EXHIBIT A

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

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

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**pro hac vice admission to be sought*

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The first lines of Plaintiffs' Opposition Brief reveal the nature of this action: Plaintiffs purport to be waging "a vitally important public law enforcement proceeding." But Congress was clear that a lender's compliance with the PPP is ***for the SBA to police***, not for private borrowers; courts nationwide have recognized that the PPP does not entitle borrowers to a private cause of action. Permitting this case to proceed against Prestamos—a mission-driven community development financial institution—is not what Congress intended.

Plaintiffs' claims are meritless, in any event, and Plaintiffs' opposition repeatedly dodges key precedent or misdirects on the issues. For the reasons set forth in Prestamos's Opening Brief and below, the Court should dismiss the Amended Complaint with prejudice.

ARGUMENT

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

Plaintiffs' survey of the boilerplate standards governing jurisdictional challenges does not meaningfully confront the reality that courts repeatedly have dismissed claims *just like Plaintiffs'* for lack of Article III standing. *See* Def. Br. at 12–14. Their only counterargument is that their loan applications, unlike other PPP plaintiffs, had made it to approval. *See* Opp. Br. at 10. But Plaintiffs were not any more "entitled" to a PPP loan from Prestamos than any other applicant. Indeed, SBA regulations state several times that an individual does *not* have a right to a loan. *See, e.g.*, 86 Fed. Reg. 8283, 8285 (Feb. 5, 2021) (authorizing SBA at any time to investigate a recipient's eligibility for a loan (citing 15 U.S.C. § 634(b)(11)); *id.* at 8288 (explaining that SBA and lender may determine even a disbursed loan is not eligible for forgiveness).

This, too, demonstrates why any harm Plaintiffs suffered is not traceable to Prestamos. In light of the myriad explanations for why an "approved" borrower may be denied a loan, Plaintiffs' allegations do not plausibly demonstrate that their non-receipt of a PPP loan was "*because of* [Prestamos's] inaction." *Ironworks Dev. Llc v. Truist Bank*, No. 21-32, 2021 U.S. Dist. LEXIS

238037, at *7–8 (W.D. Va. Dec. 7, 2021) ("[T]he Complaint does not foreclose the possibility that [plaintiff's] loan was rejected because of the conduct of the SBA, or [plaintiff] itself; or simply because funds were more limited than applicants."). And while Prestamos's motion underscores it multiple times, Plaintiffs' opposition fails to dispute that the Amended Complaint 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* Def. Br. at 4, 9, 15, 20, 29.

Plaintiffs' other arguments fail. Their contention that they suffered a concrete harm because they *might* be "obligated to repay," and "precluded [from] applying for forgiveness" of, loans that they allegedly *did not receive* is illogical—none of them were responsible for repaying the loan. Opp. Br. at 2, 7, 11. Nothing in the law foreclosed Plaintiffs from withdrawing their applications from Prestamos if dissatisfied. Finally, although a plaintiff's well-pleaded claims about losing money to which they are entitled (and Plaintiffs were *not* entitled to any money here) may present a cognizable injury-in-fact, Plaintiffs' allegations are "conclusory assertion[s] of money lost [paired] with a request that a defendant pay up," which are legally insufficient. *See* Def. Br. at 14 (citations omitted).

At the very least, the Court should dismiss Plaintiffs' claims insofar as they are brought under the laws of states in which the named Plaintiffs were not injured. The cases Plaintiffs cite, Opp. Br. at 11–12, do not address this issue. *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3d Cir. 2015) (district court's dismissal of nationwide class was not subject of appeal); *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017) (involving claim under federal law); *Bombin v. Sw. Airlines Co.*, 529 F. Supp. 3d 411 (E.D. Pa. 2021) (Gallagher, J.) (addressing class-action waiver); *Bodor v. Maximus Fed. Servs., Inc.*, No. 19-cv-5787, 2021 U.S. Dist. LEXIS 203823 (E.D. Pa. Oct. 22, 2021) (Gallagher, J.) (federal-law claim).

