IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Alicia Marshall, *et al*., individually and on behalf of all others similarly situated, Plaintiffs, v. Prestamos CDFI, LLC and Chicanos Por La Causa, Inc., Defendants.	Civil Action No. 5:21-cv-04337-JMG

<u>Plaintiffs' Brief In Opposition To Defendants' Motion To Dismiss</u>

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Introduction

Plaintiffs have standing because defendant Prestamos CDFI, LLC's ("Prestamos") failure to fund their U.S. Small Business Administration ("SBA") approved Paycheck Protection Program ("PPP") loans hurt their businesses and committed them to pay money back to Prestamos, with interest, on loan proceeds they never received. Plaintiffs' state law claims are sufficiently alleged and not preempted or precluded. Defendant Chicanos Por La Causa, Inc. ("CPLC") controlled Prestamos's PPP lending and obtained the PPP loan fees which states a classic alter ego claim. The Court should therefore deny Defendants' motion to dismiss.

Statement of Facts

On March 27, 2020, Congress passed the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") to assist individuals, families and businesses amid the outbreak of Covid. ¶¶ 38-39.[1] An integral part of the CARES Act was the PPP. PPP loans are guaranteed by the SBA and are designed to be completely forgiven. ¶ 41. To ensure that businesses received their PPP loan proceeds quickly, the SBA delegated lending to authorized private PPP lenders and required PPP loans to be funded within ten days of SBA approval. ¶¶ 45, 51. In return, the SBA paid PPP lenders fees for each loan made. ¶¶ 45-48.

While Prestamos was an SBA-authorized PPP lender, CPLC was not. In 2020, Prestamos booked only 935 PPP loans totaling less than $27 million for fees of $1.3 million. ¶ 6. In late 2020, the PPP loan fee structure was increased to 50% or $2,500.00, whichever is less, for PPP loans up to $50,000.00 to encourage PPP loans to minority, underserved, veteran, women-owned and other small businesses like Plaintiffs. ¶¶ 46-47. Defendants seized an opportunity to exploit

[1] Unless otherwise noted, all paragraph references are to paragraphs in Plaintiffs' Second Amended Complaint (ECF 42); all page cites are to the ECF page number; all emphases are in the original; and all internal quotation marks, alterations, footnotes and citations are omitted.

that market. As a result, Prestamos committed to fund 494,415 PPP loans in 2021 for over *$7.6 billion*, or more PPP loans than any other lender in 2021, and more than Bank of America, PNC Bank, TD Bank and Wells Fargo *combined*, and obtained nearly $1.2 billion in fees. ¶¶ 9-10.

To enable PPP lending, the Federal Reserve advanced the funds to Prestamos through term loans secured by PPP loans. ¶ 86. PPPLF advances could only be secured by SBA-guaranteed PPP promissory notes, and the principal amount advanced equaled the principal amount of the PPP loan pledged to secure the advance. ¶ 90. In total, Prestamos received $7,144,136,133.27 from the PPPLF to fund PPP loans. ¶ 94.

Defendants say that Plaintiffs do not "allege that Prestamos spent or misappropriated any money it received from SBA" (ECF 46-1 at 10). But they omit that, despite Plaintiffs' repeated and ongoing efforts (ECF 22, 30, 34) including for an accounting (ECF 36) and Prestamos's clear obligation as a PPP lender to properly maintain and readily access the data (ECF 36-1 at 6-7), Defendants have fiercely resisted producing *any* information regarding the status and whereabouts of those proceeds. ECF 27, 31, 35, 38. Plaintiffs instead responsibly and narrowly allege that they "are unaware whether Prestamos has retained or spent or disbursed any such funds" (¶ 229), although Defendants' continued resistance to producing that vitally important information gives rise to an inference of further serious malfeasance.[2]

Plaintiffs are sole proprietors engaged in healthcare, food catering, hair care, real estate, construction, janitorial, clothing upholstery and delivery businesses. ¶¶ 15-25. Plaintiffs all timely applied for PPP loans in 2021 to help with their businesses; had their PPP loans approved by the SBA; signed and returned to Prestamos all required Loan Documents (¶ 101; ECF 42 at

[2] Defendants do repeat that Prestamos owed interest to the Federal Reserve on the PPP advances Prestamos obtained. ECF 46-1 at 10, 15. But they don't say whether Prestamos actually *paid* any such interest or, more fundamentally, what it did with the principal.

77-90); and failed to *ever* receive their PPP loan proceeds despite Defendants' absurd position that Plaintiffs' claim is for mere "alleged delay" in funding. ECF 46-1 at 5.

Plaintiffs further allege that CPLC owned Prestamos and controlled and directed its PPP lending and was its alter ego; caused it to upstream to CPLC PPP lending fees; placed its President and CEO, David Adame, CFO Alicia Nunez and EVP Max Gonzales, as the *sole* members of Prestamos's Board of Directors; had its EVP Jose Martinez sign the Loan Documents (ECF 42 at 86) while also serving as President of Prestamos (¶ 66); and held the companies out publicly as one. ¶¶ 11-12, 35, 62, 65-68.

