

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 SECOND 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 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 until recently had 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 JSA 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 (including the JSA) to Axos Nevada 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.

7. Axos also intentionally procured other breaches by Epiq of key provisions of the original JSA.

8. For example, the JSA prohibited either party from disclosing confidential information of the other party, including the terms of the JSA itself. Epiq breached the confidentiality provisions of the JSA during its negotiations with Axos by disclosing to Axos, at Axos' request, the terms of the JSA and other sensitive financial and commercial information about Union Bank and its customers, which Epiq obtained by virtue of its status as Union Bank's counterparty on the JSA. The sale of Epiq's chapter 7 trustee software business to Axos would not have occurred but for Epiq's disclosure of this confidential information to Axos.

9. The JSA likewise prohibited either party from attempting to sell, convey, or transfer joint client relationships or accounts to another entity without the prior written consent of the other. Yet, both Epiq and Axos acknowledged during negotiations that, in purchasing Epiq's chapter 7 software business, Axos believed it was buying the joint client relationships of Union Bank and Epiq's other partner banks, as well as the chapter 7 deposits held by those banks.

### **PARTIES**

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

11. 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.

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

13. 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, at Axos' request, specifically to hold certain assets of Epiq's chapter 7 trustee software business—specifically the JSA and the joint services agreements Epiq had with other banks, Epiq's contracts with chapter 7 trustees, and a few employment contracts—and be sold to Axos Bank. On information and belief, Seller Sub now does business as Axos Fiduciary.

14. 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>.)

15. 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**

16. 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.

17. 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 Anti-Assignment, Confidentiality, and Other Provisions Protecting Union Bank's Interests**

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

19. 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.)

20. Consistent with this purpose, the JSA provided that “Epiq, in its sole discretion, will present to [Union] Bank potential Joint Client relationships from time to time . . . .” (JSA § 6.A.) Following the execution of the JSA and until April 3, 2018, Epiq regularly referred potential chapter 7 trustee customers to Union Bank for their chapter 7 banking needs.

21. Under the JSA, the parties further 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).

22. 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).

23. 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 (3<sup>rd</sup>) anniversary of the Effective Date of this Agreement (regardless of whether this Agreement is terminated prior to the third (3<sup>rd</sup>) 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 (3<sup>rd</sup>) 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).

24. 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.)

25. The JSA also provided that “[n]either party may attempt to sell, convey, or transfer the Joint Client relationships and/or Joint Client accounts to another entity without the prior written consent of the other.” (JSA § 6.K.)

26. The JSA also contained stringent confidentiality restrictions that, by their terms, “survive termination of this Agreement [the JSA] for the longest period of time permitted under applicable law.” (JSA § 13.H.)

27. Among other things, under the JSA, the parties agreed that “all of the terms, conditions and provisions of this Agreement and any amendments thereto are confidential and will only be disclosed to third parties including any Joint Clients or prospective client(s) if required by law, subpoena, request for information by a government or regulatory agency, or regulation.” (JSA § 13.F.)

28. The parties also agreed generally in the JSA not to disclose each other’s “Confidential Information” to a third party. “Confidential Information” is defined in the JSA to include, without limitation:

(a) all of the terms, conditions and provisions of this Agreement (as may be amended), including for the avoidance of doubt, the Term of this Agreement including the Disengagement Period, the fee schedule, the Effective Date of Termination, and all financial and financial related terms including but not limited to pricing and pricing models, conditions and provisions contained herein; (b) the names, addresses, telephone and facsimile numbers, financial data, and e-mail addresses respecting Disclosing Party’s customers, or prospective customers; (c) Disclosing Party’s business plans, processes, policies and procedures for marketing, sales, and customer service and support activities, financial service pricing and profitability, and customer and vendor contracts and related documents; (d) Disclosing Party’s Intellectual Property; (e) such other information, reports, correspondence, documents and data as

the Disclosing Party may from time to time designate, in its sole and absolute discretion, as confidential; or (f) any other information that should reasonably have been understood by the Receiving Party because of legends or markings, the circumstances of disclosure, or the nature of the information itself, to be confidential to Disclosing Party.

(JSA § 13.B.)

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

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

30. 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.

31. 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.

32. 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).

33. 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).

34. 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.

35. 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.)

36. 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**

37. 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.

38. Epiq formed Seller Sub at the request of Axos. Axos requested that Epiq form Seller Sub in order to circumvent the JSA's restrictions on assignments.

