MAYER BROWN LLP
BRONWYN F. POLLOCK (SBN 210912)
bpollock@mayerbrown.com
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

MAYER BROWN LLP
LUCIA NALE (Admitted Pro Hac Vice)
lnale@mayerbrown.com
THOMAS V. PANOFF (Admitted Pro Hac Vice)
tpanoff@mayerbrown.com
CHRISTOPHER S. COMSTOCK (Admitted Pro Hac Vice)
ccomstock@mayerbrown.com
ANDREW J. SPADAFORA (Admitted Pro Hac Vice)
aspadafora@mayerbrown.com
71 South Wacker Drive
Chicago, IL 60606-7463
Telephone: (312) 782-0600
Facsimile: (312) 701-7711

Attorneys for Specially Appearing Defendant CITIGROUP, INC. and Defendant CITIBANK, N.A.

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 situation businesses and individuals,

Plaintiffs,

v.

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 N.A.; BANK OF AMERICA CO., BANK OF AMERICA N.A.; MUFG BANK LTD., MUFG UNION BANK N.A.; LIVE OAK BANKSHARES INC., LIVE OAK BANKING COMPANY;

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY SPECIALLY APPEARING DEFENDANT CITIGROUP INC. AND DEFENDANT CITIBANK, N.A. [Fed. R. Civ. P. 12(b)(1), 12(b)(6), & 12(b)(2)]

Date: June 22, 2020
Time: 1:30
Judge: Hon. Otis D. Wright II
Court: Courtroom 5D
First Street Courthouse
350 W. 1st Street
Los Angeles, CA 90012

Complaint Filed: April 27, 2020

PAYPAL HOLDINGS, INC.; NEWTEK BUSINESS SERVICES, INC.; HAVEST SMALL BUSINESS FINANCE; and; DOE LENDERS 1 to 4,975, inclusive,

Defendants.

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I. INTRODUCTION

Specially appearing Defendant Citigroup Inc. ("Citigroup")[1] and Defendant Citibank, N.A. ("Citibank," and together, the "Citi Defendants") respectfully submit this Memorandum of Points and Authorities in Support of their Motion to Dismiss the claims against them in Plaintiffs' Complaint (Dkt. # 1). As shown below, Plaintiffs' Complaint fails on multiple grounds and should be dismissed as a matter of law in its entirety. The Complaint alleges no plausible basis for even naming the Citi Defendants in this case, and neither is alleged to have had any dealings whatsoever with Plaintiffs or their alleged businesses. Plaintiffs' shotgun pleading effort to drag the Citi Defendants into this matter should be rejected.

Plaintiffs have filed this lawsuit against over a dozen named financial institutions, as well as 4,975 unnamed "Doe" Defendants.[2] This lawsuit is just one in series of nearly identical copy-cat lawsuits around the country filed by the same Plaintiffs' counsel.[3] Plaintiffs' claims relate to the Paycheck Protection Program ("PPP"), a small business lending program that was established by the recently passed Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L.

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[1] Defendant Citigroup Inc. enters a special appearance to challenge this Court's jurisdiction over it. Citigroup Inc. is not an entity that processes loans under the CARES Act. Instead, Citigroup Inc. is a financial holding company under section 4(k) and (1) of the Bank Holding Company Act of 1956. Plaintiffs have not alleged any facts whatsoever as to why Citigroup Inc., the financial holding company, is a proper Defendant or subject to any order here.

[2] Plaintiffs' Complaint violates C.D. Cal. Local Rule 19-1, which limits complaints to including no more than ten (10) Doe or fictitiously named parties.

[3] *See, e.g.*, *A.D. Sims, LLC v. Wintrust Fin. Corp., et al.*, No. 20-cv-02644 (N.D. Ill. filed Apr. 30, 2020); *David S. Lowry, CPA, Ltd. v. U.S. BANCORP, et al.*, No. 20-cv-00348 (S.D. Ohio filed Apr. 30, 2020); *Am. Video Duplicating, Inc. v. Royal Bank of Canada, et al.*, No. 20-cv-04036-JFW-JPR (C.D. Cal. filed May 1, 2020); *Panda Group, P.C. v. Bank of Am., et al.* No. 4:20-cv-00045 (D. Utah filed May 11, 2020); *Alliant CPA Group, LLC v. Bank of Am., et al.*, No. 1:20-cv-02026 (N.D. Ga. filed May 11, 2020); *ImpAcct LLC v. JPMorgan Chase Co., et al.*, No. 1:20-cv-01344 (D. Colo. filed May 12, 2020).

116-136. Under the PPP, eligible borrowers can receive loans through lenders that are authorized by the Small Business Administration ("SBA") to make such loans.

Plaintiff American Video Duplicating, Inc. ("AVD") apparently is a video duplicating store. The President of AVD is alleged to be David M. Wohl ("Mr. Wohl"), who is alleged to be a licensed CPA. Compl. ¶ 1. Mr. Wohl and the named Plaintiffs allegedly provided consulting, accounting, legal, and tax services to their clients. Compl. ¶¶ 1-3. Plaintiffs allege that they assisted some of their clients in preparing applications for PPP loans and that they are entitled to certain "agent fees" for that work. *Id.* ¶¶ 41-48. According to Plaintiffs, under the PPP, lenders will receive certain "processing fees" from the SBA after funding the PPP loans, and lenders allegedly must pay agents fees out of the processing fees they receive from the SBA. *Id.* ¶¶ 33-36. Plaintiffs allege that Defendants "funded loans" under the PPP and that Defendants owe Plaintiffs certain agent fees. *Id.* ¶¶ 38-39. Plaintiffs bring claims for: (1) Declaratory Relief (*id.* ¶¶ 60-64), (2) Violation of the "Unfair" Prong of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.* (*id.* ¶¶ 65-72), and (3) Unjust Enrichment (*id.* ¶¶ 73-77). Plaintiffs seek to represent a putative class of agents who allegedly assisted borrowers in applying for PPP loans. *Id.* ¶¶ 40, 52.

