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20 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
21 **COUNTY OF SAN DIEGO - CENTRAL DIVISION**

22 DANIEL MCSWAIN, TRUSTEE OF THE
23 DANIEL S. MCSWAIN TRUST DATED JULY
24 17, 2012, on behalf of the trust and all others
25 similarly situated, and the general public;

26 Plaintiff,

27 v.

28 AXOS BANK, fka BANK OF INTERNET USA;
and DOES 1-10, INCLUSIVE,

Defendant.

Case No: 37-2019-00015784-CU-BC-CTL

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: November 25, 2020

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

1 **TO ALL PARTIES AND THEIR ATTORNEYS' OF RECORD:**

2 Please take notice that on November 25, 2020, at 9:00 a.m., in Department C-73 of the San
3 Diego Superior Court, Central Division, or as soon thereafter as the Court's schedule allows, before the
4 Honorable Judge Joel R. Wohlfeil, Plaintiff Daniel McSwain, Trustee of the Daniel S. McSwain Trust
5 Dated July 17, 2012, ("Plaintiff") will move this Court for an order granting final approval of class
6 action settlement and entry of judgment. Said motion will be based on this notice, the attached
7 memorandum of points and authorities, the Declaration of Ronald A. Marron in Support of the
8 Motion, the Declaration of Erik Bowen in Support of the Motion, and the complete files and
9 records in this action.

10
11
12 Dated: October 9, 2020

_____

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Defendant.

Case No: 37-2019-00015784-CU-BC-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: November 25, 2020

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

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1 Plaintiff Daniel McSwain, Trustee of the Daniel S. McSwain Trust dated July 17, 2012,
2 (“Plaintiff” or “Mr. McSwain”) respectfully submits this memorandum in support of his motion for
3 final approval of a class action settlement in this action and requests that the Court enter the proposed
4 order and judgment submitted with this motion.

5 I. INTRODUCTION

6 Following this Court’s Order Granting Preliminary Approval (ROA # 61), and after
7 successfully notifying the Settlement Class of the pending Class Action settlement, Plaintiff, on behalf
8 of himself and all others similarly situated (“the Settlement Class”), seeks the Court’s final approval of
9 the Settlement Agreement reached with Defendant Axos Bank (“Defendant” or “Axos”). This
10 settlement was reached as a result of ongoing negotiations between the parties and with the assistance
11 of mediator Hon. Leo Papas, Ret., who was instrumental in helping the parties reach a fair settlement in
12 the best interests of the Settlement Class.

13 Plaintiff’s operative First Amended Complaint alleges claims against Axos for: (1) violation of
14 the California Unfair Competition Law; and (2) breach of contract (the “Litigation”). Plaintiff
15 contends that Axos violated section 2954.8(a) of the California Civil Code (“Section 2954.8(a)”) by
16 failing to pay borrowers a minimum of 2% simple interest for money held in borrowers’ escrow
17 accounts for loans secured by 1-4 family homes located in California. Axos, in turn, contends that
18 Section 2954.8(a) does not apply to Federal Savings Banks, such as Axos, and that Section 2954.8(a) is
19 preempted by the Federal Home Owners’ Loan Act (12 U.S.C. § 1461, *et seq.*) (“HOLA”). In
20 *McShannock v. JPMorgan Chase Bank, N.A.*, 2020 U.S. App. LEXIS 30234, at n.3, *23. (9th Cir. Sep.
21 22, 2020), the Ninth Circuit recently held that HOLA preempts Section 2954.8(a) with respect to loans
22 originated by Federal Savings Banks (such as Axos) prior to January 21, 2013. Axos further contends
23 that Mr. McSwain lacked standing to pursue his claims for breach of contract and for violation of the
24 Unfair Competition Law because he failed to comply with the notice and cure provisions of his Deed of
Trust.

25 As a result of this settlement, Axos has agreed to pay an award to all members of the Settlement
26 Class within the four year statute of limitation period and has agreed to pay interest on the escrow
27 accounts for loans secured by 1-4 family residential properties located in California on a going forward
28 basis, unless there is a change in the law. In light of the *McShannock* decision, Axos will exclude 29

1 loans within the Settlement Class, which remain on Axos's books and were originated prior to January
2 21, 2013, from the change in policy regarding the payment of interest pursuant to Section 2954.8(a) on
3 the funds held in escrow accounts for those loans. The customers owning those loans, however, will
4 still receive their corresponding share of the settlement payment award pursuant to the terms of the
5 Settlement Agreement. The parties believe that the settlement reached, attached as **Exhibit 1** to the
6 Declaration of Ronald A. Marron ("Marron Decl."), is fair, adequate, and reasonable.

7 **II. FACTUAL BACKGROUND**

8 Section 2954.8(a) of the California Civil Code provides that:

9 Every financial institution that makes loans upon the security of real property containing
10 only a one-to four-family residence and located in this state or purchases obligations
11 secured by such property and that receives money in advance for payment of taxes and
12 assessments on the property, for insurance, or for other purposes relating to the property,
13 shall pay interest on the amount so held to the borrower. The interest on such amounts
14 shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be
15 credited to the borrower's account annually or upon termination of such account,
16 whichever is earlier.

17 Cal. Civ. Code § 2954.8(a). In the past, federal regulation established that the regulations promulgated
18 by the Office of Thrift Supervision under HOLA occupied the entire field of lending, which
19 unequivocally established that Section 2954.8(a) was preempted by federal law. *See* 12 CFR § 560.2.
20 In 2010, however, the Dodd-Frank Act established that HOLA was no longer intended to preempt the
21 entire field of banking. 12 U.S.C. § 1465. With the passage of that law and upon the updating of the
22 relevant regulations, field preemption was no longer applicable to federal savings association. 12
23 U.S.C. § 1465(b). In a 2018 decision, the Ninth Circuit held that the separate National Bank Act
24 (applicable to National Banks, but not Federal Savings Banks such as Axos) did not preempt Section
25 2954.8(a). *Lusnak v. Bank of America, N.A.* (9th Cir. 2018) 883 F.3d 1185, 1194-95. The Supreme
26 Court denied Bank of America's petition for writ of certiorari in the *Lusnak* case. *Bank of America,*
27 *N.A. v. Lusnak* (2018) 139 S.Ct. 567. In *McShannock*, however, the Ninth Circuit recently clarified
28 that HOLA preempts Section 2954.8(a), at least with respect to loans originated by Federal Savings
Banks prior to January 21, 2013. *See McShannock*, 2020 U.S. App. LEXIS 30234, at n.3, *23.
Plaintiff argues that, pursuant to the analysis set forth in *Lusnak*, HOLA also no longer preempts
Section 2954.8(a). Axos, in turn, contends that *Lusnak* is inapplicable because it does not discuss
preemption under HOLA and because Federal Savings Banks and National Banks are different in

1 material respects that may lead to a different preemption analysis under HOLA. Axos further contends
2 that the *McShannock* decision leaves the door open for the Ninth Circuit to conclude that loans
3 originated by institutions governed by HOLA should receive a preemption analysis different from what
4 the Ninth Circuit did in *Lusnak* with respect to loans originated by institutions governed under the
5 National Bank Act.

6 Mr. McSwain filed his initial complaint on March 25, 2019. (ROA # 1.) Mr. McSwain filed an
7 amended complaint, which remains the operative complaint, on June 3, 2019. (ROA # 17.) Axos
8 answered the amended complaint on September 12, 2019. (ROA # 46.) Plaintiff also served
9 comprehensive written and document discovery, to which Axos answered. (Marron Decl., ¶ 1.)

10 The parties began to negotiate a potential settlement. (Marron Decl., ¶ 5.) In order to facilitate
11 a final settlement, the parties attended mediation with Hon. Leo Papas, Ret. on December 12, 2019.
12 (Marron Decl., ¶ 6.) At the mediation, the parties, with the assistance of Judge Papas, continued to
13 negotiate additional terms of a possible settlement of this action. (Marron Decl., ¶ 7.) Judge Papas was
14 instrumental in raising issues for the parties' consideration to ensure fairness to the class and the
15 workability of the settlement. (Marron Decl., ¶ 6.) The mediation enhanced the basic terms of the
16 settlement, leaving the parties to finalize the final settlement agreement. (*Id.*)

17 After the mediation, the parties negotiated a settlement agreement. (Marron Decl., ¶ 7.) After
18 several rounds of revisions and further negotiations, the parties reached a settlement and entered into
19 the Settlement Agreement that Plaintiff now presents to this Court. (Marron Decl., Exh. 1 (hereinafter
20 "Settlement Agreement").)

21 Plaintiff filed his motion for preliminary class settlement to the Court on June 23, 2020. (ROA
22 # 50-56.) The Court granted the motion for preliminary class settlement on July 22, 2020 and set the
23 final approval hearing for November 25, 2020. (ROA # 60.) The deadline to file any opt-out notices
24 and objections was set for October 26, 2020. (*Id.*)

25 Since that order, the parties have executed all of the requirements of the Court's July 22, 2020
26 order. Axos uses the Jack Henry System ("JHA System"), which is regarded as the standard for escrow
27 tracking in the industry, to keep track of all of the information regarding the escrow accounts on the
28 mortgages at issue in this action. (Declaration of Erik Bowen ("Bowen Decl."), ¶ 3.) The system

1 includes payment controls to ensure payment activity is recorded correctly, and transactions are subject
2 to oversight by federal regulators. (*Id.*) After receiving the Court's order of July 22, 2020, Axos
3 proceeded to gather the information of the relevant settlement class from the JHA System, a process
4 that was personally reviewed by Erik Bowen, First Vice President, Portfolio & Special Assets
5 Manager. (Bowen Decl., ¶¶ 4-5.) The initial spreadsheet that included the data for all members of the
6 Settlement Class was gathered on August 2, 2020 and was finalized on August 7, 2020. (Bowen Decl.,
7 ¶ 10.) Those excluded from the Settlement Class, including loans where the escrow account only ever
8 had a zero or less balance and loans to Axos's employees, officers, and/or directors, were removed
9 from the list. (*Id.*)

10 The data revealed that there was 6,415 relevant escrow accounts. (Bowen Decl., ¶ 11.) Because
11 some of those escrow accounts represented persons with one or more loans, there was a total of 5,848
12 unique borrowers. (Bowen Decl., ¶ 12.) Of the total 6,415 relevant accounts, 5,922 had e-mail
13 addresses associated with them. (Bowen Decl., ¶ 13.) On August 18, 2020, Axos e-mailed the notices
14 to those accounts. (*Id.*) Axos has provided a sample notice of that e-mail. (Bowen Decl., Exh. A.)

15 After the initial notice via e-mail, 154 of the attempted e-mail notices were rejected and/or
16 undeliverable. (Bowen Decl., ¶ 13.) 54 accounts did not have an associated e-mail address, though
17 two of those accounts were for a single customer. (*Id.*) There were a total of 207 members of the
18 Settlement Class who did not receive the Class Notice through e-mail.

19 To serve the Notice on the members of the Settlement Class who did not receive the Notice via
20 e-mail, on August 20, 2020, Axos sent the Notice via U.S. Postal Service First Class Mail to the 207
21 members of the Settlement Class who did not have a valid email address on file. (Bowen Decl., ¶ 14.)
22 Accordingly, all members of the Settlement Class were served with the Notice no later than August 20,
23 2020. Each Settlement Class Member had more than two months' notice of the Class Action
24 Settlement prior to the objection/opt-out deadline of October 26, 2020.

25 In addition to the notice, on August 18, 2020, Axos finalized and established a settlement
26 website, www.escrowinterestclassactionsettlement.com. (ROA # 15.).

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1 officer presiding over the Litigation, (2) Defendant and Released Parties, and each of their current or
2 former officers, directors, and employees; (3) legal representatives, successors, or assigns of any such
3 excluded person, and (4) any person who properly executes and sends a timely Request for
4 Exclusion.” (Settlement Agreement, § 2.25.) As noted above, there are 6,415 relevant escrow
5 accounts, resulting in 5,848 unique class members after duplicates and those excluded from the
6 Settlement Class definition are removed from the total count. (Bowen Decl., ¶¶ 11-12.)

7 **B. The Gross Settlement Fund**

8 In exchange for the releases, Axos will establish a gross settlement fund of five hundred
9 thousand dollars 00/100 (\$500,000.00) to cover payments to class members, attorneys’ fees and costs
10 of up to \$200,000.00, and a class representative enhancement. (Settlement Agreement, §§ 2.10, 7.2.)
11 Axos has agreed to pay for the notice to the class and the distribution of the settlement fund to the
12 class separately. (Settlement Agreement, § 6.3.) The class representative enhancement is \$7,500, and
13 Class Counsel will request \$200,000.00 for fees and costs.

14 **C. Distribution of the Common Settlement Fund**

15 Payment to the class members will be made from the Net Settlement Fund, which is the
16 amount of money that will remain after the following are deducted from the Gross Settlement Fund
17 upon approval by the Court: (1) attorneys’ fees of up to the amount approved by the Court and other
18 costs associated with the settlement no greater than \$200,000; and (2) an Incentive Award in the
19 amount of up to \$7,500 to Plaintiff. (Settlement Agreement, § 2.12.) The parties estimate that the Net
20 Settlement Fund will total approximately \$292,500 and the Net Settlement Fund will be used to make
21 Settlement Payments to members of the Settlement Class. (*Id.*)

22 From that approximate \$292,500, the settlement fund will be distributed to the members of the
23 Settlement Class based upon the number of years within the statutory period the Class Member has
24 had a positive balance within a Relevant Escrow Account. (Settlement Agreement, § 7.2.) Those who
25 had accounts for less than one year will receive \$25; those who had accounts at least one year, but less
26 than two years will receive \$50; those who had accounts at least two years, but less than three years
27 will received \$75; those who had accounts at least three years, but less than four years will receive
28 \$100; and those who had accounts more than four years will receive \$125. (Settlement Agreement, §§

1 7.2.1-7.2.5.) If those payments do not exhaust the Net Settlement Fund, then the payments will
2 increase pro rata. (Settlement Agreement, § 7.2.6.) If those payments are over the available amount
3 in the Net Settlement Fund, then each Class Member's payments will be reduced pro rata. (*Id.*)

4 Based on the final numbers of the Settlement Class, the payoff to each member will be reduced
5 by a pro rata share. (Bowen Decl., ¶ 16.) There are 2,614 members of the Settlement Class in tier
6 one, 1,477 in tier two, 947 in tier three, 746 in tier four, and 631 in tier five. (*Id.*) Factoring in the
7 prorated amounts for each tier, those with mortgages of less than a year will receive \$20.11 instead of
8 \$25, those with mortgages between one year and two years will receive \$40.21 instead of \$50, those
9 with mortgages between two years and three years will receive \$60.31 instead of \$75, those with
10 mortgages between 3 years and four years will receive \$80.42 instead of \$100, and those with
11 mortgages of over four years will receive \$100.53 instead of \$125. (*Id.*) These amounts are more
12 than 80.42% of the unadjusted amounts. (*Id.*) Though the cash amounts have experienced a modest
13 reduction pursuant to the terms of the Settlement Agreement, the reduction was predicted at the
14 preliminary approval stage, and as much of the relief in this case is non-monetary in the form of future
15 compliance with the law, the end result is still an excellent result for the class. Indeed, as explained
16 below, the benefit to the Settlement Class is further enhanced by the fact that they will receive their
17 payment automatically, without the need of having to file a claim form or "opt-in."

18 If final settlement is approved, Axos will pay the settlement to each Settlement Class Member
19 within 30 days of the Court's entry of the Final Approval Order. (Bowen Decl., at ¶ 18.) Those who
20 still have escrow accounts will receive the money directly into their escrow account. If a Settlement
21 Class member no longer has an escrow account with the bank, Axos will mail a physical check to the
22 Class Member's postal address. (*Id.*) Any check that is returned or not cashed will be awarded cy
23 pres to Public Citizen, an organization who performs work on behalf of California consumers, or to
24 another non-profit, public benefit corporation approved by the Court. (*Id.*)

25 Class Council requests that the Court order that any remaining balance after payment to the
26 Settlement Class be issued to Public Citizen. Public Citizen is a nonprofit consumer advocacy
27 organization. More information about Public Citizens is presented in Exhibit 2. (Marron Decl., Exh.
28 2.)

1 **D. Non-Monetary Relief**

2 In addition to the monetary relief to class members (and with the exception of the 29 loans
3 originated prior to January 21, 2013 that are covered by the *McShannock* decision), Axos has agreed
4 to begin paying of at least 2% simple interest per annum on the escrow accounts that have a positive
5 balance for loans secured by one to four family residential properties located in California.
6 (Settlement Agreement, § 7.3.) The interest will be credited to the borrower's account in accordance
7 with Section 2954.8(a). (*Id.*) Axos will reserve the right to change this policy if there is a change in
8 law. (*Id.*) If these payments last for at least four years, the estimated monetary value of these
9 payments is \$1,412,144. (Bowen Decl., ¶ 19.)

10 **E. Plaintiffs' Attorneys' Fees/Costs and Class Representative Enhancement**

11 Awards for Plaintiffs' attorneys' fees and costs and class representative enhancements will be
12 at the sole discretion of the Court. All such payments will come out of the Gross Settlement Fund
13 before payments to the Settlement Class are made. (Settlement Agreement, § 7.2.) The parties agree
14 that Class Counsel may make a request for fees and costs not to exceed \$200,000. (Settlement
15 Agreement, § 8.1.) The parties also agree that Mr. McSwain may seek an Incentive Award of up to
16 \$7,500. (Settlement Agreement, § 8.3.) Any remaining amount will be credited to the Net Settlement
17 Fund.

18 Class Counsel is requesting the full \$200,000 be awarded, as detailed in the accompanying
19 motion for attorney's fees and costs. The proposed Incentive Award is fair and well earned, as Mr.
20 McSwain has been an active participant and advocate for the Class throughout the process. (Marron
21 Decl., ¶ 10.).

22 **F. The Releases**

23 The Settlement Class will release Axos and related parties from liability for any claims
24 reasonably related to the claims pled in Plaintiffs' complaint (and its amendments) arising during the
25 Class Period. (Settlement Agreement, § 10.2.) Mr. McSwain will provide a general release to Axos
26 of all known and unknown claims. (Settlement Agreement, § 10.1.).

1 **G. Notice, Opt-Out, and Objections**

2 In order to save money and to prevent unnecessary duplication of work, the parties have
3 agreed to allow Axos itself to oversee the process of sending out notice and of administering the
4 Settlement in this action. (Settlement Agreement, §§ 6.2, 7.2.) The reason for this in this case is
5 simple—as the entity in control of the mortgages and escrows, Axos already possesses the capacity to
6 send notice to all members of the Settlement Class and has access to active members of the Settlement
7 Class’ accounts. By proceeding in this fashion, the members of the Settlement Class will benefit
8 because they will avoid using funds from the Gross Settlement Fund to pay a third-party settlement
9 administrator. In order to ensure compliance, Axos is required to provide Class Counsel with a
10 declaration attesting to the completion of the notice process. (Settlement Agreement, § 6.4.) Class
11 Counsel will have the right to audit and monitor Axos’s implementation of the notice process. (*Id.*)

12 Any Class Member who does not wish to be a part of this Settlement Agreement may request
13 to be excluded by submitting a Request for Exclusion to Class Counsel. (Settlement Agreement, §
14 5.1.) All requests must be sent to Class Counsel. (*Id.*) The deadline is October 26, 2020. To date,
15 Class Counsel have received just two requests for exclusion. (Marron Decl., ¶ 14).

16 Any Class Member who objects to this Settlement must file their objections with the Court and
17 send copies of all pleadings to Class Counsel and Counsel for Axos. (Settlement Agreement, § 5.2.)
18 Objections must be in writing and accompanied by documents or other evidence along with any
19 factual or legal argument the objector will rely upon. (Settlement Agreement, § 5.3.) The other
20 requirements for objecting are noted in the Settlement Agreement. (*Id.*) The deadline is October 26,
21 2020. To date, no objections have been received. (Marron Decl., ¶ 15).

22 **V. THE COURT SHOULD GRANT FINAL APPROVAL**

23 **A. This Class Action Settlement Is Entitled to a Presumption of Fairness**

24 This settlement agreement deserves the presumption of fairness. Under California law, a
25 “presumption of fairness exists if (1) the settlement is reached through arm’s length bargaining; (2)
26 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
27 counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Dunk*, 48
28 Cal.App.4th at 1802.

1 Here, the first factor is clearly met. The settlement was accomplished after a mediation and
2 follow up negotiations with the distinguished neutral Hon. Leo Papas, Ret. (Marron Dec., ¶ 6.).
3 Second, the discovery in this action was thorough, revealing the strengths and weaknesses of the case.
4 In May 2019, class counsel served discovery upon Axos on behalf of Mr. McSwain. (Marron Dec., ¶
5 4.) The discovery consisted of Form Interrogatories, 20 Special Interrogatories, 25 Requests for
6 Production, and 20 Requests for Admission. (*Id.*) Axos provided responses to discovery which were
7 used as a basis for our settlement negotiations. (*Id.*) In lieu of the deposition of a person most
8 knowledgeable, Axos agreed to provide the Declaration of Erik Bowden, who answered questions
9 posed by Plaintiff's counsel under oath. (*Id.*) The Parties also negotiated a protective order so that
10 Plaintiff's counsel could review sensitive documents from Axos. (*Id.*) All of the discovery was used
11 to negotiate the settlement and ensure that the settlement would be fair to the class. Axos also
12 provided Class Counsel with the Declaration of Erik Bowen in support of the motion for preliminary
13 approval, which included the information Class Counsel requested to ensure that the settlement was
14 proper. (ROA # 54.) That information, combined with the information exchanged at the mediation,
15 permitted the Class Representative and his counsel to make informed decisions about settlement and
16 allowed the parties to fully evaluate the strengths and weaknesses of their claims.

17 Third, the Class Counsel involved in the settlement are qualified. Mr. Marron, is experienced
18 in class action cases. Mr. Marron's extensive class action experience is detailed further in his
19 declaration. (Marron Dec., ¶¶ 16-41.) Mr. Olinik also has experience with class actions. (Olinik
20 Dec., ¶ 7.) Therefore, the experience of counsel is not in question.

21 Finally, it is expected that number of objections and opt-outs will be small. As of the date of
22 this motion, there have been zero objections, and just two opt-outs. (Marron Decl., ¶ 14-15.) The last
23 day for filing objections and opting out of the settlement is October 26, 2020. (ROA # 60.) Plaintiff
24 will update the Court on the number of objections and opt outs, as well as respond to any objections,
25 in its reply in support of this motion for final approval. The lack of known objections combined with
26 the lack of expected opt-outs show that the Class itself is willing to participate in the settlement.
27 Therefore, this settlement has a presumption of fairness.

1 **B. Additional Factors Support Final Approval of the Class Action Settlement**

2 Other factors courts consider also demonstrate that the settlement is fair. Under California law:

3 The trial court's discretion is broad, and is to be exercised through the application
4 of several well-recognized factors. The list, which “ ‘is not exhaustive and should
5 be tailored to each case,’ ” includes “ ‘the strength of plaintiffs' case, the risk,
6 expense, complexity and likely duration of further litigation, the risk of
7 maintaining class action status through trial, the amount offered in settlement, the
8 extent of discovery completed and the stage of the proceedings, the experience
9 and views of counsel, the presence of a governmental participant, and the reaction
 of the class members to the proposed settlement.’ ” “ ‘“The most important factor
 is the strength of the case for plaintiffs on the merits, balanced against the amount
 offered in settlement.” ’ ” While the court “ ‘must stop short of the detailed and
 thorough investigation that it would undertake if it were actually trying the case,’
 ” it “ ‘must eschew any rubber stamp approval in favor of an independent
 evaluation.’ ”

10 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 407–08 (internal
11 citations omitted).

