Ex. 16 – Report of Kenneth Swain, dated July 12, 2024

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, JAMIE JONES, GEORGINA DREVNAK, JOHN MARTIN, EZRA BEATTIE, GREGORY LLOYD, ALYSHIA JOHNSON, LAMETRIA MARVEL, GUY GRICHAR, JAHBRAEL HORNE, ENOBONG ETUKNWA, and SHARON BRADLEY SMITH, individually and on behalf of all others similarly situated, *Plaintiffs*, v. PRESTAMOS CDFI, LLC, *Defendant*.	Civil Action No. 5:21-cv-04337-JMG

EXPERT REPORT OF KENNETH SWAIN

July 12, 2024

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I. INTRODUCTION

A. Qualifications

1. My name is Kenneth Swain. I have over 35 years of experience in commercial banking, with a focus on the lending programs of the Small Business Administration (the "SBA").

2. I started my career in 1972 at the Wall Street bank Irving Trust Company as a commercial banker. Since then, I have worked in commercial banking at various financial institutions, including Mercantile Bank and Trust, PNC, SunTrust, Sandy Spring Bank, and now Freedom Bank of Virginia. The various executive positions I have held include Senior Lending Officer-Approver of loans, Chief Credit Officer responsible for all loans, middle manager, and relationship manager implementing loan programs, cash management programs, and certain programs managed by the U.S. Treasury.

3. I have spent much of my career in and around the SBA and its lending programs. For example, at Allied Capital from 1978 to 1984, I spent six years managing Allied Lending, a non-bank lender licensed and supervised only by the SBA. While working at Allied Capital, I became an expert in SBA rules and regulations. From 1986 to 1990, I was President of Washington Ventures, a Small Business Investment Company (a venture capital company owned by Washington Bancorp and licensed and regulated only by the SBA, specialized in the management of private debt and equity investments in small businesses). In that capacity, I was responsible for knowing and abiding by all the applicable SBA rules and regulations. From 2016 to 2023, as a Senior Vice President and a Commercial Relationship Manager at Sandy Spring Bank, I was part of the team to facilitate the SBA's Paycheck Protection Program ("PPP") for

commercial customers in 2020 and 2021. As I explain in more detail below, the PPP was a program administered by the SBA to provide businesses with low-interest loans designed to help keep their workforce employed during COVID-19. I, along with my team, implemented the first and second tranches of the program. My team met several times a week, trying to keep up with all the changes that the U.S. Treasury was making to the program. Sandy Spring Bank made \$2.6 billion in PPP loans to 6,000 clients. I personally processed approximately 330 loan applications, about 300 of which were approved and funded. I also processed forgiveness applications for these loans. In addition, I have been a member of the Business Finance Group's loan committee from 2013 to 2023. The Business Finance Group is licensed by the SBA as a lender for its 504 loan program (which provides long-term financing to commercial businesses for major fixed assets, such as equipment or real estate).

4. I have a B.A. degree from the University of Pennsylvania and an M.B.A. from George Washington University.

5. A copy of my complete curriculum vitae is attached as **Appendix A**.

B. Case Background

6. Established in 2000, Prestamos CDFI, LLC ("Prestamos") is a subsidiary of Chicanos Por La Causa, Inc. ("CPLC") and is a certified Community Development Financial Institution ("CDFI").[1] A CDFI is a private sector, financial intermediary with community development as its primary mission.[2] Prestamos makes loans to a targeted population of Hispanics in Arizona and Nevada who face barriers to securing credit from traditional lending

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[1] "About Us," *Prestamos CDFI*, *available at* https://prestamoscdfi.org/about-prestamos/.

