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17 UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

19 JENNA LLOYD and JAMIE  
 PLEMONS, on behalf of themselves and  
 20 all others similarly situated,  
 21  
 Plaintiffs,  
 22  
 vs.  
 23  
 24 NAVY FEDERAL CREDIT UNION,  
 25  
 Defendant.

CASE NO. 3:17-cv-01280-BAS-RBB

**MEMORANDUM OF POINTS  
 AND AUTHORITIES IN  
 SUPPORT OF PLAINTIFFS'  
 UNOPPOSED MOTION FOR  
 PRELIMINARY APPROVAL OF  
 CLASS SETTLEMENT AND FOR  
 CERTIFICATION OF  
 SETTLEMENT CLASS**

Judge: Hon. Cynthia Bashant

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<b>Cases</b>	<b>Page(s)</b>
<i>Adams v. Inter-Con Sec. Sys. Inc.</i> , No. C-06-5428 MHP, 2007 WL 3225466 (N.D. Cal. Oct. 30, 2007) .....	13
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<i>Breedon v. Benchmark Lending Group, Inc.</i> , 229 F.R.D. 623 (N.D. Cal. 2005) .....	21
<i>Churchill Vill., LLC v. GE</i> , 361 F.3d 566 (9th Cir. 2004) .....	24
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<i>In re Bluetooth Headset Prods. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011) .....	11

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 13 *Low v. Trump Univ., LLC*,  
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 18 *Mendoza v. Tucson Sch. Dist. No.1*,  
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 22 *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*,  
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1 *Rodriguez v. West Pub. Corp., No. CV05-3222,*  
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1 **I. INTRODUCTION**

2 Plaintiffs, Jenna Lloyd and Jamie Plemons (“Plaintiffs”), respectfully move for  
3 Preliminary Approval of the Settlement Agreement and Release (“Settlement” or  
4 “Agreement”), attached as ***Exhibit A***, which will resolve all claims against Navy Federal  
5 Credit Union (“Navy Federal”) in the above-captioned action (“Action”).<sup>1</sup> The Court  
6 should grant Preliminary Approval because the Settlement provides substantial relief for  
7 the Settlement Class and the terms of the Settlement are well within the range of  
8 reasonableness and consistent with applicable case law. Indeed, given the significant risks  
9 inherent in this Action, the Settlement – which provides for Navy Federal’s: (a) cash  
10 payment of \$24,500,000.00; and (b) agreement to pay up to \$500,000.00 towards  
11 Settlement Administration Costs – is an outstanding result for the Settlement Class.

12 The Settlement satisfies all Ninth Circuit criteria for settlement approval. One of  
13 the keystones of this Settlement is that all Settlement Class Members will automatically  
14 receive their *pro rata* share of the Net Settlement Fund. There are no claims forms to fill  
15 out and Settlement Class Members will not be asked to prove that they were damaged by  
16 Navy Federal’s practice of assessing OOPS Fees on transactions that were authorized into  
17 a positive balance. Instead, Class Counsel and its expert will use available Navy Federal  
18 data to determine which checking Account Holders were affected by OOPS Fees, and as  
19 a result incurred Relevant Overdraft Fees, and will apply a formula to calculate each  
20 Settlement Class Member’s appropriate distribution. Thus, the plan of allocation fairly  
21 and adequately accounts for the value of each Settlement Class Member’s individual  
22 damages.

23 In the face of certain risks discussed below, this Settlement is fair and reasonable  
24 and merits Preliminary Approval.

25  
26  
27 <sup>1</sup> All capitalized terms used throughout this memorandum have the same meanings as  
28 those found in the Agreement.

1 **II. BACKGROUND**

2 **A. Procedural History**

3 On June 22, 2017, Plaintiffs filed their Complaint against Navy Federal alleging  
4 improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary  
5 damages, interest, attorneys’ fees, restitution, and equitable relief. [ECF No. 1.] On August  
6 22, 2017, Plaintiffs filed their First Amended Complaint. [ECF No. 4.]

7 On September 5, 2017, Navy Federal filed a Motion to Dismiss the First Amended  
8 Complaint (“MTD”). [ECF No. 9.] On October 16, 2017, Plaintiffs filed their Response  
9 in Opposition to Navy Federal’s MTD, and on October 23, 2017, Navy Federal filed its  
10 Reply to the MTD. [ECF No. 11, 12.]

11 On December 4, 2017, Plaintiffs filed a Motion for Leave to File a Notice of  
12 Supplemental Authority in additional support of their Response to Navy Federal’s MTD;  
13 Navy Federal filed a Response to the Motion for Leave; and the Court granted Plaintiffs’  
14 motion. [ECF No. 16, 17, 18.] On December 5, 2017, Plaintiffs filed their Notice of  
15 Supplemental Authority. [ECF No. 19.]

16 On February 23, 2018, Plaintiffs filed a second Motion for Leave to File Notice of  
17 Supplemental Authority in further support of their Response in Opposition to the MTD.  
18 [ECF No. 22.] On March 5, 2018, the Court denied Plaintiffs’ Motion. [ECF No. 23.]

19 On March 7, 2018, the Court entered an Order Requesting Supplemental Briefing  
20 on choice of law regarding the MTD. [ECF No. 24.] The Parties each filed their  
21 Supplemental Briefing on Choice of Law on March 13, 2018. [ECF No. 29, 30.]

22 On April 12, 2018, the Court entered an Order granting in part and denying in part  
23 the MTD. [ECF No. 33.] The Court denied the MTD with respect to the breach of  
24 contract and conversion claims, while dismissing the unjust enrichment and Consumer  
25 Legal Remedies Act claims. *Id.* The Court granted the MTD with respect to the implied  
26 covenant of good faith and fair dealing and Unfair Competition Law claims, granting  
27 Plaintiffs leave to file a Second Amended Complaint. *Id.*



1 On May 4, 2018, Plaintiffs filed their Second Amended Complaint and on May 18,  
2 2018, Navy Federal filed its Answer and Affirmative Defenses. [ECF No. 38, 39.]

3 On May 21, 2018, the Court entered an Order Setting Early Neutral Evaluation  
4 Conference (“ENEC”) for June 27, 2018. [ECF No. 40.] On May 31, 2018 and on August  
5 8, 2018, the Parties moved to continue the ENEC. [ECF No. 41.] On August 9, 2018,  
6 the Court continued the ENEC until September 26, 2018. [ECF No. 42.]

7 On September 14, 2018, the Parties participated in a full day mediation in  
8 Washington, DC, with the Honorable Walter Kelley (Ret.), which resulted in the Parties  
9 agreeing on the materials terms of a settlement, at which time they signed a Term Sheet.

10 On September 25, 2018, the Parties filed a Notice of Settlement advising the Court  
11 of the Settlement and requesting a stay of all proceedings until the filing of this Settlement  
12 Agreement and a Motion for Preliminary Approval. [ECF No. 48.]

