IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SPORT & WHEAT CPA PA, a Florida corporation, individually and on behalf of a class of similarly situated businesses and individuals, Plaintiff, v. SERVISFIRST BANK INC.; SYNOVUS BANK; THE FIRST, A NATIONAL BANKING ASSOCIATION; and TRUIST BANK, Defendants.	Case No. 3:20-cv-05425-TKW-HTC

DEFENDANT SYNOVUS BANK'S
MOTION TO DISMISS THE AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Synovus Bank ("Synovus") respectfully submits this Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof, dated June 10, 2020.

Plaintiff Sport & Wheat CPA PA ("S&W") claims an entitlement to fees found nowhere in the statute or regulations underlying this suit, brings a claim under a federal statute that provides no private right of action, and asserts state law claims that do not, as a matter of law, support any relief on the basis of the facts alleged. The Amended Complaint should be dismissed.

PRELIMINARY STATEMENT

This action involves the Paycheck Protection Program ("PPP"), created as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (the "CARES Act" or the "Act"). The CARES Act is part of the federal government's response to the economic hardship caused by the COVID-19 pandemic. To provide emergency assistance to small businesses affected by the pandemic, the PPP significantly expanded the Small Business Administration's ("SBA") 7(a) loan program for small businesses and provided a mechanism by which borrowers could receive funds to cover payroll and other expenses and, in certain circumstances, have their loans forgiven by the government. PPP loans are processed and disbursed through private lenders, and those lenders receive a statutory processing fee from the government for each approved loan.

Plaintiff S&W is an accounting firm. S&W claims it assisted a client, identified only as "Borrower C," when that client made an application to Synovus for a PPP loan. S&W admits Synovus did not authorize such work and never agreed to pay an agent's fee. Instead, S&W alleges that the CARES Act and SBA regulations thereunder create an absolute entitlement to fees for any agent who merely claims to have assisted a PPP borrower in preparing an application. S&W

insists that lenders must pay those fees even where, as here, the lender in no way authorized the agent's activities.

S&W is plainly wrong. It asks the Court to effect a wholesale change to the SBA 7(a) loan program—which has never required the involuntary payment of agent fees—rather than read the applicable regulation as a *limitation* on such fees, as the CARES Act clearly requires. That statute merely directs the SBA to set a cap on agent fees. The regulations promulgated pursuant to that statutory authorization provide that *if* an agent is to be compensated for assisting a borrower, such compensation will be paid by lender and not borrower. There is no authority for the proposition that someone who claims to have been an agent *must* be compensated by a lender, particularly when the lender never agreed to do so and the lender has not certified that the services were reasonable and satisfactory to it, as is required by SBA regulations. The entitlement that S&W proposes would also be susceptible to rampant fraud and abuse, requiring PPP lenders to blindly compensate any agent who merely claims to have assisted a PPP applicant. Congress and the SBA intended the exact opposite by establishing a cap on agent fees and limitations on the source of their payment. S&W has thus failed to plead a violation of federal law.

S&W has not only failed to plead a violation of federal law, it is attempting to make an errant claim for declaratory relief for which there is no private right of action. Am. Compl. ¶¶ 186–190 (Count Four). The CARES Act did not create a new right for agents to bring a suit of this kind. The Eleventh Circuit has repeatedly held that the Small Business Act, which the CARES Act amends, does not create a private right of action, and the only court to address whether the CARES Act itself confers a private right of action has correctly held that it does not. *See Profiles, Inc. v. Bank of Am. Corp.*, 2020 WL 1849710, at *7 (D. Md. Apr. 13, 2020).

S&W fails to state any claim under Florida law. S&W attempts to assert a claim for unjust enrichment—and an entirely duplicative claim based on "contract implied in law"—arising out of Synovus's allegedly unjust retention of a loan processing fee from the SBA. Am. Compl. ¶¶ 160–181 (Counts One and Two). But the Amended Complaint fails to plead facts sufficient to satisfy even the first element required to sustain such a claim: that the plaintiff has conferred a direct benefit on the defendant. S&W then attempts to assert a claim for conversion, *id.* ¶¶ 182–185 (Count Three), even though an alleged monetary obligation cannot give rise to a conversion claim and Synovus has not yet received the loan processing fees at issue.

Based on its own maximum alleged claim on Synovus of a mere $1,633.03, Am. Compl. ¶ 112, S&W purports to seek to represent a nationwide class of supposed agents. S&W's claim is not remotely appropriate for class action treatment. Notably, Synovus management is currently aware of a total of only nine entities or persons that have even contacted the Bank about possible agents' fees, of the approximately 20,000 PPP applications the Bank has processed. Synovus is unaware of *any* communications from S&W inquiring about agents' fees or insisting upon entitlement to such fees prior to the filing of S&W's April 26, 2020 Complaint. It appears S&W rushed to file suit to position itself among other plaintiffs that have filed similar putative class action complaints claiming entitlement to agent fees.

Because the Amended Complaint fails to state a claim under federal or state law, it should be dismissed in its entirety.

