BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: Paycheck Protection Program ("PPP") Agent Fees Litigation	MDL Docket:2950

REGIONAL AND SMALL BANK RESPONSE IN OPPOSITION TO MOVANT ALLIANT CPA GROUP, LLC'S MOTION FOR TRANSFER OF ACTIONS

The "Regional and Small Bank Group"[1] opposes Movant Alliant CPA Group, LLC's ("Movant")'s Motion for Transfer of Actions. The Regional and Small Bank Group join the opposition filed by Synovus Bank (and others) but write separately to identify the particular perspective of regional and smaller banks.

I. INTRODUCTION

Consolidation under 28 U.S.C. § 1407(a) is the option of last resort, and Movant has failed to meet its burden of demonstrating that consolidation would be for "the convenience of the parties and witnesses" or "promote the just and efficient conduct" of these actions.

Most banks are sued only once*:** Most of the defendants in these actions are like the Regional and Small Bank Group – involved in a single lawsuit. For instance, although there were nominally 72 defendants in the 12 actions listed by Movant, ***66 defendants are involved in only a single lawsuit.[2] Most of the remaining are defendants in only two actions or three actions. Only the very largest banks with nationwide footprints are defendants in more than three actions. *See In re Transocean Ltd. Sec. Litig.*, 753 F.Supp.2d 1373, 1374 (J.P.M.L. 2010) (denying centralization

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[1] "Regional and Small Bank Group" includes: (1) Cadence Bancorporation and Cadence Bank, N.A. (collectively, "Cadence"), (2) ServisFirst Bank; (3) Newton Federal Bank; (4) First National Bank of Pennsylvania; and (5) F.N.B. Corp.

[2] Exhibit A lists the cases in which each defendant has been named. Movant's Motion states there are 83 defendants. This was true, but movant has dismissed some defendants, generally bank holding companies; other bank holding companies are due to be dismissed, and Movant's failure to do so artificially inflates the number of defendants.

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of two actions, "[a]s we have stated in the past, where only a minimal number of actions are involved, the moving party generally bears a heavier burden …"); *In re Six Flags Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 289 F. Supp. 3d 1343, 1344 (J.P.M.L. 2018) (centralization unnecessary where only two actions pending); *In re: Chemed Corp. S'holder Derivative Litig.*, 11 F. Supp. 3d 1335, 1336 (J.P.M.L. 2014) (same); *In re: Alteryx, Inc., Customer Data Sec. Breach Litig.*, 291 F. Supp. 3d 1377-78 (J.P.M.L. 2018) ("centralization is not necessary" when only three actions pending).

***Most banks are far smaller*:** Most of the defendants are far smaller than the handful of banks, with nationwide footprints, which have been sued in five or more actions. For example, Cadence Bank is less than 1% the size of JP Morgan Chase or Wells Fargo by assets.[3] Likewise, Cadence made only approximately 4,000 PPP loans. In comparison, JP Morgan Chase announced it would make 239,000 PPP loans and that it had made PPP loans "in all 50 states"[4] and Wells Fargo has made well over 100,000 PPP loans.[5] Cadence is headquartered in Atlanta, Georgia, and has less than 100 branches in six states (Alabama, Florida, Georgia, Mississippi, Tennessee and Texas). To compare, as of April 2020, Wells Fargo had 75 times as many branches as Cadence

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[3] *See* Alicia Phanuef, *Here's a List of the Largest Banks in the United States by Assets in 2020*, BUSINESS INSIDER (Aug. 26, 2019), *available at* https://www.businessinsider.com/largest-banks-us-list (last visited June 12, 2020).

[4] *Chase approved to fund about $29 billion to 239,000 businesses through the Paycheck Protection Program*, JPMORGANCHASE.COM (May 1, 2020), https://institute.jpmorganchase.com/news-stories/chase-approved-to-fund-29-billion-to-239000-businesses-through-ppp (last visited June 15, 2020).

[5] *See* Imani Moise & Bharath Manjesh, *Wells Fargo Gets Federal Inquiries Over Handling of PPP Loans*, RUETERS (May 5, 2020), *available at* https://www.reuters.com/article/us-wells-fargo-loans/wells-fargo-gets-federal-inquiries-over-handling-of-ppp-loans-idUSKBN22H2V9 (last visited June 12, 2020).

and served a third of all American households.[6] As of 2018, JP Morgan Chase had 52 times as many branches as Cadence and planned to open more.[7] Many of the other defendant banks are even smaller than Cadence. *See* Chart Ranking Defendants by Size, attached hereto as Exhibit B. The top five banks by size in the United States hold almost 50% of the assets[8] and the top eight banks are designated as Global Systemically Important Banks.[9] The Regional and Small Banks have little in common with these substantially larger lenders with a nationwide footprint.

Bootstrapping cannot justify consolidation because no efficiency is gained. Counsel for Movant has manufactured this MDL petition. They have filed ten putative class actions against PPP lenders in eight different United States District Courts throughout the country.[10] In fact, Movant's counsel has filed multiple cases against some of the same banks, making the same claims

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[6] *See Wells Fargo Today*, WELLSFARGOMEDIA.com (April 2020), https://www08.wellsfargomedia.com/assets/pdf/about/corporate/wells-fargo-today.pdf, at 1 (last visited June 15, 2020).

[7] Matthew Heimer, *Bank Branches Are Closing At A Record Pace. Here's Why JPMorgan Chase Is Opening More*, FORTUNE, https://fortune.com/2018/08/20/jp-morgan-chase-bank-branches/ (last visited June 15, 2020).

