

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)	
)	Case No. 19-04539-JMC-7A
KERRI L. AGEE,)	
)	
Debtors.)	
_____)	
)	
NEWTEK BUSINESS SERVICES HOLDCO 5,)	
INC., NEWTEK BUSINESS SERVICES CORP,)	
and ADR Partners, LLC)	
d/b/a BANC-SERV PARTNERS, LLC)	Adv. No.
)	
Plaintiffs,)	
)	
- Against -)	
)	
KERRI L. AGEE,)	
)	
Defendant.)	
_____)	

COMPLAINT

Newtek Business Services Holdco 5, Inc. f/k/a banc-serv Acquisition, Inc. (“Holdco” or “BSAI”), Newtek Business Services Corp. (“Newtek”), and ADR Partners, LLC d/b/a banc-serv Partners, LLC (“banc-serv”), as and for their complaint in the above-captioned adversary proceeding against Kerri L. Agee (the “Debtor” or “Agee”), the above-captioned Chapter 7 debtor, respectfully allege:

Relief Requested

1. Plaintiffs Holdco, Newtek and banc-serv (collectively, the “Plaintiffs”) commence this adversary proceeding (the “Adversary Proceeding”), seeking entry of a judgment pursuant to §§ 523(a)(2), (4) and (6) of the Bankruptcy Code, excepting their claims against the Debtor from

any discharge granted in this case on the grounds of fraud, defalcation while acting in a fiduciary capacity, embezzlement and larceny and inflicting a willful and malicious injury.

Parties

2. Plaintiff Newtek is a Maryland corporation with an address at 1981 Marcus Avenue, Suite 130, Lake Success, New York 11042. Newtek is a publicly traded internally managed, non-diversified, closed-end management investment company that has elected to be regulated as a business development company under the Investment Company Act of 1940.

3. Plaintiff Holdco, which was formerly known as Banc-Serv Acquisition, Inc. (“BSAI”), is a New York corporation with an address at 1981 Marcus Avenue, Suite 130, Lake Success, New York 11042. Holdco is a wholly owned subsidiary of Plaintiff Newtek.

4. Plaintiff ADR Partners, LLC d/b/a banc-serv Partners, LLC (“banc-serv” or the “Company”) is a Delaware limited liability company, with an address at 877 Purdue Road, Indianapolis, Indiana 46268. Plaintiff Newtek, through its wholly owned consolidated subsidiaries, owns 100% of the membership interests of banc-serv.

5. Defendant Agee is the Debtor in the above-captioned Chapter 7 case and resides at 20880 N. State Road 37, Noblesville, Indiana 46060.

Jurisdiction And Venue

6. This Court has jurisdiction over this Adversary Proceeding under 28 U.S.C. § 1334.

7. This Adversary Proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and (J).

8. Venue over this Adversary Proceeding is appropriate in this district under 28 U.S.C. § 1409.

Background

9. On June 19, 2019 (the “Petition Date”), the Debtor filed a voluntary Chapter 7 bankruptcy petition, along with her schedules of assets and liabilities (the “Schedules”) and statement of financial affairs (“Statement of Financial Affairs”).

10. The Debtor’s bankruptcy petition was filed: (i) approximately one month before hearings were to commence in an arbitration proceeding (the “Arbitration”) commenced before the American Arbitration Association by Holdco and Newtek against Agee, seeking damages for fraud in connection with, *inter alia*, Holdco’s acquisition of the Debtor’s 100% ownership interest in banc-serv; and (ii) approximately 3 months after the Debtor’s federal indictment (the “Indictment”) by a grand jury in the Southern District of Indiana in connection with her participation in a 13-year conspiracy in which she is alleged to have used banc-serv to defraud the United States government and other financial institutions in connection with improperly obtained U.S. Small Business Administration (“SBA”) loans. The Arbitration has been stayed by § 362 of the Bankruptcy Code as a result of the Debtor’s filing of the above-captioned bankruptcy case.

banc-serv

11. At all relevant times prior to June 23, 2016, the Debtor was the sole and managing member of banc-serv, and its president and chief executive officer. As its president and chief executive officer, the Debtor owed a fiduciary duty to banc-serv.

12. At all times relevant to this Adversary Proceeding, banc-serv’s business consisted of acting as a lender service provider to banks and other lenders, assisting in the origination and servicing of SBA loans. The Company’s services for its clients included credit analysis, structuring and eligibility, packaging and closing compliance to secondary market management, due diligence, auditing, portfolio compliance and servicing, and special assets management.

The Transaction and the Purchase Agreement

13. On or about June 24, 2016, Holdco closed (the “Closing”) on its purchase of the Debtor’s 100% ownership interests in banc-serv for \$5,400,000 pursuant to a Membership Interest Purchase Agreement (the “Purchase Agreement”) and other documents (collectively, the “Transactional Documents”) between and among Holdco, the Debtor and banc-serv (the “Transaction”). Newtek is an intended third party beneficiary under the Purchase Agreement. (A copy of the Purchase Agreement is annexed hereto as Exhibit A).