STATEMENT OF FACTS

I. The Enactment of the CARES Act and PPP

On March 27, 2020, President Trump signed the CARES Act into law. The purpose of the Act was to provide "emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic." First Interim Final Rule, 85 Fed. Reg. at 20,811 ("IFR" or "First IFR"). The CARES Act granted the SBA funding and authority to establish a new loan program for small businesses, called the PPP. The PPP amended section 7(a) of the Small Business Act, which is the federal government's primary small business loan program. *Id.* Under the PPP, SBA guarantees 100 percent of loans made by eligible lenders to eligible borrowers. *Id.* SBA reimburses lenders for making PPP loans through a loan-processing fee, with the reimbursement amount determined based on the size of the loan. *See* 15 U.S.C. § 636(a)(36)(P)(i). As of June 7, 2020, approximately $511 billion in PPP loans had been approved, leaving more than $130 billion in remaining funds available to applicants.[1]

This action concerns the role of *agents* in the PPP. Congress delegated to the SBA the authority to set a maximum limit for fees paid to agents who assist borrowers with preparing an application for a PPP loan. 15 U.S.C. § 636(a)(36)(P)(ii). Congress did not otherwise modify the existing regulatory framework applicable to agents assisting lenders and borrowers with 7(a) loans, nor did Congress delegate to the SBA any authority to do so.

On April 15, 2020, the SBA promulgated the First IFR which, among other things, exercised the SBA's statutory authority to establish limits on agent fees. The First IFR states:

> *Who pays the fee to an agent who assists a borrower?*
>
> Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:

[1] SBA, Paycheck Protection Program Report: Approvals through 06/06/2020, at 2, 9 (2020), https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf. With more than $130 billion still available, funds are not, as S&W alleges, "quickly running out." Am. Compl. ¶¶ 19–20.

> i. One (1) percent for loans of not more than $350,000;
> ii. 0.50 percent for loans of more than $350,000 and less than $2 million; and
> iii. 0.25 percent for loans of at least $2 million.
>
> The Act authorizes the Administrator [of the SBA] to establish limits on agent fees. The Administrator, in consultation with the Secretary [of the Treasury], determined that the agent fee limits set forth above are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.

85 Fed. Reg. at 20,816. The First IFR does *not* state that lenders must pay agent fees regardless of whether or not an agent has been authorized by the lender. Rather, it speaks to what an agent "*may* collect from the lender." *Id.* (emphasis added).

On April 22, 2020, shortly after the First IFR was released, the Association of International Certified Professional Accountants released a special report on the PPP *confirming* that interpretation of the IFR. Ex. A, AICPA, *Small Business Loans Under the Paycheck Protection Program: Issues Related to CPA Involvement* (Apr. 22, 2020) ("AICPA Report"). The report advises that "CPAs should note, that even though the Treasury has outlined guidelines related to agency fees, there is a possibility that you will not be paid for your services, even when noting you are an agent to the application. . . . It is important to discuss this issue with clients *and the banks* to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." *Id.* at 3 (emphasis added).

There is not a word in either the CARES Act or the First IFR even suggesting that an agent who claims to have helped a borrower is *entitled* to be paid a fee by the lender. Congress and the SBA were focused on putting a cap on agents' fees and ensuring that borrowers did not pay them—that is all, as the AICPA report implicitly acknowledges.

II. **S&W Claims It Helped a Client Apply for a <u>PPP Loan and Files Suit Alleging Synovus Must Pay Its Fees</u>**

Plaintiff S&W alleges that, on March 24, 2020, it was approached by a small business client—identified only as "Borrower C"—for assistance in applying for a PPP loan. Am. Compl. ¶ 99. S&W alleges that "Borrower C hired [S&W] to prepare a loan application intended to be submitted to Synovus Bank," *id.* ¶ 102, and that on April 1, 2020, it "prepared a PPP loan application that Borrower C signed as the borrower, and that [S&W] signed as its PPP Agent," *id.* ¶ 104. There is no allegation that S&W actually submitted this or any other application to Synovus, or that any application submitted to Synovus identified S&W as an agent.

S&W alleges that, also on April 1, 2020, it "communicated with Synovus Bank" to resolve "a mismatching of Borrower C's name." *Id.* ¶ 105.[2] From that alleged interaction, S&W speculates that "Synovus Bank knew that [S&W] was acting as Borrower C's PPP Agent in connection with Borrower C's PPP loan

[2] Synovus is unaware of the identity of Borrower C and has requested that S&W identify the borrower, but S&W has not done so.

application." *Id.* ¶ 106. S&W does not allege that it sought authorization from Synovus to do any work, that Synovus authorized S&W to do any work, or that Synovus agreed to compensate S&W. Other than that one alleged communication, S&W does not claim that Synovus had any knowledge of what work S&W was purportedly doing.

In the meantime, on April 3, 2020, Synovus Bank began processing PPP loans to small business borrowers. To facilitate expeditious and efficient processing of applications, Synovus set up a user-friendly, web-based portal to process applications and made Bank personnel available to assist applicants.

