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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

M&M Consulting Group LLC,

Plaintiff,

v.

JPMorgan Chase Bank, N.A.; and First Republic Bank,

Defendants.

CASE NO. 8:20-cv-01318-JVS (KESx)

Hon. James V. Selna

JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT

[Notice of Motion and Motion to Dismiss; Request for Judicial Notice; [Proposed] Order filed concurrently]

Date: January 4, 2021
Time: 1:30 p.m.
Courtroom: 10C

Action filed: July 22, 2020
FAC filed: October 26, 2020
Response date: November 16, 2020

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on January 4, 2021, at 1:30 p.m., or as soon as the matter may be heard before the Honorable James Selna, United States District Judge, Central District of California, located at 411 West 4th Street, Santa Ana, California 92701, Defendants First Republic Bank ("First Republic") and JPMorgan Chase Bank, N.A. ("Chase" and collectively with First Republic, "Defendants") will, and hereby do respectfully move this Court for an order dismissing Plaintiff M&M Consulting Group, LLC's ("M&M" or "Plaintiff") First Amended Complaint ("FAC") under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This putative class action recycles the same flawed claims asserted in actions around the country. M&M, a self-proclaimed "agent," asserts that it is entitled to recover fees from Defendants for alleged but unspecified work assisting unidentified clients in submitting applications for small business loans to Defendants through the Paycheck Protection Program ("PPP") under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (the "CARES Act"). But "every court that has decided this issue has held that the CARES Act does not require lenders to pay agent fees absent an agreement to do so[.]" Request for Judicial Notice ("RJN"), Ex. 1 (Order in *Am. Video Duplicating Inc. et al., v. Citigroup Inc. et al.*, No. 2:20-cv-03815-ODW (AGRx) (C.D. Cal. Nov. 16, 2020) ("*Am. Video* Order") (dismissing putative class action seeking agent fees under the CARES Act) at 14; *see also Johnson v. JPMorgan Chase Bank, N.A.*, No. 20-CV-4100 (JSR), 2020 WL 5608683, at *1, 8 (S.D.N.Y. Sept. 21, 2020) (same); *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, No. 3:20CV5425-TKW-HTC, 2020 WL 4882416, at *1 (N.D. Fla. Aug. 17, 2020) (same); *Juan Antonio Sanchez, PC v. Bank of S. Tex.*, No. 7:20-CV-00139, 2020 WL 6060868, at *9 (S.D. Tex. Oct. 14, 2020) (joining the "emerging consensus" that "agents who assist applicants with a PPP [loan] are not entitled to agent fees in the absence of an agreement with the lenders"). Each of Plaintiff's claims fails because the FAC does not and cannot allege that Plaintiff ever had such an agreement with either Defendant and concedes that Plaintiff failed to comply

with the Small Business Administration's ("SBA") longstanding requirements regarding agent fees.

M&M's claims also fail because there is no private right of action under the CARES Act. *See Leigh King Norton & Underwood, LLC*, No. 2:20-CV-00591-ACA, 2020 WL 627379, at *9 (N.D. Ala. Oct. 26, 2020) ("Nothing in the Small Business Act or the CARES Act implies the existence of a remedy for agents denied an agent fee."); *Johnson*, 2020 WL 5608683, at *8 ("There is no language in the CARES Act that suggests Congress intended for agents—who are not even the intended beneficiary of a statute that is designed to get money in the hands of small businesses—to have a private remedy."); *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.'"); *Sport & Wheat*, 2020 WL 4882416, at *3 (dismissing declaratory judgment claim on merits but observing that "[t]he CARES Act does not require lenders to pay the agent's fees absent an agreement to do so (or create a private right of action for payment)[.]"); *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 751 (D. Md. 2020) ("[T]he CARES Act does not expressly provide a private right of action."). M&M's attempt to cloak claims that it is not entitled to assert in state common law causes of action should be rejected as well, and this action should be dismissed.

M&M's claims fail for the additional, independent reason that it has not pled the requisite elements of its common law or California statutory claims. Put differently, the state law claims are facially deficient for a host of reasons. Plaintiff's unjust enrichment "claim" fails because there is no cause of action for unjust enrichment in California. *Patrick v. Volkswagen Grp. of Am.*, No. SACV191908JVSADSX, 2020 WL 3883275, at *7 (C.D. Cal. Mar. 5, 2020) (Selna, J.). In any event, the claim fails because M&M is not entitled to fees under the PPP, and it cannot demonstrate that it conferred any benefit on Defendants. *Hernandez v. Lopez*, 180 Cal. App. 4th 932, 938 (2009). The conversion claim fails because it is based on M&M's incorrect assertion that lenders are required under the CARES Act and regulations to pay fees they never agreed to pay. *See Johnson*,

2020 WL 5608683, at *10 ("[O]nce again, because the Court holds that the PPP rules and regulations do not entitle plaintiffs to agent fees, the Court rejects these conversion claims."). The conversion claim also fails because Plaintiff's claim for PPP fees "could be discharged by an ordinary payment of money," *Sanchez*, 2020 WL 6060868, at *10, and because the FAC only alleges conversion of an "approximate" amount of fees, rather than a specific amount as required. *Satre v. Wells Fargo Bank, N.A.*, No. C 10-01405 JSW, 2014 WL 1292139, at *7 (N.D. Cal. Sept. 16, 2014). M&M's breach of implied contract claim fails on numerous grounds, including because the FAC does not allege mutual assent, and any implied contract would fail for uncertainty and because it conflicts with federal law. The California Unfair Competition Law ("UCL") claim fails because M&M does not allege that Defendant's alleged conduct violates a public policy that is tethered to any authority or that the conduct lacks justification. And both the unjust enrichment "claim" and UCL claim fail because M&M does not allege that an adequate legal remedy is unavailable as required for purely equitable claims. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020).

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, Defendants' Request for Judicial Notice, and all pleadings and papers on file in this action.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on October 19, 2020 and November 9, 2020.

Respectfully submitted,

DATED: November 16, 2020 GREENBERG TRAURIG, LLP

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DATED: November 16, 2020 ARNOLD & PORTER KAYE SCHOLER LLP

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ECF CERTIFICATION

Pursuant to Local Civil Rule 5-4.3.4(a)(2)(i), I hereby attest that Sharon D. Mayo, on whose behalf this filing is jointly submitted, has concurred in this filing's content and has authorized me to file this document.

/s/ Robert J. Herrington
Robert J. Herrington

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Rules

Regulations

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

M&M is a consultant and self-proclaimed "agent" that claims to have provided unspecified services to unspecified clients to help obtain loans from Defendants under the Paycheck Protection Program ("PPP"), created by the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020) (the "CARES Act" or "Act"). M&M concedes that it was never retained by Defendants and has no agreement with them. Yet, M&M is asking this Court to be the first to create a statutory entitlement to "agent fees" from lenders. More specifically, M&M asks this Court to depart from all agent fee cases decided thus far and find that any self-proclaimed agent that claims to have helped a borrower obtain a PPP loan has an automatic right to fees from a PPP lender—regardless of whether that "agent" had any agreement with the lender to pay those fees.

But this imagined entitlement runs contrary to the unambiguous language of the CARES Act, the PPP regulations, and the Small Business Administration ("SBA") Section 7(a) loan program regulations, all of which place *limitations* on possible agent fees and do not create an automatic right to them. As a unanimous consensus of courts have now held, self-proclaimed agents like M&M have no entitlement to agent fees without a compensation agreement with the lenders providing for those fees. *See* RJN, Ex. 1 (*Am. Video* Order) at 14 ("[E]very court that has decided this issue has held that the CARES Act does not require lenders to pay agent fees absent an agreement to do so. . . . The Court sees no reason to depart from these conclusions."); *Johnson v. JPMorgan Chase Bank, N.A.*, No. 20-CV-4100 (JSR), 2020 WL 5608683, at *1, 8 (S.D.N.Y. Sept. 21, 2020) (same); *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, No. 3:20CV5425-TKW-HTC, 2020 WL 4882416, at *1 (N.D. Fla. Aug. 17, 2020) (same); *Sanchez v. Bank of S. Tex.,* No. 7:20-cv-00139, 2020 WL 6060868, at *9 (S.D. Tex. Oct. 14, 2020) (same); *see also Leigh King Norton & Underwood, LLC*, No. 2:20-CV-00591-ACA, 2020 WL 627379, at *10 (N.D. Ala. Oct. 26, 2020) (holding that the CARES Act and implementing regulations "plainly do[] not require lenders to pay agents").

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 receive a fee "in any matter involving SBA assistance." 13 C.F.R. § 103.5(a). This requirement promotes the SBA's twin objectives of allowing lenders to choose with whom they do business and preventing fraud and abuse by unscrupulous or unnecessary agents. M&M concedes that it did not meet this requirement, that it was "not retained by defendants" (FAC at 2:15-16), and that it only sought fees "prior to the filing of this suit." (*Id.* ¶¶ 10–11.) Thus, because M&M had no compensation agreement with either Defendant and did not comply with SBA regulations, it is not entitled to any fees from Defendants, and all of its claims should be dismissed.

Plaintiff's declaratory judgment and federal statutory claims also fail because the CARES Act and the Small Business Act do not provide for a private right of action. *See* RJN, Ex. 1 (*Am. Video* Order) at 14 ("[E]very court that has decided this issue has held that the CARES Act does not … create a corresponding private right of action."); *Leigh King*, 2020 WL 627379, at *9; *Sanchez*, 2020 WL 6060868, at *7; *Johnson*, 2020 WL 5608683, at *8-9. And M&M's common law claims constitute an impermissible end run around the absence of a federal private right of action and should be dismissed as well.

M&M's claims fail for the additional, independent reason that it has not pled the requisite elements of its common law claims. Plaintiff's unjust enrichment "claim" fails because (i) there is no cause of action for unjust enrichment in California (*Patrick v. Volkswagen Grp. of Am.*, No. SACV 19-1908-JVS (ADSx), 2020 WL 3883275, at *7 (C.D. Cal. Mar. 5, 2020) (Selna, J.)), and (ii) M&M cannot show that it conferred any benefit on Defendants. *Hernandez v. Lopez*, 180 Cal. App. 4th 932, 938 (2009). The conversion claim fails because it is based on M&M's incorrect assertion that lenders must pay fees they never agreed to pay. *Johnson*, 2020 WL 5608683, at *10 ("[O]nce again, because the Court holds that the PPP rules and regulations do not entitle plaintiffs to agent fees, the Court rejects these conversion claims."). The claim also fails because (i) it "could be discharged by an ordinary payment of money" (*Sanchez*, 2020 WL

6060868, at *10), and (ii) the FAC alleges only an "approximate" amount of fees, rather than a specific amount as required. *Satre v. Wells Fargo Bank, N.A.*, No. C 10-01405 JSW, 2014 WL 1292139, at *7 (N.D. Cal. Sept. 16, 2014).

M&M's breach of implied contract claim fails on numerous grounds, including because the FAC does not allege mutual assent, any implied contract would fail for uncertainty, and this claim conflicts with federal law. The UCL claim fails because M&M does not allege that Defendants' alleged conduct violates a public policy that is tethered to any authority, or that the conduct lacks justification. In addition, the unjust enrichment "claim" and UCL claim both fail because M&M does not allege that an adequate legal remedy is unavailable as required. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). The FAC should be dismissed in entirety.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The SBA's Section 7(a) Program Requires Agent Compensation Agreements Before An Agent Can Receive Agent Fees.

Congress created the SBA in 1953 to develop programs to encourage lending to small businesses. 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* 15 U.S.C. § 636(a). Congress required that PPP loans be administered by the SBA "under the same terms, conditions, and processes as a loan made under" the agency's Section 7(a) loan program unless Congress "otherwise provided." *Id.* ¶ 636(a)(36)(B).

