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-5425-TKW-HTC

PLAINTIFF SPORT & WHEAT'S OPPOSITION TO SYNOVUS BANK'S MOTION TO DISMISS

I. Introduction

Synovus's scattershot motion to dismiss should be denied. Although Synovus attempts to raise a number of distracting side issues, the motion does not establish that any of Sport & Wheat's claims fail or should be dismissed.

As the Court knows, the new coronavirus has changed everything in America. The dramatic halt to general economic activity that was required by public health officials to get the virus under control initially was devastating. Businesses were at risk of going under permanently.

To deal with coronavirus-related economic fallout, the Congress and the President quickly agreed on several legislative solutions, one of them being the Paycheck Protection Program, which is part of the new "CARES Act."[1] The Paycheck Protection Program, styled a lending program, is a mechanism by which Congress was able to rapidly funnel money to small businesses.

By its own count, Synovus made 20,000 loans under the PPP, none of which carry any risk at all for the bank. Sport & Wheat swung into service to assist its own clients, and to help Synovus make some of those loans. Synovus earned a percentage fee on each loan it made. Sport & Wheat, a professional accounting firm, is entitled to fair compensation for its hard work because it benefited Synovus. And such compensation is consistent with, not antagonistic to, federal law.

II. Factual allegations relevant to this motion

Sport & Wheat is a small, two-person accounting firm in Pace. (Am. Compl. ¶ 26.) Jill Sport and Tim Wheat have been accountants in the Santa Rosa area for over 30 years each. Sport & Wheat provides general accounting and tax services to a clientele that consists largely of small businesses in the region. *Id.* ¶ 74. Pace and Milton are small towns and the business community is close-knit.

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[1] A helpful table of authorities appears on page 2 of the Amended Complaint. For consistency, Sport & Wheat uses the same terms in this brief.

Borrower C—a pseudonym Sport & Wheat has used to protect the privacy of this small business on the public docket—is a small medical group in nearby Pensacola that has nine employees. (Am. Compl. ¶¶ 100–01.) Borrower C asked Sport & Wheat to prepare an application for a loan under the Paycheck Protection Program, which would be submitted to Synovus. *Id.* at ¶ 102.

Sport & Wheat carefully documents its work for each client, because it generally bills by the hour for its time. Sport & Wheat spent 8.67 hours on Borrower C's application, including "preparing, processing, and filing the PPP loan application and supporting documents." *Id.* at ¶ 103 (emphasis added). (Thus Synovus is incorrect to say "[t]here is no allegation that S&W actually submitted this . . . to Synovus." (Mot. at 8.))

Sport & Wheat's activity with Borrower C was primarily during April 2020.

As the Amended Complaint alleges, "Synovus Bank knew that Sport & Wheat was acting as Borrower C's PPP Agent in connection with Borrower C's PPP loan application." *Id.* at ¶ 106. (Again, Synovus's motion is flatly wrong to state that "S&W does not claim that Synovus had any knowledge of what work S&W was purportedly doing." (Mot. at 9.))

Synovus was aware of Borrower C's designation of Sport & Wheat as its PPP Agent as early as April 1, 2020, when Synovus asked Sport & Wheat for help in resolving a name mismatch in the bank's computer, which was causing a delay with processing the borrower's application. (Am. Compl. ¶ 105.)

The Amended Complaint alleges that Sport & Wheat prepared a loan application for Borrower C, and that the application was submitted using Sport & Wheat's information and documentation. *Id.* at ¶¶ 102, 103, 109.

To add substance to the allegation that "Synovus Bank knew that Sport & Wheat was acting as Borrower C's PPP Agent," Sport & Wheat will recount some evidence of its communications with Anna Weaver, a Synovus local banker in the Pace branch of the bank. Sport & Wheat has dozens of text messages that show the communication between the two parties.

- For example, on April 3, Sport & Wheat texted Ms. Weaver to say that the bank's web site was "up!" Ms. Weaver responded: "Thank you Jesus!!!!! 🙏🙏🙏🙏" Ex. A at Text 1.[2] The two parties then exchanged screenshots of the Synovus web site for PPP loans. *Id.* at Text 2.

- Later that day, Sport & Wheat asked, in connection with Borrower C's loan, if "Telephone and cell count as utilities?" *Id.* at Text 4. The bank employee responded, "Hell fire and damnation. I don't know. It does not on usual application. . . . Let's go to a spa I know in San Antonio after this is over."

- On Saturday, April 4, the two parties exchanged texts about whether the bank would be e-mailing Sport & Wheat's clients regarding their loan status. *Id.* at Text 5. The same day, Sport &

[2] Some of the names in Ex. A have been redacted to protect the financial or medical privacy of individuals.

Wheat asked if certain loans were being processed; Ms. Weaver responded, "Yes they are processing." *Id.* at Text 9.