On April 9, 2020, S&W alleges that it asked an unidentified Synovus employee "about the payment of [S&W's] fees as Borrower C's PPP Agent," *id.* ¶ 107, and that Synovus "advised . . . that it would not pay PPP Agents' fees," *id.* ¶ 108. Indeed, from the inception of the PPP, Synovus included notices on its PPP application portal making clear it would not be paying applicant agents' fees.[3] More than a week after S&W alleges it was told by Synovus that agent fees would not be paid, S&W alleges that Borrower C proceeded to submit its PPP loan application through Synovus's online portal. *Id.* ¶ 109. S&W alleges that four

[3] *See, e.g.*, *CARES Act – Paycheck Protection Program*, SYNOVUS, https://www.synovus.com/covid-19/paycheck-protection-program/ (current version of website).

days later, on April 21, 2020, "Borrower C received the funds from its PPP loan as requested." *Id.* ¶ 110.

In connection with that loan, S&W alleges that Synovus "will receive or has received" a loan processing fee. *Id.* ¶ 111. As S&W's allegation seems to acknowledge, Synovus has not yet received any statutory fees under the CARES Act for PPP loans, and understands that the SBA will authorize and process any such fees at a future date. Those fees, moreover, are subject to clawback by the SBA if the borrower is later determined to be ineligible. Loan Review Procedures IFR, 85 Fed. Reg. at 33,014. Nevertheless, S&W alleges that it "has not been compensated by Synovus Bank for its services as Borrower C's PPP Agent." *Id.* ¶ 113. S&W further claims—without elaboration and with full knowledge of Synovus's position that it will not pay any such fees—that it "has assisted and will assist other clients with their PPP loan applications with Synovus Bank" and "expects to be paid for its services in connection with each loan." *Id.* ¶ 114.

Based only on the foregoing, on April 26, 2020, S&W filed a Complaint seeking to represent a statewide class of all agents purporting to have assisted clients to obtain PPP loans, and seeking to recover for all such persons. Synovus Trust Company moved to dismiss the Complaint on May 17, 2020, ECF No. 14, pointing out that the wrong Synovus entity had been named and that proper service had not been effected, in addition to S&W's failure to state a claim. S&W filed the

Amended Complaint on May 28, 2020, ECF No. 21, attempting to expand the putative statewide class to a nationwide class, naming additional defendants, and attempting to remedy its prior pleading deficiencies.

LEGAL STANDARD

"[T]o 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.'" *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), or a "formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, are insufficient. When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

ARGUMENT

The Court should dismiss the Amended Complaint. As explained below, S&W's claim for declaratory relief (Count Four) fails because the CARES Act does not create a private right of action and S&W has failed to plead a violation of federal law. S&W's unjust enrichment claim (Count One), contract implied in law claim (Count Two), and conversion claim (Count Three) likewise fail to state a claim under Florida law. We address the CARES Act claim first below, because all of S&W's claims rely on the faulty premise that federal law creates an absolute entitlement to PPP agent fees, and then turn to S&W's state law claims.

I. The CARES Act Does Not Provide a Private Right of Action

S&W claims entitlement to a declaration that "because it performed work for Borrowers, it is entitled to fees, to be paid from Defendants' origination fees under the Paycheck Protection Program."[4] Am. Compl. ¶ 189. But the CARES Act provides neither an express nor implied right of action for private parties to bring suit. "[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Absent "[s]tatutory intent" to create a private remedy, "a cause of action does not exist and courts may not create one." *Id.* S&W does not allege that the CARES Act contains an express private right of action, nor could it. *Profiles*, 2020 WL 1849710, at *7 ("[T]he CARES Act does not expressly provide a private right of action."). The Amended Complaint concedes this by seeking a ruling under the Declaratory Judgment Act. Am. Compl. ¶ 187. But the Declaratory Judgment Act does not create a private right of action. *See, e.g., Rebuild Nw. Fla., Inc. v. Fed. Emergency Mgmt. Agency*,

[4] S&W also seeks a declaration that "Defendants acted unlawfully, in refusing to maintain [S&W]'s name as PPP Agent on loan applications and documents filed with the Small Business Administration." Am. Compl. ¶ 190. While S&W has alleged such conduct on the part of other defendants, *see id.* ¶ 120, it has not alleged any such conduct as to Synovus and the claim should be dismissed as to Synovus on that ground. Additionally, the claim fails because it seeks a declaration of rights under a federal statute that provides no private right of action.

2018 WL 7351690, at *1 (N.D. Fla. July 12, 2018) (citing *Musselman v. Blue Cross & Blue Shield of Ala.*, 684 F. App'x 824, 829 (11th Cir. 2017)). Because no express private right of action exists under the CARES Act, "the burden rests with [plaintiff] to establish that an implied private right of action exists." *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002).

S&W fails to meet that burden: it does not even allege an implied private right of action, because there is none. The Eleventh Circuit has repeatedly held that the Small Business Act, which the CARES Act amends in limited part, does not confer a private right of action at all. *See United States v. Fidelity Capital Corp*., 920 F.2d 827, 838 n.39 (11th Cir. 1991); *Bulluck v. Newtek Small Bus. Fin., Inc.*, 2020 WL 1490702, at *3 (11th Cir. Mar. 27, 2020).[5] Nothing in the CARES Act changes this analysis, and the only court to address whether the CARES Act itself creates a private right of action has held that it does not. *See Profiles*, 2020 WL 1849710, at *7.[6]

Courts have sometimes looked to four factors to determine the existence of an implied private right of action.[7] *See, e.g.*, *McDonald v. S. Farm Bureau Life*

[5] *Accord Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 563–64 (5th Cir. 1990).

