

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 Attorney for Plaintiff Daniel McSwain and  
19 the Proposed Class

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

22 DANIEL MCSWAIN, on behalf of himself, all  
23 others similarly situated, and the general public;

24 Plaintiff,

25 v.

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

28 Defendant.

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

CLASS ACTION COMPLAINT FOR:

- 1) VIOLATION OF THE CALIFORNIA  
UNFAIR COMPETITION LAW (CAL. BUS. &  
PROF. CODE § 17200, ET SEQ.);  
2) BREACH OF CONTRACT

UNLIMITED CIVIL ACTION

**DEMAND FOR JURY TRIAL**

Plaintiff Daniel McSwain, on behalf of himself, all others similarly situated, and the general public, alleges against Defendant AXOS Bank, a national bank formerly known as the Bank of Internet USA; the following upon his own personal knowledge, or where there is no personal knowledge, upon information, belief, and the investigation of his counsel.

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1 **I. INTRODUCTION**

2 1. This class action is based upon Defendant AXOS Bank's ("AXOS") blatant and willful  
3 violation of California laws requiring a mortgage lender making loans secured by property located in  
4 California to pay the borrower a minimum of 2% simple interest for money received in a borrower's  
5 escrow account for the payment of property tax and insurance. AXOS requires borrowers such as  
6 Plaintiff Daniel McSwain ("Mr. McSwain") to maintain an impound escrow account in connection  
7 with their mortgages. Borrowers are forced to pay money into the escrow account in advance, and  
8 AXOS holds onto the money until it pays the property tax and insurance for the mortgaged property.  
9 The money in the escrow account, however, is the borrower's money and which mortgage lenders have  
10 use of for investment. Accordingly, California law requires mortgage lenders, including AXOS, to pay  
11 at least 2% interest on the monies to the borrowers. The Ninth Circuit has ruled that California's  
12 statutory requirement to pay interest is not preempted by federal banking laws and regulations. *Lusnak*  
13 *v. Bank of America, N.A* (9th Cir. 2018) 883 F.3d 1185. In fact, federal law also requires banks to pay  
14 any interest mandated by state law, though this lawsuit is brought solely based on state law.

15 2. AXOS systematically and uniformly has adopted a policy to violate California law.  
16 When Mr. McSwain reached out to AXOS demanding his interest, AXOS incorrectly asserted that is  
17 not required to pay interest. Meanwhile, in a quarterly earnings call, AXOS Financial, Inc. touted an  
18 increase in non-interest bearing accounts. AXOS is therefore willfully not complying with California  
19 law, then using the proceeds in order to enrich itself and the investors of Axos Financial, Inc. This  
20 class action is brought in order to force AXOS to pay its borrowers the interest they are entitled to by  
21 law on the money that is theirs, and which they are required to pay to AXOS through their mortgages.

22 **II. JURISDICTION AND VENUE**

23 3. Pursuant to Article VI, § 10 of the California Constitution, subject matter jurisdiction is  
24 proper in the Superior Court of California, county of San Diego.

25 4. This Court has jurisdiction over AXOS, as it is a citizen of California and because it is  
26 located in California. .

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5. The amount in controversy under this Complaint exceeds the jurisdictional minimal jurisdictional limit of this Court, and the claims asserted in this Complaint are within the subject-matter jurisdiction of this Court, as, upon information and belief, the improperly withheld interest payments are valued at over \$25,000.

6. This Court has personal jurisdiction over Defendant because it is an association, corporation, limited liability company, business entity, national association, and/or person that resides in, are based in, authorized to, and/or registered to conduct, and in fact do conduct, substantial business in the state of California, county of San Diego.

7. Venue is proper in this Court because material acts upon which this Complaint is based upon occurred in the county of San Diego, and because Defendant conducts substantial business, holds significant contacts, operate business facilities, and entered into a contract with Plaintiff within the state of California, county of San Diego.

### III. PARTIES

8. Plaintiff Daniel McSwain, a natural person, is, and at all times mentioned herein was, a resident and citizen of the state of California. During the Class Period, McSwain was the trustor of a mortgage of which Defendant AXOS was the beneficiary.

