IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern District)

PROFILES, INC., *et al.*, on behalf of themselves and all others similarly situated,	*	
PLAINTIFFS,	*	
v.	*	**CIVIL ACTION NO. 1:20-cv-00894-SAG**
BANK OF AMERICA CORPORATION, *et al.*,	*	
DEFENDANTS.	*	

* *

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

In accordance with Fed. R. Civ. P. 62(d) and Fed. R. App. P. 8(a)(1)(C), Named Plaintiffs Profiles, Inc., Proline Products, Inc., Diaspora Salon, LLC and Elite Security Group, LLC (collectively, "Plaintiffs"), on behalf of themselves and all others similarly situated, respectfully submit this memorandum of law in support of their emergency motion for injunctive relief pending disposition of the appeal taken this date. Plaintiffs respectfully request an injunction enjoining Defendants Bank of America Corporation and Bank of America, N.A. (collectively, "Defendants" or "BOA") from imposing any requirements other than those stated in the Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136 ("CARES Act") for small businesses to apply for loans under the Paycheck Protection Program ("PPP").

I. INTRODUCTION

This case concerns federally-enacted emergency legislation to afford immediate relief to American small businesses on the brink of collapse due to the devasting economic impacts of the coronavirus disease 2019 ("COVID-19"). The lawsuit was filed on April 3, 2020, *see* ECF 1. On April 7, 2020, Plaintiffs filed their Second Amended Complaint (ECF 5) seeking, *inter alia*, a declaratory judgment and permanent injunction pursuant to 28 U.S.C. §§ 2201 and 2202, enjoining Defendants-from their ongoing violations of the CARES Act and the Small Business Administration's ("SBA") 7(A) loan program, 15 U.S.C. § 636(a), namely, their imposition of restrictions on applications for PPP loans, not found in the CARES Act, that barred Plaintiffs from obtaining loans from BOA.

Plaintiffs simultaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction (ECF 7), seeking to enjoin BOA *pendente lite* from imposing any restrictions on applications for PPP loans other than those mandated in the statute. On April 13, 2020, the Court issued a Memorandum Opinion (ECF No. 17) (hereinafter "Opinion") and accompanying Order

(ECF No. 18) denying Plaintiffs' motion for temporary restraining order and a preliminary injunction. Plaintiffs, contemporaneously with the filing of this motion, are appealing that Order.

If this case is not decided before BOA exhausts the funds available for PPP loans – and current press reports indicate that funds will be exhausted in a matter of weeks or days, Plaintiffs will have been denied any remedy for BOA's wrongdoing. Accordingly, this Court should enjoin BOA from imposing on Plaintiffs any criteria for application for a PPP loan not recited in the CARES Act during pendency of the appeal of the Court's underlying decision.

II. BACKGROUND

With the outbreak of COVID-19, the People of the United States face the most severe national crisis of our time, one that threatens the shutdown of thousands upon thousands small businesses and the collapse of our economy. In response to this unprecedented crisis affected every American small business and the tens of millions of employees who depend upon them, the federal government enacted emergency legislation designed to assist America's small businesses in keeping their doors open and their employees employed. The CARES Act creates the PPP, which allows lenders to make federally backed and guaranteed loans to protect payroll expenses and cost for two months. The loan pool, however, is limited in size, and the PPP is being run on a first-come-first-served basis.

Instead of utilizing this program in the service of small businesses, however, Defendants have privileged discriminatory policies of corporate greed over the needs of the statute's intended beneficiaries. Authorized by Congress and the President under the CARES Act and its loan programs to administer billions of dollars in federal funding to small businesses in a fair, equitable and uniform manner, Defendants initially implemented a loan process that unlawfully prioritized their existing borrowing clients and barred their depository clients and other small businesses from

even applying for funds from the governmental loan programs. Following the filing of the complaint in this action, Defendants revised their policy on April 4, 2020, by allowing depository-only clients to apply for PPP loans but added a new illegal requirement – that depository-only clients have no credit card or loan with any other bank.

Nothing in the CARES Act authorizes or permits Defendants to select who should have access to or benefit from the federally-backed lending program. And, the priority of access to these limited "first come, first served" funds is material – the demand is overwhelming as America responds to the economic tsunami of COVID-19. BOA had no legal authority under the CARES Act to deny access, restrict or otherwise impede the access to these critically important business-saving funds, nor did BOA have the legal right or justification to make certain classes of small businesses go to the back of the line or be selectively denied access to the line at all.

The purpose and motivation behind BOA's discriminatory practice is transparent – it is using the PPP as a credit enhancement – a strategy for improving its own credit risk profile – by giving priority to its clients with preexisting BOA debt at the expense of small business customers who have lending relationships with other banks. BOA should not be permitted to flout the purpose of crucial, emergency legislation to aid American small businesses, and instead illegally manipulate the PPP for its own greedy purposes, using taxpayer money to reduce the default risk to BOA's loan portfolio.

III. LEGAL STANDARD

Rule 62(d) provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction . . . ." Fed. R. Civ. P.

62(d). *See also* Fed. R. App. P. 8(a)(1) (providing that a party must ordinarily first request a stay of judgment or order in the district court before asking the court of appeals to entertain a stay).