[8] *See Bank Asset Concentration for United States,* FEDERAL RESERVE BANK OF ST. LOUIS (Updated Oct. 21, 2019) *available at* https://fred.stlouisfed.org/series/DDOI06USA156NWDB (last visited June 12, 2020).

[9] *See* Jared Berry and Akber Khan et al., *How Do U.S. Global Systemically Important Banks Lower Their Capital Surcharges?*, FederalReserve.gov (Jan. 31, 2020), *available at* https://www.federalreserve.gov/econres/notes/feds-notes/how-do-us-global-systemically-important-banks-lower-their-capital-surcharges-20200131.htm, at n.5 (last visited Jun 12, 2020).

[10] *See American Video Duplicating Inc. et al. v. Citigroup Inc. et al.*, 2:20-cv-03815-ODW-AGR (C.D. Cal. Apr. 27, 2020); *A.D. Sims, LLC v. Wintrust Financial Corp. et al.*, 1:20-cv-02644 (N.D. Ill. Apr. 30, 2020); *David S. Lowry CPA Ltd. v. U.S. Bancorp. et al.*, 1:20-cv-00348-MWM (S.D. Ohio April 30, 2020);*American Video Duplicating Inc. v. Royal Bank of Canada et al.*, 2:20-cv-04036-JFW-JPR (C.D. Cal. May 1, 2020). *Brunner Accounting Group v. SVB Financial Group, et al.*, 2:20-cv-04235-GW-E (C.D. Cal. May 8, 2020); *Panda Group PC v. Bank of America Corporation et al.*, 4:20-cv-00045-DN-PK (D. Utah May 11, 2020); *ImpAcct, LLC v. JPMorgan Chase & Co. et al.*, 1:20-cv-01344-NRN (D. Colo. May 12, 2020); *Panda Accounting LLC v. Academy Bank, N.A. et al.*, 2:20-cv-00985-DJH (D. Ariz. May 20, 2020).

on behalf of the exact same putative class members.[11] The MDL process is not intended to be manipulated for advantage by litigants. Because the large bank classes by the Movant are identical – and brought by the same core group of plaintiff's counsel – the plan for efficiency is simple and within their own power to achieve (that is, either coordinate their own cases with the same lawyers for the same large defendants, or just dismiss without prejudice the cases with identical classes).[12]

No common facts (actually no facts at all) pled by movants**:** These 10 complaints filed by Movant counsel are virtually "block and paste" copies and they include no factual allegations regarding the individual Regional and Small Banks. Because there are no facts pled about any of the Regional and Small Banks or any of their transactions, it is simply impossible for Movant to assert that there are any common factual issues.

To illustrate, the Alliant complaint ***does not even use the names of any banks*** except in the paragraphs identifying their citizenship. In all of the other paragraphs, the complaint simply makes generic assertions about the "Defendants". This type of naked "shotgun" pleading is not only insufficient to sustain a complaint, but it cannot possibly demonstrate common facts even among a particular bank – much less among all of the banks. *See Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294–95 (11th Cir. 2018) (quoting *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015)) ("Shotgun pleadings violate Rule 8, which requires 'a short

[11] *Compare Panda Group PC*, No. 4:20-cv-00045-DN-PK, [Doc. 1] at ¶ 52 *with American Video Duplicating Inc.*, No. 2:20-cv-0815-ODW-AGR, [Doc. 1] at ¶ 52.

[12] *In re CP4 Fuel Pump Mktg., Sales Practices, & Prod. Liab. Litig.*, 412 F. Supp. 3d 1365, 1366 (J.P.M.L. 2019) (denying centralization because risk of redundant discovery and inconsistent class certification rulings was diminished "plaintiffs in nine of the ten actions, as well as one of the two tag-alongs, [we]re represented by the same attorneys") ; *In re Credit Union Checking Account Overdraft Litig.*, 158 F. Supp. 3d 1363, 1364 (J.P.M.L. 2016) (denying centralization of eleven actions (four tag-alongs), noting informal coordination of any overlapping discovery appeared practicable, as all plaintiffs were represented by the same law firms); *In re Helicopter Crash Near Savannah, Georgia, on Jan. 15, 2014*, 178 F. Supp. 3d 1372, 1373 (J.P.M.L. 2016) (denying centralization in four actions; "plaintiffs are represented in all actions by the same law firm").

and plain statement of the claim showing that the pleader is entitled to relief,' Fed. R. Civ. P. 8(a)(2), by 'fail[ing] to one degree or another ... to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.'); *Weiland*, 792 F.3d at 1323 (shotgun pleadings commit the "sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against"). For instance, the *Alliant* complaint:

- does not identify any borrower for whom Alliant allegedly assisted as an agent;
- does not identify (even in vague terms) any loan at issue;
- does not identify the work done on any particular loan application;
- does not identify any person at any bank involved
- does not identify any person involved at Alliant with a particular bank
- does not identify any person involved by any borrower;
- does not identify how a particular bank would know that Alliant was involved on a particular loan;
- does not identify any communications with any bank by Alliant;
- does not identify any dates for any work done or any loan submission;
- does not identify whether any borrower agreed (in writing or otherwise) that Alliant was its agent, how the borrower agreed, or when;
- does not identify whether Alliant has made a demand (verbal or in writing) for agent fees for a loan; and does not identify whether Alliant has itemized its fees, or completed an SBA Form 159 (required under SBA rules for agent fees). *See* 13 C.F.R. § 103.5(a).

***No efficiency is gained by dragging smaller banks away from where they operate*:** There is no reason to drag the Regional and Small Banks across the country to be consolidated with cases that contain no common factual questions, will have no overlapping discovery, and will produce no efficiency. This is especially true considering all of the witnesses, employees, borrowers, agents and documents will be in their home states or nearby.

