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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN VIDEO DUPLICATING, INC., a California corporation; TUSH LAW LTD., a California limited partnership, and KENNETH M. HAHN, a sole proprietor, DBA CAL STATE FINANCIAL, individually and on behalf of a class of similarly situated businesses and individuals,

Plaintiffs,

vs.

Case No.: 2:20-cv-03815-ODW-AGR

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: October 19, 2020
Time: 1:30 pm PT
Judge: Hon. Otis D. Wright II
Courtroom: 5D

CITIGROUP INC.; CITIBANK, N.A.; U.S. BANCORP; U.S. BANK, N.A.; JPMORGAN CHASE & CO.; JPMORGAN CHASE BANK, N.A.; WELLS FARGO & CO.; WELLS FARGO BANK, N.A.; BANK OF AMERICA CO.; BANK OF AMERICA N.A.; MUFG BANK LTD.; MUFG UNION BANK N.A.; LIVE OAK BANCSHARES INC.; LIVE OAK BANKING COMPANY; NEWTEK BUSINESS SERVICES, INC.; HARVEST SMALL BUSINESS FINANCE; and DOE LENDERS 1 to 4,975, inclusive,

Defendants.

Plaintiffs, by and through their attorneys of record, hereby file their opposition to Defendants U.S. Bank National Association, JPMorgan Chase Bank, N.A., Wells Fargo Bank, N.A., Bank of America, N.A., Live Oak Banking Company, and Harvest Small Business Finance's (collectively, "Defendants") motion to dismiss. Plaintiffs' opposition is based upon the attached memorandum of points and authorities, as well as any evidence or argument presented at any hearing on this matter.

Respectfully submitted,

DATED: October 12, 2020

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I. INTRODUCTION

Defendants U.S. Bank National Association, JPMorgan Chase Bank, N.A., Wells Fargo Bank, N.A., Bank of America, N.A., Live Oak Banking Company, and Harvest Small Business Finance's (collectively, "Defendants") motion to dismiss the First Amended Complaint ("FAC") (Dkt. 117) is based on a fundamental misapprehension of the Paycheck Protection Program ("PPP") statutory scheme (including what laws, regulations, and procedures apply). Starting with the Background of "The CARES Act and PPP" section (Br. at 2), Defendants' misunderstanding of the PPP infects the entirety of its brief. This culminates in asking this Court to impose pleading requirements concerning the PPP and the resulting causes of action that simply do not exist.

II. BACKGROUND OF THE PPP PROGRAM

As described throughout the FAC, the PPP was a brand-new federal assistance program established by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), P.L. 116-136, designed to provide a rapid infusion of cash to small and medium-sized businesses to survive during the COVID-19 pandemic. Under the CARES Act, the Administrator of the Small Business Administration (the "Administrator" or "SBA") has the authority to "modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency." *Id.* at 3. Section 1102 of the CARES Act amended the Small Business Act, 15 U.S.C. § 636, and established the $349 billion PPP, under which participating Lenders are authorized to make loans to eligible small businesses. *See* P.L. No. 11-136, § 1102(a)(2).

Given the Federal Government's directive to distribute the PPP loans quickly, it elected to graft the PPP program onto the existing SBA 7(a) loan statute, but with fundamental differences, including a streamlined structure and a PPP specific set of rules and regulations for the three primary participants in the program - the Lender, the Borrower, and the Agent. To implement the PPP, the Treasury Department published the

PPP Information Sheet for Lenders[1], which is consistent with the SBA PPP Final Rule (collectively, the "SBA Regulations")[2].

Defendants are wrong when they argue that the PPP is merely a traditional Section 7(a) loan program and that all of that program's rules apply and must be pled here. Defendants' motion relies entirely on a set of 7(a) regulations that have been explicitly superseded by the SBA Regulations. (Br. at 12) The form Defendants assert is mandatory (the "Form 159"), actually conflicts with the SBA Regulations. *Id.* Conclusively, the SBA has ordered that "the program requirements of the PPP . . . temporarily supersede any conflicting" requirement of traditional 7(a) loans, which includes the Form 159 requirement. 85 Fed. Reg. 20811, 20816. Even the new SBA's Standard Operating Procedure 50 10 6, Part 2, Section B, page 224, effective October 1, 2020, states, "Because Paycheck Protection Program (PPP) 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**" (emphasis added).[3]

