IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DNM CONTRACTING, INC., on behalf of itself and all others similar situated,	)	**Civil Action**
Plaintiff,	)	**File No. 4:20-cv-01790**
v.	)	
WELLS FARGO BANK, N.A.,	)	
Defendant.	)	

Wells Fargo Bank, N.A.'s Motion to
Compel Arbitration and Dismiss Plaintiff's Complaint

August 28, 2020

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Defendant Wells Fargo Bank, N.A. ("Wells Fargo") hereby moves to compel arbitration and dismiss, or, in the alternative, for dismissal pursuant to Federal Rules of Civil Procedure 9(b), 12(b)(1), and 12(b)(6).

PRELIMINARY STATEMENT

Congress created the Paycheck Protection Program ("PPP") as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 ("CARES Act"), to assist small businesses facing hardship during the COVID-19 pandemic. The PPP provides $659 billion in funding for loans to help small businesses meet payroll and cover other expenses. The loans, which are forgivable and guaranteed by the Small Business Administration ("SBA"), are not made by the federal government or the SBA, but by private lenders like Wells Fargo. No bank is required to take part in the PPP, but Wells Fargo elected to participate in order to help small businesses. Wells Fargo also announced that it would not keep any fees earned from PPP loans.

Plaintiff's putative class action against Wells Fargo is premised on just a single factual allegation: that Plaintiff applied to Wells Fargo for a PPP loan on April 14, 2020 but had not received funds as of April 16, 2020, when the first of two rounds of PPP funding ran out. (Compl. ¶¶ 11-12.) Based on this one unremarkable fact, Plaintiff leaps to the conclusion that Wells Fargo "never processed or properly submitted to the SBA the loan applications of [Plaintiff and] many other small businesses" and "prioritized its bigger 'small businesses' for loan processing and submission to the SBA to the detriment of its other small business customers." (*Id.* ¶ 14.) These allegations are entirely speculative, conclusory, and unsupported by any facts. Plaintiff's complaint should be dismissed for at least three reasons.

First, all of Plaintiff's claims are subject to mandatory arbitration. On March 12, 2015, Plaintiff signed a Business Account Application in which it "agree[d] to be bound" by an "account

agreement that includes the Arbitration Agreement under which any dispute between [Plaintiff] and [Wells Fargo] relating to [Plaintiff]'s use of any [Wells Fargo] deposit account, product or service will be decided in an arbitration proceeding." (Ex. 1 at 4.)[1] Plaintiff's claims fall squarely within the scope of its agreement to arbitrate and should be ordered to arbitration.

Second, Plaintiff lacks standing to bring these claims because it has failed to plead that Wells Fargo caused it an injury-in-fact. Plaintiff's sole allegation of harm is that it did not receive PPP funds as of April 16, 2020, a mere two days after it applied for a loan. (Compl. ¶¶ 11-12.) Plaintiff fails to disclose that, on April 24, the day it first filed this complaint in Texas state court, Congress authorized an additional $310 billion in PPP funding, that this PPP funding remained available to Plaintiff for another four months, and that the PPP concluded on August 8, 2020 with over $133 billion still available and unclaimed.[2] Plaintiff pleads absolutely nothing regarding its efforts to obtain, or even whether it *already has in fact obtained*, a PPP loan from one of the thousands of other PPP lenders. Plaintiff also fails to plead any facts regarding any actual harm that it suffered as a result of allegedly not having received a PPP loan from Wells Fargo just two days after it applied. Plaintiff instead relies on the repeated statement that it and class members "have been damaged." (*Id.* ¶¶ 29, 34, 38) That wholly conclusory statement does not come close to the required pleading of "alleged injury" that is both "concrete and particularized." *Pub. Citizen, Inc.* v. *Bomer*, 274 F.3d 212, 219 (5th Cir. 2001) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992)).

[1] All exhibit references are to the exhibits attached to the Declaration of Christopher M. Viapiano, dated August 28, 2020.

