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 and CHICANOS POR LA CAUSA, INC.,	:	
Defendants.	:	

RESPONSE OF DEFENDANTS PRESTAMOS CDFI, LLC AND CHICANOS POR LA CAUSA, INC. TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

Defendants Prestamos CDFI, LLC ("Prestamos") and Chicanos Por La Causa, Inc. ("CPLC") respectfully submit this response in opposition to Plaintiffs' Motion for Leave to File Supplemental Authority, ECF No. 53. The extraneous documents that Plaintiffs attempt to introduce to the Court are irrelevant to the allegations in Plaintiffs' Second Amended Complaint, and do not comprise "authority" for resolving the jurisdictional and substantive arguments in Defendants' Motion to Dismiss. For these reasons, as more fully set forth below, the Court should deny Plaintiffs' Motion and disregard the documents they attach to it.

Plaintiffs moved the Court for leave to file as "supplemental authority" two documents: a draft report from the United States House of Representatives' Select Subcommittee on the Coronavirus Crisis entitled "'*We Are Not The Fraud Police': How Fintechs Facilitated Fraud in the Paycheck Protection Program*" (the "Fintech Report," attached to Plaintiffs' Motion as Exhibit 1), and a December 8, 2022 Press Release by the United States Small Business Administration related to the Fintech Report (the "SBA Press Release," attached to Plaintiffs' Motion as Exhibit 2). Even a cursory examination of these documents reveals that Plaintiffs misrepresent their contents as well as their relevance to this action. Plaintiffs' putative class action is based on Prestamos's alleged delay in funding their loans, which—according to Plaintiffs' own allegations—is plausibly attributable to plaintiffs' banks *flagging* and *rejecting* attempted PPP deposits into their accounts. That theory is antithetical to the basis of the Fintech Report and SBA Press Release—that certain Fintech companies lacked measures that should have resulted in the *flagging* and *rejecting* of more ineligible or fraudulent PPP loans. That is, the Seconded Amended Complaint attempts to police Prestamos for not funding plausibly problematic loans, while the Fintech Report and SBA Press Release criticize Fintech companies for causing the over-distribution of too many loans, *i.e.*, ineligible or fraudulent loans.[1]

Plaintiffs lack true "supplemental authority" to combat Prestamos's jurisdictional and substantive challenges that are fatal to Plaintiffs' claims. Rather, Plaintiffs hope to avoid dismissal with an eleventh-hour attempt to tag Prestamos with impertinent materials.

The Fintech Report. The Fintech Report declares its purpose in its first paragraph: to present findings from an investigation into "the role of *financial technology companies* . . . in facilitating . . . fraudulent and otherwise ineligible loans through the Paycheck Protection Program (PPP)." *See* Fintech Report at 1 (emphasis added). Motivating the investigation was the Select Subcommittee's concern that PPP funds were disbursed to "ineligible or fraudulent applicants," *id.*, to the enrichment of financial technology companies—like Blueacorn, with which Prestamos contracted to assist with its PPP program—and not lenders, *see id.* at 1–4. As one of the largest

[1] Defendant CPLC is not mentioned in the Fintech Report or the SBA Press Release, besides a one-sentence statement in the Fintech Report that "Prestamos is a wholly owned subsidiary of a nonprofit organization, Chicanos Por La Causa (CPLC)." *See* Fintech Report at 44.

lenders of PPP loans, Prestamos willingly cooperated in the Select Subcommittee's investigation, acknowledging only that they received more PPP applications than they had anticipated but strove to meet the demand because of a commitment to its mission of serving underserved communities. *See id.* at 44–45.

Remarkably, Plaintiffs submitted to the Court an outdated version of the Report that omits critical words from the testimony of Prestamos' CEO. The corrected version of the Report, available on the Select Subcommittee's website and attached here as Exhibit A, shows that Prestamos in fact diligently assessed Blueacorn's fraud-prevention practices before contracting with them. *Compare* Exhibit A, at 44 ("Prestamos' CEO stated: 'No, we didn't. We did spend a lot of time on the front end to try to understand what they were doing to prevent or eliminate any fraud.'"), *with* Plaintiffs' Exhibit 1, at 44 (omitting the words "We did"). At base, far from recommending penalties for specific lenders, the Fintech Report expressly calls on Congress to *continue funding* CDFIs, like Prestamos. *See id.* at 84.

