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

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR ACCOUNTING

Introduction

Plaintiffs' Amended Complaint details facts demonstrating that Defendant Prestamos CDFI, LLC ("Defendant") secured cash advances from the federal government in large amounts based on misrepresentations regarding the loans that secured those advances. In particular, Defendant falsely reported to the U.S. Small Business Administration (the "SBA") that Plaintiffs' and other proposed class members' Paycheck Protection Program ("PPP") loans were disbursed, so that Defendant could obtain nearly $1.2 billion in PPP loan processing fees. Those allegations are based largely on facts in the public record. Despite having made wide-ranging attacks on Plaintiffs' other allegations, Defendant has never denied these particular facts.

Also indisputably, Plaintiffs and the putative members of the proposed class were the intended recipients of those PPP cash advances. In fact, Plaintiffs' and putative class members'

SBA-approved PPP loan agreements *necessarily* and *exclusively* served as the collateral pursuant to which Defendant obtained *each dollar* of those advances.

Despite Plaintiffs' clear interests in the PPP loan advances Defendant has received on the backs of Plaintiffs' and other class members' SBA-approved but unfunded PPP loans, the status, whereabouts, potential theft or other intentional or unintentional disposition of those funds remains unanswered. Or perhaps Defendant has safely maintained the proceeds of those unfunded PPP loan advances secured by the plaintiff class PPP loans, although Defendant's refusal to give Plaintiffs any information and Defendant's continued opposition to any discovery certainly gives rise to the inference that the explanation may not be benign. Either way, this information should be produced and be produced now.

Furthermore, the status and disposition of each dollar of PPP loan advances is core information that is not only within Defendant's possession, but Defendant is *required* to update and maintain records and account for these cash advances by virtue of its status as a PPP lender and its PPP lending commitments. Indeed, Defendant and defendant's corporate parent, Chicanos Por La Casa, Inc. ("CPLC"), are likely to exclusively possess this information. And although Defendant continues to resist producing any discovery (and CPLC has similarly opposed producing any information in response to Plaintiffs' separate subpoenas to CPLC, which is represented by the same counsel that represents Defendant here), an accounting of those PPP loan dollars would not necessarily be available or produced *in* discovery and, even if some data would be produced, would not address any bottom line potential collectability issues Plaintiffs may face depending on the status and whereabouts of the unfunded PPP advances at issue. Accordingly, the Court should require Defendant to provide an accounting.

In particular, Plaintiffs seek that Defendant promptly provide an accounting that answers the following five specific questions:

1. How many of the 494,415 SBA-approved PPP borrowers that Defendant committed to fund did Defendant fail to fund?

2. How much in federally-originated Paycheck Protection Program Liquidity Facility ("PPPLF") and other cash advances did Defendant receive that it failed to fund to SBA-approved borrowers?

3. Where are those unfunded proceeds presently?

4. And if Defendant paid any such PPPLF and other cash advances to others, when and to whom and how much and why?

5. How much in PPP loan processing fees did Defendant obtain on the unfunded loans of Plaintiffs and the putative members of the proposed class?

Plaintiffs have a vested interest in the PPP loan proceeds Defendant secured PPPLF advances on, and are clearly entitled to this information individually and to properly represent the proposed class and subclasses of similarly-situated SBA-approved but unfunded PPP borrowers they seek to represent. In addition, the answers to these fundamental questions go right to the core of the merits of this litigation, will enable the Court to adjudicate this matter in a secure, just and speedy manner on a fulsome record, and even help guide the scope and contours of the parties' discovery going forward.

<u>**Factual Background**</u>

Plaintiffs allege that Defendant failed to fund their PPP loans despite the SBA's approval of those loans. Despite lodging wide-ranging challenges to Plaintiffs' other allegations, Defendant has never denied (nor could it) any of the following facts:

- that, in 2021, it agreed to fund 494,415 Paycheck Protection Program ("PPP") loans totaling over $7.0 billion in proceeds, representing more loans than any other PPP lender in 2021 *(*ECF 18, ¶ 7)*;*