[6] *See also* Order, *Profiles*, No. 20-1438 (4th Cir. May 1, 2020), ECF No. 27 (denying plaintiff's request for an emergency injunction pending appeal).

[7] The four factors are: (1) whether "the statute create[s] a federal right in favor of the plaintiff"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to

Ins. Co., 291 F.3d 718, 722 (11th Cir. 2002). The "central inquiry," however, is "whether Congress intended to create, either expressly or by implication, a private cause of action." *Id.* (quoting *Sandoval*, 532 U.S. at 286). "[T]he Supreme Court has gradually receded from its reliance on [the other] three . . . factors," which "remain relevant *only* insofar as they provide evidence of whether Congress intended to create a private right of action." *Love v. Delta Air Lines*, 310 F.3d 1347, 1351–52 (11th Cir. 2002); *see also Hernandez v. Mesa*, 140 S. Ct. 735, 751 (2020) (Thomas, J., concurring) (noting that *Sandoval* rejected the Court's previous "freewheeling approach" to implying private rights of action).

"[T]he bar for showing legislative intent is high." *Love*, 310 F.3d at 1352. (quotation omitted). "Congressional intent to create a private right of action will not be presumed," and "[t]here must be clear evidence of Congress's intent to create a cause of action." *McDonald*, 291 F.3d at 722 (quoting *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1345 (11th Cir. 1997)).

S&W cannot clear that high bar. The entirety of the section of the CARES Act at issue here, captioned "FEE LIMITS," provides: "An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee

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create such a remedy or to deny one"; (3) whether it "is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff"; and (4) whether "the cause of action [is] one traditionally relegated to state law." *McDonald*, 291 F.3d at 722 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

in excess of the limits established by the Administrator." 15 U.S.C. § 636(a)(36)(P)(ii). Neither this text nor the rest of the statute evince *any* intent to create a private right of action in favor of PPP agents.

First, the relevant statutory provision does not contain "[r]ights-creating language" that confers rights "directly" on PPP agents. *See Love*, 310 F.3d at 1352 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.3 (1979)). Rather than creating rights in the agents' favor, the fee-cap provision *prohibits* certain conduct by agents. A private right of action will not be inferred where, as here, the plaintiff is not the intended beneficiary of the statute. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) ("We doubt . . . that providers are intended beneficiaries . . . of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves."). Indeed, the CARES Act does not even confer a private cause of action to small business borrowers, who *are* the intended beneficiaries. *Profiles*, 2020 WL 1849710, at *7.

Second, as the recent *Profiles* decision notes, "the view that Congress did not intend to create a separate private right of action in the CARES Act is further bolstered by the criminal and civil enforcement regime codified in the SBA." 2020 WL 1849710, at *6; *see* 15 U.S.C. § 650(a)(2), (c) (conferring enforcement authority upon the SBA Administrator). Because Congress "provide[d] a discernable enforcement mechanism," that mechanism should not be disturbed by implying a private right of action. *Love*, 310 F.3d at 1353.

Finally, the First IFR does not and cannot create a private right of action. "[I]f examination of a statute's text, structure, and history does not yield the conclusion that Congress intended it to confer a private right and a private remedy, . . . such a right may not be created or conferred by regulations promulgated to interpret and enforce it[.]" *Id.* at 1353. In other words, "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. Because the CARES Act clearly does not reflect Congressional intent to confer a private right of action, that ends the inquiry. Count Four of the Amended Complaint therefore must be dismissed.

II. The CARES Act and Its Regulations Create No Affirmative Entitlement for Agents That Assist PPP Applicants

Even if the CARES Act created a private right of action, which it does not, S&W has failed to plead any violation of federal law. While S&W contends that PPP lenders "must" pay agents, Am. Compl. ¶ 50, it cannot convert a statutory fee limit or regulatory guidance as to "*Who pays the fee to an agent who assists a borrower?*" into an affirmative entitlement to such fees. *See* 15 U.S.C. § 636(a)(36)(P)(ii); 85 Fed. Reg. at 20,816. That is especially true where, as here, the lender has made it clear to agents that it will not pay agent fees. *See* Am.

Compl. ¶ 108. As explained below, any attempt to convert a *limitation* into an *entitlement* is antithetical to the statutory and regulatory language and the SBA 7(a) program overall.

A. The CARES Act Does Not Create an Entitlement to Agent Fees—It Limits Agent Fees

The Court's analysis begins and ends with the plain text of the statute. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." (quotations omitted)); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (same).

As noted above, in a section captioned "FEE LIMITS," the CARES Act provides that "[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator." 15 U.S.C. § 636(a)(36)(P)(ii). That is the entirety of the statutory language as it relates to agent fees: an establishment of a limitation on agents' fees and an authorization to the SBA to establish those precise limits.

