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,	Case No. 5:21-cv-04337-JMG
Plaintiffs,	
v.	
PRESTAMOS CDFI, LLC,	
Defendant.	

DEFENDANT PRESTAMOS CDFI, LLC'S RESPONSE TO PLAINTIFFS' REQUEST TO COMPEL DISCOVERY

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**pro hac vice admission to be sought*

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PRELIMINARY STATEMENT

Plaintiffs have boldly proclaimed that their breach of contract case—alleging that nine Plaintiffs did not receive their Paycheck Protection Program ("PPP") loans pursuant to loan agreements with Prestamos—is a "public law enforcement proceeding." (Pls. Opp. Mot. Dismiss at 2, Doc. 29.) With that exaggerated view of their private loan agreement disputes, Plaintiffs attempt to justify unfettered and far-flung discovery of Prestamos. But this is not a government enforcement action: the law does not permit Plaintiffs to stand in the shoes of the U.S. Small Business Administration, the agency charged with administering and regulating the PPP. The CARES Act, which created the PPP, provides no private right of action to enforce it. Plaintiffs therefore cannot deputize themselves as the national caretakers of the PPP to support their unbridled discovery demands. They have no legal right to the intrusive discovery that they seek, which amounts to discovery of virtually every document in Prestamos's possession about PPP and Prestamos's finances, employees, customers, third-party contracts, and regulatory compliance.

Indeed, Plaintiffs lack Article III standing to bring these claims even on behalf of themselves, and their allegations fail to state a claim as a matter of law. Prestamos has raised these issues in the now fully briefed Motion to Dismiss Plaintiffs' Amended Complaint. (Docs. 24, 29, 32). The Motion to Dismiss is case dispositive and would obviate the need for any discovery at all, let alone the production of, according to Plaintiffs, the "hundreds of thousands, and perhaps millions of pages of documents" that Plaintiffs seek from Prestamos. (Doc. 17 at 13.) A nationwide, putative class action seeking such sweeping discovery presents the "extraordinary circumstances" that justify a stay of discovery under the Court's Policies and Procedures. Accordingly, because of the significant burden Plaintiffs' discovery requests impose on Prestamos while its dispositive motion is pending and the lack of prejudice to Plaintiffs in waiting, the Court should stay discovery pending resolution of the Motion to Dismiss.

FACTUAL BACKGROUND

Plaintiffs filed this nationwide, putative class action on October 1, 2021. (Doc. 1). They then served premature discovery requests on Prestamos on November 16, 2021. On December 27, 2021, the parties filed a Joint Rule 26(f) report in which Plaintiffs represented that they "anticipate that Defendant will produce hundreds of thousands, and perhaps ***millions*** of pages of documents." (Doc. 17 at 13 (emphasis added)). The parties agreed to and did serve initial disclosures under Rule 26(a)(1) on January 14, 2022, and Prestamos responded to Plaintiffs' interrogatories and requests for production on January 19, 2022, largely with objections to the substance of the requests, which were voluminous, overbroad, and sought irrelevant information.

The parties met and conferred at length on January 25, 2022 and again on March 23, 2022.[1] Prestamos's position is that Plaintiffs' discovery requests—some of which seek discovery into matters involving over 490,000 loans and how Prestamos financed its PPP operation—should be stayed pending resolution of the case-dispositive Motion to Dismiss. While Prestamos stood by its current position that discovery should be stayed in full, Prestamos proposed—as a compromise—to produce in the interim discoverable information in its possession, custody, or control that relates

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[1] Plaintiffs assert that Prestamos did not respond to its offer to put in writing the categories of documents that Prestamos would produce and a date for production, which could "potentially resolve" the parties' dispute. (Pls. Br. at 2 n.1.) As Prestamos explained, in light of Plaintiffs' prior conduct, Prestamos did not consider that offer to be in good faith. On February 5, 2022—over 45 days before the second meet-and-confer—Prestamos made the *first request* Plaintiffs to submit specific requests for documents that would not be burdensome to produce, and Plaintiffs never responded. It also became clear during the March 23 meet-and-confer that Plaintiffs had no intention on compromising to accept limited discovery because, regardless of what Prestamos offered, Plaintiffs insisted on discovery into irrelevant topics, such as Prestamos's borrowings from the Federal Reserve Bank.

to each named Plaintiff. However, Plaintiffs have refused to limit the scope of discovery during the pendency of the Motion to Dismiss. Plaintiffs have declined—without negotiating or offering a counter-proposal to address Presatmos's well-founded concerns—to accept Prestamos' proposal to produce this limited set of discovery.

