BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE PAYCHECK PROTECTION PROGRAM (PPP) AGENT FEE LITIGATION	**MDL DOCKET NO. 2950**

SUPPLEMENTAL OPPOSITION OF THE "OHIO DEFENDANTS" TO ALLIANT CPA GROUP'S MOTION FOR TRANSFER OF ACTIONS

This supplemental opposition is respectfully submitted by defendants who only appear in one or both of two agent fee cases filed by Ohio residents in the United States District Court for the Southern District of Ohio.[1] The undersigned "Ohio Defendants"[2] oppose transfer for all the reasons expressed in the opposition memorandum filed today by Synovus Bank, which they join. The Ohio Defendants write separately to call the Panel's attention to additional reasons why transfer of the two Ohio cases would be especially inappropriate for the Ohio Defendants, each of which is headquartered either in Ohio or within 40 miles of an Ohio border. *See Lowry* Compl. ¶¶ 10-11 (Fifth Third Bancorp and Fifth Third Bank, N.A. headquartered in Cincinnati, Ohio); *id.* ¶¶ 8-9 (First Financial Bancorp and First Financial Bank headquartered in Cincinnati, Ohio); *id.* ¶¶ 6-7 (Huntington Bancshares Incorporated and The Huntington National Bank headquartered in Columbus, Ohio); *id.* ¶ 12 (North Side Bank & Trust Company headquartered in Cincinnati, Ohio); *id.* ¶¶ 4-5 (PNC Financial Services Group, Inc. and PNC Bank, N.A. headquartered in Pittsburgh, PA); *see also Bookmyer* Am. Compl. ¶ 27 (CME

[1] The Ohio cases are *Lowry* v. *U.S. Bancorp., et al.*, No. 1:20-cv-00348-MWM (S.D. Ohio *filed* April 30, 2020) and *Bookmyer* v. *PNC Bank, N.A., et al.*, No. 2:20-cv-02284-EAS-EPD (S.D. Ohio *filed* May 5, 2020). *Bookmyer* did not appear in the motion to transfer pending before the Panel, but was identified via Notice of Related Action filed by the *Bookmyer* Plaintiffs on June 9, 2020. *See* CM/ECF No. 25.

[2] The Ohio Defendants are CME Federal Credit Union, Fifth Third Bancorp, Fifth Third Bank, N.A., First Financial Bancorp., First Financial Bank, Huntington Bancshares Incorporated, The Huntington National Bank, The North Side Bank & Trust Company, PNC Financial Services Group, Inc., PNC Bank, N.A., and Telhio Credit Union. PNC Financial Services Group, Inc. appears as a defendant only in *Lowry* v. *U.S. Bancorp., et al.* On the eve of this filing, PNC Financial Services Group, Inc. learned of an additional agent fee action filed against it the Northern District of Illinois for which it has yet to receive service. *See Winner v. PNC Financial Services Group, Inc.*, No. 1:20-cv-03515 (N.D. Ill. *filed* June 16, 2020).

Federal Credit Union headquartered in Columbus, Ohio); *id.* ¶ 35 (Telhio Credit Union headquartered in Columbus, Ohio). Moreover, both complaints include Ohio common law claims that do not appear in any of the other actions proposed for transfer.

Pending motions to dismiss. The two Ohio complaints (like the other agent fee cases) rest on the flawed legal premise that the CARES Act and related regulations entitle agents to be paid, and also raise claims under Ohio state law not pleaded elsewhere. Fully dispositive motions to dismiss in both Ohio cases demonstrating that plaintiffs' claims have no basis under federal *or* state law are already on file.[3] *See* Ex. A[4] (*Bookmyer* Defs.' Joint Motion to Dismiss, June 16, 2020); Ex. B. (*Lowry* Defs.' Joint Motion to Dismiss, June 3, 2020). The motions are straightforward, the Ohio judges presiding over the two cases are fully capable of resolving them, and the Ohio Defendants expect both cases will be dismissed before any need ever arises for coordinated pretrial discovery. To sweep these cases out of Ohio, with their Ohio plaintiffs and Ohio defendants, and require a non-Ohio judge to consider the motions to dismiss, including the Ohio state-law issues embedded in both, would neither serve the "convenience of parties and witnesses" nor "promote the just and efficient conduct" of either case. 28 U.S.C. § 1407; *see In re ATM Interchange Fee Antitrust Litig.*, 350 F. Supp. 2d 1361, 1362-63 (J.P.M.L. 2004) (transfer should be denied where pending motions may moot the multidistrict proceedings); *see also In re Ecuadorian Oil Concession Litig.*, 487 F. Supp. 1364 (J.P.M.L. 1980) (denying motion to transfer where centralization "could delay the termination of [one] action without producing any overriding benefits").