12 The Settlement Agreement is fair, reasonable and adequate and is in the best interest of the
13 Settlement Class in light of all known facts and circumstances, including the risk of loss of class
14 certification, loss on the merits of each claim, significant delay, and defenses asserted by Defendant.
15 Proceeding also has its risks of appellate issues. (*See* Marron Dec., ¶ 9.) Indeed, the Ninth Circuit’s
16 recent decision in *McShannock* highlights the very real risk Plaintiff faces if the Ninth Circuit extends
17 its ruling to loans originated under institutions governed by HOLA generally and not just to those
18 loans originated by Federal Savings Banks prior to January 21, 2013. Plaintiff and Class Counsel
19 recognize the expense and burden of continuing to litigate and try this action against Axos through
20 possible appeals, which could take several years. (*Id.*) Class Counsel has also taken into account the
21 uncertain outcome and risk of litigation. (*Id.*)

22 **C. The Settlement Class Received Adequate Notice of the Settlement**

23 “The principal purpose of notice to the class is the protection of the integrity of the class action
24 [settlement] process.” *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 970. The proposed notice
25 of settlement must “fairly apprise the class members of the terms of the proposed compromise and of
26 the options open to dissenting class members.” *Wershba*, 91 Cal.App.4th 224, 251.

27 The sample class notice attached as Exhibit “A” to the Declaration of Erik Bowen fairly
28 apprises the members of the Settlement Class of the relevant details regarding the settlement and the

1 options open to them and is in the same basic form of the Proposed Settlement Notice approved by
2 this Court at the Preliminary Approval hearing. (Bowen Decl., Exh. A.) On August 18, 2020, the
3 Notice was e-mailed to all persons for whom Axos had e-mail addresses. On August 20, 2020, the
4 Notice was mailed via U.S. Mail to the 207 persons within the Settlement Class who did not have a
5 valid email address on file with Axos.. (Bowen Decl., ¶¶ 13-14.) The Settlement Class was also able
6 to access information about the settlement at www.escrowinterestclassactionsettlement.com. (Bowen
7 Decl., ¶ 15.) Accordingly, the Settlement Class received Notice of the Settlement.

8 **D. The Settlement Is Fair and Adequate**

9 1. The Settlement is the Product of Serious, Informed, Non-collusive Negotiations

10 The settlement in this litigation is the result of hard-fought capable advocacy on both sides.
11 (Marron Dec., ¶ 12.) There was no collusion in creating this Agreement, which is the result of skilled
12 negotiation. (Marron Decl., ¶ 12.) The parties exchanged information discovery that formed the basis
13 of negotiations. (Marron Decl., ¶ 12.) The informal discovery was substantiated by a declaration
14 from Axos. (Bowen Decl.) The parties utilized the Hon. Leo Papas as a neutral to help negotiate the
15 final details of the Settlement Agreement. (Marron Decl., ¶ 6.) Defendant continues to deny liability
16 in this matter, but has agreed to this Settlement Agreement nonetheless. (ROA # 54, ¶¶ 4-5.)
17 Altogether, this Settlement Agreement is entitled to the presumption of fairness.

18 2. The Settlement has no “Obvious Deficiencies”

19 The proposed settlement has no obvious deficiencies and is well within the range of
20 reasonableness that supports possible final approval. First, all class members received the same
21 Notice and opportunity to object to the settlement and to reap the benefit of the monetary relief after
22 settlement has been approved. The monetary relief provided in the settlement will benefit the
23 Settlement Class fairly and proportionally according to the amount of time each borrower had an
24 escrow account with Axos in the past. Furthermore, all current clients of Axos who have escrow
25 accounts on loans originated after January 21, 2013 and secured by 1-4 family properties located in
26 California will receive the benefit of this Settlement on a going forward basis. (Settlement
27 Agreement, §§ 7.2, 7.3.) The goals of the litigation – to recover money owed to past escrow account
28 holders and to ensure future compliance with California law– have been met.

1 3. The Settlement Does Not Favor the Class Representative or Segments of the Class

2 The settlement does not improperly grant preferential treatment to Class Representatives or
3 segments of the Settlement Class in any way. All members of the Settlement Class will receive
4 monetary compensation based on the amount of time they have had escrow accounts with Axos.
5 (Settlement Agreement, § 7.2.) The amounts will be prorated based on the time they have had their
6 accounts with Axos, and thus all members of the Settlement Class will be treated fairly based upon the
7 amount of time they held a Relevant Escrow Account. (*Id.*) All members of the Settlement Class,
8 with the exception of those who had their loan originated on or before January 21, 2013, will receive
9 the benefit of receiving interest in the future, so long as their accounts remain with Axos. (Settlement
10 Agreement, § 7.3.) Mr. McSwain will be treated the same as all other members of the Settlement
11 Class, except for his Incentive Award of \$7,500, subject to the Court's approval. (Settlement
12 Agreement, § 8.3.) The proposed Incentive Award is fair and well earned, as Mr. McSwain has been
13 an active participant and advocate for the Class throughout the process. (Marron Decl., ¶ 9.)

14 4. The Settlement Falls Within the Range of Possible Judicial Approval

15 In approving class action settlements, the court should consider relevant factors including the
16 strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the
17 risk of maintaining class action status through trial, the amount of discovery completed and the stage
18 of the proceedings, and the experience and views of counsel. *In re Microsoft I-V Cases*, 135
19 Cal.App.4th at 723. In this case, the evidence supports the conclusion that the Settlement falls within
20 the range of judicial approval.

21 At the preliminary approval stage, the Parties predicted that the amount of award to each Class
22 Member would be prorated down due to the number of members of the Settlement Class. (ROA #54,
23 ¶ 14.) While the final award could fluctuate if there are objections and/or exclusions, the prorated
24 amounts are evenly distributed among all class members according to the amount of time each
25 members of the Settlement Class had a relevant escrow account. (Bower Decl., ¶ 16.) Because the
26 cash payment represents a compromise of disputed claims and avoids the risk and expense of trial, the
27 aggregate recovery is lower than the total that could hypothetically be recovered assuming Plaintiff
28 were successful at the end of trial and that the members of the Settlement Class recovered all

1 purported unpaid interest on the Relevant Escrow Accounts for a period up to four years prior to the
2 filing of the Complaint. (See ROA # 54, ¶ 17.) Class Counsel believes the amount of the settlement is
3 fair based upon the increased cost and expenses of litigating this action through trial and a possible
4 appeal. (Marron Decl., ¶ 9.) Indeed, given that there is no binding authority in the Ninth Circuit or
5 the California Court of Appeal holding that HOLA does not preempt Section 2954.8(a) and given the
6 recent decision in *McShannock*, proceeding with this action through an appeal presents a real risk that
7 the members of the Settlement Class would recover nothing as a result of an adverse preemption
8 ruling by an appellate court. Finally, all Settlement Class members who had loans originated after
9 January 21, 2013 and who still have accounts with Axos will receive their full interest payments going
10 forward. (Settlement Agreement, § 7.3.) That relief is valued at approximately \$1,412,144 within the
11 first four years of payments. (Bowen Decl., ¶ 19.) Future customers of Axos who have residential
12 loans secured by real property in California and have an escrow account on such loans for the payment
13 of taxes, assessments, insurance or other purposes related to the property will also benefit. Together,
14 the monetary and non-monetary relief are reasonable compromises and a fair settlement of the claims.

15 VI. CONCLUSION

16 The parties have committed substantial amounts of time and energy resolving this matter. The
17 proposed settlement is a fair and reasonable compromise of the issues in dispute. The Settlement
18 Class was provided with notice of the settlement, had the opportunity to object and/or opt out, and
19 based upon the lack of objections and opt-outs, appears to consent to the Settlement Agreement. After
20 weighing the substantial, certain, and immediate benefits of this settlement against the uncertainty of
21 trial and appeal, the parties believe that the proposed settlement is fair, reasonable and adequate, and
22 that it warrants the Court's final approval.

23 Therefore, Plaintiff respectfully requests that the Court grant final approval of the Class Action
24 Settlement, and sign the proposed order and judgment filed concurrently with this motion.

25
26
27 Dated: October 9, 2020



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19 *the Proposed Class*

20 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
21 **COUNTY OF SAN DIEGO - CENTRAL DIVISION**

22 DANIEL MCSWAIN, TRUSTEE OF THE
23 DANIEL S. MCSWAIN TRUST DATED JULY
24 17, 2012, on behalf of the trust and all others
25 similarly situated, and the general public;

26 Plaintiff,

27 v.

28 AXOS BANK, fka BANK OF INTERNET USA;
and DOES 1-10, INCLUSIVE,

Defendant.

Case No: 37-2019-00015784-CU-BC-CTL

**DECLARATION OF RONALD A. MARRON
IN SUPPORT OF PLAINTIFF'S MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: November 25, 2020

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

1 I, Ronald A. Marron, hereby declare as follows:

2 1. I am a member in good standing of the State Bar of California and I represent Plaintiff
3 Daniel McSwain in the above-captioned action. I submit this Declaration in Support of Plaintiff's
4 Motion for Final Approval of Class Action Settlement. I make this Declaration based on my personal
5 knowledge and if called to testify, I could and would competently testify to the matters contained
6 herein.

7 2. Attached hereto as **Exhibit 1** is a true and correct copy of the Class Action Settlement
8 Agreement between Plaintiff Daniel McSwain ("Plaintiff" or "Mr. McSwain") and Defendant Axos
9 Bank, fka Bank of Internet USA ("Axos" or "Defendant").

10 3. This Action was originally filed on March 25, 2019. (ROA # 1.) Axos filed a demurrer
11 on May 15, 2019. (ROA # 13.) Mr. McSwain filed an amended complaint, which remains the operative
12 complaint, on June 3, 2019. (ROA # 17.) Axos filed a second demurrer on July 19, 2019. (ROA # 22.)
13 Mr. McSwain opposed the demurrer. (ROA # 27.) The Court ultimately overruled the demurrer on
14 August 23, 2019. (ROA # 35.) Axos answered the amended complaint on September 12, 2019. (ROA #
15 46.).

16 4. In May 2019, my firm served discovery requests upon Axos on behalf of Mr. McSwain.
17 The discovery consisted of Form Interrogatories, 20 Special Interrogatories, 25 Requests for
18 Production, and 20 Requests for Admission. Axos provided responses to discovery which were used as
19 a basis for settlement negotiations. In lieu of the deposition of a person most knowledgeable, Axos
20 agreed to provide the Declaration of Erik Bowden, who answered questions posed by Plaintiff's
21 counsel under oath. The parties also negotiated a protective order so that Plaintiff's counsel could
22 review confidential documents provided by Axos. All of the discovery was used to negotiate the
23 settlement and ensure that the settlement would be fair to the class.

24 5. Following the denial of Axos's demurrer, the parties began to negotiate a potential
25 settlement. Axos provided figures regarding the amount of money it held in escrow accounts for loans
26 secured by 1-4 family properties located in California for the four years prior to the date Plaintiff filed
27 his initial complaint through the date the report was created, which Plaintiff reviewed. Based upon the
28 initial information, the parties eventually signed a Memorandum of Understanding.

1 6. After reaching the initial Memorandum of Understanding, the parties attended mediation
2 with Hon. Leo Papas, Ret. on December 12, 2019. At the mediation, the parties, with the assistance of
3 Judge Papas, continued to negotiate additional terms of a possible settlement of this action. Judge
4 Papas was instrumental in raising issues for the parties' consideration to ensure fairness to the class and
5 the workability of the settlement. As a result of the mediation, the parties entered into the First
6 Addendum to the Memorandum of Understanding to memorialize the progress made at the mediation.

7 7. After the mediation, the parties negotiated a settlement agreement. After several rounds
8 of revisions and further negotiations, the parties reached a settlement and entered into the Settlement
9 Agreement that Plaintiff now presents to this Court.

10 8. Through the confirmatory discovery process, Class Counsel has obtained sufficient
11 information and documents to evaluate the strengths and weaknesses of the case. In the eyes of Class
12 Counsel, the proposed Settlement provides the Settlement Class with an outstanding opportunity to
13 obtain significant relief at this stage in the litigation. The Settlement also abrogates the risks that might
14 prevent them from obtaining any relief. Class Counsel believes the amount of the settlement is fair
15 based upon the increased cost and expenses of litigating this action through trial and a possible appeal.

16 9. Based on my experience, I conclude that the Settlement provides exceptional results for
17 the Settlement Class while sparing it from the uncertainties of continued and protracted litigation. The
18 Settlement Agreement is fair, reasonable and adequate and is in the best interest of the Settlement Class
19 in light of all known facts and circumstances, including the risk of loss of class certification, loss on the
20 merits of each claim, significant delay, and defenses asserted by Defendant. Proceeding also has its
21 risks of appellate issues, including as a result of the Ninth Circuit's recent decision in *McShannock v.*
22 *JPMorgan Chase Bank, N.A.* (9th Cir. Sep. 22, 2020) 2020 U.S. App. LEXIS 30234. Plaintiff and
23 Class Counsel recognize the expense and length of continuing to litigate and try this action against
24 Axos through possible appeals which could take several years. Class Counsel has also taken into
25 account the uncertain outcome and risk of litigation.

26 10. Class Representative Daniel McSwain has performed an exemplary job representing the
27 putative class members to date. Mr. McSwain, with his investigative journalist background, brought
28 this case to counsel himself, and has extensively researched Axos Bank and their assets throughout the

1 process to ensure that the information provided by Axos aligned with the publicly available data. Mr.
2 McSwain has, and if appointed will continue to, adequately represent the Settlement Class.

3 11. My law firm, the Law Offices of Ronald A. Marron, is also qualified to represent the
4 Settlement Class. As discussed in detail below, my law firm has experience handling class action
5 settlements and will adequately represent the Settlement Class Members' interests. My law firm has
6 worked diligently to prosecute this case and to reach a fair settlement for the Settlement Class.

7 12. The settlement in this litigation is the result of hard-fought capable advocacy on both
8 sides. There was no collusion in creating the Settlement Agreement, which is the result of skilled
9 negotiation. The parties exchanged information discovery that formed the basis of negotiations and the
10 informal discovery was substantiated by a declaration from Axos.

11 13. The parties have selected Public Citizen as the cy pres recipient. Accordingly, any
12 amounts remaining in the fund or after the expiration of the settlement checks will be awarded to
13 Public Citizen for work intended to benefit California consumers, or another non-profit public benefit
14 corporation nominated by Class Counsel and approved by the Court. Attached hereto as **Exhibit 2** is a
15 true and correct copy of the "About Us" section from Public Citizen's website, which is available at
16 <https://www.citizen.org/about/> (last visited June 15, 2020).

17 14. The deadline for class members to submit requests for exclusion is currently set for
18 October 26, 2020. To date, Class Counsel have received just two requests for exclusions from Angie
19 Hermogenes and Paula Andrea Hermogenes.

20 15. The deadline for class members to object to the settlement is currently set for October
21 26, 2020. To date, Class Counsel has received no objections to the settlement.

22 **Ronald A. Marron Firm's Qualifications and Experience Prosecuting**

23 **Consumer Class Action Lawsuits**

24 16. My work experience and education began in 1984, when I enlisted in the United States
25 Marine Corps (Active Duty 1984-1988, Reserves 1988-1990) and thereafter received my Bachelor of
26 Science in Finance from the University of Southern California (1991). While attending Southwestern
27 University School of Law (1992-1994), I also studied Biology and Chemistry at the University of
28 Southern California and interned at the California Department of Corporations with emphasis in
consumer complaints and fraud investigations. I was admitted to the State Bar of California in January

1 of 1995 and have been a member in good standing since that time. In 1996, I started my own law firm
2 with an emphasis in consumer fraud. My firm currently employs six full-time attorneys and two
3 paralegals. Attached hereto as **Exhibit 3** is a true and correct copy of my firm's current resume.

4 17. Over the years I have acquired extensive experience in class actions and other complex
5 litigation, and have obtained large settlements as lead counsel. In recent years, I have devoted almost
6 all of my practice to the areas of false and misleading labeling of food, nutrition or over-the-counter
7 products; cases involving violations of the Telephone Consumer Protection Act; and other privacy
8 cases.

9 18. Most recently, on August 3, 2020, the Honorable Judge Gonzalo P. Curiel of the United
10 States District Court for the Southern District of California granted final approval of a \$5,400,000.00
11 settlement in the certified class action styled *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-cv-
12 02335-GPC-MDD (S.D. Cal.), Dkt. No. 259, with my firm appointed as class counsel. In his Final
13 Approval Order, Judge Curiel stated that the "Settlement was negotiated by counsel with extensive
14 experience in consumer class action litigation." *Id.* at 14.

15 19. On February 24, 2020, the Honorable Christina A. Snyder of the United States District
16 Court for the Central District of California granted final approval of a \$2,500,000.00 class action
17 settlement in *Graves v. United Industries Corp.*, No. 2:17-cv-06983-CAS-SK (C.D. Cal.) and
18 appointed the Marron Firm as class counsel. Judge Snyder noted that the Law Offices of Ronald A.
19 Marron had "vigorously represented the Class" and has "extensive experience in consumer class action
20 litigation." Judgment & Order at 9, *Graves v. United Indus. Corp.*, No. 2:17-cv-06983-CAS-SK (C.D.
21 Cal. Feb. 24, 2020), Dkt. No. 87.

22 20. On January 28, 2020, the Honorable William Alsup granted final approval of a
23 settlement of a nationwide certified class in *Esparza v. Smartpay Leasing, Inc.*, No. 3:17-cv-03421-
24 WHA, 2020 WL 465865, at *2 (N.D. Cal. Jan. 28, 2020), judgment entered, 2020 WL 465863(N.D.
25 Cal.). Myself, Alexis M. Wood, and Kas L. Gallucci of the Law Offices of Ronald A. Marron served as
26 class counsel.

27 21. On October 11, 2019, the Honorable Judge Wilhelmina M. Wright granted final
28 approval of a nationwide TCPA settlement class in *Busch v. Bluestem Brands, Inc.*, No. 0:16-cv-00644-
WMW-HB, 2019 WL 5092952, at *1 (D. Minn. Oct. 11, 2019). The settlement created a \$5.25 million

1 non-reversionary Settlement Fund for the benefit of the class. Myself, Alexis M. Wood, and Kas L.
2 Gallucci of the Law Offices of Ronald A. Marron served as co-lead class counsel.

3 22. On September 12, 2019, the Honorable Judge Jose E. Martinez granted final approval of
4 a nationwide TCPA settlement class in *Medina v. Enhanced Recovery Co., LLC*, No. 2:15-cv-14342-
5 JEM (S.D. Fla.), Dkt. No. 131, with my firm serving as co-lead class counsel. The settlement created a
6 \$1.45 million common fund.

7 23. On June 17, 2019, the Honorable Anthony J. Battaglia granted final approval of a
8 nationwide CLRA settlement case in *Littlejohn v. Ferrara Candy Co.*, No. 18-cv-0658-AJB-WVG
9 (S.D. Cal.), stating “Class Counsel has fully and competently prosecuted all causes of action, claims,
10 theories of liability, and remedies reasonably available to the Class Members.” Final Judgment &
11 Order at 5, *Littlejohn v. Ferrara Candy Co.*, No. 3:18-cv-00658-AJB-WVG (S.D. Cal. June 17, 2019),
12 Dkt. No. 47.

13 24. On October 19, 2018, the Honorable William T. Lawrence granted final approval of a
14 nationwide TCPA settlement case in *Simms v. ExactTarget, LLC*, No. 1-14-cv-00737-WTL-DLP (S.D.
15 Ind.), Dkt. No. 178, where the Law Offices of Ronald A. Marron served as class counsel. The
16 settlement created a \$6.25 million common fund.

17 25. On August 14, 2018, the Honorable Robert N. Scola, Jr. granted final approval of class
18 action settlement regarding false advertising claims in *Mollicone v. Universal Handicraft*, No. 1:17-cv-
19 21468-RNS (S.D. Fla.), in which the Law Offices of Ronald A. Marron served as class counsel. In his
20 preliminary approval order, Judge Scola stated that the Marron Firm is “experienced and competent in
21 the prosecution of complex class action litigation.” Order Prelim. Certifying Settlement Class, Granting
22 Prelim. Approval of Settlement, & Setting Final Fairness H’rg at 2, *Mollicone v. Universal Handicraft*,
23 No. 1:17-cv-21468-RNS (S.D. Fla. Apr. 3, 2018), Dkt. No. 120.

24 26. On June 29, 2018, in *Mason v. M3 Financial Services, Inc.*, No. 1:15-cv-04194 (N.D.
25 Ill.), the Honorable Andrea R. Wood granted final approval of a nationwide TCPA settlement which
26 provided a common fund in the amount of \$600,000. The Law Offices of Ronald A. Marron served as
co-lead class counsel.

27 27. On May 4, 2018, the Honorable Analisa Torres granted final approval of a false
28 advertising class settlement in *In re Tommie Copper Products Consumer Litigation*, No. 7:15-cv-

1 03183-AT-LMS (S.D.N.Y.), Dkt. No. 129. On January 4, 2016, the Honorable Analisa Torres
2 appointed the Marron firm as Interim Lead Class Counsel over the opposition and challenge of other
3 plaintiffs’ counsel, noting that the Marron firm’s “detailed” complaint was “more specifically pleaded,
4 . . . assert[ing] a more comprehensive set of theories . . . and [was] more factually developed.” *Potzner*
5 *v. Tommie Copper Inc.*, Nos. 15 CIV. 3183 (AT), 15 Civ. 6055 (AT), 2016 WL 304746, at *1
6 (S.D.N.Y. Jan. 4, 2016). Judge Torres also noted that Mr. Marron and his firm’s attorneys had
7 “substantial experience litigating complex consumer class actions, are familiar with the applicable law,
8 and have the resources necessary to represent the class.” *Id.*

9 28. On March 26, 2018, the Honorable Marilyn Huff granted final approval of a nationwide
10 TCPA class action settlement in *Gutierrez-Rodriguez v. R.M. Galicia, Inc.*, No. 16-CV-00182-H-BLM,
11 2018 WL 1470198, at *2 (S.D. Cal. Mar. 26, 2018). The Law Offices of Ronald A. Marron served as
12 class counsel.

13 29. On January 27, 2017, my firm obtained final approval of a TCPA class action against
14 *RBS Citizens, N.A. Sanders v. RBS Citizens, N.A.*, No. 13-cv-3136-BAS-RBB, 2017 WL 406165 (S.D.
15 Cal. Jan. 27, 2017). In granting final approval, the Honorable Cynthia Bashant found that “Class
16 Counsel [had] fairly and adequately represented the Class for purposes of entering into and
17 implementing the Settlement, and, thus, continues to appoint . . . Ronald A. Marron, Alexis M. Wood
18 and Kas L. Gallucci of the Law Offices of Ronald A. Marron as Class Counsel for the Settlement
19 Class.” *Id.* at *4.

20 30. In addition to the above cases and the present action, my firm has an in-depth
21 knowledge of other consumer cases including litigating over-the-counter (“OTC”) product cases,
22 including the FDCA’s history, principles, and regulations, and courts have recognized my firm’s ability
23 to litigate complex class actions. For example, in *Gallucci v. Boiron, Inc.*, No. 3:11-cv-02039- JAH-
24 NLS (S.D. Cal.), we drafted a complaint with five potential causes of action, including claims under the
25 CLRA, UCL, and FAL, with respect to OTC homeopathic drugs which concerning novel legal theories
26 in a specialized area of law. This action involved extensive motion practice, and my firm’s opposition
27 brief was so persuasive that defendants decided to withdraw their motion. My firm’s well-drafted
28 briefing, knowledge, and experience resulted in a \$5 million common fund and injunctive relief
settlement in favor of Gallucci against French homeopathic giant, Boiron, Inc. On April 25, 2012, the

1 Honorable John A. Houston granted preliminary approval, noting that:

2 During the pendency of the Litigation, Class Counsel conducted a extensive
3 examination and evaluation of the relevant facts and law to assess the merits of the
4 named plaintiffs’ and class claims to determine how best to serve the interests of
5 Plaintiffs and the Class. . . . Class Counsel conducted thorough review of the Food,
6 Drug and Cosmetic Act, its numerous changes over the years, and the Act’s
7 implementing regulations. Class Counsel have carefully considered the merits of
8 Plaintiffs’ claims, and the defenses raised by defendants.