[2] *See* Paycheck Protection Program & Health Care Enhancement Act, Pub. L. No. 116-139, § 101(a), 134 Stat. 620, 620 (Apr. 24, 2020); Pub. L. No. 116-147, 134 Stat. 660 (July 4, 2020).

Third, Plaintiff fails to state any claim as a matter of law. Plaintiff asserts five state law causes of action based on the theory that Wells Fargo "prioritized its bigger 'small businesses' for loan processing and submission." (Compl. ¶ 14.) But, as another court recently explained, the CARES Act "does not constrain banks" regarding "from whom to accept applications, or in what order to process applications [they] accept[]." *Profiles, Inc.* v. *Bank of Am. Corp.*, 2020 WL 1849710, at *7 (D. Md. Apr. 13, 2020). Regardless, Plaintiff has not alleged a single well-pled fact or non-conclusory allegation to support its theory, which is directly rebutted by judicially noticeable facts, including SBA statistics showing Wells Fargo's below-average PPP loan size and Wells Fargo's public commitment not to retain its PPP lender fees. In addition to failing to plead an injury, Plaintiff fails to plead multiple other required elements of its claims. In particular: (i) Plaintiff's fraud and fraudulent inducement claims are subject to the heightened pleading requirements of Rule 9(b) but, under any pleading standard, Plaintiff cannot plead a knowing misstatement; (ii) Plaintiff's breach of fiduciary duty claim fails at the outset because there is no fiduciary relationship between a lender and borrower; (iii) Plaintiff's breach of contract claim fails because Plaintiff has failed to plead the existence of a contract or a breach thereof; (iv) Plaintiff's negligence claim fails because it alleges only economic harm and fails to allege a duty or any breach thereof; and (v) Plaintiff's Texas Deceptive Trade Practices Act ("DTPA") claim fails because Plaintiff is not a consumer under the DTPA.

BACKGROUND AND ALLEGATIONS OF THE COMPLAINT

The CARES Act was signed into law on March 27, 2020. On April 2, 2020, the SBA issued an Interim Final Rule ("IFR") to implement the PPP. 85 Fed. Reg. 20811. The IFR provides a schedule of loan fee percentages that the SBA will pay to lenders for making PPP loans. Those fee percentages decrease as the loan amount increases: 5% for loans of $350,000 or less; 3% for loans between $350,000 and $2 million; and 1% for loans above $2 million. *Id.* at 20816.

On April 5, 2020, Wells Fargo announced that it (i) was planning "to distribute a total of $10 billion to small business customers under the requirements of the PPP"; (ii) would focus on serving nonprofits and businesses with fewer than 50 employees, which had "fewer resources" than other businesses; and (iii) would not retain fees generated from PPP loans. (Ex. 2 at 1.) Wells Fargo limited its PPP loans to applicants with "a Wells Fargo Business checking account as of Feb. 15, 2020" (Ex. 3 at 1)—a decision that allowed Wells Fargo to "expedite the processing of loan applications" because it did not need to collect and verify new client information to satisfy its "know your customer" and due diligence obligations. *See Profiles*, 2020 WL 1849710, at *12. Wells Fargo "mobilized hundreds of Wells Fargo employees and launched new automation and technology so [it could] process the extremely high volume of [PPP] applications." (Ex. 4 at 1.) It succeeded: according to the SBA, as of August 8, 2020, Wells Fargo had issued over 194,000 PPP loans with an average amount of $54,501, the second *lowest* among the 15 top lenders, and little more than *half* of the overall average loan amount of $101,000. (Ex. 5 at 6, 7.)

