

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MUFG UNION BANK, N.A. (F/K/A
UNION BANK, N.A.),

Plaintiff,

- against -

AXOS BANK (F/K/A BANK OF
INTERNET USA), AXOS FIDUCIARY
SERVICES, AXOS NEVADA, LLC, EPIQ
SYSTEMS, INC., and SELLER SUB, LLC,

Defendants.

Index No. 652474/2019

Honorable Barry R. Ostrager

VERIFIED AMENDED COMPLAINT

Plaintiff MUFG Union Bank, N.A. (f/k/a Union Bank, N.A.) (“Union Bank” or “Plaintiff”), by and through undersigned counsel, brings this Complaint for damages, injunctive relief, and declaratory relief against Epiq Systems, Inc. (“Epiq”) for breach of contract and breach of the implied covenant of good faith and fair dealing; against Axos Bank (f/k/a Bank of Internet USA) (“Axos Bank”), Axos Fiduciary Services (“Axos Fiduciary”), Seller Sub, LLC (“Seller Sub”), and Axos Nevada, LLC (“Axos Nevada,” and together with Axos Bank, Axos Fiduciary, and Seller Sub, “Axos”) for tortious interference with contractual relations, breach of contract, and breach of the implied covenant of good faith and fair dealing; and against Axos and Epiq (collectively, “Defendants”) for declaratory judgment, and alleges as follows:

NATURE OF THE ACTION

1. Union Bank has a substantial business providing deposit services to chapter 7 bankruptcy trustees. Prior to Axos' and Epiq's wrongful conduct, Union Bank held approximately \$500 million in trustee deposits and, on information and belief, had more chapter 7 trustee deposits than any bank in the market, save for one. Axos, with Epiq's participation, hatched a scheme to steal that business. To accomplish its goal, Axos intentionally procured multiple breaches by Epiq of Epiq's contract with Union Bank and then breached that contract itself after Axos acquired the contract.

2. Chapter 7 trustee deposit services must be offered in conjunction with bankruptcy trustee software. Union Bank, in order to provide its deposit services to chapter 7 trustees, therefore had a contract with Epiq, a software provider. That contract is referred to as the Joint Services Agreement (the "JSA," which because of confidentiality restrictions in the JSA is not attached to this Complaint). It provided that Epiq and Union Bank were "to jointly promote [each other's] products and services to bankruptcy and insolvency professionals and other fiduciary types as may be agreed upon by the parties on a case-by-case basis." The JSA contained certain restrictions that prevented Union Bank from using or negotiating to use software other than Epiq's. Union Bank agreed to these restrictions because Epiq could not take bank deposits and thus could not compete with Union Bank.

3. Axos knew that if it were to acquire Epiq's trustee software operations, Axos could then replace Union Bank as the provider of deposit services for the chapter 7 trustees and thereby capture Union Bank's trustee business; something Epiq could not have done on its own. Axos recognized that because of the restrictions on Union Bank in the JSA, Axos could motivate Union Bank's trustee customers to move their deposits to Axos by offering them various inducements

that Axos could prevent Union Bank from matching because changes to the fees Union Bank charged its chapter 7 trustees required Union Bank to obtain the JSA counter-party's consent.

4. Axos' problem was that Epiq's agreement with Union Bank does not allow the contract to be assigned to any counter-party without Union Bank's permission. Axos thought it had a solution: The Epiq trustee software business could be placed into a special purpose subsidiary that Epiq wholly owned, called Seller Sub, and then Axos would cause Axos Nevada to buy the subsidiary from Epiq and, with it, the JSA.

5. But, Axos' scheme violates both the terms of the JSA and its intent, which was to jointly promote Union Bank's and Epiq's products and services. In particular, the original JSA prohibited the assignment of Epiq's duties, obligations, rights, and privileges under the JSA without Union Bank's consent. The only exception in the JSA potentially applicable here is where the assigning party sells all or substantially all of its assets to the assignee. But, on information and belief, Epiq's transfer of its trustee software business to Seller Sub was a transfer of, at most, only 33.3% of its assets—hardly all or substantially all of its assets.

6. In addition, Axos' scheme violated an amendment that Epiq entered into a mere five days before Axos Nevada—at the behest and direction of Axos Bank—bought Epiq's trustee software unit. That amendment explicitly requires that Epiq itself provide the software services to Union Bank and prohibits any and all assignments (including assignments pursuant to a sale) without Union Bank's consent. Further, the amendment allowed Union Bank to void any assignment that violated the terms of the JSA. Axos tortiously interfered with Union Bank's contract with Epiq by inducing Epiq to breach the JSA by assigning it to Seller Sub and then to Axos Nevada without Union Bank's consent.

PARTIES

7. Plaintiff Union Bank is a national bank with its home office located in the City of San Francisco, State of California.

8. On information and belief, defendant Axos Bank is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of California.

9. On information and belief, defendant Axos Nevada is a Nevada limited liability company, and a subsidiary of Axos Bank.

10. On information and belief, defendant Seller Sub is a Delaware limited liability company, wholly owned and operated by Axos Bank. Seller Sub was originally formed by Epiq specifically to hold Epiq’s chapter 7 trustee software business and be sold to Axos Bank. On information and belief, Seller Sub now does business as Axos Fiduciary.

11. On information and belief, defendant Axos Fiduciary, having its principal place of business at 7300 College Blvd, Lighton Plaza 1, Suite 450, Overland Park, Kansas 66310, is the same entity as Seller Sub and operates Axos’ chapter 7 trustee banking business. (The address referenced in this paragraph is the only address listed on Axos Fiduciary’s website, available at: <https://www.axosfiduciaryservices.com/Contact>.)

12. On information and belief, defendant Epiq is a corporation organized and existing under the laws of the State of Missouri, having its principal place of business at 501 Kansas Ave, Kansas City, Kansas 66105.