9 Order Granting Prelim. Approval of Class Action Settlement at i, *Gallucci v. Boiron, Inc.*, No. 3:11-cv-
10 02039- JAH-NLS (S.D. Cal. Apr. 25, 2012), Dkt. No. 89.

11 Accordingly, Judge Houston appointed my firm as class counsel, finding that class counsel
12 “will fairly and adequately protect the interests of the Class . . . [and] are experienced and competent to
13 prosecute this matter on behalf of the Class.” Id. at iii-iv. The fairness hearing was held on October 1,
14 2012, and, on October 31, 2012, the court granted final approval. See *Gallucci v. Boiron, Inc.*, No.
15 11cv2039 JAH(NLS), 2012 WL 5359485 (S.D. Cal. Oct. 31, 2012).

16 31. Further, on June 26, 2015, the Honorable Maxine M. Chesney of the United States
17 District Court for the Northern District of California granted preliminary approval to a class action
18 settlement with injunctive relief for class wide claims of false representations regarding the defendant’s
19 weight loss teas. See Order Prelim. Approving Class Action Settlement, *Johnson v. Triple Leaf Tea*
20 *Inc.*, No. 3:14-cv-01570-MMC (N.D. Cal. June 26, 2015), Dkt. No. 53 (“Having considered the factors
21 set forth in Rule 23(g)(1) of the Federal Rules of Civil Procedures, the Court appoints Plaintiff’s
22 counsel, the Law offices of Ronald A. Marron APLC, to serve as Class Counsel.”).

23 32. On October 31, 2013, the Honorable Gonzalo P. Curiel of the United States District
24 Court for the Southern District of California granted preliminary approval to a class action settlement
25 of \$1 million and injunctive relief for class-wide claims of false and deceptive advertising of OTC
26 drugs, which was negotiated by my firm in *Mason v. Heel, Inc.*, No. 3:12-cv-03056-GPC-KSC (S.D.
27 Cal.), and, “[h]aving considered the factors set forth in Rule 23(g)(1) of the Federal Rules of Civil
28 Procedure,” appointed my firm as class counsel. Order Prelim. Approving Class Action Settlement at 5,
Mason v. Heel, Inc., No. 3:12-cv-03056-GPC-KSC (S.D. Cal. Oct. 31, 2015), Dkt. No. 27. Final

1 approval of this settlement was granted on March 13, 2014. *See Mason v. Heel, Inc.*, No. 3:12-CV-
2 03056-GPC, 2014 WL 1664271, at *1 (S.D. Cal. Mar. 13, 2014).

3 33. On October 23, 2013, the Honorable Michael M. Anello of the United States District
4 Court for the Southern District of California granted final approval to a \$1.2 million and injunctive
5 relief class action settlement concerning false and deceptive advertising of OTC drugs, which was
6 negotiated by my firm, in *Nigh v. Humphreys Pharmacal, Inc.*, No. 3:12-cv-02714-MMA-DHB (S.D.
7 Cal.), finding that “the Class was adequately represented by competent counsel.” Order Affirming
8 Tentative Ruling & Granting Mot. for Final Approval of Settlement at 14, *Nigh v. Humphreys*
9 *Pharmacal, Inc.*, No. 3:12-cv-02714-MMA-DHB (S.D. Cal. Oct. 23, 2013), Dkt. No. 30.

10 34. On March 13, 2012, my firm settled a case against manufacturers of OTC dietary
11 supplement products for \$900,000 in a common fund and injunctive relief settlement, styled *Burton v.*
12 *Ganeden Biotech, Inc.*, No. 3:11-cv-01471-W-NLS (S.D. Cal.). Burton alleged that defendants falsely
13 advertised their products as containing “clinically proven” proprietary bacteria that improved and
14 benefitted the digestive and immune health of individuals when, in fact, no clinical proof existed.
15 Before this settlement was finalized, my firm rejected defendants’ coupon settlement offer, because we
16 did not believe it constituted the best relief for the class members. Instead, we continued extensive and
17 lengthy rounds of negotiations with the defendants to obtain the best result for the class. These months-
18 long negotiations included back and forth exchange of approximately twenty versions of the settlement
19 agreement, multiple conference calls and e-mails. On March 14, 2012, the parties filed a Joint Motion
20 for Preliminary Approval of Class Action Settlement, Dkt. No. 38, which the court granted on April 16,
21 2012, Dkt. No. 42. After the fairness hearing in this case on August 21, 2012, Dkt. No. 48, Judge
22 Thomas J. Whelan granted final approval on October 4, 2012, Dkt. No. 52.

23 35. When my firm was appointed interim lead class counsel for a class of consumers in a
24 deceptive food labeling case in March of 2011, the Honorable Marilyn Huff recognized class counsel
25 “appears to be well qualified to represent the interest of the purported class and to manage this
26 litigation.” *Hohenberg v. Ferrero U.S.A., Inc.*, Nos. 11-CV-205 H (CAB), 11-CV-249 H (CAB), 2011
27 WL 13134161, at *2 (S.D. Cal. Mar. 22, 2011). Subsequently, when my firm obtained certification of
28 the proposed class, the court reaffirmed its finding that my firm is adequate to serve as class counsel.
See In re Ferrero Litig., 278 F.R.D. 552, 559 (S.D. Cal. 2011). Judge Huff gave final approval of a

1 settlement on July 9, 2012. Final Judgment & Order Approving Settlement, In re Ferrero Litig., No.
2 3:11-cv-00205-H-KSC (S.D. Cal. July 9, 2012), Dkt. No. 127.

3 36. On November 14, 2011 my firm obtained the certification of a nationwide class of
4 consumers who purchased Qunol CoQ10, a dietary supplement making misleading efficacy claims. *See*
5 *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524 (C.D. Cal. 2011). My firm then successfully
6 defeated the defendants' motion to decertify the class following the Ninth Circuit's decision in *Mazza*
7 *v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). *See Bruno v. Eckhart Corp.*, 280 F.R.D.
8 540 (C.D. Cal. 2012). The case then settled on the eve of trial, which was scheduled for October 2,
9 2012.

10 37. On June 14, 2011, the Honorable Richard Seeborg appointed my firm interim class
11 counsel, over a competing application from a former partner at the New York law firm Milberg Weiss
12 regarding a deceptive food labeling case. *See Chacanaca v. Quaker Oats Co.*, No. 10-0502 RS, 2011
13 WL 13141425, at *3 (N.D. Cal. June 14, 2011) (since restyled as *In re Quaker Oats Labeling Litig.*)
14 ("There is no question here that both the Weston/Marron counsel . . . have ample experience handling
15 class actions and complex litigation. It is also clear that both have particular familiarity with suits
16 involving issues of mislabeling in the food industry.").

17 38. I was appointed class counsel in *Peterman v. North American Co. for Life & Health*
18 *Ins.*, No. BC357194 (L.A. Cty. Super. Ct.), which was litigated for more than 4 years and achieved a
19 settlement of approximately \$60 million for consumers. In granting preliminary approval of the
20 settlement, the Honorable Carolyn B. Kuhl noted that "the excellent work that the plaintiffs' side has
21 done in this case has absolutely followed through to the settlement . . . The thought and detail that went
22 into the preparation of every aspect was very impressive to me."

23 39. I also served as class counsel in *Clark v. National Western Life Insurance Co.*, No.
24 BC321681 (L.A. Cty. Super. Ct.), a class action that, after being litigated for more than 6 years,
25 resulted in a settlement of approximately \$25 million for consumers.

26 40. In *Iorio v. Asset Marketing*, No. 3:05-cv-00633-JLS-CAB (S.D. Cal.), I was appointed
27 class counsel on August 29, 2006, Dkt. No. 121, following class certification, which was granted on
28 July 27, 2006 by the Honorable Irma E. Gonzalez, Order Granting Pls.' Class Certification, Dkt. No.
113. After nearly 6 years of intensive litigation, a settlement valued at \$110 million was reached in

1 Iorio and approved on March 3, 2011, by the Honorable Janis Sammartino. Final Order Approving
2 Class Action Settlement, Dkt. No. 480. Co-counsel and I successfully defended multiple motions
3 brought by defendant in the Southern District of California, including “challenges to the pleadings,
4 class certification, class decertification, summary judgment, . . . motion to modify the class definition,
5 motion to strike various remedies in the prayer for relief, and motion to decertify the Class’ punitive
6 damages claim,” plus three petitions to the Ninth Circuit, attempting to challenge the Rule 23(f) class
7 certification. *Id.* at 6:9-15, 7:18-22 (commenting that class counsel were “highly experienced trial
8 lawyers with specialized knowledge in insurance and annuity litigation, and complex class action
9 litigation generally” and “capable of properly assessing the risks, expenses, and duration of continued
10 litigation, including at trial and on appeal”). Judge Sammartino also noted “the complexity and subject
11 matter of this litigation, and the skill and diligence with which it has been prosecuted and defended,
12 and the quality of the result obtained for the Class.” *Id.* at 17:25-27.

13 41. Besides these cases, I have also represented plaintiffs in other complex cases including
14 Ponzi scheme-related litigation, shareholder derivative suits, and securities fraud cases. I have litigated
15 hundreds of lawsuits and arbitrations against major corporations, including approximately thirty (30)
16 cases against large corporations such as Shell Oil, Citigroup, Wells Fargo, Morgan Stanley, and Merrill
17 Lynch, which have gone through trial or arbitration. Many more have settled on the eve of trial,
18 although I was fully prepared to proceed to trial.

19 I declare under penalty of perjury of the laws of California that the foregoing is true and correct.
20 Executed on this 9th day of October, 2020 at San Diego, California.

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23 Ronald A. Marron
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EXHIBIT 1

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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN DIEGO
10

11 DANIEL MCSWAIN, TRUSTEE OF THE
12 DANIEL S. MCSWAIN TRUST DATED
13 JULY 17, 2012, on behalf of the trust and all
others similarly situated, and the general
public,

14 Plaintiff,

15 v.

16 AXOS BANK, fka BANK OF THE
17 INTERNET USA; and DOES 1-10,
18 INCLUSIVE,

19 Defendant.
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Case No. 37-2019-00015784-CU-BC-CTL

**CLASS LITIGATION SETTLEMENT
AGREEMENT**

1 This Class Litigation Settlement Agreement (the “Settlement Agreement” or “Agreement”) is
2 made and entered into by and between Plaintiff Daniel McSwain, Trustee of the Daniel S. McSwain
3 Trust Dated July 17, 2012 (“Plaintiff”), individually and on behalf of the settlement class that he purports
4 to represent, counsel for Plaintiff, Law Offices of Ronald A. Marron, APLC and the Law Office of
5 Michael G. Olinik (“Class Counsel”), and Defendant Axos Bank, formerly known as BofI Federal Bank
6 (“Axos” or “Defendant”). Plaintiff and Defendant are referred to hereinafter as the “Settling Parties.”
7 This settlement is intended to fully, finally, and forever resolve, discharge, release, and settle the lawsuit
8 captioned *Daniel McSwain, Trustee of the Daniel S. McSwain Trust Dated July 17, 2012 v. Axos Bank,*
9 *fka Bank of the Internet, USA*, Case No. 37-2019-00015784-CU-BC-CTL (the “Litigation”), upon and
10 subject to the terms and conditions herein.

11 **1. Recitals**

12
13 1.1 On March 25, 2019, Plaintiff filed a Class Action Complaint in the Superior Court of
14 California for the County of San Diego (the “Court”), captioned *Daniel McSwain, Trustee of the*
15 *Daniel S. McSwain Trust Dated July 17, 2012 v. Axos Bank, fka Bank of the Internet, USA*, Case No.
16 37-2019-00015784-CU-BC-CTL (Register of Actions (“ROA”) # 1).

17 1.2 Plaintiff’s Complaint alleged that Defendant violated section 2954.8(a) of the California
18 Civil Code because it failed to pay borrowers a minimum of 2% simple interest per annum on the
19 amounts in its borrowers’ escrow accounts for loans secured by one to four family residential
20 properties located in California. Plaintiff alleged causes of action for violations of section 17200 of
21 California’s Business & Professions Code (the “UCL”) and breach of contract. (ROA # 1).

22 1.3 On May 15, 2019, Defendant filed a Demurrer to Plaintiff’s Complaint arguing, *inter*
23 *alia*, that Plaintiff failed to comply with the Notice and Cure Provision in his Deed of Trust before
24 filing suit and that Plaintiff’s claims are preempted by the federal Homeowners’ Loan Act (“HOLA”),
25 12 U.S.C. §§ 1461, *et seq.* (ROA # 13).

1 1.4 On June 3, 2019, Plaintiff filed a First Amended Complaint (“FAC”) adding additional
2 allegations concerning Plaintiff’s purported compliance with the Notice and Cure Provision in his
3 Deed of Trust. (ROA # 17).

4 1.5 On June 14, 2019, the Court overruled Defendant’s Demurrer to the Complaint as moot
5 in light of Plaintiff’s filing of the FAC. (ROA # 20).

6 1.6 On July 19, 2019, Defendant filed a Demurrer to Plaintiff’s FAC arguing, *inter alia*,
7 that Plaintiff failed to comply with the Notice and Cure Provision in his Deed of Trust before filing suit
8 and that Plaintiff’s claims are preempted by HOLA. (ROA # 22).

9 1.7 On August 23, 2019, the Court entered an Order overruling Defendant’s Demurrer.
10 (ROA # 35).

11 1.8 On May 1, 2019, Plaintiff served his first set of written discovery on Defendant
12 consisting of form interrogatories, special interrogatories, requests for production of documents, and
13 requests for admission.

14 1.9 On August 15, 2019, Defendant served responses to Plaintiff’s first set of written
15 discovery. Defendant also produced documents relating to the aggregate monthly escrow account
16 balances for all loans held or serviced by Axos and secured by one to four family residential properties
17 located in California, which allowed Plaintiff to estimate the total damages that would be available if
18 Plaintiff were to prevail at trial.

19 1.10 Following the Court’s ruling on Defendant’s Demurrer to the FAC, the Settling Parties
20 began engaging in settlement negotiations that resulted in a binding Memorandum of Understanding
21 (“MOU”) that set forth the material terms of the settlement that form the basis for this Settlement
22 Agreement.

23 1.11 On December 12, 2019, the Settling Parties also participated in a half day mediation
24 before the Hon. Leo S. Papas (Ret.) of Judicate West to discuss and negotiate additional terms of the
25 settlement. Following the Settling Parties’ mediation, the Settling Parties executed an Addendum to
26 their MOU that sets forth additional terms of the settlement that form the basis for this Settlement
27 Agreement.

1 1.12 The Settling Parties and their counsel have extensively investigated the facts and issues
2 raised in the Litigation, and have sufficient information to evaluate their settlement and this Settlement
3 Agreement.

4 1.13 Defendant denies the allegations in the Litigation and further denies that it is liable to
5 Plaintiff or any Settlement Class Member (as defined in Section 2.26 below) in connection with the
6 allegations and claims asserted in the Litigation. Nonetheless, to avoid the substantial burden, risk,
7 and distraction that arises from continuation of the Litigation, and to fully and finally resolve the
8 claims asserted or that could have been asserted against it therein, Defendant has agreed to the terms of
9 this Settlement Agreement. Defendant continues to maintain that it has complied with applicable
10 California laws and that Section 2954.8(a) of the California Civil Code is preempted by HOLA.

11 1.14 Counsel for the Settling Parties engaged in arm's-length negotiations to achieve
12 settlement of the Litigation. After extensive confidential settlement negotiations, the Settling Parties
13 reached an agreement that forms the basis of this Settlement Agreement. The Settling Parties did not
14 discuss attorneys' fees, costs, or any potential incentive award to Plaintiff until they first agreed on the
15 substantive terms of their settlement.

16 1.15 Class Counsel analyzed and evaluated the merits of Defendant's defenses, the risks of
17 continued litigation, and the benefits this settlement would confer on Plaintiff and the Settlement Class,
18 as defined below. Among the risks of continued litigation considered by Class Counsel are the
19 possibilities the Court will not certify a class, Plaintiff will be unable to prove liability, damages, or
20 entitlement to injunctive relief at trial on a class-wide or individual basis, and, even if proven,
21 Defendant could challenge the determinations on appeal.

22 1.16 Based on their experience and knowledge of the strength of the claims and defenses in
23 the Litigation, counsel for the Settling Parties concluded and are satisfied that the terms and conditions
24 of this Settlement Agreement are fair, reasonable, adequate, and in the best interest of the Settling
25 Parties and the Settlement Class Members.

26 1.17 Nothing contained in this Settlement Agreement shall be used or construed as an
27 admission of liability and this Settlement Agreement shall not be offered or received in evidence in any
28

1 action or proceeding in any court or other forum as an admission or concession of liability or
2 wrongdoing of any nature or for any other purpose other than to enforce the terms of this Settlement
3 Agreement.

4 1.18 **NOW, THEREFORE**, pursuant to the terms set forth herein and subject to the Court's
5 approval of this Settlement Agreement, the Settling Parties hereby stipulate and agree, including on
6 behalf of the Settlement Class, as defined below, fully and finally to settle, compromise, and resolve
7 the claims that were or could have been asserted in the Litigation.

8 **2. Definitions**

9
10 Capitalized terms in this Settlement Agreement are defined by the terms set forth in this Section.
11 If and to the extent Definitions in this Section conflict with other terms set forth in this Settlement
12 Agreement, the Definitions in this Section shall govern.

13 2.1 "Class Counsel" means the Law Offices of Ronald A. Marron, APLC and the Law
14 Office of Michael G. Olinik.

15 2.2 "Class Counsel's Fees" means an award of Plaintiff's attorneys' fees, costs, and
16 expenses to be approved by the Court of up to \$200,000.00.

17 2.3 "Class Period" means March 25, 2015 until the date of preliminary approval.

18 2.4 "Class Released Claims" means the claims to be released by the Settlement Class
19 Members as set forth in Section 10.2 of this Settlement Agreement.

20 2.5 "Court" shall mean the Superior Court of the State of California, for the County of San
21 Diego.

22 2.6 "Effective Date" means the date on which the Final Judgment (defined below) in the
23 Litigation becomes "Final." As used in this Settlement Agreement, "Final" means three business days
24 after all of the following conditions have been satisfied:

- 25 (1) the Final Judgment is entered; and
26 (2) if reconsideration and/or appellate review is not sought from the Final Judgment, the
27 expiration of time for filing or noticing any motion for reconsideration, appeal, petition, and/or writ; or
28

(3) if reconsideration and/or appellate review is sought from the Final Judgment: (a) the date on which the Final Judgment is affirmed and is no longer subject to judicial review, or (b) the date on which the motion for reconsideration, appeal, petition, or writ is dismissed or denied and the Final Judgment is no longer subject to judicial review.

2.7 “Final Approval” means: (a) issuance of a Court order granting final approval of the settlement and this Settlement Agreement as binding on the Settling Parties and the Settlement Class; (b) the Court’s determination that the Settlement Agreement and Preliminary Approval Order are fair, adequate, reasonable, and binding on the Settlement Class; (c) determination that the relief provided in this Settlement Agreement should be disseminated to the Settlement Class; (d) effectuating the releases set forth in Section 10 of this Settlement Agreement; (e) entering Final Judgment in the Litigation; and (f) retaining continuing jurisdiction over the interpretation, implementation, and enforcement of the Settlement.

2.8 “Final Approval Hearing” means the hearing to be held by the Court to adjudicate whether:

(1) the terms of this Settlement Agreement are fair, reasonable, and adequate to the Settlement Class and should be approved;

(2) the Notice constitutes due, adequate, and sufficient notice to all persons entitled to notice of the Litigation and meets all applicable requirements of the California Rules of Court, the United States Constitution (including the Due Process Clause), rules of this Court, and any other applicable law, and constitutes notice as directed by the Court in the Preliminary Approval Order to apprise the Settlement Class of the (a) pendency of the Litigation; (b) nature and terms of the Settlement; (c) right of Settlement Class Members to object to the Settlement; and (d) right of Settlement Class Members to appear at the Final Approval Hearing;

(3) a Final Judgment should be entered dismissing the Litigation with prejudice, as contemplated by this Settlement Agreement;

(4) the Court should approve the award of Class Counsel’s Fees to Class Counsel; and

(5) any other matter that the Court may deem appropriate.

1 The Settling Parties anticipate the Final Approval Hearing will be scheduled approximately one hundred
2 and twenty (120) days after the Notice to the Settlement Class.

3 2.9 “Final Judgment” means the Final Judgment to be entered by the Court, which, among
4 other things, fully and finally approves this Settlement Agreement and dismisses Defendant from the
5 Litigation with prejudice.

6 2.10 “Gross Settlement Fund” means the non-reversionary amount of \$500,000 (Five
7 Hundred Thousand Dollars 00/100) that Defendant shall pay in settlement of the Litigation. From the
8 Gross Settlement Fund, the following will be deducted upon approval by the Court (1) attorneys’ fees
9 of up to the amount approved by the Court and other costs associated with the settlement no greater
10 than \$200,000 as set forth in Section 8.1 below; and (2) an Incentive Award in the amount of up to
11 \$7,500 to Plaintiff as set forth in section 8.3 below.

12 2.11 “Incentive Award” means the award that will be sought by application and, if approved
13 by the Court, will be payable to Plaintiff from the Settlement Fund for his role as the class
14 representative and the responsibility and work attendant to that role.

15 2.12 “Net Settlement Fund” means the amount of money that will remain after the following
16 are deducted from the Gross Settlement Fund upon approval by the Court (1) attorneys’ fees of up to
17 the amount approved by the Court and other costs associated with the settlement no greater than
18 \$200,000 as set forth in Section 8.1 below; and (2) an Incentive Award in the amount of up to \$7,500
19 to Plaintiff as set forth in section 8.3 below. The Settling Parties estimate that the Net Settlement Fund
20 will total approximately \$292,500 and the Net Settlement Fund will be used to make Settlement
21 Payments to Settlement Class Members as described in Section 7.2 of this Settlement Agreement.

22 2.13 “Notice” means the notices to be sent via e-mail, direct U.S. postal mail, and/or made
23 available online, in a form substantially similar to the Notice attached hereto as **Exhibit A**.

24 2.14 “Notice Date” means the date Notice is communicated to Settlement Class Members
25 pursuant to Section 6 of this Settlement Agreement.

26 2.15 “Notice Plan” means the proposal for dissemination of Notice to members of the
27 Settlement Class as described in Section 6 of this Agreement.

1 2.16 “Objection” means the written communication that must be filed with the Court and
2 sent to counsel for the Settling Parties and postmarked on or before the Objection/Exclusion Deadline
3 by a Settlement Class member who wishes to object to the terms of the Settlement as detailed in
4 Section 5.2 below.

5 2.17 “Objection/Exclusion Deadline” is the date by which an Objection or Request for
6 Exclusion by a Settlement Class member must be postmarked, as ordered by the Court in its
7 Preliminary Approval Order referred to in Section 4 of this Settlement Agreement.

8 2.18 “Plaintiff” means class representative and Plaintiff Daniel McSwain, Trustee of the
9 Daniel S. McSwain Trust Dated July 17, 2012.

10 2.19 “Plaintiff’s Released Claims” means the claims to be released by Daniel McSwain as
11 set forth in Section 10.1 of this Settlement Agreement.

12 2.20 “Preliminary Approval Order” means the order to be entered by the Court, substantially
13 in the form attached hereto as **Exhibit B** which preliminarily approves the Settlement, conditionally
14 certifies the Settlement Class for the purposes of this Settlement only, sets dates for the Final Approval
15 Hearing, Objection/Exclusion Deadline, and Notice Date, and approves the Notice Plan.

16 2.21 “Released Claims” means the claims released in accordance with Section 10 of this
17 Settlement Agreement, including the Plaintiff’s Released Claims and the Class Released Claims.