Plaintiff alleges that it applied for a PPP loan from Wells Fargo on April 14, 2020. (Compl. ¶ 11.) After applying, Plaintiff alleges that it "soon learned"—presumably two days later, when the first round of PPP funding expired—that "funding for the PPP program had been exhausted." (*Id.* ¶ 12.) Plaintiff, however, fails to mention that eight days later, on April 24, the federal government made available another $310 billion in PPP funds, Pub. L. No. 116-139, § 101(a), which remained available to PPP borrowers until August 8, 2020 (*see* Ex. 5 at 9 (over $133 billion in PPP funds available as of August 8, 2020)). Plaintiff also does not mention that it entered into a business account agreement with Wells Fargo on March 12, 2015 in which Plaintiff expressly agreed to resolve "any dispute" "relating to" its "use of any [Wells Fargo] deposit account, product or service" in arbitration, not litigation. (Ex. 1 at 4.) Plaintiff nevertheless filed this action in state

court on April 24, 2020. Wells Fargo timely removed this action to the Southern District of Texas on May 22, 2020. (ECF No. 1.) On August 4, 2020, Wells Fargo made a demand that Plaintiff dismiss this lawsuit and proceed to arbitration as required by the parties' agreement. (Ex. 6.) Plaintiff has refused that demand.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE SUBJECT TO MANDATORY ARBITRATION.

Under the Federal Arbitration Act, arbitration agreements are "valid, irrevocable, and enforceable" through "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. §§ 2, 4. "[C]ourts must 'rigorously enforce' arbitration agreements according to their terms," *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citation omitted), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

On March 12, 2015, Plaintiff signed a Wells Fargo Business Account Application and "agree[d] to be bound by" the Wells Fargo "account agreement that includes the Arbitration Agreement under which any dispute between [Plaintiff] and [Wells Fargo] relating to [Plaintiff]'s use of any [Wells Fargo] deposit account, product or service will be decided in an arbitration proceeding before a neutral arbitrator as described in the Arbitration Agreement." (Ex. 1 at 4.) The account agreement in effect now and at the time Plaintiff applied for a PPP loan includes an arbitration provision in which Plaintiff "agree[d]," at Wells Fargo's or Plaintiff's request, "to submit to binding arbitration all claims, disputes, and controversies between or among Wells Fargo and [Plaintiff]," "whether in tort, contract or otherwise arising out of or relating in any way to [Plaintiff's] account(s) and/or service(s), and their negotiation, execution, administration, modification, substitution, formation, inducement, enforcement, default, or termination." (Ex. 7

at 6.)[3] The agreement also states that a dispute regarding "a disagreement about this Arbitration Agreement's meaning, application, or enforcement" is subject to arbitration, and that the arbitration will be conducted pursuant to the American Arbitration Association ("AAA") commercial dispute resolution procedures (*id.* at 4), which in turn provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Commercial Arbitration Rules Rule 7(a). On August 4, 2020, Wells Fargo served an arbitration demand on Plaintiff, which Plaintiff has refused. (Ex. 6.)

All of Plaintiff's claims should be dismissed because Plaintiff made a binding contractual commitment to arbitrate any dispute "arising out of or relating in any way to" its Wells Fargo account or services. (Ex. 7 at 6.) This provision is a clear example of a "broad type" of arbitration agreement. *See Nauru Phosphate Royalties, Inc.* v. *Drago Daic Interests, Inc.*, 138 F.3d 160, 165 (5th Cir. 1998) (holding that a clause that covered "[a]ny dispute . . arising out of or [] relating to" an agreement is "a broad arbitration clause" (citation omitted)); *Jureczki* v. *Banc One Tex., N.A.*, 252 F. Supp. 2d 368, 374 (S.D. Tex. 2003) ("Examples of broad clauses are those that cover: . . . 'any controversy or claim arising out of or relating to [an a]greement.'"), *aff'd*, 5 F. App'x 272 (5th Cir. 2003). "Where the arbitration clause is broad, it is only necessary that the dispute touch matters covered by the agreement to arbitrate." *Machesky* v. *United Recovery Sys., LP*, 2016 WL 7635517, at *1 (S.D. Tex. Dec. 23, 2016). The dispute here is entirely about Plaintiff's application to Wells Fargo for a loan that it could obtain only as a Wells Fargo business checking account customer. (Ex. 3 at 1 (explaining that Wells Fargo limited its PPP loans to applicants with "a

[3] The account agreement in effect when Plaintiff signed its application includes this language and provides that Plaintiff agrees to subsequent versions of the account agreement by "continued use of [its] account or a related service." (Ex. 8 at 4, 33.)

