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

ALICIA MARSHALL, DANIEL PRONSKY, PARIS TOWNSEND, NANCILEE HOLLAND, LEONA OWSLEY, KOLAWOLE AHMADOU, KIANA DERVIN, KRISTINA HENDERSON, DUSTIN INNIS, KELLY STALNAKER and JAMIE JONES, individually and on behalf of all others similarly situated, Plaintiffs, v. PRESTAMOS CDFI, LLC, Defendant.	Case No. 5:21-cv-04337-JMG

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

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TABLE OF CONTENTS

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 Amended Complaint asserts breach of contract claims against Prestamos on behalf of a putative nationwide class and statutory consumer fraud claims under the laws of three states on behalf of subclasses from each of those states—all based on the inadequately pled experiences of the named Plaintiffs whose bank accounts did not receive deposits of PPP loans from Prestamos. This Court should dismiss the Amended 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. Other courts have concluded that a PPP applicant is not entitled to a loan from any particular lender and does not, therefore, suffer a cognizable injury by being denied it. Plaintiffs do not explain how the injuries to their businesses wrought by the pandemic are traceable to any alleged delay on the part of Prestamos. In fact, allegations demonstrate that the delay in funding borrowers' PPP loans could have been attributable to causes other than Prestamos's conduct, such as borrowers' banks flagging and rejecting attempts by Prestamos to deposit their 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.). Plaintiffs are residents of nine states, and they cannot bring contractual claims under the laws of 41 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 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 Amended 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 Amended Complaint, however, cites *no* contractual provision in any loan document obligating Prestamos to guarantee the funding of Plaintiffs' loans, let alone by a specific date; it is black-letter law that a lender owes no duty of care to a borrower to go above and beyond their contractual terms. 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 Amended Complaint fails to state a claim under any of the state consumer fraud statutes because the allegations fail to show how Plaintiffs or Prestamos are covered by these laws or that Plaintiffs are entitled to the relief each statute authorizes.

For the reasons set forth below, the Court should dismiss the Amended 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.*, Am. Compl., ECF No. 18, ¶ 48.

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 for individuals, families, and businesses affected by the pandemic. *Id.*; *see also* Am. Compl. ¶ 27. 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. Am. Compl. ¶ 30.

Applying for PPP Loans. As detailed in the Amended 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* Am. Compl. ¶¶ 38–41. 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* Am. Compl. ¶ 37.[1] The form for second-draw loans—SBA Form 2483-SD—contains similar language. *Id.*[2] This form is to be completed by the applicant and submitted to an SBA participating lender.

Without citing any source of this purported contractual 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.* ¶ 39. 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.

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[1] 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 Feb. 11, 2022).

[2] This form is located at https://www.sba.gov/document/sba-form-2483-sd-ppp-second-draw-borrower-application-form (last accessed Feb. 11, 2022).

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.* (permitting non-bank lenders to rely on the anti-money laundering and customer identification programs of a federally insured bank or credit union). Congress granted all lenders approved to make other Section 7(a) loans delegated 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's 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 Amended Complaint states that Prestamos processed 494,415 PPP loans. *See* Am. Compl. ¶¶ 7, 61–62; *see also id.* ¶¶ 63–71 (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* Am. Compl. ¶¶ 55–57, 60. Blueacorn was created in 2020 to help small businesses find PPP lenders, as, according to an article cited in the Amended 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* Am. Compl. ¶¶ 60, 62. Blueacorn's technology streamlined the PPP application process, which made it easier for a lender to make smaller loans to smaller businesses. As shown by the loan documents, borrowers asked Prestamos to disburse their PPP loans to the bank accounts the borrowers identified. *Id.* ¶ 78.

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.* ¶ 240, 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.

The premise underlying Plaintiffs' allegations that Prestamos failed to "disburse the proceeds" of Plaintiffs' individual loans, as if Prestamos received funds reserved for each Plaintiff, is demonstrably false. Prestamos issued loans with money it borrowed from the federal government. *See* Am. Compl. ¶ 73. The Federal Reserve Bank, through the Paycheck Protection Program Liquidity Facility ("PPPLF"), extended credit at 35 basis points to institutions like Prestamos, which pledged the PPP loans as collateral at face value. *See* Am. Compl. ¶¶ 63–64 (citing Federal Reserve documents); 85 Fed. Reg. 38282, 38283.

