EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAVID S. LOWRY, CPA, LTD., an Ohio limited partnership, individually and on behalf of a class of similarly situated businesses and individuals, Plaintiffs, v. U.S. BANCORP, *et al*., Defendants.	Case No. 1:20-cv-00348-MWM Judge Matthew W. McFarland

DEFENDANTS' JOINT MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants PNC Financial Services Group, Inc., PNC Bank N.A., Huntington Bancshares Incorporated, The Huntington National Bank, Fifth Third Bancorp, Fifth Third Bank, National Association, First Financial Bancorp, First Financial Bank, and The North Side Bank & Trust Company respectfully move to dismiss Plaintiff's complaint with prejudice.[1]

A memorandum of law supporting this motion follows. For judicial efficiency, defendants have combined their joint arguments in that memorandum. Certain defendants are also filing short supplemental memoranda with arguments that may be specific to them.

[1] Plaintiff's counsel purported to serve the complaint by certified mail, but "the Federal Rules do not provide for service . . . by certified mail." *Easterling* v. *Trump*, No. 3:19-cv-112, 2019 WL 3543286, at *3 (S.D. Ohio Aug. 5, 2019). The Federal Rules "do allow service on an individual in accordance with the Ohio Rules of Civil Procedure," which "permit service on an individual by certified mail," but in that case the certified mail "must be [sent] by the Clerk of Court." *Id.*; *see* Ohio R. Civ. P. 4.1(A). By this motion, defendants waive their objections to defective service in this instance.

Dated: June 3, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of June, 2020 a true and accurate copy of the foregoing Joint Motion to Dismiss was sent to counsel of record via the Court's ECF system.

/s/ Angelyne E. Lisinski
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAVID S. LOWRY, CPA, LTD., an Ohio limited partnership, individually and on behalf of a class of similarly situated businesses and individuals, Plaintiffs, v. U.S. BANCORP, *et al.*, Defendants.	:	Case No. 1:20-cv-00348-MWM Judge Matthew W. McFarland

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF JOINT MOTION TO DISMISS

PRELIMINARY STATEMENT

This action concerns the Paycheck Protection Program ("PPP"), an emergency loan program created by the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (the "CARES Act"). The PPP provides assistance to small businesses that have been affected by the COVID-19 pandemic. To date, more than 4.4 million borrowers have received over $510 billion in emergency relief. U.S. Small Business Administration ("SBA"), *Paycheck Protection Program (PPP) Report* (May 30, 2020). The loans are processed and funded by private lenders, who receive a statutorily mandated processing fee from the government for each funded loan.

Plaintiff David S. Lowry, an Ohio-based accountant, seeks to divert nearly $4 billion in statutory PPP fees from lenders to unknown third parties. On behalf of all "agents," he demands that lenders pay *every* person who even *claims* to have helped a borrower obtain a PPP loan—regardless of whether the "agent" had any kind of agreement with that lender. Although it is not clear from the complaint, Lowry's demand appears to be based on his (incorrect) interpretation of informal administrative guidance.[1]

The barebones complaint must be dismissed for several reasons. First, Lowry does not have standing to assert any of his claims. There is no "injury in fact" because Lowry does not allege that any of his clients actually received a PPP loan. Even if they did, the complaint contains no allegations that trace Lowry's purported injury to any named defendant.

Second, under the CARES Act and related regulations, lenders have no duty to pay unauthorized agents. The statute and regulations merely impose *limits* on the fees that

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[1] This action is one of seven actions filed by the same counsel in districts around the country making similar claims on behalf of different plaintiffs against different defendant banks. Plaintiff's counsel has filed a petition pursuant to 28 U.S.C. § 1407 with the Judicial Panel on Multidistrict Litigation to consolidate the actions, including this one, in the Northern District of Georgia or, alternatively, the District of Arizona. Moreover, after this case was filed, a separate plaintiff represented by a separate firm filed another similar action in the Southern District of Ohio, Eastern Division. It is captioned *Bookmyer* v. *PNC Bank N.A. et al.*, No. 2:20-cv-00284-EAS-EPD (S.D. Ohio *filed* May 5, 2020), and is currently pending before Judge Sargus.

agents may collect *if* there is an agreement with the lender to pay them. The regulations do not, and cannot, undo the clear statutory mandate that lenders, not agents, "shall" be paid set processing fees. Nothing in the statute, the regulations, or the guidance requires lenders to pay *customers'* agents when the *lender* did not agree to pay them. On the contrary, existing SBA regulations *prohibit* any payment to agents absent a written agreement among the borrower, lender, and agent. Because Lowry does not allege any such agreement, payments to him are prohibited as a matter of law.

