IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SPORT & WHEAT CPA PA, a Florida corporation, individually and on behalf of a class of similarly situated businesses and individuals, Plaintiff, v. SERVISFIRST BANK INC., SYNOVUS TRUST COMPANY, NATIONAL ASSOCIATION and DOES 1-100, inclusive, Defendants.	Case No. 3:20-cv-05425-TKW-HTC

DEFENDANT SYNOVUS TRUST COMPANY'S MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Federal Rules of Civil Procedure 12(b)(5) and 12(b)(6), Defendant Synovus Trust Company, N.A. respectfully submits this Motion to Dismiss and Memorandum of Law in Support Thereof, dated May 17, 2020.

PRELIMINARY STATEMENT

Plaintiff Sport & Wheat CPA PA ("S&W") claims an entitlement to fees found nowhere in the statute or regulations underlying this suit, has sued Synovus Trust Company, an entity that has absolutely nothing to do with the federal lending program at issue, and has even failed to effect proper service of the Complaint.

This action involves the Paycheck Protection Program ("PPP"), created as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (the "CARES Act" or "the Act"). The CARES Act is part of the federal government's response to the economic hardship caused by the COVID-19 pandemic. To provide emergency assistance to small businesses affected by the pandemic, the PPP significantly expanded the Small Business Administration's ("SBA") 7(a) loan program for small businesses and provided a mechanism by which borrowers could receive funds to cover payroll and other expenses and, in certain circumstances, have their loans forgiven by the government. PPP loans are processed and disbursed through private lenders, and those lenders receive a statutory processing fee from the government for each approved loan.

Plaintiff S&W is an accounting firm. S&W claims it assisted a "client," identified as "Client C," when that client made an application to Synovus for a PPP loan. S&W does not allege that Synovus authorized any such work; in fact it admits Synovus did not authorize such work. Instead, S&W alleges that the

CARES Act and SBA regulations thereunder create an absolute entitlement to fees for any agent who claims to have assisted a PPP borrower in preparing an application. S&W insists that lenders must pay those fees even where, as here, the lender in no way authorized the agent's activities.

S&W is plainly wrong. The CARES Act merely directs the SBA to set a cap on agent fees. The regulations further provide that *if* an agent is to be compensated for assisting a borrower, such compensation must be paid by lender and not borrower. There is no authority for S&W's proposition that someone who claims to have been an agent must be compensated by a lender, even when the lender never agreed to do so and the lender has not certified that the services were reasonable and satisfactory to it, as is required by SBA regulations. The requirements of the SBA 7(a) loan program, which mandate that lenders certify and confirm an agent's services, apply in equal force to the PPP. The entitlement that S&W proposes would also be susceptible to rampant fraud and abuse, requiring PPP lenders to blindly compensate any agent who purports to have assisted a PPP applicant. Congress and the SBA intended the exact opposite by establishing a cap on agent fees and limitations on the source of their payment. S&W has thus failed to plead a violation of federal law.

S&W has not only failed to plead a violation of federal law, it is attempting to make an errant claim for which there is clearly no private right of action. The

CARES Act did not create a new right for agents to bring a suit of this kind. The Eleventh Circuit has repeatedly held that the Small Business Act, which the CARES Act amends, does not create a private right of action, and the only court to address whether the CARES Act itself confers a private right of action has correctly held that it does not. *See Profiles, Inc. v. Bank of Am. Corp.*, 2020 WL 1849710, at *7 (D. Md. Apr. 13, 2020).

S&W's allegations of violations of Florida law do not cure these deficiencies. First, S&W attempts to assert a claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), which by its terms exempts banks and federally regulated entities. Second, it attempts to assert a claim for unjust enrichment based on Synovus's allegedly unjust retention of a loan processing fee received from the SBA. But the Complaint fails to plead facts sufficient to satisfy even the first element required to sustain an unjust enrichment claim under Florida law: that the plaintiff has conferred a direct benefit on the defendant.

Not only has S&W claimed violations of federal and state law that do not exist and attempted to make federal claims for which no private right of action exists, but S&W has also sued a party—Synovus Trust Company—that has had nothing to do with the PPP or with "Client C," and S&W has failed even to attempt proper service on the defendant it did sue. It is indisputable that Synovus Trust Company, the defendant S&W has sued, had nothing to do with the PPP or the

CARES Act. *See* Ex. A, Declaration of Robert C. Brand ("Brand Decl."). Plaintiff's Complaint *does not even allege* that Synovus Trust Company had anything to do with the PPP or with S&W's "Client C." Synovus Bank has participated in the PPP, but Synovus Bank is not named as a defendant.

Service on the defendant named by S&W, Synovus Trust Company, was also deficient—a fact admitted by the counsel who filed the Complaint and commissioned that attempted service. S&W attempted to serve Synovus Trust Company by having a process server drive up to the teller window of a branch of Synovus Bank—not Synovus Trust Company—and hand the Complaint and summons to the bank branch manager, a person who is not only not authorized to accept service for Synovus Trust Company but is not even an employee of Synovus Trust Company.

