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 SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A SECOND AMENDED CLASS ACTION COMPLAINT

Introduction

Plaintiffs respectfully submit this Memorandum of Law in support of their accompanying Motion under Fed. R. Civ. P. 15(a)(2) for leave to file a Second Amended Class Action Complaint (the "SAC"). A copy of Plaintiffs' proposed SAC is attached to Plaintiffs' Motion as Exhibit 1. The SAC differs from the pending first amended complaint (ECF 18) in that it adds as a defendant Chicanos Por La Causa Inc. ("CPLC"), which is the parent company of defendant Prestamos CDFI, LLC ("Prestamos"), based on newly discovered information, and adds a new count alleging unjust enrichment against CPLC in the alternative, and adds CPLC as a defendant in the breach of contract and California state law counts. A redline comparing Plaintiffs' proposed SAC to Plaintiffs' pending first Amended Class Action Complaint is attached to Plaintiffs' Motion as Exhibit 2.

Defendant Prestamos filed a motion to dismiss Plaintiffs' first amended complaint (ECF 24) which Plaintiffs opposed (ECF 29). *See also* ECF 32-2 (defendant Prestamos's reply brief). Thus, unless the Court directs otherwise, briefing on that motion is complete. Accordingly, and in an effort to streamline and facilitate the just, speedy and inexpensive determination of this litigation consistent with Fed. R. Civ. P. 1, Plaintiffs are amenable to deferring further proceedings on defendant Prestamos's current motion to dismiss to coordinate any motion to dismiss CPLC may want to file should the Court grant Plaintiffs leave to file the SAC, or proceed otherwise as the Court may direct.

Either way, these proceedings remain in their early stages; little discovery has been produced (and indeed defendant Prestamos has sought to stay discovery); the Court has not yet adjudicated defendant Prestamos's pending motion to dismiss; and no undue prejudice would result from granting Plaintiffs leave to file their SAC.[1] In any event at this early stage -- prior to a Rule 16 conference, and prior to any meaningful exchange of discovery -- Plaintiffs' should be granted leave to file their SAC.

<u>Background</u>

Plaintiffs' pending amended complaint alleges that Prestamos failed to fund Paycheck Protection Program ("PPP") loans for their businesses, despite the Small Business Administration's ("SBA") approval of those loans. ECF 18. Prestamos is a wholly-owned subsidiary of CPLC. CPLC's Consolidated Financial Statements for the fiscal year ended June 30, 2021 (the "Financial Statements") -- which were only recently released and made available publicly via ProPublica -- reflect not only its own direct involvement in PPP lending,

[1] Plaintiffs nevertheless contacted defendant Prestamos before filing their Motion for leave to file the SAC consistent with Fed. R. Civ. P. 15(a)(2). Defendant Prestamos opposed Plaintiffs' request.

but also the fact that defendant Prestamos upstreamed to proposed defendant CPLC hundreds of millions of dollars in PPP loan processing fees despite the fact that defendant Prestamos and not CPLC was the SBA-approved PPP lender. *See* https://projects.propublica.org/nonprofits/display_audit/11175820211. Those Financial Statements define CPLC itself as the "Organization." *Id.* at 15 ("Chicanos Por La Causa, Inc. (CPLC or the Organization) is an Arizona statewide community development corporation …"); state that, "[s]tarting in May 2020, *the Organization* began participating in the Paycheck Protection Program" *id.* at 18; and state the following concerning *the Organization's* PPP loan processing fees:

> For each approved PPP loan, the Small Business Administration (SBA) covered a percentage of the loan principal balance as a loan processing fee to the organization. The fee is amortized through the term of each PPP loan. As of June 30, 2021, *the Organization received* $314,260,826 from SBA, $5,086,196 was recognized as loan fee revenue and $309,174,630 was recorded as deferred revenue.

Id. (emphasis added).

Similarly, those Financial Statements reflect that "*[t]he Organization* attained a Paycheck Protection Program Liquidity Facility (PPPLF) advance agreement with the Federal Reserve Bank in May 2020. The advance is used to fund PPP lending …," *id.* at 37 (emphasis added), yet later state "[f]rom July 1, 2021 to October 31, 2021 $3,597,107,548 PPP loans funded through *Prestamos CDFI, LLC* have been forgiven by the Small Business Association and *Prestamos CDFI, LLC* recognized $172,977,576 PPP loan fees from deferred revenue." *Id.* at 50 (emphasis added).

Moreover, Prestamos President Jose Martinez ("Martinez") signed the standard form loan contracts that were entered into by Plaintiffs and the members of the proposed classes. *See* ECF 18-1, at 10. The new disclosures in CPLC's own Financial Statements support other publicly available facts now firmly establishing CPLC's control and domination of Prestamos's PPP lending activities and CPLC's status as alter ego of Prestamos and unjust enrichment therefrom. For example, all three of the members of Prestamos's Board of Directors are senior CPLC officers. *See* SAC ¶¶ 64-65. Prestamos President Martinez simultaneously served as CPLC's Executive Vice President Economic Development, and other CPLC Directors serve on Prestamos's Community Advisory Board. *Id*. ¶¶ 65. CPLC and Prestamos referred to each other interchangeably on their websites and in other public representations. *Id.* ¶¶ 67-68, 85.

Plaintiffs issued subpoenas to CPLC seeking its production of documents and the deposition of its representative. Those subpoenas are now the subject of motion practice in the United States District Court for the District of Arizona, where both CPLC and Prestamos are headquartered in adjoining buildings. *See Marshall v. Prestamos CDFI, LLC*, No. 2:22-mc-00007-DJH (D. Ariz.). Appearing to oppose compliance with those subpoenas for CPLC are the very same two law firms that represent defendant Prestamos in this litigation. CPLC's and Prestamos's dual counsel contend in the Arizona subpoena proceedings that Plaintiffs must exhaust their attempts to obtain party discovery before seeking discovery from CPLC. *Id.*, ECF 10, at 4. The fact that the same counsel represents both defendant Prestamos and proposed defendant CPLC further undermines any potential argument of undue prejudice or that defense counsel lacks sufficient time to familiarize themselves with this litigation and the claims.

