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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

**NOTICE OF MOTION AND MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT**

Date: July 22, 2020

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

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

Please take notice that on July 22, 2020, at 9:00 a.m., in Department C-73 of the San Diego Superior Court, Central Division, or as soon thereafter as the Court's schedule allows, before the Honorable Judge Joel R. Wohlfeil, Plaintiff Daniel McSwain, Trustee of the Daniel S. McSwain Trust

1 Dated July 17, 2012, ("Plaintiff" or Mr. McSwain") will move this Court to (1) preliminarily approve  
2 the settlement of the Action; (2) certify the provisional Settlement Class; (3) approve and appoint the  
3 law firms of The Law Offices of Ronald A. Marron, APLC and The Law Office of Michael G. Olinik  
4 as counsel for the provisional Class; (4) approve the form of the notice provided to the provisional  
5 Settlement Class; (5) approve the method of providing Notice to the provisional Settlement Class; and  
6 (6) set deadlines for providing notice to the Class and for Class members to submit requests for  
7 exclusion / opt-out or objections to the proposed settlement. This motion is brought pursuant to Cal.  
8 Code Civ. P. § 378 *et seq.* and Cal. R. of Court 3.769.

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

19 This motion seeks preliminary approval of the settlement and certification of a settlement class  
20 for causes of action Nos. 1 through 2.

21 This motion will be based upon this Notice, the Memorandum of Points and Authorities in  
22 Support of Preliminary Approval, the Declaration of Ronald A. Marron, the Declaration of Michael G.  
23 Olinik, the Declaration of Erik Bowden, the Settlement Agreement, the Proposed Notice to Class  
24 Members, the Proposed Order, and all pleadings and evidence to be ledged at a time required by the  
25 California Code of Civil Procedure, supporting declarations, and any evidence and/or oral argument  
26 that may be presented at the hearing.

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1 Plaintiffs request that the final preliminary approval hearing be approximately 120 days out, or  
2 as soon thereafter as the Court can hear it, to give time for the Class Notice Process to complete.  
3

4  
5 Dated: June 23, 2020

  
Ronald A. Marron

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

MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT

Date: July 22, 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 preliminary approval of a class action settlement in this action and requests that the Court enter the  
4 proposed order submitted with this motion.

### 5 **I. INTRODUCTION**

6 After thorough investigation and confirmatory discovery, Plaintiff, on behalf of himself and all  
7 others similarly situated (“the Settlement Class”), seeks the Court’s approval of the Settlement  
8 Agreement reached with Defendant Axos Bank (“Defendant” or “Axos”). This settlement was  
9 reached as a result of ongoing negotiations between the parties and with the assistance of mediator  
10 Hon. Leo Papas, Ret., who was instrumental in helping the parties reach a fair settlement in the best  
11 interests of the Settlement Class.

12 Plaintiff’s operative First Amended Complaint alleges claims against Axos for: (1) violation of  
13 the California Unfair Competition Law; and (2) breach of contract (the “Litigation”). Plaintiff  
14 contends that Axos violated section 2954.8(a) of the California Civil Code (“Section 2954.8(a)”) by  
15 failing to pay borrowers a minimum of 2% simple interest for money held in borrowers’ escrow  
16 accounts for loans secured by 1-4 family homes located in California.. Axos, in turn, contends that  
17 Section 2954.8(a) does not apply to Federal Savings Banks, such as Axos, and that Section 2954.8(a)  
18 is preempted by the Federal Home Owners’ Loan Act (12 U.S.C. § 1461, *et seq.*) (“HOLA”). Axos  
19 further contends that Mr. McSwain lacked standing to pursue his claims for breach of contract and for  
20 violation of the Unfair Competition Law because Mr. McSwain failed to comply with the notice and  
21 cure provisions of his Deed of Trust.

22 As a result of this settlement, Axos has agreed to pay an award to all members of the  
23 Settlement Class within the four year statute of limitation period and has agreed to pay interest on the  
24 escrow accounts for loans secured by 1-4 family residential properties located in California on a going  
25 forward basis, unless there is a change in the law. The parties believe that the settlement reached,  
26 attached as Exhibit 1 to the declaration of Ronald A. Marron (“Marron Decl.”), is fair, adequate, and  
27 reasonable. The settlement does not require the Settlement Class to make claims. Rather, Axos will  
28 disburse the payments directly into its customers’ accounts or through the mail for those persons

1 within the Settlement Class who no longer have an account with Axos.

2 By this motion, Plaintiff applies for an order that: (1) preliminarily approves the settlement of  
3 the Action; (2) certifies a provisional Settlement Class; (3) approves and appoints The Law Offices of  
4 Ronald A. Marron, APLC and The Law Office of Michael G. Olinik as counsel for the Settlement  
5 Class; (4) approves the form of the notice provided to the Settlement Class (attached to the Settlement  
6 Agreement as Exhibit A); (5) approves the method of providing Notice to the Settlement Class; and  
7 (6) sets deadlines for providing notice to the Settlement Class and for Settlement Class members to  
8 submit requests for exclusion/opt-out or objections to the proposed settlement based upon the date of  
9 the final approval hearing. The proposed order is attached to the Settlement Agreement as Exhibit B.  
10 The Court should grant the requested order because the proposed class-wide settlement is fair,  
11 reasonable and adequate to compensate for the Settlement Class given all factors surrounding this  
12 case.

## 13 **II. FACTUAL BACKGROUND**

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

15 Every financial institution that makes loans upon the security of real property containing  
16 only a one-to four-family residence and located in this state or purchases obligations  
17 secured by such property and that receives money in advance for payment of taxes and  
18 assessments on the property, for insurance, or for other purposes relating to the property,  
19 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.

20 Cal. Civ. Code § 2954.8(a). In the past, federal regulation established that the regulations promulgated  
21 by the Office of Thrift Supervision under HOLA occupied the entire field of lending, which  
22 unequivocally established that Section 2954.8(a) was preempted by federal law. *See* 12 CFR § 560.2.  
23 In 2010, however, the Dodd-Frank Act established that HOLA was no longer intended to preempt the  
24 entire field of banking. 12 U.S.C. § 1465. With the passage of that law, field preemption was no  
25 longer applicable to federal savings association. 12 U.S.C. § 1465(b). In a 2018 decision, the Ninth  
26 Circuit held that the separate National Bank Act (applicable to National Banks, but not Federal Savings  
27 Banks such as Axos) did not preempt Section 2954.8(a). *Lusnak v. Bank of America, N.A.* (9th Cir.  
28 2018) 883 F.3d 1185, 1194-95. The Supreme Court denied Bank of America's petition for writ of

1 certiorari in the *Lusnak* case. *Bank of America, N.A. v. Lusnak* (2018) 139 S.Ct. 567. Plaintiff argues  
2 that, pursuant to the analysis set forth in *Lusnak*, HOLA also no longer preempts Section 2954.8(a).  
3 Axos, in turn, contends that *Lusnak* is inapplicable because it does not discuss preemption under  
4 HOLA and because Federal Savings Banks and National Banks are different in material respects that  
5 may lead to a different preemption analysis under HOLA.

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

12 Following the denial of Axos's demurrer, the parties began to negotiate a potential settlement.  
13 (Marron Decl., ¶ 5.) Axos provided figures regarding the amount of money it held in escrow accounts  
14 for loans secured by 1-4 family properties located in California for the four years prior to the date  
15 Plaintiff filed his initial complaint through the date the report was created, which Plaintiff reviewed.  
16 (Marron Decl., ¶ 5.) Based upon the initial information, the parties eventually signed a Memorandum  
17 of Understanding. (Declaration of Erik Bowen ("Bowen Decl."), Exh. A.)

18 After reaching the initial Memorandum of Understanding, the parties attended mediation with  
19 Hon. Leo Papas, Ret. on December 12, 2019. (Marron Decl., ¶ 6.) At the mediation, the parties, with  
20 the assistance of Judge Papas, continued to negotiate additional terms of a possible settlement of this  
21 action. (Marron Decl., ¶ 6.) Judge Papas was instrumental in raising issues for the parties'  
22 consideration to ensure fairness to the class and the workability of the settlement. (Marron Decl., ¶ 6.)  
23 As a result of the mediation, the parties entered into the First Addendum to the Memorandum of  
24 Understanding to memorialize the progress made at the mediation. (Bowen Decl., Exh. A.)

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

As part of the settlement, Axos provided confirmatory discovery through a declaration. Axos is a Federal Savings Bank regulated by the Office of the Comptroller of the Currency (“OCC”). (Bowen Decl. ¶ 3.) Axos does not pay interest on the funds held in escrow accounts for mortgage loans owned and/or serviced by Axos and which are/were secured by 1-4 family residential properties located in California (“Relevant Escrow Accounts”). (Bowen, Decl., ¶¶ 4-5.) Based on Mr. Bowen’s analysis, Axos has 5,402 Relevant Escrow Accounts amongst 5,038 unique borrowers. (Bowen Decl., ¶¶ 12, 13.) Axos determined the approximate award each Settlement Class member would ultimately receive, assuming that there are no opt-outs and that the total net settlement amount available to distribution of the class is \$292,500.00. (Bowen Decl., ¶ 14.) Based on historic projections and taking into account the increase in Relevant Escrow Accounts from March 25, 2015 through the date of final approval (the “Class Period”), if Axos begins paying interest on the amounts held in the Relevant Escrow Accounts, the members of the Settlement Class who still have residential loans with Axos and future borrowers can expect an additional monetary benefit of approximately \$1,419,304.00 within the first four years of payments. (Bowen Decl., ¶ 19.)

### **III. SUMMARY OF THE CLASS ACTION SETTLEMENT**

#### **A. The Settlement Class**

The 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.” (Settlement Agreement, § 2.25.)

#### **B. The Gross Settlement Fund**

In exchange for the releases, Axos will establish a gross settlement fund of five hundred

1 thousand dollars 00/100 (\$500,000.00) to cover payments to class members, attorneys' fees and costs  
2 of up to \$200,000.00, and a class representative enhancement. (Settlement Agreement, §§ 2.10, 7.2.)  
3 Axos has agreed to pay for the notice to the class and the distribution of the settlement fund to the  
4 class separately. (Settlement Agreement, § 6.3.)

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

6 Payment to the class members will be made from the Net Settlement Fund, which is the  
7 amount of money that will remain after the following are deducted from the Gross Settlement Fund  
8 upon approval by the Court: (1) attorneys' fees of up to the amount approved by the Court and other  
9 costs associated with the settlement no greater than \$200,000; and (2) an Incentive Award in the  
10 amount of up to \$7,500 to Plaintiff. (Settlement Agreement, § 2.12.) The Settling Parties estimate  
11 that the Net Settlement Fund will total approximately \$292,500 and the Net Settlement Fund will be  
12 used to make Settlement Payments to Settlement Class Members. (*Id.*)

13 From that approximate \$292,500, the settlement fund will be distributed to Class Members  
14 based upon the number of years within the statutory period the Class Member has had a positive  
15 balance within a Relevant Escrow Account. (Settlement Agreement, § 7.2.) Those who had accounts  
16 for less than one year will receive \$25; those who had accounts at least one year, but less than two  
17 years will receive \$50; those who had accounts at least two years, but less than three years will  
18 received \$75; those who had accounts at least three years, but less than four years will receive \$100;  
19 and those who had accounts more than four years will receive \$125. (Settlement Agreement, §§ 7.2.1-  
20 7.2.5.) If those payments do not exhaust the Net Settlement Fund, then the payments will increase pro  
21 rata. (Settlement Agreement, § 7.2.6.) If those payments are over the available amount in the Net  
22 Settlement Fund, then each Class Member's payments will be reduced pro rata. (*Id.*)

23 Any amounts remaining in the fund or after the expiration of the settlement checks will be  
24 awarded to Public Citizen for work intended to benefit California consumers, or another non-profit  
25 public benefit corporation nominated by Class Counsel and approved by the Court. (*Id.*) The "About  
26 Us" section from Public Citizen's website is provided for the Court's consideration. (Marron Decl.,  
27 Exh. 2.)  
28

1           **D.       Non-Monetary Relief**

2           In addition to the monetary relief to class members, Axos has agreed to begin paying at least  
3 2% simple interest per annum on the escrow accounts that have a positive balance for loans secured by  
4 one to four family residential properties located in California. (Settlement Agreement, § 7.3.) The  
5 interest will be credited to the borrower's account in accordance with § 2954.8. (*Id.*) Axos will  
6 reserve the right to change this policy if there is a change in law. (*Id.*) If these payments last for at  
7 least four years, the estimated monetary value of these payments is \$1,419,304.00. (Bowen Decl., ¶  
8 19.)

