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19 ***Class Counsel***

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21 UNITED STATES DISTRICT COURT
22 SOUTHERN DISTRICT OF CALIFORNIA

23 JENNA LLOYD and JAMIE PLEMONS,
24 on behalf of themselves and all others
25 similarly situated,

26 Plaintiffs,

27 vs.

28 NAVY FEDERAL CREDIT UNION,

Defendant.

Case No.: 17-cv-1280-BAS-RBB

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
RECONSIDERATION**

Date: July 1, 2019

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

Courtroom: 4B

Hon. Cynthia A. Bashant

NOTICE OF MOTION AND MOTION

TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiffs Jenna Lloyd and Jamie Plemons hereby move for limited reconsideration of this Court’s Order granting in part and denying in part Plaintiffs’ Unopposed Motion for Attorneys’ Fees, Reimbursement of Expenses and Service Awards [ECF No. 70]. This motion is based on this Notice of Motion and Motion, the concurrently filed Memorandum of Points and Authorities, the concurrently filed Supplemental Declaration of Arthur Olsen, the record in this action, and on such other written argument as may be presented to the Court.

Defendant does not oppose the relief requested in this Motion.

Dated: May 31, 2019

Respectfully submitted,

/s/ Jeff Ostrow

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28 NAVY FEDERAL CREDIT UNION,

Defendant.

Case No.: 17-cv-1280-BAS-RBB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
RECONSIDERATION**

Complaint filed: June 22, 2017

1 **I. INTRODUCTION**

2 On May 28, 2019, this Honorable Court granted in part and denied in part Plaintiffs’
3 Unopposed Motion for Attorneys’ Fees, Reimbursement of Expenses and Service Awards.
4 [ECF No. 65, 70]. This Motion only seeks this Court’s reconsideration of one narrow aspect
5 of that Order—namely, the Court’s reduction of Plaintiffs’ award of costs from the requested
6 amount of \$143,038.82 to the awarded amount of \$33,938.82. Specifically, the Court
7 reimbursed Plaintiffs in the amount of \$23,400 for work their expert, Arthur Olsen, performed
8 prior to the Court’s preliminary approval order. As clarified in this Motion, the award excluded
9 important work done between the time the Parties agreed to settle the case and before entry
10 of the preliminary approval order, and the extensive necessary work performed pursuant to
11 the Settlement Agreement (*see* ECF No. 64-2, ¶ 57) and the preliminary approval order. The
12 Court declined to reimburse Plaintiffs for this work, which amounted to \$109,100, based on
13 the Court’s understanding that the work he performed *after* preliminary approval “merely
14 confirmed what the parties already understood to be the class’s potential recovery.” [ECF No.
15 70, at 30].

16 Plaintiffs concede that the record on this issue is less than clear and apologize to the
17 Court for failing to elucidate the specific nature of Mr. Olsen’s crucial contributions both
18 before and after preliminary approval that justify the award of the entire amount requested.
19 In Mr. Olsen’s original declaration submitted in support of Plaintiffs’ Unopposed Motion for
20 Final Approval (ECF No. 64-5) and in the Notice of Explanation of Total Litigation Costs
21 and Expenses submitted by undersigned counsel on May 20, 2019 (ECF No. 68), Plaintiffs
22 outlined the work completed by Mr. Olsen in this matter, but in hindsight should have better
23 clarified for the Court the timing and nature of each task or analysis Mr. Olsen performed
24 **first** to aid Plaintiffs and Class Counsel in preparing for settlement negotiations and mediation
25 prior to preliminary approval using Defendant’s sample data, and **second** to actually perform

1 the extensive and time-consuming analysis of the class-wide data needed to allow the Notice
2 Plan to be completed and the Net Settlement Fund to be disbursed to Settlement Class
3 Members. Plaintiffs now do this.

