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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Radix Law, PLC, an Arizona professional limited liability company, Plaintiff, v. JPMorgan Chase Bank, National Association, a Delaware corporation, Defendant.	Case No. 2:20-cv-01810-SRB **DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** (Oral Argument Requested)

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant moves to dismiss Plaintiff's Complaint with prejudice. The Parties met and conferred on October 23, 2020, but could not agree that the pleading is curable by a permissible amendment.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Through its Complaint, Plaintiff attempts to rewrite the Paycheck Protection Program ("PPP"), created as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (the "CARES Act"), to require that lenders pay a fee to any self-proclaimed agent that claims to have helped borrowers obtain PPP loans—regardless of whether that "agent" had any agreement with the lender. Plaintiff's attempt runs contrary to the unambiguous language of the CARES Act, the PPP, and the Small Business Administration's ("SBA") Section 7(a) loan program,[1] all of which regulate and *limit* possible agent fees. The Section 7(a) loan program has ***never*** required the involuntary payment of agent fees, but instead sets forth agreement and certification requirements to, among other things, safeguard against fraud and abuse.

Four courts to date have ruled on motions to dismiss in materially similar cases, and all four have dismissed the claims for "agent fees." These courts have agreed that the CARES Act and its associated regulations ***do not*** entitle an agent to a fee from a lender absent an agreement and that Plaintiffs also failed to plead cognizable claims under state law. *Johnson v. JPMorgan Chase Bank, N.A.*, Nos. 20-CV-4100, 20-CV-4144, 20-CV-4145, 20-CV-4146, 20-CV-4858, 20-CV-5311, 2020 WL 5608683, at *1, 8 (S.D.N.Y. Sept. 21, 2020); *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, No. 3:20-CV-5425-TKW-HTC, 2020 WL 4882416, at *3 (N.D. Fla. Aug. 17, 2020); *Juan Antonio Sanchez, PC v. Bank of S. Tex., et al.*, No. 7:20-CV-00139, 2020 WL 6060868, at *7 (S.D. Tex. Oct. 14, 2020); *Steven L. Steward & Assoc., P.A. v. Truist Bank, et al.*, No. 6:20-CV-1083-ORL-40GJK, 2020 WL 5939150, at *2-3 (M.D. Fla. Oct. 6, 2020).

[1] As more thoroughly discussed below, the CARES Act and PPP loans are administered by the SBA "under the same terms, conditions, and processes, as a loan made under" the SBA's established Section 7(a) loan program. *See* 15 U.S.C. § 636(a)(36)(B).

The CARES Act and SBA regulations do not entitle purported agents to fees from lenders in the absence of a written agreement for said fees. *Sport & Wheat, Johnson,* and *Sanchez* rejected nearly identical allegations and claims as those asserted here. In *Sport & Wheat*, an accounting firm alleged that it assisted borrowers in applying for PPP loans and was automatically entitled to agent fees irrespective of whether it had entered into an agreement with the lenders. 2020 WL 4882416 at *2. But the court held that, absent an agreement between the agent and lender, the agent is not entitled to an agent fee. *Id.* at *7. Similarly, the *Johnson* plaintiffs alleged that the CARES Act and the PPP "require[] the defendant banks to provide them with a portion of the resulting compensation the defendants received for processing their clients' loan applications," even though they did "not allege that they entered into an agreement with defendant banks regarding agent fees." 2020 WL 5608683, at *4. The court dismissed these claims, holding that (i) agents may receive fees only when they first execute an agreement signed by the lender, agent, and applicant, and (ii) neither the CARES Act nor its regulations alter this condition. *Id.* at *6–8. Noting the "emerging consensus" on this issue, the *Sanchez* court likewise rejected plaintiff's claimed entitlement to agent fees, concluding that plaintiff's argument is "simply unmoored from the text," and is contrary to "how the PPP works, and it contradicts a common-sense interpretation of the relevant statutes and regulations." *Sanchez,* 2020 WL 6060868, at *6-7, 9.

The same result applies here. Longstanding SBA regulations require an agent to "execute and provide to SBA a compensation agreement" signed by the lender, agent, and applicant before it may become entitled to receive a fee "in any matter involving SBA assistance." 13 C.F.R. § 103.5(a). This requirement promotes the twin objectives of allowing lenders to choose with whom they do business and preventing fraud and abuse by unscrupulous or unnecessary agents. Just as in *Sport & Wheat*, *Johnson*, and *Sanchez*, Plaintiff does not allege that it complied with this requirement.