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

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

17          **F.       The Releases**

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

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

23          In order to save money and to prevent unnecessary duplication of work, the parties have  
24 agreed to allow Axos itself to oversee the process of sending out notice and administering the  
25 Settlement in this action. (Settlement Agreement, §§ 6.2, 7.2.) The reason for this in this case is  
26 simple—as the entity in control of the mortgages and escrows, Axos already possesses the capacity to  
27 send notice to all Settlement Class Members and has access to active Settlement Class Members'  
28 accounts. By proceeding in this fashion, the Settlement Class Members will benefit because they will

1 avoid using funds from the Gross Settlement Fund to pay a third-party settlement administrator. In  
2 order to ensure compliance, Axos is required to provide Class Counsel with a declaration attesting to  
3 the completion of the notice process. (Settlement Agreement, § 6.4.) Class Counsel will have the  
4 right to audit and monitor Axos's implementation of the notice process. (*Id.*)

5 A true and correct copy of the proposed Notice is attached as Exhibit "A" to the Settlement  
6 Agreement. Notice shall be delivered via electronic mail by Axos. (Settlement Agreement, § 6.2.1.)  
7 If Axos does not have a valid e-mail address for a Settlement Class Member or if the e-mail is  
8 "bounced back," Axos shall send the Notice via U.S. Mail. (*Id.*) If both the electronic mail and U.S.  
9 Mail addressees prove to be invalid, Defendant shall use reasonable means to identify a valid postal  
10 address through the use of skip tracing or other methods. (*Id.*) In addition to the direct notice, Axos  
11 will establish a Settlement Website that will include the Notice, a copy of the Settlement Agreement,  
12 the Preliminary Approval Order, and other material filing and orders from this Litigation. (Settlement  
13 Agreement, § 6.2.2.) The Settlement Agreement includes all deadlines for objections and submitting  
14 requests for exclusions, and the date of the Final Approval Hearing. (*Id.*)

15 Any Class Member who does not wish to be a part of this Settlement Agreement may request  
16 to be excluded by submitting a Request for Exclusion to Class Counsel. (Settlement Agreement, §  
17 5.1.) All requests must be sent to Class Counsel. (*Id.*)

18 Any Class Member who objects to this Settlement must file their objections with the Court and  
19 send copies of all pleadings to Class Counsel and Counsel for Axos. (Settlement Agreement, § 5.2.)  
20 Objections must be in writing and accompanied by documents or other evidence along with any  
21 factual or legal argument the objector will rely upon. (Settlement Agreement, § 5.3.) The other  
22 requirements for objecting are noted in the Settlement Agreement. (*Id.*)

23 The guidelines for requesting exclusion and objecting are also included in the Notice.  
24 (Settlement Agreement, Exh. A.) Accordingly, the Class Members will be advised of their rights.

25 The deadline for requests for exclusion and objections are the same and will be ordered by the  
26 Court in the Preliminary Approval Order – Counsel request that the deadline be 30 days prior to the  
27 original date of the Final Approval Hearing. (Settlement Agreement, §§ 4.1.13, 5.1, 5.2.)

28 Axos will fund the settlement within 30 days of the Final Approval of this settlement and will

begin crediting interest within 30 days of the Final Approval. (Settlement Agreement, §§ 7.2, 7.3.) The Net Settlement Funds will be distributed to the Settlement Class Members within thirty days after the Effective Date. (Settlement Agreement, § 7.2.8.) The Effective Date will depend on whether there is further litigation in this action. (Settlement Agreement, § 2.6.)

#### **IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL**

##### **A. The Process of Preliminary Approval**

When a proposed class-wide settlement is reached, to prevent fraud, collusion or unfairness to the class, the settlement of a class action must be submitted to the court for approval. *Malibu Outrigger Bd. Of Governors v. Superior Court* (1980) 103 Cal. App.3d 573, 578-79; *see also* Newberg on Class Actions (2017) at § 13.12.<sup>1</sup> Preliminary approval is the first of three steps of the class action settlement procedure, which requires that the parties file a motion for preliminary approval of the settlement. *Id.* at §13:10. If a class has not yet been certified, the parties will simultaneously move for certification of a settlement class, typically conditioned upon approval of the settlement. *Id.* at § 13:12. The second step, which occurs after the court preliminarily approves the settlement (and conditionally certifies the class), notice is sent to the class describing the terms of the proposed settlement. *Id.* at §13:10. The third step is a final settlement approval hearing, during which the court decides to grant final approval of the settlement. *Id.* The trial court must determine whether the settlement is fair adequate and reasonable. *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1801 (Citations omitted).

##### **B. The Court Should Certify the Proposed Settlement Class**

As part of this settlement, Plaintiff requests that the Court certify the proposed Settlement Class, defined above. Axos provisionally consents to certification of the Settlement Class only for purposes of this settlement. Should the Court, for any reason, refuse to enter an order of final approval of this class action settlement, or if such order is reversed or otherwise modified on appeal, then the certification of the Settlement Class shall be null and void. Should this case proceed to litigation, Plaintiff shall bear the burden of proving each of the elements necessary to certify the

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<sup>1</sup> California courts have cited to Newberg on Class Actions as an authority on class action settlements. *See, e.g., Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1802 (Citing to the treatise in the context of reviewing a trial court's final approval of a settlement).

1 proposed class and Axos reserves all of its rights to contest class certification.

2 In accordance with California Code of Civil Procedure § 382, the Parties stipulate to a  
3 preliminary certification of the defined class subject to the condition that if, for whatever reason, the  
4 Court does not grant Final Approval of the Settlement, this stipulation to class certification shall  
5 become null and void. (Settlement Agreement, § 3.1.) “The certification question is ‘essentially a  
6 procedural one that does not ask whether an action is legally or factually meritorious.’” *Brinker Rest.*  
7 *Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023 (quoting *Sav-on Drug Stores, Inc. v. Superior*  
8 *Court* (2004) 34 Cal.4th 319, 326.) Class certification requires “an ascertainable and sufficiently  
9 numerous class, a well-defined community of interest, and substantial benefits from certification that  
10 render proceeding as a class superior to the alternatives.” *Brinker Rest. Corp.*, 53 Cal.4th at 1021.  
11 “[T]he ‘Community of interest’ requirement embodies three factors: (1) predominant common  
12 questions of law or facts; (2) class representatives with claims or defenses typical of the class; and (3)  
13 class representatives who can adequately represent the class.” *Fireside Bank v. Superior Court* (2007)  
14 40 Cal.4th 1069, 1089 (quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470).

15 “Class members are ‘ascertainable’ where they may be readily identified without unreasonable  
16 expense or time by reference to official records.” *Sotelo v. MediaNews Grp., Inc.* (2012) 207  
17 Cal.App.4th 639, 648 (citation omitted). “In determining whether a class is ascertainable, the trial  
18 court examines the class definition, the size of the class and the means of identifying class members.”  
19 *Id.* (citations omitted).

20 The Settlement Class Members here are easily ascertainable. As the Class Members currently  
21 hold or previously held Relevant Escrow Accounts with Axos, they are easily ascertainable from  
22 Axos’s records. As Axos is required to keep track of its escrow accounts and mortgages, it has  
23 records of the Settlement Class Members. Ascertainability is not an issue here.

24 Second, the “community of interest” requirement is indisputably met. “The proponent of  
25 certification must show ... that questions of law or fact common to the class predominate over the  
26 questions affecting the individual members (hereafter sometimes referred to as predominance).”  
27 *Washington Mut. Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913. “[T]he focus in a certification  
28 dispute is on what type of questions—common or individual—are likely to arise in the action, rather

1 than on the merits of the case.” *Sav-on Drug Stores, Inc.*, 34 Cal.4th at 327.

2 The “ultimate question” the element of predominance presents is whether “the issues  
3 which may be jointly tried, when compared with those requiring separate adjudication,  
4 are so numerous or substantial that the maintenance of a class action would be  
5 advantageous to the judicial process and to the litigants.” . . . A court must examine the  
6 allegations of the complaint and supporting declarations and consider whether the legal  
and factual issues they present are such that their resolution in a single class proceeding  
would be both desirable and feasible. “As a general rule if the defendant's liability can  
be determined by facts common to all members of the class, a class will be certified  
even if the members must individually prove their damages.”

7 *Brinker*, 53 Cal. 4th at 1021-22 (citations omitted).

8 This issue in this case is simple: whether Axos was required to pay simple 2% interest on the  
9 escrow accounts for loans secured by one to four family residential property located in the State of  
10 California. Axos had the same policy for all accounts, and did not pay the simple interest. (Bowen  
11 Decl., ¶ 5.) All Settlement Class Members, including Mr. McSwain, were subject to the identical,  
12 uniformly enforced policies. Therefore, the common questions apply to all Settlement Class Members  
13 equally, and overcome individual issues.

14 Finally, class adjudication is the superior method to adjudicate these claims. Here, it is in the  
15 judicial interest to resolve these claims in a single class action lawsuit rather than having 5,038  
16 separate lawsuits regarding 5,402 separate escrow accounts. The only way to efficiently and  
17 effectively adjudicate the claims of the Settlement Class is to allow them class action treatment.

18 Without unconditionally or finally deciding the issue of class certification for all purposes, this  
19 Court can, and should, find that the Parties’ stipulation that the Settlement Class should be certified  
20 for purposes of settlement is appropriate under the facts, applicable law, and circumstances of this  
21 case.

### 22 **C. The Class is Adequately Represented**

23 “Plaintiffs seeking class certification have the burden of proving the adequacy of their  
24 representation by a member of the putative class.” *Richmond*, 29 Cal.3d at 470. “The adequacy of  
25 representation component of the community of interest requirement for class certification comes into  
26 play when the party opposing certification brings forth evidence indicating widespread antagonism to  
27 the class suit . . . To assure ‘adequate’ representation, the class representative's personal claim must  
28 not be inconsistent with the claims of other members of the class.” *Capitol People First v. Dep’t of*

1 *Developmental Servs.* (2007) 155 Cal.App.4th 676, 696-97. “[A] party's claim of representative status  
2 will only be defeated by a conflict that ‘goes to the very subject matter of the litigation’ . . . Thus,  
3 antagonism per se by members of a class will not automatically preclude certification, given the state's  
4 policy of encouraging the use of the class action device.” *Id.* at 697 (citing *Richmond*, 29 Cal.3d at  
5 470, 473).

6 Also, the “[a]dequacy of representation” aspect “depends on whether the plaintiff's attorney is  
7 qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the  
8 interests of the class.” *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450. The test is  
9 straightforward. “In order for the representative to adequately represent the class, the representative's  
10 attorney must be qualified, experienced and generally able to conduct the proposed litigation.” *Miller*  
11 *v. Woods* (1983) 148 Cal.App.3d 862, 874 (citing *Richmond*, 29 Cal.3d at 470).

