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

PRESTAMOS CDFI, LLC'S OPPOSITION TO
PLAINTIFFS' MOTION FOR AN ACCOUNTING

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**pro hac vice admission to be sought*

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Plaintiffs have triple-downed on deputizing themselves the roving enforcers of the United States Small Business Administration's ("SBA") Paycheck Protection Program ("PPP"). Three pending, fully-briefed motions before two federal courts were not enough; Plaintiffs apparently believe a *fourth* appeal for the Court's attention is necessary to seek the *same relief they already have asked for*. As Defendant Prestamos CDFI, LLC ("Prestamos") has argued in its Motion to Dismiss, ECF No. 24, and its opposition to Plaintiffs' Motion to Compel Discovery, ECF No. 35, and as non-party Chicanos Por La Causa, Inc. ("CPLC")—Prestamos's corporate parent—has argued in its Motion to Quash Plaintiffs' Subpoena and Opposition to Plaintiffs' Motion to Compel, *Marshall v. Prestamos CDFI, LLC ("CPLC Action")*, No. 22-mc-00007, ECF Nos. 1 and 10 (D. Ariz.), the troves of financial information Plaintiffs seek is at a minimum premature if not wholly irrelevant and incredibly burdensome, a burden which would be unfair to impose on Prestamos until the Court resolves Prestamos's challenges to subject matter jurisdiction and the plausibility of Plaintiffs' claims.

Plaintiffs' "Motion" for an Accounting should be denied. They do not cite any authority for bringing such a motion. An accounting is a legal or equitable cause of action under Pennsylvania law that properly is asserted in a pleading. Plaintiffs cannot circumvent the procedures for amending their complaint via a miscellaneous motion to the Court; the relief is unavailable to Plaintiffs in any event because they cannot satisfy the standard for making an accounting claim. And the Motion also fails because an accounting is not permitted to obtain information that otherwise is available through proper and relevant discovery.

The Court should deny Plaintiffs' Motion.

FACTUAL BACKGROUND[1]

The history of this dispute, despite its relative infancy, is a winding record full of premature, repetitive, and meritless overtures on the part of Plaintiffs. Plaintiffs' filed their initial Complaint on October 1, 2021. ECF No. 1. In it, on behalf of putative classes, they brought claims against Prestamos for breach of contract and violation of California statutory law related to Prestamos's purported failure to fund Plaintiffs' PPP loans under the terms of their promissory notes. Ultimately, Plaintiffs filed an amended complaint, ECF No. 18—adding new plaintiffs, classes, and statutory claims, though few new facts—which Prestamos again moved to dismiss for the Court's lack of subject matter jurisdiction and Plaintiffs' failure to state plausible claims for relief, ECF No. 24. The Motion to Dismiss is fully briefed and pending before this Court.

Meanwhile, Plaintiffs served Prestamos with expansive discovery requests, to which Prestamos properly objected and which instead resulted in a surprise letter from Plaintiffs seeking the Court's intervention, ultimately culminating in Plaintiffs' Motion to Compel. *See* ECF Nos. 22, 27, 30, 31 (the parties' letters); ECF Nos. 34, 35 (Motion to Compel and Prestamos's response). As the Court is aware from these filings, Prestamos is willing to negotiate on proper and relevant discovery but maintains the most judicious course is to stay discovery until after the Court resolves the Motion to Dismiss. Notably, in moving to compel, Plaintiffs contend, *inter alia*, that discovery is necessary to obtain "critical information" such as the number of loans Prestamos allegedly failed

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[1] Throughout their Motion, as in other filings, Plaintiffs trumpet that Prestamos has not disputed or denied several of their allegations, or that no "shred of evidence in the record" supports Prestamos's arguments. *See, e.g.*, Mot. at 3–5. This is, of course, because there is no record—Prestamos has not yet even answered their Amended Complaint. To be clear, Prestamos vigorously disputes Plaintiffs' hyperbolic, irrelevant, and unfounded allegations.

to fund and the location of those funds. *Id.* at 2–3. The Motion to Compel is fully briefed and pending before this Court.

