BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE JPMORGAN CHASE PAYCHECK PROTECTION PLAN LITIGATION	MDL No. 2944
	ORAL ARGUMENT REQUESTED

JPMORGAN CHASE BANK, N.A.'S CONSOLIDATED RESPONSE IN OPPOSITION TO MOTIONS FOR TRANSFER OF ACTIONS FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

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JPMorgan Chase Bank, N.A. ("Chase"),[1] by its undersigned counsel, opposes: (1) the Motion of Plaintiff for Transfer of Actions to the Southern District of California Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings (the "Hyde-Edwards Motion") [Dkt. 1]; and (2) Plaintiff's Motion to Transfer Actions to the Central District of California for Coordination and Consolidated Pretrial Proceedings (the "Cyber Motion") [Dkt. 3] (collectively, the "Motions").[2] Chase states the following in opposition to the Motions:

I. INTRODUCTION

Consolidation under 28 U.S.C. § 1407(a) is the option of last resort, and Movants have failed to meet their burden of demonstrating that consolidation would be for "the convenience of the parties and witnesses" or "promote the just and efficient conduct" of these actions. Movants ask this Panel to transfer eleven or twelve putative class actions pending in seven districts across the country (the "Identified Actions")[3] to either the Southern District of California (the Hyde-Edwards Motion) or the Central District of California (the Cyber Motion) for pretrial consolidation. Yet the Identified Actions are a jigsaw puzzle of unmatched pieces, jumbling together dissimilar plaintiffs, defendants, theories, and claims into an unworkable muddle that lacks predominant common questions of fact and unifying legal theories. Consolidating these cases would produce few efficiencies far outweighed by the resulting delays and new burdens.

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[1] Specially appearing Defendant JPMorgan Chase & Co. is a financial holding company under Section 4(k) and (l) of the Bank Holding Company Act of 1956. It is not a proper defendant, as it does not, and never has, participated in the PPP and has made no loans in connection with the PPP.

[2] Where appropriate, the movants on the Hyde-Edwards Motion are referred to as the "Hyde-Edwards Movants," and the movant on the Cyber Defense Motion is referred to as the "Cyber Movant." All movants are referred to collectively as "Movants."

[3] The Hyde-Edwards Motion identifies nine cases, while the Cyber Defense Motion adds a tenth. [Dkts. 1-3, 5-2]. As discussed *infra*, several parties anticipate stipulating that one of these cases should no longer be considered part of the Motions. The parties have identified three other cases as potential tag-along actions. [Dkts. 15, 57]. Without conceding that any of these cases are related and for ease of reference only, Chase refers to these cases together as the "Identified Actions."

Movants assert that the Identified Actions share a common factual thread based largely on the happenstance that they all relate to the recently enacted Paycheck Protection Program ("PPP"). But the cases' superficial similarities do not support consolidation. At even the broadest level of comparison, the Identified Actions rapidly differentiate into: (1) cases asserting (erroneously) that Chase prioritized larger customers over smaller customers (the "Prioritization Cases"); (2) cases asserting (also erroneously) that Chase's PPP loan application process was too difficult for them to navigate (the "Application Cases"); (3) cases asserting that Chase excluded non-customers from applying for PPP loans (the "Exclusion Cases"); (4) a case wrongly alleging backdating of PPP loan approvals (the "Backdating Case"); and (5) a case asserting that Chase failed to pay fees to agents that allegedly assisted customers in applying for PPP loans (the "Agent Fee Case").[4] Each category of cases involves distinct factual issues, legal theories, claims, defenses, and remedies.

The differences do not end there. Plaintiffs in the Identified Actions are differently situated in other material and legally significant ways—most notably, on the dispositive question of whether they ever received PPP loans. Some plaintiffs say they could not even begin an application because they were excluded from applying without an existing bank relationship. Others say they were allowed to apply but could not effectively navigate the application process. Still others say they were frustrated by the application process but were ultimately able to secure a loan in the first round of PPP funding. Yet others allege they completed an application and did not receive a loan in the first round of funding but were funded in the second round. And still others say they completed an application and were denied approval. Other plaintiffs are not applicants or

[4] There is one Agent Fee Case identified in the Schedules of Actions for both Motions, *American Video Duplicating, Inc., et al. v. Citigroup Inc., et al.*, No. 2:20-cv-03815-ODW-AGR (C.D. Cal.) ("*American Video*"). Plaintiff's counsel in *American Video* has requested a stipulation removing it from the Schedules of Actions for the Motions. Chase, the Hyde-Edwards Movants, and the Cyber Movant have agreed, and work on a stipulation is underway. To be clear, it is Chase's position that none of the Identified Actions, including the Agent Fee Case, should be consolidated into an MDL.

borrowers at all, but putative agents who claim to have assisted borrowers with their loan applications.