12 Class Representative Daniel McSwain has performed an exemplary job representing the  
13 putative class members to date. (Marron Dec., ¶ 10.) Mr. McSwain, with his investigative journalist  
14 background, brought this case to counsel himself, and has extensively researched Axos Bank and their  
15 assets throughout the process to ensure that the information provided by Axos aligned with the  
16 publicly available data. (*Id.*) Mr. McSwain has, and, if appointed, will continue to adequately  
17 represent the Settlement Class. (*Id.*)

18 The Law Offices of Ronald A. Marron and The Law Office of Michael G. Olinik are qualified  
19 to represent the Settlement Class. (Marron Dec., ¶¶ 11, 14-41); Declaration of Michael G. Olinik  
20 (“Olinik Dec.”), ¶¶ 2-8.) Each has experience handling class action settlements and will adequately  
21 represent the Settlement Class Members’ interests. (Marron Dec., ¶¶ 11, 14-41.) Class Counsel  
22 worked diligently to prosecute this case and to reach a fair settlement for the Settlement Class.  
23 (Marron Dec., ¶ 11.) Therefore, the Court should appoint The Law Offices of Ronald A. Marron and  
24 The Law Office of Michael G. Olinik as Class Counsel.

#### 25 **D. The Proposed Notice is Adequate**

26 “The principal purpose of notice to the class is the protection of the integrity of the class action  
27 [settlement] process.” *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 970. The proposed notice  
28 of settlement must “fairly apprise the class members of the terms of the proposed compromise and of

1 the options open to dissenting class members.” *Wershba v. Apple Computer, Inc.* (2011) 91  
2 Cal.App.4th 224, 251.

3 The proposed class notice attached as Exhibit “A” to the Settlement Agreement fairly apprises  
4 the Settlement Class Members of the relevant details regarding the settlement and the options open to  
5 them. (Settlement Agreement, Exh. A.) The notice will be distributed directly to class members by  
6 electronic mail, or, failing that, through U.S. Mail. (Settlement Agreement, § 6.2.1.) Axos will also  
7 establish a website to give notice to the Class Members. (Settlement Agreement, § 6.2.2.) The  
8 proposed notice satisfies all the requirements for adequate settlement notice.

9 **E. The Settlement is Fair, Adequate, and Reasonable**

10 The final settlement or compromise of an entire class action requires the approval of the court  
11 after a hearing. Cal. R. Ct. 3.769(a). The approval of a proposed settlement of a class action suit is a  
12 matter within the broad discretion of the trial court. *Wershba*, 91 Cal.App.4th at 234-235; *Dunk*, 48  
13 Cal.App.4th at 1801. In considering a potential settlement for preliminary approval purposes, the  
14 court does not have to reach any ultimate conclusions on the issues of fact and law on the merits of the  
15 dispute, and need not engage in a trial on the merits. *See Wershba*, 91 Cal.App.4th at 239-240; *Dunk*,  
16 48 Cal.App.4th at 1801. When considering a motion for preliminary approval of settlement, a trial  
17 court should consider the following factors: “the strength of the plaintiffs’ case, the risk, expense,  
18 complexity and likely duration of further litigation, the risk of maintaining class action status through  
19 trial, the amount offered in settlement, the extent of discovery completed, the stage of the proceedings,  
20 and the experience and views of counsel . . .” *Dunk*, 48 Cal.App.4th at 1801, citing *Officers for*  
21 *Justice v. Civil Service Com’n*, (9th Cir. 1982) 688 F. 2d 615, 624. This list is not exhaustive, and the  
22 inquiry should be tailored to the facts of the case before the Court. *Id.*

23 Additionally, due regard should be given to a consensual agreement between the parties. *Id.*  
24 As the Court of Appeals stated in *Dunk*, the inquiry “must be limited to the extent necessary to reach a  
25 reasoned judgment that the agreement is not the product of fraud, or overreaching by, or collusion  
26 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and  
27 adequate to all concerned”. *Id.* (Citations omitted).

28 Preliminary approval of a settlement should be granted when the following factors are met: (1)

1 the proposed settlement appears to be the product of serious, informed, and non-collusive  
2 negotiations; (2) the settlement has no obvious deficiencies; (3) the settlement does not improperly  
3 grant preferential treatment to class representatives or segments of the class; (4) the settlement falls  
4 within the range of possible judicial approval. Newberg on Class Actions § 13:13. This settlement  
5 meets all of these criteria.

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

7 At the preliminary approval stage, a presumption of fairness exists where, as here, the settlement  
8 was obtained through arms-length negotiations, investigation and discovery is sufficient to allow counsel  
9 and the Court to act intelligently, and counsel are experienced in similar litigation. *Dunk*, 48 Cal.App.4th  
10 at 1802. 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. (Bowen Decl., ¶¶ 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 will receive the same  
21 Notice and opportunity to object to the settlement and 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 secured by 1-4 family properties located in California will receive the benefit of this  
26 Settlement on a going forward basis. (Settlement Agreement, §§ 7.2, 7.3.) The goals of the litigation  
27 – to recover money owed to past escrow account holders and to ensure future compliance with  
28 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 Class in any way. All members of the Class will receive monetary compensation  
4 based on the amount of time they have had escrow accounts with Axos. (Settlement Agreement, §  
5 7.2.) The amounts will be prorated based on the time they have had their accounts with Axos, and  
6 thus all Class Members will be treated fairly based upon the amount of time they held a Relevant  
7 Escrow Account. (*Id.*) All Class Members will receive the benefit of receiving interest in the future,  
8 so long as their accounts remain with Axos. (Settlement Agreement, § 7.3.) Mr. McSwain will be  
9 treated the same as all other Class Members, except for his Incentive Award of \$7,500, subject to the  
10 Court's approval. (Settlement Agreement, § 8.3.) The proposed Incentive Award is fair and well  
11 earned, as Mr. McSwain has been an active participant and advocate for the Class throughout the  
12 process. (Marron Decl., ¶ 10.)

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

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

20           Axos was able to project the expected payout to Settlement Class Members based on how long  
21 they had escrow accounts with Axos. (Bowen Decl., ¶ 14.) Based upon these estimates, the payouts  
22 to each Settlement Class Member would be marginally prorated down. (*Id.*) The payments, however,  
23 could actually increase once Settlement Class Members request exclusion. Because it represents a  
24 compromise of disputed claims and avoids the risk and expense of trial, the aggregate recovery is  
25 lower than the total that could hypothetically be recovered assuming Plaintiff was successful at the  
26 end of trial and that the Settlement Class Members recovered all purported unpaid interest on the  
27 Relevant Escrow Accounts for a period up to four years prior to the filing of the Complaint. (*See*  
28 Bowen Decl., ¶ 17.) That said, the Gross Settlement Fund represents a recovery of more than 89 cents

1 on the dollar for the time period Axos believes is relevant, from March 2, 2018 to the present (March  
2 2, 2018 being the date the Ninth Circuit issued the *Lusnak* decision discussed above). (*Id.*) Class  
3 Counsel believes the amount of the settlement is fair based upon the increased cost and expenses of  
4 litigating this action through trial and a possible appeal. (Marron Decl., ¶ 8.) Indeed, given that there  
5 is no binding authority in the Ninth Circuit or the California Court of Appeal holding that HOLA does  
6 not preempt Section 2954.8(a), proceeding with this action through an appeal presents a real risk that  
7 the Settlement Class Members would recover nothing as a result of an adverse preemption ruling by  
8 an appellate court. Finally, all Class Members who still have accounts with Axos will receive their  
9 full interest payments going forward. (Settlement Agreement, § 7.3.) That relief is valued at  
10 approximately \$1,419,304.00 within the first four years of payments. (Bowen Decl., ¶ 19.) Together,  
11 the monetary and non-monetary relief are reasonable compromises and a fair settlement of the claims.


12 Finally, the Court will determine the validity of the attorney's fees and the Incentive Award at  
13 the time of the Final Approval Hearing. For now, the amounts are adequate to justify preliminary  
14 approval.

## 15 **V. 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. After weighing the  
18 substantial, certain, and immediate benefits of this settlement against the uncertainty of trial and  
19 appeal, the parties believe that the proposed settlement is fair, reasonable and adequate, and that it  
20 warrants the Court's preliminary approval.

21 Therefore, Plaintiff respectfully requests that the Court grant preliminary approval of the Class  
22 Action Settlement, and sign the proposed order filed concurrently with the motion.

23  
24  
25 Dated: June 23, 2020

  
\_\_\_\_\_  
Ronald A. Marron

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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  
18 others similarly situated, and the general  
public,

19 Plaintiff,

20 v.

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

23 Defendants.

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

CLASS ACTION

**DECLARATION OF ERIK BOWEN**

Dept.: C-73

The Hon. Joel R. Wohlfeil

Complaint Filed: March 25, 2019

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1 McSwain purports to assert class claims for breach of contract and unfair business  
2 practices against Axos.

3           5.       As Axos's Portfolio & Special Assets Manager, I know that Axos did  
4 not (and presently does not) pay interest on the funds held in the Relevant Escrow  
5 Accounts. It is my understanding that Axos does not pay interest on the funds held in the  
6 escrow accounts for loans secured by one-to-four family residential properties located in  
7 California because it believes Section 2954.8(a) is preempted by HOLA. Based on my  
8 review of materials provided to me by Axos, it is my understanding that, on March 2,  
9 2018, federal case law in California established that the separate National Bank Act (which  
10 does not apply to Axos) does not preempt a financial institution's obligation to pay  
11 interest, pursuant to Section 2954.8(a), on the amounts held in the applicable escrow  
12 accounts for loans secured by one to four family residential properties located in  
13 California. *See Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). To my  
14 knowledge, there is no equivalent decision establishing that Section 2954.8(a) is not  
15 preempted by HOLA.

16           6.       Based on my review of the materials provided to me in connection  
17 with this matter, I am aware that Axos and McSwain have entered into a Memorandum of  
18 Understanding ("MOU") documenting the material terms of a settlement to be submitted to  
19 the Court. Attached hereto as **Exhibit A** is a true and correct copy of the MOU and the  
20 Addendum thereto. As set forth in the MOU, the settlement period starts as of March 25,  
21 2015 and goes through the Court's preliminary approval of the proposed settlement to be  
22 submitted to the Court by McSwain's counsel. Axos has agreed to settle this matter by  
23 paying \$500,000 (non-reversionary) inclusive of McSwain's attorneys' fees and costs, and  
24 McSwain's award as representative plaintiff. Axos has agreed not to object to an  
25 attorneys' fees and costs request by McSwain of up to \$200,000 and a request for an  
26 incentive award to McSwain of up to \$7,500.

27           7.       The MOU provides that Axos will pay members of the settlement  
28 class (defined in the MOU as the "Settlement Class") a predetermined amount based upon

1 the number of years each member of the Settlement Class (the "Class Members") has had a  
2 Relevant Escrow Account open.<sup>1</sup> Class Members who held an escrow account with Axos  
3 for less than one (1) year during the Settlement Period will receive \$25 ("Tier 1") per  
4 account that falls into Tier 1. Class Members who held an escrow account with Axos for  
5 at least one (1) year but less than two (2) years during the Settlement Period will receive  
6 \$50 ("Tier 2") per account that falls into Tier 2. Class Members who held an escrow  
7 account with Axos for at least two (2) years but less than three (3) years during the  
8 Settlement Period will receive \$75 ("Tier 3") per account that falls into Tier 3. Class  
9 Members who held an escrow account with Axos for at least three (3) years but less than  
10 four (4) years during the Settlement Period will receive \$100 ("Tier 4") per account that  
11 falls into Tier 4. Class Members who held an escrow account with Axos for four (4) or  
12 more years during the Settlement Period will receive \$125 ("Tier 5") per account that falls  
13 into Tier 5. Per the MOU, to the extent the amounts available for distribution to the Class  
14 Members exceed the total amount to be distributed to the Class Members pursuant to the  
15 formula described above, then the amount distributed to each Class Member will be  
16 increased proportionately until the amounts available for distribution are exhausted. To  
17 the extent the amounts available for distribution to the Class Members are less than the  
18 total amount to be distributed to the Class Members pursuant to the formula described  
19 above, then the amount distributed to each Class Member will be decreased in proportion  
20 to the difference between the amount available for distribution and the amounts that would  
21 have been distributed pursuant to the formula described above.

