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July 18, 2023

By Electronic Filing

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 write on behalf of Defendant Prestamos CDFI LLC ("Prestamos") in response to Plaintiffs' July 14, 2023 discovery dispute letter (ECF No. 76) and pursuant to the Court's July 17, 2023 Notice of Telephonic Discovery Conference, setting Prestamos's deadline to respond. This dispute arose because Plaintiffs seek the production of regulatory reports—SBA Form 1502s and PPPLF Pledge and Advance Request forms ("PARs")—that Prestamos submitted to the Small Business Administration ("SBA") and the Federal Reserve Bank, respectively, ***after*** Plaintiffs executed their Notes. Notably, Plaintiffs' focus is not on the contents of these reports; they have not identified any field of data that is relevant to their claims. Rather, they contend that the submission of these reports is somehow relevant to their claims, even though the reports are not referenced in any contracts between the parties and the reports likely contain information for over 400,000 nationwide borrowers who are not members of their putative class.

The reports are irrelevant to Plaintiffs' breach of contract claim. Under basic principles of contract law, subsequent dealings with third parties can have no bearing on the objective terms of the contract ***as between the parties***. In addition, the collection, review, and production of these reports covering over 400,000 borrowers—not just the 7,900 loans at issue in this litigation—would impose substantial burdens on Prestamos separate from and in addition to its obligation to preserve such records. Because Prestamos's post-hoc reports to the SBA and the Federal Reserve are neither relevant to Plaintiffs' breach of contract claim nor proportional to the needs of the case, the records are beyond the scope of discovery and not subject to production. *See* Fed. R. Civ. P. 26(b)(1).

Background

The central issue in this case is whether Prestamos breached an obligation to fund Plaintiffs' Paycheck Protection Program ("PPP") loans and not, as Plaintiffs' letter suggests, whether Prestamos collected a loan processing fee or what Prestamos reported to the SBA and the Federal Reserve concerning Prestamos's loans. Plaintiffs' claims relate solely to contracts between Plaintiffs and Prestamos – there are no third-party or indemnity claims at issue here. Whether Prestamos promised to lend Plaintiffs money, whether Prestamos breached that promise, and whether Plaintiffs were damaged thereby is each an element on which Prestamos's after-the-fact reports to the SBA and the Federal Reserve would have no bearing.

The SBA Form 1502 is "completed monthly by Lenders participating in the SBA's 7(a) loan program." *See* SBA Form 1502 and Instructions (available at https://www.sba.gov/document/sba-form-1502-sba-form-1502-instructions) (last visited July 18, 2023). A Form 1502 report can contain thousands of entries. Form 1502 reports are submitted to the SBA only after underlying notes are executed – as evidenced by the information sought. For instance, the Form 1502 reports require lenders to provide the 10 digit numerical SBA-assigned loan identification number, as well as information about each borrower's next payment installment due date, the total amount disbursed on the loan during the reporting month, and the interest rate on the loan. Consistent with these requirements, to the extent Prestamos prepared and submitted Form 1502 reports to the SBA that contained information on Plaintiffs' loans, the Forms were prepared and submitted only after Plaintiffs' underlying Notes were executed. Plaintiffs do not dispute that Prestamos's Form 1502 reports were submitted to the SBA only after Plaintiffs' underlying Notes were executed. *See* Plaintiffs' Letter at 2 ("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) (emphasis added). The Form 1502s that Prestamos sent to SBA contain entries for all of Prestamos' over 400,000 borrowers, not just Plaintiffs.

As for the PARs, during the relevant time period, Prestamos submitted the PARs on practically a daily basis to the Federal Reserve to obtain advances from the PPP Liquidity Facility (the "PPPLF") to fund its PPP loans. PARs can also contain thousands of entries. Like the Form 1502 reports, to the extent Prestamos prepared and submitted PARs in connection with Plaintiffs, they were prepared and submitted only ***after*** Plaintiffs' underlying Notes were executed—a point Plaintiffs do not dispute. *See* Plaintiffs' Letter at 3 ("A PPPLF loan advance would only be provided by the Federal Reserve ***after*** the SBA approved the loan and the loan documents were executed") (emphasis added). Like the 1502s, the PARs contain information relating to all of Prestamos's borrowers, not just the borrowers in the putative class.