Instead, Plaintiff asserts that one line in the SBA's regulation implementing the PPP purportedly dispensed with the longtime requirement that a lender agree to pay an

agent before having an obligation to do so, and created in its place a new, mandatory obligation for participating lenders to pay agents notwithstanding the absence of any such requirement in the CARES Act itself. But the SBA's regulation did no such thing, and Plaintiff's theory is refuted by the plain language of the CARES Act and the existing regulatory framework, as the only courts to have considered this issue have held.

Additionally, Plaintiff's claims are barred because, as *Johnson* and *Sanchez* further held, the CARES Act and the Small Business Act do not provide for a private right of action. *See* 2020 WL 5608683, at *8-9; 2020 WL 6060868, at *7. Plaintiff's claims constitute an impermissible end-run around the lack of a federal private right of action. And, in any event, Plaintiff fails to plead the requisite elements of its claims. All of Plaintiff's claims should be dismissed with prejudice.

BACKGROUND

I. THE SBA'S SECTION 7(A) PROGRAM REQUIRES AGENT COMPENSATION AGREEMENTS.

Under the SBA's largest loan program, the "Section 7(a)" program, lenders make loans to small businesses, and the SBA guarantees a percentage of those loans if certain conditions are satisfied. *See generally* 15 U.S.C. § 636(a). Neither small businesses nor lenders are required to use "agents" to help submit Section 7(a) loan applications. *See* 13 C.F.R. § 103.2(a). Fewer than three percent of Section 7(a) borrowers use agents. *See* 85 Fed. Reg. 7,622, 7,627 (Feb. 10, 2020). But when borrowers do use agents, the Small Business Act and Part 103 of the SBA's regulations set forth a comprehensive scheme with which agents must comply when "[p]reparing or submitting on behalf of an applicant an application for financial assistance of *any kind*" from the SBA. *Id*. § 103.1(b)(1) (emphasis added); *see also* 15 U.S.C. § 642 (requiring that a borrower disclose to the SBA the identity of, and compensation paid to, any agent).

Under this framework, the "SBA regulate[s] an Agent's fees and provision of service." 13 C.F.R. § 103.5. Before an agent can receive a fee, the agent first "must execute and provide to SBA a compensation agreement," which "governs the

compensation charged for services rendered or to be rendered to the Applicant or lender in any matter involving SBA assistance." *Id*. § 103.5(a). These requirements have been in place since 1996. *See* Standards for Conducting Business with SBA, 61 Fed. Reg. 2,679, 2,682 (Jan. 29, 1996).

The "SBA provides the form of compensation agreement … to be used by Agents." 13 C.F.R. § 103.5(a). For Section 7(a) loans, agents must use the SBA's Form 159 Fee Disclosure and Compensation Agreement.[2] That agreement "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." *Id*. at 1. In the agreement, "[t]he Agent must be identified, all services provided must be listed, and *the party paying the fee and amount paid* must also be disclosed (and itemized, when required)." *Id.* (emphasis added). If the agent claims a fee above $2,500, the agent must provide "1) a detailed explanation of the work performed; and 2) the hourly rate and the number of hours spent working on each activity." *Id*. Agents must provide this information "even if the compensation is charged on a percentage basis." *Id*. at 2.

These disclosures do more than deter unscrupulous agents from charging excessive fees. As the SBA's inspector general has observed, the SBA adopted 13 C.F.R. § 103.5 and Form 159 "to mitigate the risk associated with loan agent participation, and to protect program participants and taxpayers from fraud and abuse."[3]

II. THE CARES ACT DOES NOT REQUIRE PAYMENT OF AGENT FEES

Congress instructed that PPP loans be administered by the SBA "under the same terms, conditions, and processes as a loan made under" the agency's established Section 7(a) loan program, unless Congress "otherwise provided." *Id*. § 636(a)(36)(B). To encourage lenders to offer PPP loans, Congress directed that the SBA "shall reimburse" lenders for the cost of making loans by paying loan-processing fees based on the amounts

[2] A true and correct copy of Form 159 Fee Disclosure and Compensation Agreement is attached hereto as Exhibit A.

[3] *See* SBA Office of the Inspector General, "SBA Needs to Improve Its Oversight of Loan Agents," September 25, 2015, p. 5, attached hereto as Exhibit B.

of the loans. *Id*. § 636(a)(36)(P)(i).

