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U.S. DISTRICT COURT
N.D. OF ALABAMA

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEIGH, KING, NORTON & UNDERWOOD, LLC, on behalf of itself and all others similarly situated in the United States of America	)	
Plaintiff,	)	
v.	)	**No. 2:20-cv-00591**
REGIONS FINANCIAL CORPORATION and REGIONS BANK,	)	**OPPOSED**
	)	**ORAL ARGUMENT REQUESTED**
Defendants.	)	

<u>DEFENDANT REGIONS BANK'S MOTION TO DISMISS</u>

Defendant Regions Bank ("Regions") moves the Court under Federal Rules of Civil Procedure 12(b)(1) and (6) to dismiss this action and all claims in the Complaint filed by Plaintiff Leigh, King, Norton & Underwood, LLC ("LKNU"). LKNU alleges that Regions wrongfully withheld fees from "agents" who prepared and submitted Paycheck Protection Program ("PPP") loan applications and brings claims for an alleged violation of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (the "CARES Act") (Count II), unjust enrichment (Count I), and injunctive relief (Count III).

LKNU's alleged claims, however, are untenable under the law. The CARES Act does not provide a private cause of action, and LKNU fails to plead a viable unjust enrichment claim because it cannot allege that it provided a "benefit" to Regions or that it maintained a "reasonable expectation of payment." The Court also should dismiss the entire action for an independent reason: LKNU's claims are not ripe and therefore not justiciable because the Small Business Administration ("SBA") has not yet disbursed to Regions the fees allegedly owed to LKNU. If LKNU had not jumped the gun and filed this lawsuit too early, it would have learned that Regions intends to pay agent fees but cannot do so unless and until it actually receives lender fees from the SBA. Finally, without any plausible independent claims for relief, LKNU cannot maintain a request for an injunction.

The Court, therefore, should dismiss the claims for failure to state a claim under Rule 12(b)(6) and the entire action for lack of a justiciable controversy under Rule 12(b)(1). In further support of this motion, Regions states the following grounds:

GROUNDS

I. The CARES Act Does Not Create a Private Cause of Action

1. The CARES Act created the PPP by amending the SBA 7(a) small business loan program, and well-established law in the Eleventh Circuit holds that no private right of action exists for alleged violations of the program's rules. *See*

Tectonics, Inc. v. Castle Constr. Co., 753 F.2d 957, 960 (11th Cir. 1985) (holding that "***there was no intent to create civil rights of action in private persons***" (emphasis added)).

2. The holding in *Tectonics* has been confirmed by all subsequent rulings and is directly applicable here. *See, e.g.*, *United States v. Fid. Capital Corp.*, 920 F.2d 827, 838 n. 39 (11th Cir. 1991); *Bulluck v. Newtek Small Bus. Fin., Inc.*, __ Fed. App'x __, No. 19-10238, 2020 WL 1490702, at *3 (11th Cir. Mar. 27, 2020). Every circuit that has considered the question has reached the same conclusion: The SBA creates no private right of action. *See, e.g.*, *Aardwoolf Corp. v. Nelson Capital Corp.*, 861 F.2d 46, 48 (2d Cir. 1988); *Royal Servs., Inc. v. Maint., Inc.*, 361 F.2d 86, 92 (5th Cir. 1966); *Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996); *Integrity Mgmt. Int'l, Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 487 n. 4 (10th Cir. 1987).

3. Nothing in the CARES Act, its implementing regulations, or agency guidance abrogates these holdings or otherwise creates a cause of action for an alleged violation of the PPP. Thus, without a statutory basis for a private cause of action, the Court should dismiss the claims under Rule 12(b)(6).

II. The Unjust Enrichment Claim Fails Because LKNU Cannot Plausibly Plead a Reasonable Expectation of Payment or a Benefit Conferred

4. "To prevail on a claim of unjust enrichment under Alabama law, a plaintiff must show that: (1) the defendant knowingly accepted and retained a

benefit, (2) provided by another, (3) who has a reasonable expectation of compensation." *Portofino Seaport Vill., LLC v. Welch*, 4 So. 3d 1095, 1098 (Ala. 2008). LKNU fails to satisfy each element.

5. LKNU has failed to plead that it has "provided" any benefit to Regions. LKNU has expressly averred that it provided services for the benefit of its client, not Regions. *See* Complaint ¶ 23 ("On April 6, 2020, LKNU, by and through Tim Leigh, who is a certified public accountant and one of its owners, timely submitted a loan application to the Defendant on behalf of a client . . . ."). Accordingly, LKNU has not plausibly alleged that it has bestowed any "benefit" to Regions, rather than its client. *See, e.g.*, *Hancock-Hazlett General Const. Co., Inc. v. Trane Co.*, 499 So. 2d 1385, 1387 (Ala. 1986) (explaining that "unjust enrichment" applies only where the "defendant *holds* money" which belongs to the plaintiff or which was "improperly paid" to the defendant).

6. LKNU also cannot plausibly allege that Regions has accepted and retained a "benefit" because it has not alleged — and cannot plausibly allege — that the SBA actually has paid lender fees to Regions. In truth, Regions has not received and thus does not "hold" those fees. *See Trane*, 499 So. 2d at 1387.

7. In its Complaint, LKNU alleges that it was explicitly told by Regions that Regions would not pay it an agent fee, prior to LKNU's submitting the application. Complaint ¶ 26. Consequently, based on the face of the Complaint,

LKNU cannot allege that it had a "reasonable expectation of compensation." *See Welch*, 4 So. 3d at 1098. Thus, as a matter of law, LKNU cannot clear the Rule 12(b)(6) hurdle on the unjust enrichment claim.