Third, although Lowry seeks a "declaration in accordance with SBA guidance," he cannot pursue declaratory relief because the CARES Act does not provide for a private right of action. And, finally, the complaint does not state a claim for unjust enrichment because Lowry does not allege that lenders had knowledge of his alleged role in loan applications, much less that they agreed to pay Lowry for his services.

In short, unauthorized agents have no claim to the statutory fees that lenders are paid as part of the federal pandemic response. The complaint should be dismissed in its entirety.

STATEMENT OF FACTS

A. The Coronavirus Pandemic and the CARES Act

The CARES Act was enacted on March 27, 2020, just two weeks after the World Health Organization recognized the COVID-19 pandemic. The purpose of the new law was 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. at 20,811 (Apr. 15, 2020) ("First IFR").

As part of that relief, Congress established the PPP to provide emergency loans to small businesses. The PPP, like other loan programs for small businesses, was codified in Section 7(a) of the Small Business Act. Under the PPP, the SBA guarantees 100 percent of loans made by SBA-approved lenders to eligible borrowers. The SBA also reimburses lenders for the cost of making PPP loans by paying a mandatory loan-processing fee that depends 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 contrast, the CARES Act does not specify if, how, or by whom *agents* may be paid. The statute addresses agent fees in a single paragraph, entitled "FEE LIMITS." *Id.* § 636(a)(36)(P)(ii). That provision instructs that agents "may not collect a fee in excess of the limits established by the [SBA]," to the extent they may be paid at all. *Id.* Congress did not adjust any other terms applicable to agents under the Section 7(a) loan program or direct the SBA to do so.

B. The Regulatory Background

On April 2, 2020, hours before the PPP application window opened, the SBA issued the First IFR to provide guidance on the operation of the program. As directed by Congress, the SBA set clear 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. Under the First IFR, 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.* The First IFR also provides that agent fees, to the extent they are paid at all, will be paid by the lender. *Id.* Likewise, an informal Information Sheet issued by the Department of the Treasury reiterates that PPP agent fees (such as they may be) "will be paid out of lender fees." *Paycheck Protection Program (PPP) Information Sheet Lenders*.[2]

[2] *Available at* https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf? (last accessed June 2, 2020).

Like the CARES Act, neither the First IFR nor the Information Sheet states that lenders *must* pay any person who purports to be an agent of a customer. Rather, because the PPP is an extension of the Small Business Act's Section 7(a) Loan Guarantee Program, it 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) program"). Existing SBA regulations *prohibit* any payment to agents absent a written "compensation agreement" among the borrower, lender, and agent. *See* 13 C.F.R. § 103.5(a).

C. Lowry Had No Reason to Believe He Would Be Paid Agent Fees.

Lowry does not allege that any of the defendants in this action ever agreed to pay agent fees for PPP loans, much less that they would pay for unsolicited work performed by self-declared agents. In fact, shortly after the First IFR was issued, defendants began giving conspicuous notice that they would *not* pay customers' agents in connection with PPP loans.[3] For example, in the first week of April, PNC Bank, N.A. ("PNC") stated that it "will not pay Agents for assistance they may provide an applicant in obtaining a PPP loan."[4] Other banks did so as well. For example, Bank of America, N.A. (not named here, but named in other suits brought by this same counsel) has stated that "[i]n the absence of a pre-loan approval written

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[3] Where, as here, defendants challenge a court's subject matter jurisdiction, the court may consider facts from outside the four corners of the complaint. Under Rule 12(b)(1), a jurisdictional challenge may be either "facial" or "factual." *Ohio Nat'l Life Ins. Co.* v. *United States*, 922 F.2d 320, 325 (6th Cir. 1990). "If a Rule 12(b)(1) motion makes a factual attack, a court is free to consider and weigh extrinsic evidence of its own jurisdiction, without granting the plaintiff's allegations any presumption of truthfulness." *Ryan* v. *McDonald*, 191 F. Supp. 3d 729, 735 (N.D. Ohio 2016) (citing *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 325).

