BEFORE THE
UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re: Paycheck Protection Program (PPP) Agent Fees Litig.	MDL No. 2950

PLAINTIFF SPORT & WHEAT CPA PA'S
BRIEF IN SUPPORT OF CENTRALIZATION
AND IN SUPPORT OF THE WESTERN DISTRICT OF WASHINGTON

Plaintiff Sport & Wheat CPA PA, the first company in the United States to file a case of this kind, supports the movant's motion seeking to centralize this now-sprawling and growing litigation. The actions already on file constitute an overlapping tangle of class actions, and the thicket grows denser with time. While several lending institutions have conceded the merit of claims like Sport & Wheat's—agreeing to compensate the small bookkeeping firms who helped them—it is evident that others will not do so without some protracted litigation. There is no orderly way to do this without an MDL. The Panel should bring order to the situation by centralizing these actions.

I. Centralization is plainly appropriate, because the class actions at issue overlap with each other, were brought by diverse parties, involve many of the same defendants, and those defendants will continue to be named in future suits.

A. Sport & Wheat's first-filed case seeks justice on behalf of small accounting firms who helped the nation's largest banks make billions.

All of these class actions consist of similar claims. The plaintiff, typically a small accounting firm like Sport & Wheat, assisted both the defendant lenders and scores of non-party borrowers—the lenders' and the accountants' mutual clients—in the processing of loans under the brand-new Paycheck Protection Program.

As explained in Sport & Wheat's amended complaint, attached as Ex. A, the Paycheck Protection Program sprang into existence on March 27, 2020 when President Trump signed the "CARES Act" into law.[1] The PPP is formally an extension of an existing program of the Small Business Administration, but it differs greatly from the SBA's past offerings, in that it has streamlined underwriting requirements; carries a fixed-term, low-interest rate; and above all, is intended to be entirely forgivable upon a proper showing that the borrower spent its money on employee paychecks and other costs of keeping the lights on. In other words, the PPP is not really a loan program but a direct injection of federal cash into the economy—an economy crippled by the worst levels of unemployment since the 1930's and whose stock values were chopped, peak to trough, by one-third in just 29 days.[2] The PPP was part of Congress's response to this instant economic depression and one of several multi-trillion-dollar programs enacted just in the last three months. Overall, the PPP represents $649 billion of federal spending.

Because spooling up an entirely new bureaucracy capable of distributing this money—on the timeframe Congress wanted (*i.e.*, absolutely immediately)—would have been impossible, Congress invited the network of lenders already doing business with the Small Business Administration to serve as the conduit. These lenders have some SBA processing requirements to meet, but bear zero risk on their loans. Congress paid the lenders percentage amounts of the funds expended—either 1%, 3%, or 5% of the face amount of the loan—depending on the size. If the $649 billion represented a lifeline to Main Street, the 1–5% of that money that was paid out in fees to lenders represented a risk-free sunny day on Bankers' Row. Banks' workload was not

[1] Pub. L. No. 116-136.
[2] The S&P 500 fell from its all-time high close of 3,386.15 on Feb. 19 to a trough of 2,237.40 on Mar. 23.

particularly heavy in light of their guaranteed payout from the outfit with the best credit rating in the world, the U.S. Treasury.

Plaintiff Sport & Wheat, however, did bear a heavy workload, and now faces unanticipated litigation risk. Sport & Wheat is a small, two-accountant firm in Florida. Jill Sport and Tim Wheat's clients are—like their firm itself—mainly very small businesses operating in small towns. In most years Sport & Wheat does a steady business helping its clients with general accounting and tax needs. It is a small but proud part of the local business sector. When Congress passed the PPP, however, the phone began ringing off the hook. Suddenly, Sport & Wheat's hundreds of small clients reached out for help—all at once—to get its assistance in dealing with their applications to the Paycheck Protection Program.

It was late March. Sport & Wheat was in the thick of a busy tax season. To assist its clients in keeping themselves afloat, Sport & Wheat set aside that tax work and processed an enormous number of loan applications in a very short time. Sport & Wheat also directly managed communications with the defendant banks, acting quite literally as the agent for many of its borrowers.