39. 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.

40. As part of the Transfer, in addition to assigning the JSA to Seller Sub, Epiq also transferred to Seller Sub Epiq's joint services agreements with other banks, Epiq's contracts with chapter 7 trustees, and several employment contracts. The other assets of the Epiq chapter 7 software business being sold to Axos, including the software, were not transferred to Seller Sub. On information and belief, that was because the subterfuge of transferring assets to Seller Sub was needed only for the JSA and the other contracts, which contained restrictions on assignment and transfer.

41. 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.

42. 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"). Separately, as part of the Acquisition, Epiq also directly transferred to Axos Nevada the other assets of the Epiq chapter 7 software business, which had not been transferred to Seller Sub. The Acquisition did not involve the sale of all or substantially all of Epiq's assets. Rather, it entailed a transfer of a minority of Epiq's assets, all of which it considered non-core.

43. On information and belief, Epiq and Axos agreed not to seek Union Bank's consent for the Transfer or the Acquisition.

44. 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.

45. As a result of the Transfer and Acquisition, Epiq stopped performing its duties under the JSA itself beginning in April 2018. Instead Seller Sub and/or Axos purportedly assumed responsibility for performing those duties.

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

47. To accomplish the Transfer and Acquisition, Epiq breached other provisions of the JSA. As with the anti-assignment provisions in Section 23 of the JSA, Axos knew of these provisions prior to the Transfer and Acquisition, but nonetheless knowingly encouraged Epiq's breaches of those provisions.

48. As part of the negotiation of the sale of Epiq's chapter 7 software business to Axos, Axos requested, and Epiq provided to Axos, confidential information of Union Bank and the other banking partners of Epiq's chapter 7 trustee software business. As it pertains to Union Bank, that disclosure first included a minimally redacted, and subsequently entirely unredacted, copy of the JSA, as well as Union Bank's sensitive financial information and a list of its chapter 7 trustee customers, including deposit levels. These disclosures, all of which were made without Union Bank's knowledge or consent, violated the confidentiality restrictions in Section 13 of the JSA. On information and belief, the sale of Epiq's chapter 7 trustee software business to Axos would not have occurred but for Epiq's disclosure of this confidential information to Axos.

49. Axos also intentionally procured a breach by Epiq of Section 6.K of the JSA, which prohibited Epiq from selling, conveying, or transferring joint client relationships or accounts to a third party. During the negotiations of the sale of Epiq's chapter 7 software business to Axos,

Axos communicated to Epiq, and Epiq understood, that Axos believed that, by purchasing Epiq's chapter 7 software business, it was purchasing Epiq's relationships with the chapter 7 trustee customers (of both Union Bank and of Epiq's other partner banks) and those customers' banking deposits.

50. Following the Acquisition, Axos used its position as the chapter 7 trustee banking software provider for Union Bank's customers to move most of the chapter 7 trustee banking business that had been Union Bank's to Axos.

51. On information and belief, Axos began contacting those Union Bank customers no later than August 2018 to try to convince them to move their deposits to Axos.

52. Among other things, Axos told some of those customers, prior to the commencement of this lawsuit, that they must move their deposits because Union Bank's contract with Epiq had been terminated, would expire at or before the end of 2019, and would not be renewed.

53. Such disclosure violated Section 7.C.4 of the JSA, which prohibited 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 was January 1, 2020, Epiq and Axos were forbidden until July 1, 2019, to communicate to Joint Clients that the JSA had been terminated.

54. In addition, knowing that the JSA required Union Bank to charge most of its chapter 7 trustee customers fees, Axos began contacting those very same customers in or prior to August 2018 and offered them trustee deposit services without any fees. In some instances, relationship

managers for Axos told Union Bank trustees that they had a fiduciary duty to move their funds to a no-fee banking environment, such as that which exists at Axos.

55. On information and belief, Axos made the decision to offer chapter 7 trustee customers no fees in or prior to July 2018, and intended to be the first bank/software provider in the chapter 7 trustee industry to do so. Axos' plan was to use the offer of zero fees to lure chapter 7 trustee customers (and their deposits) away from Union Bank and Epiq's other partner banks, while simultaneously denying permission to those banks to similarly reduce or eliminate their own fees.