[3] The motions to dismiss were joined by all undersigned Ohio Defendants except CME Federal Credit Union and Telhio Credit Union.
[4] Submitted herewith is the Declaration of Jonathan M. Moses. Exhibit citations refer to the exhibits to the Moses Declaration.

Lack of common factual questions. Even if the Ohio cases could survive the motions to dismiss, they have virtually no facts in common with the other agent fee cases proposed for transfer. Panel decisions require that common questions of fact "predominate." *E.g.*, *In re Pharmacy Ben. Plan Administrators Pricing Litig.*, 206 F. Supp. 2d 1362, 1363 (J.P.M.L. 2002). The complaints before the Panel may have a facial resemblance, but that is only because a single, coordinated group of counsel filed many cookie-cutter pleadings against more than 70 defendants across multiple different districts. That is *not* a basis for MDL consolidation. *In re Linear Gadolinium-Based Contrast Agents Products Liab. Litig.*, 341 F. Supp. 3d 1381, 1382 (J.P.M.L. 2018) (finding consolidation unwarranted given a significant overlap in plaintiffs' counsel and co-counsel across actions). But more to the point, even a cursory skim of the bare-bones complaints reveals the disparate and diverse facts that underlie each of the claims of each of the individual agents in each of the cases proposed for transfer.

The gist of all these cases is that lenders allegedly should have paid agents for assisting borrowers to submit PPP loan applications. Even if there were any legal merit to that overarching theory (and there is not), each and every claim to fees would turn on facts that are unique to each purported agent, each loan applicant that he or she allegedly helped, and each lender to which the applications were allegedly submitted. For example, while the claims in the Ohio cases rest on the premise that agents are entitled to fees when they help clients obtain PPP funding, the *Lowry* complaint does not allege that any particular applicants actually received a PPP loan from any particular lender, and the *Bookmyer* plaintiffs' shotgun pleading concedes that only some of the applications that the *Bookmyer* plaintiffs helped prepare were ultimately funded. *See Lowry* Compl. ¶ 31; *Bookmyer* Am. Compl. ¶¶ 38-39, 49-50. In both complaints, there is scant detail on the actual services performed by the alleged agents. But, even assuming the alleged agents were entitled to fees, the size of any fees would turn on a fact-intensive inquiry for each agent, the nature of the services rendered to each loan applicant, and the details of the agent's written compensation agreement. *See* 13 C.F.R. § 103.5 (requiring execution and disclosure of a written agreement to govern any compensation to be paid to an agent in connection with any loan guaranteed by the Small Business Administration).

In terms of agent communications with lenders, the *Bookmyer* plaintiffs allege they approached only some of the defendant lenders about fees, but not all, while the *Lowry* plaintiffs do not allege that they contacted any lenders about agent fees. *Bookmyer* Am. Compl. ¶¶ 11-12, 40, 44, 51, 53; *see generally Lowry* Compl. And each lender has its own specific approach to agent fees, which would need to be considered if these cases proceed. Among the Ohio Defendants, PNC, Huntington, and First Financial each posted public notices making clear they would not pay agent fees on PPP loans, while other lenders communicated their policies differently. *See Bookmyer* Am. Compl. ¶ 10; Ex. B (*Lowry* Defs.' Joint Motion to Dismiss at 4, n. 4).