S&W would have the Court read into that clear language an *affirmative entitlement* for anyone who claims to be an agent to be compensated by the lender upon demand, regardless of whether the agent's services were engaged, authorized, or agreed to by the lender, or were reasonable. There is no basis to create such an affirmative right out of a negative limitation. *See Sandoval*, 532 U.S. at 289

("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." (quotation omitted)). Indeed, Congress knows exactly how to create an affirmative entitlement to fees, and did so in the provision immediately preceding the one on which S&W relies—*but as to lenders only*. There, the CARES Act provides that "[t]he Administrator [of the SBA] *shall reimburse* a lender authorized to make a covered loan at a rate" pursuant to a schedule that is set out in the statute. *Id.* § 636(a)(36)(P)(i) (emphasis added). The deliberate difference between what lenders "*shall* [be] reimburse[d]" and what agents "may *not* collect" is striking. *See In re Failla*, 838 F.3d 1170, 1176–77 (11th Cir. 2016) ("The presumption of consistent usage instructs that '[a] word or phrase is presumed to bear the same meaning throughout a text' and that 'a material variation in terms suggests a variation in meaning.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012)). While S&W would like the CARES Act to say "*agents shall be compensated by lenders*," S&W cannot rewrite the statute and create an entitlement Congress deliberately rejected.

B. The First IFR Does Not Create an Entitlement to Agent Fees

1. The Plain Language of the First IFR Creates No Entitlement to Agent Fees

Unable to find support in the CARES Act itself, S&W contends that the First IFR makes it "entitled to fees" paid by lenders, even absent lender authorization.

Am. Compl. ¶¶ 112, 189. The First IFR does no such thing. Rather, as authorized by the CARES Act, the First IFR (1) sets out a schedule of maximum fees "an agent *may* collect" for assistance in preparing an application for a PPP loan, and (2) states that such fees will be paid by the lender out of the fees the lender receives from the SBA instead of by the borrower or out of the loan proceeds. 85 Fed. Reg. at 20,815 (emphasis added). Nothing in the rule requires a lender to pay agents' fees. Just like the governing statute, it is a limitation on amount and source.

2. Existing SBA Regulations Confirm There Is No Entitlement to Agent Fees

Existing SBA regulations applicable to the 7(a) loan program confirm there is no entitlement to agent fees. The First IFR makes clear that the 7(a) background regulations are applicable, *see id.* at 20,815, and S&W agrees that the PPP regulations must be read in the context of the existing 7(a) regulatory scheme, *see* Am. Compl. ¶¶ 43, 65–67.

The SBA does not require borrowers or lenders to use agents in connection with 7(a) loans—borrowers and lenders may "conduct business with SBA without a representative." 13 C.F.R. § 103.2(a). But when agents are used, the SBA regulations dictate who may pay the fee. The background regulations governing the 7(a) loan program recognize three categories of agents: (1) lender service providers, who work for the lender and are paid by the lender; (2) "packagers," "who prepare[] the Applicant's application for financial assistance and [are] employed and compensated by the Applicant"; and (3) loan brokers, who intermediate between lenders and borrowers and can be paid by either the lender or the borrower, but not both. *See* 13 C.F.R. § 103.1(a). The agents referred to in the CARES Act and the First IFR are akin to the "packagers" who are, by preexisting regulation, "compensated by the Applicant." *See id.* The First IFR varies that rule by requiring such agents to be paid, *if at all*, by the lenders. And just as Section 103.1(a) does not create an affirmative obligation of borrowers to use or pay "packagers," the First IFR imposes no such obligation on lenders.

Section 103.1(a) also requires that an agent, whether of a lender or a borrower, be an "authorized representative." *Id.* As S&W concedes, Synovus clearly communicated that it was *not* compensating agents. Am. Compl. ¶ 108. Synovus did not enter into any agreement to compensate S&W or otherwise authorize it to serve as an agent on a PPP application, so S&W was therefore not "authorized" under Section 103.1(a) as required. S&W's theory that an agent is entitled to compensation *by the lender* so long as *the borrower* "agrees to hire a PPP agent," *id.* ¶ 65, has it exactly backwards.[8]

[8] Reading the First IFR as S&W suggests would upend long-established agency law, which does not recognize "involuntary agency." An agency relationship can only arise where the principal "manifests assent" through words or conduct that an agent can act on its behalf. *See* Restatement (Third) of Agency §§ 1.01, 1.03 (2006).

S&W's claim of entitlement to fees is also contrary to 7(a) loan program agent certification requirements. To ensure that agents are properly authorized and have performed the services claimed, agents must disclose and certify their services to the SBA. *See* 13 C.F.R. § 103.5(a). This certification is embodied in SBA Form 159, the "Fee Disclosure and Compensation Agreement," which "must be completed and signed by the SBA Lender and Applicant whenever an Agent is paid by either the Applicant or the SBA Lender in connection with the SBA loan application." SBA Form 159 (rev. Apr. 2018).[9] Form 159 also requires the lender to certify that "representations of services rendered and the amounts charged as identified in this form are reasonable and satisfactory to it." *Id.*; *see also* 13 C.F.R. § 103.5(b) (requiring that total compensation charged by an agent be reasonable).

S&W agrees that Form 159 "must" be submitted as a precondition to agent compensation. Am. Compl. ¶ 65. But S&W does not allege that the form was ever submitted here, or that Synovus certified its services. S&W's contention that lenders must compensate unauthorized agents is at odds with the lender's obligation to certify that the agent's services were "reasonable and satisfactory."

