BAILEY GLASSER LLP
1622 Locust Street
Philadelphia, PA 19103
Tel: 215.274.9420
Fax: 304.342.1110

Lawrence J. Lederer
llederer@baileyglasser.com

March 8, 2024

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:

On behalf of the Plaintiffs, this responds to defendant Prestamos CDFI, LLC's ("Prestamos") letter filed on March 4, 2024 (ECF No. 98) regarding certain discovery issues addressed below as directed by the Court.

First, Prestamos's position seeks to manufacture a discovery dispute but ignores the fact that Plaintiffs have not withheld ***any*** discovery based on ***any*** objection to ***any*** of Defendants' discovery requests despite the overly broad scope of many of those requests. Instead, Prestamos's position boils down to a dissatisfaction with what documents and information Plaintiffs have, and when Plaintiffs will complete their productions. Discovery in this litigation remains in its early stages. The Court has indicated it will issue a scheduling order. Defendant Prestamos likewise owes Plaintiffs substantial written and documentary discovery. Prestamos's dissatisfaction with what Plaintiffs have produced to date does not give rise to a substantive dispute ripe for adjudication particularly in the circumstances here with discovery ongoing.

Second, Prestamos's position continues to ignore the disparities in the respective bargaining power, role and function of the parties and the relative Paycheck Protection Program ("PPP")-related documents and other information they have as a consequence. *See, e.g., Greathouse v. Capital Plus Financial. LLC*, No. 4:22-CV-0686-P, 2023 WL 5759250, at *15 (N.D. Tex. Sept. 6, 2023) (holding that the release in the parties' loan contract, just like the one Prestamos argues here immunizes Prestamos (ECF No. 46-1 at 33), is void as against public policy; "But when one party has substantially less bargaining power in a relationship, the exculpatory agreement will be declared void."). During the November 16, 2023 initial conference with the Court, Prestamos's counsel said that Prestamos received "only 30%" of the PPP loan processing fees it obtained. But 30% of $1.2 billion is $360 million, on 494,415 total PPP loans for over $7.4 billion in federally-guaranteed PPP loan proceeds that Prestamos obtained from the PPP Liquidity Facility (the "PPPLF") and contracted with Plaintiffs and the class under the same standard form U.S. Small Business Administration ("SBA") note and accompanying loan documents to fund. Prestamos obtained those fees despite its professed status as a tax advantaged, allegedly devoted CDFI, *and* the nonprofit, tax exempt status of its parent, Chicanos Por La Causa, Inc. ("CPLC"), to whom it upstreamed those fees and whose CEO and President, David Adame, departed the company just a week before it filed its motion to dismiss on grounds of jurisdiction (ECF No. 84) amid reported government investigation of "financial malfeasance" regarding CPLC's/Prestamos's PPP lending. *See, e.g.*, https://www.cplc.org/blog/viewpost.php?id=1162 (last visited Mar. 8, 2024); Arizona Independent, Allegations of Fraud Haunt Chicanos Por La Causa As Adame Exits (Dec. 4, 2023) ("While the organization released a statement claiming that Adame left to 'pursue other opportunities,' sources say allegations of financial malfeasance preceded his exit."), available at https://arizonadailyindependent.com/2023/10/05/allegations-of-fraud-haunt-chicanos-por-la-causa-as-adame-exits/ (last visited Mar. 8, 2024). Although by Order on December 5, 2023 (ECF No. 93) the Court granted that motion and CPLC is thus no longer a defendant in this case, Plaintiffs are all sole proprietors not corporations that operate (or, during the PPP, operated) home healthcare, hair care, real estate brokerage, construction, janitor, clothing, cleaning and driving businesses and whose SBA-approved loans ranged between $1,875 and $20,832. In sum, Plaintiffs can only produce the documents and other information they have, and Prestamos is also free to depose each of them including regarding their records and record keeping.