For all the reasons stated—failure to state a claim under federal or state law, failure to sue the correct party, and failure to serve the party it did sue—S&W's Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

I. The Enactment of the CARES Act and PPP

On March 27, 2020, President Trump signed the CARES Act into law. The purpose of the Act was to provide "emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic."

First Interim Final Rule, 85 Fed. Reg. at 20,811 ("IFR" or "First IFR"). Among other things, the CARES Act granted the SBA funding and authority to establish a new loan program for small businesses, called the PPP. The PPP amended section 7(a) of the Small Business Act, which is the federal government's primary small business loan program. *Id.* Under the PPP, SBA guarantees 100 percent of loans made by eligible lenders to eligible borrowers. *Id.* SBA reimburses lenders for making PPP loans through a loan-processing fee, with the reimbursement amount determined based on the size of the loan. *See* 15 U.S.C. § 636(a)(36)(P)(i).

This action concerns the role of *agents* in the PPP. Congress delegated to the SBA the authority to set a maximum limit for fees paid to agents who assist borrowers with preparing an application for a PPP loan. 15 U.S.C. § 636(a)(36)(P)(ii). Congress did not otherwise modify the existing regulatory framework applicable to agents assisting lenders and borrowers with 7(a) loans or delegate to the SBA the authority to do so.

On April 15, 2020, the SBA promulgated the First IFR that, among other things, exercised the SBA's statutory authority to establish limits on agent fees. The First IFR stated:

> *Who pays the fee to an agent who assists a borrower?*
>
> Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent

> may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:
>
> > i. One (1) percent for loans of not more than $350,000;
> > ii. 0.50 percent for loans of more than $350,000 and less than $2 million; and
> > iii. 0.25 percent for loans of at least $2 million.
>
> The Act authorizes the Administrator to establish limits on agent fees. The Administrator, in consultation with the Secretary, determined that the agent fee limits set forth above are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.

IFR, 85 Fed. Reg. at 20,816. The First IFR does not state that lenders must pay agent fees regardless of whether an agent has been authorized by the lender.

On April 22, 2020, shortly after the First IFR was released, the Association of International Certified Professional Accountants released a special report on the PPP *confirming* that interpretation of the IFR. Ass'n of Int'l Certified Professional Accountants, *Small Business Loans Under the Paycheck Protection Program: Issues Related to CPA Involvement* (2020).[1] The report advises that "CPAs should note, that even though the Treasury has outlined guidelines related to agency fees, there is a possibility that you will not be paid for your services, even when noting you are an agent to the application. . . . It is important to discuss this issue with

[1] *Available at* https://www.aicpa.org/content/dam/aicpa/interestareas/centerforplainenglishaccounting/resources/2020/special-report-sba-ppp-loans.pdf.

clients *and the banks* to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." *Id.* at 3 (emphasis added).

II. S&W Claims It Assisted a Client in Applying for a PPP Loan and Demands Compensation from Synovus[2]

On March 24, 2020, plaintiff S&W was approached by a small business client—which S&W refers to in the Complaint as "Client C"—for assistance in applying for a PPP loan. Compl. ¶ 62. On April 1, 2020, S&W "prepared a loan application which was signed by the client and S&W as its PPP agent." *Id.* ¶ 66. There is no allegation that such an application was ever submitted. *See id.* In the meantime, nonparty Synovus Bank began processing PPP loans to small business borrowers on April 3, 2020.[3]

Sometime after April 1, 2020, "S&W interfaced with Synovus and assisted in resolving a mismatching of Client C's name." *Id.* ¶ 66. From that interaction, S&W alleges that "Synovus therefore knew that S&W was acting as Client C's PPP Agent in connection with Client C's PPP loan application." *Id.* ¶ 67. S&W does not allege that it sought authorization from Synovus to do any work, or that Synovus authorized S&W to do any work, or that Synovus agreed to compensate

[2] For purposes of a motion to dismiss, plaintiff's factual allegations are accepted as true.

[3] *Synovus Announces Paycheck Protection Program Lending Results*, SYNOVUS (May 6, 2020), https://www.synovus.com/about-us/news/2020/2020-05-06-ppp-results.

S&W. Other than that one clerical clarification, S&W does not allege that Synovus had any knowledge of what work S&W was doing.

On April 9, 2020, S&W allegedly asked Synovus to pay the agent fee in connection with S&W's work for Client C. *Id.* ¶ 68. Having entered no such agreement with S&W, Synovus refused. *Id.* ¶ 69. Synovus has also included notices on its website making clear it would not be paying applicant agents' fees.[4] Nevertheless, on April 17, 2020, Client C proceeded to submit its PPP loan application through Synovus's online portal. *Id.* ¶ 70. Days later, on April 21, 2020, "Client C received its PPP loan." *Id.* ¶ 71. In connection with that loan, S&W alleges that Synovus received a loan processing fee.[5] *Id.* ¶ 72. S&W alleges that it "has not been compensated by Synovus for its services as Client C's PPP Agent." *Id.* ¶ 73.

Based only on the foregoing, on April 26, 2020, S&W filed its Complaint seeking to represent a class of all persons or entities who might claim to have been agents assisting clients to obtain PPP loans, and seeking to recover for all such persons.

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[4] *See, e.g.*, *CARES Act – Paycheck Protection Program*, SYNOVUS, https://www.synovus.com/covid-19/paycheck-protection-program/ (current version of website).

