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 OMNIBUS OPPOSITION TO THREE DEFENDANTS' MOTION TO DISMISS

I. Introduction

Sport & Wheat responds to the motions to dismiss by ServisFirst, Truist, and TheFirst. (ECF Nos. 49, 67, 69.) These largely overlapping motions should be denied. In opposing these motions, Sport & Wheat also refers the Court to its opposition to the Synovus motion to dismiss (ECF No. 56), incorporates it by reference, and attempts not to repeat the same arguments found in that brief.

In short, these Defendants' motions do not add much beyond what Synovus has already argued. This brief responds to the specific factual contentions applicable to each Defendant and deals with each Defendant's specific legal arguments.

II. Factual allegations relevant to this motion

As discussed in its opposition to the Synovus motion, Sport & Wheat is a small, two-person accounting firm in Pace. (Compl. ¶ 26.)[1] Sport & Wheat provides general accounting and tax services to small businesses in its vicinity. *Id.* ¶ 74. Sport & Wheat assisted at least one borrower with respect to each of the three moving lenders. *Id.* ¶ 68. The most relevant facts in connection with each defendant are here.

ServisFirst. Sport & Wheat assisted Borrower R, an engineering firm, with making a PPP loan. *Id.* ¶¶ 81–84. Sport & Wheat spent 6.8 hours of its time preparing, processing, and filing Borrower R's PPP application and supporting documents. *Id.* ¶ 84. During a six-day period, Sport & Wheat sent multiple versions of the loan application and other documents, by hand delivery and e-mail, to ServisFirst. *Id.* ¶ 86. ServisFirst does not dispute that it knew of Sport & Wheat's involvement with this loan. (ServisFirst Mot. 5–6.) And ServisFirst did not reject Sport & Wheat's help, ask to verify its identity, or otherwise attempt to dispel Sport & Wheat from assisting it.

[1] All citations are to the operative complaint, ECF No. 21.

Only after it had accepted Sport & Wheat's work product, ServisFirst claimed in an e-mail that "[t]he SBA guidance on charging the client fees changed late in the game. The Bank has made a decision to not pay agents." *Id.* ¶ 93. (ServisFirst does not discuss this in its motion.)

Truist. Sport & Wheat's client Borrower M is an HVAC company. *Id.* ¶ 129. On April 1, Sport & Wheat expressly notified Truist that: "Under the guidelines released by the Treasury yesterday, we will be acting as [Borrower M's] agent in this process." *Id.* ¶ 130. Sport & Wheat spent four hours on its loan application, gathering documents, uploading them, and communicating with Truist about the loan. *Id.* ¶¶ 131, 133, 134, 136.

On April 6, Sport & Wheat uploaded Borrower M's loan application, bearing Sport & Wheat's signature, acting as Borrower M's agent. *Id.* ¶ 133.

Truist continued to affirmatively request and rely on Sport & Wheat's help. On April 24, Truist's banker e-mailed the firm to say that it could sign Borrower M's application "as authorized representative." *Id.* ¶ 134. In a second e-mail, Truist wrote: "Jill - it might be a good idea to log into the portal and upload on your end the PPP Worksheet." *Id.*

Truist continued to work up this loan via Sport & Wheat—not even including Borrower M on their communications of April 29 or May 1. *Id.*

¶¶ 135–36. On May 1, Truist told Sport & Wheat that the loan would be funded. *Id.* ¶ 136.

Sport & Wheat sought compensation on April 29, and again on May 8. *Id.* ¶¶ 135, 140. At no point did Truist deny Sport & Wheat's right to compensation—not before it performed the work and not after. Truist never sought to investigate Sport & Wheat's validity as an agent and never rejected its help.

In Truist's summary of these facts, it complains that there are various unanswered "questions" about the allegations in the complaint. (Truist Mot. 7.) But it doesn't deny them, and it passed up the opportunity to move for a more definite statement under Rule 12(e). All plausibly alleged facts in the complaint must be accepted as true and construed in the plaintiff's favor.

TheFirst. Sport & Wheat's dealings with TheFirst were on Borrower I's loan. Borrower I performs washing services. (Compl. ¶ 116.)