No one must use "agents"[2] to help submit Section 7(a) loan applications. *See* 13 C.F.R. § 103.2(a). In fact, fewer than three percent of Section 7(a) borrowers use agents.

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[1] As required under the Court's Initial Order Following Filing of Complaint Assigned to Judge Selna, Defendants attach a copy of Plaintiff's FAC to this Memorandum of Points and Authorities as Exhibit A.

[2] An "agent" is any "authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an applicant or participant by conducting business with SBA." 13 C.F.R. § 103.1(a).

See 85 Fed. Reg. 7,622, 7,627 (Feb. 10, 2020). But if borrowers elect to do so, the Small Business Act and Part 103 of the SBA's regulations establish a comprehensive framework that agents must satisfy 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); *see also* 15 U.S.C. § 642.

For example, 13 C.F.R. § 103.5 establishes how the "SBA regulate[s] an Agent's fees and provision of service." The agent's compensation cannot exceed what the SBA deems "reasonable." *Id.* § 103.5(b). And before an agent can receive a fee, the agent first "must execute and provide" 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* 61 Fed. Reg. 2,679, 2,682.

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. (*See* RJN, Ex. 2 (Form 159).) 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 19.) It also requires the agent to make certifications about the services to be performed and compensation to be paid or received in connection with the loan. (*Id.* at 20-21.) And 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.* at 19.) Agents must provide this information "even if the compensation is charged on a percentage basis." (*Id.*) 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." (RJN, Ex. 3 at 30 (*SBA Needs to*

Improve Its Oversight of Loan Agents).) As set forth below, the above requirements govern PPP loans. (*See infra* Section B(2).)

B. The CARES Act and PPP Do Not Require PPP Lenders to Pay Agent Fees.

The PPP is one component of the CARES Act, Pub. L. No. 116-136. *See* Paycheck Protection Program and Health Care Enhancement Act § 101(a), Pub. L. 116-139 (2020). 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 of the loans. *Id*. § 636(a)(36)(P)(i). In contrast to Congress's 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, which appears immediately after the provision requiring fees payable to lenders, 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 SBA's existing framework for regulating agents and their compensation.

C. The SBA's IFR Implements the PPP and Does Not Require Lenders to Pay Agent Fees.

The SBA posted its Interim Final Rule (the "IFR") to guide operation of the PPP on the SBA website on April 2, 2020 and published it in the Federal Register on April 15, 2020. 85 Fed. Reg. 20,811 (Apr. 15, 2020). The IFR requires small businesses to complete a form—the PPP Borrower Application (Form 2483)—to apply for a PPP loan. *See* 85 Fed. Reg. at 20,812; (RJN, Ex. 4 (Form 2483)). Form 2483 *does not* include any field or question about whether the applicant used an agent. As Congress directed, the IFR also limits the "total amount that an agent may collect" for "assistance in preparing an application for a PPP loan." 85 Fed. Reg. at 20,816. It provides that "Agent fees will be paid by the lender out of the fees the lender receives from the SBA," as well as ranges for "the total amount that an agent may collect" depending on the size of the loan. *Id*. Like the CARES Act, the IFR simply *does not require* lenders to pay fees to any person who claims to be an agent. To the contrary, the Secretary of the Treasury testified before

Congress: "What our guidance did say is that banks could pay agent fees out of the fees that they received [from the SBA], [and] *that was intended to be based upon a contractual relationship between the agent and the bank*." (RJN, Ex. 6 (June 30, 2020 Transcript) at 102-103 (emphasis added).)[3]

D. M&M Did Not Have a Compensation Agreement with Defendants.

M&M, a firm engaged in an unspecified line of business, does not (and could not) allege that it entered into any agreement with Defendants to pay for its alleged work assisting unidentified PPP loan applicants.[4] The FAC does not identify the name of M&M's clients; what specific work M&M supposedly performed (other than "assist[ing] [a]pplicants in the preparation of their [a]pplication [*sic*]" (*id*. ¶ 53)); how much time it spent assisting with that work; or its customary fees for such work. M&M does not allege that it or its unidentified clients disclosed M&M's alleged role as an agent to Defendants before the loan application process, had any compensation agreement with Defendants or that it or its clients submitted the SBA's Form 159 Fee Disclosure and Compensation Agreement as required for Section 7(a) loans, or even that Plaintiff or its clients requested Defendants to complete Form 159.

III. ARGUMENT

A. Procedural Standard

To avoid dismissal under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a

[3] 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.

[4] After the SBA published the IFR, professional organizations for CPAs, who often provide agent services, advised agents to "discuss [payment] with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." (RJN, Ex. 7 (Small Business Loans Under the PPP: Issues Related to CPA Involvement (2020) at 111.)

cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). In resolving a Rule 12(b)(6) motion, the Court may consider the complaint, materials incorporated by reference, and matters of which the Court may take judicial notice. *Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1104 (9th Cir. 2020).

B. The CARES Act and Its Implementing Regulations Do Not Entitle M&M to Agent Fees.

M&M's claims are all based on the mistaken theory that the CARES Act requires lenders to pay a portion of their PPP loan processing fees to agents, regardless of what services the agent performed or whether a lender agreed to pay those fees. All Plaintiff's claims should be dismissed because neither the CARES Act nor its implementing regulations imposes any such requirement. Plaintiff's theory "finds no support in the plain language of the [CARES Act] or the [PPP] regulation." *Sport & Wheat*, 2020 WL 4882416, at *2 (dismissing a claim for agent fees).

1. The CARES Act does not entitle agents to fees without an agreement.

M&M claims that it is "entitl[ed] [to] mandatory [a]gent fees . . . as a result of the assistance [it] provided to [b]orrowers in preparing their PPP loan applications that were submitted to a given Defendant—and ultimately funded by that Defendant—under and pursuant to the CARES Act and SBA Regulations" (FAC ¶ 4). But the FAC does not cite any provision of the CARES Act imposing such a requirement. And that is because no such requirement exists.

The CARES Act's only reference to agent fees *limits* those fees. Congress provided 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). On its face, this restriction on what fees an agent "may . . . collect" does not impose an affirmative duty on lenders to pay agents, and certainly no obligation to pay the maximum permissible fee. *See 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."); *see also*

Johnson, 2020 WL 5608683, at *7 ("The Court finds that the language 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.").

When Congress intended to compensate parties involved in processing PPP loan applications, it did so explicitly. In the subsection immediately before the limitation on agent fees, 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). The CARES Act has no similar mandate for agent fees.

"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." *Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993). The stark difference between the CARES Act's neighboring provisions governing lender fees and agent fees confirms that Congress did not provide agents with an automatic right to receive fees from lenders for purportedly assisting on PPP loan applications. 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; *Sport & Wheat*, 2020 WL 4882416, at *3 ("the different language used by Congress in mandating payment of lenders ('shall reimburse') and limiting agent fees ('may not collect') is indicative of an intent not to require lenders to pay agent fees."); *see also Leigh King*, 2020 WL 6273739, at *7 ("If Congress had wanted to require lenders to pay agent fees, it could easily have provided that lenders 'shall' pay those fees, just as it provided that the Administrator 'shall' pay fees to lender").

2. The CARES Act directs the SBA to implement the PPP under the Existing Section 7(a) Program Rules for Agent Compensation.

The goal of the PPP was to provide liquidity to small businesses quickly. Accordingly, Congress directed the SBA to make PPP loans available under the agency's existing Section 7(a) program. *See* CARES Act § 1102 (amending 15 U.S.C. § 636(a)); 85 Fed. Reg. at 20,811–2 (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]

The existing 7(a) framework and "terms, conditions, and processes" include the requirement that "any applicant, agent, or packager must execute and provide to the SBA a compensation agreement" using the Form 159 Compensation Agreement 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). By requiring a compensation agreement to which the lender and applicant also are parties *before* an agent may receive a fee, 13 C.F.R. § 103.5(a), the SBA made agent compensation an issue to be settled by contract among the lender, applicant, and agent—not a statutory or regulatory entitlement. This approach provides important safeguards against unreasonable or excessive compensation, fraudulent agent-fee requests, and claims by debarred or otherwise ineligible agents.

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."). The CARES Act expressly modified certain aspects of the existing Section 7(a) regime to enable lenders to make forgivable loans rapidly. *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 include nonprofits); *id.* § 636(a)(36)(F)(ii)(I) (giving all existing Section 7(a) lenders delegated authority to make and approve PPP loans). But nothing in the text, structure, history, or purpose of the

[5] The SBA will only guarantee loans if PPP lenders approve, close, disburse, service, and liquidate PPP loans in accordance with the "PPP Loan Program Requirements." (*See* RJN, Ex. 8 (CARES Act Section 1102 Lender Agreement) at 117 (§§ 2–5).) This includes requirements imposed on lenders, as well as "forms applicable to the 7(a) Loan Program." (*Id.* at 117 (§ 2) (citing 13 C.F.R. § 120.10).)

CARES Act suggests that Congress intended to exempt PPP loans from SBA's longstanding rules regulating agent compensation—including the requirement 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). Thus, Congress must be presumed to have intended that the existing regulatory scheme, which applies to "any matter involving SBA assistance," *id*., cover PPP loans as well. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions[.]"); *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (agencies may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

It makes good sense that Congress did not disturb the SBA's 24-year-old rule requiring lenders, agents, and applicants to reach an agreement on acceptable fees. "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. Congress's mandate that the SBA "*shall reimburse* a lender . . . at a rate" set forth in the CARES Act reinforces this conclusion. 15 U.S.C. § 636(a)(36)(P)(i) (emphasis added). By setting a specific rate that lenders "shall" receive, Congress sought to encourage lenders to make PPP loans and compensate lenders for doing so. At the same time, by directing that PPP loans generally be made under the "same terms, conditions, and processes" as other Section 7(a) loans, *id*. § 636(a)(36)(B), Congress left intact preexisting rules designed to give lenders the freedom to decide whether to work with agents and how much to pay them. M&M's assumption that it can ignore these longstanding rules and demand a portion of the fees that lenders "shall" receive under the CARES Act would undermine the careful balance Congress struck, as well as the purpose of the SBA's agent fee regulations.

M&M's approach also raises practical problems. For example, under M&M's approach, self-proclaimed agents would be compensated regardless of the services

performed, the value of those services, or whether a lender was even aware of the agents' existence. And under M&M's approach, agents would receive a fee simply by claiming they provided services (even if they did not). Further, if multiple agents claim they assisted with a single PPP loan application, M&M's approach would seek to force lenders to pay an ever-increasing portion (if not all) of their processing fees for individual loans, even if those agents were unknown to lenders or never approved by them. Neither Congress nor the SBA intended these absurd results. This would be a recipe for fraud and abuse. *See Devi v. Aguirre*, No. C 05-01179 JSW, 2005 WL 2656590, at *2 (N.D. Cal. Oct. 18, 2005) ("Courts should reject interpretations of statutes or regulations which produce an unjust, unreasonable, or absurd result.").[6]

3. M&M mischaracterizes the IFR, Form 159, and the SOP.

Because neither the CARES Act nor the SBA's existing Section 7(a) regulations supports its theory, M&M resorts to contorted readings of the IFR, an informal Information Sheet, and the requirements of Form 159 to claim it is entitled to agent fees. (FAC ¶¶ 29–34, 44–51.) None supports its claims. And Plaintiff's position conflicts with the CARES Act and the SBA's longstanding agent-fee regulations. *See Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress");[7] *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005) ("[Courts] try to avoid, where possible, an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress") (internal quotation omitted).

[6] To the extent M&M complains that the IFR prohibited it from seeking compensation directly from clients (*see, e.g.*, FAC ¶ 88), its complaint is with the mechanics of the PPP, not the lenders.

[7] Notably, adopting Plaintiff's position would effectively create an SBA regulation that goes against the express provision of the CARES Act as enacted by Congress and that would exceed SBA's authority to issue.

a The IFR does not entitle agents to fees.

