UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JASON CARR, VICKI LEMASTER, EDWARD FORD SERVICES LLC, CARLTON MORGAN, 365 SUN LLC, and CANDICE WORTHY, *individually and on behalf of others similarly situated*, Plaintiffs, v. KABBAGE, INC., d/b/a K SERVICING, Defendant.	CIVIL ACTION NO. 1:22-cv-01249-VMC

DEFENDANT KABBAGE, INC., D/B/A KSERVICING'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Kabbage, Inc., d/b/a KServicing ("KServicing"),[1] respectfully moves this Court to dismiss Plaintiffs' Complaint in its entirety with prejudice.

I. INTRODUCTION

Named Plaintiffs, Jason Carr, Vicki LeMaster, Edward Ford Services, LLC, Carlton Morgan, 365 Sun LLC, and Candice Worthy ("Plaintiffs") bring this purported nationwide class action against KServicing complaining that KServicing has failed to "timely and competently" process their Small Business Administration ("SBA") Paycheck Protection Program ("PPP") loan forgiveness applications. (Compl. ¶¶ 1, 14-15, 137-138.). On this basis, they have asserted a panoply of claims for declaratory and injunctive relief and damages for unjust enrichment, as well as claims under various state consumer statutes.

All of Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted, because all of the claims arise out of and seek enforcement of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 ("CARES Act") or the SBA regulations that seek to enforce the CARES Act, which do not provide a private right of action.

[1] Kabbage is a trademark of American Express used under license. Kabbage, Inc., doing business as KServicing, is not affiliated with American Express.

Furthermore, the Terms of Service Plaintiffs agreed to, mandates that all disputes relating to KServicing's services with respect to PPP loans are governed by Georgia law. Therefore, Plaintiffs' consumer protection claims arising under California, North Carolina, Michigan, and Florida statutes are inapplicable and must also be dismissed for this additional reason. Finally, all of the deceptive or unfair trade practices act claims (including those in Georgia) fail as a matter of law. As to the Georgia consumer protection act claim, it fails for three main reasons: (1) Plaintiffs failed to comply with the statutes' pre-suit notice requirement; (2) Plaintiffs lack standing to assert the claim; and (3) Plaintiffs failed to allege facts supporting the essential elements of the cause of action including reliance. (Compl. ¶¶ 255-301.) Similarly the remaining state claims fail because: (1) KServicing is not a proper defendant; (2) the statutes regulate conduct with consumers—not business owners; (3) the transactions at issue are not covered; and (4) Plaintiffs have not pled that they have suffered a cognizable injury or damages.[2] *Id.*

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[2] The California consumer protection claim fails because Plaintiffs have not demonstrated that KServicing committed an unlawful, fraudulent, or unfair business practice. *Id.* The North Carolina claim fails because: (1) Plaintiffs failed to plead facts alleging a fraudulent or deceptive practice; (2) KServicing's alleged actions do not affect commerce; and (3) Plaintiffs fail to allege facts demonstrating reliance or causation. *Id.* The Michigan claim fails because: (1) the transaction between KServicing and the Plaintiff is not "trade or commerce" as defined under Michigan law; and (2) transactions specifically authorized by federal statute—such as KServicing's PPP loan processing—are explicitly exempt from the Michigan

II. FACTS

A. Background

To alleviate the financial devastation caused by the COVID-19 pandemic, Congress passed a series of financial recovery measures, including the CARES Act, on March 25, 2020, which was signed into law on March 27, 2020. *See Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cnty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231, 1235 (N.D. Ga. 2020). As part of the CARES Act, the PPP expanded the SBA's Section 7(a) loan program by providing small businesses an opportunity to borrow money to cover payroll and other expenses. *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1247 (11th Cir. 2020).

As an approved lender and loan processor, KServicing partnered with the SBA to connect small businesses to PPP loans in record time with its proprietary technology.[3] (Compl. ¶¶ 57-58, 62-63.) For example, within three months of the pandemic arriving in the United States, KServicing assisted over 130,000 small

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Consumer Protection Act. *Id.* Finally, the Florida claim fails because: (1) it does not apply to KServicing's alleged debt collection efforts; (2) Plaintiffs fail to allege reliance or causation; and (3) Plaintiffs have not pled actual damages. *Id.*

[3] Kabbage Partners with SBA-Authorized Bank to Deliver Paycheck Protection Program Loans to Small Businesses, https://www.businesswire.com/news/home/20200407005618/en/Kabbage-Partners-with-SBA-Authorized-Bank-to-Deliver-Paycheck-Protection-Program-Loans-to-Small-Businesses, dated April 7, 2020. Last accessed May 31, 2022. (*See* Compl. fn. 20).

businesses in obtaining PPP funding at an average loan of just $29,000, well below the SBA's overall average of $113,000.[4] In all, KServicing processed approximately $7 billion in PPP loans, providing vital support ("a much-needed emergency lifeline") to hundreds of thousands of businesses. (Compl. ¶¶ 37, 70.)

B. The Loan Application and Loan Forgiveness Allegations

Plaintiffs have filed the instant action against KServicing seeking to bring claims individually and on behalf of others similarly situated, for a variety of claimed grievances relating to their PPP loan forgiveness applications. (Compl. ¶ 8.)

First, Plaintiffs allege that KServicing failed to timely process their PPP loan forgiveness applications "within 60 days" despite the SBA's guidance that "a lender must issue a decision to SBA on a loan forgiveness application not later than 60 days after receipt of a *complete* loan forgiveness application from borrower." (*Id*. ¶ 14, 91.) (emphasis added).

Second, Plaintiffs allege that KServicing wrongfully failed to participate in the SBA's Direct Borrower Forgiveness Portal ("SBA Portal"), although Plaintiffs acknowledge it was not a requirement but merely "an alternative method for

[4] How Kabbage saved its small business lending operation in the middle of the pandemic. https://www.cnbc.com/2020/06/17/kabbage-turned-to-doling-out-ppp-loans-to-save-its-lending-business.html, last accessed May 31, 2022. (*See* Compl. fn. 16).

processing borrower loan forgiveness applications for all PPP loans of $150,000 or less." (*Id.* ¶ 108.)