Plaintiffs are exactly right, though, that at this stage, the "standing inquiry focuses solely on the class representatives." Opp. Br. at 11 (quotation omitted). And that inquiry involves whether a named plaintiff can "demonstrate standing for ***each claim*** he seeks to press." *Neale*, 794 F.3d at 359 (3d Cir. 2015) (quotation omitted) (emphasis added). As this Court and others in the Circuit have recently held, this means that plaintiffs cannot bring claims based on state laws under which they themselves were not injured. Def. Br. at 16; *see also, e.g.*, *In re Sensipar Antitrust Litig.*, MDL No. 2895, 2022 U.S. Dist. LEXIS 43561, at *46–48 (D. Del. Mar. 11, 2022); *Cohen v. Subaru of Am., Inc.*, No. 20-8442, 2022 U.S. Dist. LEXIS 42511, at *17–18 (D.N.J. Mar. 10, 2022); *In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 758 (E.D. Pa. 2014).

II. Plaintiffs cannot use state law to enforce Prestamos's obligations under the PPP.

Plaintiffs' claims are not viable because they seek to enforce Prestamos's compliance with a federal statute that does not give them the right to do so. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985) (quotation omitted). Honoring this fundamental precept, courts nationwide routinely dismiss state-law claims predicated on alleged violations of federal laws Congress did not permit private plaintiffs to enforce—including the PPP. *See* Def. Br. at 17–18.[1] Plaintiffs contend their claims are different because they are more direct. Opp. Br. at 17–18. But it is unclear why that means Plaintiffs' independent state-law claims should be treated any differently than those asserted, and rejected, in the cases Prestamos cites. *Cf.* Opp. Br. at 17.

Plaintiffs also fault Prestamos for "fail[ing] to address" preemption doctrine. Opp. Br. at 13. But preemption is *not* a basis for Prestamos's Motion. Whether federal law preempts state law

[1] *See also, e.g.*, *Shehan v. United States DOJ*, No. 20-cv-500, 2020 U.S. Dist. LEXIS 244022, at at *30–32 (S.D. Ohio Dec. 29, 2020) (rejecting fraud-related state-law claims against PPP lender in part because of the CARES Act's lack of a private right of action).

is a distinct question from whether a private party can sue to enforce that federal law. *See, e.g.*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 (2d Cir. 1987).

Consistent with this position, Prestamos does not contend that the CARES Act's lack of a private right of action will "preclude" any and all state claims that may "refer to or incorporate some element" of the law. *Bukowski v. Wells Fargo Bank, N.A.*, 757 F. App'x 124, 128–29 (3d Cir. 2018) (citation omitted) (cleaned up). This is the reasonable holding of courts addressing violations of independent substantive obligations that touch on—but *do not entirely overlap with*—federal law or regulation. *See id.* at 129 (upholding claim that lender deceived the borrowers about their satisfaction of certain federal program guidelines, similar to *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012)); *Scott v. Gate Gourmet, Inc.*, No. 20-11033, 2021 U.S. Dist. LEXIS 33020 (C.D. Cal. Feb. 22, 2021) (employer committed wrongful termination and other breaches when firing employees in advance of receiving CARES Act funds); *Cave v. Saxon Mortg. Servs., Inc.*, No. 11-cv-4586, 2012 U.S. Dist. LEXIS 75276 (E.D. Pa. May 30, 2012) (lender breached express contract terms promising to consider the borrower's eligibility for a loan modification).[2]

Contrast those cases with the circumstances here, where Plaintiffs admit that they seek to enforce Prestamos's obligations under the PPP, and not just bring a claim that merely relates or refers to the PPP. Opp. Br. At 19 (contract's "central purpose" is to "fund Plaintiffs' loans"); 20 ("PPP loan funding" is "mandatory" under federal regulations); 22 (alleged "failure to fund . . . implicates very serious SBA rule violations"). Congress could not have intended to bar private