There are also differences in the mix of defendants. Chase is the sole defendant in some cases. In others, one or more other lenders were named as co-defendants. In others, loan recipients are included as co-defendants. And in one, the Small Business Administration ("SBA") was a co-defendant. The claims asserted by the various plaintiffs span the statutory and common law of at least seven states (California, Colorado, Florida, Illinois, New Jersey, New York, and Texas), as well as federal antitrust claims under the Sherman and Clayton Acts.

Movants thus propose to merge mismatched facts, theories, claims, and parties into a single proceeding where individual issues will inescapably predominate over any common issues. Chase proposes a simpler solution: the cases should stay put. The ongoing approval of PPP loans in the second round of funding, including many plaintiffs' loans, has already mooted and will continue to moot many claims. Chase thus anticipates filing early dispositive motions in the Identified Actions based on the plaintiffs' individual circumstances and case-specific standing, mootness, and pleading grounds. To the extent any cases remain following dispositive motion practice, informal coordination and alternative procedures can readily supply whatever efficiencies Movants expect to realize through consolidation, without the corresponding delay and inefficiency. Consolidation is neither necessary nor appropriate, and the Panel should deny the Motions.

II. BACKGROUND

A. The Enactment and Rapid Rollout of the Payment Protection Program.

These actions arise involve loan applications made under a small business assistance program enacted by Congress in response to the crisis caused by the sudden shutdown of the United

States economy due to the COVID-19 pandemic.[5] On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. 116-136, which amended the Small Business Act, 15 U.S.C. § 636, and created the $349 billion PPP loan program. The CARES Act authorized the SBA "to modify existing loan programs and establish a new loan program to assist businesses nationwide adversely impacted by the COVID-19 emergency."[6]

There was higher-than-anticipated volume of loan requests for PPP loans.[7] SBA issued its first PPP Interim Final Rule and launched the program on April 3, 2020, just one week after the CARES Act passed. By April 16, 2020, PPP lenders had approved more than 1.66 million loans totaling nearly $342.3 billion, depleting the initial round of funding within two weeks.[8] In response, on April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act, which allocated an additional $320 billion in funds to the PPP for a "second round." As of May 23, 2020, more than 5,500 PPP lenders have approved a combined total of more than 4.4 million loans totaling more than $511 billion over both rounds of PPP financing.[9] The SBA and PPP lenders are permitted to continue processing loan applications through June 30, 2020.[10]

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[5] Under Section 1102 of the CARES Act, small businesses include any business with no more than 500 employees or any accommodation or food service business with fewer than 500 employees per location.

[6] Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 3, 2020); 13 C.F.R. Part 120. As of April 30, 2020, SBA had issued six additional Interim Final Rules, including one imposing additional eligibility requirements. *See* Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loan, 85 Fed. Reg. 21,747 (Apr. 14, 2020); 13 C.F.R. Part 120.

[7] SBA Office of Inspector General, *Flash Report Small Business Administration's Implementation of the Paycheck Protection Program Requirements* at 2, available at https://www.sba.gov/sites/default/files/2020-05/SBA_OIG_Report_20-14_508.pdf (last visited May 8, 2020).

[8] *Id*. at 3.

[9] *See* SBA, *Paycheck Protection Program (PPP) Report: Approvals through 05/23/2020*, available at https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf (last visited May 27, 2020).

[10] 85 Fed. Reg. at 20,812.

B. Chase Participated in the PPP, Approving and Funding Hundreds of Thousands of PPP Loans for Qualifying Businesses.

Nearly 5,000 banks, including Chase, have voluntarily participated in the PPP. Chase's Business Banking line of business created an initial online form for businesses to submit interest in PPP loans, which went live on Friday, April 3, 2020. Chase began accepting applications from Business Banking customers on April 4, 2020, and made an online process available for Business Banking customers to complete applications electronically the following Monday, April 6, 2020. By April 23, 2020, Chase had received more than 373,000 PPP applications. To date, Chase has funded more than 250,000 PPP loans to qualifying American businesses, totaling over $30 billion in emergency relief to sustain these businesses.[11] The average loan amount is $122,000, and 50% of Chase's loans have gone to businesses with fewer than five employees.[12]

Notably, plaintiffs in most of the Identified Actions filed their complaints after the SBA completed the first round of PPP approvals but before the second round of PPP approvals, and have not amended their pleadings to update their loan approval statuses. Chase will show at the appropriate time and in the appropriate jurisdictions[13] that multiple plaintiffs were approved in the second round, others never submitted or completed PPP applications with Chase, others appear to have received approval through other lenders, and others were denied approval through Chase and may not have obtained loans through other institutions. Reasons for denials vary from applicant to applicant.

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[11] *Paycheck Protection Program*, available at https://recovery.chase.com/cares1 (last visited May 27, 2020); *Chase approved to fund about $29 billion to 239,000 businesses through the Paycheck Protection Program*, May 1, 2020, https://media.chase.com/news/chase-approved-to-fund-29-billion-to-239000-businesses-through-ppp (last visited May 16, 2020).

[12] *Id*.

