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, *et. al.* Defendants.	Case No. 3:20-cv-05425-TKW-HTC

DEFENDANT THE FIRST'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 The First, A National Banking Association ("The First") submits this Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof.

Plaintiff Sport & Wheat ("S&W") claims that it is entitled to fees for assisting borrowers in submitting loan applications under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (the "CARES Act") and the Paycheck Protection Program ("PPP"). The underlying federal statute, however, does not create a private right of action and the state law claims fail as a matter of law.

In addition to the arguments made herein, The First hereby joins, adopts, and incorporates by reference as if fully set forth herein the arguments in support of dismissal as set forth in Defendant Synovus Bank's Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof (Dkt. Nos. 46, 65), Defendant ServisFirst Bank's Motion to Dismiss the Amended Complaint and Supporting Memorandum of Law (Dkt. No. 49), and Defendant Truist Bank's Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof (Dkt. No. 67).

Statement of Facts

I. Enactment of the CARES Act and the Paycheck Protection Program

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 Small Business Administration ("SBA") funding and authority to establish a new loan program for small businesses, called the Paycheck Protection Program. 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).

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:
>
> 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).

There is nothing 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.

II. Facts as Alleged in the Complaint Against The First

Plaintiff S&W alleges that, on April 8, 2020, it was approached by Borrower I to assist in applying for a PPP loan. Dkt. No. 21, Am. Compl., ¶ 115. On April 9, 2020, S&W allegedly prepared a PPP loan application and supporting documents. Am. Compl., ¶ 119. S&W inaccurately alleges that it signed the "application" in a space marked "Borrowers Agent." *Id.* (There is no space on the application marked "Borrowers Agent"). S&W then alleges that it emailed the application to Borrower I, and Borrower I submitted the application to The First. Am. Compl., ¶ 119.

S&W alleges, on April 10, 2020, Borrower I was informed by The First that the application needed to be redone, and that only the borrower should sign the application. Am. Compl., ¶ 120. The First also requested a spreadsheet showing how the loan amount had been calculated. Am. Compl., ¶ 121. S&W alleges that it spent a total of 1.8 hours preparing Borrower I's PPP loan application and gathering supporting documents. Am. Compl., ¶ 118.

From these alleged interactions, S&W speculates that "TheFirst knew that Sport & Wheat was acting as Borrower I's PPP Agent in connection with the loan." Am. Compl. ¶ 123. S&W further assumes that The First has received or will receive a PPP loan origination fee of $378.73. Am. Compl., ¶ 125. Finally, S&W claims that The First is required to share its fee with S&W as Borrower I's PPP agent. Am. Compl., ¶ 126.

Argument and Citations of Authority

I. The CARES Act Does Not Provide a Private Right of Action[1]

S & W's claims should be dismissed because 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

[1] The First hereby joins, adopts, and incorporates the arguments in support of dismissal as set forth in Section I of Defendant Synovus Bank's Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof ("Synovus MTD") Dkt. No. 46, at pp. 12-16, Section II of Defendant ServisFirst Bank's Motion to Dismiss the Amended Complaint and Supporting Memorandum of Law ("ServisFirst MTD") Dkt. No. 49, at pp. 16-20, and Section I of Defendant Truist Bank's Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof ("Truist MTD") Dkt. No. 67, at pp. 9-12.

of action, nor could it. *See Profiles, Inc. v. Bank of Am. Corp.*, No. SAG-20-0894, 2020 WL 1849710, at *7 (D. Md. Apr. 13, 2020) ("[T]he CARES Act does not expressly provide a private right of action.").

Nor does S&W allege an implied private right of action. When determining whether an implied private right of action exist Courts consider four factors: (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 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 v. S. Farm Bureau Life Ins. Co.,* 291 F.3d 718, 722 (11th Cir. 2002) (quoting *Cort v. Ash,* 422 U.S. 66, 78 (1975)). However, the "central inquiry" is "whether Congress intended to create, either expressly or by implications, a private cause of action." *Id.* (quoting *Sandoval,* 532 U.S. at 286). Nothing in the CARES Act evidences any intent to create a private right of action in favor of PPP agents.

Additionally, 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. *See United States v. Fid. 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).