[4] *Available at* https://www.pnc.com/en/customer-service/paycheck-protection-program.html (last accessed June 2, 2020). Plaintiff in the *Bookmyer* case expressly acknowledges these notices. *See Bookmyer* v. *PNC Bank, N.A.*, Case No. 2:20-cv-02284 (S.D. Ohio), Dkt. 1 ¶ 10 (alleging that PNC "announced that it will not pay agents"). The Huntington National Bank also stated that it "will not pay fees to any firm claiming to be a borrower's agent." *Available at* https://www.huntington.com/coronavirus/business-resources (last accessed June 2, 2020). *See also* First Financial Bank's "CARES Act SBA Paycheck Protection Program Frequently Asked Questions," *available at* https://www.bankatfirst.com/content/first-financial-bank/home/firstfinancialbank/sba-cares-act.html#faq (last accessed June 2, 2020).

agreement between the agent and Bank of America, Bank of America does not pay fees or other compensation to agents who represent or assist borrowers."[5]

All of this is common knowledge in Lowry's field. Just days after the First IFR was published, the Association of International Certified Public Accountants ("AICPA") warned potential agents that neither the CARES Act nor the related guidance requires lenders to pay agent fees absent a written agreement with the lender: "CPAs should note, that even though the Treasury has outlined guidelines related to agency fees, there is a possibility that you will not be paid for your services." *Small Business Loans Under the Paycheck Protection Program: Issues Related to CPA Involvement* (2020).[6] Accordingly, the AICPA recommended that potential agents "discuss this issue with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." *Id.*

D. Lowry Sues Thousands of Lenders on Behalf of All Purported Agents.

On April 30, 2020, less than a month after lenders began funding emergency loans, Lowry filed this action seeking to recover $3,848,587,082 on behalf of all purported agents "that facilitated small businesses to receive a loan under the PPP." Compl. ¶¶ 1-14, 33, 44, 45. Lowry sued 10 named defendants and 4,975 unnamed lenders. His math assumes that every single loan issued by every single bank involved an agent, and that every single agent is entitled to the maximum fee allowed under the First IFR.

This headline-inducing calculation aside, the complaint is extraordinarily short on details of any actual work done. Lowry alleges that "in or about April 2020, Plaintiffs assisted their clients in the gathering and analysis of their documents, as well as the calculation and

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[5] *Available at* https://about.bankofamerica.com/promo/assistance/faqs/small-business-paycheck-protection-program (last accessed June 2, 2020).

[6] *Available at* https://www.aicpa.org/content/dam/aicpa/interestareas/centerforplainenglishaccounting/resources/2020/special-report-sba-ppp-loans.pdf (last accessed June 2, 2020).

preparation of their Applications." *Id.* ¶ 36. However, Lowry does not say how many loan applications *he* allegedly submitted, on behalf of which applicants, to which lenders, or whether any of his clients actually received a PPP loan. Similarly, Lowry does not allege that he communicated with or sought authorization from any lender, that his actions were in fact authorized by any lender, that any lender was aware of his actions, or that he even *sought* compensation from any lender.

Instead, Lowry asserts that he "believed" that purported agents "would receive the Agent fees from the Lenders upon funding of their clients' Applications." *Id.* ¶ 41. Lowry does not cite the CARES Act or any PPP regulation in support of his belief. In fact, Lowry does not cite the statute or regulations at all. Although it is not clear from the complaint, he seems to assert that the Treasury Information Sheet "mandate[s]" payment of all claimed agent fees. *Id.* ¶ 37; *see id.* ¶ 55 ("Defendants failed to pay Agent fees . . . in direct violation of [the Information Sheet]"). On that basis, citing the vague "conduct" of unspecified defendants, Lowry seeks declaratory relief and restitution for "unjust enrichment." *Id*. at ¶¶ 53-62.

ARGUMENT

I. LEGAL STANDARD

"To survive a motion to dismiss, the complaint must present 'enough facts to state a claim to relief that is plausible on its face.'" *Total Benefits Planning Agency, Inc.* v. *Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (*quoting Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). The Court need not accept "bare assertions," "legal conclusions," or "unwarranted factual inferences." *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

Rule 8(a)(2) of the Federal Rules of Civil Procedure also "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (*quoting Twombly*, 550 U.S. at 557). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (*quoting* Fed. R. Civ. P. 8(a)(2)).

