

## **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.***

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**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 July 22, 2020 (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 OCTOBER 26, 2020</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 OCTOBER 26, 2020</b>	You may file a written Objection no later than October 26, 2020 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.escrowinterestclassactionsettlement.com](http://www.escrowinterestclassactionsettlement.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 July 22, 2020 (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, and directors), 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 July 22, 2020 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 (as defined in the Settlement Agreement) 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 October 26, 2020:

**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 October 26, 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 October 26, 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 addresses, so **that is received by each of them no later than** October 26, 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 October 26, 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 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 November 25, 2020 at 9:00 a.m. 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.escrowinterestclassactionsettlement.com](http://www.escrowinterestclassactionsettlement.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.escrowinterestclassactionsettlement.com](http://www.escrowinterestclassactionsettlement.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.**