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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

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Plaintiffs Jason Carr, Vicki LeMaster, Edward Ford Services LLC, Carlton Morgan¸ 365 Sun LLC and Candice Worthy, individually and on behalf of all others similarly situated (collectively, "Plaintiffs") and in opposition to Defendant Kabbage, Inc. d/b/a KServicing's ("Kabbage" or "Defendant") Motion to Dismiss and Request for Oral Argument and Memorandum of Law in Support (Doc. 12, 12-1, hereafter the "Motion" or "MTD") state as follows:

INTRODUCTION

Evidently, after reaping hundreds of millions of dollars for merely approving Paycheck Protection Program ("PPP") loan applications with little to no due diligence, Kabbage now wants to deepen its pockets at the expense of the same small businesses that the PPP was designed to protect. Kabbage's ill-motive could not be more obvious. Rather than opting into the SBA's Direct Borrower Forgiveness Portal to ensure timely forgiveness of the thousands of loans it processed, Kabbage instead opted to self-service the forgiveness program, keeping borrowers under the burden and weight of these loans for as long as possible. The result of this choice: collecting additional tens of millions of dollars in loan servicing fees while the small businesses and their individual owners suffer under the strain and threat of losing their business in an inflationary environment that is wreaking havoc on almost every small business in the nation.

The end-game for Kabbage is clear, as its CEO has been quite vocal about it:

- after lobbying the Treasury Department for inclusion in the PPP to save its floundering business,

- after employing (and boasting about) a PPP loan screening processes that failed to detect numerous and obvious instances of fraud, and that has been described as "woefully inadequate,"

- after receiving approximately $330 million for processing (not funding) PPP loan applications while performing little to no due diligence, which has resulted in federal investigations into Kabbage by the Senate Select Subcommittee on the Coronavirus Crisis and the United States Department of Justice,[1]

- after pocketing that money, and selling itself to American Express for nearly a billion dollars and rebranding the remaining skeletal loan servicing division as KServicing,

- after attempting to collect additional untoward tens of millions of dollars for servicing fees by keeping Plaintiffs' and the putative class members' PPP loans on the books as loan as possible by incompetently servicing those loans including forgiveness applications,

- after such a notorious and lucrative run, Kabbage's new CEO announces that the company is now ready to wind up operations.[2]

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[1] *See* Letter to Rob Frohwein, (former) Chief Executive Officer of Kabbage, from The Honorable James Clyburn, Chair, Senate Select Subcommittee on the Coronavirus Crisis, May 27, 2021, at *1, available at https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021-05-27.Clyburn%20to%20Kabbage%20re%20FinTech%20PPP%20Fraud.pdf (last visited July 8, 2022) (stating that "[t]his failure to detect fraud occurred while Kabbage and other FinTechs made hundreds of millions of dollars in fees by issuing publicly funded PPP loans"); *see also* MTD at 23 n. 8 (citing cases for proposition that court can take judicial notice of records on official government websites).

[2] *See* Laquisha Milner, *K Servicing: CEO: How to Guide an Organization to Its End*, METRO ATLANTA CEO (April 29, 2022), available at

Against that backdrop, it is hard to fathom how Kabbage can brazenly ask this Court to dismiss Plaintiffs' claims because its conduct was *not* unfair, deceptive or unlawful as a matter of law. (MTD at 20 stating that "Plaintiffs have simply failed to plead any facts establishing that any harm outweighs the benefits, as required".)

Starting in October of 2020, individuals and entities that received PPP loans could begin to apply for forgiveness. As detailed in the Complaint, Kabbage is refusing to timely process loan forgiveness applications because the longer it keeps those loans "on the books" the more servicing fees, which by its own estimation can amount to tens of millions of dollars, it can manufacture. In order to accomplish this rather pernicious objective, Kabbage is (i) failing to timely process forgiveness applications, (ii) repeatedly requesting non-existent and/or unnecessary documentation; (iii) representing that its so-called state-of-the-art technology will allow borrowers' loans to be processed and serviced quickly but, in actuality, not having a working platform for months at a time; (iv) sending borrowers loan forgiveness applications with the amount to be forgiven pre-populated to "$0.00," among many, many other deficiencies.

There are tens of thousands of borrowers who have been severely impacted by Kabbage's seemingly inexhaustible greed and abject incompetence. Those individuals

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http://metroatlantaceo.com/news/2022/04/kservicing-ceo-leading-backward-how-guide-organization-its-end/ (last visited July 11, 2022).

have spent countless hours tracking down irrelevant paperwork, attempting to speak with Kabbage customer service, waiting months for the Kabbage portals to become operational, re-submitting loan forgiveness applications and documents numerous times—all because the longer Kabbage takes to process these forgiveness applications, the more money it can extract in servicing fees.[3]

Now, faced with this class action lawsuit, Kabbage is attempting to manufacture an "out" by representing to this Court that Plaintiffs' claims are all improper because they somehow seek to enforce the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which does not provide for a private right of action. Yet, Kabbage does not—because it cannot—point to any provision of the CARES Act that Plaintiffs purportedly seek to enforce by this lawsuit. Contrary to Kabbage's oft-repeated refrain, Plaintiffs are not claiming that Kabbage should have participated in the SBA's Direct Borrower Forgiveness Portal; rather, Plaintiffs contend that once Kabbage began servicing these loans, it should have done so competently and in good-faith so that borrowers would have received a decision on their forgiveness applications in a timely

[3] *See*, *e.g.*, Doc. 1, Complaint, ¶163 (citing Miami Herald article entitled "*Unforgiven: Two years later, small businesses still waiting for promised PPP loan forgiveness*," detailing the saga of Plaintiff Vicki LeMaster stating that "she's spent hundreds of hours on the phone and replied to numerous emails asking her to resubmit documents and paperwork that she had already provided").

manner and so that they would not be stuck in a seemingly endless loop between the SBA, their funding banks and Kabbage, their loan servicer. That is the essence of Plaintiffs' claims, and determination of those issues do *not* depend on private enforcement of the CARES Act.

Kabbage is attempting to have it both ways. On one hand, it wants this Court to absolve it of any potential liability merely because the loans were issued further to the "CARES Act," but on the other hand, Kabbage itself has commenced a separate lawsuit contending that one of its partner banks has refused to pay it "tens of millions" of dollars in fees for servicing PPP loans authorized by the CARES Act. Evidently, Kabbage's attempt to force one of its partner banks to pay it millions of dollars for servicing these very same PPP loans is not preempted by the CARES Act but Plaintiffs' attempt to have this Court consider whether they were damaged as a result of Kabbage's incompetence in servicing the very same loans is for some reason beyond judicial scrutiny. It is not.