[2] "About Us," *Prestamos CDFI*, *available at* https://prestamoscdfi.org/about-prestamos/.

institutions for various reasons (including their smaller loan requests, greater need for flexible underwriting, or need for help with meeting underwriting standards).[3] During COVID-19, Prestamos played a role nationally in supporting small businesses by providing close to 500,000 PPP loans to underserved communities in crisis.[4]

7. Prestamos contracted with Blue Acorn PPP, LLC (including its affiliate such as FinCap, Inc.) (collectively "Blueacorn") in 2021 to help identify borrowers to whom Prestamos could make PPP loans and assist in the PPP paperwork process.[5] Blueacorn is a lender service provider ("LSP"), an agent that carries out lender functions in originating, processing, disbursing, servicing, or liquidating SBA loans.[6] It was launched in 2020 and assisted hundreds of thousands of borrowers in applying for and securing PPP loans through the end of the PPP in May 2021.[7]

8. In 2021, Prestamos approved 494,415 PPP loans, totaling nearly $7.7 billion.[8] Among all PPP lenders in 2021, Prestamos ranked the first in terms of the number of PPP loans

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3 "Prestamos CDFI: Phoenix, Arizona," *CDFI Coalition*, *available at* https://cdfi.org/wp-content/uploads/2019/02/Prestamos-CDFI.pdf.

4 "Building on Success and Trust," *Prestamos CDFI*, *available at* https://prestamoscdfi.org/ppp/.

5 Third Amended Class Action Complaint and Demand for Jury Trial, *Alicia Marshall, Daniel Pronsky, Paris Townsend, Nancilee Holland, Leona Owsley, Kolawole Ahmadou, Kiana Dervin, Kristina Henderson, Dustin Innis, Kelly Stalnaker, Jamie Jones, Georgina Drevnak, John Martin, Ezra Beattie, Gregory Lloyd, Alyshia Johnson, Lametria Marvel, Guy Grichar, Jahbrael Horne, Enobong Etuknwa, and Sharon Bradley Smith, 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, May 2, 2024 ("Third Amended Complaint"), ¶ 90.

6 "Part 103 - Standards for Conducting Business with SBA," *Code of Federal Regulations*, *available at* https://www.ecfr.gov/current/title-13/chapter-I/part-103 ("Lender Service Provider means an Agent who carries out lender functions in originating, disbursing, servicing, or liquidating a specific SBA business loan or loan portfolio for compensation from the lender.")

7 "What is Blueacorn?," *Blueacorn*, *available at* https://blueacorn.co/faq/; "About Blueacorn," *Blueacorn*, *available at* https://blueacorn.co/about.

8 "Paycheck Protection Program (PPP) Report: Approvals through 05/31/2021," *U.S. Small Business Administration (SBA)*, *available at* https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf, p. 7.

approved and the third (behind JPMorgan Chase Bank and Bank of America) in terms of the total dollar amount of PPP loans.[9]

9. The Named Plaintiffs bring this action individually and on behalf of two putative classes.[10] Throughout the remainder of this report, I refer to the two putative classes collectively as the "Putative Class" and the purported members of the two putative classes as the "Putative Class Members." Specifically, the Named Plaintiffs allege that, although the SBA approved the Putative Class Members' PPP loans and assigned SBA loan numbers, and the Putative Class Members completed and timely returned to Prestamos all requisite loan documentation, Prestamos never funded their PPP loans.[11] The Named Plaintiffs also allege that Prestamos misreported the Putative Class Members' PPP loans to the SBA as being funded so that Prestamos could obtain the loan fees.[12]

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9 "Paycheck Protection Program (PPP) Report: Approvals through 05/31/2021," *U.S. Small Business Administration (SBA)*, *available at* https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf, p. 7.

10 I understand that the "Damages Class" is defined as: "all persons and entities in California, Pennsylvania, Connecticut, Missouri, Illinois, Washington, Michigan, Nevada, Ohio, Arizona, Colorado, Utah, Texas, Indiana, Mississippi, Oklahoma, and New York (collectively, the 'Class Member States') who, in 2021, applied for PPP loans with defendant Prestamos as the lender for whom the SBA provided a SBA loan number, and who executed and submitted their Loan Documents and provided to Prestamos all required loan documentation, but as to whom Prestamos both failed to disburse the PPP loan proceeds and reported to the SBA that the loan proceeds were disbursed." (Third Amended Complaint, ¶ 376.) I understand that the "Declaratory Judgment Class" is defined as: "all persons and entities in the Class Member States who, in 2021, applied for PPP loans with defendant Prestamos as the lender for whom the SBA provided a SBA loan number, and who executed and submitted their Loan Documents and provided to Prestamos all required loan documentation, but as to whom Prestamos both failed to disburse the PPP loan proceeds and reported to the SBA that the loan proceeds were disbursed." (Third Amended Complaint, ¶ 377.) I further understand that both definitions exclude: "Prestamos, CPLC, any entities in which Prestamos or CPLC has a controlling interest, Defendants' agents and employees, any Judge to whom this action is assigned, and any member of such Judge's staff and immediate family." (Third Amended Complaint, ¶ 378.)