Nothing in the IFR requires lenders to pay agent fees. Instead, the IFR caps the "total amount that an agent *may* collect." 85 Fed. Reg. at 20,816 (emphasis added). In response to a question about "who pays the fee to an agent who assists a borrower," the IFR directs that "agent fees 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 provides only that *if* an agent is to be compensated for assisting a borrower (because they have a compensation agreement and have complied with SBA regulations on agent fees), that compensation must be paid by the lender, and then only up to the maximum stated in the IFR.

The IFR simply does not mandate that a lender pay an agent any fees in the first place. *See Johnson*, 2020 WL 5608683, at *7 ("[The IFR] do[es] not entitle agents to fees but simply regulate[s] how such fees would be paid when they are to be paid."); *Sanchez*, 2020 WL 6060868, at *10 ("[T]he PPP does not entitle plaintiffs to any portion of the lenders' fees (absent an agreement)."); *Sport & Wheat*, 2020 WL 4882416, at *3 ("This language does not require that lenders share their fees."); *Leigh King*, 2020 WL 6273739, at *7 ("[The CARES Act] does not provide that anyone . . . *must* pay fees to agents that assist eligible recipients. Nor does the interim regulation impose any such requirement.") (emphasis added). Five courts, including this district (RJN, Ex. 1 (*Am. Video* Order) at 14), have already considered Plaintiff's entitlement theory and rejected it, comprising the unanimous judicial "consensus" that agents "are not entitled to agent fees in the absence of an agreement with the lenders." *Sanchez*, 2020 WL 6060868, at *2; *see also Leigh King*, 2020 WL 6273739; *Johnson*, 2020 WL 5608683; *Sport & Wheat*, 2020 WL 4882416.[8]

[8] All of these Courts have recognized that the IFR's language concerning payment fees is strictly permissive, just like the language in the CARES Act concerning payment of agent fees, which is far different from the mandatory language Congress included in the CARES Act that the SBA "*shall reimburse* a lender . . . at a rate" set forth in the CARES Act. 15 U.S.C. § 636(a)(36)(P)(i) (emphasis added).

These courts have found no support for Plaintiff's claim that the CARES Act and the IFR "create an independent entitlement for agent fees," concluding instead that they merely "impose limits on agent fees." *Johnson*, 2020 WL 5608683, at *7; *see also Sanchez*, 2020 WL 6060868, at *2 ("[A]gents who assist applicants with a PPP [loan application] are not entitled to agent fees in the absence of an agreement with the lenders."); *Leigh King*, 2020 WL 6273739, at *10 (holding that the CARES Act and implementing regulations "plainly do[] not require lenders to pay agents").[9]

b The Information Sheet does not entitle agents to fees.

The FAC also cites an informal Information Sheet issued by the Treasury Department (FAC ¶ 29), but that informal guidance says nothing different. (*See* RJN, Ex. 9 (PPP Information Sheet—Lenders).)[10] 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 121.) Like the CARES Act and the IFR, the Information Sheet does not mandate agent fees or alter the SBA's longstanding requirements for agent fees, including a compensation agreement. The Treasury Secretary confirmed as much when he testified that agent fees were "intended to be based upon a contractual relationship between the agent and the bank." (RJN, Ex. 6 (June 30, 2020 Transcript) at 102-03.)

c The SOP and Form 159 do not entitle agents to fees.

M&M offers a distorted characterization of Form 159 and the SBA's Section 7(a) Standard Operating Procedures ("SOP") to claim that, even without any agreement, Defendants were somehow required to submit Form 159 and pay the maximum amount

[9] A fifth court also dismissed an agent-fee action because the plaintiff had not sufficiently alleged the elements of its claim for unjust enrichment. *Steven L. Steward & Assocs., P.A. v. Truist Bank*, No. 620CV1083ORL40GJK, 2020 WL 5939150, at *3 (M.D. Fla. Oct. 6, 2020). The court did not reach the question of whether the CARES Act or the IFR entitles agents to fees. No agent-fee claims to date have survived a motion to dismiss.

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

of fees based on a purported agent's unilateral demand. (*See* FAC ¶¶ 39–49.) M&M is wrong, for several reasons.

First, M&M's argument is entirely circular. Plaintiff *assumes* a legal entitlement to agent fees that the lender supposedly must pay, and, based on this assumption, argues that lenders must complete and submit a Form 159. But, as shown, there is no such entitlement in the CARES Act, the IFR, the SBA Regulations, or anywhere else. Plaintiff takes the position that lenders have an obligation to complete Form 159 and pay fees upon any agent's demand: Lenders have "[no] power to tell the Borrower they cannot use the Agent of their choosing or decide to not fill out, sign, and submit Form 159." (FAC ¶ 49.) But this assertion is beside the point. Form 159 *documents*, but does not *replace*, the required underlying compensation agreement between the lender and the agent, as Judge Rakoff explicitly recognized. *See Johnson*, 2020 WL 5608683, at *7 n.16 ("[E]ven 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."). Completing and submitting a belated Form 159 would not remedy the fact that Plaintiff has not alleged, because it cannot, that it reached the required agreement with Defendants in advance of allegedly providing assistance to PPP loan applicants.

Second, M&M argues that, because PPP applicants are "expressly disallowed" from paying an agent, "[a]gent[s] are not required to fill out or sign Form 159." (FAC ¶ 47.) But this argument disregards the most basic requirements of Form 159, which provide a triple-check against fraud: agents must certify that they have accurately described the services provided, applicants must certify that the agent's representations about the services are satisfactory, and lenders must certify that the agent fees charged are reasonable and satisfactory given the certifications provided. (RJN, Ex. 2 (Form 159) at 20-21.) Form 159 is unambiguous, requiring that when an agent seeks a fee above $2,500 (as Plaintiff does from Chase), the agent must provide "supporting documents that include: 1) a detailed explanation of the work performed; and 2) the hourly rate and the

number of hours spent working on each activity." (*Id*. at 6.) Agents must provide this information "even if the compensation is charged on a percentage basis." (*Id*.) Even for fees of less than $2,500 (as Plaintiff seeks from First Republic), the Agent must be identified and its services listed. And, whenever agent fees are sought, lenders must 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*.) There is nothing in the IFR or CARES Act that does away with these requirements and safeguards, and given the SBA's concerns with agent-fee fraud,[11] there is no reason to conclude the agency intended to depart from its longstanding requirements.

Third, M&M's reliance on cherry-picked excerpts from the SBA's SOP—an attempt to manufacture separate categories of "Lenders' Agents" and "Borrowers Agents" that are subject to separate requirements (*see* FAC ¶ 38)—gets it nowhere. In reality, the SOP makes clear that an agent cannot demand compensation without an agreement. Despite quoting SOP 50 10 5(K), Plaintiff selectively quotes portions of the SOP but omits the provision that unambiguously requires an agent to have a compensation agreement to collect fees: "SBA regulations at 13 CFR § 103.5 require any Agent to execute … a compensation agreement ('Agreement')." (RJN, Ex. 10 (SOP 50 10 5(K)) at 305.) "Each Agreement governs the compensation charged for services rendered or to be rendered to the Applicant or Lender in any matter involving SBA assistance." (*Id*.) Moreover, the SOP states that "[f]or all other Agents [besides Lender Service Providers, who must instead submit a separate written agreement[] *paid by either an Applicant or a Lender*, [the] SBA Form 159 [compensation agreement] must be completed and signed by the Applicant and the Lender." (*Id*. at 306.) Thus, far from

[11] (*See* RJN, Ex. 11 (*Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2020*) at 575, 580 (discussing "a pattern of fraud by . . . for-fee agents in the 7(a) Loan Program," and the SBA's "progress in developing effective methods to disclose and track loan agent activities on 7(a) program loans" by requiring the completion of Form 159 agreements).)

establishing "distinct categories of agents, with separate SBA governing requirements (FAC ¶ 38) the SOP, like the SBA regulations, reaffirms the basic principle that, before a lender is required to pay agent fees, the lender must have agreed to do so.

Fourth, had the SBA intended for every putative agent claiming to have helped a PPP applicant to receive a fee, even in the absence of a compensation agreement, it would have (at a minimum) required loan applicants to identify those agents. But Form 2483 (the Borrower Application Form) does not ask borrowers to identify agents that assisted them; that information must instead be provided on the traditional Form 159 Compensation Agreement. (*See* RJN, Exs. 2 (Form 159) and 3 (Form 2483).) The SBA form that lenders use to apply for PPP loan guarantees, Form 2484, reaffirms this point. Unlike the *borrower* application form, the *lender* application form asks the *lender* to identify whether the *lender* used an agent. (*See* RJN, Ex. 5 (Form 2484) at 53 (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 from the lender. *See* RJN, Ex. 1 (*Am. Video* Order) at 15 ("[T]he fact that the PPP lender application form asks whether the lender used an agent to assist with the application— in a system where agent fees can only be recovered from lenders, not borrowers— shows that the SBA contemplated certain PPP loans would not involve agent fees."). M&M's position—which would permit agents to claim after-the-fact to have assisted borrowers with PPP applications, and then unilaterally demand that a lender submit Form 159 and pay the maximum amount regardless of the services provided and without the lender's consent to do business with that agent—invites fraud and abuse.

Disclosure to the SBA of the agent's identity and agreed-to compensation is required by *statute* before a loan is made. 15 U.S.C. § 642. The lender could not fulfill that requirement and the SBA could not meet its administrative obligations if, as Plaintiff

insists, an agent can assist a borrower and then demand compensation after the loan has been disbursed without ever previously identifying itself to the lender. *See Sanchez*, 2020 WL 6060868, at *8 ("Plaintiff cites no authority for the novel argument that a federal agency's [PPP] forms could supersede a federal statute and the Court declines to recognize this argument."). Plaintiff ignores these indications to the contrary in insisting, without any support, that the IFR creates a new obligation for lenders to pay agents regardless of whether the lenders agreed to do so. Plaintiff is mistaken. As the court in *Sanchez* put it, "[P]laintiff believed that it could serve as applicants' agent, kick its feet up and wait for the banks to issue PPP loans to successful applicants, and only *then* notify [d]efendant banks of its agency role and demand payment[,] [but] . . . that approach 'is not how the PPP works.'" 2020 WL 6060868, at *9 (emphasis in original).

* * * * *

To summarize: each of M&M's claims is based on the same theory: that a self-proclaimed agent with no compensation agreement with Defendant lenders is somehow entitled to fees from lenders for unidentified work for unspecified client borrowers. Count I seeks a declaratory judgment "in accordance with the SBA Regulations that a portion of the Lender Fees paid to Defendants must be paid to Plaintiff and the Class." (FAC ¶ 77.) Count II claims Defendants have been unjustly enriched "through the illegal retention of the Agent Fee portion of the Lender Fees paid by the Federal Government" (*id*. ¶ 86), and Count III that Defendants have "committed civil conversion by retaining monies owed to Plaintiff and the Class" (*id*. ¶ 105). Count IV asserts that Defendants "have a quasi-contractual obligation to pay for the services by which they benefited" (*id*. ¶ 113), and Count V that Defendants' "refus[al] … to pay regulatory-mandated Agent Fees" constitutes unfair conduct under California law (*id*. ¶¶ 121-122). And Plaintiff asserts two "implied cause[s] of action" for "Violations of the CARES Act" (Count VI) and "Violations of the SBA's 7(a) Program" (Count VII) based on the "refus[al] to pay Agent Fees" (*see id*. ¶¶ 127, 131, 135, 137).

