

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

TRACY FRY, individually and on behalf of all  
other similarly situated,

Plaintiff,

v.

MIDFLORIDA CREDIT UNION,

Defendant.

Case No. 8:15-CV-2743 RAL TGW

Judge Assigned: Hon. Richard A. Lazzara

**DECLARATION OF TARAS KICK IN SUPPORT OF PLAINTIFF'S  
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

I, Taras Kick, declare as follows:

1. I am an attorney at law duly licensed to practice before all courts of the State of California and a shareholder with The Kick Law Firm, APC. The following is based on my personal knowledge, and, if called as a witness, I could and would testify competently thereto.

2. I have been a member of the California State Bar since 1989, the year I graduated from the University of Pennsylvania Law School. Prior to that, in 1986, I graduated from Swarthmore College, from which I earned a Bachelor of Arts degree in Economics and Psychology. I have served as class counsel in numerous national and state class actions, including being appointed lead counsel and a member of plaintiffs' executive committees. For over five years I was a member of the national Board of Directors of Public Justice, including its Class Action Preservation Committee. I am or have been a member of numerous other committees pertaining to consumer class actions, including the American Association for Justice Class Action Litigation Sub-Group; the Consumer Attorneys of California Class Action Group; the American Bar Association Committee on Class Actions & Derivative Suits; and, the State Bar of California Antitrust and Unfair Competition Litigation section. From 2012 through September 2017, I was a Commissioner of the California Law Revision Commission, an

independent state agency created by statute in 1953 to assist the Legislature and Governor by examining California law and recommending needed reforms, having been appointed by Governor Edmund G. Brown Jr. in 2012, and was Chair of the Commission from September 2015 through September 2016 (although my role in this case is independent of any aspect of my duties with the Commission and does not reflect one way or the other any positions of the Commission). The Kick Law Firm, APC primarily represents plaintiffs in consumer class actions.

3. The firm's class action experience includes, but is not limited to, the following cases: *Ketner v. SECU Maryland*, Civil No.: 1:15-CV-03594-CCB (D. MD. 2017) (appointed co-lead counsel in federal consumer class action in the District of Maryland regarding alleged improper overdraft fees by a credit union, with issues similar to this case, final approval granted on January 11, 2018, attorneys' fees awarded of one-third); *Towner v. 1st MidAmerica Credit Union*, No. 3:15-cv-1162 (S.D. Ill. 2017) (appointed co-lead counsel in federal consumer class action regarding alleged improper overdraft fees by a credit union, with issues similar to this case, final approval granted in November 2017, attorneys' fees awarded of one-third); *Lane v. Campus Federal Credit Union*, Case No. 3:16-cv-00037 (M.D. La. 2017) (appointed co-lead counsel in consumer class action in the Middle District of Louisiana regarding alleged improper overdraft fees by a credit union, with issues similar to this case, final approval granted in August 2017, with fees awarded of one-third); *Hernandez v. Point Loma Credit Union*, San Diego County Superior Court, Case No. 37-2013-00053519 (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by a credit union, with issues similar to this case, final approval granted of \$1.5 million settlement in September 2017, fees awarded of \$745,000); *Gray v. Los Angeles Federal Credit Union*, Los Angeles County Superior Court, Case No. BC625500 (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by a credit union, with issues similar to this case, final approval granted in June 2017, with fees awarded of one-third); *Moralez v. Kern Schools Federal Credit Union*, Kern County Superior Court, Case No. BCV-15-100538 (appointed co-lead counsel in California state consumer class action regarding alleged improper

overdraft fees by a credit union, with issues similar to this case, final approval granted in June 2017, with fees awarded of one-third); *Manwaring v. Golden 1 Credit Union*, Sacramento County Superior Court, Case No. 34-2013-00142667 (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by a credit union, with issues similar to this case, final approval granted of \$5 million settlement by the court in December 2015, with fees awarded of one-third); *Casey v. Orange County Credit Union*, Orange County Superior Court No. 30-2013-00658493-CJ-BT-CXC (appointed co-lead counsel in California state consumer class action regarding alleged improper overdraft fees by credit union, with issues similar to this case, final approval granted of \$1.8 million settlement by the court in May 2015, with fees awarded of one-third); *Hernandez v. Point Loma Credit Union*, No. 37-2013-00053519-CU-BT-CTL (appointed co-lead counsel in a contested motion for class certification in a case involving alleged improper overdraft fees by a credit union); *Southern California Gas Leak JCCP & Other Related Cases*, Case No. JCCP 4861, Los Angeles County Superior Court (appointed as interim co-lead counsel for the class action cases); *Howard v. Sage Software*, Los Angeles County Superior Court Case No. BC487140 (appointed lead counsel in multi-state consumer class action regarding alleged improper sales tax issues, final approval granted); *Kirtley v. Wadekar*, United States District Court for the District of New Jersey, Case No. 05-5383 (lead class counsel for nationwide class of purchasers of generic drugs); *Ford Explorer Cases*, Sacramento County Superior Court, JCCP Nos. 4266 & 4270 (co-class counsel and head of discovery committee for California class of car purchasers); *Pereyra v. Mike Campbell & Associates*, Los Angeles County Superior Court Case No. BC365631 (appointed lead class counsel for state-wide class of employees); *Alston v. Pacific Bell*, Los Angeles County Superior Court Case No. BC297863 (appointed lead class counsel for multi-state class regarding alleged improper telephone service related charges); *Oshaben v. Monster Worldwide, Inc., et al.*, San Francisco County Superior Court Case No. CGC-06-454538 (appointed lead class counsel for nationwide class regarding improper auto-renewal of subscription fees); *Cole v. T-Mobile USA, et al.*, Central District of California Case No. 06-6649 (appointed lead class counsel for an adversely certified state-wide class of 1.4 million cell-phone customers). Additionally, since