Third, Prestamos' position also continues to ignore that the claim at issue is whether Prestamos' failure to disburse the PPP loans to ***already SBA-approved borrowers*** violates the parties' standard form notes. As this Court stated in granting in part and denying in part Prestamos' motion to dismiss (ECF No. 56), "Plaintiffs do not allege merely that they applied for PPP loans, but rather that they were ***approved*** for PPP loans that Prestamos ***agreed*** to fund, and because they were approved, they were precluded from applying for other PPP loans." *Marshall v. Prestamos CDFI, LLC*, Civil No. 5:21-cv-04337-JMG, 2023 WL 2727541, at *6 (E.D. Pa. March 30, 2023) (emphasis in original). Contrary to Prestamos, the claim is not about front-end PPP loan eligibility, no matter how much Prestamos repeats its professed desire for discovery from Plaintiffs regarding that. *See, e.g.*, ECF No. 98 at 3 ("The issues … include … whether the Plaintiffs were lawfully entitled to PPP loans in the first instance."). Instead, it is about borrowers who were ***already approved*** for their federally-guaranteed, forgivable PPP loan proceeds, and who were locked into and reliant solely upon Prestamos to fund them. *See also* 86 F.R. 8283, at 8287 (identifying loan forgiveness process); *id.*, at 8293 (identifying documentation required). Prestamos was also obligated under the PPP to underwrite and do a due diligence review for each PPP loan it agreed to fund, including Plaintiffs' loans. *See, e.g.*, 86 F.R. at 3707-08. It defies common sense for Prestamos to even suggest wrongdoing here on ***Plaintiffs'*** part, where each Plaintiff has knowingly and voluntarily stepped up, and brought this lawsuit seeking loan funding and to serve as representatives of a class of other similarly situated SBA-approved but unfunded small business owners, and subjecting themselves to cross-examination regarding their loans. The fact that other actual PPP loan ***recipients*** are being prosecuted for fraud says nothing about Plaintiffs or class members – none of whom, by definition, were funded. The court's holding in another PPP case is in accord. *See Greathouse*, 2023 WL 5759250, *at* *15 (N.D. Tex. Sept. 6, 2023) (the lender's "only job was mechanical – to approve or deny the loan and then release the funds"). In truth, Prestamos seeks this "front end eligibility" discovery only pretextually.

Fourth, Prestamos mischaracterizes several other aspects of the PPP in a continued effort to impose excess discovery on Plaintiffs and manufacture a dispute regarding it under the ploy that *Prestamos* seeks to police fraud. To qualify for a PPP loan (and to again ***quote*** the PPP rather than characterize it all), "[t]he applicant must submit Paycheck Protection Program Borrower Application Form (SBA Form 2483), or lender's equivalent form**,** and payroll documentation, as described above." 86 F.R. 3692 at 3703. Payroll "documentation sufficient to establish eligibility and to demonstrate the qualifying payroll amount … may include, as applicable, payroll records, payroll tax filings, Form 1099-MISC, Schedule C or F, income and expenses from a sole proprietorship, or bank records." *Id*. at 3695.

Similarly, PPP loan forgiveness was likewise streamlined especially for loans under $150,000 – as would have applied to each Plaintiff had Prestamos actually funded their loans. *See* 86 F.R. 8283-02, at 8287 ("To receive loan forgiveness on either a First Draw PPP Loan or a Second Draw PPP Loan, a borrower must complete and submit the Loan Forgiveness Application to its lender (or to the lender servicing its loan). For Second Draw PPP Loans in excess of $150,000, the borrower must submit its loan forgiveness application for the First Draw PPP Loan before or simultaneously with the loan forgiveness application for the Second Draw PPP Loan, even if the calculated amount of forgiveness on the First Draw PPP Loan is zero."). *See also* SBA Form 3805S (PPP Loan Application Forgiveness Form for PPP loans of $150,000 or less).

In fact, borrowers with loans of $150,000 or less are not required to submit any documentation with Form 3508S in order to apply and be approved for forgiveness. *See* 86 F.R. 8293 ("An eligible borrower that received a loan of $150,000 or less should use the SBA Form 3508S and shall not, at the time of its application for loan forgiveness, be required to submit any application or documentation in addition to the certification and information required by section 7A(*l*)(1)(A) of the Small Business Act"); *see also* 15 U.S.C. § 636m(l)(1)(b) ("An eligible recipient of a covered loan that is not more than $150,000 shall not, at the time of the application for forgiveness, be required to submit any application or documentation in addition to the certification and information required to substantiate forgiveness.").