Kabbage's other arguments in support of dismissal are as ill-conceived and haphazard as its loan servicing. For starters, Kabbage inexplicably argues that Plaintiffs' claim under the Georgia Fair Business Practices Act, O.C.G.A. §10-1-393(a), should be dismissed for a litany of reasons, but the fundamental problem with Kabbage's argument is that Plaintiffs have ***not asserted a claim under the GFBPA at all***. Rather, as is clear and unmistakable from the Complaint, Plaintiffs state a claim under the Georgia Uniform Deceptive Trade Practices Act, O.G.C.A. §10-1-370, and that claim is adequately pled with sufficient factual detail. Moreover, Kabbage's attempt to use its Terms of Service ("ToS") to ward off Plaintiffs' statutory consumer fraud claims fails because (i) it has not made any showing that Plaintiffs either provided express consent or were otherwise on constructive notice of the terms and (ii) the choice of law provision does not mandate application of Georgia law to those statutory consumer fraud claims.

In sum, Kabbage has devised an opportunistic scheme to profit off the COVID-19 pandemic at every turn, regardless of the impact of its actions (or inactions) on American taxpayers and the hundreds of thousands of individuals and small businesses continuing to struggle as a result of the pandemic. Plaintiffs have set forth well-pled allegations giving rise to plausible claims and Kabbage's Motion to Dismiss should be denied in its entirety.

ARGUMENT

I. PLAINTIFFS' CLAIMS DO NOT SEEK TO ENFORCE ANY PROVISION OF THE CARES ACT.

Kabbage first argues that "all of the claims [in Plaintiffs' Complaint] arise out of and seek enforcement of the [CARES Act] or the SBA regulations that seek to enforce the CARES Act, which do not provide a private right of action." (MTD at 1.) Kabbage further remarks that Plaintiffs' unjust enrichment claim and state law statutory consumer fraud claims "seek[] damages based on [Kabbage's] performance administering the CARES Act." (*Id*. at 6.) Kabbage's mistaken attempt to reframe Plaintiffs' claims as attempts to enforce the CARES Act is unavailing because it has not pointed to a single provision of the Act that Plaintiffs claim Kabbage violated.

A. The CARES Act, PPP & FinTech Companies.

The CARES Act—the largest economic relief bill in U.S. history, with a total of $2.2 trillion allocated to support individuals, business and organizations—was signed into law on March 27, 2020. *See* Pub. L116-136, § 15002(b), 134 Stat 281. The CARES Act established the PPP, which provided cash-flow assistance through 100% federally-guaranteed loans to help small businesses survive the COVID-19 crisis by providing forgivable loans to cover payroll, rent and utility payments.

On April 8, 2020 and after facing unprecedented numbers of PPP applications, the SBA began allowing non-bank lenders, including financial technology companies ("FinTechs") like Kabbage, to process and/or to provide loans to eligible recipients. (*See* Doc. 1, hereafter "Compl.", ¶ 4.) In many instances, FinTechs partnered with regulated banks to process loans; typically, the FinTechs on-boarded, verified and approved applications and then submitted the loans to SBA through the bank partners.

B. Kabbage is Currently Under Investigation for PPP Fraud.

Although in its MTD Kabbage goes to great lengths to make it appear that it was a savior to small business,[4] the truth of the matter is that Kabbage is under Congressional and Department of Justice scrutiny because it failed to exercise an appropriate amount of due diligence but rather rushed through as many PPP loan applications as possible in order to generate massive amounts of origination fees; "[t]his failure to detect fraud occurred while Kabbage and other FinTechs made hundreds of millions of dollars in fees by issuing publicly funded PPP loans."[5]

FinTechs, including Kabbage, handled 75 percent of the approved PPP loans that have been connected to fraud, despite facilitating just 15 percent of PPP loans overall. The fraud rates associated with these loans strongly suggest that FinTech companies' loan screening processes were woefully inadequate. A Bloomberg report identifies multiple instances of fraud that could have been prevented had FinTechs simply conducted web searches for the company name of inactive, nonexistent, or otherwise clearly ineligible applicants.[6] Kabbage itself processed over 300,000 PPP loans worth

[4] *See, e.g.*, MTD at 20 (stating "[a]bsent the work of [Kabbage] and other similarly-situated loan servicers, businesses without prior existing relationships were likely facing financial ruin and the shuttering of their businesses").

[5] *See* May 27, 2021 letter from Hon. James Clyburn Letter to Kabbage, at *1.

[6] *See id.*

$7 billion between April 3, 2020 and August 8, 2020, making it the second-largest PPP lender by application volume. (Compl., ¶¶ 5-8.) Independent experts estimate that Kabbage has "earned" at least $330 million in fees for its "work." (*Id*.) Kabbage accounts for an astonishing 20 percent of all suspicious PPP loans, casting significant doubt on the company's onboarding and fraud detection process.

C. Kabbage's Lawsuit Against Customers Bank for Allegedly Failing to Pay Fees for Servicing PPP Loans Belies its Argument that this Lawsuit is Proscribed.

Oddly, Kabbage has sued the only one of its partner banks that is not currently under investigation. On May 25, 2022, Kabbage filed a lawsuit—which was assigned to Judge J. P. Boulee—against Customers Bank. By that lawsuit, Kabbage alleges that Customers Bank has refused to pay Kabbage tens of millions of dollars for servicing PPP loans that were authorized and issued further to the CARES Act.[7]

That lawsuit demonstrates not only that Kabbage is seeking millions of dollars in servicing fees—attesting to the magnitude of its greed—but also the sheer falsity of its argument in support of dismissal of this lawsuit, namely, that Plaintiffs' claims are somehow preempted or untenable because there is no private right of action under the

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[7] *See Kabbage, Inc. d/b/a KServicing v. Customers Bank*, Case No. 1:22-cv-02101-JPB (N.D. Ga.), ¶¶ 9-10 & 16.

