

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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ALICIA MARSHALL, DANIEL  
PRONSKY, and PARIS TOWNSEND,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

PRESTAMOS CDFI, LLC,

Defendant.

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Case No. 5:21-cv-04337-JMG

**MEMORANDUM OF LAW IN SUPPORT OF PRESTAMOS CDFI, LLC'S  
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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**PRELIMINARY STATEMENT**

As the Coronavirus (“COVID-19”) pandemic devastated the United States, small businesses nationwide suffered severe financial hardships as economic activity decreased. Congress, through the CARES Act, authorized the U.S. Small Business Administration (“SBA”) to administer the Paycheck Protection Program (“PPP”). The program enabled SBA to guarantee forgivable loans issued by private lenders to small businesses, subject to certain conditions.

The SBA’s primary goal was clear: encouraging SBA-approved lenders to issue PPP loans to as many eligible borrowers as possible, with a particular focus on reaching the smallest businesses and those owned by people of color, women, and veterans. To increase PPP access, SBA encouraged community development financial institutions, like Defendant Prestamos CDFI LLC (“Prestamos”), to support its goal. Through a partnership with start-up technology company Blue Acorn PPP, LLC (“Blueacorn”), Prestamos issued 494,415 PPP loans—the most of any lender according to a 2021 SBA report. According to materials cited by Plaintiffs, Prestamos was successful because some larger lenders focused on making larger loans to more established businesses, rather than issuing relatively smaller loans to underserved businesses as Prestamos did.

The Complaint asserts breach of contract claims against Prestamos on behalf of a putative nationwide class and California Unfair Competition Law (“UCL”) claims on behalf of a California subclass—all based on the inadequately pled experiences of the named Plaintiffs who did not receive their PPP loans from Prestamos. This Court should dismiss the Complaint in its entirety.

First, Plaintiffs lack standing to bring this lawsuit because they do not allege an injury-in-fact that is fairly traceable to Prestamos. Each Plaintiff repeats the same generic allegations: that they did not receive their approved loan from Prestamos and that they each made “multiple additional attempts to obtain the loan proceeds,” without describing those “attempts” in the

Complaint. Plaintiffs' allegations about unnamed borrowers, however, demonstrate that the delay in funding borrowers' PPP loans could have been attributable to causes other than Prestamos's conduct, such as borrowers' personal banks rejecting attempts by Prestamos to fund the loans. And, even if the named Plaintiffs had standing to bring their individual claims, they cannot assert state-law claims on behalf of borrowers residing in states in which the Plaintiffs themselves do not reside or in which they were never injured—as this Court itself recently held. *See Talbert v. Am. Water Works Co.*, No. 2:19-cv-05010, 2021 U.S. Dist. LEXIS 88346 (E.D. Pa. May 7, 2021) (Gallagher, J.). Similarly, here, Plaintiffs are residents of California and Pennsylvania; therefore, they cannot bring contractual claims under the laws of 48 other states and the District of Columbia.

Second, Congress did not provide a private right of action—whether express or implied—under the CARES Act or any of the SBA's implementing regulations. Because Plaintiffs are barred from suing under the CARES Act, they attempt to enforce its terms anyway under the guise of state-law claims. The alleged breaches of their SBA-form Promissory Notes (and related statutory claim) are not grounded in contract, but rather the quality of Prestamos's performance under the PPP regulatory scheme. Courts regularly reject this type of end-run around Congress's decision to exclude private rights of action from federal statutes, including the CARES Act.

Third, even if the Complaint survives the above grounds for dismissal, Plaintiffs fail to make out any plausible claims for relief. To state their contract claim, Plaintiffs must identify an express commitment to Plaintiffs that Prestamos breached. The Complaint, however, cites *no* contractual provision in any loan document (all conspicuously unattached to the pleadings) obligating Prestamos to fund Plaintiffs' loans. Moreover, Plaintiffs cannot enforce the terms of an agreement between Prestamos and *the SBA* to which they are not a party. And the Notes bar Plaintiffs' claims in any event as each contains an unambiguous release provision.

Lastly, the Complaint fails to state a claim under the California UCL. Plaintiffs do not allege the requisite plausible facts that Prestamos' conduct was "unlawful or unfair." And the pleadings fail to demonstrate that Plaintiffs are entitled to any restitutionary relief under the UCL, the only relief they seek and one of the few available forms of relief under the statute.

For the reasons set forth below, the Court should dismiss the Complaint.

### **FACTUAL SUMMARY**

Prestamos is a Community Development Financial Institution ("CDFI") certified by the United States Department of the Treasury as a Loan Fund. CDFIs are mission-driven organizations that have a primary goal of promoting community development through improving the social and/or economic conditions of underserved persons, including low-income persons, persons who lack adequate access to capital or financial services, as well as residents of economically distressed communities. *See* 12 U.S.C. § 4702(5)(A). Prestamos has administered a variety of lending programs aimed at creating jobs, revitalizing communities, and facilitating community wealth-building. *See, e.g.,* Compl., ECF No. 1, ¶ 40.

***History of the CARES Act.*** On March 13, 2020, the federal government declared the COVID-19 pandemic of sufficient severity and magnitude to warrant an emergency declaration for the entire country. *See* 86 Fed. Reg. 3692. On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to provide emergency assistance and health care response for individuals, families, and businesses affected by the pandemic. *Id.*; *see also* Compl. ¶ 18. The SBA received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by COVID-19. *See* 86 Fed. Reg. 3692. Section 1102 of the CARES Act temporarily authorized a new program, the PPP, under SBA's Section 7(a) Loan Program. *See*

15 U.S.C. 636(a)(36). The CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP. The federal government modified, extended, and renewed the PPP several times. Compl. ¶ 22.