Defendants argue that the Note releases them from liability (ECF 46 at 34-36) but contradictorily contend that Prestamos was not contractually obligated to fund the loans. That contention is belied by the Loan Documents (¶¶ 101, 243-47) and by applicable PPP rules which require lenders to disburse the loans. *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") (emphasis added).

Prestamos refused to fund despite numerous follow-up efforts by Plaintiffs to get funded. *See, e.g.*, ¶¶ 107-10, 150-53, 200-01. As a result, Plaintiffs were deprived of funds to which they were contractually entitled (¶¶ 243-48) and reliant exclusively on Prestamos to fund (¶¶ 54, 119, 255-57), and are obligated to pay back to Prestamos loan proceeds they never received plus interest (¶ 121; ECF 42 at 78) and unable to properly apply for loan forgiveness. ¶ 122. The Amended Complaint details similar complaints by numerous other approved but unfunded borrowers. *See* ¶¶ 226(a)-(g); 227(a)-(xx).

Argument

The Court should "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party" (*Allstate Prop. & Cas. Ins.*

Co. v. Dynamic Sols. Worldwide, LLC, 2020 WL 6940884, at *2 (E.D. Pa. Nov. 25, 2020)), "and then determine whether they plausibly give rise to an entitlement for relief." *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). Defendants cite *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 896 (3d Cir. 1977), but that court reversed dismissal, holding that Rule 12(b)(1) motions "prior to giving the plaintiff ample opportunity for discovery should be granted only sparingly."

A. Plaintiffs Have Standing

Plaintiffs are among those Congress designed the PPP to help. Plaintiffs were reliant on Prestamos and deprived of funds to assist their businesses, and are obligated to repay with interest loans they never received and precluded from lawfully applying for forgiveness. Far from being "too speculative" as Defendants claim (ECF 46-1 at 16 n.5), these allegations clearly allege cognizable injury fairly traceable to Prestamos's failure to fund. *See Talbert v. Am. Water Works Co.*, 538 F. Supp. 3d 471, 482 (E.D. Pa. 2021) (Gallagher, J.) (the injury-in-fact element of standing "is 'very generous to claimants, demanding only that the claimant allege[ ] some specific, identifiable trifle of injury' … 'Monetary harm is a classic form of injury-in-fact'").

Further, issues as to causation and the extent of damages should not be resolved at this procedural stage. *See PetroChoice Holdings, Inc. v. Orobono*, 2022 WL 138008, at *8 (E.D. Pa. Jan. 14, 2022) (Gallagher, J.) ("Whether causation has been established in a breach of contract action … is normally a question of fact for the jury …."); *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 479 (3d Cir. 2018) ("our standing inquiry must avoid any consideration of the merits beyond a screening for mere frivolity"); *Davis v. Wells Fargo*, 824 F.3d 333, 348 (3d Cir. 2016) ("when a factual challenge to jurisdiction attacks facts at the core of the merits of the underlying cause of action, the proper procedure for the district court is to find that jurisdiction exists and to deal with the objection as a direct attack on the merits of the plaintiff's case"); *CNA v. United States*, 535 F.3d 132, 145 (3d Cir. 2008) (courts should "not prematurely grant Rule 12(b)(1) motions to dismiss claims in which jurisdiction is intertwined with the merits and could be established, along with the merits, given the benefit of discovery").

Although there is no evidence in the record that Prestamos is still considering voluntarily funding the loans, improper delay itself can also be actionable. *See*, *e.g.*, *Pontes v. Rowan Univ.*, 2021 WL 4145119, at *4 n.5 (3d Cir. Sept. 13, 2021) (a "temporary loss of use of money is itself a sufficiently concrete injury to establish standing").

Defendants improperly rely on *Pinehurst Neuropsychology, PLLC v. First-Citizens Bank & Tr. Co.*, 2021 WL 4460273, at *3 (M.D.N.C. Sept. 29, 2021) and *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 746 (D. Md. 2020), to argue that Plaintiffs lack standing. But those cases involve PPP loan *applicants* who could have gone elsewhere for PPP loans, not contractually-entitled, SBA-approved but unfunded borrowers bound to the lender by enforceable Loan Documents. *See also Elizabeth M. Byrnes, Inc. v. Fountainhead Com. Cap., LLC*, 2021 WL 5507225, at *4 (C.D. Cal. Nov. 24, 2021) ("It is far from certain that Plaintiff suffered any injury, as she does not allege that she was unable to obtain a loan from another source or how much of a delay she suffered as a result of Fountainhead's conduct.").

