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.

Civil Action No. 5:21-cv-04337-JMG

PLAINTIFFS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR REQUEST TO COMPEL DISCOVERY

Plaintiffs respectfully submit this memorandum of law in accordance with the Court's March 18, 2022 directives in further support of their request to compel discovery.

Background

Plaintiffs allege that Defendant Prestamos CDFI, LLC ("Defendant") failed to fund U.S. Small Business Association-approved Paycheck Protection Program ("PPP") loans for their own businesses and the proposed class of hundreds or thousands of other similarly-situated business owners across the country. Plaintiffs filed their initial complaint on October 1, 2021. ECF No. 1. After stipulating to an extension for Defendant to respond to that complaint (ECF 12), Plaintiffs served document requests and interrogatories on November 16, 2021. The parties thereafter spent hours discussing the discovery Plaintiffs seek, including on January 25, 2022 for over 80 minutes, but were unable to resolve their dispute concerning Defendant's position that discovery should be stayed and bifurcated.

Accordingly, Plaintiffs filed a letter on February 14, 2022 requesting a conference with the Court to resolve this dispute pursuant to the Court's Policy and Procedure II.C.2. ECF No. 22. On February 25, 2022, Defendant opposed Plaintiff's request for a conference, and falsely contended that there was only "a purported discovery dispute" and that Plaintiffs' letter was "premature." ECF No. 27 at 1-2. Plaintiffs replied on March 14 and Defendant submitted a sur-reply on March 21. ECF Nos. 30-31, 33. In accordance with the Court's directives on March 18, 2022, the parties had another conference on March 23, 2022, but were unable to reach agreement.[1]

To date, Defendant has failed to produce a single document or even committed to a date certain to produce any documents or provide any other meaningful information. Rather, and despite Plaintiffs' repeated requests, Defendant has cloaked itself in specious arguments to justify its failure to disclose critical information that would answer basic questions at the heart of this case:

- How many SBA-approved borrowers did it fail to fund?
- How much in total federally-originated proceeds are at issue?
- Where are those proceeds presently?
- If Defendant paid any such proceeds to others, when and to whom and how much and why?

[1] Plaintiffs offered during that conference that if Defendant agreed to identify categories of responsive documents it would be willing to produce and a date certain by which it would produce them, that could potentially resolve the parties' dispute. Defendant agreed during that conference to provide Plaintiffs with that information in writing. Defendant has failed to do so.

- How much in PPP lender processing fees did Defendant obtain, including on the backs of Plaintiffs and the other unfunded borrower putative members of the national class?

Every case is no doubt important to every litigant. But as Plaintiffs have previously stated, this case and the stakes involved are national in both scope and consequence. ECF No. 29 at 3.[2] There is no dispute that Defendant agreed in 2021 to fund 494,415 PPP loans totaling over $7.6 billion in proceeds, representing more loans than any other PPP lender in 2021 and more than the total number of PPP loans made in 2021 by Bank of America, PNC Bank, TD Bank and Wells Fargo *combined*. Nor has Defendant disputed that it failed to fund many such SBA-approved loans -- indeed, Plaintiffs' Amended Complaint, even *without* the benefit of *any* discovery, already details dozens of them. *See* ECF No. 18, ¶¶ 88, 108, 117, 126, 140, 149, 158, 167, 176, 188, 197, 203(a)-(g), 204(a)-(ww). Plaintiffs' counsel continues to receive inquiries by many others since the filing of this litigation who have similarly complained about Defendant's failure to fund their loans. And Defendant also does not dispute that it obtained nearly $1.2 billion in fees, including on the backs of Plaintiffs and other class members it failed to fund.

Instead, Defendant dodges every chance it gets, seeking to not even *answer* much less actually engage in basic discovery aimed squarely at getting to the evidence. It seeks to divert the Court by, for example, saying the Federal Reserve Bank advances the funds to Defendant and it pays interest, and "prays that this explanation puts to rest" (ECF No. 31 at 2) the understandably difficult questions it still has failed to answer regarding where the unfunded PPP proceeds are, how much, and to whom and when they may have been distributed.

In resisting discovery, the guise Defendant proffers is that discovery should be stayed pending the Court's ruling on its motion to dismiss, and also bifurcated and thus limited to only

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[2] All ECF citations herein are to ECF rather than native page numbers; all emphases are in the original; and all internal quotation marks, alterations, footnotes and citations are omitted.

documents that Defendant itself unilaterally determines (to quote Defendant) "are strictly related to the named plaintiffs." And although totally unfair and unworkable, Defendant's "Plaintiffs-only" position is not limited to documents but would extend also to interrogatories and other discovery, including depositions of its and other witnesses. In effect, Defendant has granted itself a complete stay of discovery through sheer obstinance.