Meanwhile *again*, on February 16, 2022, Plaintiffs served CPLC—a non-party to this litigation who is hardly mentioned in the Amended Complaint—with two third-party subpoenas. One demanded that CPLC produce troves of documents, many of which were identical to the documents Plaintiffs already requested from Prestamos. The other demanded that CPLC designate an individual to be deposed about any document CPLC eventually produced. CPLC objected to both subpoenas and, following a meet-and-confer, moved to quash the deposition subpoena in the United States District Court for the District of Arizona. *See CPLC Action*, ECF No. 1. On March 31, 2022, while CPLC's motion to quash was pending, Plaintiffs filed a motion in that court to compel CPLC's response to the document subpoena. *Id.*, ECF No. 6. That motion also is fully briefed and pending before that court. *See id.*, ECF Nos. 6, 10.

With all of the above disputes still unresolved, on April 22, 2022, Plaintiffs filed the instant Motion for Accounting.

<u>ARGUMENT</u>

I. <u>Plaintiffs cannot assert a legal claim for an accounting via this Motion.</u>

This Motion is an impermissible and insufficient attempt to further amend the Amended Complaint to assert alternative claims for relief. Plaintiffs acknowledge in their Motion that they seek to "state a claim for a legal accounting." Mot. at 8. A legal accounting is a "demand for relief" that derives from Pennsylvania Rule of Civil Procedure 1021. *See Bordoni v. Chase Home Fin. LLC*, 374 F. Supp. 3d 378, 387 (E.D. Pa. 2019). That rule provides that "[a]ny *pleading* demanding relief shall specify the relief sought" and expressly lists an accounting as an example of such relief. Pa. R. Civ. P. 1021(a). *See also, e.g.*, *Baird v. Macklin*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 130, at *12 (Pa. Ct. Com. Pl. Dec. 11, 2008) (discussing the adequacy of the plaintiff's complaint and explaining that "[u]nder [Rule 1021], a plaintiff may seek an accounting as part of his remedy at law"). Unsurprisingly, most of the cases Plaintiffs cite in their Motion concern decisions on the adequacy of an accounting claim in the plaintiff's complaint. *See, e.g.*, *Bordoni*, 374 F. Supp. 3d 378 (motion to dismiss accounting claim in complaint); *Berger & Montague, P.C. v. Scott & Scott, LLC*, 153 F. Supp. 2d 750, 754 (E.D. Pa. 2001) (same); *Loc. Union No. 98 IBEW v. LP Herman Co.*, No. 15-cv-815, 2016 U.S. Dist. LEXIS 6916 (E.D. Pa. Jan. 21, 2016) (same). Plaintiffs cite no other authority permitting the relief they seek.

If Plaintiffs believe they are entitled to an accounting, they should have stated so in their first, second, or proposed third complaint. *See* ECF No. 37, Ex. 1 (proposed Second Amended Complaint does not state a claim or demand for an accounting). Because they did not, the proper vehicle for stating an accounting claim now is still a motion, pursuant to Federal Rule of Civil Procedure 15, to amend their complaint. *See* Fed. R. Civ. P. 15(a)(2). Plaintiffs do not address that Rule or the standard for granting a motion under it, and the Court should deny the Motion on that basis alone.

Still, adding an accounting claim would be futile in any event. "In Pennsylvania, the right to an accounting at law is a form of relief that attaches only where the defendant has breached a valid contract with the plaintiff." *Lightman v. Marcus*, No. 12-cv-97, 2012 U.S. Dist. LEXIS 54322, at *10–11 (E.D. Pa. Apr. 17, 2012) (internal citation omitted); *see also Zamias v. Fifth Third Bank*, No. 17-cv-153, 2018 U.S. Dist. LEXIS 118496, at *17 (W.D. Pa. July 16, 2018) (explaining that a "legal accounting is . . . merely an incident" to a breach-of-contract claim). A prerequisite for an accounting is the defendant's breach of a valid contract between the parties. Only certain contracts, however, can give rise to this relief—the alleged contract must be an agreement:

> 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.