14. As required by the Purchase Agreement, Holdco caused banc-serv to enter into an employment agreement with the Debtor (the “Employment Agreement”), dated June 23, 2016. Under the Employment Agreement, banc-serv would continue to employ the Debtor as its president and chief executive officer for a period of two years following the closing, subject to the right to terminate the Debtor’s employment with or without just cause. The Employment Agreement is one of the Transactional Documents, as defined in the Purchase Agreement.

15. Prior to entry into the Purchase Agreement and other Transactional Documents, the Debtor made certain representations and provided certain financial information concerning banc-serv’s business and finances to Holdco and Newtek, who the Debtor understood would be relying upon such information in determining whether to purchase her interests in banc-serv and at what price.

16. Among the financial documents (the “Financial Statements”) provided by the Debtor to BSAI and Newtek prior to a closing of the Transaction were:

- (a) a draft of audited financial statements of the Company as of December 31, 2015, (which is defined in the Purchase Agreement as the “Year-End Financial Statements”);
- (b) an unaudited balance sheet of the Company as of May 31, 2016;
- (c) related statements of income, member’s equity and cash flows;

- (d) a schedule of liabilities and indebtedness of the Company as described in more detail in ¶ 5.12 of the Purchase Agreement;
- (e) a schedule of Material Contracts, as defined in the Purchase Agreement; and
- (f) financial projections for the Company.

The Debtor's Multiple Misrepresentations To Holdco And Newtek To Induce Entry Into The Purchase Agreement

17. The Debtor was in personal financial straits at the time she entered into the Purchase Agreement. In 2015, the Debtor personally guaranteed a \$750,000 loan from Wing Financial to banc-serv, which was in default in early 2016. She had tried unsuccessfully to sell her interest in banc-serv to numerous entities, and was in need of funds to pay off the Wing Financial loan and obtain a release of her liability under her guaranty of such loan. Indeed, after the Closing of the Transaction, Holdco and Newtek learned that another potential purchaser of the Debtor's interests in banc-serv had broken off negotiations with the Debtor after accusing her of providing material false financials of banc-serv.

18. The Debtor made numerous misrepresentations to Holdco and Newtek in order to induce entry into the Purchase Agreement, including those representations hereafter defined as the Compliance with Laws Representation, Absence of Liabilities Representation, Financial Statements Representation, the Employee Bonus Representation and the No Agreements With Affiliates Representation, (collectively, the "Representations"), which are set forth in more detail *infra* at ¶¶ 19-71 of this Complaint (the "Representations").

The Debtor's Compliance With Laws Misrepresentation

19. For example, in ¶ 5.14(a) of the Purchase Agreement (the "Compliance With Laws Representation"), the Debtor represented to Holdco and Newtek:

5.14. **Compliance with Laws; Permits** (a) Except as set forth on Schedule 5.14(a), Company has complied with each, and is not in violation of, any Applicable Law, in any material respect, and has not failed in any material respect to obtain or adhere to the requirements of any Permit necessary to the ownership of Company's Assets or to the conduct of its business except for any such violations that would not reasonably be expected to have a Material Adverse Effect.

20. The Compliance With Laws Representation made by the Debtor was false. Unbeknownst to Holdco and Newtek at the time of the Closing, the Debtor had been using banc-serv to engage in illegal and allegedly criminal conduct.

21. Specifically, on October 12, 2017, the Federal Bureau of Investigation (the "FBI"), pursuant to a federal search warrant (the "Search Warrant"), conducted a raid at banc-serv's then premises and removed boxes of documents and electronic data from banc-serv's servers and computers. The FBI's execution of the Search Warrant related to a criminal investigation (the "Criminal Investigation") of the Debtor and banc-serv's business activities prior to the Closing, when banc-serv was under the ownership and control of the Debtor.

22. On March 20, 2019, a federal grand jury for the Southern District of Indiana indicted the Debtor and charged her with six counts of violating federal law in connection with her actions at banc-serv, consisting of counts for: (i) Conspiracy to Commit Wire Fraud Affecting a Financial Institution in violation of 18 U.S.C. § 1349 (Count 1); (ii) Wire Fraud Affecting a Financial Institution in violation of 18 U.S.C. § 1343 and 2 (Counts 2 through 5); and (iii) Conspiracy to Make False Statements in Purchases and Applications for Guarantees in violation of 8 U.S.C. § 1371 (Count 6). A copy of the indictment (the "Indictment") is annexed hereto as Exhibit B.