- that it received $7,144,136,133.27 in advances from the Federal Reserve System's PPPLF (*id.*, ¶ 71); *see also* Board of Governors of the Federal Reserve System, Paycheck Protection Program Liquidity Facility (PPPLF), available at https://www.federalreserve.gov/monetarypolicy/ppplf.htm (last accessed Sept. 17, 2021);

- that it failed to fund Plaintiffs' and numerous other SBA-approved PPP loans (*id.*, ¶¶ 88, 108, 117, 126, 131, 140, 149, 158, 167, 176, 179, 188, 197, 203 (a) – (g), 204 (a) – (ww);

- that these SBA-approved PPP loans were the required and *exclusive* collateral, dollar-for-dollar, for every nickel of cash advances Defendant obtained from the PPPLF (*id.*, ¶ 67); and

- that Defendant was and is required, under clear and definitive PPP recordkeeping requirements, to maintain detailed records concerning its receipt and disposition of all such PPPLF advances.

Multiple Plaintiffs and absent members of the proposed class report that the SBA has identified their loans as "disbursed" despite their never having been disbursed. *See, e.g.*, *id.* ¶¶ 86, 127-30, 203(b), 203(g), 204(j), 204(u), 204(x), 204(mm), 204(uu). Those false reports to the SBA came from Defendant. *Id.*, ¶ 89. While Defendant has disputed other allegations, again it disputes none of the above nor reasonably could it.

Instead, Defendant has bobbed and weaved and sought to delay, defer and derail these proceedings every way it can. It has successfully (at least thus far) resisted in producing a single document under the guise it filed a motion to dismiss (ECF 24) which Plaintiffs have opposed (ECF 29). It has failed to produce discovery despite 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**" (original emphasis), and thus resulted in Plaintiffs moving to compel. *See* ECF 34 (Plaintiffs' motion to compel); ECF 35 (Defendant's opposition). And despite the seriousness and nationwide scope of its alleged wrongdoing at issue and the highly detailed and well-pleaded allegations in Plaintiffs' Amended Complaint, Defendant seeks to hide behind a clearly deficient motion to dismiss to avoid even answering the claims.

To take just one issue, Defendant characterizes in its motion to dismiss its failure to disburse Plaintiffs' and class members' loans as mere "delay," citing forms and documents that purport to impose no time requirements for disbursing those loans. ECF 24-1 at 7. But Defendant was obligated to fund class member PPP loans within the prescribed period. *See*, *e.g.*, 86 Fed. Reg. 3692, 3710 ("The lender must make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval").

Further, there is not one shred of evidence in the record indicating that Defendant has belatedly funded any PPP loans or is seeking to continue to fund any PPP loans. But even if Defendant does intend to belatedly pursue any such PPP loan funding, that likewise supports the accounting Plaintiffs now seek.

Defendant's status and dealings as an SBA-approved PPP lender also support the requested accounting. PPP loans are funded by advances from the PPPLF. ECF 18, ¶¶ 63-64. PPPLF advances are secured by PPP loans and made in amounts equal to the total amount of PPP loans that serve as collateral for each advance. *See* Paycheck Protection Program Liquidity Facility Term Sheet ("PPP Loans pledged as collateral to secure extensions of credit under the Facility will be valued at the principal amount of the PPP Loan.").[1] To the extent that Defendant falsely reported to the SBA that PPP loans it actually failed to fund were "disbursed," it improperly received, dollar-for-dollar, those PPPLF advances. Once again, the accounting Plaintiffs seek will answer these vitally important questions.

Of direct relevance, PPP recordkeeping requirements are such that Defendant *already has* compiled or should easily be able to compile the information Plaintiffs seek. The very *basic*

[1] Board of Governors of the Federal Reserve System, available at https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20210625a1.pdf (last accessed Apr. 22, 2022).

information Plaintiffs seek -- how much federally-originated PPP advances Defendant received; how much it paid out; how much it still owes; where any unfunded proceeds are or may have been distributed to; and how much in loan processing fees on the unfunded PPP loans it received – is, or necessarily had to be, literally at the fingertips of Defendant. For example, PPP lenders are required to comply with 13 C.F.R. § 120.461. *See* 85 FED. REG. 33010, 33012. 13 C.F.R. § 120.461 in turn provides in relevant part that:

> An SBA Supervised Lender must permanently *preserve in a manner permitting immediate (one business day) retrieval* the following documentation for the financial statements and other reports required by § 120.464 (and the accompanying certified public accountant's opinion):
>
> (1) All general and subsidiary ledgers (or other records) reflecting asset, liability, capital stock and additional paid-in capital, income, and expense accounts;
>
> (2) All general and special journals (or other records forming the basis for entries in such ledgers).

