EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

A.D. SIMS, LLC, on behalf of a class of similarly situated businesses and individuals,

Plaintiff(s),

v.

WINTRUST FINANCIAL CORPORATION; WINTRUST BANK, N.A.; BANK OF AMERICA CO.; BANK OF AMERICA N.A.; RETAIL CAPITAL LLC DBA CREDIBLY; MODERN BANK MANAGEMENT, LLC; MODERN BANK N.A.; CRB GROUP INC.; CROSS RIVER BANK; BLUEVINE CAPITAL INC.; and DOE LENDERS 1 to 4,975, inclusive,

Defendants.

Case No. 1:20-cv-02644

Judge: Hon. Edmond E. Chang

MOTION TO DISMISS OF DEFENDANT CROSS RIVER BANK

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, defendant Cross River Bank, mistakenly sued as Cross River Bank, Inc. ("CRB"), moves to dismiss this action as to CRB. As grounds for this motion, CRB states as follows:

1. By this motion, CRB asks this Court to dismiss a facially defective claim that self-disclosed, unauthorized agents are somehow entitled to receive commissions for helping applicants to submit applications for federal Payment Protection Program ("PPP") loans for the millions of small businesses severely impacted by the COVID-19 pandemic.

2. In this action, Plaintiff, A.D. Sims, LLC ("Plaintiff") seeks to recover nearly $4 billion in agent fees on behalf of every entity that has ever assisted applicants who received PPP,

and without regard to whether the agent ever disclosed its assistance or was formally authorized, in writing, to act on any applicant's behalf. In shotgun-pleading form, Plaintiff purports to sue nearly five thousand lender defendants with absolutely no details as to (i) whether Plaintiff ever interacted with any specific lender defendant, or (ii) how those lenders could have conceivably known about Plaintiff, or harmed if such alleged agency was never disclosed and no pre-litigation demand for fees was ever made.

3. This Court should dismiss the action for lack of subject matter jurisdiction, per Fed. R. Civ. P. 12(b)(1). Plaintiff: (i) fails to allege it assisted any business that applied for and received a PPP loan *from CRB*; (ii) fails to allege that Plaintiff a*ctually or even attempted to enter into a fee agreement* with CRB; (iii) fails to allege that CRB *even knew of Plaintiff's existence* or connection to any applicant; (iv) fails to allege that Plaintiff *demanded agent fees* from CRB; and (v) fails to allege CRB itself *received lender fees* but thereafter *refused to pay such agent fees* to Plaintiff with respect to a PPP loan funded by CRB. As a result, Plaintiff lacks Article III standing for failing to show an injury that is fairly traceable to CRB, or that the suit is even ripe for adjudication here.

4. In the alternative, the Complaint fails to state a claim for relief under Fed. R. Civ. P. 12(b)(6), and should be dismissed with prejudice, for three reasons:

i. Even assuming the presence of facts not pled, agents have no private right of action to sue lenders for alleged noncompliance with the CARES Act or SBA Regulations. Thus, Plaintiff has no right to declaratory relief under Count I. Further, even if there were a private right of action, Plaintiff has not pled facts that, if true, would violate the CARES Act. As shown below, there is no requirement that lenders compensate professionals who assist applicants with PPP loans. Instead, agents must first disclose themselves, enter into compensation agreements with the applicant and lender, and thereafter will be paid only out of proceeds the lender receives from SBA (while meeting other SBA requirements). Plaintiff fails to plead such facts.

ii. Plaintiff's claim alleging violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") (Count II) fails because it relies exclusively on the "unfairness" of failing to comply with the CARES Act and SBA Regulations, and Plaintiff fails to plead facts that if true would violate those laws. Moreover, Plaintiff, a business, is not entitled to pursue an ICFA claim in that this purely business-to-business dispute lacks a consumer nexus.

iii. Plaintiff's unjust enrichment claim (Count III) fails because it cannot stand alone under Illinois law and no other claim is viable for the reasons above. Moreover, Plaintiff also fails to identify even a single applicant Plaintiff supposedly assisted and for which CRB was paid a lender fee out of which agent fees could even potentially be one day owed.

5. In further support of and grounds for this motion, CRB refers to and relies upon its Memorandum in Support, filed concurrently.