Plaintiffs provide a side by side comparison of the traditional 7(a) program requirements and the new PPP in the attached Appendix A. This comparison highlights Defendants' misunderstanding. For instance: (a) traditional 7(a) does not allow the SBA to compensate Lenders (or Agents) for originating SBA loans, while the PPP mandates a lender fee (the "Lender Fee"); (b) traditional 7(a) requires the lender to pay the SBA a guarantee fee, while the PPP does not; (c) traditional 7(a) does not allow Agents to receive a contingent fee, while all Agent fees under the PPP are contingent upon the loan being approved by the SBA and funded by the Lender; (d) traditional 7(a) does not require that

[1] Declaration of Nitoj P. Singh, Ex. 1 (PPP Information Sheet for Lenders). Any exhibit referenced herein will be attached to the Declaration of Nitoj P. Singh, and is subject to judicial notice as set forth in the accompanying Request for Judicial Notice.

[2] Ex. 2 (SBA PPP Final Rule).

[3] https://www.sba.gov/document/sop-50-10-lender-development-company-loan-programs-0.

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Lenders pay Agents out of the fees the Lender receives (because there are none), while the PPP mandates, "*Agent fees will be paid by the lender out of the fees the lender receives from SBA*"[4]; (e) traditional 7(a) requires that an SBA Form 159 ("Form 159") be used, while the PPP supersedes this requirement, disallows the use of this form, and sets up a mandatory fee schedule which "[t]he [SBA], in consultation with the Secretary, determined … are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans"[5]; and (f) Agents and Lenders, are narrowly defined under traditional 7(a), while the PPP expands the definition of both. *See* App. A, at R1-R15.

Using a mislaid foundation about how the PPP works, Defendants argue that Agents are not entitled to compensation for their role in helping Borrowers. What Defendants fail to tell the Court is that there are Lender Agents contracted for in writing between the Lenders and the Lenders Agents, and that there are Borrower Agents, which Borrowers "employ" per the SBA Regulations. The Lenders have no right to approve or disapprove of the Borrowers' Agents. All the Lender is required to do is to pay the Borrowers' Agents the reasonable Agent Fees they have earned for assisting the Borrowers in preparing their PPP loan applications.

However, Defendants' tortured reading of the PPP ignores clear language that mandates that Agent fees be paid out of the Lender Fees and sets the statutory amount of such payment as reasonable. Defendants interpret the SBA Regulations to read, if the Lender elects to recognize the participation of an Agent retained by the Borrower, and if the Lender elects to pay that Borrower's Agent a fee, then that fee, if any, will be paid at an amount the Lender decides between $0 and the statutorily defined reasonable fee. However, this interpretation is not how the PPP works.

The applicable SBA Regulations expressly provide that Lenders and Agents be compensated from the fees the SBA entrusted to the Lenders for processing the PPP loans.

[4] 85 FR 20811, 20816 (4)(c) (italics added).

[5] 85 FR 20811, 20816 (4)(c).

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"**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"[6] (the "Agent Fees").

The SBA Regulations are clear: the Agents cannot be paid by the Borrower, but instead *must* receive their required statutory fee from the Lender itself, to be paid from the Lender Fees. Once the PPP program is understood in its correct context, it becomes clear that Defendants' motion should be denied, as further discussed below.

III. ARGUMENT

As outlined below, the FAC is not subject to dismissal under Fed. R. Civ. P. 8(a)(2) or 12(b)(6) for three (3) reasons.[7] ***First***, as alleged, Plaintiffs have standing to sue Defendants, and their claims are ripe for adjudication. ***Second***, Plaintiffs' claims for: (a) declaratory relief; (b) violation of the State's Unfair Competition Law ("UCL"); and (c) unjust enrichment, are properly pled to withstand a motion to dismiss. And ***third***, the PPP Loans do not allow Lenders to veto a Borrower's choice of agent. Additionally, Plaintiffs address two newly raised arguments previously not addressed in Citibank, N.A.'s ("Citi") Motion to Dismiss ("Citi Mot.") (Dkt. 83).

In support of their position that Plaintiffs' fail to state a claim for relief, Defendants attempt to conflate provisions of the law that apply only to a Lender's Agent with those that apply to a Borrower's Agent. But under the PPP (as well as the traditional 7(a) loan

[6] 85 FR 20811, 20816 (4)(c) (emphasis added).

