MUFG Union Bank, N.A. v Axos Bank
2020 NY Slip Op 33161(U)
September 25, 2020
Supreme Court, New York County
Docket Number: 652474/2019
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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

Plaintiff,

- v -

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

Defendants.

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INDEX NO.	652474/2019
MOTION DATE	
MOTION SEQ. NO.	009 & 011

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

This Court held extensive oral argument via Skype on September 25, 2020 in connection with the two pending motions by the various defendants for summary judgment dismissing the claims against them in whole or in part. In the first motion (seq. 009), defendant Epiq Systems, Inc. ("Epiq") seeks to dismiss all claims asserted against it by plaintiff MUFG Union Bank, N.A. ("Union") in the Second Amended Complaint (NYSCEF Doc. No. 289), or in the alternative, to limit damages. In the second motion (seq 011), defendants Axos Bank, Axos Fiduciary Services, Axos Nevada, LLC, and Seller Sub, LLC ("Axos ") move for partial summary judgment dismissing some of the claims against Axos in their entirety and others only in part, or in the alternative, limiting damages. Axos does not seek any affirmative relief in its motion in connection with either of the two counterclaims included in its Answer (NYSCEF Doc. No. 293). Epiq has not asserted any counterclaims in its Answer (NYSCEF Doc. No. 294). For the reasons that follow, the motions are granted in part and denied in part, and the case will proceed as scheduled for a trial by jury on October 26, 2020.

The dispute between the parties relates to the September 27, 2012 Joint Services Agreement between Union and Epiq, effective October 1, 2012 and later amended ("the JSA",

NYSCEF Doc. Nos. 399). Pursuant to the JSA § 1.A, Union and Epiq agreed "to jointly promote their 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." According to Union, the JSA represented "the new model of chapter 7 software/banking relationships, as it shortly followed and incorporated in its terms the United States Trustee's announcement in 2011 that financial institutions could assess banking fees on chapter 7 trustee deposits." (Union Memo in Opp, Doc. 541 at p. 3). The JSA contemplated customers entering into separate "End-User" agreements with Union and Epiq, providing that Union would deliver deposit and other banking services and Epiq would provide software services, to parties deemed to be "Joint Clients". (JSA § 1.B).

The JSA contains various restrictions on the parties' business conduct, including a prohibition on the disclosure of confidential information (JSA § 13). Additionally, the JSA expressly prohibits either party from assigning the JSA or transferring Joint Client relationships or accounts without the prior written consent of the other party, except under certain circumstances not applicable here. (JSA §§ 23 and 6K).

The central theory of Union's case is that Epiq and Axos worked together to create an arrangement that enabled Epiq to transfer the JSA to Axos without the consent of Union in contravention of the strict anti-assignment provisions in the JSA. The factual underpinnings of that theory are set forth in the Second Amended Complaint, primarily at paragraphs 37-43, which can be summarized as follows.

The story begins when Epiq decided to sell, and Axos decided to purchase, Epiq's Chapter 7 software business. But Epiq and Axos apparently recognized that the software business would have far greater value if Axos could also offer to the Chapter 7 trustees the depository services that Union had been providing to the trustees under the JSA. However, the

parties also clearly recognized that neither the JSA, nor any of the Joint Client relationships or accounts, could be assigned to Axos without Union's consent (JSA § § 23 and 6K).

Thus, on March 27, 2018, the day before Union and Epiq executed the Fifth Amendment to the JSA, Epiq created Seller Sub, LLC, a special purpose entity wholly owned by Epiq and allegedly created for the sole purpose of effectuating the transfer of the JSA to Axos without Union's consent. On or about April 3, 2018, Epiq transferred the JSA to Seller Sub, along with 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, presumably because that software business was not subject to the anti-assignment provisions of the JSA. Seller Sub was then acquired by Axos, along with the JSA. On the same day, Epiq transferred directly to Axos the Chapter 7 software business.