6. On June 8, 2020, before filing this motion, counsel for CRB emailed opposing counsel of record for Plaintiff to advise that CRB intended to file on June 12, 2020, a Rule 12(b)(1) and 12(b)(6) motion to dismiss, and to determine whether Plaintiff objected to the motion. Likewise, counsel for CRB notified opposing counsel that it would assume an objection in the absence of a response. As of the date of filing, counsel for Plaintiff has not advised whether it will object or agree to the motion.

WHEREFORE, defendant Cross River Bank respectfully moves to dismiss Plaintiff's Complaint: (1) for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or, (2) in the alternative, with prejudice under Fed. R. Civ. P. 12(b)(6) because there is no private right of action for the purported acts or omissions alleged, there is no right to such relief under Illinois law, and such defects cannot be cured by amendment. Further, Cross River Bank requests such other relief that the Court deems just and proper.

Dated: June 12, 2020

Respectfully submitted,

CROSS RIVER BANK

By: /s/ Richard E. Gottlieb

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CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2020, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic docket.

/s/ *Richard E. Gottlieb*
Richard E. Gottlieb

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

A.D. SIMS, LLC, on behalf of a class of similarly situated businesses and individuals, Plaintiff(s), v. WINTRUST FINANCIAL CORPORATION; WINTRUST BANK, N.A.; BANK OF AMERICA CO.; BANK OF AMERICA N.A.; RETAIL CAPITAL LLC DBA CREDIBLY; MODERN BANK MANAGEMENT, LLC; MODERN BANK N.A.; CRB GROUP INC.; CROSS RIVER BANK; BLUEVINE CAPITAL INC.; and DOE LENDERS 1 to 4,975, inclusive, Defendants.	Case No. 1:20-cv-02644 Judge: Hon. Edmond E. Chang

MEMORANDUM OF LAW IN SUPPORT OF
<u>CROSS RIVER BANK'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT</u>

INTRODUCTION AND SUMMARY OF ARGUMENT

In "shotgun pleading" fashion, A.D. Sims, LLC ("Plaintiff") seeks to recover from nearly five thousand lenders a substantial portion of the statutory fees received for processing emergency business loans under the Paycheck Protection Program, which is part of the federal COVID-19 response. These fees, Plaintiff claims, are allegedly due to a class of purported "agents" who supposedly assisted borrowers in their loan applications. However, Plaintiff fails to plead, and cannot plead, any colorable injury from any acts or omissions by *Cross River Bank*, incorrectly sued as "Cross River Bank, Inc." ("CRB"). Plaintiff instead speculates on possible future harms and fails even to tie those speculative future harms to any actionable claims against CRB itself. CRB does not have an agreement with Plaintiff for agent fees. But even if Plaintiff were an authorized agent of the borrower, unauthorized, undisclosed agents have no legal right to any portion of those lender fees. For all these reasons, and as more fully set forth below, Plaintiff's Complaint should be dismissed, with prejudice.

Plaintiff's threadbare class action complaint names CRB, but that is about as far as the allegations go in connecting Plaintiff to CRB itself. Indeed, other than the caption and Complaint's opening paragraph, CRB appears solely in ¶ 10, and merely to identify CRB as a New Jersey bank. *Every other allegation* merely groups CRB among the supposedly 4,975-plus lenders for whom Plaintiff (a one-person LLC) somehow allegedly assisted borrowers. Compl. ¶¶ 34-41. Further, it is solely "[u]pon information and belief" that Plaintiff even alleges it was not paid for the alleged agent service it supposedly provided. *Id.* ¶ 42.

Plaintiff's lawsuit is fatally defective and should be dismissed for lack of subject matter jurisdiction, per Fed. R. Civ. P. 12(b)(1). Plaintiff: (i) fails to allege it assisted any business that applied for and received a PPP loan *from CRB*; (ii) fails to allege that Plaintiff a*ctually or even* *attempted to enter into a fee agreement* with CRB (as required by Small Business Administration ("SBA") regulations, discussed below); (iii) fails to allege that CRB *even knew of Plaintiff's existence* or connection to any applicant; (iv) fails to allege that Plaintiff ever *demanded agent* fees from CRB; and (v) fails to allege CRB itself *received lender fees* or that CRB has *refused to pay such agent fees* to Plaintiff on any PPP loan funded by CRB. As a result, Plaintiff lacks Article III standing for failing to show an injury that is fairly traceable to CRB, or that the suit is even ripe for adjudication here.