Mattern & Assocs., LLC v. Lathan & Watkins LLP, No. 13-cv-6592, 2014 U.S. Dist. LEXIS 136596, at *13 (E.D. Pa. Sept. 26, 2014); *accord Haft v. U.S. Steel Corp.*, 499 A.2d 676, 676–68 (Pa. Super. 1985).

Plaintiffs do not meet these elements. Foremost, and for the reasons set forth in Prestamos's Motion to Dismiss, Plaintiffs have not plausibly alleged a breach-of-contract claim at all. *See* ECF No. 24. Such defect is fatal to an accounting claim. *Lightman*, 2012 U.S. Dist. LEXIS 54322, at *10–11 (denying accounting claim where plaintiffs did not adequately allege a breach of contract); *Zamias*, 2018 U.S. Dist. LEXIS 118496, at *17 (same). At the very least, Prestamos's well-grounded challenges to Plaintiffs' contract claim should be resolved before the litigation proceeds.

Moreover, the Amended Complaint does not allege the type of contractual obligation that would entitle Plaintiffs to accounting relief. The cases Plaintiffs cite make this clear. *See* Mot. at 8–9. *Bordoni* involved a borrower's dispute with his mortgage lender over, *inter alia*, the lender's refusal to tell the borrower how much debt was outstanding on the loan. *See* 374 F. Supp. 3d at 381–82. *LP Herman Company* similarly concerned a dispute over the amount of money one party had already paid to another. *See* 2016 U.S. Dist. LEXIS 6916, at *9–11 (sustaining the accounting claim where the pleadings alleged that the contract created "a legal obligation to determine [the party's] delinquencies in the payments made by [the party] to the multi-employer benefit funds"). And in *Berger & Montague*, the court upheld an accounting claim where the plaintiff alleged that the defendant "was responsible under the parties' agreement for the collection and distribution of monies received from the clients" and that the failure to provide an accounting was *itself* the contractual breach. 153 F. Supp. 2d at 754.

In contrast, the contract Plaintiffs allege that Prestamos breached was a promissory note—a promise to pay back a loan on certain terms. Prestamos did not, under that contract, "receive[] monies [from plaintiffs] as agent, trustee or in any other capacity" that "imposed a legal obligation upon the defendant to account to the plaintiff for the monies received by the defendant." *Haft*, 499 at 677–78 (Pa. Super. 1985). Even if Prestamos has some legal obligation to account for any PPP-related funding, that obligation is not *to Plaintiffs*, and does not arise *from the promissory note*. *See id.* at 678 (denying an accounting claim because there were "no facts which indicate that [defendant] received any monies in any capacity from [plaintiffs] under any contract, express or implied").

Plaintiffs also do not plausibly allege that they are "unable to state the exact amount due" to them because of Prestamos's failure to provide an accounting—the second ground for obtaining that relief. *Id.* at 677–78. As alleged in the Amended Complaint, the damages Plaintiffs seek for breach of contract are "the loan proceeds owed and due to [them]," proceeds which would be expressly set forth in the promissory notes themselves. Am. Compl., Prayer for Relief, ¶ D.

"Because: 1) [Prestamos] never received monies from Plaintiff[s] as an agent, trustee, or through a contractual relationship which imposed upon [Prestamos] a legal obligation to account for those monies, and 2) the contract between Plaintiff[s] and [Prestamos] failed to create a legal duty upon [Prestamos] to account, Plaintiff[s are] not entitled to a legal accounting." *Mattern*, 2014 U.S. Dist. LEXIS 136596, at *14 (cleaned up). This Motion should be denied.