Wells Fargo Business checking account as of Feb. 15, 2020").) This dispute therefore more than just "touch[es] matters covered by the agreement to arbitrate," *Machesky*, 2016 WL 7635517, at *1, and should be ordered to arbitration. *See Nauru Phosphate Royalties*, 138 F.3d at 165 ("[W]hen parties include such a broad arbitration clause, they intend the clause to reach all aspects of the relationship." (citation omitted)); *The Shipman Agency, Inc.* v. *TheBlaze Inc.*, 315 F. Supp. 3d 967, 975 (S.D. Tex. 2018) (rejecting plaintiff's argument that its claims are not subject to arbitration because they "can be maintained without reference to the [agreement]" and "relate to conduct separate from [d]efendants' obligations under the [agreement]").

Even if Plaintiff seeks to challenge the enforceability and scope of the arbitration agreement, these questions have been delegated to the arbitrator. Indeed, "express incorporation of the . . . AAA Rules," as here, "constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Crawford Prof'l Drugs, Inc.* v. *CVS Caremark Corp.*, 748 F.3d 249, 262-63 (5th Cir. 2014). As the Supreme Court recently explained, "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).[4]

When "all issues raised in [an] action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose." *Alford* v. *Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (citation omitted). Here, all of Plaintiff's claims are subject to arbitration, and therefore "[t]he weight of authority clearly supports dismissal

[4] In a similar PPP-related case against Wells Fargo and involving the same Account Agreement, the plaintiff agreed to arbitrate at least the issue of arbitrability, and the court closed the case. *See* Order, *Physical Therapy Specialists, P.C.* v. *Wells Fargo Bank, N.A.*, No. 20 Civ. 1190, ECF No. 35 (D. Colo. Aug. 18, 2020).

of the case." *Jureczki*, 252 F. Supp. 2d at 380 (citation omitted). Accordingly, the Court should compel arbitration and dismiss the complaint with prejudice. *See Machesky*, 2016 WL 7635517, at *2 (dismissing the complaint with prejudice because the claims were covered by "a valid and enforceable arbitration provision").[5]

II. PLAINTIFF FAILS TO PLEAD AN INJURY CAUSED BY WELLS FARGO, AND THEREFORE LACKS STANDING.

Even if Plaintiff could escape its binding agreement to arbitrate, it has failed to plead that Wells Fargo caused it an injury in fact, and its claims should therefore be dismissed for lack of standing. Plaintiff, "as the party invoking federal jurisdiction, bears the burden of establishing" the "elements of Article III standing," including "injury in fact." *Delta Commercial Fisheries Ass'n* v. *Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269, 272 (5th Cir. 2004). Plaintiff must demonstrate an injury that is "concrete," "distinct and palpable," "actual or imminent," *id.* (citation omitted), and "fairly traceable" to Wells Fargo's allegedly unlawful conduct. *Lujan*, 504 U.S. at 560 (citation and alterations omitted). Plaintiff falls well short of this required jurisdictional showing.

First, as to injury, Plaintiff relies entirely on the conclusory statements that Plaintiff and class members "have been damaged" and that Wells Fargo's actions were "to [their] detriment." (Compl. ¶¶ 29, 32, 34, 38.) This allegation does not come close to pleading a "concrete and particularized" injury. *Pub. Citizen, Inc.*, 274 F.3d at 218 (citation omitted). Plaintiff "ha[s] done little more than present a generalized grievance, . . . and as such, lack[s] standing." *Id.* at 219; *see Sw. Capital Inv. Corp.* v. *HSBC Bank USA, N.A.*, 2013 WL 164088, at *3 (S.D. Tex. Jan. 15, 2013)

[5] As explained in the parties' agreement, "the benefit of arbitration is diminished if either [party] refuse[s] to submit to arbitration following a lawful demand." (Ex. 7 at 4.) For that reason, the agreement also provides that "the party that does not agree to submit to arbitration after a lawful demand must pay all of the other party's costs and expenses for compelling arbitration." (*Id.*)

(holding that plaintiff failed to plead injury because its "allegations are conclusory, not factual, stating only that 'plaintiff has been damaged' but failing to cite any specific injury suffered").