Separately, Plaintiffs have also served duplicative, wide-ranging discovery on Prestamos's parent entity, Chicanos Por La Causa Inc. ("CPLC"), and the parties are litigating the enforceability of those subpoenas in the U.S. District Court for the District of Arizona, where CPLC is located and where compliance is to take place.

ARGUMENT

I. The Court should stay discovery.

A. The legal standard.

"Rule 26(c) of the Federal Rules of Civil Procedure empowers district courts to impose a stay of discovery on a showing of good cause." *Pfizer, Inc. v. Johnson & Johnson*, No. 17-cv-4180, 2018 WL 1071932, at *1 (E.D. Pa. Feb. 27, 2018). Whether to stay discovery while considering a motion to dismiss is within the Court's sound discretion. *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 365 (3d Cir. 2001). While the filing of a motion to dismiss does not automatically stay discovery, "a stay is proper where the likelihood that such a motion may result in a narrowing or an outright elimination of discovery outweighs the likely harm to be produced by the delay." *19th St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 349 (E.D. Pa. 2000) (internal quotation marks omitted). The Court should "carefully balance the relative benefit and harm that would ensue to each party from the grant or denial of a stay." *Id.*

Where "a pending motion to dismiss may dispose of the entire action and where discovery is not needed to rule on such motion, the balance generally favors granting a motion to stay."

Weisman v. Mediq, Inc., No. 95-cv-1831, 1995 WL 273678, at *2 (E.D. Pa. May 3, 1995). The Court need not "form an opinion as to the merits of the motion," but rather must "consider the scope of the motion and ask whether it may potentially lead to the end of the case, and whether it will provide the parties with full knowledge as to which claims are viable and, correspondingly, as to what discovery need occur." *Perelman v. Perelman*, No. 10-cv-5622, 2011 WL 3330376, at *1 (E.D. Pa. Aug. 3, 2011) (internal quotation marks omitted).

B. The Motion to Dismiss is case dispositive and would eliminate the need for discovery.

Here, the Motion to Dismiss would dispose of the entire action and would obviate the need for discovery. As a starting point, then, the balance already "lean[s] in favor of staying discovery." *Pfizer*, 2018 WL 1071932, at *1. Even a partial grant would narrow the issues in the case, such that a stay would avoid needless expense and help focus discovery on those claims that are viable. *Weisman*, 1995 WL 273678, at *2. Simply put, "delaying discovery until the Court can determine whether or not Plaintiffs have pled the facts necessary to proceed with the claim, may help to streamline the expensive discovery process, and, thereby, minimize the burden on counsel, parties and the Court." *McLafferty v. Deutsche Lufthansa A.G.*, No. 08-cv-1706, 2008 WL 4612856, at *2 (E.D. Pa. Oct. 15, 2008).

The Motion to Dismiss presents exceptional circumstances warranting a stay. *First*, the Motion to Dismiss asserts that the Court lacks subject matter jurisdiction to entertain the suit, as Plaintiffs lack Article III standing. It would be unfair to require that Prestamos engage in costly discovery only for the Court to later hold it lacked jurisdiction to permit Plaintiffs' sweeping discovery in the first place. *See Wyers Prod Grp. v. Cequent Performance Prod., Inc.*, No. 12-cv-02640, 2013 WL 2466917, at *2 (D. Colo. June 7, 2013) ("Courts have routinely recognized that discovery may be inappropriate where the court's jurisdiction is at issue. . . . [S]tays are generally *favored* when a jurisdictional defense under Rule 12(b)(1) is asserted."). Even if the Court has subject matter jurisdiction, the Motion to Dismiss sets forth comprehensive arguments for why each count of the Amended Complaint fails to state a claim.

