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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

19 LISA SILVEIRA, *on behalf of herself*
20 *and all others similarly situated,*

21 Plaintiff,

22 v.

23 M&T BANK,

24 Defendant.

25 Case No. 2:19-cv-06958-ODW-KS

26 **PLAINTIFF’S NOTICE OF**
27 **MOTION FOR FINAL**
APPROVAL OF CLASS ACTION
SETTLEMENT

Courtroom: 5D
Judge: Hon. Otis Wright, II

Date Filed: August 9, 2019
Trial Date: None set

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1 **NOTICE OF MOTION AND MOTION**
2 **FOR FINAL APPROVAL OF SETTLEMENT**

3 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE THAT on September 27, 2021 at 1:30 p.m., or as soon
5 thereafter as the matter may be heard by the Honorable Judge Otis Wright, II of the United
6 States District Court for the Central District of California, Plaintiff Lisa Silveira, by and
7 through her undersigned counsel of record, will and hereby does move the Court for an
8 order granting final approval of the parties' proposed Settlement Agreement and Release
9 and exhibits thereto, dated May 26, 2020.¹

10 This Motion is based on Federal Rule of Civil Procedure 23, this Notice of
11 Motion, the supporting Memorandum of Points and Authorities, the Settlement Agreement,
12 the accompanying declaration of Cameron R. Azari ("Azari Decl."), the pleadings and
13 papers on file in this action, and any additional information or argument as the Court may
14 consider.

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27 ¹ All capitalized terms, unless otherwise defined herein, have the same meaning as set forth in the Settlement Agreement.

1 **MEMORANDUM OF POINT AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Lisa Silveira (“Ms. Silveira” or “Class Representative”), by and through
4 Class Counsel, respectfully seeks final approval of the proposed nationwide class
5 Settlement Agreement and Release (“Agreement”), which resolves claims arising out of
6 Defendant M&T Bank’s (“M&T”) practice of charging fees for making mortgage
7 payments over the phone or online (“Pay-to-Pay Fees”). The Settlement achieves an
8 excellent result for the Class, as it establishes a \$3,325,000 Common Fund that will
9 provide cash payments to class members, and cover administration costs, reasonable
10 attorney’s fees and expenses, and a service award. May 27, 2020 Declaration of Hassan
11 Zavareei, ECF No. 21-2 (“Zavareei Prelim. Approval Decl.”), Ex. 1, Agreement § 3. And,
12 because of the lawsuit, M&T stopped charging the fees. After a robust direct notice
13 campaign, there were only ten opt-outs and no objections, demonstrating the fairness of
14 the Settlement as a whole.

15 The Settlement is “fair, reasonable, and adequate to all concerned” and therefore
16 merits final approval. *Officers for Justice v. Civ. Serv. Comm’n of City and County of San*
17 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, the Settlement avoids any of the
18 potential “red flags” identified by the Ninth Circuit in *In re Bluetooth Headset Products*
19 *Liability Litigation*, 64 F.3d 935, 947 (9th Cir. 2011). Here, the parties did not discuss any
20 award of attorneys’ fees during their arms-length negotiations with a mediator, and there
21 is no clear sailing provision that prevents M&T from challenging the fee award. Indeed,
22 the fee award still leaves a settlement fund that provides adequate compensation of the
23 class, maximizes redemption by automatically paying class members instead of requiring
24 them to submit claims and provides that no portion of the settlement fund will revert to
25 M&T. This Settlement is a superb result for the class, considering the hotly contested legal
26 theories that made continued litigation risky, with the chance of no recovery at all.

1 On May 6, 2021, the Court preliminarily approved the Settlement. Since then, the
2 Parties have complied with the Agreement and the Court's Preliminary Approval Order
3 and provided notice to the class. The response rate confirms that the Class Notice
4 effectively provided the best notice practicable as required by due process. Indeed, there
5 have been 1,507 unique visitors to the settlement website, and 1,632 calls to the
6 administrator. Azari Decl. ¶¶ 16-17.

7 The response to the Settlement has been overwhelmingly favorable. The deadline
8 to request exclusion from the Settlement or to object to the Settlement was August 3, 2021.
9 As of August 27, 2021, only ten Class Members have requested exclusion from the Class.
10 *Id.* ¶ 19. No Class Member has objected to the settlement. *Id.*

11 For all of these reasons and the reasons set forth below, Ms. Silveira submits that
12 the Settlement is fair, adequate, and reasonable, and should be finally approved. Therefore,
13 Ms. Silveira respectfully requests that this court: (1) grant this Motion, (2) finally approve
14 the proposed Settlement, (3) affirm the certification of the Settlement Class for settlement
15 purposes only, (4) affirm the appointment of Lisa Silveira as Class Representative, (5)
16 affirm the appointment Hassan A. Zavareei of Tycko & Zavareei LLP and James L.
17 Kauffman of Bailey Glasser LLP as Class Counsel, (6) retain jurisdiction over this matter
18 to resolve issues related to interpretation, administration, implementation, effectuation,
19 and enforcement of the Settlement, and (7) enter Final Judgment dismissing this action.²

20 **II. LITIGATION AND SETTLEMENT HISTORY**

21 Ms. Silveira commenced this litigation on August 9, 2019 by filing a complaint in
22 this court on behalf of herself and other similarly situated borrowers. Complaint
23 ("Compl."), ECF No. 1. The complaint alleged that M&T Bank charged borrowers an
24 unlawful and excessive \$15.00 fee to pay their mortgage payments online or by phone.
25 The actual cost to M&T to process these transactions is well below \$15.00, and M&T

26 _____
27 ² As set forth in Plaintiff's July 21, 2021 motion for attorneys' fees, costs, and service award, ECF No. 37, in connection with
this settlement, Ms. Silveira requests an award of \$857,172.03 in attorneys' fees and costs and \$5,000 in a service award.

1 keeps the difference. Ms. Silveira alleged that these Pay-to-Pay Fees violated the Fair Debt
2 Collection Protections Act (“FDCPA”) and the Rosenthal Act, because the fees were not
3 expressly authorized by the mortgage or permitted by law, and the fees represented M&T’s
4 fees for collecting payments. *See id.* ¶¶ 10, 20, 21.

5 In October 2019, after lengthy discussions, the Parties agreed to engage in
6 mediation with the assistance of the Honorable Edward A. Infante (Ret.), an experienced
7 class action mediator, to explore whether a negotiated resolution was possible. The Parties
8 participated in two full days of hard-fought negotiations before Judge Infante on October
9 24, 2019 and on February 5, 2020. After the second day of mediation, the Parties reached
10 an agreement in principal and signed a term sheet. The Parties continued to negotiate the
11 specific terms and language of the agreement over the following months. Notably, there
12 was no “clear sailing” provision in any of the terms negotiated by the Parties. *See*
13 Agreement § 8.1. Moreover, the Parties did not discuss attorneys’ fees or reimbursement
14 of litigation costs until after they agreed on material terms. *See* Zavareei Prelim. Approval
15 Decl. ¶ 8.

16 The Settlement Agreement was executed on May 26, 2020. Ms. Silveira filed a
17 Motion for Preliminary Approval of the Class Settlement. ECF No. 21. The Court denied
18 the Motion, raising concerns about the amount of the Settlement Fund, the upper limit of
19 the proposed Attorneys’ Fees, the proposed cap on the Service Award to be requested, and
20 the form and manner of delivery of the proposed Class Notice. ECF No. 29. Accordingly,
21 when Ms. Silveira filed an Amended Motion for Preliminary Approval of the Class Action
22 Settlement, ECF No. 30, in which M&T joined, ECF No. 31, the Parties submitted
23 information demonstrating that the amount of the Settlement Fund represents 34.7% of
24 the Pay-to-Pay Fees collected by M&T during the Class Period. Further, Class Counsel
25 agreed not to seek attorneys’ fees exceeding 25% of the Settlement Fund. In addition, Ms.
26 Silveira agreed not to seek a Service Award greater than \$5,000. Finally, the Parties
27

1 revised the Class Notice to better distinguish it from junk mail. On May 6, 2021, the Court
2 granted preliminary approval of the Settlement. ECF No. 35.

3 **III. SUMMARY OF THE SETTLEMENT BENEFITS**

4 The proposed Agreement establishes a \$3,325,000 Common Fund to benefit the
5 class. The Common Fund shall be used to make Settlement Payments, and to pay any Fee
6 and Expense Award, any Service Awards, and all Administrative Costs. Agreement §
7 3.2.3. The Common Fund represents 34.7% of the total \$9,581,409.20 Pay-to-Pay Fees
8 collected by M&T from borrowers in the United States during the class period. After
9 payment of costs of administration and notice and any fees, expenses, and service award
10 authorized by the Court, Settlement Class members are entitled to receive monetary
11 benefits from the Net Settlement Fund on a pro rata basis, based upon the amount of Pay-
12 to-Pay Fees paid by each Settlement Class Member during the Class Period. Agreement §
13 5.3.

14 **IV. CLASS NOTICE WAS PROVIDED AS DIRECTED BY THE COURT**

15 After preliminary approval, the Parties provided Notice of the Settlement in
16 conformance with this Court's Preliminary Approval and Provisional Class Certification
17 Order. M&T provided Epiq with the Settlement Class Member List containing names,
18 loan numbers, and last known mailing addresses for each Class Member. Azari Decl. ¶ 7.
19 Then, beginning on June 4, 2021, Epiq provided the Court approved Notice Plan to the
20 Class as follows: (1) checked all mailing addresses against the National Change of
21 Address database maintained by the USPS; (2) certified the mailing addresses via the
22 Coding Accuracy Support System and verify the accuracy of the address through Delivery
23 Point Validation; (3) sent 110,857 Long Form Notices via USPS first class mail to all
24 members of the Settlement Class with an associated physical address; and (4) sent eighteen
25

26 ³ As described in detail in the Agreement, residual funds may be redistributed to eligible class members on a pro rata basis, if
27 there are sufficient funds remaining. Otherwise, they will be distributed as cy pres awards, subject to the Court's approval. See
Agreement § 5.9.

1 Long Form Notices to all persons who requested one via telephone or by mail. Azari Decl.
2 ¶¶ 10, 12, 13. For Notices returned as undeliverable, Epiq re-mailed the Notices to any
3 new address available through USPS information or through third-party address lookup
4 services. As of August 29, 2021, Epiq has re-mailed 1,546 Notices to Class Members
5 where a forwarding address was provided or research identified a new address. As of
6 August 29, 2021, Epiq has received a total of 2,471 undeliverable Notices, including re-
7 mailed notices that were returned as undeliverable. Azari Decl. ¶ 14.