- On April 6, Sport & Wheat and Ms. Weaver texted further about a mismatched name for Borrower C. *Id.* at Text 13. The banker asked, "So can it be corrected?" Sport & Wheat responded: "Working on it. Had to change the app I prepared so it's ready if they [Borrower C] get the next email." *Id.*

- On April 7, Sport & Wheat texted Ms. Weaver to say that "[Borrower C] is submitted. Thanks for all your help!" *Id.* at Text 15. The banker responded: "Awesome. . . . Thank you thank you!!!!" Sport & Wheat, referring to more than one Synovus borrower, replied, "All my chickadees are in the coop."

- On April 16, the parties commiserated over the intense demand for loans, and Ms. Weaver wrote: "My phone has blown up with every customer that received an email stating funds were gone [meaning, the PPP pool had run dry]. It's a tough time because I'm heartbroken for all my customers." *Id.* at Text 16.

During this time period, the bank employee also repeatedly notified Sport & Wheat that the loan process was extremely intense at the bank and that people were working around the clock to process an avalanche of PPP loan applications. For example, Ms. Weaver wrote on April 4 that there was a "group working all weekend." *Id.* at Text 6. On April 5, she wrote: "[Bank employees] are still working through submissions. [An employee] was texting me at 10 last night." *Id.* at Text 10. The next day she wrote that there had been 11,000 loan applications. *Id.* at Text 11. (This program had been signed into law by the President only eight days earlier, on

March 27.) The same day, Sport & Wheat asked: "Has your day been crazy?" Ms. Weaver responded: "Absofreakinlutely." *Id.* at Text 12.

On April 9, Sport & Wheat asked Synovus about being paid for its work as an agent for borrowers. (Am. Compl. ¶ 107.) These communications occurred with more than one bank employee and were conducted in writing. Bank employee Larry Strain notified Sport & Wheat that: "At this point Synovus has taken the position, right or wrong, that they are not paying the agent fees. Decision was made way above my pay grade." (Ex. B at 2.) He continued, suggesting a way around federal law, which bars Sport & Wheat from charging its clients, "I know a lot of acxountants who are being paid to gather the information but just not to prepare the application. I know that it seems to be parsing but that us how many are approaching it." *Id.* at 3.

By this point, Sport & Wheat had already provided Synovus with critical help in getting the loan for Borrower C processed and funded, and had prepared the loan application. (Am. Compl. ¶¶ 104, 108.)

Borrower C's loan was ultimately funded in the amount of $163,303. *Id.* at ¶¶ 109–10. Synovus is entitled to a fee of $8,165.15 from the Small Business Administration, which under the statute was to have been paid to Synovus in April. *Id.* at ¶ 111; 15 U.S.C. § 636(a)(36)(P)(iii).

Synovus never paid any portion of that fee to Sport & Wheat. *Id.* at ¶ 113.

Under the agreement between Sport & Wheat and Borrower C, Sport & Wheat will continue to render services as an agent. *Id.* at ¶ 103. This is not necessarily an easy task. The forgiveness application is five pages long, the instructions are seven pages long, and they require preparation and consultation of further supporting documentation.[3] The "Paycheck Protection Program Flexibility Act," Pub. L. 116-142, has complicated matters even further. Failure to complete this process successfully will cost Borrower C $163,303—the amount of the loan—plus interest payable to Synovus. Sport & Wheat's assistance is necessary. *Id.* at ¶ 103.

Complaining that this suit got filed—even after Synovus expressly refused to pay Sport & Wheat—Synovus states that "[i]t 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." (Mot. at 5.) Because this motion concerns only *this* action, it is a wholly irrelevant remark. It is also not true. *This* case was the first filed in the United States to allege entitlement to relief on behalf of a PPP Agent. It is correct that Synovus is now defending at least one other such

[3] Ex. F, Paycheck Protection Program Loan Forgiveness Application (June 16, 2020); Ex. G, Loan Forgiveness Application Instructions for Borrowers (June 16, 2020). Many PPP forms, including these two, are available on the Small Business Administration's web site at https://www.sba.gov/document/?program=PPP.

action in the federal system, and that there are approximately 40 such federal actions now on file in the putative MDL.

III. Legal standard applicable to a motion to dismiss

This is a motion to dismiss under Fed. R. Civ. P. 12(b)(6), testing the sufficiency of the complaint. Regarding factual allegations in a pleading, Fed. R. Civ. P. 8(a)(2) merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief." It does not require exhaustive factual recitations.

On this motion, the Court must accept all of the complaint's allegations as true and construe them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). The plaintiff need not give "detailed factual allegations," but merely must "provide the grounds of his entitlement to relief," and must include more than labels or formulaic recitations of the elements of a cause of action. *Cooley v. HMR of Alabama, Inc.*, 747 F. App'x 805, 807 (11th Cir. 2018) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Notice pleading "does not require a plaintiff to specifically plead every element of his cause of action," just sufficient information regarding the elements of a cause of action "to support recovery under some viable legal theory." *AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186 (11th Cir. 2011).

Where a party presents matters outside the pleadings to a district court, and such matters are not excluded by the court, the court must convert the motion to a motion for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). "Conversion . . . should be exercised with great caution and attention to the parties' procedural rights." *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009).