This intensive period of work has lasted for months, with the funds only now being exhausted. Sport & Wheat's work is not done, however. To get the all-important loan forgiveness, borrowers have to complete an 11-page application certifying that they did not divert the money to other purposes. Sport & Wheat will be helping its hundreds of clients with this task too.

The PPP's statute and implementing rule[3] forbid Sport & Wheat from being paid by its client, however. Under the rule, the firm may *only* be paid by the defendants—the lenders—and only out of the fee they've been granted by Congress. It is illegal for a borrower to pay for Sport & Wheat's help—even after years of relying on the firm for their general accounting work.

While a good number of the lenders approached by Sport & Wheat have offered to pay a fair fee for the work the firm did, some of them—the defendants in this putative MDL—have refused. This is flatly illegal. It is particularly galling in light of the fact that these lenders directly benefited from Sport & Wheat's work. Every hour Sport & Wheat spent on a borrower's application is an hour that a lender was able to spend processing somebody else's loan, making more money for itself. If Congress considered the banks its "force multiplier," then the defendant banks used firms like Sport & Wheat as theirs. Overall, the PPP's goals rested in part on the performance of agents, and that's why the PPP rule[4] requires the banks to pay agents for their work.

There are thousands of accounting firms, consultants, and others in the same position as Sport & Wheat: unable to legally charge their own clients for work they did, but also unable to collect from the very banks whom they helped and who received a ten-figure gift from the Congress.

Accordingly—swallowing its reluctance to jeopardize its own relationships with the defendants in future transactions—Sport & Wheat brought its suit. The suit alleges a combination of contractual and tort claims against four defendant banks: Truist Bank, Synovus Bank, ServisFirst Bank, and TheFirst, N.A. Sport & Wheat's claims are not exotic; they just

[3] 15 U.S.C. § 636(a)(36); 85 Fed. Reg. 20811.
[4] 85 Fed. Reg. 20811, 20816 ("Agent fees will be paid by the lender out of the fees the lender receives from SBA.").

arise out of bedrock state law. Sport & Wheat asserts the existence of a nationwide class and a Florida-specific subclass. The case was filed on April 26, 2020, first in the nation, and counsel for Sport & Wheat have five more to be filed.

B. There is substantial overlap in the cases on file, making centralization the only solution, and not centralizing would leave chaos.

Since Sport & Wheat's case was filed, at least 30 more actions have followed. All these actions allege similar claims, and all of them seek nationwide or statewide class action treatment.

Since the early years of the MDL statute, the Panel has recognized that overlapping and parallel class actions are particularly well-suited for centralization. *In re: Hawaiian Hotel Room Rate Antitrust Litig.*, 438 F. Supp. 935, 936 (J.P.M.L. 1977). **Indeed, the potential for conflicting or overlapping class actions "presents one of the strongest reasons for transferring such related actions to a single district."** *In re: Plumbing Fixtures*, 308 F. Supp. 242, 243–44 (J.P.M.L. 1970). Centralization of class actions can prevent inconsistent rulings, "particularly with respect to class certification." *In re: Tyson Foods, Inc. Chicken Litig.*, 582 F. Supp. 2d 1378, 1379 (J.P.M.L. 2008).

Moreover, this Panel "considers that eliminating duplicate discovery in similar cases, avoiding conflicting judicial rulings, and conserving valuable judicial resources are sound reasons for centralizing pretrial proceedings." Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2236 (2008).

These cases indubitably overlap. Many defendants are currently named in multiple actions:

	Number of actions currently defending	Number of districts currently appearing in
Bank of America	8	7
Celtic Bank	3	3
JPMorgan Chase	9	9
Kabbage	2	2
Royal Bank of Canada	2	1
Synovus Bank	2	2
TD Bank	2	2
Truist Bank	4	4
Wells Fargo	4	4

Some kind of transfer, if for no other reason than to get these defendants in front of a single judge, is warranted. As to JPMorgan Chase, it does not make sense for that bank to be defending nine cases in front of nine separate judges. In fact, nine class action cases against a single defendant is sufficient enough to constitute an MDL all by itself. *In re Allura Fiber Cement Siding Prods. Liab. Litig.*, 366 F. Supp. 3d 1365 (J.P.M.L. 2019) (transferring nine class actions).