8 The Court-approved notices informed Class Members about the proposed
9 Settlement, their rights as to the \$3,325,000 Settlement Amount, their rights to object or
10 opt-out of the Settlement, and the prospective request for attorneys' fees and expenses and
11 a service award. *Id.* at Exs. A, B.

12 **V. THE LEGAL STANDARD FOR FINAL APPROVAL**

13 The law favors the settlement of class actions. *See, e.g., In re Hyundai and Kia Fuel*
14 *Economy Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc). “[T]he decision to approve
15 or reject a settlement is committed to the sound discretion of the trial judge because he [or
16 she] is exposed to the litigants and their strategies, positions, and proof.” *Hanlon v.*
17 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (internal citations and quotations
18 omitted). To grant final approval of a settlement, “Fed. R. Civ. P. 23(e) requires the district
19 court to determine whether a proposed settlement is fundamentally fair, adequate, and
20 reasonable.” *Id.* “It is the settlement taken as a whole, rather than the individual component
21 parts, that must be examined for overall fairness.” *Id.* In making this assessment, courts
22 must balance several similar factors, including the *Hanlon* or *Churchill* factors, set forth
23 below.

24 The Court’s role in reviewing “what is otherwise a private consensual agreement
25 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach
26 a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
27 collusion between, the negotiating parties, and that the settlement, taken as a whole, is

1 fair, reasonable and adequate to all concerned.” *Officers for Justice*, 688 F.2d at 625. To
 2 “smoke out potential collusion” and determine whether the settlement is “adequate” the
 3 Court must “balance the ‘proposed award of attorney’s fees’ vis-à-vis the ‘relief provided
 4 for the class.’” *Briseno v. Henderson*, 998 F.3d 1014, 1023-24 (9th Cir. 2021) (quoting
 5 Fed. R. Civ. P. 23(e)(2)(c)(iii)). To scrutinize attorney’s fee arrangements, district courts
 6 should apply the factors established in *Bluetooth*. *See Briseno*, 998 F.3d at 1026. The “red
 7 flags” identified in *Bluetooth* that may lead to a determination that the settlement is
 8 inadequate are: (1) when class counsel receives “a disproportionate distribution of the
 9 settlement”; (2) when there is a clear sailing provision “under which the defendant agrees
 10 not to challenge a request for an agreed-upon attorney’s fee”; and (3) when the settlement
 11 contains a reverter allowing unawarded fees to return to the defendant and not the class.
 12 *Id.* at 1023 (quoting *Bluetooth*, 654 F.3d at 947). The presence of any of the *Bluetooth*
 13 factors does not create “an independent basis for withholding settlement approval.” *Id.* at
 14 1027.

15 The proposed Settlement meets the requirements for final approval.

16 **VI. THE AGREEMENT IS FAIR AND REASONABLE**

17 **A. A presumption of fairness applies to the Settlement**

18 The Settlement is presumptively fair as (1) it is the result of arms’ length
 19 negotiations, (2) there has been investigation and discovery sufficient to permit counsel
 20 and the court to act intelligently, and (3) counsel are experienced in similar litigation.
 21 *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (stating that the Ninth
 22 Circuit “put[s] a good deal of stock in the product of an arm’s-length, non-collusive,
 23 negotiated resolution”); *see also id.* at 967 (“Parties represented by competent counsel are
 24 better positioned than courts to produce a settlement that fairly reflects each party’s
 25 expected outcome in litigation.”); *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221
 26 F.R.D. 523, 528 (C.D. Cal. 2004) (“*DIRECTV*”) (explaining that class settlements are
 27 presumed fair when they are reached “following sufficient discovery and genuine arms-

1 length negotiation”); *Stewart v. Applied Materials, Inc.*, No. 15-cv-02632-JST, 2017 WL
2 3670711, at *6 (N.D. Cal. Aug. 25, 2017) (explaining that “[t]he recommendations of
3 plaintiffs’ counsel should be given a presumption of reasonableness”).

4 1. The Settlement was negotiated at arm’s length.

5 The Settlement was negotiated at arm’s length during two all-day mediation
6 sessions before Judge Infante of JAMS and weeks of negotiations. Zavareei Prelim.
7 Approval Decl. ¶¶ 3-6. See *Adams v. Inter-Con Sec. Sys. Inc.*, No. C-06-5428 MHP, 2007
8 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) (“The assistance of an experienced mediator
9 in the settlement process confirms that the settlement is non-collusive.”). Additionally, the
10 Parties did not discuss attorneys’ fees or a Service Award until after they had agreed upon
11 the material terms of the Settlement. Zavareei Prelim. Approval Decl. ¶ 8. Thus, nothing
12 should disturb the Court’s preliminary determination that the proposed Settlement is the
13 product of hard-fought settlement discussions and negotiations between Ms. Silveira and
14 M&T.

15 2. The Settlement followed extensive investigation and discovery.

16 Before agreeing upon the terms of the Settlement, the Parties conducted a thorough
17 examination and investigation of the facts and law in this litigation. In advance of
18 mediation, M&T provided informal discovery, which included information similar to what
19 Class Counsel would have sought through the formal discovery process. The informal
20 discovery included information regarding the size of the Settlement Class and the amount
21 of Pay-to-Pay Fees collected by M&T during the preceding several years. Zavareei Prelim.
22 Approval Decl. ¶¶ 3, 6. As a result, Class Counsel are well versed in the novel and complex
23 issues raised in this case.

24 3. Experienced Class Counsel negotiated the Settlement

25 Class Counsel have extensive experience in complex litigation, consumer rights,
26 and other class action litigation. Zavareei Prelim. Approval Decl., Exs. 2-3. Based on their
27 experience, including comparable cases that they have settled, Class Counsel concluded

1 that the Settlement provides exceptional results for the class while sparing the class from
2 the uncertainties of continued and protracted litigation. Zavareei Prelim. Approval Decl.
3 ¶¶ 9-12.

4 **B. The Settlement is Adequate Under *Briseno***

5 The Settlement Agreement reached by the parties here is adequate in accordance
6 with *Briseno v. Henderson*, 998 F.3d at 1026-28. Namely, it avoids all of the red flags of
7 a class settlement discussed in *Bluetooth*. First, as discussed in more detail in Ms.
8 Silveira’s July 21, 2021 Motion for Fees, Costs, and Service Award, Class Counsel does
9 not receive a disproportionate amount of the Settlement Fund when compared to the
10 benefit to the class. Rather, they seek a fee of 25% of the Common Fund, which is within
11 the range of reasonableness. *See Six Mexican Workers v. Az. Citrus Growers*, 904 F.2d
12 1301, 1311 (9th Cir. 1990) (“In *Grauly*, we established 25 percent of the fund as the
13 ‘benchmark’ award that should be given in common fund cases.”). *See also* ECF No. 37.
14 Second, there is no clear sailing provision. Third, under no circumstances will any of the
15 Settlement Fund revert back to M&T. None of the factors that might prevent this court
16 from finding that the Settlement is adequate under *Briseno* are present.

17 **C. Additional criteria favor approval of the Settlement**

18 Although there is an initial presumption of fairness, the Court must independently
19 analyze the Settlement to determine whether it is in the best interests of the class,
20 considering:

21 [t]he strength of plaintiff’s case; the risk, expense, complexity, and
22 likely duration of further litigation; the risk of maintaining class action
23 status throughout the trial; the amount offered in settlement; the extent
24 of discovery completed and the stage of the proceedings; the experience
and views of counsel; the presence of a governmental participant; and
the reaction of the class members to the proposed settlement.

25 *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at
26 1026). Each of these factors weighs in favor of finally approving the Settlement.

1 1. The Settlement provides substantial relief to the Class.

2 The Settlement provides substantial monetary relief to the Class. Ms. Silveira
3 secured a common fund of \$3,325,000 which constitutes approximately 34.7% of the total
4 \$9,581,409.20 Pay-to-Pay Fees the Settlement Class paid to M&T during the Class Period.
5 Agreement § 3. Each of the Settlement Class Members are entitled to receive monetary
6 benefits from the Net Settlement Fund on a pro rata basis, based upon the amount of Pay-
7 to-Pay Fees paid by each Settlement Class Member during the Class Period. Agreement §
8 5.

9 Moreover, this litigation caused M&T to voluntarily change its practices with
10 respect to Pay-to-Pay Fees. As of March 2020, M&T has voluntarily ceased charging or
11 collecting Pay-to-Pay Fees to any borrower in the United States, while still offering
12 borrowers the option to make payments online or over the phone. Assuming the same rates
13 of usage of these payment options over the last sixteen months as compared to the Class
14 Period, Settlement Class Members have saved approximately \$2.6 million since M&T
15 stopped charging Pay-to-Pay Fees, and may continue to save \$2 million a year going
16 forward. July 21, 2021 Declaration of Hassan A. Zavareei, ECF No. 37-2 (“Zavareei Fees
17 Decl.”) ¶ 5. Thus, this litigation achieved additional, valuable benefits for the Settlement
18 Class.

19 2. The Settlement eliminates the risk of no recovery.

20 While the Settlement in this case would provide benefits to the class that are certain,
21 if Ms. Silveira continued to litigate this case, the class would likely not see any recovery
22 for several more years, and there is a risk that there would never be any recovery at all.
23 The potential risks and duration of further litigation therefore support final approval.
24 Courts have long recognized the inherent risks and “vagaries of litigation,” and
25 emphasized the comparative benefits of “immediate recovery by way of the compromise
26 to the mere possibility of relief in the future, after protracted and expensive litigation.”
27 *DIRECTV*, 221 F.R.D. at 526; *see also In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D.

1 299, 318 (N.D. Cal. 2018) (delay in recovery as a result of trial and appellate proceedings
2 weighs in favor of final approval where “[s]ettlement provides the Class with timely,
3 certain, and meaningful recovery”).