II. LOWRY LACKS STANDING TO SUE.

The complaint must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure because the Court lacks subject matter jurisdiction. A court lacks subject matter jurisdiction if the plaintiff does not have standing. *See Stalley* v. *Methodist Healthcare*, 517 F.3d 911, 916 (6th Cir. 2008) ("lack of standing" implicates "subject matter jurisdiction"). To demonstrate standing, a plaintiff must show, among other things, (i) "injury in fact" (ii) that "is fairly traceable to the challenged conduct of the defendant." *Chapman* v. *Tristar Prod., Inc.*, 940 F.3d 299, 304 (6th Cir. 2019) (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Lowry alleges neither.

An "injury, for standing purposes, means the 'invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent.'" *Daunt* v. *Benson*, 956 F.3d 396, 417 (6th Cir. 2020) (*quoting Lujan*, 504 U.S. at 560). Here, lenders purportedly harmed agents by "fail[ing] to pay Agent fees . . . in direct violation of [the Information Sheet]." Compl. ¶ 55. But even under Lowry's interpretation of the guidance, agents are not entitled to any fees until the "funding of their clients' Applications." *Id.* ¶ 41. The complaint does not establish any "actual" injury because Lowry does not allege that any of his clients *actually* received a PPP loan.

Even if Lowry had shown injury-in-fact, he does not trace any purported injury to any particular defendant. Where, as here, the plaintiff is a "potential class representative," he "must demonstrate individual standing *vis-à-vis* [a particular] defendant; he cannot acquire such standing merely by virtue of bringing a class action." *Fallick* v. *Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998); *see also Brown* v. *Nationwide Life Ins. Co.*, No. 2:17-CV-558, 2019 WL 4543538, at *3 (S.D. Ohio Sept. 19, 2019) (a "class representative" must have "a cause of action against each defendant") (citation omitted); 1 Newberg on Class Actions 2:5 (5th ed.).

Lowry, the only named plaintiff here, has not alleged injury traceable to any of the named defendants—much less the 4,975 unnamed lenders in his complaint. The threadbare complaint omits even the most basic details about Lowry's alleged harm. He does not claim to have assisted any applicant who actually submitted an application to any lender. Nor does he allege that he sought payment from any lender or that any lender refused such a request.

In any event, any purported injury was self-inflicted. "A self-inflicted injury, by definition, is not traceable to anyone but the plaintiff." *Buchholz* v. *Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020). Lowry concedes that he "understood that [agents] were not allowed to charge their clients a fee relating to the Application." Compl. ¶ 37. Numerous banks conspicuously published notice that they would not compensate agents. *See* pp. 4-5 & n.4, *supra*. And Lowry, a certified public accountant, should have been aware of the AICPA's advice that potential agents should "discuss this issue with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." *Small Business Loans Under the Paycheck Protection Program: Issues Related to CPA Involvement* (2020).

Lowry apparently did not heed these warnings. As a result, "[a]ny injury that [Lowry] conceivably suffered was . . . self-inflicted, which means that it was not 'fairly traceable to the challenged conduct of the defendant.'" *Butt* v. *FD Holdings, LLC*, 799 F. App'x 350, 353 (6th Cir. 2020) (quoting *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016)); *see also Buchholz*, 946 F.3d at 866.

III. THE COMPLAINT FAILS TO STATE A CLAIM.

A. Agents Are Not Entitled to Fees under the CARES Act or Related Guidance.

Even if Lowry had standing (he does not), the complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure because Lowry fails to state a claim. The entire complaint rests on Lowry's assertion that PPP lenders *must* pay fees to *any* purported "agents," even if those agents have no agreement with the lenders. But lenders have no such payment obligation. To hold otherwise would conflict with the unambiguous language of the CARES Act, PPP-related guidance, the broader regulatory scheme, settled common law, and the SBA's historical concerns about agent fraud.

1. The CARES Act Does Not Create an Entitlement to Agent Fees.

Although Lowry does not cite the CARES Act, its plain language bars his claims. *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).

The CARES Act imposes a limit on agent fees; nothing more. Congress directed that "[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the [SBA] Administrator." 15 U.S.C. § 636(a)(36)(P)(ii). That provision—defining what an agent "may not collect" and directing the SBA to establish "limits"—is the statute's only reference to agent fees. Plainly, a restraint on agents cannot impose an affirmative duty on lenders. *See, e.g., Reasor* v. *Walmart Stores E.*, *L.P.*, No. 3:19-CV-27-CRS, 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); *see also Sexton* v. *Panel Processing, Inc.*, 754 F.3d 332, 339 (6th Cir. 2014) ("When faced with clear language, . . . a court may not conclude that what Congress omitted from the statute is nevertheless within its scope.") (citation omitted).