Second, the Court must "consider the scope of the proposed discovery," *Pfizer*, 2018 WL 1071932, at *2, and here, as in *Pfizer*, "the scope of discovery in this case will likely be enormous." *Id.* (finding that a stay is justified where "discovery will be a large and costly undertaking.") Plaintiffs have made clear that they "anticipate that Defendant will produce hundreds of thousands, and perhaps ***millions*** of pages of documents." (Doc. 17 at 13 (emphasis added)). Plaintiffs seek intrusive discovery into Prestamos's issuance of over 490,000 loans and virtually every document and communication in Prestamos's possession about PPP. For example, Plaintiffs seek discovery into *every* PPP application that Prestamos received—a number that would exceed the 490,000 loans it issued—through a request with over ***70 sub-parts*** (RFP No. 13); *all* documents related to Prestamos's "Bank accounts, securities accounts, trust accounts and other accounts" that it used to participate in PPP (RFP Nos. 15–16); *every* report (Form 1502) that Prestamos sent to the SBA for every fully disbursed loans (RFP No. 21); Prestamos's compliance with the "Bank Secrecy Act or other federal anti-money laundering policies" (RFP No. 24); and *every* communication that Prestamos had with SBA about PPP (RFP. No. 25). Where, as here, "discovery will be a large and costly undertaking," a stay should issue. *Pfizer*, 2018 WL 1071932, at *2.

By comparison, any prejudice to Plaintiffs is minimal. While the Court considers and does not take lightly a plaintiff's "interest in a speedy resolution" of the litigation, such delay does not, by itself, constitute prejudice "in a significant way" or create any particularized harm. *Pfizer*, 2018 WL 1071932 at *4. Plaintiffs have not sought time-sensitive relief through a temporary restraining order or preliminary injunction, and any delay in obtaining relief (if it were warranted) could be accounted for in a damages award. Nor is this a case involving time-sensitive evidence that may disappear absent its immediate production. *Cf. 19th St. Baptist Church*, 190 F.R.D. at 346 (allowing immediate discovery where witnesses were "aged and infirm" and might no longer be available at trial). As Plaintiffs acknowledge, Prestamos "already has a clear and basic obligation to maintain" the records Plaintiffs seek, (Doc. 34 at 8), and they provide no basis to support an insinuation that Prestamos would fail to honor its record preservation obligations. They certainly provide no evidence whatsoever for their irresponsible accusation that funds may be misappropriated or stolen. (Doc. 34 at 7.)

Because the Court may lack subject matter jurisdiction to hear this suit, the scope of discovery is massive and costly to Plaintiffs, and the relative burden to Plaintiffs is light, a stay of discovery pending resolution of the Motion to Dismiss is appropriate. "In short, the stay will potentially save time and money for all concerned." *Weisman*, 1995 WL 273678, at *2.

Alternatively, even if the Court does not issue a stay, it should direct Plaintiffs to continue to meet-and-confer on Prestamos's compromise proposal to proceed with discovery into documents relating to the named Plaintiffs. Plaintiffs' overwrought concern that such an agreement would give Prestamos "unilateral" discretion to decide the scope of the discovery it provides (Doc. 34 at 8) can easily be assuaged by negotiating over that scope, which Plaintiffs have so far declined to do in favor of burdening the Court with a vague request for relief.

II. Plaintiffs are not entitled to discovery of the "status and whereabouts" of so-called "proceeds."

Rule 26(b)(1) limits the scope of discovery to matters that are "relevant to any party's claim or defense," and subsection (c)(1)(D) provides that the Court may enter protective orders to protect a party from undue burden or expense by "forbidding inquiry into certain matters." Here, even if the Court does not stay discovery altogether, good cause warrants a protective order to forbid inquiry into "the status and whereabouts of the SBA-approved proceeds at issue," (Doc. 34 at 7), because such information is irrelevant to the merits of Plaintiffs' claims.[2]

Plaintiffs press for information "about where the unfunded PPP proceeds are, how much, and to whom and when they may have been distributed." (Doc. 34 at 3.) As Prestamos explained in its March 15, 2022 letter to the Court, Plaintiffs are knowingly perpetuating a false narrative regarding how PPP works, in contravention of public knowledge. (Doc. 31.) Prestamos never received individual borrowers' "PPP proceeds." In order to issue a PPP loan, Prestamos lent its <u>own money</u> that it borrowed, with interest, from the Federal Reserve Bank through the PPP Liquidity Facility ("PPPLF"). *Id.*; *see also See* Def. Mem. Supp. Mot. Dismiss at 8, 13, Doc. 24-1. But what Prestamos did with money that it paid to borrow from the Federal Reserve Bank is beside the point: what matters, under Plaintiffs' theory, is that Plaintiffs did not receive PPP loans from Prestamos. The critical issues for the breach-of-contract theory underpinning Plaintiffs' entire case is whether Prestamos had indeed promised to fund Plaintiffs' loans; whether Prestamos breached that promise; and whether Plaintiffs suffered damages. The "whereabouts" of money that Prestamos borrowed is irrelevant, regardless of the answers to any of those issues.

