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

IN RE PAYCHECK PROTECTION PROGRAM ("PPP") AGENT FEES LITIGATION	MDL No. 2950

FIRST NATIONAL BANK OF PENNSYLVANIA AND F.N.B. CORP.'S RESPONSE IN OPPOSITION TO ALLIANT CPA GROUP LLC'S MOTION FOR TRANSFER OF ACTIONS

Pursuant to Rule 6.1(c) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, First National Bank of Pennsylvania and F.N.B. Corp. (collectively, "FNB"), hereby oppose Alliant CPA Group, LLC's ("Alliant") Motion for Transfer of Actions ("Motion"). FNB also joins in the Oppositions filed by Synovus Bank and the Regional and Small Bank Group, but files this short Opposition to raise FNB's particularized issues and arguments.

I. INTRODUCTION

FNB opposes transfer and consolidation, and Alliant's Motion should be denied because none of the requirements for consolidation are satisfied. FNB is a defendant in exactly *one* relevant lawsuit, pending in the United States District Court for the Western District of Pennsylvania in Pittsburgh, Pennsylvania. In that suit, the Plaintiff, HallockShannon, P.C., is a Pennsylvania professional corporation that provides accounting and other services to business clients and has offices located in Wyalusing and Tunkhannock, Pennsylvania. Plaintiff HallockShannon asserts various Pennsylvania state law claims seeking to recover certain alleged "agent fees" from the various named defendant banks for assisting its business clients with preparing their loan applications under the Paycheck Protection Program ("PPP"). However, the factual claims against FNB share no common facts with any of the other PPP bank or lender defendants, even those bank defendants named in the same lawsuit, because the bank defendants are unrelated and acted independently. None of the bank defendants are alleged to have any involvement in the same purported transaction, occurrence or series of transactions with any plaintiff. Lacking any common facts, there would be no efficiencies gained by consolidating the *HallockShannon* lawsuit with the other PPP lawsuits. To the contrary, FNB would be significantly inconvenienced by Alliant's proposed consolidation. Alliant is advocating Georgia or Arizona as the proposed venue for consolidation. FNB has no bank branches or offices in either Georgia or Arizona. Rather, FNB is headquartered in Pittsburgh, Pennsylvania, the same venue where Plaintiff chose to file its complaint and the *HallockShannon* case is pending. Indeed, the majority of FNB's documents and witnesses are located in Pittsburgh, so a transfer to a different venue – particularly a venue where FNB has no offices or operations – would be a significant inconvenience. Moreover, the *HallockShannon* case is pending before the Honorable Arthur J. Schwab, a Senior District Judge that is well-known for moving his docket forward in a very prompt and efficient fashion. Thus, Alliant's proposed venues are particularly inappropriate for FNB and the Motion should be denied.

Further, Alliant's Motion should be denied because it is premature. As other banks have done or may decide to do, FNB intends to file a motion to dismiss. Like other motions to dismiss that are already pending, FNB's motion likely will attack substantive legal issues as well attacks on the sufficiency of the operative complaint for failure to plead any actual factual allegations. FNB has compelling dismissal arguments, which is further reason why these lawsuits should not be consolidated. As this Panel has acknowledged, consolidation should not occur unless and until it is needed. *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).

If some of the plaintiffs survive motions to dismiss as to some PPP defendants, it *may* be appropriate to utilize coordinated discovery or transfers within districts for some of the PPP defendants – unlike FNB – that are named in numerous similar, overlapping lawsuits. Moreover, the majority of the claims raised in these PPP lawsuits – including the *HallockShannon* case – are premised upon state law, which necessarily varies from state to state. A Judge in Georgia (or Arizona or New York) necessarily lacks the deep familiarity with Pennsylvania law that Judge Schwab has acquired over nearly 20 years of experience on the Western Pennsylvania federal bench and 30 years in private practice as a Pennsylvania lawyer. For FNB, consolidation and transfer are simply inappropriate. With only one pending suit against FNB in Western Pennsylvania, transfer will significantly increase the costs and complexity of litigation, with no attending efficiencies or benefits. Thus, Alliant's Motion should be denied.

II. THE MOTION TO TRANSFER SHOULD BE DENIED.

A. Applicable Legal Standard

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred by this Panel upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. 28 U.S.C.A. § 1407. Centralization of actions pending in different districts is appropriate only if: (1) one or more common questions of fact exist among the 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. *Id.* The 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). In this case, Alliant cannot meet any of these factors, particularly as it relates to FNB.