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[9] *Available at* https://www.sba.gov/document/sba-form-159-fee-disclosure-compensation-agreement.

3. Explicit Agreements Between Lenders and Agents Are Necessary to Address Contingencies Associated with SBA Payments

An explicit agreement between lender and agent, as contemplated by the authorization requirement in the 7(a) regulations, is also necessary to address contingencies specific to the SBA's review of PPP applications and the potential clawback of lenders' processing fees. The SBA may review any PPP loan at any time in its discretion. Loan Review Procedures IFR, 85 Fed. Reg. at 33,012. In connection with that review, the SBA may claw back the lender processing fee if it determines the borrower is ineligible. *Id.* at 33,014. The SBA may also claw back the processing fee if the lender fails to abide by PPP rules. *See id.* Absent an explicit agreement between lenders and agents addressing such contingencies, lenders would have no ability to recover an agent fee paid out of funds clawed back by the SBA—even in circumstances where the agent is responsible for the borrower's ineligibility. Neither Congress nor the SBA could have intended such an inequitable result.

4. S&W's Interpretation of the First IFR Would Lead to Fraud and Abuse

Automatic payment by lenders to any agent that claims to have assisted a borrower—to which S&W contends it is entitled—would lead to fraud and abuse. If a lender is required to compensate an agent, regardless of whether the lender has certified in Form 159 that the services were "reasonable and satisfactory," there is no control over the quality of the services rendered or the appropriateness of the fee charged—or even whether the purported services were provided at all. S&W's apparent contention that the agent may certify its own services, Am. Compl. ¶ 65, makes no sense and runs counter to the SBA's long-held concerns about agent-fee fraud and the fact that SBA has consistently pointed to Form 159 as a safeguard against such fraud. *See, e.g.*, SBA, Off. of the Inspector Gen., *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2019*, at 8, 9 (Oct. 11, 2018) ("OIG investigations have revealed a pattern of fraud by loan packagers and other for-fee agents in the 7(a) Loan program, involving hundreds of millions of dollars.").[10] Such a scheme would also upend the typical SBA practice of permitting lenders to choose the agents with whom they wish to associate, again, in part, to guard against fraud. *See* SBA Info. Notice No. 9000-1793, SBA, Off. of the Inspector Gen. (Apr. 7, 2009) (outlining lender guidelines "[t]o protect against a potentially corrupt loan agent").[11]

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[10] *Available at* https://www.sba.gov/sites/default/files/2019-08/SBA-OIG-Report-19-012.pdf.

[11] *Available at* https://www.sba.gov/document/information-notice-9000-1793-detecting-fraud-small-business-administration-lending-programs.

5. The First IFR Must Be Construed Consistently with the CARES Act

Even if the language in the First IFR were ambiguous as to the payment of agents' fees—which it is not—the First IFR cannot create an entitlement that does not exist in the CARES Act itself. *See Love*, 310 F.3d at 1352–53; *see also Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress."). Instead, the First IFR must be read in a way that is consistent with its empowering statute. *See Sec'y of Labor, Mine Safety & Health Admin. v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990).

In sum, the notion that lenders must simply accept and compensate any demand for payment by anyone who claims to have been an agent is contrary to the regulatory scheme and the SBA's historical concerns about agent fraud.

III. <u>S&W Fails to State a Claim for Unjust Enrichment or Contract Implied in Law</u>

S&W's claims for unjust enrichment (Count One) and contract implied in law (Count Two) are duplicative, and both fail. Under Florida law, there is no difference between claims for unjust enrichment and contract implied in law. *See Monahan v. WHM, LLC*, 2010 WL 11504336, at *4 (S.D. Fla. Mar. 18, 2010). "To the extent Plaintiffs allege a contract implied in law, such contracts must be pled in the same way as unjust enrichment claims[.]" *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 n.2 (11th Cir. 2012).

There are four elements to an unjust enrichment claim (or contract implied in law) under Florida law: (1) the plaintiff has conferred a direct benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit. *Am. Safety Ins. Serv. v. Griggs*, 959 So. 2d 322, 331 (Fla. 5th DCA 2007).

As further evidence that the claims are duplicative as a matter of law, S&W pleads the same facts in support of Counts One and Two. *Compare* Am. Compl. ¶¶ 160–172, *with id.* ¶¶ 173–181. The only distinction is that S&W alleges in Count Two that "*certain* Defendants . . . affirmatively requested further assistance from Sport & Wheat in connection with various transactions." *Id.* ¶ 175 (emphasis added). But no such allegation is made as to Synovus.

A. S&W Does Not Allege It Conferred a Direct Benefit on Synovus, or That Synovus Had Knowledge of or Accepted a Benefit from S&W

Florida courts strictly adhere to the requirement that the plaintiff confer a direct benefit on the defendant. *Donoff v. Delta Air Lines, Inc.*, 2020 WL 1226975, at *12 (S.D. Fla. Mar. 6, 2020); *see GVB MD, LLC v. United Healthcare Ins. Co.*, 2019 WL 5260274, at *4 (S.D. Fla. Aug. 14, 2019) (applying direct benefit requirement to claim for unjust enrichment and contract implied in law).