***Applying for PPP Loans.*** As detailed in the Complaint, Congress conditioned a business’s eligibility for a PPP loan on numerous criteria. *See* 86 Fed. Reg. 3692, 3695–3703 (setting forth extensive guidelines for program eligibility and limitations). SBA promulgated rules governing the processes for applying for, approving, and disbursing PPP loans. *See* Compl. ¶¶ 30–33. Prospective borrowers applied for PPP loans by submitting a standard form created by the SBA: the PPP Borrower Application Form, also known as SBA Form 2483. *See* Compl. ¶ 30.<sup>1</sup> The form for second-draw loans—SBA Form 2483-SD—contains similar language. *Id.*<sup>2</sup> This form is to be completed by the applicant and submitted to an SBA participating lender.

Although citing no source of this purported obligation, Plaintiffs charge that PPP lenders were required to disburse approved loans “within ten days of SBA approval and assignment of the loan number.” *Id.* ¶ 32. Neither SBA Form 2483 nor SBA Form 2483-SD—nor any loan documents Plaintiffs reference—guarantee a time by which borrowers’ applications will be reviewed, approved or rejected, or their funds disbursed.

The PPP requires lenders to implement certain underwriting requirements. *See* 86 Fed. Reg. 3692, 3708. Lenders must also follow any applicable Bank Secrecy Act and anti-money laundering requirements. *Id.* Congress granted all lenders approved to make other Section 7(a) loans delegated

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<sup>1</sup> SBA revised the form several times; all versions are located at <https://www.sba.gov/document/sba-form-2483-ppp-first-draw-borrower-application-form> (last accessed Dec. 10, 2021).

<sup>2</sup> This form is located at <https://www.sba.gov/document/sba-form-2483-sd-ppp-second-draw-borrower-application-form> (last accessed Dec. 10, 2021).

authority to make and approve PPP loans without requiring the SBA to conduct its own underwriting analysis of every issued loan. 15 U.S.C. § 636(a)(36)(F)(ii)(I). Lenders must submit SBA Form 2484 (an application with various information about the borrower and certifications) to issue a PPP loan and receive a loan number for each originated PPP loan. 86 Fed. Reg. 3692, 3709.

The PPP loan is 100 percent guaranteed by SBA. 15 U.S.C. § 636(a)(2)(F). To receive forgiveness of a PPP loan, the borrower must submit an application for forgiveness to the lender along with certain certifications regarding how PPP funds were spent. 15 U.S.C. § 9005(e).

***Prestamos' PPP Lending Program.*** The SBA strongly encouraged CDFIs, like Prestamos, and minority-, women-, veteran-, and military-owned lenders to apply to become PPP lenders in order to reach diverse, small businesses. 86 Fed. Reg. 3692, 3707. Citing an SBA report, the Complaint states that Prestamos processed 494,415 PPP loans. *See* Compl. ¶¶ 7, 53–54; *see also id.* ¶¶ 55–63 (describing lending process).

Under SBA rules, a lender such as Prestamos may contract with a lender service provider to assist with one or more lender functions. *See* 13 C.F.R. § 103.1(d). Prestamos partnered with Blueacorn, a lender service provider, to facilitate and administer the loan application, paperwork collection, and approval process. *See* Compl. ¶¶ 47–49, 52. Blueacorn was created in 2020 to help small businesses find PPP lenders, as, according to an article cited in the Complaint discussing Blueacorn and another PPP technology company, some lenders would not make smaller loans to small businesses, but gravitated toward providing larger loans to more established businesses because it was more lucrative. *See* Compl. ¶¶ 47, 52. Blueacorn's technology streamlined the PPP application process, which made it easier for a lender to make smaller loans to smaller businesses.

Although Plaintiffs intimate throughout the Complaint that Prestamos was enriched by receiving credit from SBA for loan proceeds it never disbursed, *see, e.g., id.* ¶ 127, at no point do

Plaintiffs allege that Prestamos spent or misappropriated any money it received from SBA or did not otherwise distribute those funds to other PPP applicants.

***Plaintiffs’ causes of action.*** Despite a lengthy pleading winding through Prestamos’s participation in the PPP, much of what is contained in the Complaint is irrelevant to Plaintiffs’ causes of action. Plaintiffs are Alicia Marshall, Daniel Pronsky, and Paris Townsend, individuals residing in California and Pennsylvania who manage small businesses. Compl. ¶¶ 11–13. Plaintiffs each applied for a PPP loan with Prestamos through Blueacorn, submitted required documentation, received notice of approval from SBA, received and executed a Promissory Note and accompanying documents, and did not receive the loan. *See id.* ¶¶ 65–100. In each case, Plaintiffs allegedly inquired with SBA about the status of their loans and made “multiple additional attempts to obtain the loan proceeds,” although they provide no detail about those “attempts.” *See id.* For example, the Complaint does not explain whether any of the named Plaintiffs contacted Prestamos, Blueacorn, or their personal bank regarding the attempt to fund the loan and if so, what, if anything, they learned, such as whether their personal bank rejected Prestamos’ attempt to fund the loan.

Plaintiffs assert two causes of action: First, Plaintiffs allege breach of contract, claiming that Prestamos “entered into a binding agreement with each of the Plaintiffs . . . to fund their respective PPP loans” but “breached its obligations to fund Plaintiffs’ . . . PPP loans by failing to fund the loans within 10 days of the SBA’s approval of the loans.” *See* Compl. ¶¶ 116, 118.