JURISDICTION AND VENUE

13. The Court has personal jurisdiction over the Parties under Civil Practice Law and Rules (“CPLR”) § 301 and General Obligations Law §§ 5-1401 and 5-1402 because (i) both the

value of the JSA and the amount in controversy in this action substantially exceed \$1 million and, (ii) in the JSA, the parties (including Axos, which purportedly has acquired Epiq's rights, duties, and obligations under the JSA and has asserted that it has rights under it):

- (a) expressly agreed that the JSA is “governed by and construed in accordance with the laws of the state of New York, without reference to its conflict of law provisions” (JSA § 24); and
- (b) “irrevocably and unconditionally consent[ed] to and submit[ted] to the exclusive jurisdiction of the courts of the State of New York and of the United States of America located in the City of New York, for any actions, suits or proceedings arising out of or relating to [the JSA] and the transactions contemplated thereby.

14. Venue is proper in this Court under CPLR § 501 because, under the JSA, the parties (including Axos, which has asserted that its rights are under the JSA):

- (a) irrevocably and unconditionally waived and agreed not to plead or claim in any such court any objection to venue; and
- (b) irrevocably and unconditionally waived and agreed not to plead or claim in any such court that such court is an inconvenient forum.

FACTS

A. Union Bank and Epiq Enter into the Joint Services Agreement, Including an Anti-Assignment Provision

15. On or about September 27, 2012, Union Bank and Epiq entered into the JSA, effective as of October 1, 2012.

16. As noted, the stated purpose of the JSA was “to jointly promote [Union Bank’s and Epiq’s] products and services to bankruptcy and insolvency professionals and also other fiduciary types as may be agreed upon by the parties on a case-by-case basis.” (JSA § 1.A.)

17. Under the JSA, the parties agreed that the “Agreement and the rights, privileges, duties and obligations of the parties hereto may not be assigned or delegated by any party without the prior written consent of the other party.” (JSA § 23) (emphasis added).

18. Prior to the Fifth Amendment, there were two limited exceptions to this anti-assignment provision:

- “for the assignment by any party of its rights and privileges hereunder to a person or entity controlling, controlled by or under common control with such party (it being understood that no such assignment shall relieve the assigning party of its duties or obligations hereunder, which must be explicitly guaranteed by the assigning party),” or
- “the assignment and delegation by any party of its rights, privileges, duties and obligations hereunder to any person into or with which the assigning party shall merge or consolidate or to which the assigning party shall sell all or substantially all of its assets, provided that the assignee shall formally agree in writing to assume all the rights and obligations of the assigning party created hereby.”

(JSA § 23) (emphasis added).

19. In consideration of these anti-assignment provisions, Union Bank, for its part, agreed in the JSA to a long exclusivity period with Epiq until October 2015 (under which even negotiations with Epiq’s competitors were prohibited), and somewhat relaxed exclusivity restrictions thereafter until the termination of the JSA:

Bank represents that it has not, and will not from and after the execution of this Agreement by both parties until the third (3rd) anniversary of the Effective Date of this Agreement (regardless of whether this Agreement is terminated prior to the third (3rd) anniversary of the Effective Date), negotiate, execute, perform under or announce an agreement with any party other than Epiq to provide to End-User Clients the same or similar cooperative products and services offered by the parties under this Agreement. Bank further represents that from and after the third (3rd) anniversary of the Effective Date of this Agreement, Bank shall not directly or indirectly perform under or announce an agreement with any party other than Epiq to provide to End-User Clients the same or similar cooperative products and services offered by the parties under this Agreement prior to the Effective Date of Termination of this Agreement.

(JSA § 5.B) (emphasis added).

20. Union Bank also agreed, on behalf of itself and its subsidiaries, “not to develop or have developed any software for use by End-User Clients or Joint Clients that are competitive with any Epiq Software provided by Epiq to End-User Clients, including, without limitation, any bankruptcy case management software marketed to and used by End-User Clients.” (JSA § 5.C.)

B. Epiq and Union Bank Enter into a Fifth Amendment to the JSA, Including an Even More Stringent Anti-Assignment Provision

21. Following execution of the original JSA, the parties entered into a total of five amendments to that agreement.

22. On or about March 28, 2018, Union Bank and Epiq entered into the fifth amendment to the JSA (the “Fifth Amendment”), which was effective as of March 29, 2018.

23. The Fifth Amendment added further restrictions on assignments, which apply specifically to Epiq—and make no exception for assignments to affiliates or assignments via merger, acquisition, other change in control, or otherwise.

24. Specifically, the Fifth Amendment provides that: “Epiq shall perform the obligations described in this Agreement and in the Statement(s) of Work, if any, itself. Epiq may not assign, delegate or subcontract this Agreement or any of its rights, duties or obligations under this Agreement without Bank’s prior express written consent. . . .” (Fifth Amendment § 7, new JSA § 38) (emphasis added).

25. In addition, under the Fifth Amendment, “[a]ny purported assignment or delegation not consented to by Bank shall be void at Bank’s option and shall constitute a material breach of this Agreement. Epiq acknowledges that Bank has entered this Agreement in reliance on Epiq’s ability and agreement to personally perform Epiq’s obligations hereunder. . . .” *Id.* (emphasis added).

26. The Fifth Amendment addressed the agreement that Epiq and Union Bank had made to allow their joint customers to access Union Bank deposit information through Epiq's portal. In consideration of these and other additional provisions in the Fifth Amendment, Union Bank, among other things, agreed to new provisions regarding Force Majeure and Termination for Cause that were to Epiq's benefit.

27. In keeping with the agreement that Epiq perform the obligations under the JSA itself, Exhibit F to the Fifth Amendment, which "[d]escribes the performance standards and service levels to be achieved by Epiq in providing the Services," required that Epiq "[o]perate the Services on a Server owned and maintained by Epiq." (Fifth Amendment, Ex. F ¶ 2.)

28. At no time has Union Bank ever provided express written consent to any assignment, delegation, or subcontracting by Epiq of its rights, duties, or obligations under the original JSA or the JSA as amended, or to the migration of the Epiq, now Axos, chapter 7 banking software from an Epiq server to a server operated and maintained by Axos.