In the alternative, the Complaint fails to state a claim for relief under Fed. R. Civ. P. 12(b)(6), and should be dismissed with prejudice for the following reasons:

First, even assuming the presence of facts not pled, agents have no private right of action to sue lenders for alleged noncompliance with the federal laws and regulations identified in the Complaint. Thus, Plaintiff has no right to declaratory relief under Count I. Further, even if there were a private right of action, Plaintiff has failed to plead sufficient facts that, if true, would violate those laws or regulations. Instead, as shown below, nothing in the CARES Act requires such payments to unauthorized agents, and Plaintiff fails to plead any facts that would change this result. The Complaint fails for these reasons alone.

Second, Count II, alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), fails because it relies exclusively on the "unfairness" of failing to comply with the same federal laws and regulations cited in Count I, and Plaintiff fails to plead such noncompliance. Moreover, Plaintiff, a business suing for non-payment of business-related fees, is not entitled to pursue an ICFA claim because it lacks the requisite consumer nexus. Finally, Plaintiff's Count II fails to allege any act by CRB that offends public policy because compliance with federal law and regulations cannot be violative of public policy.

Third, Plaintiff's unjust enrichment claim (Count III) fails because it cannot stand alone under Illinois law, and no other claim is viable for the reasons above. Moreover, Plaintiff also fails to identify even a single applicant Plaintiff supposedly assisted and for which CRB was paid a lender fee out of which agent fees could even potentially be one day owed.

BACKGROUND ON THE CARES ACT AND PPP

Congress Creates Paycheck Protection Program in Response to Pandemic – On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act ("the CARES Act"), Pub. L. 116-136 was signed into law. It was enacted two weeks after the World Health Organization recognized the COVID-19 pandemic, to provide "emergency assistance and health care response for individuals, families and businesses affected by the coronavirus pandemic." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 15, 2020). As part of that relief, Congress established the Paycheck Protection Program ("PPP") to provide emergency loans to small businesses. The PPP, like other small business loan programs, was codified in Section 7(a) of the Small Business Act, and the SBA not only guarantees 100 percent of loans made by SBA-approved lenders to eligible borrowers but it also reimburses lenders for the cost of making loans by paying a mandatory loan-processing fee depending on the size of the loan. *See* 15 U.S.C. § 636(a)(36)(P)(i). The statute is express: "The [SBA] *shall* reimburse a *lender* authorized to make a covered loan at a rate" set by the statute. *Id.* (emphasis added). In stark contrast, however, the CARES Act itself does ***not*** specify if, how, or by whom *agents* may be paid at all, or what amount they must be paid. Rather, it merely addresses agent fees in a *single paragraph* entitled "FEE LIMITS," which merely instructs that agents "may not collect a fee in excess of the limits established by the [SBA]." *Id.* § 636(a)(36)(P)(ii).

SBA Guidance Applies to PPP Loans Unless Abrogated by CARES Act —The CARES Act specifies that the PPP is an extension of the Small Business Act's Section 7(a) Loan Guarantee Program, and is subject to all the "same terms, conditions, and processes" as other Section 7(a) loans—including with respect to agents—unless those terms, conditions, or processes are expressly abrogated by the CARES Act. 15 U.S.C. § 636(a)(36)(B). *See also* 85 Fed. Reg. 20,812 (describing the PPP as a "new 7(a) loan program"). Here, the only relevant CARES Act change to Section 103.5 is with respect to the maximum agent fees. Under 13 C.F.R. § 103.5(b), while maximum 7(a) loan agent fees range from 1.5-3.5 percent, CARES Act agents may receive a maximum of between 0.25 and one percent of the loan amount. *See* 85 Fed. Reg. 20816 (Apr. 15, 2020).

***SBA Implements the PPP Loan Program* —** On April 2, 2020, hours before the PPP application window opened, the SBA issued the First Interim Final Rule ("IFR"). As directed by Congress, the SBA set express limits on the "total amount that an agent may collect" for "assistance in preparing an application for a PPP loan." 85 Fed. Reg. at 20,816. Total agent fees "may not exceed" (i) 1% for loans up to $350,000, (ii) 0.5% for loans of more than $350,000 and less than $2 million, and (iii) 0.25% for loans of at least $2 million. *Id.* Agent fees, to the extent they are even paid at all, will be paid out of the fees received by the lender from the SBA after funding. *Id.* None of the CARES Act provisions specify a minimum amount, or that they be paid in any particular instance.