The MDL process is a powerful force for good when used in the correct circumstances, but it also imposes significant costs and inconvenience on the parties. There are no efficiencies gained when a Regional and Small Bank, named as a defendant in only one or two actions in its home region, is forced into a complex and time consuming MDL in a place where they do not do business – with no common facts – simply because Movant counsel has filed other actions against other unrelated parties.

The Motion is premature**:** Although all of these cases are freshly filed,[13] almost a third of the Movant counsel's actions already have serious motions to dismiss pending.[14] These motions include both (1) a simple attack under Rule 12(b)(6) (for instance, there are no facts pled at all) and (2) more sophisticated attacks under Rule 12(b)(1) (for instance, ripeness, standing and subject matter jurisdiction). Many more such motions are coming. All of the Regional and Small Banks intend to file Motions to Dismiss. For instance (and this is just an example), Regions Bank[15] has raised a ripeness argument because it has not yet received its lender's fees and therefore no agent fee is currently due to "be paid out of lender fees" (quoting the plaintiff's complaint and the SBA

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[13] *See* Press Release No. 20-45, *Joint Statement by SBA Administrator Jovita Carranza and U.S. Treasury Secretary Steven T. Mnuchin Regarding Enactment of the Paycheck Protection Program Flexibility Act*, SMALL BUSINESS ADMINISTRATION (Jun. 8, 2020), *available at* https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/joint-statement-sba-administrator-jovita-carranza-and-us-treasury-secretary-steven-t-mnuchin.

[14] Attached as Exhibit C is a chart showing which actions have pending motions to dismiss.

[15] *Leigh, King, Norton & Underwood, LLC et al. v. Regions Financial Corporation et al.*, No. 2:20-cv-00591-JHE (N.D. Al. Apr. 28, 2020), [Doc. 7] at 2, 6, 11, 12, & 14.

"Fact Sheet").[16] The Regional and Small Banks believe that their diverse facts and postures will provide them even additional grounds for such motions. As this Panel has repeatedly held, consolidation should not occur until the proper time. *See In re ATM Interchange Fee Antitrust Litigation*, 350 F. Supp. 2d 1361, 1362-63 (J.P.M.L. 2004); *In re Republic W. Ins. Co. Ins. Coverage Litig.*, 206 F. Supp. 2d 1364, 1365 (J.P.M.L. 2002). To the extent cases survive early motions to dismiss raising threshold questions of standing, ripeness, mootness, and subject matter, then any efficiencies can be better achieved through informal coordinated discovery, internal transfers within districts, § 1404 transfers, and stays under the first-filed rule.

II. BACKGROUND

These actions generically allege that a myriad of ***unrelated*** banks failed to pay "agent fees" under the CARES Act for various types and degrees of assistance in the preparation of thousands of different PPP loan applications, for thousands of different borrowers, by thousands of different alleged agents. [Doc. 1-1] at 1-2, 4-5.

However, for the vast majority of loan applications, no agent would even be necessary. The SBA form application for a PPP loan is a mere two pages, including signature lines. It states: "***The estimated time for completing this application, including gathering data needed, is 8 minutes***." SBA Form 2483 (emphasis added).[17] The applicant is only required (1) to answer eight simple "yes/no" questions, and (2) list their average payroll and number of employees. The entire PPP loan program was designed to be streamlined and easy for small business. The application was

[16] *See* Paycheck Protection Program Information for Lenders, available at https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf.

[17]https://www.sba.gov/sites/default/files/2020-06/PPP%20Borrower%20Application%20Form%20%28Revised%20June%2012%202020%29-Fillable-508.pdf.

designed so that the overwhelming majority of small businesses would not need the use of an agent as contemplated under the "regular" 7(a) loan program. Plaintiffs appear to assert that all 4,475,599 PPP borrowers[18] required an agent. Nonsense. Determining which (if any) of these borrowers used an agent will never be a common question.

A. Pleadings Demonstrate Significant Factual Differences Among Banks, Borrowers and Alleged Agents.

The complaints filed by Movant's counsel, though not necessarily adequately pled under Rule 12(b)(6), at least include some factual allegations.[19] Those complaints illustrate some of the significant factual differences (1) among banks, (2) among individual borrowers and (3) among individual alleged agents. The pleadings in those cases illustrate that it is not enough to make a conclusory claim of providing undisclosed assistance to an unknown bank for undescribed work at an unidentified time. An example is – *Sport & Wheat CPA, P.A. et al. v. ServisFirst Bank Inc. et al*., Case No. 3:20-cv-05425-TKW-HTC (N.D. Fla. Apr. 27, 2020). The *Sport & Wheat* complaint, for instance, makes clear:

- Some banks pay agent fees and some do not. *See* [Doc. 21] at ¶ 80 ("Some lenders have agreed to pay Sport & Wheat for its services. Defendants, however, have refused.")

- Agents cannot qualify for a fee unless they have submitted a completed SBA Form 159 for each transaction (which requires a borrower's signature agreeing the alleged agent was their agent). *Id.* at ¶ 65 ("to be paid under 13 CFR § 103.5(a), the PPP Agent must submit the arrangement in writing on SBA's Form 159");

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[18] This figure is the total number of PPP borrowers nationally. *See* Press Release No. 20-45, *supra* note 13. The *Alliant* complaint demands a flat percentage of all "lender fees" be placed into a "fund." It is unclear if the *Alliant* class is every PPP loan in the country or whether other actions filed by Movant's counsel would cover the remainder. Regardless, the number of loans is huge and the assertion is a maximum agent fee is due on every loan made by every defendant.