Despite seeking nearly $4 billion in purported damages, Plaintiffs do not identify ***any*** specific applicant they assisted in applying for PPP loans.[4] Nor do Plaintiffs allege that they assisted any applicant who actually submitted an application to either of the Citi Defendants. Plaintiffs do not even allege that they asked either Citi Defendant to pay any agent fees or that either Citi Defendant

[4] Given Plaintiffs' failure to plead even basic information demonstrating any purported tie to the Citi Defendants, one is unable to determine, for example, whether Plaintiffs' claims might be subject to mandatory arbitration or a prohibition on joining a class action. To the extent Plaintiffs later plead sufficient information to demonstrate a connection to the Citi Defendants, the Citi Defendants hereby reserve their rights to seek to compel arbitration and enforce any class action prohibition, if applicable.

refused to pay any such fees upon request. Indeed, the SBA has not yet disbursed processing fees to lenders and only recently published rules describing the forms and processes for the disbursement of such processing fees. *See* Interim Final Rule on Disbursements, 85 Fed. Reg. 26321 (Apr. 28, 2020) ("Disbursement IFR").[5]

Plaintiffs' bare-bones claims against the Citi Defendants should be dismissed in their entirety for at least three independent reasons. ***First***, the claims should be dismissed under Fed. R. Civ. P. ("Rule") 12(b)(1) for lack of subject matter jurisdiction. Because there are no allegations ***at all*** demonstrating any connection between any of the named Plaintiffs and either of the Citi Defendants, let alone any specific factual allegations, Plaintiffs lack standing to maintain any claims against the Citi Defendants. In addition, Plaintiffs' claims are not yet ripe for adjudication.

Second, Plaintiffs' claims against the Citi Defendants should be dismissed under Rule 12(b)(6) because Plaintiffs fail to plead a "short and plain statement" of a claim against either Citi Defendant, and Plaintiffs cannot allege facts that support a plausible claim for relief under any of their three purported causes of action.

Third, Plaintiffs' claims against Citigroup should be dismissed under Rule 12(b)(2) because Citigroup is not subject to personal jurisdiction in this Court.

The Court therefore should dismiss the claims against the Citi Defendants in their entirety.

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[5] Available at: https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Disbursements.pdf

II. BACKGROUND AND FACTUAL ALLEGATIONS[6]

A. Background of the CARES Act and PPP

On March 27, 2020, Congress passed, and the President signed, the CARES Act, Pub. L. 116-136, to provide emergency assistance for individuals, families, and businesses affected by the coronavirus pandemic. Section 1102 of the Act amends the Small Business Act, 15 U.S.C. § 636, to create the PPP, a $349 billion loan program. CARES Act § 1102(a)(2). The CARES Act articulates an eligibility floor for borrower participation in the PPP, as well as permissible uses of loan proceeds. *Id.* "For the purpose of making covered loans" as described in the CARES Act, certain lending institutions "shall be deemed to have been delegated authority by the [SBA] to make and approve covered loans." *Id.* The SBA will fully guarantee PPP loans applied for prior to June 30, 2020. *Id.*[7]

On April 2, 2020, the SBA posted an interim final rule implementing the PPP. *See* SBA Interim Final Rule, 85 Fed. Reg. 20811 (Apr. 2, 2020) ("First IFR").[8] Among other things, the First IFR explains that the "SBA will pay lenders fees for processing PPP loans" and sets forth the amounts for such processing fees. *Id.* at 20816. In addition, the First IFR states that "Agent fees will be paid by the lender out of the fees the lender receives from SBA" and that "Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds." *Id.* The

[6] Plaintiffs' factual allegations are taken as true only for purposes of the Citi Defendants' Motion to Dismiss. The Citi Defendants reserve their rights to challenge any factual allegations at any appropriate time in the future. To the extent that other Defendants file motions to dismiss that raise additional bases for dismissal applicable to the Citi Defendants as well, those additional bases are hereby adopted and incorporated by the Citi Defendants.

[7] This is a modification of the pre-existing SBA lending model under 15 U.S.C. § 636. Under the pre-existing model, small businesses apply for an SBA-guaranteed loan through a financial institution; the financial institution provides the loan; and the SBA guarantees a ***portion*** of a loan issued under the statute. The PPP modifies this regime by guaranteeing ***all of*** a loan issued pursuant to the PPP.

[8] Available at: https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf.