***SBA Compensation Agreement Provisions* —** While nothing in the CARES Act or PPP regulations requires that applicants engage professionals to assist them with their PPP loan applications, the Small Business Act and relevant SBA §7(a) regulations require disclosure when they do, *before the loan is made*. Under Section 13 of the Small Business Act, 15 U.S.C. § 642, "[n]o loan shall be made … by the [SBA] under this chapter to any business enterprise unless the owners, partners, or officers of such business enterprise (1) certify to the [SBA] the names of any attorneys, agents, or other persons engaged by or on behalf of such business enterprise for the purpose of expediting applications made to the [SBA] for assistance of any sort, and the fees paid or to be paid to any such persons…" To enforce this provision on §7(a) loans, the SBA requires the agent, the applicant and lender to enter into a compensation agreement, such as the SBA Form 159. *See also* 13 C.F.R. § 103.5 (requiring each applicant and agent to "execute" a "compensation agreement" with the lender).

PLAINTIFF'S ALLEGATIONS IN THIS LAWSUIT

On April 30, 2020, less than a month after lenders began funding emergency loans, Plaintiff filed this action against ten named defendants and 4,975 unnamed lenders, seeking to recover $3,848,597,082 (*yes, nearly $4 billion*) on behalf of all purported agents "that facilitated small businesses to receive a loan under the PPP." Compl. ¶¶ 1-12, 33, 44, 45. This math assumes, of course, that *every single loan issued by every single bank* involved a purported agent, and that every single agent is entitled to the *maximum* fee allowed under the First IFR.

The Complaint contains no further factual detail with respect to CRB or (for that matter), any other specific defendant. Instead, Plaintiff merely alleges that "[i]n or about April 2020, Plaintiff assisted its clients in the gathering and analysis of their documents, as well as the calculation and preparation of their loan applications." *Id.* ¶ 36. Yet, the Complaint does not allege how many loan applications *Plaintiff* allegedly submitted, on behalf of which applicants, to which lenders, or whether any (or how many) of its clients actually received a PPP loan. Similarly, it does not allege whether Plaintiff communicated with or sought authorization from any lender, whether its actions were in fact authorized by any lender (or whether Plaintiff ever submitted a SBA Form

159 or entered a compensation agreement), whether any lender was even aware of its involvement in the loan application(s), or whether it even *sought* compensation from any lender (let alone that it did any of these things with respect to CRB, individually). Nor does Plaintiff even attribute the same wrongdoing to every defendant, and it fails to specify which supposedly wrongful conduct (if any) can be attributed *to CRB*. *See, e.g.*, Compl. ¶ 32 ("Defendants have *either* failed and refused to pay, *or* are willing to pay only a partial percentage of the monies owed to Plaintiff."); ¶ 42 ("Defendants *either* retained all of the Agent Fees, *or* informed Agents that they would be paid only fifty (50) percent of the mandated fees.") (emphasis added).

APPLICABLE LEGAL STANDARDS

***Fed. R. Civ. P. 12(b)(1)*—**Article III of the Constitution confers the power on federal courts to adjudicate certain cases and controversies. *See Groshek v. Time Warner Cable, Inc*., 865 F.3d 884, 886 (7th Cir. 2017). To establish sufficient standing, (i) Plaintiff must have suffered a concrete and particularized "injury in fact," (ii) "fairly traceable to the challenged conduct of the defendant" and (iii) capable of being redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). If it cannot, the suit must be dismissed for lack of subject matter jurisdiction. *See, e.g., Perea v. Codilis & Assocs., P.C.*, 2019 WL 4750283, at *2-4 (N.D. Ill. Sept. 30, 2019) (Chang, J.).

Fed. R. Civ. P. 12(b)(6)—A Rule 12(b)(6) motion "challenges the sufficiency of the complaint to state a claim upon which relief may be granted." *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). Consistent with the "short and plain statement" requirements of Fed. R. Civ. P. 8(a)(2), the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). Such allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. A "bare assertion" and "conclusory allegations" will not suffice. *Id.* at 556-57.

ARGUMENT

I. PLAINTIFF LACKS ARTICLE III STANDING TO BRING ANY OF ITS CLAIMS.

This Court should dismiss the Complaint for lack of subject matter jurisdiction. As shown below, Plaintiff lacks Article III standing because: (1) it has not alleged any injury-in-fact that is traceable to CRB, and (2) even if it had, Plaintiff's claims are not yet ripe for adjudication because Plaintiff fails to allege that the conditions precedent to agent fee payments have occurred, or that Plaintiff has any agreement with CRB requiring payment of such fees.

