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

Date: July 6, 2020  
Time: 1:30 p.m.  
Courtroom: 5D  
Judge: Hon. Otis Wright, II

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

1 TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on July 6, 2020, at 1:30 p.m., or as soon  
3 thereafter as this matter may be heard, in Courtroom 5D, before the Honorable Otis D.  
4 Wright, II, Plaintiff will and hereby does respectfully move this court to preliminarily  
5 approve the Settlement reached in this case, the terms of which are more specifically  
6 described in the Memorandum and Points of Authority filed in support of this Motion.

7 This Motion is based upon this Notice of Motion, the accompanying  
8 Memorandum of Points and Authorities, the Settlement Agreement, the Declaration of  
9 Hassan A. Zavareei and exhibits thereto, the Declaration of Cameron A. Azari and  
10 exhibits thereto, the pleadings and papers on file in this Action, and any other such  
11 evidence and argument as the Court may consider. Defendant M&T Bank does not  
12 oppose this motion.

13 Dated: May 27, 2020

Respectfully submitted,

14  
15 /s/ Hassan A. Zavareei  
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23 v.

24 M&T BANK,

25 Defendant.

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

27 **PLAINTIFF’S MEMORANDUM**  
**OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF MOTION FOR**  
**PRELIMINARY APPROVAL OF**  
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1 **I. INTRODUCTION**

2 Plaintiff Lisa Silveira, individually and on behalf of the proposed Settlement  
3 Class,<sup>1</sup> seeks preliminary approval of a proposed Settlement of claims against defendant  
4 M&T Bank (“M&T”). The Settlement Agreement, if approved, will provide for a  
5 \$3,325,000 common fund and will resolve the claims of Ms. Silveira and the Class  
6 Members deriving from M&T’s practice of charging fees for making mortgage  
7 payments online or over the phone (“Pay-to-Pay Fees”).

8 Under the Settlement Agreement, M&T will pay \$3,325,000 into a common fund,  
9 and Class Members need not submit a claim in order to receive compensation *pro rata*  
10 according to the number of Pay-to-Pay Fees they were charged. The proposed  
11 Settlement of this action is the product of extensive arms-length negotiations by  
12 experienced and informed counsel and warrants preliminary approval, as the terms are  
13 fair, reasonable, and adequate. Accordingly, Ms. Silveira requests that the Court (1)  
14 preliminarily approve the proposed Settlement, (2) certify the Settlement Class for  
15 settlement purposes only, (3) appoint Ms. Silveira as Class Representative, (4) appoint  
16 Ms. Silveira’s counsel as Class Counsel, (5) order that Class Notice be distributed to the  
17 Settlement Class, and (6) schedule a Final Approval Hearing.

18 M&T does not oppose the relief sought in this Motion. Plaintiff understands that  
19 M&T will separately respond to this motion by joining the request for preliminary  
20 approval and explaining from its perspective why this Settlement is fair, reasonable and  
21 adequate.

22 **II. BACKGROUND**

23 Plaintiff Lisa Silveira commenced this litigation on August 9, 2019 by filing a  
24

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25  
26 <sup>1</sup> Unless otherwise specifically defined herein, all capitalized terms have the same meanings as those  
27 set forth in the parties’ Settlement Agreement, attached as Exhibit 1 to the Declaration of Hassan A. Zavareei (“Zavareei Decl.”).

1 complaint in this court on behalf of herself and other similarly situated borrowers.  
2 Complaint (“Compl.”), Dkt. 1. The complaint alleged that M & T Bank charged  
3 borrowers an unlawful and excessive \$15.00 fee to pay their mortgage payments online  
4 or by phone. The actual cost to M&T to process these transactions is well below \$15.00,  
5 and M&T keeps the difference. Ms. Silveira alleged that these Pay-to-Pay Fees violated  
6 the FDCPA and the Rosenthal Act, because the fees were not expressly authorized by  
7 the mortgage or permitted by law, and the fees represented M&T’s fees for collecting  
8 payments. *See id.* ¶¶ 10, 20, 21.

9 In October 2019, after lengthy discussions, the Parties agreed to engage in  
10 mediation with the assistance Honorable Edward A. Infante (Ret.), an experienced class  
11 action mediator, to explore whether a negotiated resolution was possible. *See*  
12 Declaration of Hassan A. Zavareei in Support of Plaintiff’s Motion for Preliminary  
13 Approval of Class Action Settlement (“Zavareei Decl.”) ¶ 3. The Parties exchanged  
14 mediation memoranda and M&T provided necessary class data to Plaintiff’s counsel. *Id.*  
15 On October 24, 2019, the parties mediated before Judge Infante for a full day. Both sides  
16 made presentations to the mediator and all attendees. *Id.* After a full day of hard-fought  
17 negotiations, the Parties did not reach an agreement, but made significant progress  
18 towards resolution. *Id.* ¶ 4.

19 With the assistance of Judge Infante, the parties continued to negotiate by phone  
20 and email, with an additional exchange of information. *Id.* ¶ 5. On February 5, 2020, the  
21 Parties held a second in-person mediation session with Judge Infante. *Id.* ¶ 6. After a  
22 second full-day negotiation, the parties reached an agreement in principal and signed a  
23 term sheet. *Id.* Over the following months, the parties spent significant time  
24 documenting and negotiating over the specific terms and language of the settlement  
25 agreement. *Id.* The onset of the COVID-19 pandemic in the United States posed  
26 additional special challenges to obtaining approval of the settlement terms from the  
27 Parties. On May 26, 2020, the Parties executed the Settlement Agreement before the

1 Court for preliminary approval.

2 **III. THE SETTLEMENT AGREEMENT**

3 **A. The Proposed Class**

4 The Settlement Agreement contemplates certification of the following Settlement  
5 Class for settlement purposes only: *All borrowers with a residential mortgage loan*  
6 *serviced by M&T from whom M&T collected a Pay-to-Pay Fee during the Class Period.*  
7 Zavareei Decl. Ex. 1 at § 6.1. The Class Period is defined as August 9, 2015, through the  
8 date the Court enters the preliminary approval order. *Id.* at § 1.7.

9 **B. Benefits to the Settlement Class**

10 The Settlement Agreement provides for a Settlement Fund of \$3,325,000, from  
11 which all (a) payments to Settlement Class Members, (b) Notice and Administrative  
12 Costs, (c) any Service Award to Ms. Silveira, and (d) any award of Attorneys' Fees and  
13 Expenses shall be paid. *See* Zavareei Decl. Ex. 1 at §§ 1.29, 3.1-3.2. After payment of  
14 costs of administration and notice and any fees, expenses, and service award authorized  
15 by the Court, the Net Settlement Fund will be distributed to Class Members *pro rata* by  
16 check. *Id.* at §§ 5.1-5.7.