First IFR also set forth limits on the total amounts an agent may collect for assisting in preparing a PPP loan application. *Id.*

On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act ("PPPEA"), which added an additional $310 billion in PPP funding. Meanwhile, the SBA continued to publish additional rules regarding the PPP on April 3 (Second IFR), April 14 (Third IFR), April 24 (Fourth IFR), and April 28, 2020 (Fifth IFR, *i.e.*, the Disbursement IFR).[9]

In the Disbursement IFR, issued on April 28, 2020, the SBA described the forms and processes for the disbursement of processing fees. 85 Fed. Reg. at 26323. Specifically, the SBA stated that it "will make available a specific SBA Form 1502 reporting process through which PPP lenders will report on PPP loans and collect the processing fee on fully disbursed loans to which they are entitled." *Id.* Lenders must upload SBA Form 1502 information within 20 calendar days after a PPP loan is approved by the SBA or by May 18, 2020 for loans approved before the availability of SBA Form 1502. *Id.* The lender must report whether it has fully disbursed PPP loan proceeds, and lenders will not receive a processing fee: (1) prior to full disbursement of the PPP loan, (2) if the PPP loan is cancelled before disbursement, or (3) if the PPP loan is cancelled or voluntarily terminated and repaid after disbursement. *Id.*

B. Plaintiffs' Allegations

Plaintiffs filed their Complaint on April 27, 2020, the day before the SBA posted its Disbursement IFR. In the Complaint, Plaintiffs allege that they provide

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[9] *See* Apr. 3, 2020 Second IFR (https://www.sba.gov/document/policy-guidance--ppp-affiliation-interim-final-rule); Apr. 14, 2020 Third IFR (https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule-additional-eligibility-criteria-requirements-certain-pledges-loans); Apr. 24, 2020 Fourth IFR (https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule-promissory-notes-authorizations-affiliation-eligibility); Apr. 28, 2020 Fifth IFR (Disbursement IFR) (https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule-disbursements).

consulting, accounting, legal, and tax services to their clients. Compl. ¶¶ 1-3. Plaintiffs allege that they assisted their clients in preparing applications for PPP loans and that they are entitled to certain agent fees for that work. *Id.* ¶¶ 41-48.

Plaintiffs named over a dozen financial institutions as Defendants. *Id.* ¶¶ 4-21. However, Plaintiffs do not set forth ***any*** specific allegations about any particular Defendant other than alleging the jurisdictions in which each Defendant allegedly is headquartered and does business. *Id.* Instead, Plaintiffs generically lump all Defendants together and assert undifferentiated and general allegations against all "Defendants." *See, e.g.*, *id.* ¶ 39 (alleging generically and "on information and belief" that "Defendants received approval from the SBA and funded loans for numerous businesses, yet failed to issue compensation to Plaintiffs . . ."). Plaintiffs allege that Defendants "funded loans" under the PPP. *Id.* ¶¶ 38-39. According to Plaintiffs, Defendants owe them agent fees but "are refusing to pay or are willing to pay only a partial percentage of the monies owed." *Id.* ¶ 39. However, Plaintiffs do not allege that they assisted any particular applicant who actually submitted a PPP loan application to either of the Citi Defendants or that any such loans were actually approved and funded. Nor do Plaintiffs allege that they asked either Citi Defendant to pay any agent fees or that either Citi Defendant refused any such request.

Plaintiffs bring claims for: (1) Declaratory Relief (*id.* ¶¶ 60-64), (2) Violation of the "Unfair" Prong of the UCL, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (*id.* ¶¶ 65-72), and (3) Unjust Enrichment (*id.* ¶¶ 73-77). Plaintiffs seek to represent a putative class of agents who assisted borrowers in applying for PPP loans and seek over $3.8 billion in damages. *Id.* ¶¶ 40, 52.[10]

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[10] Plaintiffs' allegations do not support the certification of the putative class alleged in the Complaint. The Citi Defendants oppose any attempt to certify a class in this case and reserve their rights to oppose any request for class certification.

III. ARGUMENT

As explained in detail below, Plaintiffs' claims against the Citi Defendants should be dismissed in their entirety for at least three independent reasons. ***First***, Plaintiffs' claims should be dismissed under Rule 12(b)(1) because Plaintiffs lack standing to bring their claims against the Citi Defendants, and Plaintiffs' claims are not yet ripe. ***Second***, Plaintiffs' claims should be dismissed under Rule 12(b)(6) because they have not pled a "short and plain statement" of a claim and they cannot plead facts to state a plausible claim for relief under any of their three causes of action. ***Third***, Plaintiffs' claims against Citigroup should be dismissed under Rule 12(b)(2) because this Court lacks personal jurisdiction over Citigroup.

A. Plaintiffs' Claims Should Be Dismissed Under Rule 12(b)(1).

A party may move to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). "A motion to dismiss for lack of subject matter jurisdiction under [Rule] 12(b)(1) may challenge jurisdiction either on the face of the pleadings or by presenting extrinsic evidence for the court's consideration." *Siofele v. Duncan*, 2009 WL 10674359, at *1 (C.D. Cal. Sept. 14, 2009) (Wright, J.) (citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). In this case, the face of the Complaint demonstrates that subject matter jurisdiction is lacking because Plaintiffs lack standing and their claims are not yet ripe for adjudication.

1. The named Plaintiffs lack standing to assert claims against the Citi Defendants.

"To satisfy the 'irreducible constitutional minimum' of Article III standing, a 'plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *MAO-MSO Recovery II, LLC v. Farmers Ins. Exch.*, 2018 WL 2106467, at *6 (C.D. Cal. May 7, 2018) (quoting *Spokeo, Inc. v. Robins*, ---U.S.---, 136 S. Ct. 1540, 1547 (2016)). "Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of establishing the elements of Article III standing, and at the pleading stage, must 'clearly allege . . . facts demonstrating' each element." *MAO-MSO,* 2018 WL 2106467, at *6 (quoting *Spokeo*, 136 S. Ct. at 1547); *see also Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983) ("The facts to show standing must be clearly apparent on the face of the complaint.").