The standard for consideration of a motion to stay pending appeal is substantially similar to the standard governing a request for preliminary injunction. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Thus, the court considers four factors: (1) whether the applicant has made a strong showing he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent an injunction; (3) whether an injunction will substantially injure the other party; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Standard Havens Prods., Inc. v. Gencor Indus., Inc*., 897 F.2d 511, 513 (Fed. Cir. 1990). "Each factor . . . need not be given equal weight." *Standard Havens*, 897 F.2d at 512. Instead, the court "assesses [the] movant's chances for success on appeal and weighs the equities as they affect the parties and the public." *Id.* at 513 (quoting *E.I. Dupont de Nemours & Co. v. Phillips Petroleum*, 835 F.2d 277, 278 (Fed. Cir. 1987)) (internal quotation marks omitted); *see also Hilton*, 481 U.S. at 777 ("[T]he traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules."); *MicroStrategy, Inc. v. Business Objects, S.A*., 661 F. Supp. 2d 548, 558 (E.D. Va. 2009) ("Many courts view the first two factors as a sliding scale, with the greater the harm to the movant requiring a lesser showing of the likelihood of success on appeal.").

IV. THE COURT SHOULD GRANT AN INJUNCTION PENDING APPEAL.

Injunctive relief *pendente lite* is warranted because, as fully addressed below: (1) Plaintiffs have established a strong likelihood of success on appeal or, alternatively, that they demonstrate a substantial case on the merits; (2) in the absence of injunctive relief, Plaintiffs are threatened with a well-recognized, irreparable harm if unable to timely apply for a PPP loan from BOA; (3) the

injunction will not substantially injure BOA; and (4) public interest will not be impaired – and in fact will be advanced – by the grant of injunctive relief.

A. Plaintiffs Demonstrate A Likelihood Of Success Or, Alternatively, A Substantial Case On The Merits Of Their Claims.

To satisfy the first element for injunctive relief pending appeal, a plaintiff must either demonstrate a likelihood of success on appeal or, where the other three factors militate in a plaintiff's favor, "a substantial case on the merits." *Par Pharms., Inc. v. TWi Pharms., Inc*., 2014 U.S. Dist. LEXIS 110963, at *5-6 (D. Md. Aug. 12, 2014). Thus, "[t]o succed, [a plaintiff] does not need to demonstrate that it will certainly win on appeal or that there is a mathematical probability of success. [ ] At a minimum, it must demonstrate a substantial case." *Id.* at *6 (citation and footnote omitted).

"The likelihood-of-success standard does not mean that the trial court needs to change its mind or develop serious doubts concerning the correctness of its decision in order to grant a stay pending appeal." *Goldstein v. Miller*, 488 F. Supp. 156, 172 (D. Md. 1980). The *Goldstein* Court stated that "despite this Court's strong belief as to the correctness of its views as set forth in its February 29, 1980 opinion, there is little doubt that at least some of the issues raised in these cases present serious questions of first impression. For that reason, this Court concludes that plaintiffs have met the burden [of showing a likelihood of success]." *Id.* at 175.

While Plaintiffs here demonstrate a likelihood of success on appeal, at a minimum, Plaintiffs show "substantial case on the merits" to warrant an injunction pending appeal since this case raises an issue of first impression and the Fourth Circuit may resolve the issue differently. Opinion p. 11 (observing that "no court has had occasion to address whether the CARES Act includes a private right of action"); *Miller v. Brown*, 465 F. Supp. 2d 584, 596 (E.D. Va. 2007):

> While the Court cannot say that Defendants are likely to prevail in their appeal, the Court does recognize that this case raises an issue of first impression. Because the Fourth Circuit may resolve the issue differently, Defendants have at least demonstrated a "substantial case on the merits." *Hilton*, 481 U.S. at 778.

i. The CARES Act Contains an Implied Right of Private Action.

As this Court correctly observed, a plaintiff suing under an implied private of action must demonstrate that a statute manifests both a private right and a private remedy. Opinion pp. 8-9. Plaintiffs demonstrate a substantial likelihood of success or, alternatively, a substantial case on the merits as to both having a private right under the CARES Act to apply for a PPP loan from participating lenders and having a private remedy under the CARES Act against those that illegally deny that right.

1. *The CARES Act Manifests An Intent To Create A Private Right To Apply To Any Participating Lender For A PPP Loan.*

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Supreme Court set forth a four-factor test to determine whether a statute implies a private right of action. The *Cort* factors include whether (1) the plaintiff is one of the class for whose special benefit the statute was enacted; (2) there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff; and (4) the cause of action is one traditionally relegated to state law, in an area basically the concern of the States. *Id.* While the Supreme Court has subsequently emphasized that the overarching factor is congressional intent, the *Cort* factors remain relevant in analyzing whether a private right of action exists under a statute. *See Qwest Communs. Corp. v. Maryland-*

National Capital Park & Planning Comm'n, 2010 U.S. Dist. LEXIS 47009, at *14 (D. Md. May 13, 2010).[1]

Congressional intent to create a private right (as well as a private remedy) is drawn from the "text and structure" of the statute to determine whether "right-creating language" exists. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). "Rights-creating language" is language that "explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Thus, "[f]or a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Cannon*, 441 U.S. at 692 n.13). "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of intent to confer rights on a particular class of persons.'" *Alexander*, 532 U.S. at 288 (citation omitted). This Court observed, "As Plaintiffs here correctly point out, the panel [in *Blessing v. Freestone*, 520 U.S. 329 (1997)] concluded that 'Congress's use of the phrase 'any individual' is a prime example of the kinds of 'right-creating' language required to confer a personal right on a discrete class of persons . . . ." Opinion p. 8 (citations omitted).