Plaintiffs' causes of action. Despite a lengthy pleading winding through Prestamos's participation in the PPP, much of what is contained in the Amended Complaint is irrelevant to Plaintiffs' causes of action. Plaintiffs are alleged sole proprietors who reside in California, Pennsylvania, Missouri, Illinois, Washington, Michigan, Nevada, and Arizona, who manage small businesses. Am. Compl. ¶¶ 11–21. 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.* ¶¶ 74–201. In each case, Plaintiffs allegedly inquired with SBA about the status of their loans and made attempts to obtain the loan proceeds, although they provide no or sparse details about those attempts. *See id.* Even where Plaintiffs purport to provide details through their amendments, interestingly, ***none of the eleven*** Plaintiffs allege what communications they had with their individual banks regarding their PPP loans and if so, what, if anything, they learned, such as whether and why their individual bank rejected Prestamos's attempt to fund the loan.

Plaintiffs assert four 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* Am. Compl. ¶¶ 224, 230.

Next, Plaintiffs allege that Prestamos violated California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("CA UCL"), because its failure to fund PPP loans "constitute[d] unlawful and unfair business acts or practices" within the meaning of the CA UCL. *See id.* ¶¶ 235–47. Because of these violations, Plaintiffs allege they "are entitled to equitable relief" such as restitution and injunctive relief directing Prestamos to pay Plaintiffs the loan proceeds. *Id.* ¶ 247. Plaintiffs also claim that Prestamos engaged in "deceptive" and "unfair" conduct under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1, *et seq.* ("IFCA"), *see* Am. Compl. ¶¶ 248–62, and the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.01, *et seq.* ("OCSPA"), Am. Compl. ¶¶ 263–72.

The Promissory Note. The Promissory Note, which is an SBA form, confers *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[3] §§ 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.

ARGUMENT

Plaintiffs' Amended 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 standing to bring their claims. Nor do Plaintiffs have a *right* to bring their state law claims, which are veiled attempts to use state law 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 Amended 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."

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[3] A copy of the Promissory Note, identical versions of which each Plaintiff signed, is attached to the Amended Complaint as Exhibit A.

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). 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. <u>Plaintiffs do not have standing to bring their claims.</u>

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

In order to invoke federal court jurisdiction, Plaintiffs must "clearly . . . allege facts demonstrating" that they have standing to sue. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Two elements of standing are relevant here. First, Plaintiffs must show that they "suffered an injury in fact," which "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 v. Defenders of Wildlife,* 504

U.S. 555, 560–61 (1992)). Second, the alleged injury must be "fairly traceable to the challenged conduct of the defendants," and not, for example, result "from the independent action of some third party not before the court." *Id.* at 366 (quotation omitted). Failure to establish either of these prongs—and the Amended Complaint fails both—requires dismissing Plaintiffs' claims. *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016).

The allegations do not make out an injury in fact because, as other courts have recognized, an applicant for a PPP loan is not necessarily entitled to receive it. In *Pinehurst Neuropsychology, PLLC v. First-Citizens Bank & Tr. Co.*, the court dismissed, for lack of standing, a complaint by a PPP applicant alleging that the lender took too long to fund the applicant's loan. No. 20-cv-636, 2021 U.S. Dist. LEXIS 186525 (M.D.N.C. Sept. 29, 2021). The court held that the plaintiff "fail[ed] to establish that it ha[d] a legally protected interest in receiving any loan from [defendant], irrespective of a delay," because 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 *9–11 (citing *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 748 (D. Md. 2020)). It was not a cognizable injury to be deprived of something the plaintiff was not *entitled* to receive.