17 Class Members do not have to submit claims or take any other affirmative step to  
18 receive benefits under the Settlement. Instead, M&T will provide the Settlement  
19 Administrator with a Settlement Class List that includes the names and last known  
20 mailing addresses of the Class Members. *Id.* at §§ 1.27, 6.3.1. M&T estimates that the  
21 Settlement Class includes approximately 112,000 loans. Zavareei Decl. ¶ 23. The total  
22 number of class members will be greater because some of those loans have co-  
23 borrowers. *See id.*

24 Each Class Member who paid at least one Pay-to-Pay Fee during the Class Period  
25 that was not refunded shall be entitled to receive a *pro rata* share of the Net Settlement  
26 Fund. Zavareei Decl. Ex. 1 at § 5.3. For each loan on which a Class Member has paid  
27 Pay-to-Pay Fees, the Settlement Administrator shall allocate the amount of the Net

1 Settlement Fund that represents the proportional amount of Pay-to-Pay Fees charged by  
2 M&T within the Class Period on that loan. *Id.* In the event that there is more than one  
3 borrower indebted on a loan served by M&T and either one of those borrowers is a Class  
4 Member, the check shall be made payable jointly to all borrowers. *Id.* § 5.4. Cash  
5 payments shall be mailed by check by the Settlement Administrator. *Id.* § 5.7. Prior to  
6 mailing checks, the Settlement Administrator shall attempt to update the last known  
7 address of the Class Member through the National Change of Address database. *Id.*  
8 Checks returned with a forwarding address shall be re-mailed to the new address within  
9 seven calendar days. *Id.* Any checks that are not cashed within 90 days shall be voided  
10 and the money returned to the Settlement Fund. For good cause shown by the Class  
11 Member involved, the Settlement Administrator may reissue a check for up to an  
12 additional 90-day period following the original 90-day period. *Id.*

13 In the event that there are any funds remaining in the Settlement Fund following  
14 the distribution of checks to Settlement Class Members as a result of checks that are  
15 returned undeliverable or not cashed within 90 days, that amount will be distributed on a  
16 *pro rata* basis to Class Members who cashed their checks as a secondary distribution. *Id.*  
17 § 5.9.

18 If there is any amount in the Settlement Fund following the secondary  
19 distribution, or there are not enough funds to make a secondary distribution  
20 economically feasible, then upon approval by the Court, pursuant to the *cy pres* doctrine,  
21 the remaining amount shall be paid to a 501(c)(3) charitable organization that will be  
22 jointly agreed upon by the parties and presented to the Court for its approval. *Id.* The  
23 organization's mission will be aligned with the objectives of the litigation, address the  
24 objectives of the underlying statutes, and target the class members. *See Nachshin v. AOL*  
25 *LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).

### 26 C. Settlement Administrator and Administration Costs

27 Subject to Court approval, the Settlement Administrator is Epiq Class Action &

1 Claims Solutions, a leading class action administration firm in the United States.  
2 Zavareei Decl. Ex. 1 § 1.26. *See also generally* Declaration of Cameron A. Azari, Esq.  
3 On Settlement Notice Program (“Azari Decl.”). All Notice and Administrative Costs  
4 shall be paid from the Settlement Fund. *See* Zavareei Decl. Ex. 1 §§ 1.18, 5.2. The  
5 Settlement Administrator will oversee the provision of notice to the Class Members and  
6 administration of the Settlement Fund.

7 **D. Class Member Release**

8 In exchange for the benefits conferred by the Settlement, all Settlement Class  
9 Members will be deemed to have released the Released Parties<sup>2</sup> from all claims that  
10 were or could have been asserted by the Class Representative or Settlement Class  
11 Members arising out of the collection or attempted collection of Pay-to-Pay Fees.  
12 Zavareei Decl. Ex. 1 §§ 7.1-7.3.

13 **E. Proposed Plan of Notice**

14 The Parties’ proposed notice plan is designed to reach as many Class Members as  
15 possible and is the best notice practicable under the circumstances of the instant case.  
16 *See* Zavareei Decl. Ex. 1 § 6.3. Within ten days or such other time as provided in the  
17 Preliminary Approval Order, M&T, at its own expense, will compile the Settlement  
18 Class List and provide it to the Settlement Administrator and Class Counsel. *Id.* § 6.3.1.  
19 The Settlement Administrator will then update the Settlement Class List by running the  
20 addresses through the National Change of Address database or its equivalent before  
21 mailing the Class Notice. *Id.* § 6.3.1.

22 No later than 30 days after entry of the Preliminary Approval Order, unless such  
23 other time is specified in the order, the Settlement Administrator will mail the Class  
24 \_\_\_\_\_

25  
26 <sup>2</sup> The “Released Parties” are M&T and its parents, subsidiaries, affiliates, vendors, agents, successors,  
27 assignors, assignees, and/or assigns and their respective subsidiaries, affiliates, vendors, agents,  
successors, assignors, assignees, and/or assigns, and each of their respective present, former, or future  
officers, directors, shareholders, employees, representatives, consultants, accountants, and attorneys.

1 Notice. *Id.* § 6.3.2. The Class Notice will be sent by direct first-class mail. *Id.* If a Class  
2 Notice is returned undeliverable without a forwarding address specified, the Settlement  
3 Administrator will cause a skip trace to be run and re-send the Class Notice in  
4 accordance once, with update information obtained from the skip trace (if any). *Id.* The  
5 Class Notice will inform Class Members of basic information about the Settlement.

6 In addition to direct mail notice, the Settlement Administrator will maintain a  
7 dedicated settlement website and a dedicated toll-free number whereby Class Members  
8 may request additional information and documents. *Id.* § 6.4. The settlement website  
9 will prominently display the Class Notice and provide the toll-free number. *Id.* The  
10 settlement website will also host the operative complaint, the Settlement Agreement, any  
11 motions or memoranda seeking approval of the Settlement or approval of attorneys' fees  
12 and costs payable to Class Counsel, and any orders of the Court relating to the  
13 Settlement. *Id.* The settlement website will also provide answers to frequently asked  
14 questions, the text of which shall conform to the Class Notice approved by the Court. *Id.*

#### 15 **F. Opt-Outs and Objections**

16 The Class Notice will advise Class Members of their right to opt out of the  
17 Settlement or to object to the Settlement and/or to Class Counsel's application for  
18 attorneys' fees, costs, and expenses and/or Service Award to the Class Representative,  
19 and of the associated deadlines to opt out or object. *See* Zavareei Decl. Ex. 1 §§ 11-12.

20 Class Members who choose to opt out must submit a written request for exclusion  
21 by first class U.S. mail, postage paid, to the United States Post Office Box established  
22 and maintained by the Settlement Administrator for purposes of this Settlement. *Id.*  
23 § 11.1. Any request for exclusion must be postmarked on or before the deadline set by  
24 the Court and specified in the Class Notice, which shall be no less than sixty calendar  
25 days after the initial mailing of the Class Notice. *Id.* Anyone submitting a request for  
26 exclusion must set forth (a) his or her full name and current address; (b) his or her loan  
27 number with M&T; and (c) his or her desire to be excluded from the Settlement Class.