A. Plaintiff Has Not Alleged Any Injury That Is Traceable to CRB, and Fails As Putative Class Representative to Tie Claims to Each of the Defendants.

Here, Plaintiff alleges "on information and belief" that Defendants collectively received SBA approval and "funded loans for numerous businesses, yet failed to pay the required compensation to Plaintiff (the 'Agent') …" Compl. ¶ 31. *See also id.*, ¶¶ 32, 42 (same). But it fails to point to *any* individualized actions of *any* Defendant, let alone CRB. Instead, Plaintiff groups the Defendants together in the type of "shotgun" pleading courts repeatedly reject.[1] *See, e.g., Atkins v. Hasan,* 2015 WL 3862724, at *2 (N.D. Ill. June 22, 2015) ("Details about who did what are not merely nice-to-have features of an otherwise-valid complaint; to pass muster under [Fed. R. Civ.

[1] Throughout its Complaint, Plaintiff conflates and does not differentiate among the defendants—consistently lumping them together and using the generic term "Defendants" to comprise all of the named as well as the 4,975 "Doe" lenders. *See, e.g.*, Compl. ¶ 32 ("Defendants have either failed and refused to pay, or are willing to pay only a partial percentage of the monies owed to Plaintiff."); *id.* ¶ 42 ("Defendants either retained all of the Agent Fees, or informed Agents that they would be paid only fifty (50) percent of the mandated fees."). Yet, Plaintiff fails, among other things, to: (i) describe which alleged unlawful act each Defendant took (let alone acts by CRB); (ii) identify a single applicant who submitted an application to and received a loan from CRB with Plaintiff's assistance; (iii) allege Plaintiff had any agreement with CRB to pay any agent fees for any applicant, much less any communications with CRB; or (iv) assert that Plaintiff ever asked CRB to pay agent fees and that CRB refused to pay, either in whole or in part.

P. 8], a claim to relief must include such particulars."); *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990) (complaint may not "lump[] all the defendants together" and fail to specify "who was involved in what activity"). Here, Plaintiff does *not* allege that any of its purported (and unidentified) clients' loans were actually processed through or funded *by CRB*, or that *CRB* has even received any processing fees from the government that it is now withholding.

These threadbare allegations are insufficient for Article III purposes. Where the plaintiff is a "potential class representative," it "must demonstrate individual standing to pursue each claim alleged at the time the complaint is filed without looking to the purported class." *Potts v. U.S. Parcel Serv., Inc.*, 2008 WL 3884370, at *3 (N.D. Ill. May 9, 2008) (citing *Morlan v. Universal Guar. Life Ins. Co.*, 298 F.3d 609, 616 (7th Cir. 2002)). "In multidefendant class actions [like this one], the named plaintiffs must show that *each defendant* has harmed at least one of them." *Newberg on Class Actions* § 2.5 (5th ed. 2017) (emphasis added). Plaintiff has plainly failed to do so here.

As Plaintiff has failed to allege that it assisted an actual applicant whose loan was processed and funded by CRB, and (critical here, per SBA regulations) that Plaintiff likewise contracted with CRB for payment of such agent fees, Plaintiff lacks standing for lack of traceability. *See, e.g., Hope, Inc. v. DuPage Cty., Ill.,* 738 F.2d 797, 815–16 (7th Cir. 1984) (plaintiff lacked standing where, among other things, it failed to "allege specific and particular" unlawful acts by the defendant); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1144–45 (N.D. Ill. 1993) (plaintiff lacked Article III standing where the complaint contained no allegations of "specific activities that demonstrate the requisite nexus to [the] defendant['s] actions"); *see also Yau v. Deutsche Bank Nat. Tr. Co. Americas,* 2011 WL 8327957, at *2 (C.D. Cal. May 9, 2011) (plaintiff failed to demonstrate an injury fairly traceable to defendants for Article III by "[l]umping all Defendants together without describing particular actions committed by a particular defendant").

B. Plaintiff's Purported Claims Are Not Ripe Because Plaintiff Fails to Plead that CRB Received Lender Fees For Loans With Which Plaintiff Assisted, or That Plaintiff Submitted to and Executed with CRB a Written Compensation Agreement.