The Amended Complaint does not allege that S&W conferred a benefit directly on Synovus. Even if Synovus had incurred an obligation to pay S&W for its alleged agent services (it did not), S&W provided those services to PPP applicants, not to Synovus. *See, e.g.*, Am. Compl. ¶ 79. Indeed, as alleged, the borrower asked S&W for assistance, hired S&W, and received S&W's services. *Id.* ¶¶ 99, 102, 113. Synovus did not receive the benefit of those services. *See A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, 2015 WL 12867010, at *5–6 (M.D. Fla. Jan. 22, 2015) (auto repair shop's work for customers did not confer benefit on insurer, which merely incurred an obligation to pay by virtue of its contract with the customers).

Nor did Synovus have knowledge of the scope of S&W's alleged services. The only alleged interaction between S&W and Synovus is that, on one occasion, "[S&W] communicated with Synovus Bank, assisting Synovus Bank in resolving the bank's mismatching of Borrower C's name"—but even then, S&W alleges that it was acting on behalf of and at the direction of Borrower C, not Synovus. *See id.* ¶ 105. S&W speculates that "Defendants performed less work than they would have, absent Sport & Wheat's involvement," *id.* ¶ 164, but "[a]n indirect benefit" of this sort "is not sufficient to support a claim for unjust enrichment." *See Tilton v. Playboy Entm't Grp., Inc.*, 2007 WL 80858, at *3 (M.D. Fla. Jan. 8, 2007).

The purported benefit that Synovus will receive—"origination fees from the SBA"—is by definition conferred by the SBA, not S&W. *Id.* ¶ 168. This illustrates the attenuated nature of S&W's theory: S&W allegedly provided agent services to an applicant, who then submitted a loan application to Synovus, who then submitted that application to the SBA (a third party) and will receive a processing fee from the SBA. Such attenuated allegations cannot sustain an unjust enrichment claim under Florida law. *See Johnson v. Catamaran Health Sol., LLC*, 687 F. App'x 825, 830 (11th Cir. 2017) (dismissing claim where plaintiff paid membership fees to a third party that in turn paid a premium to defendant); *Peoples' Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., N.A.*, 667 So. 2d 876, 879 (Fla. 3d DCA 1996) (claim failed where the alleged payments in which plaintiff claimed an interest were made by a third party, not plaintiff); *Extraordinary Tile Servs., LLC v. Fla. Power & Light Co.*, 1 So. 3d 400, 403 (Fla. 3d DCA 2009) (dismissing unjust enrichment claim based on attenuated relationship between plaintiff and defendant).

B. Synovus's Actions Cannot Be Inequitable Because It Refused to Pay an Agent's Fee Before the Application Was Submitted

The unjust enrichment claim also fails because Synovus's actions are not inequitable as a matter of law. An unjust enrichment claim only lies if the "circumstances are such that it would be inequitable under the circumstances for the defendant to retain the benefit." *Griggs*, 959 So. 2d at 331. "A claim for unjust enrichment . . . requires examination of . . . *the expectations of the parties* to determine whether an inequity would result or whether their *reasonable expectations* were met." *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1100 (Fla. 3rd DCA 2014) (emphasis added) (citations omitted). Although Florida courts do not require that a reasonable expectation of compensation exist for every unjust enrichment claim, it is nonetheless relevant to evaluating the inequity prong. *See Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 807–08 & n.5 (11th Cir. 1999).

S&W does not and cannot allege that it had a reasonable expectation that Synovus would pay its agent fee. S&W concedes that it knew Synovus would *not* pay an agent's fee. Am. Compl. ¶ 108. Synovus transacted with the applicant, not S&W: it was Borrower C itself that accessed Synovus's online portal and submitted an application days later on April 17, 2020. *Id.* ¶ 109. This timeline of events demonstrates that S&W fails to plausibly allege that Synovus's retention of the entire loan processing fee is inequitable. *See Skytruck Co., LLC v. Sikorsky Aircraft Corp.*, 2012 WL 12898020, at *3 (M.D. Fla. Jan 31, 2012) (claim failed where plaintiff "had sufficient notice" that defendant "did not intend to pay commissions to [plaintiff]").

As explained in Part II above, S&W also clearly had no right to payment of fees under the CARES Act and thus could have had no reasonable expectation of payment of such fees absent Syonvus's agreement and authorization. This is why the professional organization for CPAs counseled its members "to discuss this issue with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." Ex. A, AICPA Report, at 3.

IV. S&W Fails to State a Claim for Conversion

S&W's final state law claim—conversion—fails both because a monetary obligation can never be the subject of a conversion claim and because Synovus has not received the loan processing fee on which S&W bases its claim.

Conversion is an "act of dominion wrongfully asserted over another's property inconsistent with his ownership therein." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1270 (11th Cir. 2009). "In order to maintain an action for conversion, one must have possession of the property or an immediate right to possession." *Scherer v. Laborers' Int'l Union of N. Am.*, 746 F. Supp. 73, 84 (N.D. Fla. 1988). That means that a conversion claim cannot stand unless the plaintiff has "a present or immediate right of possession of the property in question"—here, the loan processing fee. *Allen v. Universal C.I.T. Credit Corp.*, 133 So. 2d 442, 445 (Fla. 1st DCA 1961).