[5] To be clear, Synovus Bank has not yet received *any* statutory fees under the CARES Act for PPP loans, and understands such fees will be authorized and processed by SBA at some future date.

LEGAL STANDARDS

I. Rule 12(b)(5)

"Service of process is a jurisdictional requirement: a court lacks jurisdiction over the person of a defendant when the defendant has not been served." *Pardazi v. Cullman Med. Ctr.*, 896 F.3d 1313, 1317 (11th Cir. 1990). To contest service of process under Federal Rule of Civil Procedure 12(b)(5), the defendant must challenge "with specificity how the service of process failed to meet the procedural requirements of [Federal Rule of Civil Procedure 4]." *Int'l Imps., Inc. v. Int'l Spirits & Wines, LLC*, 2011 WL 7807548, at *3 (S.D. Fla. July 26, 2011) (quoting *Hollander v. Wolf*, 2009 WL 3336012, at *3 (S.D. Fla. Oct. 14, 2009)). Subsequently, the burden shifts to the plaintiff to prove a *prima facie* case of proper service. *Id.* at *8. If the plaintiff succeeds in doing so, the burden shifts back to the defendant to provide strong and convincing evidence of insufficient process. *Hollander*, 2009 WL 3336012, at *3.

II. Rule 12(b)(6)

"[T]o survive a motion to dismiss, a complaint must . . . contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory

statements," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), or a "formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, are insufficient. When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

ARGUMENT

The Court should dismiss the Complaint. S&W's attempted service of the Complaint was ineffective under Florida law, and in any event, defendant Synovus Trust Company is not a proper party to this action. The CARES Act also does not create a private right of action, and S&W has failed to plead violations of either federal or state law.

I. Service on Synovus Trust Company Was Ineffective

S&W's attempt to serve Synovus Trust Company at the drive-through window of a Florida branch of Synovus Bank was ineffective. Even if Synovus Trust Company were the proper party (it is not), drive-through service was ineffective even as to that entity.

Service of process on a corporation can be made in any manner accepted in the state where the district court is located or where service is made. Fed. R. Civ. P. 4(h)(1)(A), (e)(1); *see also Iberiabank v. Radno, Inc.*, 2014 WL 3887170, at *2-3 (M.D. Fla. Aug. 6, 2014). Here, the district court is located in and service was attempted in Florida, so Florida law applies.

Service on financial institutions is governed by Fla. Stat. Ann. § 655.0201, which provides that the "sole location" where that entity may be served is at the place of its registered agent. *Id.* § 655.0201(2). Only if a financial institution has no registered agent, or service cannot be made in accordance with this section, can service be made "to any officer, director, or business agent of the financial institution at its principal place of business or at any other branch, office, or place of business in the state." *Id.* § 655.0201(3).

Here, S&W attempted service on Synovus Trust Company, an improper party, in an improper manner. On April 28, 2020, a process server drove to a branch of Synovus Bank, located at 7150 9th Avenue, Pensacola, Florida 35204. Ex. A, Brand Decl. ¶ 7. The process server drove up to a drive-through window, asked to speak to the branch manager, and handed a copy of S&W's Complaint to the branch manager, Gwen Smith. *Id.* ¶ 10. Ms. Smith is not an employee of Synovus Trust Company. *Id.* ¶ 11. Moreover, Ms. Smith is not—and has never been—an "officer, director, or business agent" authorized to accept service of process on behalf of Synovus Trust Company or Synovus Bank. *Id.* ¶ 11. Accordingly, the attempted service of process was ineffective. *See Louis v. Roger Gladstone Law Grp.*, 2013 WL 12145975, at *3 (S.D. Fla. 2013) (service on "low level employees" does not satisfy the requirement of service on an officer or agent).

S&W knows this. On April 30, 2020, counsel for plaintiff stipulated in writing that the attempted service described above was ineffective. Ex. B, 4/30/2020 Email from J. Wirt to P. Nathanson. Because service was improper, the Court should dismiss the Complaint.

II. Synovus Trust Company Is Not a Proper Defendant

S&W must accurately identify and direct its Complaint to the correct defendant. *See* Fed. R. Civ. P. 4(a)(1). It has not done so. S&W named Synovus Trust Company as the sole Synovus defendant. However, Synovus Trust Company does not, and has never, participated in the PPP and has made no loans in connection with the PPP. Ex. A, Brand Decl. ¶ 7. Again, plaintiff's Complaint *does not even allege* that Synovus Trust has had anything to do with the PPP or S&W's "Client C." The Court should therefore dismiss Synovus Trust Company as a defendant in this suit. *See Brown v. Carnival Corp.*, 202 F. Supp. 3d 1332, 1342 n.1 (S.D. Fla. 2016) (dismissing improper defendants from action where corporate entities named had no relation to plaintiff's claims).