The problem, however, is that it is not possible to centralize JPMorgan Chase's cases in one court without transferring cases where other banks are defendants, because of the interlocking nature of these actions. The table below shows some selected actions and some of the defendants in those actions.

Plaintiff	District	Case number	Sued JPMorgan Chase?	Sued Bank of America?	Sued Wells Fargo?
American Video Dup.	C.D. Cal.	2:20-cv-3815	✓	✓	✓
Brunner Accounting	C.D. Cal.	2:20-cv-4235	✓	✓	
Fruci & Associates	W.D. Wash.	2:20-cv-864			✓
Full Compliance	S.D. Fla.	1:20-cv-22339	✓	✓	✓
ImpAcct	D. Colo.	1:20-cv-1344	✓	✓	✓
Panda Accounting	D. Ariz.	2:20-cv-985	✓		
Panda Group	D. Utah	4:20-cv-45	✓	✓	
Quinn	S.D.N.Y.	1:20-cv-4100	✓		
Sanchez	S.D. Tex.	7:20-cv-139	✓		
Smukler	N.D. Cal.	3:20-cv-3413	✓		
William Bookmyer	S.D. Ohio	2:20-cv-2284	✓	✓	

So as this table shows, even if the Panel were to put just the JPMorgan Chase cases in one forum—or even if the parties were somehow to agree to a transfer like that under 28 U.S.C. § 1404—it would necessitate moving claims against Bank of America and Wells Fargo to that new forum too. There is no way to solve each bank's multi-judge problem *without* centralization.

Thus, overlap is a basis for forming an MDL of class actions. Even in cases where class claims were carefully defined to avoid overlap, the Panel has ordered transfer. That is because "Section 1407 proceedings will have the salutary effect of ensuring consistent application of Rule 23." *In re Nissan Mot. Corp. Antitrust Litig.*, 385 F. Supp. 1253 (J.P.M.L. 1974).

In this case, there is gross overlap. From a defendant's standpoint, it makes sense to centralize all of these actions in one forum.

It also makes sense from the standpoint of class members. Most accountants worked as an agent for many banks. Assuming that these class actions are successful, bookkeeper class members would then ultimately be bound by the judgment of perhaps a dozen different courts, subjecting themselves to perhaps a dozen different schedules, claims forms, and jurisdictions. That is no way to run a railroad.

C. The Panel *has* created multi-defendant MDLs when they were warranted; this is one more such case.

Defendants have argued that multi-defendant MDLs have been historically disfavored. But this Panel has done it before, in appropriate circumstances, and there is a precedent for this. One Panel decision in particular seems particularly relevant: *In re Proton-Pump Inhibitor Prod. Liab. Litig. (No. II)*, 261 F. Supp. 3d 1351 (J.P.M.L. 2017).

In "*PPI II*", the Panel created a single MDL composed of 24 actions brought against an interlocking web of 21 corporate defendants. Those same defendants had formerly argued, in "*PPI I*," that an MDL consisting of so many separate companies would be unwieldy, and this Panel had agreed. 273 F. Supp. 3d 1360 (J.P.M.L. 2017). But only a few months later, the Panel reversed itself, after noting that many of the plaintiffs in the putative MDL had multiple claims against certain repeat defendants who showed up in multiple cases. The Panel noted: "a significant number of actions are 'mixed use' cases in which the plaintiffs allege use of more than one PPI [drug]." 261 F. Supp. 3d at 1355. And the Panel turned back a bid by Takeda, which positioned itself as a bit player in the litigation, to be "carve[d] out" of the MDL. *Id.*

The Panel did that because the nature of these PPI heartburn drugs is that many people switch from one drug to the next. Similarly, the accountants and other claimants in the cases in this MDL have had dealings with one bank after another. That is why the Panel sees so many of these overlapping case captions and why one plaintiff can reasonably name ten or more defendants on a complaint.