56. Ultimately, Axos was the first significant player in the chapter 7 trustee industry to offer customers zero banking fees, and the result was that other significant software providers (and their partner banks) in the industry likewise started offering zero fees. While a very minor player in the chapter 7 trustee business announced a zero-fees offer before Axos did, Axos had intended to be the first to make such an announcement. Axos promptly made its announcement afterward in early August 2019. Other chapter 7 software providers and their partner banks followed suit later that month, after Axos' announcement.

57. 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 were financially incentivized to move their deposits from Union Bank to Axos Bank.

58. 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.

59. Axos' scheme to offer customers zero fees to induce them to move their deposits, while simultaneously refusing to allow Union Bank to make the same offer, was essential to Axos' broader plan to move deposits from Union Bank and Epiq's other chapter 7 banking partners to Axos Bank before the end of 2019. As explained in more detail below, Axos purported to terminate the JSA on or about June 8, 2019, which triggered an eighteen-month "Disengagement Period," ending December 31, 2019. As noted above, during the first twelve months of this Disengagement Period, Axos was not permitted under the JSA to tell customers or other third parties that the JSA had been terminated; that was allowed only during the last six months of the Disengagement Period, and even then, only "in a fashion that is commercially reasonable and acceptable to both parties."

60. Axos thus could not use the prospect of the termination of the JSA between June 8, 2018, and June 30, 2019, to induce customers to move their deposits from Union Bank to Axos Bank. Moreover, Axos could not have moved all of Union Bank's chapter 7 trustee customers over to Axos Bank during the last six months of the Disengagement Period, as the process of moving a chapter 7 trustee's accounts from one bank to another is time consuming.

61. Instead, Axos took steps to start moving deposits from Union Bank to Axos Bank beginning no later than August 2018, approximately one month into the Disengagement Period. The way it planned to accomplish this was by offering chapter 7 trustee customers zero fees while preventing Union Bank from doing the same. Axos knew that this was the only way it could convince customers to abandon their established banking relationships with Union Bank, which

enjoyed a good reputation and a long history in the chapter 7 industry, to Axos Bank, a much smaller bank that had no prior experience in the chapter 7 industry.

62. In addition, on information and belief, in order to induce Union Bank's chapter 7 trustee customers to move their deposits to Axos, Axos misinformed some of these customers during the 2018-2019 period that Union Bank's relationship manager was going to retire and that the customers would therefore not receive the same support from Union Bank they had previously received and/or that Union Bank was leaving the chapter 7 trustee business. Neither claim was true: Union Bank's relationship manager was at no time (and is still not) planning to retire, and—prior to the end of 2019, when Union Bank was indeed forced to leave the chapter 7 trustee business as a result of Defendants' actions—it had no intention of leaving the business, which was profitable.

63. 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.

64. 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. As of June 30, 2019, Union Bank had lost more than \$200 million in deposits as a result of the actions of Axos and Epiq.

65. With the Court's encouragement, Union Bank and Axos entered into a stipulated injunction in June 2019 (described below). The protections for Union Bank in that injunction, however, came too little and too late to reverse the harm caused by Defendants' prior actions. Following entry of that injunction, Axos continued to leverage its improperly acquired position as software provider to Union Bank's chapter 7 trustees, and used this position to aggressively solicit trustees to move their deposits from Union Bank to Axos Bank.

66. As a result of those actions, and Defendants' prior actions, Union Bank was forced to close its chapter 7 banking business in or about December 2019, resulting in the loss of an additional approximately \$300 million in chapter 7 trustee deposits.

67. Defendants' actions thus caused the total destruction of Union Bank's chapter 7 trustee banking business, causing damages to Union Bank of not less than \$98 million, which consists of both lost income and added expenses to Union Bank.

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

68. On April 4, 2018, individuals who had previously been employed by Epiq's chapter 7 trustee business—including Jill Bauer—notified 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.

69. Contrary to Epiq's prior practice of regularly referring potential chapter 7 trustee customers to Union Bank, Axos did not refer a single chapter 7 trustee customer to Union Bank following the Transfer and Acquisition. The reason was because Axos intended to move all

existing chapter 7 trustee banking business from Union Bank and Epiq's other partner banks to Axos Bank, and encourage new potential chapter 7 trustee customers to use Axos Bank for their banking business.

70. Then, 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.)

71. 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.

72. 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.

73. 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.

74. 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**

75. 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.

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

77. 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).

78. 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.

79. 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.

80. 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.