4 Here, Ms. Silveira and the Settlement Class Members face substantial risks. Indeed,
5 as discussed in the July 21, 2021 Motion for Fees, Costs, and Service Award, district
6 courts have split on the threshold legal question here of whether the Pay-to-Pay fees are
7 prohibited by state and federal debt collection statutes and the borrowers’ mortgage
8 agreements. See ECF No. 37, pp. 10-11 (citing cases). This question is on appeal in both
9 the Fourth and Ninth Circuit, which increases the possibility of a circuit split and Supreme
10 Court review. While Ms. Silveira believes that her view of the law will ultimately be
11 endorsed by appellate courts, to get there, this case could have been stayed and taken years
12 to achieve full recovery. By settling now in the early stages, this risk as well as the risks
13 and costs associated with expert discovery and litigating additional dispositive motions
14 and a motion for class certification can be avoided. Zavareei Prelim. Approval Decl. ¶¶
15 16, 22.

16 Moreover, early resolution conserves resources and leaves more funds available for
17 Settlement Class Members. Had litigation progressed, the Parties would need to resolve
18 discovery disputes and incur the expense and burden of preparing for trial. Even if Ms.
19 Silveira succeeded at class certification and on the merits, any recovery would likely be
20 delayed by appeals. Yet there is no guarantee that lengthy litigation and expensive
21 discovery would lead to greater benefits for the Settlement Class Members. *Id.* Instead,
22 there would be multiple points at which the Class’s claims could be narrowed or
23 dismissed. *Id.* ¶ 16. Thus, the Settlement eliminates the various risks including complete
24 lack of recovery which is possible with further litigation.

25 3. The Settlement compares favorably to potential relief.

26 A proposed settlement is not to be measured against “a hypothetical or speculative
27 measure of what might have been achieved.” *Officers for Justice*, 688 F.2d at 625; *see*

1 *also DIRECTV*, 221 F.R.D. at 527 (“[I]t is well-settled law that a proposed settlement may
2 be acceptable even though it amounts to only a fraction of the potential recovery that might
3 be available to the class members at trial.”); *Custom LED, LLC v. eBay, Inc.*, No. 12-cv-
4 00350-JST, 2014 WL 2916871, at *4 (N.D. Cal. June 24, 2014) (“[C]ourts have held that
5 a recovery of only 3% of the maximum potential recovery is fair and reasonable . . .”).

6 Here, besides its substantial size in absolute numbers, the Settlement is fair and
7 reasonable in relation to the Settlement Class’s potential damages. The Settlement Fund
8 is exactly 34.7% of the total amount of Pay-to-Pay Fees collected by M&T during the
9 Class Period, an impressive percentage that is in line with other court-approved
10 settlements involving similar fees. *See, e.g., McWhorter v. Ocwen Loan Servicing, LLC*,
11 No. 2:15-cv-1831, 2017 WL 4304625 (N.D. Ala. Sept. 28, 2017) (granting final approval
12 of a settlement creating a \$9.7 million common fund, representing 30% of the total fees
13 collected); *Sanders v. LoanCare, LLC*, No. 2:18-cv-09376-PA (RAOx) (C.D. Cal. Dec. 4,
14 2020) (granting final approval of settlement creating a \$3.4 million common fund,
15 representing 38.64% of the total fees collected from the class members); *Garcia v.*
16 *Nationstar Mortgage LLC*, No. 2:15-cv-01808 TSZ (W.D. Wash.) (granting final approval
17 of a \$3.875 million common fund, representing 33% of the total amount of fees collected from
18 class members); *Montesi v. Seretus, Inc.*, No. 2015CA010910, 2020 WL 1951751 (Fla.
19 Cir. Ct. Apr. 1, 2020) (granting final approval of \$1.75 million settlement, representing
20 36.4% of total collected fees).

21 As discussed above, this lawsuit also caused M&T to cease charging or collecting
22 Pay-to-Pay Fees beginning in March 2020, which has saved Class Members
23 approximately \$2.6 million. *Zavareei Fees Decl.* ¶ 5. Assuming the practice continues, the
24 Class Members can expect to save approximately \$2 million per year going forward. *Id.*
25 Accordingly, the relief provided by the Settlement favors final approval.

1
2 4. The Settlement enjoys overwhelming class support.

3 In determining the fairness of a settlement, the Court should consider class member
4 objections. The absence of a large number of objections to a proposed settlement raises a
5 strong presumption that the terms of the agreement are fair. *See, e.g., Churchill Vill.,*
6 *L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (approving a settlement where
7 “only 45 of the approximately 90,000 [.005 percent] notified class members objected to
8 the settlement”). As of the end of the opt-out and objection deadline on August 3, 2021
9 only ten of the 112,316 Class Members opted out of the settlement and none of the Class
10 Members objected to the settlement. Azari Decl. ¶ 19. Indeed, the absence of any
11 objections from Class Members who received notice and the small number of opt-outs
12 indicates overwhelming favor from the Class.

13 This support is particularly notable given that over 1,632 class members contacted
14 the Settlement Administrator directly via telephone, with over 1,507 unique visitors to the
15 Settlement Website. *Id.* ¶¶ 16, 17. The lack of opt-outs when paired with the response rate,
16 also indicate a favorable reaction by the class members to the proposed Settlement and
17 provide further support for final approval. *See, e.g., Perkins v. LinkedIn Corp.*, No. 5:13-
18 cv-04303-LHK, 2016 WL 613255, at *3 (N.D. Cal. Feb. 16, 2016) (“low rates of
19 objections and opt-outs are ‘indicia of the approval of the class’”) (citation omitted); *In*
20 *re: Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (low number of
21 objectors (a “handful”) and opt-outs (only one) supported trial court’s finding that
22 settlement was “fair, adequate and reasonable”); *Hanlon*, 150 F.3d at 1027 (9th Cir. 1998)
23 (upholding approval of settlement where only 971 Class Members, or 0.1% of the class,
24 opted out and only a few objected); *De Leon v. Ricoh USA, Inc.*, No. 18-cv-03725-JSC,
25 2020 WL 1531331, at *11 (N.D. Cal. Mar. 31, 2020) (“Courts have repeatedly recognized
26 that the absence of a large number of objections to a proposed class action settlement
27 raises a strong presumption that the terms of a proposed class settlement action are

1 favorable to the Class Members.” (internal quotation marks and citation omitted)).
2 Additionally, because there were no objectors, objections cannot weigh against final
3 approval.

4 **D. Any *Cy Pres* Award Will Benefit the Class.**

5 To account for any money remaining in the Settlement Fund after settlement
6 distribution, the parties will submit with M&T’s joinder in this motion an agreed upon *cy*
7 *pres* plan. In no event shall any remaining funds return to M&T.

8 **VII. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES**

9 The Parties agreed to certification of the Settlement Class, the Court conditionally
10 certified it, and the Court should now certify it at final approval. The Settlement Class is
11 numerous, indeed over one hundred thousand consumers received notice in this case.
12 There are common issues concerning the issues related to M&T’s practices and policies
13 that predominate over individual issues. Ms. Silveira is typical of the Class because all of
14 the claims against M&T arise from the same course of conduct: M&T charging borrowers
15 a fee to make payments not authorized by borrowers’ mortgages or permitted by law. Ms.
16 Silveira has no conflicts with the class, participated in this action, and is adequate.
17 Plaintiff’s Counsel are experienced and adequate. Finally, class treatment is superior
18 because the Parties agreed to certification of the Settlement Class (Settlement Agreement
19 § 6.1), the Court conditionally certified it, and the Court should now certify it at final
20 approval.

21 **VIII. CONCLUSION**

22 For the reasons stated herein, Ms. Silveira respectfully requests that the Court (1)
23 grant this Motion, (2) finally approve the proposed Settlement, (3) affirm the certification
24 of the Settlement Class for settlement purposes only, (4) affirm the appointment of Lisa
25 Silveira as Class Representative, (5) affirm the appointment Hassan A. Zavareei of Tycko
26 & Zavareei LLP and James L. Kauffman of Bailey Glasser LLP as Class Counsel, (6)
27 retain jurisdiction over this matter to resolve issues related to interpretation,

1 administration, implementation, effectuation, and enforcement of the Settlement, and (7)
2 enter Final Judgment dismissing this action. By the separate motion filed on July 21, 2021,
3 Ms. Silveira also requests that the Court grant a service award of \$5,000 to the Class
4 Representative, and award Class Counsel reasonable attorneys’ fees and expenses in the
5 amount of \$857,172.03, as set forth in the Settlement, which shall be paid out of the
6 Settlement Fund.

7
8 Dated: August 30, 2021

Respectfully submitted,

9
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**United States District Court
Central District of California**

LISA SILVEIRA, on behalf of herself and
all other similarly situated,

Plaintiff,

v.

M&T BANK,

Defendant.

Case No. 2:19-cv-06958-ODW-KS

**[PROPOSED] ORDER GRANTING
FINAL APPROVAL**

I. INTRODUCTION

Plaintiff Lisa Silveira brought this putative class action suit against Defendant M&T Bank (“M&T” or “Defendant”) on behalf of a class of homeowners, alleging that Defendant charged borrowers convenience fees when they made mortgage payments online and over the phone (“Pay-to-Pay Fees”). Plaintiff alleged that these fees violated the federal Fair Debt Collection Practices Act (“FDCPA”), California’s Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”), and California’s Unfair Competition Law (“UCL”), and breached contracts with the borrowers. (*See* Compl. ¶¶ 1, 3, ECF No. 1.)

1 The parties reached a settlement on behalf of the class, and the Court
2 preliminarily approved the settlement and certified the class. (Order granting
3 Prelim. Approval (“Order”), ECF No. 35.) The parties now seek final approval of
4 the class settlement. (Mot. for Final Approval (“Mot.”), ECF No. ____). For the
5 reasons discussed below, the Court overrules any objections and **GRANTS** the
6 Motion.

7 **II. BACKGROUND**

8 Plaintiff Silveira filed this lawsuit on August 9, 2019, on behalf of
9 homeowner borrowers throughout the United States, including California, whose
10 mortgage loans are serviced by M&T. (Compl. ¶ 36.) Silveira alleges that M&T
11 charged her and the members of the class she seeks to represent Pay-to-Pay Fees
12 when they made mortgage payments online or over the phone. (*Id.* ¶¶ 1-3.). Silveira
13 alleges that M&T’s conduct breached the class members’ mortgage agreements and
14 violated the FDCPA, Rosenthal Act, and UCL. (*Id.* ¶¶ 48-81.)