As courts in this district have explained, "one of the elements of standing is 'traceability, i.e., a causal connection between the injury and the actions' about which a plaintiff complains." *MAO-MSO,* 2018 WL 2106467, at *9 (quoting *Easter v. Am. West. Fin.*, 381 F.3d 948, 961-62 (9th Cir. 2004)). "In multidefendant class actions, the named plaintiffs must show that each defendant has harmed at least one of them." *MAO-MSO,* 2018 WL 2106467, at * 9 (quoting William B. Rubenstein, Newberg on Class Actions § 2.5 (5th ed. 2017)).

> To establish Article III standing in a class action, at least one named plaintiff must have standing in his own right to assert a claim against each named defendant before he may purport to represent a class claim against that defendant. This is not to say that each named plaintiff must have a claim against each named defendant . . . Rather, what is required is that for every named defendant, there be at least one named plaintiff who can assert a claim directly against that defendant.

MAO-MSO, 2018 WL 2106467, at * 9 (quoting *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev. 2004) (alterations in *MAO-MSO*)); *see also In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1068-69 (N.D. Cal. 2015) ("[F]or a class action to proceed between the named parties, each named plaintiff must have standing to sue at least one named defendant; to hold each defendant in the case, there must be at least one named plaintiff with standing to sue said defendant.").

Plaintiffs' Complaint falls far short of this constitutional standard. It does not allege ***any*** facts to demonstrate that any of the named Plaintiffs have standing to sue the Citi Defendants. Plaintiffs do not allege that any of the named Plaintiffs assisted any particular applicant who actually submitted an application to either of the Citi Defendants and received a loan. Nor do Plaintiffs allege that they asked either Citi Defendant to pay any agent fees or that either Citi Defendant refused any such request. Indeed, Plaintiffs have made no factual allegations as to the Citi Defendants whatsoever.

At most, the Complaint includes generic allegations that attempt to lump all of the "Defendants" together. *See, e.g.*, Compl. ¶¶ 37-39 (generically alleging that "Defendants" funded loans under the PPP and "are refusing to pay or are willing to pay only a partial percentage of the monies owed to Agents"). These generic, boilerplate allegations fall far short of the requirement to "clearly allege . . . facts demonstrating" that at least one of the named Plaintiffs suffered an injury in fact caused by the Citi Defendants and that can be redressed through this lawsuit. *MAO-MSO*, 2018 WL 2106467, at *6 (dismissing claims for lack of standing where the named plaintiffs failed to allege any facts "tying any claim by one or more of the [plaintiffs] to any specific named defendant"); *see also Konopasek v. Ten Assocs., LLC*, 2018 WL 6177249, at *4 (C.D. Cal. Oct. 22, 2018) (dismissing claims where the "allegations generally lump all of the Defendants together" without specific factual allegations about each defendant); *Vargas v. JP Morgan Chase Bank, N.A.*, 2014 WL 3435628, at *5 (C.D. Cal. July 11, 2014) (Wright, J.) (dismissing claims premised on "egregious use of lump pleading").

Because the named Plaintiffs fail to meet their burden to clearly allege facts demonstrating that at least one named Plaintiff has standing to sue the Citi Defendants, the Court should dismiss all of the claims against the Citi Defendants.

2. Any claims by the named Plaintiffs against the Citi Defendants are not yet ripe.

Even if Plaintiffs could somehow satisfy the traceability element for standing—and as shown above, they cannot—their claims should still be dismissed on standing grounds because they are not ripe because there is no injury. "A court's subject matter jurisdiction is limited to matters 'ripe' for adjudication, and if a case is not ripe, the court should dismiss it." *Assoc. of Am. R.R. v. Cal. Office of Spill Prevention and Response*, 113 F. Supp. 3d 1052, 1056 (E.D. Cal. 2015) (citing *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121, 1122 (9th Cir. 2010)). "The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Assoc. of Am. R.R.*, 113 F. Supp. 3d at 1057 (quoting *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003)). "The basic rationale behind the ripeness doctrine 'is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements,' when those 'disagreements' are premised on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Assoc. of Am. R.R.*, 113 F. Supp. 3d at 1057 (quoting *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

"A claim is not ripe for judicial resolution 'if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Winebarger v. Penn. Higher Ed. Assistance Agency*, 411 F. Supp. 3d 1070, 1087-88 (C.D. Cal. 2019) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). "Courts consider two factors in the ripeness analysis: (1) whether delayed review of the issue would cause hardship to the parties and (2) whether the issues are fit for judicial decision or would benefit from further factual development." *Winebarger*, 411 F. Supp. 3d at 1088 (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983)).