13 **B. Class Counsel’s Investigation.**

14 Class Counsel spent many hours investigating the claims of several potential  
15 plaintiffs against Navy Federal. *See* Joint Declaration of Class Counsel (“Joint Decl.”),  
16 attached as *Exhibit B*, at ¶ 5. Class Counsel interviewed a number of Navy Federal  
17 members to gather information about Navy Federal’s conduct and its impact upon  
18 consumers. *Id.* This information was essential to Class Counsel’s ability to understand  
19 the nature of the Navy Federal’s conduct, the language of the Account agreement and  
20 other documents at issue, and potential remedies. *Id.*

21 Class Counsel expended significant resources researching and developing the legal  
22 claims at issue. *Id.* at ¶ 6. Class Counsel is familiar with the claims as they have litigated  
23 and resolved several similar cases with the same factual and legal issues. *Id.* Class Counsel  
24 has experience in understanding the damages at issue, what information is critical in  
25 determining class membership, and what data is necessary to calculate each Settlement  
26 Class member’s respective damages. *Id.* Class Counsel spent a significant amount of time  
27 analyzing data regarding Navy Federal’s fee revenue related to the assessment of OOPS  
28

1 Fees, with a well-qualified expert's assistance. *Id.* at ¶ 7. Prior to mediation, Class Counsel  
2 and Plaintiffs' expert used this data to analyze the damages at issue. *Id.*

3 Class Counsel entered the mediation fully informed of the merits of Settlement  
4 Class members' claims and negotiated the proposed Settlement while zealously advancing  
5 the position of Plaintiffs and Settlement Class members and being fully prepared to  
6 continue to litigate rather than accept a settlement that was not in the best interest of  
7 Plaintiffs and the Settlement Class. *Id.* at 10. Judge Walter Kelley (Ret.) actively supervised  
8 and participated in the settlement discussions to help the Parties reach an acceptable  
9 compromise, and in fact, personally met with Plaintiffs' counsel prior to the mediation to  
10 explore the legal issues and obtained answers to his follow up questions from Class  
11 Counsel in advance of mediation. *Id.* at 11. Judge Kelley met with Navy Federal as well  
12 before and after meeting with Class Counsel.

13 Prior to negotiating the Settlement, Class Counsel spent significant time  
14 communicating with Plaintiffs, investigating facts, researching the law, preparing well-  
15 pleaded complaints and amended complaints, engaging in informal discovery, working  
16 with an expert witness, and reviewing important documents and data. This resulted in the  
17 Settlement achieved for which Preliminary Approval is respectfully requested.

### 18 **C. Summary of the Settlement Terms.**

#### 19 **1. The Settlement Class.**

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

22 All current and former Navy Federal members who were charged an  
23 OOPS Fee on a transaction that was authorized into a positive available  
24 balance during the Class Period, excluding individuals who enrolled in  
OOPS for the first time after February 13, 2017.

25 Class Period means the period from July 22, 2012, through November 20, 2017.  
26 Excluded from the Settlement Class is Navy Federal, its parents, subsidiaries, affiliates,  
27 officers and directors, all Settlement Class members who make a timely election to be  
28 excluded, and all judges assigned to this litigation and their immediate family members.

1 Agreement at ¶¶ 20, 49.

2 **2. Relief for the Benefit of the Settlement Class.**

3 **a. Settlement Fund & Settlement Administration Costs**

4 The Settlement consists of Navy’s Federal’s commitment to establish a Settlement  
5 Fund of \$24,500,000.00 for the benefit of Settlement Class members, as well as Navy  
6 Federal’s separate commitment to pay up to \$500,000.00 toward Settlement  
7 Administration Costs. Agreement at ¶¶ 29, 55. The Settlement Fund will be used to: (a)  
8 pay Settlement Class Members their respective Settlement Class Member Payments; (b)  
9 Class Counsel for any Court awarded attorneys’ fees and litigation expenses and costs; (c)  
10 any Court awarded Service Awards for the Class Representatives; (d) Settlement  
11 Administration Costs above the Navy Federal Settlement Administration Costs Cap; and  
12 (e) in the event funds remain after the initial distribution to Settlement Class Members,  
13 reimburse Navy Federal up to its cap. *Id.*

14 Settlement Class members do not have to submit claims or take any other  
15 affirmative step to receive relief under the Settlement or to receive a Settlement Class  
16 Member Payment. Instead, within 30 days following the Effective Date of the Settlement,  
17 Navy Federal and the Settlement Administrator will distribute the Net Settlement Fund to  
18 all Settlement Class Members. Agreement at ¶ 73.

19 Payments to Settlement Class Members who are Current Account Holders will be  
20 made by Navy Federal crediting such Settlement Class Members’ accounts, and notifying  
21 them of the credit, or by checks mailed by the Settlement Administrator. *Id.* at ¶ 81. Past  
22 Account Holders will receive payments from the Settlement Fund by checks mailed by the  
23 Settlement Administrator. *Id.* at ¶ 74. Any uncashed or returned checks will remain in the  
24 Settlement Fund, during which time the Settlement Administrator will make reasonable  
25 efforts to effectuate delivery of the Settlement Class Member Payments. *Id.* at ¶ 82.

26 All Settlement Class Members who are entitled to a Settlement Class Member  
27 Payment will receive a *pro rata* distribution from the Net Settlement Fund based on the  
28

1 number of Relevant Overdraft Fees the Settlement Class Member paid or was assessed  
2 during the Class Period. *Id.* at ¶ 76. Because each Settlement Class Member's distribution  
3 amount is dependent on his or her specific Account activity and the number of Settlement  
4 Class Members, it is not possible to determine the likely recovery of each Settlement Class  
5 Member until this calculation is performed.

6 In the event funds remain in the Settlement Fund after the initial distribution to  
7 Settlement Class Members, Navy Federal shall be reimbursed for the Settlement  
8 Administration Costs it paid. Thereafter, if funds remain, to the extent feasible, those  
9 funds shall be distributed in a second distribution to those Settlement Class Members that  
10 were paid or credited with a Settlement Class Member Payment in the first distribution.  
11 All Settlement Administration Costs of a second distribution will be paid out of the  
12 Settlement Fund, including those related to Navy Federal's facilitation of Account credits  
13 in the event of a second distribution. If a second distribution is not feasible, or if funds  
14 remain after a second distribution, those funds shall be distributed to a *cy pres* recipient or  
15 recipients, proposed by the Parties and to be approved by the Court, that work to promote  
16 financial literacy, including for members of the military or veterans. *Id.* at ¶ 83.

### 17 **b. Practice Change – Modified Disclosures**

18 In November of 2017, after this Action had been initiated, Navy Federal voluntarily  
19 modified its Account disclosures to better inform its members that they may incur an  
20 OOPS Fee on Debit Card transactions that were authorized against a positive available  
21 balance, if at the time of settlement, the account balance is negative. This practice change  
22 inures to the benefits of Settlement Class members and to other Navy Federal customers  
23 and has resulted in and will continue to result in millions of dollars of savings.