22 8. Pursuant to the MOU, Axos agreed to provide confirmatory discovery  
23 concerning the Relevant Escrow Accounts operative during the settlement period. Axos  
24 agreed to provide the following confirmatory discovery: (i) the aggregate number of  
25

26 <sup>1</sup> It is my understanding that the parties have agreed to exclude Relevant Escrow Accounts  
27 that only ever had a zero or less balance from the Settlement Class because such Axos  
28 customers have not suffered any damages as a result of Axos's alleged conduct in this  
action and should not be considered Class Members. The parties have also excluded the  
escrow accounts for any loans held by Axos employees, officers, or directors.

1 escrow accounts within the Settlement Class; (ii) the aggregate number of Class Members;  
2 (iii) the aggregate escrow balances for escrow accounts within the Settlement Class,  
3 calculated for each month of the Settlement Period; (iv) the number of Class Members who  
4 fall within each of the settlement payment tiers described in paragraph 7 of my  
5 Declaration; and (v) the estimated future value of Axos's policy to begin paying interest on  
6 the Relevant Escrow Accounts pursuant to the settlement.

7           9.     Axos stores its escrow account data and tracks its mortgage payments  
8 on a Jack Henry system (the "JHA System"). The JHA System is a tracking and  
9 accounting program that is recognized as standard in the industry. When a mortgage  
10 payment is received, the following procedure is used to process and apply the payment,  
11 and to create the records I reviewed:

12           a.     Axos receives and credits periodic payments at or near the time of the  
13 payment.

14           b.     Payment activity is automatically recorded by the JHA System,  
15 according to a set of rules based on factors such as the mortgage type and loan state. The  
16 JHA System automatically dates when the entry is posted (subject to the ability of the loan  
17 servicing department to confirm and modify the effective date, if necessary and  
18 appropriate), and identifies the transaction type. If the record relates to the application of a  
19 payment or disbursement, the JHA System itemizes the amounts applied. The JHA  
20 System then automatically calculates running account totals, which allow us to accurately  
21 reproduce account balances, including in any associated loan escrow accounts.

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

26           10.    Axos directed me to gather information responsive to McSwain's  
27 requests for confirmatory discovery. Although I referred the actual gathering and  
28 processing of the relevant information to technical personnel within the Credit Department,

1 I personally reviewed the work performed by the technical staff and cross-checked the data  
2 provided to me with the data stored on Axos's JHA System.

3 11. On January 14, 2020, Axos technical staff working at Axos's  
4 direction created a spreadsheet synthesizing data from the JHA System relevant to this  
5 action and McSwain's request for confirmatory discovery. The spreadsheet was later  
6 updated on January 21, 2020. The spreadsheet captures loans that had changes in their  
7 escrow balances between March 25, 2015 and January 21, 2020. The list was then further  
8 filtered to include only loans secured by one to four family residential properties located in  
9 California. The list was then further filtered to exclude loans that only ever had a zero or  
10 less balance in their escrow account and loans to Axos's employees, officers and/or  
11 directors.

12 12. The spreadsheet shows that Axos had 5,402 Relevant Escrow  
13 Accounts (excluding escrow accounts that only ever had a zero or less balance or were  
14 created pursuant to Axos's employee loan program), which existed at any time between  
15 March 25, 2015 through January 21, 2020 Axos has personal identifying information  
16 regarding each of the Relevant Escrow Accounts, including the name of the borrower, the  
17 borrower's physical address, the number of years (or portions thereof) the Relevant  
18 Escrow Account was active from March 25, 2015 through the date the report was created,  
19 and the aggregate monthly balances for such Relevant Escrow Accounts. The spreadsheet  
20 also contains the email addresses for nearly all borrowers who have a Relevant Escrow  
21 Account.

22 13. Some Axos customers have multiple loans with the Bank. As a result,  
23 the total number of putative class members is lower than the total number of unique  
24 Relevant Escrow Accounts. There are 5,038 unique borrowers in the Settlement Class as  
25 of the date of the creation of the special report described above.

26 14. The number of Relevant Escrow Accounts in each of the various  
27 settlement tiers is as follows: (i) 1,839 Relevant Escrow Accounts fall within Tier 1; (ii)  
28 1,399 Relevant Escrow Accounts fall within Tier 2; (iii) 996 Relevant Escrow Accounts

1 fall within Tier 3; (iv) 614 Relevant Escrow Accounts fall within Tier 4; and (v) 554  
2 Relevant Escrow Accounts fall within Tier 5. Assuming approximately \$292,500.00 is  
3 available for distribution to the Settlement Class, the distribution to each of the Relevant  
4 Escrow Accounts pursuant to the formula set forth in Section 6.c of the MOU would be as  
5 follows:

Tier	Members	Unadjusted Individual Award	Unadjusted Aggregate Award	Adjusted Individual Award	Adjusted Aggregate Award
< 1 year	1,839	\$25	\$45,975	\$22.76	\$41,855.64
1 year, < 2 years	1,399	\$50	\$69,950	\$45.52	\$63,682.48
2 years, < 3 years	996	\$75	\$74,700	\$68.28	\$68,006.88
3 years, < 4 years	614	\$100	\$61,400	\$91.04	\$55,898.56
>4 years	554	\$125	\$69,250	\$113.08	\$63,045.02
<b>Total</b>	<b>5,402</b>		<b>\$321,275</b>		<b>\$292,488.58</b>

15  
16 15. Assuming that \$292,500.00 remains for distribution to the Class  
17 Members after payment of McSwain's attorneys' fees, costs, and McSwain's incentive  
18 award, then the amount distributed to each Relevant Escrow Account will be  
19 approximately 91.04% of the total unadjusted award amount due to each Relevant Escrow  
20 Account (excluding escrow accounts that only ever had a zero or less balance) under  
21 Section 6.c of the MOU.

22 16. Technical personnel at Axos created a report showing the aggregate  
23 monthly balances for the Relevant Escrow Accounts from March 31, 2015 through  
24 November 29, 2019. This data was gathered by accessing the transaction data for each of  
25 the Relevant Escrow Accounts and aggregating the monthly balance of each Relevant  
26 Escrow Account from March 31, 2015 through November 29, 2019. I have reviewed this  
27 data and confirmed that it is in accordance with the data stored on Axos's Jack Henry  
28 system. Attached to my Declaration as **Exhibit B** is a true and correct copy of the

1 aggregate monthly balances for the Relevant Escrow Accounts from March 31, 2015  
2 through November 29, 2019, which includes escrow accounts with a negative balance.

3           17. Assuming McSwain were to succeed after trial of this action and  
4 assuming that HOLA does not preempt Section 2954.8(a), Axos believes that it should  
5 only be liable for the interest due on the Relevant Escrow Accounts after March 2, 2018 –  
6 the date the Ninth Circuit issued its decision in *Lusnak*. I have reviewed the interest  
7 amounts due under Section 2954.8(a) based the aggregate monthly escrow balances in the  
8 Relevant Escrow Accounts from March 30, 2018 through November 29, 2019. Assuming  
9 that McSwain recovered 100 cents on the dollar for the class claims on the Relevant  
10 Escrow Accounts operative during this period, based upon the figures in Exhibit B, the  
11 Class would recover \$559,979.73.

12           18. I have also reviewed the interest amounts due under Section 2954.8(a)  
13 going back approximately four years from the filing of the Complaint, from March 31,  
14 2015 through November 29, 2019. Assuming that McSwain recovered 100 cents on the  
15 dollar for the class claims on the Relevant Escrow Accounts operative during this period,  
16 based upon the figures in Exhibit B, the Class would recover \$1,227,088.52.

17           19. It is my understanding that, as consideration for the settlement, Axos  
18 will be changing its policy to start paying at least 2% *per annum* interest on the Relevant  
19 Escrow Accounts within 30 days of the Court's entry of judgment in this matter. Based on  
20 the historical balances in the Relevant Escrow Accounts contained in Exhibit B for the  
21 twelve months including and prior to November 29, 2019, I estimate the value of Axos's  
22 change in policy for the first four years after the change in policy would be worth  
23 approximately \$1,419,304 to the Class.

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

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Executed on this 18 day of June, 2020, at San Diego,  
California.

  
ERIK BOWEN

# **EXHIBIT A**

## MEMORANDUM OF UNDERSTANDING

1. This Memorandum of Understanding is entered into by and between the parties to the putative class action Daniel McSwain, Trustee of the Daniel S. McSwain Trust Dated July 17, 2012 v. Axos Bank, San Diego County Superior Court, Case No. 37-2019-00015784-CU-BC-CTL (the "Action"), for the purpose of memorializing their agreement to the principal terms of a settlement of this Action on behalf of themselves, the putative class, and alleged aggrieved customers of Axos Bank.
2. This Memorandum shall become binding and enforceable pursuant to California Code of Civil Procedure section 664.6 upon its execution.
3. The Settlement Period will commence on March 25, 2015 and end on the date of Preliminary Approval. Plaintiff acknowledges that any claims existing prior to March 25, 2015 are barred by the applicable statutes of limitations.
4. The 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 Settlement 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 (each a "Class Member").
5. Defendant shall stipulate to class certification solely for settlement purposes in connection with Plaintiff's motion for settlement approval. Should the Court fail to enter final settlement approval and judgment ("Judgment") in accordance with the terms of the parties' settlement, then the class shall be decertified to allow Plaintiff to make the appropriate showing, if any, that this Action should be treated as a class action. Should the Court fail to enter final Judgment, the Memorandum and any longform Settlement Agreement agreed to thereafter will terminate and neither party will have any rights or obligations thereunder.
6. Within ten days of the entry of Judgment by the Court, Defendant shall pay an amount of no more than:
  - a. A non-reversionary \$500,000 (Five Hundred Thousand Dollars 00/100) payment in settlement of the Action ("Gross Settlement Amount").
  - b. From the Gross Settlement Amount, the following will be deducted upon approval by the Court: (1) attorneys' fees of up to the amount approved by the Court and any other costs associated with settlement up to \$200,000; and (2) a Class Representative Award in the amount of up to \$7,500 to Plaintiff.
  - c. The remainder, the Net Settlement Amount, estimated to be approximately \$300,000, will be paid out to participating Class Members. The formula for payment to Class Members will be as follows: Class Members who held an

escrow account with Defendant for less than one (1) year during the Settlement Period will receive \$25. Class Members who held an escrow account with Defendant for at least one (1) year but less than two (2) years during the Settlement Period will receive \$50. Class Members who held an escrow account with Defendant for at least two (2) years but less than three (3) years during the Settlement Period will receive \$75. Class Members who held an escrow account with Defendant for at least three (3) years but less than four (4) years during the Settlement Period will receive \$100. Class Members who held an escrow account with Defendant for four (4) or more years during the Settlement Period will receive \$125. If the Net Settlement Amount is not exhausted, then each payment to Class Members will be proportionately increased pro rata. If the amount of payments to Class Members exceeds the Net Settlement Amount, then each payment to Class Members will be proportionately decreased pro rata.

- d. Plaintiff recognizes and acknowledges that the Gross Settlement Amount is based upon the aggregate escrow balances provided to Plaintiff on June 27, 2019, which reflects the total escrow monthly balances from March 31, 2015, including the beginning of the Settlement Period through May 31, 2019. If Judgment is entered by the Court, Defendant shall change its policy for the operation of its escrow accounts for loans secured by one to four family residential properties located in California as described in Section 8 below.

