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Via CM/ECF

Judge John M. Gallagher
United States District Court for the
Eastern District of Pennsylvania
Edward N. Cahn Courthouse & Federal Bldg.
504 W. Hamilton Street, Suite 4701
Allentown, Pennsylvania 18101

Re: *Marshall, et al. v. Prestamos CDFI, LLC*, No. 5:21-cv-04337-JMG (E.D. Pa.)

Dear Judge Gallagher:

We reluctantly write on behalf of Plaintiffs pursuant to section II.C.2 of Your Honor's Policies and Procedures to request a conference to resolve a simple discovery dispute that the parties unfortunately have been unable to resolve despite numerous attempts. As explained below, Plaintiffs seek production of the two basic forms that Prestamos had to submit to the federal government and is required to maintain and readily access regarding the Paycheck Protection Program ("PPP") loans at issue in this case, and Prestamos refuses to produce those forms on claimed grounds of relevance.

Background

Plaintiffs allege on behalf of themselves and a proposed class that defendant Prestamos CDFI, LLC ("Prestamos") failed to fund U.S. Small Business Administration (the "SBA") approved Paycheck Protection Program ("PPP") loans for their businesses in violation of the parties' loan agreements. On March 30, 2023, the Court granted in part and denied in part Prestamos's motion to dismiss. *See Marshall v. Prestamos CDFI, LLC*, Civil No. 5:21-cv-04337-JMG, 2023 WL 2727541 (E.D. Pa. Mar. 30, 2023) (ECF No. 56). The Court held that Plaintiffs have standing to bring their breach of contract claims "except to the extent Named Plaintiffs purport to bring state law claims under the laws of states in which they do not reside in or in which they were never injured." *Id.* at *17.

Following that ruling, the parties continued with the discovery process that had started in November 2021, when Plaintiffs first served requests for production of documents and interrogatories. On April 26, 2023, May 26, 2023, and June 5, 2023, the parties met and conferred. As a result, the parties agreed that Plaintiffs would designate a subset of certain requests as a top priority, and Prestamos would respond to those requests promptly without prejudice to Plaintiffs' remaining discovery requests. Plaintiffs specified five priority document requests. The parties continued to meet and confer and have been unable to reach agreement on one such priority request. In particular, Prestamos refuses to produce any documents identifying the amount and current status or disposition of the advances that Prestamos obtained from the Federal Reserve's PPP Liquidity Facility (the "PPPLF") for the PPP loans of Plaintiffs and other putative in-state class members, including Prestamos's PPPLF Pledge and Advance Request forms (the "PARs") and SBA Form 1502 monthly reports regarding those specific loans. The PARs and 1502s are a top priority because they bear directly on the parties' dispute regarding whether Prestamos was obligated to fund the PPP loans at issue.

Despite the clear relevance of these documents, Prestamos initially responded as follows:

> Prestamos does not believe that information related to PPPLF advances Prestamos obtained, including PPPLF Pledge and Advance Request forms and SBA Form 1502 monthly reports, is relevant to Plaintiffs' breach of contract claims or proportional to the needs of the case. However, Prestamos is willing to meet and confer regarding this request.

After additional discussions among the parties to resolve the issue without the Court's intervention, Prestamos merely doubled down and concluded as follows:

> Neither the Form 1502 reports nor the PARs are relevant to the merits of Plaintiffs' claims. Neither of those documents relates to any contract between Prestamos and Plaintiffs, and they are not otherwise mentioned in Plaintiffs' loan documents. In short, the central issue in this case is whether Prestamos breached a contractual obligation to Plaintiffs – not, as Plaintiffs' email suggests, whether Defendants collected a loan processing fee or what Prestamos reported to the SBA concerning the loan.

Argument

As this Court has held, "[e]vidence is relevant in discovery if it '[encompasses] any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.'" *Cutillo v. Cutillo*, No. 5:21-CV-02787-JMG, 2023 WL 1971211, at *1 (E.D. Pa. Feb. 13, 2023) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). "As a result, discovery rules are to be considered broadly and liberally." *Id*.

The Form 1502 Reports and PARs are highly probative concerning Plaintiffs' claim that Prestamos was obligated to fund their PPP loans, and how Prestamos treated those loans. The relevance of the 1502s and PARs is evident from the nature of the documents themselves.

The Form 1502 Report is a form which PPP lenders are obligated to submit to the SBA, on a loan-by-loan basis, initially within 10 days after a loan was funded to advise, *inter alia*, that the loan proceeds had been disbursed to the SBA-approved borrower and to enable the lender to obtain a loan processing fee for that loan, and then monthly thereafter to update the SBA concerning the status of the loan. *See* https://www.sba.gov/document/sba-form-1502-sba-form-1502-instructions; *see also* SBA Procedural Notice, Control No. 5000-20091 (Feb. 8, 2021), Second Updated Paycheck Protection Program Lender Processing Fee Payment and 1502 Reporting Process (at 4) ("SBA Form 1502 is a spreadsheet containing identifying information for each PPP loan.") (available at https://www.sba.gov/sites/default/files/2021-02/Procedural%20Notice%205000-20091%20-%202nd%20Updated%20PPP%20Processing%20Fee%20and%201502%20Reporting-508.pdf) (last visited July 14, 2023).