23. According to the Indictment:

The Defendants, co-conspirators, other Banc-Serv employees, and lending officers at other banks or lending institutions, would seek to obtain SBA guarantees for loans that did not meet SBA's guidelines and requirements. To ensure the loans would appear to meet SBA lending guidelines, the Defendants and co-conspirators would make false statements on loan-guarantee applications and purchase requests sent to the SBA about matters such as a borrower's eligibility to receive a loan and how loan proceeds would be disbursed. Specifically, but not exclusively, the Defendants and their co-conspirators worked to obtain SBA-guaranteed financing for ineligible expenses and uses of money—such as past-due payroll taxes and personal debt—by falsely designating the loan proceeds going to those ineligible expenses and uses as “working capital,” which were funds for a business's normal operating expenses. Additionally, the Defendants and their co-conspirators abused PLP authority by submitting applications for loans and borrowers that the SBA had previously deemed to be ineligible. The Defendants knew these practices were against SBA guidelines. When the loans defaulted, the Defendants and co-conspirators would submit the same misrepresentations in the loan applications, authorizations, settlement statements, and questionnaires as part of purchase requests to the SBA to ensure that the banks originating the SBA-guaranteed loans, or the secondary-market investors that had purchased the guaranteed portions of the loans, would be compensated. As a result, the SBA incurred losses by purchasing loans that, had it known of the misrepresentations made in the loan files by the co-conspirators, it never would have guaranteed in the first place.

(Indictment at ¶ 26).

24. The Indictment further states:

The purpose of the scheme was for the Defendants and co-conspirators (a) to generate additional unlawful revenue for Banc-Serv—and ultimately compensation for themselves — in the form of packaging fees, servicing fees, and fees for selling the guaranteed portions of the loans to investors, and (b) to conceal the ineligible loans from the SBA so Banc-Serv would not have to indemnify the lending institutions, the secondary-market investors, or the SBA for having originated and sold ineligible loans that ultimately defaulted.

(Indictment at ¶ 28.)

25. According to the Indictment, the Debtor's use of banc-serv to conduct her criminal scheme took place over a 13-year period, and related to dozens of illegally obtained loans, aggregating over \$10,000,000. (Indictment at ¶ 27.)

26. The offenses for which the Debtor was indicted were not the only reason why the Compliance With Laws Representation was false. Prior to the Closing, the Debtor also caused banc-serv to convert over \$800,000 in funds belonging to its clients.

27. Specifically, when the Company was servicing SBA loans for its customers, it was required to collect principal and interest payments on the loans and remit the payments at specified times to both the lenders and, if the guaranteed portions of the loans were sold in the secondary market, the prorated portions of the principal and interest payments to the SBA's Fiscal Transfer Agent, Colson Services Corp.

28. After the Closing, it was discovered, that the Debtor, since as early as 2004, was causing banc-serv to deposit or transfer loan payments it received on behalf of its clients into banc-serv's operating account, where it expended such funds for banc-serv's business operations and to fund the Debtor's lavish lifestyle.

29. This conversion of client funds caused by the Debtor resulted in a shortfall of over \$800,000 in banc-serv's servicing accounts to the detriment of its clients, which was not disclosed to Holdco or Newtek prior to Closing of the Transaction, and which were only learned about by Holdco and Newtek after the Closing.

30. As a result, Plaintiff Newtek advanced funds to banc-serv post-Closing in order to restore funds converted by, or at the direction of, the Debtor, in order to make sure all of banc-serv's customers were made whole.

31. The Debtor knew the Compliance With Laws Representation was false when she made it.

32. The Debtor made the Compliance With Laws Representation to Holdco and Newtek for the purpose of inducing entry into the Purchase Agreement and purchase of the Debtor's interest in banc-serv for \$5,400,000.

33. Holdco and Newtek reasonably and justifiably relied upon the Compliance With Law Representation made by the Debtor in deciding to enter into the Purchase Agreement.

34. Holdco would not have entered into the Purchase Agreement, and Newtek would never have authorized Holdco to enter into the Purchase Agreement had they known that the Debtor's Compliance With Laws Representation was false.

35. Holdco and Newtek were damaged by the Debtor's false Compliance with Law Representation.

36. In addition to the \$5,400,000 purchase price Newtek expended over \$700,000 in legal defense costs for criminal defense counsel for banc-serv following the FBI Raid.

37. After the FBI Raid occurred, which was highly publicized in banc-serv's industry, banc-serv's business, name, reputation and goodwill were severely damaged, and customers began fleeing the Company.

38. As disclosed in Newtek's Form 10-K for the year ended December 31, 2017, Newtek disclosed that it wrote down the fair value of its investment in banc-serv from \$5.4 million to \$3.4 million.

39. As of March 31, 2018, Newtek was required to again write down its investment in banc-serv by an additional \$1.43 million, to \$2 million, reflecting the impact of the Criminal Investigation, as well as Agee's other Purchase Agreement misrepresentations.