[7] The Department of Justice, Civil Division, is closely monitoring banks' conduct in denying Agent Fees under the PPP. On May 27, 2020, United Community Banks, Inc. ("UCB") received a civil investigative demand from DOJ pursuant to the False Claims Act concerning its "non-payment of fees to agents of borrowers" under the PPP. *See*, UCB Form 8-K (last visited Oct. 2, 2020), https://ir.ucbi.com/static-files/c7f8eaa8-d6bf-48e8-8ebc-a60c0bf3adea.

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program), there is, "Employment of Agent Initiated by Applicant" and "Employment of Agent by Lender."[8] In other words, there are Lenders' Agents that are employed by the Lender, and there are Borrowers' Agents that are employed by the Borrower. Each are identified separately by the SBA and each have separate governing requirements. See App. A, R15. It is clear that the provisions as applied to the *Lenders' Agent* require a "written agreement" for the SBA to review. 13 C.F.R. § 103.1(c); *see also* SBA SOP, ch. 3, IX(A)(1)(b). However, such a requirement does not exist for *Borrowers' Agents*, such as Plaintiffs. It is also clear that unlike the traditional 7(a) loan, when it comes to paying the Lenders' or Borrowers' Agents, the "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."[9]

Defendants raised the new argument asking this Court to follow the holdings in *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc., et al.* *See* Br. at pp. 1-2, 23, 3:20cv5425-TKW-HTC, 2020 WL 4882416 (N.D. Fla. Aug. 17, 2020), and the Opinion and Order ("Order") entered on September 21, 2020, in the cases numbered 20-cv-4100, 20-cv-4144, 20-cv-4145, 20-cv-4146, 20-cv-4858, and 20-cv-5311 in the U.S. District Court for the Southern District of New York (the "Consolidated Cases"). Plaintiffs urge this Court not apply *Sport & Wheat* or the opinion in the Consolidated Cases because both holdings were erroneously reached—neither of them gave the SBA Regulations deference under *Chevron* and neither properly analyzed the text of those regulations.

A. PLAINTIFFS HAVE STANDING TO SUE DEFENDANTS AND THEIR CLAIMS ARE RIPE FOR ADJUDICATION.

As to standing, Defendants' Motion to Dismiss directly tracks co-Defendant Citi's Motion to Dismiss. For purposes of brevity, Plaintiffs incorporate by reference their Opposition to Citi's Motion to Dismiss ("Plf.'s 1st Opp.") as if fully set forth herein.

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

[9] 85 FR 20811, 20816 (4)(c).

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Plaintiffs' argument as to why Plaintiffs have standing to sue Defendants and why its claims are ripe is articulated in Section II, Argument, subsection (A)-(B). *See*, Plf.'s 1st Opp. at 4-10.

B. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO DISMISSAL UNDER RULE 12(B)(1) OR RULE 12(B)(6).

Defendants erroneously argue the FAC "never alleges that Plaintiffs specifically assisted any borrowers who received PPP loans from Defendants." Br. at 1. Such argument is objectively false and fails to set forth the appropriate pleading standard. "A Complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 662 (2009). "Detailed factual allegations are not required." *Id.*; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs FAC alleges, "Plaintiffs, knowing that the COVID-19 crisis would significantly impact their clients' businesses, **assisted their clients with obtaining PPP loans through specific Defendants**." *Id.* at 45. Such allegation must be "taken as true" *Twombly*, 550 U.S. at 555, and a reasonable reading of this clearly indicates Plaintiffs alleged they assisted borrowed in obtaining loans from Defendants. Even assuming, *arguendo,* the court disagrees, such defect is easily cured by amendment or through initial disclosures; both of which are courses of action Plaintiffs are happy take should the court so desire.