On April 19, 2022, Plaintiffs requested a meet-and-confer with Prestamos addressed to this Motion. Prestamos responded to the effect that it would not consent to such a motion and that it would not even meet and discuss the issues with Plaintiffs in advance, contending instead that "[s]uch an amendment would … serve no purpose other than to burden, harass, and embarrass CPLC, seemingly for refusing Plaintiffs' unlawful discovery demands." But contrary to defendant Prestamos, Plaintiffs have nothing to gain and much to lose by wasting the Court's or their own resources by unduly burdening, harassing, or embarrassing CPLC. Plaintiffs' Motion is not only entirely consistent with the governing standards, but quite properly based on new publicly available information from CPLC's own Financial Statements and other statements in its own words concerning CPLC's own direct involvement in the PPP lending at issue.

Argument

The amendment of pleadings before trial is governed by Federal Rule of Civil Procedure 15(a).[2] As this Court observed in *Richardson v. Barbour*, No. 2:18-CV-01758-JMG, 2020 WL 4815829 (E.D. Pa. Aug. 19, 2020): "It is axiomatic that a court should freely give leave to amend unless the court finds undue delay, that the amendment would be inequitable and prejudice the non-moving party, or that it would be futile." *Id.* at *7 (citing Rule 15(a)). The burden is on the non-moving party to show prejudice, bad faith, undue delay, or futility. *Gerhart v. Progressive Preferred Ins. Co.*, No. 5:20-CV-01401-JMG, 2021 WL 3709522, at *3 (E.D. Pa. Aug. 20, 2021).

Prestamos cannot credibly claim prejudice at this early stage of the case. There is also no evidence that Prestamos has undertaken any effort to compile discovery that it would now have to duplicate by virtue of CPLC's becoming a party to the case. *See also Gerhart*, 2021 WL 3709522, at *3 ("[T]he need for additional discovery due to amendment does not, without more, prejudice the non-moving party.") (citations omitted). Nor should Prestamos be required to

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[2] Rule 16 and its progeny require parties to demonstrate good cause for filing amended pleadings once a pretrial scheduling order's deadline for such filings has passed. *See, e.g., Gerhart v. Progressive Preferred Ins. Co.*, No. 5:20-CV-01401-JMG, 2021 WL 3709522, at *2 (E.D. Pa. Aug. 20, 2021). But Rule 16 does not apply here, as the Court has not yet entered a pretrial scheduling order. *See Fletcher Partners, LLC v. Truist Bank*, No. 2:20-CV-00775-JMG, 2020 WL 5407857, at *1 (E.D. Pa. Sept. 9, 2020) (motion to amend not unduly delayed prior to Rule 16 conference).

expend substantial resources responding to an amended complaint. As the redlined proposed complaint submitted with this Motion reflects, Plaintiffs' allegations against Prestamos have not changed. The briefing addressed to Prestamos's pending Motion to Dismiss Plaintiffs' pending first amended complaint (ECF 24) can just as readily apply to the proposed SAC. Or if the Court determines that Prestamos should be allowed to revisit its arguments in response to the proposed SAC, Prestamos's burden in doing so should be minimal.

Nor is there any evidence of bad faith on Plaintiff's part. The Third Circuit has held that bad faith includes "some indication of an intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay." *Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986) (citing *Baker Indus., Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 223 (3d Cir. 1985)). Plaintiffs plainly have no interest in delay so long as Plaintiffs' funds are retained by Prestamos and/or its affiliates and have at all times acted to move these proceedings along.

Moreover, any delay in the filing of the instant Motion is negligible, particularly in light of the early procedural stage at which this case sits -- defendant Prestamos's Motion to Dismiss remains pending, and Plaintiffs' proposed SAC adds no claims against defendant Prestamos, such that the Court may readily rule concurrently as to both the pending Motion to Dismiss and any forthcoming motion to dismiss filed by CPLC. In any event, "the length of delay is rarely dispositive." *Gerhart*, 2021 WL 3709522, at *3. *See also Richardson*, 2020 WL 4815829, at *7 ("Although the delay between the original Complaint and SAC was substantial, it was not so long as to impute a dilatory motive or require denial of leave to amend.") (citing Third Circuit precedent). Plaintiffs have acted diligently at all times, and therefore this factor supports granting Plaintiffs' Motion to file the SAC.

Nor do Plaintiffs stand to gain by harassing Prestamos or CPLC. Plaintiffs do, however, maintain compelling interests in prosecuting their claims consistent with the evidence including any newly uncovered facts as is the case concerning CPLC and on proof and by judgment securing whatever funds are available to fully compensate them and members of the proposed classes for their claims. This is exactly what the SAC intends to pursue.

Finally, Plaintiffs' allegations fall far above the exacting standard necessary to reflect futility. "Given the liberal standard for amendment, ... courts place a heavy burden on opponents who wish to declare a proposed amendment futile." *Ogelsby v. Ferguson*, No. 1 9-cv-5598, 2021 WL 2935987, at *7 (E.D. Pa. July 13, 2021). CPLC will of course have ample opportunity to address the merits of Plaintiffs' claim via a Rule 12 motion or otherwise. Plaintiffs' showing at this stage is more than sufficient.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Leave to File their proposed Second Amended Complaint.

Dated: May 2, 2022

Respectfully submitted,

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