18 2.22 “Released Parties” means Defendant, and each of its past, present and future agents,
19 employees, servants, officers, directors, partners, trustees, representatives, shareholders, stockholders,
20 attorneys, parents, subsidiaries, equity sponsors, related companies/corporations and/or partnerships,
21 divisions, assigns, predecessors, successors, insurers, consultants, joint venturers, joint employers,
22 affiliates, alter-egos, and affiliated organizations, and all of its respective past, present and future
23 employees, directors, officers, agents, attorneys, stockholders, fiduciaries, parents, subsidiaries, and
24 assigns.

25 2.23 “Request for Exclusion” means the written communication that must be sent to Class
26 Counsel and postmarked on or before the Objection/Exclusion Deadline by a Settlement Class member
27
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who wishes to be excluded from the Settlement Class as detailed in Section 5.1 of this Settlement Agreement.

2.24 “Settlement” or “Settlement Agreement” means this Class Action Settlement Agreement, including all exhibits thereto.

2.25 “Settlement Class” consists of all persons who obtained a loan from Defendant and/or had a loan serviced by Defendant at any time within the Class Period which was secured by a one to four family residential property located in the State of California and had an escrow or impound account on such loan that received money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, and which at any time within the Class Period had a positive balance in such account. The Settlement Class specifically excludes (1) any judicial officer presiding over the Litigation, (2) Defendant and Released Parties, and each of their current or former officers, directors, and employees; (2) legal representatives, successors, or assigns of any such excluded person, and (4) any person who properly executes and sends a timely Request for Exclusion.

2.26 “Settlement Class Members” means all persons who are members of the Settlement Class.

2.27 “Settlement Payment” means the amount to be paid to a Settlement Class Member from the Net Settlement Fund as described in Section 7.2 of this Settlement Agreement.

2.28 “Settlement Website” means an internet website created and maintained by Defendant to provide the Settlement Class Members with information relating to the Settlement, including links to material filings in the Litigation and this Settlement Agreement. The URL of the Settlement Website shall be provided in the Notice.

3. Stipulation to Class Certification

3.1 The Settling Parties hereby stipulate, for purposes of this Settlement only, that the requirements of California Code of Civil Procedure Section 382 are satisfied and, subject to Court approval, the Settlement Class shall be certified for settlement purposes pursuant to the terms and

conditions set forth in this Settlement Agreement. The Settling Parties stipulate and agree to conditional certification of the Settlement Class for purposes of this Settlement only. Should the Court not grant Final Approval of the Settlement, for whatever reason, this stipulation to class certification shall become null and void.

3.2 Neither this Settlement Agreement nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of this Settlement Agreement shall be construed as, or deemed evidence of an admission or concession by Defendant that a class should or could have been certified in the Litigation for any purpose other than settlement. If the Court fails to grant Final Approval of the Settlement, the Settling Parties agree and stipulate that Defendant shall and does retain all of the rights, defenses, and arguments it had preceding execution of this Settlement Agreement, and nothing in this Settlement Agreement shall or can be used as evidence or argument by Plaintiff or putative Settlement Class Members concerning any aspect of the Litigation, including whether the alleged claims properly can be maintained as a class action.

4. Preliminary Approval

4.1 On or before June 26, 2020, Plaintiff shall apply to the Court for entry of a Preliminary Approval Order substantially in the form attached hereto as **Exhibit B**. The Preliminary Approval Order shall include provisions that:

4.1.1 Preliminarily approve this Settlement as falling within the range of reasonableness meriting final approval;

4.1.2 Direct Notice to the Settlement Class in the manner specified in this Settlement Agreement as set forth in Section 6 below;

4.1.3 Preliminarily determine that Plaintiff is a Settlement Class Member and, for purposes of the Settlement Agreement, satisfies the requirements of California Code of Civil Procedure Section 382 to appoint Plaintiff as the class representative of the Settlement Class;

4.1.4 Conditionally certify the Settlement Class under California Code of Civil Procedure Section 382 for purposes of this Settlement only;

1 4.1.5 Appoint the Law Offices of Ronald A. Marron, APLC and the Law Office of
2 Michael G. Olinick as Class Counsel;

3 4.1.6 Schedule the Final Approval Hearing;

4 4.1.7 Set a briefing schedule for a Motion for Final Approval of the Settlement;

5 4.1.8 Establish the Notice Date, which direct Defendant to cause Notice to be
6 disseminated in the manner set forth in this Settlement Agreement within thirty (30) days after entry of
7 the Preliminary Approval Order;

8 4.1.9 Determine that the Notice to be sent to the Settlement Class: (a) meets the
9 requirements of California Law and the Due Process Clause of the United States Constitution; (b) is
10 the best practicable notice under the circumstances; and (c) is reasonably calculated to apprise
11 Settlement Class members of the pendency of the Litigation and their right to object and opt out of or
12 participate in the Settlement within the timeframe provided herein;

13 4.1.10 Require Settlement Class Members who wish to opt out of the Settlement to
14 submit written Requests for Exclusion timely on or before the Objection/Exclusion Deadline to Class
15 Counsel, as specified in Section 5 of this Settlement Agreement;

16 4.1.11 Require Settlement Class Members who wish to object to the fairness,
17 reasonableness, or adequacy of the Settlement, Class Counsel's Fees, or Incentive Awards to file with
18 the Court and deliver to Class Counsel and Defendant's counsel by the Objection/Exclusion Deadline,
19 a statement of his or her Objection, as well as the specific reason for such Objection, including legal
20 support the Settlement Class Member wishes to bring to the Court's attention, and evidence the
21 Settlement Class Member wishes to introduce in support of his or her Objection;

22 4.1.12 Provide that any Settlement Class Member who does not timely submit a written
23 Request for Exclusion or Objection will be bound by all proceedings, orders, and judgments in this
24 Litigation; and

25 4.1.13 Provide the Objection/Exclusion Deadline be a date that is thirty (30) days prior
26 to the Final Approval Hearing.

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1 **5. Requests for Exclusion and Objections to the Settlement**

2 5.1 Any Settlement Class Member who does not wish to participate in the Settlement must
3 submit a Request for Exclusion to Class Counsel stating his or her intention to be “excluded” from the
4 Settlement. The Request for Exclusion must contain the Settlement Class Member’s name, current
5 address, and telephone number. The Request for Exclusion must be personally signed by the
6 Settlement Class Member and dated, mailed, and postmarked to Class Counsel at the following address
7 on or before the Objection/Exclusion Deadline:

8 **LAW OFFICES OF RONALD A. MARRON, APLC**

9 ATTN: Axos Settlement

10 651 Arroyo Drive

11 San Diego, California 92103

12 Multiple, so-called “mass” or “class,” opt-outs shall not be allowed. The date of the postmark on
13 the return mailing envelope shall be the exclusive means used to determine whether a Request for
14 Exclusion has been timely submitted. Any Settlement Class Member whose request to be excluded from
15 the Settlement Class is approved by the Court will not be bound by the Settlement and will have no right
16 to object, appeal, or comment thereon.

17 5.2 Any Settlement Class Member, on his or her own, or through an attorney hired at his or
18 her own expense, may object to the terms of the Settlement, Class Counsel’s application for an award
19 of Class Counsel’s Fees, or the Incentive Award. Any such Objection must be in writing and include
20 the contents described in Paragraph 5.3 below and must be filed with the Court and sent to counsel for
21 the Settling Parties as set forth below via U.S. Mail on or before the Objection/Exclusion Deadline or
22 as the Court may otherwise direct. Any Objection that is not properly or timely raised is waived. All
23 Objections to the Settlement must be sent to each of the following addresses:

24 **LAW OFFICES OF RONALD A. MARRON, APLC**

25 ATTN: Axos Settlement

26 651 Arroyo Drive

27 San Diego, California 92103

1
2 **SHEPPARD, MULLIN, RICHTER & HAMPTON LLP**

3 ATTN: Alejandro E. Moreno

4 RE: Axos Settlement

5 501 West Broadway, 19th Floor

6 San Diego, California 92101

7 5.3 To be effective, Objections must be in writing and accompanied by documents or other
8 evidence, as well as any factual or legal argument the objecting Settlement Class Member intends to
9 rely upon in making his or her Objection. All Objections must include (a) a reference, in its first
10 sentence, to the Litigation, *McSwain v. Axos Bank*, Case No. 37-2019-00015784-CU-BC-CTL; (b) the
11 objector's full, legal name, residential address, telephone number, and email address (and the
12 objector's lawyer's name, business address, telephone number, and email address if objecting through
13 counsel); (c) a statement describing the objector's membership in the Settlement Class, including a
14 verification under oath as to the objector's escrow account number(s); (d) a written statement of all
15 grounds for the Objection, accompanied by any legal support for such Objection; (e) copies of any
16 papers, briefs, or other documents upon which the Objection is based; (f) a list of all persons who will
17 be called to testify in support of the Objection; (g) a statement of whether the objector intends to
18 appear at the Final Approval Hearing (note: if the objector intends to appear at the Final Approval
19 Hearing through counsel, the Objection must also state the identity of all attorneys representing the
20 objector who will appear at the Final Approval Hearing); (h) a list of the exhibits that the objector may
21 offer during the Final Approval Hearing, along with copies of such exhibits; and (i) the objector's
22 signature. In addition, Settlement Class Members, if applicable, must include with their Objection (a)
23 the identity of all counsel who represent the objector, including former or current counsel who may be
24 entitled to compensation for any reason related to the objection; and (b) a detailed list of any other
25 objections submitted by the Settlement Class Member, or his/her counsel, to any class actions
26 submitted in any court, whether state or federal, in the United States in the previous five (5) years.
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5.4 Any Settlement Class Member who fails to file and serve a written Objection timely, setting forth all of the information required by this Section shall be precluded from objecting to the Settlement and foreclosed from seeking any review of the Settlement or the terms of the Settlement Agreement by any means, including, but not limited to, through an appeal.

5.5 Either Party may request that the Court, within its discretion, exercise its right to deem any Objection frivolous and award appropriate costs and fees to any or both of the Settling Parties opposing such Objection(s).

5.6 Any Settlement Class Member who fails to timely submit a Request for Exclusion or Objection as provided in this Settlement Agreement shall be bound by all subsequent proceedings, orders, and Final Judgment in the Litigation, even if he or she has pending, or subsequently initiates, any litigation, arbitration, or other proceeding against Defendant or Released Parties relating to the Released Claims.

6. Notice to Settlement Class Members

6.1 The Notice shall:

6.1.1 Inform the Settlement Class that if they do not timely exclude themselves from the Settlement Class or object to the Settlement they may be eligible to receive the relief provided by the proposed Settlement Agreement;

6.1.2 Contain a short, plain statement of the background of the Litigation and the proposed Settlement;

6.1.3 Describe the proposed relief outlined in this Settlement Agreement;

6.1.4 Explain the impact the proposed Settlement will have on any existing or future litigation, arbitration, or other proceeding;

6.1.5 State that any relief to Settlement Class Members is contingent upon the Court's granting Final Approval of the Settlement; and

6.1.6 Disclose Class Counsel will seek an award of Class Counsel's Fees from the Settlement Fund.

6.2 Notice to the Settlement Class Members. Within thirty (30) days after entry of the Preliminary Approval Order, or on the date established by the Court in the Preliminary Approval Order, Defendant shall effect notice as set forth below:

6.2.1 Direct Notice. On the Notice Date, Defendant will cause the Notice, in the form attached hereto as **Exhibit A**, to be sent to all Settlement Class Members via electronic mail. If Defendant does not have a valid electronic mail address for Settlement Class Members, or if Defendant receives a “bounce-back” from a Settlement Class Member’s electronic mail address, then Defendant shall cause the Notice to be sent via U.S. Mail. If Defendant does not have a valid electronic mail address or a valid postal address for any Settlement Class Members, then Defendant shall use reasonable means to identify a valid postal address for the Settlement Class Members through use of skip tracing or otherwise.

6.2.2 Settlement Website. On or before the Notice Date, Defendant shall establish the Settlement Website, from which Settlement Class members may download or print the Notice, a complete copy of this Settlement Agreement, the Preliminary Approval Order, and material filings and Orders in the Litigation. The Settlement Website shall include the deadlines for submitting Requests for Exclusion from the Settlement Class, Objections, the date of the Final Approval Hearing, and other information pertaining to the Settlement. Defendant shall establish the Settlement Website using a website name to be mutually agreed upon by the Settling Parties. The Website shall be operative no later than the Notice Date and shall be accessible for a period of not fewer than sixty (60) days following the Effective Date. Following the expiration of sixty (60) days after the Effective Date, Defendant can choose to discontinue the operation of the Settlement Website.

6.3 Defendant shall pay for all costs associated with providing Notice to the Settlement Class and administering the Settlement separate and apart from the Gross Settlement Fund.

6.4 Declaration of Compliance and Class Counsel’s Audit Rights. Within twenty (20) calendar days after the Notice Date, Defendant shall provide Class Counsel with a declaration attesting to completion of the notice process set forth in this Section. Subject to agreement between the Settling Parties regarding measures sufficient to protect the confidential personal financial information of

Defendant's customers, Class Counsel shall have the right to audit and monitor Defendant's implementation of the notice process set forth in Section 6.

7. Settlement Consideration

7.1 Class Benefits. Class Counsel and Plaintiff believe the Settlement confers substantial benefits upon the Settlement Class, as identified below, particularly as weighed against the risks associated with the inherent uncertain nature of a litigated outcome; the complex nature of the Litigation in which Class Counsel have reviewed internal and confidential documents; the difficulty and complexity of calculating actual economic harm, if any, allegedly attributable to Defendant's conduct; and the length and expense of continued proceedings through additional fact depositions, expert depositions, third-party document productions and depositions, class certification and summary judgment briefing, trial, and appeals. Based on their evaluation of such factors, Class Counsel and Plaintiff have determined the Settlement, based on the terms set forth herein, is in the best interests of the Settlement Class.

7.2 Monetary Relief. Within thirty (30) days of the entry of the Final Approval Order by the Court, Defendant shall pay a non-reversionary amount of \$500,000 (Five Hundred Thousand Dollars 00/100) in settlement of the Litigation (the "Gross Settlement Fund"). From the Gross Settlement Fund, the following will be deducted upon approval by the Court (1) attorneys' fees of up to the amount approved by the Court and other costs associated with the settlement up to \$200,000 as set forth in Section 8.1 below; and (2) an Incentive Award in the amount of up to \$7,500 to Plaintiff as set forth in Section 8.3 below. The remainder (the "Net Settlement Fund"), estimated to be approximately \$292,500, will be paid out to Settlement Class Members as follows:

7.2.1 Each Settlement Class Member who held an escrow account with Defendant for less than one (1) year during the Class Period will receive \$25.

7.2.2 Each Settlement Class Member who held an escrow account with Defendant for at least one (1) year but less than two (2) years during the Class Period will receive \$50.

1 7.2.3 Each Settlement Class Member who held an escrow account with Defendant for
2 at least two (2) years but less than three (3) years during the Class Period will receive \$75.

3 7.2.4 Each Settlement Class Member who held an escrow account with Defendant for
4 at least three (3) years but less than four (4) years during the Class Period will receive \$100.

5 7.2.5 Each Settlement Class Member who held an escrow account with Defendant for
6 four (4) or more years during the Class Period will receive \$125.

7 7.2.6 If the Net Settlement Fund is not exhausted, then each payment to Settlement
8 Class Members will be proportionately increased pro rata. If the total amount to be paid to Settlement
9 Class Members pursuant to the formula set forth in Sections 7.2.1 through 7.2.5 exceeds the Net
10 Settlement Amount, then each payment to Settlement Class Members will be proportionately
11 decreased pro rata. If any amounts remain in the Net Settlement Fund following the pro rata
12 distribution to settlement class members described in this paragraph, then the remainder shall be
13 awarded cy pres to Public Citizen for work by Public Citizen whose benefit will be intended to include
14 California consumers (or some other non-profit, public benefit corporation nominated by Class
15 Counsel and approved by the Court).

16 7.2.7 Plaintiff and Class Counsel acknowledge that the Gross Settlement Fund is
17 based upon the aggregate escrow balances provided to Class Counsel on June 27, 2019, which reflect
18 the total escrow monthly balances from March 31, 2015 through March 31, 2019. If the Final Approval
19 Order is entered by the Court, Defendant shall change its policy for the operation of its escrow
20 accounts for loans secured by one to four family residential properties located in California as
21 described in Section 7.3 below.

22 7.2.8 Defendant shall provide the payments to Settlement Class Members described in
23 Sections 7.2.1 through 7.2.6 above within thirty (30) days of the Effective Date of the settlement by
24 depositing the settlement payments directly into the escrow account(s) of each Settlement Class
25 Member. If a Settlement Class Member no longer holds an escrow account with Defendant, then
26 Defendant shall provide the settlement payment via check to the Settlement Class Member's postal
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address on record with Defendant. Any checks returned to Defendant unpaid will be distributed to Public Citizen pursuant to the provisions of Section 7.2.6 above.

7.3 Non-Monetary Relief. Within thirty (30) days of the Court's Final Approval Order, Defendant shall begin paying at least 2% simple interest per annum on the escrow accounts that have a positive balance for loans secured by one to four family residential properties located in California. However, in accordance with California Civil Code Section 2954.8, such interest shall be credited to borrower's account annually or upon termination of such account, whichever is earlier. Notwithstanding the foregoing, Defendant shall retain the right to revisit its policy of paying interest (including whether to pay interest and the amounts of such interest payments) on escrow accounts for loans secured by one to four family residential properties located in California at any time in accordance with changes in any applicable legal obligations of Defendant.

7.4 Defendant agrees to provide a declaration or another form of evidence demonstrating the monetary value associated with its change in policy to begin paying at least 2% simple interest per annum on the escrow accounts for loans secured by one to four family residential properties located in California.

7.5 Upon execution of this Settlement Agreement, Daniel McSwain shall be free to refinance his property loan currently held by Defendant.

8. Award of Fees and Expenses to Class Counsel and Incentive Award to Plaintiff

8.1 An award of Class Counsel's Fees shall be made from the Gross Settlement Fund to Class Counsel. Class Counsel may make an application for an award of Class Counsel's Fees in the Litigation not to exceed \$200,000. If this Court approves Class Counsel's Fees in an amount lower than \$200,000, then the difference shall become part of the Net Settlement Fund. Subject to the terms and conditions of this Settlement Agreement and any order of the Court, Class Counsel's Fees shall be paid by Defendant within ten (10) days after the Final Approval Order, notwithstanding an appeal. Should the Final Judgment approving the Settlement be reversed on appeal, Class Counsel shall repay Class Counsel's Fees to Defendant within ten (10) days of the order of reversal on appeal. Should

1 Class Counsel's Fees be reduced on appeal, Class Counsel shall repay into the Net Settlement Fund an
2 amount equal to the reduction ordered by the appellate court within ten (10) days of the order of
3 reversal on appeal.

4 8.2 Class Counsel shall have the sole and absolute discretion to allocate and distribute Class
5 Counsel's Fees among Plaintiff's Counsel and any other attorney for Plaintiff.

6 8.3 Class Counsel will ask the Court for an Incentive Award from the Gross Settlement
7 Fund to Plaintiff Daniel McSwain in the amount of up to \$7,500. Any Incentive Award approved by
8 the Court shall be paid from the Settlement Fund within ten (10) days after the Effective Date. If this
9 Court approves the Incentive Award in an amount lower than \$7,500, then the difference shall become
10 part of the Net Settlement Fund. Should the Final Judgment approving the Settlement be reversed on
11 appeal, Plaintiff shall immediately repay the Incentive Award to Defendant. Should the Incentive
12 Award be reduced on appeal, Plaintiff shall repay into the Net Settlement Fund an amount equal to the
13 reduction ordered by the appellate court within ten (10) days of the order of reversal on appeal.
14 Defendant makes no representations regarding the tax effect, if any, of the Incentive Award on
15 Plaintiff and is not responsible for payment of any such taxes.

16 **9. Conditions of Settlement, Effect of Disapproval, Cancellation, or Termination**

17 9.1 In the event this Settlement Agreement is not approved by the Court or the Settlement
18 set forth herein is terminated or fails to become effective in accordance with its terms, the Settling
19 Parties shall be restored to their respective pre-settlement positions in the Litigation, including with
20 regard to any agreements concerning tolling and similar agreements, and this entire Settlement
21 Agreement shall become null and void. The class certification agreed to in this Settlement Agreement
22 shall be null and void and such class shall be decertified, without prejudice to Plaintiff's right to
23 petition the Court for class certification via a motion for class certification..

24 9.2 Defendant's Option to Cancel Settlement. If ten percent (10%) or more of the total
25 number of Settlement Class Members opt-out of the settlement of this Litigation as provided in Section
26 5.1 above, Defendant shall, at its sole and absolute discretion, have the option of cancelling each of the
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1 following: (i) this Settlement Agreement; (ii) the Memorandum of Understanding; and/or (iii) the
2 addendum to the Memorandum of Understanding. Should Defendant exercise its option to cancel the
3 aforementioned agreements, the class certification agreed to in those agreements shall be null and void
4 and such class shall be decertified, without prejudice to Plaintiff's right to petition the Court for class
5 certification via a motion for class certification.

6 9.3 The Settling Parties and their counsel agree to cooperate fully with one another and to
7 use their best efforts to effectuate the Settlement, including, without limitation, in seeking the
8 preliminary approval and final approval of the Settlement, carrying out the terms of this Settlement
9 Agreement, and promptly agreeing upon and executing all such other documentation as may be
10 reasonably required to obtain final approval by the Court of the Settlement. The Settling Parties shall
11 cooperate in good faith and undertake all reasonable actions and steps in order to accomplish the
12 events described in this Settlement Agreement.

13 10. Releases

14
15 10.1 Plaintiff Daniel McSwain. From the beginning of time to the date Final Judgment is
16 entered by the Court, Plaintiff fully and finally releases the Released Parties, from any and all claims,
17 known and unknown, under federal, state and/or local law, statute, ordinance, regulation, common law,
18 or other source of law ("Plaintiff's Released Claims"). Plaintiff's Released Claims include, but are not
19 limited to, all claims arising from or related to the Litigation. Plaintiff's Released Claims include, but
20 are not limited to, all claims for unpaid interest related to his escrow account with Defendant and/or for
21 violation of section 2954.8 of the California Civil Code.

22 Plaintiff's Released Claims include all claims, whether known or unknown. Even if Plaintiff
23 discovers facts in addition to or different from those that he now knows or believes to be true with respect
24 to the subject matter of Plaintiff's Released Claims, those claims will remain released and forever barred.
25 Thus, Plaintiff expressly waives and relinquishes the provisions, rights and benefits of section 1542 of
26 the California Civil Code, which reads:
27
28

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR
2 OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR
3 HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN
4 BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
5 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

6 10.2 Settlement Class Members. As of the Effective Date, all Settlement Class Members
7 fully and finally release the Released Parties from any and all claims, known and unknown, under
8 federal, state and/or local law, statute, ordinance, regulation, common law, or other source of law
9 arising from Defendant's alleged failure to comply with section 2954.8 of the California Civil Code
10 ("Class Released Claims"). The Class Released Claims include, but are not limited to, all claims
11 arising from or related to the Action. The Class Released Claims include, but are not limited to, all
12 claims for unpaid interest related to the Settlement Class Members' residential escrow accounts with
13 Defendant. The Class Released Claims exclude the release of claims the release of which is not
14 permitted by applicable law.

15 The Class Released Claims include all claims, whether known or unknown arising from
16 Defendant's alleged failure to comply with section 2954.8 of the California Civil Code. Even if Class
17 Members discover facts in addition to or different from those that they now know or believe to be true
18 with respect to the subject matter of the Settlement Class Members' Released Claims, those claims will
19 remain released and forever barred. Thus, Settlement Class Members expressly waive and relinquish
20 the provisions, rights and benefits of section 1542 of the California Civil Code, which reads

21 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR
22 OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR
23 HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN
24 BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
25 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.
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1 **11. Confirmatory Discovery**

2 11.1 Defendant shall provide a declaration, under oath, of an appropriate employee at Axos
3 Bank that sets forth, *inter alia*, information concerning (i) the aggregate number of escrow accounts
4 within the Settlement Class; (ii) the aggregate number of Class Members; (iii) the aggregate escrow
5 balances for escrow accounts within the Settlement Class, calculated for each month of the Class
6 Period; (iv) the number of Class Members who fall within each of the settlement payment tiers
7 described in Sections 7.2.1 through 7.2.5 of this Agreement; and (v) the estimated future value of
8 Defendant's policy to being paying interest pursuant to Section 7.4 of this Agreement.