Here, Plaintiffs allege that they are entitled to receive certain agent fees out of the processing fees that the SBA allegedly will pay to Defendants who funded PPP loans. Compl. ¶¶ 36-40. First and foremost, as noted above, no such claim could exist here because there is no alleged connection between Plaintiffs and either Citi Defendant. But even putting that aside, it was only recently, on April 28, 2002, that the SBA issued its Disbursement IFR, in which it described the forms and processes for the disbursement of processing fees to PPP lenders. 85 Fed. Reg. at 26323. Under the Disbursement IFR, lenders will be required to use SBA Form 1502 to provide information to the SBA about the PPP loans they funded. *Id.* The lenders are not required to finalize and upload these forms until 20 calendar days after a PPP loan is approved by the SBA or by May 18, 2020 for loans approved before the availability of the SBA Form 1502. *Id.* A lender will not receive a processing fee: (1) prior to full disbursement of the PPP loan, (2) if the PPP loan is cancelled before disbursement, or (3) if the PPP loan is cancelled or voluntarily terminated and repaid after disbursement. *Id.*

All of Plaintiffs' claims (none of which have an alleged connection to the Citi Defendants) are contingent on the Defendants—including the Citi Defendants—first being paid processing fees under the PPP and then refusing to pay all or part of the agent fees that Plaintiffs are allegedly owed out of those processing fees. Compl. ¶¶ 36-40. Those events may not occur as Plaintiffs anticipate or indeed may not occur at all. *See Winebarger*, 411 F. Supp. 3d at 1087-88. For example, a Defendant may not receive processing fees for a particular loan because the loan is never fully disbursed or is cancelled. In addition, a Defendant may agree to pay Plaintiffs or other agents certain agent fees for a particular loan once they receive processing fees for that loan. Thus, Plaintiffs' claims are contingent on events that may not occur and therefore are not yet ripe for adjudication.

In addition, delayed review of this issue would not cause any hardship to the parties. Plaintiffs can wait until the lender processing particular PPP loans receives processing fees for a particular PPP loan before seeking to recover agent fees for that loan. In addition, the PPP is continuing to evolve and receive further regulatory clarification and guidance. Indeed, the SBA already has published a number of separate interim final rules on the PPP throughout April and May 2020. The Department of the Treasury also has published an interim final rule. The Court would benefit from allowing additional time for regulators to finalize the rules and processes governing the PPP and for the program to continue to develop as loans are funded.

Thus, Plaintiffs' claims are not ripe and should be dismissed under Rule 12(b)(1). *See Winebarger*, 411 F. Supp. 3d at 1087-88 (dismissing unripe claims).

B. Plaintiffs' Claims Should Be Dismissed Under Rule 12(b)(6).

Fed R. Civ. P. 8(a)(2) requires that any federal pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Borchenko v. L'Oreal USA, Inc.*, 389 F. Supp. 3d 769, 772 (C.D. Cal. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim is plausible if the plaintiff alleges enough facts to draw a reasonable inference that the defendant is liable." *Id.* (citing *Iqbal*, 556 U.S. at 678). A plaintiff "must provide more than mere legal conclusions." *Borchenko*, 389 F. Supp. 3d at 772 (citing *Twombly*, 550 U.S. at 555). And "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Borchenko*, 389 F. Supp. 3d at 772 (citing *Iqbal*, 556 U.S. at 678).

Plaintiffs' claims against the Citi Defendants should be dismissed under Rule 12(b)(6) for at least two independent reasons. ***First***, the Complaint does not include any allegations about the Citi Defendants and thus fails to contain a "short and plain" statement of a claim under Rule 8(a). ***Second***, Plaintiffs fail to allege facts that give rise to a plausible claim against the Citi Defendants under any of their three purported causes of action.

1. The Complaint does not contain a "short and plain" statement of a claim against either Citi Defendant, as required by Rule 8(a).

As an initial matter, as explained in Argument Section (A)(1) above, other than alleging that the Citi Defendants are headquartered and do business in certain jurisdictions, Plaintiffs' Complaint does not include any factual allegations as to the Citi Defendants whatsoever. Thus, the Complaint fails to set forth a "short and plain statement" of a claim against either Citi Defendant, as required by Rule 8(a). For this reason alone, Plaintiffs fail to state a plausible claim against either Citi Defendant, and their claims should be dismissed under Rule 12(b)(6). *See, e.g.*, *Prem v. Access Servs., Inc.*, 2011 WL 3516170, at *3 (C.D. Cal. Aug. 10, 2011) (Wright, J.) (dismissing claims that failed to include allegation about any statute, rule, or regulation that defendant allegedly violated for failure to include a "short and plain statement"); *see also Bains v. Pac. Gas and Elec. Comp. PG and E*, 2016 WL 6071130, at *3 (C.D. Cal. Sept. 9, 2016) (dismissing complaint that "does not contain a short and plain statement" of plaintiff's claims against the defendant).

Even assuming for the sake of argument that the Complaint contained any substantive allegations as to the Citi Defendants—as shown above, it does not—Plaintiffs have not plausibly alleged that they complied with numerous agent disclosure requirements, such as: (1) 15 U.S.C. § 642, which requires that a loan applicant "certify to the…[SBA] the names of any attorneys, agents, or other persons" who assisted with the application; or (2) 13 CFR Parts 103 and 120, and

SBA's Standard Operating Procedure 50 10 5(J), which govern agent disclosure and compensation. Indeed, SBA Form 159, titled *Fee Disclosure and Compensation Agreement*, is used to "identify Agents and the fees and/or compensation paid to Agents by or on behalf of a small business applicant…for the purpose of obtaining or expediting an application for a loan guaranteed by the…[SBA]."[11] But in paragraph 46 of their Complaint, Plaintiffs do not identify Form 159 as one of the 19 forms and documents that they claim were submitted as part of the PPP loan applications. Plaintiffs also fail to allege that the PPP loan applications that they assisted with did not include waivers or limitations on paying agent fees. Accordingly, far from pleading a plausible entitlement to relief, Plaintiffs' Complaint shows just the opposite in failing to allege even a basic level of compliance with the statutory and regulatory requirements.