2014, I have taken two consumer class action cases to trial, with both trials resulting in judgments in favor of the consumer class. I was co-lead counsel in both of those cases.

4. Other attorneys at The Kick Law Firm, APC (“TKLF”) who have worked on this matter include Robert Dart, a 2001 graduate of Duke University and 2004 graduate of the University of Chicago Law School, who became a member of the Illinois State Bar in 2004, and a member of the California State Bar in 2009. After law school, Mr. Dart worked as a complex commercial litigator at Jenner & Block in Chicago, and after that he was a federal law clerk for The Honorable Aleta Trauger of the Middle District of Tennessee. After clerking, Mr. Dart worked as a complex commercial litigator at Quinn Emanuel Urquhart & Sullivan in Los Angeles. Since arriving at TKLF in February of 2016, Mr. Dart has devoted the majority of his time to consumer class action cases against financial institutions involving overdraft fee disputes.

5. The Kick Law Firm, APC undertook this case on a contingent basis, with the understanding that we would not be compensated for our efforts unless the case was successful. To date, TKLF has not been paid for any of its time spent on this matter. The time spent on this matter by the firm’s attorneys has required considerable work that could have, and would have, been spent on other billable matters. As a result of having accepted and been devoted to this case, it is my informed belief this law firm wound up not representing parties in cases it otherwise would have, and which in my opinion likely would have compensated this firm at its hourly rates requested in this matter.

6. TKLF worked cooperatively, efficiently and very effectively with co-lead counsel McCune Wright Arevalo on this matter. The firms made every reasonable effort to prevent the duplication of work or inefficiencies, and I believe were successful in this. Assignments were made for specific tasks and activities so that it was clear which firm had primary responsibility for each task.

7. Regarding the specifics of the work performed by TKLF on this case, at least the following work was performed. Prior to the filing of this lawsuit my law firm analyzed Ms. Fry’s account statements as well as other information provided to her by MidFlorida Credit Union (“MCU”) and analyzed MCU’s agreements with customers. The action was filed on

November 24, 2015. On August 11, 2016, Plaintiff propounded on MCU its first set of requests for production of documents, comprised of 86 categories of documents, its first set of special interrogatories, comprised of 23 special interrogatories, and its first set of requests for admissions, comprised of 12 requests for admission. Defendant responded to the requests for production on August 2, 2016, and to the special interrogatories and requests for admission on October 20, 2016. On May 18, 2016, Plaintiff propounded on MCU its second set of requests for production, comprised of 11 additional requests for production, to which Defendant responded on October 20, 2016. On February 28, 2017, MCU took the deposition of Plaintiff, and on March 2, 2017, Plaintiff took the deposition of MCU's corporate representatives designated as most knowledgeable on overdraft issues, Ashely Ely and Mark Gray, in Lakeland, Florida. Additionally, there were numerous conversations with the class representative during the pendency of the case; the drafting the Motion for Preliminary Approval of Class Action Settlement; the drafting the settlement agreement; the drafting of the Motion for Final Approval; reviewing and editing documents which co-counsel took the lead in drafting; working with opposing counsel to finalize the settlement agreement; and, working with the claims administrator and opposing counsel on class notice and settlement administration issues.

8. Subsequent to this Court's Order granting the Motion for Preliminary Approval, at my request, Plaintiff's database expert Arthur Olsen flew to Defendant MCU's headquarters in Lakeland, Florida, on October 11, 2017, and spent approximately two days there, October 12 and October 13, working with MCU's data team to further verify and analyze all the data and damages in this matter. Mr. Olsen's declaration is being filed contemporaneously. As a result of his analysis, Mr. Olsen reports he has determined that during the class period MCU charged \$4,706,280 in overdraft fees when there was enough money in the account to cover the transaction in question if "holds" on deposits or pending transactions were not taken into account, which is what the Plaintiff's "sufficient funds" theory of the case is. Further, Mr. Olsen reports that based on his review of the actual data pertaining to overdraft fees at MCU, the savings in overdraft fees from MCU's change in practice from using the "available balance" to assess overdraft fees instead to using the "actual balance" to assess overdraft fees is about

\$1,150,000 per year. If using only the one year which already has passed since the change to using the “actual balance” method for assessing overdraft fees, this mean the value of the settlement in this case equals \$3,525,000, representing approximately 75% of the total “sufficient funds” damages in this case. As evident from his declaration, Mr. Olsen is recognized as a leading overdraft fees database expert, and has served as an expert in multiple overdraft cases, including *In re Checking Account Overdraft Litigation*, MDL No. 2036 (S.D. Fla.) and *Gutierrez v. Wells Fargo*, (N.D. Cal. 2010) 730 F.Supp.2d 1080.