[19] The Regional and Small Bank Group Defendants do not in any way acknowledge that any of the complaints filed against them or any of the other Defendants are adequately pled such as to state a claim under Fed. R. Civ. P. 12(b)(6), and the Regional and Small Bank Group Defendants each reserve their rights to move to dismiss under this rule, and on any other grounds.

- Agents must itemize their services if the amount claimed is over $2,500. *See id.*; *Fee Disclosure and Compensation Agreement*, https://www.sba.gov/sites/default/files/2018-09/Form%20159%20-%20%28FINAL%29%209.10.18.pdf, at 2 ("Itemization and supporting documentation is required if the compensation paid exceeds $2,500. Itemization must include: 1) a detailed explanation of the work performed; and 2) the hourly rate and the number of hours spent working on each activity.").[20]

An agent's work is also not compensable unless it is reasonable and satisfactory. *See* SBA Form 159 ("The undersigned 7(a) participating lender certifies that the representations of services rendered and amounts charged as identified in this form are reasonable and satisfactory to it.").

In short, even the pled facts among banks are not common. They pled for example that some banks, like Synovus, allegedly posted notices on their public websites that they would not pay agent fees. *See Sport & Wheat*, [Doc. 14] at 8 & n.4.[21] Some, also like Synovus, allegedly told purported agents that they would not pay agent fees. *See Sport & Wheat*, [Doc. 21] at ¶¶ 107-108. Other banks allegedly told borrowers they would not pay agent fees at the time when some borrowers submitted their PPP loan application. *Id*. at ¶¶ 92-93. Still, Plaintiffs allege that other banks, like Truist, (allegedly) simply did not know what to say in response to agent fees inquiries and either did not respond at all or stated that they were awaiting further guidance from their legal team or SBA. *Id*. at ¶¶ 135, 140. Even within the same bank, statements allegedly varied. Some banks never announced any formal policy regarding agent fees but sometimes paid fees and sometimes did not.

Another case illustrates the exact same thing. In *Leigh, King, Norton & Underwood, LLC et al. v. Regions Financial Corporation et al.*, No. 2:20-cv-00591-JHE (N.D. Al. Apr. 28, 2020),

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[20] Further, itemization may also be required for amounts below $2,500. The SBA Form 159 states: "Note: SBA, in its discretion, may request an itemization and supporting documentation for any fee charged in connection with an SBA loan application, regardless of the amount."

[21] *See, e.g.*, *CARES Act – Paycheck Protection Program*, SYNOVUS, https://www.synovus.com/covid-19/paycheck-protection-program/ (last visited June 9, 2020).

Regions Bank has filed a Rule 12(b) motion and attached a sworn and detailed declaration. In the declaration, Regions explains that it will pay agent fees (after the receiving its lender fees) but only when there is a properly documented demand that meets all federal rules and regulations. [Doc.6-1] at ¶¶ 8, 11. Each Regions transaction will need to be individually examined to determine whether any agent fee is due. In other words, there are no common factual questions. Likewise, there are no efficiencies by lumping Regions Bank in with lenders who have taken an entirely different approach (as Synovus allegedly has, for example.).

Cadence Bank has taken a similar but slightly different position and has stated in writing to Movant counsel that it pays agent fees when it receives a fully completed SBA Form 159 (at the time they are due) in connection with applying for the loan which are reasonable, necessary and appropriate under the then applicable SBA Section 7(a) procedures, rules and guidelines.[22]

B. Plaintiffs assert an array of state law claims which will vary by state and bank.

Plaintiffs assert an array of state law claims as varied as the banks' agent fees responses: injunctive relief, declaratory judgment, unjust enrichment, breach of implied contract, quantum meruit, conversion, tortious interference with economic relations, and violations of various state consumer protection and unfair trade practices laws. *Compare*, *e.g.*, *Alliant* Action at [Doc. 1] ¶¶ 57-115 *with Panda Group* [Doc. 6] at ¶¶ 49-89.

Most of the claims brought by the Movant are *state law claims*[23] and such state law will vary depending upon where the PPP loan was made and alleged agent services rendered to the

[22] Cadence's willingness to pay such documented fees should not be taken as creating any reliance interest and should not be taken as a legal admission that such fees are due, or as an admission about when they are due. Cadence has agreed to pay such fees as a business judgment.

[23] An example is the *Alliant* action. There, plaintiffs brought declaratory judgment, unjust enrichment, quantum meruit, conversion, and Georgia Uniform Deceptive Trade Practices claims. Putting aside the declaratory judgment (which might be a hybrid), *every single claim is brought under state law*. In fact, it appears that the only action with an exception is Plaintiff Leigh King

borrower, yet another reason against consolidation. *See In re DirectTV, Inc., Fair Labor Standards Act & Wage & Hour Litig.*, 84 F. Supp. 3d 1373, 1375 (J.P.M.L. Feb. 6, 2015) (denying centralization of eleven actions where plaintiffs' claims implicated multiple states' laws); *In re Title Ins. Real Estate Settlement Procedures Act (RESPA) & Antitrust Litig.*, 560 F. Supp. 2d 1374, 1375 (J.P.M.L. 2008) (denying centralization of 25 actions involving "different regulatory regimes in the states in which the actions [we]re pending along with variances in insurance regulation and law in each state"). The Regional and Small Bank group has prepared a chart in Exhibit D illustrating the different state law claims.