9 **12. Applicable Law**

10 12.1 This Agreement shall be governed by and interpreted, construed, and enforced pursuant
11 to the laws of the State of California.

12 **13. Representations**

13 13.1 The Settling Parties represent that they have each read this Settlement Agreement and
14 are fully aware of and understand all of its terms and the legal consequences thereof. The Settling
15 Parties represent that they have consulted or have had the opportunity to consult with and have
16 received or have had the opportunity to receive advice from legal counsel in connection with their
17 review and execution of this Settlement Agreement.

18 13.2 The Settling Parties have not relied on any representations, promises or agreements
19 other than those expressly set forth in this Settlement Agreement.

20 13.3 The Plaintiff, on behalf of the Settlement Class Members, represents that he has made
21 such inquiry into the terms and conditions of this Settlement Agreement as he deems appropriate, and
22 that by executing this Settlement Agreement, he believes the Settlement Agreement and all the terms
23 and conditions set forth herein, are fair and reasonable to all Settlement Class Members.

24 13.4 The Plaintiff represents that he has no conflicts or other personal interests that would in
25 any way impact his representation of the Class in connection with the execution of this Settlement
26 Agreement.

1 13.5 Defendant represents and warrants that it has obtained all corporate authority necessary
2 to execute this Settlement Agreement.

3 **14. Severability**

4
5 14.1 With the exception of the releases set forth in Section 10 above, in the event any one or
6 more of the provisions of this Settlement Agreement is determined to be invalid, illegal or
7 unenforceable in any respect, the validity, legality and enforceability of the remaining provisions
8 contained in this Agreement will not in any way be affected or impaired thereby. If Section 10 of this
9 Agreement is found to be invalid, illegal or unenforceable, then the entire Settlement Agreement shall
10 be null and void. Class Counsel and Plaintiff shall be required to return to Defendant the Class
11 Counsel Fees and/or the Incentive Award within ten (10) days of any Court determination that Section
12 10 of the Settlement Agreement is invalid, illegal or unenforceable.

13 **15. Miscellaneous Proceedings**

14 15.1 Pending entry of the Preliminary Approval Order and the entry of Final Judgment, the
15 Settling Parties agree to stay all proceedings in this Litigation, except those incident to the Settlement
16 itself.

17 15.2 The Settling Parties agree to use their best efforts to prevent, stay, or seek dismissal of,
18 or to oppose entry of any interim or final relief in favor of, any claim by any member of the Settlement
19 Class in any litigation that would be barred by the releases contemplated by this Settlement
20 Agreement, and any other litigation against any of the Parties challenging the Settlement, or that
21 otherwise involves, directly or indirectly, a Class Released Claim.

22 15.3 The Settling Parties and their undersigned counsel agree to undertake their best efforts
23 and mutually cooperate to promptly effectuate this Settlement Agreement and the terms of the
24 Settlement set forth herein, including taking all steps and efforts contemplated by this Settlement
25 Agreement and any other steps and efforts which may become necessary by order of the Court or
26 otherwise.
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1 15.4 The undersigned represent that they are fully authorized to execute and enter into the
2 terms and conditions of this Settlement Agreement.

3 15.5 This Settlement Agreement contains the entire agreement among the Settling Parties
4 and supersedes any prior agreements or understandings between them (including, without limitation,
5 the MOU and the addendum thereto). All terms of this Settlement Agreement are contractual and not
6 mere recitals and shall be construed as if drafted by all Settling Parties. The presumption found in
7 California Civil Code Section 1654 that uncertainties in a contract are interpreted against the party
8 causing an uncertainty to exist is hereby waived by all Settling Parties.

9 15.6 The terms of this Settlement Agreement are and shall be binding upon each of the
10 Settling Parties, successors and assigns, and upon all other persons claiming any interest in the subject
11 matter through any of the Settling Parties, including any Settlement Class member.

12 15.7 Whenever this Settlement Agreement requires or contemplates that one Settling Party
13 shall or may give notice to the other, notice shall be provided by email, or next day (excluding Sunday)
14 express delivery service as follows:

15 If to Plaintiff, then to:

16 Ronald A. Marron

17 **LAW OFFICES OF RONALD A. MARRON, APLC**

18 651 Arroyo Drive

19 San Diego, California 92103

20 ron@consumersadvocates.com

21
22 If to Defendant, then to:

23 Alejandro E. Moreno

24 **SHEPPARD, MULLIN, RICHTER & HAMPTON LLP**

25 501 West Broadway, 19th Floor

26 San Diego, California 92101

27 AMoreno@sheppardmullin.com
28

1 15.8 The time periods and dates described in this Settlement Agreement with respect to the
2 giving of notices and hearings are subject to approval and change by the Court or by the written
3 agreement of Class Counsel and Defendant's counsel, without notice to Settlement Class Members.
4 The Settling Parties reserve the right, by agreement and subject to the Court's approval, to grant any
5 reasonable extension of time that might be needed to carry out any of the provisions of this Settlement
6 Agreement.

7 15.9 All time periods set forth herein shall be computed in calendar days unless otherwise
8 expressly provided. In computing any period of time prescribed or allowed by this Settlement
9 Agreement or by order of the Court, the day of the act, event, or default from which the designated
10 period of time begins to run shall not be included. The last day of the period so computed shall be
11 included, unless it is a Saturday, Sunday, or legal holiday or, when the act to be done is the filing of a
12 paper in Court, a day in which weather or other conditions have made the Office of the Clerk or the
13 Court inaccessible, in which event the period shall run until the end of the next day.

14 15.10 The Settling Parties, their successors and assigns, and their attorneys undertake to
15 implement the terms of this Settlement Agreement in good faith and to use good faith in resolving any
16 disputes that may arise in the implementation of the terms of this Settlement Agreement.

17 15.11 This Settlement Agreement may be amended or modified only by a written instrument
18 signed by Class Counsel and Defendant's counsel. Amendments and modifications may be made
19 without additional notice to the Settlement Class Members unless such notice is required by the Court.

20 15.12 Neither this Settlement Agreement nor any act performed or document executed
21 pursuant to or in furtherance of this Settlement Agreement: (a) is or may be deemed to be or may be
22 used as an admission or evidence of the validity of any Released Claim, or of any wrongdoing or
23 liability of Defendant, or of the propriety of Class Counsel maintaining the Litigation as a class action;
24 or (b) is or may be deemed to be or may be used as an admission or evidence of any fault or omission
25 of Defendant in any civil, criminal, or administrative proceeding in any court, administrative agency,
26 or other tribunal, except that Defendant may file this Settlement Agreement or the Final Judgment in
27 any action that may be brought against any Released Party in order to support a defense or
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1 counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement,
2 judgment bar, or reduction, or any other theory of claim preclusion, issue preclusion, or similar defense
3 or counterclaim.

4 15.13 Neither Plaintiff nor Plaintiff's counsel shall issue any press release or announcement of
5 any kind related in any way to the Settlement. Plaintiff and Plaintiff's counsel agree that, prior to
6 preliminary approval of the settlement, they will keep the terms of this settlement confidential except
7 for purposes of communicating with Plaintiff only. Plaintiff shall be informed that the settlement is
8 confidential and shall be advised to keep the settlement confidential. From and after preliminary
9 approval of the settlement, the Class Members (including Plaintiff and Class Counsel) may: (1) as
10 required by law; (2) as required under the terms of the settlement; or (3) as required under counsel's
11 duties and responsibilities as Class Counsel, comment regarding the specific terms of the settlement.
12 Nothing in this Paragraph is intended to interfere with Class Counsel's duties and obligations to
13 faithfully discharge their duties as Class Counsel, including but not limited to, communicating with
14 Class Members regarding the Settlement.

15 15.14 The Court shall retain jurisdiction with respect to the implementation and enforcement
16 of the terms of this Settlement Agreement, and all Settling Parties hereto submit to the jurisdiction of
17 the Court for purposes of implementing and enforcing the settlement embodied in this Settlement
18 Agreement.

19 15.15 Notwithstanding the dates of execution by the undersigned, this Settlement Agreement
20 shall be deemed to have been executed and go into force on June 26, 2020, so long as all signatories
21 below have affixed their signature.

22 15.16 This Settlement Agreement may be executed in counterparts, each of which shall
23 constitute an original.
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1 **IN WITNESS THEREOF**, the Settling Parties hereto have caused this Settlement Agreement
2 to be executed by their duly authorized representatives.

3
4 **UNDERSTOOD AND AGREED:**

5 Dated: 6/15/2020

6 By: Eilo
Representative of Defendant Axos Bank

7
8
9 Dated: 6/16/2020

10 By: DM
Plaintiff Daniel McSwain

11
12 **LAW OFFICES OF RONALD A. MARRON**

13 Dated: 6/16/2020

14 By: Ronald A. Marron
Ronald A. Marron
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9006
Email: ron@consumersadvocates.com
Counsel for Plaintiff and the Class

15
16
17
18
19 **LAW OFFICE OF MICHAEL G. OLINIK**

20
21 Dated: 6/16/2020

22 By: Michael G. Olinik
Michael G. Olinik
3443 Camino Del Rio South, Ste. 101
San Diego, California 92108
Telephone: (619) 780-5523
Email: michael@oliniklaw.com
Counsel for Plaintiff and the Class

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

Dated: June 17, 2020

By: 

Alejandro E. Moreno
501 West Broadway, 19th Floor
San Diego, California 92101
Telephone: (619) 338-6500
Email: AMoreno@sheppardmullin.com
Counsel for Defendant Axos Bank

EXHIBITS

EXHIBIT A: Notice

EXHIBIT B: [Proposed] Preliminary Approval Order

EXHIBIT A

NOTICE OF PROPOSED CLASS LITIGATION SETTLEMENT

Daniel McSwain, Trustee of the Daniel S. McSwain Trust Dated July 17, 2012 v. Axos Bank, fka Bank of the Internet, USA, Case No. 37-2019-00015784-CU-BC-CTL
Superior Court of the State of California for the County of San Diego

THIS NOTICE CONCERNS YOUR LEGAL RIGHTS. PLEASE READ IT CAREFULLY.

*A court authorized this Notice. It is not a solicitation from a lawyer. **YOU ARE NOT BEING SUED.***

IF YOU obtained a loan from Defendant Axos Bank (“Axos”) and/or had a loan serviced by Axos at any time from March 25, 2015 until [date] (the “Class Period”), which was secured by a one-to-four-family residential property located in the State of California and had an escrow or impound account on such loan that received money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, and which at any time within the Class Period had a positive balance in such account, not including escrow accounts for loans held by Axos employees, officers, or directors, **YOU MAY BE ENTITLED TO A CASH PAYMENT.**

This Settlement resolves a lawsuit against Axos alleging that Axos violated section 2954.8(a) of the California Civil Code because it failed to pay borrowers a minimum of 2% simple interest per annum on the amounts in its borrowers’ escrow accounts for loans secured by 1-4 unit residential properties located in California.

Axos denies the allegations, denies engaging in any wrongdoing and specifically contends that section 2954.8(a) of the California Civil Code is preempted by federal law. Nonetheless, it has agreed to settle this action to avoid the cost and uncertainty of litigation. The parties have reached a settlement that would provide monetary recovery as detailed below in exchange for a waiver and release of your claims. By participating in the Settlement, you waive and release any claims against Axos concerning the allegations in the lawsuit.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

DO NOTHING	<u>If you do nothing, you will automatically receive a payment pursuant to the terms of the Settlement Agreement</u> and you will also give up your right to sue Axos on your own regarding any claims that are part of the Settlement.
EXCLUDE YOURSELF FROM THE SETTLEMENT CLASS BY [DATE]	If you ask to be excluded, you will not be bound by what the Court does in this case and will keep any right you might have to sue Axos separately about the legal claims in this lawsuit. If there is a recovery in this case, including under the proposed Settlement, you will not share in that recovery.
OBJECT OR COMMENT BY [DATE]	You may file a written Objection no later than [date] and/or appear at the Final Approval Hearing to tell the Court why you believe the proposed Settlement is unfair, unreasonable, or inadequate. If you ask to be excluded from the Class (i.e., “opt out”), you may not file an Objection.

- These rights and options, **and the deadlines to exercise them**, are further explained in this Notice.
- The Court is in charge of this Litigation and still has to decide whether to approve the Settlement. The settlement benefits will be made available if the Court approves the Settlement and after any appeals are resolved.
- The terms of the Settlement may be subject to change and persons that remain in the Settlement Class will be bound by those changes.
- If you have any questions, then please read on and visit www.xxxx.com.

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BASIC INFORMATION

1. Why did I receive this Notice?

If you obtained a loan from Axos and/or had a loan serviced by Axos at any time from March 25, 2015 until [date] (the “Class Period”) which was secured by a one-to-four-family residential property located in the State of California and had an escrow or impound account on such loan that received money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, and which at any time within the Class Period had a positive balance in such account (not including escrow accounts for loans held by Axos employees, officers, directors or any other persons who have participated in Axos’s internal employee loan program), then you have a right to know about a proposed settlement in this class action lawsuit and your options.

You also may have received this Notice because you were identified by Axos as being a member of the Settlement Class.

The Court ordered that you be given this Notice because you have a right to know about a proposed settlement of this class action lawsuit and your options in relation to that lawsuit before the Court decides whether to give its final approval to the settlement. If the Court approves the settlement, and after objections and appeals are resolved, you may be entitled to a monetary payment.

This Notice explains the lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

2. What is this lawsuit About?

The Plaintiff who filed the lawsuit alleges that Axos violated section 2954.8(a) of the California Civil Code because it failed to pay borrowers a minimum of 2% simple interest per annum on the amounts in its borrowers’ escrow accounts for loans secured by 1-4 unit residential properties located in California.

Axos denies the allegations, denies engaging in any wrongdoing and specifically contends that section 2954.8(a) of the California Civil Code is preempted by federal law. The Court has not made any ruling on the merits of the lawsuit. To avoid the expense of further litigation, the parties have reached a settlement that is further described in this Notice.

3. What Is a Class Action and Who Is Involved?

In a class action lawsuit, one or more people, called Class Representatives (in this case Plaintiff Daniel McSwain) represent the interests of similarly situated people who may have the same claims in common, but have not filed a lawsuit. All of these people are collectively referred to as a class. The people who file the lawsuit are called Plaintiffs. The company or persons they sue are called the Defendants. A single court resolves the issues for everyone in the class—except for those people who choose to exclude themselves from the class.

4. Why Is There a Proposed Settlement?

The Court has not decided in favor of either side. Axos denies all allegations in the lawsuit. Axos is settling simply to avoid the expense, inconvenience, and inherent risk of litigation, as well as the related disruption to its business. The Class Representative and his attorneys assert that the proposed Settlement is in the best interests of the Class because it provides an appropriate recovery now while avoiding the risk, expense, and delay of pursuing a lawsuit through trial and any appeals. There would be no guarantee of success for either side if the lawsuit were pursued through trial and any appeals.

WHO IS COVERED BY THE PROPOSED SETTLEMENT

To see if you are entitled to a monetary payment, you first have to determine if you are a member of the Settlement Class.

5. How Do I Know If I Am Part of the Proposed Settlement?

You are a part of the Settlement Class if you obtained a loan from Axos and/or had a loan serviced by Axos at any time from March 25, 2015 until [date] (the “Class Period”) which was secured by a one-to-four-family residential property located in the State of California and had an escrow or impound account on such loan that received money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, and which at any time within the Class Period had a positive balance in such account.

You are not a part of the Settlement Class if you are (1) are a judicial officer presiding over the Litigation, (2) Axos and any of the Released Parties defined in this notice, and each of their current or former officers, directors, and employees; (2) legal representatives, successors, or assigns of any such excluded person, and (4) if you properly execute and send a timely Request for Exclusion.

THE PROPOSED SETTLEMENT BENEFITS

6. What Does the Proposed Settlement Provide?

Settlement Fund

The proposed settlement will provide for the non-reversionary amount of \$500,000 to be paid into a Gross Settlement Fund.

From the Gross Settlement Fund, the following will be deducted upon approval by the Court (1) attorneys’ fees of up to the amount approved by the Court and other costs associated with the settlement no greater than \$200,000; and (2) an Incentive Award in the amount of up to \$7,500 to Plaintiff Daniel McSwain. After these deductions, a Net Settlement Fund will total approximately \$292,500 and the Net Settlement Fund will be used to make Settlement Payments to Settlement Class Members.

Payments to Settlement Class Members

Subject to Court approval, the entire Net Settlement Fund shall be available for distribution to the Settlement Class Members and distributed as follows:

- Each Settlement Class Member who held an escrow account with Axos for less than one (1) year during the Class Period will receive \$25.
- Each Settlement Class Member who held an escrow account with Axos for at least one (1) year but less than two (2) years during the Class Period will receive \$50.
- Each Settlement Class Member who held an escrow account with Axos for at least two (2) years but less than three (3) years during the Class Period will receive \$75.
- Each Settlement Class Member who held an escrow account with Axos for at least three (3) years but less than four (4) years during the Class Period will receive \$100.
- Each Settlement Class Member who held an escrow account with Axos for four (4) or more years during the Class Period will receive \$125.

If the Net Settlement Fund is not exhausted, then each payment to Settlement Class Members will be proportionately increased pro rata. If the total amount to be paid to Settlement Class Members pursuant to the formula above exceeds the Net Settlement Fund, then each payment to Settlement Class Members will be proportionately decreased pro rata. If any amounts remain in the Net Settlement Fund following the pro rata distribution to settlement class members described in this paragraph, then the remainder shall be awarded cy pres to Public Citizen for work by Public Citizen whose benefit will be intended to include California consumers (or some other non-profit, public benefit corporation nominated by Class Counsel and approved by the Court).

Class Members who do not opt-out of the Settlement will automatically receive a share of the Net Settlement Fund.

Non-Monetary Relief

Within thirty (30) days of the Court's Final Approval Order, Axos shall begin paying at least 2% simple interest per annum on the escrow accounts that have a positive balance for loans secured by one-to-four-family residential properties located in California. However, in accordance with California Civil Code Section 2954.8(a), such interest shall be credited to borrower's account annually or upon termination of such account, whichever is earlier. Notwithstanding the foregoing, Axos shall retain the right to revisit its policy of paying interest (including whether to pay interest and the amounts of such interest payments) on escrow accounts for loans secured by one-to-four-family residential properties located in California at any time in accordance with changes in any applicable legal obligations of Axos.

Incentive Award to Class Representative Daniel McSwain

Subject to Court approval, Class Counsel is seeking an Incentive Award from the Gross Settlement Fund to Plaintiff Daniel McSwain in the amount of \$7,500.

SETTLEMENT CLASS MEMBERS WILL AUTOMATICALLY RECEIVE A PAYMENT

7. How Can I Obtain a Portion of the Settlement?

Settlement Class Members will automatically receive a settlement payment from Axos. Axos must provide the payments to Settlement Class Members within thirty (30) days of the Effective Date of the settlement by depositing the settlement payments directly into the escrow account(s) of each Settlement Class Member. If a Settlement Class Member no longer holds an escrow account with Axos, then Axos will provide the settlement payment via check to the Settlement Class Member's last known postal address on record with Axos. Any checks returned to Axos unpaid will be distributed *cy pres* to Public Citizen.

8. Do I Need to Fill Out a Claim Form?

No, Settlement Class Members do not need to fill out a claim form. Settlement Class Members will automatically receive a settlement payment from Axos as described in Section 7 above.

YOUR RIGHTS AND CHOICES - EXCLUDING YOURSELF FROM THE PROPOSED SETTLEMENT

If you do not want to receive any of the benefits from the Settlement, and you want to preserve the right to sue Axos about the subject matter of this lawsuit, then you must take affirmative steps to opt out of the Settlement.

9. How Do I Exclude Myself From the Settlement?

To exclude yourself from the Settlement Class, you must submit a Request for Exclusion to Class Counsel stating your intention to be "excluded" from the Settlement. The Request for Exclusion must contain your name, current address, and telephone number. The Request for Exclusion must be personally signed by you and dated, mailed, and postmarked to Class Counsel at the following address on or before [date]:

LAW OFFICES OF RONALD A. MARRON, APLC

ATTN: Axos Settlement

651 Arroyo Drive

San Diego, California 92103

You cannot exclude yourself by telephone or by e-mail. Your Request for Exclusion must be on behalf of yourself. You may not include multiple persons on a single Request for Exclusion.

If you ask to be excluded, you will not get any payment from the Settlement Fund, and you cannot object to the Settlement. You will not be legally bound by anything that happens in the Settlement

or this lawsuit. You may be able to sue (or continue to sue) Axos in the future on the claims asserted in this action.

10. If I Don't Exclude Myself, Can I Sue Axos Later?

If you do not properly and timely submit a Request for Exclusion, you waive your right to opt out, you will be deemed to be a member of the Settlement Class, you give up the right to sue Axos for the claims the Settlement resolves, and you will be bound by the terms of the Settlement Agreement. If you have a pending lawsuit against Axos, other than this lawsuit, speak to your lawyer in that lawsuit immediately. You must exclude yourself from *this* Settlement Class to continue your own lawsuit. Remember, any Request for Exclusion must be signed, mailed, and postmarked or submitted online by no later than [REDACTED], 2020.

11. If I Exclude Myself, Can I Get a Payment from the Settlement Fund?

No. If you exclude yourself, you are not eligible for any payment from the Settlement Fund.

YOUR RIGHTS AND CHOICES - OBJECTING TO THE PROPOSED SETTLEMENT

You can tell the Court that you object to the Settlement or any particular part of it.

12. How Do I Tell the Court That I Object to the Proposed Settlement?

If you are a member of the Settlement Class, you may object to the Settlement. In doing so, you must give reasons why you think the Court should not approve it, and the Court will consider your views.

To object, you must file an objection accompanied by documents or other evidence, as well as any factual or legal argument you intend to rely upon in making your Objection. Your objection must include the following:

- (i) a reference, in its first sentence, to the Litigation, *McSwain v. Axos Bank*, Case No. 37-2019-00015784-CU-BC-CTL;
- (ii) Your full, legal name, residential address, telephone number, and email address (and the Your lawyer's name, business address, telephone number, and email address if objecting through counsel);
- (iii) a statement describing your membership in the Settlement Class, including a verification under oath as to your escrow account number(s);
- (iv) a written statement of all grounds for the Objection, accompanied by any legal support for such Objection;
- (v) copies of any papers, briefs, or other documents upon which the Objection is based;

- (vi) a list of all persons who will be called to testify in support of the Objection;
- (vii) a statement of whether you intend to appear at the Final Approval Hearing, and if you are objecting through counsel, you must also state the identity of all attorneys who will appear at the Final Approval Hearing on your behalf;
- (viii) a list of the exhibits you will offer during the Final Approval Hearing, along with copies of such exhibits; and
- (ix) your signature.

In addition, if applicable, you must include with your Objection (i) the identity of all counsel who represent you, including former or current counsel who may be entitled to compensation for any reason related to the Objection; (ii) a detailed list of any other objections you or your counsel have submitted to any other class actions submitted in any court, whether state or federal, in the United States, in the previous five (5) years.

If you choose to object through a lawyer, you must pay for the lawyer yourself.