Third, Plaintiffs allege that KServicing's statements were deceptive because they listed loan forgiveness amounts as "$0.00," as required by the SBA for loans that were not yet forgiven. (*Id.* ¶ 172.)

Finally, Plaintiffs allege that KServicing wrongfully attempted to collect loan payments by sending them letters, despite the fact that each of these letters stated: "If you have filed an appeal for your Forgiveness decision, please notify us at pppforgiveness@kservicing.com.". (*Id.* ¶ 189.)

None of these allegations have merit and fail as a matter of law.

C. <u>The Terms of Service and Choice of Law Provision</u>

Each of KServicing's customers, including Plaintiffs, have agreed to KServicing's Terms of Service, which also includes a Georgia choice-of-law provision and states in relevant part as follows:

General & Acceptance

> BY USING AND/OR VISITING THIS WEBSITE AND/OR USING THE KABBAGE, INC. SERVICES, YOU SIGNIFY YOUR ASSENT TO BOTH THESE TERMS AND CONDITIONS (the "Terms of Use" or "Agreement"). . . If you do not agree to any of these terms, then please do not use the Website or the Services. . . . In addition to all other agreements that may be provided to you, this Terms of Use Agreement sets forth the legally binding terms for your use of the Services and they shall apply to all users of the Website. By continuing to use the Services, you agree to be bound by this Agreement. You

> are only authorized to use the Services (regardless of whether your access or use is intended) if you agree to abide by all applicable laws and to this Agreement….
>
> …

Section 14: General

> You agree that: (i) the Website shall be deemed solely based in Georgia, USA; and (ii) the Website shall be deemed a passive website that does not give rise to personal jurisdiction over Kabbage, Inc. either specific or general, in jurisdictions other than Georgia. **These Terms of Service shall be governed by the internal substantive laws of the State of Georgia, without respect to its conflict of laws principles.** Any claim or dispute between you and Kabbage, Inc. that arises in whole or in part from the Website or the Services shall be decided exclusively by a court of competent jurisdiction located in Atlanta, Georgia.
>
> …

(*See also id.* ¶ 234.) (emphasis added).[5]

D. The Lawsuit

On March 30, 2022, Plaintiffs filed their Complaint asserting the following causes of action: First, Count 1 seeks a declaratory judgment that KServicing must comply with the terms of the CARES Act SBA regulations by, among other things, "immediately ceasing to ask for documentation that is not required … and allowing borrowers to utilize the streamlined application process." (Compl. ¶¶ 243-244.) This count seeks direct enforcement of the CARES Act.

[5](*See* Compl. ¶ 234; KABBAGE, "Kabbage, Inc. Terms of Service," available at https://www.kservicing.com/legal/tos/ (last accessed May 31, 2022)).

Next, Count 2, a claim for unjust enrichment, alleges that KServicing has "frustrated Congressional intent to aid small businesses" by allegedly being "unwilling or unable to adequately service the plaintiffs" and claim KServicing should not be allowed retain the fees it received as a result. (*Id.* ¶ 252.) This count seeks damages based on KServicing's performance administering the CARES Act.

Counts 3-7 allege that KServicing has violated various state unfair and deceptive trade practice acts by failing to adhere to its obligations as a servicer of PPP loans. (*Id.* ¶ 264.) Specifically, Plaintiffs allege that KServicing has failed to process loan forgiveness applications within the mandated time period according to SBA regulations. (*Id.* ¶¶ 274; 278; 284; 297-298.) Again each of these claims seek damages based on KServicing's performance administering the CARES Act.

III. LEGAL STANDARD

A. Motion to Dismiss

A court must dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) if the facts alleged do not entitle the plaintiff to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (complaint must "state a claim to relief that is plausible on its face.") "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008).

Although "a court must view the complaint in the light most favorable to the plaintiff and accept all of the plaintiff's well-pled facts as true," *Am. United Life Ins. Co. v. Martinez*, 403 F.3d 1043, 1057 (11th Cir. 2007), "[c]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Bonilla v. United States*, 652 F.App'x 885, 889 (11th Cir. 2016) (citing *Oxford Asset Mgmt. Ltd. v. Jaharis*, 27 F.3d 1182, 1188 (11th Cir. 2002)). In short, Plaintiffs must allege facts that support each element of their causes of action in order to make out a valid claim. *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006). Here, the Complaint fails to meet the requirements of *Twombly*, *Iqbal* and its progeny.

IV. LEGAL ARGUMENT

A. Plaintiffs Cannot Maintain a Private Cause of Action Under the CARES Act, Requiring Dismissal of All Claims.

Plaintiffs' claims should be dismissed in their entirety because there is no private right of action to enforce the CARES Act. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Private rights of action to enforce federal law must be created by Congress."). Moreover, Plaintiffs cannot establish that the CARES Act imposed a duty on KServicing to support any of its claims. *See, e.g.*, *Tectonics, Inc. v. Castle Constr. Co.*, 753 F.2d 957, 960 (11th Cir. 1985) (finding no private right of action under Small Business Act (the "SBA Act"), which was amended by the CARES

Act). Where there is no private cause of action, Plaintiffs claims must be dismissed under 12(b)(6) as a matter of law. *See, e.g., Laster v. Georgia*, No. 1:20-CV-81 (LAG), 2020 U.S. Dist. LEXIS 253347, at *6 (M.D. Ga. July 1, 2020) (holding Plaintiff's HIPAA claims must be dismissed because HIPPA does not create a private right of action.); *Bennett v. Loancare*, LLC, No. CV418-297, 2019 U.S. Dist. LEXIS 141233, at *5 (S.D. Ga. Aug. 20, 2019) ("to the extent that Plaintiff is attempting to raise violations of [an FTC statute], those claims must be dismissed because there is no private right of action for [such] violations".)