2. Each of Plaintiffs' three causes of action fail as a matter of law.

As explained below, Plaintiffs fail to state a plausible claim for relief against the Citi Defendants under any of their three causes of action: (1) Declaratory Relief, (2) Violation of the UCL, or (3) Unjust Enrichment. Therefore, all three claims against the Citi Defendants should be dismissed.

a. Plaintiffs' Declaratory Relief claim should be dismissed (Count I).

Plaintiffs' first cause of action seeks a declaration that Defendants owe agent fees to Plaintiffs under the PPP and the "SBA regulations." Compl. ¶¶ 60-64. As shown below, this claim is meritless and should be dismissed as a matter of law.

The Declaratory Judgment Act ("DJA") authorizes federal courts, in cases of "actual controversy," to "declare the rights and other legal relations of any

[11] Available at: https://www.sba.gov/sites/default/files/2018-09/Form%20159%20-%20%28FINAL%29%209.10.18.pdf. To the extent that the SBA, Treasury Department or federal government otherwise issues subsequent rules or guidance applicable to this Motion, the Citi Defendants reserve their rights to amend this Motion to incorporate the updated rules or guidance.

interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The DJA's operation "is procedural only." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937). The DJA does not create a substantive cause of action. *See Schilling v. Rogers*, 363 U.S. 666, 677 (1960) ("The Declaratory Judgment[] Act is not an independent source of federal jurisdiction; the availability of such relief presupposes the existence of a judicially remediable right.").

"Federal courts do not have a duty to grant declaratory judgment." *CRV Imperial-Worthington, LP v. Gemini Ins. Co.*, 770 F. Supp. 2d 1070, 1072-73 (S.D. Cal. 2011) (citing *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 533 (9th Cir. 2008)). "Therefore, it is within a district court's discretion to dismiss an action for declaratory judgment." *CRV Imperial-Worthington, LP*, 770 F. Supp. 2d at 1072-73 (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995)). "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *CRV Imperial-Worthington, LP*, 770 F. Supp. At 1072-73 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)).

Here, the Court should decline to entertain Plaintiffs' declaratory judgment claim and dismiss the claim for two independent reasons. ***First***, as explained directly below, Plaintiffs' other two claims—for violation of the UCL and unjust enrichment—fail as a matter of law. Plaintiffs cannot maintain a declaratory judgment claim—which is purely procedural—in the absence of any substantive causes of action. *See, e.g.*, *Shomaker v. GMAC Mortg. LLC*, 2012 WL 13020070, at *5 (C.D. Cal. Mar. 7, 2012) (dismissing declaratory judgment claim "[i]n the absence of other claims" because "[a] request for declaratory judgment is a remedy and, therefore, does not state a cause of action") (citing *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161 (9th Cir. 2005)).

Second, Plaintiffs' claim under the DJA fails because it asks the Court to interpret and declare the parties' rights and obligations under the CARES Act and the Small Business Act, both of which lack a private right of action. Specifically, Plaintiffs ask the Court to declare that the "SBA guidance"—which is issued under the CARES Act and the Small Business Act—requires Defendants to pay certain agent fees to the Plaintiffs. Compl. ¶ 64.

Neither the CARES Act nor the Small Business Act contain a private right of action for agents to bring suit seeking fees from lenders. *See, e.g.*, *Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996) ("Other circuits that have considered the question have unanimously agreed that the Small Business Act does not create a private right of action in individuals.") (collecting cases from other circuits); *Profiles, Inc. v. Bank of Am. Corp.*, 2020 WL 1849710, at *4-7 (D. Md. Apr. 13, 2020) (in the only published decision to consider the issue to date, holding that the CARES Act does not include an express or implied private right of action). The Small Business Act, of which the operative sections of the CARES Act are now a part, includes a robust criminal and civil enforcement regime by which government regulators—not private plaintiffs—can hold borrowers and lenders accountable for any violations. *See, e.g.*, 15 U.S.C. §§ 645, 650, 13 C.F.R. §§ 120.1400, 1500, 1600.

Where a party lacks a private right of action to bring claims under a federal or state statute, the party cannot use the DJA as an "end-run" around the lack of a private right of action. *See, e.g.*, *N. Cty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1162 (9th Cir. 2010) (affirming dismissal of DJA claim where the plaintiff sought a declaration of rights under the Federal Communications Act ("FCA") because the FCA does not create a private right of action); *see also*

Dallas Cty, Tex. v. MERSCORP, Inc., 2 F. Supp. 3d 938, 946 (N.D. Tex. 2014) (dismissing DJA claim seeking declaration under statute without a private right of action because "a plaintiff cannot use the [DJA] to create a private right of action where none exists"); *Millenium Labs., Inc. v. Universal Oral Fluid Labs., LLC*, 2012 WL 12905083, at *4 (M.D. Fla. Apr. 25, 2012) (collecting cases and explaining that "[m]any courts . . . have held that a claim for declaratory relief must be dismissed where there is no private right of action available for an alleged statutory violation."); *Jones v. Hobbs*, 745 F. Supp. 2d 886, 893 (E.D. Ark. 2010) (the DJA does not authorize actions to decide whether a statute has been violated where there is no private right of action).