- 7. Defendant will be responsible for providing notice of the Settlement to the Class Members.
- 8. Within ten days of the Court's entry of Judgment, Defendant shall 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 for four years forward from the Court's entry of Judgment. However, in accordance with 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.
- 9. 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 for four years forward.
- 10. To receive the Class Representative Award, Plaintiff must sign a separate long-form Settlement Agreement and General Release of All Claims provided by Defendant. Defendant will not oppose Plaintiff's request for a Class Representative Award. To the extent the Court does not approve the full amount of attorneys' fees and costs or the Class Representative Award, the non-approved amounts will be made available to Class

Members as part of the non-reversionary Net Settlement Amount. Upon signing the separate long-form Settlement Agreement and General Release, Plaintiff shall be free to refinance his property loan currently held by Defendant.

11. Released Claims

The Releases detailed herein shall be augmented in the long-form settlement agreement to reference specific statutes, claims, and/or causes of actions arising from or related to the facts and claims alleged in the Action, or that could have been raised in the Action based on the facts and claims alleged, as amended, and/or if a claim or other term/condition arising from or related to the Action, as amended, is unintentionally omitted from the Plaintiff and/or Class Release. In addition, the Released Parties may be modified if there is an omission as agreed to by the Parties.

- a. **Plaintiff Daniel McSwain.** From the beginning of time to the date Judgment is entered by the Court, Plaintiff fully and finally releases Defendant, and each of its past, present and future agents, employees, servants, officers, directors, partners, trustees, representatives, shareholders, stockholders, attorneys, parents, subsidiaries, equity sponsors, related companies/corporations and/or partnerships, divisions, assigns, predecessors, successors, insurers, consultants, joint venturers, joint employers, affiliates, alter-egos, and affiliated organizations, and all of its respective past, present and future employees, directors, officers, agents, attorneys, stockholders, fiduciaries, parents, subsidiaries, and assigns (collectively, the "Released Parties"), 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 ("Plaintiff's Released Claims"). Plaintiff's Released Claims include, but are not limited to, all claims arising from or related to the Action. Plaintiff's Released Claims include, but are not limited to, all claims for unpaid interest related to his escrow account with Defendant and/or for violation of section 2954.8 of the California Civil Code.

Plaintiff's Released Claims include all claims, whether known or unknown. Even if Plaintiff discovers facts in addition to or different from those that he now knows or believes to be true with respect to the subject matter of Plaintiff's Released Claims, those claims will remain released and forever barred. Thus, Plaintiff expressly waives and relinquishes 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.

- b. **Class Members.** As of the date of the Judgment, all Class Members fully and finally release Defendant and the Released Parties 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 Defendant's 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 Action. The Class Released Claims include, but are not limited to, all claims for unpaid interest related to the Class Members' residential escrow accounts with Defendant. 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 Defendant'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 Class Members' Released Claims, those claims will remain released and forever barred. Thus, 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.

12. Class Members shall be permitted no more than 90 days to Object or Request Exclusion. Each Class Member who does not Request Exclusion shall receive a portion of the settlement amount pursuant to the formula described in Section 6.c. above or, alternatively, a different formula to be agreed upon in the longform Settlement Agreement. Each Class Member who does not Request Exclusion shall receive payment directly credited to the escrow account of each Class Member who does not Request Exclusion. Any Class Members who no longer have an escrow account with Defendant shall be mailed a settlement check. Defendant shall be responsible for the expense of mailing any such checks. Any uncashed checks shall be handled in accordance with applicable California law.
13. Each Class Member who does not submit a valid Request For Exclusion will automatically and without further action be conclusively deemed to have released for all purposes all Class Released Claims at the time of Final Approval of the settlement by the Court as more fully defined in the settlement agreement.
14. Defendant agrees to provide mutually agreed upon confirmatory discovery to Plaintiff's counsel. The scope of the confirmatory discovery shall be discussed and negotiated at the mediation referenced in Section 21 below.
15. The parties to this Memorandum pledge their good faith and fair dealing in supporting the approval of this settlement by the Court.

16. The parties contemplate that a long-form stipulated settlement agreement will be jointly negotiated consistent with this Memorandum.
17. None of this Memorandum, the final form of settlement (memorialized in the written settlement agreement), or the commencement of payment of interest by Defendant (whether under the settlement contemplated hereby or otherwise) shall constitute an admission on behalf of Defendant or in any manner constitute or be deemed to constitute evidence of any form of liability or the accuracy of any allegation made or legal theory advanced by Plaintiff or his counsel, and Defendant denies all such allegations and denies that it has committed any wrongdoing.
18. The parties to this Memorandum are represented by competent counsel and have had an opportunity to consult with counsel prior to its execution.
19. Neither Plaintiff nor Plaintiff's counsel shall issue any press release or announcement of any kind related in any way to the settlement. Plaintiff and Plaintiff's counsel agree that, prior to preliminary approval of the settlement, they will keep the terms of this settlement confidential except for purposes of communicating with Plaintiff only. Plaintiff shall be informed that the settlement is confidential and shall be advised to keep the settlement confidential. From and after preliminary approval of the settlement, the Class Members (including Plaintiff and Class Counsel) may: (1) as required by law; (2) as required under the terms of the settlement; or (3) as required under counsel's duties and responsibilities as Class Counsel, comment regarding the specific terms of the settlement. In all other cases, Plaintiff and Class Counsel agree to limit their statements regarding the terms of the settlement, whether oral, written or electronic (including the world wide web), to say the Class Action has been resolved and that Plaintiff and Class Counsel are satisfied with the settlement terms. Nothing in this Paragraph is intended to interfere with Class Counsel's duties and obligations to faithfully discharge their duties as Class Counsel, including but not limited to, communicating with Class Members regarding the settlement.
20. This Memorandum may be executed in counterparts and, as so executed, shall constitute one agreement binding on the parties.
21. Plaintiff and Defendant have agreed to one (1) half-day mediation regarding the settlement of this dispute before the Honorable Leo S. Papas, Ret. on December 8, 2019 in San Diego, California. Defendant agrees to advance the costs of the mediation. If the mediation results in an agreement between Plaintiff and Defendant to settle this dispute consistent with the terms set forth in this Memorandum, Defendant agrees to pay for the full cost of the mediation.

IT IS SO AGREED:

Dated: \_\_\_\_\_, 2019

\_\_\_\_\_  
Plaintiff Daniel McSwain, Individually and  
as Trustee, or Authorized Representative

Dated: November 4, 2019

Eh\_\_\_\_\_  
Defendant Axos Bank

By: Eh Bar-Ad\_\_\_\_\_  
Title: EVP

Dated: \_\_\_\_\_, 2019


\_\_\_\_\_  
Ronald A. Marron  
Counsel for Plaintiff Daniel McSwain

Dated: \_\_\_\_\_, 2019

Polly Towill\_\_\_\_\_  
Polly Towill  
Alejandro E. Moreno  
Counsel for Defendant Axos Bank

IT IS SO AGREED:

Dated: 11/7, 2019

  
Plaintiff Daniel McSwain, Individually and  
as Trustee, or Authorized Representative

Dated: \_\_\_\_\_, 2019

Defendant Axos Bank

By: \_\_\_\_\_  
Title: \_\_\_\_\_

Dated: 11/4, 2019

  
Ronald A. Marron  
Counsel for Plaintiff Daniel McSwain

Dated: \_\_\_\_\_, 2019

\_\_\_\_\_  
Polly Towill  
Alejandro E. Moreno  
Counsel for Defendant Axos Bank


## FIRST ADDENDUM TO MEMORANDUM OF UNDERSTANDING

1. This First Addendum (the "Addendum") to the Memorandum of Understanding ("MOU"), effective November 7, 2019, entered into by and between the parties to the putative class action *Daniel McSwain, Trustee of the Daniel S. McSwain Trust Dated July 17, 2012 v. Axos Bank*, San Diego County Superior Court, Case No. 37-2019-00015784-CU-BC-CTL, is entered into for the purpose of memorializing additional, supplemental provisions to the MOU, which were agreed upon by the parties at the mediation held before the Hon. Leo S. Papas (Ret.) of Judicate West on December 12, 2019 in San Diego, California.
2. Defined Terms: Unless defined in this Addendum, all defined terms have the same meaning as in the MOU.
3. Confirmatory Discovery: Axos shall provide a declaration, under oath, of an appropriate employee at Axos that sets forth information concerning (i) the aggregate number of escrow accounts within the Settlement Class; (ii) the aggregate number of Class Members; (iii) the aggregate escrow balances for escrow accounts within the Settlement Class, calculated for each month of the Settlement Period; (iv) the number of Class Members who fall within each of the settlement payment tiers described in Section 6.c. of the MOU; and (v) the estimated future value of Axos's policy to begin paying interest pursuant to Sections 8 and 9 of the MOU. Axos shall provide a draft of the declaration to Plaintiff's counsel on or before January 10, 2020.
4. Axos's Option to Cancel Settlement: If ten percent (10%) or more of the total number of Class Members opt-out of the settlement of this Action, Axos shall, at its sole and absolute discretion, have the option of cancelling each of (i) the settlement agreement to be submitted to the Court with the motion for preliminary approval (the "Settlement Agreement"), (ii) MOU, and (iii) Addendum. Should Axos exercise its option to cancel the aforementioned agreements, the class certification agreed to in those agreements shall be null and void and such class shall be decertified, without prejudice to Plaintiff's right to petition the Court for class certification via a motion for class certification.
5. Settlement Administration: Axos shall provide notice to the Class Members and administer the settlement, including payment to the Class Members. Axos shall provide a report to Plaintiff's counsel explaining its class notice and administration process.
6. Draft Settlement Agreement: Plaintiff's counsel shall prepare a first draft of the Settlement Agreement incorporating, as appropriate, the provisions of the MOU and this Addendum. Plaintiff's counsel shall provide a draft of the Settlement Agreement to Axos's counsel on or before January 10, 2020.
7. Modification of Section 8 of the MOU: The terms of Section 8 in the MOU shall be modified to strike out the phrase "for four years forward from the Court's entry of Judgment" from the first sentence in that section.


8. The terms of the MOU remain fully in effect: The Addendum shall be interpreted so as to supplement the terms of the MOU. To the extent the Addendum and MOU conflict in any material respect, the terms of the Addendum shall govern.

IT IS SO AGREED:

Dated: December 17, 2019

  
\_\_\_\_\_  
Ronald A. Marron  
Counsel for Plaintiff Daniel McSwain

Dated: December 26, 2019

  
\_\_\_\_\_  
Polly Towill  
Alejandro E. Moreno  
Counsel for Defendant Axos Bank

# **EXHIBIT B**

# axos Legal Escrow Balances by State (1-4 Family Residence)

## Month-end Total Escrow Balance by Group

- Property in CA
- Escrow exists
- No minimum origination date
- Accounts with negative escrow balances will be included in results.