[13] Chase can supply plaintiffs' loan documents and statuses to the Panel for *in camera* inspection at the Panel's request, but it has elected not to include customers' loan documentation in a public filing.

C. Plaintiffs Allege a Multiplicity of Facts, Circumstances, and Claims Largely Arising Out of the First Round of PPP Funding.

Plaintiffs allege a hodgepodge of issues that purportedly arose in connection with Chase's participation in the PPP, for the most part during the first round of PPP funding. During those first 14 days, the combination of rapid mobilization and unprecedented loan application volume resulted in millions of applicants vying for loans at the same time as lenders raced to process applications. The second round of PPP funding appears to have cleared the backlog of eligible applicants and significant funds remain available. The plaintiffs in the Identified Actions, however, assert a variety of purported setbacks encountered in those first two weeks of funding.

Many of the Identified Actions are, at least in part, Prioritization Cases alleging (erroneously) that Chase prioritized larger customers over smaller customers. The Hyde-Edwards Movants assert that Chase prioritized larger loans over smaller loans to "protect [Chase's] financial gains" against the risk of "greater exposure in the event of business failure"—a theory contradicted by Movant's admission that PPP loans are fully SBA-guaranteed. [Dkt. 1-5, ¶¶ 3, 23]. The Cyber Movant asserts that Chase prioritized larger loans over smaller loans but offers a different explanation—that Chase wanted to generate "larger loan origination fees"—a theory that is contradicted by the Cyber Movant's admission that the origination fees were highest (5%) on the smallest loans ($350,000) and lowest (1%) on the largest loans ($2 million to $10 million), incentivizing approval of a higher number of small loans over a lower number of large loans—but nevertheless diverges from the theory espoused by the Hyde-Edwards Movants. [Dkt. 5-5, ¶¶ 2, 23]. Further, some Prioritization Cases involve plaintiffs that ultimately received funding while others involve plaintiffs who, to date, may not have done so or do not disclose in their pleadings whether or not they did. *See* Appendix 1.

Other actions assert additional or different theories. Several are Application Cases asserting flaws or lack of individualized attention in Chase's application process or in the underlying PPP loan

process itself. Plaintiff Outlet Tile Center, for example, identifies understaffing at the SBA and the administration of PPP through the SBA's loan program as inherently discriminatory against smaller businesses. [Dkt. 1-7, ¶¶ 15-16]. Plaintiff Sha-Poppin Gourmet Popcorn LLC ("Sha-Poppin") alleges that Chase's application web portal was "non-functional" and forced customers to "look elsewhere." [Dkt. 1-10, ¶ 6]. Plaintiff VR Consultants, Inc. ("VR") alleges that, even if Chase did not prioritize processing of PPP loan applications from wealthier clients, it provided "individualized attention" to wealthier clients and not smaller clients. [Dkt. 57-3, ¶ 45].

Several of the Identified Actions are Exclusion Cases, alleging that the SBA, Chase, and other banks improperly excluded or colluded to exclude plaintiffs from the applicant pool by requiring a prior relationship as a prerequisite to apply. [*See* Dkt. 1-7, ¶ 16; Dkt. 1-8, ¶¶ 44-46].

And one is an Agent Fee Case in which the plaintiffs are not suing as PPP borrowers or applicants, but rather allege they are owed agent fees by Chase and numerous other banks for their alleged role in assisting PPP loan applicants. [*See* Dkt. 1-9, ¶¶ 34-39].

Plaintiffs in the Identified Actions allege differing experiences and had differing outcomes. Movants Hyde-Edwards and Cyber, for example, allege that they completed applications and were denied funding due to depletion of the first round of PPP funding but do not allege whether they sought and received funding in the second round. [*See* Dkt. 1-5, ¶¶ 39-42; Dkt. 5-5, ¶¶ 28-41]. Plaintiff Legendary Transport, LLC admits it did not submit a PPP application through Chase or any other bank. [Dkt. 1-8, ¶¶ 64-65]. Plaintiff Sha-Poppin alleges that it was unable to apply through Chase's online portal but secured a smaller PPP loan through another lender. [Dkt. 1-10, ¶¶ 60-67]. Plaintiffs Starwalk of Dallas, LLC and Kona-Wood Houston, LLC allege they contacted a representative of Chase for assistance in submitting applications, were told to apply later, subsequently completed online applications, and were never told if their loans were approved. [Dkt.

1-13, ¶¶ 11-16]. Plaintiff Ladaga Ventures, LLC states that it submitted a complete and timely application, contacted Chase for status updates, and was ultimately told it did not receive SBA approval "for some reason." [Dkt. 5-14, ¶¶ 14-16]. Plaintiff KPA Promotions & Awards, Inc. alleges that it received funding in the second round of PPP approvals but that Chase backdated the loan approval and shorted the period in which KPA could use the loan. [Dkt. 15-3]. VR alleges that it received a PPP loan in the second round of funding, but states that during the interim between the first and second round of funding it missed out on business opportunities. [Dkt. 57-3, ¶¶ 71-73].