III. ARGUMENT AND CITATION TO AUTHORITY

A. Standard

Centralization of actions is appropriate only if: (1) one or more common questions of fact exist among actions; (2) transfer would be more convenient for the parties and witnesses; and (3) transfer would promote the just and efficient conduct of the actions. 28 U.S.C. § 1407(a). Movant bears the "burden of demonstrating the need for centralization." *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1379 (J.P.M.L. 2011). Movant fails to demonstrate transfer is appropriate under any of these factors, much less all of them.

B. Movant Has Not Met Its Burden of Showing One or More Common Questions of Fact Exist Among the Actions.

A factual question should only satisfy the commonality requirement if it will generate common answers. It is not enough that the same factual question be asked in different actions – otherwise every car crash case would be consolidated. The relevant inquiry is whether there is overlapping and common discovery that will all relate to resolving a common factual question.

Norton Underwood, who alleges a violation of the SBA Section 7(a) Loan Program. *See Leigh King Norton Underwood*, [Doc. 1] at ¶¶ 56-58.

The Supreme Court has explained this in the class action context: What matters "is not the raising of common 'questions' – even in droves – but rather, the capacity of a class-wide [or multi-district] proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011) (emphasis in original).

There are zero factual questions capable of common answers. Commonality demands more than superficial similarity. This Panel has emphasized that "numerosity of actions" will not support centralization without "sufficient common questions of fact." *In re Not-for-Profit Hospitals/Uninsured Patients Litigation*, 341 F. Supp. 2d 1354, 1355 (J.P.M.L. 2004).[24] Common issues must "predominate over individual factual issues." *In re Westinghouse Elec. Corp. Employment Discrimination Litigation*, 438 F. Supp. 937, 939 (J.P.M.L. 1977); *see also In re Pharmacy Benefit Plan Adm'rs Pricing Litigation*, 206 F. Supp. 2d 1362, 1363 (J.P.M.L. 2002) (denying transfer "unique questions of fact predominate over any common questions").[25]

1. *No common questions of fact.*

Movant contends common questions of fact exist because "all of the cases involve a single loan product" – the PPP loan – and are " based on the allegation that the PPP Lender defendants failed to remit the Agent Fees owed to plaintiffs despite the SBA Regulations that require payment[.]" [Doc. 1-1] at 7-13. Movant asserts these cases share a common factual thread simply because they are based upon the same federal loan product. But, all of the fact questions raised are incapable of common answers, and therefore, do not satisfy the commonality requirement.

[24] *See also In re Asbestos School Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *In re Eli Lilley & Co. "Oraflex" Prods. Liab. Litig.*, 578 F. Supp. 422 (J.P.M.L. 1984)..

[25] *See also In re Electrolux Dryer Prods. Liab. Litig.*, 978 F. Supp. 2d 1376, 1377 (J.P.M.L 2013); *In re Ocala Funding, LLC, Commercial Litig.*, 867 F. Supp. 2d 1332 (J.P.M.L. 2012); *In re Blair Corp. Chenille Robe Prods. Liab. Litig.*, 831 F. Supp. 2d 1367 (J.P.M.L. 2010).

The answers will vary by each loan, borrower, type of business, agent, and even *within* each bank. Even if class certification could be made (and it cannot), there would need to be separate classes against each defendant bank. It would be only happenstance that a particular alleged agent was in the class for more than one bank. Even so, that agent might recover against one bank and fail to recover against another bank because their claim against one bank would not depend upon their claim against another. The principals for these alleged agents – the borrowers – would certainly not be connected to more than one class and one bank – since they can legally only have one PPP loan. Based upon the current complaints, these individualized issues could include:

- **Whether an agent completed an SBA Form 159 to receive agent fees, and if so.**
    - **Did the Form itemize the services?**
    - **Was the Form signed by the borrower? Also by the agent? Also by the lender?**
    - **What particular services were provided and detailed in the form? (Who provided them? What rate was charged?)**
    - **When was the Form submitted to the lender?**
    - **Was the agent cleared through the federal government's System for Awards Management (SAM)?** [26] (SAM validates information about vendors in government programs).
- **Whether the individual borrower and agent have any written or verbal agreement regarding payment of fees;**
- **Whether the agent had any written or verbal agreement or understanding with the bank about payment of agent fees;**
- **Whether the borrower already paid the agent;**

[26] The Form 159 requires three signatures: the agent signature, the applicant/borrower signature and the Lender signature. ***The Lender is also required to conduct due diligence on the reasonableness of the fee and confirm the agent through SAM***. SBA Form 159 states: "The SBA Lender must ensure that the Agent performing services is not debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or Agency. (See www.sam.gov.)"

- **Whether an agent communicated to the bank that it was serving as an agent for any borrower(s) or in connection with any PPP loan application(s).**
    - Did the agent provide to the bank an engagement letter with the borrower? *See Leigh King Norton Underwood*, [Doc. 1] at ¶ 24;
    - Did the agent work directly with the bank on iterations of a PPP loan application? *See Sport & Wheat*, [Doc. 21] at ¶ 86;
    - Did the agent sign the loan application documents? *Id*. at ¶ 119 ("Sport & Wheat signed the application as PPP Agent in the space marked 'Borrower's Agent'");
    - Did the borrower or agent ask the bank about payment of agent fees prior to submitting a loan application? *See id*. at ¶¶ 92-93.
- **Whether a bank manually removed, or demanded a borrower remove, an agent's name from any individual application.** *Id*. at ¶¶ 76, 121, and 136.
- **What each bank told each PPP loan applicant – and each alleged agent -- about agent fees <u>and</u> whether the bank's position changed over time <u>or</u> changed with respect to any particular PPP loan.**