The *Pinehurst* plaintiff's alleged injury—economic harm caused by the lender's purported delay in processing plaintiff's loan—mirrors Plaintiffs' allegations exactly, and the Court's conclusion should follow. Prestamos is delegated authority by SBA to disburse federally-guaranteed loans at its discretion using underwriting processes to verify that a borrower satisfies each of the program's expansive eligibility criteria. SBA approval of a loan application—as allegedly occurred for Plaintiffs here—is necessary, but not sufficient, for a borrower's receipt of loan funds in their individual bank accounts, which may be subject to additional verification processes. *See, e.g.*, 86 Fed. Reg. 3692, 3708 (PPP rule describing requirements for anti-money laundering compliance program, which may include reliance upon customer identification program of federally insured depository institution or federally insured credit union). Moreover, SBA approval did not result in the transfer of funds to Prestamos specific to any individual Plaintiff's application; rather, it merely identified the loan amount the agency would forgive for the borrower and guarantee for the lender. Indeed, Prestamos used its own funds that it borrowed—at 35 basis points—from the Federal Reserve through PPPLF to make PPP loans and transfer funds to bank accounts identified by borrowers. *See* Am. Compl. ¶¶ 63–64 (citing Federal Reserve documents); 85 Fed. Reg. 38282, 38283. As the *Pinehurst* court and others have concluded, and as the case with Plaintiffs here, an applicant does not have standing to sue to enforce a particular lender to disburse a PPP loan. 2021 U.S. Dist. LEXIS 186525, at *9–11; *Elizabeth M. Byrnes, Inc. v. Fountainhead Com. Cap., LLC*, No. 20-cv-4149, 2021 U.S. Dist. LEXIS 227046, at *10 (C.D. Cal. Nov. 24, 2021) (dismissing claim because "Plaintiff, of course, was not guaranteed to have her loan application approved, or otherwise entitled to any 'use of money'" and caused her own harm by "refraining from applying elsewhere"); *Scherer v. Wells Fargo Bank, N.A.*, No. 20-cv-1295, ECF No. 20, at 3 (S.D. Tex. Apr. 29, 2020) (denying injunction) ("Plaintiffs fail to show how Plaintiffs would suffer irreparable injury if not given access to a loan specifically from Wells Fargo [and] why Plaintiffs could not obtain loans under the PPP through another lender."); *Profiles*, 453 F. Supp. 3d at 755 ("Since the evidence on the current record shows that there are thousands of institutions participating in PPP, and several that accept loans from new customers, BofA, by definition, has not denied Plaintiffs access to the PPP.").[4]

The Amended Complaint does not state an injury in fact for another reason—it provides no detail whatsoever as to the nature or extent of the harm Plaintiffs purportedly suffered. By not receiving a PPP loan, Plaintiff Marshall was "deprived . . . of funds that would have directly assisted in the operation of her . . . business and resulted in lost opportunities and other consequential damages." Am. Compl. ¶ 97. The other Plaintiffs suffered identically vague injury. *See id.* ¶¶ 109, 118, 132, 141, 150, 159, 168, 180, 189, and 201. Conclusory assertions such as these do not suffice to trigger federal jurisdiction.[5] *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 288 (3d Cir. 2018) ("While the evidentiary burdens placed on a plaintiff at the pleading stage are minimal, our precedent requires the plaintiff to do more than simply pair a conclusory assertion of money lost with a request that a defendant pay up.").

As for traceability, each Plaintiff fails to allege whether and why any of the harm they supposedly suffered was attributable to Prestamos. The pleadings make clear it was *the pandemic* that hurt Plaintiffs' businesses. *See* Am. Compl. ¶¶ 75, 102, 111, 120, 134, 143, 152, 161, 170, 182, and 191. And Plaintiffs provide no explanation for how Prestamos's disbursement of loan proceeds

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[4] As these opinions demonstrate, Plaintiffs' charge that they were unable to apply for a PPP loan elsewhere do not reflect the settled view of the law.

[5] Plaintiffs also allege that they were harmed because they are "potentially obligated . . . to repay funds they never received" and must swear that they used loan funds they never received if they seek loan forgiveness. Am. Compl. ¶¶ 98, 99. These are too speculative to establish standing to sue. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2212 (2021) (speculative injury insufficient to support Article III standing).

would resolve the impact of Covid-19 on their businesses.[6] Further, it is unclear Plaintiffs' receipt of the loan was up to Prestamos at all. The Amended Complaint itself offers *other* reasons why borrowers did not receive their loans, including that some borrowers' banks rejected attempts by Prestamos to fund a PPP loan. *See, e.g.*, Am. Compl. ¶ 204.f. This does not adequately trace any harm to Prestamos, and the Amended Complaint must be dismissed. *See Pinehurst*, 2021 U.S. Dist. LEXIS 186525, at *8–9 (dismissing claim in part because it lacked detail about *whether* or *why* the delay was attributable to the defendant lender).