This case is therefore not like *In re Hotel Indus. Sex Trafficking Litig.*, MDL No. 2928, ____ F. Supp. 3d _____, 2020 WL 581882 (J.P.M.L. Feb. 5, 2020), where the Panel declined to create an MDL of sex-trafficking victims. In that putative MDL, the Panel found that ***each action*** "involves different alleged sex trafficking ventures, different hotel brands, different owners and employees, different geographic locales, different witnesses, different indicia of sex trafficking, and different time periods." *Id*. at *2. By contrast, here, each claim against a defendant lender involves the *same* key decisionmakers, same corporate policies to pay or not pay agents, same forms, same web sites, same procedures, and an absolutely identical time period and federal-law scheme. Defendants should face one judge, not nine of them, and plaintiffs should be able to get discovery against those banks in a single forum.

Just as discovery against the defendants in a single forum will be more efficient, discovery against each plaintiff would also be more efficient in a single forum. The interlocking nature of these actions counsels this Panel to follow the precedent it set in *PPI II* and create this multi-defendant MDL.

D. The usual alternatives to centralization will not work in these circumstances.

The Panel always teaches that parties should explore alternatives to centralization before the Panel will consider founding an MDL. But the circumstances here preclude other alternatives from taking root.

First of all, this is not a situation where voluntary coordination between plaintiffs' counsel would be successful or helpful. These are class actions, and a leadership battle is imminent. There is no practical way to have lawyers "share" leadership of separate nationwide class actions in different districts.

Nor are plaintiffs' counsel currently coordinated. These class action cases have been filed by a diverse set of attorneys, reflecting the intense press scrutiny this case has received and the attention that has arisen across the accounting industry and the plaintiff's bar. Since Sport & Wheat—acting alone—filed the first case in Florida, several plaintiff lawyer groups have emerged. While the "Graylaw Group" does appear in several actions, it is by no means a strong majority of the actions. The several cases filed by the McCune firm in California (*see* doc. 98-1) do not appear to have anything in common with Graylaw, and it is seeking a different district from movant. The *Leigh, King* case in Alabama, is represented by counsel distinct from all other cases. The *Bookmyer* case in Ohio also has distinct, separate counsel. And more are likely to arise. Moreover, many of these cases have named the same exact defendants.

So there are indeed competing plaintiff "groups"—groups which are directly competing to lead nationwide class actions, in different jurisdictions, against the same defendants. Sport & Wheat, for example, has sued Truist Bank, and expects to lead the litigation against that party; but Truist has also been sued by two other plaintiffs elsewhere. In short, this case is not like the *In re Family Dollar* litigation this Panel just disposed of, where the Panel noted that "[a]ll plaintiffs are represented by the same counsel, and one law firm is defending Family Dollar in all actions." MDL No. 2939, ____ F. Supp. 3d _____, 2020 WL 2849474 (J.P.M.L. Jun. 2, 2020).

This putative MDL is also not a situation where a strategic set of Section 1404 transfer motions might bring order and harmony. There is no real center of gravity for these cases. No plaintiff or plaintiff's lawyer has an incentive to let its case go to another district; no defendant would *truly* like to see its case sent anywhere other than its own hometown, and that can't happen for all of them because of the interlocking nature of these claims. There is just no Rubik's Cube-type list of grantable Section 1404 motions which would bring order to this thicket. As the Panel noted just this month, "[v]oluntary coordination across these dispersed districts, especially given the complexity of the factual questions and the number and nature of discovery disputes, appears problematic." *In re Smitty's/CAM2 303 Tractor Hydraulic Fluid Litig.*, MDL No. 2936, ____ F. Supp. 3d _____, 2020 WL 2848377, at *2 (J.P.M.L. Jun. 2, 2020).