III. The CARES Act Does Not Provide a Private Right of Action

Even if plaintiff were to properly name and serve the proper Synovus entity,[6] the declaratory and injunctive claims fail. The CARES Act provides neither an

[6] To be clear, on April 28, 2020—two days after S&W's Complaint was filed and the day of the attempted, ineffective service—counsel for Synovus told plaintiff's counsel that it had sued the wrong entity. *See* Exhibit B, 4/28/20 Email from P. Nathanson to J. Wirt ("I'm (….continued)

express nor implied right of action for private parties to bring suit. Specifically, S&W alleges that it is entitled to a declaration that "PPP Lenders are required to pay the reasonable and customary fees of PPP Agents . . . who assist a PPP Lender's Bank Customer in successfully applying for a PPP loan" and an injunction "restrain[ing]" Synovus from "refusing to pay" such fees. Compl. ¶¶ 106, 114. But "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Absent "[s]tatutory intent" to create a private remedy, "a cause of action does not exist and courts may not create one." *Id.* Because Congress did not create a private right of action, S&W's declaratory judgment and injunction claims fail.

S&W does not and cannot allege that the CARES Act contains an express private right of action. *Profiles, Inc. v. Bank of Am. Corp.*, 2020 WL 1849710, at *7 (D. Md. Apr. 13, 2020) ("[T]he CARES Act does not expressly provide a private right of action."). That is evident from the framing of Claims Three and Four, seeking a declaratory judgment and an injunction, respectively, neither of which is premised on a valid cause of action. The Declaratory Judgment Act does

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(continued….)

responding on behalf of Synovus Trust Company, N.A., to advise you that Synovus Bank, not Synovus Trust Company, is the lender under the Paycheck Protection Program."). Synovus's counsel recommended that plaintiff's counsel amend the Complaint, but no such amendment has been filed. Plaintiff's counsel agreed by email to stipulate that the attempted service on April 28 upon an employee of Synovus Bank was ineffective, but later refused to sign such a stipulation that could be filed with this Court, forcing Synovus Trust Company to file the instant motion to dismiss now. *See id.*

not create a private right of action. *See, e.g.*, *Rebuild Nw. Fla., Inc. v. Fed. Emergency Mgmt. Agency*, 2018 WL 7351690, at *1 (N.D. Fla. July 12, 2018) (citing *Musselman v. Blue Cross & Blue Shield of Ala.*, 684 F. App'x 824, 829 (11th Cir. 2017)). And "an injunction is not a cause of action but a remedy." *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 619 F. Supp. 2d 1260, 1288 (M.D. Fla. 2009). Because no express private right of action exists under the CARES Act, "the burden rests with [plaintiff] to establish that an implied private right of action exists." *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002).

S&W also does not allege an implied private right of action, because there is none. The Eleventh Circuit has repeatedly held that the Small Business Act, which the CARES Act amends in limited part, does not confer a private right of action at all. *See United States v. Fidelity Capital Corp.*, 920 F.2d 827, 838 n.39 (11th Cir. 1991); *Bulluck v. Newtek Small Bus. Fin., Inc.*, 2020 WL 1490702, at *3 (11th Cir. Mar. 27, 2020).[7] Nothing in the CARES Act changes this analysis, and the only

[7] *Accord Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 563-64 (5th Cir. 1990).

court to address whether the CARES Act creates a private right of action has held that it does not. *See Profiles*, 2020 WL 1849710, at *7.[8]

Courts traditionally look to four factors to determine the existence of an implied private right of action: (1) whether "the statute create[s] a federal right in favor of the plaintiff"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether it "is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff"; and (4) whether "the cause of action [is] one traditionally relegated to state law." *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 722 (11th Cir. 2002) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

The "central inquiry" is "whether Congress intended to create, either expressly or by implication, a private cause of action." *Id.* (quoting *Sandoval*, 532 U.S. at 286). Thus, "the Supreme Court has gradually receded from its reliance on [the other] three . . . factors," which "remain relevant *only* insofar as they provide evidence of whether Congress intended to create a private right of action." *Love v. Delta Air Lines*, 310 F.3d 1347, 1351-52 (11th Cir. 2002); *see also Hernandez v. Mesa*, 140 S. Ct. 735, 751 (2020) (Thomas, J., concurring) ("After a series of

[8] In *Profiles*, the United States Court of Appeals for the Fourth Circuit denied plaintiff's request for an emergency injunction pending appeal on May 1, 2020. Order, No. 20-1438 (4th Cir. May 1, 2020), ECF No. 27.

decisions limiting courts' discretion to create statutory causes of action, we renounced the Court's freewheeling approach in [*Sandoval*] . . . ."). "[T]he bar for showing legislative intent is high." *Love*, 310 F.3d at 1352. (quotation omitted). "Congressional intent to create a private right of action will not be presumed," and "[t]here must be clear evidence of Congress's intent to create a cause of action." *McDonald*, 291 F.3d at 722 (quoting *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1345 (11th Cir. 1997)).

S&W cannot clear that high bar. The entirety of the section of the CARES Act at issue here, captioned "FEE LIMITS," provides: "An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator." 15 U.S.C. § 636(a)(36)(P)(ii). Neither this text nor the rest of the statute evince any intent whatsoever to create a private right of action in favor of PPP agents.