In this instance, because Synovus's treatment of the facts is so inconsistent with its *own* knowledge of those facts; and so as to present additional context, Sport & Wheat does present additional matters to the Court for consideration in the form of the attached exhibits. Sport & Wheat believes its complaint stands on its own, however, and is sufficient to withstand Synovus's attack without any extrinsic evidence. Sport & Wheat does not seek conversion to a Rule 56 motion.

IV. Argument regarding Sport & Wheat's affirmative claims in Counts 1–4

This section addresses the real core of Synovus's motion—its direct attack on those claims Sport & Wheat has brought in Counts 1 through 4. (Section V, the next section, responds to Synovus's arguments regarding the overall structure CARES Act, its regulation, and their relevance to this action.)

A. Counts 1 and 2: Sport & Wheat's unjust enrichment and contract implied in law claims are adequately pled.

Count 1 of the Amended Complaint states a claim for unjust enrichment. Count 2 states a claim for "contract implied in law (restitution/quasi-contract)." These claims, which are closely related, are fully supported by the facts and the law.

A contract implied in law, or quasi contract, has four elements: (1) the plaintiff has conferred a 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 without paying fair value for it. *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 386 (Fla. 4th DCA 1997). Synovus agrees with this read of the law. (Mot. at 25.)

According to some commentators, to recover for unjust enrichment, the same elements must be proved, plus there must be a "lack of adequate remedy at law." H. Hugh McConnell, *Distingushing Quantum Merit and Unjust Enrichment in the Construction Setting*, 71 Fla. Bar J. 88, 89 (Mar. 1997). Other authorities use both "unjust enrichment" and "contract implied in law" to describe the same theory. Sport & Wheat has no express contract with Synovus, so has no adequate remedy at law, so Sport & Wheat can prevail under both theories. This brief will discuss them together.

Importantly, the basis for recovery on either such claim "does not turn on the finding of an enforceable agreement," so recovery may be had "even where the parties had no dealings at all with each other." *Commerce*, 695 So. 2d at 386. "Florida courts have made clear that an unjust enrichment claim may be brought whether or not the parties had any previous contact at all." *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 806 (11th Cir. 1999). *See also 14th & Heinberg, LLC v. Terhaar & Cronley Gen. Contractors, Inc.*, 43 So. 3d 877, 880 (Fla. 1st DCA 2010) (unjust enrichment claim can lie "even though the parties to such an implied contract never indicated by deed or word that an agreement existed between them"); *Circle Fin. Co. v. Peacock*, 399 So. 2d 81, 84 (Fla. 1st DCA 1981) (unjust enrichment "acknowledges an obligation which is imposed by law regardless of the intent of the parties").

For these reasons, as Synovus acknowledges, a party's reasonable expectation of payment is not an element of the claim. Instead, "[q]uasi-contracts are based primarily upon a benefit flowing to the person sought to be charged." *Variety Children's Hosp., Inc. v. Vigliotti*, 385 So. 2d 1052, 1053 (Fla. 3d DCA 1980). The theory is intended to correct a wrong.

The following table reviews each of the four common legal elements of these two claims, and the factual allegations that support that particular element.

Element	Facts supporting the element
Did Sport & Wheat confer a benefit on Synovus?	Yes. Sport & Wheat assisted Synovus by taking work off of the overtaxed bank employees and putting it onto its own shoulders. This permitted Synovus to process more loans, and make more money using its own workforce. (Am. Compl. ¶¶ 164, 174.) As discussed in the Amended Complaint, demand for PPP funds was extremely high. The entire initial $349 billion was depleted in just fourteen days. (Am. Compl. ¶ 57.) The financial community as a whole knew that the funds would run out fast. *Id.* at ¶ 76. Sport & Wheat was "inundated" with requests—which it passed on to lenders including Synovus. *Id.* at ¶ 78. Sport & Wheat specifically assisted Synovus by preparing, processing, and submitting Borrower C's loan application, and its supporting documents. *Id.* at ¶ 103. That conferred a benefit on Synovus in at least these ways: First, Sport & Wheat brought business to Synovus and enabled it to make the loan, earning its statutory fee. Second, Sport & Wheat assisted Synovus by making it easier for Synovus to process Borrower C's application. By accepting Sport & Wheat's help, Synovus was able to save its own labor and process another borrower's loan—rather than dealing directly with Borrower C. Third, Sport & Wheat assisted Synovus with its name mismatch computer problem, so that Synovus could make the loan. *Id.* at ¶ 105. Again, the delay here could have cost Synovus access to the limited PPP pool, since Synovus was competing with other lenders for the right to make loans. Fourth, as alleged, Borrower C is not the only borrower with whom Sport & Wheat worked. Synovus