All these claims fail because M&M's core legal proposition—that it is entitled to fees—is incorrect as a matter of law. *See Johnson*, 2020 WL 5608683, at *7 ("[U]nder longstanding SBA regulations, agents are only entitled to receive fees for their work in connection with securing a loan when they first execute a 'compensation agreement' signed by the lender, agent, and applicant."). Plaintiff is demanding payment of fees that Defendants never agreed to pay and to which it is not entitled, and seeks a regulatory rewrite of the Section 7(a) loan program, which requires an act of Congress, not judicial intervention. The FAC should be dismissed in its entirety. *See Flores v. GMAC Mortgage, LLC*, No. C 12-794 SI, 2013 WL 2049388, at *2 (N.D. Cal. May 14, 2013) (dismissing complaint where all seven claims based on the same "flawed theory").

C. M&M's Claims Should Be Dismissed for Additional Reasons.

In addition to the FAC's core defect – that M&M has no legal entitlement to agent fees – M&M's claims fails for several independent reasons.

1. There is no private right of action under the CARES Act or Small Business Act (Counts VI and VII).

Plaintiff's contention that it has an "implied cause of action" under the CARES Act and the SBA's Section 7(a) program (FAC ¶¶ 125-138) is incorrect. "[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Nothing in the text of the CARES Act contemplates private enforcement, which is why every court that has addressed whether the CARES Act created an implied private right of action has held that it does not. RJN, Ex. 1 (*Am. Video* Order) at 14 ("[E]very court that has decided this issue has held that the CARES Act does not … create a corresponding private right of action."); *Sanchez*, 2020 WL 6060868, at *7; *Johnson*, 2020 WL 5608683, at *9; *Leigh King*, 2020 WL 6273739, at *7-9 ; *Sport & Wheat*, 2020 WL 4882416 at *3; *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 751-52 (D. Md. 2020) ("The Court is not persuaded that the language of the CARES Act evidences the requisite congressional intent to create a private right of action.").

These rulings accord with the Ninth Circuit's three-factor analysis: (i) the CARES Act text contains no "language that would imply Congress intended to allow private enforcement of the statute's requirements;" (ii) the CARES Act structure does not "suggest[] any congressional intent to allow private enforcement;" and (iii) "Congress designated a method of enforcement other than through private lawsuits"—namely, the SBA's existing enforcement regime. *Northstar Fin. Advisors, Inc. v. Schwab Investments*, 615 F.3d 1106, 1115-16 (9th Cir. 2010). The Ninth Circuit has long 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). Likewise, 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); *see also Sanchez*, 2020 WL 6060868, at *7 ("[I]t is precisely [the SBA's] administrative enforcement authority that 'tend[s] to contradict a congressional intent to create privately enforceable rights.'" (quoting *Sandoval*, 532 U.S. at 290)). The CARES Act's amendments do not alter that Congressional intent. *See Profiles*, 453 F. Supp. 3d at 751.

Finally, M&M's reliance on the IFR is similarly misplaced, as regulations 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.").

2. M&M's Declaratory Judgment Act claim fails because it has no private right of action (Count I).

The "availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). And where Congress has not created a private right of action to vindicate a violation of a federal statute or regulation, a plaintiff may not circumvent that intent by seeking a declaration under the Declaratory Judgment Act. *See N. Cty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1154-56 (9th Cir. 2010) (plaintiff cannot seek declaration that it is entitled to compensation under the Federal Communications Act because the Act provides no

private right of action). This is precisely what M&M seeks here: a declaration "in accordance with the SBA Regulations that a portion of the Lender Fees paid to Defendants must be paid to Plaintiff and the Class." (FAC ¶ 77.) Because Plaintiff lacks a substantive claim under the CARES Act, it may not seek declaratory relief under the Act. (*See* RJN, Ex. 1 (*Am. Video* Order) at 16-17 ("[p]laintiffs' declaratory judgment claim fails because it is premised on the alleged mandatory agent fees . . . which are not automatically mandated under the PPP.").)

3. Plaintiff cannot assert common-law claims to circumvent the absence of a federal private right of action (Counts II, III, and IV).

Lacking a private right of action under the CARES Act, M&M seeks to bring state common law claims for unjust enrichment, conversion, and breach of implied contract as a fallback. But 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 predicated on alleged violations of that federal standard. *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 118 (2011). A plaintiff cannot "argue around" the lack of a private right of action "by bootstrapping [its] cause of action onto a [common law]. . . claim based on the same statute." *Lil' Man In the Boat, Inc. v. City & Cty. of San Francisco*, No. 17-CV-00904-JST, 2018 WL 4207260, at *4 (N.D. Cal. Sept. 4, 2018); *see also Astra USA, Inc.*, 563 U.S. at 118 ("The absence of a private right to enforce [a statute] would be rendered meaningless if [plaintiffs] could overcome that obstacle by suing [on a contract claim] instead."); *accord Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 66 (3d Cir. 2008) (rejecting "attempts to use state common law to circumvent the absence of a private right of action"). Here, Plaintiff seeks a share of fees paid by the federal government, for participation in a federal lending program, and asks for relief that depends on this Court's interpretation of a federal statute and regulations. M&M alleges no independent common-law right to agent fees, and Counts II, III, IV, and V fail for this additional reason. (*See* RJN, Ex. 1 (*Am. Video* Order) at 17

(dismissing unjust enrichment claim that was "dependent upon a private cause of action in the PPP which does not exist").)

4. M&M's common law and UCL claims are defective for additional reasons.

In addition to the lack of any statutory entitlement to an agent fee and the absence of a private right of action – both of which warrant dismissal – M&M's claims are also elementally deficient and should be dismissed for failure to state a claim.

a "Unjust enrichment" is not a claim and would fail in any event (Count II).

M&M's unjust enrichment "claim" fails. "There is no cause of action for unjust enrichment in California." *Patrick*, 2020 WL 3883275, at *7. For this reason alone, the unjust enrichment claim should be dismissed. In any event, this "claim" fails for the same reason already articulated: M&M has no ownership interest in Defendants' lender fees and is not otherwise entitled to agent fees under the PPP. *See* RJN, Ex. 1 (*Am. Video* Order) at 17 ("Just as [p]laintiffs' declaratory judgment claim must be dismissed for lack of an underlying substantive claim, so too must their claim for unjust enrichment.") (citations and quotations omitted); *Johnson*, 2020 WL 5608683, at *9-10 (unjust enrichment claims failed under California and New York law because "the PPP rules and regulations do not entitle plaintiffs to agent fees"); *Sanchez*, 2020 WL 6060868 at *11 ("[d]efendants' retention of fees does not affront justice, decency, or reasonableness because Plaintiff was never entitled to the fees"). M&M also cannot demonstrate that it conferred any benefit on Defendants. *See Hernandez*, 180 Cal. App. 4th at 932 ("The [unjust enrichment] doctrine applies where *plaintiffs*, while having no enforceable contract, nonetheless have conferred a benefit on defendant.") (emphasis added). Here, any alleged benefit was conferred on the unidentified *borrowers*, not Defendants. And the "benefit" alleged here consists of fees that Defendants received *from the federal government* (FAC ¶ 6), not M&M. *See Sport & Wheat*, 2020 WL 4882416, at *5 (claim fails because any benefit to lenders was merely "an incidental benefit of [p]laintiff's

work for borrowers"). Nor can M&M demonstrate, in the absence of a valid entitlement to fees, that Defendants unjustly retained any such benefit. *Mangindin v. Washington Mut. Bank*, 637 F. Supp. 2d 700, 711 (N.D. Cal. 2009).

b M&M fails to state a claim for conversion (Count III).

Plaintiff's conversion claim fails for multiple reasons. M&M asserts a "right to, title in, and the legal right of possession" of agent fees. (FAC ¶ 93.) But this ownership claim relies entirely on M&M's incorrect assertion that lenders are required to pay agent fees they never agreed to pay. Because neither the CARES Act nor the SBA Regulations contain any such mandate, *see supra* Sections B(1)-(3), the conversion claim fails. *Johnson*, 2020 WL 5608683, at *10 ("[O]nce again, because the Court holds that the PPP rules and regulations do not entitle plaintiffs to agent fees, the Court rejects these conversion claims."). And even if Plaintiff did have some claim on lender fees—and it does not—M&M cannot show that Defendants converted the fees. A "generalized claim for money [is] not actionable as conversion." *Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229, 235 (1997). A claim for agent fees does not and cannot state a conversion claim because it "could be discharged by an ordinary payment of money." *Sanchez*, 2020 WL 6060868, at *10. The claim also fails because a conversion claim for money must be for specific amount. *Satre*, 2014 WL 1292139, at *7 (conversion claim failed because "it is predicated upon an alleged conversion of an unspecified amount of money."). Plaintiff's claim for "approximate" amounts of money (FAC ¶¶ 10-11) is not a claim for a readily identifiable sum.

c M&M's breach of implied contract claim fails on numerous grounds (Count IV).

M&M claims that Defendants "have a quasi-contractual obligation to pay for the services by which they benefitted and to compensate Plaintiff and the Class for the reasonable value of their services." (FAC ¶ 113.) Yet M&M cannot maintain a breach of implied contract claim for several reasons, including because "neither the CARES Act nor SBA regulations obligated [d]efendants to pay agent fees to [p]laintiff in the absence

of a compensation agreement." *Sanchez*, 2020 WL 6060868 at *11 (dismissing implied contract claim).

i M&M does not allege mutual assent.

In California, "[a]s to the basic elements, there is no difference between an express and implied contract." *Div. of Labor Law Enforcement v. Transpacific Transportation Co.*, 69 Cal. App. 3d 268, 275 (1977). "Both types of contract are identical in that they require a meeting of minds or an agreement." *Id*. Thus, where the parties did not have an agreement on the amount to be paid, the claim fails for lack of mutual assent. *See*, *e.g.*, *Aton Center, Inc. v. Regence Blue Cross Blue Shield of Oregon*, No. 320CV00497WQHBGS, 2020 WL 4747753, at *2, 5 (S.D. Cal. Aug. 17, 2020) (dismissing claim where allegations "lack[ed] the specific facts required for the Court to determine there was an agreement between [p]laintiff and [d]efendant to pay a specific amount"); *Pac. Bay Recovery, Inc. v. Cal. Physicians' Servs., Inc.*, 12 Cal. App. 5th 200, 216 (2017) (claim failed "because there [was] no indication in the FAC what exactly [defendant] agreed to pay"). Here, M&M alleges nothing showing mutual assent. It claims to be entitled to the maximum percentage possible (FAC ¶¶ 10-11), but makes no allegations that Defendants ever agreed to compensate it in any amount, let alone at the maximum. Thus, the implied contract claim fails.

ii Even if an implied contract existed, it would fail for uncertainty and because it conflicts with federal law.

Even if M&M was able to allege an implied contract (it cannot), any such contract would fail for uncertainty and because it conflicts with federal law. Where a contact is "so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." *Cheema v. L.S. Trucking, Inc.*, 39 Cal. App. 5th 1142, 1149 (2019). Here, even if an implied contact existed between Defendants and M&M for payment of agent fees (it did not), there are no allegations showing the "material particulars" of that agreement, including the fundamental issue of how much Defendants allegedly agreed to pay.

Any implied contract also would fail as contrary to federal law. For example, in *Inglis v. Feinerman*, No. C 81-4429, 1982 WL 31342, at *2 (N.D. Cal. Apr. 20, 1982), the court held that alleged express or implied employment contracts made with a bank were unenforceable and void as violative of the Federal Home Loan Bank Act because they purported to provide employees with greater rights than those provided by the Act. *Id*. Here, the alleged implied contract would grant M&M the ability to recover agent fees that it is not entitled to collect under the governing regulations and the CARES Act and without complying with the SBA's Section 7(a) loan program.

d M&M's UCL claim fails because it does not allege any unfair business practices (Count V).