These individualized, transaction-specific inquiries are not suited for consolidation. No common evidence will provide proof for any answer – and certainly not between banks. Nor will the discovery be common or overlapping. For example, what Wells Fargo stated to any particular borrower or alleged agent has nothing to do with what a different borrower or agent may have been told by another bank. Because resolving each transaction, for each bank will depend on such individualized inquiries, the claims and cases lack commonality. *See In re American-Manufactured Drywall Prods. Liab. Litig.*, 716 F. Supp. 2d 1367, 1368 (J.P.M.L. 2010) ("The proponents of centralization have not convinced us that any efficiencies from centralization would outweigh the multiple individualized issues. . . . "). Literally, each borrower and each agent would need to provide testimony for each PPP loan. The need for different discovery for different banks based on differing allegations and claims and differently-situated plaintiffs' counsels against centralization. *See In re Pharmacy Benefit Plan Administrators*, 206 F. Supp. 2d at 1363

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(recognizing that transfer is inappropriate when individual discovery predominates); *In re Westinghouse*, 438 F. Supp. at 938.

The Regional and Small Banks are entitled to develop the individual facts that bear on their individual claims. They are entitled to be heard, individually, on their defenses for each agent and each transaction and not lumped together with unrelated banks. It is never enough to simply sue an entire industry and make no showing of common fact questions. *In re Mortgage Lender Force-Placed Ins. Litig.*, 895 F. Supp. 2d 1352, 1353 (J.P.M.L. 2012) (declining transfer of an alleged industry-wide practice among banks and insurers concerning placement of insurance policies because common questions of fact among different defendants did not predominate).[27]

2. *Movant only identifies legal questions.*

Movant fails to identify common questions of fact in its Motion. Rather, the Motion is ultimately an effort to have one cherry-picked court answer a single question of law – whether the CARES Act ever mandates payment of agent fees – and obtain universal application of that legal decision. This is evidenced by Movant's own list of purported "common questions," nearly all of which are legal – not factual – questions:

- "Whether defendants **complied with all applicable SBA Regulations** . . . ."
- "Whether defendants **complied with their legal obligations** under the terms of the CARES Act . . . ."
- "Whether defendants were **required to pay** the PPP Agent Fees to the plaintiffs and PPP Agents **under the CARES Act and SBA Regulations**"
- "Whether the defendants **converted** plaintiffs' and Agents' PPP Agent fees"

[27] The Panel is "typically hesitant to centralize litigation on an industry-wide basis," *In re AndroGel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378, 1379 (J.P.M.L. 2014); *In re Hotel Indus. Sex Trafficking Litig.*, — F. Supp. 3d —, 2020 WL 581882, at *2 (J.P.M.L. Feb. 5, 2020) (denying centralization of actions alleging that various hotel chains knowingly profited from sex trafficking, where "[t]he vast majority of actions involve different hotels")).

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- "Whether the defendants were **unjustly enriched** . . . ."

[Doc. 1-1] at 12-13. (emphasis added). The answers to these legal questions will vary by each bank and each PPP loan. These *legal* questions do not show that any common questions of *fact* exist among the actions.[28] Therefore, Movant has failed to satisfy 28 U.S.C. § 1407(a)'s first element.

C. Movant Has Not Met Its Burden of Showing Transfer Would Be More Convenient for Parties and Witnesses – Especially as to Regional and Small Banks.

Here, there is no reason to expect centralization could "eliminat[e] duplicative discovery," or "conserve the resources of the parties, their counsel and the judiciary." *In re Airline Baggage Fee Antitrust Litig.*, 655 F. Supp. 2d 1362, 1362-63 (J.P.M.L. 2009). Whether a particular bank owes agent fees for services rendered to a particular borrower, by a particular agent, for a particular transaction has no connection with whether another bank owes agent fees to a different agent on a different transaction. Centralizing cases making different allegations against different defendants, under the laws of different states makes no sense and will not generate convenience or efficiency.

On the other hand, it is certain that the Regional and Small Banks would suffer increased burdens if forced into a large, slow moving MDL proceeding where they cannot be heard for years on their individual facts and arguments. Therefore, Movant has not shown consolidation is more convenient for the parties or witnesses. The second element of 28 U.S.C. § 1407(a) is not satisfied.

D. Movant Has Not Met Its Burden of Showing Transfer Promotes the Just and Efficient Conduct of Actions -- Especially as to Regional and Small Banks.

Movant claims consolidation promotes the just and efficient conduct of actions by giving a "single judicial voice to what otherwise could become a chaotic litigation[.]" [Doc. 1-1] at 11. However, Movant's counsel created their own chaos by instituting 10 putative class actions against

[28] Multidistrict Litig. Manual § 5.4 ("Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Judicial Panel of Multidistrict Litigation is nearly certain to conclude that transfer is not appropriate.").

unrelated defendants. It is illogical to reward Movant's counsel's self-inflicted, manufactured chaos by imposing significantly greater economic burdens on the Regional and Small Banks. Moreover, there is no possible efficiency in having the Regional and Small Banks leave the state in which they are headquartered (and where their borrowers, as putative class members, likely conduct business) to participate in an MDL. The vast majority of witnesses and documents are in the forum state – not across the county.

Because the claims against the banks lack basic commonality, there is no efficiency to be gained. *See In re American-Manufactured Drywall Prods. Liab. Litig.*, 716 F. Supp. 2d 1367, 1368 (J.P.M.L. 2010) ("The proponents of centralization have not convinced us that any efficiencies from centralization would outweigh the multiple individualized issues, including ones of liability and causation, that these actions appear to present."). Centralization would not streamline the pretrial process. Instead, it would place upon a transferee court a compound burden that could be addressed more efficiently and with greater local expertise by the courts of original jurisdiction.[29] For all of these reasons, Movant has failed to show transfer promotes the efficient and just consideration of the *Alliant* Action.