C. Epiq Breached the JSA and Fifth Amendment by Assigning Its Rights and Obligations to Seller Sub LLC, Which was Then Acquired by Axos Nevada, All Without Union Bank's Prior Express Written Consent

28. On information and belief, Seller Sub, a wholly-owned subsidiary of Epiq, was formed on March 27, 2018, one day before Union Bank and Epiq executed the Fifth Amendment.

29. On information and belief, Epiq formed Seller Sub at the request of Axos. On information and belief, Axos requested that Epiq form Seller Sub in order to circumvent the JSA's restrictions on assignments.

30. On April 3, 2018—less than a week after the Fifth Amendment took effect—Epiq transferred and assigned all of its rights and privileges, as well as its duties and obligations under the JSA to Seller Sub (the "Transfer"). The JSA did not permit Epiq to transfer its duties and obligations to Seller Sub without the consent of Union Bank.

31. In the Transfer, Epiq transferred the assets, including Epiq's duties and obligations under the JSA, constituting its chapter 7 trustee software unit to Seller Sub. The Transfer entailed, at most, a transfer of only 33.3% of Epiq's assets, and not all or substantially all of Epiq's assets.

32. It is apparent that the purpose of the Transfer was to allow Epiq's business to be acquired by Axos Nevada without Union Bank's consent, and thereby destroy Union Bank's ability to receive the fruits of the JSA.

33. The very same day, with Epiq's agreement, Axos Nevada purportedly acquired the LLC shares of Seller Sub, and with them, Epiq's rights, privileges, duties, and obligations under the JSA (such transactions collectively, the "Acquisition"). On information and belief, Epiq and Axos agreed not to seek Union Bank's consent for the Transfer or the Acquisition.

34. The Transfer and Acquisition violated both the JSA before any amendments, and the Fifth Amendment because Union Bank was never asked for, and did not give, its prior express written consent to these transactions, and the Transfer and Acquisition involved the transfer of Epiq's duties and obligations and did not involve the sale by Epiq of all or substantially all of its assets.

35. As a result of the Transfer and Acquisition, Epiq has not itself been performing its duties under the JSA since April 2018. Instead Seller Sub and/or Axos have been performing those duties.

36. In addition, as a result of the Acquisition, Epiq is not able to guarantee Seller Sub's and/or Axos' performance of Epiq's duties and obligations under the JSA.

37. Since the Acquisition, Axos has used its position as the chapter 7 trustee banking software provider for Union Bank's customers to move a substantial amount of the chapter 7 trustee banking business that had been Union Bank's to Axos.

38. On information and belief, Axos has been contacting these Union Bank customers since August 2018 to try to convince them to move their deposits to Axos.

39. Among other things, Axos has been telling some of these customers that they must move their deposits because Union Bank's contract with Epiq will expire at or before year end and will not be renewed.

40. Such disclosure violates Section 7.C.4 of the JSA, which prohibits the parties from "communicat[ing] with Joint Clients regarding the termination of this Agreement no more than six months prior . . . to the Effective Date of Termination, in a fashion that is commercially reasonable and acceptable to both parties." Given that the purported Effective Date of Termination of the JSA is January 1, 2020, Epiq and Axos were forbidden until July 1, 2019, to communicate to Joint Clients that the JSA had been terminated.

41. In addition, knowing that the JSA requires Union Bank to charge most of its chapter 7 trustee customers fees, Axos has been contacting these very same customers and offering them trustee deposit services without any fees. In some instances, relationship managers for Axos have told Union Bank trustees that they have a fiduciary duty to move their funds to a no-fee banking environment, such as that which exists at Axos.

42. After the Acquisition, Union Bank asked Axos, which purported to own Epiq's chapter 7 trustee banking software business, for permission to reduce its fees, but Axos refused to grant such permission. According to testimony given in this proceeding by Axos Fiduciary's Executive Vice President and Managing Director, the reason Axos declined Union Bank's request, even though Epiq had previously granted similar requests by Union Bank prior to the Acquisition, was to ensure that chapter 7 trustees are financially incentivized to move their deposits from Union Bank to Axos Bank.

43. This refusal to agree to a reduction in Union Bank's fees was calculated to advantage Axos to Union Bank's detriment, and was contrary to Epiq's obligation under the JSA to promote Union Bank's products.

44. In addition, on information and belief, in order to induce Union Bank's chapter 7 trustee customers to move their deposits to Axos, Axos has been misinforming some of these customers that Union Bank's relationship manager is going to retire and that the customers will therefore not receive the same support from Union Bank they have previously received and/or that Union Bank is leaving the chapter 7 trustee business.

45. As a result of Axos' wrongful, misleading, and unfair campaign of solicitation, as of April 26, 2019 (the date of Union Bank's original Complaint in this action), (i) approximately forty of Union Bank's chapter 7 trustee customers had moved \$108.9 million in deposits to Axos Bank; (ii) approximately twenty of such customers had moved \$40.6 million in deposits to other banks, many of which, on information and belief, have no-fee arrangements that Axos prevented Union Bank from matching; (iii) an additional twelve customers had notified Union Bank that they plan to move \$13.5 million in deposits to Axos Bank prior to the end of June 2019; and (iv) an additional two customers had notified Union Bank that they plan to move \$3.1 million in deposits to other banks prior to the end of June 2019.

46. Axos' wrongful solicitation continued after the filing of Union Bank's original Complaint in this action, resulting in the loss of approximately \$40 million in additional deposits to Axos Bank as of June 30, 2019.

47. Union Bank has thus lost more than \$200 million in deposits as a result of Axos' actions. If Axos were allowed to continue to leverage its improperly acquired position as software provider to Union Bank's chapter 7 trustees, and use this position to aggressively solicit trustees

to move their deposits from Union Bank to Axos Bank, Union Bank believes that it would lose an additional approximately \$300 million in chapter 7 trustee deposits.