A monetary obligation cannot give rise to a conversion claim. *Kee v. Nat'l Reserve Life Ins. Co.*, 918 F.2d 1538, 1541–42 (11th Cir. 1990); *Neelu Aviation, LLC v. Boca Aircraft Maint., LLC*, 2019 WL 3532024, at *8 (S.D. Fla. 2019). S&W alleges that "[a] portion of the origination fee each Defendant received was the rightful property of [S&W]." Am. Compl. ¶ 183. Yet under S&W's own theory of recovery, the processing fees are "paid directly to lenders by the SBA," *id.* ¶ 9, 49, and then any agent fees "will be paid" to the agent "by the lender," *id.* ¶ 12. Thus, S&W does not actually allege that Synovus has "converted" S&W's property but that Synovus has not fulfilled an alleged monetary obligation, which does not give rise to a conversion claim.

S&W also cannot possibly have a "present or immediate right of possession" of a fee that Synovus has not yet received. S&W acknowledges as much, noting that "Synovus Bank *will* receive or has received its PPP loan origination fee." Am. Compl. ¶ 111 (emphasis added). Even then, the fee is subject to clawback under certain circumstances, so it is unclear what, if any, payment Synovus will receive and retain. *See supra* Part II.B.4. Assuming Synovus eventually receives a processing fee, S&W's alleged future possessory interest in that fee is "insufficient" to sustain a conversion claim. *See United States v. Bailey*, 288 F. Supp. 2d 1261, 1271–72 (M.D. Fla. 2003) (collecting cases). And, regardless, as discussed above, S&W has no entitlement that could support a property interest in any loan processing fee Synovus eventually receives.

For these reasons, Count Three should be dismissed.

V. This Case Is Not Suitable for Class Action Treatment

The decision of S&W's lawyers to package S&W's meritless claims in a putative class action does not change the fact that the Amended Complaint should be dismissed as a matter of law.[12]

First, S&W will not be able to satisfy Rule 23(a)'s numerosity requirement. S&W's allegation that the putative class consists of "thousands of agents," Am. Compl. ¶ 150, is unsupported and certainly not correct: after processing approximately 20,000 PPP applications, Synovus management is aware of only nine entities or persons that even contacted the Bank about possible agents' fees. There is considerable doubt that S&W could possibly demonstrate that "the class is so numerous that joinder of all members is impracticable." *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266–67 (11th Cir. 2009) (quoting Fed. R. Civ. P. 23(a)(1)).

Second, "common issues will not predominate over individual questions" because, "as a practical matter, the resolution of an overarching common issue breaks down into an unmanageable variety of individual legal and factual issues."

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[12] Remarkably, the Amended Complaint, dated May 28, 2020, alleges that S&W is "unaware of any other case involving these particular Defendants," Am. Compl. ¶ 155, despite a consolidation motion pending before the Judicial Panel on Multidistrict Litigation that seeks to join this case with another similar action naming Synovus as a defendant. *See* Motion to Transfer & Schedule of Actions, *In re Paycheck Protection Program (PPP) Agent Fees Litig.*, MDL No. 2950 (May 22, 2020), ECF Nos. 1, 1-2. As of the date of this filing, at least 19 similar cases had been filed nationwide.

Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1274 (11th Cir. 2019) (quotation omitted). Because the CARES Act sets a cap on agent fees—not a fixed fee—the reasonableness and amount of each specific fee claimed by each specific agent would have to be litigated individually. With respect to the state law claims in particular, "common questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009). Each of S&W's claims, if they survive the instant motion, will turn on individualized factual questions.

Finally, the Amended Complaint makes no effort to allege how putative class members will be identified. It states in a conclusory fashion that "[c]lass members are . . . readily ascertainable, because the Defendants have a record of every loan they have made under the Paycheck Protection Program." Am. Compl. ¶ 156. While lenders could identify PPP *borrowers* in this manner, the existence of a database of borrowers will not identify agents. *See Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 948–50 (11th Cir. 2015) (allegation of the existence of a "sales database" insufficient to satisfy ascertainability requirement). Indeed, Synovus's online application portal does not collect agent information and does not contemplate the use of an agent, consistent with the fact that *the SBA's PPP* *borrower application itself does not include a field to identify agents*.[13] Because the Amended Complaint seeks recovery on behalf of an unascertainable class of unreported and unverified agents, it merely presents another opportunity for agent fraud, and needless litigation.

CONCLUSION

Based on the foregoing, and pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Synovus Bank respectfully requests that the Court dismiss Plaintiff's claims in their entirety.

Dated: Washington, D.C.
June 10, 2020

By: /s/ *Paul J. Nathanson*

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[13] *Available at* https://home.treasury.gov/system/files/136/PPP-Borrower-Application-Form-Fillable.pdf.

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LOCAL RULE 7.1(F) WORD LIMIT CERTIFICATION

Pursuant to Northern District of Florida Local Rule 7.1(F), I certify that this Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof is in compliance with the Court's word limit. According to the word processing program used to prepare this motion and memorandum, the document contains 7,965 words, exclusive of the case style, signature block, and this certification.

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