Alliant CPA Group's moving papers gloss over these differences and point instead to the statute and rules that are common to the agents' claims. Movant's Mem. in Supp. of Motion for Transfer at 8, May 20, 2020, CM/ECF No. 1-1 ("The core facts at issue here are the same, including the same CARES Act, the same SBA Regulations . . . , and the same rules . . ."). But the proper interpretation of the CARES Act and SBA regulations and rules is a legal question that will be resolved by the Ohio Defendants' motions to dismiss and is dispositive of plaintiffs' claims and, as legal issues, would not be a basis for MDL treatment in any event. And, if the cases survive the motions to dismiss, the peculiar facts underlying each agent fee claim preclude any reasonable expectation that pretrial coordination on a national level will do anything to streamline the resolution of factual issues. *See In re Proton-Pump Inhibitor Prod. Liab. Litig.*, 273 F. Supp. 3d 1360 (J.P.M.L. 2017) (denying consolidation where significant defendant-specific discovery was required); *see also In re "Truckin" Cartoon Characters Copy. Litig.*, 372 F. Supp. 1400, 1401 (J.P.M.L. 1974) (denying motion to transfer where discovery would necessarily focus on individualized conduct).

Inconvenience and inefficiency. Transfer of the Ohio cases into a national MDL would not serve the "convenience of the parties and witnesses" or "promote the just and efficient conduct" of either action, as the MDL statute requires. 28 U.S.C. § 1407. The Ohio Defendants, as set forth above, are headquartered either in or just outside Ohio, and they are not named in any of the other agent fee cases currently proposed by Movant for transfer, all of which were filed in other states. The named plaintiffs in both Ohio cases are likewise based in Ohio. *Lowry* Compl. ¶ 1; *Bookmyer* Am. Compl. ¶¶ 20-23.[5] In light of the defendant-specific discovery that plaintiffs' fact-intensive claims would require if either case were to proceed to discovery, the convenience of the parties and witnesses would best be served by keeping the cases where the plaintiffs filed them, subject to possible coordination by the two Southern District of Ohio judges to whom they are assigned. *See, e.g.*, *In re CP4 Fuel Pump Mktg., Sales Practices, & Prod. Liab. Litig.*, 412 F. Supp. 3d 1365, 1366-67 (J.P.M.L. 2019) (declining to centralize where actions presented "numerous [defendant]-specific and plaintiff-specific issues" and centralization "likely would result in significant inefficiencies and delay, without producing any substantial offsetting benefits").

[5] Nor is the convenience of Plaintiffs' counsel a factor that deserves any weight when determining whether an action should be transferred or consolidated. *See In re DirectBuy, Inc., Mktg. & Sales Practices Litig.*, 682 F. Supp. 2d 1349, 1350-51 (J.P.M.L. 2010) (citing *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403 (J.P.M.L. 1977)). Section 1407 is not a tool to manipulate the judicial system for the benefit of counsel.

The Ohio Defendants note that JPMorgan Chase has favored MDL treatment of agent fee cases pending against it across multiple jurisdictions, but has not proposed transfer of claims against other lenders. *See* JPMorgan Chase's Response to Motion to Transfer, June 17, 2020, CM/ECF No. 158. That approach may promote convenience and efficiency for whatever defendant-specific discovery may be required from a defendant who has been sued in multiple jurisdictions around the country, largely in locations far from its headquarters.[6] But that logic does not apply to the Ohio Defendants, who, to date, have appeared as defendants in only one district, the Southern District of Ohio, and, in large part, are headquartered in Ohio. Indeed, certain of the Ohio Defendants maintain a physical presence exclusively within the State of Ohio. For example, all nine of North Side Bank & Trust Company's physical locations are in the Greater Cincinnati Area. Accordingly, should the Panel see fit to order the transfer of claims in the Ohio cases against defendants whom agents have sued across a broader geographic footprint, the Ohio Defendants would respectfully urge the Panel to remand the claims against the Ohio Defendants to the Southern District of Ohio where they belong.

Alternative means of coordination. Finally, the Panel's precedents are clear that MDL transfer is inappropriate where less drastic alternatives are available to promote convenience and efficiency for the parties and the courts. *In re Linear Gadolinium-Based Contrast Agents Prod. Liab. Litig.*, 341 F. Supp. 3d at 1382 (J.P.M.L. 2018) (recognizing centralization is the "last solution after considered review of all other options"). As evidenced by this joint filing and the joint motions to dismiss filed in the two Ohio cases, counsel for the Ohio Defendants have already established an efficient local coordination mechanism, and

[6] To the extent that any defendant joins Movant Alliant CPA Group in arguing that an MDL for *all* cases and claims is warranted due to a common threshold issue of law, the position is likewise incorrect. *See In re ABA Law Sch. Accreditation Litig.*, 325 F. Supp. 3d 1377, 1378 (J.P.M.L. 2018) (describing movants' effort to centralize cases to avoid having different federal courts decide the same issue as insufficient to justify transfer).

welcome any additional measures the Southern District of Ohio courts might implement to minimize the burdens on the judicial system, the parties, and any potential witnesses, including potential consolidation of the two Ohio cases. Transfer of the Ohio cases and the Ohio Defendants into a national MDL, with a huge and likely unwieldy group of over 115 lender defendants, will only make these Ohio cases more difficult for the parties and the courts.