D. Epiq's Representatives Notify Union Bank of the Transfer and Acquisition

48. On April 4, 2018, individuals who had previously been employed by Epiq's chapter 7 trustee business—including Jill Bauer—notification Union Bank by e-mail and telephone that Epiq's Trustee and Fiduciary Services business had been acquired by a "subsidiary" of Bank of Internet (n/k/a Axos Nevada, LLC). None of the communications Union Bank received that day from these individuals referenced an entity called "Seller Sub, LLC." Union Bank, however, was assured by Ms. Bauer that it would still be "business as usual." It soon learned that this was not true.

49. On Friday, June 8, 2018, just over two months after the Transfer and Acquisition, Seller Sub sent a letter to Union Bank (the "Transfer Letter"), stating: "On or about April 3, 2018, Epiq transferred the Agreement to its wholly owned subsidiary 'Seller Sub, LLC,' a Delaware limited liability company, which continues to hold Epiq's interest in the Agreement." (Due to confidentiality restrictions in the JSA, the Transfer Letter is not attached to this Complaint.)

50. Such "transfer" was, in both form and substance, the very manner of assignment and delegation expressly prohibited under the JSA, including as amended by the Fifth Amendment.

51. In the Transfer Letter, Seller Sub further notified Union Bank that it was terminating the JSA, and that a contractually-required "Disengagement Period" would commence.

52. Union Bank did not receive the Transfer Letter on June 8, 2018. Union Bank's Corporate Executive under the JSA, Kimberly Siebler, however, did receive a telephone call that day from Jill Bauer (by then a representative of both Seller Sub and other Axos entities), during which Ms. Bauer informed Ms. Siebler that the JSA was being terminated.

53. Union Bank first received the Transfer Letter on Monday, June 11, 2018. Prior to that date, Union Bank had never heard of Seller Sub.

E. Union Bank Notifies Epiq of Its Breaches of the JSA, but Epiq Fails to Cure

54. Upon learning of the Transfer and Acquisition, Union Bank engaged in lengthy discussions with individuals it believed to be representatives of Epiq, Seller Sub, and Axos to obtain more information about the Transfer and Acquisition, and to share Union Bank's concerns about the acquisition of Epiq's business by Axos. Union Bank also unsuccessfully sought permission to match the financial offers being made by Axos and other banks to Union Bank's chapter 7 trustee customers. That process continued into early 2019.

55. Under Section 31 of the JSA, "[n]o . . . waiver of this Agreement will be implied from any conduct of the parties."

56. On February 21, 2019, after negotiations with Axos failed, Union Bank sent a notice of breach (pursuant to Section 25 of the JSA) to Epiq, Seller Sub, and Axos Bank (the "Breach Notice," which is not attached to the Complaint due to confidentiality restrictions in the JSA, but is quoted from herein as necessary).

57. In the Breach Notice, Union Bank declared that the Transfer and Acquisition constitute material breaches by Epiq of the JSA and Fifth Amendment, as well as a violation of the covenant of good faith and fair dealing implied in every contract under New York law.

58. Union Bank further notified Epiq, Seller Sub, and Axos Bank in the Breach Notice that the Transfer and Acquisition constitute tortious interference by Axos Bank with the contractual relations between Union Bank and Epiq, as memorialized in the JSA, as amended.

59. In light of these material breaches and tortious acts, Union Bank declared the existence of a Dispute between Union Bank and Epiq pursuant to Section 25 of the JSA and referred the Dispute to the parties' Corporate Executives for resolution.

60. By agreement of the parties, a meeting of the Corporate Executives to resolve the Dispute was scheduled for Friday, April 12, 2019 (the "April 12th Meeting").

61. Though the Corporate Executive for Union Bank appeared for the April 12th Meeting, no Corporate Executive for Epiq appeared.

62. Union Bank has therefore complied with all conditions precedent under the JSA for the filing of this suit.

F. Axos Moves its Chapter 7 Trustee Services Software Off of Epiq Servers

63. By executing the Fifth Amendment, Epiq agreed to “perform the obligations described in this Agreement and in the Statements of Work, if any, itself.” (Fifth Amendment § 7, new JSA § 38) (emphasis added).

64. Union Bank relied on the provision in the Fifth Amendment, and the language in its accompanying Exhibit F (*see supra* ¶ 27), requiring Epiq to own and operate the servers on which its chapter 7 trustee banking software was contained, in order to meet its own internal third-party risk management requirements, which ensure that Union Bank complies with its regulatory obligations.

65. On information and belief, however, on or around February 23-24, 2019, shortly after Union Bank sent the Breach Notice to Axos Bank and Seller Sub, Axos migrated its (formerly Epiq’s) chapter 7 bankruptcy trustee services software from Epiq servers to Axos servers.

66. On a February 28, 2019 phone call, Union Bank shared its concerns with Axos that the software move was contrary to and in breach of the JSA. Axos ignored Union Bank’s position and refused to reverse the software migration or negotiate further.

G. Axos Ramps Up Its Efforts to Steal Union Bank’s Customers

67. On information and belief, on or about March 22, 2019—after Union Bank sent its Breach Notice and prior to the April 12th Meeting—Axos put in motion a new plan to even more aggressively solicit chapter 7 trustee deposits away from Union Bank and move them to Axos.

68. That plan, which was approved by the chief executive officer of Axos Bank, has involved stepping up its activities, including continuing to make misleading statements about Union Bank and statements that Axos was not permitted to make under the JSA, which were designed to cause Union Bank's chapter 7 trustee customers to agree to move their deposits from Union Bank to Axos.

69. For example, Axos representatives have been telling some of Union Bank's chapter 7 trustee clients that they have 30 days to move their deposits from Union Bank to Axos.

70. Axos has been telling other Union Bank customers that they must move their deposits to Axos Bank if they want to continue using the Epiq software, because Axos now owns that software.

71. On information and belief, as of the date of this Complaint, Axos is continuing to pressure Union Bank's chapter 7 trustee clients to move their deposits from Union Bank to Axos.

72. As a result of this campaign, since April 26, 2019 (the date of Union Bank's original Complaint in this action), Union Bank has lost more than \$40 million in deposits to Axos Bank.