II. The CARES Act and Its Regulations Create No Affirmative Entitlement for Agents That Assists PPP Applicants[2]

The CARES Act only 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; however, there is no basis to create such an affirmative right.

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' fee.

---

[2] The First hereby joins, adopts, and incorporates the arguments in support of dismissal as set forth in Section II of the Synovus MTD Dkt. No. 46, at pp. 18-24, Section I of the ServisFirst MTD Dkt. No. 49, at pp. 7-16, and Section I of the Truist MTD Dkt. No. 67, at pp. 12-26.

III. S&W Fails to State a Claims for Unjust Enrichment or Contract Implied in Law[3]

S&W's claims for unjust enrichment (Count One) and contract implied in law (Count Two) are duplicative, and both fail. See *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 n.2 (11th Cir. 2012) ("To the extent Plaintiffs allege a contract implied in law, such contracts must be pled in the same way as unjust enrichment claims[.]"); *Monahan v. WHM, LLC*, 2010 WL 11504336, at *4 (S.D. Fla. Mar. 18, 2010). 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).

S&W does not allege that it conferred a direct benefit on The First. Rather, it alleges that Borrower I asked S&W for assistance and Borrower I received S&W services. Am. Compl., ¶ 115. Thus, if S&W conferred a direct benefit on anyone, it is Borrower I, not The First. Additionally, S&W cannot plausibly allege that The

[3] The First hereby joins, adopts, and incorporates the arguments in support of dismissal as set forth in Section III of the Synovus MTD Dkt. No. 46, at pp. 24-29, Section II of the ServisFirst MTD Dkt. No. 49, at pp. 20-25, and Section III A of the Truist MTD Dkt. No. 67, at pp. 26-31.

First accepted any benefit conferred by S&W or that The First's actions are inequitable.

IV. S&W Fails to State a Claim for Conversion[4]

S&W's conversion claim fails because a monetary obligation cannot be the subject of a conversion 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). A traditional monetary obligation claim, like the one claimed here, never gives rise to a conversion claim under Florida law. *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); *Belford Trucking Co. v. Zagar*, 243 So. 2d 646, 648 (Fla. Dist. Ct. App. 1970) ("A mere obligation to pay money may not be enforced by a conversion action.").

V. This Case is Not Suitable for Class Action Treatment[5]

S&W will not be able to satisfy the class certification requirements for three reasons. First, 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*

[4] The First hereby joins, adopts, and incorporates the arguments in support of dismissal as set forth in Section IV of the Synovus MTD Dkt. No. 46, at pp. 29-30, Section IV of the ServisFirst MTD Dkt. No. 49, at pp. 25-27, and Section III B of the Truist MTD Dkt. No. 67, at pp. 31-32.

[5] The First hereby joins, adopts, and incorporates the arguments in support of dismissal as set forth in Section V of the Synovus MTD Dkt. No. 46, at pp. 31-33.

v. T-Mobile USA, Inc., 564 F.3d 1256, 1266–67 (11th Cir. 2009) (quoting Fed. R. Civ. P. 23(a)(1)). S&W's allegation that the punitive class consist of "thousands of agents," Am. Compl. ¶ 150, is unsupported. After processing more than 3,000 PPP applications, The First is only aware of one entity, S&W, with a dispute related to agent fees.

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." *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).

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).

CONCLUSION

Based on the foregoing, and pursuant to the Federal Rule of Civil Procedure 12(b)(6), The First respectfully requests that the Court dismiss Plaintiff's Amended Complaint with prejudice.

Respectfully submitted this 6th day of July 2020.

/s/Christopher A. Riley
CHRISTOPHER A. RILEY
Florida Bar No. 0168165

ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-4790
Chris.riley@alston.com

Counsel for Defendant The First, A National Banking Association

LOCAL RULES 7.1(F) WORD LIMIT CERITIFCATION

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 this Court's word limit. According to the word processing program used to prepare this motion and memorandum, the document contains 2,575 words, exclusive of the case style, signature block, and this certification.

/s/Christopher A. Riley
CHRISTOPHER A. RILEY

Counsel for Defendant The First, A National Banking Association

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

/s/Christopher A. Riley
CHRISTOPHER A. RILEY

Counsel for Defendant The First, A National Banking Association