The Identified Actions also name varying combinations of defendants. Though some name only Chase (and sometimes erroneously add its holding company) as the sole defendant, others named multiple banks as co-defendants [Dkts. 1-8, 1-9], while others name a defendant class of other loan recipients as co-defendants [Dkt. 1-10], and another named the SBA [Dkt. 1-7].

The putative class definitions in the Identified Actions also vary in scope and language. Some, including both of Movants' complaints, seek to represent statewide classes. [Dkt. 1-5, ¶ 3; Dkt. 5-5, ¶ 43]. Others seek to represent putative nationwide classes. [Dkts. 1-8, ¶ 83; Dkt. 1-9, ¶ 70; Dkt. 1-13, ¶ 18]. Some include definitions that depend on whether the putative class members' applications were processed "in accordance with" the legal requirements and/or the "stated intent" of federal or state law. [Dkt. 1-1, ¶ 53; Dkt. 5-5, ¶ 43]. Others define classes or sub-classes based on eligibility, outcome, and reason for the outcome, identifying different Chase policies or reasons as giving rise to different classes or sub-classes. [Dkt. 1-8, ¶ 83; Dkt. 1-9, ¶ 70]. Still others define classes broadly to include all small businesses or all Chase customers who applied for PPP loans. [Dkt. 1-8, ¶ 83; Dkt. 1-13, ¶ 18]. One other includes defendant classes and subclasses based on allegedly backdated loans. [Dkt. 15-3]. One statewide class seeks to include only those eligible

applicants who did not receive a PPP loan from April 3 to 27, 2020. [Dkt. 57-3, ¶ 74]. And one has no proposed class definition. [Dkt. 1-7].

The complaints in the Identified Actions assert varying claims under different combinations of state consumer protection, advertising, and unfair or deceptive practices statutes (California, Colorado, Florida, Illinois, New Jersey, New York, and Texas), two federal antitrust statutes (the Sherman and Clayton Acts), and an array of theories under the common law or equity law of five states, including misrepresentation, fraudulent concealment, fraud, fraudulent inducement, breach of contract, breach of fiduciary duty, tortious interference, negligence, negligence *per se*, negligent misrepresentation, unjust enrichment, promissory estoppel, and injunctive or other equitable relief. To assist the Panel, Chase has prepared the table in **Appendix 1**, illustrating the different parties, facts, theories, claims, and proposed class definitions across the Identified Actions.

III. LEGAL STANDARD

The Panel is authorized to transfer "civil actions involving one or more common questions of fact" that "are pending in different districts" to a single district "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). But transfer and centralization are not appropriate unless: (1) the civil actions involve "common questions of fact"; (2) transfer will be "for the convenience of the parties and witnesses"; and (3) transfer will "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The party seeking consolidation bears the burden of showing that transfer "will further the purposes of Section 1407." *In re Cable Tie Pat. Litig.*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980). And the movants have an even heavier burden when "only a minimal number of actions are involved." *In re Transocean Ltd. Sec. Litig. (No. II)*, 753 F. Supp. 2d 1373, 1374 (J.P.M.L. 2010). Consolidation under Section 1407 "should be the ***last solution*** after considered review of all other options." *In re Best Buy, Co., Inc. Cal. Song-Beverly*

Credit Card Act Litig., 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011) (emphasis added). Movants have not met their burden here.

IV. ARGUMENT AND AUTHORITIES

A. Individual Differences in the Identified Actions Overwhelm Any Superficially Common Questions of Fact.

The commonality requirement demands more than superficial similarity. The Panel has emphasized that "numerosity of actions" will not support centralization without "sufficient common questions of fact to warrant Section 1407 transfer." *In re Not-for-Profit Hospitals/Uninsured Patients Litig.*, 341 F. Supp. 2d 1354, 1355 (J.P.M.L. 2004).[14] Common issues must "predominate over individual factual issues." *In re Westinghouse Elec. Corp. Employment Discrimination Litig.*, 438 F. Supp. 937, 939 (J.P.M.L. 1977); *see also In re Pharmacy Benefit Plan Adm'rs Pricing Litig.*, 206 F. Supp. 2d 1362, 1363 (J.P.M.L. 2002) (denying transfer where "unique questions of fact predominate over any common questions").[15]

This commonality requirement is not met here. Though Movants strain to piece together commonality by arguing that some (but not all) plaintiffs are small businesses alleging that Chase's conduct somehow deprived them of access to a PPP loan, their disparate theories and experiences fall short of demonstrating predominant commonality. The Hyde-Edwards Motion refers generally to the putative commonality of Chase's alleged violation of the SBA's purported "first-come, first-served" mandate and Chase's "policies and procedures" for PPP applications. [Dkt. 1-1 at 5.] The

[14] *See also In re Asbestos School Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *In re Eli Lilley & Co. "Oraflex" Prods. Liab. Litig.*, 578 F. Supp. 422 (J.P.M.L. 1984); *In re Luminex Int'l, Inc. Prods. Liab. Litig.*, 434 F. Supp. 668, 669-70 (J.P.M.L. 1977); *In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 909-910 (J.P.M.L. 1977); *In re United Gas Pipe Line Co. Litig.*, 391 F. Supp. 774, 776 (J.P.M.L. 1975).