Plaintiffs also have standing to assert their nationwide breach of contract claims. The Third Circuit, this Court and other courts have repeatedly held that, "[i]n the class action context, our standing inquiry focuses solely on the class representative(s)." *Mielo*, 897 F.3d at 478. *Accord In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 634 (3d Cir. 2017); *Neale v. Volvo Cars of North Am.*, 794 F.3d 353, 362 (3d Cir. 2015); *Bombin v. Sw. Airlines Co.*, 529 F. Supp. 3d 411, 418-19 (E.D. Pa. 2021) (Gallagher, J.) (citing *Horizon*);

Bodor v. Maximus Fed. Servs., Inc., 2021 WL 4941503, at *2 (E.D. Pa. Oct. 22, 2021). (Gallagher, J.).

Rather than acknowledge controlling precedent, Defendants' other cases largely pre-date it, and raise differences in state law not present here. *See In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 156 (E.D. Pa. 2009) (disputing plaintiffs' standing under "various state statutes"); *Lauren v. PNC Bank, N.A.*, 296 F.R.D. 389, 390 (W.D. Pa. 2014) (decided before *Mielo); In re Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litig.*, 2013 WL 5503308, at *8-*9 (D.N.J. Oct. 2, 2013) (state antitrust and consumer protection law claims); *In re Niaspan Antitrust Litig.*, 2015 WL 8150588, at *3 (E.D. Pa. Dec. 8, 2015) (collecting cases). Only *Talbert,* 538 F. Supp. 3d at 489, is recent by comparison. And unlike this case which involves a standard-form contract and nationwide alleged breaches that, if proven, would uniformly result in liability under the laws of every jurisdiction, the plaintiffs in *Talbert* did "not attach any contract or identify any essential terms of a contract" but instead alleged contaminants in their respective two residential water supplies only in Pennsylvania and New Jersey.

B. Plaintiffs' Claims Are Not Preempted or Precluded

Defendants do not contend that the CARES Act expressly preempts Plaintiffs' state law claims or that Plaintiffs' claims conflict with the CARES Act, nor reasonably could they. *See Rolon v. Metro. Life Ins. Co*., 2022 WL 35609, at *4 (E.D. Pa. Jan. 4, 2022) (Gallagher, J.) ("Under the principles of implied conflict preemption, a state law is preempted when it conflicts with a federal law such that dual compliance is impossible or when it stands as an obstacle to the federal statute's objective."). Instead, Defendants claim field preemption on the premise that "the CARES Act and related rules already provide a robust enforcement scheme" (ECF 46-1 at 19). But robust federal enforcement does not result in preemption. Rather, field preemption is found only "if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Defendants cite nothing in the CARES Act suggesting that Congress left no room for state law. To the contrary, section 7 of the standard form Note affirmatively *incorporates* state law into the parties' agreement (ECF 42 at 81), and even precludes borrowers from claiming against the SBA that federal law preempts state law. *Id.*

This Court's ruling in *Rolon*, 2022 WL 35609, is spot on although Defendants do not even cite it despite Plaintiffs' prior discussion of it. ECF 29 at 15-16. *Rolon*, 2022 WL 35609, at *1, involved disputed life insurance proceeds created under a federal program which, like the SBA and PPP lending, tasked a federal agency to implement that, in turn, retained private firms to administer "in accordance with the requirements and conditions of FEGLIA, the OPM's regulations and the FEGLI Contract." Defendant argued that plaintiffs' claims were expressly and impliedly preempted. The Court held that "neither of these arguments is persuasive because Plaintiffs' breach of contract claim is entirely consistent with the FEGLI Contract and FEGLIA itself" (*id*. at *3) and that "the whole purpose of a breach of contract claim is to *enforce* a contract's provisions, not to alter them." *Id*. at *4. Likewise here, there is no inconsistency between Plaintiffs' state law claims and federal law, and the purpose of Plaintiffs' state law claims is to enforce federally-created PPP lending obligations, not alter or interfere with them.

Further, a section of the CARES Act protecting healthcare workers actually preempts state law. *See* 15 U.S.C. § 3215(c)(1). This further evidences Congressional intent for the CARES Act to not otherwise displace state law. *See Adams v. McMaster*, 851 S.E.2d 703, 712 (S.C. 2020).

The absence of a private right of action in the CARES Act also does not preclude Plaintiffs' state law claims. *See Bukowski v. Wells Fargo Bank, N.A.*, 757 F. App'x 124, 128-29 (3d Cir. 2018) (reversing dismissal; "As the Seventh Circuit explained in *Wigod [v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 581 (7th Cir. 2012)], '[t]he absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law.'"); *Scott v. Gate Gourmet, Inc.*, 2021 WL 677897, *10 (C.D. Cal. Feb. 22, 2021) (citing *Wigod*; "the Court similarly finds that the absence of a private right of action from the CARES Act, which does not expressly prohibit state law claims, does not require dismissal of plaintiffs' common law claims").