15 **III. SETTLEMENT TERMS**

16 The key provisions of the parties’ Settlement Agreement are set forth below.

17 **A. Proposed Class**

18 On May 6, 2021, the Court preliminarily approved the settlement and
19 certified the following class: “All borrowers with a residential mortgage loan
20 serviced by M&T from whom M&T collected a Pay-to-Pay Fee during the period
21 of August 9, 2015 through [the date of this Order].” (*See generally* Order.) The
22 Class Period is from August 9, 2015 to May 6, 2021.

23 The Court also appointed Silveira as the class representative and her counsel
24 as class counsel.

25 **B. Settlement Fund**

26 In full settlement of the claims asserted in this lawsuit, M&T agrees to pay
27 \$3,325,000 (the “Settlement Fund”). (SA § 1.29.) The Settlement Fund includes all
28 shares of class members who did not request exclusion (“Settlement Class

1 Members”), as well as the costs of notice and administration, any service award to
2 the class representative, and any award of attorneys’ fees and expenses. (*Id.*)

3 Every Settlement Class Member will automatically receive a share of the
4 Settlement Fund determined according to the proportional amount of Pay-to-Pay
5 Fees charged to that Class Member by M&T within the class period. (*Id.* § 5.3.)
6 Payments to Settlement Class Members shall be made per loan, such that the
7 settlement payment on any loan with more than one Settlement Class Member
8 borrower shall be made payable jointly to all Settlement Class Member borrowers
9 on that loan. (*Id.* § 5.4.) Thus, for each loan for which more than one borrower on
10 that loan is a Settlement Class Member, the Settlement Administrator shall make a
11 single allocation to that loan payable to all co-borrower or joint borrower
12 Settlement Class Members on that loan. (*Id.*) Payments will be made by check. (*Id.*
13 § 5.7.)

14 If there is any amount in the Settlement Fund that remains following the
15 initial distribution of checks to Settlement Class Members, that amount will be
16 distributed on a *pro rata* basis to Settlement Class Members who cashed their initial
17 checks. (*Id.* § 5.9.) If there is any amount remaining in the Settlement Fund after the
18 secondary distribution, or there are not enough funds to make a secondary
19 distribution economically feasible, then upon approval by the Court, pursuant to the
20 *cy pres* doctrine, the remaining amount shall be paid to a 501(c)(3) charitable
21 organization. The parties will later apprise the Court if there are remaining funds to
22 distribute per *cy pres*, the amount of such funds, and the parties’ proposed *cy pres*
23 recipient. The Court will then determine whether to accept the proposed
24 organization, or order the distribution of those funds to another entity.

25 **C. Releases**

26 The Settlement Agreement provides that all Class Members other than those
27 who opted out will release M&T from:
28

1 all actions, causes of action, claims, demands, obligations, or
2 liabilities of any and every kind that were or could have been asserted
3 in any form by Class Representative or Class Members, including but
4 not limited to, statutory or regulatory violations, state or federal debt
5 collection claims (including but not limited to violations of the Fair
6 Debt Collection Practices Act and the California Rosenthal Act),
7 unfair, abusive or deceptive act or practice claims, tort, contract, or
8 other common law claims, or violations of any other related or
9 comparable federal, state, or local law, statute or regulation, and any
damages (including any compensatory damages, special damages,
consequential damages, punitive damages, statutory penalties,
attorneys' fees, costs) proximately caused thereby or attributable
thereto, directly or indirectly, and any equitable, declaratory,
injunctive, or any other form of relief arising thereunder, whether or
not currently known, arising out of, based upon or related in any way
to the collection or attempted collection of Pay-to-Pay Fees.

10 (*Id.* § 7.1.) Further, the Settlement Agreement provides that Settlement Class
11 Members waive and relinquish the rights and benefits of California Civil Code
12 section 1542 and similar provisions that may be applicable to class members
13 residing outside of California. (*Id.* § 7.2.)

14 **D. Notice and Response**

15 Notice was sent to potential class members pursuant to the Settlement
16 Agreement and the method approved by the Court. The Class Notice consisted of
17 direct notice via USPS first class mail, as well as a Settlement Website where Class
18 Members could view and request to be sent the Long Form Notice. The Class
19 Notice adequately described the litigation and the scope of the involved class.
20 Further, the Class Notice explained the amount of the Settlement Fund, the plan of
21 allocation, that Plaintiff's counsel and Plaintiff will apply for attorneys' fees, costs,
22 and a service award, and the class members' option to participate, opt out, or object
23 to the settlement.

24 The parties now seek final approval of the class action settlement. Plaintiff
25 also seeks: attorneys' fees of 25% the common fund (\$831,250); reimbursement of
26 costs totaling \$25,922.03; and a service award of \$5,000.

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IV. ANALYSIS

A. Class Certification

The Court previously found that the class merited certification for settlement purposes, and nothing has changed since the Court conditionally certified the class. Accordingly, the Court maintains its approval.

B. Fairness of Settlement Terms

The Court previously found that the settlement was fair, adequate, and reasonable in its preliminary approval order.

In determining whether a proposed class action settlement is “fair, reasonable, and adequate,” this Court may consider some or all of the following factors: (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). The settlement is appropriate when analyzing these factors.

1. Strengths of Plaintiff’s Case

Defendant denies liability in this case. Plaintiff appears to be settling disputed claims, which favors approving the settlement. “In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

2. Risk/Expense of Litigation & Status of Proceedings

Without settlement, the cost of continuing to litigate this class action would be great because of discovery and motion practice. This factor weighs in favor of approving the settlement.

1 **3. Risk of Maintaining Class Action Status**

2 Silveira sets forth her belief that if the case proceeded, M&T would likely
3 assert that individualized issues preclude certification. This factor weighs in favor
4 of approving the settlement.

5 **4. Amount of Settlement**

6 The Settlement Agreement provides for a Settlement Fund of \$3,325,000.
7 (SA § 1.29.) The Settlement Fund is within the acceptable range of recovery.

8 **5. Experience and Views of Class Counsel**

9 “The recommendations of plaintiffs’ counsel should be given a presumption
10 of reasonableness.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043
11 (N.D. Cal. 2008) (citation omitted). Class Counsel has experience in class action
12 litigation and has endorsed the settlement as fair, reasonable, and adequate. This
13 factor favors final approval.

14 **6. Presence of Government Participant**

15 There is no government participant in this case, so this factor is neutral.

16 **7. Reaction of Class Members**

17 There were no objections to the Settlement Agreement.. This factor weighs in
18 favor of granting final approval. *See In re Omnivision*, 559 F. Supp. 2d at 1043.

19 On balance, these factors weigh in favor of approving the settlement.

20 **C. Conclusion as to Final Approval of the Settlement.**

21 Having considered the above factors, the Court finds that the proposed
22 Settlement is fair, reasonable and adequate. Accordingly, the Court **GRANTS** the
23 Motion for Final Approval of Class Action Settlement

24 **V. MOTION FOR FEES, COSTS AND INCENTIVE AWARD**

25 On July 21, 2021, Plaintiff moved for attorneys’ fees in the amount of
26 \$831,250, reimbursement of costs totaling \$25,922.03, and a service award of \$
27 5,000 for Ms. Silveira. (ECF No. 37).

28

1 The Court finds that the amount of attorney’s fees requested by Class
2 Counsel to be reasonable and within the 25% benchmark established by the Ninth
3 Circuit. *State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990). In considering
4 the common fund, the Court considers both monetary and non-monetary relief. *See*,
5 *e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Pokorny v.*
6 *Quixtar, Inc.*, 2013 WL 3790896, *1 (N.D. Cal. July 18, 2013), appeal dismissed
7 (Sept. 13, 2013) (“The court may properly consider the value of injunctive relief
8 obtained as a result of settlement in determining the appropriate fee.”). The parties
9 estimate that Class Members paid \$174,207 in Pay-to-Pay fees per month between
10 August 2015 and March 2020, and Defendant has provided Class Members
11 telephone and internet payment options free of charge since March 2020. Therefore,
12 between March 2020 and June 2021, Class Members have benefited an additional
13 \$2.6 million from enjoying fifteen months of free payment options for which they
14 would have otherwise paid. When this additional relief is considered as part of the
15 Settlement’s total value, the fee request of \$831,250 is 14% of the total (\$5,925,000
16 = \$3,325,000 + \$2,600,000), below the 25% benchmark.

17 The Court finds that the amount of attorney’s fees requested by Class
18 Counsel also to be reasonable based on Class Counsel’s lodestar, which may be
19 used as a “cross-check to assess the reasonableness of the percentage award.”
20 *Weeks v. Kellogg Co.*, 2013 WL 6531177, *25 (C.D. Cal. Nov. 23, 2013). Once the
21 court has fixed the lodestar, it may increase or decrease that amount by applying a
22 positive or negative “multiplier to take into account a variety of other factors,
23 including the quality of the representation, the novelty and complexity of the issues,
24 the results obtained and the contingent risk presented.” *Lealao v. Beneficial*
25 *California, Inc.*, 82 Cal. App. 4th 19, 26 (2000); *see also Walsh v. Kindred*
26 *Healthcare*, 2013 WL 6623224, *3 (N.D. Cal. Dec. 16, 2013) (citing *Lealao’s*
27 *method with approval*).

28

1 Class Counsel submitted evidence that their lodestar through July 16, 2021
2 (three business days before the date of their fee application) was \$329,388.90. They
3 estimate that work performed to complete the briefing and prepare for the
4 September 29, 2021 fairness hearing and overseeing the work of the Settlement
5 Administrator may result in a lodestar of \$430,000 at the time the matter is
6 complete. Their requested fee award would reflect a fee multiplier of 1.93, which is
7 appropriate given the risk undertaken, the early and efficient resolution, and the
8 results obtained here. *See, e.g., Rodriguez v. Marshalls of CA, LLC*, No.
9 EDCV181716MWFSPX, 2020 WL 7753300, at *10 (C.D. Cal. July 31, 2020)
10 (granting multiplier where risks to the litigation made an unfavorable
11 outcome uncertain); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334
12 (N.D. Cal. 2014) (“A 2.83 multiplier falls within the Ninth Circuit’s
13 presumptively acceptable range of 1.0–4.0.”).

14 Class Counsel are entitled to reimbursement of reasonable out-of-pocket
15 expenses. Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.
16 1994) (holding that attorneys may recover reasonable expenses that would typically
17 be billed to paying clients in non-contingency matters.); *Van Vranken v. Atlantic*
18 *Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (approving reasonable costs
19 in class action settlement). Costs compensable under Rule 23(h) include
20 “nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R.
21 Civ. P. 23(h). Here, class counsel seeks reimbursement of \$25,922.03 in litigation
22 expenses, which includes the cost of a private mediator. They have provided
23 records that document their claim. *See* ECF No. 37-2; ECF No. 37-3 ¶ 28. The
24 court therefore finds that these submissions support an award of \$25,922.03 in
25 costs.