In assessing whether a plaintiff can maintain a private action under a federal statute, the"central inquiry," is "whether Congress intended to create, either expressly or by implication, a private cause of action." *McDonald v. S Farm Bureau Life Ins. Co.*, 291 F.3d 718, 722 (11th Cir. 2002) (internal quotation marks omitted). "[T]he bar for showing legislative intent is high." *Love v. Delta Air Lines*, 310 F.3d 1347, 1352 (11th Cir. 2002) (internal quotation marks omitted). "Congressional intent to create a private right of action will not be presumed," rather "[t]here must be clear evidence of Congress's intent to create a cause of action." *McDonald*, 291 F.3d at 722 (quotation omitted).

Neither the CARES Act nor its predecessor, the SBA Act, create an express or implied private right of action. *See e.g. Tectonics, Inc. of Fla.*, 753 F.2d at 960 (finding the "declared purpose" of the SBA Act establishes "there was no intent to create civil rights of action in private persons"); *see also Bulluck v. Newtek Small Bus. Fin., Inc.*, 2020 WL 1490702, at *3 (11th Cir. Mar. 27, 2020) (finding a breach of a duty of care claim for not providing loan information is not viable because "no private right of action exists for a violation of the [SBA Act] or the regulations"). Thus, "the burden rests with [plaintiff] to establish that an implied private right of action exists." *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002). Plaintiffs cannot satisfy this burden because, since the enactment of the CARES Act in 2020, courts have repeatedly concluded that no private right of action exists, either express or implied.

In the face of this controlling authority Plaintiffs seek to improperly assert state law claims directly rooted in purported violations of the CARES Act. (Compl. ¶¶ 243-244.) But, the law is clear: Plaintiffs cannot circumvent the Supreme Court's holding in *Alexander* by pleading a violation of the CARES Act (and SBA regulations) as a state law claim. *See* 532 U.S. at 286–87 ("[A] state cannot manufacture a judicial right of action to enforce a federal statute where, as here, Congress has not affirmatively intended for a State to be able to do so nor clearly crafted one on its own volition.") (internal citations omitted). Despite this clear mandate prohibiting plaintiffs from cloaking federal claims as state law claims, however, Plaintiffs' claims of unjust enrichment and alleged violations of state consumer protection laws are *all* premised on duties ostensibly created by the CARES Act (or SBA regulations). (*See* Compl. ¶¶ 119-141.)

When the gravamen of a Plaintiffs' claims are rooted in an alleged violation of federal law that provides no private right of action, the Court must dismiss those claims as well regardless of how the claims are characterized or styled. *See, e.g.*, *McKibben v. I.C. Sys., Inc.*, No. 117CV01384LMMAJB, 2018 WL 1896419, at *3 (N.D. Ga. Jan. 19, 2018), report and recommendation adopted, No. 1:17-CV-1384-LMM-AJB, 2018 WL 1905067 (N.D. Ga. Feb. 20, 2018) (affirming dismissal of FCDPA claims that were found to be an "impermissible attempt to circumvent the Fair Credit Reporting Act," which carries no private right of action.). In the instant case, Counts 2-7 are ultimately rooted in violations of the CARES Act. Because the CARES Act provides no private right of action, these additional claims must be dismissed, too.

B. Plaintiffs' Claims Brought Pursuant to California, North Carolina, Michigan, and Florida Statutes Should Be Dismissed Because Georgia Law Governs.

Plaintiffs' claims brought under California, North Carolina, Michigan, and Florida law should each be dismissed because under "KServicing's Terms of Service," which the Plaintiffs allege governs the agreement between the parties, Georgia law applies. (*See* Compl. ¶ 234); KABBAGE, "Kabbage, Inc. Terms of Service," available at https://www.kservicing.com/legal/tos/) asserts that Georgia law governs.

Under Georgia's choice of law rules, "parties by contract may stipulate that the laws of [a] jurisdiction will govern the transaction." *Rayle Tech, Inc. v. DeKalb Swine Breeders, Inc*., 133 F.3d 1405, 1409 (11th Cir. 1998) (quotation marks and citation omitted). "[C]ontractual choice-of-law provisions will be enforced unless application of the chosen law would be contrary to the public policy or prejudicial to the interests of this state." *Nat'l Freight, Inc. v. Consol. Container Co., LP*, 166 F. Supp. 3d 1320, 1326 n.3 (N.D. Ga. 2015) ("The State of Georgia has significant interest in regulating the conduct of businesses operating within its borders.") (citations omitted); *see also* (Compl. ¶¶ 228-229.).

Moreover, "[a] contractual choice of law bars actions brought under another state's law." *See, e.g.*, *Kronos Prods. v. Sasib Bakery N. Am., Inc.*, 00 C 670, 2002 U.S. Dist. LEXIS 10684, at *15 (N.D. Ill. June 13, 2002); *Martin v. Creative Mgmt. Grp., Inc.*, No. 10-cv-23159, 2013 WL 12061809, at *9 (S.D. Fla. July 26, 2013) ("Where the parties agreed to a choice-of-law provision in their contract, claims brought under the statutes of other states are generally inapplicable."). Therefore, Georgia law governs not just the parties' contractual claims, but all claims raised by

Plaintiffs. *See Nat'l Freight, Inc.*, 166 F. Supp. 3d at 1326 n.3; *see also Baxter v. Fairfield Fin. Servs.*, 307 Ga. App. 286, 292 (2010) (finding that Georgia law applied to Plaintiffs' non-contractual claims because the alleged misconduct occurred in Georgia).

First, Plaintiffs allege the Terms of Service are applicable to the parties' dispute. (*See* Compl. ¶ 234.) Second, Georgia law expressly applies to the Terms of Service. (*Id.*) Moreover, Georgia courts also apply the rule of *lex loci delictis*—which directs that the substantive law of the place where the alleged wrong occurred should govern the dispute. *Kapordelis v. Gainesville Surgery Ctr.*, L.P., No. 2:10-CV-69-RWS, 2011 U.S. Dist. LEXIS 93164, at *8 (N.D. Ga. Aug. 19, 2011). Because Georgia law governs, Plaintiffs cannot maintain causes of actions brought under California, North Carolina, Michigan, and Florida law. Accordingly, dismissal of all claims brought under any other state's statutory law is required.