Element	Facts supporting the element
	benefited from other work by Sport & Wheat as well. *Id.* at ¶ 114. All the foregoing, found solely in the Amended Complaint, is sufficient to support this element of unjust enrichment. But looking outside the complaint, there is even additional evidence that readily bears out that Synovus was snowed under with work, and was benefited by Sport & Wheat. The text messages from Ms. Weaver, the local banker, show that people at the bank were working around the clock and heavily overloaded. Her references to needing a spa break are an example. Ex. A at Text 4. The deposition of Synovus under Rule 30(b)(6) was begun last week. It provides additional context for Sport & Wheat having conferred a benefit on Synovus. The company's representative testified that employees were brought together from across the bank to deal with PPP loans. (Ex. C at 52:3–24.) Synovus assigned 400 people, just in customer-facing jobs, to handle PPP loans—with more presumably behind the scenes. *Id.* at 49:24–50:8. Some of these people were working formal overtime hours. *Id.* at 50:9–13. In fact, a local bank vice president in Pensacola wrote to bank customers that the process was "stressful" and that bankers were "talking on the phone at 11:00 and 12:00 at night" with customers. 44:3–46:11. The corporate representative testified that this meant "tension and stress" for the bank. *Id.* The deponent also testified that the bank would benefit from receiving a "clean" PPP application, versus one with errors. *Id.* at 61:12–62:13. He agreed that this "would have freed up some labor resources to work on a different application, which would allow the bank to do

Element	Facts supporting the element
	more business." *Id.* at 62:14–23.
Did Synovus have knowledge of the benefit Sport & Wheat conferred on it?	Yes, for the same reasons discussed above. Synovus was aware that Sport & Wheat was serving as an agent and providing it with a benefit. The Amended Complaint makes this plain. Synovus knew that Sport & Wheat had signed Borrower C's application "as its PPP Agent." (Am. Compl. ¶ 104.) Synovus was in constant contact with Sport & Wheat about the application. *Id.* at ¶ 105. And most significantly, "Synovus Bank knew that Sport & Wheat was acting as Borrower C's PPP Agent." *Id.* at ¶ 106. Moreover, even if we look outside the complaint, there is even more evidence that Synovus knew about Sport & Wheat's help. The text messages showing the screenshots of the bank's web site are good evidence of that. And the April 7 text message from the bank, which read "Thank you thank you!!!!", Ex. A at Text 15, is clear evidence that Synovus not only knew about the benefit Sport & Wheat conferred on it, but welcomed it.
Did Synovus accept or retain the benefit conferred on it?	Yes, plainly. The Amended Complaint alleges that Synovus repeatedly and directly communicated with Sport & Wheat to smooth the way for multiple loan applications to go through. (Am. Compl. ¶¶ 104, 105, 106, 114.) And even if evidence outside the complaint is necessary to establish this element, Sport & Wheat can do that by referring again to the text messages. Indeed, the corporate representative deponent also agreed with that obvious read of the messages. *E.g.*, "It would indicate that this Ms. Sport is, you know, doing something in the process, you know, submitting

Element	Facts supporting the element
	information it appears on behalf of the customer." Ex. C at 122:16–20.
Are the circumstances such that it would be inequitable for Synovus to retain the benefit without paying fair value for it?	Yes, the Amended Complaint alleges this as well. First of all, all of the facts above establish that Synovus benefited from Sport & Wheat's work and encouraged it. Where Synovus took advantage of Sport & Wheat's services, it is equitable for Synovus to pay. Further, from Sport & Wheat's perspective, *it* has suffered a loss as a result of these transactions. To assist Synovus with making money on its PPP loans, "Sport & Wheat employees put considerable time" into researching the law, and "set aside other opportunities for profitable work" of their own. (Am. Compl. ¶ 76.) In particular, this was late March: income tax season. Sport & Wheat will have suffered a loss, and Synovus a windfall, if Synovus is not ordered to make restitution in unjust enrichment. Synovus claims that it put "notices on its PPP application portal making clear it would not be paying applicant agents' fees." (Mot. at 9.) The Court must disregard that allegation, because it does not appear in the Amended Complaint. But even if it did, the contradictory *conduct* of the bank—welcoming and encouraging Sport & Wheat's help—is strong evidence that it would be inequitable for Synovus to retain the benefit. In any event, this element has been adequately pleaded.

Taken as a whole, Counts 1 and 2 of the Amended Complaint survive scrutiny under Rule 12(b)(6), particularly when construed in Sport & Wheat's favor. These counts must not be dismissed.

Some minor points remain to respond to from Synovus's motion.

1. Synovus claims that Sport & Wheat did not allege it conferred a benefit on Synovus. It misconstrues the "purported benefit that Synovus will receive" as "origination fees from the SBA," and it goes on to call Sport & Wheat's allegations "attenuated." (Mot. at 26–27.) Synovus says Sport & Wheat's help did not *directly* lead to fees for Synovus.

Sport & Wheat disagrees. Construing the complaint in its favor, it brought Synovus the transaction, and that would not have happened without its help. But this is not Sport & Wheat's entire theory of the claims.

Sport & Wheat conferred a benefit *directly* on Synovus: Sport & Wheat provided material assistance, directly to the bank as well as its borrower, in the form of professional accounting services. As alleged in Count 1, Synovus "performed less work than [it] would have, absent Sport & Wheat's involvement"; in Count 2, Sport & Wheat "[made] it easier and faster for [Synovus] to process loans." (Am. Compl. ¶¶ 164, 174.) These allegations are sufficient to support the claim. The facts are, Synovus conserved time and energy—which it badly needed—because of Sport & Wheat.