73. In addition, on information and belief, there are other banks similarly situated to Union Bank, whose chapter 7 trustee customers Axos is actively trying to divert for itself. Union Bank understands that at least one of those banks, which does not have an exclusivity provision in its contract with Epiq, has contracted with a different trustee software provider in an effort to salvage its business.

74. Prior to June 27, 2019—the date of this Court's so-ordered stipulation resolving Union Bank's motion for preliminary injunction against Axos Bank and Seller Sub (NYSCEF Doc. No. 140)—Union Bank had not held any substantive negotiations with alternative software

providers (out of an abundance of caution, though it was allowed to do so under the JSA), let alone announced or performed under an agreement with any alternative software provider.

75. Union Bank did not do so because Axos had told Union Bank that it would consider it to be a breach of the JSA if Union Bank were to begin such negotiations. Union Bank did not want to risk Axos depriving Union Bank of the right to use the Epiq software, which Union Bank needed to service its remaining chapter 7 trustee customers.

76. This Court entered a temporary restraining order against Axos Bank and Seller Sub on May 16, 2019. On May 17, 2019, this Court subsequently entered a revised temporary restraining order against Axos Bank and Seller Sub (NYSCEF Doc. No. 41) (the “TRO”).

Pursuant to the TRO,

[t]he defendants and their respective subsidiaries affiliates officers, directors, trustees, employees, agents and representatives individually and collectively are temporarily enjoined and restrained from communicating with chapter 7 trustees to induce them to move their deposits from Union Bank to Axos or communicating with chapter 7 trustees with respect to the JSA including without limitation the provisions or purported termination thereof.

And it is further ordered that Axos continue to provide to Union Bank software services as required by the JSA. And it is further ordered that for the avoidance of doubt, Union Bank is permitted to advise chapter 7 trustees whose deposits are already scheduled to move to Axos that they are not required to move those deposits out of Union Bank.

77. On June 27, 2019, this Court replaced the TRO with a so-ordered stipulation to preliminary injunction (NYSCEF Doc. No. 140). The terms of injunctive relief provided for by the stipulation include that: (1) Union Bank is allowed to provide a no-fee banking option to its current, former, and future clients, and that in such cases, it will not be required to make fee payments (as directed by the JSA) to Axos, although Union Bank will still make payments (again, as directed by the JSA) to Axos based upon the total value of chapter 7 trustee joint client deposits

at Union Bank; (2) Union Bank can partner with a new software provider, to begin serving Union Bank customers on January 1, 2020, and extoll now the virtues of this new provider to the market; and (3) Axos must fully cooperate with Union Bank regarding all Union Bank third-party risk management-related requests. The Court also warned the parties not to make misleading statements about each other.

AS AND FOR A FIRST CAUSE OF ACTION

**(Breach of Contract)
(Against Epiq)**

78. Plaintiff incorporates by reference paragraphs 1 through 77 as if fully alleged herein.

79. The JSA, as amended up through and including the Fifth Amendment, constitutes a binding and valid agreement by and among Union Bank and Epiq.

80. The JSA prohibited any assignment by Epiq of its rights, privileges, duties, and obligations under the JSA to a third party without Union Bank's prior express written consent.

81. Union Bank has performed all of its obligations under the JSA, as amended.

82. Epiq agreed to both the Transfer and Acquisition.

83. The Transfer and Acquisition did not involve the sale of all or substantially all of Epiq's assets.

84. The Transfer and Acquisition constitute an assignment and delegation of Epiq's rights, privileges, duties, and obligations under the JSA, in contravention of the anti-assignment provisions of the JSA, including as amended by the Fifth Amendment.

85. Epiq has willfully breached the JSA in the manner described herein, including by, among other things, conducting the Transfer and Acquisition.

86. As a direct result of Epiq's breaches of the JSA, Union Bank has suffered many

millions of dollars in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

87. Further, under the terms of the JSA, as amended, Union Bank is entitled to void the transfer of the JSA to Axos.

88. Epiq has agreed to refrain from certain activities with regard to the JSA. In addition, Union Bank has already received preliminary injunctive relief in the above-captioned action against Axos Bank and Seller Sub in the form of a so-ordered stipulation (NYSCEF Doc. No. 140). To the extent that Epiq assists Axos in luring chapter 7 trustee deposits away from Union Bank, Union Bank reserves the right to seek additional injunctive relief against Epiq.

AS AND FOR A SECOND CAUSE OF ACTION

**(Breach of Duty of Good Faith and Fair Dealing)
(Against Epiq)**

89. Plaintiff incorporates by reference paragraphs 1 through 88 as if fully alleged herein.

90. Under the original JSA, Epiq was prohibited from assigning its rights, privileges, duties, or obligations under the JSA to a third party, without Union Bank's prior written express consent, subject to two exceptions not applicable here.

91. In addition, under the original JSA, Epiq was in all circumstances required to guarantee performance of its duties and obligations to Union Bank, even in the event of an assignment by Epiq of its rights and privileges under the JSA to a wholly-owned subsidiary or affiliate under common control.

92. On information and belief, Epiq formed Seller Sub only because Axos requested it, and did so with the intent to circumvent the JSA's anti-assignment provisions.

93. Epiq agreed to the transactional documents for both the Transfer and Acquisition.

94. Though the Transfer was an assignment by Epiq to Seller Sub (a wholly-owned subsidiary of Epiq, and not a third party), it—in conjunction with the Acquisition—accomplished the same result as if Epiq would have formally and directly assigned its rights, privileges, duties, and obligations to Axos Nevada: it deprived Union Bank of performance by the party with which it contracted.

95. Accordingly, even if the Transfer did not constitute a formal breach of the JSA, it achieved the same result, and prevented Union Bank from receiving the fruits of the contract.