[15] *See also In re Electrolux Dryer Prods. Liab. Litig.*, 978 F. Supp. 2d 1376, 1377 (J.P.M.L 2013); *In re Ocala Funding, LLC, Commercial Litig.,* 867 F. Supp. 2d 1332 (J.P.M.L. 2012); *In re Blair Corp. Chenille Robe Prods. Liab. Litig.*, 831 F. Supp. 2d 1367 (J.P.M.L. 2010).

Cyber Motion refers in broad strokes to the alleged commonality of "whether Chase prioritized PPP loan applications rather than processing them on a first-come, first-served basis" and whether Chase processed PPP Loan applications in violation of applicable laws. [Dkt. 3-1 at 5.] The Cyber Motion also refers to "banking practices" as an appropriate subject for consolidation. [Dkt. 5-1 at 6.] But mere repetition of the phrase "first-come, first-served" and criticism of Chase's alleged "policies," "procedures," or "practices" does not establish commonality of fact.

The Identified Actions are replete with material factual differences that predominate over any perceived commonality. First, the Identified Actions lack the "common core" asserted by the Movants. [Dkt. 1-1 at 5 (citing *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, 398 F. Supp. 2d 1365, 1366 (J.P.M.L. 2005); Dkt. 3-1 at 8.] The Prioritization Cases, Application Cases, Exclusion Cases, Backdating Case, and Agent Fee Case all allege different factual circumstances, purported injuries, and putative claims arising out of different alleged policies, procedures, and practices. *See* § II.C, *supra*. The alleged prioritization of larger customers over smaller customers asserted in the Prioritization Cases differs from the allegations in the Application Case that Chase failed to provide a workable online application portal that plaintiffs could navigate. Both are starkly different from the alleged refusal by Chase to deal with non-customers and collusion asserted in the Exclusion Cases. And all have little or nothing in common with the alleged non-payment of fees in the Agent Fee Case. *See id*.

Second, the plaintiffs in the Identified Actions allege different individual circumstances that impact the claims and defenses in each case. *See* § II.C, *supra*. Most obviously, plaintiffs who received PPP loan approvals and funding in either the first or second round are in a wholly different position from those never approved for funding, and are subject to defenses of, *inter alia*, standing, mootness, causation, and injury that may dispose of their claims early with no or minimal

discovery. Conversely, plaintiffs who never completed or submitted applications or who did so with lenders other than Chase face entirely distinct questions of standing and causation, as well as defects of, *inter alia*, ripeness, duty, and liability that may also dispose of their claims with no or minimal discovery. Plaintiffs who allege they submitted applications but secured no funding in the first or second rounds, by comparison, may require individual inquiry into their unique applications and the circumstances giving rise to their denials, including whether they were eligible and sufficiently established their eligibility as PPP borrowers, whether their submissions met the PPP requirements, and whether their denials were for some other reason. Some plaintiffs allege Chase made individual representations to them by phone or email, requiring particularized inquiry into who at Chase made the alleged representations to each plaintiff, what the Chase representative said, the accuracy of those statements, when they made these statements, and how or whether plaintiffs relied on those statements, among other topics for examination. *See id*. And plaintiffs claiming they were deprived of agent fees are entirely separate and distinct from PPP loan applicants and have little or no common ground with the plaintiffs in any other Identified Action.

Third, the Identified Actions naming Chase alone (or with its parent company) are substantially different from the cases identifying other lenders, other PPP borrowers, or the SBA as co-defendants. The inclusion of additional named defendants raises separate and distinct fact questions as to the other defendants' alleged liabilities, absent from cases naming Chase alone.

Fourth, the disparity in class definitions raise case-specific and individualized fact issues. Class certification discovery will differ between putative nationwide classes and statewide classes, between statewide classes of different states, and between classes enumerating different criteria, with case-specific questions regarding numerosity, ascertainability, commonality, predominance, typicality, and superiority. Further, class definitions that define classes by whether Chase acted "in

accordance with" the requirements or "stated intent" of federal or state law are subject to challenge as "fail-safe" classes, whereas others class definitions appear to be unlimited in scope and thus may cover putative class members with no claim. *See Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); *Oom v. Michaels Cos.*, No. 1:16-cv-257, 2017 U.S. Dist. LEXIS 112113, at *10-11 (W.D. Mich. July 19, 2017). And, as discussed above, individualized issues predominate as to each member of the putative classes requiring a mini-trial for each of them.