The CARES Act includes rights-creating language. The statute is phrased in terms of the persons benefited – small businesses impacted by COVID-19, and the statute states that those small businesses "shall be eligible" to receive PPP loans if they meet the statutory requirements. *See*, *e.g.*, CARES Act § 1102(a)(1)(B) ("During the covered period, in addition to small business

[11] The Court noted that during oral argument, BOA "posited that the *Cort* decision is no longer good law." Opinion, p. 7, n.2. The Court found that it "need not address the issue, however, because whether the Court applies the *Cort* factors, or follows only the framework of analysis applied in *Sandoval*, Plaintiffs fail to demonstrate that the CARES Act provides a private right of action." *Id.* While Plaintiffs maintain that *Cort* factors are applicable post-*Sandoval*, for the reasons discussed herein, Plaintiffs adequately allege a private cause of action under the CARES Act under either standard.

concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) *shall be eligible to receive a covered loan* if . . ." (Emphasis added)); *id.* ("During the covered period, individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals *shall be eligible to receive a covered loan*." (Emphasis added)); *id.* ("During the covered period, any business concern that employs not more than 500 employees per physical location of the business concern and that is assigned a North American Industry Classification System code beginning with 72 at the time of disbursal *shall be eligible to receive a covered loan*." (Emphasis added)); *see also id.* (" . . . the term 'eligible recipient' means *an individual or entity that is eligible to receive a covered loan*" (emphasis added)).

Based on this language, case law supports finding a private right. *See Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 694 (4th Cir. 2019) (finding a private right to choose among qualified providers willing to perform services under Medicaid "since plain language of the statute said states 'must' furnish Medicaid recipients the right to choose among providers qualified to perform the service or services required, and barred states from excluding providers for reasons unrelated to professional competency.");[2] *Mando v. Beame*, 398 F. Supp. 569, 575 (S.D.N.Y.

[2] As the Court observed, § 1983 cases are relevant here "because of the inquiry's focus on congressional intent." Opinion p. 9, n.3. *See also Gonzaga*, 536 U.S. at 283 ("[W]e further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."). However, it should be noted that it is a higher bar to prove an implied private right in § 1983 cases that concern spending clause statutes as in *Planned Parenthood*. *See Planned Parenthood*, 941 F.3d at 700-01:

> . . . courts must be especially cautious in finding that a provision in Spending Clause legislation, such as the Medicaid Act, creates a private right enforceable under § 1983. Spending Clause legislation, as noted, has been likened to a contract: "[I]n return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending

1975) (in analyzing whether there is an implied right of private action under the Emergency Employment Act, the court found the sections of the Act "and the entire legislative scheme evince Congressional concern with individuals, rather than with reducing high unemployment as an abstract economic goal. The Act is intended to benefit unemployed persons and clearly, the plaintiffs are intended beneficiaries of the Act."); *see also, e.g., Holliman v. Price*, 1973 U.S. Dist. LEXIS 15571, at *16 (E.D. Mich. Jan. 3, 1973):

> Moreover, a private right to sue to enforce the provisions of the Emergency Employment Act can easily be implied in favor of plaintiffs, the intended beneficiaries under the Act. It has been recognized on numerous occasions by a variety of jurisdictions that a federal statute (such as the EEA), enacted to protect or benefit a particular class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action.

(Citing cases).

The rights-creating language in the CARES Act is reinforced by the SBA's Interim Final Rule the PPP, which states, "The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted under the Coronavirus Disease 2019 (COVID-19) Emergency Declaration (COVID-19 Emergency Declaration) issued by President Trump on March 13, 2020." 13 CFR Part 120, Summary, p. 1. *See also id.* at § II, p. 3 ("The intent of the Act is that SBA provide relief to America's small

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> power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). Since a state cannot voluntarily and knowingly accept conditions unknown to it, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*

This case is not a matter of compliance with a federal law for a state or agency to receive federal funds. It is a matter of small businesses such as the plaintiffs – the direct beneficiaries of PPP funds – getting access to apply for the funds. Thus, the grounds for finding a private right in this case is even stronger than the § 1983 cases upon which Plaintiffs rely.

businesses expeditiously."); *id.* at § III(1), p. 5 ("The intent of the Act is that SBA provide relief to America's small businesses expeditiously, which is expressed in the Act by giving all lenders delegated authority and streamlining the requirements of the regular 7(a) loan program."). This language clearly states the persons benefitted – small businesses nationwide adversely impacted by COVID-19, and the right provided – economic relief via a PPP loan.

This Court stated, "Although no court has had occasion to address whether the CARES Act includes a private right of action, courts have previously found that the SBA does not contain an implied right of action." Opinion p. 11. However, as the Court observed – case law holding that the Small Business Act does not contain a private right of action "were limited to specific provisions within the SBA," Opinion p. 11 n.5, none of which are at issue in this case. Indeed, the Interim Final Rule on the PPP notes that the CARES Act established "a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency." 13 CFR part 120 § I, p. 3. Accordingly, case law regarding other provisions – not to mention none of which concerned Section 7(a) loans – is not relevant here. *See*, *e.g.*, *Sandoval*, 532 U.S. 275 (holding that there is no private right of action under § 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., despite a private of action existing under § 601 of the same Act).

The SBA case law that the Court cites – *Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907 (9th Cir. 1996), and *Bulluck v. Newtek Small Bus. Fin., Inc*., 2020 U.S. Dist. LEXIS 9509 (11th Cir. Mar. 27, 2020), can be further distinguished. In *Crandal*, the plaintiff alleged implied private right of action under 15 U.S.C. § 637(d)(1) of the Small Business Act for money damages due from a contractor. Unlike the purpose of the PPP under the CARES Act, the policy of the SBA provision at issue in *Crandal* is "to assure 'maximum practicable opportunity to participate' in the performance of federal contracts by small business concerns owned and controlled by

women and persons from certain other groups . . .” 99 F.3d at 908 (quoting SBA, 15 U.S.C. § 637(d)(1)). Furthermore, the court expressly found that an implied private right of action under the SBA for unpaid subcontractors is not needed “to give them a remedy” because “[f]emale and minority subcontractors, like any other suppliers of labor or materials on a government contract, already have remedies under the Miller Act, 40 U.S.C. § 270a, and state law.” *Id.* at 910. That is not the case here. Plaintiffs and the class – vulnerable businesses eligible for PPP loans and for whom the emergency CARES Act legislation was swiftly implemented in order to get money quickly in their hands – have no remedy against BOA for unlawfully denying their private right under the CARES Act to apply for a PPP loan.