11 Third Amended Complaint, ¶ 73.

12 Third Amended Complaint, ¶ 73.

C. Assignment

10. Ballard Spahr LLP, counsel for Prestamos ("Counsel"), retained me to provide expert testimony in this matter based on my knowledge of and experience in the lending programs of the SBA, including the PPP. Specifically, Counsel asked me to: (a) provide an overview of the PPP lending program, including the process for disbursements of loan funds using the Automated Clearing House ("ACH") payments network, as well as the loan forgiveness process; (b) assess the reasons why the Putative Class Members did not receive PPP loan funds; and (c) assess the reasons why the Putative Class Members' PPP loans may not have been fully forgiven.

11. I am being compensated at an hourly rate of $925 for my time spent on this matter. Employees of Analysis Group, Inc. working under my direction and supervision have assisted me in this assignment. Neither my compensation nor that of the Analysis Group staff supporting me is contingent upon my findings or the outcome of this litigation.

12. A list of materials I considered in forming my opinions is attached as **Appendix B**. I have also drawn on my professional experience. My work on this matter is ongoing, and I therefore reserve the right to update, refine, and/or revise my opinions, or form additional opinions, including in response to Plaintiffs' experts and any additional information I may receive.

D. Summary of Opinions

13. Based on my experience with SBA lending programs, including facilitating the PPP for borrowers in 2020 and 2021, and my review of the documentary and data evidence made available to me to date, I have formed the following opinions:

14. To the extent the Putative Class Members did not receive PPP loan funds, there was a variety of reasons. For some, a borrower's loan application may have been withdrawn prior to the initiation of disbursement of loan proceeds. For others, a disbursement was initiated and funds successfully reached the borrower's bank via an ACH transfer, but the bank may have withheld the funds without releasing to the borrower's account for various reasons, including suspicion of fraud. For yet another category of Putative Class Members, the ACH fund transfer initiated by Prestamos was returned, accompanied by an ACH return code. This return, in turn, led to follow-up with the borrower by Blueacorn, Prestamos, and/or the borrower's bank. While this follow-up process resolved the issues for some borrowers, it resulted in non-funding for others due to various reasons, including suspected fraud.

15. For those failed disbursements accompanied with an ACH return code, an analysis of the code alone is insufficient to assess why each borrower did not receive the PPP loan funds. This is because one code can be used to denote multiple (sometimes unrelated) reasons for a return. Moreover, the return code itself does not convey information on what follow-up with the borrower was conducted by various parties. Therefore, understanding why each Putative Class Member did not receive PPP loan proceeds requires an individualized analysis of each borrower's situation and the timeline of actions (or inactions) of different parties.

16. The Putative Class Members' PPP loans may not have been fully forgiven for a variety of reasons. The PPP loan forgiveness application was onerous, requiring extensive documentary support, and rules for determining the eligible loan forgiveness amount were complex. Inaccuracies in the original loan application could also impact loan forgiveness eligibility. Thus, to determine whether each Putative Class Member's PPP loan could have been

forgiven (and in what amount) would require an individualized analysis of each borrower's loan forgiveness application that accounts for various factors, such as the covered period, payroll cost, non-payroll cost, employee wage level, and employee headcount.