Argument

A threshold element of an enforceable contract is "mutual assent by the parties to be bound." *Ryan v. Temple Univ.*, 535 F. Supp. 3d 356, 364 (E.D. Pa. 2021) (Gallagher, J.). "In ascertaining the existence of mutual assent, the relevant inquiry is what a reasonable person would understand the intent of parties to be given their objective manifestations." *Id.* at 364–65. To ascertain the parties' intent when the writing itself is unclear, "the court considers the parties' outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions." *Landan v. Wal-Mart Real Est. Bus. Tr.*, No. 2:12-cv-926, 2015 WL 1491257, at *10 (W.D. Pa. Mar. 31, 2015) (quoting *Stamerro v. Stamerro*, 889 A.2d 1251, 1258 (Pa. Super. Ct. 2005)).

The upshot is that courts engage in an objective analysis of the parties' words and conduct ***to each other***; subjective understandings held by one party but never disclosed to the other do not inform the objective question of contractual intent. *See Azer Sci. Inc. v. Quidel Corp.*, No. 5:21-cv-02972-JMG, 2023 WL 289696, at *5 (E.D. Pa. Jan. 18, 2023) (Gallagher, J.) ("[T]he subjective intent of the Parties is not material to the formation of a contract."); *Sethness-Greenleaf, Inc. v. Green River Corp.*, 65 F.3d 64, 67 (7th Cir. 1995) ("Contractual obligations are created and defined by objective signals the parties exchange. Private expectations are of no consequence . . . .") (internal citations omitted). It follows that one party's manifestations or expressions of intent to non-parties and undisclosed to a counterpart on the contract are irrelevant in a breach of contract suit.

Consistent with these elementary principles of contract law, various courts have found third-party dealings irrelevant and undiscoverable as to the contractual intent of the parties. *See, e.g.*, *Mid-Am. Salt, LLC v. Bob & Dave's Lawn & Landscape Maint., Inc.*, No. 1:16-cv-285-HAB, 2020 WL 1181769, at *3 (N.D. Ind. Mar. 12, 2020) (noting that a court's obligation "to review all circumstances in determining the intent of the parties . . . refers to the circumstances surrounding the negotiations of the parties, not dealings with third parties") (emphasis in original); *Neill Corp. v. John Paul Mitchell Sys.*, No. CIV. A. 92-2157, 1995 WL 217480, at *6 (E.D. La. Apr. 12, 1995) ("Discovery requests relating to contracts between an opponent and others in connection with allegations which did not involve the party that sought the discovery is not relevant to a litigation involving claims for breach of contract.") (internal quotation marks and citations omitted); *Freeman v. Witco Corp.*, No. CIV. A. 97-1448, 1999 WL 389892, at *1 (E.D. La. June 11, 1999) (denying motion to compel seeking "documents related to contract negotiations between [party litigant] and its other clients" to show habitual conduct of said litigant was irrelevant to dispute concerning contractual dispute between parties to the lawsuit); *World Wrestling Fed. Entm't, Inc. v. William Morris Agency, Inc.*, 204 F.R.D. 263, 265 (S.D.N.Y. 2001) ("Ordinarily, what is relevant in a breach of contract claim is the transaction between the parties to the contract. Ordinarily, contractual agreements between one of the contracting parties and third parties is irrelevant."); *Herman v. Seaworld Parks & Ent., Inc.*, No. 8:14-cv-3028-T-35JSS, 2016 WL 3746421, at *2 (M.D. Fla. July 13, 2016) (observing that while the scope of discovery is broad, the civil rules "do not permit the parties to go on a fishing expedition," (alteration omitted) and, relying on cases refusing to compel production of non-party contracts, holding that such non-party contracts not referenced in or a part of any claim or defense were irrelevant and that their production would be disproportional to the needs of the case); *BNSF Ry. Co. v. Panhandle N. R.R. LLC*, No. 4:16-cv-01061-O, 2018 WL 4076487, at *2 (N.D. Tex. Jan. 11, 2018) (holding that "third-party agreements and communications should not generally be discoverable" in breach of contract action, and that requests for such information "are highly likely to be irrelevant and overbroad").