Defendants cite no case holding that the CARES Act preempts or precludes state law. Instead, they cite cases for the undisputed point that the CARES Act and other statutes do not contain a private right of action (*see* ECF 46-1 at 19 n.7; *Gibbs v. SLM Corp*., 336 F. Supp. 2d 1, 16-17 (D. Mass. 2004) (federal education act); *Umland v. PLANCO Fin. Servs., Inc*., 542 F.3d 59, 67 (3d Cir. 2008) (federal tax statute); *Mankodi v. Trump Marina Assocs. LLC*, 525 F. App'x 161, 166 (3d Cir. 2013) (state statute)), and cases involving PPP applicants or agents who, unlike here, lacked any binding contract with PPP lenders. *See Johnson v. JPMorgan Chase Bank, N.A.*, 488 F. Supp. 3d 144, 149 (S.D.N.Y. 2020); *Profiles*, 453 F. Supp. 3d at 750-751; *Radix Law PLC v. JPMorgan Chase Bank, N.A.*, 508 F. Supp. 3d 515, 520 (D. Ariz. 2020). And also as in *Rolon*, 2022 WL 35609, at *4, the absence of a federal private right of action in the CARES Act renders state law enforcement here more important.

Defendants also cite *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110 (2011). But that case involved comprehensive pharmaceutical pricing regulation that "'centralized enforcement in the government'" and no claim that the defendants "violated any independent substantive obligation" to plaintiff. *Id*. at 119. Here, Plaintiffs allege independent and direct state law claims in their own right as counterparties to the Loan Documents.

C. Plaintiffs Sufficiently Allege Alter Ego Claims Against CPLC

Plaintiffs sufficiently allege that CPLC was Prestamos's alter ego. *See* ¶¶ 11-12, 35, 62, 65-68. Indeed, Defendants spend over eight pages in their brief trying to refute the *merits* of those allegations. ECF 46-1 at 24-32. That alone demonstrates the claim is sufficiently *alleged*. *Castillo v. Johnson*, 2019 WL 4222289, at *8 (D. Ariz. Sept. 15, 2019) (alter ego allegation sufficient where corporate defendant was "collecting millions in management fees in exchange for no consideration"); *Slep-Tone Entm't Corp. v. Brophy*, 2014 WL 11498396, at *2 (D. Ariz. June 4, 2014) (allegation sufficient that the individual defendant was sole manager of the LLC defendant); *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991) (denying summary judgment where key executive served two defendants).

Further, Defendants ignore that they have not produced any discovery and that courts, including in virtually all the cases they cite, overwhelmingly allow discovery rather than dismiss alter ego claims under Rule 12. *See, e.g., PSC Info Group v. Lason, Inc.*, 2008 WL 4660943, *7 (E.D. Pa. Oct. 21, 2008); *Powervar, Inc. v. Power Quality Scis., Inc.*, 2021 WL 2986417, at *6 (E.D. Pa. Jul. 15, 2021); *Gladstone Tech. Partners, LLC v. Dahl*, 222 F. Supp. 3d 432, 439 & n.23 (E.D. Pa. 2016); *Pimal Prop., Inc. v. Capital Ins. Group, Inc.*, 2012 WL 608392, at *4 (D. Ariz. Feb. 27, 2012) ("[a]lter ego determinations are highly fact-based").

Accordingly, Prestamos's PPP lending activities in Pennsylvania are imputed to CPLC and the Court therefore has jurisdiction over CPLC. *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 781 (3d Cir. 2018) ("the alter ego theory … instructs that, if a subsidiary is merely the agent of a parent corporation, or if the parent corporation otherwise controls the subsidiary, then personal jurisdiction exists over the parent whenever personal jurisdiction … exists over the subsidiary"); *Deardorff v. Cellular Sales of Knoxville, Inc.*, 2020 WL 5017522, at *7 (E.D. Pa. Aug. 25, 2020) (quoting *Shuker*).

The Court also has jurisdiction over CPLC directly given the loan fees it obtained even though it was not the SBA-approved lender. SBA data reflect that Prestamos committed to fund 13,672 loans totaling $208,677,578 to Pennsylvania borrowers in 2021. *See* https://bit.ly/3O4XmW4 (public_up_to_150k_10_220403.csv). Those loans resulted in the payment of at least $34,180,000 in fees assuming a fee of at least $2,500.00 for each such loan.

And, if there was any question the Court may exercise jurisdiction over CPLC, Plaintiffs should be afforded discovery for further details concerning the relationship between the Defendants and their contacts here, including via Blueacorn and any other agent they used for PPP lending. *See, e.g.*, *Shuker*, 885 F.3d at 781-82; *Rocke v. Pebble Beach Co.*, 541 Fed. App'x. 208, 212-13 (3d Cir. 2013); *Deardorff*, 2020 WL 5017522, at *8; *Trett Texas LLC v. Pitney Road Partners, LLC*, 2015 WL 5737571, at *2 (E.D. Pa. Sept. 30, 2015). Discovery is particularly called for here given CPLC's failure to put any relevant evidence of its own in the record. *Coles v. Hawks' Towing & Recovery, LLC*, 2005 WL 8177264, at *1 (E.D. Pa. June 23, 2005) (allowing discovery in "the conspicuous absence of any denial that [defendant] conducts business in Pennsylvania").