9. The Kick Law Firm, APC and McCune Wright Arevalo LLP have agreed to share equally in any attorney fees awarded in this matter, and class representative Ms. Fry has been aware of this at all times and agreed to this fee sharing in writing. Further, the two firms are in agreement to pay local counsel, Morgan & Morgan Complex Litigation Group, ten percent from any attorneys’ fees awarded.

10. The parties’ settlement negotiations at all times were at arm’s length and adversarial. On March 20, 2017, the parties participated in a mediation before Peter J. Grilli. Towards the conclusion of the mediation Mr. Grilli made a mediator’s proposal which both sides ultimately accepted. The agreed settlement being presented to this Court of \$2.375 million new money and maintaining the change in overdraft fees practices of assessing overdraft fees based on “actual balance” rather than “available balance” is the result of an accepted arm’s length mediator’s proposal at that March 20, 2017, mediation. On or about June 29, 2017, the parties signed a settlement agreement, which was attached to the Kick Declaration filed in Support of the Motion for Preliminary Approval as Exhibit 1.

11. The costs incurred by the two firms to date are \$80,030.01. Most of these are detailed in the contemporaneously filed Declaration of Richard McCune. Further, I anticipate and estimate an additional \$600 in costs for travel by me to and from the Motion for Final Approval, including airfare, food, and one night in a hotel. I will bring to Court the receipts pertaining to both firms’ costs to the extent this Court may wish to see them *in camera*. Despite the costs exceeding \$80,000, Class Counsel agreed to cap their costs in this matter at \$65,000, and this is what was stated in the notice sent to class members. Therefore Class Counsel are not

seeking reimbursement of more than \$65,000 despite having incurred over \$80,000 in costs.

12. Plaintiff Tracy Fry is typical of the settlement classes. She was charged overdraft fees when the ledger balance of her account was positive. Ms. Fry has actively participated in this case. She investigated the claims, gathered documents, met with her attorneys, sat for deposition, and repeatedly made herself available to provide the attorneys further information when requested.

13. Plaintiff proposes Public Citizen Foundation as the recipient of any *cy pres* award. Public Citizen Foundation is a 501(c)(3) organization involved in consumer education and litigation. Plaintiff has contemporaneously presented the Declaration of Robert Weissman, the President of Public Citizen Foundation, which elaborates further on the work of Public Citizen as well as its intended uses for *cy pres*. I am a member of Public Citizen but I am not on the Board of Directors or involved in the governance of the organization.

14. Although I do believe this case was strong for certification even if there had been an adversely contested motion for certification, as explained in my Declaration in Support of Preliminary Approval, this case did have risks. If the settlement is not approved, Plaintiff first would need to prevail on an adverse contested motion for class certification. If successful, next MCU would likely file a motion for summary judgment, and if Plaintiff prevailed, she then would face additional challenges. For example, at trial on liability, MCU likely would have argued that Plaintiff's interpretation of the contractual language was incorrect and that it thus did not breach any contracts.

15. It is my estimate that, should this case have proceeded to trial, and the Plaintiff Class proved victorious, the total recovery most likely would have been \$4,706,280, which I am informed by our database expert Arthur Olsen is the total amount of overdraft fees charged against the class members when they had enough money in their accounts to cover the transaction in question, without consideration for holds placed on the funds arising from pending debit card transactions or deposits. The settlement value of \$3,525,000 (\$2,375,000 payment plus one year of savings of \$1,150,000 derived from the change in practices to using the actual balance to assess overdraft fees) is therefore approximately 75% of this most likely result

number. Further, I have confirmed with lead defense counsel the agreed change in overdraft fee assessment practices to use of “actual balance” rather than “available balance” remains in place, and will not be changed barring a circumstance such as a change in law. Further, it is my estimate that to go all the way through trial would have resulted in costs and additional attorneys’ fees likely in excess of a million dollars, as there not only would have been substantial additional law and motion work prior to trial, but the trial itself. Further, I believe it is likely the side which lost the trial would have then appealed, contributing further to these additional attorneys’ fees, as well as delay to class members. This is another reason why I consider this settlement to be advantageous to the class members—because it avoids all of these additional costs and fees and delay which would have arisen if Plaintiff had gone all the way through trial. In sum, this was an arm’s-length, adversarial settlement by experienced counsel on both sides, one which I believe is fair, adequate, and reasonable, and in the best interest of the class members, and which I recommend.

16. There is no government participant in this settlement either as a supporter or an objector.

I declare under penalty of perjury under the laws of the United States of America and the State of Florida that the foregoing is true and correct. Executed this 12th day of January 2017, at Los Angeles, California.

/s/ Taras Kick  
Taras Kick

**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2018 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Middle District of Florida by using the CM/ECF system, which sent notification of such filing to all CM/ECF participants.

/s/ Taras Kick

Taras Kick