appropriate, timely request for exclusion received by the Settlement Administrator no later than ninety (90) days after the entry of this Order (the "Opt-Out and Objection Date").

22. The opt-out request must be personally signed by the Settlement Class Member requesting exclusion, contain a statement that indicates his or her desire to be excluded from the Settlement Class and contain a statement that he or she is otherwise a member of the Settlement Class. A timely and valid request to opt-out of the Settlement Class shall preclude the person opting out from participating in the proposed Settlement and

he or she will be unaffected by the Agreement. The Settlement Administrator shall compile a list of all Settlement Class Members who properly and timely submit an opt-out request (the "Opt-Out List").

23. Any Settlement Class Member who does not submit a timely and valid written request for exclusion shall be bound by all subsequent proceedings, orders and judgments in this Litigation, regardless of whether he or she currently is, or subsequently becomes, a plaintiff in any other lawsuit, arbitration or other proceeding against any of the Released Parties asserting any of the Released Claims.

VI. OBJECTIONS

24. Any Settlement Class Member who does not properly and timely file an opt-out request and who wishes to object to the fairness, reasonableness, or adequacy of the Agreement or the proposed Settlement or who wishes to object to the Attorneys' Fee Award or Incentive Payment must file with the Court and serve on Class Counsel and OLO's Counsel, and must be received no later than the Opt-Out and Objection Date, a written statement of the objection signed by the Settlement Class Member containing all of the following information:

A. Settlement Class Members With Unique Numerical Identifier

Under penalty of perjury:

- a. Claimant's unique Settlement Class Member identifier.
- b. identify the telephone number where the person received a text message from Off Lease Only; Claimant's name, current address, telephone number, and email address;
- c. Claimant's cellular telephone number that was allegedly sent a text message;
- d. affirmation they are (or were) the subscriber of the cellular telephone at the time that they were allegedly sent a text message and
- e. a statement of whether he/she intends to appear at the Final Approval Hearing, either with or without counsel.

B. Settlement Class Member Without a Unique Numerical Identifier

- a. Claimant's name, current address, telephone number, and email address;

- b. Claimant's telephone number that received a text message from Off Lease Only;
- c. an affirmation that Claimant received a text message from Off Lease Only;
- d. affirmation, with appropriate documentary proof, they were the subscriber to the number at the time that the text message was received;
- e. a declaration under penalty of perjury that all information and representations contained in the Claim Form are true and correct and
- f. a statement of whether he/she intends to appear at the Final Approval Hearing, either with or without counsel

25. Any member of the Settlement Class who fails to file and serve a timely written objection and notice of his or her intent to appear at the Fairness Hearing pursuant to this Paragraph (Paragraph 23) and as detailed in the Class Notice shall not be permitted to object to the approval of the Settlement or the Agreement at the Fairness Hearing and shall be foreclosed from seeking any review of the Settlement or the terms of the Agreement by appeal or other means.

26. Any objections must be appropriately filed with the Court no later than the Opt-Out and Objection Date, or alternatively they must be mailed to the Court at the address below no later than the Opt-Out/Objection Deadline.

Clerk of Court
United States District Court for the Southern District of Florida
99 N.E. Fourth Street
Miami, FL 33132
Attention: "Mohamed v. Off Lease Only, Inc., Case No. 1:15-cv-23352)."

A copy of the objection must also be mailed to Class Counsel and Counsel for Off Lease Only and must be received by [90 days after the entry of the Preliminary Approval Order].

27. No person shall be heard and no paper or brief submitted by any objector shall be received or considered by the Court unless such person has filed with the Clerk of Court and timely mailed to the Settlement Administrator, as provided above, a notice of intention to appear at the Final Approval Hearing by the Objection Deadline ("Notice Of

Intention to Appear”); and (b) serves the Notice of Intention to Appear on Class Counsel and Counsel for Off Lease Only by the Objection Deadline.

28. The Notice of Intention to Appear must include: (a) the case name and number; (b) the Settlement Class Member’s name, address, telephone number, and signature, and, if represented by counsel, their contact information; (c) the telephone number where he/she received a text message from Off Lease Only; and (d) copies of any papers, exhibits, or other evidence that the objecting Settlement Class Member will present to the Court in connection with the Final Approval Hearing.

29. Any Settlement Class Member who does not file a written objection in the time and manner described above shall be: (a) deemed to have waived and forfeited any objections to the proposed Settlement; (b) foreclosed from raising any objection to the proposed Settlement at the Fairness Hearing; (c) bound by all of the terms of the Agreement and by all proceedings, orders and judgments by the Court; and (d) foreclosed from seeking any adjudication or review of the Settlement by appeal or otherwise.