Plaintiffs may argue that they need this discovery to preserve their ability to collect on a judgment. (Doc. 34 at 7 (alleging, baselessly, that a stay would "jeopardize Plaintiffs' ability to collect on any judgment that Plaintiffs may obtain)). But except where punitive damages are available, "district courts across the country generally do not allow pre-judgment discovery

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[2] Importantly, discovery into information related to the "whereabouts" of Prestamos's finances is not the only request from Plaintiffs that Prestamos believes is objectionable. Nonetheless, Plaintiffs continue to invoke this information as an example of the discovery they purportedly need to litigate their claims; because it is wholly irrelevant and needlessly intrusive, Prestamos moves for a protective order against it while reserving all rights to seek relief from other of Plaintiffs' discovery requests in the future.

regarding a defendant's financial condition or ability to satisfy a judgment," because "such discovery is not relevant to the parties' claims or defenses and is not reasonably calculated to lead to the discovery of admissible evidence." *Sierrapine v. Refiner Prod. Mfg., Inc.*, 275 F.R.D. 604, 609 (E.D. Cal. 2011) (collecting cases); *see also DiNapoli v. Int'l All. of Theatrical Stage Emps. 8*, No. 09-cv-5924, 2011 WL 1004576, at *7 (E.D. Pa. Mar. 18, 2011) ("[I]f punitive damages are unavailable, the court will not allow discovery to determine whether the defendant has the means to satisfy a judgment because a defendant's ability to satisfy a judgment has little to do with the subject matter of the litigation notwithstanding a claim for punitive damages.").

Punitive damages are not available here, and therefore the Court should not allow discovery into Prestamos's ability to satisfy any judgment. The cases are clear that punitive damages can never be awarded for breach of contract or for violation of the California or Ohio consumer protection statutes upon which Plaintiffs rely. *See DiGregorio v. Keystone Health Plan E.*, 840 A.2d 361, 370 (Pa. Super. 2003) ("Appellants could not recover punitive damages for an action solely sounding in breach of contract."); *Clark v. Superior Court*, 235 P.3d 171, 174 (Cal. 2010) ("Not recoverable [under California's unfair competition statute] are damages, including punitive damages and increased or enhanced damages."); *Frisch's Rest., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 661 F. Supp. 971, 992 (S.D. Ohio 1987) (recognizing that the Ohio Deceptive Trade Practices Act does not provide for an award of punitive damages). Punitive damages are sometimes available under the Illinois Consumer Fraud and Deceptive Businesses Practices Act, *Keeling v. Esurance Ins. Co.*, 660 F.3d 273, 275 (7th Cir. 2011). But Plaintiffs cannot state a claim under that statute because, as described in the Motion to Dismiss briefing, the alleged consumer fraud and breach of contract "rest on the same foundation" (that Prestamos did not fund the loans as allegedly promised), and no distinct deceptive acts are alleged. *Greenberger v. GEICO Gen.*

Ins. Co., 631 F.3d 392, 399 (7th Cir. 2011) ("When allegations of consumer fraud arise in a contractual setting, the plaintiff must prove that the defendant engaged in deceptive acts or practices distinct from any underlying breach of contract.").

Plaintiffs also cannot obtain this discovery based on general allegations of "the national import of this case." (Doc. 34 at 6.) Congress did not create a private right of action in the CARES Act or the PPP amendments. *See* 15 U.S.C. §§ 9001–9141, 636(a)(36); *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 748 (D. Md. 2020). Plaintiffs instead can seek discovery relevant to the merits of their claims. For that reason, Prestamos has offered to produce nonprivileged discovery that is specific to each Plaintiff and relevant to their claims. Discovery about the "whereabouts" of SBA proceeds are irrelevant to Plaintiffs' claims, and its production should not be compelled.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' request to compel discovery and should instead stay all discovery pending resolution of the Motion to Dismiss. In the alternative, the Court should enter a protective order to protect Prestamos from having to produce information regarding the ultimate disposition of loan proceeds and fees.