On April 9, Sport & Wheat prepared an application for Borrower I, signed it in the space marked "Borrower's Agent," and sent it to Borrower I, who sent it to the bank. *Id.* ¶ 119. On April 10, TheFirst asked Sport & Wheat to redo the application, to provide an additional spreadsheet to show how the loan amount had been calculated, and to remove its name from the application. *Id.* ¶¶ 119–21. Sport

& Wheat did so. *Id.* ¶ 122. Sport & Wheat asked TheFirst to compensate it, *id.* ¶ 69, but TheFirst refused to do so and still has not paid, *id.* ¶¶ 69, 127.

*   *   *

All of these borrowers will require additional help—"back-end work"—necessary to secure loan forgiveness. The forgiveness application is five pages long, the instructions are seven pages long, and they require preparation and consultation of further supporting documentation.[2]

In sum, each Defendant:

- Knew that Sport & Wheat was acting as the borrower's agent.
- Communicated with Sport & Wheat regarding loans.
- Accepted Sport & Wheat's help, at a time when Sport & Wheat had put aside other profitable work. (Compl. ¶ 76.)
- Benefited from the assistance of a professional accounting firm, which saved effort, permitting that lender to assist some other borrower and make more money. *Id.* ¶¶ 164, 174.
- Did nothing to disclaim the duty to pay fees to Sport & Wheat—at least, not before the work was performed and accepted by the lender.
- Refused to pay Sport & Wheat anything.

[2] ECF No. 56-6, Paycheck Protection Program Loan Forgiveness Application (June 16, 2020); ECF No. 56-7, Loan Forgiveness Application Instructions for Borrowers (June 16, 2020).

III. Legal standard applicable to a motion to dismiss

Fed. R. Civ. P. 12(b)(6) is the rule these Defendants invoke and the standard is a familiar one. Rule 12(b)(6) tests the sufficiency of the pleading. 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)).

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

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

Each of the Defendants challenges Sport & Wheat's unjust enrichment and contract implied in law claims, which Sport & Wheat discusses together because the legal theories are so similar.

A contract implied in law 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). The Defendants agree with this basic law. *E.g.*, Truist Mot. 26.

ServisFirst challenges, in this formulation, prongs (1), (3), and (4). (In other words, it does not challenge that it had knowledge of the benefit.) Truist challenges prongs (1), (2), and (4). (Truist does not challenge that it retained a benefit; indeed it argues that retaining the benefit is the equitable course.) TheFirst's barebones argument as to Counts 1 and 2 was just one paragraph on the law and one paragraph on the facts; its position is like Truist's in that it does not challenge that it retained a benefit.

At the outset, it is important to note that most of the Defendants' objections to Counts 1 and 2 are about fact issues—they are not truly objections to the sufficiency of the complaint. In this posture, the Court must draw all factual inferences in Sport & Wheat's favor. Defendants may think they have good points for trial, but that does not carry the day on these motions.

(1) The complaint alleges that Sport & Wheat conferred a benefit on each Defendant.

Defendants strive mightily to show that Sport & Wheat did not confer a benefit on them. ServisFirst and TheFirst argue, in identical language, that if a benefit was conferred on anyone, it was on their borrowers, not the banks. Truist argues that if anything, Sport & Wheat injured Truist by slowing it down (a tacit concession that agents can also help banks speed *up*).

These Defendants are all incorrect. The complaint plausibly alleges, as to each Defendant, that "[w]ith respect to each loan issued, Defendants performed less work than they would have, absent Sport & Wheat's involvement." (Compl. ¶ 164.) The facts of how Sport & Wheat helped each specific Defendant are amply plead:

Sport & Wheat helped Truist with paperwork and processing, *id.* ¶¶ 134-36, collecting documents, filling out its loan application, *id.* ¶¶ 131, 133, 134, 136, and providing a worksheet that Truist asked for, *id.* ¶ 134.

Sport & Wheat went back and forth with ServisFirst working on its loan application and supporting documents, and submitting the documents into ServisFirst's custom loan portal. *Id.* ¶¶ 86, 88.