Second, Plaintiffs allege that Prestamos violated California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (“UCL”), because its failure to fund PPP loans “constitute[d] unlawful and unfair business acts or practices” within the meaning of the UCL. *See id.* ¶¶ 123–32. Because of these violations, Plaintiffs allege they “are entitled to restitution for the amount of the wrongfully withheld PPP loan proceeds.” *Id.* ¶ 132.

***The Promissory Note.*** Conspicuously omitted from the pleadings is any description of the Promissory Note each Plaintiff signed, the only contract Plaintiffs identify as possibly having been breached by Prestamos.<sup>3</sup> Notably, the Promissory Note, which is an SBA form, sets forth *absolutely no* obligations on the part of Prestamos to fund the loan. Rather, it expresses Plaintiffs' promise to repay the loan evidenced by the Note and the terms by which they will do so, *see* Note §§ 1, 3, outlines conditions constituting a loan default and Prestamos's subsequent remedies, *id.* §§ 4, 5, and enumerates Prestamos's "General Powers," which include the prerogative to "[t]ake any action necessary to protect the Collateral or collect amounts owing on this Note," *id.* § 6(E). Notably, the Note does not state a timeframe or date by which Prestamos must fund the loan.

Each Promissory Note also includes an express release of claims against Prestamos. By signing the Note, Plaintiffs agreed to release Prestamos for

any and all claims . . . whether statutory . . . , in contract or in tort, . . . arising out of or in any way connected to (i) any extension of credit by the Lender to Borrower on or prior to the date hereof, or (ii) any matter or thing done, omitted or suffered to be done by the Lender . . . on or prior to the date hereof.

Note § 10. Plaintiffs each signed their Promissory Note, although no Note contains any signature or evidence of execution by Prestamos. *See* Note § 11.

### **ARGUMENT**

Plaintiffs' Complaint is not viable for multiple reasons. Foremost, this Court does not have subject matter jurisdiction over the dispute because the pleadings do not show that Plaintiffs have

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<sup>3</sup> Copies of Plaintiffs' PPP Notes (SBA Form 147) are attached as Exhibits A (Marshall), B (Pronsky), and C (Townsend). The substantive provisions of each Note are identical. Even on a motion to dismiss, the Court can consider the provisions of the Note because Plaintiffs' allegations incorporate and rely on them. *See Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

standing to bring their claims. Nor do Plaintiffs have a *right* to bring their claims, which are attempts, masquerading as state law claims, to enforce a federal statute that contains no right of action. And the allegations—which are vague, if not irrelevant—do not make out plausible claims in any event. For any or all of these reasons, the Complaint should be dismissed.

Under Federal Rule of Civil Procedure 12(b)(1), “a party may move to dismiss the complaint by alleging that the court lacks subject-matter jurisdiction over the plaintiff’s claims.” The court must “assume that the allegations of the complaint are true” and decide whether “the pleadings fail to present an action within the court’s jurisdiction.” *Wheeler v. Corr. Emergency Response Team*, No. 18-cv-3813, 2019 U.S. Dist. LEXIS 108459, at \*5 (E.D. Pa. June 27, 2019) (citation omitted). If the plaintiff is unable to establish the existence of subject matter jurisdiction over their claims, the Court is without power to hear those claims and must dismiss the case. *See Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977).

A complaint also should be dismissed where it fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citations omitted). The allegations must “raise a right to relief above the speculative level.” *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (quotation omitted). In other words, “[a]lthough the plausibility standard does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully.” *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (quotation marks and citations omitted). When deciding the motion, the Court “need not credit a complaint’s bald assertions or legal conclusions.” *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

**I. Plaintiffs do not have standing to bring their claims.**

**A. Plaintiffs lack a legally protected interest in receiving loan funds from Prestamos.**

In order to invoke federal court jurisdiction, Plaintiffs must establish they have standing to sue. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). At the pleadings stage, this means that Plaintiffs must “clearly . . . allege facts demonstrating” three elements: that they “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendants, and (3) that is likely to be redressed by a favorable judicial decision.” *See Warth v. Seldin*, 422 U.S. 490, 498–99 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). The first two of these elements are relevant here. An injury in fact “requires ‘an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’” *Constitution Party v. Aichele*, 757 F.3d 347, 361 (3d Cir. 2014) (quoting *Lujan*, 504 U.S. at 560–61). As for traceability, “[a] federal court may ‘act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.’” *Id.* at 366 (quotation omitted). Failure to establish either of these prongs is dispositive. “Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff’s claims, and they must be dismissed.” *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) (quotation omitted).

The allegations here fail to demonstrate that Plaintiffs have suffered an injury-in-fact or that any purported injury is traceable to Prestamos. A recent decision from the Middle District of North Carolina is directly on point. *See Pinehurst Neuropsychology, PLLC v. First-Citizens Bank & Tr. Co.*, No. 20-cv-636, 2021 U.S. Dist. LEXIS 186525 (M.D.N.C. Sept. 29, 2021). There, plaintiff applied for a loan from a PPP lender; its application was delayed, but ultimately approved

by the lender before being rejected by the SBA. *See id.* at \*2–6. The plaintiff sued, alleging that it was “denied timely access to funds that would have helped it mitigate the issues resulting from . . . the economic crisis, and was delayed from seeking assistance from a different lender,” which further resulted in unspecified economic harm relating to lost business. *Id.* at \*5–6.