### 24 **3. Releases.**

25 In exchange for the benefits conferred by the Settlement, all Settlement Class  
26 Members will be deemed to have released Navy Federal from claims relating to the subject  
27 matter of the Action. The Releases are set forth in Section XIII of the Agreement.

1           **4. The Notice Program.**

2           The Settlement Administrator is Epiq Class Action & Claims Solutions, Inc. Epiq’s  
3 notice division is Hilsoft Notifications, one of the leading notice administration firms in  
4 the United States. The Settlement Administrator will oversee the Notice Program. The  
5 Notice Program is designed to provide the best notice practicable and is tailored to take  
6 advantage of the information Navy Federal has available about the Settlement Class. Joint  
7 Decl. at ¶ 30. The Notice Program is reasonably calculated under the circumstances to  
8 apprise members of the Settlement Class of the following: a description of the material  
9 terms of the Settlement; a date by which persons in the Settlement Class may exclude  
10 themselves from the Settlement Class; a date by which Settlement Class Members may  
11 object to the Settlement; the date when the Final Approval Hearing will occur; and the  
12 address of the Settlement Website where the Settlement Class may access the Agreement  
13 and other related documents. Agreement at ¶¶ 60-62 and *Exhibits C-E* hereto. The  
14 Notice and Notice Program constitute sufficient notice to all persons entitled to notice.  
15 Joint Decl. at ¶ 31. The Notice Program satisfies all applicable requirements of law,  
16 including Federal Rule of Civil Procedure 23 and constitutional due process. *Id.*

17           The Notice Program is comprised of three parts: (1) direct mail postcard notice  
18 (“Postcard Notice”) to all Settlement Class members for whom Navy Federal no longer  
19 has a current email address; (2) email notice (“Email Notice”) to those Settlement Class  
20 members that Navy Federal maintains email addresses for; and (3) Long Form Notice  
21 containing more detail than the Postcard Notice and Email Notice that will be available  
22 on the Settlement website ([www.NFOverdraftLitigation.com](http://www.NFOverdraftLitigation.com)) and via U.S. mail upon  
23 request. Agreement at ¶ 64.

24           Among the additional information provided, the Long Form notice will describe  
25 the procedure that Settlement Class members must follow to (a) opt-out of the Settlement  
26 or (b) object to the Settlement; Class Counsel’s application for attorneys’ fees, costs and  
27 expenses; and/or to the Service Awards to the Plaintiffs. Specifically, opt-outs must be  
28

1 postmarked no later than the last day of the Opt-Out Period, and objections must be  
2 postmarked no later than the last day of the Opt-Out Period (no later than 30 days before  
3 the Final Approval Hearing). Agreement at ¶¶ 60-62. For an objection to be valid, it must  
4 include: (i) the name of the Action; (ii) the objector's name, address, and telephone  
5 number; (iii) an explanation of how the objector is a member of the Settlement Class; (iv)  
6 the basis for the objection; (v) a description of the number of times the objector or the  
7 objector's counsel has objected to a class settlement in the last five years, the names of any  
8 such cases, and any relevant orders issued in response to such past objections; (vi) a  
9 statement confirming whether the objector will appear at the Final Approval Hearing and  
10 a description of counsel or witnesses who will appear on behalf of the objector; and (vii)  
11 the objector's signature (even if the objector is represented by counsel). *Id.* at ¶ 63.

12 The Notice Program (Postcard Notice and Email Notice, including the Notice Re-  
13 Mailing Process) shall be completed no later than 60 days before the Final Approval  
14 Hearing. Agreement at ¶ 67.

15 The Settlement Website (which will include hyperlinks to the Agreement, the Long  
16 Form Notice, the Preliminary Approval Order and such other documents as the Parties  
17 agrees to post or that the Court orders posted) will be established following Preliminary  
18 Approval and prior to the commencement of the Notice Program. *Id.* at ¶¶ 53, 60.

19 The Settlement Administrator will also establish and maintain an automated toll-  
20 free telephone line for the Settlement Class to call with Settlement-related inquiries and to  
21 receive automated responses, and to accept requests for Long Form Notices. *Id.* at ¶ 59.

## 22 **5. Settlement Administration**

23 The Settlement Administrator is one of the leading class action settlement  
24 administrators in the United States. Its Settlement Administration responsibilities include:

25 a. As soon as practicable after Preliminary Approval, obtain from Navy Federal  
26 and Class Counsel and its expert the name, physical address, and email address  
27 information (to the extent it is reasonably available) for Settlement Class members. To  
28

1 the extent necessary, the Settlement Administrator will verify and update the physical  
2 addresses received through the National Change of Address database for the purpose of  
3 mailing the Postcard Notice, and later mailing distribution checks to Past Account  
4 Holders, and to Current Account Holders where it is not feasible or reasonable for Navy  
5 Federal to make the payment by a direct credit to Settlement Class Members' Accounts;

- 6 b. Establish and maintain a post office box for exclusion requests;
- 7 c. Establish and maintain the Settlement Website;
- 8 d. Establish and maintain an automated toll-free telephone line for Settlement  
9 Class members to call with Settlement-related inquiries and receive automated answers to  
10 the questions of persons who call with or otherwise communicate such inquiries;
- 11 e. Respond to any mailed inquiries from Settlement Class members;
- 12 f. Process all requests for exclusion from Settlement Class members;
- 13 g. Provide weekly reports and a final report to the Parties that summarize the  
14 number of requests for exclusion and objections received that week, the total number of  
15 exclusion requests and objections received to date, and other pertinent information;
- 16 h. At Class Counsel's request in advance of the Final Approval Hearing, prepare  
17 an affidavit that identifies each member of the Settlement Class who timely and properly  
18 requested exclusion from the Settlement Class;
- 19 i. Process and transmit Settlement Class Member Payments to Settlement Class  
20 Members from the Net Settlement Fund;
- 21 j. In the event Settlement Funds remain in the Settlement Fund after the initial  
22 distribution of Settlement Class Member Payments: (i) repay Navy Federal for any  
23 Settlement Administration Costs that Navy Federal has paid; and (ii) if Settlement Funds  
24 remain after repayment to Navy Federal, facilitate a second distribution pursuant to the  
25 terms of the Agreement or distribute the funds to the *cy pres* recipients. *Id.* at ¶ 59.

26 **6. Settlement Termination.**

27 Either Party may terminate the Settlement if the Settlement is rejected or materially  
28

1 modified by the Court or an appellate court. Agreement at ¶ 95(b). Navy Federal also  
2 may terminate the Settlement if the number of Settlement Class members who timely  
3 request exclusion from the Settlement Class equals or exceeds the number or percentage  
4 specified in the separate letter executed by Class Counsel and Navy Federal. The number  
5 or percentage shall be confidential except to the Court, which shall upon request be  
6 provided with a copy of the letter for in camera review. *Id.* at ¶ 96.