2. Synovus claims, Mot. at 26, that Sport & Wheat failed to allege that Synovus had any knowledge of the scope of Sport & Wheat's services. As discussed in the table above, this is not true. These allegations are present.

3. Synovus claims, Mot. at 27–28, that Sport & Wheat could have no reasonable expectation of being paid for its work. But Synovus concedes—as it must—that this is not an element of the cause of action. *Id.* at 28 (citing *Tooltrend*, 198 F.3d at 807–08 & n.5). Thus, this argument cannot support Synovus's motion to dismiss. At best, it's a fact dispute to be resolved by the jury that relates—as Synovus concedes—to the "inequity prong" of the causes of action. Moreover, Synovus totally fails to mention that Sport & Wheat performed significant work *before* being informed on April 9 that it could not be paid. (Am. Compl. ¶¶ 107–08.)

4. Synovus argues in passing that there is no allegation it "affirmatively requested further assistance from Sport & Wheat in connection with various transactions," which is an allegation Sport & Wheat made against all Defendants in Count 2. (Am. Compl. ¶ 175.) This is wrong, because Sport & Wheat did allege that Synovus sought its assistance: it asked Sport & Wheat to intervene in correcting the name mismatch on April 1. (Am. Compl. ¶ 105.) Although the complaint is enough, the text messages further support this allegation, because Synovus returned to the

subject on April 6 in a text message: "So can it be corrected?" Sport & Wheat replied: "Working on it." The bank responded: "Good !" Ex. A at Text 13.

At this stage—on a motion to dismiss—it is not for Synovus to argue contrary facts, nor must Sport & Wheat prove its entire case today. Sport & Wheat has more than amply stated its claims for unjust enrichment and for contract implied in law.

B. Count 3: Sport & Wheat has adequately pled a claim for conversion.

Count 3 of the Amended Complaint states a claim for state-law conversion. This count too is adequate to withstand attack.

Under Florida law, the elements of conversion are "(1) an act of dominion wrongfully asserted; (2) over another's property; and (3) inconsistent with his ownership therein." *Joe Hand Promotions, Inc. v. Creative Enter., LLC*, 978 F. Supp. 2d 1236, 1241 (M.D. Fla. 2013); *see also Cty. of Monroe, Fla. v. Priceline.com, Inc.*, 265 F.R.D. 659, 668 n.8 (S.D. Fla. 2010) ("Under Florida law, 'conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time.'") (quoting *Mayo v. Allen*, 973 So. 2d 1257, 1258–59 (Fla. 1st DCA 2008).

And Sport & Wheat has alleged conversion: Synovus has taken money which belongs to Sport & Wheat, which is earmarked to pay Sport & Wheat under the PPP Interim Final Rule, and retained it for itself.

Synovus flatly argues that there can never be a conversion claim for money. (Mot. at 29–30.) But that is not true. Conversion has been successfully alleged against banks who reordered processing fees on debit card transactions, resulting in excessive fees. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) (approving agreed settlement). *See also Cty. of Monroe, Fla. v. Priceline.com, Inc.*, 265 F.R.D. 659, 668 (S.D. Fla. 2010) (certifying class including claims for conversion and unjust enrichment).

A different decision in the same case is instructive. *Cty. of Monroe, Fla. v. Priceline.com, Inc.*, No. 09-10004, 2009 WL 4890664, at *5 (S.D. Fla. Dec. 17, 2009). There the court examined other precedent that "money is generally the proper subject of a conversion claim [only] where it exists as 'a specific fund capable of separate identification.'" *Id.* (citing *Bankest Imports, Inc. v. ISCA Corp.*, 717 F. Supp. 1537, 1542 (S.D. Fla. 1989)). The court continued, however, that "this general rule is an expression of the principle that an action in tort is inappropriate where the claim is based on a breach of contract." *Id.* (citation and punctuation omitted). In *Priceline*, the disputed funds were *not* the subject of any contractual relationship—thus, the conversion claim withstood a motion to dismiss. Such is the case here.

Finally, in fact, the funds Synovus received from the SBA in connection with Borrower C's loan *are* "specific funds, capable of separate identification." In a notice to lenders dated May 21, 2020, SBA stated that it "will make a payment for each loan on an individual basis so that Lenders will be able to match the received payment with the corresponding loan." (Ex. D at 7.)

Synovus also argues that Sport & Wheat cannot show a "present or immediate right of possession" to its fee because Synovus does not have the fee yet. (Mot. at 30.) This is a deft argument, but on this motion, the Court cannot simply take Synovus's word that it does not yet have the fee. Moreover, the statute requires the Small Business Administration to pay Synovus its fee within five days of disbursing the loan. 15 U.S.C. § 636(a)(36)(P)(iii). By now, Synovus has been paid. This argument fails.