Even if Plaintiff had sufficiently pled both an applicant and a fee arrangement with CRB, (and it plainly does not), the Court should likewise dismiss the Complaint under Rule 12(b)(1) because any claim(s) Plaintiff might possess are not yet ripe for adjudication. *See Family Life Church v. City of Elgin,* 2007 WL 2790763, at *3 (N.D. Ill. Sept. 24, 2007) ("We treat [defendant]'s standing, ripeness, and mootness arguments as arising under [Rule] 12(b)(1).") (citations omitted). A claim is not ripe for judicial resolution if it "involves uncertain or contingent events that may not occur as anticipated, or not occur at all." *Protect Our Parks, Inc. v. Chicago Park Dist.*, 368 F. Supp. 3d 1184, 1196 (N.D. Ill. 2019) (citation omitted).

SBA regulations and the PPP IFR provide for agents to be paid only out of fees paid to lenders only after the SBA *actually disburses* lender fees (85 Fed. Reg. 20816). Plaintiff nowhere alleges that CRB has been paid lender fees on any loan with which it assisted, and that CRB then failed or refused pay them to Plaintiff. There is no allegation that CRB has even been paid any lender fees on any SBA PPP loans with respect to a PPP loan funded by CRB. Furthermore, because there is no allegation that there is even a written compensation agreement between the Plaintiff and CRB (such as by use of SBA Form 159[2] or otherwise), there is no privity of contract that would impose such liability. Plaintiff does not even allege (nor could it) that it even made a demand to CRB for payment of Agent fees. Moreover, there also remain other contingencies that would preclude payment of such fees *even if* Plaintiff could establish these other preconditions were met. *See* IFR on Disbursements, 85 Fed. Reg. 26321

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[2] SBA Form 159 is an Agent compensation disclosure form.

(Apr. 28, 2020). For example, the agent would still not be entitled to agent fees if the PPP loan were cancelled before disbursement; or the PPP loan was repaid after disbursement (including if a borrower repays the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request). *Id.* at 26323. As a result, any future non-payment by CRB, as well as Plaintiff's entitlement thereto, remains purely speculative at this juncture, and the suit fails for lack of ripeness.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF.

In the alternative, Plaintiff's claims fail under Rule 12(b)(6) and should be dismissed with prejudice for at least the reasons stated below.

A. Plaintiff is Not Entitled to Declaratory Relief (Count I) Because Plaintiff Lacks a Private Right of Action and, In Any Event, Plaintiff Pleads No Violation.

In Count I, Plaintiff seeks "a declaration in accordance with SBA Regulations that 19.14% of all administrative fees paid to all Defendants" be paid to Plaintiff and the putative class. Compl., ¶ 56. But even if Plaintiff were entitled to such extraordinary damages (and it is not, as shown below), there is no right to declaratory relief here because there is no private right of action under the CARES Act, the Small Business Act, or SBA Regulations.

First, the federal Declaratory Judgment Act, 28 U.S.C. § 2201 itself establishes no private right of action. *See Elward v. Electrolux Home Prod., Inc.,* 214 F. Supp. 3d 701, 708 (N.D. Ill. 2016). Rather, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001). And here, there is no private right of action under the CARES Act or Small Business Act. *See, e.g., Profiles, Inc. v. Bank of Am. Corp.*, 2020 WL 1849710, at *4 (D. Md. Apr. 13, 2020); *Bulluck v. Newtek Small Bus. Fin., Inc.*, 2020 WL 1490702, at *3 (11th Cir. Mar. 27, 2020) (regarding SBA); *Countryside Bank v. Naseer*, 2018 WL 2214053, at *2–3 (N.D. Ind. May 15, 2018) (same re SBA); *U.S. ex rel. First Am. Engineered*

Sols., LLC v. Olin Corp., 2008 WL 4224350, at *6 (E.D. Wis. Sept. 11, 2008) (same re SBA). Finally, even if Treasury's PPP information sheet and related SBA "guidance" cited by Plaintiff (Compl., ¶¶ 26-29, and *ad damnum*) contained language creating such a right (it does not), an agency "may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. Accordingly, Plaintiff's Complaint does not articulate any legal requirement that CRB allegedly violated. Therefore, Count I should be dismissed with prejudice.

