BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

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

RESPONSE IN OPPOSITION BY
HONAT BANCORP, HONESDALE NATIONAL BANK, PEOPLES FINANCIAL SERVICES CORP. and PEOPLES SECURITY BANK & TRUST CO.
IN OPPOSITION TO ALLIANT CPA GROUP LLC'S
MOTION FOR TRANSFER OF ACTIONS

Pursuant to the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, Defendants, Honat Bancorp; Honesdale National Bank; Peoples Financial Services Corp. and Peoples Security Bank & Trust Co. (collectively, "Honesdale and Peoples"), by and through their undersigned counsel, hereby submit their opposition to the motion of Alliant CPA Group, LLC ("Alliant") for Transfer of Actions ("Motion"). Honesdale and Peoples join in the Oppositions filed by Synovus Bank and Cadence Bank, as well as the Opposition filed by the Regional and Small Bank Group, comprising Cadence Bancorporation and Cadence Bank, N.A. (2) ServisFirst Bank; (3) Newton Federal Bank; (4) First National Bank of Pennsylvania; and (5) F.N.B. Corp.. Honesdale and Peoples respectfully submit the within Opposition in order to raise their particularized issues and arguments.

Introduction.

Honesdale and Peoples oppose the transfer and consolidation sought by Alliant, and respectfully submit that Alliant's Motion should be denied because none of the requirements for consolidation are satisfied. Honesdale and Peoples are named defendants in only one of the lawsuits that Alliant seeks to transfer to this MDL: <u>HallockShannon, PC v. Citizens & Northern</u>

Corp., *et al.*, which is now pending in the United States District Court for the Western District of Pennsylvania at Civil Action No. 2:20-cv-714. 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.[1] 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 Honesdale and Peoples 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 the plaintiff. Lacking any common facts, there would be no efficiencies gained by consolidating the HallockShannon lawsuit with the other PPP lawsuits. To the contrary, Honesdale and Peoples would be significantly inconvenienced by Alliant's proposed consolidation.

Moreover, Alliant is advocating Georgia or Arizona as the proposed venue for consolidation. Honesdale and Peoples do not have any bank branches or offices in either Georgia or Arizona.[2] While it will be burdensome upon Honesdale and Peoples to defend against HallockShannon's claims in the Western District of Pennsylvania, where they do not regularly conduct business, such burden would be compounded dramatically if they were to be required to

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1 Curiously, HallockShannon's offices are located, in Bradford and Wyoming Counties, both of which are within the Middle District of Pennsylvania.

2 Honesdale and Peoples are headquartered in Pennsylvania, and have their branches in counties within the Eastern and Middle Districts of Pennsylvania.

litigate these claims in Georgia or Arizona. Accordingly, Alliant's proposed venues are particularly inappropriate for Honesdale and Peoples; as such, its Motion should be denied.

More fundamentally, Alliant's Motion should be denied, simply because it is premature. As presumably all other similarly-situated defendants in the HallockShannon matter will do, Honesdale and Peoples will file a motion to dismiss for failure to state a claim upon which relief may be granted for various reasons, including, *inter alia*, HallockShannon's failure to plead essential factual elements in support of its theories of liability. The compelling arguments in favor of an early dismissal of HallockShannon's claims present an additional reason that these lawsuits should not be consolidated, or at least that the HallockShannon matter should not be included with any cases that may be consolidated. As this Panel has acknowledged, consolidation should not occur unless and until it is needed. *See, e.g.*, 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 Honesdale and Peoples – 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. For Honesdale and Peoples, consolidation and transfer are simply inappropriate. With only one pending suit against Honesdale and Peoples in Western Pennsylvania, transfer will significantly increase the costs and complexity of litigation, with no concomitant efficiencies or benefits. Thus, Alliant's Motion should be denied.

I. 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. § 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 these factors, particularly as they relate to Honesdale and Peoples.

B. No Common Questions of Fact exist among the PPP Bank Defendants.

Honesdale and Peoples are unrelated to any other PPP defendants and acted independently in processing PPP loans, there are no common factual questions relating to Honesdale and Peoples that would counsel in favor of any type of 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 Honesdale and Peoples, or their 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, Honesdale and Peoples, who are defendants in just one 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, Honesdale and Peoples would undoubtedly suffer increased delay, burden and expense if forced into a MDL proceeding where larger banks would presumably attempt to address their individual issues and arguments, requiring Honesdale and Peoples to remain party to the proceedings until there is an 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, e.g.,* 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 the 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. The Dispositive Motion to be Filed by Honesdale and Peoples also demonstrates that consolidation is premature, at best.