On or about June 11, 2018, Axos purportedly terminated the JSA pursuant to JSA § 7.A, which commenced a contractually mandated "Disengagement Period" that extended until the effective date of termination of the JSA. Union contends that when the market became aware that Epiq had sold its Chapter 7 software business and that Axos (another bank with depository services) had acquired it, trustees began moving their deposits from Union to Axos, under "no-fee" arrangements created by Axos. Those no-fee arrangements were unavailable to Union because Axos, having acquired Epiq's rights under the JSA, refused to allow Union to modify the fee structure set forth in the JSA. This scenario, of course, gave Axos an enormous

competitive advantage over Union, to the point where Union was allegedly left without any Chapter 7 trustee banking business at all.[1]

Union commenced this action on April 26, 2019, seeking injunctive relief and damages (NYSCEF Doc. No. 1). Simply stated, as discussed above, Union primarily claims that the transfer of the JSA to an entity then acquired by Axos, along with the sale to Axos of Epiq's software business, was effectuated pursuant to a scheme designed by Epiq and Axos to allow the transfer of the JSA to a third-party competitor bank in contravention of the anti-assignment provisions in the JSA. Epiq and Axos deny any breach of the JSA or other wrongful conduct and assert that the transfer, in any event, did not cause Union to suffer any damages compensable under the JSA or the law.

On June 27, 2019, at the hearing on Union's motion for injunctive relief (seq. 001), the parties stipulated to a preliminary injunction essentially agreeing that (1) Union could offer a no-fee product similar to the Axos product; (2) Union could retain a new software provider; and (3) Union and Axos would work together on risk management issues (NYSCEF Doc. Nos. 140 and 145).

On June 4, 2020, the Court granted in part Union's motion for partial summary judgment on the First Cause of Action in the First Amended Complaint "to the extent of finding that Epiq's transfer and assignment of its chapter 7 bankruptcy trustee software business to its wholly-owned subsidiary, Seller Sub, and Epiq's subsequent sale of Seller Sub to Axos Nevada, both are breaches of the Joint Services Agreement between Union Bank and Epiq, effective as of October 1, 2012, as amended." The motion was otherwise denied (mot. seq 005, NYSCEF Doc. No. 283).

[1] This decision includes only a summary of the relevant facts. The parties have submitted extensive Statements of Material Facts and Memoranda of Law, together with hundreds of exhibits, for review by the Court.

Union filed its Second Amended Complaint soon thereafter on July 17, 2020 ("SAC", NYSCEF Doc. No. 289), which is the operative Complaint on these motions by Epiq and Axos.

The Court turns first to Epiq's motion for summary judgment (seq. 009). The first three causes of action in the Second Amended Complaint are directed at Epiq. The first two allege breaches of various provisions of the JSA, and the third alleges a breach of the implied covenant of good faith and fair dealing. As indicated earlier, Epiq seeks to dismiss all three claims in their entirety, or in the alternative, to set a cap on damages pursuant to the Limitations on Liability clause in the JSA.

The First Cause of Action in the Second Amended Complaint replicates the First Cause of Action in the First Amended Complaint that was ruled upon by this Court on June 27, 2019 (SAC fn. 1). Union alleges in that cause of action that: "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." Because Epiq cannot reasonably dispute that the Court's earlier decision found a violation of the anti-assignment provision in the JSA, Epiq now seeks to dismiss the First Cause of Action based on its claim that the breach was not the proximate cause of any compensable damages. While the Court agrees with Epiq that the June 27 decision did not include a finding in favor of Union on causation, such that Union cannot rely on the doctrine of law of the case, the Court denies Epiq summary judgment dismissing the First Cause of Action based on a claimed lack of compensable damages proximately caused by the breach.