TheFirst sought a spreadsheet and further help with the loan calculations. *Id.* ¶ 119–21. Sport & Wheat provided it. *Id.*

They all benefited directly from Sport & Wheat's help, *id.* ¶ 165, as well as from being able to earn PPP fees they would not have earned had they not been able to write all of these loans, *id.* ¶¶ 168–69. Finally, Sport & Wheat helped all of the Defendants' borrowers by becoming educated on the law and advising their borrowers how to make loans. *Id*. ¶¶ 75–78. This lessened the burden on Defendants and permitted them to do more business.

All players were overwhelmed by the PPP program when it started. The $349 billion began running out almost immediately, which is why Congress soon added another $310 billion. *Id*. ¶¶ 2, 20. The Court has seen evidence of the crushing strain inside Synovus, which had bankers working around the clock, 400 people coming in from other departments just to handle PPP loans, and handled 20,000 loan applications in a matter of weeks. Sport & Wheat itself was "inundated." *Id*. ¶ 78. The reasonable inference to be drawn is that every bank was like this. All effort Sport & Wheat contributed to the Defendants' loan-processing operations was a benefit.

Truist, alone among all the Defendants, argues that if anything, Sport & Wheat slowed it down by improperly uploading documentation and wasting its time. (Truist Mot. 27–28.) It also argues that, with or without Sport & Wheat, the loans would have been made. *Id*. at 29. But these are jury questions—and the Court should draw any factual disputes in Sport & Wheat's favor.

Prong (1) is plausibly alleged.

(2) The complaint alleges that each Defendant had knowledge of the benefit.

Only Truist and TheFirst challenge that the complaint fails to allege that they had knowledge of the benefit conferred.

It is hard to see how. As to Truist, the complaint flatly alleges that Sport & Wheat notified it: "we will be acting as [Borrower M's] agent in this process." (Compl. ¶ 130.) Truist and Sport & Wheat went back and forth on several specific days, and asked for help finalizing the application. *Id*. ¶¶ 130–34. As to TheFirst, the complaint alleges that Sport & Wheat assisted—at its request—with further documents and a spreadsheet. *Id*. ¶¶ 119–21.

Plainly, each Defendant knew that Sport & Wheat was on the scene, working on these loans, and available to confer with. Prong (2) is plausibly alleged.

(3) The complaint alleges that each Defendant accepted or retained the benefit.

Only ServisFirst challenges this prong, ServisFirst Mot. 23–24, which requires Sport & Wheat to plausibly allege that it accepted *or* retained a benefit.

ServisFirst, however, misreads the law. ServisFirst argues that Sport & Wheat must show that the bank "accepted" the benefit. In fact, the law permits recovery if a defendant simply "retains" a benefit. "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).

There is another reason ServisFirst is wrong about this prong. Its case, *Coffee Pot Plaza P'ship*, was a review of a final judgment. As the Fourth District Court of Appeal has commented, that case does not support dismissal of a complaint before any evidence has been heard. *Hillman Const. Corp. v. Wainer*, 636 So. 2d 576, 577 (Fla. 4th DCA 1994).

Nevertheless, the complaint does allege that ServisFirst asked Sport & Wheat for its help and specifically accepted the work product, the spreadsheet, that it had asked for. (Compl. ¶¶ 119–22.) Prong (3) is adequately alleged.

(4) The complaint alleges that it is inequitable to retain the benefit conferred by Sport & Wheat.

All three Defendants argue that it would not be inequitable for them to retain the benefit conferred by Sport & Wheat. But the complaint adequately alleges inequity, and it withstands their motions to dismiss.

The inequity of a defendant's retaining a benefit conferred by a plaintiff is generally a fact issue that turns on the entirety of the circumstances. *In re Standard Jury Instr.*, 116 So. 3d 284, 309 (Fla. 2013) ("The circumstances are such that (defendant) should, in all fairness, be required to pay for the benefit").

As Synovus conceded, a party's reasonable expectation of being paid is no requirement under these theories. "Quasi-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). Unjust enrichment "acknowledges an obligation which is imposed by law regardless of the intent of the parties." *Circle Fin. Co. v. Peacock*, 399 So. 2d 81, 84 (Fla. 1st DCA 1981). *See also Tooltrend, Inc.*, 198 F.3d at 806 (claim can be brought even if the parties had no contact whatsoever).