40. During 2018, Newtek recognized \$4,939,000 in unrealized depreciation on its investment in banc-serv, including \$1,509,000 in capital contributions, and as of December 31, 2018, the fair valuation of Newtek's investment in banc-serve was \$0.

41. In other words, Holdco and/or Newtek: (i) paid \$5,400,000 for a company that was being operated in violation of federal law, and which had converted approximately \$1,000,000 in customer funds which Newtek restored in order to make such clients whole; (ii) paid over \$700,000 in criminal defense costs for banc-serv, arising from the Debtor's alleged crimes; (iii) paid approximately \$200,000 in undisclosed employee bonuses (as discussed infra at ¶¶ 60-65) and, in the end, banc-serv was worthless as reflected in Newtek's write-downs of banc-serv's value to \$0.

**The Absence of Liabilities And Indebtedness Misrepresentations
And Financial Statement Misrepresentations**

42. The Debtor made the following representations (the "Absence Of Liabilities And Indebtedness Representation") in ¶ 5.12 of the Purchase Agreement:

5.12. **Absence of Liabilities and Indebtedness** (a) Except as set forth in Schedule 5.12(a), Company does not have any Liability other than (i) Liabilities reflected on the Financial Statements and not paid or discharged as of the Closing Date, (ii) Liabilities of the type reflected on the Financial Statements arising subsequent to the Balance Sheet Date in the Ordinary Course of Business, (iii) Liabilities arising from executory obligations under Contracts to which Company is a party, (iv) Liabilities not required under the Historical Manner of Determination to be shown on a balance sheet of the Company, (v) Liabilities disclosed in, related to or arising under any agreements, instruments or other matters disclosed in this Agreement or any Schedule hereto, (vi) Liabilities incurred in connection with the negotiation and execution of this Agreement or the consummation of the transactions contemplated hereby or thereby, or (vii) other undisclosed liabilities that are not, individually or in the aggregate, material to the Company.

(b) Except as set forth on Schedule 5.12(b), Company has no Indebtedness.

(c) Except as disclosed on Schedule 5.12(c), Company has no liability for Repair Costs.

43. The Purchase Agreement defined the term “Liability” as “any direct or indirect liability, indebtedness, obligation, interest, penalty, commitment, expense, claim, deficiency, guaranty or endorsement of or by any Person of any type, know or unknown, asserted or unasserted, and whether accrued, absolute, contingent, matured or unmatured, including any liability for Taxes.”

44. Repair and denial liability (“Repair and Denial Liability”) occurs in connection with an SBA loan when a lender fails to comply with certain of the SBA’s regulations in connection with the origination, servicing, or liquidation of an SBA 7(a) loan. When this occurs, the SBA may be released from liability on its guaranty of a SBA 7(a) loan, and may refuse to honor a guaranty purchase request in full (referred to by SBA as a “denial”) or in part (referred to by SBA as a “repair”), or recover all or part of the funds already paid in connection with a guaranty purchase. In the event of a repair or denial liability on the guaranty, the lender may seek damages from the Company. To the extent that banc-serv contracted to provide services to a bank that originated a loan, banc-serv had potential exposure to the bank if the SBA denied the guarantee on the loan.

45. In connection with the Transaction, the Debtor also made the following representations in ¶ 5.7 of the Purchase Agreement (the “Financial Statements Representation”) concerning its finances:

Financial Statements (a) The Company has made available to Purchaser true and correct copies of (i) the audited financial statements of the Company as of December 31, 2015 (such December 31, 2015 (the “*Year-End Financial Statements*”) and (ii) the unaudited balance sheet of the Company as of May 31, 2016 (the “*Balance Sheet Date*”), and the related statements of income, member’s equity and cash flows for the period then ended (the “*Interim Financial Statements*”, and together with the Year-End Financial Statements, the “*Financial Statements*”).

(b) The Financial Statements (i) fairly present in all material respects the financial position of Company as of their respective dates and the results

of operations for the respective periods reported therein; and (ii) have been prepared from the Books and Records of Company and in accordance with GAAP, except as may be indicated in the notes thereto and except for the unaudited financial statements, which are subject to normal year-end audit adjustments and do not contain footnotes, and except for certain adjustments and allocations required in connection with the preparation of the pro forma balance sheets and related statements of income, member's equity and cash flows.

(c) Company maintains accurate books and records reflecting its Assets and Liabilities and maintains adequate internal control procedures in light of Company's size, operations and industry over financial reporting that provides reasonable assurance that (i) material transactions are executed with the authorization of management; (ii) transactions are recorded as reasonably necessary to permit preparation of the Financial Statements and to maintain accountability for Company's consolidated Assets in all material respects; and (iii) accounts, notes and other receivables were recorded accurately and properly in all material respects and adequate procedures in light of Company's size, operations and industry are implemented to effect the collection thereof on a current and timely basis. Since January 1, 2016, neither Company's manager nor any officers have been advised of: (x) any material deficiency in the design or operation of internal controls effecting Company's ability to record, process, summarize and report financial data, or (y) any fraud, whether or not material, that involves management or other Employees who have a role in Company's internal controls. Since January 1, 2016, no material weakness in internal controls has been identified by Company, and there has been no significant change in internal controls or other factors, including any corrective actions with regard to any significant deficiency or material weakness.