26 The Court finds that Plaintiff’s requested service award of \$5,000 is
27 reasonable in light of the time Plaintiff spent and risks she took in bringing and
28 participating in the litigation. Further, the Court finds that a service award of \$5,000

1 is consistent with reasonable and just service awards in the Ninth Circuit. *See In re*
2 *Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (upholding
3 award to named plaintiff \$5,000 in case with \$1.725 million total recovery); *Willner*
4 *v. Manpower Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *8 (N.D. Cal.
5 June 22, 2015) (“Many courts in the Ninth Circuit have also held that a \$5,000
6 incentive award is “presumptively reasonable.”) (citations omitted).

7 Finally, the Court finds that the settlement avoids the pitfalls identified by the
8 Ninth Circuit in *Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2001), and is
9 adequate for class members when the proposed attorneys’ fees are compared
10 against relief provided for the class. Class Counsel are not receiving a
11 disproportionate amount of the Settlement, there is no clear sailing provision, and
12 no part of the Settlement Fund reverts to the Defendant. There is no evidence that
13 Class Counsel colluded with Defendant to prioritize the interests of the attorneys in
14 this matter over those of the Class. And the injunctive relief here appears to have
15 real value.

16 **VI. CONCLUSION**

17 For the foregoing reasons, the Court **GRANTS** the Motion for Final
18 Approval of Class Settlement (ECF No. __); **GRANTS** the Motion for Attorneys’
19 Fees, Costs and Incentive Award (ECF No. 37).

20 **IT IS SO ORDERED.**

21
22 Dated: _____

23 **OTIS D. WRIGHT, II**
24 **UNITED STATES DISTRICT JUDGE**

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14
15 **IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

16
17 LISA SILVEIRA, *on behalf of herself*
and
18 *all others similarly situated,*

19 Plaintiff,

20 v.

21 M&T BANK,

22 Defendant.

Case No. 2:19-cv-06958-ODW-KS

**DECLARATION OF CAMERON R.
AZARI, ESQ. ON
IMPLEMENTATION OF
SETTLEMENT NOTICE
PROGRAM**

1 I, Cameron Azari, declare as follows:

2 1. My name is Cameron R. Azari, Esq. I have personal knowledge of the
3 matters set forth herein, and I believe them to be true and correct.

4 2. I am a nationally recognized expert in the field of legal notice, and I have
5 served as an expert in hundreds of federal and state cases involving class action notice
6 plans.

7 3. I am a Senior Vice President with Epiq Class Action & Claims Solutions,
8 Inc. (“Epiq”) and the Director of Legal Notice for Hilsoft Notifications (“Hilsoft”); a
9 firm that specializes in designing, developing, analyzing and implementing large-scale
10 legal notification plans. Hilsoft is a business unit of Epiq.

11 4. This declaration will describe the implementation of the Settlement
12 Notice Plan (“Notice Plan” or “Plan”) here for the settlement in *Silveira v. M&T Bank*,
13 2:19-cv-06958-ODW-KS in the United States District Court for the Central District of
14 California. I previously executed my *Declaration of Cameron R. Azari, Esq. on*
15 *Settlement Notice Plan*, on May 26, 2020, in which I detailed Hilsoft’s class action
16 notice experience and attached Hilsoft’s *curriculum vitae*. I also provided my
17 educational and professional experience relating to class actions and my ability to
18 render opinions on overall adequacy of notice programs.

19 **OVERVIEW**

20 5. On May 6, 2021, the Court approved the Notice Plan as designed by
21 Hilsoft and appointed Epiq as the Settlement Administrator in the *Order Granting*
22 *Amended Motion for Preliminary Approval of Class Action Settlement* (“Preliminary
23 Approval Order”). In the Preliminary Approval Order, the Court conditionally certified
24 the following Class for purposes of the settlement:

25 All borrowers with a residential mortgage serviced by M&T
26 from whom M&T collected a Pay-to-Pay Fee from the period
of August 9, 2015, through May 6, 2021.

27 6. After the Court’s Preliminary Approval Order was entered, we began to
28 implement the Notice Plan. This declaration will detail the notice activities undertaken

1 and explain how and why the Notice Plan was comprehensive and well-suited to the
2 Settlement Class. This declaration will also discuss the administration activity to date.
3 The facts in this declaration are based on what I personally know, as well as information
4 provided to me in the ordinary course of my business by my colleagues from Hilsoft
5 and Epiq, who worked with us to implement the notification effort.

6 7. Epiq was provided the Settlement Class List, which included the list of
7 Class Members, along with their loan number and last known mailing addresses, as
8 maintained by M&T Bank. This data was used to provide individual notice to virtually
9 all members of the Settlement Class. A Long Form Notice was sent via United States
10 Postal Services (“USPS”) first class mail to all members of the Settlement Class with a
11 physical mailing address. The Long Form Notice is also available on the website
12 established for the Settlement. The individual notice efforts as implemented and
13 detailed below reached 99% of the identified Settlement Class.

14 8. In my opinion, the Notice Plan as designed reached the greatest
15 practicable number of the members of the Settlement Class through the use of
16 individual notice. In my opinion, the Notice Plan is the best notice practicable under
17 the circumstances of this case and satisfies the requirements of due process, including
18 its “desire to actually inform” requirement.¹ Federal Rules of Civil Procedure 23 directs
19 that the best notice practicable under the circumstances must include “individual notice
20 to all members who can be identified through reasonable effort.”² The Notice Plan here
21 satisfied this requirement.

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24 ¹ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (“But when notice is a person’s due, process which
25 is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee
26 might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method
27 may be defended on the ground that it is in itself reasonably certain to inform those affected”); *see also In re Hyundai
28 & Kia Fuel Econ. Litig.*, 926 F.3d 539, 567 (9th Cir. 2019) (“To satisfy Rule 23(e)(1), settlement notices must ‘present
information about a proposed settlement neutrally, simply, and understandably.’ ‘Notice is satisfactory if it generally
describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come
forward and be heard.’”) (citations omitted); N.D. Cal. Procedural Guidance for Class Action Settlements, Preliminary
Approval (3) (articulating best practices and procedures for class notice).

² Fed. R. Civ. P. 23(c)(2)(B).

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NOTICE PLAN

Individual Notice

9. The Settlement Class List was initially provided on May 14, 2021, with an updated file received on May 25, 2021. The data Epiq received contained contact information (in the form of physical mailing addresses) for virtually all members of the Settlement Class. After de-duping the records, Epiq identified 110,871 unique Class Members to be sent the Long Form Notice.

Individual Notice – Mailed Notice

10. On June 4, 2021, Epiq sent 110,857 Long Form Notices via USPS first class mail. The Long Form Notice was sent to all members of the Settlement Class with an associated physical address (the entire identified Settlement Class).

11. The Long Form Notice clearly and concisely summarizes the Settlement and explains that a Class Members does not have to do anything to receive a payment (if the Settlement is granted Final Approval). The Long Form Notice also fully explains the procedure for requesting exclusion from, or objecting to, the Settlement. Pursuant to the direction of the Court, the Long Form Notice also includes the logo of M&T Bank, in color, prominently printed at the top of the first page. The Long Form Notice also directs the recipients to a website dedicated specifically to the Settlement where they can access additional information.

12. Additionally, a Long Form Notice was mailed to all persons who requested one via the toll-free telephone number or by mail. As of August 30, 2021, 18 Long Form Notices have been mailed as a result of such requests. The Long Form Notice is included as **Attachment 1**.

13. Prior to mailing the Long Form Notice, all mailing addresses provided were checked against the National Change of Address (“NCOA”) database maintained by the USPS.³ In addition, the addresses were certified via the Coding Accuracy

³ The NCOA database contains records of all permanent change of address submissions received by the USPS for the last four years. The USPS makes this data available to mailing firms and lists submitted to it are automatically updated with any reported move based on a comparison with the person’s name and known address.

1 Support System (“CASS”) to ensure the quality of the zip code, and verified through
2 Delivery Point Validation (“DPV”) to verify the accuracy of the addresses. This
3 address updating process is standard for the industry and for the majority of promotional
4 mailings that occur today.

5 14. The return address on the Notices is a post office box that Epiq maintains
6 for this case. The USPS automatically forwards Notices with an available forwarding
7 address order that has not expired (“Postal Forwards”). For Notices returned as
8 undeliverable, Epiq re-mails the Notices to any new address available through USPS
9 information (for example, to an address provided by the USPS on the returned mail
10 piece if the forwarding order has expired, but is still within the time period in which
11 the USPS returns the piece with a forwarding address indicated), and to addresses Epiq
12 obtains from a third-party address lookup service. As of August 29, 2021, Epiq has re-
13 mailed 1,546 Notices to Class Members where a forwarding address was provided or
14 address research identified a new address. As of August 29, 2021, Epiq has received a
15 total of 2,471 undeliverable Notices (which includes any re-mailed Notices that were
16 also returned as undeliverable).

17 15. As of August 27, 2021, a Long Form Notice was successfully delivered to
18 99% of identified Class Members to whom Epiq sent Notice. This means the individual
19 notice efforts reached 99% of the identified Settlement Class.

20 ***Settlement Website, Toll-free Telephone Number, and Postal Mailing Address***

21 16. On June 4, 2021, a neutral, informational settlement website
22 (www.MortgageFeeSettlement.com) was established to reflect the Settlement of the
23 case. At the website, Class Members can obtain additional information and documents
24 including the Long Form Notice, Settlement Agreement, Preliminary Approval Order,
25 Motion for Preliminary Approval, Amended Complaint, and the Motion for Attorneys’
26 Fees and Service Award, as well as the date of the final approval hearing, a list of
27 frequently asked questions (“FAQs”) and answers and other information. The website
28 also includes information on how potential Class Members can request exclusion from

1 or object to the Settlement if they choose. The website address was prominently
2 displayed in all printed notice documents. As of August 29, 2021, there have been
3 1,507 unique visitors to the website and 2,611 website pages presented.