That is why, for example, Truist's argument that it had no contract with Sport & Wheat is irrelevant; the intent of the parties doesn't matter. (Truist Mot. 30–31.) As a matter of Rule 12(b)(6), this complaint survives this attack; Truist can argue at the trial that the lack of a contract makes these claims inequitable. (Moreover, this is somewhat tortured logic; unjust enrichment and contract implied in law are theories *specifically designed* to deal with the situation where there is no enforceable contract.)

Sport & Wheat has more than plausibly alleged inequity if the Defendant banks retain the portion of the fee that was earmarked for Sport & Wheat—and this does not turn on the words of any federal law. In general terms, Sport & Wheat has shown how every Defendant benefited from making the loans involving Sport &

Wheat's clients, and how every Defendant saved time and energy because of the presence of Sport & Wheat in the transaction. In this posture where the Court must draw all facts in its favor, Sport & Wheat's complaint is adequately drawn.

Further, as to each Defendant, there are specific facts that demonstrate inequity. For example, Truist was specifically informed on April 1 that Sport & Wheat would be acting as an agent. Truist remained silent and never indicated that it would not be paying Sport & Wheat after all the work was done. This is a sufficient allegation of inequity to permit this complaint to proceed.

ServisFirst also argues that prong (4) is not met "because ServisFirst's actions are not inequitable as a matter of law" (which is not the standard; Sport & Wheat must simply allege the inequity in a plausible way, not as a matter of law). ServisFirst's argument regarding "reimburse[ment]" in the PPP statute does not square with the Interim Final Rule, which states that agent fees "will be" paid by the lender.

Its other argument, that Sport & Wheat has "no right to payment of fees under the CARES Act and thus could not have reasonably expected that ServisFirst, with whom it had no agreement, would pay it," deserves more attention. (ServisFirst Mot. 25.) First of all, as shown, the lack of an agreement is irrelevant under Florida law. But ServisFirst's major premise, that an agent has "no right" to earn fees, is simply incorrect. Agents do have the right to earn fees. They have always had the right to earn fees, whether under Section 7(a)'s old rules or under the streamlined, abbreviated requirements of the PPP statute and its regulations. ServisFirst might have a point here if there were *no* ability for an agent to earn a fee. But that is not what the scheme provides. Instead, the Rule provides that agents may earn fees, and that the only possible source is the lender. How could it be inequitable to bring this claim?

Prong (4) is adequately alleged as to all Defendants. Counts 1 and 2 should survive.

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

Count 3 of the complaint states a claim for conversion. TheFirst and ServisFirst level the same general attack as Synovus did—that money can never be the subject of a conversion claim. Here, Sport & Wheat relies on its arguments in its opposition to the Synovus motion, and in particular, points out that money which is designated for a specific recipient *can* be the subject of a conversion claim.

Truist's argument is different, but still not correct. Truist argues that because "Sport & Wheat never possessed the fees" and has no right to the fees, no conversion claim can lie. As shown, Sport & Wheat does have a right to its portion of Truist's fee, and so this argument fails.

Truist also argues that "Sport & Wheat cannot maintain a tort action for a claim that should sound in contract." (Truist Mot. 31–32.) This is illogical. Truist cannot defeat a tort claim by asserting that this case is really about a contract dispute, and then turn around and say there was no contract.

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. ServisFirst and Truist challenge this count.

Sport & Wheat addressed Count 4 in its opposition to Synovus's motion and asks the Court to consider the arguments presented there. 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. (Compl. ¶¶ 63–66.)

Standing alone, Truist makes a unique but misguided argument about declaratory relief. (Truist Mot. 9–10.) Citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), it argues that the Declaratory Judgment Act "does not establish an independent cause of action." This much is correct. Truist goes off the rails, however, when it claims that Count 4 cannot stand because there must be "an underlying cause of action for agent fees," and there isn't one in the complaint.

