

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
EDWARD D. VOGEL, Cal. Bar No. 110081
3 ALEJANDRO E. MORENO, Cal. Bar No. 256802
501 West Broadway, 19th Floor
4 San Diego, California 92101
Telephone: 619.338.6500
5 Facsimile: 619.234.3815
E mail evogel@sheppardmullin.com
6 amoreno@sheppardmullin.com

7 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
8 Including Professional Corporations
POLLY TOWILL, Cal. Bar No. 120420
9 333 South Hope Street, 43rd Floor
Los Angeles, California 90071-1422
10 Telephone: 213.620.1780
Facsimile: 213.620.1398
11 E mail ptowill@sheppardmullin.com

12 Attorneys for Defendant AXOS BANK
13

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN DIEGO
16

17 DANIEL MCSWAIN, on behalf of
himself, all others similarly situated, and
18 the general public,

19 Plaintiff,

20 v.

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

22 Defendants.
23

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

CLASS ACTION

NOTICE OF RULING

Date: August 23, 2019

Time: 9:00 a.m.

Dept.,: C-73

The Hon. Joel R. Wohlfeil

Complaint Filed: March 25, 2019

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the demurrer filed by Defendant Axos Bank (“Axos”) to Plaintiff Daniel McSwain’s First Amended Complaint (“FAC”) came on for hearing on August 23, 2019 at 9:00 a.m. before the Honorable Joel R. Wohlfeil. After considering the papers submitted by the parties, the Court confirmed its Tentative Ruling, overruling the demurrer to the FAC. The Court ordered Axos to file and serve its Answer to the FAC within twenty (20) days of the hearing. A true and correct copy of the Tentative Ruling is attached as **Exhibit A**.

Dated: August 23, 2019

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By s/Alejandro E. Moreno
POLLY TOWILL
ALEJANDRO E. MORENO

Attorneys for Defendant Axos Bank

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - August 21, 2019

EVENT DATE: 08/23/2019

EVENT TIME: 09:00:00 AM

DEPT.: C-73

JUDICIAL OFFICER: Joel R. Wohlfeil

CASE NO.: 37-2019-00015784-CU-BC-CTL

CASE TITLE: MCSWAIN VS AXOS BANK [E-FILE]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Demurrer / Motion to Strike

CAUSAL DOCUMENT/DATE FILED: Demurrer, 07/19/2019

The general Demurrer (ROA # 22) of Defendant Axos Bank ("Defendant" or "Axos") to the First Amended Complaint ("FAC") filed by Plaintiff Daniel McSwain, as Trustee of the Daniel S. McSwain Trust dated July 17, 2012 ("Plaintiff"), is OVERRULED.

Defendant's Request (ROA # 25) for judicial notice is DENIED.

Defendant is ordered to file and serve an Answer within 20 days of this hearing.

Contractual "Notice of Grievance" Procedure

Paragraph 14 of the FAC references the "Deed of Trust." This agreement is attached to the FAC as "Exhibit 1," and contains the following:

20. Sale of Note; Change of Loan Servicer; Notice of Grievance.

....
Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notices given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action....

Paragraph 16 of the FAC alleges that Plaintiff sent an email to Defendant demanding payment of the disputed interest. What appears to be a portion of this email chain is attached as "Exhibit 2." Paragraph 17 alleges that notice of this claim was also mail to Defendant on April 30, 2019. This demand letter is attached as "Exhibit 3." Section 15 of the Deed of Trust states that notices must be provided in writing, and: "Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender." It is reasonable to conclude that an email received by the lender constitutes delivery and actual receipt of the notice, a permitted alternative to first class mail. Therefore, Plaintiff has complied, or at the very least, substantially complied with Section 20. Cal-Air Conditioning, Inc. v. Auburn Union School Dist. (1993) 21 Cal. App. 4th 655, 668 (substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute; technical deviations are not to be given the stature of noncompliance – notice of

bid error). Further, a second written notice was mailed after initiation of this lawsuit, but prior to filing of the FAC. This late notice cured any prior technical deficiency. Section 20 does not expressly prohibit the ability to cure a deficiency. Therefore, Defendant's argument lacks merit.