JHA As of Date	Group	Total Escrow Balance
11/29/2019	Total	\$12,578,277.64
10/31/2019	Total	\$23,293,444.58
9/30/2019	Total	\$23,950,685.91
8/30/2019	Total	\$23,041,278.09
7/31/2019	Total	\$20,162,298.22
6/28/2019	Total	\$17,081,076.28
5/31/2019	Total	\$16,465,366.95
4/30/2019	Total	\$12,789,669.41
3/29/2019	Total	\$10,326,090.11
2/28/2019	Total	\$21,157,933.31
1/31/2019	Total	\$16,560,850.47
12/31/2018	Total	\$14,958,168.95
11/30/2018	Total	\$10,606,092.59
10/31/2018	Total	\$21,044,072.07
9/28/2018	Total	\$19,020,793.65
8/31/2018	Total	\$18,198,099.46
7/31/2018	Total	\$14,538,115.60
6/29/2018	Total	\$13,845,044.39
5/31/2018	Total	\$10,593,544.70
4/30/2018	Total	\$8,840,091.03
3/30/2018	Total	\$7,853,755.65
2/28/2018	Total	\$16,676,981.16
1/31/2018	Total	\$13,841,491.46
12/29/2017	Total	\$12,116,928.29
11/30/2017	Total	\$9,258,265.02
10/31/2017	Total	\$20,385,066.02
9/29/2017	Total	\$18,897,557.34
8/31/2017	Total	\$15,637,093.52
7/31/2017	Total	\$13,139,694.82
6/30/2017	Total	\$12,017,881.01
5/31/2017	Total	\$8,604,171.90
4/28/2017	Total	\$6,316,525.27
3/31/2017	Total	\$5,822,881.92
2/28/2017	Total	\$12,947,230.13
1/31/2017	Total	\$11,039,767.69
12/30/2016	Total	\$10,369,907.10
11/30/2016	Total	\$8,713,779.28
10/31/2016	Total	\$17,388,687.16
9/30/2016	Total	\$16,539,420.13
8/31/2016	Total	\$14,179,125.44
7/29/2016	Total	\$12,063,826.68
6/30/2016	Total	\$10,677,046.22
5/31/2016	Total	\$8,052,872.09
4/29/2016	Total	\$6,717,367.49
3/31/2016	Total	\$4,324,929.06
2/29/2016	Total	\$11,756,533.09
1/29/2016	Total	\$10,421,232.46
12/31/2015	Total	\$9,028,705.86
11/30/2015	Total	\$6,883,961.70
10/30/2015	Total	\$15,522,093.41
9/30/2015	Total	\$13,888,540.37
8/31/2015	Total	\$12,049,047.32
7/31/2015	Total	\$10,688,307.80
6/30/2015	Total	\$8,617,281.55
5/29/2015	Total	\$6,446,784.04
4/30/2015	Total	\$4,928,257.58
3/31/2015	Total	\$3,784,779.98

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

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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

DECLARATION OF MICHAEL G. OLINIK IN  
SUPPORT OF MOTION FOR PRELIMINARY  
APPROVAL

Date: July 22, 2020

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

**DECLARATION OF MICHAEL G. OLINIK**

I, Michael G. Olinik, declare:

1. I am an attorney at law duly authorized to practice law before all the courts of the State of California and the Commonwealth of Pennsylvania. I am the sole proprietor of the Law Office of

1 Michael G. Olinik. I am co-counsel for Plaintiff Daniel McSwain, Trustee of the Daniel S. McSwain  
2 Trust Dated July 17, 2012. I am familiar with the facts in this case and if called upon as a witness I  
3 could and would testify to the following facts based upon my own personal knowledge.

4 2. I received a B.A. in Government and in Economics, cum laude, from the College of  
5 William and Mary in 2006. In 2009, I received my J.D. from Villanova University School of Law  
6 Magna Cum Laude. I became a member of the Commonwealth of Pennsylvania's Bar in November  
7 2009. I became a member of the State Bar of California in August 2013.

8 3. Since January 2010, I have practiced civil litigation. I practiced for three years at Reed  
9 Smith, LLP in Philadelphia, Pennsylvania. I served as a law clerk for Hon. Magistrate Judge Bernard  
10 Skomal of the Southern District of California for approximately five months in 2013, prior to joining  
11 the Butler Firm, APC in San Diego. I practiced at the Butler Firm for almost 3 years. In September  
12 2016, I opened my own law practice, where I currently still work.

13 4. I have legal experience including in the fields of complex litigation, such as  
14 employment litigation, consumer class actions, business litigation, environmental law, product liability,  
15 and unlawful detainer actions. I also effectively litigated wrongful termination actions. I participated  
16 in a bench private arbitration in the Chancery Court of Delaware, and was second chair in a bifurcated  
17 trial in the San Diego Superior Court, which was comprised of a jury phase of approximately 3 weeks  
18 and a bench phase of approximately 3 days. In July 2015, I served as lead trial counsel in a three day  
19 bench trial in an employment matter. I was co-lead counsel in 2019 on a jury unlawful detainer trial  
20 before Judge Bacal and was lead co-counsel again in a non-jury retrial before Judge Meyer. I have also  
21 participated in numerous unlawful detainer trials before numerous judges in the San Diego Superior  
22 Court.

23 5. I have been active in the legal community. I participated in pro bono legal matters while  
24 at Reed Smith, LLP. I have been a member of the San Diego County Bar Association since August  
25 2013. I am appointed to be a member of the Executive Committee of the Forum for Emerging Lawyers  
26 starting in January 2016 and was elevated to Vice-Chair in January 2017. I was also editor-in-chief of  
27 the monthly publication "For the Record" in 2016 and 2017. Since 2019, I have been on the editorial  
28 board of San Diego Lawyer Magazine put out by the San Diego County Bar Association.

1           6.       I am admitted to practice before all courts in the state of California, all courts in the  
2 Commonwealth of Pennsylvania, the United States District Courts in the Eastern District of  
3 Pennsylvania, the Southern, Central, and Eastern Districts of California, and the Ninth Circuit Court of  
4 Appeals.

5           7.       I have litigated in a number of potential class action lawsuit and certified class action  
6 lawsuits. Two of the certified actions in which I have participated are *Moyle v. Liberty Mutual*  
7 *Retirement Benefit Plan*, 9th Circuit Court of Appeals, No. 13-56330; 13-56412; and *Warner, et al. v.*  
8 *U.S. Quality Furniture Services*, San Diego Superior Court Case No. 37-2014-00043876-CU-OE-CTL.  
9 I was also designated co-class counsel in the case *Gonzales v. Starside Security & Investigation, Inc.*,  
10 San Diego Superior Court, Case No. 37-2015-00036423-CU-OE-CTL, which resulted in a settlement.

11           8.       I have litigated matters involving banks since I began my litigation career and  
12 represented Bank of America, Wells Fargo, and Santander. I have litigated numerous unlawful  
13 detainer actions follow non-judicial foreclosure sales in which matters related to the Deed of Trust  
14 were at issue. My combination of previous class action experience and experience relating to banks  
15 and mortgages makes me qualified to be class counsel in this matter.

16           I declare under penalty of perjury under the laws of California that the foregoing is true and  
17 correct, and that this declaration was executed on June 16, 2020, in San Diego, California.

18  
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21 Michael G. Olinik  
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28

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

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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

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

Date: July 22, 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 Preliminary Approval of Class Action Settlement. I make this Declaration based on my  
5 personal knowledge and if called to testify, I could and would competently testify to the matters  
6 contained 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 "Defenant"). Attached to the Settlement Agreement are  
10 the following two exhibits: (1.) Exhibit A- Notice of Proposed Class Litigation Settlement; and (2.)  
11 Exhibit B- [Proposed] Order Granting Preliminary Approval of Class Action Settlement.

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

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

26 5. Following the denial of Axos's demurrer, the parties began to negotiate a potential  
27 settlement. Axos provided figures regarding the amount of money it held in escrow accounts for loans  
28 secured by 1-4 family properties located in California for the four years prior to the date Plaintiff filed

1 his initial complaint through the date the report was created, which Plaintiff reviewed. Based upon the  
2 initial information, the parties eventually signed a Memorandum of Understanding.

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

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

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

18 9. Based on my experience, I conclude that the Settlement provides exceptional results for  
19 the Class while sparing the Class from the uncertainties of continued and protracted litigation.

20 10. Class Representative Daniel McSwain has performed an exemplary job representing the  
21 putative class members to date. Mr. McSwain, with his investigative journalist background, brought  
22 this case to counsel himself, and has extensively researched Axos Bank and their assets throughout the  
23 process to ensure that the information provided by Axos aligned with the publicly available data. Mr.  
24 McSwain has, and if appointed will continue to, adequately represent the Settlement Class.

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

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

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

11                   **Ronald A. Marron Firm’s Qualifications and Experience Prosecuting**

12                           **Consumer Class Action Lawsuits**

13           14.     My work experience and education began in 1984 when I enlisted in the United States  
14 Marine Corps (Active Duty 1984-1988, Reserves 1988-1990) and thereafter received my Bachelor of  
15 Science in Finance from the University of Southern California (1991). While attending Southwestern  
16 University School of Law (1992-1994), I also studied Biology and Chemistry at the University of  
17 Southern California and interned at the California Department of Corporations with emphasis in  
18 consumer complaints and fraud investigations. I was admitted to the State Bar of California in January  
19 of 1995 and have been a member in good standing since that time. In 1996, I started my own law firm  
20 with an emphasis in consumer fraud. My firm currently employs six full-time attorneys and three  
21 paralegals. Attached hereto as **Exhibit 3** is a true and correct copy of my firm’s current resume.

22           15.     Over the years I have acquired extensive experience in class actions and other complex  
23 litigation, and have obtained large settlements as lead counsel. In recent years, I devoted almost all of  
24 my practice to the area of false and misleading labeling of food, nutrition or over-the-counter products,  
25 cases involving violations of the Telephone Consumer Protection Act, and other privacy cases.

26           16.     Most recently, on February 24, 2020, the Honorable Christina A. Snyder of the United  
27 States District Court for the Central District of California granted final approval of a \$2,500,000.00  
28 class action settlement in *Graves v. United Industries Corporation*, No. 2:17-cv-06983-CAS-SK (C.D.  
Cal.) and appointed the Marron Firm as class counsel. Judge Snyder noted that the Law Offices of

1 Ronald A. Marron had “vigorously represented the Class” and has “extensive experience in consumer  
2 class action litigation.” (Dkt. No. 87).

3 17. On January 31, 2020, the Honorable Judge Gonzalo P. Curiel of the United States  
4 District Court for the Southern District of California granted preliminary approval of a settlement in the  
5 certified class action styled *Hilsley v. Ocean Spray Cranberries, Inc.*, Case No. 3:17-cv-02335-GPC-  
6 MDD (S.D. Cal.) (Dkt. No. 83).

7 18. On January 28, 2020, the Honorable William Alsup granted final approval of a  
8 settlement of a nationwide certified class in *Esparza v. Smartpay Leasing, Inc.*, No. 3:17-cv-03421-  
9 WHA (N.D. Cal.). The Court also appointed Ronald A. Marron, Alexis M. Wood and Kas L. Gallucci  
10 of the Law Offices of Ronald A. Marron as class counsel.

11 19. On October 11, 2019, the Honorable Judge Wilhelmina M. Wright granted final  
12 approval of a nationwide TCPA settlement class in *Busch v. Bluestem Brands, Inc.*, No. 16-cv-  
13 0644(WMW/HB) (D. Minn.) and appointed the Law Offices of Ronald A. Marron as co-lead class  
14 counsel. The settlement created a \$5.25 million non-reversionary Settlement Fund for the benefit of the  
15 class.

16 20. On September 12, 2019, the Honorable Judge Jose E. Martinez granted final approval of  
17 a nationwide TCPA settlement class in *Medina v. Enhanced Recovery Company, LLC*, No. 15-CV-  
18 14342-MARTINEZ-MAYNARD (S.D. Fla.) and appointed the Law Offices of Ronald A. Marron as  
19 co-lead class counsel. The settlement created a \$1.45 million common fund.

20 21. On June 17, 2019, the Honorable Anthony J. Battaglia granted final approval of a  
21 nationwide CLRA settlement case in *Littlejohn v. Ferrara Candy Company*, No. 18-cv-0658-AJB-  
22 WVG (S.D. Cal.), stating “Class Counsel has fully and competently prosecuted all causes of action,  
23 claims, theories of liability, and remedies reasonably available to the Class Members.”

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

27 23. On August 10, 2018, the Honorable Robert N. Scola, Jr. granted final approval of class  
28 action settlement regarding false advertising claims in *Mollicone v. Universal Handicraft*, No. 17-

1 21464-Civ-Scola (S.D. Fla.), in which the Law Offices of Ronald A. Marron served as class counsel. In  
2 his Preliminary Approval Order, Judge Scola stated that the Marron Firm is “experienced and  
3 competent in the prosecution of complex class action litigation.” (Dkt. No. 120).