Defendants' merits arguments are also inapt. For example, even if the term "Organization" refers collectively to CPLC and its subsidiaries as Defendants claim (ECF 46-1 at 26), the financial statement also states that "[t]he Organization is the *sole* member of seven limited liability companies." *See* ProPublica, Chicanos Por La Causa Inc., at 15 (available at https://bit.ly/3NBsPiY) (emphasis added). That reference can logically be only to CPLC alone.

And the use of "one consolidated financial statement and annual report for the whole [corporate] family" weighs in favor of personal jurisdiction over a corporate defendant in any event. *Williams v. OAO Severstal*, 2019 WL 4888570, at *9 (Pa. Super. Oct. 3, 2019).

None of Defendants' cases dictate a different result. Several were decided after trial (*see*, *e.g.*, *United States v. Bestfoods*, 524 U.S. 51, 58 (1998); *In re Blatstein*, 192 F.3d 88, 105 (3d Cir. 1999)), or on summary judgment. *See*, *e.g*., *Pearson v. Component Tech. Corp*., 247 F.3d 471 (3d Cir. 2001); *Lieberman v. Corporacion Experienca Unica, S.A.*, 226 F. Supp. 3d 451 (E.D. Pa. 2016). The courts in others allowed jurisdictional discovery. *See, e.g*., *Reynolds v. Turning Point Holding Co., LLC*, 2020 WL 953279, at *2 (E.D. Pa. Feb. 26, 2020). And the corporate defendant in *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 823 (D. Ariz. 2016), filed two affidavits detailing its thorough lack of involvement in the events that precipitated the case. Defendants here have proffered nothing.

D. Plaintiffs Sufficiently Allege Breach of Contract Claims

Defendants' argument that Prestamos was not contractually bound to fund the PPP loans ignores the terms of the Loan Documents, basic principles of contract construction, the PPP rules and Defendants' own actions confirming -- *and reaping the benefits of* -- Plaintiffs' approved loans. Defendants admit the Loan Documents are binding by affirmatively pledging them as collateral to obtain PPPLF loan advances and PPP loan fees and by seeking to enforce the release in the Note. Defendants cannot now change their position that the Notes are supported by adequate consideration and enforceable.

Section 1 of the Note states that the consideration for the borrower's agreement is "the Loan" and that "*[i]n return for the Loan*, Borrower promises to pay to the order of the Lender" the principal amount plus interest unless forgiven (ECF 42 at 78) (emphasis added); identifies

Prestamos as the "Lender" and each Plaintiff as the SBA-approved "Borrower" and the SBA loan number and amount, terms, the lender's rights and other provisions (*id* at 78-83); and was signed by each borrower and accepted by Prestamos. *Id.* at 83, 86. The Additional Agreement states that "*[i]n consideration of Prestamos … making the above loan* …" and contains other conditions including "that Lender is relying upon this agreement *in making the above loan* …." *Id*. at 90 (emphasis added). The Information form identifies the Plaintiff borrower's account to disburse the loan. *Id*. at 90. Prestamos also signed and delivered to Plaintiffs the Notice – No Oral Agreement which defines "Loan Agreement" and also evinces Prestamos's agreement to fund. *Id*. at 86. *See also* ¶¶ 243-47.

Further, a central purpose of the Loan Documents is to fund Plaintiffs' loans. "When interpreting a contract, the court's paramount goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." *Doe v. Univ. of the Scis.*, 961 F.3d 203, 212 (3d Cir. 2020). *Accord Gallagher v. Upper Darby Twp*., 539 A.2d 463, 467 (Pa. Commw. 1988) ("where an obligation was within the contemplation of the parties when making the contract or is necessary to carry out their intention, the law will imply that obligation and enforce it"); *Bombin*, 529 F. Supp. 3d at 420 ("We must construe the contract 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served and will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.'"); *Azer Sci. Inc. v. Quidel Corp.*, 2021 WL 5918655, at *4 (E.D. Pa. Dec. 15, 2021) (Gallagher, J.) ("'It is by now hornbook law that the test for enforceability of an agreement is whether both parties have manifested an intention to be bound.'").