Proximate cause is "an essential element" of a breach of contract cause of action. *Lola Roberts Beauty Salon, Inc. v Leading Ins. Group Ins. Co., Ltd.*, 160 AD3d 824, 825 (2d Dep't 2018). "Generally, it is for the trier of fact to determine the issue of proximate cause [and] the issue of proximate cause may be decided as a matter of law where only one conclusion may be

drawn from the established facts…." *Id.* at 826 (citations omitted). While not disputing that there may be more than one cause of an injury, Epiq argues that the conduct of Axos following the transfer of the JSA constitutes an "intervening act" so extraordinary that it breaks any causal connection and relieves Epiq of any liability for damages. In short, as Epiq contended at oral argument, Epiq asserts that Axos is responsible for any compensable damages to which

The principle of "intervening cause" was aptly explained by the Court of Appeals in *Hain v Jamison*, 28 NY3d 524 (2016). While *Hain* is a tort cause, the principles applicable to proximate cause and intervening cause are also applicable in this breach of contract case. The *Hain* Court stated in relevant part as follows (at p 529 with internal citations and quotation marks omitted, emphasis in the original):

> When a question of proximate cause involves an intervening act, "liability turns upon whether the intervening act is a *normal or foreseeable consequence* of the situation created by the defendant's negligence" … Thus, "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed" …. Rather, "[t]he mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury" … It is "[o]nly where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, [that it] may . . . possibly break[ ] the causal nexus" …. To state the inverse of this rule, liability *subsists* "[w]hen ... the intervening act is a natural and foreseeable consequence of a circumstance created by defendant" ...

As explained below, Epiq has failed to even come close to meeting its burden of establishing as a matter of law that the only conclusion one could draw from the evidence is a lack of proximate cause. Indeed, if the Court were to search the record on Epiq's motion for summary judgment, the Court could very well identify substantial evidence to support a determination by the trier of fact in favor of Union on the proximate cause issue.

Epiq first points to the testimony of various Union witnesses offered at the preliminary injunction hearing or in depositions to argue that Epiq's breach either caused no damages at all,

or that the conduct of Axos or some other event was an intervening, superseding cause that broke the required causal connection. But Union disputes Epiq's characterization of that testimony, and the Court finds the testimony does not compel a finding in favor of Epiq on the causation issue as a matter of law. A jury could well find in this case that Epiq and Axos share responsibility for Union's loss and that the conduct of Axos was "a natural and foreseeable consequence of a circumstance created by defendant" Epiq.

Epiq next argues that the claimed damages, in the nature of future lost profits, are "consequential damages" barred by the JSA. The Court denies summary judgment on this claim as well. "Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law." *Kenford Co. v. Erie Cty.*, 67 NY2d 257, 261 (1986). Thus, the only issue is whether the JSA by its express terms bars the damages.

Epiq relies on JSA § 22, entitled "Limitations of Liability", which begins by setting certain caps on damages. Section 22 then states: "Notwithstanding the foregoing limitations of liability, if any breach by a party is finally found by a court or arbitration panel of competent jurisdiction to have been caused willfully or by the gross negligence of the breaching party, then the non-breaching party shall be entitled to seek, and may be awarded, consequential, special, indirect, punitive and/or treble damages for any such breach in an amount not to exceed $10,000,000." In other words, consequential damages may be available under the JSA if the Court finds the breach was caused "willfully or by the gross negligence of the breaching party."

The Court firmly rejects Epiq's claim that the evidence here compels a finding as a matter of law that Epiq's alleged breach was not willful. While Epiq argues its conduct cannot, by definition, be considered willful because the conduct did not demonstrate bad faith or a purpose to harm Union, Union counters that willful conduct need only be intentional. Each party offers significant case law for its position. The answer is somewhere in between and can only be

determined in the context of the contract as a whole and the intent of the parties. *Metropolitan Life Ins. Co. v Noble Lowndes Int'l,* 84 NY2d 430 (1994). But in any event, the issue of willful conduct is for the jury. As the Court of Appeals explained in *Metropolitan Life* (at p 435):

> The issue here is not how we and other courts have construed "willful" in other contexts, such as in interpreting statutes using that term or in formulating or applying legal principles in tort or contract law. Rather, the issue is what the parties intended by "willful acts" as an exception to their contractual provision limiting defendant's liability for consequential damages arising from its [breach].

Consequently, at a minimum, there are triable issues of fact concerning the willfulness of Epiq's conduct and the foreseeability of the consequences of Epiq's actions.