Whether Prestamos notified the SBA that it had disbursed funds for Plaintiffs' PPP loans is a central issue in this case. Prestamos denies that Plaintiffs have enforceable contracts that even obligated it to fund their PPP loans. *See, e.g.*, ECF No. 46-1 at 32 ("Neither any agreement between Prestamos and the SBA, Prestamos's approval of Plaintiffs' loan applications, nor the Loan Documents created a contract whereby Prestamos promised to fund Plaintiffs' loans."); ECF No. 51 at 1 ("But Plaintiffs were not any more 'entitled' to a PPP loan from Prestamos than any other applicant, approved or not."). Plaintiffs' position is that Prestamos cannot plausibly deny that it had an obligation to fund a PPP loan for which it submitted a Form 1502 Report notifying the SBA it had funded the loan, and obtained a loan processing fee. But the 1502 Reports also bear directly on Prestamos's defense that it had no obligation to actually fund the loans. Although resolution of that core underlying dispute is for the trier of fact, the question at this stage is simply whether the 1502 Reports could bear on an issue in this case. The answer to that is most certainly yes.

The PARs compel the same result. The PARs are the forms that lenders submitted to obtain advances from the PPPLF to fund PPP loans. *See* Paycheck Protection Program Liquidity Facility PPP Pledge and Advance Request (advance request) (available at https://www.frbdiscountwindow.org/GeneralPages/ppplf_historical_documentation (last visited July 12, 2023). Without PPPLF advances, Prestamos would not have had the liquidity to commit to fund the more than $7 billion of PPP loans it had committed to fund. The PARs required Prestamos to identify each borrower, loan number, advance amount sought, and other information about the loan. A PPPLF loan advance would only be provided by the Federal Reserve after the SBA approved the loan and the loan documents were executed, and Prestamos submitted a completed PAR. In submitting a PAR, Prestamos confirmed that, by borrowing from the PPPLF, it received the loan advance for the purpose of funding the SBA-approved PPP loan, and Prestamos was obligated to pledge the loan, in turn, as collateral to secure the PPPLF loan advance. *See* Paycheck Protection Program Liquidity Facility Term Sheet, available at https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20210625a1.pdf (last visited July 11, 2023).

Hence, whether Prestamos submitted a PAR and obtained a PPPLF loan advance for class members' PPP loans are also highly probative. In fact, Prestamos could only submit PARs for loans which Prestamos was obligated to fund. *See also* https://home.treasury.gov/system/files/136/SBA-Form-3507-PPP--Agreement-for-New-Lenders-

Non-Bank-Non-Insured-Depository-Institution-Lenders.pdf (at § 4) (To be authorized by the SBA and U.S. Treasury to make PPP loans, a lender had to agree that it "*must close and disburse* each covered loan in accordance with the terms and conditions of the PPP Authorization and PPP Loan Program Requirements.") (emphasis added) (last visited July 12, 2023). A PPP loan could only serve as collateral for a PPPLF advance if the underlying PPP loan documents constituted an enforceable contract to fund a PPP loan.

Prestamos's opposition to producing the 1502s and PARs on grounds of burden and disproportionality is also inapt. Prestamos is required to maintain *and* readily access its records concerning PPP lending. *See id*. ("Lender must ensure that a note and all other Loan Documents (as defined in this paragraph) and additional documents are properly executed and take such other actions necessary to fulfill the requirements of the Paycheck Protection Program. SBA is entitled, at any time, to examine and obtain copies of all notes, certifications and documentation (herein, collectively, called the 'Loan Documents'), and all other records held by Lender which relate to covered loans made pursuant to the Paycheck Protection Program."). *See also* 13 C.F.R. § 120.461 (identifying additional record keeping requirements for SBA Supervised Lenders); ECF No. 36-1 at 6-7 (discussing additional PPP record keeping requirements).

The 1502 Reports and PARs are contained in simple Excel spreadsheets, and producing what Prestamos is already obligated to maintain and readily access is also clearly proportional to the needs of this case to include – and, indeed, not prejudicially exclude – the loans of Plaintiffs and other in-state putative class members. Along these lines, Prestamos recently produced a spreadsheet indicating that there are 7,907 class member loans in Plaintiffs' 10 respective states representing $133,562,175.00 in total PPP loan proceeds that should have been but were not funded for which Prestamos obtained $19,259,141.00 in loan processing fees. But that spreadsheet only identifies the applicable SBA-approved but unfunded class member loans at issue (segregated also by the respective subtotals for each of Plaintiffs' 10 applicable states); it does not even *address*, let alone purport to *answer*, whether Prestamos breached its alleged obligation to fund those loans.

Accordingly, Plaintiffs respectfully request that the Court schedule a telephone conference to resolve the foregoing discovery dispute.

Respectfully submitted,

/s/ Lawrence J. Lederer

Lawrence J. Lederer

cc: All counsel of record (via CM/ECF)