4 17. On June 4, 2021, a toll-free telephone number (855-917-3514) was also
5 established to allow Class Members to call for additional information, listen to answers
6 to FAQs, and request that a Long Form Notice be mailed to them. The toll-free
7 telephone number was displayed prominently in the Notice documents as well. The
8 automated phone system is available 24 hours per day, 7 days per week. As of August
9 29, 2021, the toll-free telephone number has handled 1,632 calls representing 5,219
10 minutes of use.

11 18. A post office box for correspondence about the case was also established
12 and maintained, to allow Class Members to contact the Settlement Administrator by
13 mail with any specific requests or questions.

14 ***Requests for Exclusion and Objections***

15 19. The deadline to request exclusion from the Settlement or to object to the
16 Settlement was August 3, 2021. As of August 29, 2021, Epiq has received ten requests
17 for exclusion from the Settlement Class. As of August 29, 2021, I am aware of no
18 objections to the Settlement. The Exclusion Request Report is included as **Attachment 2**.

19 **PERFORMANCE OF THE NOTICE PLAN**

20 **Reach**

21 20. The individual notice efforts reached 99% of the identified Settlement
22 Class. Many courts have accepted and understood that a 75 or 80 percent reach is more
23 than adequate. In 2010, the Federal Judicial Center issued a Judges' Class Action
24 Notice and Claims Process Checklist and Plain Language Guide. This Guide states that,
25 "the lynchpin in an objective determination of the adequacy of a proposed notice effort
26 is whether all the notice efforts together will reach a high percentage of the class. It is
27 reasonable to reach between 70–95%."⁴ Here the Notice Plan delivered notice at the

28 ⁴ Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010)*, p. 3.

1 highest end of this range.

2 **CONCLUSION**

3 21. In class action notice planning, execution, and analysis, we are guided by
4 due process considerations under the United States Constitution, by federal and local
5 rules and statutes, and further by case law pertaining to notice. This framework directs
6 that the notice program be designed to reach the greatest practicable number of potential
7 class members and, in a settlement class action notice situation such as this, that the
8 notice or notice program itself not limit knowledge of the availability of benefits—nor
9 the ability to exercise other options—to class members in any way. All of these
10 requirements were met in this case.

11 22. Our notice efforts followed the guidance for how to satisfy due process
12 obligations that a notice expert gleans from the United States Supreme Court’s seminal
13 decisions, which are: a) to endeavor to actually inform the class, and b) to demonstrate
14 that notice is reasonably calculated to do so:

15 A. “But when notice is a person’s due, process which is a mere gesture
16 is not due process. The means employed must be such as one
17 desirous of actually informing the absentee might reasonably adopt
18 to accomplish it,” *Mullane v. Central Hanover Trust*, 339 U.S. 306,
19 315 (1950).

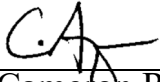
20 B. “[N]otice must be reasonably calculated, under all the
21 circumstances, to apprise interested parties of the pendency of the
22 action and afford them an opportunity to present their objections,”
23 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) citing *Mullane*
24 at 314.

25 23. The Notice Plan provided the best notice practicable under the
26 circumstances of this case, conformed to all aspects of Federal Rules of Civil Procedure
27 23, and comported with the guidance for effective notice articulated in the Manual for
28 Complex Litigation 4th Ed.

1 24. The Notice Plan schedule afforded enough time to provide full and proper
2 notice to the Settlement Class before the opt-out and objection deadlines.

3 I declare under penalty of perjury, under the laws of the United States of America,
4 that the foregoing is true and correct. Executed on August 30th, 2021 in Beaverton,
5 Oregon.

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Cameron R. Azari, Esq.

Attachment 1



UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

A class action settlement may affect your rights if you paid M&T Bank a fee to make a residential loan payment by telephone or the internet on or after August 9, 2015.

THIS NOTICE COULD AFFECT YOUR RIGHTS – PLEASE READ IT CAREFULLY

A court authorized this Notice. This is not a solicitation from a lawyer.

The United States District Court for the Central District of California (the “Court”) authorized this Notice. This Notice is a summary of a proposed settlement of a class action lawsuit titled *Lisa Silveira v. M&T Bank*, Case No. 2:19-cv-06958-ODW-KS (the “Action”). Lisa Silveira (“Plaintiff”) sued M&T Bank (“M&T”), alleging that M&T charged borrowers Pay-to-Pay fees to make mortgage payments online or by phone. The Action asserts that M&T’s practice of charging such fees, among other things, violated the Fair Debt Collection Practices Act and the Rosenthal Fair Debt Practices Act, and breached the terms of the borrowers’ loan agreements. M&T denies the allegations asserted in the Action.

More information about the Action and a copy of the complete settlement agreement is available on the settlement website: www.MortgageFeeSettlement.com.

The following is a summary of the Settlement and of your rights.

1. Who is a Class Member?

The Court has determined that every person who fits the following description is a Class Member:

All borrowers with a residential mortgage loan serviced by M&T from whom M&T collected a Pay-to-Pay Fee from the period of August 9, 2015 through May 6, 2021.

M&T’s records reflect that you may be a Class Member.

2. What are the terms of the proposed Settlement?

The complete terms of the proposed Settlement are set forth in a formal Settlement Agreement (the “Agreement”) which is on file with the Court, and which is also available on the settlement website at: www.MortgageFeeSettlement.com. This Notice is only a summary of the Settlement, and in case of any conflict between this Notice and the Agreement, the terms of the Agreement will control.

In the proposed Settlement, M&T has agreed to create a \$3,325,000.00 Settlement Fund. Notice and Administrative Costs, any Court-awarded Attorneys’ Fees and Expenses to Class Counsel, and any Service Award to the Class Representative will be paid out of the Settlement Fund first. The remaining balance of the Settlement Fund (the “Net Settlement Fund”) will be distributed among the

Questions? Call 1-855-917-3514 or visit www.MortgageFeeSettlement.com

Class Representative and all Class Members who are not excluded from the class, as set forth below (the “Settlement Class Members”).

Allocations of the Settlement Fund will be calculated on a loan-by-loan basis, not a borrower-by-borrower basis, such that the settlement payment on any loan with more than one Settlement Class Member borrower shall be made payable jointly to all Settlement Class Member borrowers on that loan. For each loan on which a Class Member is a borrower, the Settlement Administrator shall allocate the amount of the Net Settlement Fund that represents the proportional amount of Pay-to-Pay Fees charged by M&T within the Class Period on that loan. By way of illustration, if you are a borrower on a loan that paid one percent of the total Pay-to-Pay fees collected by M&T during the Class Period, you (and any co-borrower or joint borrower on the loan) will be allocated one percent of the Net Settlement Fund.

If there is any amount in the Settlement Fund that remains following the distribution of checks to Settlement Class Members as a result of checks being returned undeliverable or which are not cashed within 90 days, that amount will be distributed on a *pro rata* basis to Settlement Class Members who cashed their checks. If there is any amount in the Settlement Fund that remains following the secondary distribution, or there are not enough funds to make a secondary distribution economically feasible, then, with the Court’s approval, the remaining amount will be paid to a 501(c)(3) charitable organization that will be proposed by the parties in advance of final approval.

Attorneys’ Fees and Expenses, and Service Award. Class Counsel will ask the Court to award attorneys’ fees in an amount not to exceed one third of the Settlement Fund, plus litigation costs and expenses. Class Counsel will also request Court approval of a Service Award to the Class Representative in the amount of \$10,000. Class Counsel will file that request, along with all supporting documents, at least 28 days before the Fairness Hearing. At least 28 days before the Fairness Hearing, the request and all supporting papers will be available for your review on the settlement website at www.MortgageFeeSettlement.com. The Court will determine the appropriate amount of the attorneys’ fees and awards to be paid. The Settlement is not conditioned upon approval of any of the attorneys’ fees, costs, or service award amounts.

You are not required to make any payments to Class Counsel in this action.

3. How Can I Get the Relief?

As long as you do not exclude yourself from the Settlement, you will automatically receive relief, and you do not need to take further action.

4. When Will I Get the Relief?

As described below, the Court will hold a Fairness Hearing on **September 27, 2021**, to decide whether to grant final approval of the Settlement. The Court must finally approve the Settlement before any relief will be distributed, and it will only do so after finding that the Settlement is fair, reasonable, and adequate. In addition, any final approval order the Court may enter may be subject to appeal. If there are any such appeals, resolving them takes time. Payments to Settlement Class Members will only be made after the time for any appeals expires.

Payments to Settlement Class Members will be made in the form of a check, and all checks will expire and become void 90 days after they are issued. For good cause shown by the Settlement Class Member involved, however, the Settlement Administrator may reissue a check for up to an additional 90-day period following the original 90-day period.

Questions? Call 1-855-917-3514 or visit www.MortgageFeeSettlement.com

5. Who Represents Me?

The Court has appointed Bailey & Glasser LLP and Tycko & Zavareei LLP to represent you and other Class Members in this Action and for purposes of this Settlement, and for no other purpose. These attorneys are called “Class Counsel.” You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your own expense.

6. What Happens Next?

The Court will hold a “Fairness Hearing” on **September 27, 2021, at 1:30 p.m.** at the United States District Court for the Central District of California, First Street Courthouse, 350 W. 1st Street, Los Angeles, CA 90012 – Courtroom 5D, 5th Floor, to hear any objections and to consider whether to give final approval to the Settlement. The Court will hear objections at the hearing only from those who timely object to the Settlement, as described below. You may participate in the Fairness Hearing with or without an attorney, but if you choose to be represented by an attorney, you must do so at your own expense.

YOU DO NOT HAVE TO APPEAR AT THE HEARING TO RECEIVE THE BENEFITS OF THE SETTLEMENT.

7. What Are Your Options?

Participate in the Settlement. If you wish to remain a part of the Settlement, you do not have to do anything now. You automatically will be eligible for the settlement benefits if the Court approves the Settlement.

Opt Out of the Settlement. If you choose to exclude yourself, or “opt out,” of the Settlement, you must send a written statement to the Settlement Administrator that includes: (1) your full name and current address; (2) your M&T loan number; and (3) a specific statement that you desire to be excluded from the Settlement. You must personally sign your written “opt-out” statement and **mail it postmarked no later than August 3, 2021, to the following address:**

Settlement Administrator
c/o Epiq
P.O. Box 3719
Portland, OR 97208-3719

If you are a co-borrower or joint borrower on a loan covered by the Settlement and you opt out of the Settlement, all co-borrowers and/or joint borrowers on the loan will also be excluded from the Settlement. Similarly, if you are a co-borrower or joint borrower on a loan covered by the Settlement and another borrower on that loan is a Class Member who opts out of the Settlement, you will also be excluded from the Settlement. If you do not opt out, and no co-borrower or joint borrower on your loan opts out, you (and your co-borrower(s) and/or joint borrower(s), if any) will be bound by this Settlement.