1 *Id.* Any timely written request for exclusion submitted by any co-borrower or joint  
2 borrower on a given loan will have the effect of excluding all other co-borrowers or joint  
3 borrowers on that loan, none of whom thereafter will be treated as Settlement Class  
4 Members. *Id.* § 11.2. Any person who receives the Class Notice and does not submit a  
5 request to opt out in accordance with the deadlines and other requirements will be bound  
6 by the Settlement absent a court order to the contrary. *Id.* § 11.3.

7 Class Members who wish to object to the Settlement must send a written  
8 Objection to the Settlement Administrator by first class U.S. mail, postage paid, to the  
9 United States Post Office Box established and maintained by the Settlement  
10 Administrator for purposes of this Settlement. *Id.* § 12.1. Objections must also be filed  
11 with the Court and served on Class Counsel and counsel for M&T at the address  
12 specified in § 14 of the Settlement Agreement. *Id.* § 12.1. Objections must be  
13 postmarked on or before the deadline set by the Court and specified in the Class Notice,  
14 which shall be no less than 60 calendar days after mailing of the Notice. *Id.* The  
15 Objection must set forth (a) the Class Member's full name, current address, and  
16 telephone number; (b) the Class Member's loan number with M&T, which shall be  
17 partially redacted by the Settlement Administrator before filing with the Court; (c) a  
18 statement of the position of the objector, including his or her factual or legal grounds for  
19 the position; (d) the names and a summary of testimony of all witnesses the objector  
20 may call in connection with the Objection; (e) copies of all documents the objector  
21 wishes to submit in connection with the Objection; (f) the name(s) of any attorney(s)  
22 representing the objector; (g) the name, court, and docket number of any class action  
23 litigation in which the objecting Class Member and/or the objecting Class Member's  
24 attorney(s) have previously appeared as an objector or provided legal assistance with  
25 respect to an objection; and (h) state whether the objection applies only to the objector, a  
26 specific subset of the class, or the entire class. *Id.* Subject to Court approval, any  
27 objecting Class Member may appear at the Fairness Hearing, in person or through

1 counsel, to show cause why the proposed Settlement should not be approved as fair,  
2 adequate, and reasonable. *Id.*

### 3 **G. Attorneys' Fees and Costs and Service Award**

4 The Settlement Agreement contemplates Class Counsel petitioning the Court for  
5 attorneys' fees, as well as documented, customary costs incurred by Class Counsel.  
6 Zavareei Decl. Ex. 1 §§ 1.3, 8.1. Class Counsel may seek attorneys' fees and expenses in  
7 an amount not to exceed one third of the Settlement Fund. *Id.* § 8.1. Any approved  
8 Attorneys' Fees and Expenses will be paid from the Settlement Fund prior to distribution  
9 to the Settlement Class Members. *Id.* §§ 1.29, 5.2. Class Counsel intends to seek a fee  
10 award and will explain why this fee is warranted in a separately-filed petition for  
11 attorneys' fees and costs. *See* Zavareei Decl. ¶ 24. Class Counsel may also petition the  
12 Court for up to \$10,000 for Ms. Silveira as a Service Award as compensation for her  
13 time and effort in the Action. *See* Zavareei Decl. Ex. 1 §§ 1.24, 8.2. Any approved  
14 awards will be deduced from the Settlement Fund prior to distribution to the Settlement  
15 Class Members. *Id.* § 5.2. The Attorneys' Fees and Expenses and Service Award were  
16 not negotiated until after other material settlement terms were agreed upon. *See* Zavareei  
17 Decl. ¶ 8. Neither final approval, nor the size of the Settlement Fund, are contingent  
18 upon approval of the full amount of requested Service Award or any award of Attorneys'  
19 Fees and Expenses. *Id.* Ex. 1 §§ 8.1-8.2.

### 20 **IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL**

21 Federal Rule of Civil Procedure 23 requires court approval of a class action  
22 settlement. Fed. R. Civ. P. 23(e). Under Rule 23(e)(1), when the decision to grant  
23 preliminary approval depends on whether the Court “will likely be able to: (i) approve  
24 the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on  
25 the proposal.” *Reyes v. Experian Info. Sols., Inc.*, No. SACV 16-00563 AG, 2020 WL  
26 466638, at \*1 (C.D. Cal. Jan. 27, 2020) (citing Fed. R. Civ. P. 23(e)(1)(ii)). “Approval  
27 of a class action settlement requires a two-step process — a preliminary approval



1 followed by a later final approval.” *Behfarin v. Pruco Life Ins. Co.*, No. CV 17-5290-  
2 MWF-FFMx, 2019 WL 7188575, at \*5 (C.D. Cal. Nov. 26, 2019) (quoting *Spann v. J.C.*  
3 *Penney Corp.*, 314 F.R.D. 312, 319 (C.D. Cal. 2016)). Courts in this District generally  
4 consider at preliminary approval whether a proposed settlement is both procedurally and  
5 substantively fair and reasonable. *See, e.g., Behfarin*, 2019 WL 7188575, at \*6.

6 Rule 23, as amended in 2018, provides additional guidance to federal courts  
7 considering whether to grant preliminary approval of a class action settlement. *See* Fed.  
8 R. Civ. P. 23(e), Committee Notes. “[I]n weighing a grant of preliminary approval,  
9 district courts must determine whether ‘giving notice is justified by the parties’ showing  
10 that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii)  
11 certify the class for purposes of judgment on the proposal.” *In re Payment Card*  
12 *Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y.  
13 January 28, 2019) (citing Fed. R. Civ. P. 23(e)(1)(B)(i–ii)); *see also Reyes*, 2020 WL  
14 466638, at \*1 (“[U]nder Rule 23(e)(1), the issue at preliminary approval turns on  
15 whether the Court ‘will likely be able to: (i) approve the proposal under Rule 23(e)(2);  
16 and (ii) certify the class for purposes of judgment on the proposal.’”). Thus, although the  
17 Rule 23(e)(2) factors apply to final approval, a court should also look to them to  
18 determine whether it will likely grant final approval. *See, e.g., Avina v. Marriott*  
19 *Vacations Worldwide Corp.*, No. SACV 18-685 JVS, 2019 WL 8163642, at \*5 (C.D.  
20 Cal. Oct. 25, 2019) (citing and evaluating preliminary approval under Rule 23(e)(2)  
21 factors). Those factors include:

22 (A) the class representatives and class counsel have adequately represented the  
23 class;

24 (B) the proposal was negotiated at arm’s length;

25 (C) the relief provided for the class is adequate, taking into account:

26 (i) the costs, risks, and delay of trial and appeal;

27 (ii) the effectiveness of any proposed method of distributing relief to the

1 class,

2 including the method of processing class member claims;

3 (iii) the terms of any proposed award of attorney's fees, including timing of  
4 payment; and

5 (iv) any agreement required to be identified under Rule 23(e)(3); and

6 (D) the proposal treats class members equitably relative to each other.

7 *Id.* (citing Fed. R. Civ. P. 23(e)).