That's not the case, plainly; Counts 1, 2, and 3 are in the complaint. More fundamentally, Truist just misreads the rule of *Skelly Oil*, which is to keep out so-called "federal defense" cases. In such cases, the plaintiff has no basis to seek affirmative relief that supports federal jurisdiction, but argues that an anticipated federal-law defense to a declaratory count supplies the necessary jurisdiction. *E.g.*, *Hudson Ins. Co. v. Am. Elec. Corp.*, 957 F.2d 826, 828–29 (11th Cir. 1992) ("[t]hese possible federal defenses are insufficient to confer jurisdiction"). In this suit, Sport & Wheat presents a federal question in Counts 1, 2, and 3, and Section 1331 supplies the necessary grant of jurisdiction.

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

V. Argument regarding Defendants' position on federal law

Defendants make several arguments about the fit between the PPP statute (Section 1102 of the CARES Act) and the PPP Interim Final Rule (85 Fed. Reg. 20811). Sport & Wheat directs the Court to that section of its brief submitted in connection with the Synovus motion to dismiss. However, to respond to the moving Defendants' argument, some repetition from that brief is regrettably necessary.

A. The "no private right of action" argument is irrelevant.

Each of the Defendants argues that there is "no private right of action" under the CARES Act. Sport & Wheat does not argue that there is, meaning that Sport & Wheat concedes nothing in the CARES Act creates a specific and direct federal cause of action that did not exist. This is, for the reasons in the Synovus opposition, beside the point. The PPP statute and the PPP Interim Final Rule *are* federal laws that *do* bind both Sport & Wheat and the Defendants. No party is free to violate these laws. Just because there is not an express cause of action in the statute to enforce these laws, does not mean the banks can ignore them.

The relevance of these federal provisions is that they are not preemptive. State law provides Sport & Wheat's causes of action, and these federal laws are not to the contrary, nor do they preempt the state-law claims.

B. The PPP statute and the PPP Interim Final Rule fit together and express a common Congressional design.

The SBA's Interim Final Rule implemented the PPP statute. This enactment was lawful and a valid exercise of rulemaking authority on agent fees.

As shown in Sport & Wheat's brief opposing the Synovus motion, the PPP statute expressly discusses and allows for the payment of agent fees. It would not make any sense to mention them in 15 U.S.C. § 636(a)(36)(P)(ii) if not.

All of Section 636(a)(36)(P) is worth close examination:

> **(P) Reimbursement for processing.—**
>
> (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.
>
> (iii) Timing.— . . .
>
> (iv) Sense of the senate.—
>
> It is the sense of the Senate that the Administrator should issue guidance to lenders and agents to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals . . . , women, and businesses in operation for less than 2 years.

This statute is instructive, for several reasons. First, this is not just a "lender's subsection"—the title, "(P) Reimbursement for processing," applies to *both* lenders and agents. Subsection (i) refers to lenders but subsection (ii) refers to agents, and subsection (iv) refers to *both.* The Defendants' argument, that subsection (P) money belongs to them alone, does not have a strong statutory tether. Subsection (i), the "lender" part, is stated "in general," but it must be read in conjunction with subsection (ii). And "Reimbursement for processing" applies to both lenders and borrowers' agents.

This is why the Interim Final Rule is an appropriate use of rulemaking authority that fits within the statute: the Rule implements the division of fees that is inherent in this statute.

The PPP Interim Final Rule was promulgated under the statutory rulemaking authority of 15 U.S.C. § 9012. The SBA was granted "emergency," plenary authority in that section, which says "the Administrator shall issue regulations to carry out this title and the amendments made by this title." The SBA's general rulemaking authority, 15 U.S.C. § 634(b)(6), is also broad, permitting the Administrator to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter." *E.g.*, *Roberts Constr. Co. v. U.S. Small Bus. Admin.*, 657 F. Supp. 418, 422 (D. Colo. 1987) (authority is "broad").[3]

In turn, the SBA expressly authorized the payment of agent fees—following the statutory directive—and stated where they must come from, "the lender[,] out

[3] Section 634(b)(6) appears to be cited on Westlaw 39 times. In three other decisions, the courts construe this grant as "broad." Very little other guidance on the scope of this rulemaking grant is available in caselaw. Sport & Wheat submits that its breadth is evident.

of the fees the lender receives from SBA." 85 Fed. Reg. at 20816. The Rule also holds that the fee amounts "are reasonable," specifically when taking into account the statutory fees to lenders. Further, the Rule expressly wipes out any pre-existing regulation to the contrary: "The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10)."