Defendants also allege Plaintiffs' claims should be dismissed because "Plaintiffs cannot identify a single section, sentence, or even a single word in the CARES Act or any other statute that supports their alleged entitlement to agent fees" and that "Plaintiffs rely solely on a misreading of a single line in the section of the SBA's IFR (and the same language in Treasury's Information Sheet) setting out limits on agent fees that can be paid in connection with PPP loans: that '[a]gent fees will be paid by the lender out of the fees the lender receives from SBA.' 85 Fed. Reg. at 20816." Br. at 5. Such an argument is misguided, and Plaintiff respectfully directs this Court to Plf.'s 1st Opp., Section II, Argument Subsection (B). Plf.'s 1st Opp. at 10-24 (citing Plaintiffs' FAC complies with

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Rule 8(a), *see* subsection (B)(1) at 10-11; Plaintiffs adequately allege the facts giving rise to [Defendants'] liability, *see* subsection (B)(1)(a) at 11; Plaintiffs are entitled to Agent Fees under the PPP, *see* subsection (B)(1)(b); the PPP statute and SBA Regulations make the payment of Agent Fees mandatory, *see* subsection (B)(1)(b)(i); the SBA Regulations supersede the standard 7(a) loan requirements upon which Defendants pin their Motion, *see* subsection (B)(1)(b)(ii); and each of Plaintiff's claims are properly pled, *see* subsection (B)(2)(a)–(c).)

1. THE PPP LOANS DO NOT ALLOW LENDERS TO VETO A BORROWER'S CHOICE OF AGENT.

Unlike a traditional 7(a) loan, the PPP prohibits Agents from collecting any fee from the Borrower. See App. A, at R8. This means that the only way that Agents can be compensated for their work is through that portion of the processing fees explicitly set aside for Agents. Defendants, however, want to keep all of the processing fees for themselves, including that portion belonging to the Agents. To accomplish this, Defendants employ a clever tactic; they conflate provisions of the law that apply only to a Lender's Agent with those that apply to a Borrower's Agent. But under the PPP (as well as the traditional 7(a) loan program), there are Lender Agents and Borrower Agents – they are two separate things with separate governing requirements. See App. A, R15.

The Borrower Agent works for the Borrower. As detailed in the 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…"[10] As for the, "compensation is reasonable and customary for those services", as stated above, the SBA and Secretary Mnuchin determined that the Agent Fees "are reasonable based upon the application requirements and the fees that lenders receive for making PPP

[10] Ex. 3, SBA SOP, Subpart B, Ch. 3, IX(D) (emphasis added).

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loans."[11]

The Lender Agent, on the other hand, is "[s]omeone who assists a lender with originating, disbursing, servicing, liquidating, or litigating SBA loans[.]" *See*, SBA Regulations, at pp. 1-2; *see also* 13 C.F.R. § 103.1(a) (also providing for "Lender Service Providers" defined as "an Agent who assists the Lender with originating, disbursing, servicing, liquidating, or litigating SBA loans"). The Lender has full control over that relationship—it "bears full responsibility" for it. *Id*. For Lender Agents, there must be a "written agreement" for the SBA to review. 13 C.F.R. § 103.1(c); see also SBA SOP Ch. 3, IX(A)(1)(b). In fact, "lenders have reasonable discretion in setting compensation for Lender Service Providers" (13 C.F.R. § 103.1(c)). These provisions only apply to Lender Service Providers— a/k/a the Lenders' agents. None of this is true for the Borrowers' Agent. Lenders have neither control over a Borrowers' decision to employ its own Agent nor authority to override or reduce that Agent's fee since the SBA Regulations state that the Agent Fees "are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans."[12]

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."[13]

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' choice of Agent.

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[11] 85 FR 20811, 20816 (4)(c).

[12] 85 FR 20811, 20816 (4)(c).

[13] Ex. 3, SBA SOP, Subpart B, Ch. 3, IX(D) (emphasis added).

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Similarly, per the SBA SOP, Borrowers are free to choose their own Agent, and the Lender has no right to approve or disapprove the Borrowers' Agent.

The Defendants' asserted authority to choose an agent relates to Lenders' Agents, not Borrowers' Agents. Br. at pp. 1, 4, 9, 11, and 14. For example, Defendants argue that "[a] person is not required to deal with another unless he so desires" and further object that "one has no duty to pay for services officiously rendered without request although resulting in benefit to him." Br. at pp. 10-11. This may make sense when discussing Defendants' own voluntary agent relationship with a "Lender Service Provider," but makes absolutely no sense and is illogical in the context of the Borrowers' Agent relationship. *See generally*, 85 Fed. Reg. 20811, 20816 (4)(c). The SBA Regulations and the SBA SOP make clear that the Borrower can choose their own agent, the Lender has no right to approve or disapprove the agent, and that the "Agent fees will be paid by the lender out of the fees the lender receives from SBA."[14]