* * *

For the foregoing reasons, as well as the reasons set forth in Synovus Bank's opposition to the transfer motion, the Ohio Defendants respectfully submit that Alliant CPA Group's motion for transfer should be denied with regard to the two agent fee cases pending in the Southern District of Ohio, which are the only two cases currently pending before the Panel in which any of the undersigned Ohio Defendants appear as defendants.

Dated: June 17, 2020

/s/ Jonathan M. Moses
Jonathan M. Moses
Jeohn Salone Favors
Brittany A. Fish
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
Telephone: (212) 403-1000
E-mail: JMMoses@wlrk.com
E-mail: JFavors@wlrk.com
E-mail: BAFish@wlrk.com

Anthony J. O'Malley
Angelyne E. Lisinski
VORYS, SATER, SEYMOUR AND PEASE LLP
200 Public Square, Suite 1400
Cleveland, OH 44144
Telephone: (216) 479-6100
Email: ajomalley@vorys.com
Email: aelisinski@vorys.com

Counsel for Defendants PNC Financial Services Group, Inc. and PNC Bank, N.A.

/s/ Elaine Golin
Elaine Golin
Kevin M. Jonke
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
Telephone: (212) 403-1000
E-mail: EPGolin@wlrk.com
E-mail: KMJonke@wlrk.com

H. Toby Schisler
DINSMORE & SHOHL LLP
255 E. Fifth Street, Suite 1900
Cincinnati, OH 45202
Telephone: (513) 977-8100
Email: toby.schisler@dinsmore.com

D. Michael Crites
DINSMORE & SHOHL LLP
191 W. Nationwide Blvd, Suite 300
Columbus, OH 43215
Telephone: (614) 628-6900
Email: michael.crites@dinsmore.com

Counsel for Defendants Huntington Bancshares Incorporated and The Huntington National Bank

/s/ Nathaniel Lampley, Jr.
Nathaniel Lampley, Jr.
Jeffrey A. Miller
Joseph M. Brunner
Wesley R. Abrams
VORYS, SATER, SEYMOUR AND PEASE LLP
301 East Fourth Street
Great American Tower, Suite 3500
Cincinnati, OH 45202
Telephone: (513) 723-4616
E-mail: nlampley@vorys.com
E-mail: jamiller@vorys.com
E-mail: jmbrunner@vorys.com
E-mail: wrabrams@vorys.com

Counsel for Defendants Fifth Third Bancorp and Fifth Third Bank, National Association

/s/ James E. Burke
James E. Burke
Drew M. Hicks
Sophia R. Holley
Amanda Stubblefield
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, OH 45202
Telephone: (513) 579-6400
E-mail: JBurke@KMKLaw.com
E-mail: DHicks@KMKLaw.com
E-mail: SHolley@KMKLaw.com
E-mail: AStubblefield@KMKLaw.com

Counsel for Defendants First Financial Bancorp and First Financial Bank

/s/ Ryan S. Lett
James C. Frooman
Ryan S. Lett
FROST BROWN TODD LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, OH 45202
Telephone: (513) 651-6800
E-mail: jfrooman@fbtlaw.com
E-mail: rlett@fbtlaw.com

Counsel for Defendant The North Side Bank & Trust Company

/s/ Steven David Forry
Steven David Forry
Kishala Srivastava
Kristina S. Dahmann
ICE MILLER LLP
250 West Street
Columbus, OH 43215-7513
Telephone: (614) 462-2254
Email: steven.forry@icemiller.com
Email: kishala.srivastava@icemiller.com
Email: kristina.dahmann@icemiller.com

Counsel for CME Federal Credit Union

/s/ David K. Stein

David K. Stein
Daniel C. Gibson
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
Telephone: (614) 227-7740
Email: dstein@bricker.com
Email: dgibson@bricker.com

Counsel for Telhio Credit Union