Second, even if Plaintiff could assert a claim for declaratory relief, nothing in the applicable federal statutes or regulations mandates the payment of agent fees under the facts pled by Plaintiff here. 15 U.S.C. § 636(a)(36)(P)(ii) is the *only* provision of the CARES Act that governs the payment of agent fees, and it does nothing more than direct SBA to establish an upper limit. Count I should be dismissed for this reason alone. *See Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.") (citation omitted). Plainly, a mere *cap* on agent fees cannot impose an *affirmative duty* on lenders to pay them, when no such duty exists in the statute. *See Univ. of Texas Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 353 (2013) ("[I]t would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope."); *Reasor* v. *Walmart Stores E.*, 2019 WL 5597302, at *3 (W.D. Ky. Oct. 30, 2019) (law that "prohibits" pharmacists from filling certain prescriptions "does not create an affirmative duty to fill" other prescriptions).

With respect to *lender* fees, the CARES Act provides that "[t]he [SBA] Administrator *shall* reimburse a lender" at set rates. 15 U.S.C. § 636(a)(36)(P)(i) (emphasis added). The CARES Act and SBA regulations lack any similar provision by which Congress commands that *the lender* pay *agents* any specified fee amount. Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *U.S.*, 464 U.S. 16, 23 (1983) (citation omitted). And, respectfully, this Court's only role is to apply the statutory language as written, and it lacks authority to add provisions to the statute that do not exist. *See, e.g., Lamie*, 540 U.S. at 534; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

Plaintiff's Complaint does not contain any allegation even *purporting* to point to a federal law, regulation, or even formal or informal SBA or Treasury Department guidance stating lenders *must* pay agents any set fee amounts. *See* Compl. ¶¶ 16-42. Plaintiff incorrectly equates the "PPP Information Sheet Lenders" with "SBA Regulations." Compl. ¶¶ 26, 31, 42. But, not only does the "Sheet" not mandate the payment of fees as shown above, but also it is merely *informal administrative guidance* that does not have the force and effect of law in any event. *See Am. Fed'n of Gov't Employees v. Rumsfeld,* 262 F.3d 649, 656 (7th Cir. 2001). Any "Declaration" by this Court would be a non-sequitur because Plaintiff does not even offer a suggestion as to what it is the Court should specify as the legal requirement CRB violated. Accordingly, Count I of the Complaint fails.

B. Plaintiff's ICFA Claim Fails (Count II) Because Plaintiff Lacks the Requisite Consumer Nexus, and Otherwise Fail to Plead Any Unfair or Deceptive Acts.

Plaintiff next attempts to plead an ICFA claim, alleging all Defendants engaged in "unfair practices" by "circumventing and ignoring their obligations to comply with the Agent fee payment requirements." Compl., ¶ 60. Stated simply, Plaintiff asserts Defendants violated ICFA by failing to comply with the CARES Act and SBA regulations governing the payment of agent fees. So, if the Court concludes that Plaintiff's claims fail under Count I, it should likewise conclude that Count II fails to state a claim for the same reasons.

To the extent that Plaintiff is asserting grounds independent from the CARES Act or SBA Regulations, however, Plaintiff has not alleged any acts or practices that could plausibly be construed as "unfair" (Plaintiff does not plead deception). ICFA is designed "to protect *consumers* from unfair methods of competition and other unfair and deceptive business practices." *Batson v. Live Entm't, Inc.,* 746 F.3d 827, 830 (7th Cir. 2014) (emphasis added) (citing *Robinson v. Toyota Motor Credit Corp*., 775 N.E.2d 951, 960 (Ill. 2002)). Even though ICFA permits some businesses to sue, it does only if there is a "consumer nexus," and there is none here (nor is one even pled). Rather, this is merely a fee dispute between two businesses (agent and specified lender), and thus fails to invoke *consumer* protection concerns. *Roppo v. Travelers Companies*, 100 F. Supp. 3d 636, 650–51 (N.D. Ill. 2015), *aff'd,* 869 F.3d 568 (7th Cir. 2017) (quoting *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.,* 190 Ill. App. 3d 524, 534 (1989). *See also MidAmerican Energy Co. v. Utility Resources Corp*., No. 03 C 2313, 2003 WL 22359526, *5 (N.D. Ill. Oct. 15, 2003) ("private business dispute" between two companies fails to state claim under ICFA).

Even if Plaintiff could otherwise pursue such relief under ICFA, there is nothing "unfair" alleged about any of Defendants' conduct, and certainly none alleged as against CRB. In determining whether particular conduct is "unfair," Illinois courts consider whether the conduct: "(1) offends public policy; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers." *Batson*, 746 F.3d at 830; *Robinson*, 775 N.E.2d at 961. Here, leaving aside the express SBA provisions requiring a compensation agreement among agent, lender and applicant, there is no identifiable *Illinois* public policy that conflicts with federal law, nor could it be unfair, immoral, unethical, oppressive or unscrupulous for CRB to comply with such controlling federal law and regulations.