Your Objection must be signed and mailed to the Court, along with any supporting documents, so that it is received no later than [REDACTED], 2020 by the Court at:

Clerk of Court
Superior Court of California
County of San Diego
330 West Broadway
San Diego, CA 92101

A copy of your Objection **must** also be signed and mailed, along with any supporting documents to each of the following two addresses, so **that is received by each of them no later than** [REDACTED], 2020:

Counsel for Plaintiff and the Settlement Class

LAW OFFICES OF RONALD A. MARRON, APLC

ATTN: Axos Settlement
651 Arroyo Drive
San Diego, California 92103

THE LAW OFFICES OF MICHAEL G. OLINIK

ATTN: Michael G. Olinik
3443 Camino Del Rio S., Ste. 101
San Diego, CA 92108
Tel: (619) 780-5523

Counsel for Axos Bank

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

ATTN: Alejandro E. Moreno
RE: Axos Settlement
501 West Broadway, 19th Floor
San Diego, California 92101

13. What's the Difference Between Objecting and Excluding?

Objecting is explaining to the Court why you do not believe it should approve the Settlement. You can object only if you stay in the Settlement Class.

Excluding yourself from the Settlement is telling the Court that you do not want to be part of the Settlement Class. If you exclude yourself, you will not be eligible to file an Objection or to appear at the Final Approval Hearing.

YOUR RIGHTS AND CHOICES - APPEARING IN THIS LAWSUIT

14. Can I Appear or Speak in the lawsuit About the Proposed Settlement?

As long as you do not exclude yourself, you can (*but do not have to*) participate and speak for yourself in the lawsuit about the proposed Settlement. This is called making an appearance. You can also have your own lawyer appear in court and speak for you, but you must pay for the lawyer yourself.

15. How Can I Appear in this lawsuit?

If you want to participate or speak in this lawsuit, either individually or through your own lawyer (*instead of Class Counsel*), you must file a "Notice of Appearance" with the Court. The Notice of Appearance must contain the title of this lawsuit, a statement that you wish to appear at the Final Approval Hearing, and the signature of you or your lawyer.

Your Notice of Appearance can also state that you or your lawyer would like to speak at the Court's Final Approval Hearing on the proposed Settlement. If you submit an Objection (*see Question 12 above*) and would like to speak about the Objection at the Court's Final Approval Hearing, both your Notice of Appearance and your Objection should include that information.

Your Notice of Appearance must be signed, mailed, and postmarked by [REDACTED], 2020, to the Court at:

Clerk of Court
Superior Court of California
County of San Diego
330 West Broadway
San Diego, CA 92101

Copies of your Notice of Appearance **must also be mailed to** each of the individuals at the same two addresses appearing in Question 12.

IF YOU DO NOTHING

16. What Happens If I Do Nothing At All?

If you do nothing, you will automatically be included in the Settlement Class and receive a payment from the Settlement Fund. But unless you timely excluded yourself, you also will not be able to start a new lawsuit, continue with a lawsuit, or be part of any other lawsuit against Axos about the subject matter of this lawsuit ever again.

THE LAWYERS REPRESENTING YOU

17. Do I Have a Lawyer in this Case?

The Court has appointed the Law Offices of Ronald A. Marron, APLC and the Law Office of Michael G. Olinik as legal counsel for the Settlement Class. These law firms are called Class Counsel. You will not be charged for these lawyers.

18. How Will The Lawyers Be Paid?

Class Counsel has not yet received any payment for prosecuting this lawsuit, nor have they been reimbursed for any out-of-pocket expenses they have incurred. When they ask the Court to approve the Settlement, Class Counsel will also make a motion to the Court to approve and award attorneys' fees and a reimbursement of expenses to Class Counsel, in a total amount not to exceed \$200,000.00. No matter what the Court decides with regard to the requested attorneys' fees, members of the Settlement Class will never have to pay anything toward the fees or expenses of Class Counsel. Class Counsel will seek final approval of the Settlement on behalf of all members of the Settlement Class. You may hire your own lawyer to represent you in this lawsuit if you wish, but it will be at your own expense.

THE COURT'S FINAL APPROVAL HEARING

The Court will hold a hearing to decide whether to approve the Settlement. Unless you have excluded yourself from the Class, you may have the right to attend or speak at the hearing, but do not have to do so.

19. When and Where Will the Court Decide Whether to Approve the Settlement?

The Court overseeing this case will hold a Final Approval Hearing in Department 73 of the Superior Court of California for the County of San Diego located at 330 West Broadway, San Diego, CA 92101 on [REDACTED], 2020 to decide whether the Settlement is fair, reasonable, and adequate, as well as to determine the amount of attorneys' fees and costs and incentive fees to

award. If there are objections, the Court will consider them at the Final Approval Hearing. After the Final Approval Hearing, the Court will decide whether to approve the Settlement and whether to grant Class Counsel's request for attorneys' fees and expenses. We do not know how long it will take the Court to make these decisions.

20. Do I Have to Come to the Hearing?

You are not required to attend the hearing, but you are welcome to attend at your own expense. If you send an Objection, you do not have to appear in Court to present it. As long as you mailed your written Objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

FINAL SETTLEMENT APPROVAL

21. What Is The Effect of Final Settlement Approval?

If the Court grants final approval of the Settlement, all members of the Settlement Class will fully and finally release the Released Parties (as defined in the Settlement Agreement), including Axos, from any and all claims, known and unknown, under federal, state and/or local law, statute, ordinance, regulation, common law, or other source of law arising from Axos' alleged failure to comply with section 2954.8 of the California Civil Code ("Class Released Claims"). The Class Released Claims include, but are not limited to, all claims arising from or related to the Litigation. The Class Released Claims include, but are not limited to, all claims for unpaid interest related to the Settlement Class Members' residential escrow accounts with Axos. The Class Released Claims exclude the release of claims the release of which is not permitted by applicable law.

The Class Released Claims include all claims, whether known or unknown arising from Axos's alleged failure to comply with section 2954.8 of the California Civil Code. Even if Class Members discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of the Settlement Class Members' Released Claims, those claims will remain released and forever barred. Thus, Settlement Class Members expressly waive and relinquish the provisions, rights and benefits of section 1542 of the California Civil Code, which reads:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

If the Court does not approve the Settlement, this lawsuit will proceed as if no settlement had been attempted.

If the Settlement is not approved and litigation resumes, there is no guarantee of payment to the Settlement Class.

GETTING MORE INFORMATION

22. Are There More Details About the Settlement?

This Notice is only intended to provide a summary of the proposed Settlement. You may obtain the complete text of the Settlement Agreement at www.xxxx.com or from the court file, which is available for your inspection during regular business hours at the Superior Court of California for the County of San Diego, 330 West Broadway, San Diego, CA 92101, under the Civil Action Number 37-2019-00015784-CU-BC-CTL.

By visiting the website located at www.xxxx.com, you will find the Plaintiff's operative First Amended Complaint along with other material filings and orders entered in the Action.

PLEASE DO NOT CALL OR DIRECT ANY INQUIRIES TO THE COURT.

This Notice is given with the approval and at the direction of the Court.

EXHIBIT B

1 **LAW OFFICES OF RONALD A. MARRON**

2 RONALD A. MARRON (SBN 175650)

3 *ron@consumersadvocates.com*

4 MICHAEL T. HOUCHIN (SBN 305541)

5 *mike@consumersadvocates.com*

6 LILACH HALPERIN (SBN 323202)

7 *lilach@consumersadvocates.com*

8 651 Arroyo Drive

9 San Diego, California 92103

10 Telephone: (619) 696-9006

11 Facsimile: (619) 564-6665

12 Michael G. Olinik (SBN # 291020)

13 The Law Office of Michael G. Olinik

14 3443 Camino Del Rio South, Ste. 101

15 San Diego, CA 92108

16 Phone: (619) 780-5523

17 E-mail: michael@oliniklaw.com

18 *Attorneys for Plaintiff Daniel McSwain and*
19 *the Proposed Class*

20 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
21 **COUNTY OF SAN DIEGO - CENTRAL DIVISION**

22 DANIEL MCSWAIN, TRUSTEE OF THE
23 DANIEL S. MCSWAIN TRUST DATED JULY
24 17, 2012, on behalf of the trust and all others
25 similarly situated, and the general public;

26 Plaintiff,

27 v.

28 AXOS BANK, fka BANK OF INTERNET USA;
and DOES 1-10, INCLUSIVE,

Defendant.

Case No: 37-2019-00015784-CU-BC-CTL

[PROPOSED] ORDER GRANTING
PRELIMINARY APPROVAL

Date: **DATE**

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

On **DATE** at 9:00 a.m., in Department C-73 of the San Diego Superior Court, Plaintiff Daniel McSwain, Trustee of the Daniel S. McSwain Trust Dated July 17, 2012's Unopposed Motion for Certification of the Settlement Class & Preliminary Approval of Class Settlement was heard. Based on the papers filed by the parties and oral argument, for good cause shown,

1 **IT IS HEREBY ORDERED:**

2 1. The Court preliminarily approves the Settlement Agreement of the parties and finds
3 that the range of the settlement is reasonable and merits final approval;

4 2. The Parties are directed to send Notice of this settlement to the Settlement Class in the
5 manner specified in Section 6 of the Settlement Agreement, which is attached as **Exhibit 1** to this
6 proposed order and incorporated herein;

7 3. Plaintiff Daniel McSwain, Trustee of the Daniel S. McSwain Trust Dated July 17, 2012
8 is determined to be a member of the Settlement Class and is provisionally appointed Class
9 Representative pursuant to Cal. Code Civ. P. § 382 to represent the members of the Settlement Class
10 in this action;

11 4. The Court hereby certifies the Settlement Class pursuant to Cal. Code Civ. P. § 382 for
12 the purposes of settlement only. Should the Court, for any reason, refuse to enter an order of final
13 approval of this class action settlement, or if such order is reversed or otherwise modified on appeal,
14 then the certification of the Settlement Class shall be null and void. Should this case proceed to
15 litigation, Plaintiff shall bear the burden of proving each of the elements necessary to certify the
16 proposed class and Axos reserves all of its rights to contest class certification. The Settlement Class is
17 defined as: all persons who obtained a loan from Defendant and/or had a loan serviced by Defendant
18 from March 25, 2015 until the date of this preliminary approval (the "Class Period"), which was
19 secured by a one-to-four-family residential property located in the State of California and had an
20 escrow or impound account on such loan that received money in advance for payment of taxes and
21 assessments on the property, for insurance, or for other purposes relating to the property, and which at
22 any time within the Class Period had a positive balance in such account. The Settlement Class
23 specifically excludes (1) any judicial officer presiding over the Litigation, (2) Defendant and Released
24 Parties, and each of their current or former officers, directors, and employees; (2) legal
25 representatives, successors, or assigns of any such excluded person, and (4) any person who properly
26 executes and sends a timely Request for Exclusion.

27 5. The Court hereby appoints The Law Offices of Ronald A. Marron, APLC and the Law
28 Office of Michael G. Olinik as class counsel for purposes of this settlement;

1 6. The Final Approval Hearing in this matter shall be scheduled for _____, 2020
2 at 9:00 a.m. in Department C-73 of the San Diego Superior Court, Hall of Justice, 330 West
3 Broadway, San Diego, CA 92101;

4 7. The briefing schedule for the Final Approval Hearing is as follows:
5 Moving Papers must be filed and served no later than _____, 2020.
6 Any opposition must be filed and served no later than _____, 2020.
7 Any and all objections must be filed and served no later than _____, 2020.
8 Any reply papers must be file and served no later than _____, 2020;

9 8. The Notice to the Class must be sent pursuant to Paragraph 6 of the Settlement
10 Agreement no later than 30 days from the date that this order is signed;

11 9. The proposed Notice to the Settlement Class is hereby approved. The Notice meets the
12 requirements of California Law and the Due Process Clause of the United States Constitution; is the
13 best practicable notice under the circumstances, and is reasonably calculated to apprise Settlement
14 Class members of the pendency of the Litigation and their right to object or opt out of participation in
15 the Settlement;

16 10. All Settlement Class members who wish to opt out of this Settlement Agreement must
17 submit their Requests for Exclusion to Class Counsel timely on or before _____, the
18 Objection/Exclusion Deadline, as specified in Section 5 of the attached Settlement Agreement;

19 11. Any Settlement Class member who wishes to object to the fairness, reasonableness, or
20 adequacy of the Settlement, Class Counsel's Fees, or the Incentive Award must file with the Court and
21 deliver to Class Counsel and Defendant's counsel a written statement of their Objection, as well as the
22 specific reason for such Objection, including legal support the Settlement Class Member wishes to
23 bring to the Court's attention, and evidence the Settlement Class Member wishes to introduce in
24 support of their Objection no later than _____, the Objection/Exclusion
25 Deadline;

26 12. Any Settlement Class member that does not timely submit a written Request for
27 Exclusion or Objection shall be bound by all proceedings, orders, and judgments in this action;
28

1
2 Dated: _____

Hon. Joel R. Wohlfeil
JUDGE OF THE SUPERIOR COURT

EXHIBIT 2

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Corporations have their lobbyists in Washington, D.C. The people need advocates too.

That's where we come in.

Public Citizen is a nonprofit consumer advocacy organization that champions the public interest in the halls of power. We defend democracy, resist corporate power and work to ensure that government works for the people – not for big corporations. Founded in 1971, we now have 500,000 members and supporters throughout the country.

We don't participate in partisan political activities or endorse any candidates for elected office. We take no government or corporate money, which enables us to remain fiercely independent and call out bad actors – no matter who they are or how much power and money they have.

We use every tool at our disposal to take on big fights – and win. We mobilize activists to grow democratic movements, watchdog Congress, sue the government when it fails to do its job, petition regulatory agencies to safeguard the public and engage in cutting-edge research that effects change.

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Need someone to explain how corporate influence in a policy area affects people? We can help. We have experts on a wide array of issues — from money in politics, trade and health care to energy, banking and access to the courts.

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See who works in the public interest every day.

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Join us at Public Citizen, and help us represent the public interest in the halls of power. We champion good government, a strong regulatory system, a clean and

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Our boards of directors work in tandem to plan Public Citizen's future and adjust to the ever-changing present. Public Citizen Foundation board members focus on research and public education, while Public Citizen Inc. board members focus on lobbying and organizing.

Our History

In the halls of power, Public Citizen has represented citizens for nearly two generations – through the awakening of the consumer movement; the struggle for health, safety and environmental and marketplace safeguards in the 1960s and the 1970s; the corporate backlash of the 1980s and 1990s; and into the new millennium's fight against abuses of globalization. The organization has battled for patients who are prescribed dangerous drugs, workers exposed to toxic chemicals, motorists with unsafe vehicles, voters with corrupt representatives, citizens exploited by energy companies and many more.

"Public Citizen, the Sentinel of Democracy," a book published in 2016, takes readers through the years and highlights the most salient accomplishments by the first generation of Public Citizen leaders – achievements that have altered the American marketplace, government and political culture in ways that reverberate today.

"At Public Citizen, our starting point is what we think is right, not what others say is 'reasonable.' Time and again, we've shown that we can take on corporate power, change the terms of debate and win transformative victories for health, safety, justice and democracy."

Robert Weissman, president

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EXHIBIT 3

LAW OFFICES OF RONALD A. MARRON, APLC

651 Arroyo Drive
San Diego • CA • 92103
Tel.: (619) 696-9006
Fax: (619) 564-6665

Firm Resume

FIRM OVERVIEW

The Law Offices of Ronald A. Marron is a recognized class action and complex litigation firm based out of San Diego, California, representing clients across the nation. Founded in 1996 with an emphasis in consumer and securities fraud, the firm has expanded its practice to include complex cases such as electronic privacy, banking regulations, antitrust, automatic renewals, Telephone Consumer Protection Act and Government Environmental Law Litigation. The firm has skillfully litigated hundreds of lawsuits and arbitrations against investment advisors and stockbrokers, such as Morgan Stanley, LPL Financial, Merrill Lynch, Banc of America Securities, and Citigroup, who placed clients into unsuitable investments, failed to diversify, and who violated the Securities Act of 1933 and/or 1934. Aptly and competently prepared to represent its clients, the firm has taken on cases against the likes of Shell Oil, Citigroup, Wells Fargo, Union Bank of California, American Express Advisors, Morgan Stanley and Merrill Lynch. Since 2004, the firm has devoted most of its practice to the area of false and misleading labeling of Consumer Products and food, drug and over-the-counter products, as well as seeking to protect consumers from unauthorized and unsolicited telephone calls, SMS or text messages to cellular phones from corporations under the Telephone Consumer Protection Act. The firm employs six attorneys, whose qualifications are discussed in brief below.

THE MARRON FIRM'S ATTORNEYS:

Ronald A. Marron, Founder

As the founder of the Law Offices of Ronald A. Marron, APLC, Mr. Marron has been practicing law for 25 years. He was a member of the United States Marine Corps from 1984 to 1990 (Active Duty 1984-1988, Reserves 1988-1990) and thereafter received a B.S. in Finance from the University of Southern California (USC) in 1991. While attending Southwestern University School of Law (1992-1994), he interned at the California Department of Corporations with emphasis in consumer complaints and fraud investigations; and studied Bio-Chemistry at the University of Southern California and was a member of the Trojan Chemistry Club. Mr. Marron has extensive experience in class actions and other complex litigation and has obtained hundreds of millions of dollars on behalf of consumers as lead counsel. Mr. Marron has represented plaintiffs victimized in TCPA cases, Consumer Fraud, Antitrust, Broker-Dealer Liability, Ponzi schemes, shareholder derivative suits, and securities fraud cases.

Mr. Marron has assisted two United States Senate Subcommittees and their staff in investigations of financial fraud, plus the Senate Subcommittee on Aging relating to annuity sales practices by agents using proceeds from reverse mortgages. Mr. Marron's clients have testified before the United States Senate Subcommittee on Investigations relating to abusive sales practices alleged in a complaint he filed against All-Tech Investment Group. The hearings resulted in federal legislation that: (a) raised

the minimum capital requirements, and (b) required written risk disclosure signed by consumer. The civil action resulted in return of client funds and attorneys' fees pursuant to the private attorney general statute and/or Consumers Legal Remedies Act. Mr. Marron conducted the legal research and co-wrote the brief that resulted in the largest punitive damages award (500%) in NASD history for aggrieved investors against Dean Witter Reynolds in securities arbitration. Mr. Marron's opinion on deferred annuity sales practices targeting the elderly has often been sought by major financial news organizations and publications such as Forbes, the Wall Street Journal, the Kiplinger's Retirement Report, CNN, and FOX News affiliates. In addition, he has devoted significant energy and time educating seniors and senior citizen service providers, legislators, and various non-profits (including Elder Law & Advocacy) about deferred annuity sales practices targeting the elderly. Mr. Marron had numerous speaking engagements at FAST (Fiduciary Abuse Specialist Team), which is an organization devoted to the detection of, prevention, and prosecution of elder financial abuse; Adult Protective Services; and Elder Law & Advocacy, a non-profit dedicated to assisting seniors who have been the victims of financial fraud. He has litigated hundreds of lawsuits and arbitrations against major corporations, such as Shell Oil, Citigroup, Wells Fargo, Morgan Stanley, and Merrill Lynch. In recent years, Mr. Marron has devoted almost all of his practice to the area of TCPA and Privacy Violations, false and misleading labeling of food, dietary supplements, and over-the-counter products. He is a member in good standing of the State Bar of California; the United States District Courts for the Eastern, Southern and Northern Districts of New York; the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California; the United States District Court for the Eastern District of Michigan; the United States District Court for the Eastern and Western Districts of Wisconsin; the United States District Court of Colorado; the United States District Court for the Eastern District of Arkansas; the United States Court of Appeals for the Ninth Circuit; and the Supreme Court of the United States.

Alexis M. Wood, Senior Associate

Ms. Wood graduated *cum laude* from California Western School of Law in 2009, where she was the recipient of the Dean's Merit Scholarship for Ethnic & Cultural Diversity and also Creative Problem Solving Scholarships. In addition, during law school, Ms. Wood was the President of the Elder, Child, and Family Law Society, and participated in the study abroad program on international and comparative human rights law in Galway, Ireland. Ms. Wood interned for the Alternate Public Defender during law school, and also held a judicial externship with the San Diego Superior Court. Upon graduation, Ms. Wood obtained her Nevada Bar license and worked at the law firm Alverson Taylor Mortensen & Sanders in Las Vegas, Nevada where she specialized in medical malpractice. Ms. Wood then obtained her license to practice law in California in 2010 and worked at the bankruptcy firm Pite Duncan, LLP in San Diego, California, in which she represented financial institutions in bankruptcy proceedings. She additionally worked for the national law firm Gordon & Rees, LLP as an associate attorney in the professional liability defense and tort & product liability practice groups. Ms. Wood was also selected to the 2015 and 2016 California Super Lawyers Rising Star list (general category)—a research-driven, peer influenced rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. No more than 2.5% of the lawyers in the state were selected for the Rising Stars list. Ms. Wood joined the Law Office of Ronald Marron in September of 2012 and has dedicated her practice to consumer advocacy. Ms. Wood is also a foster youth advocate with Voices for Children. She is a member in good standing of the State Bar of California; the State Bar of Nevada; the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California; the United States District Court of Nevada; the United States District Court for the Eastern and Western Districts of Wisconsin; the

United States District Court of Colorado; the United States Court for the Eastern District of Arkansas; and the United States Court of Appeals for the Ninth Circuit.

Kas L. Gallucci, Senior Associate

Ms. Gallucci graduated *cum laude* from California Western School of Law in 2012, where she ranked in the top 12% of her graduating class and was listed on the Dean's Honor List for four terms. During law school, Ms. Gallucci received the highest grade in her Legal Skills and Advanced Legal Research classes. She also participated in the Capitals of Europe Summer Study Abroad Program, where the Honorable Samuel A. Alito, Jr. was a Distinguished Guest Jurist. Ms. Gallucci has worked for the firm since 2009 and has a number of years' experience in consumer fraud cases and is currently prosecuting violations of the Telephone Consumer Protection Act. Ms. Gallucci also regularly assists with the firm's food, drug, and cosmetic cases. She is a member in good standing of the State Bar of California; the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California; the United States District Court for the Eastern District of Michigan; the United States District Court for the Eastern and Western Districts of Wisconsin; the United States District Court for New Mexico; the United States District Court of Colorado; the United States Court for the Eastern District of Arkansas; and the United States Court of Appeals for the Ninth Circuit.

Michael Houchin, Associate

Mr. Houchin has been with the Law Offices of Ronald A. Marron since 2011. Prior to passing the California bar exam, Mr. Houchin worked as a law clerk for the firm while he attended law school courses in the evenings at the Thomas Jefferson School of Law. During law school, Mr. Houchin received four Witkin Awards for the highest grade achieved in his Legal Writing, Constitutional Law, American Indian Law, and California Civil Procedure courses. He also served as an editor on the *Thomas Jefferson Law Review* and was a member of an editing team that prepared a student Note for compliance with publishable quality standards. See I. Suruelo, *Harmonizing Section 14(B) with The Policy Goals of the NLRA on the Heels of Michigan's Enactment of Right-To-Work Laws*, 36 T. JEFFERSON L. REV. 427 (2014). Mr. Houchin graduated *magna cum laude* in May of 2015 and ranked in the top 5% of his graduating class. Through his work at the Law Offices of Ronald A. Marron, APLC, Mr. Houchin has gained substantial familiarity with multi-district litigation proceedings, solutions for e-discovery management, and false advertising investigations. He is a member in good standing of the State Bar of California; and the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California; the Western District of Wisconsin; the United States Court of Appeals for the Ninth Circuit; and the Supreme Court of the United States.

Lilach Halperin, Associate

Ms. Halperin graduated *cum laude* from the University of San Diego School of Law in 2018. During law school, Ms. Halperin held a judicial externship with the San Diego Superior Court and volunteered for numerous pro bono clinics, including the USD Entrepreneurship Clinic, the USD State Sales and Use Tax Clinic, and the San Diego Clean Slate Clinic. In addition, Ms. Halperin was the Chair of the USD Pro Bono Legal Advocates Consumer Affairs Clinic, where she worked with the Legal Aid Society of San Diego to assist indigent clients with lawsuits in consumer protection law. In her third year of law school, Ms. Halperin was hired as a law clerk for the Law Offices of Ronald A. Marron and assisted in consumer fraud cases for the firm, including the areas of false and misleading labeling of consumer products. She is a member of good standing of the State Bar of California; the United States District Courts for the Central, Eastern, Northern and Southern Districts of California; and the Western District of Wisconsin.