CARES Act. This action is no more an improper CARES Act suit than the action Kabbage is pursuing to obtain servicing fees.[8]

D. Plaintiffs Do Not Allege *Any* Violation of the Small Business Act or the CARES Act.

As is apparent from the Complaint, Plaintiffs are *not* suing to enforce any provision of the Small Business Act or the CARES Act. Kabbage realizes this (as it has not pointed to a single provision that Plaintiffs contend it violated), but nonetheless spills a significant amount of ink asserting this tenuous argument. Plaintiffs are suing because the manner in which Kabbage serviced their loans was contrary to consumer law and public policy. Plaintiffs claim Kabbage violated various state consumer protection statutes, in addition to alleging common law unjust enrichment and seeking declaratory and injunctive relief. (*See generally* Compl., ¶¶ 8, 65, 80-81, 110, 113-141.) None of Plaintiffs' counts depend on an underlying violation of the CARES Act. *See, e.g.*, *United States v. Crowther*, No. 220CR00114JLBMRM, 2021 WL 50481, at *3 (M.D. Fla. Jan. 6, 2021) (denying motion to dismiss because "as the Government points out, Mr. Crowther is not accused of violating the CARES Act"); *Duncan v. Rushmore Loan Mgmt. Servs., LLC*, No. 6:20-CV-1524-CEM-GJK, 2021 WL 8774248,

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[8] Moreover, the *Kabbage v. Customers Bank* Complaint demonstrates just how lucrative Kabbage's exploitative practices are in that it alleges "Customers has withheld tens of millions in [various] fees," even "after accounting for setoffs by [Kabbage] of amounts [Kabbage] owes to Customers." *See id*., ¶ 16.

at *5 (M.D. Fla. Sept. 30, 2021) (rejecting defendant's argument "that the CARES Act does not create a private right of action" and therefore claims premised on alleged CARES Act violations are an improper attempt at "bootstrapping").

Plaintiffs are not seeking to enforce any provision of either statute but rather assert exclusively state law-based claims regarding loans authorized by these federal statutes, which are not preempted. Notably, "[t]he Eleventh Circuit has held that the SBA does not completely preempt all state causes of action that implicate the standards created by the SBA." *Bracciale v. Valdez*, No. 8:17-CV-2040-T-36AEP, 2017 WL 4117806, at *7 (M.D. Fla. Sept. 18, 2017) (citing *Tectonics, Inc. of Florida v. Castle Const. Co., Inc.*, 753 F.2d 957, 962 (11th Cir. 1985) (stating that "Congress did not intend to occupy the entire field of small business concerns to the extent that all state remedies would be foreclosed")); *see also Integrity Mgm't Intern., Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 494 (10th Cir. 1987) (holding Small Business Act did not preempt state law claims); *Beco Const. Co., Inc. v. Bannock Paving Co., Inc.*, 797 P.2d 863 (D. Idaho 1990) (holding Small Business Act did not preempt state common-law claims).[9]

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9 Moreover, where a plaintiff brings a state law claim based in part on failure to adhere to federal regulations, federal courts may look to those regulations for guidance. *See, e.g., College. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 599 n. 9 (4th Cir. 2005) ("[W]e have specifically recognized that, absent preemption, an injured plaintiff may sue under state law seeking redress for a violation of a federal regulation."); *Dickerson*

E. The Court Should Reject Kabbage's Argument that the CARES Act Does Not Provide for an Implied Right of Action.

Although not strictly necessary because Plaintiffs are *not* suing to enforce any provision of the CARES Act, Kabbage's claim that this Court should—at the pleading stage—throw out *all* of Plaintiffs' claims because the CARES Act does not authorize an implied private right of action should be rejected. (*See* MTD at 9, stating that "[n]either the CARES Act nor its predecessor, the SBA Act, create an express or implied private right of action").

The very first case cited by Kabbage in putative support of that contention, *Tectonics, Inc. of Florida v. Castle Construction, Co*., actually supports Plaintiffs' position: "[t]hus, we hold that Congress, by enacting the Small Business Act, did not preempt the field so as to preclude a state cause of action based upon the Act as a standard in determining whether the actions of fraud, unjust enrichment or interference with a business relationship are available ..." (*See* MTD at 9-10) (citing 753 F.2d 957, 960 (11th Cir. 1985)). As the Eleventh Circuit held in *Tectonics*, Plaintiffs here should

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v. Nahra, 809-CV-963-T-17TGW, 2010 WL 746707, at *6 (M.D. Fla. Mar. 2, 2010) ("While the violation of federal regulations may be evidence of the breach of fiduciary duty under substantive principles of state law, the breach of fiduciary duty claim remains a state law claim."). And federal courts in this Circuit have examined the SBA PPP regulations in evaluating causes of action not based on the Small Business Act or CARES Act. *See, e.g., Lucius, v. Fort Taco, LLC*, No. 21-22397-CIV, 2022 WL 335491, at *3 (S.D. Fla. Jan. 5, 2022) (analyzing SBA regulations related to the PPP, including the Interim Final Rules).

be able to assert their state law claims because Kabbage makes no showing that these claims are preempted or precluded by the Small Business Act or the CARES Act.

Moreover, courts have denied motions to dismiss similar actions finding that the CARES Act does provide for an implied private right of action. For instance, on January 19, 2022, Judge Gonzales Ramos, in *Diagnostic Affiliates of Northeast Hou, LLC v. United Healthcare Services, Inc.*, issued an extremely thorough decision assessing whether, in the context of a healthcare provider asserting that various health insurers had an obligation to pay for COVID-19 testing, the CARES Act implies a private right of action; "the Court concludes that there is an implied private right of action to enforce the provisions of the FFCRA and CARES Act reimbursement requirement." *See* No. 2:21-CV-00131, 2022 WL 214101, at **8-9 & *18 (S.D. Tex. Jan. 18, 2022) (denying motion to dismiss based on argument that there is no implied private right of action to enforce the CARES Act).

F. The Case Law Kabbage Relies Upon is Inapposite.

Not one of the cases Kabbage cites for the proposition that "Plaintiffs cannot maintain a private cause of action under the CARES Act" so much as mentions the CARES Act, let alone holds that the Act bars Plaintiffs' claims here. (*See generally* MTD at 8-11.) In fact, the only case Kabbage cites post-dating the CARES Act is a completely irrelevant case discussing claims brought in relation to the Health Insurance

Portability and Accountability Act of 1996. (MTD at 9) (citing *Laster v. Georgia*, No. 1:20-CV-81, 2020 U.S. Dist. LEXIS 253347 (M.D. Ga. July 1, 2020).)