4 As explained in Mr. Olsen’s Supplemental Declaration attached hereto, Mr. Olsen’s
5 work prior to preliminary approval was based on a limited data sample for purposes of
6 estimating damages. After the Court granted preliminary approval, Mr. Olsen was required to
7 conduct an extensive *new* analysis to determine which Navy Federal Credit Union (“NFCU”)
8 members were members of the Settlement Class; calculate the amount of each such Settlement
9 Class member’s individual damages, and calculate the actual aggregate amount of damages for
10 all Settlement Class members using the class-wide data that was not produced by NFCU until
11 December of 2018, nearly two months after this Court granted preliminary approval. The
12 Supplemental Declaration also clarifies Mr. Olsen’s necessary work with Class Counsel and
13 NFCU’s counsel, expert, and representatives between the date that the Parties agreed to settle
14 and the granting of preliminary approval to address issues prior to NFCU employees pulling
15 the actual complete class-wide data.

16 Without Mr. Olsen’s aforementioned analysis the Settlement could not be completed
17 because the Parties would have been unable to complete the Notice Plan or distribute the Net
18 Settlement Fund. The list of Settlement Class members to be noticed did not exist until Mr.
19 Olsen performed this work, nor did anyone know the dollar amounts to attribute to each
20 Settlement Class member for the pro rata distribution of the Net Settlement Fund. Therefore,
21 Plaintiffs respectfully request that the Court reconsider its prior order and fully reimburse
22 Plaintiffs for all of Mr. Olsen’s work. As such, Plaintiffs seek an order approving
23 reimbursement from the Settlement Fund of expenses in the additional amount of \$109,100
24 for fees for Mr. Olsen’s work performed after the Parties agreed to settle the case, the vast
25

1 majority of which occurred after the Court’s preliminary approval order. That will compensate
2 Plaintiffs a total of \$132,500 for Mr. Olsen’s work.

3 **II. LEGAL STANDARD**

4 A district court may reconsider a judgment under either Federal Rule of Civil Procedure
5 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment or order).
6 *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1991); *Backlund v. Barnhart*, 78 F.2d 1386,
7 1388 (9th Cir. 1985). Under Rule 59(e), reconsideration is appropriate if the district court (1)
8 is presented with newly discovered evidence, (2) committed clear error or the initial decision
9 was manifestly unjust, or (3) if there is an intervening change in controlling law. *See School Dist.*
10 *No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993). Under Rule 60(b),
11 the Court may grant reconsideration based on: (1) mistake, inadvertence, surprise or excusable
12 neglect; (2) newly discovered evidence which by due diligence could not have been discovered
13 before the court’s decision; (3) fraud by the adverse party; (4) the judgment is void; (5) the
14 judgment has been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b).
15 Here, to the extent Class Counsel inadequately delineated Mr. Olsen’s extensive pre- and post-
16 preliminary approval work in previous filings, the Court should apply Rule 59(e) and/or Rule
17 60(b) to grant reconsideration based on the mistake, inadvertence and excusable neglect of
18 Class Counsel, or because excluding the additional expenses sought would be manifestly unjust
19 given the critically important work Mr. Olsen performed for the Settlement. The grounds
20 argued in this Motion otherwise justify the relief requested.

21 **III. ARGUMENT**

22 Mr. Olsen conducted significant expert work after preliminary approval and Plaintiffs
23 respectfully request that the Court reimburse Plaintiffs for the fees associated with that work.
24 While it is correct that, prior to preliminary approval, the Parties estimated the Settlement
25 Class’s total damages at approximately \$60 million (*see* ECF No. 51-1, at 23), Class Counsel

1 apparently failed to clarify to the Court that Mr. Olsen conducted significant additional, new
2 work after preliminary approval that was critical to successful notice and administration
3 efforts. Specifically, and as detailed in Mr. Olsen’s declaration submitted herewith, Mr. Olsen
4 was unable to perform the full analysis contemplated by the Preliminary Approval Order and
5 the Settlement Agreement until after mid-December 2018, when NFCU produced the full and
6 complete class-wide data that Mr. Olsen needed to complete the following critical tasks: (a)
7 identify each of the NFCU members who were Settlement Class members, (b) calculate the
8 amount of each such Settlement Class member’s individual damages, (c) calculate the *actual*
9 total amount of damages for all Settlement Class members, which Mr. Olsen calculated as
10 \$57,930,140 (*see* ECF No. 64-5, Arthur Olsen Decl. ¶ 20).