These individualized, case-specific inquiries are not readily amenable to consolidation or centralization. And because resolving each Identified Action will depend on such individualized inquiries, with each plaintiff differently positioned and subject to unique defenses, the Identified Actions lack commonality. *See In re American-Manufactured Drywall Prods. Liab. Litig.*, 716 F. Supp. 2d 1367, 1368 (J.P.M.L. 2010) ("The proponents of centralization have not convinced us that any efficiencies from centralization would outweigh the multiple individualized issues, including ones of liability and causation, that these actions appear to present."). The need for different discovery in different cases based on differing allegations and claims, differently-situated plaintiffs and defendants, and different class definitions further counsels against centralization, as discovery into Chase's alleged prioritization policies differs from discovery into its application process, eligibility requirements, agent fee policies, or supposed "backdating" practices. *See In re Pharmacy Benefit Plan Administrators*, 206 F. Supp. 2d at 1363 (recognizing that transfer is inappropriate when individual discovery predominates); *In re Westinghouse*, 438 F. Supp. at 938. Centralization would thus neither eliminate nor streamline the pretrial process. To the contrary, it would place upon one transferee court a compound burden that could be addressed more efficiently and with greater local expertise by the courts of original jurisdiction.

The vastly differing claims asserted across the Identified Actions further supports leaving the actions in their home districts. With claims asserted on all manner of theories ranging across federal antitrust law, state consumer protection law, state common law fraud, state common law negligence, state contract or fiduciary duty law, and state equity law, and with an equally diverse array of proposed remedies, the variance in claims stands as another factor against consolidation. *In re DirectTV, Inc., Fair Labor Standards Act & Wage & Hour Litig.*, 84 F. Supp. 3d 1373, 1375 (J.P.M.L. Feb. 6, 2015) (denying centralization of eleven actions where plaintiffs' claims implicated multiple states' laws).[16]

B. Transfer Would Not Serve the Convenience of the Parties and Witnesses and Would Not Promote the Just and Efficient Conduct of the Actions.

This Panel often considers the second and third elements of the Section 1407 inquiry in tandem, finding that centralization may "serve the convenience of the parties and witnesses" and "promote the just and efficient conduct of the litigation" where it would accomplish such efficiencies as "eliminat[ing] duplicative discovery," "prevent[ing] inconsistent pretrial rulings," and "conserve[ing] the resources of the parties, their counsel and the judiciary." *In re Airline Baggage Fee Antitrust Litig.*, 655 F. Supp. 2d 1362, 1362-63 (J.P.M.L. 2009). The mere presence of "some factual overlap," however, will not suffice where the pending actions may "proceed in an orderly manner" in their original jurisdictions. *In re Snider*, No. MDL No. 2934, 2020 U.S. Dist. LEXIS 54442, at *1-2 (J.P.M.L. Mar. 27, 2020). Movants may not "rely on broad similarities among the actions to support their request for centralization" where differences give rise to "unique issues" that "predominate" over alleged common issues. *In re Hotel Indus. Sex Trafficking Litig.*, No. MDL No. 2928, 2020 U.S. Dist. LEXIS 19882, at *3-4 (J.P.M.L. Feb. 5, 2020).

[16] *See also In re Title Ins. Real Estate Settlement Procedures Act (RESPA) & Antitrust Litig.*, 560 F. Supp. 2d 1374, 1375 (J.P.M.L. 2008) (denying centralization of 25 actions due to variances in state law).

Here, as discussed above (*see* § IV.A, *supra*), there is little reason to expect centralization would eliminate duplicative discovery, prevent inconsistent rulings, or conserve resources. Rather, fusing together the disparate Prioritization Cases, Application Cases, Exclusion Cases, Backdating Case, and Agent Fee Case would create complexity, delay, and needless repetition in proceedings better resolved in their home courts. Centralizing a cast of differently situated plaintiffs alleging distinct facts and an array of federal and state claims against various combinations of defendants, with materially different class definitions and remedies, places upon the coordinating judge the burden of making case-by-case determinations of individualized defenses and coordinating discovery of cases driven by their own facts and with little common ground.

Moreover, early dispositive motion practice likely will eliminate any perceived multidistrict character of the litigation. At the outset, many plaintiffs in the Identified Actions have already secured PPP approval and funding, either in the first or second round, and have failed to amend to reflect this change in status in their pleadings. Others never applied and are merely speculating they would have received PPP loans had they done so, even as the second round of funding remains open. Given these circumstances, there is a high likelihood that many of the Identified Actions can be addressed through dismissal on grounds of standing, mootness, or ripeness, depending on the individual circumstances of each case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that a plaintiff lacks standing if it cannot demonstrate a concrete and particularized injury-in-fact); *Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016) (holding that "[s]peculative or conjectural assertions are not sufficient" to establish standing); *Coons v. Lew*, 762 F.3d 891, 898 (9th Cir. 2014) (holding that speculative allegations of future injury do not satisfy the constitutional requirement of ripeness).