Object to the Settlement. You may remain a member of the class, but object to the terms of the Settlement. You may object to all or any portion of the Settlement at the Fairness Hearing, but you must first explain your objections in writing. All objections must include: (1) your full name, current address, and telephone number; (2) your M&T loan number; (3) a statement of the position you wish to assert, including the factual and legal grounds for the position; (4) the names and a summary of

Questions? Call 1-855-917-3514 or visit www.MortgageFeeSettlement.com

testimony of any witnesses that you intend to call in connection with the objection; (5) copies of all documents that you wish to submit in support of your position; (6) the name(s) of any attorney(s) representing you; (7) the name, court, and docket number of any class action litigation in which you or your attorney(s) have previously appeared as an objector or provided legal assistance with respect to an objection; and (8) state whether the objection applies only to you, to a specific subset of the class, or to the entire class.

To be considered, objections must be: (1) mailed to the Settlement Administrator by first class U.S. mail, postage paid, to the address below and **postmarked no later than August 3, 2021**; and (2) filed with the Court and mailed or otherwise delivered to Class Counsel and Counsel for M&T. If you are not represented by Counsel, you may file your objection with the Court by mailing it to the address below. If you are represented by Counsel, your Counsel must file an appearance and submit your objection through the Court's e-filing system.

The addresses are:

Settlement Administrator

Settlement Administrator
c/o Epiq
P.O. Box 3719
Portland, OR 97208-3719

Counsel for Class Representative

James Kauffman
Bailey & Glasser LLP
1055 Thomas Jefferson Street NW
Suite 540
Washington, DC 20007

Hassan Zavareei
Tycko & Zavareei LLP
1828 L Street, NW – Suite 100
Washington, DC 20036

Counsel for M&T

Michael J. Agoglia
Alston & Bird LLP
560 Mission Street, Suite 2100
San Francisco, CA 94105

The Court

Clerk of Court, United States District Court for the Central District of California
255 E. Temple Street, Suite TS-134
Los Angeles, CA 90012-3332

You have the right to consult with your own attorney, at your own expense, before deciding how best to proceed.

Questions? Call 1-855-917-3514 or visit www.MortgageFeeSettlement.com

8. What am I agreeing to by remaining in the class in this case?

If the Settlement receives final approval from the Court, the Settlement will be legally binding on all Settlement Class Members, including Settlement Class Members who object. If you, or someone acting on your behalf, are currently litigating claims against M&T or other released parties that are the same as or similar to those addressed here, you will be barred from pursuing the claims released by the Settlement unless you validly opt out, as described above.

The full terms of the release, which will bind all Settlement Class Members as to certain claims against M&T and certain affiliates and related entities (“Released Parties”), are set forth in the Settlement Agreement, which is on file with the Court, and which is available on the settlement website at: www.MortgageFeeSettlement.com. Unless you exclude yourself, you will be a Settlement Class Member, and that means that any claims you have regarding fees Pay-to-Pay fees you paid to M&T will be fully and completely resolved, and that you cannot sue, continue to sue, or be part of any other lawsuit against M&T about M&T’s collection of Pay-to-Pay fees. It also means that the Court’s Orders approving the Settlement and the judgment in this case will apply to you and legally bind you.

If you want to keep the right to sue or continue to sue M&T, on your own, about M&T’s collection of Pay-to-Pay fees, you must exclude yourself from the Settlement in this case. If you exclude yourself, as set forth above, you will not receive any of the benefits of the Settlement, as described above.

9. More Information Is Available

This Notice is only a summary of the Settlement and the Agreement. If you have questions regarding the Settlement, you may contact Class Counsel at:

James Kauffman, Bailey & Glasser LLP, 1055 Thomas Jefferson Street NW, Suite 540, Washington, DC 20007, (202) 463-2105, jkauffman@baileyglasser.com.

Hassan Zavareei, Tycko & Zavareei LLP, 1828 L Street, NW – Suite 100, Washington, DC 20036, (202) 973-0900, [hzavareei@tzlegal.com](mailto:havareei@tzlegal.com).

You may also contact the Settlement Administrator at:

Settlement Administrator, c/o Epiq, P.O. Box 3719, Portland, OR 97208-3719, (855) 917-3514.

You may also review the Court’s file during regular court hours at:

U.S. District Court for the Central District of California
255 E. Temple Street, Suite TS-134
Los Angeles, CA 90012-3332

You may also view additional information, including the Settlement Agreement, and copies of other relevant documents and Court Orders, at the settlement website at www.MortgageFeeSettlement.com.

PLEASE DO NOT TELEPHONE THE COURT, THE JUDGE, OR THE CLERK OF THE COURT.

Questions? Call 1-855-917-3514 or visit www.MortgageFeeSettlement.com

Attachment 2

| Epiq Record Number | Borrower First Name | Borrower Last Name | Co-Borrower First Name | Co-Borrower Last Name | State |
|---------------------------|----------------------------|---------------------------|-------------------------------|------------------------------|--------------|
| 453 | Hannelore | Brink | | | AZ |
| 35497 | James | Skay | | | NJ |
| 41712 | Laura | Tarwater | Cynthia | Dodge | IN |
| 47008 | Marie | Scott | | | CA |
| 65321 | Daisy | Goza | | | AL |
| 75455 | Sammy | Fugatt | Tina | Fugatt | TN |
| 83819 | Carol | Wingerter | Cory | Wingerter | NJ |
| 95768 | Mebel | Dispo | Joseph | Dispo | NJ |
| 107791 | Clinton | Spring | | | MS |
| 109916 | Valorie | Barton | | | MA |

* Loan numbers are being supplied to M&T Bank for ease of identification.

1 Michael J. Agoglia (SBN 154810)
Rachel A. Naor (SBN 284966)
2 Tania L. Rice (SBN 294387)
ALSTON & BIRD LLP
3 560 Mission Street, Suite 2100
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Facsimile: (415) 243-1001
5 michael.agoglia@alston.com
rachel.naor@alston.com
6 tania.rice@alston.com

7 Attorneys for Defendant
M&T Bank

8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 LISA SILVEIRA, on behalf of herself and
all other similarly situated,

13 Plaintiff,

14 v.

15 M&T Bank,

16 Defendant.

Case No. 2:19-cv-06958-ODW-KS

**M&T BANK'S JOINDER IN
PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS
SETTLEMENT**

Hon. Otis D. Wright, II

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1 **I. INTRODUCTION**

2 Defendant M&T Bank (“M&T”) hereby joins in the relief requested in
3 plaintiff Lisa Silveira’s motion for final approval of the parties’ proposed
4 nationwide class settlement of this action (Dkt. No. 38). M&T fully agrees that the
5 proposed settlement should be finally approved. To underscore the factors leading
6 to that conclusion, and because M&T obviously does not share all of plaintiff’s
7 positions on the underlying allegations and facts, M&T submits in this brief its
8 independent views. M&T firmly believes that the settlement was the product of
9 good faith, arms-length negotiation, is abundantly fair, reasonable and adequate,
10 especially in light of the risks, costs and timing of the litigation alternatives, and
11 that it meets all requirements for final approval.

12 **II. BACKGROUND**

13 M&T is a state-chartered bank headquartered in Buffalo, New York. Its
14 primary regulators are the Federal Reserve and the New York Department of
15 Financial Services. Among other banking products and services, M&T services
16 mortgage loans, both those it originated as well as loans originated by other lenders.
17 The servicing of mortgages generally involves the collection and application of
18 borrowers’ monthly payments, the communication with borrowers and investors
19 who may own the rights to those payments, assisting borrowers with loss mitigation
20 efforts (*e.g.*, forbearances, modifications), and, where necessary, efforts to collect
21 and undertake the steps required by the governing law and contracts to administer
22 defaults. M&T has distinguished itself, even through the prior financial crisis, as
23 being well-managed and conservative in its practices. Among other things, this
24 compliance focus saw M&T avoid the types of regulatory and other legal actions
25 pursued against other mortgage servicers.

26 M&T offered borrowers throughout the Class Period¹ many different ways to

27 ¹ Per the Settlement Agreement, the Class Period is defined as August 9, 2015,
28 through the date of preliminary approval (which the Court ordered on May 6,
2021). But, because the class is defined by loans on which borrowers paid a

1 make a mortgage payment. These included both electronic payment channels, in
2 which the payment is transferred to M&T electronically or over the phone, and non-
3 electronic payment channels, such as when a borrower mails a physical check to
4 M&T as payment, or makes a payment in-person at one of M&T's branch locations.
5 The only payment method for which M&T has ever charged a fee during the Class
6 Period is the Convenience Fee charged where a borrower paid by phone.

7 At no point did M&T ever require borrowers to use the phone pay method.
8 Only a very small percentage of borrowers—at most 5-6% during the Class
9 Period—used the phone pay method to make their mortgage payments. (*See* Dkt.
10 31-2, Heath Decl. *iso* M&T Bank's Joinder in Plaintiff's Am. Mot. for Prelim.
11 Approval, ¶ 6.) Of those borrowers who chose to pay their mortgages by phone
12 over the Class Period, 42% did so on only one occasion. (*See* Dkt. 31-1, Kieser
13 Decl. *iso* M&T Bank's Joinder in Plaintiff's Am. Mot. for Prelim. Approval, ¶ 7.)
14 The average amount of Convenience Fees paid by a borrower on any class loan was
15 \$86. (*Id.* at ¶ 8.)

16 Finally, borrowers were never charged a Convenience Fee without their
17 knowledge. Borrowers who opted to make loan payments by phone were first
18 informed about the associated Convenience Fees, and so proceeded with that
19 payment method only after they knew the fee would be imposed. (Heath Decl., ¶
20 5.) This has never been a case where fraud was alleged or inferred. The class
21 members were not “duped” into paying for something unwittingly. Instead, the
22 core of plaintiff's allegations is that although Convenience Fees were disclosed,
23 such fees were nevertheless unlawful because they allegedly were not specifically
24 authorized in the customers' underlying loan agreements. (Complaint [Dkt. 1] ¶¶ 2-
25 3, 29-33.)