13 C.F.R. § 120.461(c) (emphasis added).[2] PPP regulations further require SBA-approved PPP lenders to comply with additional regulations pertaining to individual loans in order to be paid PPP loan processing fees. *See* 85 Fed. Reg. 33010, 33014 (referencing "retention requirements described in the lender application form (SBA Form 2484)"). *See also* SBA Form 2484 (Revised 3/21).[3]

All PPP lenders are required to enter into a Letter Agreement to access PPPLF funds. *See* Letter of Agreement – PPPLF Non-DI.[4] That Letter Agreement requires compliance with "the

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[2] 13 C.F.R. § 120.464(b) requires that lenders maintain the "reports" referenced in the text in accordance with GAAP principles.

[3] *Available at* https://www.sba.gov/sites/default/files/2021-03/LenderApplication 202484ARPrevisions%20%28final%203-18-21%29-508.pdf (last accessed Apr. 22, 2022).

[4] *Available at* https://www.frbdiscountwindow.org/~/media/documents/nondi_ ppplf_loa.docx (last accessed Apr. 22, 2022).

provisions of the Reserve Bank's Operating Circular No. 10." *Id.* at 1. Operating Circular No. 10, in turn, requires that PPP lenders keep in an "accessible and secure location on the [lender's] premises … a current statement of outstanding Advances and Indebtedness." *See* Federal Reserve Banks Operating Circular No. 10 § 8.0.[5] That Circular further requires that all "Lending Documents shall be immediately and routinely available to any examiner authorized to examine the [lender]." *Id.* § 10(I). *See also* SBA Procedural Notice (July 15, 2021), at 1-2 (detailing additional PPP recordkeeping requirements).[6]

Argument

Plaintiffs and other similarly situated SBA-approved but unfunded class member borrowers entered into loan agreements with Defendant and maintain an ongoing interest in the whereabouts of the funds Defendant secured from the PPPLF by using their undisbursed PPP loans and loan agreements as collateral. Defendant implies that only a single one of its employees maintains responsibility for the management of its PPP responsibilities. *See* ECF 22 at 3. Although it is inconceivable that a single individual alone was responsible for processing and administering over $7 billion in PPP loans, to the extent Defendant's PPP loan management is centralized, that also supports readily accessing the accounting Plaintiffs now seek.

Even if Defendant ultimately produces some of the requested information in discovery, an accounting is warranted to determine the total amount of the PPPLF advances Defendant obtained but failed to disburse to the very SBA-approved borrowers whose standard form PPP loan contracts served as collateral for those funds. Additionally, the information requested

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[5] *Available at* https://www.frbservices.org/binaries/content/assets/crsocms/resources/rules-regulations/071613-operating-circular-10.pdf (last accessed Apr. 22, 2022).

[6] *Available at* https://www.sba.gov/sites/default/files/2021-07/Procedural%20Notice%205000-812316%20PPP%20Guaranty%20Purchase%20%26%20Charge%20Off%20Servicing%207.15.21-508.pdf (last accessed Apr. 22, 2022).

through an accounting is also directly relevant to Plaintiffs' claims that Plaintiffs' and other absent class members' standard form loan agreements are valid, enforceable contracts to make loans and that Defendant treated them as such because Defendant submitted them as collateral to receive PPPLF advances and PPP loan fees, and even to certain defenses Defendant may have such as concerning the scope of its unfunding. An accounting also is necessary to determine the potential disposition and location of those funds and where they are being held or to whom they may have been distributed which may raise collectability issues among other things.