8 Before the 2018 revisions to Rule 23(e), the Ninth Circuit had developed its own  
9 list of factors to be considered when approving a settlement. *See e.g., In re Bluetooth*  
10 *Headset Products Liab. Litig.*, 654 F.3d 935, 964 (9th Cir. 2011) (citing *Churchill Vill.*,  
11 *L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)); *Avina*, 2019 WL 8163642, at  
12 \*5. These factors include: (1) the strength of the plaintiff's case; (2) the risk, expense,  
13 complexity, and likely duration of further litigation; (3) the risk of maintaining class  
14 action status throughout the trial; (4) the amount offered in settlement; (5) the extent of  
15 discovery completed and the stage of the proceedings; (6) the experience and views of  
16 counsel; (7) the presence of a governmental participant; and (8) the reaction of the class  
17 members of the proposed settlement. *See Churchill Vill.*, 361 F.3d at 575; *Hanlon v.*  
18 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Ms. Silveira will address the  
19 factors relevant to both standards, many of which overlap.

## 20 **V. ARGUMENT**

### 21 **A. The Settlement Agreement warrants preliminary approval.**

22 Each of the relevant factors weighs in favor of Preliminary Approval of this  
23 Settlement. First, the Settlement was reached in the absence of collusion and is the result  
24 of good-faith, informed, arms' length negotiation between competent counsel, in  
25 conjunction with an experienced mediator, Hon. Edward A. Infante of JAMS. Further, a  
26 preliminary review of the factors relating to the fairness, adequacy, and reasonableness  
27 of the Settlement demonstrates that the Settlement warrants preliminary approval.

1 Any settlement requires the parties to balance the merits of the claims and  
2 defenses asserted against the attendant risks of continued litigation and delay. Ms.  
3 Silveira believes her claims are meritorious and she would prevail if this case proceeded  
4 to trial. M&T argues that her claims are unfounded, denies any liability, and has  
5 indicated a willingness to litigate vigorously. Ms. Silveira faces the challenge of a  
6 motion to dismiss, motion for summary judgment, and opposition to a motion for class  
7 certification, as well as the risk of a loss at trial. The only thing that is certain is that if  
8 this case continues in litigation, the Class Members will need to wait much longer before  
9 receiving any recovery. In Class Counsel's experience and informed judgment, the  
10 benefits of settling outweigh the risks and uncertainties of continued litigation, as well as  
11 the attendant time and expenses associated with litigation, discovery, and possible  
12 appellate review. *See* Zavareei Decl. ¶¶ 9-13.

13 **1. The class representative and Class Counsel have adequately**  
14 **represented the proposed class.**

15 Under Rule 23(e)(2)(A), the first factor to be considered is whether the class  
16 representative and Class Counsel have adequately represented the class, including the  
17 nature and amount of discovery undertaken in the litigation. *See Avina*, 2019 WL  
18 8163642, at \*6. Here, Ms. Silveira assisted Class Counsel by providing documents,  
19 reviewing the pleadings, and reviewing the Settlement Agreement. *See* Zavareei Decl.  
20 ¶ 21. Ms. Silveira does not have any conflicts with the proposed class and has  
adequately represented them in the litigation. *Id.* ¶ 22.

21 Class Counsel has also adequately represented the class. Class Counsel is  
22 particularly experienced in the litigation, certification, trial, and settlement of nationwide  
23 class action cases. *Id.* ¶¶ 14-18, Exs. 2-3. And, Class Counsel is currently litigating over  
24 a dozen other proposed class actions against mortgage servicers like M&T involving  
25  
26  
27

1 Pay-to-Pay Fees.<sup>3</sup> *Id.* ¶ 17. In negotiating the Settlement Agreement, Class Counsel had  
 2 the benefit of years of experience and familiarity with the factual and legal bases for this  
 3 case, as well as other cases involving servicers, financial institutions, and fees. *Id.* ¶ 18.  
 4 This understanding of the intricacies of the consumer finance and mortgage servicing  
 5 space provided Class Counsel with the tools and perspective to achieve an outstanding  
 6 recovery for the Class—and prepared them to fight this Action to a successful  
 7 conclusion if necessary. *Id.* ¶¶ 14-18.

8 Before filing the Complaint, Class Counsel spent many hours investigating  
 9 potential claims against M&T. *Id.* ¶ 20. Class Counsel interviewed potential plaintiffs  
 10 and gathered information about M&T's conduct and its impact on consumers. *Id.* This  
 11 information was essential to Class Counsel's ability to evaluate the risks of this litigation  
 12 and the benefits to the Class. Class Counsel also expended significant resources  
 13 researching and developing the legal claims at issue, as well as other settlements of  
 14 similar cases (including one in which Bailey & Glasser LLP, one of the firms

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15  
 16 <sup>3</sup> Tycko & Zavareei LLP and Bailey & Glasser LLP are currently jointly litigating the following Pay-to-  
 17 Pay Fee cases: *Austin v. Lakeview Loan Servicing*, No. 1:20-cv-01296-RDB (D. Md.); *Bingham v.*  
 18 *Caliber Home Loans*, No. 1:20-cv-00338-TDS-LPA (M.D.N.C.); *Brown v. Lakeview Loan Servicing*,  
 19 No. 3:20-cv-00280-FDW-DSC (W.D.N.C.); *Brown v. PennyMac Loan Services*, No. 5:20-cv-01052-  
 20 FMO(KKx) (C.D. Cal.); *Cheney v. Lakeview Loan Servicing*, No. 3:20-cv-03016 (N.D. Cal.); *Dawkins*  
 21 *v. Carrington Mortgage Co.*, No. 20-cv-60998 (S.D. Fla.); *Elbert v. RoundPoint Loan Servicing*, No.  
 22 3:20-cv-00250-MMC(N.D. Cal.); *Owoc v. LoanCare LLC*, No. 20-cv-60805-RS (M.D. Fla.); *Lange v.*  
 23 *Arvest Central Mortgage Co.*, No. 4:20-cv-00293-LPR (E.D. Ark.); *Lembeck v. Arvest Central*  
 24 *Mortgage Co.*, No. 3:20-cv-03277-AGT (N.D. Cal.); *McFadden v. Nationstar Mortgage Co. d/b/a Mr.*  
 25 *Cooper*, No. 1:20-cv-00166-EGS (D.D.C.); *Ochondo v. Specialized Loan Servicing*, No. 1:20-cv-00701  
 26 (D. Colo.); *Tabat v. Select Portfolio Services*, No. 3:19-cv-01264-HES-JRK (M.D. Fla.); *Thomas-*  
 27 *Lawson v. Carrington Mortgage Co.*, No. 1:19-cv-03567-CCB (D.Md.); *Fernandez v. Rushmore Loan*  
*Servicing*, No. 30-2020-01128156-CU-AT-CXC (Cal. Sup. Ct., Orange Cty.); *Miller v. Arvest Central*  
*Mortgage Co.*, No. 132020CA010342000001 (Fla. Dist. Ct., Miami-Dade Cty.).