The plaintiff in *Bulluck* alleged an implied private right of action based on implied duty of care in SBA Guidelines requiring defendant to provide plaintiff’s loan information “after any ‘Loan Action’.” 2020 U.S. Dist. LEXIS 9509, at *7. However, this action not being premised on an implied duty of care but on a right to proceeds for which the CARES Act provides Plaintiffs “shall” be eligible.

Accordingly, the CARES Act creates a private right and Plaintiffs are part of the class for whose special benefit the CARES Act was enacted thereby satisfying the first *Cort* factor.

2. *The CARES Act Manifests An Intent To Create A Private Remedy.*

If a court finds that a statute provides an implied private right, the court must then consider the structure of the statute, within which the provision in question is embedded, to determine whether the statute provides a remedy or an enforcement mechanism. *See Alexander*, 532 U.S. at 289-91.

“[W]here no enforcement mechanism is explicitly provided by Congress or an administrative agency, it is appropriate to infer that Congress did not intend to enact unenforceable

requirements. Thus, it is fair to imply a private right of action from the statute at issue." *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1126 (9th Cir. 2000). *See also Breitwieser v. KMS Indus*., 467 F.2d 1391, 1392 (5th Cir. 1972) (noting that upon finding that a statute creates a private right, the courts have found implied remedies for infringement of those federally conferred rights "when the law creating the right provided for no remedy or for a grossly inadequate remedy. The courts have thus implied relief when necessary to prevent abrogation of congressional policies." (Citing cases)).[3] The *Helfer* court, which held that 12 U.S.C.S. § 1821 (d)(15) allowed shareholders a private right of action, explained:

> In this case, there is no alternative remedy or means to enforce § 1821(d)(15) apart from an implied right of action. There is no separate enforcement provision within the statutory scheme, nor is there any indication of what entities might compel an accounting. Although the FDIC must submit annual reports to the Secretary of the Treasury, the Comptroller General of the United States, and the appointing authority, the language of the statute gives none of these entities any greater right to compel production of the reports than we recognize today as implied in the shareholders.

224 F.3d at 1126.

The *Crandal* court, upon which this Court's opinion relies, specifically highlighted that there was no need to find an implied remedy where remedies for the alleged wrong already exists. 99 F.3d at 910. Thus, supporting the inference that where there is no remedy for a violation of a

[3] The *Breitwieser* court affirmed the lower court's dismissal of a private action for damages under the Fair Labor Standards Act ("FLSA") for the wrongful death of a child, noting that the FLSA had elaborate criminal provisions which fulfilled the act's purpose and that state law afforded the plaintiff a limited monetary remedy. *Id.* at 1392-94. *See also* Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 136-37 (Fall 2017) [hereinafter "Newcombe"] (stating that legislative intent to create a private remedy is generally not inferred where the statute contains "comprehensive and detailed enforcement mechanism"). As discussed, *infra*, the CARES Act, in contrast, does not contain a comprehensive and detailed enforcement mechanism.

private right – either judicial or administrative – a court should infer an implied private remedy. Indeed, the Supreme Court has observed that an implied private right of action will be found where the law creating the private right lacks a procedure for the class of protected persons to complain about violations of their rights. *See*, *e.g.*, *Gonzaga*, 536 U.S. at 280 (observing that in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), it was significant "that the federal agency charged with administering the Public Housing Act 'had never provided a procedure by which tenants could complain to it about the alleged failures [of state welfare agencies] to abide by [the Act's rent-ceiling provision],'" *id.* (quoting *Wright*, 479 U.S. at 426) (alterations in original), and that in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), the Medicaid provision at issue had "no sufficient administrative means of enforcing the requirement [that States pay an 'objective' monetary entitlement to individual health care providers] against States that failed to comply." *Id.* (quoting *Wilder*, 496 U.S. at 522-523)).[4]

The PPP is a new loan program without a comprehensive set of enforcement regulations. The CARES Act, which creates the PPP, does not provide for an administrative remedy for small businesses who are illegally prevented from applying for a PPP loan. It merely provides in Section 1114, entitled, "Emergency Rulemaking Authority" (the final section under Title I-Keeping American Workers Paid and Employed Act): "Not later than 15 days after the date of enactment of this Act, the Administrator [of the SBA] shall issue regulations to carry out this title and

[4] While *Wright* and *Wilder* were § 1983 claims, and thus the remedy was provided by § 1983, it follows that where a State is not the wrongdoer under a statute (and thereby § 1983 does not apply), the statute creating the private right should be deemed to contain a private remedy where no effective administrative remedy is provided as, otherwise, there is no effective means of enforcement of a private right. *See*, *e.g.*, *Helfer*, 224 F.3d at 1126. The Court claimed that the SBA could have taken action as to Plaintiffs' complaints in this action, Opinion p. 12, but this overlooks that the SBA only became aware of such complaints because Plaintiffs filed a lawsuit. As discussed below, there is no administrative procedure for the protected small businesses such as Plaintiffs to lodge complaints with the SBA.