M&M fails to allege the elements for a claim under the "unfair" prong of the UCL. Plaintiff alleges that Defendants "failed to fill out, sign, and submit Form 159" and "concealed and omitted" the fact that "despite holding themselves out as PPP lenders," they would not "pay regulatorily-mandated Agent Fees." (FAC ¶¶ 117, 121.) Again, as explained, nothing in the CARES Act or the IFR mandates that a lender fill out a Form 159 and pay an agent fees when the lender has not agreed to do so. Moreover, Plaintiff concedes in the FAC that Chase publicly stated that it would not be paying agent fees. (*Id*. ¶¶ 10.) Plaintiff's contention that Defendants engaged in unfair or deceptive behavior is thus contradicted by both the statutory and regulatory text and the very allegations in the Amended Complaint. Plaintiff fails to identify any practice that contravenes established public policy, nor has it alleged a practice that is immoral, unethical, unscrupulous, or substantially injurious. *See Starks v. Geico Indemnity Co.*, No. CV-15-5771-MWF (PJW), 2015 WL 12942282, at *7 (C.D. Cal. Nov. 10, 2015).

Plaintiff also does not allege that any harm outweighs the utility of the alleged practices, as it does not allege that Defendants' conduct lacks justification. *See Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1028-29 (N.D. Cal. 2012) (dismissing claim where plaintiff did not allege facts about potential utility). The SBA's regulations underscore that Defendants' conduct was justified, as the rules for agent compensation allow lenders

to choose with whom they do business. Under any standard, M&M's claim fails.

e Plaintiff's equitable claims for unjust enrichment (Count I) and under the UCL (Count V) fail.

In addition to the deficiencies already discussed, Plaintiff's claims for unjust enrichment and under the UCL (both are purely equitable) fail for the additional reason that Plaintiff does not allege that an adequate legal remedy is unavailable. *Sonner*, 971 F.3d at 844 ("courts of equity should not act . . . when the moving party has an adequate remedy at law."). In "the Ninth Circuit, the relevant test is whether an adequate damages remedy is available, not whether the plaintiff elects to pursue it, or whether she will be successful in that pursuit." *Mullins v. Premier Nutrition Corp.*, No. 13-CV-01271-RS, 2018 WL 510139, at *2 (N.D. Cal. Jan. 23, 2018). Here, M&M does not allege that it has an inadequate remedy at law, and its alleged injury could be remedied through damages.

IV. CONCLUSION

M&M seeks to maintain a putative class action to recover fees to which it is not entitled, under a federal law it has no right to enforce. The FAC does not allege that Defendants ever agreed to pay Plaintiff agent fees, and concedes that Plaintiff failed to comply with the SBA's longstanding requirements for agent compensation. M&M cannot use the common law or UCL to create claims where none exist. Accordingly, the FAC should be dismissed with prejudice.

Respectfully submitted,

DATED: November 16, 2020

GREENBERG TRAURIG, LLP

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DATED: November 16, 2020

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ECF CERTIFICATION

Pursuant to Local Civil Rule 5-4.3.4(a)(2)(i), I hereby attest that Sharon D. Mayo, on whose behalf this filing is jointly submitted, has concurred in this filing's content and has authorized me to file this document.

/s/ Robert J. Herrington
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EXHIBIT A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

M&M CONSULTING GROUP, LLC, a California limited liability company, individually and on behalf of all others similarly situated, Plaintiff,	Case No. 8:20-cv-01318-JVS-KES **FIRST AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES**

vs.

JPMORGAN BANK, N.A.; and FIRST REPUBLIC BANK,

Defendants.

Plaintiff M&M Consulting Group, LLC brings this class action complaint on behalf of itself and those similarly situated against Defendants JPMorgan Chase Bank, N.A., and First Republic Bank (collectively, "Defendants" or "Lenders"), to obtain fees owed to Plaintiff as a result of its work as agents ("Agents" or "PPP Agents" or "Borrower Agents") who assisted small- and medium-sized business borrowers ("Borrowers" or "Applicants") in obtaining federally-guaranteed loans through the Paycheck Protection Program ("PPP"), a federal bail-out program implemented to provide businesses with loans to combat the economic impact of COVID-19.

The Agents were not retained by Defendants, but directly by the Borrowers to serve as their independent representatives to assist in the process of preparing their PPP loan applications (the "Applications"). Federal regulations **require** Defendants to complete, sign and submit to the Small Business Administration ("SBA"), the proper SBA forms to pay Plaintiff and the proposed Class for their work as the Borrowers' Agents under the PPP in the form of agent fees (the "Agent Fees"). The Lender has no right under the regulations to reject the involvement or role of the Borrower Agents in the PPP process. Despite precise regulatory requirements providing that the Agent Fees are owed to Plaintiff, Defendants have failed to pay Plaintiff and the Class Members and intentionally interfered with the Plaintiff's ability to collect the Agent Fees. Instead, Defendants have kept the entirety of the Agent Fees for themselves. Plaintiff alleges the following based upon their knowledge and upon information and belief, including investigations

conducted by their attorneys.

I. PARTIES

1. Plaintiff M&M Consulting Group LLC ("M&M" or "Plaintiff") is a limited liability company, organized and authorized to do business, and doing business in the State of California since November 2018. Becca Moody is partner, member, and CFO of M&M, which is located in Huntington Beach, California. Ms. Moody resides within the Central District of California. Although Plaintiff assisted its clients with preparing their Application(s) for a PPP loan from the Defendants, Defendants have failed to pay Plaintiff the Agent Fees Defendants owe Plaintiff for Plaintiff's work in securing the PPP loans.

DEFENDANTS, THE SERIES OF PPP TRANSACTIONS AND/OR OCCURRENCES, AND THE COMMON QUESTIONS OF LAW

2. As recently observed by the United States Judicial Panel on Multidistrict Litigation (JPML) concerning this action and similar actions around the country, the case against the defendants "….allege similar policies and practices by the defendant banks – specifically, that defendants failed to pay fees to agents who assisted small businesses in applying for and obtaining PPP loans, contrary to the provisions of the CARES Act and federal regulation." (See Order Denying Transfer at 1, IN RE: Paycheck Protection Program (PPP) Agent Fees Litigation, MDL 2950, ECF No. 365.)

3. Each claim against each Defendant involves a single loan product (PPP loans) that was created under a single Congressional act (the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act (P.L. 116-136) ("CARES Act"), administered by a single government agency, the SBA, and is governed by the SBA Regulations (as defined below).

4. Plaintiff served as a Borrowers' Agent for PPP loan Borrowers and alleges entitlement of mandatory Agent Fees to which Plaintiff is entitled as a result of the assistance provided to Borrowers in preparing their PPP loan applications

that were submitted to a given Defendant – and ultimately funded by that Defendant – under and pursuant to the CARES Act and SBA Regulations.

5. In addition, almost all the facts at issue here are common to Defendants. That is because there is a single loan product at issue here—the federally funded PPP loan—not multiple proprietary loan products created by different defendants. To participate as PPP Lenders, "Lenders **must** comply with the applicable lender obligations set forth in [the SBA Regulations]."[1]

6. As alleged, all Defendants treated the program the same way: Defendants were paid tens of millions of dollars in PPP lender fees ("Lender Fees") by the federal government.

7. Each Defendant has refused to recognize the statutory role and participation of the Borrower Agents in the PPP and refused to pay them the required Agent Fees out of the PPP Lender Fees received.

8. The common practice addressed here is Defendants' willing participation in the PPP and receipt of federal funds in the form of the PPP Lender Fees and subsequent failure to remit to the Class the Agent Fees as required by the SBA Regulations.

9. Fundamentally, there is a common core legal issue present against all Defendants: Whether Agents who assisted Borrowers in applying for PPP loans are entitled to the statutory Agent Fees the federal government entrusted to Defendants for the benefit of Agents, such as Plaintiff and the proposed Class Members (as defined below).

INDIVIDUAL DEFENDANTS' ALLEGATIONS

10. Upon information and belief, Defendant JPMorgan Chase Bank, N.A. ("Chase"), is a federally chartered banking institution with its headquarters located in New York, New York. Chase conducts substantial business within this District. Plaintiff acted in the statutorily defined role of the Borrower's Agent in

[1] 85 FR 20812 (1) (emphasis added).

securing PPP loans for one Applicant of Chase in an amount of approximately $700,000. This Borrower's PPP loan was funded, and Chase has been paid its Lender Fees by the federal government under the PPP, which by definition, includes Plaintiff's Fees of approximately $3,500. Prior to the filing of this suit, Plaintiff sent several requests to Chase requesting payment of its Borrower Agent Fee. Chase failed to respond. Additionally, Chase took the public position that it is not paying Agent Fees, and its online application system did not allow the Borrower or Agent to submit any information identifying the Agent. Having taken custody from the SBA of the Agent Fees owed to Plaintiff, Chase has failed to comply with the SBA Regulations and submit to the SBA the SBA Form 159, "Fee Disclosure Form and Compensation Agreement" ("Form 159"), thereby allowing Defendant to pay Plaintiff the statutorily-required fees that Plaintiff is owed.

11. Defendant First Republic Bank ("First Republic") is a California chartered bank with its principal place of business in San Francisco, California. First Republic conducts substantial business in this District. Plaintiff acted in the statutorily defined role of the Borrower's Agent in securing PPP loans for one Applicant of First Republic in an amount of approximately $40,000. Applicant's PPP loan was funded by First Republic. Based on information and belief, First Republic has taken custody of the money owed to Plaintiff from the federal government, yet, prior to filing this suit, when First Republic was sent an email requesting payment of the Agent Fee, First Republic failed to respond. Having taken custody from the SBA of the approximately $400 in Agent Fees owed to Plaintiff, First Republic has failed to comply with the SBA Regulations and submit to the SBA Form 159, thereby allowing Defendant to pay Plaintiff the statutorily-required fees that Plaintiff is owed.

II. JURISDICTION AND VENUE

12. The Court has original jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. §1332(d), because this is a class action in which

(1) at least some members of the proposed Class have different citizenship from Defendant(s); (2) the proposed Class consists of more than 100 persons or entities; and (3) the claims of the proposed members of the Class exceed $5,000,000 in the aggregate.

13. This Court also has original jurisdiction over this action under 28 U.S.C. §1331 because the action arises under the laws of the United States, including the Coronavirus Aid, Relief, and Economic Security Act, the CARES Act (P.L. 116-136), and the SBA Regulations (as defined below).

14. This Court has personal jurisdiction over Defendants because Defendants do business in this District, and a substantial number of the events giving rise to the claims alleged herein took place in this District.

15. The venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because Plaintiff's principal place of business is located in this District, and a substantial part of the events or omissions giving rise to the alleged claims occurred in this District. Plaintiff, on behalf of its clients, applied for the PPP loans while in this District and Defendants marketed, promoted, and took Applications for the PPP loans in this District.

III. FACTUAL ALLEGATIONS

BACKGROUND

16. On January 21, 2020, the Center for Disease Control and Prevention ("CDC") confirmed the first U.S. case of a new coronavirus, known as COVID-19.

17. On January 30, 2020, the World Health Organization ("WHO") declared the COVID-19 outbreak to be a "public health emergency of international concern."

18. On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19.

19. On March 11, 2020, the WHO declared that the spread of COVID-

19 had become a pandemic.

20. On March 13, 2020, President Trump issued the Coronavirus Disease 2019 (COVID-19) Emergency Declaration applicable to the United States, which declared that the pandemic was of "sufficient severity and magnitude to warrant an emergency declaration for all states, territories and the District of Columbia."

21. The Trump Administration expressly recognized that with the COVID-19 emergency, "many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, and local public health measures that are being taken to minimize the public's exposure to the virus." *See Business Loan Program Temporary Changes; Paycheck Protection Program*, 13 CFR Part 120, Interim Final Rule (the "SBA PPP Final Rule").

22. On March 25, 2020, in response to the economic damage caused by the COVID-19 crisis, the United States Senate passed the Coronavirus Aid, Relief, and Economic Security Act, the CARES Act (P.L. 116-136). The CARES Act was passed by the House of Representatives the following day and signed into law by President Trump on March 27, 2020. This legislation included $377 billion in federally-funded loans to small businesses and a $500 billion governmental lending program administered by the United States Department of Treasury ("Treasury") and the SBA, a United States government agency that provides support to entrepreneurs and small businesses.