Fortunately, MDL judges have shown the ability to deal with cases in this posture. A thoughtful trial judge ought to be able to streamline things, including: (1) coordinating discovery against the defendant banks; (2) coordinating discovery against the plaintiff accounting firms; (3) overseeing the factual discovery necessary to determine whether Rule 23's requirements have been met as to each defendant; and (4) motions practice on preliminary matters—most urgently, the meaning of the PPP statute and rule, which is a common question in each case (albeit not really a factual one). The Panel historically trusts trial judges to chart the right way, leaving to transferee judges "'the extent and manner of coordination or consolidation of actions' in an MDL." *In re Equifax, Inc. Customer Data Security Breach Litig.*, 289 F. Supp. 3d 1322, 1325 (J.P.M.L. 2017).

And many trial judges have proved able to coordinate sprawling litigation like this—against multiple defendants—within an MDL structure. *E.g.*, *In re Blue Cross/Blue Shield*

Antitrust Litig., MDL No. 2406 (N.D. Ala.). In that MDL, separate tracks have been created to coordinate discovery in class actions with national reach. Similarly, in *In re Generic Pharms. Pricing Antitrust Litig.*, MDL No. 2724 (E.D. Pa.), the judge has established a separate track and docket number for each of the generic drugs at issue; there are well over 30 tracks and scores of differently-situated class action parties, but it is an orderly process, and it can work here too.

E. Responses to other parties' positions on this motion.

Some of the defendants have argued, in opposing the motion to transfer, that any overlap or redundancy is of plaintiffs' making. These are the same defendants who would be the first to raise a defense based on improper personal jurisdiction if plaintiffs' actions were filed anywhere else. The fact is, Sport & Wheat's complaint was properly venued and has been duplicated, through no fault of its own, by other plaintiffs whom the Panel should view equally.

Many of the defendants, rather than focusing on the practicality of sending these actions to a central forum for handling, have chosen to focus instead of the merits of these claims, arguing that the claims aren't ripe, or that plaintiffs simply are misreading the CARES Act and its regulations. As the Panel well knows, "an assessment of the merits of [] actions is beyond the Panel's authority." *In re Uber Techs., Inc., Data Sec. Breach Litig.*, 304 F. Supp. 3d 1351, 1354 (J.P.M.L. 2018). But if anything, the sheer number of motions to dismiss filed, *see e.g.*, doc. 166-3 ("Regional and Small Banks'" Br., Ex. C), with several more threatened to come, illustrates the commonality of issues between these actions. It points *toward*, not away from, centralized handling.

Other defendants, including JPMorgan Chase and Wells Fargo, support centralization. This means they believe movant has shown sufficiently common factual issues so as to warrant an MDL. It raises the question why this treatment is not appropriate for the other banks too.

* * *

This Panel is one of the most practical judicial bodies in the Nation. As a matter of practicalities, centralization is the best realistic option. It will promote judicial efficiencies, conserve the parties' resources, allow for common rulings on discovery questions and class certification in a way that does not set up inter-district conflicts, and provide for a uniform application of this very new federal law.

Creation of this MDL is warranted, and its benefits would certainly outweigh the alternative of leaving these overlapping actions to shuffle along without centralization.

II. The Western District of Washington is the best available district.

As the Panel well knows, the selection of an appropriate transferee forum depends greatly on the specific facts and circumstances of the litigation being considered for consolidation and depends on the "the nuances of a particular litigation." Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 214 (1977).

The unique "nuances" presenting themselves to the Panel here are as follows:

- Nationwide, overlapping class actions.
- No clear center of gravity.
- Plaintiffs and defendants located across the country.
- Defendants who did business across the country.
- Uniformly applicable federal law in the form of the Paycheck Protection Program statute and its implementing rules.
- All actions are in their extreme infancy.

In candor, there really is no true "best" district for this litigation to be held. Some of the Panel's traditional factors, such as the location of evidence, documents, or witnesses, also do not strongly counsel in favor of a specific district. (With the advent of computerization and cloud-based discovery, this factor grows less important every year anyway.)

Sport & Wheat has reviewed the districts where actions have already been filed and would submit that the Western District of Washington is as good a district as any to host this MDL. Here is why:

- The Western District of Washington currently hosts no MDL presently, so the clerk's office should have capacity to handle these class action cases.