HOLA Preemption

The first cause of action alleges that Defendant's failure to pay interest constitutes a violation of Civil Code section 2954.8, as well as constituting "unfair" conduct. Section 2954.8(a) provides that mortgage lenders for one- to four-family residences that receive money in advance for payment of taxes, insurance, etc. "shall pay interest on the amount so held to the borrower ... at the rate of at least 2 percent simple interest per annum." The second cause of action alleges a breach of the express terms of the "mortgage agreement" premised on the same failure.

Defendant argues: "The federal Homeowners' Loan Act, 12 U.S.C. §§ 1461, et seq. ('HOLA') preempts Section 2954.8 of the California Civil Code." Even assuming this is true, this would not make either cause of action entirely defective and subject to a Demurrer. The first cause of action is premised on a violation of section 2954.8 and unfair conduct. Because section 17200 is written in the disjunctive, it establishes three varieties of unfair competition: acts or practices which are unlawful, or unfair, or fraudulent. Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal. 4th 163, 180. In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa. Id.; see also Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 38 ("If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer."). Also, the second cause of action is not premised on section 2954.8. Thus, the Demurrer is overruled on this basis.

In addition, section 2954.8 is simply not preempted. The Court finds the reasoning expressed in Lusnak v. Bank of America, N.A. (9th Cir. 2018) 883 F. 3d 1185 to be persuasive authority as applied to both national banks and federal savings banks. Although Defendant is governed by HOLA and not the National Bank Act ("NBA"), the analysis is the same because HOLA incorporates the NBA's preemption analysis. Both are regulated by TILA. There is no legal authority establishing that state escrow interest laws prevent or significantly interfere with the exercise of federal savings bank powers. In fact, enactment of the Dodd-Frank Act indicates the opposite.

1 *Daniel McSwain v. Axos Bank*
2 San Diego Superior Court, Case No. 37-2019-00015784-CU-BC-CTL

3 PROOF OF SERVICE
4 STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

5 At the time of service, I was over 18 years of age and **not a party to this action**. I
6 am employed in the County of Los Angeles, State of California. My business address is
7 501 West Broadway, 19th Floor, San Diego, California 92101.

8 On August 23, 2019, I served true copies of the following document(s) described as

9 **NOTICE OF RULING**

10 on the interested parties in this action as follows:

11 **SERVICE LIST**

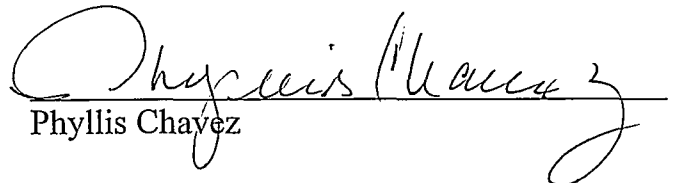
12 Ronald A. Marron, Esq. Attorney for Plaintiff Daniel McSwain and
13 Michael T. Houchin, Esq. the Proposed Class
14 Lilach Halperin, Esq.
15 Law Offices of Ronald A. Marron
16 651 Arroyo Drive
17 San Diego, CA 92103
18 Tel (619) 696-9 006; Fax (619) 564-6665
19 ron@consumersadvocates.com;
20 mike@consumersadvocates.com;
21 lilach@consumersadvocates.com

22 Michael G. Olinik, Esq. Attorney for Plaintiff Daniel McSwain and
23 The Law Office of Michael G. Olinik the Proposed Class
24 3443 Camino Del Rio South, Suite 101
25 San Diego, CA 92108
26 Tel (619) 780-5523
27 michael@oliniklaw.com

28 **BY ELECTRONIC SERVICE:** I served the document(s) on the person listed in
the Service List by submitting an electronic version of the document(s) to One Legal, LLC,
through the user interface at www.onelegal.com.

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

Executed on August 23, 2019, at San Diego, California.


Phyllis Chavez