Kabbage completely ignores existing federal case law where courts *have* held that the CARES Act does not provide for the relief sought. Perhaps this is because this case law is completely distinguishable from the instant case. The majority of this case law involves businesses, such as accounting firms, suing PPP lenders for failing to pay "agent fees" that they were allegedly owed under the CARES Act. *See, e.g., Steven L. Steward & Assocs., P.A. v. Truist Bank*, No. 620CV1083ORL40GJK, 2020 WL 5939150, at *3 (M.D. Fla. Oct. 6, 2020) (dismissing complaint because "Plaintiff's claim for declaratory relief requires [finding] an underlying cause of action for agent fees [within the CARES Act], and no such action exists"); *Leigh King Norton & Underwood, LLC v. Regions Fin. Corp*., 497 F. Supp. 3d 1098, 1098 (N.D. Ala. 2020) (dismissing complaint alleging claim for violation of SBA Act); *Daniel T.A. Cotts PLLC v. Am. Bank, N.A.*, No. 2:20-CV-185, 2021 WL 2196636, at *5 (S.D. Tex. Feb. 9, 2021) (same). Although not cited by Kabbage, the case law is inapposite because it is wholly dependent on courts finding that defendants violated a specific provision of the CARES Act.

In this case, if the Complaint were to be stripped of all references to the CARES Act and PPP, Plaintiffs' claims—that they were misled into believing that Kabbage could adequately service their loans only to suffer significant damages due to Kabbage's ineptitude—would substantively remain the same, thereby demonstrating that Plaintiffs' claims are *not* dependent on a finding of violation of any federal law or regulation. The crux of this case is not any specific section of the CARES Act or SBA regulations – the crux of this case is the unfair, deceptive, fraudulent and tortious conduct of Kabbage in servicing Plaintiffs' loans.

G. Plaintiffs' State Law Claims Are Not Precluded by the CARES Act.

Kabbage contends that Plaintiffs' Michigan Consumer Protection Act ("MPCA") claim is precluded because that statute 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." (MTD at 27.) In putative support, Kabbage cites to inapposite Michigan case law regarding the state's regulation of occupational conditions, casinos and slot machines. (*See id*.) The only other law Kabbage refers to is the CARES Act. Kabbage states that "the issuance of PPP loans by KServicing is specifically authorized by the CARES Act." (*Id.* at 27.) Not only did Kabbage not *issue* any loans, but it does not identify any section of the CARES Act authorizing any of its conduct servicing the loans.

Yet, Kabbage does not demonstrate that just because the CARES Act authorized the *funding* of PPP loans it ultimately *serviced* that Plaintiffs are somehow precluded from alleging a Michigan state consumer law claim regarding incompetent and defective servicing that caused damages separate and distinct from the CARES Act. It defies common sense and logic to argue that the CARES Act somehow authorizes or sanctions the tortious conduct of Kabbage detailed by Plaintiffs in the Complaint, and as reported in numerous media reports. Neither Plaintiffs' MCPA claim, nor any other claim is precluded by the CARES Act.

II. KABBAGE'S TERMS OF SERVICE ("ToS") DO NOT PRECLUDE PLAINTIFFS' NON-GEORGIA STATUTORY CLAIMS.

Kabbage states that "the [ToS] of Service Plaintiffs agreed to mandate[] that all disputes relating to [Kabbage's] services with respect to PPP loans are governed by Georgia law" and "therefore Plaintiff's consumer protection claims under California, North Carolina, Michigan and Florida statutes are inapplicable." (MTD at 2.)

Kabbage seemingly thinks it can skip over basic principles of contract formation because Plaintiffs cite two sentences of the ToS in the Complaint: "[Kabbage]'s Terms of Service state that '[t]hese [ToS] 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.'" (Compl., ¶ 234.)[10] Kabbage is mistaken as to the applicability of the ToS in general, and certainly as to the breadth of the choice-of-law clause.

A. Kabbage Has Not Made the Required Showing that Plaintiffs Agreed or Were Otherwise on Notice of the Terms of Service.

First, Kabbage has made no showing whatsoever that Plaintiffs agreed to or were otherwise on constructive notice of the ToS. Kabbage does not even attempt to establish that Plaintiffs so much as viewed, let alone manifested affirmative assent to the ToS. *See, e.g., Thornton v. Uber Techs., Inc.*, 359 Ga. App. 790, 794, (2021) (holding trial court erred in finding assent to terms and conditions as a matter of law because evidence raised questions as to whether party had the opportunity to see them); *Fridman v. 1-800 Contacts, Inc.*, 554 F. Supp.3d 1252, 1260 (S.D. Fla. 2021) ("Therefore, the Court does not find that Plaintiff was on actual notice of the Terms.").

Kabbage's ToS appear to be a browsewrap agreement. (*See* MTD at 5-6, citing ToS, General & Acceptance, stating that by using the website and/or using Kabbage's services, "you signify your assent to both these terms and conditions.") But, once again, Kabbage has completely failed to establish the validity of any browsewrap agreement, the enforceability of which turns on whether the website puts a reasonably prudent user

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10 The second cited sentence is a forum selection clause, which merely mandates where a plaintiff can initiate suit. Regardless of the applicability of the ToS to the instant lawsuit, this sentence is irrelevant as Plaintiffs have filed suit in this Court.

on inquiry notice of the terms of the contract which, in turn, focuses on the clarity and conspicuousness of the terms. *See, e.g.*, *Babcock v. Neutron Hold., Inc.*, 454 F. Supp.3d 1222, 1230 (S.D. Fla. 2020) (citations & quotations omitted); *Fridman*, 554 F. Supp.3d at 1260 (finding a browsewrap agreement unenforceable because "the record does not support the conclusion that Plaintiff was on constructive notice of the Website's Terms . . ."); *SeeIT Strat. Grp., Inc. v. Allday Consult. Grp., L.L.C.*, 975 F. Supp.2d 1267, 1282-83 (S.D. Fla. 2013) (finding no mutual assent to the terms of a browsewrap agreement). Kabbage has not established any mutual assent regarding the purported applicability of its ToS.

B. Regardless of Whether the Terms of Service Apply, Their Limited Scope Does Not Impact Plaintiffs' State Consumer Law Claims.