As a matter of law and procedure, Defendant's position is indefensible and should be rejected especially in the circumstances here; has interfered with the schedule the parties negotiated and proposed in their Joint Rule 26(f) Report (ECF No. 17); has prejudiced Plaintiffs' ability to abide by those deadlines; and has improperly delayed what Plaintiffs pray for in this case -- which is a fair opportunity on a level playing field to obtain reasonable discovery commensurate with the claims at issue so they can fairly pursue the justice they seek and the Court can adjudicate this case on a full record.

Argument

Defendant's position to stay and bifurcate should be rejected. It is contrary to the Court's Policies and Procedures, unfairly prejudicial to the Plaintiffs and the absent class members they seek to represent who would be subject to Defendant's own biased, one-sided determinations regarding what allegedly constitutes "Plaintiffs-only" evidence, and highly inefficient, likely fostering more rather than less satellite litigation about discovery.

First, Defendant's position is flatly inconsistent with the Court's Policy and Procedure II.C.1, which states that "[p]ending motions will not excuse counsel from proceeding with discovery" and II.A.1, which states that "**the Court will grant a stay of discovery only in extraordinary circumstances**." Here, no circumstances, let alone "extraordinary" ones, justify a stay let alone the total stay that Defendant seeks. In fact, the opposite is the case.

Here, the Court, the Plaintiffs and the entire proposed class are entitled to know how many SBA-approved but unfunded borrowers there are; where the unfunded proceeds are, or to whom and when they were disbursed and how much and why; whether Defendant still has any such proceeds and, if so, their whereabouts; and the extent to which Defendant obtained PPP loan fees on the backs of Plaintiffs' and class members' loans it failed to fund. Far from warranting further delay, these questions are real and pressing and should be answered and answered now.

Defendant's argument that it "lent *its own money* that it borrowed, with interest" and its personal attack that "[e]ither Plaintiffs lack a fundamental understanding of how PPP works or they have elected to use misleading language in order to provoke the Court" (ECF No. 31 at 2), are, of course, also diversions.[3] Again, Plaintiffs understand that Defendant wants to avoid answering and forestall or delay discovery. And there may even be plausible explanations, such as that Defendant did not misappropriate any unfunded PPPLF advances it obtained that were secured, dollar for dollar, by the SBA-approved PPP loans of Plaintiffs, class members and other

[3] Defendant is also demonstrably wrong on the merits. Although Plaintiffs acknowledge that, as an SBA-qualified lender, Defendant should have vast knowledge about the PPP and PPP lending, Plaintiffs also have some understanding about the process and have *actually alleged* the very thing Defendant incorrectly says Plaintiffs do not understand -- namely, that "the Federal Reserve supplied liquidity to Prestamos and other participating financial institutions through term financing to be secured by the PPP loans." ECF No. 18, ¶ 63. Also, Defendant misleadingly overstates that it is "its" funds alone at issue; the advances from the Paycheck Protection Program Liquidity Facility (the "PPPLF") to which it refers, and as the name of that Facility reflect, are secured by the very PPP loans Defendant agreed to fund. *Id*. ¶¶ 63-64. In fact, *only* SBA-guaranteed PPP loans were eligible to serve as collateral for the PPPLF advances, and the amount of the advances was to equal the amount of the PPP loans pledged to secure the advances. *Id*. ¶ 67. Put differently, without Plaintiffs' and the other class member and other PPP loans Defendant was contractually committed to fund and for which the PPPLF advances were made and earmarked, Defendant would not have received any such advances.

SBA-approved borrowers. But again, that also favors getting the answers now to these fundamental questions.

Second, Defendant premises its attempt to stay and bifurcate discovery on the shopworn argument that its motion to dismiss is pending. A pending motion to dismiss, however, should not grind discovery to a halt not only per the Court's Policies II.C.1 and II.A.1, but also as courts have held. *See, e.g.*, *Coca-Cola Bottling Co. of Lehigh Valley v. Grol*, No. 92-7061, 1993 WL 13139559, at *2 (E.D. Pa. Mar. 8, 1993) ("Had the drafters of the Federal Rules of Civil Procedure wanted an automatic stay of discovery pending a motion to dismiss they could have so provided.") (quoting *Moran v. Flaherty*, 1992 WL 276913 (S.D.N.Y. Sept. 25, 1992)); *Gerald Chamales Corp. v. Oki Data Ams., Inc.*, 247 F.R.D. 453, 454 (D.N.J. 2007) (citing *Chesney v. Valley Stream Union Free Sch. Dist. No. 24*, 236 F.R.D. 113, 115 (E.D.N.Y. 2006) ("It is well settled that the mere filing of a dispositive motion does not constitute 'good cause' for issuance of a discovery stay")).

Plaintiffs understand that courts have also gone the other way and granted stays. But contrary to Defendant, caselaw on the issue is of limited import since the decision is ultimately one of discretion for courts based on the factual circumstances each case presents. And here, in addition to this Court's own preferences concerning discovery as stated clearly in its Policies and Procedures, the national import of this case, logic and any fair balancing of the relative equities strongly counsel against any stay or bifurcation.