### 7 **7. Class Representatives' Service Awards.**

8 Class Counsel will seek Service Awards of \$5,000.00 for each Class Representative.  
9 Agreement at ¶ 93. If the Court approves the awards, the total of \$10,000.00 will amount  
10 to .04% of the Settlement Fund. Joint Decl. at ¶ 19. The Service Awards will be paid  
11 from the Settlement Fund and will be in addition to the Settlement Class Member  
12 Payments the Plaintiffs will be entitled to receive under the Settlement. *Id.* The awards  
13 will compensate the Class Representatives for their time and effort and for the risks they  
14 assumed in prosecuting the Action. *Id.* Specifically, Plaintiffs provided assistance that  
15 enabled Class Counsel to successfully prosecute the Action and reach the Settlement,  
16 including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding  
17 documents and information to Class Counsel; and (3) participating in conferences with  
18 Class Counsel. *Id.* at ¶ 35. In so doing, the Plaintiffs were integral to the case. *Id.* Navy  
19 Federal does not object to the request for these Service Awards. Agreement at ¶ 93.

### 20 **8. Attorneys' Fees and Costs.**

21 Class Counsel has not been paid for their extensive efforts or reimbursed for  
22 litigation costs and expenses incurred. Class Counsel are entitled to request, and Navy  
23 Federal will not oppose, attorneys' fees of up to 35% of the Settlement Fund, as well as  
24 reimbursement of litigation costs and expenses incurred in connection with the Action.  
25 Agreement at ¶ 89; Joint Decl. at ¶ 18. The Parties negotiated and reached agreement  
26 regarding fees and costs only after agreeing on all material terms of the Settlement.  
27 Agreement ¶ 94; Joint Decl. ¶ 18. Such award is subject to this Court's approval and will  
28



1 serve to compensate for the time, risk and expense Plaintiffs’ counsel incurred pursuing  
2 claims on Settlement Class Members’ behalf.

### 3 **III. ARGUMENT**

#### 4 **A. The Legal Standard for Preliminary Approval.**

5 “The Ninth Circuit adheres to a ‘strong judicial policy that favors settlements,  
6 particularly where complex class action litigation is concerned.’” *Low v. Trump Univ., LLC*,  
7 246 F. Supp. 3d 1295, 1299 (S.D. Cal. 2017), *aff’d*, 881 F.3d 1111 (9th Cir. 2018) (quoting  
8 *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992)). “[C]ourt approval of a class  
9 action settlement involves a two-step process—preliminary approval, followed by final  
10 approval after notice to the class[.]” *In re M.L. Stern Overtime Litig.*, No. 07-CV-0118-BTM  
11 JMA, 2009 WL 995864, at \*3 (S.D. Cal. Apr. 13, 2009) (citing Manual for Complex  
12 Litigation, Fourth (“MCL, 4th”) § 21.632)). “The initial decision to approve or reject a  
13 settlement proposal is committed to the discretion of the trial judge.” *Class Plaintiffs*, 955  
14 F.2d at 1276. When a settlement is negotiated prior to formal class certification, settlement  
15 approval “requires a higher standard of fairness and a more probing inquiry than may  
16 normally be required under Rule 23(e).” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir.  
17 2012) (internal quotation marks omitted). The court “must be particularly vigilant not only  
18 for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit  
19 of their own self-interests and that of certain class members to infect the negotiations.”  
20 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

21 “The Court’s task at the preliminary approval stage is to determine whether the  
22 settlement falls ‘within the range of possible approval.’” *Low v. Trump Univ., LLC*, No.  
23 310CV00940GPCWVG, 2016 WL 7387292, at \*1 (S.D. Cal. Dec. 20, 2016)(quoting *In re*  
24 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (internal citation  
25 omitted)). *See also* MCL, 4th § 21.632 (courts “must make a preliminary determination on  
26 the fairness, reasonableness, and adequacy of the settlement terms and must direct the  
27 preparation of notice of the certification, proposed settlement, and date of the final  
28

1 fairness hearing”). Next, at the second Final Approval stage “the Court must determine  
2 whether the proposed settlement terms appear to be sufficiently fair, reasonable, and  
3 adequate.” *Jones v. San Diego Metro. Transit Sys.*, No. 314CV01778-KSC, 2017 WL 2819842,  
4 at \*3 (S.D. Cal. June 27, 2017). This Motion concerns the first step.

5 “Preliminary approval of a settlement is appropriate if ‘the proposed settlement  
6 appears to be the product of serious, informed, non-collusive negotiations, has no obvious  
7 deficiencies, does not improperly grant preferential treatment to class representatives or  
8 segments of the class, and falls within the range of possible approval.’” *In re Tableware*, 484  
9 F. Supp. 2d at 1079. *See also Manual for Complex Litigation, Second* § 30.44 (FJC 1985). “The  
10 proposed settlement need not be ideal, but it must be fair and free of collusion, consistent  
11 with a plaintiff’s fiduciary obligations to the class.” *Dyer v. Wells Fargo Navy Federal, N.A.*,  
12 No. 13-cv-02859-JST, 2014 WL 1900682, at \*6 (N.D. Cal. May 12, 2014) (citing *Hanlon v.*  
13 *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (“Settlement is the offspring of  
14 compromise; the question we address is not whether the final product could be prettier,  
15 smarter or snazzier, but whether it is fair, adequate and free from collusion.”)).

16 The Court of Appeals for the Ninth Circuit has adopted the following eight-factor  
17 test for determining whether a settlement is fair, reasonable, and adequate:

18 The strength of plaintiffs’ case; the risk, expense, complexity, and likely  
19 duration of further litigation; the risk of maintaining class action status  
20 throughout the trial; the amount offered in settlement; the extent of discovery  
21 completed; the experience and views of counsel; the presence of a  
22 governmental participant; and the reaction of the class members to the  
23 proposed settlement.

24 *Hanlon*, 150 F.3d at 1026. *See also Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625  
25 (9th Cir. 1982). “It is the settlement taken as a whole, rather than the individual  
26 component parts, that must be examined for overall fairness.” *Hanlon*, 150 F.3d at 1026.  
27 Courts cannot delete, modify, or substitute certain provisions because the settlement must  
28 stand or fall in its entirety. *Id.*

**B. This Settlement Satisfies the Criteria for Preliminary Approval.**

Each of the relevant factors weighs in favor of Preliminary Approval of this

1 Settlement. First, the Settlement was reached in the absence of collusion, and is the  
2 product of good-faith, informed and arm's length negotiations by competent counsel, in  
3 conjunction with an experienced mediator. Furthermore, a preliminary review of the  
4 factors related to the fairness, adequacy and reasonableness of the Settlement  
5 demonstrates that the Settlement warrants Preliminary Approval.

6 Any settlement requires the parties to balance the merits of the claims and defenses  
7 against the attendant risks of continued litigation. Plaintiffs believe that the claims asserted  
8 are meritorious and that they would prevail if this matter proceeded to trial. Navy Federal  
9 argues that Plaintiffs' claims are unfounded, denies any potential liability, and up to the  
10 point of settlement has indicated a willingness to litigate those claims vigorously.