The court dismissed the complaint for lack of standing on several rationale that apply equally here. The *Pinehurst* plaintiff’s alleged injury—economic harm caused by the lender’s purported delay in processing plaintiff’s loan—mirrors Plaintiffs’ allegations exactly. Compl. ¶¶ 81, 91, 100. Yet this did not satisfy Article III, for two reasons. First, the court found the complaint lacked sufficient detail about *whether* or *why* the delay was attributable to the defendant lender. *See Pinehurst*, 2021 U.S. Dist. LEXIS 186525, at \*8–9. Second, and more importantly, the plaintiff “fail[ed] to establish that it ha[d] a legally protected interest in receiving any loan from [defendant], irrespective of a delay.” *Id.* at \*9. Although, the court acknowledged, delay in receipt of owed money can constitute an injury-in-fact, *see id.* at \*10, the plaintiff, as a PPP borrower, was merely “a loan applicant whose application could have been approved or denied for a variety of reasons at [the lender’s] discretion,” *id.* at \*10–11 (citing *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 748 (D. Md. 2020)). Because the plaintiff was not *entitled* to any SBA-guaranteed loan money, it did not suffer a cognizable injury by being allegedly deprived of it.

Here, each Plaintiff fails to allege whether and why the alleged delay was attributable to Prestamos. Thrice repeating that Plaintiffs made “multiple additional attempts to obtain the proceeds” does not provide sufficient (or any) detail about Prestamos’s alleged role in delaying disbursement the loans. In fact, the Complaint itself offers *other* reasons why borrowers did not receive their loans, including that some borrowers’ personal banks rejected attempts by Prestamos to fund a PPP loan. *See* Compl. ¶ 103.f. This does not adequately trace any harm to Prestmaos.

Plaintiffs fare no better in alleging an injury-in-fact at all. They each make the same unspecific claim that the PPP loan would have “directly assisted” in the operation of their sole proprietorships and that the alleged delay “resulted in lost opportunities and other consequential damages,” without explaining what those opportunities or damages are. *See* Compl. ¶¶ 81, 91, 100. Even crediting these vague allegations, Plaintiffs do not explain, in any way, that or why they held a legally protected interest in receiving PPP loan proceeds from Prestamos, a lender delegated authority by SBA to disburse federally-guaranteed loans at its discretion using its own underwriting processes to verify that a borrower satisfies each of the program’s expansive eligibility criteria. These allegations are not enough to establish standing.

**B. At minimum, Plaintiffs lack standing to assert claims under the laws of states in which they do not reside or were not injured.**

Plaintiffs seek to bring breach of contract claims on behalf of themselves and a proposed national class. Compl. ¶¶ 115–22. At the outset, Plaintiffs’ failure to “link their claim to the law of any particular state” dooms their claim as a matter of law. *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 167 (E.D. Pa. 2009). “[C]obbling together the elements of a [common law claim] from the laws of the fifty states”—no matter how substantively similar those laws may be—“is no different from applying federal common law,” which is impermissible. *See id.*

But even if Plaintiffs’ failure to receive PPP loan funds were a cognizable injury (it is not), they would still lack standing to raise state-law claims under the laws of states in which they do not reside or in which they were never injured. *See id.* at 157 (declining to defer resolution of named plaintiffs’ standing until class certification stage and concluding, at the pleadings stage, that their “allegations present no facts that would connect injuries specific to the plaintiffs . . . to any cause arising in states where no named plaintiff” was located or injured).

Resolving the issue of Plaintiffs’ claim-specific standing at this juncture avoids the need “to embark on lengthy class discovery with respect to injuries in potentially every state in the Union” and would prevent Plaintiffs from “proposing to represent the claims of parties whose injuries and modes of redress they would not share.” *Id.* at 155. This Court and others in the Third Circuit are in accord. *See Talbert*, 2021 U.S. Dist. LEXIS 88346, at \*13 (“Plaintiffs have suffered alleged injuries under Pennsylvania and New Jersey law, so they do not have standing to assert state law claims under the laws of any other states.”); *see also Lauren v. PNC Bank, N.A.*, 296 F.R.D. 389, 391 (W.D. Pa. 2014); *In re Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litig.*, No. 12-cv-169, 2013 U.S. Dist. LEXIS 142466, at \*35 (D.N.J. Oct. 2, 2013). Plaintiffs’ claims must be dismissed *at least* to the extent they assert claims under the laws of a state in which they do not reside.

**II. Plaintiffs have no private right of action under the CARES Act and cannot circumvent that Congressional choice by suing under state law.**

Plaintiffs’ claims are an impermissible attempt to enforce the provisions of a statute under which Congress did not grant them the right to do so. Plaintiffs did not sue under the CARES Act because they cannot; nor, therefore, should they be able to recast such claims under state law. Recent decisions have rejected other plaintiffs’ attempts to enforce the CARES Act through state-law causes of action, and this Court should do the same.

When enacting the CARES Act, which created the PPP, Congress did not include a private right of action—express or implied. *See* 15 U.S.C. §§ 9001–9141 (CARES Act); *id.* § 636(a)(36) (PPP amendments). “[P]rivate rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). It is well-settled that there is no express private right of action in the CARES Act. *See Profiles, Inc.*, 453 F. Supp. 3d at 748. Nor is there an express

private right of action in the Small Business Act, which the CARES Act amended. *Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996) (collecting cases).