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

82. Though the Corporate Executive for Union Bank appeared for the April 12<sup>th</sup> Meeting, no Corporate Executive for Epiq appeared.

83. 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**

84. 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).

85. Union Bank relied on the provision in the Fifth Amendment, and the language in its accompanying Exhibit F (*see supra* ¶ 35), 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.

86. 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.

87. 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**

88. On information and belief, on or about March 22, 2019—after Union Bank sent its Breach Notice and prior to the April 12<sup>th</sup> 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. Axos devised and executed this new plan at that time because of Union Bank’s transmission of the Breach Notice and because Axos was afraid that, if the parties’ dispute ripened into litigation, its plan for capturing the remainder of Union Bank’s chapter 7 deposits would not succeed.

89. Axos’ March 22, 2019 plan, which was approved by the chief executive officer of Axos Bank, involved stepping up Axos’ 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.

90. For example, Axos representatives told some of Union Bank's chapter 7 trustee clients that they had 30 days to move their deposits from Union Bank to Axos.

91. Axos told 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.

92. On information and belief, Axos continued to pressure Union Bank's chapter 7 trustee clients to move their deposits from Union Bank to Axos through the end of 2019.

93. As a result of this campaign, since April 26, 2019 (the date of Union Bank's original Complaint in this action), Union Bank lost more than \$340 million in deposits to Axos Bank and lost the balance of its chapter 7 trustee deposits to other banks.

94. In addition, on information and belief, there were and/or are other banks similarly situated to Union Bank, whose chapter 7 trustee customers Axos actively tried to divert for itself since 2018. 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.

95. 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.

96. 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.

97. 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.

98. 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 included that: (1) Union Bank was allowed to provide a no-fee banking option to its current, former, and future clients, and that in such cases, it would not be required to make fee payments (as directed by the JSA) to Axos, although Union Bank would 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 could partner with a new software provider, to begin serving Union Bank customers on January 1, 2020, and immediately extoll the virtues of this new

provider to the market; and (3) Axos was required to 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.

99. The stipulated injunction, however, was not sufficient to save Union Bank's chapter 7 trustee banking business. As a result of Defendants' prior misconduct (including the Transfer and Acquisition and Axos' subsequent aggressive campaign, which Epiq knew Axos was planning, to move deposits from Union Bank to Axos), as well as aggressive solicitation and leveraging by Axos of its ill-gotten position during the balance of 2019, Union Bank was forced to close its chapter 7 trustee banking business and lost the bulk of its then-remaining chapter 7 trustee deposits to Axos.

100. As set forth herein, Epiq's breaches of the JSA, which Axos tortiously induced, resulted in the complete destruction of Union Bank's chapter 7 trustee business that Union Bank had taken years to create. The transfer of the JSA to Axos, which enabled Axos to cancel the JSA, caused all of Union Bank's chapter 7 trustee customers to remove their deposits from Union Bank, mostly to Axos.

101. This was because, under the terms of the JSA, Union Bank's chapter 7 trustee customers could no longer use the Epiq/Axos chapter 7 trustee software after December 31, 2019 (assuming that the Transfer and Acquisition, as well as Axos' purported termination of the JSA, were all effective). Union Bank, however, could not train and convert its chapter 7 trustee customers to the use of a new software program prior to January 1, 2020. To the extent that Union Bank wanted to remain in the chapter 7 trustee deposit business after December 31, 2019, it would have had to start that business all over again after that date, as it became apparent that Union Bank would hold no chapter 7 trustee deposits as of January 1, 2020.

**AS AND FOR A FIRST CAUSE OF ACTION****(Breach of Contract)  
(Against Epiq)**

102. Plaintiff incorporates by reference paragraphs 1 through 101 as if fully alleged herein.

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

104. 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.

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

106. Epiq agreed to both the Transfer and Acquisition.

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

108. 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.

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

110. As a direct result of Epiq's breaches of the JSA, Union Bank has suffered not less than \$98 million in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

**AS AND FOR A SECOND CAUSE OF ACTION****(Breach of Contract)  
(Against Epiq)<sup>1</sup>**

111. Plaintiff incorporates by reference paragraphs 1 through 110 as if fully alleged herein.

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

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

114. The JSA prohibited Epiq from disclosing to a third party confidential information of Union Bank, including the terms of the JSA, without Union Bank's consent.