Further, the Court agrees with Union that the alleged damages may, in any event, qualify as direct, rather than consequential damages. *See generally, Biotronik A.G. v Conor Medsystems Ireland, Ltd.,* 22 NY3d 799 (2014) (discussing the distinction between general and special, or consequential, contract damages for lost profits). Union has made compelling arguments that the claimed lost profits are the natural and probable result of Epiq's breach that were contemplated by the parties at the time of the JSA and wholly foreseeable, as discussed by the Court in *Biotronik*. A fuller record at trial is needed to determine these issues.

The Court now turns to Epiq's request for summary judgment dismissing the Second Cause of Action. There Union claims that Epiq breached the confidentiality provisions in JSA § 13 by disclosing to Axos during the due diligence period preceding the sale information such as the terms of the JSA, customer information, and Union's financial service pricing and profitability. Union also claims that Epiq breached JSA § 6K, which provides that: "Neither 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."

Epiq does not vigorously pursue summary judgment relating to the confidentiality clause. With respect to 6K, Epiq argues that it was transferring its membership interest in the business,

and not directly conveying Joint Client relationships. The argument is based on semantics and, in the opinion of this Court, falls flat. And the causation and damages issues related to the Second Cause of Action are the same as those related to the First. Therefore, summary judgment dismissing the Second Cause of Action is denied.

The Third Cause of Action sounds in breach of the covenant of good faith and fair dealing that is implied in every contract. Union alleges that, even if Epiq's transfer of the JSA to Axos 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." (SAC, ¶ 127). However, Union has not pointed to any conduct tied to a breach beyond the terms of the JSA. Accordingly, the Court grants Epiq summary judgment dismissing the claimed breach of the implied covenant of good faith and fair dealing as duplicative of the breach of contract claim, as both claims arise from the same facts and seek the identical damages for each alleged breach. *See, e.g., Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dep't 2010) (affirming dismissal of breach of implied covenant claim as duplicative of facts alleged and damages sought in the breach of contract claim).

Epiq's final argument, offered as an alternative to dismissal of the claims, seeks to set a cap on Union's damages of no more than $20M pursuant to the Limitations of Liability found at JSA § 22. That section states (with full capitalization in the original) that:

> EXCEPT AS SET FORTH BELOW WITH RESPECT TO BREACHES OF SECTIONS 12 (INTELLECTUAL PROPERTY), 13 (CONFIDENTIALITY) AND 21 (INDEMNIFICATION) OF THIS AGREEMENT, IN NO EVENT WILL A PARTY'S LIABILITY UNDER THIS AGREEMENT EXCEED AN AMOUNT EQUAL TO $5,000,000. FOR ANY BREACH OF SECTION 13 (CONFIDENTIALITY), EACH PARTY'S AGGREGATE LIABILITY SHALL BE LIMITED TO $10,000,000. FOR ANY BREACH OF SECTION 12 (INTELLECTUAL PROPERTY) OR CLAIM PURSUANT TO SECTION 21 (INDEMNIFICATION), EACH PARTY'S AGGREGATE LIABILITY SHALL BE LIMITED TO $20,000,000.

In other words, a party's liability under the JSA is capped at $5M, with the following exceptions: (1) for any breach of Section 13 (Confidentiality), each party's aggregate liability is limited to $10M; and (2) for any breach of Section 12 (Intellectual Property) or a claim under Section 21 (Indemnification), each party's aggregate liability is limited to $20M. Further, as indicated above (at p 5), "notwithstanding the foregoing," if the Court finds that any breach was caused "willfully or by the gross negligence of the breaching party, then the non-breaching party shall be entitled to seek, and may be awarded, consequential, special, indirect, punitive and/or treble damages for any such breach in an amount not to exceed $10,000,000."

Epiq asserts that this clause must be construed as setting an aggregate cap of $20M in damages, despite the nature of the breach or type of damages at issue (NYSCEF Doc. No. 395, p 21). In response, Union argues that Epiq has waived the limitation of liability defense by failing to assert it until it answered the Second Amended Complaint. The Court rejects Union's waiver argument and finds that Epiq preserved the defense by including it in the Answer to Union's final pleading.