9. Defendant AXOS Bank, is a national bank with its principle place of business located at 4350 La Jolla Village Drive, Suite 140, San Diego, CA 92122. AXOS Bank was formerly known as Bank of Internet USA. AXOS Bank's NMLS ID is 524995. AXOS Bank is a bank that, among other activities, hold mortgages as well as services mortgages.

10. The true names and capabilities, whether individual, corporate, associate, or otherwise, of the Doe Defendants 1 through 20, are unknown to Plaintiff, and therefore Plaintiff sues these Doe Defendants by such fictitious names pursuant to California Code of Civil Procedure § 474. Plaintiff will seek leave to amend this Complaint to show their true names and capacities when the same has been ascertained.

11. Plaintiff is informed and believes, and based thereon allege, that each of the Doe Defendants were, or are, in some way or manner, responsible and liable to Plaintiff and Class Members for the events, happenings, and damages hereinafter set forth in the body of this Complaint. Plaintiff is

1 informed and believes, and based thereon allege, that said Doe Defendants may be responsible for the  
2 damages and injuries suffered by Plaintiff and Class Members on alternative theories of liability not  
3 specifically addressed herein.

4 12. Plaintiff is informed and believes, and based thereon allege, that Defendants, and each  
5 of them, were, and are, an owner, co-owner, agent, representative, partner, and/or alter ego of its co-  
6 defendants, or otherwise acted, and continue to act, on behalf of each and every remaining defendant  
7 and, in doing the things hereinafter alleged, were, at all times material hereto, acting within the course  
8 and scope of their authorities as an owner, co-owner, agent, representative, partner, and/or alter ego of  
9 its co-defendants, with the full knowledge, permission, consent, and authorization of each and every  
10 remaining defendant, each co-defendant having ratified or promoted the acts of the other co-  
11 defendants, such that each of them are jointly and severally liable to Plaintiff and Class Members.

#### 12 **IV. GENERAL ALLEGATIONS**

13 13. Plaintiff Daniel McSwain entered into mortgage contracts for a one-to four-family  
14 residence located in California that were eventually owned by Defendant AXOS.

15 14. Mr. McSwain's mortgage requires him to pay money into an impound escrow account.  
16 AXOS uses the money in that escrow account to pay property taxes and insurance for the property  
17 when those bills become due. Up until the payment of those bills, the money belongs with Mr.  
18 McSwain, but AXOS has use of the funds for their own investment purposes.

19 15. California law requires financial institutions such as AXOS to pay borrowers at least 2  
20 percent simple interest per annum on such impound escrow accounts:

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

25 (b) No financial institution subject to the provisions of this section shall impose any fee  
26 or charge in connection with the maintenance or disbursement of money received in  
27 advance for the payment of taxes and assessments on real property securing loans made  
by such financial institution, or for the payment of insurance, or for other purposes  
relating to such real property, that will result in an interest rate of less than 2 percent per  
annum being paid on the moneys so received.

28 (c) For the purposes of this section, "financial institution" means a bank, savings and  
loan association or credit union chartered under the laws of this state or the United

1 States, or any other person or organization making loans upon the security of real  
2 property containing only a one- to four-family residence.

(d) The provisions of this section do not apply to any of the following:

(1) Loans executed prior to the effective date of this section.

(2) Moneys which are required by a state or federal regulatory authority to be placed by  
3 a financial institution other than a bank in a non-interest-bearing demand trust fund  
4 account of a bank.

The amendment of this section made by the 1979–80 Regular Session of the Legislature  
5 shall only apply to loans executed on or after January 1, 1980.

6 Cal. Civ. Code § 2954.8

7 16. Mr. McSwain has continuously deposited funds into his escrow account which are due  
8 every month.

9 17. McSwain has never received the interest accrued on his funds maintained in the escrow  
10 account back from AXOS, and AXOS has expressly refused to pay Plaintiff interest on these funds as  
11 demanded by Mr. McSwain prior to his filing the lawsuit.