C. <u>Plaintiffs' State Law Claims Fail Procedurally and Substantively and Should Be Dismissed.</u>

Notwithstanding the fact that Plaintiffs are precluded from pursuing state law claims under the CARES Act, for the additional reasons that follow, Plaintiffs have independently failed to plead cognizable claims against KServicing on each of its state law claims.

1. Plaintiffs Have Not Pled a Violation of Georgia's Fair Business Practices Act Claim.

The Georgia Fair Business Practices Act ("GFBPA") provides in relevant part: Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful. O.C.G.A. §10-1-393(a).

Plaintiffs' claims brought under the GFBPA should be dismissed on both procedural and substantive grounds. First, Plaintiffs have failed to provide statutorily-required pre-suit notice. Second, Plaintiffs lack standing to bring a GFBPA claim because they are not "consumers" as defined by the statute. Third, KServicing's alleged conduct is regulated by federal law, making the GFBPA inapplicable. Finally, Plaintiffs have failed to plead facts supporting the basic elements of a GFBPA claim—violation, causation, and injury—providing additional, and independent grounds for dismissal.

a. Plaintiffs Have Failed to Comply With the Statutory Pre-suit Notice Requirement

Plaintiffs must provide notice of a GFBPA claim "[a]t least 30 days prior to the filing of any such action." Ga. Code Ann. § 10-1-399(b). Absent proper pre-suit notice, dismissal is required. *See, e.g.*, *Alvear v. Sandy Springs Toyota, Inc.*, 775 S.E.2d 172, 177 (Ga. Ct. App. 2015) ("Construing the first version of a complaint as 'written demand for relief' filed 'prior to the filing of any such action' would render [the notice requirement] meaningless[.]"). Like the Plaintiff in *Alvear*, here Plaintiffs have failed to even allege that they sent the required notice prior to filing their Complaint. Therefore, Plaintiffs have not alleged compliance with GFBPA's notice requirement.

b. <u>Plaintiffs Lack Standing to Assert a GFBPA Claim</u>

Plaintiffs also lack standing to bring their GFBPA claim. A GFBPA claim "must be brought in the plaintiff's capacity as an individual member of the consuming public." *Friedlander v. PDK Labs, Inc.*, 266 Ga. 180, 181 (1996) (internal quotation marks omitted). Such a claim may "not" be brought "in a representative capacity." *Id.* (quoting Ga. Code Ann. § 10-1-399(a)). In other words, a GFBPA claim cannot be brought by a business or on behalf of a business. *See e.g. State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 8, 244 S.E.2d 15, 16 (1978) (holding GFBPA did not apply because the private sale of the cars was limited to non-consumers). Because Plaintiffs are small business owners, and applied for PPP loans to benefit their businesses, Plaintiffs are not "consumers" within the meaning of the statute. (*See, e.g.*, Compl. ⁋ 210); *State ex rel. Ryles*, 145 Ga. App. at 8. The GFBPA also does not apply to KServicing's alleged conduct. *See also*, *Johnson v. JPMorgan Chase Bank, N.A.*, 488 F. Supp. 3d 144, 162 (S.D.N.Y.

2020) (Dismissing plaintiff's business law claims, in part, because the PPP loans were "business-to business transactions" and the statements about PPP loans were not consumer orientated"); *Lopez v. Bank of Am., N.A.*, 505 F. Supp. 3d 961, 977 (N.D. Cal. 2020) (holding failure to pay PPP agent fees did not violate the UCL because doing so was not unfair as it did not constitute a consumer injury).

c. **The GFBPA Does Not Apply to KServicing's Alleged Conduct**

Further, even assuming, *arguendo*, that Plaintiffscan be considered as consumers, the GFBPA does not apply to the conduct alleged because the PPP is a federal lending program subject to an existing enforcement scheme. In other words, the GFBPA does not apply to "[a]ctions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of . . . the United States," Ga. Code Ann. § 10-1-396, including "loan lending and servicing." *Sheppard v. Bank of Am., N.A.*, 542 F. App'x 789, 793 (11th Cir. 2013). Because Plaintiffs' GFBPA claim is premised on alleged violations of federal law, the action is expressly precluded. *See Stewart v. SunTrust Mortg., Inc.*, 770 S.E.2d 892, 898 (Ga. Ct. App. 2015).

Additionally, like the California UCL, "unfair or deceptive acts or practices" under GFBPA are expressly limited to activities "in the conduct of *consumer transactions and consumer acts or practices in* trade or commerce"—*i.e.*, conduct that is not at issue here. Code Ann. § 106-1203 (a); *see Meredith Chevrolet, Inc.* 145 Ga. App. at 12 (finding business activities are not "consumer transactions" within the meaning of the statute). KServicing's processing of PPP loans or forgiveness applications, are not a "consumer transaction" within the meaning of the statute because it is neither a sale, lease nor rental, nor was it primarily for "personal, family, or household purposes." Because KServicing's alleged conduct is not governed by the GFBPA, this claim must be dismissed.

d. <u>Plaintiffs Have Failed to Establish the Elements of a GFBPA Claim</u>

Dismissal is also warranted because Plaintiffs have failed to plead facts supporting an essential element of their claim—reliance. *Zeeman v. Black*, 156 Ga. App. 82, 87, 273 S.E.2d 910, 916 (1980) (finding that when alleging a GFBPA violation as a result of a misrepresentation the plaintiff must show injury resulting from reliance on the alleged misrepresentation). Not only have Plaintiffs failed to plead facts supporting a misrepresentation, but nowhere in the Complaint do Plaintiffs allege they were damaged as a result of relying on statements made by KServicing.

2. <u>Plaintiffs Have Not Pled a Violation of California's Unfair Competition Law ("UCL").</u>

Plaintiffs have not pled a cognizable claim under California's UCL. Plaintiffs allege that KServicing violated Cal. Bus. & Prof. Code §§ 17200 which prohibits "unfair competition." The statute provides in relevant part: "unfair competition" is "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code §§ 17200; *et seq.*; *Odinma v. Aurora Loan Servs.*, No. C-09-4674 EDL, 2010 U.S. Dist. LEXIS 54190, at *22-23 (N.D. Cal. June 3, 2010). Plaintiffs' claims under California's UCL fail because the Complaint does not set forth facts establishing unfair competition, as Plaintiffs have failed to allege facts demonstrating that KServicing has committed an unlawful, fraudulent, or unfair business practice.