Defendants cite a statement made by Secretary of the Treasury Steven Mnuchin in response to a "planted" question that did not state whether it pertained to a Lender's Agent or a Borrower's Agent. See Br. at pp. 6-7, fn. 7 (citing https://www.congress.gov/event/116th-congress/house-event/110839, at 1:32:00 to 1:33:48). Secretary Mnuchin's impromptu answer clearly addressed only the Lenders Agents' Fees, which Plaintiff agrees that the Lender has "discretion" on, and that the Lender must have a "written agreement" with the Lenders' Agent. 13 C.F.R. § 103.1(c). It is equally clear that the statement could not apply to a Borrowers' Agent since the regulations state: (i) the Lender "will pay" the Applicant's Agent out of the Lender processing fees, (ii) the Lender has no discretion to reduce fees, and (iii) the lender has no discretion to approve or disapprove of the Borrowers' Agents.

Notably, Secretary Mnuchin's off-the-cuff answer is not law, and although he indicated he would issue an FAQ if there was any "confusion" about Agent Fees, **the only additional FAQ related to the payment of Agent Fees issued after Secretary**

[14] 85 FR 20811, 20816 (4)(c).

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Mnuchin's testimony supports Plaintiff's position that the Lenders are required to pay Agent Fees. On August 11, 2020, in response to the question, "What effect does the payment or nonpayment of fees of an agent or other third party have on SBA's guarantee of a PPP loan or SBA's payment of fees to lenders," the SBA answered in the FAQ, "The payment or nonpayment of fees of an agent or other third party is not material to SBA's guarantee of a PPP loan or to SBA's payment of fees to lenders. Additional information about such fees can be found in paragraph III.4.c of the initial Paycheck Protection Program interim final rule."[15] The SBA is making it clear, the Lender paying Agent Fees does not affect the SBA guarantee of the PPP loan, and "paragraph III.4.c", referred to in the FAQ answer, is the lynchpin of Plaintiffs' arguments; "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."[16] Why else would the SBA on August 11, 2020, once again clarify that the, "*Agent fees will be paid by the lender out of the fees the lender receives from SBA*," except to clarify the Lenders' "misunderstanding" as to their statutory obligation to pay the Borrowers Agents' Fees.

The Defendants lament that "Plaintiffs' contention about the IFR not only is contrary to the SBA's existing regime, it also would lead to a system that is ripe for fraud and abuse. According to Plaintiffs, agents could demand compensation at the regulatory maximums, and lenders would have no opportunity to negotiate a reasonable rate for such services, assess the value of such services, or ensure that such services were in fact adequately performed (or performed at all)." Br. at pp. 15. While Lenders can certainly choose who they want as their Agents, see, *supra*, they have no say over who the Borrower uses. The truth of the matter is that the Defendants' hypothetical "fraud" problem is self-inflicted.

Assuming, *arguendo*, that Form 159 is required for PPP loans, then, as stated in the

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[15] Ex. 4, October 7, 2020, Paycheck Protection Program Loans – Frequently Asked Questions (FAQs).

[16] 85 FR 20811, 20816 (4)(c).

SBA SOP, it was the responsibility of the Lender to obtain the 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] Instead, each of the Defendants: (1) specifically designed their loan process to avoid learning the fact or identity of any agents being used; and (2) failed to explain to, and provide the Borrowers with, Form 159, which the Lenders now claim is required.

The SBA SOP is clear that the Lenders' role in reviewing the payment of Agents' Fees is to report alleged fraud to the SBA and that the SBA shall perform the investigation to determine if there is fraud. The only time "Lenders must review the Agent's services and related fees to determine if the fees are necessary and reasonable [is] when: a. There is an indication from a third party that an Agent's fees might be excessive; or b. When an Applicant complains about the fees charged by an Agent. 2. In cases where fees appear to be unreasonable, Lenders should contact the D/OCRM to report the fees. 3. If an SBA investigation determines an Agent fee is excessive, the Agent must reduce the fee to an amount SBA deems reasonable..." However, with the PPP loans, the SBA has already determined that the Agent Fees are reasonable, alleviating the reporting requirement.[18]

The Defendants now apparently regret their decision to be willfully blind, complaining that "any agent can demand fees from a PPP lender at the maximum rate allowed simply by claiming to have assisted a borrower with its loan application and regardless of whether the lender ever agreed to pay such compensation." Br. at p. 9-10. If the Lenders had permitted Borrowers to disclose their Agents during the application process in the first place, no such hypothetical double-claimants or "fraud" problem would exist. And, it bears noting, Defendants do not point to even a single instance of the type of fraud (or attempted fraud) they assert.