In addition, Bailey & Glasser LLP is counsel in the following Pay-to-Pay cases: *Bardak v.*  
*Ocwen Loan Servicing*, No. 8:19-cv-1111 (M.D. Fla.); *Bell v. PHH Mortgage Corp.*, No. 20-cv-03187  
(D. NJ); *Barnett v. Caliber Home Loans*, No. 2:19-cv-0309 (S.D. Tex.); *Caldwell v. Freedom Mortgage*  
*Corp.*, No. 3:19-cv-02193-N (N.D. Tex.); *Dees v. Nationstar Mortgage Co.*, No. 2:19-cv-00314 (S.D.  
Tex.); *Mariscal v. Flagstar Bank, F.S.B.*, No. 5:19-cv-02023 (C.D. Cal.); *Mignano v. Flagstar Bank,*  
*F.S.B.*, No. 2019CA01441 (Fla. Dist. Ct. Palm Beach Cty.); *Montesi v. Seterus, Inc.*, No.  
2015CA010910 (Fla. Dist. Ct., Palm Beach Cty); *Phillips v. Caliber Home Loans*, No. 0:19-cv-02711  
(D. Minn.); *Pierce v. Statebridge Co.*, No.1:20-cv-117 (M.D.N.C.); and *Urbina v. Freedom Mortgage*  
*Co.*, No. 1:19-cv-01471 (E.D. Cal.).

1 representing the Settlement Class, served as Class Counsel). *Id.* ¶¶ 17-18 & *supra* n.3.  
2 Based on its foundation of knowledge from other related litigation and its investigation  
3 into this specific case, Class Counsel was well positioned to evaluate the strengths and  
4 weaknesses of Ms. Silveira’s and the Class’s claims, and the appropriate basis upon  
5 which to settle them. Zavareei Decl. ¶¶ 17-18.

6 **2. The Settlement is the product of good-faith, informed, arms’  
length negotiations.**

7 The Settlement Agreement is the result of intensive, arms’ length negotiation  
8 between experienced attorneys who are familiar with class action litigation and the legal  
9 and factual issues in this Action. Zavareei Decl. ¶¶ 3-8. A presumption of fairness  
10 applies when a proposed class settlement, which was negotiated at arm’s-length by  
11 counsel for the class, is presented for Court approval. *See, e.g., Maine State Ret. Sys. V.*  
12 *Countrywide Fin. Corp.*, No. 2:10-cv-00302-MRP(MANx), 2013 WL 6577020, at \*12  
13 (C.D. Cal. Dec. 5, 2013) (citing *Newberg on Class Actions*, § 11.41 (4th ed. 2013)).  
14 Moreover, “[t]he assistance of an experienced mediator in the settlement process  
15 confirms that the settlement is non-collusive.” *Adams v. Inter-Con Sec. Sys. Inc.*, No. C-  
16 06-05248-MHP, 2007 WL 3225466, at \*3 (N.D. Cal. Oct. 30, 2007). *See also Cohorst v.*  
17 *BRE Props.*, No. 3:10-CV-2666-JM-BGS, 2011 WL 7061923, at \*12 (S.D. Cal. Nov. 9,  
18 2011) (“[V]oluntary mediation before a retired judge in which the parties reached an  
19 agreement-in-principle to settle the claims in the litigation are highly indicative of  
20 fairness . . . . We put a good deal of stock in the product of an arms’-length, non-  
21 collusive, negotiated resolution.” (internal citation and quotation marks omitted)).

22 Here, the Parties engaged in two formal mediations between Hon. Edward A.  
23 Infante (Ret.) of JAMS before reaching the Settlement Agreement now sought to be  
24 approved. Zavareei Decl. ¶¶ 3-6. The Parties first mediated before Judge Infante on  
25 October 24, 2019. *Id.* ¶ 3. In advance of that mediation, M&T provided Ms. Silveira  
26 with information about the number of class members and damages. *Id.* Although the  
27 Parties did not settle that day, they continued to discuss possible settlement and agreed

1 to participate in a second mediation. *Id.* ¶ 4. In advance of the second mediation, M&T  
 2 provided additional information about the potential settlement class and associated fees  
 3 paid. *Id.* ¶ 5. The Parties then mediated before Judge Infante again. *Id.*  
 4 ¶ 6. The mediation lasted a full day. *Id.* The parties agreed to the material terms of the  
 5 Settlement, including the size of the common fund. *Id.* The Parties then continued their  
 6 settlement discussions for several weeks as they finalized the terms of the Settlement  
 7 Agreement. *Id.* The Parties' vigorous negotiation of the claims in this action evidences  
 8 an absence of collusion and the presence of fairness and good faith.

### 9 **3. The Settlement is fair, adequate, and reasonable.**

10 A preliminary review of the relevant factors supports the conclusion that the  
 11 Settlement falls within the "range of reason" such that the Court should preliminarily  
 12 approve the Settlement, order that notice be sent to the Class, and schedule a Final  
 13 Approval Hearing. The Ninth Circuit has adopted the following eight-factor test for  
 14 determining whether a settlement is fair, reasonable, and adequate:

15 [T]he strength of the plaintiffs' case; the risk, expense, complexity, and  
 16 likely duration of further litigation; the risk of maintaining class action status  
 17 throughout the trial; the amount offered in settlement; the extent of  
 18 discovery completed and stage of the proceedings; the experience and views  
 19 of counsel; the presence of a government participant; and the reaction of the  
 20 class members to the proposed settlement.

21 *Russell v. Kohl's Dep't Stores, Inc.*, 755 Fed. App'x 605, 608 (9th Cir. 2018) (quoting  
 22 *Hanlon*, 150 F.3d at 1026). While the Class Members cannot react to the settlement until  
 23 after notice goes out, the Court can "properly consider[] the *Hanlon* factors in deciding  
 24 that the settlement [i]s fair, reasonable, and adequate" at the preliminary approval stage.  
 25 *See Russell*, 755 Fed. App'x at 608 (affirming district court's review of *Hanlon* factors  
 26 in preliminary approval order).

27 **First**, the Settlement is fair, adequate, and reasonable in light of the strengths and  
 risks of Ms. Silveira's case. While confident in the strength of her claims, Ms. Silveira  
 and Class Counsel are also pragmatic and recognize the risks inherent in litigation of this  
 magnitude. *See Zavareei Decl.* ¶¶ 10-12. Should the case proceed in litigation, Ms.

1 Silveira could see her claims dismissed or narrowed at the motion to dismiss stage,  
2 summary judgment, at trial, or on a subsequent appeal. She also faces the risk that class  
3 certification could be denied. *Id.* ¶¶ 10-11. Each risk, by itself, could impede the  
4 successful prosecution of these claims at trial and in an eventual appeal—which would  
5 result in a *zero* recovery to the class. *Id.* And even if Ms. Silveira prevailed at trial, any  
6 recovery would likely be delayed for years by an appeal. *Id.* In contrast, the Settlement  
7 provides immediate and substantial benefits to over 112,000 Class Members. *Id.* ¶ 12.