II. <u>**An accounting is inappropriate because the information Plaintiffs seek is available to them through discovery.**</u>

Even if Plaintiffs were able to identify the authority permitting them to obtain, or even request, an accounting at this juncture, case law is conclusive that an accounting is not available to obtain information that parties can seek via discovery. *Reivia Ashley, LLC v. Paselo Logistics, LLC*, No. 14-cv-5092, 2017 U.S. Dist. LEXIS 198420, at *50 (E.D. Pa. Dec. 1, 2017) (internal citation omitted) (collecting cases). Simply, "courts will not grant a request for an accounting merely because the plaintiff desires information it could obtain through discovery." *Id.*; *see also Pa. Ship Supply, Inc. v. Fleming Int'l Ltd.*, 113 F. Supp. 2d 760, 764 (E.D. Pa. 2000) (holding that plaintiff was not entitled to an accounting where the information sought was attainable through the discovery process); *cf., e.g.*, *Camafel Bldg. Inspections, Inc. v. BellSouth Advert. & Pub'lg Corp.*, No. 06-cv-1501, 2008 U.S. Dist. LEXIS 18192, at *35 (N.D. Ga. Mar. 7, 2008) (construing "Plaintiffs' motion for 'legal accounting'" as "essentially a request for damages discovery," which the Court denied).

Here, the information Plaintiffs ask Prestamos to provide in an accounting is *exactly the same* as information they already have requested via discovery. They demand answers to the following questions:

1. How many SBA-approved borrowers did it fail to fund?
2. How much federally-originated proceeds are at issue?
3. Where are those proceeds presently?
4. If Defendant paid any such proceeds to others, when and to whom and how much and why?
5. 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?

See Mot. at 2–3. These are identical to already outstanding discovery requests. *See* RFP No. 12 (number of SBA-approved loans Prestamos did not fund); RFP No. 13(ii)–(nn), (aaa) (receipt and location of federal proceeds); RFP No. 13(nnn)–(sss) (receipt of fees); *see also, e.g.*, Interrog. Nos. 1, 2; CPLC Subpoena RFP Nos. 1, 2, 5, 17–20, 24. Plaintiffs' entitlement to certain discovery does not depend on the number of times they ask for it.

An accounting is not justified, as Plaintiffs argue, simply because Prestamos has not propounded the discovery they requested. Case law shows that an accounting may be necessary only where the defendant has refused to comply with proper and relevant discovery requests despite the court's instruction otherwise. For example, *Schutter v. Herskowitz* (cited by Plaintiffs) involved a dispute over a real estate broker's refusal to release money the plaintiff had deposited in an escrow account in advance of a land sale that eventually was cancelled. No. 07-cv-3823, 2008 U.S. Dist. LEXIS 79975, at *1–6 (E.D. Pa. Oct. 8, 2008). Over *years* of litigation, the broker failed outright to even respond to multiple discovery requests, motions to compel, Court orders compelling discovery, motions and orders for contempt of Court, and dispositive substantive motions. *See, e.g.*, *id.*, ECF No. 140, at 1–9 (detailing the procedural history of the case). After all of this, the Court ordered the broker to submit an accounting of the escrow funds—not only, as Plaintiffs misrepresent, because the broker had failed "to comply with various discovery requests," but also because the Court had ruled against the broker's claims on the merits and ordered the broker, under Rule 67(b), to deposit the escrow funds into a Court account. *See id.*, ECF No. 147. *See also, e.g.*, *Centrix HR, LLC v. On-Site Staff Mgmt.*, 349 F. App'x 769, 775 (3d Cir. 2009) (suggesting an accounting is appropriate where "defendants intentionally and repeatedly ignored numerous discovery orders and then argued that plaintiffs failed to prove damages" (citation omitted)).

Plaintiffs cannot conceivably assert that anything similar has transpired here. It is their burden to request and adduce evidence of the damages they purportedly suffered as a result of Prestamos's alleged actions. The proper means of obtaining this information is through discovery, which Plaintiffs have propounded and Prestamos is disputing, as it is entitled to do. Plaintiffs' request for alternative relief, a naked attempt to circumvent the Court's adjudication of (multiple) pending disputes, is premature and warrantless. The Motion should be denied. *See, e.g.*, *Centrix HR*, 349 F. App'x at 774–75 (3d Cir. 2009) (upholding lower court's rejection of an accounting claim where "there was an adequate . . . claim for damages," the defendants did not "disobey[] repeated discovery orders" and the plaintiff failed to produce any evidence of damages).

CONCLUSION

For the foregoing reasons, Prestamos respectfully requests that the Court dismiss Plaintiffs' Motion for Accounting.

Dated: May 6, 2022

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