26 _____
27 Convenience Fee (referred to herein as “Class Loans”), and because as of March
28 2020, M&T voluntarily stopped charging Convenience Fees, the size of the class
and total Convenience Fees paid were fixed and definite prior to preliminary
approval.

1 **III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

2 **A. There Have Been No Objections and Less than 0.01% of Class**
3 **Members Opted Out.**

4 During the Class Period, there were 110,871 loans on which a Convenience
5 Fee was charged (Class Loans). As described in plaintiff’s Motion for Final
6 Approval and the accompanying Azari Declaration, notice was provided to Class
7 Members precisely in accordance with the plan ordered by the Court.

8 No Class Members have objected to the settlement. (See Dkt. 38-2, Azari
9 Decl. on Implementation of Settlement Notice Program, ¶ 19.) Only 10 Class
10 Members opted out of the settlement—less than 0.01% of the class. (*Id.*) Both of
11 these factors—zero objections and extremely low opt out rates—strongly support
12 the conclusion that the settlement is fair, reasonable and adequate. See *Churchill*
13 *Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (approving settlement
14 where 45 objections were filed and 500 class members opted out from a total of
15 90,000 class members [0.56%]).

16
17 **B. The Settlement Is Fair, Reasonable, and Adequate, Especially**
18 **When Balanced Against the Significant Risks Plaintiff Faces in**
19 **Further Litigating this Case.**

20 M&T submits that the terms of this settlement are well within the range of
21 fair, reasonable, and adequate to justify final approval under Federal Rule of Civil
22 Procedure 23(e). The settlement was in every sense the product of arms-length
23 bargaining. Counsel for M&T have many decades of experience litigating
24 mortgage-specific putative class actions, and plaintiff’s counsel are also very
25 experienced in this area. The parties utilized the services of one of the preeminent
26 mediators, the Honorable Edward Infante (Ret.), in no small part to ensure that the
27 course of negotiations would be vigorously but ethically pursued. Reaching
28 agreement took considerable effort, including substantial exchanges of information

1 about M&T’s practices, the class size, and Convenience Fees actually paid. The
2 parties appeared twice for all-day mediation sessions before Judge Infante, and
3 engaged with the mediator remotely on several other occasions. M&T estimates
4 that during the negotiation and drafting of the settlement, the parties independently
5 conducted approximately a dozen conference calls between counsel to discuss
6 factual and legal issues and to address elements of the potential settlement.

7 The fairness, reasonableness, and adequacy of the settlement must also
8 include an assessment of the alternative available to the class. Indeed, in evaluating
9 the fairness of the settlement, the Court should consider the risk, expense,
10 complexity, and likely duration of further litigation. *See Campbell v. Facebook,*
11 *Inc.*, 951 F.3d 1106, 1121 (9th Cir. 2020). M&T respectfully submits that, if the
12 parties did not reach a settlement and continued to litigate this case, plaintiff and the
13 putative class would face the very real threat of having some or all of her claims
14 dismissed. That risk is not just theoretical. Indeed, this Court has recently
15 dismissed similar claims with prejudice, finding that “Plaintiffs do not set forth a
16 cognizable legal theory that [the defendant’s] pay-to-pay fees are unlawful.”
17 *Thomas-Lawson v. Carrington Mortg. Servs., LLC*, No. 2:20-cv-07301-ODW (Ex),
18 2021 U.S. Dist. LEXIS 65841, at *16 (C.D. Cal. Apr. 5, 2021) (appeal filed).

19 There is a growing body of case law in which other courts across the nation
20 have also dismissed similar claims that a servicer’s convenience fees violated the
21 FDCPA, corollary state debt collection statutes, or other laws. *See, e.g., Lish v.*
22 *AmeriHome Mortg. Co., LLC*, 2020 U.S. Dist. LEXIS 215172 (C.D. Cal. Nov. 10,
23 2020) (Walter, J.); *Reid v. Ocwen Loan Serv., LLC*, No. 20-CV-80130-AHS, 2020
24 U.S. Dist. LEXIS 79378 (S.D. Fla. May 4, 2020); *Lang v. Ocwen Loan Servicing,*
25 No. 3:20-cv-81-J-20MCR, 2020 U.S. Dist. LEXIS 159355 (M.D. Fla. July 16,
26 2020); *Brown v. Loancare, LLC*, No. 3:20-cv-00280-FDW-DSC, 2020 U.S. Dist.
27 LEXIS 236846 (W.D.N.C. Dec. 16, 2020). At least one other court has indicated
28 that appellate guidance is appropriate on these unsettled issues of law. *Turner v.*

1 *PHH Mortg. Corp.*, 467 F. Supp. 3d 1244, 1249 (M.D. Fla. 2020).

2 The existence of this substantial legal uncertainty with respect to the merits
3 of plaintiff's claims is a very significant factor in favor of approval. At a minimum,
4 if litigated, these claims would have been the subject of dispositive motion practice
5 before this Court. If any of plaintiff's claims survived that motion practice, M&T
6 would very likely appeal such ruling or seek a stay pending the resolution of the
7 appeal in *Thomas-Lawson*. So, even if successful in pursuing her claims and
8 certifying a nationwide class, if this case were not settled, plaintiff and the class
9 would likely have to wait three or more years before they saw any actual recovery.
10 Conversely, M&T is well aware that had these claims been successfully challenged
11 through a dispositive motion, plaintiff almost certainly would have appealed that
12 decision to the Ninth Circuit, as the plaintiffs did in the *Thomas-Lawson* action.
13 That likelihood would impose significant additional cost, delay, and uncertainty in
14 outcome on M&T. Such a result would be contrary to M&T's interest in putting
15 any issues with respect to the charging of phone pay fees behind it, which was a
16 substantial motivation for M&T to enter into this settlement. Prior to the litigation,
17 M&T had already decided not to charge convenience fees in many states. It then
18 voluntarily ceased charging all remaining phone pay fees as of March 2020. M&T
19 made a rational choice not to continue to invest in litigation to defend a practice it
20 was no longer engaged in. The fact that district courts have divided in their
21 treatment of these types of claims underscores that the parties' settlement is
22 abundantly fair, reasonable, and adequate.

23 Finally, the financial terms of this settlement fall squarely within the range of
24 convenience fee settlements previously reached and readily approved in many other
25 cases—including *Sanders v. LoanCare, LLC*, No. 2:18-cv-09376-PA-RAO (C.D.
26 Cal.), a case in which Judge Percy Anderson of this District granted final approval
27 on December 4, 2020, to a class settlement with a very similar common fund and
28 notice plan (*see* Dkt. 115). In *Sanders*, the \$3,400,000 common fund represented

1 38.64% of the total fees collected from class members. *See also McWhorter v.*
2 *Ocwen Loan Serv.*, 2019 U.S. Dist. LEXIS 232149 (N.D. Ala. Aug. 1, 2019)
3 (common fund represented 30% of the total amount of fees collected from class
4 members); *Garcia v. NationStar Mortg., LLC*, No. 15-cv-01808-TSZ (W.D. Wa.)
5 (common fund represented 33% of the total amount of fees collected from class
6 members); *Phillips, et al. v. Caliber Home Loans, Inc.*, Case No. 0:19-cv-02711-
7 WMW-LIB (D. Minn.) (preliminary approval granted of settlement with common
8 fund representing 29.39% of the total amount of fees collected from class
9 members).

10 The parties' settlement here represents 34.7% of the total Convenience Fees
11 collected from class members. The fact that this settlement compares favorably to
12 other similar settlements is persuasive evidence that the financial terms here are
13 within the range of fair, reasonable, and adequate such that final approval is
14 warranted. *See In re Bond*, 2004 U.S. Dist. LEXIS 33770, at *44-45 (C.D. Cal.
15 Aug. 9, 2004) (fact that settlement compared favorably to other settlements
16 demonstrated that it was fair, adequate, and reasonable).

17 **C. Plaintiff's Request for Attorneys' Fees and an Incentive Award**

18 Plaintiff's Motion separately addresses the amount of attorney fees and
19 incentive award that plaintiff is seeking. M&T weighs in on these topics only to
20 make clear that the settlement agreement provisions regarding attorneys' fees and
21 an incentive award are not in any way contingent on a specific dollar threshold
22 being met. The settlement instead provides that the amounts paid out of the
23 common fund to plaintiff as an incentive award and to her counsel in fees and costs
24 are committed to the discretion of the Court.

1 **IV. THE PARTIES JOINTLY PROPOSE THE NATIONAL**
2 **FOUNDATION FOR CREDIT COUNSELING AS THE *CY PRES***
3 **RECIPIENT**

4 The settlement agreement provides that remaining amounts in the settlement
5 fund following the distribution plan will be paid to a 501(c)(3) charitable
6 organization, to be jointly proposed by the parties, pursuant to the *cy pres* doctrine.
7 The parties have conferred on this issue, and hereby jointly propose the National
8 Foundation for Credit Counseling (NFCC) as the *cy pres* recipient.

9 It is appropriate for the Court to approve of *cy pres* distribution of unclaimed
10 funds, “as long as an appropriate nexus existed between the issues underlying the
11 case and the *cy pres* recipients.” *Fraley v. Batman*, 638 F. App’x 594, 597 (9th Cir.
12 2016). That nexus exists here. The issues underlying this case relate to the
13 collection of mortgage payments. The NFCC is the “largest and longest-serving
14 nonprofit financial counseling organization in the U.S.,” which focuses on
15 nationwide counseling on debt and financial literacy. *See*
16 <https://www.nfcc.org/about-us/>. It has been approved by the Department of
17 Housing and Urban Development as a provider of credit counseling services for
18 over two decades and utilizes a nationwide network of credit counselors. *Id.* The
19 NFCC is not affiliated with M&T, plaintiff, or its/her respective counsel.

20 For all these reasons, the parties respectfully request that the Court approve
21 the NFCC as the *cy pres* recipient of any funds remaining in the Common Fund
22 after the settlement administration costs and Court-ordered distributions have been
23 made.

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V. CONCLUSION

For all the foregoing reasons, and for the reasons set forth in plaintiff's Motion for Final Approval of Class Settlement, M&T respectfully submits that this settlement fully meets the requirements for final approval.

DATED: September 7, 2021

Respectfully submitted,

ALSTON & BIRD LLP

/s/ Michael J. Agoglia
Michael J. Agoglia

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