4 24. On June 29, 2018, in *Mason v. M3 Financial Services, Inc.*, No. 15-cv-4194 (N.D. Ill.),  
5 the Honorable Andrea R. Wood granted final approval of a nationwide TCPA settlement class which  
6 provided a common fund in the amount of \$600,000. The Law Offices of Ronald A. Marron served as  
7 co-lead class counsel.

8 25. On May 4, 2018, the Honorable Analisa Torres granted final approval of a false  
9 advertising class settlement in *Lucero v. Tommie Copper, Inc.*, No. 15 Civ. 3183 (AT) (S.D. N.Y.). On  
10 January 4, 2016, the Honorable Analisa Torres appointed the Marron firm as Interim Lead Class  
11 Counsel over the opposition and challenge of other plaintiffs’ counsel, noting that the Marron firm’s  
12 “detailed” complaint was “more specifically pleaded, . . . assert[ing] a more comprehensive set of  
13 theories . . . [and was] more factually developed.” *Potzner v. Tommie Copper Inc.*, No. 15 CIV. 3183  
14 (AT), 2016 WL 304746, at \*1 (S.D.N.Y. Jan. 4, 2016). Judge Torres also noted that Mr. Marron and  
15 his firm’s attorneys had “substantial experience litigating complex consumer class actions, are familiar  
16 with the applicable law, and have the resources necessary to represent the class.” *Id.*

17 26. On March 26, 2018, the Honorable Marilyn Huff granted final approval of a nationwide  
18 TCPA class action settlement in *Gutierrez-Rodriguez v. R.M. Galicia, Inc.*, No. 16-CV-00182-H-BLM,  
19 2018 WL 1470198, at \*2 (S.D. Cal. Mar. 26, 2018). The Law Offices of Ronald A. Marron were  
20 appointed class counsel.

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

28 28. In addition to the above cases and the present action, my firm has an in-depth  
knowledge of other consumer cases including litigating over-the-counter (“OTC”) product cases,

1 including the FDCA's history, principles, and regulations, and Courts have recognized my firms'  
2 ability to litigate complex class actions. For example, in *Gallucci v. Boiron, Inc.*, Case No. 3:11-CV-  
3 2039 JAH NLS (S. D. Cal.), we drafted a Complaint with five potential causes of action, and claims  
4 under the CLRA, UCL and FAL with respect to OTC homeopathic drugs which "concern[ed] novel  
5 legal theories in a specialized area of law." See *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 590 n. 4  
6 (C.D. Cal. 2011). This action involved extensive motion practice and my firm's opposition brief was so  
7 persuasive that defendants decided to withdraw their motion. My firm's well-drafted briefing,  
8 knowledge and experience resulted in a \$5 million common fund plus injunctive relief settlement in  
9 favor of Gallucci against French homeopathic giant, Boiron, Inc. On April 25, 2012, the Honorable  
10 John A. Houston granted preliminary approval, noting that:

11 During the pendency of the Litigation, Class Counsel conducted a extensive  
12 examination and evaluation of the relevant facts and law to assess the merits of the  
13 named plaintiffs' and class claims to determine how best to serve the interests of  
14 Plaintiffs and the Class. . . . Class Counsel conducted thorough review of the Food,  
15 Drug and Cosmetic Act, its numerous changes over the years, and the Act's  
16 implementing regulations. Class Counsel have carefully considered the merits of  
17 Plaintiffs' claims, and the defenses raised by defendants. *Gallucci* Dkt. No. 89 at i.

18 29. Accordingly, Judge Houston appointed my firm as Class Counsel, finding that Class  
19 Counsel "will fairly and adequately protect the interests of the Class . . . [and] are experienced and  
20 competent to prosecute this matter on behalf of the Class." *Id.* at iii-iv. The Fairness Hearing was held  
21 on October 1, 2012 and on October 31, 2012, the court granted final approval. See *Gallucci v. Boiron,*  
22 *Inc.*, 2012 U.S. Dist. LEXIS 157039 (S.D. Cal. Oct. 31, 2012).

23 30. Further, on June 26, 2015, the Honorable Maxine M. Chesney of the United States  
24 District Court for the Northern District of California granted preliminary approval to a class action  
25 settlement with injunctive relief for class wide claims of false representations regarding the defendant's  
26 weight loss teas. See *Johnson v. Triple Leaf Tea Inc.*, Case No. 3:4-cv-01570 MMC (Dkt. No. 53)  
27 ("Having considered the factors set forth in Rule 23(g)(1) of the Federal Rules of Civil Procedures, the  
28 Court appoints Plaintiff's counsel, the Law offices of Ronald A. Marron APLC, to serve as Class  
Counsel.").

31. On October 31, 2013, the Honorable Gonzalo P. Curiel of the United States District  
Court for the Southern District of California granted preliminary approval to a class action settlement

1 of \$1 million and injunctive relief for class wide claims of false and deceptive advertising of OTC  
2 drugs negotiated by my firm in *Mason v. Heel, Inc.*, Case No. 3:12-cv-3056 GPC (KSC) (Dkt. No. 27),  
3 also finding there was “sufficient basis . . . under the factors set forth in Rule 23(g)(1) of the Federal  
4 Rules of Civil Procedure” to appoint my firm as Class Counsel. *Id.* at p. 5.

5 32. On October 23, 2013, the Honorable Michael M. Anello of the United States District  
6 Court for the Southern District of California granted final approval to a \$1.2 million and injunctive  
7 relief class action settlement concerning false and deceptive advertising of OTC drugs negotiated by  
8 my firm in *Nigh v. Humphreys Pharmacal, Inc.*, Case No. 3:12-cv-02714-MMA-DHB (Dkt. No. 30),  
9 finding that “the Class was adequately represented by competent counsel.” *Id.* at p. 14.

10 33. On March 13, 2012, my firm settled a case against manufacturers of OTC dietary  
11 supplement products for \$900,000 in a common fund plus injunctive relief, styled *Burton v. Ganeden*  
12 *Biotech, Inc. et al.*, Case No. 3:11-cv-01471 W (NLS) (S.D. Cal.). Burton alleged that defendants  
13 falsely advertised their products as containing “clinically proven” proprietary bacteria that improved  
14 and 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 editions of the Settlement  
19 Agreement, multiple conference calls (including on the weekends) and e-mails. On March 14, 2012,  
20 the parties filed a Joint Motion for Preliminary Approval of Settlement, (Dkt. No. 38) which the court  
21 granted on April 16, 2012 (*Id.* at 42). After the Fairness Hearing in this case on August 21, 2012, Judge  
22 Whelan granted final approval on October 5, 2012. Dkt. Nos. 48, 52.

23 34. On March 1, 2012, the Honorable Janis L. Sammartino appointed my firm Interim Class  
24 Counsel in an action styled *Margolis v. The Dial Corporation*, Case No. 3:12-cv-288 JLS (WVG) (Dkt.  
25 No. 14). This case involved an OTC pheromone soap product that its manufacturer alleges enhances a  
26 man’s sexual attraction to women.

27 35. When my firm was appointed Interim Lead Class Counsel for a class of consumers in a  
28 deceptive food labeling case back in March of 2011, the Honorable Marilyn Huff recognized Class  
Counsel “appears to be well qualified to represent the interest of the purported class and to manage this

1 litigation.” *Hohenberg v. Ferrero U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 38471, at \*6 (S.D. Cal. Mar. 22,  
2 2011). Subsequently, when my firm obtained certification of the proposed class, the court reaffirmed its  
3 finding that my firm is adequate Class Counsel. *See In re Ferrero Litig.*, 278 F.R.D. 552, 559 (S.D.  
4 Cal. 2011). Judge Huff gave Final Approval of a settlement on July 9, 2012. (*Ferrero* Dkt. No. 127).

5 36. On November 14, 2011 my firm obtained the certification of a nationwide class of  
6 consumers who purchased Qunol CoQ10, a dietary supplement making misleading efficacy claims. *See*  
7 *Bruno v. Quten Research Inst., LLC*, 2011 U.S. Dist. LEXIS 132323 (C.D. Cal. Nov. 14, 2011). My  
8 firm then successfully defeated the defendants’ motion to decertify the class following the Ninth  
9 Circuit’s decision in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). *See Bruno v.*  
10 *Eckhart Corp.*, 2012 U.S. Dist. LEXIS 30873 (C.D. Cal. Mar. 6, 2012). The case then settled on the  
11 eve of trial (originally scheduled for October 2, 2012).

12 37. On June 14, 2011, the Honorable Richard Seeborg appointed my firm Interim Class  
13 Counsel, over a competing application from a former partner at the New York law firm Milberg Weiss  
14 regarding a deceptive food labeling case. *See Chacanaca v. Quaker Oats Co.*, 2011 U.S. Dist. LEXIS  
15 65023, at \*8-9 (N.D. Cal. June 14, 2011) (since restyled as *In re Quaker Oats Labeling Litig.*) (“There  
16 is no question here that both the Weston/Marron counsel...have ample experience handling class  
17 actions and complex litigation. It is also clear that both have particular familiarity with suits involving  
18 issues of mislabeling in the food industry.”).

19 38. I was appointed class counsel in *Peterman v. North American Company for Life and*  
20 *Health Ins., et al.*, No. BC357194, (L.A. Co. Sup. Ct.), which was litigated for over 4 years and  
21 achieved a settlement of approximately \$60 million for consumers. In granting preliminary approval of  
22 the settlement, the Hon. Carolyn B. Kuhl noted that “the excellent work that the plaintiffs’ side has  
23 done in this case has absolutely followed through to the settlement...The thought and detail that went  
24 into the preparation of every aspect was very impressive to me.”

25 39. I also served as class counsel in *Clark v. National Western Life Insurance Company*,  
26 No. BC321681 (L.A. Co. Sup. Ct.), a class action that, after litigating the case for well over 6 years,  
27 resulted in a settlement of approximately \$25 million for consumers.

28 40. In *Iorio v. Asset Marketing*, No. 05cv00633-IEG (CAB) (S.D. Cal.), I was appointed  
class counsel on August 24, 2006, following class certification, which was granted on July 25, 2006 by

1 the Honorable Irma E. Gonzalez. Dkts. Nos. 113 and 121. After nearly 6 years of intensive litigation, a  
2 settlement valued at \$110 million was reached in *Iorio, supra*, and approved on March 3, 2011, by the  
3 Honorable Janis Sammartino. Dkt. No. 480. Co-counsel and I successfully defended multiple motions  
4 brought by defendant in the Southern District of California, including “challenges to the pleadings,  
5 class certification, class decertification, summary judgment,...motion to modify the class definition,  
6 motion to strike various remedies in the prayer for relief, and motion to decertify the Class’ punitive  
7 damages claim,” plus three petitions to the Ninth Circuit, attempting to challenge the Rule 23(f) class  
8 certification. *Iorio*, Final Order Approving (1) Class Action Settlement, (2) Awarding Class Counsel  
9 Fees and Expenses, (3) Awarding Class Representatives Incentives, (4) Permanently Enjoining Parallel  
10 Proceedings, and (5) Dismissing Action with Prejudice, entered on Mar. 3, 2011, at 6:9-15  
11 (commenting that class counsel were “highly experienced trial lawyers with specialized knowledge in  
12 insurance and annuity litigation, and complex class action litigation generally” and “capable of  
13 properly assessing the risks, expenses, and duration of continued litigation, including at trial and on  
14 appeal,” *Id.* at 7:18-22). Judge Sammartino also noted “the complexity and subject matter of this  
15 litigation, and the skill and diligence with which it has been prosecuted and defended, and the quality  
16 of the result obtained for the Class.” *Id.* at 17:25-27.