96. Epiq has thus violated the covenant of good faith and fair dealing implied in the JSA under New York law. Due to this violation Union Bank has suffered many millions of dollars in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

97. Further, under the terms of the JSA, as amended, Union Bank is entitled to void the transfer of the JSA to Axos.

98. Epiq has agreed to refrain from certain activities with regard to the JSA. In addition, Union Bank has already received preliminary injunctive relief in the above-captioned action against Axos Bank and Seller Sub in the form of a so-ordered stipulation (NYSCEF Doc. No. 140). To the extent that Epiq assists Axos in luring chapter 7 trustee deposits away from Union Bank, Union Bank reserves the right to seek additional injunctive relief against Epiq.

AS AND FOR A THIRD CAUSE OF ACTION

**(Tortious Interference with Contractual Relations)
(Against Axos)**

99. Plaintiff incorporates by reference paragraphs 1 through 98 as if fully alleged herein.

100. The JSA, as amended, is a valid contract between Union Bank and Epiq.

101. On and prior to April 3, 2018, Axos Bank knew that Union Bank and Epiq were parties to the JSA, as amended.

102. Despite this knowledge, Axos (all of the Axos defendants working together) intentionally orchestrated the Transfer and Acquisition, and thereby caused Epiq to breach the JSA.

103. On information and belief, Epiq formed Seller Sub and transferred the JSA to Seller Sub only because Axos requested it do so. Further, on information and belief, Axos and Epiq agreed not to seek Union Bank's consent to the transfer of the JSA to Seller Sub or to the subsequent acquisition of Seller Sub by Axos Nevada.

104. But for Axos' conduct, the Transfer and Acquisition would not have been structured the way they were.

105. Axos, without justification, caused Epiq to breach the JSA, for the purpose of diverting Union Bank's chapter 7 trustee customers to Axos Bank.

106. The limitations on liability set forth in Section 22 of the JSA do not apply to Axos' tortious interference with Union Bank's and Epiq's contractual relationship under the JSA.

107. As a result of Axos' procurement of Epiq's breach, Union Bank has suffered many millions of dollars in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

108. Further, as set forth herein, Axos' tortious interference with Union Bank's contract with Epiq (the JSA) has allowed it to steal many of Union Bank's chapter 7 trustee customers, and may cause Union Bank to suffer irreparable harm in the form of the loss of its entire chapter 7 trustee banking business, if Axos is permitted to continue these efforts. Even

were Union Bank able to retain some of its chapter 7 trustee customers and preserve its chapter 7 trustee banking business as a result of the so-ordered stipulated preliminary injunction (NYSCEF Doc. No. 140) (which is not a foregone conclusion), it will take years for Union Bank to recover its position in the chapter 7 trustee deposit business and it may never regain its prominence.

109. Union Bank has no adequate remedy at law for such irreparable harm.

110. To the extent that Axos continues to make misstatements about Union Bank or engages in other types of unfair competition, Union Bank reserves its right to seek further injunctive relief from this Court to rectify the irreparable harm it has suffered and may suffer in the future.

111. Union Bank has already received injunctive relief in the above-captioned action against Axos Bank and Seller Sub in the form of a so-ordered stipulation (NYSCEF Doc. No. 140). To the extent that the Axos Fiduciary and Axos Nevada defendants do not act in accordance with such relief, Union Bank reserves the right to seek equivalent injunctive relief against these defendants, and/or further injunctive relief against Defendants, as it deems appropriate.

AS AND FOR A FOURTH CAUSE OF ACTION

**(Breach of Contract)
(Against Axos)**

112. Plaintiff incorporates by reference paragraphs 1 through 111 as if fully alleged herein.

113. On information and belief, Seller Sub, Axos Nevada, and Axos Fiduciary (the “Axos Subsidiaries”) are subsidiaries of Axos Bank.

114. On information and belief, Axos Bank (through its officers, directors, or employees) exercises control over and is the true prime mover behind the everyday operations of

the Axos Subsidiaries, including with respect to the conduct and transactions alleged in this Complaint.

115. On information and belief, the Axos Subsidiaries are mere instrumentalities or dummies of Axos Bank and have no function other than providing the corporate form through which the transactions, operations, and conduct alleged in this Complaint were and continue to be undertaken. In addition, on information and belief, Axos Bank conducts business through the Axos Subsidiaries, and the management of Axos Bank regards the business of the Axos Subsidiaries as its own business.

116. To the extent that this Court determines that the Transfer and Acquisition are not void, then one or more of the Axos defendants is a party to the JSA.

117. On information and belief, Axos Bank caused one of the Axos Subsidiaries, either Axos Fiduciary or Axos Nevada, the entity operating Seller Sub, to assume Seller Sub's (formerly Epiq's) rights, duties, and obligations under the JSA, or else Seller Sub is still Union Bank's counter-party to the JSA.

118. The JSA, as amended up through and including the Fifth Amendment, constitutes a binding and valid agreement by and among Union Bank and Epiq, which was (albeit improperly) assigned to Axos pursuant to the Transfer and Acquisition.

119. The JSA prohibited any party thereto from disclosing to third parties the termination of the JSA prior to July 1, 2019.

120. The Fifth Amendment to the JSA also included a provision requiring Epiq to perform, itself, the obligations in the JSA, including those obligations in its accompanying Exhibits. Exhibit F to the Fifth Amendment, which describes performance standards under the JSA, requires that Epiq "[o]perate the Services on a Server owned and maintained by Epiq."

121. Union Bank has performed all of its obligations under the JSA, as amended.

122. On information and belief, Axos Bank caused one or more of the Axos Subsidiaries to inform Union Bank's chapter 7 trustee customers, prior to July 1, 2019, that the JSA was coming to an end and would not be renewed, in violation of the JSA.

123. On information and belief, Axos Bank further caused one or more of the Axos Subsidiaries, without the consent of Union Bank and in violation of the Fifth Amendment to the JSA, to transfer its chapter 7 bankruptcy trustee services software from Epiq servers onto Axos servers.