23. On August 8, 2020, the SBA stopped accepting PPP Applications as the PPP ended.

THE PPP: A PROGRAM DESCRIPTION

24. As part of the CARES Act, the Federal Government created a $349 billion loan program, referred to as the Paycheck Protection Program or PPP, temporarily adding a new product to the SBA's 7(a) Loan Program ("SBA 7(a) Program" or "SBA 7(a) Loans").

25. The PPP provided small businesses with loans to be originated from February 15, 2020, through June 30, 2020[2]. The PPP was created to provide American small businesses with eight-weeks[3] of cash-flow assistance and to allow a certain percentage of the loan to be forgiven if the loan is utilized to retain employees and fund payrolls. Although the loans are administered by the Treasury and backed by the Federal Government, the loans are funded by private lenders, including the Defendants, that review and approve PPP Applications.

26. The Treasury announced on April 3, 2020, that small businesses and sole proprietors could fill out an Application to apply and receive loans to cover their payroll and other expenses through approved SBA Lenders. Beginning on April 10, 2020, independent contractors and self-employed individuals could apply as well.[4]

27. On April 24, 2020, President Trump signed the Paycheck Protection Program and Health Care Enhancement Act ("PPPEA"). The PPPEA added $310 billion in PPP funding, bringing the total PPP funds available to lend to $659 billion.

28. On June 5, 2020, President Trump signed the Paycheck Protection Program Flexibility Act of 2020 ("Flexibility Act") (Pub. L. 116-142), which changed key provisions of the Paycheck Protection Program, including provisions relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans. **The Flexibility Act did not change Defendants' statutory duty to pay Plaintiff the Agent Fees Plaintiff is owed**.

29. The Treasury's Paycheck Protect Program (PPP) Information Sheet

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[2] On June 30, the PPP Application deadline was extended until August 8, 2020.
[3] On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (Pub. L. 116-142), extended the eight-week period to twenty-four weeks.
[4] *Paycheck Protection Program (PPP) Information Sheet: Borrowers*, Dep't of Treasury (last visited, June 18, 2020), *https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf*

for Lenders[5] (the "PPP ISL"), consistent with the SBA PPP Final Rule (collectively, the "SBA Regulations"), describes a system to distribute the PPP loans that relies on SBA authorized Lenders – who approve and fund loan applicants – and independent agents, hired by either the Borrower or Lender – who provide small businesses with the necessary assistance enabling them to apply for a PPP loan.

30. Under the SBA Regulations, a PPP Agent "can be:

- An attorney;
- An accountant;
- A consultant;
- Someone who prepares an applicant's application for financial assistance and is employed and compensated by the applicant;
- Someone who assists a lender[6] with originating, disbursing, servicing, liquidating, or litigating SBA loans;
- A loan broker; or,
- Any other individual or entity representing an applicant by conducting business with the SBA."[7]

31. Unlike the traditional SBA 7(a) Program, the SBA Regulations expressly contemplate and encourage Borrower Agents to assist small businesses with their Applications. The SBA Regulations allow for and set standards by which PPP Agents are to be paid for their work. **Specifically, the regulations require**

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[5] *Paycheck Protection Program (PPP) Information Sheet: Lenders*, Dep't of Treasury (last visited, June 18, 2020), https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf?

[6] An agent that "assists a lender" is categorized by the SBA SOP as a lender agent ("Lender Agent") (footnote added).

[7] *Id. Paycheck Protection Program (PPP) Information Sheet: Lenders*, Dep't. of Treasury.

that PPP Agents be paid from a portion of the set fees provided to SBA Lenders for processing the PPP loan.

32. Before the passage of the CARES Act, **Lenders were not compensated** by the SBA for originating SBA 7(a) Loans. Under the newly enacted SBA Regulations for PPP loans, Lenders are **generously compensated** for processing PPP loans ("Lender Fees") based on the amount funded to the Borrower. The SBA pays Lender Fees to Lenders who process PPP loans in the following amounts:

- Five percent (5%) for loans of not more than $350,000;
- Three percent (3%) for loans of more than $350,000 and less than $2,000,000; and
- One percent (1%) for loans of at least $2,000,000.[8]

33. The SBA Regulations state, "**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 … may not exceed:

- One (1) percent for loans of not more than $350,000;
- 0.50 percent for loans of more than $350,000 and less than $2 million; and
- 0.25 percent for loans of at least $2 million."[9]

34. The CARES Act authorized the Treasury to establish limits on Agent Fees. The Treasury, "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**."[10]

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[8] 85 FR 20816 (3)(d).
[9] 85 FR 20816 (4)(c).
[10] *Id.* (emphasis added).

35. In other words, when implementing the CARES Act, the Treasury determined that the best and quickest way to get the PPP loans to the small businesses was to establish **new** regulations where Lenders and Borrower Agents work together to quickly and efficiently process Applications.[11]

Plaintiff is the Borrower's Agent, Not the Lender's Agent

36. By assisting businesses in preparing their Applications for PPP funding, PPP Agents played a critical role in fulfilling the goals of the CARES Act and ensuring adherence to the United States Congress's legislative intent. Indeed, the Senate directed the Treasury to "**issue guidance to lenders and agents to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals…, women, and businesses in operation for less than 2 years**."[12]

37. On or about August 27, 2020, the SBA reaffirmed its earlier stance on the PPP regulations as compared to the traditional SBA 7(a) Program by publishing the new SBA's Standard Operating Procedure 50 10 6, Part 2, Section B, page 224[13], which clarifies that, "Because Paycheck Protection Program (PPP)

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[11] Adding validity to the need to file this action, on May 27, 2020, United Community Banks, Inc. ("UCB"), received a civil investigative demand ("CID") from the U.S. Department of Justice (the "DOJ") pursuant to the False Claims Act. The CID directed UCB and its affiliated entities "to produce certain documents and respond to written interrogatories relating to the PPP loans approved by the Bank, the Bank's non-payment of fees to agents of borrowers and the Bank's policies related to payment or non-payment of agent fees." (United Community Banks, Inc., Form 8-K (last visited June 18, 2020), https://ir.ucbi.com/static-files/c7f8eaa8-d6bf-48e8-8ebc-a60c0bf3adea. UCB is a named defendant in another lawsuit based on the same allegations in the Northern District of Georgia, 1:20-cv-02026-LMM.)

[12] CARES ACT, PL 116-136, March 27, 2020, 134 Stat 281 (emphasis added).

[13] Effective October 1, 2020 ("SBA SOP 2020").

loans authorized under § 7(a)(b) of the Small Business Act are 7(a) loans, **this SOP applies to the making of PPP loans, to the extent that the SOP is not superseded by or in conflict with PPP-specific requirements**."

38. Under the PPP, as well as the traditional SBA 7(a) Program, there are Lender Agents and Borrower Agents. These are two separate, distinct categories of agents, with separate SBA governing requirements.

39. The Borrower Agent works for the Borrower. As detailed in the 2019 SBA Standard Operating Procedures ("SBA SOP"), "Employment of Agent Initiated by Applicant… When an Applicant employs an Agent: 1. The Agent may bill and be paid by the Applicant for providing packaging services as long as compensation is reasonable and customary for those services…"[14] As for the, "compensation is reasonable and customary for those services", as stated above, the SBA and Treasury Secretary Mnuchin determined that the Agent Fees "are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.[15]"

40. Immediately following the section in the SBA SOP titled "Employment of Agent Initiated by Applicant" is "Employment of Agent by Lender (not an LSP)." This section provides the rules that the Lender must follow when hiring its own Agent. "**When a Lender has decided to approve a loan application and needs assistance with the preparation of the paperwork for the application to SBA**, the loan closing, or preparation of the loan to sell it on the Secondary Market, **the Lender may use an Agent**…. 2. The Agent must bill and be paid by the Lender for all services and the Lender may not pass these charges through to the Applicant under any circumstances."[16]

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[14] SBA's Standard Operating Procedure 50 10 5(K) ("SBA SOP"), Subpart B, ch 3, IX(D).

[15] *85 FR 20816 (4)(c).*

[16] SBA SOP, Subpart B, Ch. 3, IX(E) (emphasis added).

41. The Lender has the sole right to determine whether or not they will retain a Lender Agent. The Borrower has no right to approve or disapprove the Lenders' Agent. Similarly, per the SBA SOP and the SBA Regulations, Borrowers are free to choose their own Agent, and the Lender has no right to approve or disapprove the Borrowers' Agent, or to dictate the amount a Borrower's Agent will be paid.

42. The Plaintiff acted in the statutorily approved role of the Borrower's Agent for the Borrower's that obtained their PPP loans from the Defendants.

43. **Nowhere in the CARES Act, the SBA SOP, the SBA SOP 2020, or the SBA Regulations does the federal government require, mandate, or even suggest that a Borrower Agent be approved by a Lender, either before or after the Agent assists the Borrower, in order for the Agent to be entitled to its Agent Fee**. What they do say is that the Lender must complete, sign, and submit the necessary forms for the Borrower's Agent to receive their Agent Fee, which Defendant refuses to do.

Defendants were Legally Required to Complete, Sign, and Submit Form 159

44. In the traditional SBA (7)(a) Program, the Lender pays the Lender's Agent, and the Borrower pays the Borrower's Agent their respective Agent Fee. However, the SBA Regulations specifically overrode that possibility by stating, "**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**." Therefore, the traditional SBA SOP is in "conflict with PPP-specific requirements," meaning the SBA Regulations which conflict apply. Therefore, the Lender is legally required to pay the Borrower's Agent the Agent Fee normally paid by the Borrower.

45. In order for the Borrower to pay the Borrower's Agent under the traditional 7(a) Program, the Borrower would use Form 159, which the Borrower, the Borrower's Agent, and the Lender must sign. But because the SBA Regulations

overrode who pays the Borrower's Agent, the SBA **requires the Lender to use Form 159.** "The Applicant or the Lender, depending on who paid or will pay the Agent, **must use** SBA Form 159, 'Fee Disclosure Form and Compensation Agreement,' to document the fees."[17] The SBA Regulations specifically put the Lender into the Borrower's shoes and require the Lender to fill out and sign the required Form 159.

46. SBA Form 159 states: "Who must complete this form?: **This form must be completed and signed by the SBA Lender and the Applicant whenever an Agent is paid by either the Applicant or the SBA Lender in connection with the SBA loan application**. Each Agent paid by the Applicant to assist it in connection with its application must also complete and sign the form. **When an Agent is paid by the SBA Lender, the SBA Lender must complete this form and the SBA Lender and Applicant must both sign the form.**"[18]

47. The only time the Agent is required to sign Form 159 is if the Agent is being paid by the Applicant. Under the PPP, the Applicant is expressly disallowed to pay the Agent, shifting the responsibility to the Lender. The Agent is not required to fill out or sign Form 159.

48. Additionally, supporting that it is the Lenders' legal responsibility to submit Form 159 to the SBA, the SOP requires that, **"Lenders must submit SBA Form 159 to Fiscal Transfer Agent ("FTA") on loans that involve payment of fees**, including, but not limited to, those covering any packaging fees charged by the Lender or where the Lender paid the Agent fee."[19]

49. Nowhere in the CARES Act, the SBA Regulations, the SOP, or Form 159, does the Lender have the power to tell the Borrower they cannot use the Agent of their choosing or decide to not fill out, sign, and submit Form 159.

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[17] SBA SOP, Subpart B, ch. 3, VIII(B)(1).
[18] SBA Form 159, at p. 1.
[19] SBA SOP, Subpart B, Ch. 3, VIII(B)(6).