First, Plaintiffs broadly allege that KServicing committed a fraudulent business practice by making purportedly fraudulent representations on KServicing's website regarding its ability to carry out its obligations as a PPP loan servicer. (Compl. ¶¶ 263-265.) But such allegations are not sufficient to meet the heightened pleading standard required for fraud claims. *See, e.g.*, *Carley Capital Group v. Deloitte & Touche, LLP,* 27 F. Supp. 2d 1324, 1335 (N.D. Ga. 1998) ("Complaints alleging fraud must meet the heightened-pleading standards of Rule 9(b), which requires that "in all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).") "The plaintiff must allege the names of the persons who made the fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Brooks v. Blue Cross and Blue Shield of Florida*, 116 F.3d 1364, 1371 (11th Cir. 1997). Instead, Plaintiffs merely summarily allege that "Defendant's conduct, described herein, violated the 'fraudulent' prong of the UCL." (Compl. ¶ 262.) Thus, the Complaint is wholly devoid of the specificity required, mandating dismissal of this claim. (*See id.* ¶ 264.); *see also Kenery v. Well Fargo, Nat'l Ass'n*, No. 5:13-cv-02411-BLF, 2014 U.S. Dist. LEXIS 117550, at *22 (N.D. Cal. Aug. 22, 2014) ("allegations of fraud under §17200 must satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b).")

Second, Plaintiffs proclaim that KServicing's "conduct with respect to servicing the PPP loans it disbursed," including its conduct "throughout the loan forgiveness application process" was "unfair." (Compl. ¶260.) However, Plaintiffs have not alleged facts that would show that KServicing's conduct was "unfair." "Unfair" under the UCL means a practice where harm to the victim outweighs its benefits. *Shroyer v. New Cingular Wireless Services, Inc.*, C.A.9 (Cal.) 2010, 622 F.3d 1035. The processing of loan applications and provision of loan money at the outset of the pandemic was to stave off the existential threats facing these borrowers. (*See* Compl. ¶ 37.) Because the demand for PPP loans were so high "traditional banks quickly became overwhelmed". (*Id.* at ¶ 61.) To handle the increased demand for PPP loans many banks often prioritized existing customers with whom they had preexisting financing relationships. *Id.* Absent the work of KServicing and other similarly-situated loan servicers, businesses without prior existing relationships were likely facing financial ruin and the shuttering of their businesses. *See id*. In light of the dire need of cash infusions at the height of the COVID-19 pandemic, and KServicing's assistance to borrowers during this period, Plaintiffs cannot meet this provision. Plaintiffs have simply failed to plead any facts establishing that any alleged harm outweighs the benefits, as required.

Third, Plaintiffs allege that KServicing violated the "unlawful" prong of the UCL by violating California's Rosenthal Act, Cal. Civ. Code §§ 1788, et seq., and the Federal Fair Debt Collections Practice Act (the "FDCPA"), 15 U.S.C. §§ 1692, *et seq*. Neither of these statutes are applicable to KServicing, however, because: (1) KServicing is not a debt collector as defined by the FDCPA;[6] and (2) the transactions between the parties are not contemplated by California's Rosenthal Act.[7]

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[6] A debt collector is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.S. § 1692a.

[7] The Rosenthal Act is specifically limited to addressing "consumer debt," which is defined as "money . . . due or owing from a natural person by reason of a consumer

Accordingly, Plaintiffs also cannot establish that KServicing's conduct was "unlawful" under the UCL. *See* e.g. *Berryman v. Merit Property Management, Inc*. (2007) 152 Cal.App.4th 1544, 1554, 62 Cal. Rptr. 3d 177 (To make an unlawful claim under §17200 of the Unfair Competition Law, a party must allege a "violation of another law … [to] stat[e] a cause of action under the UCL's unlawful prong.").

3. <u>Plaintiffs Have Not Pled Facts Establishing a Violation of North Carolina's Unfair and Deceptive Practices Act.</u>

Plaintiffs have not pled a legally cognizable claim under North Carolina's Unfair and Deceptive Trade Practices Act, N.C.G.S. §§ 75-54 ("UDTPA"). UDTPA states in relevant part: No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. N.C.G.S. §§ 75-54.

Under the UDTPA, Plaintiffs must show "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991).

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credit transaction." Cal. Civ. Code § 1788.2(f). The term "consumer credit transaction" relates to "a transaction between a natural person and another person in which property, services, or money is acquired on credit by that natural person from the other person primarily for personal, family, or household purposes." Cal. Civ. Code § 1788.2(e) (emphasis added).

Plaintiffs' claims brought under North Carolina law should be dismissed for at least three independent reasons: (1) KServicing's alleged return of loan forgiveness forms with the amount populated as "$0.00" is neither fraudulent nor deceptive under North Carolina law; (2) KServicing's processing of PPP loan applications is not an act affecting commerce; and (3) Plaintiffs have failed to plead any facts establishing reliance on the alleged misrepresentations or an injury in fact.

First, KServicing's conduct in sending loan forgiveness forms with an amount pre-populated as "$0.00" does not constitute a fraudulent or deceptive business practice. In North Carolina, whether a trade practice is unfair or deceptive depends upon the facts of each case. *In re Kittrell*, 115 B.R. 873, 877 (Bankr. M.D.N.C. 1990); *see also Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) ("A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.").

Here, Plaintiffs allege, "[a]fter denying Carr's application, KServicing then fraudulently sent Carr a forgiveness application with the forgiveness amount pre-populated as '$0.00,' meaning that if Carr signed that document he would not be requesting forgiveness of any amount of his PPP loan." (Compl. ¶ 284.)