If Congress meant to create a payment obligation, it would have done so expressly. Indeed, 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). There is a stark and purposeful difference in the language used in the CARES Act concerning lenders and agents: the SBA "*shall* reimburse" lender fees, but agents "may *not* collect" fees in excess of limits set by the SBA. Where "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). In short, the CARES Act does not create an entitlement to fees for any agent who claims to have assisted a PPP borrower. The complaint should be dismissed for that reason alone.[7]

2. The PPP Regulations and Guidance Do Not Create an Entitlement to Agent Fees.

Nothing in the PPP regulations or guidance requires lenders to pay agent fees that they did not authorize. The SBA's formal rules make this clear. In the First IFR, the SBA exercised its statutory authority to impose caps on the "total amount that an agent *may* collect." 85 Fed. Reg. at 20,816 (emphasis added). In addition, to ensure that those fees would not eat away at the emergency funds that Congress intended for borrowers, the SBA directed that

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[7] Moreover, as noted below, the CARES Act does not create a private right of action. *See* Section III.B, *infra*.

"[a]gent fees will be paid by the lender out of the fees the lender receives from SBA," and that "agents may not collect fees from the borrower or be paid out of the PPP loan proceeds." *Id.*

Like the language of the statute itself, that regulatory language cannot be read to *require* lenders to pay any fees. Rather, it clarifies that *if* an agent is to be compensated for assisting a borrower, such compensation must be paid by the lender (up to maximum potential amounts). Indeed, any contrary reading would run afoul of the statute, which, as noted, mandates that lenders "shall" be reimbursed in the form of stated processing fees, while agents "may not" be paid certain amounts. *Compare* 15 U.S.C. § 636(a)(36)(P)(i), *with id.* § 636(a)(36)(P)(ii). It is, of course, bedrock administrative law that regulations cannot "conflict[] with the enabling statute." *Hachem* v. *Holder*, 656 F.3d 430, 438 (6th Cir. 2011); *see also Lyng* v. *Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").

Lowry seizes on the "Information Sheet," but that document simply reiterates that "Agent fees will be paid out of lender fees" and that "[t]he lender will pay the agent." Compl. ¶¶ 26-29, 37, 55. Lowry asserts that this language somehow "mandate[s]" the payment of agent fees. *Id.* ¶ 37. But the Information Sheet merely paraphrases the statute and regulations, which do no such thing.

3. Other SBA Regulations Confirm There Is No Entitlement to Agent Fees.

Under the CARES Act, the PPP is governed by "the same terms, conditions, and processes" as other Section 7(a) programs, except where the statute directs otherwise. 15 U.S.C. § 636(a)(36)(B); *see also* 85 Fed. Reg. at 20,812 (PPP regulations supersede only "conflicting" Section 7(a) program requirements). The broader regulatory scheme imposes substantial checks on the role of "agents," including the circumstances under which an agent may be paid. The PPP-related guidance creates *additional* limits—it does not remove them and certainly does not mandate an unchecked transfer of compensation from lenders (who incurred significant expense to make the PPP loans on an expedited basis) to purported agents.

Lowry's argument directly conflicts with this governing regulatory scheme. The SBA does not require borrowers or lenders to use agents in connection with Section 7(a) loans. *See* 13 C.F.R. § 103.2(a) (borrowers and lenders may "conduct business with SBA without a representative"). But if agents are used, SBA regulations are clear that lenders, agents, and applicants must execute written agreements to govern agent compensation. *See* 13 C.F.R. § 103.5(a) ("Any Applicant, Agent, or Packager must execute and provide to SBA a compensation agreement, and any Lender Service Provider must execute and provide to SBA a Lender Service Provider agreement. Each agreement governs the compensation charged for services rendered or to be rendered to the Applicant or lender in any matter involving SBA assistance."). Nothing in the CARES Act or rules governing the PPP abrogates this requirement, and Lowry makes no claim that any written agreements were ever executed to govern the compensation he now demands. Indeed, Lowry does not allege any agreement with any lender or, for that matter, with his purported clients.