11 The Parties concluded that the benefits of settlement in this case outweigh the risks  
12 and uncertainties of continued litigation, as well as the time and expenses associated with  
13 contested class certification proceedings, possible interlocutory appellate review, merits  
14 discovery, pretrial motion practice, trial, and finally appellate review. Joint Decl. at ¶ 21.

15 **1. This Settlement is the Product of Good Faith, Informed and Arm's**  
16 **Length Negotiations.**

17 The Settlement in this case is the result of intensive, arm's-length negotiations  
18 between experienced attorneys who are familiar with class action litigation and with the  
19 legal and factual issues of this Action. Joint Decl. at ¶ 12. The Parties engaged in a full  
20 day formal mediation before an experienced and respected mediator, Honorable Walter  
21 D. Kelley, Jr. (Ret.). *Id.* at ¶ 10. "The assistance of an experienced mediator in the  
22 settlement process confirms that the settlement is non-collusive." *Adams v. Inter-Con Sec.*  
23 *Sys. Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at \*3 (N.D. Cal. Oct. 30, 2007). *See also*  
24 *In re Cigna Corp. Sec. Litig.*, 2007 WL 2071898, at \*3 (E.D. Pa. July 13, 2007) ("Concerning  
25 the presumption of fairness, it is clear that negotiations for the settlement occurred at  
26 arm's length, as the parties were assisted by a retired federal district judge who was privately  
27 retained and served as a mediator."). Moreover, "[t]here is a presumption of fairness when  
28

1 a proposed class settlement, which was negotiated at arm’s-length by counsel for the class,  
2 is presented for Court approval.” *Newberg on Class Actions*, §11.41 (4th Ed. 2007).

3 Furthermore, Class Counsel is particularly experienced in the litigation, certification,  
4 trial, and settlement of nationwide class action cases. Joint Decl. at ¶ 4. In negotiating  
5 this Settlement in particular, Class Counsel had the benefit of years of experience and a  
6 familiarity with the facts of this case as well as with other cases involving similar claims.  
7 *Id.* As detailed above, Class Counsel conducted a thorough investigation and analysis of  
8 Plaintiffs’ claims and engaged in significant informal discovery with Navy Federal. Class  
9 Counsel’s review enabled them to gain an understanding of the evidence related to central  
10 questions in the case and prepared them for well-informed settlement negotiations. *Id.* at  
11 ¶ 7. Class Counsel was also well-positioned to evaluate the strengths and weaknesses of  
12 Plaintiffs’ claims, and the appropriate basis upon which to settle them, as a result of their  
13 litigating similar claims in courts across the country. *Id.*

14 **2. The Facts Support a Preliminary Determination that the Settlement Is**  
15 **Fair, Adequate and Reasonable.**

16 A preliminary review of the below factors supports a determination that the  
17 Settlement falls within the “range of reason,” such that notice and a Final Approval  
18 Hearing as to the fairness, adequacy, and reasonableness of the Settlement are warranted.

19 **a. The Strength of Plaintiffs’ Case.**

20 Plaintiffs and Class Counsel are confident in the strength of their case, but they are  
21 also pragmatic in their awareness of the various defenses available to Navy Federal, and  
22 the risks inherent to litigation. Joint Decl. at ¶ 21. The dispute centers on the language  
23 that appeared in all account agreements, and whether that language prohibited Navy  
24 Federal from assessing OOPS Fees on Debit Card transactions that were authorized  
25 against a positive available balance. Plaintiffs contend the following contract language  
26 used in all Navy Federal Account agreements supports their claims:

- 27 • “An overdraft occurs when you do not have enough money in your  
28 account to cover a transaction, but we pay it anyway.”

- 1 • “On the day you make a purchase with your [debit card], a temporary hold
- 2 is placed on your account for the amount of the purchase.”
- 3 • “This hold will be removed when the transaction posts to the account[.]”
- 4 • “We pay overdrafts at our discretion, which means we do not guarantee that
- 5 we will always authorize and pay any type of transaction. If we do not
- 6 authorize and pay an overdraft, your transaction will be declined and/or your
- 7 check/ACH will be returned.”
- 8 • “We may authorize and approve the following types of transactions under
- 9 our Optional Overdraft Protection Service (OOPS) if you ask us (see below):
- 10 • Checks and other transactions made using your checking account number
- 11 • ATM transactions • Debit card transactions • Electronic debits cleared
- 12 through the Automated Clearing House (ACH).”

13 [ECF No. 38 at ¶¶ 12, 14, 16; ECF No. 9-2 at 8.] Navy Federal’s contention is that the  
 14 language in those agreements sufficiently disclosed its entitlement to assess OOPS Fees  
 15 on transactions that were authorized against a positive balance but were settled at a time  
 16 when the balance was negative based on Navy Federal’s chosen posting order. Notably,  
 17 in the Court’s order on the motion to dismiss the First Amended Complaint, the Court  
 18 observed that it could not “say that the Account Agreements clearly foreclose either  
 19 interpretation.” [ECF No. 33 at 15.]

20 Plaintiffs faced the risk of losing at class certification, summary judgment, at trial,  
 21 or on appeal. Joint Decl. at ¶ 21, 24. The success of Plaintiffs’ claims in future litigation  
 22 turns on these and other questions that are certain to arise in the context of motions for  
 23 summary judgment and at trial, as they have in other similar cases.

24 Each of these risks, by itself, could easily have impeded Plaintiffs’ and the  
 25 Settlement Class’ successful prosecution of these claims at trial and in an eventual appeal.  
 26 Under the circumstances, Plaintiffs and Class Counsel appropriately determined that the  
 27 Settlement reached with Navy Federal outweighs the gamble of continued litigation. Joint  
 28

1 Decl. at ¶ 22. Moreover, even if Plaintiffs prevailed at trial, any recovery could be delayed  
 2 for years by an appeal. *McPhail v. First Command Fin. Plan., Inc.*, No. 05cv179-IEG-JMA,  
 3 2009 U.S. Dist. LEXIS 26544, at \*12-13 (S.D. Cal. Mar. 30, 2009) (noting that the potential  
 4 complexity and possible duration of trial weighs in favor of granting final approval, and  
 5 that post-judgment appeal would require many years to resolve and delay payment to class  
 6 members). This Settlement provides substantial relief to Settlement Class Members  
 7 without further delay. Joint Decl. at ¶ 25-26.

8 **b. The Risk, Expense, Complexity, and Likely Duration of Further**  
 9 **Litigation.**

10 The claims and defenses in this Action are complex, as is clear by the record and  
 11 Class Counsel's efforts in other Overdraft Fee cases that have been hard fought for years.  
 12 *Id.* There is no doubt that continued litigation here would be difficult, expensive, and time  
 13 consuming. *Id.* The risks and obstacles in this case are just as great as those in other  
 14 Overdraft Fee cases and this case would likely have taken years as well to successfully  
 15 prosecute. *Id.* Recovery by any means other than settlement would require additional  
 16 years of litigation in this Court and the Ninth Circuit Court of Appeals. *Id. See United States*  
 17 *v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that “a principal  
 18 function of a trial judge is to foster an atmosphere of open discussion among the parties’  
 19 attorneys and representatives so that litigation may be settled promptly and fairly so as to  
 20 avoid the uncertainty, expense and delay inherent in a trial”).