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[2] The court's decision in *Steven L. Steward & Assocs., P.A. v. Truist Bank & Truist Fin. Corp.*, 2020 U.S. Dist. LEXIS 187084 (M.D. Fla. Oct. 6, 2020), gives the briefest treatment to the right-of-action issue before summarily disposing of the plaintiff's common law claims as inadequately pled. *Cf.* Opp. Br. at 16–17. It is neither mandatory nor persuasive authority.

enforcement of the PPP *while at the same time* intending to "incorporate[e] the PPP statutory scheme into [a] contract" that can be enforced under state law. Opp. Br. at 23.

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

Plaintiffs identify no term in the Promissory Note where Prestamos promised to fund their loans. They point, instead, to terms setting out *their* obligations as borrowers in the event a loan was funded. They try also to graft SBA regulations onto the contract documents, despite no contractual terms that incorporate those regulations and no legal doctrine that does so.

To hold a lender liable for not having funded a putative borrower's loan, there must have been a promise by the lender actually to fund the loan. It is not enough that certain documents (even a promissory note) reference a loan and the terms on which a borrower will repay it. That is the holding of *Mark Andrew of Palm Beaches, Ltd. v. GMAC Commercial Mortgage Corp.*, 265 F. Supp. 2d 366, 380–81 (S.D.N.Y. 2003), a case directly on point that Plaintiffs do not meaningfully distinguish. There, as here, a promissory note and other loan documents identified a loan by amount and set out the terms on which the borrower would secure and repay it. But the court held that there was no contractual obligation to lend money because none of the documents contained "any obligation, promise, or undertaking" by the lender to fund any loan. *Id.*

Plaintiffs cite to *Gallagher v. Upper Darby Township*, 539 A.2d 463, 473 (Pa. Commw. 1988), and its discussion of the contract doctrine of necessary implication, whereby a court may sometimes supply an omitted essential term. *See* Restatement (Second) of Contracts § 204. But "[t]he court may imply a missing term in a parties' contract only when it is necessary to prevent injustice and it is abundantly clear that the parties intended to be bound by such term." *Kaplan v. Cablevision of PA, Inc.*, 671 A.2d 716, 720 (Pa. Super. 1996). Here, Plaintiffs are obligated to repay the loan (if at all) only in the event a loan is made; where there is no loan, there is no obligation to repay it. Moreover, it is by no means "abundantly clear" that the parties intended to be bound by a term that would commit Prestamos to fund the loan: had the parties intended such a term, they could have just as easily included it, say, in a loan commitment letter.

Plaintiffs are also wrong that the loan documents incorporate PPP regulations. First, such incorporation appears nowhere in the contract text. Second, the principle that "[s]tatutes that pertain to the subject matter of a contract form a part of the contractual obligation as if actually incorporated into the contract," *Willisch v. Nationwide Ins. Co. of Am.*, 852 F. Supp. 2d 582, 607 (E.D. Pa. 2012), is one specific to *insurance* contracts. *Id.* ("Specifically, applicable statutory provisions of insurance law are deemed incorporated into insurance contracts."). Even in that context, courts reject incorporation of *regulations* (as opposed to statutes). *Santos v. Ins. Placement Facility of Pa.*, 626 A.2d 1177 (Pa. Super. 1993). Plaintiffs' cited cases are not contrary. *See Heyman v. Citimortgage, Inc.*, No. 14-cv-1680, 2019 U.S. Dist. LEXIS 128238 (D.N.J. June 27, 2019) (incorporating HAMP regulations as implied contract terms where dealings expressly referenced those regulations); *Skurka Aerospace, Inc. v. Eaton Aerospace, LLC*, No. 08-cv-1565, 2011 U.S. Dist. LEXIS 33489 (N.D. Ohio Mar. 29, 2011) (same, with respect to FAA regulations).