In contrast to Congress' instruction that ***lenders*** "shall" receive a fee for processing PPP loans, the CARES Act addresses agent fees only once, in a provision titled "Fee Limits." *Id*. § 636(a)(36)(P)(ii). That provision—located immediately after the provision on lenders' fees—states that agents "may not collect a fee in excess of the limits established by the [SBA]." *Id*. The CARES Act did not otherwise alter the existing SBA framework in which an agent was required to operate to be entitled to compensation.

III. THE SBA DOES NOT REQUIRE LENDERS TO PAY AGENTS

Hours before the PPP application window opened, the SBA issued its Interim Final Rule (the "IFR") for the PPP program. 85 Fed. Reg. 20,811 (Apr. 15, 2020). The IFR requires small businesses to complete a form—the PPP Borrower Application Form (Form 2483)—to apply for a PPP loan.[4] *See* 85 Fed. Reg. at 20,812. Form 2483 calls for the applicant to: provide basic identifying information; declare its average monthly payroll and number of employees; answer eight eligibility questions; and make certifications about its eligibility, the application's accuracy, and how loan proceeds will be used. (*See* Ex. C.) Form 2483 ***does not*** include any field or question for the applicant to notify the lender or the SBA that the applicant used the services of an agent.

Consistent with Congress' directive to establish limits on agent fees, the IFR limits the "total amount that an agent may collect" for "assistance in preparing an application for a PPP loan" as follows:

> **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

[4] A true and correct copy of Form 2483 is attached hereto as Exhibit C.

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.

85 Fed. Reg. at 20,816. Like the CARES Act, the IFR does not require lenders to pay fees to any person who claims to be an agent of a borrower. Nor does the IFR otherwise modify the SBA's preexisting regulations in Part 103 governing agent fees.

Plaintiff does not allege that it followed the applicable regulations. Instead, Plaintiff asserts that it is entitled to receive agent fees from Defendant for any purported help it says it provided to PPP loan applicants. (Compl. ¶¶ 10-12, 18-19.) Plaintiff fails to identify any agreement between Plaintiff and Defendant that Plaintiff would act as an agent in connection with these loans.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). This Court may consider the publicly-available materials attached as exhibits to this Motion because they are "[p]ublic documents issued by government agencies." *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

ARGUMENT

I. ALL OF PLAINTIFF'S CLAIMS FAIL BECAUSE THE CARES ACT AND IFR DO NOT CREATE AN ENTITLEMENT TO AGENT FEES.

Plaintiff's claims require a finding that the CARES Act requires payment of fees to agents without regard to whether Defendant agreed to do so. Plaintiff's claims fail because the CARES Act and related regulations do not impose any such requirement.

a. The CARES Act Does Not Mandate Payment of an "Agent Fee."

Although Plaintiff's claims rest on the premise that the CARES Act mandates

payment of agent fees by lenders to those who claim to be agents (Compl. ¶¶ 10-12, 21, 23-24, 27, and 33), Plaintiff does not cite to a single provision of the CARES Act creating such an unfettered right. That is for good reason: no such right exists.

The CARES Act's only reference to agent fees ***limits*** those fees. Congress provided: "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). Plainly, a restriction on what fees an agent "may … collect" does not impose an absolute duty on a lender to pay a fee at all, much less the maximum permissible fee. *See Bostock v. Clayton Cnty, Ga.*, 590 U.S. __, 2020, 140 S.Ct. 1731, 2020 WL 3146686, at *4 (2020) ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) ("[I]t would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope."). As the court observed in *Johnson*, the text of the CARES Act "does not create an independent entitlement for agent fees; rather, it simply imposes a limit on the amount of fees an agent is permitted to collect in the event of an agreement for agent fees." 2020 WL 5608683, at *7.

The CARES Act's provision limiting fees for agents contrasts sharply with the immediately preceding subsection addressing lender fees, in which Congress mandated that the SBA "***shall reimburse*** a lender authorized to make a covered loan at a rate" based on the size of the loan. 15 U.S.C. § 636(a)(36)(P)(i) (emphasis added). No similar mandate appears with respect to the CARES Act's sole agent-fee reference. Put simply, "if Congress had intended for agents to automatically receive a portion of the lenders' fees, it would have said so." *Johnson*, 2020 WL 5608683, at *7; *see also Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

b. Agent Compensation for PPP Loans Is Subject to Existing Section 7(a) Rules and Restrictions.