This Panel has long recognized that it should not centralize cases when, as here, dispositive motion practice offers a reasonable prospect to weed out claims and reduce the number of plaintiffs and cases. *See In re ATM Interchange Fee Antitrust Litig.*, 350 F. Supp. 2d 1361, 1362-63 (J.P.M.L. 2004) (recognizing that transfer should be denied where pending rulings or motions may moot the multidistrict proceedings); *In re The Boeing Company Employment Practices Litig.*, 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (denying transfer motion when Panel believed that a summary judgment motion "may be filed shortly").[17] Transfer is likely only to slow this process as the transferee court is confronted with separate dispositive motions involving different facts and issues for each Identified Action. This is an instance in which, "motions to dismiss or remand, raising issues unique to the particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer." *Manual for Complex Litigation (Fourth)* § 20.131 (2004).

Additionally, where there are "a relatively small number of actions" and procedural solutions short of centralization under Section 1407 offer a "reasonable prospect" to "eliminate the multidistrict character" of the litigation, the Panel should allow these other avenues to be exhausted before invoking the "last solution" of centralization under Section 1407. *In re First Am. Fin. Corp. Customer Data Sec. Breach Litig.*, 396 F. Supp. 3d 1372, 1373 (J.P.M.L. 2019). Here, even in the very unlikely event that every Identified Action survives dismissal, the cases can readily be managed on an individual case basis through procedural avenues short of centralization. "[I]nformal coordination and cooperative efforts by the parties and involved courts should be sufficient to minimize or eliminate duplicative discovery and other pretrial proceedings." *In re 3M Co. Lava Ultimate Prods. Liab. Litig.*, 222 F. Supp. 3d 1347, 1348 (J.P.M.L. 2016). To the extent

[17] *See also In re Adelphia Commn's Corp. Sec. & Derivative Litig.*, 237 F. Supp. 2d 1381, 1382 (J.P.M.L. 2002); *In re Am. Home Prods. Corp. "Released Value" Claims Litig.*, 448 F. Supp. 276, 278 (J.P.M.L. 1978); *In re Lite Beer Trademark Litig.*, 437 F. Supp. 754, 755 (J.P.M.L. 1977); *In re United States Navy Variable Reenlistment Bonus Litig.*, 407 F. Supp. 1405, 1407 (J.P.M.L. 1975).

any common fact questions arise along with the myriad individual fact questions, Chase is open to exploring all reasonable alternatives to address such questions. Informal coordination among counsel and coordination among the involved courts is practicable, particularly at this early stage. With one law firm representing Chase in every Identified Action, notices of deposition could be filed in all related actions, and the parties could stipulate that any discovery relevant to more than one action could be used in all actions, or the involved courts could direct the parties to coordinate their pretrial activities. *See In re Crest Sensitivity Treatment and Prot. Toothpaste Mktg. & Sales Practices Litig.*, 867 F. Supp. 2d 1348 (J.P.M.L. 2012). Such alternatives may minimize the potential for duplicative discovery or inconsistent pretrial rulings. *See, e.g.*, *In re Yellow Brass Plumbing Component Prods. Liab. Litig.*, 844 F. Supp. 2d 1377, 1379 (J.P.M.L. 2012); *see also Manual for Complex Litigation (Fourth)* § 20.14 (2004).

Better and simpler formal coordination options also exist, should they be required. Several of the Identified Actions are in the same district and thus may be assigned if appropriate to the same judge as related cases. *See, e.g.,* C.D. Cal. L.R. 83-1. If supported by the convenience of the parties and witnesses and the interests of justice, cases also can also be transferred under 28 U.S.C. § 1404. And, of course, all the Identified Actions are putative class actions, meaning Federal Rule of Civil Procedure 23 provides an appropriate procedural framework to address the alleged interests of unnamed putative class members, though Chase denies any such interests are implicated here. Any duplication across actions can further be addressed by staying or transferring later-filed actions under the first-filed rule. *See Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005) (collecting cases) ("Where two actions involving overlapping issues and

parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule.").[18]

D. Alternatively, if the Panel Elects to Transfer, Either the District of Colorado or the Northern District of Texas Would be an Appropriate Venue.

Though Chase opposes consolidation, should this Panel elect to consolidate the Identified Actions, Chase contends that either the District of Colorado or the Northern District of Texas would be more appropriate venues given geographic and other relevant considerations.

In determining where to transfer consolidated actions, this Panel considers: (1) the geographical centrality and convenience of the district; (2) the likelihood of additional actions being filed in the district; (3) the docket of the proposed transferee court; (4) the location of the parties and witnesses; and (5) the preference of the parties. *See., e.g.*, *In re Nat'l Hockey League Players' Concussion Injury Litig.*, 49 F. Supp. 3d 1350, 1350 (J.P.M.L. 2014); *In re Upjohn Co. Antibiotic "Cleocin" Prods. Liab. Litig.*, 450 F. Supp. 1168, 1169-71 (J.P.M.L. 1978).