Plaintiffs' mischaracterization of the equities does not help them, either. It is grossly unfair to characterize Prestamos's not disputing factual allegations that must, for purposes of Rule 12(b)(6), be accepted as true as somehow constituting their admission. And regardless of the merits of Plaintiffs "quasi-estoppel" theory, Plaintiffs provide no authority for the proposition that the doctrine may bar a legal *defense* to a claim in addition to the claim itself. Prestamos enjoys the right to defend against Plaintiffs' baseless allegations.

IV. <u>Plaintiffs agreed to release all claims against Prestamos.</u>

Plaintiffs contend that Prestamos's alleged breach invalidates the release in the Note. *See* Opp. Br. at 24. But Prestamos did not breach the Note, *see supra*; accordingly, the release cannot be invalid on that basis. In any event, Plaintiffs are wrong that an allegedly breaching party cannot take advantage of a contractual release—it is common (and is the case here) for releases expressly to encompass contract claims. *See, e.g.*, *Charbonneau v. Chartis Prop. Cas. Co.*, No. 13-cv-4323, 2015 U.S. Dist. LEXIS 85428, at *32 (E.D. Pa. July 1, 2015); *Equitrans Servs., LLC v. Precision Pipeline, LLC*, 154 F. Supp. 3d 189, 196–97 (W.D. Pa. 2015).

Further, Plaintiffs' interpretation of the release language is confined to seven words out of a hundred—that the release encompasses Lender conduct "on or prior to the date hereof." Opp. Br. at 24–25 (citing Note § 10). According to the rest of the contract language, however, Prestamos is released from all existing *and* future claims, which "have accrued or *may accrue*," "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). Because Plaintiffs' claims clearly arise out of the extension of credit Prestamos allegedly agreed to when Plaintiffs executed their notes, the release applies.

For this reason, Plaintiffs' reliance on *Bowersox* is misplaced. *See* Opp Br. at 26 (citing *Bowersox Truck Sales & Serv. v. Harco Nat'l Ins. Co.*, 209 F.3d 273, 279 (3d. Cir. 2000)). The release language at issue in *Bowersox* did not expressly include future accruing claims, and therefore the court found that a bar of such claims was not "within the contemplation of the parties when the release was given." *Id.* (internal citation omitted). By contrast, the release in the Note explicitly bars future accruing claims and, therefore, precludes Plaintiffs' claims, no matter that they accrued "no earlier than 10 days after the SBA approval" of their loans. *Cf.* Opp. Br. at 26. Finally, this language accords with the policy animating the PPP, *contra* Opp. Br. at 26, which sought to incentivize lender participation without enmeshing them in costly litigation brought by dissatisfied borrowers. The release squarely bars Plaintiffs from bringing their claims.

V. Plaintiffs fail to state a claim for violation of the CA UCL.

Because Plaintiffs do not plausibly allege that Prestamos breached any legal obligation owed to them under the CARES Act or the PPP program, they cannot establish Prestamos's conduct was "unlawful" for purposes of the California Unfair Competition Law. Cal. Bus. & Prof. Code § 17200; *Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 707 (E.D. Pa. 2015). Prestamos's discretion regarding its funding of PPP loans extended not just to whether to approve or deny applications, but to determining whether an applicant was "ineligible" for a PPP loan entirely. *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 748 (D. Md. 2020). Plaintiffs also fail to "tether" the alleged unfairness element to a legislatively declared policy, as no part of the CARES Act required Prestamos to fund *every* PPP loan applicant, regardless of eligibility.