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. Am. 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*. 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 plaintiffs' standing

[6] For this reason, too, Plaintiffs fail to meet the third element of standing—redressability. *See Spokeo*, 136 S. Ct. at 1547; *Profiles*, 453 F. Supp. 3d at 756 (denying relief because "[t]o grant relief, the Court must assume . . . that the [PPP] loan amount would serve as a panacea for the lost revenue in their respective businesses.").

until class certification and concluding that their allegations did not "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* insofar as they arise in states where no plaintiff resides.

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.

"[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, 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).[7] Perhaps this was because the CARES Act and related rules already provide a robust enforcement scheme, which "tend[s] to contradict a congressional intent to create privately enforceable rights." *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 CARES Act). In short, "nothing in its text evidences Congress's intent to enable PPP loan applicants to bring civil suits against PPP lenders." *Profiles*, 453 F. Supp. 3d at 748–52.

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). 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 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 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-

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[7] *Accord Profiles, Inc.*, 453 F. Supp. 3d at 748 (no express right of action in CARES Act); *Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996) (same, in the Small Business Act, the CARES Act's parent statute); *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) (no implied right of action).

price obligations instead.”). *See also, e.g.*, *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) (plaintiff could not sue for breach of contract reflecting an obligation under a statute without a private right of action); *Mankodi v. Trump Marina Assocs. LLC*, 525 F. App’x 161, 166 (3d Cir. 2013) (same).

The same rationale has borne out in similar cases involving attempts to enforce the PPP. *See, e.g.*, *Johnson v. JPMorgan Chase Bank*, 488 F. Supp. 3d 144, 159 & n.19 (S.D.N.Y. 2020) (dismissing PPP claim because court could not “enforce agreements that merely incorporate obligations under a statute that does not itself permit the []party to enforce it”); *Profiles*, 453 F. Supp. 3d at 750–51; *Radix Law PLC v. JPMorgan Chase Bank NA*, 508 F. Supp. 3d 515, 520 (D. Ariz. 2020) (plaintiff’s state common law and statutory claims “are not viable because they are in essence attempts to enforce the CARES Act”). Such are the circumstances here. No matter the named cause of action, the *only* obligations Plaintiffs allege Prestamos breached are those it purportedly had under the PPP to disburse their loans within ten days of SBA approval and cancel the loans after disbursement did not occur. *E.g.*, Am. Compl. ¶¶ 39, 40, 93, 94, 228. If it were to award the relief Plaintiffs seek, the Court would bypass the comprehensive enforcement scheme authorized by Congress and promulgated by SBA and compel Prestamos to give money to individuals who may not be entitled to receive it and where Prestamos would not be protected by the federal guarantees that ensured private lender participation in this federal relief program.

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. <u>The Amended Complaint fails to state a claim for breach of contract.</u>

Plaintiffs' allegations fail even to make out a simple claim for breach of contract. The existence of a contract is a threshold element of a claim for breach. *See 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 via the Loan Documents," (2) "its acceptance and approval of Plaintiffs' PPP loan applications," and (3) "as the counterparty to the Loan Documents." Am. Compl. ¶ 224. None of these actually constituted a contract obligating Prestamos to fund Plaintiffs' loans, let alone a guarantee that the funds would be deposited in the bank accounts that they identified.

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) 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 or a guarantee that their personal banks would not reject a PPP loan transaction.

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 generally* Note. 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). That some documents *reference* a loan does not equate to an explicit promise to fund a loan.

Neither any agreement between Prestamos and the SBA, Prestamos's approval of Plaintiffs' loan applications, nor the Loan Documents 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.

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—including a release agreement—according to the plain meaning of its terms. *Id.* (citation omitted); *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*" Prestamos's extension of credit to Plaintiffs or any of its conduct. 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 statutory claims for Prestamos's failure to adhere to purported obligations "in any way connected to" Prestamos's agreement to loan Plaintiffs money.[8] *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. Plaintiffs fail to state a claim for violation of the CA UCL.

The California Unfair Competition Law prohibits a business act or practice that is "unlawful, unfair, or fraudulent." Cal. Bus. & Prof. Code § 17200. Plaintiffs allege that Prestamos's conduct was unlawful and unfair, but not fraudulent. *See* Am. Compl. ¶¶ 242–43. The pleadings fail to make out a plausible claim to relief: first, Plaintiffs do not allege that Prestamos's conduct was unlawful under the CA UCL, because they fail to allege an underlying wrongful act; second, Prestamos's alleged conduct was not unfair as defined by California law; and third, Plaintiffs have not alleged that they are entitled to their requested equitable relief. For all of these reasons, Plaintiffs' CA UCL claim must be dismissed.