E. Premature: The Likelihood Early Dispositive Motions Dispose of the Cases or Claims also Counsels against Consolidation for the Regional and Small Banks.

Early dispositive motion practice will likely eliminate any perceived multidistrict character of the litigation. First, many cases may be dismissed on standing, mootness, or ripeness grounds. All plaintiffs' claims are contingent upon future events. Plaintiffs allege they are entitled to receive

[29] *In re DirectTV, Inc., Fair Labor Standards Act & Wage & Hour Litig.*, 84 F. Supp. 3d 1373, 1375 (J.P.M.L. Feb. 6, 2015) (denying centralization of eleven actions where plaintiffs' claims implicated multiple states' laws); *In re Title Ins. Real Estate Settlement Procedures Act (RESPA) & Antitrust Litig.*, 560 F. Supp. 2d 1374, 1375 (J.P.M.L. 2008) (denying centralization of 25 actions involving "different regulatory regimes in the states in which the actions [we]re pending along with variances in insurance regulation and law in each state").

agent fees out of the processing fees that the SBA allegedly will pay to banks who funded PPP loans. *See*, *e.g.*, *Alliant* Action, [Doc. 1] at ¶¶ 33, 35. But a lender will not receive a processing fee: (1) prior to full disbursement of the PPP loan, (2) if the PPP loan is cancelled before disbursement, or (3) if the PPP loan is cancelled or voluntarily terminated and repaid after disbursement. *See* 85 Fed. Reg. at 26323. No plaintiff alleges any bank has already received any of its lender fees. Thus, plaintiffs are speculating lenders will actually receive lender fees in the first instance and will then fail to pay agent fees, if agent fees are required. For example, a bank may not receive lender fees for a particular loan because the loan is never fully disbursed or is cancelled. Alternatively, as an exercise of its business judgment, a bank may agree to pay a purported agent fees for a particular loan or once they receive lender fees for that loan.

Second, many cases may also be dismissed for failure to state a claim. This Panel has long recognized that it should not centralize cases when, as here, dispositive motion practice offers a reasonable prospect of weeding out claims and reducing the number of plaintiffs and cases. *See In re ATM Interchange Fee Antitrust Litigation*, 350 F. Supp. 2d at 1362-63 (recognizing that transfer should be denied where pending rulings or motions may moot the multidistrict proceedings); *also In re The Boeing Company Employment Practices Litigation*, 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (denying transfer motion when Panel believed that a summary judgment motion "may be filed shortly").[30] Transfer is likely only to slow this process as the transferee court is confronted with separate dispositive motions involving different facts and issues for each case. This is an instance in which, "motions to dismiss or remand, raising issues unique to the particular

[30] *See also In re Adelphia Commn's Corp. Sec. & Derivative Litig.*, 237 F. Supp. 2d 1381, 1382 (J.P.M.L. 2002); *In re Am. Home Prods. Corp. "Released Value" Claims Litig.*, 448 F. Supp. 276, 278 (J.P.M.L. 1978); *In re Lite Beer Trademark Litig.*, 437 F. Supp. 754, 755 (J.P.M.L. 1977); *In re United States Navy Variable Reenlistment Bonus Litig.*, 407 F. Supp. 1405, 1407 (J.P.M.L. 1975).

case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer." *Manual for Complex Litigation, Fourth* § 20.131 (2004).

Here, whatever cases remain following early dispositive motion practice can readily be managed on an individual basis through procedural avenues short of centralization. "[I]nformal coordination and cooperative efforts by the parties and involved courts should be sufficient to minimize or eliminate duplicative discovery and other pretrial proceedings." *See In re 3M Co. Lava Ultimate Prods. Liab. Litig.*, 222 F. Supp. 3d 1347, 1348 (J.P.M.L. 2016).

F. If there must be a consolidation, the Northern District of Georgia is appropriate.

Movant requests the Northern District of Georgia and concedes "presence in or near" a judicial district weighs on the transfer analysis. [Doc. 1-1] at 11. Movant alleges "Bank of America, Wells Fargo, Synovus, Ameris Bank, Cadence Bank, United Community Bank, and Truist Bank all have corporate offices either in or near Georgia, and Atlanta is geographically central to many of the Lenders that are not otherwise connected to Georgia, making the Northern District of Georgia the most convenient location for this litigation." *Id*.[31] Many of the lawyers, parties, witnesses, and evidence are in Atlanta or nearby. Movant also discusses the benefits of Georgia because of the COVID virus. Movant also filed its largest case (in terms of numbers of defendants) in the Northern District of Georgia.

Regional and Small Banks agree that if this case must be consolidated, the Northern District of Georgia would be most convenient for witnesses, counsel, and evidence.

[31] 40% of all Cadence's PPP loans were made in Georgia. *See Paycheck Protection Program Speaks Volumes to Cadence Bank's Resolve*, CADENCEBANK.COM (May 29, 2020), *available at* https://cadencebank.com/cadencebeat/feature-stories/paycheck-protection-program-speaks-volumes?utm_source=bronto&utm_medium=email&utm_term=Read+More&utm_content=Paycheck+Protection+Program+Speaks+Volumes+to+Cadence+Bank%E2%80%99s+Resolve&utm_campaign=consumer (last visited June 12, 2020).