17 41. Besides these cases, I have also represented plaintiffs victimized in other complex cases  
18 such as Ponzi schemes, shareholder derivative suits, and securities fraud cases. I have litigated  
19 hundreds of lawsuits and arbitrations against major corporations; of these, approximately 30 cases  
20 against the likes of such corporate titans as Shell Oil, Citigroup, Wells Fargo, Morgan Stanley and  
21 Merrill Lynch have gone through trial or arbitration. Many more have settled on the eve of trial  
22 although I was fully prepared to proceed to trial.

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

25 Executed on this 23rd day of June, 2020 at San Diego, California.

26  
27   
28 Ronald A. Marron

# **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.  
28

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  
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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, 19<sup>th</sup> 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.

1           6.2    Notice to the Settlement Class Members. Within thirty (30) days after entry of the  
2 Preliminary Approval Order, or on the date established by the Court in the Preliminary Approval  
3 Order, Defendant shall effect notice as set forth below:

4                   6.2.1   Direct Notice. On the Notice Date, Defendant will cause the Notice, in the form  
5 attached hereto as **Exhibit A**, to be sent to all Settlement Class Members via electronic mail. If  
6 Defendant does not have a valid electronic mail address for Settlement Class Members, or if Defendant  
7 receives a “bounce-back” from a Settlement Class Member’s electronic mail address, then Defendant  
8 shall cause the Notice to be sent via U.S. Mail. If Defendant does not have a valid electronic mail  
9 address or a valid postal address for any Settlement Class Members, then Defendant shall use  
10 reasonable means to identify a valid postal address for the Settlement Class Members through use of  
11 skip tracing or otherwise.

12                   6.2.2   Settlement Website. On or before the Notice Date, Defendant shall establish the  
13 Settlement Website, from which Settlement Class members may download or print the Notice, a  
14 complete copy of this Settlement Agreement, the Preliminary Approval Order, and material filings and  
15 Orders in the Litigation. The Settlement Website shall include the deadlines for submitting Requests  
16 for Exclusion from the Settlement Class, Objections, the date of the Final Approval Hearing, and other  
17 information pertaining to the Settlement. Defendant shall establish the Settlement Website using a  
18 website name to be mutually agreed upon by the Settling Parties. The Website shall be operative no  
19 later than the Notice Date and shall be accessible for a period of not fewer than sixty (60) days  
20 following the Effective Date. Following the expiration of sixty (60) days after the Effective Date,  
21 Defendant can choose to discontinue the operation of the Settlement Website.

22           6.3    Defendant shall pay for all costs associated with providing Notice to the Settlement  
23 Class and administering the Settlement separate and apart from the Gross Settlement Fund.

24           6.4    Declaration of Compliance and Class Counsel’s Audit Rights. Within twenty (20)  
25 calendar days after the Notice Date, Defendant shall provide Class Counsel with a declaration attesting  
26 to completion of the notice process set forth in this Section. Subject to agreement between the Settling  
27 Parties regarding measures sufficient to protect the confidential personal financial information of  
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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  
27  
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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  
27  
28

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

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.  
26  
27  
28

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.  
27  
28

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, 19<sup>th</sup> 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  
28

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.  
24  
25  
26  
27  
28

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: Daniel McSwain  
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](mailto: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](mailto: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](mailto: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**

<b>DO NOTHING</b>	<b><u>If you do nothing, you will automatically receive a payment pursuant to the terms of the Settlement Agreement</u></b> and you will also give up your right to sue Axos on your own regarding any claims that are part of the Settlement.
<b>EXCLUDE YOURSELF FROM THE SETTLEMENT CLASS BY [DATE]</b>	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.
<b>OBJECT OR COMMENT BY [DATE]</b>	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](http://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](http://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](http://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;

1  
2 Dated: \_\_\_\_\_

\_\_\_\_\_  
Hon. Joel R. Wohlfeil  
JUDGE OF THE SUPERIOR COURT

# **EXHIBIT 2**

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## About Us

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.

## Experts

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.

## Staff

See who works in the public interest every day.

## Careers

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

sustainable environment, affordable and safe health care, citizen access to the courts, corporate accountability in the trade arena and more.

## Board of Directors

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 five 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, Northern, Eastern, 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. Ms. Halperin continued working for the Marron firm as an Associate Attorney after passing the July 2018 California Bar Exam. She is a member of good standing of the State Bar of California; the United States District Courts for the Southern, Northern,

Eastern and Central 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 Southern District 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 Corporation, No. 2:17-cv-06983-CAS-SK (C.D. Cal.)***

On February 24, 2020, the Honorable Christina A. Snyder of the United States District Court for the Central District of California granted final approval of a \$2,500,000.00 class action settlement involving the alleged false advertising of a herbicide product and appointed the Marron Firm as class counsel. Judge Snyder noted that the Law Offices of Ronald A. Marron had "vigorously represented the Class" and has "extensive experience in consumer class action litigation."

#### ***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. Most recently, on January 31, 2020, the Honorable Judge Gonzalo P. Curiel granted Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

#### ***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. The Court also appointed Plaintiff Shawn Esparza as class representative and

Ronald A. Marron, Alexis M. Wood and Kas L. Gallucci of the Law Offices of Ronald A. Marron as class counsel. The settlement created a \$8.67 million dollar common fund.

***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 and appointed the Law Offices of Ronald A. Marron as co-lead class counsel. The settlement created a \$5.25 million common fund.

***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 appointed the Law Offices of Ronald A. Marron 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. (Dkt. 67.) The Law Offices of Ronald A. Marron were appointed 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 363536 (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](http://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.*, 2012 U.S. Dist. LEXIS 30873 (C.D. Cal. Mar. 6, 2012); see also *Bruno v. Quten Research Inst., LLC*, 2011 U.S. Dist. LEXIS 132323 (C.D. Cal. Nov. 14, 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

### ***Troy Lambert v. Nutraceutical Corp.***, Case No. 15-56423 (9th Cir.)

On September 15, 2017, the Ninth Circuit Court of Appeals reversed a class decertification order in a false advertising class action concerning a dietary supplement product. The Marron Firm successfully argued that the “full refund” measure of damages could be calculated on a class wide basis and that the model matched plaintiff’s theory of liability. “In a matter of first impression,” the Ninth Circuit also held that “the Rule 23(f) deadline is not jurisdictional” and that “equitable exceptions apply.” *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1174 (9th Cir. 2017). On February 1, 2018, the defendant filed a petition for a writ of certiorari before the United States Supreme Court. (Case No. 17-1094). On June 25, 2018, the Supreme Court granted the petition for a writ of certiorari.

### ***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.

### ***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 9<sup>th</sup> 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.*, No. 17-56184, 2018 WL 2142843, at \*3 (9<sup>th</sup> Cir. May 15, 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.

**NINTH CIRCUIT CASES**

***Shyriaa Henderson v. United States Aid Funds, Inc.***, Case No. 17-55373 (9<sup>th</sup> 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 Telephone Consumer Protection Act (TCPA). The Ninth Circuit found that a reasonable jury could hold Defendant vicariously liable for the alleged TCPA violations by debt collectors.

***John Sandoval v. Pharmacare US, Inc.***, Case No. 16-56301 (9<sup>th</sup> 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.

***Reid v. Johnson & Johnson***, Case No. 12-56726 (9<sup>th</sup> 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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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: July 22, 2020

Time: 9:00 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

On July 22, 2020 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 appointed Class Representative pursuant  
9 to Cal. Code Civ. P. § 382 to represent the members of the Settlement Class in this action;

10 4. The Court hereby certifies the Settlement Class pursuant to Cal. Code Civ. P. § 382 for  
11 the purposes of settlement only. The Settlement Class is defined as: all persons who obtained a loan  
12 from Defendant and/or had a loan serviced by Defendant at any time within the Class Period which  
13 was secured by a one to four family residential property located in the State of California and had an  
14 escrow or impound account on such loan that received money in advance for payment of taxes and  
15 assessments on the property, for insurance, or for other purposes relating to the property, and which at  
16 any time within the Class Period had a positive balance in such account. The Settlement Class  
17 specifically excludes (1) any judicial officer presiding over the Litigation, (2) Defendant and Released  
18 Parties, and each of their current or former officers, directors, and employees; (2) legal  
19 representatives, successors, or assigns of any such excluded person, and (4) any person who properly  
20 executes and sends a timely Request for Exclusion.

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

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

26 7. The briefing schedule for the Final Approval Hearing is as follows:

27 Moving Papers must be filed and served no later than \_\_\_\_\_, 2020.

28 Any opposition must be filed and served no later than \_\_\_\_\_, 2020.

Any and all objections must be filed and served no later than \_\_\_\_\_, 2020.

Any reply papers must be filed and served no later than \_\_\_\_\_, 2020;

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

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

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

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

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
Hon. Joel R. Wohlfeil  
JUDGE OF THE SUPERIOR COURT

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

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

20  
21 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
22 **IN AND FOR THE COUNTY OF SAN DIEGO - CENTRAL DIVISION**  
23

24 DANIEL MCSWAIN, TRUSTEE OF THE  
25 DANIEL S. MCSWAIN TRUST DATED JULY 17,  
26 2012, on behalf of the trust and all others similarly  
27 situated, and the general public,

28 Plaintiff,

v.

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

Defendant.

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

PROOF OF SERVICE

1 **PROOF OF SERVICE**

2 CCP §§ 1011 to 1013(a)

3 **STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

4 I am employed in the County of San Diego, State of California. I am over the age of 18 and  
5 not a party to the within action; my business address is: Law Offices of Ronald A. Marron, 651  
6 Arroyo Drive, San Diego, California, 92103.

7 On June 23, 2020 I served the following documents:

- 8 • **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL**  
9 **OF CLASS ACTION SETTLEMENT;**
- 10 • **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
11 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS**  
12 **ACTION SETTLEMENT;**
- 13 • **DECLARATION OF RONALD A. MARRON IN SUPPORT OF**  
14 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS**  
15 **ACTION SETTLEMENT AND EXHIBITS 1-3 ATTACHED THERETO;**
- 16 • **DECLARATION OF MICHAEL G. OLINIK IN SUPPORT OF**  
17 **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS**  
18 **ACTION SETTLEMENT;**
- 19 • **DECLARATION OF ERIK BOWDEN AND EXHIBITS A-B ATTACHED**  
20 **THERETO;**
- 21 • **PROPOSED ORDER;**
- 22 • **PROOF OF SERVICE.**

23 On the following:

24 Edward D. Vogel <i>evogel@sheppardmullin.com</i> Alejandro Moreno <i>amoreno@sheppardmullin.com</i> SHEPPARD, MULLIN, RICHTER & HAMPTON LLP 501 West Broadway, 19 <sup>th</sup> Floor San Diego, CA 92101	Attorney for Defendants
25 Polly Towill <i>ptowill@sheppardmullin.com</i> SHEPPARD, MULLIN, RICHTER & HAMPTON LLP 333 South Hope Street, 43 <sup>rd</sup> Floor Los Angeles, CA 90071-1422	Attorney for Defendants


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In the following manner of service (check appropriate):

- ☐ **By Overnight Delivery** I deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service.
- ☐ **By Express Mail** I deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail, in a sealed envelope, with Express Mail postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by Express Mail; otherwise at that party's place of residence
- ☐ **By Mail** I deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in 2044a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence
- ☒ **By Email** I caused such document(s) to be emailed and .pdf attachment through the office e-mail service for Law Offices of Ronald A. Marron.
- ☐ **By Fax** I caused such document(s) to be telecopied to the Offices of the addressees where indicated.
- ☐ **By Person** I caused a true and correct copy of such document(s) to be personally delivered on the person of the addressee(s).

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

Executed on the 23rd day of June 2020 in Sacramento, California.

  
Lilach Halperin