The PPP rules and framework also support Prestamos's binding commitment to fund. Contrary to Defendants, funding was not voluntary but mandatory as "[t]he lender *must* make a one-time disbursement of the PPP loan within ten calendar days of loan approval" and receipt of Plaintiffs' signed Loan Documents. 86 Fed. Reg. 3692, 3710 (emphasis added). A lender would be relieved of its obligation to fund only if a borrower did not sign and submit loan documents. ¶ 52. Prestamos's obligation to fund was incorporated into the Loan Documents. *Oto Analytics, Inc. v. Capital Plus Fin. LLC*, 2022 WL 1488441, at *6 (N.D. Tex. May 11, 2022) ("the Court looks to the context provided by the SBA regulations, statutes, and traditional dictionaries to determine" whether PPP loan fees may be owed to agent); *First Nat'l Bank v. Flanagan*, 528 A.2d 134, 137-38 (Pa. 1987) ("substantive laws in effect when the parties enter into a contract are implicitly incorporated into it"); *Willisch v. Nationwide Ins. Co. of Am.*, 852 F. Supp. 2d 582, 607-08 (E.D. Pa. 2012) (accord). PPP lenders were required to make PPP loans "under the criteria, terms, and conditions" set by the SBA and the CARES Act. 15 U.S.C. § 9008(g). Defendants' argument that Plaintiffs' contract claims rely on an agreement between Prestamos and the SBA is a red herring. Plaintiffs sufficiently allege that Prestamos's failure to fund within ten days, or at all, was in breach of the Loan Documents. *See* ¶¶ 252-54.

In obtaining nearly $1.2 billion in fees and over $7 billion in PPPLF advances by pledging Plaintiffs' and other borrowers' loans as collateral, Prestamos also reaped the benefits of, and misrepresented, its agreement to fund Plaintiffs' loans. Prestamos could not properly secure PPPLF advances on loans it would not fund, and falsely reported to the SBA that it had funded class members' loans to obtain the fees. Although Prestamos's failure to fund also implicates other serious violations, that does not mean Plaintiffs lack their own independent state law claims.

Defendants are also estopped from maintaining that Prestamos had not agreed to fund the loans. *See Robb-Fulton v. Robb (In re Robb)*, 23 F.3d 895, 898 (4th Cir. 1994) ("'[Q]uasiestoppel forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects.'"); *In re Guterl Special Steel Corp.*, 316 B.R. 843, 856 (Bankr. W.D. Pa. 2004) ("The doctrine applies where it would be unconscionable to permit a person to maintain a position inconsistent with one in which he acquiesced or where he accepted a benefit.").

Defendants' cases are not to the contrary. Most concern loan agreements that could not be enforced for reasons irrelevant here, and none considers the incorporation of PPP rules into the contracts binding the parties here. *See, e.g.*, *Krebs v. FDIC*, 851 F. Supp. 430, 435 (M.D. Fla. 1994) (holding that the FDIC was entitled by law to repudiate a contract); *Brook v. Amaximis Lending, L.P. (In re Vickers)*, 275 B.R. 401, 406 (Bankr. M.D. Fla. 2001) (involving an unsigned loan agreement); *Mark Andrew of the Palm Beaches, Ltd. v. GMAC Commercial Mortg. Corp.*, 265 F. Supp. 2d 366, 381 (S.D.N.Y. 2003) (accord); *Jericho All-Weather Opportunity Fund, LP v. Pier Seventeen Marina & Yacht Club, LLC*, 207 So. 3d 938, 941-42 (Fla. Dist. Ct. App. 2016) (involving summary judgment, not a motion to dismiss, and the plaintiff borrower intentionally excluded the binding contract from its allegations).

E. Plaintiffs' Claims Are Not Released

Defendants' contention that Plaintiffs released their claims is also meritless. First, a release cannot immunize a party who, as alleged here, breached the parties' contract. *See, e.g.*, *Horne v. Elec. Eel Mfg. Co.*, 987 F.3d 704, 718 (7th Cir. 2021) ("a party in material breach may not enforce a provision of a contract that is favorable to him, such as an exculpatory clause").

Second, the release explicitly applies only to alleged acts and omissions "on or prior to the date hereof." ECF 42 at 82. Prestamos's commitment to fund the PPP loans extended, by definition, 10 days after the date Plaintiffs' notes were executed and returned to Prestamos. ¶ 51.

Defendants ask the Court to ignore this plain language. They claim in a footnote that "it would defy all logic to read the release to subject Prestamos to liability … occurring at the stroke of midnight the night the Note was signed, but not that occurring before." ECF 46-1 at 36 n.10. Logical or not (and although Defendants have it backward, as the release purports to operate *before* not *after* that stroke of midnight), that is exactly what the release says. *See Bowersox Truck Sales & Serv, Inc. v. Harco Nat'l Ins. Co.*, 209 F.3d 273, 279, 280 (3d Cir. 2000) (releases should be "strictly construed"; "the general words of the release will not be construed so as to bar the enforcement of a claim which has not accrued at the date of release"); *Neman Bros. & Assoc., Inc. v. Interfocus, Inc.*, 2022 WL 266049, at *6, *8 n.8 (C.D. Cal. Jan. 11, 2022) (releasing defendant for "activity that occurred prior to the execution" of the agreement); *Custer v. Penn State Geisinger Health Sys.*, 102 F. App'x 758, 760 (3d Cir. 2004) ("[P]arties may choose to relinquish even those claims that accrued after the signing of a release so long as that intention *is clearly expressed in the agreement*.") (emphasis added); *Zuber v. Boscov's*, 871 F.3d 255, 258 (3d Cir. 2017), ("[a] long line of Pennsylvania cases has held that a release covers only those matters which may be fairly said to have been within the contemplation of the parties when the release was given").