Second, as to traceability, Plaintiff nowhere alleges that it has been unable to obtain PPP funding because of Wells Fargo's conduct. Nor could it—such an allegation would be facially implausible in view of the more than 5,000 lenders other than Wells Fargo who offered PPP loans, which remained available to eligible small businesses for four months after Plaintiff applied to Wells Fargo. (*See* Ex. 5 at 2.). Any failure to obtain a loan could therefore only be caused by *Plaintiff's* conscious inaction. *See Ctr. for Biological Diversity* v. *U.S. Envtl. Prot. Agency*, 937 F.3d 533, 541 (5th Cir. 2019) ("[S]tanding cannot be conferred by a self-inflicted injury." (citation omitted)). Plaintiff relies on the vague and speculative assertion that putative class members "could have explored their options elsewhere, but for representations from" Wells Fargo (Compl. ¶ 27), but fails to identify any of these "representations" and fails to explain why they would have prevented Plaintiff from "explor[ing its] options" (*id.*), obtaining PPP funding from any of thousands of other PPP lenders, and avoiding any purported injury.

III. PLAINTIFF FAILS TO STATE ANY CLAIM.

"Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate where the plaintiff fails to allege 'enough facts to state a claim to relief that is plausible on its face' and thus does not 'raise a right to relief above the speculative level.'" *Montoya* v. *FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 148 (5th Cir. 2010) (citation omitted). "Dismissal 'can be based either on a lack of a cognizable legal theory or the absence of sufficient facts alleged . . . .'" *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F. Supp. 2d 504, 519 (S.D. Tex. 2011) (citation omitted). Plaintiff cannot rely on "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Bell Atl.* v. *Twombly*, 550 U.S. 544, 555 (2007).

Further, "[s]tate law fraud claims are subject to the heightened pleading requirements of Rule 9(b)." *Sullivan* v. *Leor Energy, LLC*, 600 F.3d 542, 550-51 (5th Cir. 2010). Under Rule 9(b), Plaintiff must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Pro. 9(b). In other words, "[P]laintiff must allege the '[1] time, [2] place, [3] contents of the false representations, as well as the [4] identity of the person making the misrepresentations and [5] what he obtained thereby.'" *Gonzalez* v. *State Farm Lloyds*, 326 F. Supp. 3d 346, 350 (S.D. Tex. 2017) (citation omitted). The Fifth Circuit "interprets Rule 9(b) strictly." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 339 (5th Cir. 2008).

Plaintiff fails to state a claim under these standards for at least four reasons.

First, the theory underlying all of Plaintiff's claims is that Wells Fargo "prioritized its bigger 'small businesses'" even though "[l]oans for the PPP program were supposed to be approved on a first-come, first-serve basis." (Compl. ¶¶ 11, 14.) Plaintiff, however, cites no authority for imposing a "first-come, first-served" obligation on PPP lenders. Nor would Plaintiff be able to rely on the SBA's statement that the PPP is a "first-come first-served" program, 85 Fed. Reg. at 20813, because the SBA's guidance refers to how the SBA—not PPP lenders—will process applications. In fact, the only court to address Plaintiff's argument has held that the CARES Act simply "does not constrain banks" in "deciding from whom to accept applications, or in what order to process applications [they] accept[]." *Profiles*, 2020 WL 1849710, at *7.