21 One of the most expensive aspects of ongoing litigation in this case involves the  
 22 retention of experts to perform data analyses and to present those analyses in expert  
 23 reports, at depositions, and at trial. Joint Decl. at ¶ 26. These considerations, and the  
 24 other considerations noted above, militate heavily in favor of the Settlement. *Id. See*  
 25 *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) (noting “battle of  
 26 experts” at trial regarding damages would pose “great difficulty” for plaintiffs).

27 The Settlement provides immediate and substantial benefits to thousands of Navy  
 28 Federal members. Joint Decl. at ¶ 25. The proposed Settlement is the best vehicle for

1 Settlement Class Members to promptly receive the relief to which they are entitled.

2 **c. The Risk of Maintaining Class Action Status Throughout Trial.**

3 Whether or not the Action would have been tried as a class action is also relevant  
4 in assessing the fairness of the Settlement. As the Court had not yet certified a class at the  
5 time of the Agreement, it is unclear whether or not certification would have been granted.  
6 Joint Decl. at ¶ 26. Given Navy Federal’s vigorous defense of this Action thus far, Navy  
7 Federal would have opposed Plaintiffs’ certification motion, and “would surely [have]  
8 challenge[d] class certification on appeal” in the event of an adverse judgment. *Rodriguez*  
9 *v. West Pub. Corp.*, No. CV05-3222, 2007 WL 2827379, at \*8 (C.D. Cal. Sept. 10, 2007)  
10 (finding that the likelihood that a certification decision would be appealed meant this factor  
11 weighed in favor of approval), *rev’d on other grounds*, 563 F.3d 948 (9th Cir. 2009). This  
12 litigation activity would have required the Parties to expend significant resources. Joint  
13 Decl. at ¶ 26. Accordingly, this factor weighs in favor of Preliminary Approval.

14 **d. The Amount Offered in the Settlement.**

15 The Settlement reached here is squarely within the range of possible approval. As  
16 discussed above, the Settlement is the product of arm’s-length negotiations conducted by  
17 the Parties’ experienced counsel and under the supervision of a reputable and skilled  
18 mediator. As a result of these negotiations, the Parties have reached a Settlement that  
19 Class Counsel believes to be fair, reasonable, and in the Settlement Class’ best interests.  
20 Class Counsel’s assessment in this regard is entitled to considerable deference.

21 Plaintiffs’ \$24.5 million plus recovery is outstanding given the complexity of the  
22 litigation and the significant barriers that would loom in the absence of settlement,  
23 including motions for class certification, summary judgment, trial and appeals after a  
24 Plaintiffs’ verdict. Based on Navy Federal’s data analysis prior to mediation, the Parties  
25 estimate that the Settlement Class’ most likely recoverable damages at trial would have  
26 been approximately \$60 million, and Plaintiffs’ expert will calculate the aggregate damages  
27 suffered by the Settlement Class under Plaintiffs’ theory of liability following Preliminary  
28

1 Approval. Joint Decl. at ¶ 23. The Settlement will afford Plaintiffs and the Settlement  
 2 Class a recovery of approximately 30-40% of their most probable damages, without further  
 3 risks attendant to litigation. *Id.* That is a significant achievement considering the obstacles  
 4 that Plaintiffs faced in the litigation. *See Jaffe v. Morgan Stanley & Co.*, No. C 06-3903 THE,  
 5 2008 WL 346417, at \*9 (N.D. Cal. Feb. 7, 2008) (“The settlement amount could  
 6 undoubtedly be greater, but it is not obviously deficient, and a sizeable discount is to be  
 7 expected in exchange for avoiding uncertainties, risks, and costs that come with litigation  
 8 a case to trial.”). Plaintiffs will update these calculations in their Motion for Final Approval.

9 The Settlement Fund, plus Navy Federal’s agreement to pay Settlement  
 10 Administration Costs, is fair and reasonable in light of Navy Federal’s defenses, and the  
 11 unpredictable path Plaintiffs would have faced absent a settlement. Joint Decl. at ¶ 27.

12 **e. The Extent of Discovery Completed and Stage of the Proceedings.**

13 “The extent of discovery may be relevant in determining the adequacy of the parties’  
 14 knowledge of the case.” *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523,  
 15 527 (C.D. Cal. 2004) (quoting *Manual for Complex Litigation, Third*, § 30.42 (1995)). “A court  
 16 is more likely to approve a settlement if most of the discovery is completed because it  
 17 suggests that the parties arrived at a compromise based on a full understanding of the legal  
 18 and factual issues surrounding the case.” *Nat’l Rural Telecomm. Coop.*, 221 F.R.D. at 527  
 19 (citing 5 *Moore’s Federal Practice*, §23.85[2][e] (Matthew Bender 3d ed.)).

20 Here, Class Counsel devoted substantial time and resources to investigating,  
 21 litigating, and resolving this case. Plaintiffs settled the Action with the benefit of an  
 22 analysis of key documentation and data regarding Navy Federal’s assessment and  
 23 collection of OOPS Fees. Joint Decl. at ¶ 8. To prepare for mediation, the Parties agreed  
 24 to an informal exchange of documents and data regarding Plaintiffs and the putative class,  
 25 including multiple versions of the relevant account agreements and extensive data on the  
 26 Debit Card transactions resulting in Relevant Overdraft Fees. This document and data  
 27 exchange involved extended negotiations first between counsel, and then with the  
 28



1 assistance of the mediator, Judge Walter Kelley (Ret.). Class Counsel retained and  
2 consulted with an expert witness and commissioned the expert to analyze and verify  
3 representations made by Navy Federal. *Id.* at ¶ 9. As noted above, the review of this  
4 information and data positioned Class Counsel to evaluate with confidence the strengths  
5 and weaknesses of Plaintiffs' claims and prospects for success at class certification,  
6 summary judgment, and trial. *Id.* The Parties and their counsel have sufficient information  
7 to assess and weigh the merits of claims and defenses, the risks attendant to continued  
8 litigation, and the benefits of settlement.

9 The record provides sufficient information for this Court to determine that the  
10 Settlement is fair. Further, there is no reason to doubt the Settlement's fairness. *Id.* at ¶  
11 15. Plaintiffs have litigated this Action for well over a year and Class Counsel have been  
12 involved in similar litigation for the past several years. *Id.* The litigation has been hard-  
13 fought as the Parties have engaged in motion practice and informal discovery, including  
14 having reviewed pertinent Account data to understand the scope of the damages at issue  
15 and sustained by Settlement Class members. *Id.* Accordingly, this factor also weighs in  
16 favor of preliminary approval.