- The district's docket is relatively uncongested in terms of "favorable caseload statistics," a factor the Panel has frequently used. *In re Xyberbaut Corp. Sec. Litig.*, 403 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005).

  In the March 2020 statistics report,[5] the Western District of Washington came out very favorably, placing 16th-fastest in the nation on time from filing to disposition (7.1 months), and 6th-fastest from filing to civil trial (19.1 months).

  The district is also 16th-best in terms of the number of civil cases older than 3 years. This demonstrates a district with the flexibility and capacity to handle these actions.

- Geographic convenience—long Seattle's Achilles heel—no longer matters as much in a covid-19 era.

  Candidly, this is the part in the brief where parties traditionally inform the Panel of the exact number of airlines and intercity bus companies providing convenient service to specific hotels nearby the courthouse. No one can dispute Seattle's ability to serve as a sufficient business hub for the lawyers, but Seattle has suffered from its longtime refusal to be centrally located within the U.S.A., one of the factors the Panel has flirted with at times. *E.g.*, *In re Smitty's*, 2020 WL 2848377 at *2 (Missouri is "centrally located and easily accessible").

  However, this this factor no longer matters much either. With covid-19 itself forcing much of federal litigation into virtual mode, it is not unreasonable to think that a Seattle-based judge could conduct this MDL remotely when warranted, erasing Seattle's geographic disadvantage over a place like, say, Atlanta.

[5] United States District Courts — National Judicial Caseload Profile (Mar. 2020), *available at* https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2020.pdf.

Further, the judge currently handling a member case in this putative MDL, Chief Judge Ricardo Martinez, would be a good fit to this litigation. He has a solid tenure on the federal bench, holds the distinction of being the Chief Judge in his district, has been commended by local attorneys as pragmatic, has managed other complex class litigation in the past, but has never previously presided over an MDL. Thus, Chief Judge Martinez may be ripe for selection as the transferee judge. He has certainly demonstrated the character and ability to do so.

Several of the districts that might traditionally be in the running should be excluded from consideration.

Sport & Wheat's own home district, the Northern District of Florida, continues to suffer from courthouse construction problems in Pensacola, and this small district is already hosting two MDLs—MDL No. 2734 (*Abilify*) and MDL No. 2885 (*3M Earplugs*). With over 9,000 cases currently pending, the district is busy enough.

The Northern District of Georgia, which movant and certain other defendants seek, is also a poor choice. That district already hosts four MDLs, including the sprawling *Equifax* class action, and its statistical picture is not as good as the Western District of Washington's, ranking 14th worst in average pending cases per judge, vs. 51st for W.D. Wash. Another problem with movant's selection of the Northern District of Georgia—and the choice of certain defendants—is that Judge Brown, the judge currently assigned to the only case pending there, has had a relatively short tenure on the bench, having taken his seat only in 2018, and this MDL might better be assigned to a more experienced judge. Worse, the docket he inherited from his colleagues makes him ***the most backlogged district judge in the entire Nation*** in terms of motions pending more than six months.[6] Docket conditions do matter. *In re Teflon Prods. Liab. Litig.*, 416 F. Supp. 2d 1364, 1365 (J.P.M.L. 2006). That is a reason to steer these cases elsewhere.

Other districts where MDL member cases are pending, such as the Central District of California or Southern District of New York, suffer from similar levels of case congestion and are not viable selections. As to Judge Rakoff, while he is certainly an able transferee judge, the Panel assigned him a new MDL just two weeks ago, so it makes little sense to send him another one now.

This Panel could avoid all those problems by transferring the MDL actions to the Western District of Washington, which is the best forum for a case of this scope in this era.

III. Conclusion.

Plaintiff Sport & Wheat CPA PA respectfully asks that the Panel centralize these actions, and form an MDL in the Western District of Washington.

Respectfully submitted,

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[6] Jonathan Ringel, *US Judge in Atlanta Leads Nation in Motions Pending More Than Six Months*, Daily Report / Law.com (Nov. 21, 2019), *available at* https://www.law.com/dailyreportonline/2019/11/21/us-judge-in-atlanta-leads-nation-in-motions-pending-more-than-six-months/.