Congress directed the SBA to make PPP loans available under the agency's established Section 7(a) program. *See* CARES Act § 1102 (describing the PPP as a "new 7(a) program"). Congress further directed that "[e]xcept as otherwise provided" in Section 636(a)(36), the SBA "may guarantee [PPP loans] under the ***same terms, conditions, and processes*** as a loan made under" the existing Section 7(a) program. 15 U.S.C. § 636(a)(36)(B) (emphasis added).[5]

These existing Section 7(a) "terms, conditions, and processes" include the requirement that agents must "execute and provide to the SBA a compensation agreement" between the lender, borrower, and agent before agents may receive "compensation charged for services rendered … to the Applicant or lender in any matter involving SBA assistance." 13 C.F.R. § 103.5(b); *see also* 15 U.S.C. § 642 (requiring borrowers to identify agents before a loan is made). This approach makes agent compensation an issue to be settled by contract among the lender, applicant, and agent—not a statutory or regulatory entitlement.

Plaintiff attempts to avoid this requirement by claiming that the IFR mandates lenders to pay a fee to any purported agent. (Compl. ¶¶ 10-12.) However, when Congress legislates, it is presumed to do so against the backdrop of existing regulations. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). That means the existing Section 7(a) regulatory scheme, which applies to "any matter involving SBA assistance," 13 C.F.R. § 103.5(a), presumptively covers PPP loans. *See, e.g., Flores v. Sessions*, 862 F.3d 863, 875 (9th Cir. 2017) (There is an "assumption that Congress is aware of the legal context in which it is legislating.").

[5] Under the SBA's agreements with PPP lenders, the SBA will guarantee loans if PPP lenders make loans in accordance with the "PPP Loan Program Requirements." *See* SBA CARES Act Section 1102 Lender Agreement, attached hereto as Exhibit D, §§ 2–5. This includes requirements imposed on lenders by statute and SBA regulation, as well as "forms applicable to the 7(a) Loan Program." *Id.*, § 2 (*citing* 13 C.F.R. § 120.10).

Where the CARES Act modified aspects of the existing Section 7(a) regime to enable lenders to rapidly make forgivable loans to businesses in need, it did so unambiguously. *See, e.g.*, 15 U.S.C. § 636(a)(2)(F) (requiring the SBA to fully guarantee PPP loans); *id.* § 636(a)(36)(D)(i) (expanding PPP eligibility to nonprofits); *id.* § 636(a)(36)(F)(ii)(I) (giving existing Section 7(a) lenders authority to make and approve PPP loans); *id.* § 636(a)(36)(J) (disposing with collateral requirements normally applicable to Section 7(a) loans). Conversely, nothing in the text, structure, or purpose of the CARES Act suggests that Congress intended to exempt PPP loans from SBA's rules regulating agent compensation—including that an agent must enter into a "compensation agreement" with the lender before any agent fees may be paid. 13 C.F.R. § 103.5(a).

The courts to rule on this issue have reached the same conclusion. *Sport & Wheat* held: "The Court sees no conflict in these [compensation agreement] requirements and the [IFR]." 2020 WL 4882416, at *4. *Johnson* concluded that "[n]othing in these regulations, then, is inconsistent with the Section 7(a) requirement that an agent must first execute an agreement before receiving any agent fees." *Id.*[6] *Sanchez* ruled the same, holding that "nothing about the SBA requiring *agents* to complete a compensation agreement via Form 159 conflicts with requirements imposed upon *lenders*…." 2020 WL 6060868, at *8.

It is sensible that Congress would have left undisturbed the SBA's 24-year-old rule requiring lenders, agents, and applicants to negotiate acceptable fees among themselves. "A person is not required to deal with another unless he so desires." Restatement (First) of the Law of Restitution § 2 cmt. a. And "one has no duty to pay for services officiously rendered without request although resulting in benefit to him." Restatement (Second) of the Law of Agency § 441 cmt c. Plaintiff's approach of

[6] Even if Plaintiff claims that it is not required to use the SBA's Form 159 (which would be mistaken), Plaintiff's claims would still fail because, as stated in *Johnson*, "even if plaintiffs were correct that this particular form is inapplicable to the PPP, that would not itself dispose of the requirement that agents and lenders enter into an agreement in order for agents to receive fees." 2020 WL 5608683, at *7 n. 16.

eliminating this requirement of advance agreement among lenders, agents, and applicants, by contrast, raises numerous problems. Under Plaintiff's interpretation, agents would be compensated based solely on the loan amount, regardless of the time allegedly expended, the services purportedly performed, or the value of those services. If agents need not justify what work they performed, agents would receive a fee simply by claiming they provided services, even if they did not. Also, nothing would stop multiple agents from claiming fees on behalf of a single PPP applicant. This is a recipe for fraud.

c. Plaintiff's Reliance on the IFR and the Information Sheet Is Misplaced.