115. Epiq breached the JSA by disclosing to Axos, during the negotiation of the sale of its chapter 7 trustee software business, the terms of the JSA (in partially redacted and then fully unredacted form) as well as other commercially sensitive financial information of Union Bank and its chapter 7 trustee customers, including Union Bank's deposit levels and individual trustees' account balances.

116. But for Epiq's disclosure of Union Bank's and its customers' confidential information, in breach of the JSA, it would have been unable to sell its chapter 7 trustee software business to Axos. This is because Axos would not have been able to make a determination as to the potential value of Epiq's chapter 7 trustee software business because Epiq's arrangement with Union Bank generated 50% or more of the revenues associated with the chapter 7 trustee software business.

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<sup>1</sup> At Epiq's request, Union Bank has separated the breach-of-contract allegations against Epiq that post-date its July 8, 2019 first amended complaint into a separate standalone cause of action to avoid confusion in light of the Court's granting of Union Bank's motion for partial summary judgment as to the element of breach in the First Cause of Action.

117. The JSA also prohibited Epiq from attempting to sell, transfer, or convey to a third party the joint client relationships or accounts.

118. Epiq breached this prohibition of the JSA because it learned during the negotiations with Axos that Axos believed that, by purchasing Epiq's chapter 7 trustee software business, it would be acquiring the joint client relationships and deposits. In addition, the purchase price paid by Axos for Epiq's chapter 7 trustee software business made clear to Epiq that Axos was paying for and believed it was purchasing the joint client relationships and deposits.

119. Epiq has willfully breached the JSA in the manner described herein, including by, among other things, disclosing Union Bank confidential information to Axos during the negotiations of the sale of Epiq's chapter 7 software business and agreeing to a purported sale of joint client relationships and deposits to Axos.

120. As a direct result of Epiq's breaches of the JSA, Union Bank has suffered not less than \$98 million in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

**AS AND FOR A THIRD CAUSE OF ACTION**

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

121. Plaintiff incorporates by reference paragraphs 1 through 120 as if fully alleged herein.

122. 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.

123. 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.

124. 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.

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

126. 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.

127. 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.

128. 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 not less than \$98 million in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

**AS AND FOR A FOURTH CAUSE OF ACTION**

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

129. Plaintiff incorporates by reference paragraphs 1 through 128 as if fully alleged herein.

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

131. On and prior to April 3, 2018, Axos Bank knew that Union Bank and Epiq were

parties to the JSA, as amended. In addition, because Epiq (at Axos' request) provided Axos with first partially and then fully unredacted versions of the JSA during the negotiations leading up to the sale of Epiq's chapter 7 trustee software business (which was a breach of the JSA), Axos knew of all of the material terms of the JSA, including that Union Bank was the counterparty to the JSA (and it was common knowledge in the chapter 7 trustee business that Union Bank had the second highest level of chapter 7 trustee deposits among all banks and held more chapter 7 trustee deposits than any of the other banks with which Epiq had a joint services agreement).

132. 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.

133. Epiq formed Seller Sub and transferred the JSA to Seller Sub only because Axos requested it do so and because Axos was willing to fully indemnify Epiq for the risks associated with the formation of Seller Sub, the Transfer, and the Acquisition. 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.

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

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

136. Axos also intentionally procured, without justification, Epiq's breach of the JSA's prohibition on selling, transferring, or conveying joint client relationships and accounts to a third party. Axos communicated to Epiq during negotiations that it believed that, in purchasing Epiq's chapter 7 trustee software business, it would be purchasing the joint client relationships and

deposits, and the purchase price that Axos paid for Epiq's chapter 7 trustee software business only made economic sense if Axos was buying the joint client relationships and deposits. Epiq therefore breached the JSA by agreeing to the Transfer and Acquisition with this knowledge.

137. 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.

138. As a result of Axos' procurement of Epiq's breach, Union Bank has suffered not less than \$98 million in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

**AS AND FOR A FIFTH CAUSE OF ACTION**

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

139. Plaintiff incorporates by reference paragraphs 1 through 138 as if fully alleged herein.

140. On information and belief, Seller Sub, Axos Nevada, and Axos Fiduciary (the "Axos Subsidiaries") are subsidiaries of Axos Bank.

141. 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.

142. 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.

143. 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.

144. 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.

145. 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.

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

147. 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."

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

149. 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 the commencement of this lawsuit, that the JSA had been terminated and would not be renewed after the effective date of termination, in violation of the JSA.

150. 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.

151. 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.