III. LKNU's Claims Are Not Ripe Because Regions Has Not Received Any Lender Fees From the SBA

8. Under Rule 12(b)(1), the plaintiff bears the burden of establishing the elements necessary for jurisdiction, including ripeness. *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998). If a claim is not ripe, the district court lacks jurisdiction to issue a ruling on the merits. *Georgia Advocacy Office, Inc. v. Camp*, 172 F.3d 1294, 1299 (11th Cir. 1999). LKNU's claims are not ripe.

9. The Interim Final Rule pertaining to the PPP states that "***[a]gent fees will be paid by the lender out of the fees the lender receives from the SBA***." 85 Fed. Reg. 20811, 20816 (emphasis added). This guidance importantly reflects that the lender can pay agent fees only after it has received the lender fees from the SBA. LKNU does not and cannot allege that Regions received lender fees from the SBA as of the filing of the Complaint or as of the date of this Motion. In fact, as the attached Declaration shows, "the SBA has not paid Regions fees for making any

PPP loans." Declaration of Timothy M. Monte ¶ 10 (attached hereto as Exhibit A).[1]

10. Indeed, on May 21, 2020 — three weeks after LKNU filed its Complaint — the SBA issued guidance to lenders regarding the steps necessary to receive the lender fees. *See* SBA Procedural Notice re: Paycheck Protection Program Lender Processing Fee Payment and 1502 Reporting Process, at 1 (May 21, 2020), *available at* https://www.sba.gov/sites/default/files/2020-05/5000-20028.pdf. ("When a PPP Lender successfully reports to SBA that a loan has been fully disbursed, SBA will initiate the process of paying the PPP processing fee which the PPP Lender is eligible to receive. Lenders will use an SBA Form 1502 (1502 report) to report fully disbursed loans to SBA . . . ."). Although it has submitted its initial Form 1502 to the SBA, as a matter of undisputed fact, Regions has not received any lender fees from the SBA, let alone the lender fees that would be applicable to the loan underlying this lawsuit. *See* Declaration ¶¶ 9–12. LKNU does not and cannot directly allege otherwise.

11. Consequently, as a matter of law, Regions could not and has not wrongfully withheld agent fees because Regions had yet to receive the capital out of

[1] In deciding a Rule 12(b)(1) motion, a district court may look outside of the complaint's allegations and consider evidence that has been submitted on the issue of jurisdiction. *See, e.g., McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) (recognizing that a district court may decide a Rule 12(b)(1) motion based on "the complaint supplemented by undisputed facts evidenced in the record" or "the complaint supplemented by undisputed facts plus the court's resolution of disputed facts"). None of the facts in the Declaration is or could be disputed. The SBA has not yet paid any fees to Regions.

which the IFR says agent fees, if any, should be paid. Thus, LKNU's claim is contingent on future events — i.e., Regions' receipt of the fees from the SBA and subsequent decision not to pay agent fees out of those lender fees — and therefore is not ripe for adjudication. *See Texas v. United States*, 523 U.S. at 300; *see also In re Jacks*, 642 F.3d 1323, 1332 (11th Cir. 2011) (holding that bankruptcy debtor's lawsuit seeking injunction preventing mortgage lender from collecting fees was unripe because the lender represented that it would not make efforts to collect the fees and, regardless of that representation, such matters were contingent on what might or might not happen in the future); *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (explaining that ripeness is designed to prevent courts from adjudicating disputes before the "effects" of an administrative policy are "felt in a concrete way by the challenging parties").

12. Further pushing this case outside the realm of a justiciable "case or controversy," as stated in the Declaration, "[a]fter Regions receives payment of lender fees from the SBA on the PPP loans, Regions intends promptly to make payment of agent fees to those agents who have appropriately documented their assistance." Declaration ¶ 11. As a matter of law, Regions cannot do so until it receives the lender fees from the SBA, and consequently Regions "does not know exactly when it will pay agent fees." *Id.* ¶ 12.

13. Therefore, without a live controversy as to whether Regions has improperly withheld fees that it has obtained from the SBA, this case is not justiciable because LKNU's claims are not ripe for review. *See Camp*, 172 F.3d at 1299. The Court therefore should dismiss the action under Rule 12(b)(1).

IV. Without a Viable Cause of Action, LKNU Cannot Pursue a Claim for Injunctive Relief

14. LKNU alleges a stand-alone claim for injunctive relief against Regions (Count III). "Any motion or suit for an injunction must be based upon a cause of action," however; "an injunction is a type of relief rather than an independent cause of action." *Spearman v. Wyndham Vacation Resorts, Inc.*, 69 F. Supp. 3d 1273, 1292 (N.D. Ala. 2014) (citing *Alabama v. U.S. Army Corps. of Eng'rs*, 424 F.3d 1117, 1127 (11th Cir. 2005)).

15. Because LKNU cannot maintain a stand-alone claim for injunctive relief, and because Counts I and II fail to state a claim for which relief can be granted, Count III should be dismissed as well.

CONCLUSION

Because LKNU fails to plead any claims for which this Court may grant relief, Regions respectfully asks the Court to dismiss the action and all claims in the Complaint.

Submitted on June 4, 2020.

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CERTIFICATE OF SERVICE

I certify that, on June 4, 2020, I electronically filed the foregoing document in Leigh King Norton & Underwood, LLC v. Regions Bank, No. 2:20-cv-00591, in the United States District Court for the Northern District of Alabama via the CM/ECF system. All counsel of record will be notified electronically.

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