Second, Kabbage's choice-of-law provision is not nearly as broad and comprehensive as it would have this Court believe, and it certainly does not prohibit Plaintiffs' state law claims. As noted above, the ToS' choice of law provision is very narrow: "[t]hese [ToS] shall be governed by the internal substantive laws of the State of Georgia, without respect to its conflict of laws principles." And, Kabbage, in turn, defines the term 'Service' very narrowly; "BY USING AND/OR VISITING THIS WEBSITE AND/OR USING THE KABBAGE, INC. SERVICES (specifically, inputting your user id in the space provided on various pages of the kservicing.com website, the 'Services')."[11]

Thus, even if Kabbage was able to demonstrate that Plaintiffs assented or were on constructive notice of the ToS, the choice-of-law provision would only apply to claims alleging violation of the ToS themselves, and does not apply to extra-contractual or statutory claims. *See, e.g.*, *Mesa Air Grp., Inc. v. Delta Air Lines, Inc.*, No. 1:08-CV-1334-CC, 2010 WL 11508953, at *20 (N.D. Ga. May 17, 2010) (stating that "[n]o Georgia case has ever held that [a choice of law provision] will bring in the entire body of law of the chosen state") (citation omitted). Here, Plaintiffs are not alleging an action in contract; rather, they assert consumer statutory claims and Kabbage's ToS does not prohibit the maintenance of those claims.

III. KABBAGE FOMENTS A NUMBER OF BASES TO DISMISS A CLAIM WHICH PLAINTIFFS HAVE NOT ALLEGED.

While Plaintiffs marvel at the "kitchen sink" approach that Kabbage employs in an effort to obtain dismissal, *see* MTD at 13-17 (arguing lack of notice, standing, some federal preemption basis and lack of damages), the simple truth of the matter is that Plaintiffs have ***not*** asserted a claim under Georgia's Fair Business Practices Act at all and therefore, Kabbage's arguments are completely inapplicable.

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[11] *See* "Kabbage, Inc. Terms of Service," available at https://www.kservicing.com/legal/tos/, last accessed July 10, 2022.

Although Kabbage is perhaps to be lauded for its "creativity," its arguments—in support of a claim Plaintiffs do not assert—are completely misplaced. For instance, Kabbage contends, without any citation from the CARES Act, that "the GFPBA does not apply because the PPP is a federal lending program subject to an existing enforcement scheme." (MTD at 16.) So, on one hand, when it wants to obtain dismissal of all of Plaintiffs' claims, Kabbage asserts that there is no private enforcement of the CARES Act, (*see* MTD at 8-11), but now that it ostensibly suits its purpose in obtaining dismissal of a non-existent claim, Kabbage asserts that the CARES Act and SBA regulations cover these transactions. (*Id.* at 16.)

Turning to the Georgia statutory claim that they actually assert under the Georgia Uniform Deceptive Trade Practices Act ("GUDTPA"), Plaintiffs have set forth sufficient factual allegations giving rise to a plausible claim. (Compl., ¶¶ 80-81, 110, 113-141, 208-212, 271-278.) Specifically, Plaintiffs allege that Kabbage engaged in deceptive trade practices that have caused harm and are likely to continue to cause future harm. Those allegations are more than sufficient to give rise to a viable claim for violation of the GUDTPA. *See Amin v. Mercedes-Benz USA, LLC*, 349 F. Supp.3d 1338, 1360 (N.D. Ga. 2018) (denying motion to dismiss GUDTPA claim where plaintiffs plausibly alleged that they are "likely to be damaged by [this] deceptive trade practice"). Moreover, Plaintiffs have standing to assert to assert their GUDTPA claim.

See Bolinger v. First Multiple Listing Serv., Inc., 838 F. Supp.2d 1340, 1364 (N.D. Ga. 2012) (stating that "[t]o have standing to seek injunctive relief under the [Georgia] UDTPA, a plaintiff must show ... that she is likely to be damaged in the future by some deceptive trade practice of the defendant").[12]

IV. PLAINTIFFS HAVE PLAUSIBLY ALLEGED VIOLATION OF NUMEROUS STATES' CONSUMER FRAUD CLAIMS.

In support of dismissal of Plaintiffs' various state consumer law claims, Kabbage has the temerity to assert that none of its alleged conduct was unfair, deceptive or unlawful, and that Plaintiffs have not plead reliance and damages. (*See generally* MTD at 2, 14 & 17-30.) These arguments are each unavailing.

A. Kabbage's Conduct is the Epitome of Unfair.

Kabbage contends Plaintiffs have not pled a legally viable claim for violations of California's Unfair Competition Law ("UCL"),[13] the North Carolina Unfair and

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[12] Kabbage has not moved to dismiss this claim or addressed it in any respect in its Motion and therefore it may not raise any arguments in support of dismissal of this claim in its reply brief. *See, e.g., IOU Cent., Inc. v. Shore App. Conn'n Inc.*, No. 1:20-CV-2367-MLB, 2021 WL 1061817, at *5 (N.D. Ga. Mar. 18, 2021) (citation omitted) (explaining it need not address issue raised for first time in reply brief); *See, e.g.*, *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003) (declining to consider argument raised for first time in reply brief); *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1352 n. 11 (11th Cir. 2009) (same).

[13] Section 17200 of the California Business & Professions Code concerns unfair competition and prohibited activities and provides that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." Cal. Bus. &

Deceptive Trade Practices Act,[14] nor the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA")[15] because none of the conduct alleged was unfair, fraudulent or unlawful. (*See* MTD at 17-23.)

Although the conduct sufficient to constitute an unfair or deceptive trade practice "is a somewhat nebulous concept," and depends on the circumstances of the particular case, a trade practice will be deemed "unfair" "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *See, e.g., Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 902 (4th Cir. 1996); *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350, 1364 (M.D. Fla. 2007); *Ryan-Beedy v. Bank of New York Mellon*, 293 F. Supp. 3d 1101 (E.D. Cal. 2018) (citation omitted). Or, as

Prof. Code § 17200. Each prong of the UCL is a separate and distinct theory of liability; thus, pleading any one of the prongs is sufficient to state a claim for relief. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007) (citation omitted).

[14] To state a cause of action under North Carolina's UDTPA, plaintiffs must allege: (i) conduct constituting an "unfair or deceptive act or practice;" (ii) conduct "in or affecting commerce" and (iii) that such conduct proximately caused actual injury to plaintiff. *See Food Lion, Inc. v. Cap. Cities/ABC Inc.*, 951 F. Supp. 1224, 1230 (M.D.N.C. 1996) (denying defendant's motion to dismiss the UDTPA claim).

[15] To plead a claim under FDUTPA, a plaintiff must plausibly allege: "(i) a deceptive act or unfair practice; (ii) causation and (iii) actual damages." *Kertesz v. Net Transactions, Ltd.*, 635 F. Supp. 2d 1339, 1348 (S.D. Fla. 2009) (quoting *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008)).

Kabbage points out, "[u]nfair under the UCL means a practice where harm to the victim outweighs its benefits." (MTD at 19.)