152. 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 at least \$98 million in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

**AS AND FOR A SIXTH CAUSE OF ACTION**

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

153. Plaintiff incorporates by reference paragraphs 1 through 152 as if fully alleged herein.

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

155. 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.

156. 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.

157. 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.

158. 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.

159. 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.

160. 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 began moving towards no-fee arrangements in or about August 2018 (when Axos began offering zero fees to chapter 7 trustee customers).

161. 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.

162. 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.

163. Furthermore, under the JSA, Epiq was required, in the exercise of its discretion, to refer to Union Bank potential new chapter 7 trustee customers. Under the covenant of good faith and fair dealing implied in the JSA under New York law, Epiq was required to exercise this discretion in good faith.

164. Prior to the Transfer and Acquisition, Epiq regularly and routinely referred to Union Bank potential new chapter 7 trustee customers, with the result that Union Bank held 50% or more of all deposits of chapter 7 trustees that used the Epiq software.

165. Following the Transfer and Acquisition, however, Axos failed to refer a single new potential chapter 7 trustee customer to Union Bank in an effort to deprive Union Bank of the benefits it bargained for under the JSA.

166. 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 at least \$98 million in damages, the exact amount to be specifically determined at trial, plus prejudgment interest.

**AS AND FOR A SEVENTH CAUSE OF ACTION**

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

167. Plaintiff incorporates by reference paragraphs 1 through 166 as if fully alleged herein.

168. 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.

169. 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 and (ii) that, as a result of Epiq's and/or Axos' breaches of the JSA, Union Bank was, as of April 3, 2018, no longer bound by the JSA.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiff Union Bank respectfully requests:

A. Judgment against Epiq on the First Cause of Action and/or the Second Cause of Action for all damages Union Bank has sustained as a result of Epiq's breaches of the JSA, as amended, totaling not less than \$98 million, 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 Third 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 not less than \$98 million, 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 Fourth 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 not less than \$98 million, in an amount to be specifically determined at trial, plus prejudgment interest thereon; and

D. 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' breaches of the JSA, as amended, totaling not less than \$98 million, in an amount to be specifically determined at trial, plus prejudgment interest thereon; and

E. Judgment against Axos on the Sixth 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 not less than \$98 million dollars, in an amount to be specifically determined at trial, plus prejudgment interest thereon; and

F. Judgment against all Defendants on the Seventh 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 and (ii) that, as a result of Epiq's and/or Axos' breaches of the JSA, Union Bank was, as of April 3, 2018, no longer bound by the JSA; and

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

DATED: New York, NY  
July 17, 2020

PILLSBURY WINTHROP SHAW PITTMAN LLP

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



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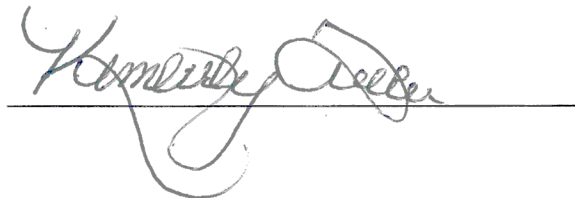
*Attorneys for Plaintiff MUFG Union Bank, N.A.  
(f/k/a Union Bank, N.A.)*

VERIFICATION

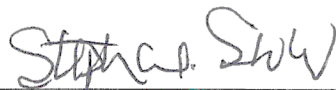
STATE OF ARIZONA            )  
  ) ss.:  
COUNTY OF Maricopa )

Kimberly Siebler, being duly sworn, deposes and says:

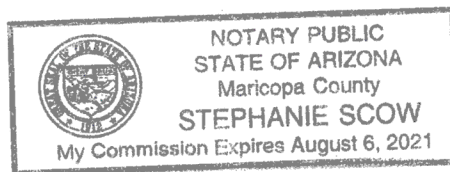
I am a Managing Director of MUFG Union Bank, S.A. (f/k/a Union Bank, N.A.), the plaintiff in the above-captioned action. I have read the foregoing amended complaint and know the contents thereof; the same is true to my knowledge, except as to matters therein to be stated on information and belief and,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



Sworn to me on this 17  
day of July 2020.



Notary Public



ACKNOWLEDGEMENT

STATE OF ARIZONA            )  
  ) ss.:  
COUNTY OF MARICOPA

On the 17th day of July in the year 2020 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.

Stephanie Scow

(signature and name of Notary Public taking acknowledgement)