30. Except for those Settlement Class Members who timely and properly file a request for exclusion, all Settlement Class Members will be deemed to be Settlement Class Members for all purposes under the Agreement, and upon the Effective Date, will be bound by its terms, regardless of whether they file a Claim Form or receive any monetary relief.

31. The Court preliminarily enjoins all Settlement Class Members, unless and until they have timely excluded themselves from the Settlement Class, from (a) filing, commencing, prosecuting, intervening in, or participating as plaintiff, claimant or class member in any other lawsuit or administrative, regulatory, arbitration or other proceeding in any jurisdiction based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Litigation and/or the Released Claims; (b) filing, commencing, participating in, or prosecuting a lawsuit or administrative, regulatory, arbitration, or other proceeding as a class action on behalf of any member of the Settlement Class who has not timely excluded himself or herself (including by seeking to amend a pending complaint to include class allegations or seeking class certification in a pending action), based on, relating to, or arising out of the claims and causes of action or the facts and circumstances giving rise to the Litigation and/or the Released Claims; and (c) attempting to effect opt-outs of a class of individuals in any lawsuit or administrative,

regulatory, arbitration, or other proceeding based on, relating to, or arising out of the claims and causes of action or the facts and circumstances giving rise to the Litigation and/or the Released Claims. Any Person who knowingly violates such injunction shall pay the attorneys' fees and costs incurred by OLO, any other Released Person and Class Counsel as a result of the violation. This Order is not intended to prevent Settlement Class Members from participating in any action or investigation initiated by a state or federal agency.

VII. FAIRNESS HEARING

32. A hearing to determine (a) whether the Settlement Class should be finally certified pursuant to Rule 23 of the Federal Rules of Civil Procedure and (b) whether the proposed Settlement is fair, reasonable and adequate (the "Fairness Hearing") shall be conducted in the United States Courthouse, United States District Court for the Southern District of Florida, Miami Division, commencing on May 22, 2019, at 2:00 p.m.

33. The Court may reschedule the Fairness Hearing without further written notice. If the Fairness Hearing is rescheduled from the currently scheduled date, information regarding a rescheduled Fairness Hearing will be posted on the Court's docket.

34. Papers in support of the final approval of the Settlement shall be filed with the Court at least 5 days before opt out deadline, objection deadline and claim deadline ("Member Deadlines") Responses to Objections shall be filed 7 days prior to Final Approval Hearing.

35. An application of Class Counsel for an award of fees and expenses shall be filed with the Court at least 5 days before opt out deadline, objection deadline and claim deadline ("Member Deadlines").

36. All discovery and other pre-trial proceedings in this Litigation are stayed and suspended pending the Fairness Hearing, except such actions as may be necessary to implement the Agreement and this Order.

37. Defendant shall file proof of compliance with the notice requirements of The Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1715(b), no later than thirty (30) days before the date of the Fairness Hearing.

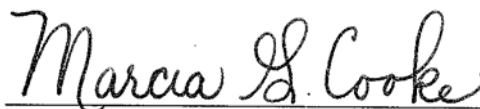
VIII. OTHER PROVISIONS

38. This Order shall become null and void, and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if (a) the proposed Settlement is not finally approved by the Court, or does not become Final, pursuant to the terms of the Agreement or (b) the proposed Settlement is terminated in accordance with the Agreement or does not become effective as required by the terms of the Agreement for any other reason. In any such event, the proposed Settlement and Agreement shall become null and void and be of no further force and effect, and neither the Agreement nor the Court's orders, including this Order, shall be used or referred to for any purpose whatsoever.

39. Neither the Agreement, nor any of its terms or provisions, nor any of its exhibits, nor any of the negotiations or proceedings connected with it, nor this Order shall be construed as an admission or concession by any Defendant of the truth of any of the allegations in the Litigation, or of any liability, fault, or wrongdoing of any kind, or of the appropriateness of the certification of the Settlement Class for purposes other than for settlement. This Order shall not be construed or used as an admission, concession or declaration by or against any of the Released Parties of any fault, wrongdoing, breach, or liability.

40. The terms and provisions of the Agreement may be amended by agreement of the Parties in writing or with approval of the Court without further notice to the Settlement Class, if such changes are consistent with this Order and do not materially limit the rights of the Settlement Class.

DONE and ORDERED in chambers, at Miami, Florida, this 20th day of February 2019.



MARCIA G. COOKE
United States District Judge

Copies furnished to:
Lauren Fleischer Louis, U.S. Magistrate Judge
Counsel of record