124. Axos Fiduciary, Axos Nevada, and/or Seller Sub, under the direction of its corporate parent, Axos Bank, has willfully breached the JSA in the manner described herein, including by, among other things, disclosing to Union Bank's chapter 7 trustee customers that the JSA was terminating and would not be renewed, and transferring its chapter 7 bankruptcy trustee services software off of Epiq's servers, thereby causing Epiq not to perform its duties and obligations under the JSA.

125. As a direct result of Axos Fiduciary's, Axos Nevada's, and/or Seller Sub's breaches of the JSA, caused by Axos Bank, Union Bank has suffered many millions of dollars in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

126. Axos' breach of the JSA has allowed it to steal many of Union Bank's chapter 7 trustee customers and may cause Union Bank to suffer irreparable harm in the form of the loss of its entire chapter 7 trustee banking business, if Axos is permitted to continue these efforts. Even were Union Bank able to retain some of its chapter 7 trustee customers and preserve its chapter 7 trustee banking business as a result of the so-ordered stipulated preliminary injunction (NYSCEF Doc. No. 140) (which is not a foregone conclusion), it will take years for Union Bank to recover

its position in the chapter 7 trustee deposit business, and it may never regain its prominence.

127. Further, as set forth herein, Axos has made misstatements about Union Bank as part of these efforts.

128. Union Bank has no adequate remedy at law for such irreparable harm.

129. To the extent that Axos continues to make misstatements about Union Bank or engages in other types of unfair competition, Union Bank reserves its right to seek further injunctive relief from this Court to rectify and prevent the irreparable harm it has suffered and may suffer in the future.

130. Union Bank has already received injunctive relief in the above-captioned action against Axos Bank and Seller Sub in the form of a so-ordered stipulation (NYSCEF Doc. No. 140). To the extent that the Axos Fiduciary and Axos Nevada defendants do not act in accordance with such relief, Union Bank reserves the right to seek equivalent injunctive relief against these defendants, and/or further injunctive relief against Defendants, as appropriate.

AS AND FOR A FIFTH CAUSE OF ACTION

**(Breach of the Implied Covenant of Good Faith and Fair Dealing)
(Against Axos)**

131. Plaintiff incorporates by reference paragraphs 1 through 130 as if fully alleged herein.

132. On information and belief, the Axos Subsidiaries are subsidiaries of Axos Bank.

133. On information and belief, Axos Bank (through its officers, directors, or employees) exercises control over and is the true prime mover behind the everyday operations of the Axos Subsidiaries, including with respect to the conduct and transactions alleged in this Complaint.

134. On information and belief, the Axos Subsidiaries are mere instrumentalities or

dummies of Axos Bank and have no function other than providing the corporate form through which the transactions, operations, and conduct alleged in this Complaint were and continue to be undertaken. In addition, on information and belief, Axos Bank conducts business through the Axos Subsidiaries, and the management of Axos Bank regards the business of the Axos Subsidiaries as its own business.

135. To the extent that this Court determines that the Transfer and Acquisition are not void, then one or more of the Axos defendants is a party to the JSA.

136. On information and belief, Axos Bank caused one of the Axos Subsidiaries, either Axos Fiduciary or Axos Nevada, the entity operating Seller Sub, to assume Seller Sub's (formerly Epiq's) rights, duties, and obligations under the JSA, or else Seller Sub continues to be Union Bank's counter-party to the JSA.

137. Under the JSA, Union Bank was required to obtain the approval of Epiq, now Axos, in order to adjust the fees that it charged on chapter 7 trustee deposits. Union Bank subsequently shared a portion of those fees, pursuant to the terms of the JSA, with Epiq, now Axos. The purpose of the provision requiring the consent of Epiq (now Axos) for Union Bank to adjust the fees it charged its chapter 7 trustee customers was to ensure that Union Bank and its counter-party to the JSA worked together to maintain their joint customers and did not unnecessarily reduce their income from those joint customers.

138. Axos Bank, directly or through its subsidiary Axos Fiduciary or Axos Nevada, however, instigated the formation and acquisition of Seller Sub in order to leverage the JSA against Union Bank and convert Union Bank's chapter 7 trustee accounts to Axos chapter 7 trustee accounts. On information and belief, Axos Bank accomplished this by causing one or more of the Axos Subsidiaries to refuse Union Bank's requests to lower its chapter 7 trustee

banking fees, and simultaneously contacting Union Bank's chapter 7 trustee customers to offer Axos Bank's no-fee banking option. Further, Axos' refusal to allow Union Bank to lower its chapter 7 banking fees caused Union Bank to be uncompetitive in the chapter 7 trustee banking market as a whole, which has been moving towards no-fee arrangements.

139. Axos' refusal to allow Union Bank to offer customers no or reduced fees caused Union Bank to lose chapter 7 trustee accounts to competitors, including Axos Bank, which were offering no-fee banking options.

140. Accordingly, even if Axos Fiduciary's, Axos Nevada's, and/or Seller Sub's refusal, at the direction of its corporate parent, Axos Bank, to allow Union Bank to adjust its chapter 7 trustee banking fees did not constitute a formal breach of the JSA, it achieved the same result, and prevented Union Bank from receiving the fruits of the contract.

141. Axos Fiduciary, Axos Nevada, and/or Seller Sub, under the direction of its corporate parent, Axos Bank, has thus violated the covenant of good faith and fair dealing implied in the JSA under New York law. As a direct result of this violation, Union Bank has suffered many millions of dollars in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

142. Axos' breach of the implied covenant of good faith and fair dealing has allowed it to steal many of Union Bank's chapter 7 trustee customers, and may cause Union Bank to suffer irreparable harm in the form of the loss of its entire chapter 7 trustee banking business, if Axos is permitted to continue these efforts. Even were Union Bank able to retain some of its chapter 7 trustee customers and preserve its chapter 7 trustee banking business as a result of the so-ordered stipulated preliminary injunction (NYSCEF Doc. No. 140) (which is not a foregone conclusion), it will take years for Union Bank to recover its position in the chapter 7 trustee deposit business

and it may never regain its prominence.