8 It is “plainly reasonable for the parties at this stage to agree that the actual  
9 recovery realized and risks avoided here outweigh the opportunity to pursue potentially  
10 more favorable results through full adjudication.” *Dennis v. Kellogg Co.*, No. 09-cv-  
11 1786-L(WMc), 2013 WL 6055326, at \*3 (S.D. Cal. Nov. 14, 2013). “Here, as with most  
12 class actions, there was risk to both sides in continuing towards trial. The settlement  
13 avoids uncertainty for all parties involved.” *Chester v. TJX Cos.*, No. 5:15-cv-01437-  
14 ODW(DTB), 2017 WL 6205788, at \*6 (C.D. Cal. Dec. 5, 2017). This factor favors  
15 preliminary approval.

16 **Second**, the risks, expense, complexity, and likely duration of further litigation  
17 support preliminary approval of the Settlement. Zavareei Decl. ¶¶ 10-11. This case is  
18 settling in its early stages; if the Settlement is not approved, the parties will likely need  
19 to litigate through multiple dispositive motions and a motion for class certification. *Id.*  
20 ¶ 10. The litigation would likely take years to resolve and involve expensive expert  
21 discovery. *Id.* ¶ 11. Yet there is no guarantee that lengthy litigation and expensive  
22 discovery would lead to greater benefits for the Class Members. *Id.* Instead, there would  
23 be multiple points at which the Class’s claims could be narrowed or dismissed. *Id.* ¶¶ 10-  
24 11. “Regardless of the risk, litigation is always expensive, and both sides would bear  
25 those costs if the litigation continued.” *Paz v. AG Adriano Goldschmeid, Inc.*, No.  
26 14CV1372DMS(DHB), 2016 WL 4427439, at \*5 (S.D. Cal. Feb. 29, 2016). Thus, this  
27 factor favors preliminary approval.

1           **Third**, the risk of maintaining class action status through trial supports preliminary  
2 approval of the Settlement. Zavareei Decl. ¶ 10. The class has not yet been certified, and  
3 M&T will oppose certification if the case proceeds. *See id.* Thus, Ms. Silveira  
4 “necessarily risk[s] losing class action status.” *Grimm v. American Eagle Airlines, Inc.*,  
5 No. LA CV 11-00406 JAK(MANx), 2014 WL 1274376, at \*10 (C.D. Cal. Sept. 24,  
6 2014). This factor favors preliminary approval.

7           **Fourth**, the amount offered in settlement supports preliminary approval. The  
8 Settlement Fund of \$3,325,000 is an excellent recovery for the class, representing  
9 approximately 35% of damages. Zavareei Decl. ¶¶ 9, 12. This settlement is in line with  
10 other settlements in similar cases involving Pay-to-Pay Fees. *See, e.g.*, Final Order and  
11 Judgment, *McWhorter v. Ocwen Loan Servicing, LLC*, No. 2:15-cv-1831 (N.D. Ala.),  
12 Dkt. 71 (\$9.7 million common fund representing 30% of damages in Pay-to-Pay Fee  
13 case); Final Order and Judgment, *Garcia v. Nationstar Mortgage, LLC*, No. 2:15-cv-  
14 1808 (W.D. Wash.), Dkt. 122 (\$3.875 million common fund representing approximately  
15 one third of damages in Pay-to-Pay Fee case)<sup>4</sup>; *Montesi et al. v. Seterus Inc.*, No.  
16 2015CA010910 (Palm Beach County, FL) (\$1.75 million common fund representing  
17 35% of damages in Pay-to-Pay Fee case). *See* Zavareei Decl. ¶¶ 27-29, Exs. 4-6.  
18 Because the settlement amount here is similar to other settlements reached and approved  
19 in similar cases, this factor reflects that the Settlement is fair. *See Calderon v. Wolf Firm*,  
20 No. SACV 16-1622-JLS(KESx), 2018 WL 6843723, at \*7-8 (C.D. Cal. Mar. 13, 2018)  
21 (comparing class settlement with other settlements in similar cases). In light of the  
22 difficulties and expenses Class Members would face to pursue individual claims, and the  
23 likelihood that they might be unaware of their claims, this Settlement Amount is  
24

25  
26  
27 <sup>4</sup> *See also* Motion for Final Approval of Class Action Settlement at 12, *Garcia v. Nationstar Mortgage, LLC*, No. 2:15-cv-1808 (W.D. Wash. Oct. 3, 2018), Dkt. 109 (explaining that the settlement amount represents approximately one-third of damages).



1 appropriate. *See id.*

2 ***Fifth***, the allocation of the Settlement is fair and reasonable, and the manner of  
3 administrating relief will be effective. Payments will be made on a *pro rata* basis  
4 depending on the number of Pay-to-Pay Fees each Class Member paid. Zavareei Decl.  
5 Ex. 1 § 5.3. According to this allocation, Class Members are treated fairly as to one  
6 another because they are compensated according to the amount of Pay-to-Pay Fees they  
7 were charged. *See* Fed. R. Civ. P. 23(e)(2)(D). And, the proposed method of distributing  
8 relief is effective. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). The Parties have agreed upon an  
9 experienced Settlement Administrator to administer the settlement. *See generally* Azari  
10 Decl. Class Members are not required to fill out an unwieldy claim form or even submit  
11 claims at all. And the Settlement Administrator will mail checks to the Class Members,  
12 after running their addresses through the National Change of Address database.

13 ***Sixth***, the terms of the proposed award of attorneys' fees are also fair. *See* Fed. R.  
14 Civ. P. 23(e)(2)(c)(iii). Class Counsel will file a separate motion seeking approval of  
15 Attorneys' Fees and Expenses and a Service Award for Ms. Silveira, and the amounts  
16 that they intend to seek are also reasonable and fair. The Settlement Agreement  
17 authorizes Class Counsel to seek an award of up to one third of the Settlement Fund, and  
18 authorizes Ms. Silveira to seek a service award of up to \$10,000. Zavareei Decl. Ex. 1  
19 §§ 8.1, 8.2. These amounts are well within the range of approval for class action  
20 settlements that provide significant benefits to the class. *See, e.g., Hickcox-Huffman v.*  
21 *U.S. Airways, Inc.*, No. 10-cv-05193, 2019 WL 1571877, at \*2 (N.D. Cal. April 11,  
22 2019) (approving service award of \$10,000); *Noroma v. Home Point Fin. Corp.*, No. 17-  
23 cv-07205, 2019 WL 1589980, at \*4 (N.D. Cal. April 12, 2019) (approving service award  
24 of \$10,000); *see also Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000) (upward  
25 departure from 25% acceptable); *In re Heritage Bond Litig.*, No. 02-ML-1475-  
26 DT(RCX), 2005 WL 1594389, at \*9 (C.D. Cal. June 10, 2005) (approving attorneys'  
27 fees of one-third of the settlement fund).