II. OVERVIEW OF THE PPP LENDING PROCESS

17. After the onset of COVID-19, the U.S. Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act on March 27, 2020.[13] The CARES Act included the PPP, which launched on April 3, 2020 and ended on May 31, 2021.[14] Administered by the SBA, the PPP provided businesses with potentially forgivable, low-interest loans to help keep their workforce employed during COVID-19.[15] PPP loans were intended to cover payroll and benefits, mortgage interest, rent, utilities, and other costs to promote job retention and ensure economic stability amid the economic turmoil caused by COVID-19.[16]

18. I understand that the Named Plaintiffs in this matter all purport to be sole proprietors.[17] Businesses eligible for a PPP loan, however, extended beyond sole proprietors. Examples of eligible businesses include: (a) sole proprietors, independent contractors, and the

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[13] "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, p. 3692.

[14] "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 5.

[15] "Paycheck Protection Program," *U.S. Small Business Administration (SBA)*, *available at* https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program.

[16] "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, p. 3704.

[17] Third Amended Complaint, ¶¶ 15-35.

self-employed; (b) any small business concerns that met the SBA's size standards;[18] (c) any businesses, 501(c)(3) nonprofit organizations, 501(c)(19) veterans organizations, or tribal business concerns with 500 or fewer employees or, for those with more than 500 employees, meeting the SBA's industry-specific size standards; and (d) any businesses in the accommodations and food services sectors that had more than one physical location and employed less than 500 people per physical location.[19] The SBA approved over 11.8 million PPP loans, totaling nearly $800 billion between April 3, 2020 and May 31, 2021.[20] In 2020, the total approved PPP loan count was over 5.2 million with an average loan size of $101,000.[21] The total approved PPP loan count in 2021 was over 6.6 million with an average loan size of $42,000.[22]

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18 The SBA's size standards for small businesses included: (1) various industry-specific revenue thresholds, or (2) alternative size standards based on metrics such as maximum tangible net worth (less than $15 million) or average net income after federal taxes (less than $5 million). *See* "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, p. 3695.

19 "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 8.

20 Levin, Adam G., Anthony A. Cilluffo, and Bruce R. Lindsay, "SBA as a Vehicle for Crisis Relief: Lessons from the COVID-19 Pandemic," *Congressional Research Service*, September 14, 2023, *available at* https://crsreports.congress.gov/product/pdf/R/R47694, p. 3.

21 In 2020, a borrower could apply for a PPP loan during the period from April 3, 2020 to August 8, 2020. *See* "Paycheck Protection Program (PPP) Information Sheet: Borrowers," *available at* https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf, p. 1; "Paycheck Protection Program (PPP) Report: Approvals through 08/08/2020," *U.S. Small Business Administration (SBA)*, *available at* https://www.sba.gov/sites/default/files/2020-08/PPP_Report%20-%202020-08-10-508.pdf, pp. 2-6.

22 In 2021, a borrower could apply for a PPP loan during the period from January 19, 2021 to May 31, 2021. *See* "SBA Re-Opening Paycheck Protection Program to Small Lenders on Friday, January 15 and All Lenders on Tuesday, January 19," *U.S. Small Business Administration*, January 13, 2021, *available at* https://www.sba.gov/article/2021/jan/13/sba-re-opening-paycheck-protection-program-small-lenders-friday-january-15-all-lenders-tuesday; "Paycheck Protection Program (PPP) Report: Approvals through 05/31/2021," *U.S. Small Business Administration (SBA)*, *available at* https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf, pp. 2-6.

A. Key PPP Players: SBA, Borrowers, and Lenders

19. The SBA was responsible for administering the program, setting the rules, overseeing its implementation, and ensuring compliance with the guidelines.[23] The U.S. Treasury Department worked closely with the SBA to provide necessary funding, and issue operational guidelines.[24] The SBA also approved PPP loans.[25] The CARES Act allowed the SBA to rely on self-certifications from borrowers regarding their operational status and the accuracy of information, rather than on lenders to verify supporting documentation independently of borrowers.[26]

20. To apply for a PPP loan, a borrower (such as the Named Plaintiffs) needed to submit the following materials: a PPP Borrower Application Form (SBA Form 2483), or a lender's equivalent form, proof of identity, 2019 or 2020 (whichever the borrower used to calculate their loan amount) IRS Form 1040, Schedule C, business records (such as bank statements) establishing that borrower operated a business on or around February 15, 2020, and certifications regarding the applicant's business size, payroll expenses, and the need for the loan to continue operations.[27]

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23 "Paycheck Protection Program," *U.S. Department of Treasury*, *available at* https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/paycheck-protection-program#.