46. Both the Absence of Liabilities and Indebtedness Representation and Financial Statements Representation made by the Debtor were false and misleading at the time they were made because, among other things, the Debtor failed to disclose the following liabilities:

- (i) over \$800,000 in liabilities owed to banc-serv's clients resulting from the deficit in banc-serv's servicing account caused by the conversion of funds belonging to banc-serv's customers;
- (ii) approximately \$200,000 in employee bonuses (which are also discussed *infra* at ¶¶ 60-65);
- (iii) Repair and Denial Liabilities as high as \$3,000,000;
- (iv) the requirement that banc-serv provide free services to a significant client (North Salem State Bank) through November 2019;

- (v) the claim of one of its clients that banc-serv overcharged it for over \$200,000 in fees;
- (vi) car leases that Agee allowed her family members to take out in banc-serv's name; and
- (vii) federal and state tax liabilities of approximately \$8,135.

47. The Financial Statements Representation was also materially false because the Financial Statements did not “fairly represent in all material respects the financial position of Company as of their respective dates and the results of operations for the respective periods reported therein.”

48. Agee did not disclose the existence of any Repair and Denial Liabilities in the Purchase Agreement, or the schedules thereto, or in the Financial Statements provided to the Claimants.

49. However, after the Closing of the Transaction, Plaintiff discovered, according to reports prepared by banc-serv, that the Company's contingent Repair and Denial Liabilities may exceed \$3,000,000, plus those illegally originated SBA loans referred to in the Indictment.

50. By the way of example with respect to banc-serv's Repair and Denial Liabilities, prior to the Closing, banc-serv had been retained by Pilot Bank to complete due diligence in connection with an \$81,000 loan (the “Pilot Loan”) to Shaken & Stirred LLC dba Excalibur Martini and Cigar Bar (“Excalibur”) in connection with the acquisition of a cocktail lounge and cigar bar. As part of its due diligence, banc-serv was required to ensure that there were no outstanding liens upon the liquor license that Excalibur would be acquiring, and that Pilot would hold a first priority security interest in the liquor license at the time closing of the Pilot Loan.

51. Banc-serv failed to conduct a proper lien search of the liquor license prior to closing the Pilot Loan, and failed to discover the existence of a pending lien on the liquor license, which

lien was not released prior to the closing of the Pilot Loan. Additionally, banc-serv failed to properly perfect any security interest in the liquor license. The borrower thereafter defaulted under the Pilot Loan, leaving Pilot with an unsecured claim against the borrower, resulting in repair liability of approximately \$54,000. The Debtor was aware of this liability at the time of the closing and failed to disclose it.

52. Another example of undisclosed liabilities is that prior to entry into the Purchase Agreement, the North Salem State Bank (“NSSB”) commenced a lawsuit (the “NSSB Lawsuit”) against the Company for, among other things, defrauding a financial institution, criminal mischief, and deception, arising out of the Debtor causing banc-serv to sell NSSB’s interest in a government guaranteed portion of an SBA 7(a) loan without NSSB’s knowledge or consent, and intentionally and wrongfully failing to turn over the proceeds of such sale to NSSB. The Debtor caused the Company to enter into a settlement (the “NSSB Settlement”) of the NSSB Lawsuit pursuant to which the Company agreed to waive and not charge any servicing fees to NSSB for a period of five years, through November 2019.

53. The Debtor’s failure to disclose both the NSSB Lawsuit and the NSSB Settlement to Holdco and Newtek, which were material omissions, caused Holdco and Newtek to be materially misled and fraudulently induced entry into the Purchase Agreement. For example, the NSSB Lawsuit raised very serious allegations about the Debtor, her operation of banc-serv in an illegal manner, her violation of the SBA rules and regulations, and her character. Moreover, pursuant to the terms of the undisclosed NSSB Settlement, the Company was required to provide free services to NSSB for five years, which constituted both a Material Contract and Material Liability or Indebtedness (as defined in the Purchase Agreement) of banc-serv. banc-serv

estimates that it has been required to provide over \$43,215.73 in free services to NSSB since the Closing.

54. The Company has also been contacted by a former bank client, which has asserted that it had been overcharged \$232,916.00 for services allegedly provided by the Company prior to the Closing.