11 After the Court granted preliminary approval, Mr. Olsen spent a total of 307 hours
12 painstakingly validating NFCU’s complete class-wide data for accuracy and completeness;¹
13 writing computer code to convert text-based numbers to actual numbers and to convert text
14 strings to usable dates; calculating and validating aggregate class-wide damages; calculating and
15 validating individual Settlement Class Member damages; and formatting the results to allow
16 for notice to the Settlement Class and distribution of the Net Settlement Fund to Settlement
17 Class Members. None of this work—which involved Mr. Olsen’s careful analysis of
18 approximately 34.5 billion records—could have been completed prior to preliminary approval.
19 Mr. Olsen performed an additional 21 hours of work between the date the Parties agreed to
20 settle and the granting of preliminary approval to address issues prior to NFCU employees
21 pulling the actual complete class-wide data. Mr. Olsen’s exceptional work—both pre and post-
22 preliminary approval—has been indispensable to the successful execution of the Settlement.

23
24 _____
25 ¹ Through this tedious but important work, Mr. Olsen identified missing data, which NFCU
26 then produced in January of 2019.

1 **IV. CONCLUSION**

2 Based upon the foregoing, Plaintiffs respectfully submit that this Court's
3 reconsideration of its cost reimbursement award in its Final Approval of the Settlement is
4 warranted. Plaintiffs respectfully request that the Court enter an order approving
5 reimbursement from the Settlement Fund of expenses in the additional amount of \$109,100
6 for fees for Mr. Olsen's work performed after preliminary approval.

7
8 Dated: May 31, 2019

Respectfully submitted,

9 /s/ Jeff Ostrow
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JENNA LLOYD and JAMIE PLEMONS,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

NAVY FEDERAL CREDIT UNION,

Defendant.

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

**SUPPLEMENTAL DECLARATION
OF ARTHUR OLSEN**

Judge: Hon. Cynthia Bashant

I, Arthur Olsen, declare as follows:

INTRODUCTION

1. On April 2, 2019, I submitted a declaration in support of final approval detailing the results of my analysis of Navy Federal Credit Union’s transaction data (“Original Declaration”). That declaration was offered to explain the work that I performed—primarily after the Parties reached a Settlement and the Court granted preliminary approval—in order to determine which Navy Federal Credit Union (“NFCU”) members were to be included in the Settlement Class, each such Settlement Class member’s individual damages under Plaintiffs’ theory of liability, and ultimately, the aggregate amount of damages suffered by the Settlement Class. To my knowledge, none of that had been previously determined by the Parties. The most labor-intensive work that I performed to aid the Parties in executing the Settlement occurred after the Court entered preliminary approval. The purpose of this declaration is to provide additional information in order to clarify certain details regarding the work that I performed.

MY ANALYSIS

1
2 2. My work prior to preliminary approval consisted of tasks to aid Plaintiffs' counsel
3 in informal discovery and settlement negotiations. Most notably, in September 2018, a
4 number of items were made available to me, including sample transactional data, aggregate
5 information (*i.e.*, the total amount of fees assessed by NFCU over the course of the class
6 period), and the methodology utilized by NFCU to arrive at a class-wide damages estimate.
7 After reviewing all of this information, it is my understanding the Parties agreed that, using
8 the sample transactional data and aggregate information, damages would be approximately \$60
9 million once a full analysis was performed.

10 3. More specifically, I performed the following work prior to the parties agreeing
11 to settle the case: (a) 22 hours spent reviewing documents and assisting with document and
12 data requests in support of discovery; and (b) 50 hours spent reviewing the limited reports
13 available as of that time, analyzing the sample transactional data, evaluating NFCU's
14 methodology, and extrapolating the sample results in order to estimate final damages. It is my
15 understanding that the Court approved reimbursement of these hours at a rate of \$325 per
16 hour for a total of \$23,400.00.

