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 REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS
MOTION TO DISMISS THE AMENDED COMPLAINT

This Reply is submitted pursuant to the Court's June 30, 2020 Order. Doc. 62.

BACKGROUND

S&W's Amended Complaint necessarily concedes that S&W cannot state a claim against Synovus. In the Amended Complaint, S&W makes the binding judicial admission that the SBA 7(a) loan program's general requirements apply to the PPP and, more specifically, that "to be paid under 13 C.F.R. § 103.5(a), the

PPP Agent must submit the arrangement in writing on SBA's Form 159." Am. Compl. ¶¶ 43, 45, 65. However, S&W does not and cannot allege that it submitted SBA Form 159 or entered into any compensation agreement with Synovus.[1] That is fatal to S&W's claims.

S&W has tried to backtrack in its response brief – to "recede[] from its position [in the Amended Complaint] that the general Section 7(a) SBA requirements apply," S&W "now argues that Form 159 and other SBA formalities are not required." Opp. Br. 21-22, 28. That is an improper attempt to make yet another amendment to the Complaint through an opposition brief. Federal courts do not allow that. *See Orta v. City of Orlando*, 2015 WL 2365834 at *5, n.3 (M.D. Fla. 2015).

The case S&W cites in support of its new argument that the SBA Section 7(a) requirements do not apply to the PPP holds no such thing. That bankruptcy court decision merely assesses whether *debtors in bankruptcy* are eligible to receive PPP loans. *See In re Gateway Radiology Consultants, P.A.*, 2020 WL 3048197 (Bankr. M.D. Fla. June 8, 2020). It has nothing to do with S&W's claims

[1] During a hearing of the U.S. House Financial Services Committee on June 30, 2020, Treasury Secretary Steve Mnuchin testified that the Treasury Department intended agent fees could be paid only when there is a "contractual relationship between the agent and the bank." *Hearing on Treasury & Fed. Reserve Pandemic Response Before the H. Fin. Servs. Comm.* (June 30, 2020). It is undisputed that no such contractual relationship exists between Synovus and S&W. That is exactly what Synovus has argued. Doc. 46 at 20, 21, 28.

to entitlement to an 'agents fee' despite not fulfilling any of the SBA requirements to claim such a fee.

ARGUMENT

I. The Section 7(a) Background Regulations Apply to the PPP

S&W's new argument that the SBA Section 7(a) background regulations do not apply to the PPP is baseless. The SBA's First Interim Final Rule ("First IFR") related to the PPP makes clear that "[t]he program requirements of the PPP identified in this rule temporarily supersede any *conflicting* Loan Program Requirement." First IFR, 85 Fed. Reg. 20,811, 20,812 (emphasis added). Nothing in the First IFR suspended or 'superseded' the program requirements (a) that a Form 159 be submitted to the SBA if an agent is to be paid; or (b) that the agent must certify that the information provided is accurate (S&W Ex. E, ECF No. 56-5 at 4); or (c) that "[a]ny . . . agent . . . must execute and provide to the SBA a compensation agreement." 13 C.F.R. § 103.5(a).

The case S&W cites proves this point. *See* Opp. Br. 22. Although *In re Gateway Radiology Consultants*, 2020 WL 3048197, at *5 (Bankr. M.D. Fla. June 8, 2020), does not address the SBA regulations relevant to this case or the compensation of supposed PPP agents, that decision does recognize the simple proposition that 7(a) background regulations apply *unless* they conflict with the

First IFR. *Id.* Again, nothing in the First IFR displaces the SBA's agent authorization and certification requirements.

S&W's argument that the First IFR conflicts with the 7(a) loan program's agent certification requirements is plainly incorrect. Form 159 states that the lender must certify that the agent's services are "reasonable and satisfactory." S&W Ex. E, ECF. No. 56-5, at 4. 13 C.F.R. § 103.5(a) requires that that "[a]ny Applicant, Agent, or Packager must execute and provide to SBA a compensation agreement."[2] Again, *none* of those requirements were eliminated by the First IFR. S&W does not allege that it has satisfied *any* of those prerequisites to getting a fee.[3]

The requirement that a supposed agent have an agreement with the lender was reaffirmed this week, by the Secretary of the Treasury:

> [Treasury] guidance [said] that banks could pay agent fees out of the fees that they received. ***That was intended to be based upon a contractual relationship between the agent and the bank***, and to the extent there's any confusion on that, we'll look at clarifying that.

[2] S&W argues that 13 CFR § 103.1(a), which requires a PPP Agent to be an "authorized" representative, "conflicts" with the First IFR. S&W, however, completely fails to explain why that is so. It is not so.

[3] If, as S&W contends, Form 159 is not required, the SBA would have no way of knowing that an agent was even involved in the loan. It certainly could not "recoup" clawed back fees "directly . . . from PPP agents." Opp. Br. 33. More importantly, neither Congress nor the SBA expressed any intent to do away with basic loan application requirements meant to guard against fraud.

Hearing on Treasury & Fed. Reserve Pandemic Response Before the H. Fin. Servs. Comm. (June 30, 2020) (emphasis added). Simply put, there is no authority for S&W's bold contention that "borrowers can select the agent of their choice, and the '[a]gent fees will be paid by the lender,'" despite the absence of any agreement between the agent and the lender. Opp. Br. 31.

II. S&W's Flawed Interpretation of Federal Law Dooms All Its Claims

S&W admits that it has no federal cause of action. Opp. Br. 23 ("Sport & Wheat does not allege such a right, even an 'implied' right of action."). But its state law claims are based entirely upon its erroneous presumption of entitlement to an agent fee under federal law. S&W concedes "there is simply no daylight between Sport & Wheat's state-law claims and the obligations of federal law." Opp. Br. 32. Synovus is not sure exactly what S&W meant by that, but it is certainly true that S&W's federal law claim assumes that S&W is absolutely entitled to an "agents fee" without having complied with any of the SBA requirements to get such a fee, and S&W's state law claims are premised on that alleged entitlement under federal law. Because S&W's assumptions about federal law are wrong, all of S&W's claims are without merit. For example, S&W's unjust enrichment, quasi-contract, and conversion claims all depend upon the presumption of entitlement to an agent fee under federal law – the notion that Synovus has money that belongs to S&W. Am. Compl. ¶¶ 169-170, 183. S&W's

theory of what federal law requires is incompatible with the existing regulatory scheme, and for that reason, as well as those explained in Synovus's opening brief, all of S&W's claims should be dismissed.

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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 1,513 words.

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