F. Plaintiffs Sufficiently Allege State Law Consumer Protection Claims

The California Subclass: A violation of a federal law may serve as a predicate for a UCL claim. *See, e.g., Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1480, 38 Cal. Rptr. 3d 653, 669 (2005), *as modified on denial of reh'g* (Jan. 26, 2006). This encompasses Prestamos's failure to fund. *See, e.g., Sandoval v. PharmaCare US, Inc.*, 145 F. Supp. 3d 986, 994 (S.D. Cal. 2015) ("Plaintiff [properly] alleges a violation of FDA regulations … and a resulting violation of the unlawful prong of the UCL."); *Harris v. Bank of Am. Corp.*, 2014 WL

1116356, at *12 (C.D. Cal. Mar. 17, 2014) (rejecting dismissal of a UCL claim alleging "behavior … which violates the public policy undergirding the HAMP").

Plaintiffs Marshall and Townsend sufficiently allege, only in the alternative to their contract claim (¶ 276), that Defendants' conduct is both unlawful and unfair under the UCL. *See* ¶¶ 262-75. The fact that the CARES Act and SBA regulations do not provide for a private right of action is again irrelevant. *See LegalForce RAPC Worldwide P.C. v. UpCounsel, Inc.*, 2019 WL 160335, at *13 (N.D. Cal. Jan. 10, 2019) ("California courts have repeatedly stated that a plaintiff may bring a UCL claim even when the conduct alleged to constitute unfair competition violates a statute that does not provide a private right of action.").

Defendants' argument that their conduct was "permitted by the rules and guidance governing the PPP" (ECF 46-1 at 37) is wrong and premature. *See Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063, 1089 (N.D. Cal. 2012) (rejecting argument defendant "did nothing more than what was authorized by statute" since that "is a fact question to be answered in discovery, not the basis for a motion to dismiss"). Defendants' cases involving compliance with relevant statutes or permissible commerce are therefore likewise irrelevant. *See Loeffler v. Target Corp.*, 324 P.3d 50, 76-77 (Cal. 2014); *Lopez v. World Sav. & Loan Ass'n*, 105 Cal. App. 4th 729, 741-42 (2003); *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 265 (2003); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 374-75 (2001).

Plaintiffs also sufficiently allege equitable relief (¶ 276) and, again only in the alternative (¶ 305), unjust enrichment. ¶¶ 304-13. Defendants cite *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 842–44 (9th Cir. 2020), to argue that "federal courts must follow federal law that equitable relief is only available where the plaintiff establishes they [sic] lack an adequate remedy at law." ECF 46-1 at 39. But neither *Sonner* nor Defendants' statement of its holding address what is required at the pleading stage. For that reason, Ninth Circuit courts have repeatedly held that *Sonner* has no bearing at the pleading stage. *See, e.g., Jeong v. Nexo Fin. LLC*, 2022 WL 174236, at *27 (N.D. Cal. Jan. 19, 2022) (citing cases); *Nacarino v. Chobani, LLC*, 2022 WL 344966, at *10 (N.D. Cal. Feb. 4, 2022). *See also Pierre v. Healthy Beverage, LLC*, 2022 WL 596097, at *14 (E.D. Pa. Feb. 28, 2022) ("When it remains unclear whether legal remedies will prevail, there is no need to dismiss an alternatively pleaded" claim for equitable relief); *Preston Grp., LLC v. Customers Bank*, 2021 WL 3562893, at *8 (E.D. Pa. Aug. 12, 2021) (a "plaintiff may plead both" breach of contract and equitable relief claims).

Defendants' arguments that Plaintiffs have no vested interest in the loan proceeds and that the SBA paid the fees ignore the Loan Documents and the PPP. And *Kivett v. Flagstar Bank, FSB*, 506 F. Supp. 3d 749, 763 (N.D. Cal. Dec. 10, 2020), held that "[t]he concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person." *Accord Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 947 (Cal. 2003) ("[u]nder the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant *or* benefits in which the plaintiff has an ownership interest"); *In re Processed Egg Products Antitrust Litig.*, 851 F. Supp. 2d 867, 897 (E.D. Pa. 2012) (denying dismissal of UCL claim that relied on payments to defendants from non-parties).