Honesdale and Peoples – like other PPP defendants – have strong legal arguments for dismissal on lack of standing and ripeness grounds, as well as the legal insufficiency of the pleading. A fundamental defect in the Complaint in the HallockShannon matter is that the plaintiff failed to allege that Honesdale and Peoples, or any defendant sued in the HallockShannon matter, received any of the lender fees. Indeed, HallockShannon acknowledges in its Complaint that the SBA Regulations provide that "Agent fees will be paid out of the fees the lender receives from the SBA." HallockShannon Complaint, ¶ 28. (W.D. Pa. ECF No. 1). Likewise, Alliant recognizes this in its Memorandum in support of its Motion: "Under the SBA Regulations, all Agent Fees must be paid out of the Lender Fees paid to the Lenders by the Federal Government." Alliant's Memorandum at 7 (MDL 2950 ECF No. 1-1).

Importantly, HallockShannon did *not* allege that Honesdale and Peoples received their fees from the government. See HallockShannon Complaint. Neither did Alliant. See Alliant's Memorandum. Thus, HallockShannon is necessarily speculating as to what lenders will pay or not pay in agent fees, or whether any agent fees are presently due and owing, *i.e.*, whether any duty to pay any agent fees had arisen before HallockShannon filed suit. Alliant is likewise speculating. Notwithstanding that Honesdale and Peoples have not been paid their lender fees, they nevertheless paid HallockShannon all of their agent fees. Accordingly, just as HallockShannon did not have a claim against Honesdale and Peoples when it filed suit in the Western District of Pennsylvania, and it does not presently have a claim against Honesdale and Peoples, it won't have a claim against Honesdale and Peoples when they receive their lender fees from the government.

HallockShannon 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, e.g.*, 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'").

Because HallockShannon did not have a ripe claim against Honesdale and Peoples when it filed suit in the Western District of Pennsylvania, and Honesdale and Peoples paid HallockShannon the agent fees that would become due and owing once the government pays them their lender fees, the facts relating to Honesdale and Peoples are necessarily different from the claims HallockShannon is asserting against other defendants, and likewise differ from the claims asserted in the other cases subject to Alliant's Motion. Accordingly, this counsels against consolidation, or at least including the HallockShannon case in any proposed consolidation.

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, e.g.*, 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); 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 defendants, like Honesdale and Peoples, are only involved in one relevant lawsuit.

E. The unusual facts in the HallockShannon case, at least relating to Honesdale and Peoples, weigh heavily against class certification.

It is undeniable that there are likely few, if any, agents that have been paid their agent fees by the lender when the government had not yet paid the lender its fees. Agents that had been paid by the lender would not have any claim, let alone a putative class action. Accordingly, the numerosity factor would not be met. For the same reason, the commonality factor would not be met, presumably because most plaintiffs are seeking agent fees from lenders that have already been paid their lender fees by the government.. Here, at least as to Honesdale and Peoples, HallockShannon has already been paid, and therefore has no claim against Honesdale and Peoples. Whatever questions of law and fact that HallockShannon may have against the other defendants that it sued have no connection to Honesdale and Peoples.

Because HallockShannon does not have a claim against Honesdale and Peoples, the superiority element is obviously lacking, as HallockShannon certainly does not need a class action to pursue a non-existent claim against Honesdale and Peoples. Likewise, the typicality requirement cannot be met, as long as Honesdale and Peoples remain in the case, because HallockShannon has already been paid its agent fees by Honesdale and Peoples, while presumably other defendants have not paid HallockShannon any fees, whether or not those other banks had been paid their lender fees by the government. In short, whatever claim HallockShannon is attempting to assert against Honesdale and Peoples is atypical, and therefore not supportive of class action treatment of the claims that HallockShannon may be pursuing against other banks. It is also for this reason that HallockShannon cannot be an adequate representative of any class that is asserting that Honesdale and Peoples failed to pay them agency fees, as HallockShannon has been made whole by Honesdale and Peoples, even before they had a duty to do so. The ascertainability factor, in contrast, should be easy to determine, as there are likely no agents that have been paid in full for their fees by the lender that could bring a cognizable claim for such fees.

II. CONCLUSION.

For the foregoing reasons, Honat Bancorp, Honesdale National Bank, Peoples Financial Services Corp. and Peoples Security Bank & Trust Co. 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/ William B. Pentecost, Jr.
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