There are many differences between the old Section 7(a) lending program and the new PPP and, but perhaps the most obvious is the new statutory disbursement itself: whereas in normal loans, Section 636(a)(18) mandates the collection of guaranty fees ***from*** lenders, the PPP law, Section 636(a)(36)(P), mandates the payment of "reimbursement for processing" fees ***to*** lenders and agents. This new statutory grant, plus the PPP's statutory provisions on agent fees, plus the SBA's rulemaking authorities, equal the conclusion that the SBA clearly had the power to implement the limits on agent fees *and* to allocate agent fees as between the Defendants and borrowers' agents. The SBA is not "taking money away" from the banks; it is providing them with slightly less (new) money than they want and providing agents with the funds they are also entitled to collect. It does not make sense to read this scheme any other way. In light of the PPP's stated intent to get as much money into the hands of borrowers as possible, as fast as possible, this is the only reasonable conclusion.

Recognizing that the Interim Final Rule requires it to pay borrowers, Truist in particular is strident about challenging the validity of the rule itself. Truist says the rule exceeds the SBA's authority. The District of Maryland has considered whether the Interim Final Rule exceeds that authority in another context—whether the SBA can bar bankruptcy debtors from receiving PPP funds, despite the statute's silence on the subject. *Tradeways, Ltd. v. United States Dep't of Treas.*, No. ELH-20-1324, 2020 WL 3447767 (D. Md. June 24, 2020). Employing *Chevron* deference, the *Tradeways* court determined that the SBA's rule was a permissible construction of the PPP statute.

The court also found that the SBA's Interim Final Rule "enjoys a presumption of validity," and that it could not overturn the bankruptcy requirement in the Interim Final Rule. *Id*. at 15. In particular, the court found that what the plaintiff "considers arbitrary agency action is simply the SBA filling in the gaps Congress left in the CARES Act so that it could nimbly respond to a complex, rapidly-evolving crisis." *Id*. at *16.

While the Treasury was a direct defendant in that case, the logic and substance holds: the SBA possesses broad discretion to swiftly enact a rule that deals with this pandemic.[4]

C. The PPP statute and the PPP Interim Final Rule do displace former elements of the general Section 7(a) lending program.

To reiterate from its brief opposing Synovus's motion to dismiss: Sport & Wheat recedes from its position that certain requirements previously imposed by Section 7(a) and its regulations apply. The better read of the Interim Final Rule is that the Rule did displace some of the requirements that Synovus argued for. What is new, on these motions to dismiss, is that both Truist and ServisFirst have conceded this point as well.

The Section 7(a) lending program is seven decades old. While the PPP is nested within the Section 7(a) statute, there are dramatic differences between the PPP's design and Section 7(a). The moving Defendants rely on some provisions of the generally applicable Section 7(a) program and its regulations as a basis to deny Sport & Wheat the fees it has earned. An examination of the provisions they cite shows that the provisions have been displaced.

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[4] Sport & Wheat acknowledges a broad diversity of views on the interplay of the Bankruptcy Code and the CARES Act. *In re Springfield Hospital, Inc.*, ____ B.R. _____, 2020 WL 3422335, at *8–11 (D. Vt. June 22, 2020) (collecting dozens of cases).

Title 13, Section 103.1(a)(2) defines a "packager" as "an Agent who prepares the Applicant's application for financial assistance and is employed and compensated by the Applicant." Sport & Wheat does not fit this definition because its borrowers did not compensate it. Section 103.1(a) defines two other types of "Agent," but none of these definitions fits Sport & Wheat either.

Section 103.5(a) permits an "Agent" to charge a fee to a borrower—in an amount higher than the PPP Interim Final Rule allows.

Section 103.5(a) also requires that an "Agent" must execute and submit a compensation agreement to the SBA. Form 159 is the SBA's designated compensation agreement.

As discussed in Sport & Wheat's brief opposing Synovus, on its face, Form 159 cannot be signed by an agent like Sport & Wheat. It reads:

> *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.