Elisa Pineda, Associate

Ms. Pineda graduated *magna cum laude* from California Western School of Law in 2019, where she was the recipient of the Dean's Merit Scholarship for Ethnic & Cultural Diversity and ranked in the top 3% of her graduating class. During law school, Ms. Pineda received an award for obtaining the highest grade in the following classes: Property I, Torts I, Trusts & Estates, Professional Ethics, and the Mediation Clinic. Ms. Pineda was listed on the Dean's Honor List for three terms. In addition, during law school, Ms. Pineda received an Outstanding Editor Award for her efforts as Senior Editor for her law school's International Law Journal. Ms. Pineda interned for both the San Diego District Attorney's Office and the San Diego Public Defender's Office. She also held a judicial externship with the Honorable United States Magistrate Judge Jill Burkhardt at the United States District Court for the Southern District of California. Ms. Pineda recently passed the California Bar and is now working as an Associate Attorney at the Law Offices of Ronald A. Marron. She is a member in good standing of the State Bar of California and the United States District Court for the Central, Eastern, Northern and Southern Districts of California.

Support Staff

The Marron Firm also employs a number of knowledgeable and experienced support staff, including paralegals and legal assistants.

EXAMPLES OF MARRON FIRM'S SUCCESSES ON BEHALF OF CONSUMERS

***Graves v. United Industries Corp.*, No. 2:17-cv-06983-CAS-SK (C.D. Cal.)**

On February 24, 2020, the Honorable Christiana A. Snyder granted final approval a nation-wide class action settlement concerning United Industries Corporation's Spectracide® Weed and Grass Killer Concentrate Products. The Plaintiffs alleged that the Spectracide® Concentrate Products were labeled as making more solution than the products were capable of making when mixed for certain weed control purposes. The Law Offices of Ronald A. Marron served as Class Counsel. The settlement created a \$2.5 million dollar common fund in addition to injunctive relief in the form of labeling changes.

***Esparza v. Smartpay Leasing, Inc.*, No. 3:17-cv-03421-WHA (N.D. Cal.)**

On January 28, 2020, the Honorable William Alsup granted final approval a nation-wide certified class action settlement. The class included individuals who were texted on behalf of the defendant, using its vendor Twilio, Inc.'s platform after texting the word "STOP", between September 29, 2015 to June 13, 2017. Ronald A. Marron, Alexis M. Wood and Kas L. Gallucci of the Law Offices of Ronald A. Marron served as class counsel. The settlement created a \$8.67 million dollar common fund. *See Esparza v. Smartpay Leasing, Inc.*, No. 3:17-cv-03421-WHA, 2020 WL 465865, at *2 (N.D. Cal. Jan. 28, 2020), judgment entered, 2020 WL 465863 (N.D. Cal.).

***Busch v. Bluestem Brands, Inc.*, No. 16-cv-0644(WMW/HB) (D. Minn.)**

On October 11, 2019, the Honorable Judge Wilhelmina M. Wright granted final approval of a nationwide TCPA class action settlement where Ronald A. Marron, Alexis M. Wood and Kas L. Gallucci served as co-lead class counsel. The settlement created a \$5.25 million common fund. *See Busch v. Bluestem Brands, Inc.*, No. 0:16-cv-00644-WMW-HB, 2019 WL 5092952, at *1 (D. Minn. Oct. 11, 2019).

Medina v. Enhanced Recovery Company, LLC, No. 15-CV-14342-MARTINEZ-MAYNARD (S.D. Fla.)

On September 12, 2019, the Honorable Judge Jose E. Martinez granted final approval of a nationwide TCPA class action settlement and the Law Offices of Ronald A. Marron served as co-lead class counsel. The settlement created a \$1.45 million common fund.

Littlejohn v. Ferrara Candy Company, No. 18-cv-0658-AJB-WVG (S.D. Cal.)

On June 17, 2019, the Honorable Anthony J. Battaglia granted final approval of a nationwide CLRA class action settlement stating “Class Counsel has fully and competently prosecuted all causes of action, claims, theories of liability, and remedies reasonably available to the Class Members.” *Littlejohn v. Ferrara Candy Co.*, No. 318CV00658AJBWVG, 2019 WL 2514720, at *3 (S.D. Cal. June 17, 2019).

Rwomwijhu v. SMX, LLC, No. BC634518 (L.A. Supr. Ct.)

On January 11, 2019, the Honorable Carolyn B. Kuhl granted final approval of case brought pursuant to under California’s Private Attorneys General Act where the Law Offices of Ronald A. Marron served as co-lead class counsel.

Jackson v. Lang Pharma Nutrition, Inc., No. 37-2017-00028196-CU-BC-CTL (S.D. Supr. Ct.)

On December 20, 2018, the Honorable Joel R. Wohlfeil of the California Superior Court granted final approval to a nationwide labeling case settlement involving Co-q10 dietary supplements where the Law Offices of Ronald A. Marron served as class counsel. The settlement created a fund in the amount of \$1,306,000 for which class members could elect to obtain cash or product vouchers.

Simms v. ExactTarget, LLC, No. 1-14-cv-00737-WTL-DKL (S.D. Ind.)

On October 19, 2018, the Honorable William T. Lawrence granted final approval of a nationwide TCPA class action settlement where the Law Offices of Ronald A. Marron served as class counsel. The settlement created a \$6.25 million common fund.

Mancini v. The Western and Southern Life Insurance Company, et al., No. 16-cv-2830-LAB (WVG) (S.D. Cal)

On September 18, 2018, the Honorable Larry Alan Burns granted final approval of settlement in the amount of \$477,500 to resolve claims under California’s Private Attorneys General Act.

Gonzales v. Starside Security & Investigation, No. 37-2015-00036423-CU-OE-CTL (S.D. Supr. Ct.)

On September 7, 2018, the Honorable Gregory W. Pollack granted final approval of a wage and hour class action settlement and where the Law Offices of Ronald A. Marron served as class counsel.

Mollicone v. Universal Handicraft, No. 17-21464-Civ-Scola (S.D. Fla.)

On August 10, 2018, the Honorable Robert N. Scola, Jr. granted final approval of class action settlement regarding false advertising claims of Adore cosmetics products marketed as containing a plant stem cell formula where in which the Law Offices of Ronald A. Marron served as class counsel. In his Preliminary Approval Order, Judge Scola stated that the Marron Firm is “experienced and competent in the prosecution of complex class action litigation.” (Dkt. No. 120).

Mason v. M3 Financial Services, Inc., No. 15-cv-4194 (N.D. Ill.)

On June 29, 2018, the Honorable Andrea R. Wood granted final approval of a nationwide TCPA class action settlement in the amount of \$600,000 in which the Law Offices of Ronald A. Marron served as co-lead class counsel.

Lucero v. Tommie Copper, Inc., No. 15 Civ. 3183 (AT) (S.D. N.Y.)

On May 4, 2018, the Honorable Analisa Torres granted final approval of a false advertising class settlement in the amount \$700,000. This case involves allegations of false and deceptive advertising and endorser liability for copper fabric compression clothing. On January 4, 2016, the Honorable Analisa Torres appointed the Marron firm as Interim Lead Class Counsel over the opposition and challenge of other plaintiffs' counsel, noting that the Marron firm's "detailed" complaint was "more specifically pleaded, . . . assert[ing] a more comprehensive set of theories . . . [and was] more factually developed." *Potzner v. Tommie Copper Inc.*, No. 15 CIV. 3183 (AT), 2016 WL 304746, at *1 (S.D.N.Y. Jan. 4, 2016). Judge Torres also noted that Mr. Marron and his firm's attorneys had "substantial experience litigating complex consumer class actions, are familiar with the applicable law, and have the resources necessary to represent the class." *Id.*

Gutierrez-Rodriguez v. R.M. Galicia, Inc., No. 16-cv-00182-H-BLM (S.D. Cal.)

On March 26, 2018, the Honorable Marilyn Huff granted final approval of a nationwide TCPA class action settlement which provided monetary relief in the amount of \$1,500,000, in addition to significant injunctive relief. The Law Offices of Ronald A. Marron served as class counsel. *Gutierrez-Rodriguez v. R.M. Galicia, Inc.*, No. 16-CV-00182-H-BLM, 2018 WL 1470198, at *2 (S.D. Cal. Mar. 26, 2018).

Thornton v. NCO Financial Systems, No. 16-CH-5780 (Cook County, Ill)

On October 31, 2017, the Honorable Tomas R. Allen of the Circuit Court of Cook County, Illinois, granted final approval to a nationwide TCPA class which created a common fund in the amount of \$8,000,000 and also provided for injunctive relief. The Law Offices of Ronald A. Marron served as co-lead class counsel.

Elkind v. Revlon Consumer Products Corporation, No. 14-cv-2484(JS)(AKT) (E.D.N.Y.)

On September 5, 2017, the Honorable A. Kathleen Tomlinson granted final approval of a nationwide false advertising class action settlement which challenged Revlon's advertising of its "Age Defying with DNA Advantage" line of cosmetics in the amount of \$900,000, and significant injunctive relief. The Law Offices of Ronald A. Marron served as co-lead class counsel.

Sanders v. R.B.S. Citizen, N.A., No. 13-CV-03136-BAS (RBB) (S.D. Cal.)

On January 27, 2017 the Honorable Cynthia A. Bashant granted final approval of a nationwide TCPA class action settlement in the amount of \$4,551,267.50. *Sanders v. R.B.S. Citizen, N.A.*, No. 13-CV-03136-BAS (RBB), 2017 WL 406165 (S.D. Cal. Jan. 25, 2017). On July 1, 2016, the Honorable Cynthia A. Bashant certified a nationwide class, for settlement purposes, of over one million persons receiving cell phone calls from Citizens made with an alleged automatic telephone dialing system. Dkt. 107. The Court appointed the Law Offices of Ronald A. Marron as class counsel, noting they have "significant experience in handling class actions." *Id.*

In re Leaf123 (Augustine v. Natrol), No. 14-114466 (U.S. Bankruptcy Court for the District of Delaware)

This action involved allegations of false and deceptive advertising of Senna Leaf tea products as dietary aids. Plaintiff alleged Senna Leaf is nothing more than a stimulant laxative which does not aid diets but hinders them. After a strong showing in the district court, and pursuant to other actions against the defendant manufacturer, the defendant filed for bankruptcy. The Marron Firm followed defendant to the federal bankruptcy court and retained bankruptcy counsel to assist. After a full day mediation before a retired federal jurist, and months of follow up negotiations, a settlement was reached. On August 7, 2015, in *In re Leaf123* (adversary proceeding of *Augustine v. Natrol*), the Honorable Brendan L. Shannon approved an injunctive relief-only settlement, finding it “fair, reasonable and adequate.”

Johnson v. Triple Leaf Tea, Inc., No. 3:14-cv-01570-MMC (N.D. Cal.)

An injunctive relief class action settlement, requiring manufacturer of senna leaf diet teas to re-label their products and remove ingredients based on alleged consumer confusion and harm, was filed in April 2014. The Marron firm served as class counsel and the Honorable Maxine M. Chesney, Senior U.S. District Court Judge granted final approval to a classwide settlement on November 16, 2015. *Johnson v. Triple Leaf Tea Inc.*, No. 3:14-CV-01570-MMC, 2015 WL 8943150, at *3, *5 (N.D. Cal. Nov. 16, 2015) (“Class Counsel has fully and competently prosecuted all causes of action, claims, theories of liability, and remedies reasonably available to the Class Members. The Court hereby affirms its appointment of the Law Offices of Ronald A. Marron, APLC as Class Counsel Class Counsel and Defendant's counsel are highly experienced civil litigation attorneys with specialized knowledge in food and drug labeling issues, and complex class action litigation generally.”).

Perry v. Truong Giang Corp., Case No. BC58568 (L.A. Supr. Ct.)

Plaintiff alleged defendant's Senna Leaf teas, advertised as diet aids, were falsely or misleadingly advertised to consumers. After an all-day mediation, a class wide settlement was reached. In granting final approval to the settlement on August 5, 2015, the Honorable Kenneth Freeman noted that class counsel's hourly rates were “reasonable” and stated the Marron Firm's lawyers used skill in securing the positive results achieved on behalf of the class. The court also noted “this case involved difficult legal issues because federal and state laws governing dietary supplements are a gray area, . . . the attorneys displayed skill in researching and settling this case, which provides a benefit not only to Class Members but to the public at large”

Carr v. Tadin, Inc., No. 3:12-cv-03040-JLS-JMA (S.D. Cal.)

An injunctive relief class action settlement, requiring manufacturer of diet teas and other health supplements to re-label their products to avoid alleged consumer confusion, was filed in January 2014 before the Honorable Janis L. Sammartino. The Marron Firm was appointed as class counsel and the classwide settlement was granted final approval on December 5, 2014.

Gallucci v. Boiron, Inc., No. 3:11-cv-2039-JAH (S.D. Cal.)

The firm was class counsel for consumers of homeopathic drug products in an action against Boiron, Inc., the largest foreign manufacturer of homeopathic products in the United States, involving allegations that Boiron's labeling and advertising were false and misleading. We obtained a nationwide settlement for the class which provided injunctive relief and restitution from a common fund of \$5 million. The settlement was upheld by the Ninth Circuit on February 21, 2015. The case

also set an industry standard for homeopathic drug labeling. See www.homeopathicpharmacy.org/pdf/press/AAHP_Advertising_Guidelines.pdf.

Red v. Kraft Foods Global, Inc., No. 2:10-1028-GW (C.D. Cal.)

The firm represented consumers in a class action against one of the world's largest food companies and was appointed lead counsel in a consolidated putative class action. The action has resulted in a permanent injunction barring the use of deceptive health claims on Nabisco packaged foods containing artificial trans fat. The Court has also granted an interim award of attorneys' fees.

Mason v. Heel, Inc., No. 3:12-cv-3056-GPC-KSC (S.D. Cal.)

Plaintiff alleged false and deceptive advertising of over-the-counter homeopathic drugs. On October 31, 2013, the Honorable Gonzalo P. Curiel granted preliminary approval to a nationwide class settlement of \$1 million in monetary relief for the class plus four significant forms of injunctive relief. Final approval was granted on March 13, 2014. See *Mason v. Heel, Inc.*, 3:12-CV-03056-GPC, 2014 WL 1664271 (S.D. Cal. Mar. 13, 2014).

Clark v. National Western Life Insurance Co., No. BC321681 (L.A. Co. Super. Ct.)

Class action involving allegations of elder financial abuse and fraud. After litigating the case for well over six years, including Mr. Marron being appointed co-lead class counsel, the case resulted in a settlement of approximately \$25 million for consumers.

In re Quaker Oats Labeling Litig., No. 5:10-cv-00502-RS (N.D. Cal.)

False and deceptive advertising case concerning Instant Oats, Chewy Granola Bars and Oatmeal To Go products, including use of partially hydrogenated vegetable oil while also representing the products as healthy snacks. An injunctive relief class action settlement was granted preliminary approval on February 2, 2014, with my firm being appointed Class Counsel. On July 29, 2014, the court granted the final approval of the settlement.

Nigh v. Humphreys Pharmacal, Inc., No. 3:12-cv-02714-MMA-DHB (S.D. Cal.)

Case involving allegations of false and deceptive advertising of homeopathic over-the-counter drugs as effective when they allegedly were not. On October 23, 2013, a global settlement was granted final approved by the Honorable Michael M. Anello, involving a common fund of \$1.4 million plus five significant forms of injunctive relief for consumers.

Burton v. Ganeden Biotech, Inc., No. 3:11-cv-01471-W-NLS (S.D. Cal.)

Action alleging false and deceptive advertising of a dietary probiotic supplement. On March 13, 2012, the Marron Firm settled the case for \$900,000 in a common fund plus injunctive relief in the form of labeling changes. Final approval was granted on October 5, 2012.

Hohenberg v. Ferrero U.S.A., Inc., No. 3:11-CV-00205-H-CAB (S.D. Cal.)

This case involved false and deceptive advertising of sugary food product as a healthy breakfast food for children. After successfully defeating a motion to dismiss, *Hohenberg*, 2011 U.S. Dist. LEXIS 38471, at *6 (S.D. Cal. Mar. 22, 2011), the Honorable Marilyn Huff certified a class on November 15, 2011, resulting in a published decision, *In re Ferrero Litig.*, 278 F.R.D. 552 (S.D. Cal. 2011). A final settlement consisting of injunctive relief labeling and marketing changes, plus a \$550,000 common fund for monetary relief to the class was finally approved on July 9, 2012.

In re Qunol CoQ10 Liquid Labeling Litigation, No. 8:11-cv-173-DOC (C.D. Cal.)

This case involved false and deceptive consumer advertising of a dietary supplement. The Marron Firm was appointed class counsel and successfully defeated defendants' motion to decertify the class following the Ninth Circuit's decision in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). See *Bruno v. Eckhart Corp.*, 280 F.R.D. 540 (C.D. Cal. 2012); see also *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524 (C.D. Cal. 2011). The case settled on the eve of trial (originally scheduled for October 2, 2012) for cash payments to the class and injunctive relief.

Iorio v. Asset Marketing Systems, Inc., No. 05cv00633-IEG-CAB (S.D. Cal.)

This action involved allegations of elder financial abuse and fraud. Mr. Marron was appointed class counsel on August 24, 2006 and the Court certified a class on July 25, 2006. After nearly six years of intensive litigation, including "challenges to the pleadings, class certification, class decertification, summary judgment, . . . motion to modify the class definition, motion to strike various remedies in the prayer for relief, and motion to decertify the Class' punitive damages claim," plus three petitions to the Ninth Circuit, attempting to challenge the Rule 23(f) class certification, a settlement valued at \$110 million was reached and approved on March 3, 2011. *Iorio*, Dkt. No. 480. In granting final approval to the settlement, the Court noted that class counsel were "highly experienced trial lawyers with specialized knowledge in insurance and annuity litigation, and complex class action litigation generally" and "capable of properly assessing the risks, expenses, and duration of continued litigation, including at trial and on appeal." *Id.* at 7:18-22.

Martinez v. Toll Brothers, No. 09-cv-00937-CDJ (E.D. Penn.)

Shareholder derivative case alleging breach of fiduciary duty, corporate waste, unjust enrichment and insider trading, filed derivatively on behalf of Toll Brothers and against individual corporate officers. Under a joint prosecution agreement, this action was litigated along with other consolidated and related actions against Toll Brothers in a case styled *Pfeiffer v. Toll Brothers*, No. 4140-VCL in the Delaware Chancery Court. After extensive litigation, the case settled in September 2012 for \$16.25 million in reimbursement to the corporation.

Peterman v. North American Co. for Life & Health Insurance, No. BC357194, (L.A. Co. Super. Ct.), involved allegations of elder financial abuse. This case was litigated for over four years and achieved a settlement of approximately \$60 million for consumers.

Vaccarino v. Midland Nat'l Life Ins. Co., No. 2:11-cv-05858-CAS (MANx) (C.D. Cal.)

This action involved allegations of elder financial abuse and fraud. On June 17, 2013, the Honorable Christina A. Snyder appointed the Marron Firm as Class Counsel, and on February 3, 2014, the Court certified a class of annuities purchasers under various theories of relief, including breach of contract and the UCL. On September 22, 2014, the court granted final approval to a class action settlement that achieved a settlement of approximately \$5.55 million for consumers, including *cy pres* relief to the Congress of California Seniors.

CURRENT AND NOTABLE APPOINTMENTS AS CLASS COUNSEL

Hilsley v. Ocean Spray Cranberries, Inc., No. 3:17-cv-02335(GPC) (S.D. Cal.)

A nationwide class of consumers brought this suit against Ocean Spray Cranberries, Inc. and Arnold Worldwide LLC for violations of California's Consumer Legal Remedies Act. Plaintiff alleges that certain Ocean Spray products falsely state "no artificial flavors" when they in fact contain the

artificial flavoring agent, malic acid. On November 29, 2018, the Honorable Gonzalo P. Curiel granted class certification, appointing Ronald A. Marron, Michael Houchin, and Lilach Halperin of the Marron Firm as class counsel. On July 3, 2019, Judge Curiel denied Defendant's Motion for Summary Judgment and on July 10, 2019 denied Defendant's Motion to Decertify the Class. On November 8, 2019, Ocean Spray agreed to a \$5.4 million dollar Class Action Settlement that was preliminarily approved by the Court on January 31, 2020. Ocean Spray has also agreed to remove the "no artificial flavors" statement from its product labels. A final approval hearing is currently set for July 31, 2020.

Romero v. Securus Technologies, Inc. No. 3:16-cv-01283 (JM) (S.D. Cal.)

Plaintiffs Juan Romero, Kenneth Elliot, and Frank Tiscareno allege that Securus Technologies illegally recorded telephone conversations between inmates and their counsel. On November 21, 2018, the Honorable Jeffrey Miller granted class certification in part, appointing the Law Offices of Ronald A. Marron as co-lead class counsel. On June 16, 2020, the class action settlement was preliminarily approved by the Court. A final approval hearing is currently set for September 28, 2020.

O'Shea v. American Solar Solutions, Inc., No. 3:14-cv-00894-L-RBB (S.D. Cal.)

On March 3, 2017, the Honorable M. James Lorenz certified a TCPA class of all individuals in the United States who were called on behalf of the defendant, using the ViciDial predictive dialers, on a cellular telephone number, between November 22, 2012 and August 22, 2015, and appointed Ronald A. Marron, Alexis Wood and Kas Gallucci as class counsel.

Reyes v. Education Credit Management Corporation, No. 3:15-cv-00628-BAS-AGS (S.D. Cal.)

Plaintiff A.J. Reyes brought suit against Education Credit Management Corporation under California's Invasion of Privacy Act. Plaintiff alleges due to an error in the Defendant's phone system, inbound calls to ECMC were being recorded without their consent. On September 20, 2017, the Honorable Cynthia Bashant certified a class of individuals who made inbound calls to lines with the faulty setting, as well as granted certification of plaintiff's demand for injunctive relief and monetary damages. The Law Offices of Ronald A. Marron was appointed as class counsel. Currently remanded back from Ninth Circuit after vacating Class Certification, this case is back at the District Court for further proceedings.

Robbins v. Gencor Nutrients, Inc., No. 16AC-CC00366 (Circuit Court, Cole Cty. Mo.).

On May 14, 2018, the Honorable Jon E. Beetem granted preliminary approval of a nationwide false advertising class action settlement concerning testosterone boosting supplements and appointed the Law Offices of Ronald A. Marron as co-lead class counsel.

Allen v. Hyland's, Inc., No. 12-CV-1150 DMG (MANx) (C.D. Cal.)

Nationwide class of consumers certified for false and deceptive advertising against largest U.S.-based manufacturer of homeopathic drugs, involving ten over-the-counter homeopathic drug products. A nationwide class was certified after two years of vigorous litigation, including Marron firm counsel surviving against two motions to dismiss, a motion for judgment on the pleadings, and a motion to strike punitive damages. *See* 300 F.R.D. 643 (C.D. Cal. 2014). Following a thirteen-day jury trial before the Honorable Judge Dolly M. Gee, a verdict was returned in favor of Hyland's. The Marron Firm timely appealed. On May 15, 2019, the Ninth Circuit reversed the judgment in part holding that "the jury's narrow findings as to deceptive advertising do not resolve [Plaintiffs']

broader unfair practices theory” and that “the district court must engage in fact-finding to resolve [the UCL claim], and erred in granting judgment to Hyland’s without doing so.” *Allen v. Hylands, Inc.*, 773 F. App’x 870, 874 (9th Cir. 2019).

Allen v. Similasan Corp., No. 12-cv-376 BAS (JLB) (S.D. Cal.)