amendments made by this title without regard to the notice requirements under Section 553(b) of title 5, United States Code." Of significance, while this language indicates that Congress intended for the SBA *to implement* the PPP, it does not indicate that Congress intended for the SBA to have sole authority *to enforce* the CARES Act. Rather, the lack of an enforcement provision under the CARES Act, considered with this generic section delegating authority to the SBA to enact the legislation, demonstrates that the class of persons protected by the CARES Act have a private remedy thereunder. *See*, *e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. at 280-81 (observing that in *Wilder*, the court found that "Congress left no doubt of its intent for private enforcement" where the Medicaid Act provision at issue required payment to health care providers and there was "no sufficient administrative means of enforcing the requirement against States that failed to comply."); *Edwards v. Armstrong*, 1995 U.S. App. LEXIS 16545, at *13-14 (6th Cir. June 30, 1995) (observing that "one court implied a private right of action under the 1984 [Cable] Act precisely because the Act lacked procedures for reviewing adverse decisions, explaining that 'the Supreme Court is more likely to allow a private remedy where Congress provides a benefit but does not provide access to any type of administrative process.'" (Quoting *Centel Cable Television Co. v. Admiral's Cove Assocs., Ltd*., 835 F.2d 1359, 1363 (11th Cir. 1988)).

Further, the SBA's Interim Final Rule notes that "remedies for borrower violations or fraud are separately addressed in this interim final rule." 13 CFR part 120 § III(1), p. 5. However, borrower violations and fraud do not cover the alleged wrong in this action. And while the Court correctly observes that 15 U.S.C. § 650(c) permits the SBA Administrator to bring a civil action against lenders for Small Business Act violations, Opinion p. 12, that provision only permits actions "to terminate the rights, privileges, and franchises of the company under this Act." 15 U.S.C. § 650(c). The SBA has no right to bring a civil action to enforce a small business's private

right under the CARES Act. Moreover, there is no administrative mechanism for the intended beneficiaries – eligible small businesses as defined by the PPP – to complain of lenders unlawfully denying them access to PPP funds.[5] As the enforcement scheme is not sufficiently comprehensive, the CARES Act should be deemed to create a private remedy. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 699 (4th Cir. 2019) (finding "enforcement scheme is not sufficiently 'comprehensive' because, inter alia, it does not provide a private remedy—either judicial or administrative—for" aggrieved individuals "seeking to vindicate their rights under the" statute); *Mando*, 398 F. Supp. at 574 (finding that while the Secretary of Labor "has broad responsibility for reviewing compliance by municipalities with EEA [Emergency Employment Act of 1971] statutory requirements does not imply private litigants directly interested may not sue." (Citing cases)).

The Court distinguished this case from *Ray Charles Foundation v. Robinson*, 795 F.3d 1109 (9th Cir. 2015), because that court found that several courts had found a private right of action under the relevant statute (the Copyright Act)[6] and also "because a regulation explicitly stated that the termination provisions [of the Copyright Act] could be enforced by private action." Opinion p. 10-11. However, neither of these reasons is dispositive here. While the Court correctly noted that Plaintiffs here cannot "claim that other courts have inferred a private of action from the

[5] The Court's argument that the Administrator could move "quickly, and even seek expediated injunctive relief similar that sought by Plaintiffs here," Opinion p. 12, overlooks that neither the CARES Act nor any SBA regulation provides any administrative means for the Administrator to become "aware of misconduct of lenders implementing the PPP" as alleged in this case. Thus, contrary to the Court's conclusion, there is no "existence of a robust criminal and civil enforcement regime." *Id.*

[6] The Court distinguished *Landegger v. Cohen*, 5 F. Supp. 3d 1278 (D. Colo. 2013), on this same ground as to the Exchange Act. Opinion p. 11, n.4 (Noting that the *Landegger* court "found it compelling that . . . a private right of action had been recognized by several courts." (Citation omitted)).

days-old statute," *id.* at p. 11, the fact that there is not existing case law holding a private right of action under the newly enacted CARES Act should not be used as proof of Congress's lack of intent to create a private right of action.

Likewise, the fact that the CARES Act does not explicitly state that Plaintiffs' rights may be enforced by private action does not defeat the claim to an implied private of action as such an action, by definition, is judicially permitted "despite the fact that the statute itself contains no express right of action." Newcombe at 120 (footnote omitted). *See also* Frank Griffin, *Fighting Overcharged Bills from Predatory Hospitals*, 51 ARIZ. ST. L.J. 1003, 1038 (Fall 2019) ("[C]ourts may deduce that Congress intended an 'implied' private right of action even though Congress left out an express right of action." (Citations omitted)); *Gordon v. Pete's Auto Serv. Of Denbigh, Inc.*, 838 F. Supp. 2d 436, 445 (E.D. Va. 2012):

> Thus, prior to the enactment of Section 802(b) [under which Congress expressly created a private right of action under the Servicemembers Civil Relief Act ("SCRA")], a federal court finding an implied private right of action under the SCRA already had "great latitude in awarding damages, including attorney's fees, especially considering the purposes of SCRA."

(Citing cases).

Accordingly, the second, third and fourth *Cort* factors are satisfied as (i) there is no indication of legislative intent to deny such a remedy and, in fact, the lack of an adequate enforcement mechanism indicates a legislative intent to create such a remedy; (ii) a private action to enforce the right of eligible businesses to apply for PPP loans is consistent with the underlying purpose of the CARES Act; and (iii) the cause of action – violations of a federal benefit program to provide emergency aid to small businesses due to a severe economic crisis – is not traditionally regulated to state law. As such, there is a private remedy under the CARES Act.