12 18. Upon information and belief, AXOS has failed to pay the required at least 2% interest  
13 on the impound escrow accounts for other borrowers who have secured real property containing only a  
14 one- to four- family residence located in this state or security by property in this state.

## 15 V. TOLLING OF THE STATUTE OF LIMITATIONS

16 19. **Delayed Discovery:** Plaintiff and the Class are laypersons who lacked the knowledge  
17 and experience to understand that AXOS was not paying interest accrued on their funds maintained in  
18 escrow accounts held by AXOS as this information was solely within AXOS' possession and control.  
19 Plaintiff did not discover that AXOS was not paying interest accrued on his funds maintained in an  
20 escrow account held by AXOS until March 2, 2019 when he received an email from AXOS denying  
21 that it had to pay interest. Thus, the delayed discovery exception postpones accrual of the limitations  
22 period for all members of the putative classes.

23 20. **Fraudulent Concealment:** Additionally, on in the alternative, AXOS was  
24 constructively and actually aware that it was not paying interest accrued on Plaintiff and the Class  
25 Members' funds maintained in escrow accounts held by AXOS. Nevertheless, AXOS continued to  
26 profit from its failure to pay interest. Therefore, at all relevant times AXOS had a duty to inform its  
27 customers that it was not paying interest accrued on Plaintiff and the Class Members' funds maintained  
28 in escrow accounts held by AXOS. Plaintiff did not discover that AXOS was not paying interest

1 accrued on his funds maintained in an escrow account held by AXOS until March 2, 2019 when he  
2 received an email from AXOS denying that it had to pay interest. Accordingly, the fraudulent  
3 concealment exception tolls the statute of limitations.

4 21. **Continuing Violation:** Additionally, or in the alternative, because AXOS' fraud and  
5 deception continues up to the present, the continuing violation exception tolls all applicable statutes of  
6 limitations for all members of the putative class until AXOS' unlawful conduct is corrected.

## 7 **VI. CLASS ALLEGATIONS**

8 22. Plaintiff brings this class action on behalf of himself and all Members of the Class  
9 ("Class"), initially defined as:

10 All persons in California who have had loans made or held by AXOS upon the security  
11 of real property containing only a one- to four- family residence and located in  
12 California or secured by property located in California that pay money in advance for  
13 payment of taxes and assessments on the property for insurance or for other purposes  
14 relating to the property, and who did not receive interest on the amount held by AXOS  
15 from the period between January 1, 1999 until the date class notice is disseminated.

16 23. This action is being brought as a class action pursuant to California Code of Civil  
17 Procedure § 382 because there is a well-defined community of interest and the proposed Class is easily  
18 ascertainable. Further, a class action is appropriate because AXOS acted, or refused to act, on grounds  
19 generally applicable to the Class, making class-wide relief appropriate.

20 24. The proposed members in the Class may be jointly referred to as "Class Members."

21 25. Upon information and belief, AXOS has failed to pay the Class Members at least 2%  
22 simple interest per annum on their impound escrow accounts and retained those funds for AXOS's own  
23 benefit and use.

24 26. Plaintiff reserves the right to amend or modify the Class and/or add Subclass definitions  
25 with greater specificity or further division into subclasses or limitation to particular issues as discovery  
26 and the orders of this Court warrant.

27 27. The Court can define the Class and create additional subclasses as may be necessary or  
28 desirable to adjudicate common issues and claims of the Class Members if, based on discovery of  
additional facts, the need arises.

### **Commonality**

28 28. This action may be brought as a class action because common questions of law and fact

predominate over any issues solely affecting individual Plaintiffs or Class Members, including, but not limited to:

i. Whether AXOS was required to pay Class Members 2 percent simple interest per annum;

ii. Whether AXIS had a policy to not pay Class Member 2 percent simple interest per annum; and

iii. Whether AXOS breached the mortgage agreements with Class Members;

iv. Whether AXOS must provide damages, restitution, and/or reimbursement to borrowers in the amount of unpaid interest on funds kept in impound escrow accounts based on the causes of action asserted herein; and

v. Whether injunctive relief is appropriate to prohibit AXOS from engaging in this conduct in the future.