The CARES Act was implemented in record time to channel PPP loan funds into the hands of small business Borrowers as quickly as possible. Therefore, it is illogical that

[17] Ex. 3, SBA SOP, Subpart B, ch. 3, VIII(B)(1).

[18] Ex. 3, SBA SOP, Subpart B, ch. 3, X(C).

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Congress and the Administration changed existing SBA Regulations where only the Borrower approves the Borrower's Agent, forcing the Borrowers to wait for the Lenders to develop a methodology to approve Agents that the Borrowers employed in order to quickly submit their PPP application before the funds ran out.[19] Congress (and the SBA to whom it granted regulatory authority) intended the Borrowers to work with their trusted advisors as the Borrowers' Agents. The duly issued governing regulations set forth the specific requirements for those Agents to receive payments. If Congress or the SBA intended Agents to be pre-approved or for their fees to be discretionary to Defendants, they would have written that language directly into the text. Instead, they chose language that specifically sets forth the regime under which Borrowers' Agents are to be paid.

The SBA Regulations' make it clear that Agents have a right to be paid for their work. Importantly, the text states, "Agent fees will be paid by the lender out of the fees[.]"[20] Indeed, the language does not say that the "Lender may pay the Agent", which the SBA could have undoubtedly written, and that would have supported the Defendants' position. But as it is written, the language used gives the Agents the right to obtain the Agent Fees from the Lenders. Importantly, the text states that the "[a]gent may collect from the lender[.]"[21] This grants the Agent the right to collect the Agent Fees, which it may or may not do, **at the Agent's discretion**. If the Agent attempts to collect the Agent Fee, then the "Agent fees will be paid by the lender out of the fees[.]"[22] The meaning of the text is clear.

The Defendants make much about the fact that the CARES Act says that the SBA "shall reimburse" the lender for "processing" fees of between 1% and 5% of the PPP loans, while the SBA Regulations say the "Agents may collect from the lender" its fees. Defendants ignore the fact that the "may" language appears after the clear statement,

[19] The initial $349 billion allotment was exhausted after just 14 days.

[20] 85 FR 20811, 20816 (4)(c).

[21] 85 FR 20811, 20816 (4)(c).

[22] 85 FR 20811, 20816 (4)(c).

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"Agent fees will be paid by the lender out of the fees the lender receives from SBA." Under a plain reading, everything following that statement supports, and does not limit, that statement. This is especially so since the "may" statement Defendants highlight pertains to the amount of Agent Fees recoverable (which varies by loan size and is not static) and not the right to collect. For these reasons, the language of the SBA Regulations make it clear that the Defendants must pay the Plaintiff for its work on the relevant PPP loans.

C. District Court Opinions on this Matter are Not Binding on this Court and Should Not Be Considered.

In making their argument that no Agent Fees are due to Plaintiff, Defendants repeatedly rely on the opinions issued in *Sport & Wheat* and the Consolidated Cases; however, neither opinion has precedential value here, and both cases involve different state laws. More importantly, the *Sport & Wheat* and Consolidated Courts did not even consider *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and its application to the facts of this matter – in fact, *Chevron* deference was not even mentioned. Instead, the Opinion focused exclusively on the language of the CARES Act itself, ignoring the interpretive regulations, which was in plain error because the CARES Act specifically gives the SBA the right of interpretation. This error, among other things, calls into question the results in *Sport & Wheat* and the Consolidated Cases and warrants an independent review by this Court.

1. *Sport & Wheat* and the Consolidated Cases do not bind this Court.

Defendants have asked this Court to rely on the holdings of two related cases issued in other jurisdictions: *Sport & Wheat* and the Consolidated Cases. Br. at 1, 12, 16-17. However, another district court decision "is not binding precedent for this Court. It is to be considered only for its wisdom, or lack of wisdom," *DSU Med. Corp. v. JMS Co., Ltd.*, 296 F. Supp. 2d 1140, 1150 (N.D. Cal. 2003), and "a decision by another federal district

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court judge is entitled to as much deference as its persuasive value may warrant." *City of Fresno v. United States*, 709 F. Supp. 2d 888, 909 (E.D. Cal. 2010) (holding "District court opinions are relevant for their persuasive authority, but they do not bind other district courts within the same district."). This Court is not bound by District Court opinions within this jurisdiction, let alone District Courts outside this jurisdiction.