1            *Seventh*, the extent of discovery completed and the stage of proceedings favors  
2 preliminary approval because the fact that this case is in its early stages means that  
3 neither side has spent significant sums on the litigation. But prior to filing, Class  
4 Counsel engaged in substantial investigation of M&T's Pay-to-Pay Fees, and Class  
5 Counsel have litigated many similar cases based on Pay-to-Pay Fees. Moreover, the  
6 parties engaged in two days of formal mediation before a respected retired judge, and  
7 conducted informal discovery prior to reaching the Settlement. Zavareei Decl. ¶¶ 3-7.  
8 Thus, "the efficiency with which the Parties were able to reach an agreement need not  
9 prevent this Court from granting preliminary approval." *Hillman v. Lexicon Consulting,*  
10 *Inc.*, No. EDCV 16-01186-VAP(SPx), 2017 WL 10433869, at \*8 (C.D. Cal. April 27,  
11 2017).

12            *Eighth*, Class Counsel's view is that this Settlement is an outstanding recovery for  
13 the Class. Zavareei Decl. ¶ 9. Class Counsel is experienced in class action litigation,  
14 including cases concerning Pay-to-Pay Fees. *Id.* ¶¶ 14-18. Based on Class Counsel's  
15 experience, counsel for M&T Bank is also experienced and sophisticated. *Id.* ¶ 19. A  
16 great deal of weight is accorded to the recommendation of counsel, who are most closely  
17 acquainted with the facts of the underlying litigation. *See, e.g., Nat'l Rural Telecomm.*  
18 *Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). Thus, this factor supports  
19 preliminary approval.

20            *Ninth*, there is no government participant and, because the Court has not yet  
21 approved the notice, the Class has not had an opportunity to react, so these factors are  
22 neutral. *See Hillman*, 2017 WL 10433869, at \*8.

23            **B. Certification of the Settlement Class is appropriate.**

24            On a motion for preliminary approval, the parties must also show that the Court  
25 "will likely be able to ... certify the class for purposes of judgment on the proposal."  
26 Fed. R. Civ. P. 23(e)(1). The Settlement Class meets all of the requirements of Fed. R.  
27 Civ. P. 23(a) and (b)(3).

### 1. The Settlement Class Meets the Requirements of Rule 23(a)

1 The Settlement Class as defined meets Rule 23(a)'s numerosity requirement. The  
2 class definition encompasses more than 112,000 Class Members. This number of Class  
3 Members demonstrates that joinder is a logistical impossibility. *See, e.g. Celano v.*  
4 *Marriott Int'l Inc.*, 242 F.R.D. 544, 548-49 (N.D. Cal. 2007) (numerosity is generally  
5 satisfied when a class has at least 40 members); *see also Rannis v. Recchia*, 380 Fed.  
6 App'x 646, 651 (9th Cir. 2010) (same).  
7

8 The Settlement Class also satisfies the commonality requirement, which requires  
9 that class members' claims "depend upon a common contention," of such a nature that  
10 "determination of its truth or falsity will resolve an issue that is central to the validity of  
11 each [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).  
12 There are several common questions in this case, including: whether M&T breached its  
13 contracts with borrowers by charging Pay-to-Pay Fees not authorized by their mortgage  
14 agreements; whether M&T violated the FDCPA and the Rosenthal Act by charging Pay-  
15 to-Pay Fees; whether M&T violated the UCL; whether M&T's cost to process Pay-to-  
16 Pay Transactions is less than the amount that it charged for Pay-to-Pay Fees; and  
17 whether Ms. Silveira and the Classes were damaged by M&T's conduct. Commonality  
18 requires a plaintiff "to demonstrate that their claims 'depend upon a common contention  
19 . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one  
20 of the claims in one stroke.'" *Gonzalez-Tzita v. City of L.A.*, No. CV 16-0194 FMO(Ex),  
21 2019 WL 7790440, at \*5 (C.D. Cal. Dec. 9, 2019) (citing *Dukes*, 564 U.S. at 350); *see*  
22 *also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010). Ms.  
23 Silveira's claims here depend on the common contentions that Pay-to-Pay Fees are  
24 neither authorized by class members' mortgages or permitted by law.

25 Typicality is satisfied if "the claims or defenses of the representative parties are  
26 typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Ms. Silveira's  
27 claims are typical of the claims of Settlement Class Members because they arise from

1 the same course of alleged conduct: charging borrowers a fee to make payments that is  
2 not authorized by borrowers' mortgages or permitted by law. To meet typicality, a claim  
3 or defense is not required to be identical, but rather "reasonably coextensive" with those  
4 of the absent class members. *Felix v. WM. Bolthouse Farms, Inc.*, No.: 1:19-cv-00312-  
5 AWI-JLT, 2020 WL 2175352, at \*5 (E.D.Cal. May 4, 2020) (quoting *Hanlon*, 150 F.3d  
6 at 1020). "The test of typicality is whether other members have the same or similar  
7 injury, whether the action is based on conduct which is not unique to the named  
8 plaintiffs, and whether other class members have been injured by the same course of  
9 conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal  
10 quotation marks and citation omitted); *see also Bias v. Wells Fargo & Company*, 312  
11 F.R.D. 528, 537 (N.D. Cal. 2015) (typicality was met where the named Plaintiffs, like  
12 class members, were all charged for marked-up broker price opinions by mortgage  
13 company).

14 Finally, the adequacy requirement is satisfied when the class representatives will  
15 "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To  
16 make this determination, "courts must resolve two questions: '(1) do the named  
17 plaintiffs and their counsel have any conflicts of interest with other class members and  
18 (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf  
19 of the class?'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (citing  
20 *Hanlon*, 150 F.3d at 1020); *Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 325  
21 (C.D. Cal. 2015).

22 Here, the Plaintiff has no conflicts of interest with other class members, and she  
23 and her counsel will and have vigorously prosecute this case on behalf of the class. *See*  
24 *Zavareei Decl.* ¶ 2; *see supra* Part V.A.1.

## 25 **2. The Settlement Class satisfies the requirements of Rule 23(b)(3).**

26 Class certification is appropriate under Rule 23(b)(3) when "questions of law or  
27 fact common to the members of the class predominate over any question affecting only

1 individual members, and ... a class action is superior to other available methods for the  
2 fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

3 Common questions predominate over any questions affecting only individual  
4 members here. The questions common to all Settlement Class members include whether  
5 M&T Bank can charge Pay-to-Pay Fees if the fees are not expressly authorized by the  
6 mortgage, not permitted by law, and exceed the bank’s actual costs. These questions can  
7 be resolved using the same evidence for all class members and is exactly the kind of  
8 predominant common issue that makes class certification appropriate. *See Tyson Foods,*  
9 *Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (“When one or more of the central  
10 issues in the action are common to the class and can be said to predominate, the action  
11 may be considered proper under Rule 23(b)(3) . . . .” (citation and quotation marks  
12 omitted)). “Implicit in the satisfaction of the predominance test is the notion that the  
13 adjudication of common issues will help achieve judicial economy.” *Longest*, 308  
14 F.R.D. at 326-28 (finding predominance met in class action alleging breach of contract  
15 and UCL violations against mortgage servicer for charging inflated charges and alleged  
16 kickbacks for forced place insurance because claims could be proven through common  
17 evidence of defendants’ uniform policies).