24 "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, pp. 3695-3705.

25 "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 9.

26 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, p. 2.

27 "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at*

21. Lenders who were already approved to participate in SBA's 7(a) program (which is SBA's primary business loan program for providing financial assistance to small businesses)[28] were authorized to issue PPP loans.[29] The SBA and the U.S. Treasury were permitted to approve additional lenders meeting certain requirements.[30] On April 30, 2020, CDFIs and Minority Depository Institutions ("MDIs", which are banks or credit unions either owned or directed primarily by members of certain minority groups),[31] were included in the program as lenders to expand lending to traditionally underserved areas.[32] Approved lenders (such as Prestamos) acted as the primary contacts for businesses seeking PPP loans.[33] Lenders processed the loan applications, confirmed receipt of borrower certifications and documentation, confirmed borrowers' calculations of loan amounts[34] by reviewing documentation, and certified the

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https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, pp. 3700, 3704, 3708. *See also* "Assessing Compliance with BSA Regulatory Requirements: Customer Identification Program," *Federal Financial Institutions Examination Council*, *available at* https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/01.

28 "7(a) Loans," *U.S. Small Business Administration*, *available at* https://www.sba.gov/funding-programs/loans/7a-loans.

29 "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 6.

30 "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 6.

31 "Minority Depository Institutions List," *FDIC*, *available at* https://www.fdic.gov/regulations/resources/minority/mdi.html.

32 "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 10.

33 "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, pp. 6-10.

34 The amount of a PPP loan was set at 2.5 times a borrower's average monthly payroll costs, up to a maximum of $10 million. *See* "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 4.

necessity of PPP loans for ongoing operations.[35] For those loan applications that lenders reached a decision to recommend for approval, lenders submitted them to the SBA for approval, and upon the SBA's approval, initiated disbursements of the funds to borrowers.[36]

22. To minimize delays and broaden eligibility, the SBA did not require traditional underwriting. Lenders did not follow traditional underwriting procedures also because PPP loans were fully guaranteed by the SBA.[37] The waiver of traditional underwriting allowed a larger number of businesses to access funds quickly.[38] Lenders made loan approval recommendations based on their review of the loan applications, which included applicants' certifications of business size, payroll expenses, and the need for funding to continue operations.[39]

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35 "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, pp. 3707-3708.

36 "Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations," *U.S. Government Accountability Office (GAO)*, September 2021, *available at* https://www.gao.gov/assets/gao-21-601.pdf, p. 9 ("To apply for a PPP loan, potential borrowers first submitted applications directly to a participating lender[.] The lender then reviewed the application documentation and submitted its loan approval decision to SBA through SBA's loan processing portal. Once received, SBA issued a loan number to the lender. The lender then disbursed the loan amount to the borrower. […] SBA issued a loan number when it agreed to guarantee the loan. Initially, SBA reviewed loan and borrower information to look for duplicate applications before issuing a loan number to the lender. For Phase 3, SBA began conducting upfront compliance checks before issuing a loan number to the lender.")

37 "Paycheck Protection Program (PPP) Information Sheet Lenders," *available at* https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf, p. 1.

38 "Paycheck Protection Program: SBA Added Program Safeguards, but Additional Actions Are Needed," *U.S. Government Accountability Office (GAO)*, July 2021, *available at* https://www.gao.gov/assets/gao-21-577.pdf, p. 10.

39 "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, p. 3694.