A. Plaintiffs fail to allege that Prestamos's conduct was "unlawful."

In order to allege a violation of the CA 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

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[8] The release is no less broad because it is for claims related to Prestamos's conduct "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 deceit. 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 "find an interpretation which will effectuate the reasonable result intended [by the contract]").

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 accompanying legal duties." Am. Compl. ¶ 239. As argued elsewhere herein, Plaintiffs do not plausibly claim that Prestamos breached any obligation owed to Plaintiffs. Therefore, because the Complaint alleges no "predicate violation of [another] law," the CA 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 "safe harbor rule" which prohibits using "the general unfair competition law" to challenge conduct that is statutorily permitted. *See Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 541 (Cal. 1999). If a law expressly permits conduct, or prohibits an action based on that conduct, then that conduct cannot be the basis of a CA UCL claim. *See Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1379 (Cal. Ct. App. 2012). As argued, 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 CA 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 . . . 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 CA 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 CA 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 equitable relief.

The CA UCL provides only two remedies for an injured consumer: restitution and injunctive relief. Plaintiffs here seek both. Am. Compl. ¶ 247. But both are equitable in nature, and are foreclosed by federal law that equitable relief is unavailable where a legal remedy may be sufficient. And Plaintiffs specifically cannot get restitution because they do not plausibly 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.

Even when applying state substantive law, federal courts must follow federal law that equitable relief is only available where the plaintiff establishes they lack an adequate remedy at law. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 842–44 (9th Cir. 2020) (collecting cases, including *Hertz v. Record Publ'g Co.*, 219 F.2d 397, 398 n.2 (3d Cir. 1955)). The Amended Complaint alleges in a passing and conclusory manner only that Plaintiffs are entitled to equitable relief "in the alternative and to the extent that their breach of contract claim fails to adequately award their damages." Am. Compl. ¶ 247. This hardly suffices to state that a legal remedy is inadequate, especially because the equitable relief mirrors the damages sought exactly. *Id.* (seeking injunctive relief "directing Prestamos to fund [the] loans" or restitution in the amount of the "wrongfully withheld PPP loan proceeds"). Thus, the CA UCL claim should be dismissed. *Sonner*, 971 F.3d at 844 (dismissing CA UCL claim because the complaint failed to allege the plaintiff lacked an adequate legal remedy and sought "the same sum in equitable restitution" as it "requested in damages"); *Elizabeth M. Byrnes*, 2021 U.S. Dist. LEXIS 227046, at *15–16 (dismissing CA UCL claim related to a PPP loan for the same reasons).

Additionally, Plaintiffs are not entitled to an order of restitution, which is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons . . . who had an ownership interest in the property . . . ." *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. *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.*, Am. Compl. ¶ 83. Moreover, they allege that the only payments Prestamos received were from SBA, a third party. *See, e.g.*, *id.* ¶¶ 62–73. 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.

VI. <u>Plaintiffs fail to state a claim under the ICFA.</u>

The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") prohibits "unfair or deceptive acts or practices" and affords a remedy to "consumers" who are harmed by such practices. 815 Ill. Comp. Stat. 505/1. This claim is untenable for several reasons.

A. The ICFA claim duplicates Plaintiffs' contract claim.

Illinois law is clear that the breach of a contract cannot give rise to a consumer fraud claim; if the alleged consumer fraud and contractual claim "rest on the same factual foundation," the claim must be dismissed. *Turner v. Orthopedic & Shoulder Ctr., S.C.*, 82 N.E.3d 801, 807 (Ill. Ct. App. 2017) (quotations omitted). Indeed, the basis for Plaintiffs' ICFA claim is that Prestamos "falsely communicated its promises to" "fulfill the terms of its written agreements with" Plaintiffs, hold Plaintiffs to obligations in those agreements, and otherwise act as a "Lender." Am. Compl. ¶ 250. "The very language of [the] amended complaint proclaims that the asserted consumer fraud was a breach of contract," and, accordingly, the claim should be dismissed. *Turner*, 82 N.E.3d at 807–08 (ICFA claim in complaint specifically referenced contractual obligations); *see also Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801, 844 (Ill. 2005) ("[A] 'deceptive act or practice' involves more than the mere fact that a defendant promised something and then failed to do it."); *Cafferty Clobes Meriwether & Sprengel, LLP v. XO Communs. Servs.*, 190 F. Supp. 3d 765, 772 (N.D. Ill. 2016) ("Even a widespread or systemic breach of contract does not suffice to state a claim for consumer fraud under the statute, notwithstanding a plaintiff's assertion that the breach implicates consumer-protection concerns." (quotation omitted)).