For these reasons, Plaintiffs' first claim for declaratory relief should be dismissed as a matter of law as against the Citi Defendants.

b. Plaintiffs' UCL claim should be dismissed (Count II).

Plaintiffs' second cause of action asserts that Defendants violated the "unfair" prong of the California UCL. Compl. ¶¶ 65-72. "The unfair prong of the UCL prohibits a business practice that 'violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *Hoai Dang v. Samsung Elec. Co., Ltd.*, 2018 WL 6308738, at *9 (N.D. Cal. Dec. 3, 2018) (quoting *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006)). Courts have held that a finding of unfairness must be "tethered to some legislatively declared policy" or include "proof of some actual or threatened impact on competition." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169-70 (9th Cir. 2012) (quoting *Cel-Tech Commc'ns. Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163 (1999)).

Plaintiffs cannot allege facts to support a plausible claim under the "unfair" prong of the UCL. Plaintiffs have not alleged any acts or practices by either Citi Defendant that would offend an established public policy or would be immoral, unethical, oppressive, unscrupulous, or substantially injurious. Nor have Plaintiffs alleged that either Citi Defendant violated a declared policy or threatened competition. Indeed, the Complaint does not include any specific allegations about the Citi Defendants at all other than listing jurisdictions in which they allegedly are headquartered and in which they do business. Compl. ¶¶ 4-5. To the extent Plaintiffs merely "lump" the Citi Defendants together with the other Defendants and attempt to assert generic allegations against all Defendants, their pleading falls far short of stating a plausible UCL claim. *See, e.g.*, *Vargas*, 2014 WL 3435628, at *5 (dismissing UCL claim premised on "lump" or "group" allegations).

In addition, plaintiffs who prevail on a UCL claim are generally limited to recovering "injunctive relief and restitution." *Cel-Tech*, 20 Cal. 4th at 179. In this context, restitution involves a claim "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003). Here, Plaintiffs have not alleged, and cannot allege, that they are seeking a return of any funds in which they have "an ownership interest." Therefore, Plaintiffs are not entitled to injunctive relief or restitution, and their UCL claim fails because they cannot seek available relief under the UCL. *See, e.g.*, *AngioScore, Inc. v. TriReme Med., LLC*, 70 F. Supp. 3d 951, 962-63 (N.D. Cal. 2014) (dismissing UCL claim that sought damages that are not available under the UCL).

Accordingly, Plaintiffs' second claim for violation of the "unfair" prong of the UCL should be dismissed against the Citi Defendants.

c. Plaintiffs' unjust enrichment claim should be dismissed (Count III).

Plaintiffs' third cause of action alleges unjust enrichment. Compl. ¶¶ 73-77. Under California law, "there is not a standalone cause of action for 'unjust enrichment.'" *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir.

2015) (citing *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350 (2010); *Jogani v. Super. Ct.*, 165 Cal. App. 4th 901 (2008)). Instead, California courts construe unjust enrichment claims "as a quasi-contract claim seeking restitution." *Astiana*, 783 F.3d at 762 (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221 (2014)).

"To plead a claim for unjust enrichment, a plaintiff must allege that [the] defendant (1) received a benefit that was (2) unjustly retained at the expense of another." *Mangindin v. Washington Mut. Bank*, 637 F. Supp. 2d 700, 711 (N.D. Cal. 2009) (citing *Lectrodyer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000)). "Ordinarily, a plaintiff must show that the benefit was conferred on the defendant through mistake, fraud[,] or coercion." *Mangindin*, 637 F. Supp. 2d at 711 (citing *Nibbi Bros., Inc. v. Brannan Street Inv.*, 205 Cal. App. 3d 1415, 1422 (1988)).

Here, Plaintiffs cannot plead any facts to support a plausible claim that the Citi Defendants were unjustly enriched at the Plaintiffs' expense. Plaintiffs do not allege that they assisted any particular applicant in preparing a PPP loan application that was submitted to either Citi Defendant. Nor do Plaintiffs allege that they requested that either Citi Defendant pay them any agent fees or that either Citi Defendant denied any such request. To the contrary, the Complaint does not include any specific allegations about the Citi Defendants other than listing jurisdictions in which they allegedly are headquartered and do business. Compl. ¶¶ 4-5. To the extent Plaintiffs simply "lump" the Defendants together and attempt to assert generic allegations against all Defendants, such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim for unjust enrichment. *Iqbal*, 556 U.S. at 678.

In addition, a prevailing plaintiff on an unjust enrichment claim may only recover in restitution. *See, e.g.*, *Astiana*, 783 F.3d at 762. As explained in Argument Section (B)(2)(b) above, a claim for restitution seeks "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply*, 29 Cal. 4th at 1149. Here, Plaintiffs have not alleged, and cannot allege, that they are seeking a return of any funds in which they have "an ownership interest." Therefore, Plaintiffs are not entitled to restitution, and their unjust enrichment claim fails for this additional reason. *See Bruaner v. MusclePharm Corp.*, 2015 WL 4747941, at *13 (C.D. Cal. Aug. 11, 2015) (dismissing standalone unjust enrichment claim and limiting plaintiff to seeking restitution under other claims).

Accordingly, Plaintiffs' third claim for unjust enrichment should be dismissed as a matter of law against the Citi Defendants.