Requiring lenders to pay unidentified agents for unauthorized and unverified work would read this basic check out of existence and invite fraud and abuse. The SBA has recently identified a "pattern of fraud by loan packagers and other for-fee agents in the 7(a) Loan program, involving hundreds of millions of dollars." U.S. Small Bus. Admin., Off. of the Inspector Gen., *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2019*, at 8, 9 (Oct. 11, 2018).[8] And the reason the SBA requires a written compensation agreement is to prevent "agents" and "loan packagers"

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8 *Available at* https://www.sba.gov/sites/default/files/2019-08/SBA-OIG-Report-19-012.pdf.

from "charging inappropriate or unreasonable fees to applicants or lenders." Immediate Disaster Assistance Program, 75 Fed. Reg. 60,588, 60,594 (Oct. 1, 2010); *see also* SBA, Lender and Development Company Loan Programs, Standard Operating Procedures (SOP) 50 10 5(J), Subpart B, Ch. 3 at 163 (2018).

Given heightened legislative and regulatory interest in preventing fraud and abuse under the PPP, it would defy common sense to require lenders to pay agents who have no written agreement governing their fees. Indeed, there is nothing that would prohibit multiple purported agents from claiming fees for work purportedly performed on behalf of a single borrower.

4. The Common Law Confirms There Is No Entitlement to Agent Fees.

Mandating payment of claimed agent fees would also upend settled common law. By requiring a written agreement, the SBA makes agent compensation a question of contract. It is well-established that "[t]here can be no contract without the mutual assent of the parties." *Utley* v. *Donaldson*, 94 U.S. 29, 47 (1876); *see also* Restatement (Second) of Contracts § 17 ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). The agreement is what creates the payment obligation: "it is inferred that 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).

By contrast, "one has no duty to pay for services officiously rendered without request although resulting in benefit to him." *Id.*; *accord* Restatement (First) of Restitution § 2. "A person is not required to deal with another unless he so desires." *Id.* And, "ordinarily, a person should not be required to become an obligor unless he so desires." *Id.*

The SBA's preexisting regulations reflect these common law principles. The SBA generally recognizes three kinds of agents: (i) lender service providers, who work for and are paid by the lender; (ii) packagers, who are "employed and compensated by the Applicant"; and (iii) loan brokers, who "may be employed and compensated by either the Applicant or the SBA Lender." 13 C.F.R. § 103.1(a). In each case, the payor requests or agrees to the agent's services. The complaint does not identify any SBA regulation to the contrary.

The CARES Act does not displace these common-law rules. The Supreme Court has required that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993). Even then, courts "construe statutes in derogation of the common law strictly and narrowly." *Portalatin* v. *Blatt, Hasenmiller, Leibsker & Moore, LLC*, 900 F.3d 377, 385 (7th Cir. 2018). Lowry does not quote a word of the CARES Act, much less point to language that "speaks directly" to common-law rules. Nor could he. The statute simply directs the SBA to establish "limits" on agent fees. 15 U.S.C. § 636(a)(36)(P)(ii). And the regulations, for their part, merely provide that PPP agents will be paid, if at all, by lenders.

In short, in recognition of these common-law (and common-sense) principles, the statute and regulations leave it to the lender and the agent to agree as to whether a fee will be paid and, if so, what that fee will be (subject to the regulatory cap). Lowry's complaint ignores these governing principles both by demanding a fee absent an agreement and by insisting on the maximum fee allowed. His claims thus fail as a matter of law and must be dismissed.

B. The CARES Act Does Not Create a Private Right of Action.

Lowry seeks a "declaration in accordance with SBA guidance" that "agents" are automatically entitled to 19.14% of lenders' administrative fees. Compl. ¶ 57. As defendants have shown, there is no basis to that claim. But even if Lowry's interpretation were correct, he could not pursue declaratory relief "in accordance with SBA guidance" because the CARES Act does not create a private right of action. *Id.*; *see Michigan Corr. Org.* v. *Mich. Dep't of Corr.*, 774 F.3d 895, 902 (6th Cir. 2014) ("The point of the [Declaratory Judgment Act] is to create a remedy for a *preexisting* right enforceable in federal court.") (emphasis added).

