**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE: Paycheck Protection Program (PPP)
Agent Fee Litigation **MDL No. 2950**

**JOINT MEMORANDUM OF BOKF, NA AND BOK FINANCIAL CORPORATION
IN OPPOSITION TO MOTION TO TRANSFER FILED BY ALLIANT GROUP LLC**

BOKF, NA and BOK Financial Corporation (collectively "the BOK defendants") file their response in opposition to Alliant's Motion to Transfer the sole case filed against them, ImpAcct v. JPMorgan Chase & Co., et al., 20-1344 (D. Colo.) (Doc. No. 1-12). The Transfer Motion does not satisfy the requirements of 28 U.S.C. §1407, and ImpAcct's suit against the BOK defendants should remain in the District of Colorado to be determined on its own merits as to federal and Colorado law.

The Transfer Motion should be denied as to the BOK defendants for 4 separate reasons: (i) the MDL, if constituted as requested, would be enormous and unmanageable; (ii) relevant common factual issues do not exist; (iii) the only truly common issues are those of law; and (iv) transfer to MDL 2950, if any, should include only those defendants that are facing multiple actions, and not the BOK defendants.

First, an unmanageably gargantuan MDL awaits: The memorandum supporting transfer notes that "[a]s of May 19, 2020, the SBA has approved over 1.6 million PPP loans for small businesses through almost 5,000 lenders." Doc. No. 1-1, Memorandum, at p. 3. It claims that so far the government has paid nearly $20 billion dollars in lenders fees, "a substantial portion of which is owed by the PPP lenders to the plaintiffs as PPP Agents." Id. Alliant speculates that the number of PPP lender defendants could "increase into the thousands." Memorandum, p. 7 (emphasis added).

The Transfer Motion nevertheless seeks to have all future related and "tag-a-long" cases centralized. Doc. No. 1.

The Panel has been here before. In 2009, the Panel established a multidistrict litigation docket and centralized all federal suits against banks' checking account overdraft practices. See, In re: Checking Account Overdraft Litigation, 626 F.Supp.2d 1333, 1335 (J.P.M.L. 2009) [MDL No. 2036]. Seven years later, a similar request was made to centralize all credit union checking account overdraft litigation. In In re Credit Union Checking Account Overdraft Litigation, 158 F.Supp.3d 1363 (J.P.M.L. 2016), the Panel rejected centralization. Reflecting on the earlier bank overdraft MDL, the Panel cautioned:

> **A review of the briefs submitted in connection with [the motion to transfer the bank MDL] indicates that no party raised serious concerns regarding the potential scope of the MDL or the logistical and other difficulties that might arise if the litigation expanded, as it did, to include numerous other unrelated financial institutions.** And, although the MDL has proceeded successfully under the able supervision of the Honorable James Lawrence King, we note that the Panel, after consulting with Judge King, ceased transferring tag-alongs to it in September 2011. In doing so, the **Panel concluded that the continued inflow of new actions "threaten[ed] to significantly hinder the resolution of the already-centralized actions."**
>
> Here, even if other grounds did not already strongly weigh against centralization, the possibility that this litigation could expand **substantially counsels caution**. According to the Towner plaintiff, there are approximately 6,000 credit unions across the country. Because it is unclear how many of them utilize an overdraft program like those allegedly used by the eleven defendants named in these actions, the possibility that the scope and complexity of this proposed MDL could expand beyond the bounds of manageability also influences our decision against centralization.

Id., 158 F.Supp.3d at 1365 (internal references omitted; emphasis added). Indeed, the flood of related cases has already begun to swamp this proposed MDL. In less than a month, there have been 8 requests to join 21 additional cases to the 12 cases identified in the Transfer Motion.[1] The Panel should heed the lessons of MDL No. 2036 and deny centralization.[2]

Second, no true common issues of fact exist: There are no true relevant common issues of fact among the cases sought to be centralized. There are 13 unique plaintiffs and 83 unique defendants in the 12 cases for which the Transfer Motion seeks consolidation. Memorandum, p. 4. The alleged factual questions listed on pp. 8-9 of the Transfer Motion are nothing more than abstract generalizations distilled from the plaintiffs' common legal claims. There are no allegations of conspiracy or concerted action by the defendant banks, nor even any allegations that the banks all adopted the same policy or practices. As the Sixth Circuit Court of Appeals observed (discussing common questions of fact for class action certification): "[i]t is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are asking for is a common issue the resolution of which will advance the litigation." Sprague v. GM Corp., 1323 F.3d 388, 399 (6th Cir. 1998).

The Panel's reasoning in support of its decision to deny centralization of insurance claims due to hurricane flood-caused damages, applies equally here:

> These actions possess only a superficial factual commonality—all plaintiffs allege that they suffered property damage as a result of one or another of several hurricanes, and that their respective insurance companies breached the terms of plaintiffs' policies by settling plaintiffs' claims for

[1] See, Doc. No. 25 (one related action); No. 88 (two related actions); No. 98 (seven related actions); No. 111 (two related actions), No. 134 (two related cases); No. 135 (four related cases); No. 143 (two related cases); Doc. 157 (1 related action).

[2] "A broad factor that is rarely discussed by the Panel, but undoubtedly weighs into the analysis of whether to order transfer, is the general track record in similar cases. . ." Herr, Multidistrict Litigation Manual, §5:31.

> amounts lower than the losses actually sustained. Each case necessarily involves a different property, different insureds, different witnesses, different proofs of loss, and different damages. The very nature of the cases ensures that unique issues concerning each plaintiff's loss, claim, investigation, and claim handling will predominate, and will overwhelm any efficiencies that centralization might achieve.