Because the CARES Act does not entitle agents to fees, Plaintiff relies on a contorted reading of the IFR and a related Information Sheet. (Compl. ¶¶ 7-12.) But neither the IFR nor the Information Sheet supports an absolute right to recover an agent fee. Any contrary reading would conflict with the CARES Act, and, thus, must be rejected. *See Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").

i. The IFR Does Not Entitle Agents to Receive Fees.

The IFR does not *require* lenders to pay fees to agents. Rather, it caps the "total amount that an agent *may* collect." 85 Fed. Reg. at 20,816 (emphasis added). To the extent an agent "may" collect a fee, the IFR also directs that the fee "will be paid by the lender out of the fees the lender receives from SBA," not "from the borrower … or the PPP loan proceeds." *Id.* Taken together, this language directs only that ***if*** an agent, assuming it has met all other applicable requirements, is to be compensated for assisting a borrower, such compensation must be paid by the lender, and only *up to* the maximum amount in the IFR. *See Johnson*, 2020 WL 5608683, at *7-8. And nowhere does the IFR mandate that a lender *must* pay an agent any fees in the first place. *See Sport & Wheat*, 2020 WL 4882416, at *3 ("This language does not require that lenders share their fees.").

The Information Sheet issued by the Treasury Department says nothing different.[7]

[7] Even if it did, "interpretations contained in policy statements … lack the force of law." *Christensen v. Harris Cty., et al.*, 529 U.S. 576, 587 (2000).

See Dep't of Treasury, Paycheck Protection Program (PPP) Information Sheet—Lenders.[8] It simply paraphrases the CARES Act and the IFR by providing that ***if*** agents are to receive fees, those fees "will be paid out of lender" fees and "[t]he lender will pay the agent." *Id.* at 2. Like the CARES Act and the IFR, the Information Sheet does not guarantee that agents will receive fees. The Treasury Secretary confirmed as much, testifying that agent fees were "intended to be based upon a contractual relationship between the agent and the bank."[9]

ii. The SBA Did Not Change Its Longstanding Agent Fee Regulations.

SBA regulations require that compensation agreements must be in place for "any matter involving SBA assistance," 13 C.F.R. § 103.5. The SBA has never indicated that agents for PPP loans are exempt from its "compensation agreement" requirement, confirming that the agency did not, in fact, alter course. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (Regulatory agency may not "depart from a prior policy *sub silentio* or disregard rules that are still on the books" but must instead provide a reasoned explanation and "display awareness that it *is* changing position.").

To complete the PPP application process, applicants submit Form 2483 and limited supporting documentation. Had the SBA intended for every putative agent to receive an agent fee even in the absence of a compensation agreement, it would have required loan applicants to identify those agents on the provided Form 2483. But Form 2483 does not ask borrowers to identify agents that assisted them; that information must instead be provided on the traditional Form 159 Compensation Agreement. That absence further supports the SBA's intention that agents seeking compensation must enter into a traditional Section 7(a) Compensation Agreement with the lender.

The SBA form that lenders use to apply to the SBA for PPP loan guarantees, Form

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[8] *Available at* https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf

[9] *See* June 30, 2020 Transcript of House Financial Services Committee hearing attached as Exhibit E. A video recording of the hearing is available at https://www.congress.gov/event/116th-congress/house-event/110839, and the cited testimony of Treasury Secretary Mnuchin is at 1:32:02 to 1:33:48.

2484, attached hereto as Exhibit F, reaffirms this point. Unlike the ***borrower*** application form, the ***lender*** application form asks the ***lender*** to identify whether the ***lender*** used an agent. *See* Ex. F at Question K ("Is the Lender using a third party to assist in the preparation of the loan application or application materials, or to perform other services in connection with this loan?"). That the SBA asked lenders to identify lender-engaged agents, but did not ask borrowers to identify borrower-engaged agents, further confirms that the SBA did not intend every self-described agent to receive a fee.