50. Instead, each of the Defendants: (1) stated they were not paying Agent Fees or failed to respond to Plaintiff's request for Agent Fees; (2) designed their Application process to avoid learning the fact or identity of any Borrower Agents, so the Lender did not have to fill out Form 159; or, (3) even after learning the identity of the Agent, Defendant refused to comply with the SBA SOP and fill out Form 159 and submit it to the SBA after the Borrower's PPP loan was funded.

51. Assuming, arguendo, that the Plaintiff or Borrower was supposed to submit Form 159 to the Lender, then, as described in detail above, even though Plaintiff was ready, willing, and able to fill out Form 159, Defendants thwarted Plaintiff's ability of submission by not allowing Plaintiff or Borrower to submit Form 159 or by stating Defendant was not paying Agent Fees, making any attempt by Plaintiff in submitting Form 159 futile. As Form 159 is required to be submitted after the Borrower's loan is funded, Plaintiff remains ready, willing, and able to fill out Form 159 if the Court finds that Plaintiff is required to do so.

PLAINTIFF ASSISTED SMALL BUSINESS BORROWERS WITH APPLYING FOR PPP LOANS

52. To assist its clients with preparing Applications for a PPP loan through Defendants, Plaintiff spent considerable time familiarizing itself with the CARES Act and the related SBA Regulations. In particular, relevant provisions include Section 1102, which permits the SBA to guarantee 100% of SBA 7(a) Loans under the PPP, and Section 1106 of the Act, which provides forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP.

53. Complying with the SBA Regulations, Plaintiff assisted Applicants in the preparation of their Application. As contemplated by the Federal Government, such assistance contributed to the successful funding of the Applicants' PPP loans with a Defendant.

54. If not for the Borrowers' Agents, millions of small businesses would have had difficulty or been unable to apply for PPP loans.

55. Based on the SBA Regulations, Plaintiff understood that it was not allowed to charge Applicants any fee relating to the Application process and that it was only permitted to receive compensation from the PPP Agents' portion of the Lender Fees the Federal Government entrusted to the Lenders for the PPP Agents' benefit.

56. Plaintiff further understood that it was not entitled to the Agent Fees until the Lender received its Lender Fees. Based on information and belief, Defendants have received the Lender Fees for the Applicants Plaintiff assisted as well as the members of the Class assisted, thereby making the Agent Fees immediately due to Plaintiff.

57. To participate in the PPP, "Lenders **must** comply with the applicable lender obligations set forth in this [PPP Final Rule]…"[20].

58. Therefore, Plaintiff believed in good faith that Defendants would comply with the law and pay Plaintiff the statutorily required Agent Fees.

59. However, Defendants violated the SBA Regulations because they did not pay Plaintiff the Agent Fees the Federal Government entrusted to the Defendants for the benefit of the Plaintiff. Instead, Defendants have illegally retained the Agent Fee portion of the Lender Fees.

60. Defendants, as Lenders under the PPP, lack any legal authority under the SBA Regulations to withhold payment of the Agent Fees to Plaintiff.

61. As a result of Defendants' unlawful actions, Plaintiff and the Class have suffered financial harm by being deprived of the statutorily mandated compensation for the assistance they provided in their critical role as a PPP Agent, assisting Applicants in the preparation of their PPP Application. Defendants barred Plaintiff from receiving compensation for their role as PPP Agents in the PPP process, which role resulted in significant benefits to both small businesses and the Lenders.

[20] 85 FR 20812 (1). (emphasis added).

IV. CLASS ALLEGATIONS

62. Plaintiff brings this action on behalf of itself and all other similarly situated Class Members pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the following Nationwide Class:

> All Agents who assisted a business in preparing an Application for a PPP loan pursuant to the CARES Act (the "Nationwide Class").

63. To the extent that a Nationwide Class is not certified, in the alternative, Plaintiff brings this action on behalf of itself, and all other similarly situated Class Members pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the following Statewide Class:

> All Agents who assisted a business in California in preparing an Application for a PPP loan pursuant to the CARES Act (the "Statewide Class").

The Statewide and Nationwide Class may hereafter be referred to as the "Class".

64. For purposes of the Class definition, the term "Agent" has the same meaning as an "agent" under the SBA Regulations.

65. Plaintiff reserves the right to expand, limit, modify, or amend this Class definition, including the addition of one or more subclasses, in connection with Plaintiff's motion for class certification, or any other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during discovery.

66. The following are excluded from the Class and/or Subclass: (a) any Judge or Magistrate presiding over this action and members of their families; (b) the officers, directors, or employees of Defendants; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

67. *Numerosity:* The Class is composed of hundreds or thousands of Agents (the "Class Members"), whose joinder in this action would be impracticable. The disposition of their claims through this class action will benefit

all Class Members, the parties, and the courts.

68. *Commonality and Predominance:* Common questions of law and fact affect the Class. These questions of law and fact predominate over individual questions affecting individual Class Members and include, but are not limited to, the following:

a. Whether Plaintiff is an "agent" as that term is defined by the Cares Act and relevant regulations;

b. Whether Defendants were obligated to pay Plaintiff and the Class Agent Fees from the Lender Fees it received under the CARES Act;

c. Whether Defendants failed to pay Agent Fees they were required to pay;

d. Whether Class Members are entitled to damages; and if so, in what amount;

e. Whether Defendants are likely to continue to mislead the public and Class Members and continue to violate SBA Regulations regarding paying Agents their earned fees under the CARES Act;

f. Whether Plaintiff and Class Members are entitled to an award of reasonable attorney's fees, pre-judgment interest and costs of suit; and

g. Whether Defendants were unjustly enriched by their practice of refusing to pay Agent Fees.

69. *Superiority*: In engaging in the conduct described herein, Defendants have acted and/or failed to act on grounds generally applicable to Plaintiff and other Class Members. Such behavior requires the Court's imposition of uniform relief to ensure compatible standards of conduct toward Class Members. A class action is superior to all other available means for the fair and efficient adjudication of Plaintiff's and the Class Members' claims. Few, if any, Class Members could afford or would deem it economically reasonable to seek legal redress of the wrongs complained of herein on an individual basis. Absent a class action, Class

Members would not likely recover or have the chance to recover, and Defendants would be permitted to retain the fruits of their misdeeds. Any difficulties that might occur in the management of this proposed class action are insubstantial. See Fed. R. Civ. P. 23(b)(1)(A).

70. *Typicality*: Plaintiff's claims are typical of, and are not antagonistic to, the claims of the other Class Members. Plaintiff and the Class Members have been injured by Defendants' uniform, unfair and unlawful practice of denying PPP Agent Fees, as alleged herein. The factual and legal basis of Defendants' liability to Plaintiff and each Class Member as a result of Defendants' actions are described herein.

71. *Adequacy*: Plaintiff is an adequate representative of the Class because it is a member of the Class, and Plaintiff's interests do not conflict with the interests of the other Class Members that Plaintiff seeks to represent. Plaintiff will fairly and adequately represent and protect the interests of the other Class Members. Plaintiff has retained counsel with substantial experience in litigating complex cases, including class actions. Both Plaintiff and its counsel will vigorously prosecute this action on behalf of the Class and have the financial ability to do so. Neither Plaintiff nor counsel has any interest adverse to other Class Members.

72. Plaintiff is informed and believes that Defendants keep extensive computerized records of their loan applications through, *inter alia*, computerized loan application systems, and Federally-mandated record-keeping practices. Defendants have one or more databases through which all of the Applicants may be identified and ascertained, and it maintains contact information, including email and mailing addresses. From this information, the existence of the Class Members (i.e., the PPP Agent for the Applicant) can be determined, and thereafter, a notice of this action can be disseminated in accordance with due process requirements.

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V. CAUSES OF ACTION

COUNT I

DECLARATORY RELIEF

AGAINST ALL DEFENDANTS

73. Plaintiff hereby incorporates by reference the foregoing allegations as if fully set forth herein.

74. Plaintiff assisted its clients with the PPP Loan application process, allowed Defendants to secure customers for PPP lending, and satisfied all prerequisites for obtaining PPP Agent Fees. Defendants failed to pay Agent Fees owed to Plaintiff as required by the SBA Regulations. Instead, Defendants kept the Agent Fees for themselves, in direct violation of the SBA Regulations.

75. An actual controversy has arisen between Plaintiff and Defendants as to the Agent Fees owed to Plaintiff by Defendants. Through their conduct of refusing to pay Agent Fees and otherwise, Defendants have denied that they owe the statutorily required Agent Fees to Plaintiff and the Class.

76. Plaintiff and the Class seek a declaration, in accordance with SBA Regulations and pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that Defendants are obligated to fill out, sign, and submit Form 159 to the SBA, set aside money to pay, and to pay the Agent Fees the Borrowers' Agents have earned for the work performed on behalf of their clients that received a PPP loan from the Defendants.

77. Plaintiff and the Class seek a declaration in accordance with the SBA Regulations that a portion of the Lender Fees paid to Defendants must be paid to Plaintiff and the Class.

COUNT II

UNJUST ENRICHMENT

AGAINST ALL DEFENDANTS

78. Plaintiff hereby incorporates by reference the foregoing allegations

as if fully set forth herein.

79. Plaintiff and the Class Members are Borrower Agents who assisted small businesses in preparing their Application for a PPP loan from Defendants. This assistance directly conferred a benefit upon Defendants, who, in turn, received a federal guarantee of repayment of the funds, interest on the lent amount, as well as a substantial Lender Fee for each PPP loan from the U.S. Government.

80. Defendants knew or should have known that they would directly receive a specific financial benefit from the Lender Fees, which included the Agent Fees, as well as the interest the Defendant earns for funding the Borrowers' PPP loan based on the Application which Plaintiff and the Class members assisted the Borrowers in preparing for submission to Defendants.

81. To participate in the PPP, "Lenders **must** comply with the applicable lender obligations set forth in this [SBA PPP Final Rule]…"[21]. Despite their efforts as PPP Agents, Defendants have failed to pay Plaintiff and the Class Members the Agent Fees in violation of the SBA PPP Final Rule.

82. Instead, Defendants have retained the full amount of the Lender Fees from which the SBA Regulations require Agent Fees to be paid. Therefore, Defendants have unfairly retained fees intended to benefit and compensate Plaintiff and the Class for their efforts in promoting the interests of the CARES Act and ensuring small businesses receive PPP loans.

83. By holding themselves out as PPP lenders and certifying that they would comply with their lender obligations, Defendants' conduct requested Plaintiffs, and the Class Members, to assist Applicants with their PPP Applications and have the Applications submitted to Defendants for approval.

84. Defendants' retention of the Agent Fees, to which Plaintiffs and the Class Members are entitled, constitutes an undue advantage or is, at a minimum, unconscionable.

[21] 85 FR 20812 (1) (emphasis added).

85. Defendants have been, and continue to be, unjustly enriched to the detriment and at the expense of the Plaintiff and the Class Members.

86. Defendants have unjustly benefitted through the illegal retention of the Agent Fee portion of the Lender Fees paid by the Federal Government to the Defendants for the benefit of the Plaintiff and the Class.

87. If Defendants' practice of retaining the full amount of Lender Fees despite the efforts of PPP Agents who, under the SBA Regulations, are entitled to a portion of the Lender Fees as Agent Fees, then the purpose and intent of the CARES Act would be upset because PPP Agents would receive no due compensation for assisting small businesses seeking a PPP Loan.

88. Plaintiff and the Class have no other means of obtaining compensation because the **SBA Regulations prohibit PPP Agents from receiving payment from any source other than the Lender Fees and expressly prohibit collecting any fees from the Applicants**.

89. Defendants' conduct willfully and intentionally negates the terms of the SBA Regulations by unilaterally refusing to fill out, sign, and submit the required SBA Form 159 and to forward to the PPP Agents the regulatorily required Agent Fees that the Federal Government entrusted to the Lenders. Defendants' actions render those terms superfluous and undermine the intent of Congress to promote small business loans under the PPP and CARES Act.