B. No Common Questions of Fact Exist Among the PPP Bank Defendants.

As FNB is unrelated to any other PPP defendants and acted independently in processing PPP loans, there are no common factual questions relating to FNB that would benefit from consolidated litigation. The Panel has made clear that "numerosity of actions" will not support centralization without "sufficient common questions of fact to warrant Section 1407 transfer." *In re Not-for-Profit Hospitals/Uninsured Patients Litigation*, 341 F. Supp. 2d 1354, 1355 (J.P.M.L. 2004). Common *factual* 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 where "unique questions of fact predominate over any common questions"). In the PPP context, the pleadings and briefings to date indicate that the individual PPP defendants have taken various positions regarding the payment of agent fees and the timing of any such payments, further demonstrating the lack of uniform common factual issues.

C. Alliant Cannot Demonstrate That Transfer Would Be More Convenient for FNB and its Witnesses.

Consolidation may "serve the convenience of the parties and witnesses" and "promote the just and efficient conduct of the litigation" where it would accomplish such efficiencies as "eliminat[ing] duplicative discovery," "prevent[ing] inconsistent pretrial rulings," and "conserve[ing] 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). However, even in the presence of "some factual overlap," where the pending actions may "proceed in an orderly manner" in their original jurisdictions, consolidation is not appropriate. *In re Snider*, No. MDL No. 2934, 2020 U.S. Dist. LEXIS 54442, at *1-2 (J.P.M.L. Mar. 27, 2020).

Here, consolidation would not eliminate duplicative discovery or conserve resources. To the contrary, FNB – a defendant in a single PPP case – would be subjected to omnibus discovery requests and demands that would merely increase their overall expense and inefficiency. A few extremely large, systemically important banks that have been sued in multiple jurisdictions and have a presence in many more states may decide that there is some potential benefit from some consolidation and coordinated discovery of their particular cases. But, FNB would undoubtedly suffer increased delay, burden and expense if forced into a MDL proceeding where non-related, larger banks would attempt to address their individual issues and arguments and FNB would need to wait for the adjudication of issues for all such unrelated PPP defendants. Moreover, the majority of claims in these PPP actions are state law claims, which will necessarily vary from state to state, and are inappropriate for 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").

D. FNB's Forthcoming Dispositive Motion Also Demonstrates That Consolidation is Premature, At Best.

FNB – like other PPP defendants – has strong legal arguments for dismissal upon lack of standing, as well as the legal insufficiency of the pleading. As a threshold matter, and putting aside the impermissible group pleading, Plaintiff HallockShannon failed to allege that any defendant bank received any of the lender fees. Thus, the Plaintiff is necessarily speculating as to what lenders will pay or will not pay agent fees, or whether any agent fees are even required. Plaintiff also did not allege facts demonstrating that it had satisfied all of the requirements for any purported agent fee. As a result, there is a high likelihood that many of the cases can be addressed through dismissal on grounds of lack of standing, or ripeness, depending on the individual circumstances of each case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that a plaintiff lacks standing if it cannot demonstrate a concrete and particularized injury-in-fact); *Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016) (holding that "[s]peculative or conjectural assertions are not sufficient" to establish standing); *Coons v. Lew*, 762 F.3d 891, 898 (9th Cir. 2014) (holding that speculative allegations of future injury do not satisfy the constitutional requirement of ripeness); *Sammons v. Nat'l Comm'n on Certification of Physician Assistants, Inc.*, 104 F. Supp. 2d 1379, 1381 (N.D. Ga. 2000) (quoting *Texas v. U.S.,* 523 U.S. 296, 300 (1998)) ("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.'").

This Panel has acknowledged that cases should not be centralized where 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); *see 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"). 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, particularly where a defendant – like FNB – is only involved in one relevant lawsuit.

III. CONCLUSION

For the foregoing reasons, First National Bank of Pennsylvania and F.N.B. Corp. respectfully request that the Panel deny Alliant's Motion and the proposed transfer and centralization.

Dated: June 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2020, the foregoing First National Bank of Pennsylvania and F.N.B. Corp.'s Response in Opposition to Alliant CPA Group LLC's Motion for Transfer of Actions was served upon all counsel of record via the electronic filing system.

/s/ Roy W. Arnold
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