Contrary to Plaintiffs' assertions, however, sending a pre-populated form in this manner was not deceptive. Carr had in fact been denied forgiveness and therefore could only request "$0.00" for forgiveness. (Compl. ¶ 156.) Moreover, KServicing's use of a pre-populated form is not "an inequitable assertion of its power" because the SBA guidelines instructed lenders to enter the amount of "$0.00" in this required field.[8] Indeed, new guidance by the SBA makes it clear that having borrowers apply for a forgiveness amount less than their total loan amount is not a deceptive practice. *See* (Exhibit 1 "SBA Procedural Notice 5000-827666"). Thus, by acting in compliance with SBA's procedures regarding the amount to be entered on the form, KServicing cannot be found to have engaged in deceptive conduct. It is illogical to conclude that compliance with SBA guidance could constitute a statutorily "deceptive practice," as Plaintiffs allege.

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[8] Instructions to lenders state: "Forgiveness Amount. This field must be 0 if the lender decision is Denied. API validation also expects other amount related fields used in determining forgive amount, as per 3508/3508EZ, to be 0." SBA Forgiveness Portal APIs, available at https://ussbaforgiveness.github.io/API-Dictionary.html#2-create-forgiveness-request (last accessed May 23, 2022); *see Henderson v. Sun Pharmaceuticals Industries, Ltd.*, 809 F. Supp. 2d 1373, 1377-78 (N.D. Ga. 2011) (finding when considering a 12(b)(6) motion to dismiss, a court may take judicial notice of records, without converting the motion to one for summary judgment) (internal citations omitted)); *FAS Capital, LLC v. Carr*, 7 F. Supp. 3d 1259, 1266-67 (N.D. Ga. Mar. 20, 2014) (courts may take judicial notice of documents on official government websites).

Second, KServicing's issuance of PPP loans to Plaintiffs is not an act affecting commerce, as defined by the statute. Under North Carolina's UDTPA, "the term 'commerce' mean[s] 'business activities.' 'Business activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *LStar Dev. Grp., Inc. v. Vining*, No. 5:20-CV-184-FL, 2021 U.S. Dist. LEXIS 181972, at *31 (E.D.N.C. Sep. 23, 2021). Here, KServicing provided a loan to Plaintiff Carr so that his business could continue to operate. The purpose of the PPP loan was to provide additional capital for business expenses. The PPP loans are thus akin to mechanisms associated with financing a business entity, rather than a purchase and sale, or other business activity under the statute. Accordingly, the services provided by KServicing are not regulated under the North Carolina UDTPA.

Third, Plaintiffs have failed to plead facts showing causation or reliance from any purported misrepresentation. Recovery under the UDTPA is "limited to those situations when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation and he or she 'suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation.'" *Burns v. First Bank* (*In re Se. Materials, Inc.*), 452 B.R. 170, 177-78 (Bankr. M.D.N.C. 2011) (internal citations omitted); *see also Miller v. Ensley*, 88 N.C. App. 686, 691, 365 S.E.2d 11, 14 (1988) ("every false statement does not constitute a 'deceptive' act under Chapter 75. To be actionable under Chapter 75, an act of deception must have some adverse impact on the individual or entity deceived."); *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison*, 869 S.E.2d 34 (N.C. Ct. App. 2022) ("The second doctrine—the reliance doctrine—holds that in order to satisfy proximate cause, a plaintiff must demonstrate that they detrimentally relied on the defendant's alleged misrepresentation or deception in order to recover under the statute.").

Plaintiffs have pled no facts alleging that Carr relied on the loan forgiveness application allegedly sent by KServicing. (*See* Compl. ¶ 284, *see generally* Compl.) Similarly, Carr also has not alleged injury from KServicing's alleged inclusion of the "$0.00" amount on the application. Carr not only acknowledges that he did not sign the form requesting a "$0.00" forgiveness amount, but also admits that his application status is "ongoing." (Compl. ¶ 158.) As a result, he has pled neither reliance nor injury resulting therefrom, requiring dismissal of his claims.

4. **<u>Plaintiffs Have Not Pled Facts Showing a Violation of Michigan's Consumer Protection Act.</u>**

Plaintiffs have not pled a legally cognizable claim under Michigan's Consumer Protection Act, Mich. Comp. Laws Ann. §§ 445.901 et seq., ("MCPA"). The MCPA states in relevant part:

> "Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

Id. at §§ 445.902 (g). Plaintiffs' claims for alleged violations of Michigan's Consumer Protection Act ("MCPA") fail for at least two reasons: (1) the transaction between KServicing and Plaintiffs are not "trade or commerce" as defined under Michigan law; and (2) transactions specifically authorized by federal statute—such as KServicing's loan PPP loan processing—are explicitly exempt from the MCPA.

First, Plaintiffs allege that KServicing is engaged in "trade or commerce" within the meaning of § 445.902(g) of the MCPA via its marketing of its small business lending services. (Compl. ⁋ 290.) Contrary to Plaintiff's assertion, however, this does not constitute "trade or commerce" pursuant to § 445.902(g) of the MCPA. Like the North Carolina, and Georgia statutes discussed previously, the MCPA was enacted to protect consumers with purchases of goods which are primarily used for personal, family or household purposes. *Noggles v. Battle Creek Wrecking, Inc.*, 153 Mich. App. 363, 395 N.W.2d 322, 1986 Mich. App. LEXIS 2791 (Mich. Ct. App. 1986). The conduct at issue here does not relate to personal, family, or household purposes, but rather to business loans for small businesses. As such, the MCPA does not apply.

Second, Plaintiffs allege that KServicing's conduct constitutes unlawful conduct of trade or commerce within the meaning of § 445.903 of the MCPA. (Compl. ¶ 291.) However, KServicing's work was "specially authorized" under Michigan law, and therefore exempt. The MCPA does not apply, to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). "[T]he relevant inquiry is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Liss v Lewiston-Richards, Inc.*, 478 Mich 203, 210; 732 N.W.2d 514 (2007) (quotation marks omitted) (holding the exception to the MCPA in MCL 445.904(1)(a) applied because residential home building was specifically authorized under the Michigan Occupational Code).