Kabbage goes to great lengths to distort the record in attempting to convince this Court that *nothing* that it did could *possibly* be construed as unfair as a matter of law, and that because there is nothing to see here, the case should be dismissed in its entirety. First, Kabbage claims "[t]he 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." (*Id.*) While that statement is likely true in a vacuum, Kabbage only did one of those things (it only processed applications and did not lend any money), and it is now the subject of a Congressional and federal investigation for its inept handling of those applications.

Undaunted, Kabbage then claims that "[a]bsent the work of KServicing and other similarly-situated servicers, businesses without prior existing relationships were likely facing financial ruin and the shuttering of their businesses." (*Id.*) (citing Compl., ¶ 61, which does not say what Kabbage contends it does). Kabbage concludes its self-congratulatory spiel by stating that "[i]n 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." (MTD at 20.) Kabbage does not actually address any of the allegations in the Complaint just blandly contends that PPP loans were a good thing, which is not in dispute.

To recap, Kabbage (i) did not fund *any* PPP loans whatsoever; (ii) negligently (at best) processed PPP loan applications while conducting little to no diligence (iii) which led to the highest incidences of fraud of any participant in the PPP program[16] (iv) and for which it received $330 million dollars (v) then became the target of a Congressional and federal investigation (vii) then sold itself to American Express for nearly a billion dollars (viii) and negligently and incompetently serviced PPP loans so badly that numerous articles are written about its sheer ineptitude and the thousands and thousands of lost hours, stress, anxiety not to mention lost credit opportunities and other issues resulting from Kabbage's self-serving decision to prolong the forgiveness process as long as possible so that it may collect additional untoward "tens of millions of dollars." (*See* Compl., ¶¶ 8, 65, 80-81 & 113-141.)

As detailed in the Complaint, there are tens of thousands of borrowers who have been severely impacted by Kabbage's seemingly inexhaustible greed and abject incompetence. (*See id*., ¶¶ 3, 10, 22, 117 & 221.) Those people have spent countless hours tracking down irrelevant paperwork, attempting to speak with Kabbage customer

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[16] According to published reports, Kabbage accounts for 20 percent of all suspicious PPP loans, casting significant doubt on the adequacy of its onboarding and fraud detection process.

service, waiting (months and months) for the Kabbage portal to become operational, re-submitting loan forgiveness applications and related documents numerous times—all because Kabbage wants to extract additional millions of dollars in servicing fees from its partner banks before it shutters operations. (*See id*., ¶¶ 13, 81 & 123-133.) But, according to Kabbage, "Plaintiffs have simply failed to plead any facts that any alleged harm outweighs the benefits, as required." (MTD at 20.) That statement is categorically untrue.

Given the foregoing, it is perhaps not surprising that at least with respect to North Carolina's UDTPA, Kabbage has—perhaps recognizing that it does not have a cogent defense—completely ignored the unfair prong of the statute. (*See id*. at 21-22) (citing case for proposition that under the UDTPA, plaintiff must show an "unfair or deceptive act or practice" and arguing that its alleged conduct was not fraudulent or deceptive). And, it is similarly not surprising that Kabbage has chosen to cherry-pick a single allegation (that it fraudulently attempts to induce borrowers to sign forgiveness applications with the forgiveness amount pre-populated to "$0.00") to claim that its conduct is not deceptive, completely ignoring all other allegations of unfair and deceptive conduct. (*See* Compl., ¶¶ 142-159.)

Kabbage's conduct related to the pre-populated loan forgiveness applications is an unfair and deceptive act or practice that is actionable under North Carolina's

UDTPA. While discovery is needed to flesh out the situation in its entirety, it appears that Kabbage would send denied forgiveness applicants a second application with the amount to be forgiven set to $0.00, meaning that if the application was approved, no amount of the loan would be forgiven, and Kabbage could then begin collection efforts. Kabbage did not inform applicants regarding the import of signing these forms, and such conduct is an unfair or deceptive practice.[17]

B. Plaintiffs Have Plausibly Alleged Fraudulent Conduct.

Kabbage next argues that Plaintiffs' allegations do not amount to fraudulent conduct because they "are not sufficient to meet the heightened pleading standard for fraud claims." (*See* MTD at 18.) The Complaint is replete with specific quotations of Kabbage's fraudulent misstatements regarding its loan servicing abilities. (*Compare, e.g.*, Compl., 22, 272 & 297, *with Raber v. Osprey Alaska, Inc*., 187 F.R.D. 675 (M.D. Fla. 1999) ("When pleading fraud, plaintiff should quote or paraphrase the alleged fraudulent misrepresentations made by the defendant. F.R.C.P. 9(b), 28 U.S.C.A.").)

C. Plaintiffs Have Plausibly Alleged Unlawful Conduct.

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[17] Nothing that Kabbage says in its MTD regarding SBA regulations changes that conclusion as Plaintiffs are not dictating what amounts Kabbage can include on forgiveness applications; rather, Plaintiffs contend that Kabbage must provide complete disclosure regarding the ramifications of those applications.

Finally, a business practice is "unlawful" in violation of California's UCL if it violates another state or federal law as the statute "borrows" violations of other laws and treats them as independently actionable. *See Perea v. Walgreen Co.*, 939 F.Supp.2d 1026, 1040 (C.D. Cal. 2013). In order to state a claim for UCL, a plaintiff must identify an underlying statute that was violated. *See, e.g., Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal.App.4th 1050, 1060 (2005). Plaintiffs contend that Kabbage violated California's Rosenthal Act, Cal. Civ. Code § 1788 and the federal Fair Debt Collections Practice Act, 15 U.S.C. § 1692. (*See* Compl., ¶ 258.)

Kabbage claims that it could not possibly violate either statute because it "is not a debt collector as defined by the FDCPA" and the debt that Kabbage is servicing is not "consumer debt." (MTD at 20 fns. 6 & 7.) Neither argument is valid. First, there is no question that Kabbage is a debt collector pursuant to the FDCPAas 15 U.S.C. § 1692a(6) sets forth, in relevant part, that an entity that uses an instrumentality of interstate commerce having a "principal purpose" of debt collection is a debt collector. *See, e.g., Sanchez v. L. Off. of Armo*, No. 120CV00163NONESKO, 2021 WL 1214559, at *4 (E.D. Cal. Mar. 31, 2021). Kabbage's sole reason for existing is to service PPP loans and to collect the amounts owed by borrowers for another entity, the funding banks. Moreover, Plaintiffs' Complaint sets forth examples of Kabbage sending past due statements and requests for payments to borrowers located throughout the country, with the "principal purpose" of debt collection. (*See* Compl., ¶¶ 137-141 & 189-191.); *See, e.g., Gerstle v. Nat'l Credit Adjusters, LLC*, 76 F.Supp.3d 503, 512 (S.D.N.Y. 2015) (sending debt collection letters can be sufficient to qualify one as a "debt collector" within the meaning of the FDCPA);[18] *United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007) (internet is an instrumentality and channel of interstate commerce).