Indisputably, Prestamos' discovery requests go far beyond this. For example, Prestamos seeks "[a]ll of [Plaintiffs'] state and federal tax returns filed for each tax year from 2018 through the present" (RFP # 3); "All Documents concerning the financial operations of Your Business, including without limitation Your sources of funding, financial condition, profit and loss (P&L) statements, balance sheets, revenues, expenses, costs, profits, cash flow, capital, loans, liens, collateral, lines of credit, equity, debt, financings, accounts receivable, accounts payable, investments, profit margins, bank accounts, and bank statements." (RFP # 21); "Describe the business activities of Your Business that was the subject of Your PPP loan application, including but not limited to trade names used to conduct business, day-to-day operations, the time period during which Your Business has been operating, locations of Your activities, number of employees, the products and/or services that You offer, and the nature of Your customers or clients." (Interrogatory # 1); "Identify all federal, state, and local licenses or permits held by Your Business, such as business activity licenses, retail or seller's licenses, rental licenses, professional licenses, trade licenses, health-related licenses, and safety certifications." (Interrogatory # 2); "For each year from 2019 through 2022, state the amount of the following attributable solely to Your Business: (a) payroll costs; (b) rent or mortgage interest; (c) covered operations expenditures; (d) covered property damage; (e) covered supplier costs; (f) covered worker protection expenditures; and (g) other expenditures that served as the basis for Your application for a PPP loan." (Interrogatory # 3); "Identify all Persons with whom You consulted or communicated with regarding the PPP …." (Interrogatory # 6). Despite their broad scope, Plaintiffs have already provided documents and Interrogatory responses and withheld no discovery based on any objection, and again discovery is at its relatively early state and is ongoing, and Prestamos is free to depose each Plaintiff including as to any of these details regarding their businesses.

Specific Objections

As to Prestamos's more specific objections, Plaintiffs respectfully add the following:

- **Verified Interrogatory Responses** (ECF No. 89 at 3**)**: Plaintiffs will endeavor to provide verification to their Interrogatory responses.

- **16 Interrogatory Responses** (*id*. at 3-4): Plaintiffs continue to collect the available information they have and will supplement their Interrogatory responses to the fullest extent practicable given the information they have. Prestamos claims Plaintiffs' responses to Interrogatory No. 3 are the most "egregious[]" (*id*.) but that is inapt. Plaintiffs simply lack the amount of information that Prestamos (again pretextually) seeks for that Interrogatory, such as regarding Plaintiffs' so-called "covered operations expenditures," "covered property damage," "covered supplier costs," and "covered worker protection expenditures", among other things. Plaintiffs are or were all sole proprietors involved in home healthcare (Marshall, Ahmadou, Stalnaker), food catering (Pronsky), hair care (Townsend), real estate brokerage (Holland), construction (Owsley), janitor (Dervin), clothing (Henderson), upholstery cleaning (Innis) and driving (Jones) businesses. Yet again, Plaintiffs can only produce the discovery they have, but that doesn't mean that they are flouting their discovery obligations. And also again, Prestamos is free to depose Plaintiffs including on these topics to the extent it really seeks information regarding them.

- **Allegedly Omitted Interrogatory Responses** (*id*. at 4): Prestamos' claims that Plaintiffs omit at least one named plaintiff from every Interrogatory response. But in many instances, that is because certain Plaintiffs have no responsive information. Plaintiffs will clarify that where it is the case.

- **Plaintiffs' Document Productions** (*id*. at 4-5): Plaintiffs are continuing in their efforts to search for and intend to produce responsive documents that they actually have. More fundamentally, Plaintiffs have not withheld production of any responsive documents on grounds of privilege or on grounds of any objection Plaintiffs asserted in their written responses to Prestamos' RFPs.

ESI Protocol (*id*. at 5-6): Plaintiffs will review and supplement their productions to the fullest practicable and endeavor to take further steps to comply with the ESI Protocol to the extent applicable. That said, Plaintiffs have relatively limited technical capabilities given their capacities as sole proprietors and the electronic and other information they have, unaccompanied by IT or other technical personnel, and this is also recognized in and is part of the ESI Protocol although not mentioned in Prestamos' letter. *See, e.g.*, ECF No. 80 at 1. D. iii. (identifying ***non***-discoverable ESI, including among other things "[e]lectronic data … sent to or from mobile devices").

Respectfully submitted,

/s/ Lawrence J. Lederer

Lawrence J. Lederer

cc: All ECF Recipients

Certificate of Service

I, Lawrence J. Lederer, hereby certify that, on this 8th day of March 2024 I caused a copy of the forgoing to be served via the Court's ECF system on counsel for all parties of record.

/s/ Lawrence J. Lederer