In short, appropriating money intended for another is a conversion and a theft. As one court put it: "As is apparent on the face of this lamentable case, Auerbach and his partners and associates simply gained possession of money they knew belonged, was meant for, and should have been paid to their brain damaged minor client. . . . [S]uch conduct in itself involves a conversion or, not to mince words, a theft of Selser's property which the miscreants were properly required to return." *Auerbach v. McKinney*, 549 So. 2d 1022, 1031 (Fla. 3d DCA 1989).

Count 3, Sport & Wheat's claim for conversion, should not be dismissed.

C. Count 4: Synovus mischaracterizes Sport & Wheat's claim for declaratory relief.

Sport & Wheat's Count 4 is for declaratory relief. Paragraph (a) of its prayer for relief also seeks declaratory relief, along with injunctive relief.

This count is present because of arguments Sport & Wheat anticipated, that because Sport & Wheat's name did not appear on certain SBA paperwork created or filed by Synovus, it may not be entitled to be paid. (Am. Compl. ¶¶ 63–66.)

In conventional Section 7(a) loans—outside the context of the PPP—the SBA has required that agents be named and disclosed on SBA "Form 159." Because Synovus has controlled access to SBA documents, Am. Compl. ¶ 71, Synovus may have kept Sport & Wheat's name from appearing on those documents. *If* Form 159 is required on a PPP loan, Count 4 seeks an order that Sport & Wheat is a rightful recipient of agent fees, and seeks a declaration that Synovus has wrongfully manipulated the form. *Id.* at ¶ 190. Sport & Wheat thus would seek declaratory and injunctive relief ordering Synovus to redress these paperwork problems.

Since filing its Amended Complaint, and the issuance of recent caselaw, Sport & Wheat has reconsidered its position and now argues that Form 159 and other SBA formalities are not required. The basis for this argument is to be found in the PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812. The SBA announced there that if there are conflicts between the PPP rule and the usual Section 7(a) lending rules, the PPP rule controls: "The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10)." *See also id.* ("for loans made under the PPP, SBA will not require the lenders to comply with section 120.150 'What are SBA's lending criteria?' ").

Synovus misreads Count 4 as a "concession" that the CARES Act "does not expressly provide a private right of action." (Mot. at 12.) That is not Sport & Wheat's theory or intent with Count 4; Count 4 is present in the event the Court finds that declaratory or injunctive relief is necessary in order to direct Synovus to take an action to legally pay Sport & Wheat's fees.

Count 4, and Sport & Wheat's prayers for declaratory and injunctive relief, should not be dismissed.

V. Argument regarding Synovus's position on federal law

Synovus's lead argument, Mot. 12–16, is that the CARES Act provides no private right of action. Synovus defensively spends several pages pressing this point. Sport & Wheat is somewhat mystified by the argument, because as Synovus correctly argues, Sport & Wheat does not allege such a right, even an "implied" right of action. (Mot. at 13.) In short, Sport & Wheat does not argue that the CARES Act *directly* creates a cause of action under which it can sue Synovus.

However, the CARES Act, and the PPP Interim Final Rule, are binding expressions of federal law which *do* bind Synovus and Sport & Wheat. They are expressions of the Congressional design of the PPP, and express Congress's clear intent to provide money for PPP Agents like Sport & Wheat within the billions they channeled to lenders. These laws are clear evidence that Congress intended PPP Agents to participate in PPP transactions and to help inject badly needed financial oil into America's economic engine.

A. The statutory and regulatory scheme show that Congress expected that PPP Agents would be part of PPP loan transactions and provided money for their work.

The PPP statute and its enabling regulation fit together. The statute gives the Small Business Administration the duty of determining how and how much agents can be paid; and the regulation directs that lenders who accept fees under the PPP must share those fees with any agents who have assisted the borrower in connection with the transaction.

As for the statute, the CARES Act, Pub. L. No. 116-136, it was signed into law on March 27, 2020. Section 1102 of the CARES Act is the Paycheck Protection Program, and that is codified at 15 U.S.C. § 636(a)(36).

When it comes to this case, 15 U.S.C. § 636(a)(36)(P)(i) and (ii) are the relevant provisions:

> **(i) In general.—**
> The Administrator shall reimburse a lender authorized to make a covered loan at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan, of--
> **(I)** 5 percent for loans of not more than $350,000;
> **(II)** 3 percent for loans of more than $350,000 and less than $2,000,000; and
> **(III)** 1 percent for loans of not less than $2,000,000.
> **(ii) Fee limits.—**
> An 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.

Accordingly, the statute *expressly* allows for agent fees. It would not make sense to discuss them in § 636(a)(36)(P)(ii) if they could not be paid out.