Second, even if prioritizing "bigger customers" (Compl. ¶ 14) were prohibited by the CARES Act, Plaintiff fails to plausibly plead that Wells Fargo engaged in that conduct. Wells Fargo publicly announced that it is not keeping its PPP lender fees (Ex. 2 at 1), defeating any possible profit motive for prioritizing larger PPP loans. And far from showing prioritization of larger businesses, public SBA statistics show that, as of August 8, 2020, Wells Fargo processed

194,451 loans with an average amount of only $54,501—the second lowest average loan amount of the top 15 lenders, and approximately half of the overall average loan amount of $101,000.[6] (Ex. 5 at 6, 7.)[7] Regardless, Plaintiff has failed to meet its burden to adequately plead facts to support its allegation that Wells Fargo did not process loans on a first-come, first-served basis. All of Plaintiff's allegations regarding Wells Fargo's alleged prioritization of larger customers are entirely "conclusory, lacking in specific facts, and insufficient to plead a plausible claim." *Lopez* v. *Sovereign Bank, N.A.*, 2015 WL 1802910, at *3 (S.D. Tex. Apr. 17, 2015).

Third, Plaintiff brings five Texas state law claims, but all of them require that Wells Fargo have caused Plaintiff injury. (*See infra* at 11-15) As set forth above, and for the same reasons that Plaintiff has failed to plead standing (*supra* at 8-9), it has failed to plead causation.

Fourth, Plaintiff has failed to plead numerous other required elements of its claims:

(i) Fraud and Fraudulent Inducement. To state a claim for fraud, Plaintiff must plead "(1) a material misrepresentation was made; (2) it was false; (3) the speaker knew it was false when made; (4) the representation was made that it should be acted upon by the other party; (5) the other party acted in reliance; and (6) the other party suffered injury." *T.L. Dallas (Special Risks), Ltd.* v. *Elton Porter Marine Ins. Agency*, 2008 WL 7627806, at *9 (S.D. Tex. Dec. 22, 2008). Fraudulent inducement shares the same elements, but also requires the "existence of a contract" and a "promise [] made with no intention of performing at the time it was made." *Murphree* v.

[6] The Court may take judicial notice of this information in deciding the motion. *Norris* v. *Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.").

[7] Pursuant to the SBA's IFR, lenders receive a *greater* percentage of fees for processing *smaller* loans than for processing "bigger" applications, such that lenders were incentivized to process as many small loans as possible. (Compl. ¶ 14; 85 Fed. Reg. at 20816.) Wells Fargo certainly had no incentive to prioritize "bigger" applications, because it is not keeping its PPP lender fees.

Godshall, 2014 WL 4782936, at *6 (S.D. Tex. Sept. 24, 2014) (citation omitted). Under Rule 9(b), "the pleader must set forth the 'who, what, when, where, and how' of the fraud alleged." *Peacock* v. *AARP, Inc*., 181 F. Supp. 3d 430, 435 (S.D. Tex. 2016).

Plaintiff comes nowhere close to meeting this pleading standard because it offers only the conclusory statement that Wells Fargo "made false representations." (Compl. ¶ 26.) Plaintiff does not allege what the representations were, who made them, when or where they were made, or how they were false. Plaintiff's allegations regarding knowledge and intent are similarly deficient. Plaintiff asserts that Wells Fargo "had no intention or ability it seems to help smaller businesses" (*id*. ¶ 28), but "[P]laintiff will not survive a Rule 9(b) motion to dismiss on the pleadings by simply alleging that a defendant had fraudulent intent." *Lovelace* v. *Software Spectrum Inc*., 78 F.3d 1015, 1018 (5th Cir. 1996). Plaintiff must "set forth specific facts to support an inference of fraud," but has failed to do so. *Id.*[8]

(ii) Breach of Fiduciary Duty. "A Texas law claim for breach of fiduciary duty requires the plaintiff to plead the following elements: '(1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages.'" *In re Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019) (citation omitted). "Rule 9(b) governs breach of fiduciary duty claims that," as here, "are 'predicated on fraud.'" *Id.* at 124 (citation omitted).

Plaintiff asserts that Wells Fargo "had a fiduciary relationship with [Plaintiff] as its banking customer[]." (Compl. ¶ 31.) Texas law, however, "do[es] not create [a fiduciary] relationship lightly." *Meyer* v. *Cathey*, 167 S.W.3d 327, 331 (Tex. 2005). In particular, "[t]he relationship between a bank and its customers . . . does not generally create a special or fiduciary relationship,"

[8] Because Plaintiff has not pled the elements of fraud, it also cannot state a claim for fraudulent inducement. That claim also fails for additional reasons, including because Plaintiff has failed to establish the existence of a contract. (*See infra* at 13-14.)