17 **f. The Experience and Views of Counsel.**

18 "Great weight is accorded to the recommendation of counsel, who are the most  
19 closely acquainted with the facts of the underling litigation." *Nat'l Rural Telecomm. Coop.*,  
20 221 F.R.D. at 528 (internal citation omitted). As stated previously, Class Counsel has  
21 significant experience litigating claims similar to those at issue in this Action through their  
22 active roles similar class actions throughout the country, many of which have settled and  
23 finally approved. Joint Decl. at ¶ 29. The data analysis has enabled Class Counsel to gain  
24 an understanding of the evidence related to central questions in overdraft fee class actions  
25 and has prepared Class Counsel for well-informed settlement negotiations. *Id.* at ¶ 7.

26 Class Counsel possesses extensive knowledge of and experience in prosecuting class  
27 actions in courts throughout the United States and have recovered hundreds of millions  
28

1 of dollars for the classes they represented. Joint Decl. at ¶ 29. The experience, resources,  
2 and knowledge Class Counsel brings to this Action is extensive and formidable. *Id.* Class  
3 Counsel is qualified to represent the Settlement Class and will, along with the Class  
4 Representatives, vigorously protect the interests of the Settlement Class. *Id.*

5 **g. The Presence of a Governmental Participant.**

6 No governmental actor is relevant to this Action, rendering this factor immaterial..

7 **h. The Reaction of the Class Members to the Proposed Settlement.**

8 The Court must wait until the Final Approval Hearing and the expiration of the  
9 Opt-Out Period to determine the reaction of the Settlement Class.

10 **C. Certification of the Settlement Class is Appropriate.**

11 For settlement purposes, Plaintiffs respectfully request that the Court certify the  
12 Settlement Class. “Confronted with a request for settlement-only class certification, a  
13 district court need not inquire whether the case, if tried, would present intractable  
14 management problems . . . for the proposal is that there be no trial.” *Amchem Products, Inc.*  
15 *v. Windsor*, 521 U.S. 591, 620 (1997).

16 Certification of the proposed Settlement Class will allow notice of the proposed  
17 Settlement to issue to the Settlement Class to inform them of the existence and terms of  
18 the proposed Settlement; of their right to be heard on its fairness; of their right to opt-out;  
19 and of the date, time, and place of the Final Approval Hearing. *See Manual for Compl. Lit.*,  
20 §§ 21.632, 21.633. For purposes of this Settlement only, Navy Federal does not oppose  
21 class certification. For the reasons set forth below, certification is appropriate under  
22 Federal Rule of Civil Procedure 23(a) and (b)(3).

23 Certification under Rule 23(a) requires that: (1) the class is so numerous that joinder  
24 of all members is impracticable; (2) there are questions of law or fact common to the class;  
25 (3) the claims or defenses of the representative parties are typical of the claims or defenses  
26 of the class; and (4) the representative parties will fairly and adequately protect the interests  
27 of the class. Fed. R. Civ. P. 23(a). Under Fed. R. Civ. P. 23(b)(3), certification is  
28

1 appropriate if questions of law or fact common to the members of the class predominate  
2 over individual issues of law or fact and if a class action is superior to other available  
3 methods for the fair and efficient adjudication of the controversy.

4 The numerosity requirement of Rule 23(a) is satisfied because the Settlement Class  
5 consists of thousands of Navy Federal customers, and joinder of all such persons is  
6 impracticable. Joint Decl. at ¶ 33. See Fed. R. Civ. P. 23(a)(1). See *Gutierrez v. Wells Fargo*  
7 *Navy Federal, N.A.*, No. C 07-05923 WHA, 2008 WL 4279550, \*14 (N.D. Cal. Sept. 11,  
8 2008) (“Given the large number of checking account customers at Wells Fargo, the  
9 numerosity requirement is met.”); *Breedon v. Benchmark Lending Group, Inc.*, 229 F.R.D. 623,  
10 628 (N.D. Cal. 2005) (236 potential class members sufficient to satisfy numerosity  
11 requirement); *Sullivan v. Chase Inv. Servs. Inc.*, 79 F.R.D. 246, 257 (N.D. Cal. 1978) (a class  
12 consisting of 1,000 members satisfies numerosity). See also 1 Newberg on Class Actions  
13 3.05, at 3-25 (3d ed. 1992) (suggesting that any class consisting of more than forty members  
14 “should raise a presumption that joinder is impracticable”).

15 “Commonality requires the plaintiff to demonstrate that the class members ‘have  
16 suffered the same injury,’” and the plaintiff’s common contention “must be of such a  
17 nature that it is capable of classwide resolution – which means that determination of its  
18 truth or falsity will resolve an issue that is central to the validity of each one of the claims  
19 in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 389-390 (2011) (citation  
20 omitted). “All questions of fact and law need to be common to satisfy the rule.” *Hanlon*,  
21 150 F.3d at 1019. However, “[t]he existence of shared legal issues with divergent factual  
22 predicates is sufficient’ to meet the requirements of Rule 23(a)(2).” *Gutierrez*, 2008 WL  
23 4279550 at \*14 (quoting *Hanlon*, 150 F.3d at 1019). Here, the commonality requirement  
24 is readily satisfied. There are multiple questions of law and fact – centering on Navy  
25 Federal’s systematic practice of assessing OOPS Fees on transactions that were authorized  
26 into a positive balance – that are common to the Settlement Class, that are alleged to have  
27 injured all Settlement Class members in the same way, and that would generate common  
28

1 answers central to the viability of the claims were the Action to proceed to trial.

2 For similar reasons, Plaintiffs' claims are reasonably coextensive with those of the  
3 absent members of the Settlement Class, such that the Rule 23(a)(3) typicality requirement  
4 is satisfied. *See Gutierrez*, 2008 WL 4279550 at \*15. The Ninth Circuit interprets typicality  
5 permissively. *Hanlon*, 150 F.3d at 1020. It is sufficient for the named plaintiff's claims to  
6 arise from the same remedial and legal theories as the class claims. *Arnold v. United Artists*  
7 *Theater, Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994). Plaintiffs are typical of absent members  
8 of the Settlement Class because they were subjected to the same Navy Federal practices  
9 leading to the assessment of OOPS Fees and claim to have suffered from the same injuries,  
10 and because they will benefit equally from the relief provided by the Settlement.