#### **Numerosity**

29. Upon information and belief, this Class consists of potentially dozens, if not hundreds, of individuals whose mortgage is owed by AXOS. The Members of the Class are so numerous that joinder of each Member is impracticable, if not impossible. As such, a class action is the only available method for the fair and efficient adjudication of this controversy.

#### **Ascertainability**

30. Class Members can easily be identified by an examination and analysis of the business records regularly maintained by AXOS, among other records within AXOS's possession, custody, or control.

#### **Typicality**

31. Plaintiff's claims are typical of the claims of each Class Member in that all claims result from AXOS's unilateral policy to not pay interest to borrowers on their impound escrow accounts, as alleged herein. Moreover, Plaintiff's claims are typical of the claims of each Class Member because each have sustained damages arising out of, and caused by, AXOS's common course of unlawful conduct, as alleged herein. As such, Plaintiff has the same interest in this matter as all Members of the

1 Class, and have no interests antagonistic to the interests of other Members of the Class.

2 **Superiority**

3 32. This action is brought as a class action because this method is superior for the fair and  
4 efficient adjudication of the controversy. This action seeks equitable relief in the form of  
5 restitution/surcharge for interest payments improperly retained by AXOS, an injunction to prevent  
6 AXOS from continuing its illegal business practice, and breach of contract. A class action is superior  
7 as each individual Class Member may lack the resources to undergo the burden and expense of  
8 individual prosecution of the complex and extensive litigation necessary to establish AXOS's liability.  
9 A class action is the only practicable method by which the Plaintiff and Members of the Class can  
10 achieve redress from AXOS and prevent AXOS from unjustly benefitting from its course of unlawful  
11 conduct, as alleged herein. The prosecution of individual actions would present a risk of inconsistent  
12 judgments, even though each Class Member has an effectively identical claim of right against AXOS.  
13 Inconsistent judgments could be dispositive to the interests of other Class Members who are not parties  
14 to the individual adjudication and/or may substantially impede their ability to adequately protect their  
15 interests. If separate actions were brought, or are required to be brought, by individual Class Members,  
16 the resulting multiplicity of lawsuits would cause an undue hardship and burden on the parties and the  
17 judicial system. In contrast, the class action device presents far fewer management difficulties and  
18 provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a  
19 single court on the issue of AXOS's liability. Class treatment of the liability issues will ensure that all  
20 claims and claimants are before this Court for consistent adjudication of the liability issues.

21 **Adequacy**

22 33. Plaintiff is an adequate representative of the Class. Plaintiff's claims are typical of those  
23 of the Class. Plaintiff and Class Members have no unique claims, have no conflicts of interest, and  
24 share the same interests in the litigation of this matter. Plaintiff retained competent counsel  
25 experienced in the prosecution of class actions and who are committed to the vigorous prosecution of  
26 this action. Further, Plaintiff's counsel have the ability and willingness to commit significant resources  
27 to the prosecution of this matter. Accordingly, Plaintiff is an adequate representatives of the Class, and  
28 will fairly and adequately protect the interests of the Class with the help of experienced and



1 knowledgeable retained counsel.

## 2 **VI. CAUSES OF ACTION**

### 3 **First Cause of Action**

#### 4 **Violation of California Business & Professions Code Section 17200 et seq. – Unfair** 5 **Competition Law (“UCL”)**

6 34. Plaintiff and Class Members re-allege and incorporate by reference each and every  
7 allegation set forth in this Complaint with the same force and effect, and further allege as follows:

8 35. The UCL defines unfair business competition to include any “unfair,” “unlawful,” or  
9 “fraudulent” business act or practice. The Act also provides for injunctive relief, restitution, and  
10 disgorgement of profits for violations.