Second, as the Complaint alleges, Plaintiffs are undoubtedly natural persons and the use of the loan funds for "rent, utilities and interest on mortgage" qualifies the PPP loans at issues as "credit consumer transactions" pursuant to the FDCPA and the Rosenthal Act. *See, e.g., Castillo v. Nationstar Mortg. LLC,* No. 15-CV-01743-BLF, 2016 WL 6873526, at *5 (N.D. Cal. Nov. 22, 2016) ("A mortgage on a single family home, which is at issue in this case, is a consumer debt").

D. Plaintiffs Have Plausibly Alleged Reliance and Damages.

Kabbage, on numerous occasions throughout its brief (including in support of dismissal of the non-existent GFPBA claim), falsely states that "nowhere in the Complaint do Plaintiffs allege they were damaged as a result of relying on statements

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[18] Kabbage is likewise a "debt collector" under the Rosenthal Act because "the definition of 'debt collector' found in the [Rosenthal Act] is broader than that contained in the FDCPA." *Izenberg v. ETS Servs., LLC*, 589 F. Supp.2d 1193, 1199 (C.D. Cal. 2008).

made by [Kabbage]." (MTD at 17 stating that Plaintiffs have failed to plead any facts establishing reliance on the alleged misrepresentations or an injury in fact.)

To begin, as to causation and reliance, Kabbage's deceptive marketing of its PPP loan servicing abilities was obviously likely to deceive consumers acting reasonably, as evidenced by the sheer magnitude of Kabbage's PPP operations and the number of Kabbage borrowers who were deceived. (*See* Compl., ¶ 112) ("Kabbage ultimately became one of the largest PPP lenders in the country by volume of loans, with nearly 300,000 approved applications that amounted to over $7 billion in small business funding.").) Yet, Kabbage did not live up to its promises, falling far short of the overall forgiveness rate of non-Kabbage-serviced PPP loans.

Moreover, Kabbage mistakenly conflates "causation" with reliance as it is well-settled Florida law that FDUTPA does not require a plaintiff to prove actual reliance on the alleged conduct.[19] *See Randolph v. J.M. Smucker Co*., 303 F.R.D. 679 (S.D. Fla. 2014) (citation omitted). Instead of actual reliance, a plaintiff must simply prove that "the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Id.* This same standard applies whether the action is brought by an

[19] Even so, Plaintiffs allege that, based on Kabbage's fraudulent marketing and misrepresentations of its ability to process and service PPP loans, they "trusted Kabbage to assist them in obtaining legitimate government resources, to which they were fully entitled, in their time of need." (Compl., ¶ 84.)

individual or as a class action. *See Cold Stone Creamery, Inc. v. Lenora Foods I, LLC*, 332 Fed.Appx. 565, 567 (11th Cir. 2009) ("[M]embers of a class proceeding under [FDUTPA] need not prove individual reliance on the alleged representation.")); *Davis v. Powertel, Inc*., 776 So.2d 971, 973 (Fla. 1st DCA 2000) ("A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.").

Plaintiffs have adequately pled proximate cause under the North Carolina UDPTA by stating that "in addition to attempting to collect[] unnecessary documentation multiple times…and then unjustly denying his forgiveness application, [Kabbage] has [wrongfully] initiated collection efforts against Carr." (Compl., ¶ 159.) *See Westchester Fire Ins. Co. v. Johnson*, 221 F. Supp. 2d 637, 649 (M.D.N.C. 2002) (plaintiff can make a showing of injury and proximate cause under NCUDPTA by demonstrating "detrimental reliance"). In other words, Plaintiff Carr detrimentally relied upon Kabbage's misrepresentations regarding its PPP loan servicing abilities and has suffered and continues to suffer injury caused by Kabbage's deceptive and fraudulent conduct. (*See, e.g.*, Compl., ¶¶ 80-81, 113-141 & 148-159.)

Finally, Plaintiffs allege actual damages sufficient to sustain their claims. The Complaint is replete with allegations of Plaintiffs' injuries as a result of Kabbage's conduct. (*See* Compl., ¶¶ 80-81, 110, 113-141, 148-159, 163, 167-177, 181-192, 198-

203 & 208-212.) Because Plaintiffs are stuck in an endless loop of applying for forgiveness of their PPP loans and being forced to wait, submit repetitive unnecessary documentation, communicate with obstructive customer service representatives and given misleading information and instructions, they adequately plead damages.

E. Kabbage's Conduct Affects Trade or Commerce.

Kabbage contends Plaintiffs have not pled that the transactions between itself and Plaintiffs involve "trade and commerce" as defined under Michigan, Florida and North Carolina law. (MTD at 21-25.) As to Florida, its FDUTPA certainly applies to Kabbage's conduct. The term "trade or commerce" is broadly 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). Kabbage clearly advertised, solicited and offered a service. The single case Kabbage cites for the premise that its conduct is not covered by the FDUTPA is inapposite. (*See* MTD at 28-29.) In *Acosta v. Gustino*, defendant was a debt collector solely attempting to collect a debt on behalf of an entirely separate entity. *See* No. 6:11-cv-1266-Orl-31GJK, 2012 U.S. Dist. LEXIS 130656, at *2 (M.D. Fla. Sep. 12, 2012). Because the plaintiff was claiming it was harmed by the separate entity, and not the debt collector, the court dismissed the FDUTPA claim. *See id*. The defendant in *Acosta* did not advertise, solicit or offer any service to the plaintiff, as Kabbage did here.

Kabbage's muddled argument regarding whether its conduct is "an act affecting commerce" and therefore covered by North Carolina's UDTPA misstates the law. (*See* MTD at 24.) For purposes of the UDTPA, "'commerce' includes all business activities, however denominated…" N.C. Gen. Stat. Ann. § 75-1.1; *see also Dalton v. Camp*, 353 N.C. 647, 656 (2001) ("[T]he statutory definition of commerce crosses expansive parameters"). Kabbage's conduct is precisely the type of conduct the UDPTA is intended to cover, and Plaintiff Carr—who sought Kabbage's services in order to maintain the "day-to-day activities" of his business—may properly bring a UDPTA claim. *See, e.g., McDonald v. Scarboro*, 91 N.C.App. 13, 370 S.E.2d 680, 683 (stating that the UDTPA does not "protect only individual consumers, but serve[s] to protect business persons as well.").