However, the Court disagrees with Epiq's interpretation of the cap. The cap would be $20M if the jury were to find only a limited number of nonwillful breaches under the specified clauses. If, however, the jury were to find one or more willful breaches of "any" of the sections of the JSA (such as the anti-assignment clause at JSA § 23 or the prohibition against the transfer of Join Client relationships or accounts at 6K) that justify an award of consequential damages, then the cap would be $10M "for any such breach." The term "aggregate liability" does not appear in that sentence. Thus, the amount of the cap depends on the particular JSA section that was breached and whether the breach was willful. Without those findings, damages cannot be capped at this time, and Epiq's request for summary judgment setting a $20M cap is denied.

The Court now turns to the motion by Axos for partial summary judgment dismissing in whole or in part the three causes of action asserted against it (seq 011). Those causes of action include the Fourth sounding in tortious interference with contractual relations, the Fifth sounding in breach of the JSA contract, and the Sixth sounding in breach of the covenant of good faith and fair dealing. Like Epiq, Axos asks the Court, in the alternative, to cap its damages on the Fifth Cause of Action to $5M; no argument is made, or can be made, that any type of cap applies to the tortious interference claim which is not governed by the JSA.

Citing cases such as *Snyder v Sony Music*, 252 AD2d 294, 299 (1st Dep't 1999), Axos urges the Court to dismiss the tortious interference claim, arguing that, because the JSA was a contract terminable at will, New York law recognizes only a claim for tortious interference with prospective contractual relations. Axos further argues that, even assuming Union had brought the proper claim, the claim would fail because Union cannot establish that: (1) Axos' alleged interference was accomplished by "wrongful" means that amounted to a crime or independent tort; or that (2) Axos acted for the sole purpose of inflicting intentional harm on Union. *See, e.g.*, *Lawrence v Union of Orthodox Jewish Congregations of Am.*, 32 AD3d 304 (1st Dep't 2006); *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 (1980).

Additionally, according to Axos, Union's claim fails because the wrongful conduct must be "directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship." *Carvel Corp. v Noonan*, 3 NY3d 182, 192 (2004). Axos claims it did not engage in any wrongful conduct because here, Epiq freely sold its Chapter 7 software business, which it had no interest in maintaining, to Axos after engaging in a competitive process, and both Epiq and Axos were acting, at least in part, to advance their own economic interests. Axos contended at oral argument that, if any party is liable to Union for damages, it is Epiq, as the original party to the JSA.

Union in opposition successfully defeats the newfound quest by Axos for summary judgment dismissing this claim. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. …" *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996) (citation omitted). The evidence supports these elements, at least to the extent of creating triable issues of fact that defeat summary judgment.

Here, the JSA was undeniably a valid contract between plaintiff Union and Epiq as the "third party" that was known to Axos, and Axos allegedly intentionally procured Epiq's breach of the anti-assignment clause (and more) of that contract without justification, resulting in a breach that caused Union damages. Axos directed its conduct at Epiq, not plaintiff, in allegedly procuring Epiq's breach of contract, and the motivation of Axos turns on issues of credibility not suitable for determination as a matter of law on summary judgment.

Axos has further failed to persuade that the tortious interference claim here fails because it is premised on an at-will contract (the JSA). Union correctly notes that at least some of the cases cited by Axos merely stand for the proposition that, for there to be tortious interference with contract, there must be an actual breach of that contract. So for example, in *Snyder v Sony Music*, the termination of plaintiff's employment contract with his law firm, procured by the third party Sony, was the alleged breach, and the court correctly determined that, because plaintiff's employment contract was terminable at will, the termination could not constitute a breach of contract. In contrast here, Epiq's breaches allegedly procured by Axos did ***not*** consist of the termination of the JSA, but instead allegedly consisted of the wrongful assignment of the JSA and the improper disclosure of Union's confidential information, without which the Transfer

and Acquisition would not have taken place, thereby resulting in the transfer of Union's customers to Axos.