143. Further, as set forth herein, Axos has made misstatements about Union Bank as part of these efforts.

144. Union Bank has no adequate remedy at law for such irreparable harm.

145. To the extent that Axos continues to engage in the foregoing misconduct or other types of unfair competition, Union Bank reserves its right to seek further injunctive relief from this Court to rectify and prevent the irreparable harm it has suffered and may suffer in the future.

146. Union Bank has already received injunctive relief in the above-captioned action against Axos Bank and Seller Sub in the form of a so-ordered stipulation (NYSCEF Doc. No. 140). To the extent that the Axos Fiduciary and Axos Nevada defendants do not act in accordance with such relief, Union Bank reserves the right to seek equivalent injunctive relief against these defendants, and/or further injunctive relief against Defendants, as appropriate.

AS AND FOR A SIXTH CAUSE OF ACTION

**(Declaratory Judgment)
(Against All Defendants)**

147. Plaintiff incorporates by reference paragraphs 1 through 146 as if fully alleged herein.

148. As set forth herein, an actual controversy exists between Union Bank and Defendants that can be resolved by a declaratory judgment determining the parties' rights and obligations under the JSA and New York law.

149. Union Bank therefore prays for a declaratory judgment declaring (i) the Transfer and Acquisition to constitute a breach of the JSA (including as amended by the Fifth Amendment) by Epiq, (ii) the Transfer and Acquisition to be void pursuant to the JSA (as amended by the Fifth Amendment), and (iii) that, as a result of Epiq's and/or Axos' breaches of

the JSA, Union Bank is itself no longer bound by the JSA, including (but not limited to) the exclusivity and non-compete provisions of Section 5 thereof.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Union Bank respectfully requests:

A. Judgment against Epiq on the First Cause of Action for all damages Union Bank has sustained as a result of Epiq’s breaches of the JSA, as amended, totaling many millions of dollars, in an amount to be specifically determined at trial, plus prejudgment interest thereon and voiding the assignment of the JSA to Axos; and/or

B. Judgment against Epiq on the Second Cause of Action for all damages Union Bank has sustained as a result of Epiq’s breach of the implied covenant of good faith and fair dealing, totaling many millions of dollars, in an amount to be specifically determined at trial, plus prejudgment interest thereon and voiding the assignment of the JSA to Axos; and/or

C. Judgment against Axos on the Third Cause of Action for all damages Union Bank has sustained as a result of its tortious interference with Union Bank’s contractual relations with Epiq, totaling many millions of dollars, in an amount to be specifically determined at trial, plus prejudgment interest thereon and appropriate injunctive relief to rectify the irreparable harm Union Bank has suffered and may suffer in the future; and

D. Judgment against Axos on the Fourth Cause of Action, if this Court determines that one or more of the Axos defendants are parties to the JSA, for all damages Union Bank has sustained as a result of Axos’ breaches of the JSA, as amended, totaling many millions of dollars, in an amount to be specifically determined at trial, plus prejudgment interest thereon and appropriate injunctive relief to rectify the irreparable harm Union Bank has suffered and may suffer in the future; and/or

E. Judgment against Axos on the Fifth Cause of Action, if this Court determines that one or more of the Axos defendants are parties to the JSA, for all damages Union Bank has sustained as a result of Axos' breach of the implied covenant of good faith and fair dealing, totaling many millions of dollars, in an amount to be specifically determined at trial, plus prejudgment interest thereon and appropriate injunctive relief to rectify the irreparable harm Union Bank has suffered and may suffer in the future; and

F. Judgment against all Defendants on the Sixth Cause of Action, declaring (i) the Transfer and Acquisition to constitute a breach of the JSA (including as amended by the Fifth Amendment) by Epiq, (ii) the Transfer and Acquisition to be void pursuant to the JSA (as amended by the Fifth Amendment), and (iii) that, as a result of Epiq's and/or Axos' breaches of the JSA, Union Bank is itself no longer bound by the JSA, including (but not limited to) the exclusivity and non-compete provisions of Section 5 thereof; and

G. Judgment against all Defendants as to each cause of action but the Sixth, enjoining Defendants, including each of their respective owners, officers, directors, agents, partners, representatives, employees, subsidiaries, and affiliates from taking any action to instruct, advise, suggest, or otherwise communicate to Union Bank's chapter 7 trustee banking customers that they move their deposits from Union Bank to Axos Bank; and

H. Expedited adjudication of this case, given that this dispute involves questions of law related to interpretation of a contract, and does not require substantial discovery (if any); and

I. Any further relief the Court deems necessary or appropriate.

DATED: New York, NY
July 6, 2019

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: /s/ David G. Keyko
E. Leo Milonas
David G. Keyko
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*Attorneys for Plaintiff MUFG Union Bank, N.A.
(f/k/a Union Bank, N.A.)*

VERIFICATION

STATE OF ARIZONA)
) ss.:
COUNTY OF NAVAJO)

Kimberly Siebler, being duly sworn, deposes and says:

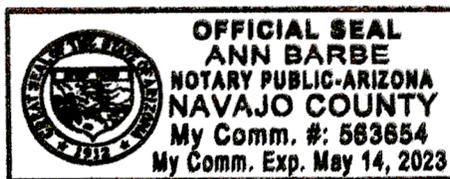
I am a Managing Director of MUFG Union Bank, S.A. (f/k/a Union Bank, N.A.), the plaintiff in the above-captioned action. I have read the foregoing amended complaint and know the contents thereof; the same is true to my knowledge, except as to matters therein to be stated upon information and belief and, as to those matters, I believe them to be true.

Kimberly Siebler

Sworn to me on this 6th
day of July 2019.

Ann Booke

Notary Public



ACKNOWLEDGEMENT

STATE OF ARIZONA)
) ss.:
COUNTY OF NAVAJO)

On the 6th day of July in the year 2019 before me, the undersigned, personally appeared Kimberly Siebler, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument, and that such individual made such appearance before the undersigned in the State of Arizona, County of Maricopa.

Ann Barbe AnnBoche
(signature and name of Notary Public taking acknowledgement)