Here, too, whatever Prestamos might have told the SBA or the Federal Reserve regarding Plaintiffs' loans would shed no light as to what Prestamos and the Plaintiffs objectively manifested to each other, whether by the terms of the Note or their course of conduct as between themselves. Unsurprisingly, the Notes do not reference the Form 1502s or the PARs because neither report relates to any contractual matter between Prestamos and Plaintiffs. Because the Form 1502 reports and PARs are irrelevant to Plaintiffs' breach of contract claim, their production is beyond the scope of discovery under Rule 26(b)(1) of the Federal Rules of Civil Procedure.

Not only are the 1502 reports and the PARs irrelevant to the breach of contract issues in this case, they would require significant burden to produce. For example, the PARs—massive spreadsheets containing reams of data—were submitted to the Federal Reserve by Prestamos on a daily basis by email during the relevant time period. If the Court determines that the PARs are relevant to the breach of contract issues in this case, Prestamos would need to pull them one-by-one through ***running individual searches*** on emails for specific loan numbers. In other words, if Prestamos were required to find the PARs covering the 7,900 putative class members, this would requiring running 7,900 individual, manual searches—an exceedingly arduous process. For the 1502s, during the relevant time-period, Prestamos submitted them via email to the SBA up until a certain point in 2021, and then began uploading them via the SBA's E-TRAN system. Similarly, finding the 1502s encompassing each of the 7,900 relevant loans would require individual, manual searches by loan number across the emailed and uploaded spreadsheets. Moreover, because both reports contain data on all of Prestamos's loans on a particular day, the reports will likely contain information for more than 400,000 additional borrowers who are not in the putative class.

Lastly, Plaintiffs' attempt to paint this dispute as one that has been ongoing since November 2021 is wrong. It was not until May 5, 2023 (after an April 26, 2023 meet and confer discussion between the parties) that the parties agreed Plaintiffs would designate a subset of five of their discovery requests as high priority (the "Priority Requests") and Prestamos would respond to those requests promptly without prejudice to Plaintiffs' remaining requests. Consistent with the parties' agreement, Prestamos responded to the Priority Requests on May 26, 2023 and began producing responsive documents and information shortly thereafter. Of the Priority Requests, Prestamos objected and refused to produce responsive documents ***only*** to Priority Request No. 3, which sought the 1502s and PARs. Prestamos objected to Priority Request No. 3 as irrelevant and disproportionate to the needs of the case but agreed to meet and confer on the issue. Plaintiffs were unable to establish the relevance of the requested documents and information during the parties' telephonic meet and confer on June 5, 2023. Prestamos encouraged Plaintiffs to set forth the purported justification for Priority Request No. 3 in writing, which they did via email on June 13, 2023. Plaintiffs' June 13, 2023 email failed to explain how documents that Prestamos submitted to the SBA and the Federal Reserve after Plaintiffs executed their notes had any bearing on Plaintiffs' breach of contract claim against Prestamos. Prestamos responded to Plaintiffs in writing on June 20, 2023, expounding upon its relevance and proportionality objections. Plaintiffs then waited nearly a month to file their discovery letter, on Friday, July 14, 2023.

Accordingly, Prestamos respectfully requests that the Court sustain its objections to Plaintiffs' Priority Request No. 3.

Respectfully submitted,

Marcel S. Pratt

Marcel Pratt

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