17 4. Once the parties agreed to settle, and before preliminary approval was granted, I
18 worked in October 2018 with Plaintiffs' counsel and NFCU's counsel, expert, and
19 representatives to address issues prior to NFCU employees pulling the actual complete class-
20 wide data.

21 5. As of the date of preliminary approval, none of the complete class-wide data had
22 been made available to me. This data was necessary to determine precisely who was in the
23 Settlement Class, the amount of each Settlement Class member's individual damages, and the
24 actual aggregate amount of damages for all Settlement Class members. In fact, it wasn't until
25 December 14, 2018, that I first I received access to any of the complete class-wide data needed
26 for this detailed analysis.

27 6. In anticipation of the production of the full class-wide data, between November
28 7, 2018 and December 13, 2018, I performed as much preliminary work as I could. This

1 included developing a project plan, working through environment and connectivity issues (as
2 the analysis was ultimately performed via a remote connection to a server maintained by
3 NFCU's experts), and writing and testing code based on the data samples produced as of that
4 time.

5 7. As my Original Declaration details, the full class-wide data originated from daily
6 reports and consisted of three separate data sources: (a) posted transactions (made available
7 to me on December 14, 2018); (b) daily balances (made available to me on December 18,
8 2018); and (c) authorization data (made available to me on December 20, 2018). The posted
9 transactions consisted of approximately 8.1 billion records, the daily balances consisted of
10 approximately 15.7 billion records, and the authorization data consisted of approximately 10.7
11 billion records. Together, the full class-wide data consisted of approximately 34.5 billion
12 records and was the data that I utilized in order to determine individualized damages for each
13 of the class members.

14 8. Once the class-wide data was made available to me, the first step was to validate
15 the data, a tedious process to ensure the data had been produced correctly, correcting any
16 formatting issues, identifying and removing any duplicate records, and looking for evidence of
17 missing records. That process revealed certain records had been omitted from the initial class-
18 wide production, and that missing data was produced and made available to me on January 7,
19 2019.

20 9. All of the various data elements were produced in text format. For example, a
21 negative balance would have the "-" appear after the number, as opposed to before the
22 number. As a result, to perform the necessary data calculations, computer code was written
23 to convert text-based numbers to actual numbers. Similarly, dates were converted from text
24 strings to actual dates to support the calculations.

25 10. The details of my analysis using the properly formatted data are explained in my
26 Original Declaration. Although I have performed dozens of analyses related to overdraft fees
27 in the past, my experience has been that the calculations required for the theory of liability in
28 this case, chiefly re-creating available balance at the time of authorization, has been the most

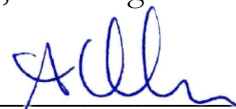
1 complicated. Also, for the first time, I had to utilize and analyze data originating from the
2 three report types listed above in such a calculation. As a result, I dedicated a great deal of
3 time to validating the results by examining individual class member results to ensure that the
4 results were complete and accurate.

5 11. Once my analysis was complete, the last step was to format the results to allow
6 NFCU to add its members' contact information so that NFCU could then forward the results
7 of my analysis to the Settlement Administrator for use in providing notice to the Settlement
8 Class and administering distribution of the Settlement Fund to Settlement Class Members.

9 12. Referring to my invoices submitted to Plaintiffs' counsel, which I understand
10 have been filed with the Court, I spent 328 hours working on this matter after the parties
11 agreed to settle the case, 21 hours of which was before preliminary approval in October, 2018,
12 and the balance of which was after preliminary approval. The total billed for these hours is
13 \$109,100.00.

14
15 I declare under penalty of perjury under the laws of the United States of America and
16 the State of California that the foregoing is true and correct.

17
18 Executed this 30th day of May 2019, at Seattle, Washington.

19 
20 _____
21 Arthur Olsen