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Lowry does not and cannot allege that the CARES Act creates an express private right of action. *See Profiles, Inc.* v. *Bank of Am. Corp.*, 2020 WL 1849710, at *4 (D. Md. Apr. 13, 2020) ("[T]he CARES Act does not expressly provide a private right of action."). And even if the "SBA guidance" 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.

Lowry therefore has the burden of demonstrating that Congress intended to create an implied private right of action. *Stew Farm, Ltd.* v. *Nat. Res. Conservation Serv.*, 767 F.3d 554, 562 (6th Cir. 2014). Plaintiff does not allege an implied right, nor could he. As the Sixth Circuit has recognized, implied rights of action are "increasingly rare creature[s]" because plaintiffs must show that Congress used "clear and unambiguous" rights-creating language "without taking the conventional route of [creating a private right of action] expressly." *Ohlendorf* v. *United Food & Commercial Workers Int'l Union, Local 876*, 883 F.3d 636, 640-41 (6th Cir. 2018). The complaint does not cite a single word from the CARES Act. For that additional reason, Lowry's declaratory judgment claim must be dismissed.[9]

C. Plaintiff Fails to Plead Unjust Enrichment.

Lowry's only remaining claim is for unjust enrichment under Ohio law. Unjust enrichment occurs when a person "has and retains money or benefits which in justice and equity

[9] In addition, the Small Business Act, as modified by the CARES Act, contains a robust criminal and civil enforcement regime. *See, e.g.*, 15 U.S.C. §§ 645, 650. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290.

belong to another." *Johnson* v. *Microsoft Corp.*, 834 N.E.2d 791, 799 (Ohio 2005). Lowry therefore cannot establish an unjust enrichment claim unless he alleges: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Id.* The complaint meets none of these requirements.

Lowry does not allege any "benefit" to any defendant. As noted, he does not identify a single application he prepared or submitted, any particular client whose loan was funded, or any processing fees paid to any defendant that may be traceable to Lowry's work. Even if he had done so, Lowry does not allege that any defendant was aware of his work or knowingly acquired any benefit from it.

There is also nothing "unjust" about defendants' retention of a potential (unpled) benefit here. That standard is exacting: plaintiffs must "show that under the circumstances they have a superior equity so that as against them it would be *unconscionable* for the defendants to retain the benefit." *Liberty Mut. Ins. Co.* v. *Three-C Body Shop, Inc.*, 2020 WL 2042916, at *2 (Ohio Ct. App. Apr. 28, 2020) (emphasis added). The complaint does not meet that high bar for several reasons.

Lowry is not entitled to fees under the CARES Act or the SBA regulations, and he knew or should have known that before performing any work. Although Lowry claims that he and other agents "assisted their clients," he does not allege that anyone promised to pay for their services. Compl. ¶ 36. In fact, Lowry concedes that "Plaintiffs understood that they were not allowed to charge their clients a fee relating to the Application." *Id.* at ¶ 37. Where, as here, plaintiffs "volunteer to do something without some kind of an agreement as to who's going to do what and who's going to pay," those plaintiffs have "made a gift of" their services. *HAD Ents.* v.

Galloway, 948 N.E.2d 473, 480 (Ohio Ct. App. 2011). "Restitution is the remedy for the unjust enrichment of one party at the expense of another," *Barrow* v. *Village of New Miami*, 104 N.E.3d 814, 818 (Ohio Ct. App. 2018), and "one who officiously confers a benefit upon another is not entitled to restitution," *Prop. Dev., Ltd.* v. *Sto-Kent Lane, Inc.*, 1995 WL 314679, at *3 (Ohio Ct. App. May 24, 1995) (citing *Wendover Rd. Prop. Owners Ass'n* v. *Kornicks*, 502 N.E.2d 226, 220 (Ohio Ct. App. 1985)); *see also* Restatement (First) of Restitution § 2.

In any event, it is not "unconscionable" for defendants to refuse to pay fees that they said they would not pay or never agreed to pay (and that are statutorily due to them). For example, in early April, PNC publicly stated in no uncertain terms that it "will not pay" PPP agent fees. Lowry allegedly chose to perform anyway. Thus, even if defendants "enjoyed a windfall," the unjust enrichment claim fails because defendants expressly "did not consent." *Wendover*, 502 N.E.2d at 230–31.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court dismiss the complaint with prejudice under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of June, 2020 a true and accurate copy of the foregoing Memorandum of Law in Support of Joint Motion to Dismiss was sent to counsel of record via the Court's ECF system.

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