The Regional and Small Banks disagree with Movant's alternative proposal of Arizona. It is not convenient and "readily accessible to all parties, witnesses and counsel" simply by virtue of the Phoenix Sky Harbor International Airport and a light rail system. *Id*. at 19. The Arizona case was not first filed. The Arizona action does not have the most defendants. Most of the Regional and Small Banks have no connection whatsoever with Arizona.

G. If any large bank desires consolidation, the Panel can create an MDL for that bank.

If any large bank is in favor of consolidation, the Regional and Small Banks suggest that the Panel create a consolidated action for that bank. With only one bank in an MDL, there is the possibility of at least some common discovery. Further, some of the larger banks have five or more actions against them – rather than a single action. Creating such a single defendant MDL is far more common and brings far fewer inconveniences and inefficiencies. To the extent that any other defendants are included in an action with a larger bank, § 1407 provides that "the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded." 28 U.S.C. § 1407(a). Consistent with this directive, the Panel has separated and remanded claims in other cases and this approach may be warranted here.[32]

IV. CONCLUSION

The Regional and Small Banks respectfully request the Panel deny Movant's proposed transfer and centralization.[33]

[32] *See, e.g., In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 812 F. Supp. 2d 1380, 1383 (J.P.M.L. 2011) (remanding claims against defendant because claims were distinct from those against others and inclusion of distinct claims "would unnecessarily complicate MDL proceedings"); *In re Light Cigarettes*, 652 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2009) (excluding certain actions).

[33] Cadence Bancorporation was voluntarily dismissed immediately prior to this filing.

Respectfully submitted this 17th day of June, 2020.

/ s/ *Gregory C. Cook*_________
Gregory C. Cook
BALCH & BINGHAM LLP
1901 6th Avenue North, Suite 1500
Birmingham, AL 35203
Telephone: (205) 251-8100
Facsimile: (205) 226-8799
Email: gcook@balch.com

Counsel for Defendant Cadence Bank, N.A. and Cadence Bancorporation

/s/ Sara Ford
Sara Ford
LIGHTFOOT FRANLIN & WHITE, LLC
Logan T. Matthews
Robert A. Pate
400 20TH Street North
Birmingham, AL 35203
Phone (205) 581-0752
Facsimile (205) 581-0799
sford@lightfootlaw.com

Counsel for ServisFirst Bank, Inc.

/s/ William V. Custer
William v. Custer
BRYAN CAVE LEIGHTON PAISNER LLP
One Atlantic Center, 14th Floor, 1201 W. Peachtree St., N.W.
Atlanta, GA 30309-3471
Phone (404) 572 6828
bill.custer@bclplaw.com

Counsel for Newton Federal Bank

9073011.1
9073464.1

/s/ Roy W. Arnold
Roy W. Arnold (PA I.D. 70544)
BLANK ROME LLP
Joseph E. Culleiton (PA I.D. 82823)
Shawna J. English (PA I.D. 316881)
501 Grant Street, Suite 850
Pittsburgh, PA 15219
Phone: (412) 932-2800
Facsimile: (412) 932-2777
rarnold@blankrome.com
jculleiton@blankrome.com
senglish@blankrome.com

Counsel for Defendants First National Bank of Pennsylvania and F.N.B. Corp.

BEFORE THE
UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re: Paycheck Protection Program (PPP) Agent Fees Litigation	MDL No. 2950

PROOF OF SERVICE

I hereby certify pursuant to J.P.M.L. R. 4.1(a) that on June 17, 2020, I filed the foregoing *Response in Opposition to Movant Alliant CPA Group, LLC's Motion for Transfer of Actions to the Northern District of Georgia Pursuant to 28 U.S.C. § 1407 for a Coordinated/Consolidated Proceeding And Brief in Support* ("Response in Opposition to Transfer") with this Panel's CM/ECF system, which served counsel of record for each of the parties to this putative MDL electronically.

I further certify I served this *Response in Opposition to Transfer* on the following via FedEx for next day delivery:

Clerk of the Panel
United States Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room G-255, North Lobby
Washington, DC 20544-0005

I further certify I served this *Response in Opposition to Transfer* on the following parties by mailing this document via U.S. Mail to the following addresses provided by the PACER system:

Ameris Bank
3490 Piedmont Rd NE
Atlanta, GA 30305

Centerstate Bank Corporation
1011 First Street South
Winter Haven, FL 33880

Academy Bank NA
8551 N. Boardwalk Ave
Kansas City, MO 64154

BSD Capital, LLC
121 West Long Lake Road
Suite 200
Bloomfield Hills, MI 48304

Square, Inc.
1455 Market Street
San Francisco, CA 94103

Vectra Bank Colorado
2000 South Colorado Blvd.
Suite 2-1200
Denver, CO 80222

Midwest Regional Bancorp, Inc.
363 Festus Centre Drive
Festus, MO 63028

Midwest Regional Bank
363 Festus Centre Drive
Festus, MO 63028

Modern Bank Management, LLC
410 Park Ave
New York, NY 10022

Modern Bank N.A.
410 Park Ave
New York, NY 10022

Citizens & Northern Corp.
90-20 Main Street
Wellsboro, PA 16901

Citizens & Northern Bank
90-92 Main Street
Wellsboro, PA 16901

/s/ *Gregory C. Cook*_________
Gregory C. Cook
BALCH & BINGHAM LLP
1901 6th Avenue North, Suite 1500
Birmingham, AL 35203
Telephone: (205) 251-8100
Facsimile: (205) 226-8799
Email: gcook@balch.com

Counsel for Defendant Cadence Bank, N.A. and Cadence Bancorporation

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