ECF No. 56-5, at 1 (emphasis added). Signing is a legal impossibility under the PPP, because agents sign only when paid by the borrower, and under the Interim Final Rule, the borrower is not *permitted* to pay.

Accordingly, Form 159 cannot be a requirement; Section 103.5(a)'s statement that "SBA provides the form of compensation agreement" cannot apply; and Section 103.1(a) contains no pigeonhole for Sport & Wheat to fit into either.

What is the upshot of all this? It is plain that these older, conflicting rules, designed for a traditional lending program like Section 7(a) must give way to the PPP Interim Final Rule, which implements a grant program. The Rule itself expressly says that it supersedes any conflicting rule. More to the point, the Rule is more recent and was written to implement a narrower, newer federal statute—the CARES Act. Whatever is connected to Section 7(a) and stands in conflict with the PPP Interim Final Rule is displaced.

Defendants lean on the parts of these old rules which favor them. *E.g.*, Truist argues that a written compensation agreement must be signed by the agent under Section 103.5(a). (Truist Mot. 4.) ServisFirst insists that it must certify that it found the agent's services and fee reasonable on Form 159. (ServisFirst Mot. 11.) Truist does not follow ServisFirst this far—it concedes that Form 159 is inapplicable in

PPP loans. (Truist Mot. 22.) None of the Defendants adequately explains how these general rules survive the PPP Interim Final Rule, because they don't.

ServisFirst even tries to have it both ways—standing on Form 159 and Section 103.5(a) of the old rules, but then admitting that the PPP Interim Final Rule "varies that rule" by barring agents from being compensated by borrowers. (ServisFirst Mot. 10.) ServisFirst's position is internally inconsistent. There is a much more straightforward way to harmonize the PPP Interim Final Rule with Section 7(a)'s backdrop: honor the PPP rule's express superseding clause, and displace the old rules to the contrary.

D. Defendants' "fraud and abuse" arguments show the error of their regulatory analyses.

Further undercutting the Defendants' arguments is their reliance on hypothetical "fraud and abuse" arguments. Truist, for example, argues that SBA's Form 159 permits lenders to "know agents' identities and . . . comply with their obligations" to avoid disbarred agents. (Truist Mot. 21–22.) Truist also argues that if Sport & Wheat's claim stands, "there would be no mechanism for lenders to verify agents' identities," and no way to stop "multiple purported agents from claiming fees." *Id.* at 22–23.

For its part, ServisFirst argues that the old Section 7(a) rules, including Form 159, also permitted the lender to investigate the parties it sought to do business with, and should still apply here. (ServisFirst Mot. 13–14.) ServisFirst's argument is a little overblown, suggesting that Sport & Wheat demands that "lenders must simply accept and compensate any demand for payment by anyone who claims to have been an agent." *Id*. at 14. Obviously, evidence will back up such claims.

These "fraud and abuse" arguments do not support their general contention that the Interim Final Rule retains the former SBA regulatory scheme. Indeed, they actually go to show that the applicable regulations have been altered, undercutting their arguments.

First off, the risk of fraud can play no role here on motion to dismiss. Sport & Wheat is a legitimate, professional accounting firm and has documents to back up its work—some of which were transmitted directly to the Defendants, which none of them deny. The suggestion of any hypothetical fraud is no basis to dismiss this action on legal grounds, and there are other obvious ways for the Court to deal with fraud.

Second, the "lender" in a PPP loan (really—a grant) is situated differently from a lender making a traditional Section 7(a) loan. Under traditional Section 7(a) lending, SBA assumes the risk of default, but only up to 75% or 85% of the loan amount. 15 U.S.C. § 636(a)(2)(A); 13 CFR § 120.210. But in a PPP loan, the lender has zero skin in the game—SBA carries 100% of the risk of default. 15 U.S.C.

§ 636(a)(2)(F). The lender's incentive to defend itself from fraud does not exist in the PPP context. Again, the lender simply does not have to do anything with a PPP loan except confirm receipt of numbers, review a form, and follow the Bank Secrecy Act. *In re Gateway Radiology Consultants, P.A.*, ____ B.R. _____, 2020 WL 3048197, at *5 (Bankr. M.D. Fla. June 8, 2020). It has no duty to verify the accuracy of the borrower's numbers.