90. Defendants should not be allowed to retain the proceeds from the benefits conferred upon it by Plaintiff and the U.S. Government.

91. Plaintiff and the Class were injured as a direct and proximate cause of Defendants' misconduct. Therefore, Plaintiff seeks disgorgement of Defendants' unjustly acquired profits and other monetary benefits resulting from Defendants' unlawful conduct, an injunction preventing Defendants from continuing their unlawful conduct, and all other relief afforded under the law that this Court deems just and proper.

COUNT III

CONVERSION

AGAINST ALL DEFENDANTS

92. Plaintiff hereby incorporates by reference the foregoing allegations as if fully set forth herein.

93. Under the SBA Regulations, Plaintiff and the Class, as PPP Agents, have a right to, title in, and the legal right of possession of, Agent Fees that must be paid from the amount of Lender Fees provided to Defendants for lending money pursuant to approved Applications.

94. The SBA Regulations state that "Agent fees ***will*** be paid out of lender fees" and provide guidelines on the amount of Agent Fees that should be paid to the PPP Agent, depending on the size of the PPP loan secured.

95. Additionally, the SBA Regulations require that Lenders, not Borrowers, pay the Agent Fees and fill out, sign, and submit Form 159 to the SBA. The SBA Regulations unequivocally state that "Agents may not collect fees from the applicant."

96. Plaintiff and the Class fulfilled the role of PPP Agent by assisting small businesses with their Applications. Due to Plaintiff's efforts, Defendants made federally backed PPP loans, entitling Defendants to Lender Fees from the U.S. Government. As such, Plaintiff has a right to receive, and title to, the regulatorily-mandated Agent Fees.

97. Although Plaintiff is entitled to Agent fees under the SBA Regulations, Defendants have failed to pay the required Agent Fees, which the Federal Government paid to the Defendants as part of the Lender Fees. Defendants have no legal claim, authorization, or approval for this wrongful withholding of the Agent Fees. Therefore, Defendants have appropriated, assumed, and exercised dominion over the Plaintiff's and Class' Agent Fees.

98. In California, money may be the subject of a conversion claim if the

money can be described, identified, or segregated, and an obligation to treat it in a specific manner is established. That requirement is met because the Agent Fees are a segregated portion of the Lender Fees awarded through the SBA Regulations for a successfully funded PPP loan.

99. At the time Defendants unlawfully retained the Agent Fees, Defendants knew or should have known that the Agent Fees were owed to Plaintiff and the other Class Members.

100. Defendants knew or should have known that they would directly receive a specific financial benefit from the Lender Fees, which included the Agent Fees, as well as the interest the Defendant earns for funding the Borrowers' PPP loan based on the Application which Plaintiff and the Class Members assisted the Borrowers in preparing for submission to Defendants.

101. The right to Agent Fees was immediately conferred upon Plaintiff and other Class Members the moment Defendants received their Lender Fees from the SBA for funding PPP loans to Borrowers that Plaintiff and other Class Members assisted in preparing the Borrower's Application.

102. Defendants' improper acts or practices of refusing to pay Plaintiff and the other Class Members the mandated Agent Fees are the proximate cause of the damages sustained by the Plaintiff and the Class Members, and such retention of the mandated Agent Fees constitutes an undue advantage or is, at a minimum, unconscionable.

103. Defendants' conduct manifests a knowing and reckless indifference toward, and a disregard of, the rights of Plaintiff and the Class Members.

104. By withholding the Agent fees, Defendants have maintained wrongful control over Plaintiff's property inconsistent with Plaintiff's entitlements under the SBA Regulations.

105. Defendants committed civil conversion by retaining monies owed to Plaintiff and the Class.

106. Plaintiff and the Class have been injured as a direct and proximate cause of Defendants' misconduct. Plaintiff, as such, seeks recovery from Defendants in the amount of the owed Agent Fees and for all other relief afforded under the law.

COUNT IV

BREACH OF AN IMPLIED CONTRACT

AGAINST ALL DEFENDANTS

107. Plaintiff hereby incorporates by reference the foregoing allegations as if fully set forth herein.

108. Plaintiff and the Class, as PPP Agents, conferred a benefit upon Defendants by assisting Applicants with their PPP Applications that were submitted to Defendants. Based in part on Plaintiff's work, Defendants received interest on the PPP loan as well as the Lender Fee from the Federal Government, approximately 20% of which was to be forwarded to the Borrowers' Agents (i.e., Plaintiff and the Class) as payment for the Agent Fee.

109. In performing work to assist Applicants in preparing Applications for a PPP loan for their small business, Plaintiff and the Class had a reasonable expectation of compensation. That reasonable expectation stemmed from the SBA SOP and SBA Regulations, which Defendants certified they would comply with, which explicitly stated Agents would receive Agent Fees from the lenders. Those Agent Fees were to be paid out of a portion of the Lender Fees.

110. Despite that reasonable expectation and the plain language of the SBA SOP and SBA Regulations, Defendants have failed to pay Plaintiff and the Class the statutorily required Agent Fees.

111. Instead, Defendants have retained, or stated their entitlement to retain, the Agent Fee portion of the Lender Fees for themselves and thereby, benefited from the work performed by Plaintiff and the Class.

112. It would be unjust to allow Defendants to retain the benefit of

Plaintiff's and the Class's Agent Fees in light of their reasonable expectation of payment for the services they rendered.

113. Defendants, regardless of any intent of the parties, have a quasi-contractual obligation to pay for the services by which they benefited and to compensate Plaintiff and the Class for the reasonable value of their services.

114. Plaintiff and the Class have been injured as a direct and proximate cause of Defendants' misconduct. Plaintiff, as such, seeks recovery from Defendants in the amount of the owed Agent Fees and for all other relief afforded under the law.

COUNT V

VIOLATION OF THE "UNFAIR" PRONG OF THE UCL

CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200, ET SEQ.

AGAINST ALL DEFENDANTS

115. Plaintiff hereby incorporates by reference the foregoing allegations as if fully set forth herein.

116. The California Unfair Competition Law (hereinafter "UCL") defines unfair business competition to include any "unlawful, unfair or fraudulent" act or practice. A business act or practice is "unfair" under the UCL if the reasons, justifications, and motives of the alleged wrongdoer are outweighed by the gravity of the harm to the alleged victims.

117. Defendants have committed unfair acts and concealed and omitted material facts that have harmed Plaintiff and the Class.

118. Specifically, Defendants, despite their obligations under the SBA Regulations and SBA SOP, have failed to fill out, sign, and submit Form 159 and to pay the Plaintiff and the Class the required Agent Fees, which the Federal Government paid to the Defendants as part of the Lender Fees. Defendants' conduct constitutes an unfair act because Defendants received Lender Fees as a result of Plaintiff and the Class's efforts to assist Applicants in the Application

process to secure PPP loans through Defendants, who are SBA approved lenders, and who agreed to comply with the SBA Regulations and SBA SOP requiring such payment.

119. By Defendants holding themselves out as PPP Lenders, Defendants necessarily held themselves out as promising to follow the mandatory PPP guidelines and regulations.

120. Nevertheless, Defendants have failed to provide Plaintiff and the Class payment in the amount of the mandatory Agent Fees and instead retained the Agent Fee portion of the Lender Fees for themselves.

121. Defendants also concealed and omitted material information, specifically, that despite holding themselves out as PPP lenders under the PPP program, that Defendants would violate the law and refuse, and continue to refuse despite clear regulatory guidance, to pay regulatorily-mandated Agent Fees. Had Plaintiff and the Class known that Defendants would refuse to pay Agent Fees, they would have taken their loans to other SBA Lenders who complied with the SBA Regulations.

122. Defendants' unfair acts and omissions occurred in connection with the sale or advertisement of services, namely, services related to the processing and financing of PPP loans under the CARES Act and SBA Regulations.

123. Defendants intended that Plaintiff and the Class rely on their omissions because, had they stated they would not pay Agent Fees as required under the SBA Regulations, Plaintiff and the Class would not have helped secure PPP loans from Defendants for their clients. By concealing and omitting their intention not to pay required Agent Fees, Defendants improperly obtained business from Plaintiff and the Class for which Defendants were compensated through the Lender Fees.

124. Plaintiff and the Class have been injured as a direct and proximate cause of Defendants' misconduct. Plaintiff, as such, seeks recovery from

Defendants in the amount of the owed Agent Fees, and for all other relief afforded under the law.

COUNT VI

VIOLATIONS OF THE CARES ACT

AGAINST ALL DEFENDANTS

125. Plaintiff hereby incorporates by reference the foregoing allegations as if fully set forth herein.

126. The CARES Act provides a stimulus package in response to the COVID-19 pandemic and includes the PPP, which assists small businesses seeking to maintain payroll and other authorized expenses.

127. There is an implied cause of action arising under the CARES Act.

128. The CARES Act, along with the SBA's Regulations, provides for the payment of Agent Fess to authorized representatives who assisted PPP loan applicants with their PPP Applications (i.e., PPP Agents consisting of the Plaintiff and the Class Members).

129. In flagrant disregard for the law, Defendants have failed and/or refused to pay the Agent Fees to the Applicants' authorized representatives (i.e., PPP Agents consisting of the Plaintiff and the Class Members), and instead, kept the fees to enrich themselves.

130. Plaintiff and Class Members are PPP Agents under the CARES Act and the SBA Regulations and, therefore, are entitled to the Agent Fees they have earned. The Agent Fees have been paid to the Lenders by the Federal Government and are to be paid by the Lenders to the Plaintiff and Class Members as set forth in the CARES Act and the SBA Regulations.

131. Nevertheless, Defendants refused to fill out, sign, and submit the required Form 159, and refused, and continue to refuse, to pay Plaintiff and the Class Members the authorized Agent Fees.

132. As a direct and proximate result of Defendants' failure and/or refusal to comply with the CARES Act and the SBA Final Rule, Plaintiff and the Class Members have suffered damages in excess of $5 million.

COUNT VII

VIOLATIONS OF THE SBA's 7(a) PROGRAM, 15 U.S.C. § 636(a)

AGAINST ALL DEFENDANTS

133. Plaintiff hereby incorporates by reference the foregoing allegations as if fully set forth herein.

134. The PPP was added to the SBA's 7(a) Program, which is designed to assist small businesses in obtaining financing.

135. There is an implied cause of action arising under the SBA's 7(a) Program, as applied through the CARES Act.

136. The SBA Regulations and SBA SOP provide for the payment of Agent Fees to authorized representatives that assisted PPP Applicants with their PPP Applications (i.e., PPP Agents consisting of the Plaintiff and the Class Members).

137. In flagrant disregard for the law, Defendants have failed and/or refused to pay Agent Fees to Plaintiff and the Class Members, and instead, have kept the fees to enrich themselves.

138. As a direct and proximate result of Defendants' wrongful actions, Plaintiff and the Class Members have suffered damages in excess of $5 million.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for the following relief:

a. For an Order certifying the Class as defined above, appointing Plaintiff as Class representative, and appointing Plaintiff's counsel as Class counsel;

b. For an Order declaring Defendants' actions to be unlawful;

c. For a declaration that all regulatorily-mandated and calculated Agent Fees are owed to Plaintiff and the Class and should be deposited into a mutually agreeable fund or funds within 60 days, to be distributed to the PPP Agents who are entitled to the funds;

d. For all injunctive and other equitable relief available to Plaintiff and Class Members;

e. For an award of all recoverable compensatory, statutory, and other damages sustained by Plaintiff and Class Members;

f. For reasonable attorneys' fees and expenses as permitted by applicable statutes and law;

g. For costs related to bringing this action;

h. For pre- and post-judgment interest as allowed by law; and,

i. Such further relief at law or in equity that this Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff, individually and on behalf of the Class, demands a trial by jury on all issues so triable.

Dated: October 26, 2020

Respectfully submitted,

/s/ Nitoj P. Singh

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