First, the relevant statutory provision does not contain "[r]ights-creating language" that confers rights "directly" on PPP agents. *See Love*, 310 F.3d at 1352 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.3 (1979)). Rather than creating rights in the agents' favor, the fee-cap provision *prohibits* certain conduct by agents. A private right of action will not be inferred where, as here, the plaintiff is not the intended beneficiary of the statute. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) ("We doubt . . . that providers are intended

beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves."). Indeed, the CARES Act does not even confer a private cause of action to small business borrowers, who *are* the intended beneficiaries. *Profiles*, 2020 WL 1849710, at *7.

Second, as the recent *Profiles* decision notes, "the view that Congress did not intend to create a separate private right of action in the CARES Act is further bolstered by the criminal and civil enforcement regime codified in the SBA." 2020 WL 1849710, at *6; *see* 15 U.S.C. § 650(a)(2), (c) (conferring enforcement authority upon the SBA Administrator). Because "the statutory structure provides a discernable enforcement mechanism," a private right of action should not be implied. *Love*, 310 F.3d at 1353.

Finally, the interim final rule upon which S&W purports to rely does not and cannot create a private right of action. "[I]f examination of a statute's text, structure, and history does not yield the conclusion that Congress intended it to confer a private right and a private remedy, . . . such a right may not be created or conferred by regulations promulgated to interpret and enforce it[.]" *Id.* at 1353. In other words, "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. Because the CARES Act clearly does not

reflect Congressional intent to confer a private right of action, that ends the inquiry. Claims Three and Four of the Complaint therefore must be dismissed because they are not premised on a valid cause of action.

IV. The CARES Act and Its Regulations Create No Affirmative Entitlement for Agents that Assist PPP Applicants

Even if the CARES Act created a private right of action, which it does not, S&W has failed to plead any violation of federal law. While S&W contends that "PPP Lenders are *required* to pay the reasonable and customary fees of PPP Agents," Compl. ¶ 106 (emphasis added), it cannot convert a statutory fee limit or regulatory guidance as to "*Who pays the fee to an agent who assists a borrower?*" into an affirmative entitlement to such fees. *See* 15 U.S.C. § 636(a)(36)(P)(ii); 85 Fed. Reg. at 20,816. That is especially true where, as here, the lender has not agreed to pay fees and has made it clear to agents that it will not agree to pay such fees. *See* Compl. ¶ 68 (Synovus clearly communicated that it was not compensating "agents."). As explained below, any attempt to convert a *limitation* into an *entitlement* is antithetical to the statutory and regulatory language and the SBA 7(a) program overall.

A. The CARES Act Does Not Create an Entitlement to Agent Fees—It Limits Agent Fees

The Court's analysis begins and ends with the plain text of the statute. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is

plain, the sole function of the courts . . . is to enforce it according to its terms." (quotations omitted)); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (noting that unless the disposition required by the text is absurd "the sole function of the courts . . . is to enforce [the statute] according to its terms." (quotations omitted)).

As noted above, in a section captioned "FEE LIMITS," the CARES Act provides that "[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator." 15 U.S.C. § 636(a)(36)(P)(ii). That is the entirety of the statutory language as it relates to agent fees: an establishment of a limitation on agents' fees and an authorization to the SBA to establish those precise limits.

S&W would have the Court read into that clear language an *affirmative entitlement* for anyone who claims to be an agent to be compensated by the lender upon demand, regardless of whether the agent's services were engaged, authorized, or agreed to by the lender. There is no basis to create an affirmative right out of a negative limitation. *See Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." (quotation omitted)). Indeed, Congress knows exactly how to create an affirmative entitlement to fees, and did so in the provision immediately preceding the one on which S&W relies—

but as to lenders only. There, the CARES Act provides that "[t]he Administrator [of the SBA] *shall reimburse* a lender authorized to make a covered loan at a rate" pursuant to a schedule that is set out in the statute. *Id.* § 636(a)(36)(P)(i) (emphasis added). The deliberate difference between what lenders "*shall* [be] reimburse[d]" and what agents "may *not* collect" is striking. *See In re Failla*, 838 F.3d 1170, 1176-77 (11th Cir. 2016) ("The presumption of consistent usage instructs that '[a] word or phrase is presumed to bear the same meaning throughout a text' and that 'a material variation in terms suggests a variation in meaning.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012)). While S&W would like the CARES Act to say "*agents shall be compensated by lenders*," S&W has no authority to rewrite the statute and create an entitlement Congress deliberately rejected.

B. The First IFR Does Not Create an Entitlement to Agent Fees

1. The Plain Language of the First IFR Creates No Entitlement to Agent Fees

Unable to find support in the CARES Act itself, S&W contends that the First IFR requires "PPP Lenders . . . to pay the reasonable and customary fees of PPP Agents" even absent lender authorization. Compl. ¶¶ 103, 106. The First IFR does no such thing. Rather, as authorized by the CARES Act, the First IFR (1) sets out a schedule of maximum fees an agent may collect for assistance in preparing an application for a PPP loan, and (2) states that such fees will be paid by the lender

out of the fees the lender receives from the SBA instead of by the borrower or out of the loan proceeds. IFR, 85 Fed. Reg. at 20,815. Nothing in the regulatory language requires a lender to pay agents' fees. Just like the governing statute, it is a limitation on amount and source.