55. The Debtor also failed to disclose other liabilities, Indebtedness and Material Contracts, including the following: (i) the Debtor caused banc-serv to finance certain car leases for her family members, which financing contracts have since matured, resulting in additional post-closing monies owed by banc-serv in excess of \$13,035; (ii) the Debtor caused banc-serv to pay the personal expenses of her brother-in-law, which personal expenses exceeded \$50,000; and (iii) the Debtor failed to disclose certain pre-closing federal tax liabilities relating to accounting fees and IRS penalties concerning the filing of a Subchapter S Corporate Tax Return, resulting in taxes, interest, penalties and fees in excess of \$8,285.

56. The Debtor knew that the Absence of Liabilities and Indebtedness Representation and Financial Statements Representation were false at the time she made such representations to Holdco and Newtek.

57. The Debtor made the Absence of Liabilities and Indebtedness Representation and Financial Statements Representation to Holdco and Newtek for the purpose of inducing entry into the Purchase Agreement.

58. Holdco and Newtek reasonably and justifiably relied upon the Absence of Liabilities and Indebtedness Representation and Financial Statements Representation in deciding to enter into the Purchase Agreement.

59. Holdco would not have entered into the Purchase Agreement and Newtek would not have authorized Holdco to enter into the Purchase Agreement had they know that the Absence of Liabilities and Indebtedness Representation and Financial Statements Representation were false.

The Employee Bonus Misrepresentation

60. Agee made the following representation (“Employee Bonus Representation”) in ¶ 5.19 of the Purchase Agreement:

5.19. **Employment and Labor Matters** (a) Set forth in Schedule 5.19(a) is a complete and accurate list of all officers and Employees of Company, listing all Contracts with such officers and Employees and the rate of compensation (and the portions thereof attributable to salary, bonus and other compensation, respectively) and any accrued sick leave and accrued vacation of each of such Persons for the year ended as of the Balance Sheet Date and as of the Closing Date. Since the Balance Sheet Date, there have been no increases in the compensation payable or any special bonuses to any officer, manager, consultant or Employee of Company, except ordinary salary increases implemented on a basis consistent with past practices, all of which have been set forth on Schedule 5.19(a). To Company’s Knowledge no individual retained by Company as an independent contractor or consultant has alleged in writing that he/she has been unlawfully misclassified nor, to Company’s Knowledge has any Governmental Authority asserted such a claim against Company. Employees listed on Schedule 5.19(a) have all entered into either employment agreements, which have previously been provided, or “Employment at Will and Non-Competition Agreements” in the form as attached to the Schedule.

61. The Employee Bonuses Representation was false at the time it was made.

62. In order to induce entry into the Purchase Agreement, the Debtor knowingly failed to disclose to Holdco and Newtek on Schedule 5.19(a) of the Purchase Agreement, approximately \$200,000 in employee bonuses to banc-serv’s employees which would be payable after the Closing,

63. Holdco and Newtek reasonably and justifiably relied upon the Debtor’s Employee Bonus Representation in determining the purchase price under the Purchase Agreement.

64. The Debtor failed to disclose the employee bonuses referred to in ¶ 62 of this Complaint because she knew that the purchase price to be paid by Holdco and Newtek would be based upon a multiple of the Company's EBITDA. By failing to disclose the employee bonuses, the Debtor made the Company's EBITDA to appear to be substantially higher than it actually was.

65. The false Employee Bonus Representation was a material misrepresentation because the \$5,400,000 purchase price for banc-serv was calculated as a multiple of banc-serv's EBITDA. Thus, by failing to disclose approximately \$200,000 in employee bonuses, Holdco and Newtek paid over \$900,000 more for banc-serv than they would have, had they known that such bonuses were payable.

The No Agreements With Affiliates Misrepresentation

66. Agee made the following representations (the "No Agreements With Affiliates Representation") in ¶ 5.16(c) of the Purchase Agreement:

Agreements with Affiliates

(i) Except as set forth on Schedule 5.16(c) there are no existing related party contracts or arrangements or understandings, between, on the one hand, Company and, on the other hand any of Company's Affiliates

(ii) Except as set forth on Schedule 5.16(c) Company is not party to any contract arrangement or understanding, with any current or former Employee, current or former officer, current or former member or any current or former consultant of Company or its Affiliates or in which any such person as aforesaid is interested (whether directly or indirectly).

67. The Debtor's No Agreements With Affiliates Representation was false when it was made. First, the Debtor had caused banc-serv to enter into automobile leases for the benefit of her family members, and Holdco and Newtek were required to reimburse the leasing companies with respect to monies due at the conclusion of such leases.

68. Furthermore, the Criminal Investigation brought to light that the Debtor assisted both her family members, and family members of her long-time friend and former banc-serv Chief

Operating Officer, Kelly Isley, in obtaining over \$1 million in SBA loans from banks that the Debtor had dealings with. On information and belief, these loans have exposed banc-serv to millions of dollars in potential SBA Denial/Repair Liabilities, or other liabilities, one of which was defaulted on by Ms. Isley's immediate family members in an amount in excess of \$1 million.