The Small Business Administration was ordered to issue emergency regulations "to carry out this title" within 15 days. 15 U.S.C. § 9012. The SBA issued its "PPP Interim Final Rule," 85 Fed. Reg. 20811, on April 2, 2020. In relevant part, the Rule provides:

> c. 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:
>
> 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 to establish limits on agent fees. **The Administrator, in consultation with the Secretary, determined that the agent fee limits set forth above are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.**

85 Fed. Reg. 20811, 20816 (emphasis added).

Thus, the PPP Interim Final Rule also *expressly* authorizes payment of agent fees and directs where they must come from: "the lender[,] out of the fees the lender receives from SBA." The last sentence of the Rule is important, too: it shows that these fee amounts "are reasonable," specifically taking into account what the statutory fees to the lenders are.

Nothing in this Rule says that lenders can opt out of it and decline to pay PPP Agents. Nothing in this Rule says that lenders can pick and choose which PPP

Agents they want to pay. Nothing in the Rule requires compliance with other, "general" Section 7(a) requirements, like SBA's Form 159, which Synovus argues is mandatory.

Looking at Section 1102 and the PPP Interim Final Rule together, it is important to consider the context. The CARES Act placed the Paycheck Protection Program within the framework of a longtime, existing SBA lending program, known as "Section 7(a)" after the section in the original SBA Act. (Am. Compl. ¶¶. 41–43.)

But in doing so, the CARES Act made massive changes to the structure of the program, compared with what is usual under Section 7(a)—because the CARES Act's real goal is not lending, but a grant. The design of the PPP can't be examined in isolation from the other changes the PPP makes in Section 7(a). There are several important distinctions between the PPP and Section 7(a) that demonstrate the distinctive nature of the PPP:

	Section 7(a) program	**Paycheck Protection Program**
Maximum amount	$5 million. 13 CFR § 120.151.	$10 million 15 U.S.C. § 636(a)(36)(E)(ii).

	Section 7(a) program	Paycheck Protection Program
Interest rate	Varies based on size, 5.0%–8.0% + prime. Source: see footnote.[4]	1% Source: see footnote.[5]
Guaranty fee payable to SBA by lender?	Yes, generally from 0.25%–3.75% 13 CFR § 120.220(a)(1).	No. PPP Interim Final Rule.

In short, the PPP is quite different from Section 7(a). And the PPP Interim Final Rule acknowledges that: "The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10)." *See also id.* ("for loans made under the PPP, SBA will not require the lenders to comply with section 120.150 'What are SBA's lending criteria?' ").

In short: if there is a conflict between the PPP and Section 7(a)'s older requirements, the PPP controls.

[4] Small Business Administration, "Terms, conditions, and eligibility," *available at* https://www.sba.gov/partners/lenders/7a-loan-program/terms-conditions-eligibility#section-header-5.
[5] U.S. Treasury, Paycheck Protection Program (PPP) Fact Sheet*, available at* https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf.

In another context, a sister Florida court has summarized the brief and streamlined requirements of the PPP, compared with Section 7(a)'s more robust review:

> [L]enders need only do five things to underwrite a PPP Loan:
> (1) confirm receipt of the borrower's certifications;
> (2) confirm receipt of information showing that a borrower had employees for whom the employer paid salaries and payroll taxes;
> (3) confirm the dollar amount of the business' average monthly payroll costs;
> (4) follow Bank Secrecy Act requirements; and
> (5) review the "Paycheck Protection Application Form."
> **That's it.**

In re Gateway Radiology Consultants, P.A., ____ B.R. _____, 2020 WL 3048197, at *5 (Bankr. M.D. Fla. June 8, 2020) (emphasis and line breaks added). This is very different from the general Section 7(a) provisions that Synovus leans on.

In re Gateway Radiology is extremely recent authority—sixteen days old—and it post-dates the filing of Sport & Wheat's Amended Complaint. Upon further review of the law, and in light of this and other PPP decisions, Sport & Wheat now recedes from its position that the general Section 7(a) SBA requirements apply. This means Synovus is incorrect to rely on superseded aspects of the Section 7(a) regulations.

For example, Synovus argues, Mot. at 20–21, that 13 CFR § 103.1(a) requires that a PPP Agent must be an "authorized" representative. Here, Sport & Wheat *was* authorized—by Borrower C. But even if Synovus is right and Section 103.1(a) requires *Synovus* to also approve a borrower's hiring of a PPP Agent, that conflicts with the PPP Interim Final Rule, and the language stating that PPP-specific requirements "temporarily supersede" Section 7(a) means that the general rule gives way.

Similarly, Synovus argues that only PPP Agents disclosed on SBA's Form 159 can be compensated, and that Form requires the lender to make certain certifications about the PPP Agent, which Synovus has not done (or refuses to do). (Mot. at 21.)

But Form 159, Ex. E, appears to be another of the general Section 7(a) requirements that does not appear to apply to PPP loans. Form 159 states:

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

Ex. E at 1 (emphasis added). These instructions set up a legal impossibility under the PPP, because the only time the Agent signs the form is if the borrower pays the Agent. But under the PPP Interim Final Rule, Agents are *prohibited* from collecting a fee from borrowers. So by its terms, an Agent can never properly sign Form 159.