2. Existing SBA Regulations Confirm There is No Entitlement to Agent Fees

Existing SBA regulations applicable to the 7(a) loan program—equally applicable to PPP loans as part of that program—confirm this fact. *See* IFR, 85 Fed. Reg. at 20,815 (noting that PPP regulations supersede only "conflicting" Section 7(a) program requirements). The SBA does not require borrowers or lenders to use agents in connection with 7(a) loans—borrowers and lenders may "conduct business with SBA without a representative." 13 C.F.R. § 103.2(a). But when agents are used, the SBA regulations dictate who may pay the fee. The background regulations governing the 7(a) loan program recognize three categories of agents: (1) lender service providers, who work for the lender and are paid by the lender; (2) "packagers," "who prepare[] the Applicant's application for financial assistance and [are] employed and compensated by the Applicant"; and (3) loan brokers, who intermediate between lenders and borrowers and can be paid by either the lender or the borrower, but not both. *See* 13 C.F.R. § 103.1(a). The agents referred to in the CARES Act and the First IFR are akin to the "packagers" who are, by pre-existing regulation, "compensated by the Applicant." *See id.* The

First IFR varies that rule by requiring such agents to be paid, if at all, by the lenders. And just as Section 103.1(a) does not create an affirmative obligation of borrowers to use or pay "packagers," the First IFR creates no such obligation of lenders.

Section 103.1(a) also requires that an agent, whether of a lender or a borrower, be an "authorized representative." *Id.* As S&W has stated, Synovus clearly communicated that it was *not* compensating agents. Compl. ¶ 68. Synovus did not enter into any agreement to compensate S&W or otherwise authorize it to serve as an agent on a PPP application, so S&W was therefore not "authorized" under Section 103.1(a) as required.[9]

S&W's claim of entitlement to fees is also contrary to 7(a) loan program agent certification requirements. To ensure that agents are properly authorized and have performed the services claimed, agents must disclose and certify their services to the SBA. *See* 13 C.F.R. § 103.5(a).[10] This certification is embodied in

[9] Reading the First IFR as S&W suggests would upend long-established agency law. Generally, the law does not recognize "involuntary agency." An agency relationship can only arise where the principal "manifests assent" through words or conduct that an agent can act on their behalf. *See* Restatement (Third) of Agency §§ 1.01, 1.03 (2006). The First IFR does not purport to alter this background principal by transmuting a borrower's agent into an agent that the lender must compensate, where the lender never manifested assent for the agent to act on the lender's behalf.

[10] Additionally, in the case of someone who claims to have been an agent, "SBA may request that any Agent supply written evidence of his or her authority to act on behalf of an Applicant." 13 C.F.R. § 103.2(b).

SBA Form 159,[11] the "Fee Disclosure and Compensation Agreement," which "must be completed and signed by the SBA Lender and Applicant whenever an Agent is paid by either the Applicant or the SBA Lender in connection with the SBA loan application." SBA Form 159 (rev. Apr. 2018). Form 159 also requires the lender to certify that "representations of services rendered and the amounts charged as identified in this form are reasonable and satisfactory to it." *Id.*; *see also* 13 C.F.R. § 103.5(b) (requiring that total compensation charged by an agent be reasonable). S&W's contention that lenders must compensate unauthorized agents is at odds with both an agent's obligation to disclose its services to the SBA and the lender's obligation to certify that the agent's services were "reasonable and satisfactory."[12] S&W does not even allege that it submitted the required agent certification documents.

3. S&W's Interpretation of the First IFR Would Lead to Fraud and Abuse

Automatic payment by lenders to any agent that claims to have assisted a borrower—as S&W contends is required—would lead to fraud and abuse. If a

[11] *Available at* https://www.sba.gov/document/sba-form-159-fee-disclosure-compensation-agreement.

[12] An agent may also be subject to an enforcement action for "[c]harging or proposing to charge any fee that does not bear a necessary and reasonable relationship to the services actually rendered or expenses actually incurred in connection with a matter before SBA *or which is materially inconsistent with the provisions of an applicable compensation agreement*." 13 C.F.R. § 103.4(e) (emphasis added). S&W's failure to submit a compensation agreement—or apparent contention that no such agreement is necessary—runs afoul of this regulation, too.

lender is required to compensate an agent, regardless of whether it has certified in Form 159 that the services were "reasonable and satisfactory," there is no control over the quality of the services rendered or the appropriateness of the fee charged—or even whether the purported services were provided at all. This runs counter to the SBA's long-held concerns about agent-fee fraud and the fact that SBA has consistently pointed to Form 159 as a safeguard against such fraud. *See, e.g.*, U.S. Small Bus. Admin., Off. of the Inspector Gen., *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2019*, at 8, 9 (Oct. 11, 2018) ("OIG investigations have revealed a pattern of fraud by loan packagers and other for-fee agents in the 7(a) Loan program, involving hundreds of millions of dollars.").[13] Such a scheme would also upend the typical SBA practice of permitting lenders to choose the agents with whom they wish to associate, again, in part, to guard against fraud. *See* SBA Info. Notice No. 9000-1793, U.S. Small Bus. Admin., Off. of the Inspector Gen. (Apr. 7, 2009) (outlining lender guidelines "[t]o protect against a potentially corrupt loan agent").[14]

[13] *Available at* https://www.sba.gov/sites/default/files/2019-08/SBA-OIG-Report-19-012.pdf.