69. The Debtor made the No Agreements with Affiliates Representation to Holdco and Newtek for the purpose of inducing entry into the Purchase Agreement.

70. Holdco and Newtek reasonably and justifiably relied upon the No Agreements With Affiliates Representation in deciding to enter into the Purchase Agreement and the purchase price under the Purchase Agreement.

The Company's Termination of Agee

71. As a result of, among other things, the aforementioned wrongdoing conducted by the Debtor, banc-serv terminated Agee's employment on April 9, 2018 for just cause pursuant to the terms of the Employment Agreement.

**AS AND FOR PLAINTIFFS FIRST CAUSE OF ACTION
Newtek and Holdco v. the Debtor
(Exception To Discharge – Fraud – 11 U.S.C. §523(a)(2)(A))**

72. The Plaintiff's repeat and incorporate ¶¶ 1 thorough 71 of this Complaint as if fully set forth herein.

73. The Debtor obtained money, property and services from Newtek and Holdco in connection with Holdco's acquisition of the Debtor's 100% ownership interest in banc-serv for \$5,400,000 through false pretenses, false representations and actual fraud.

74. The Debtor made the Representations to Newtek and Holdco for the purpose of inducing entry into the Purchase Agreement.

75. Each of the Representations was false when it was made.

76. The Debtor knew that each of the Representations were false when they were made.

77. Newtek and Holdco reasonably and justifiably relied upon the Representations, and as a result Holdco entered into the Purchase Agreement.

78. Holdco would not have entered into the Purchase Agreement, and Newtek would not have authorized Holdco to enter into the Purchase Agreement, had they known that the Representations were false.

79. Newtek and Holdco were damaged by the Debtor's false Representations. These damages have included: (i) paying \$5,400,000 for a company that was being operated in violation of federal law, and which had converted over \$800,000 in customer funds which Newtek restored in order to make such clients whole; (ii) paying over \$700,000 in criminal defense costs for banc-serv, arising from the Debtor's alleged crimes; (iii) paying approximately \$200,000 in undisclosed employee bonuses, and, banc-serv proved worthless as reflected in Newtek's write-downs of banc-serv's value to \$0. In addition, Plaintiffs have incurred legal and accounting fees in connection with the Arbitration and has and will continue to incur legal fees and expenses associated with the Debtor's bankruptcy case and this Adversary Proceeding. The Plaintiffs will be filing proofs of claim (the "Claims") in this bankruptcy case, prior to the deadline for filing proofs of claim.

80. Newtek and Holdco's Claims against the Debtor should be excepted from any discharge granted to the Debtor in this case pursuant to §523(a)(2)(A) of the Bankruptcy Code.

AS AND FOR PLAINTIFFS SECOND CAUSE OF ACTION
Newtek and Holdco v. the Debtor
(Exception To Discharge – False Financial Statement – 11 U.S.C. §523(a)(2)(B))

81. The Plaintiffs repeat and incorporate ¶¶ 1 through 80 of this Complaint as if fully set forth herein.

82. The Debtor obtained money, property and services from Newtek and Holdco in connection with Holdco's acquisition of the Debtor's 100% ownership interest in banc-serv for \$5,400,000 through false pretenses, false representation and actual fraud.

83. The Financial Statements provided by the Debtor to Holdco and Newtek were in writing.

84. The Financial Statements were materially false because, *inter alia*, they failed to disclose: (i) over \$800,000 shortfall in banc-serv's servicing account arising out of the Debtor causing bac-serv to convert moneys belonging to its clients; (ii) substantial Repair and Denial Liabilities; (iii) approximately \$200,000 in employees bonuses; the requirement that banc-serv provide free services to a significant client (North Salem State Bank) through November 2019; (iv) the claim of one of its clients that banc-serv overcharged it for over \$200,000 in fees; (v) car leases that Agee allowed her family members to take out in banc-serv's name; and (vi) federal and state tax liabilities of approximately \$8,135.

85. The Debtor knew that the Financial Statements were materially false at the time she provided them to Holdco and Newtek.

86. The Financial Statements were also materially false because they failed to "fairly represent in all material respects the financial position of Company as of their respective dates and the results of operations for the respective periods reported therein."

87. The Financial Statements related to the finances of banc-serv, which was an insider of the Debtor.

88. Holdco and Newtek reasonably relied upon the Financial Statements,

89. The Debtor caused the Financial Statements to be published to Holdco and Newtek with the intent of deceiving entry into the Purchase Agreement.

90. Holdco would not have entered into the Purchase Agreement, and Newtek would not have allowed Holdco to enter into the Purchase Agreement, had they known that the Financial Statements were materially false.