Berry v. *First Nat'l Bank of Olney*, 894 S.W.2d 558, 560 (Tex. App. 1995), and "[t]he relationship between a borrower and lender is usually neither a fiduciary relationship nor a special relationship," *Patrusky* v. *Bloomberg*, 2015 WL 3896097, at *7 (Tex. App. June 24, 2015).

Even if Plaintiff could plead a duty, it has also failed to plead a breach. Plaintiff pleads no factual allegations—beyond the unremarkable fact that it did not receive a PPP loan within two days of applying—to support the assertion that Wells Fargo did not actually process its loan application or prioritized other applications.

(iii) Breach of Contract. "Under Texas law, the elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiffs; (3) breach of the contract by the defendant; and (4) damages as a result of the breach." *Lopez v. Wells Fargo Bank, N.A.*, 2020 WL 224485, at *3 (S.D. Tex. Jan. 14, 2020). In addition, when "a breach of contract [claim] sound[s] in fraud, the particularity requirements of Rule 9(b) apply." *Dommert* v. *Raymond James Fin. Servs., Inc.*, 2007 WL 1018234, at *12 (E.D. Tex. Mar. 29, 2007).

Plaintiff's "breach of contract claim fails to state a claim because [it] has not pled the existence of a contract between it and the defendants or the factual basis for a breach of any such contract." *Real Estate Innovations, Inc.* v. *Houston Ass'n of Realtors, Inc.*, 422 F. App'x 344, 350 (5th Cir. 2011). Plaintiff offers only the conclusory statement that it "entered into [a] valid, enforceable agreement[] with Wells Fargo Bank . . . to process and submit [its] application[]" (Compl. ¶ 36), but does not attach any such agreement or explain its "essential terms," which "must be defined 'with sufficient precision to enable the court to determine the obligations of the parties.'" *Sauceda* v. *Select Portfolio Servicing, Inc.*, 2014 WL 1247827, at *3 (S.D. Tex. Mar. 25, 2014) (citation omitted). None of that is surprising because Wells Fargo could not have, and

did not, contractually obligate itself to issue Plaintiff a PPP loan before the initial round of PPP funding expired, just two days after Plaintiff applied.

(iv) Negligence. To plead negligence, Plaintiff must establish "a legal duty, a breach of that duty, and damages proximately caused by the breach." *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc.* v. *Mason*, 143 S.W.3d 794, 798 (Tex. 2004). "These elements cannot be satisfied by mere conjecture, guess, or speculation." *Id.* at 798-99.

Plaintiff alleges that Wells Fargo "owed a duty of care to Plaintiff . . . but breached that duty," which "proximately caused [its] damages." (Compl. ¶¶ 41-42.) That "formulaic recitation of the elements" is of course insufficient to state a claim. *Twombly*, 550 U.S. at 555. Plaintiff fails to plead any factual allegations regarding the duty owed or how it was breached. *See Griffin* v. *GK Intelligent Sys., Inc.*, 87 F. Supp. 2d 684, 690 (S.D. Tex. 1999) (dismissing negligence claim because plaintiffs "d[id] not allege that [d]efendants owed them a specific legal duty under Texas law, and d[id] not allege that they relied on any alleged misrepresentations by [d]efendants").

Plaintiff's negligence claim also fails because "[d]amages resulting solely from economic harm generally are not recoverable in simple negligence actions." *Express One Int'l, Inc.* v. *Steinbeck*, 53 S.W.3d 895, 898 (Tex. App. 2001); *see also Ballard* v. *Bank of Am.*, 2015 WL 12743631, at *4 (S.D. Tex. Mar. 7, 2015) ("To be entitled to damages for negligence, a party must plead and prove either a personal injury or property damage as contrasted to mere economic harm." (citation omitted)). Plaintiff alleges only economic harm, and therefore cannot recover under a negligence theory.