C. Plaintiffs' Claims Against Citigroup Should Be Dismissed Under Rule 12(b)(2).

A party may move to dismiss for lack of personal jurisdiction under Rule 12(b)(2). "In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper." *Siegler v. Sorrento Therapeutics, Inc.*, 2019 WL 581719, at *17 (S.D. Cal. Feb. 13, 2019) (citing *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008)). "Personal jurisdiction may either be authorized by federal statute or permissible to the extent provided under state law." *Siegler*, 2019 WL 581719, at *17. With respect to the latter, "the district court applies the law of the state in which the court sits." *Id.* (quoting *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011)).

"Under California law, courts may exercise jurisdiction 'to the full extent that such exercise comports with due process.'" *Siegler*, 2019 WL 581719, at *17. (quoting *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1020 (9th Cir. 2017)). As a result, "the jurisdictional analyses under state law and federal due process are the same." *Siegler*, 2019 WL 581719, at *17 (quoting *Mavrix*, 647 F.3d at 1223).

"Due process 'constrains a State's authority to bind a nonresident defendant to a judgment of its courts.'" *Siegler*, 2019 WL 581719, at *17 (citing *Walden v. Fiore*, 571 U.S. 277, 283 (2014)). A nonresident of a state generally must have "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Siegler*, 2019 WL 581719, at *17 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "Minimum contacts come in two flavors: via-a-vis general jurisdiction or specific jurisdiction." *Siegler*, 2019 WL 581719, at *17. (citing *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).

"General jurisdiction is established when a party's 'affiliations with the state are so 'continuous and systematic' as to render them essentially at home in the forum state." *Siegler*, 2019 WL 581719, at *18 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). "General jurisdiction imposes a high standard, requiring affiliations with a forum state that approximates physical presence." *Siegler*, 2019 WL 581719, at *18 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984)). The Supreme Court has held that the paradigm forum for the exercise of general jurisdiction over a corporation is its "place of incorporation and principal place of business." *Siegler*, 2019 WL 581719, at *18 (quoting *Daimler*, 571 U.S. at 137).

As Plaintiffs concede, Citigroup is a Delaware corporation with its principal place of business in New York. Compl. ¶ 4. Thus, Citigroup is neither incorporated in California nor has its principal place of business in California. Accordingly, Citigroup is not subject to general personal jurisdiction in this Court. *See, e.g.*, *Siegler*, 2019 WL 581719, at *18 (corporation that is incorporated outside of California and has principal place of business outside California is not subject to general personal jurisdiction in California federal courts).

Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation." *Id.* (citing *Walden*, 571 U.S. at 283-84). "Three things must apply before the Court can exert specific jurisdiction: (1) the defendant either 'purposefully direct[s]' its activities or 'purposefully avails' itself of the benefits afforded by the forum's laws; (2) the plaintiff's claim 'arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction [] comport[s] with fair play and substantial justice, *i.e.*, it [is] reasonable.'" *Siegler*, 2019 WL 581719, at *19 (quoting *Yamaha Motor Co.*, 851 F.3d at 1023). "The burden is on the plaintiff to establish the first two prongs." *Siegler*, 2019 WL 581719, at *19 (citing *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017)). "If the plaintiff satisfies the first two prongs then the defendant must present a 'compelling case' that exercise of jurisdiction would not be reasonable." *Siegler*, 2019 WL 581719, at *19 (quoting *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076 (9th Cir. 2011)).

Plaintiffs have not pled any facts suggesting that Citigroup "purposefully directed" its activities to California or "purposefully availed" itself of California's laws. Nor has Plaintiff alleged any facts suggesting that its claims "arise out of or relate to" Citigroup's activities in California. Indeed, the Complaint does not include any allegations of any specific Citigroup activities in California. This is not surprising. Citigroup is a financial holding company and does not make PPP loans directly. *See, e.g.*, *Schneider v. CitiMortgage, Inc.*, 2018 WL 4491244, at *15 (D. Kan. Sept. 19, 2018) (noting that "Citigroup . . . operates as a holding company for other entities or affiliates"). As such, Plaintiffs fail to meet their burden on the first two prongs of the analysis. Because of the lack of any alleged California activities by Citigroup, it would be unreasonable for this Court to exercise specific jurisdiction over Citigroup in this case. *See, e.g.*, *Siegler*, 2019 WL 581719, at *20 (not reasonable to exercise specific jurisdiction over nonresident without alleged activities in California). Thus, Citigroup is not subject to specific personal jurisdiction in this case.

Because Citigroup does not have minimum contacts with California under a general or specific jurisdiction analysis, the Court lacks personal jurisdiction over Citigroup, and Citigroup should be dismissed under Rule 12(b)(2).

IV. CONCLUSION

For the reasons stated above, Plaintiffs' claims against the Citi Defendants should be dismissed under Rule 12(b)(1) for lack of standing and lack of ripeness and under Rule 12(b)(6) for failure to state a claim. Both Citi Defendants should therefore be dismissed from this case. In addition, Citigroup should be dismissed from this case for lack of personal jurisdiction under Rule 12(b)(2).

Dated: May 18, 2020

MAYER BROWN LLP

By: /s/ Bronwyn F. Pollock
Bronwyn F. Pollock (SBN 210912)
Lucia Nale (Admitted Pro Hac Vice)
Thomas V. Panoff (Admitted Pro Hac Vice)
Christopher S. Comstock (Admitted Pro Hac Vice)
Andrew J. Spadafora (Admitted Pro Hac Vice)

Attorneys for Specially Appearing Defendant CITIGROUP INC. and Defendant CITIBANK, N.A.