It is undisputed that the issuance of PPP loans by KServicing is specifically authorized by the CARES Act. (Compl. ¶ 4.) Therefore, KServicing's alleged actions of issuing PPP loans and processing related forgiveness applications clearly fall within the MCPA "specially authorized" exception, warranting dismissal. *See Kraft v. Detroit Entm't, L.L.C.*, 261 Mich. App. 534, 536, 683 N.W.2d 200, 202 (2004) (holding that the MCPA did not apply because the conduct at issue was specifically authorized under laws administered by the Michigan Gaming Control

Board (MGCB), a state-authorized regulatory body, thus triggering the exemption under Mich. Comp. Laws § 445.904(1)(a) of the MCPA.).

5. Plaintiffs Have Not Pled a Cognizable Claim Under Florida's Deceptive and Unfair Trade Practices Act.

Plaintiffs have not pled a legally cognizable claim under Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.204.1 ("FDUTPA"). The FDUTPA prohibits: "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1) (emphasis added). The term "trade or commerce" is defined as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." Fla. Stat. § 501.203(8).

Plaintiffs have failed to plead a legally cognizable claim under FDUTPA for at least three reasons: (1) FDUTPA does not apply to KServicing's alleged debt collection efforts; (2) Plaintiffs have failed to prove causation—a necessary element of their claim; (3) Plaintiffs have failed to prove reliance or actual damages

According to Plaintiffs, KServicing is engaged in debt collection efforts. (*See* Compl. ¶¶ 189, 282.) Under FDUTPA, an attempt to collect a debt by exercising one's legal remedies does not constitute "advertising, soliciting, providing, offering, or distributing" under the statute. *See, e.g.*, *Acosta v. Gustino*, No. 6:11-cv-1266-Orl-31GJK, 2012 U.S. Dist. LEXIS 130656, at *2 (M.D. Fla. Sep. 12, 2012) (holding FDUTPA did not apply where the Defendants were debt collectors who sought to convince the Plaintiff to pay a debt allegedly owed to his homeowners association by sending demand letters). Plaintiffs allege that KServicing is attempting to collect on Plaintiffs' Loans (Compl. ¶¶ 163; 203.) Thus, under Plaintiffs' own assertions, the FDUTPA does not apply to KServicing's alleged debt collection efforts.

Plaintiffs have also failed to state at least one of the essential elements of the FDUTPA claim—causation. Plaintiffs must present individualized proof, *i.e.*, that they actually relied on the alleged misrepresentation to their detriment. *Helpling v. Rheem Mfg. Co.*, No. 1:15-cv-2247-WSD, 2016 U.S. Dist. LEXIS 37498, at *45 (N.D. Ga. Mar. 23, 2016). "Causation is a necessary element of the FDUTPA claim, and causation must be direct, rather than remote or speculative." (citations omitted) *Id.* Here, Plaintiffs have failed to allege facts establishing causation because they have failed to allege they relied on the alleged debt collection efforts. While Plaintiffs allege statements on KServicing's website are "deceptive trade practices," they never claim to have seen the website prior to selecting KServicing as a loan processor nor do they allege the statements were influential in them selecting KServicing. (Compl. ¶ 297.) Similarly, Plaintiffs have not alleged that they have suffered any actual damages from KServicing's purported debt collection efforts. *See St. Francis Holdings, LLC v. Pawnee Leasing Corp.*, No. 8:20-cv-1101-T-02, 2020 U.S. Dist. LEXIS 199151, at *19 (M.D. Fla. Oct. 27, 2020) ("It is well-established that actual damages are a required element of a FDUTPA claim."); *see also Emondson v. 2001 Live, Inc.*, No: 16-cv-3243-T-17AEP, 2017 U.S. Dist. LEXIS 155753, 2017 WL 10085029, at *2 (M.D. Fla. July 25, 2017) (dismissing FDUTPA claim because plaintiff pled only conclusory allegations of actual damages). Importantly, the FDUTPA only provides recovery for "actual damages."[9] *See City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. Dist. Ct. App. 2008) ("FDUTPA does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment.").

Here, Plaintiffs' simply state "Plaintiffs LeMaster and 365 Sun LLC and the Florida Sub-Class members seek all monetary and non-monetary relief allowed by law, including actual or nominal damages under Fla. Stat. § 501.211." Not only are nominal damages not awardable under the statute, but this is the same type of poorly

[9] Actual damages are defined as (1) the value between what was promised and what was delivered; or (2) the total price paid for a valueless good or service. *St. Francis Holdings, LLC v. Pawnee Leasing Corp.*, No. 8:20-cv-1101-T-02, 2020 U.S. Dist. LEXIS 199151, at *19 (M.D. Fla. Oct. 27, 2020)

pleaded conclusory allegation warranting dismissal as in *Edmondson*.[10] The only other damage alleged by the complaint is consequential in nature.[11] Because no actual loss has been suffered, Plaintiffs' claims are thus at best premature.

Accordingly, Plaintiff's FDUTPA claims cannot survive dismissal.

D. Plaintiffs Carr, Edward Ford Services LLC and Morgan's Claims Should Be Dismissed for Failure to Exhaust Administrative Remedies.

Plaintiffs' claims (Counts 3, 5, and 6) should be dismissed for failure to exhaust administrative remedies. The SBA promulgated a Procedural Notice to all PPP lenders and SBA Employees, effective January 27, 2022, outlining the "process being implemented by SBA to allow [PPP] borrowers to request an SBA loan review of partial approval forgiveness decisions issued by their PPP Lenders." The SBA

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[10] Further the alleged delay in forgiveness pled by Plaintiffs has resulted in no loss to Plaintiffs. Plaintiffs have not lost the ability to receive full forgiveness of their loans. The SBA can still grant forgiveness, and if they do, any forgiveness over payment made by plaintiffs' to lender must be returned. Lenders are required to return any forgiveness overpayments of $10 or more. Plaintiffs would only suffer actual loss if the period to receive loan forgiveness had ended. *see* SBA Forgiveness Portal APIs, available at https://ussbaforgiveness.github.io/UseCases/payment.html#:~:text=Overpayment,loan%20is%20%2410%20or%20less.(last accessed May 27, 2022); *see Ohome v. United States*, No. 1:21-cv-368-MLB, 2021 U.S. Dist. LEXIS 232509, at *20 n.4 (N.D. Ga. Dec. 6, 2021) (Holding court can take judicial note of information that is publicly available on a government web site) (internal citations omitted).