A California class of consumers alleging false and deceptive advertising of six homeopathic drugs was certified by the Honorable Cynthia A. Bashant on March 30, 2015, with the Court noting that the firm was experienced and competent to prosecute the matter on behalf of the Class. Judge Bashant denied summary judgment on the class’ claims that the drug products were not effective, as advertised, and certified claims under California’s Consumers Legal Remedies Act, Unfair Competition Law, False Advertising Law, breach of express and implied warranty, and violation of the federal Magnuson-Moss Warranty Act.

OTHER NOTABLE CASES

In re Santa Fe Natural Tobacco Company Marketing & Sales Practices Litig., No. 1:16-md-02695-JB-LF (D.N.M.)

On May 24, 2016, Ronald A. Marron was appointed to the Executive Committee in a multidistrict litigation labeling case. (Dkt. 24.)

Henderson v. The J.M. Smucker Company, No. 2:10-cv-4524-GHK (C.D. Cal.)

This action was the catalyst forcing the defendant to reformulate a children’s frozen food production to remove trans-fat. On June 19, 2013, the Honorable George H. King held the firm’s client was a prevailing Private Attorney General and entitled to her costs and attorneys’ fees.

APPELLATE CASES

Littlejohn v. Ferrara Candy Company, Inc., Case No. 19-55805 (9th Cir.)

The Marron Firm was appointed by the district court as class counsel for a settlement class involving purchasers of SweeTARTS candy products that are labeling as containing “No Artificial Flavors” The plaintiff alleged that the “No Artificial Flavors” claim is false and misleading because the SweeTARTS products are made with an artificial flavoring ingredient. The district court approved a nationwide class action settlement that provided valuable injunctive relief by requiring the defendant to remove the “No Artificial Flavors” labeling claim. An objector appealed the district court’s approval of the settlement. On June 30, 2020, the Ninth Circuit fully affirmed the district court’s approval of the settlement holding that the “SweeTARTS purchasers tend to be repeat buyers who would derive value from the Settlement’s injunctive relief upon each future purchase of SweeTARTS.” *Littlejohn v. Ferrara Candy Company, Inc.*, ---Fed. Appx.---, 2020 WL 3536531, at *2 (9th Cir. June 30, 2020).

Shyriaa Henderson v. United States Aid Funds, Inc., Case No. 17-55373 (9th Cir.)

On March 22, 2019, the Ninth Circuit reversed the District Court’s order granting summary judgment in favor of Defendant, and remanded for further proceedings in a class action where debt collectors acting on behalf of defendant were in violation of the TCPA. The Ninth Circuit found that a reasonable jury could hold Defendant vicariously liable for the alleged TCPA violations by debt collectors. *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068 (9th Cir. 2019).

John Sandoval v. Pharmicare US, Inc., Case No. 16-56301 (9th Cir.)

On April 5, 2016, the Ninth Circuit reversed, in part, the District Court's order granting summary judgment in a false advertising class action concerning an aphrodisiac dietary supplement called "IntenseX" The Marron Firm successfully argued that statements on the intensex.com website showed that the defendant failed to obtain approval of IntenseX as an OTC aphrodisiac drug, thus creating a basis for liability under California's Unfair Competition Law. *Sandoval v. PharmaCare US, Inc.*, 730 Fed.Appx. 417 (9th Cir. 2018).

Reid v. Johnson & Johnson, Case No. 12-56726 (9th Cir.)

On March 13, 2015, the Ninth Circuit reversed, in part, the District Court's order granting the defendant's motion to dismiss in a false advertising class action concerning Benecol spread that was allegedly falsely advertised as containing "No Trans Fat." The Marron Firm successfully argued that the plaintiff's claims are not preempted by the Federal Food, Drug, and Cosmetics Act. *Reid v. Johnson & Johnson*, 780 F.3d 952, 964 (9th Cir. 2015).

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12 Attorneys for Defendant AXOS BANK

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SAN DIEGO

15
16 DANIEL MCSWAIN, TRUSTEE OF THE
DANIEL S. MCSWAIN TRUST DATED
17 JULY 17, 2012, on behalf of himself, all
others similarly situated, and the general
18 public,

19 Plaintiff,

20 v.

21 AXOS BANK, fka BANK OF INTERNET
22 USA; and DOES 1-10, inclusive,

23 Defendants.
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Case No. 37-2019-00015784-CU-BC-CTL

CLASS ACTION

**DECLARATION OF ERIK BOWEN IN
SUPPORT OF MOTION FOR FINAL
APPROVAL OF SETTLEMENT**

Date: November 25, 2020

Time: 9:00 a.m.

Dept.: C-73

The Hon. Joel R. Wohlfeil

Complaint Filed: March 25, 2019

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1 appropriate), and identifies the transaction type. If the record relates to the application of a
2 payment or disbursement, the JHA System itemizes the amounts applied. The JHA
3 System then automatically calculates running account totals, which allow us to accurately
4 reproduce account balances, including in any associated loan escrow accounts.

5 c. Axos has implemented payment controls to ensure payment activity is
6 recorded correctly. Payment transactions are also subject to oversight by federal
7 regulators. Axos uses the JHA System in the ordinary course of business, and relies upon
8 the JHA System in the ordinary course of its business activities.

9 4. In compliance with the Court’s preliminary approval order, Axos
10 directed me to gather information regarding its efforts to provide notice (“Notice”) to the
11 Settlement Class¹ of the proposed terms of settlement of this action. Although I referred
12 the actual gathering and processing of the relevant information to technical personnel
13 within the Credit Department, I personally reviewed the work performed by the technical
14 staff and cross-checked the data provided to me with the data stored on Axos’s JHA
15 System.

16 5. It is my understanding that the Court ordered Axos to provide Notice
17 of the Court’s preliminary approval of the settlement of this action to the Settlement Class,
18 which is composed of all customers and former customers of Axos who had a loan
19 serviced by Axos at any time from March 25, 2015 until July 22, 2020 (the “Class
20 Period”), which was secured by a one-to-four family residential property located in the
21 State of California and had an escrow or impound account on such loan that received
22 money in advance for payment of taxes and assessments on the property, for insurance, or
23 for other purposes relating to the property, and which at any time within the Class Period
24 had a positive balance in such account, not including escrow accounts for loans held by
25 Axos employees, officers, or directors (the “Relevant Escrow Accounts”).

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27
28 ¹ The Settlement Class is defined in the parties’ June 17, 2020 Class Litigation Settlement Agreement (“Settlement Agreement”).

1 6. Based on my review of the materials provided to me in connection
2 with this matter, I am aware that the Court approved a settlement requiring a payment by
3 Axos of \$500,000 (non-reversionary) inclusive of McSwain's attorneys' fees and costs,
4 and McSwain's award as representative plaintiff. Axos has agreed not to object to an
5 attorneys' fees and costs request by McSwain of up to \$200,000 and a request for an
6 incentive award to McSwain of up to \$7,500.

7 7. The settlement provides that Axos will pay members of the Settlement
8 Class a predetermined amount based upon the number of years each member of the
9 Settlement Class has had a Relevant Escrow Account open. Settlement Class members
10 who held an escrow account with Axos for less than one (1) year during the Class Period
11 will receive \$25 ("Tier 1") per account that falls into Tier 1. Settlement Class members
12 who held an escrow account with Axos for at least one (1) year but less than two (2) years
13 during the Class Period will receive \$50 ("Tier 2") per account that falls into Tier 2.
14 Settlement Class members who held an escrow account with Axos for at least two (2)
15 years but less than three (3) years during the Class Period will receive \$75 ("Tier 3") per
16 account that falls into Tier 3. Settlement Class members who held an escrow account with
17 Axos for at least three (3) years but less than four (4) years during the Class Period will
18 receive \$100 ("Tier 4") per account that falls into Tier 4. Settlement Class members who
19 held an escrow account with Axos for four (4) or more years during the Class Period will
20 receive \$125 ("Tier 5") per account that falls into Tier 5.

21 8. Per the Settlement Agreement, to the extent the amounts available for
22 distribution to the Settlement Class exceed the total amount to be distributed to the
23 Settlement Class pursuant to the formula described above, then the amount distributed to
24 each Settlement Class member will be increased proportionately until the amounts
25 available for distribution are exhausted. To the extent the amounts available for
26 distribution to the Settlement Class are less than the total amount to be distributed to the
27 Settlement Class pursuant to the formula described above, then the amount distributed to
28 each Settlement Class member will be decreased in proportion to the difference between

1 the amount available for distribution and the amounts that would have been distributed
2 pursuant to the formula described above.

3 9. Per the Settlement Agreement, Axos was to provide the required
4 Notice to the Settlement Class by August 21, 2020, which was thirty (30) days after the
5 Court's order granting preliminary approval of the settlement. The notice protocols
6 required Axos to provide notice via email to all members of the Settlement Class who
7 could be contacted via email. For any member(s) of the Settlement Class for whom Axos
8 did not have a valid email address, Axos would provide mail notice at such Settlement
9 Class member's last known physical address. The Settlement Agreement also required
10 Axos to create a settlement website containing information regarding the settlement and
11 the Fairness Hearing. The settlement website went live on August 18, 2020. As of 10:39
12 a.m. on September 29, 2020, the settlement website had received 439 pageviews.

13 10. On August 2, 2020, Axos technical staff working at Axos's direction
14 created a spreadsheet synthesizing data from the JHA System listing the number of
15 Relevant Escrow Accounts and Settlement Class members required to receive Notice
16 pursuant to the Court's preliminary approval order. The spreadsheet was later finalized on
17 August 7, 2020. The spreadsheet captures loans that had changes in their escrow balances
18 between March 25, 2015 and July 22, 2020. The list was then further filtered to include
19 only loans secured by one-to-four family residential properties located in California. The
20 list was then further filtered to exclude loans that only ever had a zero or less balance in
21 their escrow account and loans to Axos's employees, officers and/or directors.

22 11. The spreadsheet shows that Axos had 6,415 Relevant Escrow
23 Accounts, which existed at any time between March 25, 2015 through July 22, 2020. The
24 spreadsheet contains certain personal identifying information associated with each of the
25 Relevant Escrow Accounts, including the name of the borrower, the borrower's physical
26 address, and the number of years (or portions thereof) the Relevant Escrow Account was
27 active during the Class Period. The spreadsheet also contains the email addresses for
28 nearly all borrowers who have or had a Relevant Escrow Account.

1 12. Some Axos customers have multiple loans with Axos. As a result, the
2 total number of putative class members is lower than the total number of unique Relevant
3 Escrow Accounts. There are 5,848 unique borrowers in the Settlement Class.

4 13. Of the 6,415 Relevant Escrow Accounts, 5,922 had customer email
5 addresses associated with such accounts that were not duplicates of the email addresses
6 associated with other accounts classified as Relevant Escrow Accounts. As a result, on
7 August 18, 2020, Axos used its email marketing system Salesforce Marketing Cloud to
8 email the Notice to the 5,922 unique email accounts associated with the Relevant Escrow
9 Accounts. Of those email accounts, Axos received automated notice that 154 of the
10 attempted email notifications were rejected and/or undeliverable. Axos created a special
11 email address that it blind copied on each of the outgoing Notice emails to keep a record of
12 each email sent. Axos also had 54 Relevant Escrow Accounts for which it did not have an
13 associated email address; however, two of those Relevant Escrow Accounts involved the
14 same customer. Attached to my Declaration as **Exhibit A** is a true and correct copy of the
15 form of email notice that was emailed to Settlement Class members who had active email
16 accounts on August 18, 2020.

17 14. To complete its notice obligations with respect to the 207 Settlement
18 Class members for whom Axos did not have a valid email address, on August 20, 2020,
19 Axos mailed (via U.S. Postal Service First Class Mail) the Notice approved by the Court at
20 the preliminary approval hearing to the remaining Settlement Class members. As a result,
21 as of August 20, 2020, Axos completed its obligation to provide Notice to the Settlement
22 Class regarding the settlement of this matter.

23 15. On August 18, 2020, Axos finalized a settlement website
24 (www.escrowinterestclassactionsettlement.com), providing information on the lawsuit and
25 access to case documents. The website includes a summary of the case, a list of important
26 dates, answers to frequently asked questions, key case filings, and contact information for
27 McSwain's counsel. The settlement website also displays the deadline to opt-out of the
28 class settlement; the deadline to submit an objection; and the date of the Fairness Hearing.

1 The website address was set forth in the Notice provided to the Settlement Class described
2 above.

3 16. The number of Relevant Escrow Accounts in each of the various
4 settlement tiers is as follows: (i) 2,614 Relevant Escrow Accounts fall within Tier 1; (ii)
5 1,477 Relevant Escrow Accounts fall within Tier 2; (iii) 947 Relevant Escrow Accounts
6 fall within Tier 3; (iv) 746 Relevant Escrow Accounts fall within Tier 4; and (v) 632
7 Relevant Escrow Accounts fall within Tier 5. Assuming approximately \$292,500 is
8 available for distribution to the Settlement Class, the distribution to each of the Relevant
9 Escrow Accounts pursuant to the formula set forth in Section 7.2, *et seq.* of the Settlement
10 Agreement would be as follows:

Tier	Members	Unadjusted Individual Award	Unadjusted Aggregate Award	Adjusted Individual Award	Adjusted Aggregate Award
< 1 year	2,614	\$25	\$65,350	\$20.11	\$52,567.64
1 year, < 2 years	1,477	\$50	\$73,850	\$40.21	\$59,390.17
2 years, < 3 years	947	\$75	\$71,025	\$60.31	\$57,113.57
3 years, < 4 years	746	\$100	\$74,600	\$80.42	\$59,993.32
>4 years	631	\$125	\$78,875	\$100.53	\$63,434.43
<u>Total</u>	6,415		\$363,700		\$292,499.03

17. Assuming that \$292,500 remains for distribution to the Settlement
Class after payment of McSwain's attorneys' fees, costs, and McSwain's incentive award,
then the amount distributed to each Relevant Escrow Account will be more than 80.42% of
the total unadjusted award amount due to each Relevant Escrow Account (excluding
escrow accounts that only ever had a zero or less balance) under Section 7.2, *et seq.* of the
Settlement Agreement.

1 18. If the Court approves the settlement, Axos will pay the appropriate
2 settlement payment to each Settlement Class member within thirty (30) days of this
3 Court's entry of the Final Approval Order. Settlement Class members who hold an escrow
4 account with Axos will receive such payment directly into their escrow account. If a
5 Settlement Class member no longer has an escrow account, Axos shall provide the
6 settlement payment via a physical check to the Settlement Class member's postal address
7 on record with Axos. Any checks returned to Axos unpaid will be distributed to Public
8 Citizen or any other *cy pres* organization approved by the Court.

9 19. It is my understanding that, as consideration for the settlement, Axos
10 will be changing its policy to start paying at least 2% *per annum* interest on the Relevant
11 Escrow Accounts within 30 days of the Court's entry of judgment in this matter. Section
12 7.03 of the Settlement Agreement, however, allows Axos to refrain from paying interest
13 under section 2954.8(a) of the California Civil Code ("Section 2954.8(a)") "at any time in
14 accordance with changes in any applicable legal obligations of [Axos]." Such a change
15 has occurred with respect to 29 loans currently classified within the Settlement Class.

16 20. On September 22, 2020, the Ninth Circuit issued a decision in
17 *McShannock v. JPMorgan Chase, N.A.*, 2020 U.S. App. LEXIS 30234 (9th Cir. Sep. 22,
18 2020) that holds that the Home Owners Loan Act preempts California's requirement to pay
19 interest under Section 2954.8(a) with respect to loans originated by federal savings
20 associations prior to January 21, 2013. Axos currently has 29 loans that were originated
21 prior to January 21, 2013. As a result, Axos is not legally required (and will not) change
22 its policy to pay interest under Section 2954.8(a) as to these 29 legacy loans originated
23 prior to January 21, 2013. Based on the historical balances in the Relevant Escrow
24 Accounts for the twelve months including and prior to November 29, 2019 (which I
25 understand were the numbers used for purposes of negotiating this settlement) and
26 subtracting the 29 loans affected by the *McShannock* decision, I estimate the value of
27 Axos's change in policy for the first four years after the change in policy would be worth
28 approximately \$1,412,144 to Axos customers who have (or will have) a loan serviced by

1 Axos originated at any time after January 21, 2013, which is secured by a one-to-four
2 family residential property located in the State of California and have an escrow or
3 impound account on such loan that receives money in advance for payment of taxes and
4 assessments on the property, for insurance, or for other purposes relating to the property.

5 I declare under penalty of perjury under the laws of the State of California
6 that the foregoing is true and correct.

7 Executed on this 7th day of October, 2020, at San Diego, California.

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10 **ERIK BOWEN**

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - CENTRAL DIVISION**

DANIEL MCSWAIN, TRUSTEE OF THE
DANIEL S. MCSWAIN TRUST DATED JULY
17, 2012, on behalf of the trust and all others
similarly situated, and the general public;

Plaintiff,

v.

AXOS BANK, fka BANK OF INTERNET USA;
and DOES 1-10, INCLUSIVE,

Defendant.

Case No: 37-2019-00015784-CU-BC-CTL

**[PROPOSED] FINAL ORDER AND
JUDGMENT APPROVING CLASS ACTION
SETTLEMENT**

Date: November 25, 2020
Time: 9:00 a.m.
Dept.: C-73
Judge: Hon. Joel R. Wohlfeil

1 Plaintiff Daniel McSwain's ("Plaintiff") motion for final approval of a proposed class action
2 settlement and Plaintiff's Motion for Attorneys' Fees, Costs, and Incentive Award came on for hearing
3 on November 25, 2020. Having read and considered the Parties' Settlement Agreement and exhibits
4 thereto, the motions and all papers submitted in connection therewith, **IT IS HEREBY ORDERED:**

5 1. This Order incorporates by reference the definitions in the Settlement Agreement, and
6 all terms used herein shall have the same meaning as that set forth in the Settlement Agreement,
7 provided however, that in the event of any inconsistency, the terms of this Order shall control.

8 2. This is a California class action in which Plaintiff contends that Defendant Axos Bank
9 ("Defendant" or "Axos") violated section 2954.8(a) of the California Civil Code ("Section 2954.8(a)")
10 by failing to pay borrowers a minimum of 2% simple interest for money held in borrowers' escrow
11 accounts for loans secured by 1-4 family homes located in California. Plaintiff's operative First
12 Amended Complaint alleges claims against Axos for: (1) violation of California Business &
13 Professions Code § 17200; and (2) breach of contract. Defendant has denied all of the allegations of
14 wrongdoing.

15 3. For purposes of settlement only, and in accordance with the standards set forth in *Dunk*
16 *v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, the Court finally certifies this litigation as a class
17 action and finally certifies the settlement Class as follows:

18 All persons who obtained a loan from Defendant and/or had a loan serviced by
19 Defendant at any time within the Class Period (March 25, 2015 through July 22,
20 2020) which was secured by a one to four family residential property located in
21 the State of California and had an escrow or impound account on such loan that
22 received money in advance for payment of taxes and assessments on the property,
23 for insurance, or for other purposes relating to the property, and which at any time
24 within the Class Period had a positive balance in such account. The Settlement
25 Class specifically excludes (1) any judicial officer presiding over the Litigation,
26 (2) Defendant and Released Parties, and each of their current or former officers,
27 directors, and employees; (2) legal representatives, successors, or assigns of any
28 such excluded person, and (4) any person who properly executes and sends a

1 timely Request for Exclusion.

2 4. For the reasons stated in the order granting preliminary approval of the settlement, the
3 Court finds that the proposed settlement, as set forth in the Settlement Agreement, is fair, reasonable,
4 and adequate for the Class. *See, e.g., Dunk v. Ford Motor Co.* (1996) 48 Cal. App.4th 1794, 1800 01;
5 Cal. Rules of Court, Rule 3.769(g). Accordingly, the Court **GRANTS** Plaintiff's motion for final
6 approval of the class action settlement.

7 5. The Court finds that the requirements of Cal. Code Civ. P. § 382 have been satisfied,
8 and the Court has made a final determination that Plaintiff Daniel McSwain is an adequate Class
9 Representative for the Class. Accordingly, the Court hereby appoints Plaintiff Daniel McSwain as the
10 Class Representative.

11 6. The Court finds that plaintiff's counsel, The Law Office of Ronald A. Marron, APLC
12 and the Law Office of Michael G. Olinik , and each of their attorneys, has adequately represented the
13 Class, and hereby appoints them Class Counsel.

14 7. The Court has reviewed and considered Plaintiff's Motion for Attorneys' Fees, Costs,
15 and Incentive Awards and hereby **GRANTS** Plaintiff's Motion. Accordingly, the Court approves the
16 attorney fee and expense payment sought by Class Counsel. Class Counsel is hereby awarded
17 \$197,892.27 in attorneys' fees, which represents 10.35% of the \$1,912,144.00 Settlement Fund.¹ Class
18 Counsel's fee request is also reasonable utilizing a lodestar cross-check. Class Counsel's lodestar in
19 the action totals \$226,098.00. Therefore, Class Counsel are requesting a negative multiplier of .875. In
20 addition, the Court awards Class Counsel \$2,107.73 in costs that were reasonably necessary to
21 prosecute the action.

22 8. The Court further approves an incentive award sought by Class Representative Daniel
23 McSwain in the amount of \$7,500.

24 9. The Court approves Public Citizen as the *cy pres* recipient of any funds remaining
25 unclaimed in the Settlement Fund.

26 10. The Court finds that the notice of settlement to the Settlement Class and notice
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¹ The Settlement Fund includes a \$500,000 gross settlement fund in addition to \$1,412,144 in estimated future payments to settlement class members.

1 methodology implemented by Axos following the Order Granting Preliminary Approval of the
2 Settlement (i) constituted the best practicable notice; (ii) constituted notice that was reasonably
3 calculated, under the circumstances, to apprise the Settlement Class of the pendency of the action, their
4 right to object to or exclude themselves from the Settlement and their right to appear at the final
5 fairness hearing; (iii) were reasonable and constituted due, adequate and sufficient notice to persons
6 entitled to receive notice; and (iv) met all applicable requirements of the California Code of Civil
7 Procedure and due process of law.

8 11. The Court finds that no individuals have objected to the settlement and that only two
9 class members have requested exclusion from the settlement. Therefore, all Class Members are bound
10 by this Final Judgment, except for Angie Hermogenes and Paula Andrea Hermogenes, who submitted
11 timely requests for exclusion.

12 12. The Parties are to give notice to all Class Members of this Final Order and Judgment in
13 accordance with California Rule of Court 3.771(b) by posting this Final Order and Judgment on the
14 settlement website in accordance with the terms of the Settlement Agreement.

15 13. To the extent not specifically ordered herein, the Court orders the parties to comply with
16 all obligations arising under the Settlement Agreement in a reasonable time and manner, with the
17 understanding that pursuant to the decision of the Ninth Circuit in *McShannock v. JPMorgan Chase*
18 *Bank, N.A.* (9th Cir. Sep. 22, 2020) 2020 U.S. App. LEXIS 30234, Axos shall not have the obligation
19 to pay interest under Section 2954.8(a) on any loans originated prior to January 21, 2013.

20 14. Nothing in this Order shall preclude any action to enforce or interpret the terms of the
21 Settlement Agreement. Any action to enforce or interpret the terms of the Settlement Agreement shall
22 be brought solely in this Court.

23 15. The Court expressly retains jurisdiction as to all matters relating to the Settlement and
24 this Order, and for any other necessary and appropriate purpose.

25 16. The Final Approval Order and Judgment pursuant to California Rules of Court Rule
26 3.769(h), wherein the Court retains jurisdiction over the parties to enforce the terms of the judgment,
27 should be entered.

28 17. The Settlement is not an admission by Axos, nor is this Order a finding of the validity of

1 any allegations of wrongdoing by Axos. Neither this Order, the Settlement, nor any document referred
2 to herein, nor any action taken to carry out the Settlement, may be construed as, or may be used as, an
3 admission of any fault, wrongdoing, omission, concession, or liability whatsoever by or against Axos.
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5 **IT IS SO ORDERED.**
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7 Dated: _____, 2020

8 Hon. Joel R. Wohlfeil
9 Judge of the Superior Court
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