The Form 159 Compensation Agreement provides a triple-check against fraud: agents must certify that they have accurately described the services provided, applicants must certify that the agent's representations are satisfactory, and lenders must certify that the agent fees charged are reasonable and satisfactory given the certifications provided. (*See* Ex. A at 2–3.) Lenders must also confirm that the agent is not "debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in th[e] transaction by any Federal department or Agency." *Id.* Given the SBA's concerns with agent-fee fraud,[10] there is no reason to imagine the agency intended to dispense with this important anti-fraud safeguard, as Plaintiff contends.

II. PLAINTIFF'S CLAIMS ARE IMPERMISSIBLE ATTEMPTS TO ASSERT A NON-EXISTENT FEDERAL PRIVATE RIGHT OF ACTION.

As shown, the CARES Act and its implementing regulation do not create an entitlement to agent fees, and this is fatal to all Plaintiff's claims. *Johnson*, 2020 WL 5608683, at *9 ("[B]ecause the PPP does not entitle plaintiffs to any portion of the lender's fees (absent an agreement), each of these state law claims fails and must be dismissed."). But Plaintiff's claims also fail because it has no private right of action.

a. <u>There Is No Private Right of Action to Enforce the CARES Act</u>.

"[P]rivate rights of action to enforce federal law must be created by Congress."

[10] *See* SBA OIG "Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration" attached hereto as Exhibit G, at 8–9 ("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.")

Alexander v. Sandoval, 532 U.S. 275, 286 (2001). Plaintiff must show that Congress created a private right of action in the CARES Act "in clear and unambiguous terms." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002). Yet the CARES Act, in combination with the SBA, provides only a framework for administering PPP applications, loans, and agent fees; it does not have the required "clear and unambiguous" language showing an intent that agents can sue a lender.

First, nothing in the text of the CARES Act contemplates private enforcement. *Profiles, Inc. v. Bank of Am. Corp*., 2020 WL 1849710, at *4 (D. Md. Apr. 13, 2020) ("the CARES Act does not expressly provide a private right of action."); *Johnson*, 2020 WL 5608683, at *8 ("there is no private cause of action to enforce this provision of the CARES Act."). To the contrary, the Small Business Act provides for enforcement by regulators, not private parties. *See, e.g.*, 15 U.S.C. § 650(c) (providing SBA authority to institute civil actions). Second, before the CARES Act, courts, including the Ninth Circuit, have held that the Small Business Act does not include a private right of action. *See Crandal* v. *Ball, Ball and Brosamer, Inc.*, 99 F.3d 907, 909-10 (9th Cir. 1996). The CARES Act's amendments do not alter that Congressional intent. *See Profiles*, 2020 WL 1849710, at *6-7. Third, Plaintiff's claims are based on a regulation, which cannot create a private right of action. *Sandoval*, 532 U.S. at 291 ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress.")

Every court that has addressed whether the CARES Act created an implied private right of action held that it does not. *Johnson*, 2020 WL 5608683, at *9 ("There is no language in the CARES Act that suggests Congress intended for agents – who are not even the intend beneficiary of a statute that is designed to get money in the hands of small businesses – to have a private remedy."); *Sport & Wheat*, 2020 WL 4882416, at *3; *Profiles*, 2020 WL 1849710, at *4-7; *Sanchez*, 2020 WL 6060868, at *7. ("The Court joins the preexisting consensus that there is no private cause of action to enforce this [agent fee] provision of the CARES Act.").

b. Plaintiff's Declaratory Judgment Claim Fails Because There is No Private Right of Action.

The "availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). When Congress does not create a private right of action, a plaintiff may not evade that intent by seeking a declaratory judgment—exactly what Plaintiff seeks to do here. *See N. Cty. Commc'ns Corp.* v. *Cal. Catalog & Tech.*, 594 F.3d 1149, 1154-56 (9th Cir. 2010) (with no private right of action, plaintiff could not seek declaration of right to payment).

c. Plaintiff's Unjust Enrichment and Violation of the Arizona Consumer Fraud Act Claims Also Fail For Lack of a Private Right of Action.