The Illinois Subclass: Defendants contend that plaintiff Ahmadou's ICFA claim duplicates his breach of contract claim. ¶ 279. But plaintiff Ahmadou alleges that Prestamos induced him to enter into the Loan Agreement, absent any intention of fulfilling the overriding purpose of it, by accepting plaintiff's application and the SBA's approval and thereby locking plaintiff into relying exclusively on Prestamos for his loan. ¶ 280. These allegations are sufficient. *See, e.g.*, *Bakopoulos v. Mars Petcare US, Inc.*, 2021 WL 2915215, at *5 (N.D. Ill. July 12, 2021) ("defendants who knowingly induce consumers to enter contracts can support an [ICFA] claim"); *Powell v. Subaru of Am., Inc.*, 502 F. Supp. 3d 856, 890 (D.N.J. 2020) (accord).

Defendants' cases did not involve alleged misconduct apart from the contract. *See Turner v. Orthopedic & Shoulder Ctr., S.C.*, 82 N.E.3d 801, 807 (Ill. Ct. App. 2017); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 843 (Ill. 2005); *Cafferty Clobes Meriwether & Sprengel, LLP v. XO Communs. Servs.*, 190 F. Supp. 3d 765, 772 (N.D. Ill. 2016).

Defendants' contention that Rule 9(b) applies is wrong because the ICFA also provides redress for unfair business practices as alleged here (*see, e.g.*, ¶ 286) to which Rule 9(b) does not apply. *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 738-39 (7th Cir. 2019) (defining unfairness under the ICFA). And plaintiff sufficiently alleges that Prestamos's actions in locking him in to the exclusion of other PPP lenders was "unfair" even if there is an element of deception in those actions. *See, e.g.*, *Newman v. Metro. Life Ins. Co.*, 885 F.3d 992, 1002 (7th Cir. 2018) (reversing dismissal; plaintiff alleged that "MetLife engaged in a bait-and-switch strategy, which (if proven) would offend Illinois's public policy"); *Saika v. Ocwen Loan Servicing, LLC*, 357 F. Supp. 3d 704, 717-18 (N.D. Ill. 2018) (denying motion to dismiss; "[a]n [ICFA] unfairness claim may … rest on violations of administrative directives … that themselves do not permit private enforcement"); *Saccameno v. Ocwen Loan Servicing, LLC*, 372 F. Supp. 3d 609, 631 (N.D. Ill. 2019) ("Here, "a jury could reasonably have concluded that Ocwen's conduct left Saccameno with a lack of meaningful choice.").

The Ohio Subclass: Defendants argue that plaintiff Stalnaker fails to allege "the kind of commercial injury necessary to state a claim under the ODTPA." ECF 46-1 at 43. But Ohio Rev. Code Ann. § 4165.01(D) provides that "'Person means an individual … or any other legal or commercial entity," and Ohio Rev. Code Ann. § 4165.03(A)(2) provides, in turn, that "[a] person who is injured by a person who commits a deceptive trade practice … may commence a civil action to recover actual damages from the person who commits the deceptive trade practice." Even Defendants' own case is in accord. *See Torrance v. Rom*, 157 N.E.3d 172, 188 (Ohio App. 2020) ("an individual may bring suit under the ODTPA in his or her 'capacity as a participant in commercial activity'").

Plaintiff Stalnaker did not "artfully" omit the word "consumer" from her ODPTA count (ECF 46-1 at 44), but instead alleges a claim entirely consistent with the words of the statute. Nor can there be any reasonable dispute that PPP loans qualify as commercial activity. *See Torrance*, 157 N.E.3d at 188 (specifying the elements of a ODTPA claim). Like the ICFA claim, plaintiff Stalnaker sufficiently alleges Prestamos induced and bound her and other Ohio borrowers to enter into the Loan Documents without intending to perform. ¶ 299. Those actions sufficiently allege the first three elements of Defendant's ODTPA violation. *See, e.g., He v. Rom*, 2016 WL 5682012, at *4 (N.D. Oh. Oct. 3, 2016) (allegations that defendants' "service was not as the Defendants represented it to be" sufficient to confer standing). Prestamos's failure to fund the loans also constitutes the requisite injury. Defendants' case, *JP Morgan Chase Bank, N.A. v. Safeco Ins. Co. of Am.*, 2012 WL 1945604, at *4-5 (N.D. Ohio May 30, 2012), by contrast, turned on plaintiff's failure to present "evidence that Safeco had any intent … to breach the contract, or any knowledge that the representations contained in the contract documents would turn out to be false."

Conclusion

For the foregoing reasons, the Court should deny Defendants' motion to dismiss in full. Alternatively, if the Court is inclined to dismiss any of Plaintiffs' claims, the Court should do so without prejudice and grant Plaintiffs discovery and leave to file an amended complaint.

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Certificate of Service

I hereby certify that, on June 17, 2022, I caused Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss to be filed on the Court's CM/ECF system and for service of same on all counsel of record.

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