There also is no basis for reading an implied right of action into the CARES Act. *See Profiles*, 453 F. Supp. 3d at 748–52 (“[N]othing in its text evidences Congress’s intent to enable PPP loan applicants to bring civil suits against PPP lenders.”); *see also Autumn Court Operating Co. LLC v. Healthcare Ventures of Ohio*, No. 20-cv-4901, 2021 U.S. Dist. LEXIS 18295, at \*13–16 (S.D. Ohio 2021) (collecting cases). And because there is no private right of action under the CARES Act, there cannot be a private right of action under SBA’s implementing regulations. *Alexander*, 532 U.S. at 291 (“[A] regulation . . . may not create a right that Congress has not.”).

In such circumstances a plaintiff cannot, in the guise of state-law claims, bring what is “in essence a suit to enforce” a federal statute that does not contain a private right of action. *Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 118 (2011). This is especially the case where the statute and regulations already provide a robust enforcement scheme, as do the CARES Act and related rules. *See Sanchez v. Bank of S. Tex.*, 494 F. Supp. 3d 421, 434 (S.D. Tex. 2020) (discussing SBA’s “supervisory and enforcement authority to enforce the provisions of the Small Business Act and its CARES Act”); *see also* 13 C.F.R. § 120.1400 (SBA enforcement actions for lenders who violate program guidelines). “[I]t is precisely this administrative enforcement authority that ‘tend[s] to contradict a congressional intent to create privately enforceable rights . . . . The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.’” *Sanchez*, 494 F. Supp. 3d at 434 (citations omitted).

The Supreme Court’s unanimous opinion in *Astra USA* is illustrative. There, the plaintiff alleged that the defendant pharmaceutical company charged prices in excess of the ceilings under Section 340B of the Public Health Services Act, which does not include a private right of action.

563 U.S. at 116. The plaintiff sought to circumvent this by pleading a state-law breach of contract claim, alleging that the defendant violated an agreement with the administering agency to abide by the price-ceiling requirements. *Id.* at 115. Because the lawsuit was “in essence a suit to enforce the statute itself,” the Supreme Court held that it must be dismissed. *Id.* at 118. (“The absence of a private right to enforce the statutory ceiling-price obligations would be rendered meaningless if [plaintiffs] could overcome that obstacle by suing to enforce the contract’s ceiling-price obligations instead.”).

The same rationale has borne out in similar cases involving plaintiffs attempting to enforce the PPP. In *Johnson v. JPMorgan Chase Bank*, the court dismissed the plaintiff’s claims against PPP lenders. 488 F. Supp. 3d 144, 159 (S.D.N.Y. 2020). Even if the claims otherwise had merit, the court reasoned, they “would be foreclosed by controlling precedent that forbids [] suits to enforce agreements that merely incorporate obligations under a statute that does not itself permit the [] party to enforce it.” *Id.* at 159 n.19. And in *Profiles*, borrowers applied for PPP loans through Bank of America but the bank’s specific policies prevented their approval. They sued as a class, alleging that the bank interfered with their ability to get loans under the CARES Act. The court dismissed in part because there was no private right of action in the CARES Act. *See* 453 F. Supp. 3d at 750–51. *See also, e.g., Radix Law PLC v. JPMorgan Chase Bank NA*, 508 F. Supp. 3d 515, 520 (D. Ariz. 2020) (agreeing with defendant that the plaintiff’s state common law and statutory claims “are not viable because they are in essence attempts to enforce the CARES Act”); *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1, 37–38 (D. Mass. 2004) (dismissing contract claims seeking to enforce the Higher Education Act); *Umland v. PLANCO Fin Servs.*, 542 F.3d 59, 66 (3d Cir. 2008) (holding that plaintiff could not bring common-law contract claim for breach of term reflecting an

obligation under a statute which did not provide a private right of action); *Mankodi v. Trump Marina Assocs. LLC*, 525 F. App'x 161, 166 (3d Cir. 2013) (same).

Even were Plaintiffs able to maintain a separate claim for breach of the Promissory Note, their Complaint must be dismissed because they allege *only* that Prestamos breached obligations it purportedly had under the PPP. *See* Compl. ¶ 32; *id.* ¶¶ 116–118 (alleging that Prestamos “breached obligations [under the PPP] . . . by failing to fund the loans within 10 days of SBA’s approval of the loans”). Indeed, the Promissory Note does not even incorporate program requirements by reference, or include any terms about loan disbursement. *See* Promissory Notes, Exs. A, B, C. Other courts have dismissed claims seeking to enforce federal statutes on this basis as well. *See Bulluck v. Newtek Small Bus. Fin., Inc.*, 808 F. App'x 698, 701–02 (11th Cir. 2020) (dismissing state-law claims in part because the court “[saw] nothing in the [contract] obligating Defendants to abide by SBA Guidelines that might provide an independent cause of action”); *cf., e.g., Astra USA*, 563 U.S. at 118 (barring contract claim to enforce statutory obligations in part because the contracts were “form agreements” that “simply incorporate[d] statutory obligations and record[ed] the manufacturers’ agreement to abide by them”).

Plaintiffs’ claims are nothing more than attempts to compel Prestamos to comply with the terms of the PPP, which—because Congress did not decide to give individuals the right to do so in the governing statutes—they cannot do via state law claims. *See Astra USA*, 563 U.S. at 118. Accordingly, Plaintiffs’ claims must be dismissed.