11 Plaintiffs and Class Counsel satisfy the adequacy of representation requirement of  
12 Rule 23(a)(4), which "serves to uncover conflicts of the interest between named parties  
13 and the class they seek to represent." *Gutierrez*, 2008 WL 4279550 at \*15. Adequacy of  
14 representation requires that the class representatives do not have conflicts of interest with  
15 other class members and that the named plaintiffs and their counsel will prosecute the  
16 action vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. Here, Plaintiffs'  
17 interests are coextensive with, not antagonistic to, the interests of the Settlement Class,  
18 because Plaintiffs and the absent members of the Settlement Class have the same interest  
19 in the relief afforded by the Settlement, and the absent members of Settlement Class have  
20 no diverging interests. Further, Plaintiffs are represented by qualified and competent  
21 counsel who have extensive experience and expertise prosecuting complex class actions,  
22 including consumer actions similar to the instant case. Joint Decl. at ¶ 29. Class Counsel  
23 has devoted substantial time and resources to this Action and will vigorously protect the  
24 interests of the Settlement Class. *Id.*

25 Certification of the Settlement Class is further appropriate because the questions of  
26 law or fact common to members of the Settlement Class predominate over any questions  
27 affecting only individual members, and a class action is superior to other available methods  
28

1 for the fair and efficient adjudication of the Action. *See* Fed. R. Civ. P. 23(b)(3). For  
 2 purposes of satisfying Rule 23(b)(3), the “predominance inquiry tests whether proposed  
 3 class members are sufficiently cohesive to warrant adjudication by representation.”  
 4 *Hanlon*, 150 F.3d at 1022 (quoting *Amchem*, 521 U.S. at 623). *See also* *Gutierrez*, 2008 WL  
 5 4279550 at \*14 (predominance satisfied “when common questions present a significant  
 6 portion of the case and can be resolved for all members of the class in a single  
 7 adjudication”). The Rule 23(b)(3) predominance requirement is readily satisfied because  
 8 liability questions common to all members of the Settlement Class substantially outweigh  
 9 any possible issues that are individual to each member of the Settlement Class. Joint Decl.  
 10 at ¶ 34. For example, each Settlement Class member’s relationship with Navy Federal  
 11 arises from an Account agreement that is the same or substantially similar in all relevant  
 12 respects to other Settlement Class members’ account agreements. *Id.*

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

16 **D. The Court Should Approve the Proposed Notice Program Because it is**  
 17 **Constitutionally Sound.**

18 “Rule 23(e)(1)(B) requires the court to ‘direct notice in a reasonable manner to all  
 19 class members who would be bound by a proposed settlement, voluntary dismissal, or  
 20 compromise’ regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or  
 21 (b)(3).” *Manual for Compl. Lit., Fourth* § 21.312. The best practicable notice is that which  
 22 is “reasonably calculated, under all the circumstances, to apprise interested parties of the  
 23 pendency of the action and afford them an opportunity to present their objections.”  
 24 *Mullane v. Central Hanover Navy Federal & Trust Co.*, 339 U.S. 306, 314 (1950). “Rule  
 25 23(c)(2)(b) requires that individual notice in [opt-out] actions be given to class members  
 26 who can be identified through reasonable efforts. Those who cannot be readily identified  
 27 must be given the best notice practicable under the circumstances.” *Manual for Compl. Lit.,*  
 28 *Fourth* § 21.311. In this Circuit, it has long been the case that a notice of a class settlement

1 will be adjudged satisfactory if it “generally describes the terms of the settlement in  
2 sufficient detail to alert those with adverse viewpoints to investigate and to come forward  
3 and be heard.” *Churchill Vill., LLC v. GE*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Mendoza*  
4 *v. Tucson Sch. Dist. No.1*, 623 F.3d 1338, 1352 (9th Cir. 1980)).

5 The proposed Notice Program satisfies these content requirements. The Notice  
6 will properly inform members of the Settlement Class of the substantive terms of the  
7 Settlement. It will advise members of the Settlement Class of their options for opting-out  
8 of or objecting to the Settlement, and how to obtain additional information about the  
9 Settlement. The Notice Program is designed to reach a high percentage of the Settlement  
10 Class by sending direct mail and email notices to Settlement Class members and exceeds  
11 the requirements of constitutional due process. Joint Decl. at ¶ 32. Therefore, the Court  
12 should approve the Notice Program and the form and content of the Notices attached to  
13 this Motion as *Exhibits C-E*.

14 **E. Notice Pursuant to the Class Action Fairness Act (CAFA)**

15 CAFA requires that settling defendants give notice of a proposed class action  
16 settlement to appropriate state and federal officials. 28 U.S.C. § 1715(b). The CAFA  
17 Notice of Proposed Settlement must supply all of the information and documents set forth  
18 in 28 U.S.C. § 1715(b)(1)-(8). Navy Federal will serve the CAFA Notice, along with a CD  
19 containing the documents described in Section 1715(b), within 10 days of the filing of the  
20 Motion for Preliminary Approval.

21 **F. Plaintiffs’ Counsel Should Be Appointed Class Counsel.**

22 Under Rule 23, “a court that certifies a class must appoint class counsel . . . [who]  
23 must fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B).  
24 In making this determination, the Court must consider counsel’s work in identifying or  
25 investigating potential claims; experience in handling class actions or other complex  
26 litigation, and the types of claims asserted in the case; knowledge of the applicable law;  
27 and resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

1 As described in detail above, proposed Class Counsel have diligently investigated  
2 Plaintiffs' claims and the feasibility of class certification and have devoted and will continue  
3 to devote substantial time and resources to this litigation. Proposed Class Counsel have  
4 extensive experience with similar class action litigation and have been appointed class  
5 counsel in many class actions, including many Overdraft Fee cases. As such, proposed  
6 Class Counsel have an in-depth knowledge of the laws applicable to the Settlement Class  
7 members' claims and certification of the Settlement Class. See Joint Decl. at ¶ 28 and Ex.  
8 1-3 thereto. Accordingly, Plaintiffs request that the Court appoint Jeff Ostrow and  
9 Jonathan Streisfeld of Kopelowitz Ostrow P.A., Hassan Zavareei and Andrea R. Gold of  
10 Tycko & Zavareei, LLP, and Taras Kick of The Kick Law Firm, APC as Class Counsel.

#### 11 **IV. CONCLUSION**

12 Based on the foregoing, Plaintiffs respectfully request that the Court: (1) grant  
13 Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed  
14 Settlement Class, pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil  
15 Procedure; (3) appoint Jenna Lloyd and Jamie Plemons as Class Representatives; (4)  
16 approve the Notice Program set forth in the Agreement and approve the form and content  
17 of the Notices; (5) approve and order the opt-out and objection procedures set forth in  
18 the Agreement; (6) stay the Action against Navy Federal pending Final Approval of the  
19 Settlement; (7) appoint as Class Counsel the law firms and attorneys identified herein; and  
20 (8) schedule a Final Approval Hearing no sooner than the week of April 1, 2019 (if  
21 convenient for the Court). For the Court's convenience, Plaintiffs attach hereto as  
22 **Exhibit F** a Proposed Order Preliminarily Approving Class Settlement and Certifying  
23 Settlement Class and setting forth the various deadlines referenced herein.

24 Pursuant to the Settlement Agreement and the Proposed Order, Plaintiffs and Class  
25 Counsel will file their motion and memorandum for Final Approval, attorneys' fee and  
26 costs, and request for Service Awards no later than 45 days prior to the Final Approval  
27 Hearing, unless otherwise ordered by the Court.

1 Dated: October 15, 2018.

2 Respectfully submitted,

3  
4 /s/ Jeff Ostrow  
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18 *Counsel for Plaintiffs and the Proposed Settlement Class*

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