The Identified Actions are spread across the country, with two in the Southern District of New York, one in the District of New Jersey, two in the Northern District of Illinois, two in the Northern District of Texas, one in the District of Colorado, three (excluding the Agent Fee Case) in the Central District of California, and one in the Southern District of California. Plaintiffs are from all of those States as well as Florida. Chase is headquartered in Ohio. The geographic diversity of the parties, witnesses, and cases thus favors a geographically central location.

[18] The Panel has held that "centralization under Section 1407 should be the last solution after considered review of all other options," including transfer pursuant to Section 1404 and the first-to-file rule. *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d at 1378; *see In re SLB Enter. Rico Litig.*, 412 F. Supp. 3d 1350, 1352 (J.P.M.L. 2019) (identifying stay of litigation under "the first-to-file rule" as alternative to MDL consolidation); *In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Mktg. & Sales Practices Litig.*, 190 F. Supp. 3d 1349, 1351 (J.P.M.L. 2016) (recognizing that "[c]entralization is not needed to further the just and efficient conduct of these few, relatively uncomplicated cases" and noting that "the parties may wish to consider seeking a stay, dismissal or transfer of the later-filed cases under the 'first-to-file rule' to streamline this litigation").

The ongoing COVID-19 pandemic and its impact on public health and business operations is also a relevant consideration for the Panel. Of all the States with districts assigned Identified Actions, Colorado and Texas have been least impacted by COVID-19 in total and per capita numbers of cases and deaths,[19] and Colorado and Texas are further along in their reopening process than California, Illinois, New Jersey, and New York, with both having begun transitioning earlier from "stay at home" models to limited reopening models.[20] As a result, amenities like hotels, restaurants, and for-hire transportation will be available sooner than they will be in the other States, where more stringent regulations remain in place or are only now being gradually eased.[21]

Transferee dockets also favor Colorado or Texas. In the District of Colorado, one Identified Action is pending before Chief Judge Philip Brimmer.[22] Chief Judge Brimmer has been on the bench for more than a decade and has extensive experience handling complex litigation. Denver provides a central location with an international airport and ample hotel space near the federal courthouse. The District of Colorado does not currently have any MDLs assigned. Alternatively, two Identified Actions are pending before Judge Brantley Starr in the Northern District of Texas. Only four MDLs are pending in the Northern District of Texas, none of which is before Judge Starr, with a full complement of twelve active and five senior status judges available and no vacancies. Dallas provides a central location for these cases, and Chase has a large campus in

[19] *See* Coronavirus Dashboard, https://www.worldometers.info/coronavirus/country/us/ (last visited May 27, 2020).

[20] *See* Colorado Dept. of Public Health & Environment, Fourth Amended Public Health Order 20-28, available at https://drive.google.com/file/d/1ieLfhoFx6RU_7tkGElC2QA_88VSfFYHj/view (last visited May 27, 2020); Texas Dept. of State Health Services, Opening the State of Texas, available at https://www.dshs.state.tx.us/coronavirus/opentexas.aspx (last visited May 19, 2020).

[21] *See, e.g.,* California Dept. of Public Health, COVID-19, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Guidance.aspx (last visited May 27, 2020).

[22] While Chase's main office is in Columbus, Ohio, none of the Identified Actions is pending there, and the Southern District of Ohio is an ill-suited venue for this MDL. With only four active judges in the Columbus Division, the Southern District of Ohio has two MDLs currently assigned (MDL Nos. 2433 and 2846), as well as the fifth highest ratio of actions per judgeship in the country.

nearby Plano. Dallas is a major metropolitan area with two international airports and plentiful hotel lodging near the federal courthouse.

Of the two California districts assigned Identified Actions, the Cyber Movant's proposal for transfer to Judge Birotte of the Central District of California is especially ill-conceived. The Central District of California has a busy docket with ten current vacancies and 101.9 vacant judgeship months.[23] It averages 564 civil cases per judgeship, more than twice as many as even the Southern District of California.[24] Moreover, Judge Birotte already has a large MDL currently assigned that is comprised of more than 900 cases, some of which are in the settlement process. *See In re Ford Motor Co. DPS6 PowerShift Transmission Prod. Liab. Litig.*, MDL No. 2814.

V. CONCLUSION

For the foregoing reasons, Defendant JPMorgan Chase Bank, N.A. respectfully requests that this Panel (1) deny both pending Motions; or (2) alternatively, if the Panel concludes that consolidation is warranted, transfer Chase requests transfer of these cases to the District of Colorado or the Northern District of Texas.

Respectfully submitted,

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[23] *See* U.S. Courts, Judicial Vacancies, available at https://www.uscourts.gov/judges-judgeships/judicial-vacancies (last visited May 27, 2020).
[24] U.S. Courts, U.S. District Courts, Combined Civil and Criminal Federal Court Management Statistics (Dec. 31, 2019), available at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2019.pdf (last visited May 27, 2020).