Finally, in order for the Michigan statute, the MCPA, to apply, Plaintiffs must demonstrate the relation of Kabbage's conduct to "trade or commerce," which explicitly "includes the advertising, solicitation…or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." M.C.L. § 445.902(d). "The MPCA is a remedial statutory scheme designed to prohibit unfair practices in trade or commerce, and must be liberally construed to achieve its intended goals." *Newton v. West*, 262 Mich. App. 434, 437 (2004) (citation omitted). Accordingly, the "trade or commerce" requirement has been found to be satisfied, despite the absence of a specific transaction between the parties involving the purchase of consumer goods. *See, e.g., Action Auto Glass v. Auto Glass Spec.*, 134 F.Supp.2d 897 (W.D. Mich. 2001).

Kabbage's deceptive conduct is actionable under the plain language of the MCPA because it is related to a service as well as a business opportunity (the PPP loans). *See, e.g., Allan v. M&S Mortg. Co.*, 138 Mich. App. 28 (1984) (stating that alleged conduct, including lender's advertising and selling its services would fall within statutory definition of "trade or commerce" for purposes of MCPA). Further, Kabbage's deceptive conduct is actionable under the MCPA because, as Plaintiffs pled, they have repeatedly been harmed by being forced to submit repetitive and unnecessary documentation, being given conflicting information regarding the status of their loans and being fraudulently and deceptively sent wrongfully pre-populated loan forgiveness applications, all so that Kabbage can continue to collect processing fees. (*See* Compl., ¶¶ 164-177 & 288-292.)[20]

[20] Other than asserting that the CARES Act provides some sort of blanket immunity for all of its conduct—however unfair, fraudulent or unlawful—Kabbage does not attack Plaintiff's unjust enrichment claim. As detailed in the Complaint (and herein), Plaintiffs have clearly conferred a benefit on Kabbage for which it would be inequitable for them to retain. (*See* Compl., ¶¶ 6-8, 67-71, 117-118 & 250-251.) *See, e.g., Parks*

V. PLAINTIFFS CARR, EDWARD FORD SERVICES LLC AND MORGAN HAVE NOT FAILED TO AVAIL THEMSELVES OF ANY PURPORTED ADMINISTRATIVE REMEDY.

Kabbage argues that the California UCL, the North Carolina UDTPA and the MPCA claims "(Counts 3, 5, and 6) should be dismissed for failure to exhaust administrative remedies." (MTD at 31.) Kabbage asserts that Plaintiffs Carr, Edward Ford Services LLC and Morgan "allege that they received loan forgiveness denials, therefore, their loan forgiveness application processed are governed by 13 C.F.R. § 120 (2021)." (*Id.*) The problem with Kabbage's argument is that, as alleged in the Complaint, Kabbage's servicing procedures were so haphazard and incompetent that these Plaintiffs would receive (in no particular order) denial of their applications, and then an additional application (usually pre-populated to $0.00 for the forgiveness amount) or any other number of random and unhelpful communications from Kabbage. Moreover, when these Plaintiffs contacted SBA regarding their loans and their

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v. Thompson Builders, Inc., 296 Ga.App. 794, 706, 675 S.E.2d 583, 585 (2009); *Hollifield v. Monte Vista Bib. Gardens, Inc.*, 251 Ga. App. 124, 131 (2001). Kabbage induced Plaintiffs to choose it as their PPP loan servicer by falsely and deceptively marketing its PPP loan originating abilities for which it "received between $330 million and $340 million in fees on $7 billion in approved PPP loans." (Compl., ¶ 8.) Not content with a mere $330 million and another billion from American Express, Kabbage deceptively represented its loan servicing abilities and failed to timely and to competently process Plaintiffs' and the class members' PPP loan forgiveness applications and therefore sought to obtain additional "tens of millions of dollars." Plaintiffs' unjust enrichment claim is well-pled, and equity demands that Kabbage be disgorged of the immense benefits it has obtained at Plaintiffs' expense.

forgiveness status, they were told to contact Kabbage, their loan servicer. These Plaintiffs have not failed to avail themselves of any purported administrative remedy as Plaintiffs explain throughout the Complaint the sheer impossibility of obtaining any relief from the SBA and/or Kabbage.

Finally, Kabbage tepidly concludes with an incredibly circular argument that because all of Plaintiffs' claims fail so too must their Declaratory Judgment Act claim and their request for attorneys' fees under O.C.G.A. § 13-6-11. (*See* MTD at 35.) As demonstrated above, Plaintiffs have set forth sufficient factual detail to raise their right to relief above a purely speculative level. Their claims are not precluded or otherwise barred by the CARES Act or any SBA regulation, and, assuming they apply, Kabbage's ToS do not prohibit the maintenance of Plaintiffs' non-Georgia statutory claims. Plaintiffs are entitled to their "day in court" regarding their claims, and the MTD should be dismissed in its entirety.[21]

[21] To the extent this Court is inclined to dismiss any of the claims asserted, Plaintiffs respectfully request that they be provided leave to re-plead. *See, e.g., Hunt v. Nationstar Mortg.*, No. 21-10398, at *9 (11th Cir. May 27, 2022) (stating that "[w]e generally require district courts to allow a litigant at least one chance to remedy any deficiencies before dismissing the complaint with prejudice, where a more carefully drafted complaint might state a claim").

CONCLUSION

For the foregoing reasons, Plaintiffs Jason Carr, Vicki LeMaster, Edward Ford Services LLC, Carlton Morgan¸ 365 Sun LLC and Candice Worthy respectfully request this Honorable Court to deny Defendant Kabbage, Inc. d/b/a KServicing's Motion to Dismiss in its entirety, and to award all such other relief as is equitable and just.

Respectfully submitted this 11th day of July, 2022.

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LOCAL RULE 7.1 CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing pleading filed with the Clerk of Court has been prepared in 14-point Times New Roman font in accordance with Local Rule 5.1(C).

Dated: July 11, 2022.

/s/ *MaryBeth V. Gibson*
MARYBETH V. GIBSON

CERTIFICATE OF SERVICE

I certify that on July 11, 2022, I filed the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT** 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.

/s/MaryBeth V. Gibson
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