The SBA Press Release. As for the SBA Press Release, it makes no finding of fraud or wrongdoing on the part of any entity, let alone Prestamos. Instead, it announces simply that the agency would conduct an investigation into "possible fraud facilitated by third-party companies" and "continue to . . . examine the evidence laid out in [the Fintech Report]." *See* SBA Press Release at 1–2. The only enforcement action the SBA Press Release announces (conveniently obscured in the version of the release attached to Plaintiffs' Motion) is directed to financial technology firms like Blueacorn. *See* https://www.sba.gov/article/2022/dec/08/us-small-business-administration-statement-house-select-subcommittee-coronavirus-crisis-report (suspending "non-lenders Blueacorn and Womply . . . from working with the SBA in any capacity").

The Court should deny Plaintiffs leave to file these documents as supplemental authority. The Court should deny Plaintiffs' Motion for at least three reasons. First, the Fintech

Report and SBA Press Release are irrelevant to Defendants' Motion to Dismiss. Both documents reveal governmental action targeted at financial technology companies, none of whom are defendants here. And in a telltale sign of the Fintech Report's irrelevance, Plaintiffs muster only five cherry-picked lines from the 128-page document (excluding exhibits, which Plaintiffs did not attach), one of which is not about Prestamos at all, and the others of which mostly parrot immaterial allegations in the Second Amended Complaint.

If anything, the documents support Defendants' position. The Fintech Report condemns lenders' funding *too many* PPP loans because of reduced capacity to detect fraud—the exact opposite of what Plaintiffs allege, *i.e.*, that Prestamos did not fund *enough* loans because of plaintiffs' banks flagging and rejecting funding attempts by Prestamos. *See* Second Am. Compl. ¶ 227.f. Plaintiffs do not explain how any of the cited conduct in the Fintech Report would bolster, or even relate to at all, their breach of contract and statutory claims. Additionally, the SBA Press Release shows enforcement and oversight of the PPP proceeding as Congress intended—not via private class action lawsuits, but by the SBA and other governmental actors—undermining Plaintiffs' arguments that they have a right to sue to enforce PPP rules and emphasizing why the CARES Act set forth no private right of action. *Accord* Defs.' Mot. to Dismiss, ECF No. 46-1, at 17.

Second, the Fintech Report and SBA Press Release are not proper "authorities" for this Court to consider when resolving Defendants' Motion to Dismiss. Courts deciding a motion to dismiss may consider only "the allegations in the complaint, exhibits attached to the complaint, . . . [and] document[s] integral to or explicitly relied upon in the complaint." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014). Although courts may also take notice of certain public records when ruling on a motion to dismiss under Rule 12(b)(6), *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 426–27 (3d Cir. 1999), Plaintiffs do not cite any authority holding that a Congressional subcommittee report and agency press release satisfy that standard. Even if they did, however, the law is clear that, on a motion to dismiss, the court may take notice only of the *existence* of the record, and not the facts it purportedly contains. *See id.* at 426 ("[W]e may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."). That Congress and the SBA have investigated and reported on the PPP bears in no way on Plaintiffs' claims.

Third, Plaintiffs' Motion is nothing more than an attempted end-run around this Court's page limitations for opposition briefing, which Plaintiffs already have exhausted but which they now seek to exceed with more than one hundred pages of supplemental material. *See* Judge John M. Gallagher Policies and Procedures ¶ II.B.4 (20-page limit for opposition briefs); ECF No. 49 (Plaintiffs' 20-page opposition to Defendants' motion to dismiss). The Court should not countenance this ploy.

For the foregoing reasons, Defendants request that the Court deny Plaintiffs' Motion for Leave to File Supplemental Authority.[2]

[2] The plaintiffs in another putative PPP class action bringing similar claims and pending in the Northern District of Texas, *Greathouse v. Capital Plus Financial, LLC*, No. 22-cv-686 (N.D. Tex.), recently moved to file the Fintech Report and SBA Press Release in support of their opposition to the motion to dismiss. *See id.*, ECF No. 48 (Dec. 13, 2022). The Court there denied the motion, finding that the documents were inappropriate to consider on a motion to dismiss. *See* Order, ECF No. 54 (Dec. 22, 2022).

Dated: December 23, 2022

Respectfully,

By: /s/ *Marcel S. Pratt*

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**pro hac vice admission to be sought*

Attorneys for Defendants

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[PROPOSED] ORDER

AND NOW, on this _____ day of December, 2022, upon consideration of the for Leave to File Supplemental Authority, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

____
The Honorable John M. Gallagher
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that, on December 23, 2022, I caused this response, along with the attached proposed order and exhibit, to be filed on the Court's CM/ECF system, which served copies of same on all counsel of record via electronic mail.

/s/ Marcel S. Pratt
Marcel S. Pratt