Plaintiffs' request for this information easily satisfies the requirements to seek a legal (as opposed to equitable) accounting. To state a claim for a legal accounting, a plaintiff must allege that:

> (1) there was a valid contract, express or implied, between the parties whereby the defendant
>
> > (a) received monies as agent, trustee or in any other capacity whereby the relationship created by the contract imposed a legal obligation upon the defendant to account to the plaintiff for the monies received by the defendant, or
> >
> > (b) if the relationship created by the contract between the plaintiff and defendant created a legal duty upon the defendant to account and the defendant failed to account and the plaintiff is unable, by reason of the defendant's failure to account, to state the exact amount due him, and
>
> (2) the defendant breached or was in dereliction of his duty under the contract.

Bordoni v. Chase Home Fin. LLC, 374 F. Supp. 3d 378, 387 (E.D. Pa. 2019). *See also Local Union No. 98 IBEW v. LP Herman Co.*, No. 15-cv-00815, 2016 WL 245313, at *3 (E.D. Pa. Jan. 21, 2016) (denying motion to dismiss claim for legal accounting). *See also Schutter v. Herskowitz*, No. 07-3823, 2008 WL 4559554, at *3 (E.D. Pa., Oct. 8, 2008) (court ordered pre-trial accounting that revealed defendant's dissipation of funds at issue); *Id.*, Aug. 7, 2008 Order, at 2 n.1 (ECF No. 147) (order necessitated by defendant's failure to comply with discovery requests).

Plaintiffs and Defendant entered into valid and express contracts whereby Defendant received funds which imposed a legal obligation on Defendant to account for those funds. *See Berger & Montague, P.C. v. Scott & Scott, LLC*, 153 F. Supp. 2d 750, 754 (E.D. Pa. 2001) (defendant's "failure to provide [plaintiff] with a full accounting … constituted a breach of its duty under the Agreement" to forward funds at issue to plaintiff). Defendant's failure to fund the loans of Plaintiffs and class members likewise breached the parties' standard form loan agreements and thus also supports an accounting.

Further, plaintiff Ahmadou individually and on behalf of the Illinois Subclass seeks punitive damages consistent with the remedies afforded by the Illinois Consumer Fraud and Deceptive Business Practices Act. *See* ECF 18, ¶ 260. Multiple Third Circuit courts have compelled the production of relevant financial information "when exemplary or punitive damages are at issue before a plaintiff has made a prima facie showing of entitlement to such damages." *Hirtle Callaghan Holdings v. Thompson*, No. 18-cv-2322, 2021 WL 1163739, at *5 (E.D. Pa. Mar. 26, 2021) (compiling cases). *See also Heagy v. Burlington Stores, Inc.*, No. 20-cv-2447, 2021 WL 5399910, at *5 (E.D. Pa. Nov. 17, 2021) ("A plaintiff may seek discovery concerning punitive damages without proving entitlement to such damages."). The possibility of punitive damages for the Illinois subclass further supports the requested accounting.

Further, basic considerations of case management and discovery likewise support an accounting. If, for instance, Defendant failed to fund 25% of the 494,415 SBA-approved PPP loans it committed to fund, then the case and discovery could be focused more narrowly on those 123,603 PPP loans. Indeed, the very accounting Plaintiffs seek could thereby potentially and even very substantially narrow the discovery Plaintiffs may seek depending on the scope of the unfunding amounts at issue. And that approach is actually consistent with the premise of Defendant's arguments in seeking a stay of discovery -- namely, that discovery should be commensurate with the claims at issue. ECF 35.

Plaintiffs also are at risk of irreparable injury absent an accounting by virtue of having no assurance as to Defendant's ability to satisfy any judgment Plaintiffs may obtain. There is no evidence in the record presently regarding Defendant's ability to pay. Potential collectability issues also favor an accounting so Plaintiffs may take appropriate action now to protect their interests.

Further, any burden to Defendant in producing the accounting would be minor compared to the harm to Plaintiffs that would result from a lack of such relief. Defendant either has or should have the information in a readily-accessible form as required and as noted above. To the extent Defendant failed to comply with its recordkeeping obligations, that is all the more reason why Plaintiffs and the Court should know that now and any potential issues with Defendant's financial condition and potential ability to satisfy a judgment in this case.

Conclusion

For the foregoing reasons, the Court should order Defendant to provide the requested accounting.

Dated: April 22, 2022

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