Also instructive on this point is the discussion by the Court of Appeals in *Guard-Life Corp. v Parker Hardware Mfg. Corp*., 50 NY2d 183 (1980) which lends support to Union's position. There the Court stated (at p 194, citations omitted):

> Where contracts terminable at will have been involved, we have upheld complaints and recoveries in actions seeking damages for interference when the alleged means employed by the one interfering were wrongful, as consisting of fraudulent representations …, or threats … or as in violation of a duty of fidelity owed to the plaintiff by the defendant by reason of a relation of confidence existing between them ….

What is more, the terms of the JSA do not definitively define it as a contract terminable at will. The JSA was structured so that no party could terminate the contract without (i) continuing the contract through a contractually defined Disengagement Period; and (ii) working cooperatively with the other party, or (iii) breaching the no-transfer provision. The thrust of Union's claims is that Axos took advantage of these very provisions to essentially appropriate Union's Chapter 7 business.

Turning to the Fifth Cause of Action for breach of contract, Axos seeks to dismiss only that aspect of the claim based on the alleged transfer of the Chapter 7 software ("the Server Switch"). Just as Epiq did in its motion, Axos seeks to dismiss the contract claim on the ground that the alleged breach did not cause Union any damages, as purportedly acknowledged in various testimony from Union witnesses. The Court rejects the motion by Axos for summary judgment dismissing the contract claim based on the absence of causation or the lack of damages, finding triable issues of fact. Thus, dismissal of the Fifth Cause of Action is denied.

In the Sixth Cause of Action, Union alleges that Axos breached the covenant of good faith and fair dealing implied in the JSA when it did not: (1) consent to Union's proposed

amendment to the JSA fee structure during the Disengagement Period to place Union on a level playing field with Axos and avoid Union's loss of all of its Chapter 7 depository business; or, (2) refer new business to Union. As to the fee amendment request, Axos correctly asserts that the JSA addresses the issue of fees, and the implied covenant cannot be used to alter the fee provisions in the JSA. To the extent Union relies on Epiq's alleged prior practice of referring business to Union, JSA § 31 arguably addresses that point, providing that "[n]o supplement, modification or waiver of this Agreement will be implied from any conduct of the parties." Thus, Union's claims in the implied covenant cause of action are more properly the subject of a breach of contract claim, and summary judgment is therefore granted dismissing the Sixth Cause of Action as duplicative of the breach of contract claims.

The final request for relief by Axos, similar to the request made by Epiq, asks the Court to set a cap on damages in the event the Court declines to dismiss the claims on the merits. But unlike Epiq, which urged a $20M cap, Axos urges a $5M cap, suggesting it did not induce a breach any of the clauses in the JSA subject to the higher cap and that it did not engage in willful conduct causing a breach so as to permit the higher cap related to consequential damages. The Court finds here, as it did earlier, that the amount of the damages cap depends on the particular JSA section that was breached and whether the breach was willful. Without those findings, damages cannot be capped at this time, and summary judgment must be denied. Further, as noted earlier, the JSA cap in no way can be applied to the tortious interference claim against Axos, as that claim is not subject to the terms of the JSA.

Accordingly, it is hereby

ORDERED that the motion by defendant Epiq Systems, Inc. for summary judgment (seq. 009) is granted to the extent of directing the Clerk to sever and dismiss the Third Cause of Action sounding in breach of the duty of good faith and fair dealing, without prejudice to the

assertion of the claim in the context of the breach of contract cause of action, and the motion is otherwise denied; and it is further

ORDERED that the motion by defendants Axos Bank, Axos Fiduciary Services, Axos Nevada, LLC, and Seller Sub, LLC for partial summary judgment (seq. 011) is granted to the extent of directing the Clerk to sever and dismiss the Sixth Cause of Action sounding in breach of the duty of good faith and fair dealing, without prejudice to the assertion of the claim in the context of the breach of contract cause of action, and the motion is otherwise denied; and it is further

ORDERED that counsel shall appear remotely for a final pre-trial conference on Tuesday, October 6, 2020 at 2:00 p.m. to discuss the procedures for the October 26, 2020 jury trial, including limits on motions *in limine*, *voir dire*, exhibits and remote testimony, as well as general time constraints for the trial.

Dated: September 25, 2020

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☒	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**