[11] Here, Plaintiffs seek compensation for spending hours on the phone and replying to numerous emails not the cost of the loan. (*See* Compl. ¶ 163.)

review process is applicable to borrowers who did not receive full denial forgiveness decisions. *See* Procedural Notice Control No. 5000-827666 n. 1 ("Borrowers that have received full denial forgiveness decisions from their Lenders should continue to follow the process outlined in the Interim Final Rule on Loan Forgiveness Requirements and Loan Review Procedures as Amended by the Economic Aid Act (86 FR 8283, February 5, 2021), as amended".) Plaintiffs Carr,[12] Edward Ford Services LLC, and Morgan allege they received loan forgiveness denials, therefore, their loan forgiveness application processes are governed by 13 CFR §120 (2021). (*See* Compl. ¶¶ 156, 171, 185.) 13 CFR §120 §(5)(1)(a)(2021) specifically provides an administrative remedy for the Plaintiffs, where they can appeal denials directly to the SBA.

The doctrine of exhaustion of administrative remedies provides that a party may not seek judicial relief in the federal courts until that party has first sought all possible relief within the agency itself. *Kobleur v. Grp. Hospitalization & Med. Servs., Inc.*, 787 F. Supp. 1444, 1448 (S.D. Ga. 1991). Importantly, the exhaustion

[12] Plaintiff Carr incorrectly asserts that he could not appeal KServicing's denial of his forgiveness application because only a determination by the SBA can be appealed (not one made by a servicer of a PPP loan). (*See* Compl. ¶ 155, fn. 71); 13 CFR §120 §(5)(1)(a)(2021) "Paycheck Protection Program SBA Loan Review Procedures and Related Borrower and Lender Responsibilities" makes clear that the SBA may review *any* PPP Loan.

doctrine applies when pertinent regulations contain the administrative remedy or remedies. *Id.*; *See*, *United States v. Barry*, 904 F.2d 29, 31 (11th Cir. 1990) (per curiam) (where litigant did not file written request for relief, as allowed by regulation, he has not exhausted appropriate administrative remedy). Failure to exhaust administrative remedies is a jurisdictional defect when Congress has designated that particular administrative remedy as a statutory precondition to a lawsuit. *Grp. Hospitalization & Med. Servs., Inc.*, 787 F. Supp. 1448 (1991) (internal citations omitted). In all other cases, including this action, exhaustion is a matter of judicial discretion. *Id*. When determining whether to impose the exhaustion requirement courts should consider the following factors: (1) judicial efficiency; (2) allowing the agency to exercise its discretion; (3) the use of the agency to make a factual record; (4) the benefit derived from drawing upon an agency's expertise; and (5) the avoidance of weakening the administrative process by allowing people to ignore administrative procedures. *Id.*

The Court should require exhaustion here as all of the factors weigh in favor of requiring exhaustion. *See Grp. Hospitalization & Med. Servs., Inc.*, 787 F. Supp. at 1448. Both Factor 1 "judicial efficiency" and Factor 5 "the avoidance of weakening the administrative process by allowing people to ignore administrative procedures," weigh in favor of requiring exhaustion because, by not requiring exhaustion, the Court will encourage thousands of PPP applicants to disregard the SBA's review and guidance procedures and instead seek to have their loan's forgiveness status litigated before the nation's courts rather than through the regulatory system established by SBA. This would lead to a judicially sanctioned flood of cases straight to the courthouse. As to Factor 2 "allowing the agency to exercise its discretion," and 3 "the use of the agency to make a factual record," appealing forgiveness decisions with the SBA first, and not the Court, prevents discrepancies from arising between how the SBA decides to handle appealed cases and how the Court does. *Id.* By not seeking review by the SBA Plaintiffs have deprived the Court of knowing how the SBA would have handled their appeals. *Id.* Factor 4 "the benefit derived from drawing upon an agency's expertise," also weighs in KServicing's favor because the SBA—as the agency responsible for issuing guidance—is the proper enforcement authority to evaluate Plaintiffs' qualification for PPP loan forgiveness. The SBA is also the most knowledgeable about the legislator's intent in enacting the CARES Act and can best insure it is carried out.

In short, because Plaintiffs Carr, Edward Ford Services LLC, and Morgan have failed to exhaust their administrative remedies, this Court should dismiss all of their claims.

Finally, as to all claims, because Plaintiffs have failed to plead cognizable claims under Georgia common law or the state statutes under which claims have been alleged, Plaintiffs' additional requests for relief must fail. *See Charly Holdings, Inc. v. Curtom Classics*, LLC, 2018 WL 6254586, at *4 (N.D. Ga. Nov. 14, 2018) ("[T]he Declaratory Judgment Act does not provide an independent cause of action."); O.C.G.A. § 13-6-11 (attorneys' fees under the Georgia law, are recoverable only for a prevailing party, and Plaintiffs' allegations establish they cannot prevail).

V. <u>CONCLUSION</u>

For the foregoing reasons, Defendant KServicing respectfully requests that this Honorable Court dismiss the complaint in its entirety with prejudice and award KServicing all such other relief to which it is justly entitled.

Dated: May 31, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JASON CARR, VICKI LEMASTER, EDWARD FORD SERVICES LLC, CARLTON MORGAN, 365 SUN LLC, and CANDICE WORTHY, *individually and on behalf of others similarly situated*, Plaintiffs, v. KABBAGE, INC., d/b/a KSERVICING, Defendant.	CIVIL ACTION NO. 1:22-cv-01249-VMC

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on May 31, 2022, I filed the foregoing **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all counsel of record. I also certify that the foregoing was prepared in accordance with N.D. Ga. L.R. 5.1, using Times New Roman font, 14 point.

/s/ Uchenna Ekuma-Nkama
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