Moreover, elsewhere on Form 159, the instructions state that "[t]he SBA does not allow contingency fees (fees paid only if the loan is approved)," which is exactly what the fees for Agents designated in the PPP Interim Final Rule are. An Agent like Sport & Wheat could easily work on an application that, due to the limited PPP pool, does not get funded; the Agent only gets paid if the loan *does* fund. Again—there's a conflict between the PPP and the background Section 7(a) regulations. The PPP rules control. It does not make sense that Form 159, a part of the general Section 7(a) background, has anything to do with this case. Form 159 is a red herring.

At bottom, Synovus's attempt to use the general Section 7(a) rules as a weapon really is an argument by Synovus that *it* has the power to determine which PPP Agents borrowers may and may not use, and which PPP Agents will and won't be paid. Synovus has no right to do this, particularly because the PPP Agent has been selected and designated by the borrower. The PPP Interim Final Rule says borrowers can select the agent of their choice, and the "[a]gent fees will be paid by the lender."

B. The effect of the CARES Act's Section 1102 and the PPP Interim Final Rule.

Plainly, Section 1102 creates a new benefit for participating lenders: loan origination fees of 1%, 3%, or 5%. What Section 1102 awards, the PPP Interim Final Rule apportions.

The Rule's command that "[a]gent fees will be paid by the lender" out of the brand-new lender fees authorized by Section 1102 is directory.

Synovus argues that the Rule must be construed consistently within the statutory authority granted by the CARES Act. (Mot. at 24.) Sport & Wheat agrees with this basic point of law. But tellingly, Synovus does *not* argue that the Rule itself is invalid or was improperly promulgated. The directory language is binding on Synovus; Synovus does not argue that it is somehow exempt.

Synovus is just left arguing that the CARES Act affords Sport & Wheat no direct right of action. But that is beside the point, because as shown in the section above, there are viable state-law claims for Sport & Wheat—like unjust enrichment—which can be enforced whether or not the Rule exists or has the directory language. And enforcement of these state-law claims is entirely consistent with and not counter to the federal laws at issue, the CARES Act and the PPP

Interim Final Rule. Indeed, in the design of those federal laws, Congress both contemplated and *encouraged* agent compensation as a means of speeding funds to ailing businesses.

The Rule also mandates that PPP Agents cannot charge borrowers anything for their services. Again, while Section 1102 contemplates that agents may collect fees, the Rule tells where the fees come from. These laws are compatible with each other. It would be a nonsensical result to hold that PPP Agents cannot charge borrowers for their services and also that lenders can evade any obligation to fund those services at their option, keeping the SBA's money for themselves—but that is what Synovus claims.

For similar reasons, Synovus is wrong in overreaching and arguing that "Congress deliberately rejected" the payment of fees by lenders to PPP Agents. (Mot. at 17–18.) There is nothing at all in Congress's statute that "deliberately" denies Sport & Wheat's claims. Indeed, Congress sought to have PPP Agents be part of the process, subject to rules written by the SBA Administrator.

In conclusion, there is simply no daylight between Sport & Wheat's state-law claims and the obligations of federal law. The PPP statute and regulation are harmonious with those claims.

VI. Synovus's other miscellaneous arguments also fail

Synovus's motion also contains a number of other miscellaneous arguments which intend to pour cold water on this case but which do not belong in a motion to dismiss and do not stand up.

Without expressly arguing that it is a reason to dismiss any particular count (in other words, making another argument not connected to or seeking anything in particular), Synovus complains that Sport & Wheat's claims would open it up to fraud or abuse. (Mot. 22–23.) But Sport & Wheat's claims would be subject to scrutiny like those of any other plaintiff. And a hypothetical *risk* of fraud is not a reason for Synovus to avoid payment of its *known* legitimate obligations.

Similarly, Synovus suggests that because it might be subject to a "clawback" of its own processing fee if an ineligible loan is inadvertently funded, it would be "inequitable" to have to divide *any* part of *any* processing fee with a PPP Agent. (Mot. at 22 (citing 85 Fed. Reg. 33010).)

This is a straw-man argument. Synovus claims that it would have to refund, to the SBA, the PPP Agent's part of the fee out of its own pocket. *Id.* There is no authority whatsoever for this in the regulation Synovus cites. The SBA has its own right of action to recoup directly fees from PPP Agents who have committed fraud on the SBA, and in an instance where the PPP Agent is the party that has committed fraud, SBA would have the discretionary authority not to seek recoupment from the lender at all.

Finally, Synovus's entire section V, regarding the suitability of this case for class treatment, should also be disregarded. (Mot. 31–33.) The motion to dismiss stage is no time to argue the merits of class certification, and Synovus again injects "facts" that the Court cannot accept as true; the Court is bound to construe all well-pleaded allegations in favor of the plaintiff. Moreover, whether the case will ultimately be certified as a class action has nothing to do with the merits of Sport & Wheat's own claims against Synovus today. With due respect to Synovus, section V is just puffery; it does not even ask the Court to do anything specific.

VII. Conclusion

Synovus's motion to dismiss should be denied in full.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT UNDER LOC. R. 7.1(F)

I certify that the core of this brief contains 7,777 words, including headers, footnotes, and quotations.

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