[14] *Available at* https://www.sba.gov/document/information-notice-9000-1793-detecting-fraud-small-business-administration-lending-programs.

4. The First IFR Must Be Construed Consistently with the CARES Act

Even if the language in the First IFR were ambiguous on the question of the payment of agents' fees—which it is not—the First IFR cannot create an entitlement for someone who claims to have been an agent that does not exist in the CARES Act itself. *See Love*, 310 F.3d at 1352-53; *see also Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress."). Instead, the First IFR must be read in a way that is consistent with its empowering statute. "[W]here there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred." *Sec'y of Labor, Mine Safety & Health Admin. v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) (quoting *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (11th Cir. 1984)).

In sum, the notion that lenders must simply accept and compensate any demand for payment by any person who claims to have been an agent is contrary to the regulatory scheme, principles of agency law, and the SBA's historical concerns about agent fraud.

V. The Florida Deceptive and Unfair Trade Practices Act Claim Fails

A. As a Federally Regulated Bank, Synovus Is Exempt from the Statute

S&W's claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") also fails. The statute does not apply to federally regulated banks or activity regulated by federal agencies. FDUTPA excludes from its reach:

> Any person or activity regulated under the laws administered by . . . (b) Banks, credit unions, and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission; [or] (c) Banks, credit unions, and savings and loan associations regulated by federal agencies . . . .

Fla. Stat. § 501.212(4); *see also Bankers Tr. Co. v. Basciano*, 960 So. 2d 773, 779 (Fla. 5th DCA 2007) ("FDUTPA clearly excludes banks from its grasp.").

Synovus Bank[15] is a member bank regulated by the Board of Governors of the Federal Reserve System and its branches in Florida are regulated by the Office of Financial Regulation of the Financial Services Commission. That ends the inquiry. *See George v. Wells Fargo Bank, N.A.*, 2014 WL 61487, at *5 (S.D. Fla. Jan. 8, 2014); *Dixon v. Green Tree Servicing, LLC*, 2019 WL 2866495, at *5 (S.D. Fla. July 3, 2019).

[15] As explained in Part II, *supra*, S&W has improperly named Synovus Trust Company as a defendant. Synovus Bank is a lender under the PPP.

B. The Complaint Fails to Allege Consumer Harm

The Complaint also fails to plead harm to a consumer, as required by Florida law. "While an entity does not have to be a consumer to bring a FDUTPA claim, it still must prove the elements of the claim, including an injury to a consumer." *Stewart Agency, Inc. v. Arrigo Enters., Inc.*, 266 So. 3d 207, 212 (Fla. 4th DCA 2019); *see also Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.*, 169 So. 3d 164, 169 (Fla. 4th DCA 2015) (explaining that a plaintiff must "prove that *there was an injury or detriment to consumers* in order to satisfy all of the elements of a FDUTPA claim"). Here, showing consumer harm would require demonstrating that a party who consumed Synovus's services was harmed. *See CMEX Constr. Materials Fla. LLC v. Armstrong World Indus., Ins.*, 2018 WL 905752, at *15-16 (M.D. Fla. Feb. 15, 2018).

The Complaint alleges no harm to any such consumer. While S&W alleges that it was not compensated by Synovus, Compl. ¶¶ 8-9, it does not purport to be a customer of Synovus or a user of Synovus's services. Rather, the consumers at issue—if any—are the small businesses that applied for and received PPP loans. As to these borrowers, the Complaint concedes that "the Bank Customers successfully applied for PPP Loans with their PPP Lenders *which were issued by the SBA*." *Id.* ¶ 90 (emphasis added). In other words, S&W does not allege that

the borrowers were harmed in any way. Absent any allegation of consumer harm, the FDUTPA claim must be dismissed.

VI. S&W Fails to State an Unjust Enrichment Claim

A. The Complaint Does Not Allege that S&W Conferred a Direct Benefit on Synovus

S&W has failed to plead an unjust enrichment claim because it has not alleged that Synovus received a direct benefit.[16] Florida courts strictly adhere to this requirement. *Donoff v. Delta Air Lines, Inc.*, 2020 WL 1226975, at *12 (S.D. Fla. Mar. 6, 2020).

A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co., 2015 WL 12867010, at *5-6 (M.D. Fla. Jan. 22, 2015), is instructive. There, an auto repair shop attempted to assert an unjust enrichment claim against an insurance company seeking compensation for certain car repairs it had performed. *Id.* According to the repair shop, the insurance company was liable for unjust enrichment because it failed to fulfill its obligation to pay for an insured's car repairs. *Id.* But the court rejected this claim, explaining that the repair shop "provided a benefit to the owners of the vehicles"—not the insurance company—and "the only effect of such

[16] There are four elements to an unjust enrichment claim under Florida law: (1) the plaintiff has conferred a direct benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit; and (4) the circumstances are such that it would be inequitable under the circumstances for the defendant to retain the benefit. *Commerce P'ship 8098 Ltd. P'ship v. Equity Contr. Co.*, 695 So. 2d 383, 386 (Fla 4th DCA 1997); *Baron v. Osman*, 39 So. 3d 449, 451 (Fla. 5th DCA 2010); *Am. Safety Ins. Serv. v. Griggs*, 959 So. 2d 322, 331 (Fla. 5th DCA 2007).