### **III. The Complaint fails to state a claim for breach of contract.**

Plaintiffs’ allegations fail to even make out a simple claim for breach of contract. The existence of a contract is a threshold element of a claim for breach. *See Thomas v. Montelucia Villas, LLC*, 302 P.3d 617, 621 (Ariz. 2013); *CDF Firefighters v. Maldonado*, 70 Cal. Rptr. 3d 667,

679 (App. 4th 2008); *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). Here, there was no contract between Plaintiffs and Prestamos in which Prestamos committed to funding Plaintiffs' loans, let alone doing so on any particular timeline.

Plaintiffs allege that Prestamos entered into an agreement with them to fund their PPP loans through (1) "its agreement to make PPP loans in compliance with the PPP and all applicable rules and regulations," (2) "its acceptance and approval of Plaintiffs' PPP loan applications," and (3) "as the counterparty to the Loan Documents." Compl. ¶ 116. None of these actually constituted a contract obligating Prestamos to fund Plaintiffs' loans.

First, any agreement between Prestamos and the SBA for Prestamos to make PPP loans in compliance with the agency's rules and regulations is not one to which Plaintiffs are a party and is therefore not one they can enforce. *See Medevac MidAtlantic, LLC v. Keystone Mercy Health Plan*, 817 F. Supp. 2d 515, 531–32 (E.D. Pa. 2011) (recognizing that for a third party to enforce a government contract, "something more than an intent to benefit the non-party must be demonstrated: the contract must express intent that the promisor will be liable to members of the general public in the event of non-performance"). And even if Plaintiffs were entitled to receive PPP funds under the program, "the breach of contract claims would be foreclosed by controlling precedent that forbids third-party suits to enforce agreements that merely incorporate obligations under a statute that does not itself permit the third-party to enforce it." *Johnson*, 488 F. Supp. 3d at 158; *see also Regions Bank v. Gator Equip. Rentals, LLC*, No. 15-cv-5084, 2016 U.S. Dist. LEXIS 112938, at \*16 (E.D. La. July 1, 2016) ("[I]t is well established that SBA guarantees are agreements between the private lender and the SBA, which are independent of and create no rights in the borrowers." (quotations omitted)).

Second, Plaintiffs do not plausibly allege any facts to support their conclusion that Prestamos’s “acceptance and approval” of their PPP loan applications created a contract to fund the loans. To do so, Plaintiffs must point to an agreement that demonstrates an express commitment to provide the funds. *See, e.g., Krebs v. FDIC*, 851 F. Supp. 430, 433 (M.D. Fla. 1994) (“Plaintiffs are unable to point to any specific documentation, or written agreement or promise by [lender] that demonstrates a *commitment* to fund the end loans.”). There is no allegation that Prestamos’s “acceptance and approval” contained such an express promise.

Third and finally, nothing in the “Loan Documents” contained an express promise by Prestamos to fund the loans, either. The Note and its accompanying documents merely state the terms on which the *borrower* promises to pay “in return for the Loan” and outlines Prestamos’s remedies in the event of default. *See* Promissory Notes, Exs. A, B, C. A note that recites the borrower’s obligations to repay a loan without an express commitment by the lender to actually fund the loan is not a binding contract to lend money. *Mark Andrew of Palm Beaches, Ltd. v. GMAC Com. Mortg. Corp.*, 265 F. Supp. 2d 366, 380–81 (S.D.N.Y. 2003); *In re Vickers*, 275 B.R. 401, 405–06 (Bankr. M.D. Fla. 2001); *Jericho All-Weather Opportunity Fund, LP v. Pier Seventeen Marina & Yacht Club, LLC*, 207 So. 3d 938, 941 (Fla. Dist. Ct. App. 2016).

Neither any agreement between Prestamos and the SBA, Prestamos’s approval of Plaintiffs’ loan applications, nor the Notes created a contract whereby Prestamos promised to fund Plaintiffs’ loans. As Plaintiffs cannot establish this threshold element, their breach of contract claim fails. *See Ryan v. Temple Univ.*, No. 20-cv-02164, 2021 U.S. Dist. LEXIS 77157, at \*22 (E.D. Pa. Apr. 22, 2021) (Gallagher, J.) (“Plaintiffs have not identified a contractual duty that Defendant breached . . . . Therefore, the Complaint fails to adequately plead an essential element necessary to support Plaintiffs’ claims for breach of contract, subjecting those claims to dismissal.”).

**IV. Plaintiffs agreed to release all claims against Prestamos.**

By signing the Note, Plaintiffs expressly agreed to release all claims that might accrue against Prestamos relating to or arising out of the Note or the PPP Loan. Their claims here squarely are encompassed by the Note's release provision. Accordingly, these claims must be dismissed.

Each Note contains an unambiguous and broad release of claims against Prestamos. The Note states that the borrower:

RELEASES, ACQUITS AND FOREVER DISCHARGES the Lender . . . from any and all claims . . . of whatsoever nature or character, whether statutory (including . . . deceptive trade practices claims), in contract or in tort [which] have accrued or may accrue . . . on account of any injures, damages or losses or otherwise arising out of or in any way connected to (i) any extension of credit by the Lender to Borrower on or prior to the date hereof, or (ii) any matter or thing done, omitted or suffered to be done by the Lender- . . . on or prior to the date hereof.

Note § 10, Exs. A, B, C.