11 36. Defendant’s unlawful, unfair, and fraudulent business acts and practices are described  
12 throughout this Complaint and include, but are not limited to the following. Defendant has and  
13 continues to engage in a practice of failing to pay interest to its borrowers on impound escrow account,  
14 as required by the laws of California, and other states, thereby illegally profiting from the use of  
15 interest free funds in hundreds of thousands of mortgage accounts. This is a *per se* violation California  
16 Civil Code § 2954.8.

17 37. Defendant’s practice is also unfair since it has no utility and, even if it did, any utility is  
18 outweighed by the gravity of harm to Plaintiff and the Class members. Defendant’s practice is also  
19 immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its  
20 benefits.

21 38. Plaintiff and the Class members, and each of them, have been damaged by said  
22 practices. Pursuant to California Business and Professions Code §§ 17200 and 17203, Plaintiff, on  
23 behalf of himself and all others similarly situated, seek relief, including  
24 restitution/surcharge/disgorgement, and an injunction requiring AXOS to pay Class Members and  
25 future mortgage customers 2 percent simple interest per annum on their impound escrow accounts and  
26 attorneys’ fees and costs.

### 27 **Second Cause of Action**

#### 28 **Breach of Contract**

39. Plaintiff and Class Members re-allege and incorporate by reference each and every allegation set forth in this Complaint with the same force and effect, and further allege as follows:

40. AXOS is and was bound by the mortgage agreements with Plaintiff and the Class, and was signatories and/or successors in interest to signatories thereto.

41. Plaintiff, and all others similarly situated, did all or substantially all, of the significant things that the agreements required them to do.

42. AXOS failed to perform the express terms of the agreements that stated AXOS would comply with applicable state and federal law, which included the state law that mandated AXOS pay interest to borrowers for funds collected on an impound escrow account. As such and as set forth above, AXOS breached an express term of the agreements.

43. As a result of AXOS's breach, Plaintiff and the Class Members have been harmed by not receiving the interest they are entitled to under state law.

## VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff and Class Members pray for judgment against AXOS Bank, as follows:

1. An order certifying that this action is properly brought and may be maintained as a class action;

2. An order appointing Plaintiff Daniel McSwain as class representative of the Class, and appointing Law Offices of Ronald A. Marron and Law Office of Michael G. Olinik as counsel for the Class;

3. An order enjoining AXOS under California Business and Professions Code § 17203:

a. To cease such alerts and practices declared by this Court to be an unlawful, fraudulent, or an unfair business act or practice, a violation of laws, statutes, or regulations, or constituting unfair competition;

b. To pay restitution/surcharge to Plaintiff and Class Members for all interest amounts that were due to Plaintiff and Class Members;

c. To disgorge all profits and compensation improperly obtained by Defendant as a result of such acts and practices declared by this Court to be an unlawful,

1 fraudulent, or unfair business act or practice, a violation of laws, statutes, or  
2 regulations, or constituting unfair competition;

3 4. An order requiring AXOS to bear the costs of Class notice;

4 5. For damages under the cause of action for breach of contract;

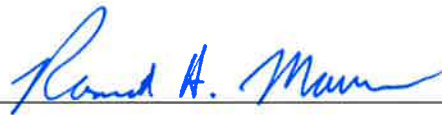
5 6. Reasonable attorneys' fees and costs of suit pursuant to California Code of Civil  
6 Procedure § 1021.5 and other statutes that may be applicable, as well as provided by the contracts;

7 7. For prejudgment interest to the extent allowed by law;

8 8. For costs of suit incurred herein; and

9 9. Any such other and further relief as this Court may deem necessary, just, and/or proper.  
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12  
13 Dated: March 22, 2019



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

15 Ronald A. Marron  
16 Michael T. Houchin  
17 Lilach Halperin  
651 Arroyo Drive  
San Diego, California 92103

18 **LAW OFFICE OF MICHAEL G. OLINIK**

19 Michael G. Olinik  
20 3443 Camino Del Rio South, Ste. 101  
San Diego, CA 92108

21 Attorney for Plaintiff Daniel McSwain and the Proposed Class  
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