B. The ICFA claim is subject to, but does not meet, a heightened pleading standard under Rule 9(b).

Plaintiffs' ICFA claim alleges fraudulent conduct on the part of Prestamos and is therefore subject to a heightened pleading standard which Plaintiffs fail to meet. *Duarte v. Convergent Outsourcing, Inc.*, No. 12-cv-06051, 2018 U.S. Dist. LEXIS 117783, at *5 (N.D. Ill. July 16, 2018) (citation omitted); *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014) (a claim of "unfair" conduct under the ICFA is subject to Rule 9(b) when the alleged conduct still is "premised upon the primary claim" that the defendant engaged in deception). Federal Rule of Civil Procedure 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud." And Plaintiffs' allegations that "Prestamos" "concealed and suppressed material facts concerning funding" Plaintiffs' loans "[i]n the course of its business," Am. Compl. ¶ 250, are vague and do not come close to specifying the "who, what, when, where, and how of" the alleged fraud that is necessary to sustain their claim. *Camasta*, 761 F.3d at 737. Moreover, nowhere in the complaint do Plaintiffs allege, even conclusorily, that Prestamos *intended* to deceive Plaintiffs, a required element of an ICFA claim. *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 608 (7th Cir. 2013).

C. Plaintiffs' vague allegations do not make out an actionable ICFA claim.

Plaintiffs fail to describe conduct on the part of Prestamos that is covered by the statute. The ICFA applies to "unfair" as well as deceptive conduct. To determine whether conduct is "unfair," Illinois courts balance three factors: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960–61 (Ill. 2002) (adopting the test set forth in *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)). Plaintiffs may pepper these terms throughout the Amended Complaint (albeit in connection with other claims, *e.g.*, Am. Compl. ¶¶ 243–44) but the "bare assertion of unfairness without describing in what manner the [conduct] either violate[s] public policy or [is] oppressive is insufficient to state a cause of action" under the ICFA. *Robinson*, 775 N.E.2d at 963 (dismissing ICFA claim based on allegations that financing company charged excessive penalties, failed to disclose capitalization charges, and engaged in unfair early termination practices). Plaintiffs' gripe with Prestamos is that it allegedly breached an SBA-form promissory note, despite the pleadings recognizing the existence of other causes (*e.g.*, Plaintiffs' banks rejecting the loans). Without more, the allegations that Prestamos breached a contract do not rise to the level of violating public policy or "oppressive" conduct. Plaintiffs' ICFA claim should be dismissed.

VII. Plaintiffs fail to state a claim under the Ohio statutes cited in their Amended Complaint.

Count Four is captioned "Violation of the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.01, *et seq.*" Am. Compl. at 58. But the allegations that follow the caption instead seek relief under a different statute, the Ohio Deceptive Trade Practices Act, Ohio Rev. Code Ann. § 4165.01–.04 ("ODTPA"). Plaintiffs fail to state a claim under either law.

A. The OCSPA does not apply to loans or other commercial transactions.

The Ohio Consumer Sales Practices Act ("OCSPA") prohibits unfair or deceptive acts or practices "in connection with a consumer transaction." Ohio Rev. Code Ann. § 1345.02(A). The statute, however, "specifically excludes transactions between financial institutions and their customers in its definition of consumer transaction." *Clark v. Lender Processing Servs., Inc.*, 949 F. Supp. 2d 763, 776 (N.D. Ohio 2013); Ohio Rev. Code Ann. § 1345.01(A). The OCSPA further limits "consumer transactions" to those that are entered into "for purposes that are primarily personal, family, or household." Ohio Rev. Code Ann. § 1345.01(A). A PPP loan transaction, which is made between a financial institution and a borrower for business rather than personal use, is not a "consumer transaction" under the OCSPA.[9]

B. The ODTPA does not protect Plaintiffs because they are consumers under the statute.

Plaintiffs also have not alleged the kind of commercial injury necessary to state a claim under the ODTPA. Ohio courts look to Lanham Act cases to interpret the ODTPA, as the two statutes are analogous. *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1431 (S.D.