91. Newtek and Holdco were damaged by the Debtor's false Financial Statements, These damages have included: (i) paying for a company that was being operated in violation of federal law, and which had converted over \$800,000 in customer funds which Newtek restored in order to make such clients whole; and (ii) paying over \$700,000 in criminal defense costs for banc-serv, arising from the Debtor's alleged crimes and, in the end, banc-serv proved worthless as reflected in Newtek's write-downs of banc-serv's value to \$0. In addition, Plaintiffs have incurred legal and accounting fees in connection with the Arbitration and has and will continue to incur legal fees and expenses associated with the Debtor's bankruptcy case and this Adversary Proceeding.

92. Newtek and Holdco's Claims against the Debtor should be excepted from any discharge granted to the Debtor in this case pursuant to §523(a)(2)(B) of the Bankruptcy Code.

AS AND FOR PLAINTIFFS THIRD CAUSE OF ACTION
Newtek, Holdco and banc-serv v. the Debtor
(Exception To Discharge – Fraud Or Defalcation While Acting In A Fiduciary Capacity,
Embezzlement Or Larceny – 11 U.S.C. §523(a)(4))

93. The Plaintiffs repeat and incorporate ¶¶ 1 through 92 of this Complaint as if fully set forth herein.

94. As president and chief executive officer of banc-serv, the Debtor owed a fiduciary duty to banc-serv.

95. The Debtor committed fraud or defalcation while acting in a fiduciary capacity, embezzlement and/or larceny by: (i) causing banc-serv to convert monies belonging to its

customers for its own benefit or the personal benefit of the Debtor; and (ii) using banc-serv to allegedly commit criminal offenses relating to SBA loans as alleged in the Indictment,

96. Newtek, Holdco and banc-serv were damaged by the Debtor's conversion of moneys belonging to the Company's clients and allegedly committing the criminal acts alleged in the Indictment. These damages have included: (i) paying \$5,400,000 for a company that was being operated in violation of federal law, and which had converted over \$800,000 in customer funds which Newtek restored in order to make such clients whole; and (ii) paying over \$700,000 in criminal defense costs for banc-serv, arising from the Debtor's alleged crimes; (iii) paying approximately \$200,000 in undisclosed employee bonuses, and, banc-serv proved worthless as reflected in Newtek's write-downs of banc-serv's value to \$0. In addition, Plaintiffs have incurred legal and accounting fees in connection with the Arbitration and has and will continue to incur legal fees and expenses associated with the Debtor's bankruptcy case and this Adversary Proceeding.

97. Newtek, Holdco and banc-serv's Claims against the Debtor should be excepted from any discharge granted to the Debtor in this case pursuant to §523(a)(4) of the Bankruptcy Code.

AS AND FOR PLAINTIFFS FOURTH CAUSE OF ACTION
Newtek, Holdco and banc-serv v. the Debtor
(Exception To Discharge – Willful And Malicious Injury – 11 U.S.C. §523(a)(6))

98. The Plaintiffs repeat and incorporate ¶¶ 1 through 97 of this Complaint as if fully set forth herein.

99. The Debtor intentionally engaged in all of the activities attributed to her in this Complaint, including without limitation, utilizing banc-serv to engage in alleged crimes, converting over \$800,000 in funds belonging to banc-serv's customers, making the false

Representations to Holdco and Newtek, providing false Financial Statements to Holdco and Newtek. These acts were accomplished by the Debtor willfully, with the knowledge and understanding that they would cause harm to the Plaintiffs.

100. The actions taken by the Debtor as alleged in this Complaint, including without limitation, utilizing banc-serv to engage in alleged criminal behavior, converting over \$800,000 in funds belonging to banc-serv's customers, making the false Representations to the Plaintiffs, and providing false Financial Statements to Holdco and Newtek, were done by the Debtor in conscious disregard of her duties or without just cause or excuse.

101. Plaintiffs were injured by the Debtors' willful and malicious conduct by: (i) paying \$5,400,000 for a company that was being operated in violation of federal law, and which had converted over \$800,000 in customer funds which Newtek restored in order to make such clients whole; (ii) paying over \$700,000 in criminal defense costs for banc-serv, arising from the Debtor's alleged crimes and, in the end, banc-serv proved worthless as reflected in Newtek's write-downs of banc-serv's value to \$0. In addition, Plaintiffs have incurred legal and accounting fees in connection with the Arbitration and has and will continue to incur legal fees and expenses associated with the Debtor's bankruptcy case and this Adversary Proceeding.

102. Newtek, Holdco and banc-serv's Claims against the Debtor should be excepted from any discharge granted to the Debtor in this case pursuant to §523(a)(6) of the Bankruptcy Code.

WHEREFORE, Plaintiffs' respectfully request entry of a judgment against the Debtor in this Adversary Proceeding, determining that the Plaintiffs' Claims against the Debtor are excepted from any discharge that may be granted to the Debtor pursuant to §§523(a)(2), (4) and (6) of the Bankruptcy Code.

Dated: September 25, 2019

By: /s/ Bruce J. Zabarauskas

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