3. *BOA's Conduct Violated the CARES Act.*

BOA's unlawful gating requirements denied Plaintiffs their right to apply for a PPP loan from a participating lender. As discussed below, Section 1102 of the CARES Act sets forth the only criterion for a participating lender's denial of a PPP loan application to a small business, and the Interim Final Rule makes that clear.

The CARES Act section on "Delegated Authority" provides:

> (I) IN GENERAL – For purposes of making covered loans for the purposes described in clause (i), *a lender approved to make loans under this subsection shall be deemed to have been delegated authority by the Administrator [of the SBA] to make and approve covered loans, subject to the provisions of this paragraph*.
>
> (II) CONSIDERATIONS – In evaluating the eligibility of a borrower for a covered loan with the terms described in this paragraph, *a lender shall consider* whether the borrower-
>
> (aa) was in operation on February 15, 2020; and
>
> (bb)(AA) had employees for whom the borrower paid salaries and payroll taxes; or
>
> (BB) paid for independent contractors, as reported on a Form 1099-MISC.

Id. at § 1102(a)(1)(B) (emphasis added).[7] Likewise, the statute section on "Borrower Requirements" provides:

[7] The Courts noted that a prior version of the bill, the section concerning eligibility requirements stated, "'a lender shall *only* consider' the date in which the business was operational and whether it had employees 'for whom the borrower paid salaries and payroll taxes.'" Opinion p. 14 (citing CARES Act, S. 3548 116th Cong., § 1102(d)(2)(B) (emphasis in original). The Court then stated, "The fact that Congress considered including the word 'only' in a previous version of the law that failed to win approval in the Senate committee, suggest, at the very least, that the Court should not read that word back into the statute that both houses of Congress enacted." *Id.* (citing *Unsecured Creditors' Comm. 82-00261c-11a v. Walter E. Heller & Co. Southeast, Inc. (In re K.H. Stephenson Supply Co.)*, 768 F.2d 580, 585 (4th Cir. 1985). However, in *In re K.H. Stephenson Supply Co.*, the Court explained:

> Although the Senate had ample opportunity to adopt the language of the House version, it refused to do so. Instead, in the final negotiations which resulted in the compromise bill, *see* Klee, 28 DePaul L. Rev. at 953-54, the Senate insisted on its version. The

> (i) CERTIFICATION,-*An eligible recipient applying for a covered loan shall make a good faith certification*-
>
> (I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;
>
> (II) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
>
> (III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and
>
> (IV) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative amounts applied for or received under a covered loan.

> Senate explicitly rejected the House language and the House agreed to this significant change. The explicit rejection of the House language by both Houses of Congress is a clear indication that, under the final version of the Bankruptcy Reform Act, Congress intended that state law should no longer govern the enforceability of attorney's fee agreements. If Congress had desired to retain this pre-existing requirement, it had the means at its disposal in the form of the House language. That Congress chose to reject that language is an indication that Congress chose to reject the pre-existing law. The statements of Representative Edwards and Senator DeConcini that, under the final version of the Act, fee agreements are enforceable "notwithstanding contrary law," 124 Cong. Rec. 32,389, 33,997 (1978), consequently reinforce an interpretation of congressional intent behind § 506(b) which is apparent from the legislative process itself.

768 F.2d at 585. Here, there was no "explicit rejection" of the word "only" in the bill. Unlike in *In re K.H. Stephenson Supply Co.*, there is no testimony of any representative or senator making clear that "the Senate insisted on its version." The CARES Act was emergency legislation that was rushed out the door to serve its purpose – save small businesses on the verge of collapse due to the impacts of COVID-19. The word "only" could have been inadvertently dropped. The Court should not give significance to the omission of a word from a prior version when nothing in the legislative history indicates any dispute as to that specific word or significance in its later omission.

Id. (emphasis added). The CARES Act further provides, "During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere, as defined in section 3(h), shall not apply to a covered loan." *Id.*

When read together, these provisions – stating that lenders are delegated authority to make PPP loans by the Administrator of the SBA, stating what requirements "shall" apply for an individual or entity to be eligible for a PPP loan, and expressly noting that the "credit elsewhere" requirement is inapplicable to PPP loans – make clear Congress's intent to have participating lenders accept applications from any qualifying small business to get money in the hands of those the statute seeks to protect without any speed bumps or, in the case of BOA, road closures.

This intent is further evinced in the SBA's Interim Final Rule on the PPP, which not only provides the eligibility requirements, *but also provides what makes an entity or individual ineligible for a PPP loan if it otherwise meets the general eligibility requirements*. 13 CFR Part 120 § III(2)(a)-(d), pp. 5-8. Moreover, the Interim Final Rule made clear that participating lenders should anticipate new clients. *See id.* at § III(3)(b)(iv)(1), pp. 21-22 ("Federally insured depository institutions and federally insured credit unions should continue to follow their existing [Bank Secrecy Act] protocols when making PPP loans to *either new or existing customers who are eligible borrowers under the PPP*." (Emphasis added)); *id.* at § III(4)(e), p. 27:

> The Administrator, in consultation with the Secretary, determined that seven weeks is the minimum period of time necessary for a lender to reasonably determine the expected forgiveness amount for a PPP loan or pool of PPP loans, since the PPP is a new program and *the likelihood that many borrowers will be new clients of the lender*.

(Emphasis added).