Illinois and federal common law are virtually identical on basic contract principles. It is axiomatic that "[t]here can be no contract without the mutual assent of the parties." *Utley* v. *Donaldson*, 94 U.S. 29, 47 (1876). *See Midland Hotel Corp. v. Reuben H. Donnelley Corp*., 515

N.E.2d 61, 65 (Ill. 1987) ("In order for there to be a contract between parties there must be a meeting of the minds or mutual assent as to the terms of the contract.") Further, in agency, an agreement to pay is inferred only when "a person promises to pay for services *which he requests or permits another to perform for him* as his agent." Restatement (Second) of Agency § 441 (emphasis added). In that (1) there is nothing in Illinois law that imposes the payment of agent fees without a prior agreement, and (2) the applicable federal standards merely place a *cap* on such fees when paid, Plaintiff cannot plead that CRB's conduct is "unfair" for ICFA purposes.[3]

The portions of Plaintiff's ICFA claim seeking injunctive relief (*see* Compl. ¶ 69) also fail. ICFA permits private plaintiffs to sue for actual damages (815 ILCS 505/10a) but only the Illinois Attorney General is allowed to obtain an injunction. *See* 815 ILCS 505/7; *see also McLaughlin v. LVNV Funding, LLC*, 971 F. Supp. 2d 796, 801–02 (N.D. Ill. 2013) ("Although [plaintiff] requests injunctive relief in Count III, such a remedy is not available to her as a private citizen.")

C. Plaintiff's Unjust Enrichment Claim Fails (Count III) Because It Is Wholly Derivative of the CARES Act and ICFA Claims.

Plaintiff's last count, for common law unjust enrichment claim, fails for all the reasons set forth above. Plaintiff's claim relies on the same CARES Act and SBA regulations that form the basis for Counts I and II, and thus fails for the same reason.

Under Illinois law, "if an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim." *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011) (applying Illinois law); *see also Martis v. Grinnell Mut.*

[3] Plaintiff does not plead deception and thus a more fulsome discussion of deception-based claims is omitted here. However, if Plaintiff attempts to assert that it pleads deception, the Complaint likewise fails for the simple reason that Plaintiff fails to plead such deception with Rule 9(b) particularity as to CRB. *See Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736–37 (7th Cir. 2014).

Reinsurance Co., 388 Ill. App. 3d 1017, 1024 (2009) (a claim of unjust enrichment "is not a separate cause of action that, standing alone, will justify an action for recovery"). Here, Plaintiff does not plead, and cannot plead, any facts supporting a plausible claim that CRB was unjustly enriched at Plaintiff's expense because such claims are based solely on Plaintiff's CARES Act and ICFA allegations, which fail for all the reasons set forth above.

CONCLUSION

Plaintiff's suit is fatally defective, and uncurable by amendment. Plaintiff lacks Article III standing to pursue the claims asserted in the Complaint because Plaintiff pleads no actionable claims traceable to CRB, and the claims are plainly unripe absent the submission of the proper compensation agreements, payment of lender fees after funding, and the failure or refusal by CRB to make payment thereunder. In the alternative, Plaintiff fails to state a claim for relief because there is no private right of action under the CARES Act and, even if there were, Plaintiff has not pled (and cannot plead) claims for declaratory relief, violation of ICFA, or for unjust enrichment because the facts, if true, allege no wrongdoing by CRB.

For these and the foregoing reasons, Cross River Bank respectfully requests that the Court dismiss Plaintiff's Complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), or, in the alternative, with prejudice under Fed. R. Civ. P. 12(b)(6), and that it grant such other and further relief as the Court deems just and proper.

Dated: June 12, 2020

Respectfully submitted,

CROSS RIVER BANK

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CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2020, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic docket.

/s/ *Richard E. Gottlieb*
Richard E. Gottlieb

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.3.3
Eastern Division

A.D. Sims, LLC

Plaintiff,

v.

Case No.: 1:20−cv−02644
Honorable Edmond E. Chang

Wintrust Financial Corporation, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, June 15, 2020:

MINUTE entry before the Honorable Edmond E. Chang: On Defendant Cross River Bank's motion to dismiss [43], Plaintiff's response is due by 07/13/2020. Cross River's reply is due by 08/03/2020. Mailed notice (mw,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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