Plaintiffs are wrong that *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), has no application at the pleadings stage. *Sonner* itself was a 12(b)(6) case. *See id.* at 838 (restitution claim at issue had been dismissed in response to 12(b)(6) motion); *Elizabeth M. Byrnes, Inc. v. Fountainhead Com. Cap., LLC*, No. 20-cv-4149, 021 U.S. Dist. LEXIS 227046 (C.D. Cal. Nov. 24, 2021) (dismissing equitable PPP claim under *Sonner* at the pleadings stage). It is of no moment that Plaintiffs alleged equitable relief in the alternative. *See Sharma v. Volkswagen AG*, 524 F. Supp. 3d 891, 907 (N.D. Cal. 2021) ("The issue is not whether a pleading may seek distinct forms of relief in the alternative, but rather whether a prayer for equitable relief states a claim if the pleading does not demonstrate the inadequacy of a legal remedy. On that point, *Sonner* holds that it does not."). Plaintiffs' restitution claim further fails because they neither possessed the funds at issue *nor* have an ownership interest in them; Prestamos retained discretion to withhold PPP funds for which Plaintiffs were ineligible. *Profiles*, 453 F. Supp. 3d at 748.

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

Plaintiff Ahmadou's claim under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") fails, firstly, because it duplicates Plaintiffs' breach of contract claim. *See Turner v. Orthopedic & Shoulder Ctr., S.C.*, 82 N.E.3d 801, 807 (Ill. Ct. App. 2017). The "falsely communicated" promises alleged in the Amended Complaint to support this claim all stem from the contract documents. Am. Compl. ¶ 250 (pointing to promise to act as a "Lender"; holding Plaintiff Ahmadou to obligations "in consideration of Prestamos . . . making the . . . loan[s]"; and promise to "fulfill the terms of its written agreements"). Plaintiffs now add, in their response, that Prestamos induced Plaintiff Ahmadou to enter into the agreement by "accepting plaintiff's application and the SBA's approval," Opp. Br. at 30, thereby "locking" him in to relying on Prestamos for the loan. But that theory of inducement appears nowhere in the Amended Complaint's allegations purporting to support the ICFA claim. Anyway, Plaintiffs still have failed to allege that Prestamos had the requisite *intent to deceive*. *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 608 (7th Cir. 2013); *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.").

The ICFA claim also fails because Plaintiffs have failed to plead it with particularity. They contend that the heightened pleading standard does not apply because Plaintiff Ahmadou alleges "unfair" business practices rather than "deceptive" ones under the statute. But the law is clear that "unfair" practices allegations that "are clearly premised upon the primary claim" of deception still trigger Rule 9. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014) ("Simply adding language of 'unfairness' instead of 'misrepresentation' does not alter the fact that [plaintiff's] allegations are entirely grounded in fraud under the ICFA."). And Plaintiffs continue to make nothing but circular and "bare assertion[s] of unfairness without describing in what manner the [conduct] either violate[s] public policy or [is] oppressive." *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 963 (Ill. 2002). Simply reciting the legal standard is not enough.

VII. <u>Plaintiffs fail to state a claim under the cited Ohio statutes cited.</u>

Plaintiffs do not dispute that the Ohio Deceptive Trade Practices Act, like the Lanham Act, bars consumer suits. *See Borden v. Antonelli Coll.*, 304 F. Supp. 3d 678, 685 (S.D. Ohio 2018).

Nor do they dispute that they must allege an "injury to a commercial interest in reputation or sales." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). Instead of addressing how they have alleged such an injury, Plaintiffs argue that they state an ODTPA claim because, they say, Prestamos induced Plaintiff Stalnaker to enter into the loan agreements and "lock[ed]" her in. Opp. Br. at 34. As with the ICFA claim, however, that theory is not alleged in the complaint, which instead rests on the promises allegedly made in the contract documents. Am. Compl. ¶ 268. That the PPP loan was for Plaintiff Stalnaker's business does not mean she has suffered an injury to a commercial interest in reputation or sales. The ODTPA claim fails.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its Opening Brief, Prestamos respectfully requests that the Court dismiss Plaintiffs' Amended Complaint, with prejudice.

Dated: March 17, 2022

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