When a plaintiff's suit is "in essence a suit to enforce" a federal statute lacking a private right of action, it is "incompatible with the statutory regime" to allow common-law claims based on alleged statutory violations. *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 118 (2011). Thus, Plaintiff cannot "argue around" the lack of a private right of action "by bootstrapping [his] cause of action onto an unjust enrichment … claim based on the same statute." *Lil' Man in the Boat, Inc. v. San Francisco*, No. 17-CV-00904-JST, 2018 WL 4207260, at *4 (N.D. Cal. Sept. 4, 2018); *see also Fossen v. Caring For Montanans, Inc.*, 993 F. Supp. 2d 1254, 1265 (D. Mont. 2014), *aff'd*, 617 F. App'x 737 (9th Cir. 2015) (dismissing common law claims that were merely a "backdoor method of presenting an alleged violation of a statute that [plaintiffs] have no right to enforce"); *Short v. Chase Home Fin. LLC*, No. CV-11-133-PHX-DGC, 2011 WL 9160941, at *5 (D. Ariz. Aug. 22, 2011) (dismissing claim for violation of the ACFA premised on an alleged a violation of the federal statute that did not provide a private right of action).

The allegations in Plaintiff's Complaint for unjust enrichment and violation of the ACFA simply attempt to enforce the alleged payment mandate under the CARES Act and the Section 7(a) loan program. Plaintiff's unjust enrichment claim alleges that "[i]t would be unjust to allow Defendant to benefit from Radix Law's work without compensating Radix Law as required by law and otherwise," (Compl. ¶ 36), while the ACFA claim asserts that Defendant targeted and misled Plaintiff into believing that

Defendant would "comply[] with the requirement to compensate PPP agents." (*Id.* ¶ 27.) This Court should reject Plaintiff's attempt to use state claims to bootstrap its way into a cause of action that the CARES Act does not give it. *See Lil' Man in the Boat, Inc.*, 2018 WL 4207260, at *4 ("When a plaintiff lacks a private right of action under a particular statute, she cannot argue around that limitation by bootstrapping her cause of action onto an unjust enrichment or declaratory relief claim.").

III. PLAINTIFF'S CLAIMS ARE SUBJECT TO DISMISSAL FOR ADDITIONAL REASONS.

a. Plaintiff's Unjust Enrichment Claim Fails Because Defendant Did Not Benefit from Plaintiff's "Assistance" with PPP Applications.

To establish a claim for unjust enrichment, Plaintiff must allege: "1. an enrichment; 2. an impoverishment; 3. a connection between the enrichment and the impoverishment; 4. the absence of justification for the enrichment and the impoverishment; and 5. the absence of a remedy provided by law." *Bd. of Trustees of Az. Bricklayers' Pension Tr. Fund v. Obeso*, No. CV-18-01765-PHX-JGZ, 2019 WL 4169005, at *2 (D. Ariz. Sept. 3, 2019). Plaintiff attempts to assert this claim based on the allegation that "[i]t would be unjust to allow Defendant to benefit from Radix law's work without compensating Radix Law as required by law and otherwise." (Compl. ¶ 36.) But because the CARES Act does not entitle Plaintiff to a fee, the requisite enrichment and impoverishment do not exist. *See Johnson*, 2020 WL 5608683, at *10.

Plaintiff also fails to allege any benefit that *Plaintiff* conferred upon Defendant. At most, Plaintiff alleges that it conferred a benefit on the unidentified PPP borrowers it allegedly assisted—not on Defendant. Thus, Plaintiff's own allegations confirm that there can be no claim for unjust enrichment. *See Haller v. Advanced Indus. Computer Inc.*, 13 F. Supp. 3d 1027, 1032 (D. Ariz. 2014) (no unjust enrichment where plaintiff indirectly benefits defendant through services defendant provided to another); *see also Steward*, Ex. A at 4-5 (dismissing unjust enrichment claim because Plaintiff failed to allege it directly assisted lender defendants "in any way during the loan process"). To the extent Plaintiff contends that Defendant received a benefit in the form of PPP lender fees,

those fees were paid by the SBA, as even Plaintiff admits. (Compl. ¶ 32.)

Finally, the unjust enrichment claim also fails because any alleged benefit was unsolicited. "Generally, a person who bestows an unsolicited benefit upon another is not entitled to restitution." *Loiselle v. Cosas Mgmt. Grp., LLC*, 224 Ariz. 207, 210, ¶ 11, 228 P.3d 943, 946 (Ariz. Ct. App. 2010). Plaintiff's complaint fails to allege any facts demonstrating that Defendant solicited the benefit they received. (Compl. ¶¶ 18-19.)

b. Plaintiff Fails to State a Claim under the ACFA.