(v) DTPA. To succeed on its DTPA claim, Plaintiff must plead, with particularity, that: (1) Plaintiff is a consumer, (2) Wells Fargo engaged in false, misleading, or deceptive acts, and (3) these acts caused Plaintiff's damages. *See Villarreal* v. *Wells Fargo Bank, N.A.*, 814 F.3d 763,

768 (5th Cir. 2016). DTPA claims are also subject to Rule 9(b)'s heightened pleading requirements. *Omni USA, Inc.* v. *Parker-Hannifin Corp*., 798 F. Supp. 2d 831, 836 (S.D. Tex. 2011); *see also Tummel* v. *Mercedes-Benz USA, LLC*, 2009 WL 10694803, at *4 (S.D. Tex. Jan. 16, 2009) (stating that a plaintiff alleging a DTPA claim based on an omission must adequately plead "the type of facts omitted, the place in which the omissions should have appeared, and the way in which the omitted facts made the representations misleading").

Plaintiff's DTPA claim first fails because Plaintiff is not a "consumer" under the DTPA. A "consumer" is "an individual, partnership, [or] corporation, . . . who seeks or acquires by purchase or lease, any *goods or services*." Tex. Bus. & Com. Code § 17.45(4) (emphasis added). "Under the DTPA, the lending of money is not 'goods or services' for purposes of consumer status." *Comeaux* v. *JPMorgan Chase Bank, N.A.*, 2013 WL 5852429, at *2 (S.D. Tex. Oct. 30, 2013) (citing *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 566 (Tex. 1984)). Indeed, "money is not a 'tangible chattel,' or 'goods.'" *Chakrabarty* v. *Ganguly*, 573 S.W.3d 413, 416 (Tex. App. 2019) (citation omitted). Therefore, because Plaintiff's claims are based entirely on its purported failure to obtain a loan, Plaintiff cannot obtain relief under the DTPA. *See Comeaux*, 2013 WL 5852429, at *2 ("A borrower whose sole objective is a loan does not become a consumer . . . ." (citation omitted)).

Regardless, Plaintiff also fails to plead a false, misleading, or deceptive act. Plaintiff asserts only that Wells Fargo "promis[ed] to (1) assist [Plaintiff] in the PPP loan application process, and (2) timely process and submit [Plaintiff's] loan application[], but fail[ed] to do so." (Compl. ¶ 45.) Plaintiff never identifies when, where, or how this purported "promise[]" was made, and therefore fails to plead the "specific, identified misrepresentation" that is required to state a DTPA claim. *ASI Lloyds* v. *Newman*, 2012 WL 13042502, at *8 (S.D. Tex. Nov. 27, 2012).

CONCLUSION

For the foregoing reasons, this Court should compel arbitration and dismiss this action. In the alternative, the Court should dismiss the Complaint under Rules 9(b), 12(b)(1), and 12(b)(6).

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Respectfully submitted,

/s/ Charles Hampton
Charles B. Hampton
Attorney-in-Charge
Texas Bar No. 00793890
McGuireWoods LLP
600 Travis St., Suite 7500
Houston, Texas 77002
(713) 353-6683 / (832) 214-9936 (Fax)
champton@mcguirewoods.com

Brendan P. Cullen
Of counsel
(admitted *pro hac vice*)
California Bar No. 194057
Sullivan & Cromwell LLP
1870 Embarcadero Road
Palo Alto, California 94303-3308
(650) 461-5600
cullenb@sullcrom.com

Christopher M. Viapiano
Of counsel
(admitted *pro hac vice*)
D.C. Bar No. 500771
New York Bar No. 4373536
Sullivan & Cromwell LLP
1700 New York Ave., N.W., Suite 700
Washington, D.C. 20006-5215
(202) 956-7500
viapianoc@sullcrom.com

ATTORNEYS FOR DEFENDANT
WELLS FARGO BANK, N.A.

CERTIFICATE OF SERVICE

I certify that on August 28, 2020, all counsel of record are being served with a copy of this document via the Court's CM/ECF system.

By: */s/ Charles Hampton*
Charles B. Hampton