Plaintiffs here are eligible for PPP loans pursuant to the CARES Act and the Interim Final Rule. Nevertheless, BOA will not accept any PPP loan application unless BOA's additional, self-

imposed criterion is met – the applicant must either have a lending relationship with BOA as of February 15, 2020, or the applicant can have no lending relationship (neither a credit card nor loan) with any other financial institution. By doing so, BOA is illegally adding PPP eligibility requirements to the CARES Act, thereby obstructing the very purpose of the Act – to "provide relief to America's small businesses expeditiously." Interim Final Rule § II, p. 3; *id.* at § III(1), p. 5 ("The intent of the Act is that SBA provide relief to America's small businesses expeditiously, which is expressed in the Act by giving all lenders delegated authority and streamlining the requirements of the regular 7(a) loan program.").

The Court observes that other lenders have created self-imposed PPP loan requirements. Opinion p. 15. However, the fact that other lenders are violating the CARES Act does not indicate that BOA's self-imposed requirements are consistent with the Act. Likewise, the fact that a small business may be able to find another lender in order to obtain a PPP loan does not indicate that BOA's illegal gating requirements are consistent with the Act; rather, as the requirements impede the purpose of the Act – to get PPP funds into the hands of eligible businesses as quickly and streamlined as possible, they cannot be deemed to be consistent with the Act.

B. Plaintiffs Will Suffer Irreparable Harm If BOA Continues To Prevent Eligible Small Business From Applying For PPP Loans.

As of close of business on Monday, April 13, 2020, a total of $242 billion in PPP loans had already been approved to 1.01 million small businesses under the CARES Act.[8] Given the current rate at which the PPP loan funds are being depleted, and absent an injunction pending appeal, Plaintiffs will likely be deprived of the opportunity to submit applications through BOA for the "first-come, first-served" PPP funds that remain. This "deteriorating circumstance" created by

[8] Marco Rubio (@marcorubio), Twitter (Apr. 14, 2020, 8:08 AM), https://twitter.com/marcorubio/status/1250033245808451584.

BOA, *i.e.*, the depletion of a limited amount of PPP loan funds, coupled with the likelihood that Plaintiffs' businesses will cease to exist absent a PPP loan, satisfies the "irreparable harm" standard as provided in *Sun Microsystems, Inc. v. Microsoft Corp.*, 333 F.3d 517, 526 (4th Cir. 2003) – "That is to say, a mandatory preliminary injunction must be necessary both [i] to protect against irreparable harm in a deteriorating circumstance created by the defendant and [ii] to preserve the court's ability to enter ultimate relief on the merits of the same kind."

"The Fourth Circuit recognizes irreparable injury when a movant makes a 'clear showing' of 'actual and imminent' harm that 'cannot be fully rectified by the final judgment after trial,' including economic harms if damages are not recoverable or could not undo a permanent harm resulting from a temporary loss of funds.'" *Mayor of Balt. v. Azar*, 392 F. Supp. 3d 602, 618 (D. Md. 2019) (quoting *Mt. Valley Pipeline, LLC v. 6.56 Acres*, 915 F.3d 197, 216-18 (4th Cir. 2019)). In particular, the Fourth Circuit has explained that where "a temporary delay in recovery somehow translates to permanent injury—threatening a party's very existence by, for instance, driving it out of business before litigation concludes"—courts may properly find that the movant will suffer irreparable harm notwithstanding the potential for recovery at trial. *Mt. Valley Pipeline*, 915 F.3d at 218. *See also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994); *Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981).

Elite is an example of the immediate and irreparable effects of BOA's "rigid eligibility criteria," as described by the Court at page 21 of its Opinion. Having already submitted its application through BOA, Elite is prohibited from applying elsewhere for a PPP loan. *See* Ex. A, Interim Final Rule at 12 (prohibiting applicants from applying for more than one PPP loan). And because Elite does not meet BOA's eligibility criteria, its application is likely to be rejected by

BOA. *See* Ex. C, Burr Aff. ¶¶ 10-11. Therefore, Elite is eligible for PPP, but cannot apply elsewhere because its application is pending (but will likely be rejected) by BOA while this case is on appeal. *See id.*, Burr Aff. ¶ 11. Without an opportunity to apply for these PPP loans through BOA, Plaintiffs and other eligible businesses are unlikely to survive financially throughout the duration of the appeal. *See id.*, Burr Aff. at ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13.[9] Plaintiffs—together with their employees and the communities in which they operate—will suffer immeasurable and irreparable harm without an injunction pending appeal to remove the unlawful barriers to entry that have been erected by BOA. Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13.

Since the "very existence" of Plaintiffs' businesses are currently threatened by the inability to apply through BOA during the pendency of this appeal, Plaintiffs will suffer irreparable harm absent an injunction from this Court. *See Mt. Valley Pipeline*, 915 F.3d at 218 (explaining that a temporary delay in recovery which threatens a party's very existence by "driving it out of business before litigation concludes" may qualify as irreparable harm). *See also Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1165-66 (9th Cir. 2011) (finding that a bar exam applicant would suffer irreparable harm without ABA-compliant accommodations given the "likely loss of the ability to pursue her chosen profession"); *Salt Pond Assocs. v. United States Army Corps. of Engineers*, 815 F. Supp. 766, 784-85 (D. Del. 1993) (finding irreparable harm where the moving

[9] Unlike *Di Biase v. SPX Corp*., 872 F.3d 224 (4th Cir. 2017), where the plaintiffs had the option to avoid loss by securing coverage elsewhere, *id.* at 235, Elite cannot apply elsewhere while its application is pending at BOA. Furthermore, in *Direx Israel, Ltd. v. Breakthrough Med. Corp*., 952 F.2d 802 (4th Cir. 1991), the Fourth Circuit explained that Breakthrough had not yet begun the process to obtain FDA approval, which "is a fairly extensive process which can continue over a substantial period of time." *Id.* at 815-16. Here, approximately 70% of the $349 billion fund has already been *approved* by the SBA, creating the "present or immediate need for preliminary relief" that was absent in *Direx Israel*. *See id.* at 816 ("By the district court's own finding, any harm to Direx in this case is at this time problematical and uncertain.").