Under Pennsylvania law, "it is firmly settled that the intent of the parties to a written contract is contained in the writing itself." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir. 1995) (quoting *Samuel Rappaport Family P'ship v. Meridian Bank*, 657 A.2d 17, 21 (Pa. Super. Ct. 1995)). A court must enforce a contract according to the plain meaning of its terms. *Id.* (citation omitted). The same principle applies when construing release agreements. "[T]he effect of a release must be determined from the ordinary meaning of its language." *Seasor v. Covington*, 670 A.2d 157, 159 (Pa. Super. Ct. 1996). "If the language of the release is clear, the court looks no further, even if the language is broad or general and no matter how 'improvident' the agreement may later prove to be for one of the parties." *Conestoga Ceramic Tile Distribs. v. Travelers Cas. & Sur. Co. of Am.*, No. 2085 C.D. 2012, 2013 Pa. Commw. Unpub. LEXIS 647, at \*9–11 (Pa. Commw. Ct. Aug. 22, 2013) (quoting *Republic Ins. Co. v. Paul Davis Sys. of Pittsburgh S., Inc.*, 670 A.2d 614, 615 (Pa. 1995)).

The release in the Note is precisely the kind that courts have applied to bar claims related to the agreement containing the release. The borrowers in *Front Street Development Associates, L.P. v. Conestoga Bank* sued the lender bank for breach of loan documents and related claims for breach of the duty of good faith and fair dealing and other torts. *See* 161 A.3d 302, 305–06 (Pa. Super. Ct. 2017). On appeal, the court affirmed dismissal of the claims because the governing document contained a provision broadly releasing the lender from “any and all . . . claims . . . , known or unknown . . . whether statutory, in contract or in tort,” relating to or arising out of the loan documents and actions taken in connection with them. *Id.* at 308. Even though borrower’s claims arose several years after the loan document was executed, the court held that the contract language clearly indicated that the release applied even to future claims that traced back to the parties’ agreement, and, therefore, barred the suit. *See id.* at 311–12; *see also, e.g., Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 895–97 (3d Cir. 1975) (parties can release future claims that are contemplated at the time the release is signed).

Applying these well-worn principles here, Plaintiffs’ claims are barred by Section 10 of the Note. Plaintiffs agreed to release Prestamos “for *any and all* claims . . . on account of any injuries . . . arising out of or *in any way connected to* (i) any extension of credit by [Prestamos] to [Plaintiffs] on or prior to the date hereof, or (ii) any [conduct] by [Prestamos] on or prior to the date hereof.” Note § 10 (emphasis added). The provision even specifies that the release encompasses contract, tort, and statutory claims, including “deceptive trade practices claims.” *Id.* The “obvious meaning” of these terms is that Plaintiffs waived their right to bring breach-of-contract, breach-of-good-faith, and California statutory claims—predicated here on “deceptive trade practices”—for Prestamos’s failure to adhere to purported obligations “in any way connected

to” Prestamos’s agreement to loan Plaintiffs money.<sup>4</sup> *See Bowman v. Sunoco, Inc.*, 65 A.3d 901, 909 (Pa. 2013) (release of future unaccrued claims will cover any matter contemplated by the parties at the time the release was signed). Accordingly, Plaintiffs’ claims must be dismissed.

**V. The Complaint fails to state a claim for violation of California’s Unfair Competition Law.**

The California Unfair Competition Law (“UCL”) prohibits a business act or practice that is “unlawful, unfair, or fraudulent.” Cal. Bus. & Prof. Code § 17200. Plaintiffs attempt to allege that Prestamos’s conduct was unlawful and unfair, but not fraudulent. *See* Compl. ¶¶ 123–132. Even were it not barred for the multiple reasons outlined here, Plaintiffs still have failed to make out a plausible claim to relief: first, Plaintiffs do not allege that Prestamos’s conduct was unlawful under the UCL, because they fail to allege an underlying wrongful act; second, Prestamos’s alleged conduct was not unfair as defined by the statute and interpreted by California law; and third, Plaintiffs have not alleged that they are entitled to their requested restitutionary relief. For all of these reasons, Plaintiffs’ UCL claim must be dismissed.

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<sup>4</sup> The release is no less broad because it is for claims related to Prestamos’s “extension of credit” or purported misconduct “on or prior to the date hereof.” *See* Note § 10. Even strictly construing that language, Plaintiffs’ claims—that Prestamos failed to disburse their loans—clearly arise out of the extension of credit Prestamos allegedly agreed to when Plaintiffs executed their Notes and its alleged immediate failure to act. Besides, it would defy all logic to read the release to subject Prestamos to liability for Loan-related misconduct occurring at the stroke of midnight the night the Note was signed, but not that occurring before. *See, e.g., Reed v. Pittsburgh Bd. of Pub. Educ.*, 862 A.2d 131, 136 (Pa. Commw. Ct. 2004) (declining to “impute” a construction of contract language leading to “an absurd result”); *Binswanger of Pa., Inc. v. TSG Real Estate LLC*, 217 A.3d 256, 262 (Pa. 2019) (court should “endeavor to find an interpretation which will effectuate the reasonable result intended [by the contract]”).

**A. Plaintiffs fail to allege that Prestamos’s conduct was “unlawful.”**

In order to allege a violation of the UCL’s “unlawful” prong, Plaintiffs must allege a violation of some other, underlying law. *See Hamilton v. Bank of Blue Valley*, 746 F. Supp. 2d 1160, 1179–80 (E.D. Cal. 2010). “Where a plaintiff cannot state a claim under the ‘borrowed’ law, she cannot state a UCL claim either.” *Rubio v. Capital One Bank (USA), N.A.*, 572 F. Supp. 2d 1157, 1168 (C.D. Cal. 2008) (citation omitted).