To state a claim under ACFA, a plaintiff has the burden to show: (1) a false promise or misrepresentation made in connection with the sale or advertisement of merchandise with the intent that others rely on it, (2) the plaintiff relied on the false promise or misrepresentation, and (3) injury resulting from the false promise or misrepresentation. *See Kuehn v. Stanley*, 208 Ariz. 124, 129 (Ct. App. 2004). Plaintiff's claim under the ACFA fails because its allegations lack particularity and do not satisfy any of the requisite elements of a consumer fraud claim.

i. Plaintiff Does Not Meet the Particularity Requirements of Rule 9(b).

Because the ACFA claim is based in fraud, Plaintiff is required to plead these elements with particularity. *See* Fed. R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) ("Rule 9(b)'s particularity requirement applies to state-law causes of action."). Plaintiff must therefore allege "the who, what, when, where, and how" of the misconduct charged. *Vess*, 317 F.3d at 1106.

Plaintiff fails to meet the high standards of Rule 9(b) because it does not allege the particulars of its claim. Plaintiff simply asserts that "Defendant used a material false pretense and/or concealed its intent not to abide by the PPP..." (Compl. ¶ 26.) These allegations do not afford Defendant sufficient notice of the allegedly fraudulent act(s). In addition, Plaintiff does not set forth any facts regarding "the times, dates, places, and other details surrounding the allegedly fraudulent conduct." *Grismore v. Capital One F.S.B.*, No. CV-05–2460–PHX–SMM, 2007 WL 841513, at *6 (D. Ariz. Mar. 16, 2007) (dismissing an ACFA claim because plaintiff failed to comply with Fed. R. Civ. P. 9(b)).

ii. Plaintiff Fails to Plead the Elements of an ACFA Claim.

Plaintiff was not the buyer or target of "the sale or advertisement of any merchandise" as required by the ACFA. *Cellco P'ship v. Hope*, No. CV-11-0432-PHX-DGC, 2011 WL 3159172, at *5 (D. Ariz. July 26, 2011) ("[T]he plaintiff under the ACFA must be the buyer in the merchandise transaction."). Nor has Plaintiff alleged any facts demonstrating how Defendant's alleged "targeting" of Plaintiff was intended to induce Plaintiff (a purported agent, not the purported borrower) to obtain a loan and thus, cannot form the basis for its claim. *See, e.g.*, *Jackson v. Wells Fargo Bank, N.A.*, No. CV-13-00617-PHX-NVW, 2013 WL 12190474, at *2 (D. Ariz. Oct. 18, 2013), *aff'd sub nom. Jackson v. Wells Fargo Bank, N.A.*, 693 Fed. Appx. 634 (9th Cir. 2017) (dismissing ACFA claim as "the allegedly false statements were not intended to induce [plaintiff] to obtain a loan.").[11]

Plaintiff also summarily states that it "relied on and has been damaged by Defendant." (Compl. ¶ 28.) But Plaintiff fails to claim it was aware of or even saw Defendant's alleged advertising or marketing releases before assisting PPP borrowers. Thus, Plaintiff's allegations fall far below the pleading requirement. *See McBride v. Wells Fargo Bank NA*, No. CV-11-02592-PHX-FJM, 2012 WL 1078467, at *3 (D. Ariz. Mar. 29, 2012) (complaint failed to state a claim under the ACFA because "plaintiffs have not pled any particulars about … how they relied on this statement to their detriment").

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint in its entirety and with prejudice.

[11] The ACFA is intended to protect consumers from exposure to disproportionate bargaining power. *See Sullivan v. Pulte Home Corp.*, 231 Ariz. 53, 61, ¶ 38, 290 P.3d 446, 454 (App. 2012), *vacated in part*, 232 Ariz. 344, ¶ 38, 306 P.3d 1 (2013). A plaintiff is not exposed to disproportionate bargaining power where, as here, it is not a party to the subject transaction. *See id.* (dismissing a claim under the ACFA because plaintiff was not a party to the original transaction and thus, not subject to disproportionate bargaining power); *see also Johnson*, 2020 WL 5608683, at *12 (dismissing claim under New York counterpart to ACFA because alleged promise to pay agent fees is not "consumer-oriented").

Dated this 23rd day of October 2020.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

☒ I hereby certify that on October 23, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

By: */s/ Tammy Mowen*
Employee, Greenberg Traurig, LLP