party's injuries "are not merely a loss of profits," but also left the company facing "complete devastation" if the injunction did not issue); *Planned Parenthood v. Cansler*, 804 F. Supp. 2d 482, 498-99 (M.D.N.C. 2011) (finding that Planned Parenthood would suffer irreparable harm where it would be forced to close facilities and lay off employees absent federal funding that remained available, and where it would be extremely difficult to reopen and reestablish client relationships in the future); *DeVito v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 778 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991) (finding irreparable harm where the movant "experienced significant declines in gross revenue which . . . necessitated laying off some of its employees," and "estimated that its business cannot continue to operate at current levels for more than six months"); *Faison-Alexander Place III, LLC v. Best Buy Stores, L.P.*, No. 5:08-CV-354-H, 2008 U.S. Dist. LEXIS 125695, at *6-7 (E.D.N.C. Aug. 8, 2008) (holding that "loss of its construction loan constitute[d] an irreparable harm to plaintiff" where the plaintiff's lender refused to extend additional credit to the project).

C. The Balance Of Equities Favors Plaintiffs, And Public Interest Supports Allowing Eligible Small Businesses To Apply For PPP Loans From BOA.

The remaining factors, *i.e.*, the balance of equities and the public interest, also weigh in favor of granting injunctive relief pending appeal to Plaintiffs. Courts often consider these factors together. *See Di Biase*, 872 F.3d at 235-36; *Bethel Ministries, Inc. v. Salmon*, Civil Case No.: SAG-19-01853, 2020 U.S. Dist. LEXIS 9789, at *42 (D. Md. Jan. 21, 2020).

With regard to the balance of equities, the "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)). As this Court observed, it was "entirely sensible for these Plaintiffs not only to start with the bank where they have an existing business relationship," and "to assume and expect that [BOA]

would accept their applications." Opinion p. 21. Plaintiffs are simply demanding that they be permitted to apply for the PPP loans on equal footing with BOA's existing lender clients and the other "eligible recipients" under federal law, and have demonstrated they will suffer irreparable harm absent injunctive relief pending their appeal.

BOA has not demonstrated that *it* may suffer any cognizable or credible harm by accepting applications from businesses that are eligible under the statutory framework set forth in the CARES Act.[10] To the point, BOA modified its eligibility criteria on Saturday, April 4, 2020, but does not contend that doing so caused it any harm. *See* ECF No. 14 at 6-7; ECF No. 14-1 ¶ 7. Plaintiffs, on the other hand, are likely to find themselves submitting applications for PPP loans from an empty fund absent any injunctive relief pending their appeal. Ex. A, Interim Final Rule at 3-4, 13; Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. Therefore, the balance of equities favors Plaintiffs. *See Mt. Valley Pipeline*, 915 F.3d at 218; *see also Int'l Brotherhood of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 239 F. Supp. 3d 906, 916 (D. Md. 2017) (holding that the balance of equities favored the Union where "even if the Union were to prevail in arbitration, the return of any eliminated positions would not be feasible").

Finally, enjoining BOA from unlawfully preventing eligible businesses from applying for PPP loans will further the public interest and intent of the CARES Act; that is, to "provide relief to America's small businesses expeditiously" in an attempt to remedy the "dramatic decrease in economic activity nationwide." Ex. A, Interim Final Rule at 3. The public has an interest in

[10] In its Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, BOA offered unsupported arguments that an injunction "would hobble [its] ability to provide PPP loans to its small business customers," and might "bring to a halt" its efforts to "distribute PPP funds, impacting an untold number of small businesses." ECF No. 14 at p.24. No evidentiary support, admissible or not, was provided for these assertions.

ensuring compliance with statutory requirements designed to protect the public health and welfare. *See Md. Dep't of Human Resources v. United States Dep't of Agriculture*, 617 F. Supp. 408, 416 (D. Md. 1985) (holding that the public had "an interest in the proper construction and implementation of the Food Stamp Act and the protection of those whom the Act was designed to assist"); *see also Hospira, Inc. v. Burwell*, Case No.: GJH-14-02662, 2014 U.S. Dist. LEXIS 115393, *12-13 (D. Md. Aug. 19, 2014) (holding that the public has an interest "in an agency's compliance with its governing statute" which was designed "to protect the public health"); *Ga. Voc. Rehab. Agency Bus. Enter. Program v. United States*, 354 F. Supp. 3d 690, 701 (E.D. Va. 2018) (holding that the balance of equities and public interest in granting a TRO favored the plaintiffs where they would "suffer the loss of major funds for programs that train blind vendors and [would] potentially cause the termination of employees, including those at the management level")..

Thus, these final two factors also weigh in favor of granting injunctive relief to Plaintiffs.

D. The Bond Requirement Should be Waived.

Finally, given the discretion afforded to this Court in fixing the amount for a bond and the exigent circumstances present here, Plaintiffs request that the Court waive the bond requirement or, in the alternative, permit Plaintiffs to post a nominal bond. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999); *Hassay v. Mayor of Ocean City*, 955 F. Supp. 2d 505, 527 (D. Md. 2013).

V. CONCLUSION

Plaintiffs, for the reasons set forth hereinabove, respectfully request that the Court grant the requested injunctive relief pending appeal.

Respectfully submitted,

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