The underlying violation Plaintiffs allege is Prestamos’s breach of “the Loan Documents and other legal duties.” Compl. ¶ 126. As argued elsewhere herein, Plaintiffs do not plausibly claim that Prestamos breached any contractual or statutory obligation owed to Plaintiffs. Therefore, because the Complaint alleges no “predicate violation of [another] law,” the UCL claim must be dismissed. *Hamilton*, 746 F. Supp. 2d at 1180.

Additionally, Prestamos’s conduct with respect to administering Plaintiffs’ loan applications specifically is permitted by the rules and guidance governing the PPP. California law recognizes a so-called “safe harbor rule” which prohibits a plaintiff from using “the general unfair competition law” to challenge conduct that is permitted by other statutory law. *See Cel-Tech Comm’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 541 (Cal. 1999). In other words, if a law expressly permits conduct, or prohibits an action based on that conduct, then that conduct cannot be the basis of a UCL claim. *See Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1379 (Cal. Ct. App. 2012).

As argued, *see supra*, there is no private right of action in either the CARES Act or the PPP. Moreover, under the implementing regulations, PPP Lenders (like Prestamos) possess “discretion” to approve or deny loan applications “for a variety of reasons.” *Pinehurst*, 2021 U.S. Dist. LEXIS 186525, at \*10; *see also Profiles*, 453 F. Supp. 3d at 748. Federal law simply does

not bar anything Plaintiffs allege Prestamos to have done. Plaintiffs cannot use the UCL to circumvent those choices by Congress. *See, e.g., Loeffler v. Target Corp.*, 324 P.3d 50, 76–77 (Cal. 2014) (“The UCL cannot properly be interpreted to impose on retailers a duty with respect to sales tax that is contradicted by the statutory scheme governing the sales tax.”); *Lopez v. World Sav. & Loan Ass’n*, 105 Cal. App. 4th 729, 741–42 (Cal. Ct. App. 2003) (“[T]he UCL remains available to remedy a myriad of potential [conduct], *so long as the practice is outside the scope of federal regulation.* (emphasis added)).

**B. Plaintiffs fail to allege that Prestamos’s conduct was “unfair.”**

In consumer cases arising under the UCL, a business practice is “unfair” when “it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *Holt v. Noble House Hotels & Resort, Ltd*, 370 F. Supp. 3d 1158, 1163 (S.D. Cal. 2019) (citation omitted). California courts employ two tests to determine whether a business practice is unfair: one, explained in *Cel-Tech*, 973 P.2d at 544, assessing whether the alleged unfairness is “tethered to some legislatively declared policy or proof of some actual or threatened impact on competition”; or two, a balancing test weighing “the utility of the defendant’s conduct against the gravity of the harm to the alleged victim,” *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886 (Cal. Ct. App. 1999). *See also Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 735–36 (9th Cir. 2007) (discussing split in California appellate courts).

Under either test, the allegations here are inadequate. Although whether conduct is “unfair” often is a fact-intensive question, California courts have not hesitated to dismiss claims similar to Plaintiffs’ outright. *See, e.g., Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 265 (Cal. Ct. App. 2003) (car dealers’ practice of receiving extra fees related to financing was not illegal and

it was “scarcely unfair” for dealers to “seek a profit on the credit services they provide”); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 374–75 (Cal. Ct. App. 2001) (conduct that was not unreasonable restraint on trade could not, as a matter of law, be “unfair” under the UCL). Courts in this circuit also have denied UCL unfair-conduct claims, especially where the pleadings fail to weigh relevant policy considerations or where they challenge conduct regulated or authorized by federal law. *See, e.g., SEPTA v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 707 (E.D. Pa. 2015).

**C. Plaintiffs fail to allege that they are entitled to restitution.**

The UCL provides only two remedies for an injured consumer: restitution and injunctive relief. Plaintiffs here only seek “restitution for the amount of the wrongfully withheld PPP loan proceeds.” Compl. ¶ 132. They cannot get restitution, however, because they do not allege that Prestamos took property from Plaintiffs in which they had a vested interest. Accordingly, failing to allege that they are entitled to any relief, Plaintiffs’ claim must be denied.

An order of restitution is one “compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.” *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 944–45 (Cal. 2003). Restitution is only appropriate to restore the “status quo” by “returning to the plaintiff funds in which he or she has an ownership interest.” *Id.* The interest must be “vested”; a mere “contingent expectancy of payment” is not recoverable under the UCL. *Ozeran v. Jacobs*, 798 F. App’x 120, 122–23 (9th Cir. 2020). And a plaintiff cannot obtain restitution to disgorge the defendant of money it received from a third party. *Drew v. Am. Home Prods. (In re Diet Drugs Prods. Liab. Litig.)*, No. 00-cv-21044, 2012 U.S. Dist. LEXIS 49319, at \*5 (E.D. Pa. Apr. 9, 2012).

Here, Plaintiffs acknowledge in the complaint that they never possessed the loan proceeds they now allege Prestamos was enriched by. *See, e.g.*, Compl. ¶¶ 74, 90, 99. Moreover, they allege that the only payments Prestamos received were from SBA, a third party. *See, e.g., id.* ¶¶ 55–63, 127. Because the expectation of receiving a loan under a promissory note—when Plaintiffs have not paid anything to the defendant—does not confer on Plaintiffs a vested ownership interest in those loan proceeds, they are not entitled to recover that loan through restitution. *Cf. Pinehurst*, 2021 U.S. Dist. LEXIS 186525, at \*9–11.

### **CONCLUSION**

For the foregoing reasons, Prestamos respectfully requests that the Court dismiss Plaintiffs’ Complaint, with prejudice.

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