In re: Florida, Puerto Rico, and U.S. Virgin Islands 2016 Hurricane Seasons Flood Claims Litigation, 325 F. Supp.3d 1367, 1368-69 (J.P.M.L. 2018).[3]

The ImpAcct action itself joins multiple defendants in one complaint and in one common set of generic allegations; however, the claims against the BOK defendants are completely unconnected factually to the claims made against the other ImpAcct defendants. As in the other cases, no allegations of conspiracy or combination are made, which militates against consolidation. See, In re Pharmacy Benefit Plan Administrators Pricing Litigation, 206 F. Supp.2d 1362, 1363 (J.P.M.L. 2002) (absence of any claim of conspiracy among defendants noted as factor supporting denial of centralization).

[3]See also, In re Provident Securities Litigation, 2010 Westlaw 2244367 (J.P.M.L., June 3, 2010) ("common factual backdrop" among claims that various brokers had facilitated a Ponzi scheme by offering and selling oil and gas interests to the plaintiffs and wasted the proceeds was insufficient to justify centralization, because discovery would be different due to the differing conduct of the defendants); In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F. Supp. 906, 909-11 (J.P.M.L. 1977) (the Panel refused to transfer 103 separate cases brought by workers alleging injury resulting from exposure to asbestos dust in the course of their employment. The Panel explained that notwithstanding "a common thread" in the cases - exposure to asbestos in one form or another – and common questions of fact as to the scientific and medical knowledge of the defendants, "[t]he liability of each defendant in each action is predominantly an individual question," and transfer "would not further the purposes of Section 1407."); In re Eli Lilly and Company (Cephalexin Monohydrate) Patent Litigation, 446 F.Supp. 242, 243-44 (J.P.M.L. 1978) (common questions of fact in related patent infringement actions were insufficient to permit transfer under §1407); In re Repetitive Stress Injury Products Liability Litigation, 1992 Westlaw 403023, *1 (J.P.M.L. Nov. 27, 1992) (where "degree of common questions of fact among" 159 actions did not "rise[ ] to the level that transfer under Section 1407 would best serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of this entire litigation," transfer denied).

Plaintiff will have to present evidence unique to the BOK defendants. Indeed, most of the factual evidence will be unique to the BOK defendants. "[W]hile these . . . actions clearly share common legal questions and, perhaps, a few factual questions, unique questions of fact predominate over any common questions of fact." Id. The claims against the BOK defendants would have to be severed in any event from the factually unrelated claims brought against the other ImpAcct defendants.[4]

Further, ImpAcct brings its complaint against the BOK defendants as a putative class action. The class allegations of ImpAcct's Complaint that the BOK defendants had a practice of not paying agents' fees, see, e.g., ImpAcct Complaint, Doc. 1, ¶¶ 51, 66-69 and 80-81, are patently false as can easily be and are properly resolved by the District Court of Colorado.

There are no common issues of fact, which is the lynchpin of the MDL Docket.

Third, the only common issues are issues of law. The only truly common issues are issues of the construction and application of the PPP provisions of the CARES Act, e.g., whether a private cause of action even exists. This Panel recently confirmed that "common legal questions are insufficient to satisfy Section 1407's requirement of 'common factual questions.'" In re Hotel Industry Sex Trafficking Litigation, 2020 Westlaw

[4]Rule 21 provides that "[t]he court may also sever any claim against a party." See, e.g., U.S. v. Taconic Hills Central School District, 8 F.Supp.3d 339, 344 (S.D.N.Y. 2014) (relators only asserted that each defendant submitted its own Medicaid bills for services provided to its own students; "[j]oinder is improper where, as here, the plaintiff does no more than assert that the defendants merely committed the same type of violation in the same way.") (internal citation omitted); DIRECTV, Inc. v. Armellino, 216 F.R.D. 240, 240-41 (E.D.N.Y. 2003) (plaintiff filed action against multiple defendants alleging that defendants intercepted plaintiff's cable programing services; each defendant was involved in a separate and discrete incident; the alleged actions were not related; joinder improper).

581882, *2 (J.P.M.L., Feb. 5, 2020).[5]

Fourth, at most the Panel should engage in partial transfer. If the Panel chooses to consolidate some of the cases identified in the Motion to Transfer, it should select only banks that have multiple suits against them, and allow single suit banks to remain in their original venues. As Alliant observes "[s]ome of the defendants are named in up to six of the Related Actions, while others are named in only one." Memorandum, at p. 5. The Panel is not constrained to either grant the Transfer Motion in toto, or deny it completely. As the Multidistrict Litigation Manual notes, "[p]artial transfer is an important tool available to the Panel to refine the somewhat blunt 'transfer/no transfer' decision it must otherwise make. Where transfer is appropriate for some claims but not others, the Panel can separate the actions and treat them differently." Herr, supra, at §5:57.[6]

CONCLUSION

The Transfer Motion should be denied as to the BOK defendants. The BOK defendants have been sued only once concerning their agent fee practice; centralization will benefit neither the BOK defendants nor the judicial system.

---

[5]See also, In Re Veroblue Farms USA, Inc. Litigation, *2 (J.P.M.L., Feb. 5, 2020).

[6]Section 1407(a) clearly grants the Panel this authority. Herr, supra, at §5:58.

RESPECTFULLY SUBMITTED,

s/ Frederic Dorwart

Frederic Dorwart, OBA #2436
J. Michael Medina, OBA #6113
Sarah W. Poston, OBA #22925
Frederic Dorwart, Lawyers PLLC
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
Telephone: (918) 583-9922
Facsimile: (918) 583-8251
E-mail: fdorwart@fdlaw.com
mmedina@fdlaw.com
sposton@fdlaw.com

Counsel for Defendants BOK Financial Corporation and BOKF, NA f/k/a Bank of Oklahoma