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[9] Plaintiffs' OCSPA class claims are not viable because Plaintiffs do not allege that any violation was previously declared deceptive by one of the methods identified in Ohio Rev. Code Ann. § 1345.09(B). *See Phillips v. Phillip Morris Cos. Inc.*, 290 F.R.D. 476, 478–82 (N.D. Ohio 2013).

Ohio 1990). Consumer suits are barred under the Lanham Act because "a plaintiff must allege an injury to a commercial interest in reputation or sales" to come within the statute's zone of interests. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). Applying these principles, nearly all federal courts to have reached the question hold that the ODTPA bars consumer suits. *See Borden v. Antonelli Coll.*, 304 F. Supp. 3d 678, 685 (S.D. Ohio 2018) (collecting cases).[10] So has every Ohio appellate court to have considered the question. *See Torrance v. Rom*, 157 N.E.3d 172, 188 (Ohio Ct. App. 2020); *Michelson v. Volkswagen Aktiengesellschaft*, 99 N.E.3d 475, 479 (Ohio Ct. App. 2018); *Hamilton v. Ball*, 7 N.E.3d 1241, 1253 (Ohio Ct. App. 2014); *Dawson v. Blockbuster, Inc.*, No. 86451, 2006 Ohio App. LEXIS 1138 (Ohio Ct. App. Mar. 16, 2006). Absent an indication that the Ohio Supreme Court would decide the matter differently (and the Sixth Circuit, in *Holbrook v. La.-Pac. Corp.*, 553 F. App'x 493, 498 (6th Cir. 2013), found none), these decisions must be afforded significant weight. *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993).

This class action is a consumer suit according to Plaintiffs' amended complaint. While Plaintiffs artfully omit use of the word "consumer" in Count Four (ODTPA), they identify members of the *Illinois* subclass as "consumers," Am. Compl. ¶ 254, and there is no basis in the complaint for this distinction. Taking Plaintiffs at their word, as consumers, Plaintiffs cannot sue under the ODTPA. None of the Plaintiffs are corporate entities and the fact that the loans were for their sole proprietorships is beside the point; Plaintiffs still have not alleged an "injury to a

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[10] Only two cases have held otherwise, and neither has been followed by other courts. *See Schumacher v. State Auto. Mut. Ins. Co.*, 47 F. Supp. 3d 618, 632 (S.D. Ohio 2014); *Bower v. Int'l Bus. Machs., Inc.*, 495 F. Supp. 2d 837, 843 (S.D. Ohio 2007).

commercial interest in reputation or sales." *Lexmark*, 572 U.S. at 118; *see also id.* ("Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the [Lanham] Act's aegis."). Their claim should be dismissed.

C. The allegations do not make out an ODTPA claim in any event.

Even if Plaintiffs were covered by the statute, they still have not stated an ODTPA claim. Prestamos did not falsely promise to "act as a 'Lender,'" Am. Compl. ¶ 268, just because it did not fund these Plaintiffs' loans: a financial institution need not lend money to anyone who asks for it to hold itself out as a lender. Nor did Prestamos fail to perform its obligations to Ohio borrowers or fulfill the terms of its written agreements with them, because no agreement included an absolute guarantee that Plaintiffs would receive a PPP loan, particularly in light of the impediments that Plaintiffs' amended complaint identifies. And, like the ICFA, a breach of contract does not suffice to give rise to a claim under the ODTPA. *See JP Morgan Chase Bank, N.A. v. Safeco Ins. Co. of Am.*, No. 02-16014, 2012 U.S. Dist. LEXIS 74570, at *12 (N.D. Ohio May 30, 2012) (dismissing ODTPA claims as failing to allege independently tortious conduct or misrepresentations outside of the "contract documents). Lacking sufficient allegations of deception or intent, and based merely on the same conduct as their contract claim, Plaintiffs' ODTPA claim should be dismissed.

CONCLUSION

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

Dated: February 14, 2022

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