a repair on the insurance company [was] the incurring of an obligation to pay for it." *Id.* That benefit was too indirect to sustain a claim against the insurance company. *See id.*

So too here. Even if Synovus had incurred an obligation to pay S&W for its agent services (it did not), S&W was providing those services to PPP applicants, not Synovus. *See* Compl. ¶¶ 73, 75, 79, 97. The Complaint does not allege that S&W conferred a benefit directly on Synovus. While S&W may have conferred a benefit on its small business customers, any benefit to Synovus was indirect at best. The purported benefit that Synovus received—the "loan processing fees paid to them by the SBA"—was by definition conferred by the SBA, not S&W. Compl. ¶¶ 93, 100. This illustrates the attenuated nature of S&W's theory: S&W allegedly provided agent services to an applicant, who then submitted a loan application to Synovus, who then submitted that application to the SBA (a fourth party), and will receive a processing fee from the SBA upon approval of the loan. Attenuated allegations of this sort cannot sustain an unjust enrichment claim under Florida law. *See Donoff*, 2020 WL 1226975, at *12; *see also Johnson v. Catamaran Health Sol., LLC*, 687 F. App'x 825, 830 (11th Cir. 2017) (dismissing as indirect a claim where plaintiff paid membership fees to a party that in turn paid a premium to enriched party); *Extraordinary Tile Servs., LLC v. Fla. Power & Light Co.*, 1 So.

3d 400 (Fla. 3d DCA 2009) (dismissing unjust enrichment claim based on attenuated relationship between plaintiff and defendant).

B. Synovus's Actions Are Not Inequitable as a Matter of Law Because It Told S&W It Would Not Pay an Agent's Fee Before the Loan Application Was Submitted

The unjust enrichment claim also fails because Synovus's actions, as alleged in the Complaint, are not inequitable as a matter of law. An unjust enrichment claim only lies if the "circumstances are such that it would be inequitable under the circumstances for the defendant to retain the benefit." *Am. Safety Ins. Serv. v. Griggs*, 959 So. 2d 322, 331 (Fla. 5th DCA 2007) (finding that unjust enrichment requires more than a determination that the requesting party is deserving). The plaintiff's knowledge is relevant to determining whether retaining the benefit is inequitable. *See Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1100 (Fla. 3rd DCA 2014). "A claim for unjust enrichment . . . requires examination of the particular circumstances of an individual case as well as *the expectations of the parties* to determine whether an inequity would result or whether their *reasonable expectations* were met." *Id.* (emphasis added) (citing *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913, at *6 (S.D. Fla. Jan. 10, 2013)). Although Florida courts do not require that a reasonable expectation of compensation exist in every unjust enrichment case, it is nonetheless a relevant consideration in evaluating the

inequity prong. *See Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 807-08 & n.5 (11th Cir. 1999).

Putting aside that S&W did not confer the benefit that was allegedly retained (the loan processing fee that Synovus would receive from the SBA), S&W has not pled any facts to suggest that it believed Synovus would pay its agent fee. Nor could it. As the Complaint alleges, on April 9, 2020, Synovus clearly informed S&W that it would *not* pay the agent fee for Client C's application. Compl. ¶ 68. Synovus dealt with its borrower: it was Client C itself that accessed Synovus's online portal and submitted an application on April 17, 2020. *Id.* ¶ 70. The Complaint does not allege that Synovus gave any indication that it would pay for S&W's services or that Synovus was even aware of the scope or nature of the services that S&W was supposedly providing Client C. The Complaint merely alleges that S&W "interfaced" with Synovus "by resolving a mismatching of Client C's name." *See id.* ¶¶ 66-67. This timeline of events demonstrates that S&W fails to plausibly allege that Synovus's retention of the entire loan processing fee is inequitable. *See Skytruck Co., LLC v. Sikorsky Aircraft Corp.*, 2012 WL 12898020, at *3 (M.D. Fla. Jan 31, 2012) (unjust enrichment claim failed where plaintiff had "had sufficient notice" that defendant "did not intend to pay commissions to [plaintiff]," meaning that plaintiff's "efforts . . . were undertaken

gratuitously and at its own risk"). And as explained in Part IV above, S&W clearly had no right to payment of fees under the CARES Act.

CONCLUSION

Based on the foregoing, and pursuant to Federal Rules of Civil Procedure 12(b)(5) and 12(b)(6), Defendant Synovus Trust Company respectfully requests that the Court dismiss plaintiff's claims in their entirety.

Dated: Washington, D.C.
May 17, 2020

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LOCAL RULE 7.1(F) WORD LIMIT CERTIFICATION

Pursuant to Northern District of Florida Local Rule 7.1(F), I certify that this Motion to Dismiss and Memorandum of Law in Support Thereof is in compliance with the Court's word limit. According to the word processing program used to prepare this motion and memorandum, the document contains 7,882 words, exclusive of the case style, signature block, and this certification.

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