18 Class certification here is also “superior to other available methods for fair and  
19 efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). Classwide resolution  
20 is the only practical method of addressing the alleged violations at issue in this case.  
21 There are thousands of class members with modest individual claims, most of whom  
22 likely lack the resources necessary to seek individual legal redress. *See Local Joint Exec.*  
23 *Bd. of Culinary/ Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163  
24 (9th Cir. 2001) (cases involving “multiple claims for relatively small individual sums”  
25 are particularly well suited to class treatment); *see also Wolin*, 617 F.3d at 1175  
26 (“Where recovery on an individual basis would be dwarfed by the cost of litigating on an  
27 individual basis, this factor weighs in favor of class certification.”).

1           **C. The Court should approve the proposed notice plan.**

2                   **1. The proposed notice plan is adequate and warrants preliminary**  
3                   **approval.**

4           The parties' proposed notice plan is formulated to conform with the procedural  
5           and substantive requirements of Rule 23. Due process under Rule 23 requires that class  
6           members receive notice of the settlement and an opportunity to be heard and participate  
7           in the litigation. *See* Fed. R. Civ. P. 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472  
8           U.S. 797, 812 (1985); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175-76 (1974)  
9           (“[I]ndividual notice must be provided to those class members who are identifiable  
10           through reasonable effort.”). The mechanics of the notice process are left to the  
11           discretion of the Court, subject only to the broad “reasonableness” standards imposed by  
12           due process. *See* *Tapia v. Zale Del. Inc.*, No. 13cv1565-PCL, 2017 WL 1399987, at \*4  
13           (S.D. Cal. April 18, 2017); *see also* *Rosenburg v. I.B.M.*, No. CV06–00430PJH, 2007  
14           WL 128232, \*5 (N.D. Cal. Jan. 11, 2007) (stating that notice should inform class  
15           members of essential terms of settlement including claims procedure and their rights to  
16           accept, object or opt-out of settlement).

17           Notice of the settlement is to be provided as follows: M&T will provide class  
18           members' addresses to the settlement administrator, which will run those addresses  
19           through the NCOA database, then send the Notice via first class mail to all class  
20           members. *Zavareei Decl. Ex. 1 § 6.3*. The settlement administrator will run a skip trace  
21           for Notices returned as undeliverable and will resend the notices to an updated address  
22           within seven days. *Id. § 6.3.2*. The Notice will summarize the settlement, and direct class  
23           members to a settlement website, established by the Settlement Administrator. *See* *Azari*  
24           *Decl. ¶¶ 14-15*. The settlement website will contain information about the settlement, a  
25           form to opt out, and information on how to object to the settlement. *See* *Zavareei Decl.*  
26           *Ex. 1 § 6.3.4*; *Azari Decl. ¶ 17*. Additionally, the settlement website will contain a toll-  
27           free number that Class Members may call to request additional information or

1 documents. Azari Decl. ¶ 18. Finally, it will make available for download the operative  
2 complaint, the Settlement Agreement, motions and memoranda seeking approval of the  
3 Settlement Agreement, and any orders related to the Settlement Agreement. *Id.* ¶ 17.  
4 Importantly, there is no need for class members to file a claim or return a claim form.

5 The operative notice plan is the best notice practicable and is reasonably designed  
6 to reach the settlement class members. *See* Zavareei Decl. ¶ 26; Azari Decl. ¶ 22. When  
7 available, direct mail notice is generally considered the “best notice practicable.” *See*  
8 *Simpao v. Gov’t of Guam*, 369 Fed. Appx. 837, 838-39 (9th Cir. 2010) (holding potential  
9 class members received “best notice practicable under the circumstances” when they  
10 received direct mail notice to their last known addresses). Here, class members will  
11 receive direct mail notice to their last known mailing address. Contact information will  
12 initially be provided from M&T Bank, which, as a mortgage servicer regularly issuing  
13 bills to class members, is highly likely to have the most accurate contact information.  
14 When combined with a process to confirm addresses through NCOA before sending  
15 notice and subsequent skip tracing in the unlikely instance that any notice is returned as  
16 undeliverable, the notice program should cause nearly every class member to receive  
17 direct mail notice at their actual addresses. And in addition to direct notice, there will  
18 also be a publicly available website that will allow class members to view all  
19 information regarding their rights under the Settlement. This design will bring awareness  
20 to as many class members as practicable and should be approved.

21 Moreover, the substance of the notice will fully apprise class members of their  
22 rights. Under Rule 23(e), notice to class members “must ‘generally describe[ ] the terms  
23 of the settlement in sufficient detail to alert those with adverse viewpoints to investigate  
24 and to come forward and be heard.’” *Lane v. Facebook, Inc.*, 696 F. 3d 811, 826 (9th  
25 Cir. 2012) (quoting *Rodriguez v. West Publ’g Corp.*, 563 F. 3d 948, 962 (9th Cir. 2009))  
26 (alteration in original). The Notice contains all the critical information required to  
27 apprise Class Members of their rights under the settlement, directs them to the settlement

1 website, where they can obtain more detailed information, and provides a toll-free  
2 number for Class Members to call with questions. This approach to notice is adequate.  
3 *See e.g. Sarabri v. Weltman, Weinberg & Reis Co., L.P.A*, No. 10cv1777 AJB (NLS),  
4 2012 WL 3809123, at \*2 (S.D. Cal. Sept. 4, 2012) (approving mailed notice where  
5 notice would include the settlement website with a full settlement details and the claim  
6 administrator’s toll free number); *Knutson v. Schwan’s Home Serv., Inc.*, No. 3:12-cv-  
7 00964-GPC-DHB, 2014 WL 3519064, at \*5 (S.D. Cal. 2014) (same). This information  
8 undoubtedly provides “sufficient detail” to allow class members with adverse viewpoints  
9 to conduct further investigation and “come forward to be heard.” *Lane*, 696 F.3d at 826  
10 (holding the sufficient detail standard “does not require detailed analysis of the statutes  
11 or causes of action forming the basis for the plaintiff class’s claims”). Accordingly, this  
12 notice program will fully apprise Class Members of their rights under Rule 23(e) and  
13 should be approved.

#### 14 **VI. CONCLUSION**

15 For the foregoing reasons, Ms. Silveira requests that the Court preliminarily  
16 approve the Settlement, enter the Preliminary Approval Order, appoint her as Class  
17 Representative, appoint Tycko & Zavareei LLP and Bailey & Glasser LLP as Class  
18 Counsel, direct that Notice be distributed to the Settlement Class, and schedule a  
19 Fairness Hearing.

20  
21 Dated: May 27, 2020

Respectfully submitted,

22  
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