Gateway Radiology points out that a lender has an extremely streamlined duty to certify borrowers' applications. "In deciding whether to approve a PPP Loan, SBA lenders need only consider two criteria: (1) Was the borrower operating on February 15, 2020?; and (2) Did the employer have employees for whom it paid salaries and payroll taxes . . . ?" *Id.* at *4 (citing 15 U.S.C. § 636(a)(36)(F)(ii)(II)). Given the lender's extremely narrow obligations, any "Form 159 duty" to certify the reasonable nature of an agent's work, or its fee, is displaced by statute. Again, this points to the statutory and regulatory displacement of the generally applicable Section 7(a) laws. Federal law does not stand in the way of an agent like Sport & Wheat asserting a claim under the PPP statute or rule.

Finally, ServisFirst argues that because it *might* become the subject of a clawback by SBA, it would be "inequitable" to pay out any portion of the fee Sport & Wheat has earned. (ServisFirst Mot. 12.) Plainly, the equity lies with Sport &

Wheat. Both ServisFirst and the SBA have adequate civil remedies to recover any wrongfully paid fees, which would be rare at most. It is not equitable to deny 100% of Sport & Wheat's fees because of a small, *X*% chance that some other agent may commit fraud.

* * *

All four Defendants argue mightily that federal law bars Sport & Wheat's state-law claims. But the PPP statute and its enabling rule do no such thing. Instead, the Interim Final Rule expressly *requires* the payment of fees by lenders like the Defendants. That is why Truist and ServisFirst (but not Synovus or TheFirst) maintain their backup argument that the SBA exceeded its authority in promulgating the rule.

Federal law does not pose an obstacle to Sport & Wheat's claims. The federal policy to be vindicated is the payment of Sport & Wheat for its hard work performed in service of the PPP's goals.

VI. The Defendants' other miscellaneous arguments also fail.

TheFirst argues that this case is inappropriate for class action treatment. (TheFirst Mot. 9–11.) Sport & Wheat responded to this argument when Synovus made it; a motion to dismiss is the wrong vehicle to defeat a class action. Moreover, this is not a reason to dismiss Sport & Wheat's individual claim.

ServisFirst offers an argument relating to the common law of contract, arguing, essentially, that a breach of contract claim can only succeed if the parties agreed to make a contract. (ServisFirst Mot. 14–16.) It also argues that the Court must proceed carefully if it intends to construe a statute in a manner that abrogates common law. *Id.* at 15–16. These legal truisms are entirely beside the point. This is not a breach-of-contract suit; the causes of action asserted exist under state law when there is no contract.

Truist argues that this suit conflicts with important federal objectives. (Truist Mot. 25–26.) Truist—America's fourth-busiest PPP lender, with at least 79,219 loans[5]—claims that having to divide its fee with Sport & Wheat "would lessen incentives to participate" in the program and collide with the goal of supporting small businesses. In reality, Sport & Wheat *is* one of the small businesses Truist champions. This suit will not disincentivize Truist from doing anything (and, again, there was no shortage of competition among banks and borrowers for these free federal billions).

If Sport & Wheat is not compensated for work it has already performed, however, that *will* conflict with this same important federal objective. Why?

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[5] U.S. Small Business Administration, Paycheck Protection Program (PPP) Report (Jul. 10, 2020) at 7, *available at* https://www.sba.gov/sites/default/files/2020-07/PPP_Report%20-%202020-07-1945-508.pdf.

Because in many cases, Sport & Wheat and accounting firms like it are the ***only*** source of the information small businesses have to make these PPP applications. The smallest of businesses do not have in-house accountants. (Compl. ¶ 19.) Sport & Wheat is not some random "packager" off the street, but these businesses' sole accounting firm. And the Rule makes clear that Sport & Wheat can't bill these clients like it normally would. Barring Sport & Wheat from recovering any compensation means these small businesses would have nowhere to turn for assistance, and *that* is counter to the PPP's intent.

VII. Conclusion

Each motion to dismiss should be denied. Sport & Wheat seeks leave to replead its complaint in the event the Court grants any of the four pending motions to dismiss.

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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 6,620 words, including headers, footnotes, and quotations.

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