Both the *Sport & Wheat* and the Consolidated Cases' Courts failed to consider *Chevron* in dismissing both actions. Such failure constitutes reversible error as Chevron deference requires this Court to defer to the SBA's Interpretation of the CARES Act. As such, Plaintiffs urge this Court to allow their attorneys a chance to argue their case and that the Court exercise its own independent judgment by declining to follow the holdings of *Sport & Wheat* and the Consolidated Cases in ruling on this Motion.

2. *Chevron* deference requires the SBA's interpretation of the CARES Act to receive judicial deference.

Failure to consider *Chevron* is outcome determinative and constitutes a reversible error of law. "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1272 (9th Cir. 2015) (holding that *Chevron's* reasonableness standard applies to a "regulation duly promulgated after a notice-and-comment period").

Consideration of whether an agency interpretation is permissible under Chevron requires an examination of two steps. First, as a threshold matter, the Court must consider "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If so, then the inquiry is over, and we must give effect to the 'unambiguously express intent of Congress.'" *Navarro*, 780 F.3d at 1271 (quoting *Chevron*, 467 U.S. at 842). But if the statute is silent or ambiguous with respect to the specific issue, the Court

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must proceed to the second step and determine whether the agency's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. If the agency's interpretation of the statute "is a reasonable one, this court may not substitute its own construction of the statutory provision," even if the Court believes the provision would best be read differently. *Navarro*, 780 F.3d at 1273 (citation omitted). *Chevron* deference is appropriate here.

i. *Chevron* Step One: The Statute is Ambiguous

Congress has not directly addressed the precise question at issue—this is why both parties are pointing to various SBA Regulations, Forms, and policies to support their argument. The CARES Act is clear that there is a cap on Agent Fees but does not speak to who will pay them, instead deferring to the SBA in its regulatory role on the issue. *See* 15 U.S.C. § 636(a)(36)(P)(ii). It is SBA Regulations that interpret the Agent Fees requiring the Defendants to pay them, by stating, "*Agent fees will be paid by the lender out of the fees the lender receives from SBA.*"[23] It is that interpretation that should be given deference.

ii. *Chevron* Step Two: SBA Deference is Appropriate

It is not subject to reasonable dispute that the SBA is entrusted to administer the portion of the CARES Act that enacts the PPP. "SENSE OF THE SENATE.—It is the sense of the Senate that the Administrator should issue guidance to **lenders and agents** to ensure … the processing and disbursement of covered loans…"[24] The SBA Regulations unambiguously provide that Borrower Agents will be paid, not by the Borrower, but out of the fees received by the Lenders from the Federal Government. The SBA's interpretation of the CARES Act—as expressed in the SBA Regulations—should be given judicial deference. Where the "agency's answer is based on a permissible construction of the statute," and "Congress has not directly addressed the precise question at issue," *Chevron*, 467 U.S. at 842-43, "considerable weight should be accorded to an executive

[23] 85 FR 20811, 20816 (4)(c) (italics added).

[24] CARES Act, P.L. 116-136; 15 U.S.C. § 636(P)(iv).

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department's construction of a statutory scheme it is entrusted to administer[.]" *Id.* at 844. Accordingly, judicial deference is appropriate, and the SBA Regulations as to the CARES Act are clear: The Borrower's Agents are to be paid Agent Fees, not by the Borrower, but out of the fees Defendants received from the federal government.

IV. CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss the FAC. If, however, the Court were to grant Defendants' motion in full or in part, Plaintiffs request leave to amend to file a second amended Complaint[25].

Dated: October 12, 2020.

Respectfully submitted,

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[25] Should dismissal be granted, the Court should permit Plaintiffs to amend their Complaint because of the Ninth Circuit's liberal policy favoring amendment. *See Bain v. Cal. Teachers Ass'n*, 156 F. Supp.3d 1142, 1145-1146 (C.D. Cal. 2015) (*citing DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) and *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

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