Here, Plaintiffs' Amended Complaint already addresses arguments Defendant raised in its first-filed motion to dismiss which its second motion to dismiss simply duplicates (such as concerning preemption, preclusion and standing), and is highly detailed in its allegations. For example, Defendant contended that Plaintiffs failed to specify any breach of contract or even attach the loan agreement. *See, e.g.*, Dkt 15-1 at 4 ("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."). Plaintiffs' Amended Complaint specifies in detail the particular provisions in the Loan Documents they claim Defendant breached, and attaches the standard form Note and other accompanying Loan Documents between Defendant and first-named plaintiff Marshall in full. *See, e.g.*, ECF No. 18, ¶¶ 76-78, 81, 219-23, 228-30; Dkt. 18-1. Similarly, Defendant contended that Plaintiffs' claim they "made 'multiple additional attempts to obtain the loan proceeds,' without describing those 'attempts' in the Complaint." ECF No. 15-1, at 3-4. Plaintiffs' Amended Complaint adds detailed examples of these follow-up attempts. *See, e.g.*, ECF No. 18, ¶¶ 84-87, 127-31, 177-79. Further, this is not a fraud case subject to the heightened pleading requirements of Rule 9(b) or otherwise in any event. Thus, premising a stay on a claim of alleged pleading insufficiency is even weaker in the circumstances here.

By contrast, a stay would further delay the answers to the fundamental questions regarding the status and whereabouts of the SBA-approved proceeds at issue. It would further prejudice Plaintiffs' ability to prosecute this case and adhere to the schedule the parties previously agreed to. It would undermine Plaintiffs' ability to prepare for class certification. It would potentially even jeopardize Plaintiffs' ability to collect any judgment that Plaintiffs may obtain as more time passes, memories fade and perhaps funds get paid out, misappropriated, stolen or otherwise cannot be accounted for.

Third, bifurcating and limiting discovery to only what Defendant unilaterally determines relates "strictly to Plaintiffs-only" is unworkable, unfair and highly prejudicial to Plaintiffs and the proposed class. For example, it would presumably provide for the production of no information regarding the extent of Defendant's failure to fund the SBA-approved loans at issue, Defendant's PPP loan policies, the whereabouts of the unfunded PPPLF advances secured by class member SBA-approved loans, and the PPP loan fees Defendant nevertheless obtained. It would fail to address even fundamental, threshold issues such as whether the class here encompasses hundreds or thousands of SBA-approved, but unfunded, borrowers. Fair and proper exploration of these issues in discovery are not only directly relevant to the merits of the parties' claims and defenses, but also "necessary for the district court to conduct the 'rigorous analysis' it is tasked with at" the class certification stage. *See, e.g.*, *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93 (3d Cir. 2011).

Bifurcating would be even worse in this case. Plaintiffs would be beholden to Defendant's own unilateral and biased determination regarding what does or does not "strictly relate to Plaintiffs' only." It would result in the Plaintiff class -- which was already unsuccessful in being bound to and exclusively reliant upon Defendant to actually fund their loans because they could not go to another lender under PPP rules (ECF No. 18, ¶¶ 42-44) -- once again wholly and unfairly dependent on Defendant. It would interfere substantially with deposition preparation and questioning of Defendant's and other witnesses. It would prejudice Plaintiffs' ability to prepare for and conduct a fair trial.

In contrast, while Plaintiffs acknowledge that this case is national in scope and absolutely could involve large amounts of documents -- again facts uniquely in Defendant's possession -- that stems from Defendant's conduct at issue, and the relative burdens on Defendant to produce documents are still nevertheless finite and limited. Indeed, Defendant already has a clear and basic obligation to maintain the bulk of the very records Plaintiffs seek. *See, e.g.*, SBA

Procedural Notice, Control No. 5000-20091 (Feb. 8, 2021), at 8 (summarizing lenders' ongoing reporting requirements for PPP loans), *available at* https://www.sba.gov/sites/default/files/2021-02/Procedural%20Notice%205000-20091%20-%202nd%20Updated%20PPP%20Processing%20Fee%20and%201502%20Reporting-508.pdf (last visited Mar. 28, 2022). Producing these records promptly in this case, therefore, is not only warranted but should not be overly burdensome given Defendant's obligations to maintain them in the first place.

Conclusion

For the foregoing reasons, the Court should deny Defendant's request to stay and to bifurcate discovery, and direct Defendant to promptly commence producing documents and written answers to Plaintiffs' interrogatories.

Dated: March 28, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 28, 2022, I caused Plaintiffs' Memorandum of Law in Further Support of Their Request to Compel Discovery to be filed on the Court's CM/ECF system and for service of same on all counsel of record.

/s/ Lawrence J. Lederer
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