23. Some lenders contracted with LSPs (such as Blueacorn) to act as their agents in originating, processing, and servicing PPP loans.[40] LSPs generally had technological advantages for processing loans quickly and securely, which made them efficient in processing applications and more likely to lend to underserved communities that had difficulties to access financial services.[41] Their lower processing costs compared to banks also made them attractive for small businesses with the need of small loans.[42] For example, Blueacorn offered technology solutions and financial expertise to streamline the PPP application process for potential borrowers.[43] Prestamos believed that engaging Blueacorn would be "more economical" and result in better quality of service to borrowers.[44]

B. PPP Loan Fraud

24. Partly because of the relaxed underwriting requirements and expedited approval processes, fraud was widespread in PPP lending. By December 2021, the SBA's Office of

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40 For a definition of a "Lender Service Provider" for SBA loans, *see* "Part 103 - Standards for Conducting Business with SBA," *Code of Federal Regulations*, *available at* https://www.ecfr.gov/current/title-13/chapter-I/part-103.

41 Battisto, Jessica, et al., "Who Received PPP Loans by Fintech Lenders?," *Liberty Street Economics*, May 27, 2021, *available at* https://libertystreeteconomics.newyorkfed.org/2021/05/who-received-ppp-loans-by-fintech-lenders.

42 Battisto, Jessica, et al., "Who Benefited from PPP Loans by Fintech Lenders?," *Liberty Street Economics*, May 27, 2021, *available at* https://libertystreeteconomics.newyorkfed.org/2021/05/who-benefited-from-ppp-loans-by-fintech-lenders.

43 "Blueacorn Pitch Deck," PRESTAMOS-00300502, p. 3; "Operation Process: Narrative," BLUEACORN-00001987, p. 2 ("To apply for a PPP loan, the prospect creates an account in Phoenix, which is used throughout Blueacorn's Eligibility Verification process. The lead is directed to complete the PPP application process using this custom implementation of a "Phoenix" form, which Blueacorn's developers have created, …. This is a 12-step form created via high-performance server-side technology.")

44 "Exhibit 16: Lender Service Provider Agreement," PRESTAMOS-00296818 ("Lender desires to acquire staff services from Service Provider to carry out certain functions related to the PPP Loan Portfolio rather than hiring employees directly for those same staff functions, as it believes that this will be more economical and will result in a higher level of service and expertise to provide better delivery to the small business concerns which Lender desires to assist.")

Inspector General ("OIG") Hotline received over 54,000 complaints related to PPP fraud.[45] Financial institutions filed over 21,000 suspicious activity reports related to PPP loans with the Financial Crimes Enforcement Network between April and October 2020.[46] The SBA's OIG investigated the complaints received from the OIG Hotline, financial institutions, and other law enforcement agencies, and evaluated the SBA's handling of potentially fraudulent loans.[47] The OIG found that the SBA lacked a well-defined organizational structure for managing and addressing potential fraud in PPP loans across the program.[48] It estimated that the potential fraud within the PPP represented eight percent of the total disbursed funds.[49]

25. The OIG also found that due to inadequate guidance from the SBA, lenders faced uncertainty in handling PPP loan fraud and recovering fraudulently obtained funds from borrowers' accounts.[50] SBA officials noted a significant rise in lender requests for specific

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45 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, p. 2.

46 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, p. 2.

47 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, p. 1.

48 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, p. 3.

49 "COVID-19 Pandemic EIDL and PPP Loan Fraud Landscape," *U.S. Small Business Administration*, June 27, 2023, *available at* https://www.sba.gov/sites/default/files/2023-06/SBA%20OIG%20Report%2023-09.pdf, p. 11. The OIG has also reported that as of February 1, 2023, SBA was pursuing the seizure (*i.e.*, confiscation) of $32 million in cash proceeds from fraudulently obtained PPP loan funds and tracking another $41 million fraudulent PPP loans for return; in addition, $95 million of PPP loan deposits were frozen by two financial institutions due to suspected fraudulent activity. *See* "Serious Concerns Regarding the Return of Paycheck Protection Program Funds," *U.S. Small Business Administration*, May 31, 2023, *available at* https://www.sba.gov/sites/default/files/2023-05/SBA%20OIG%20Report%2023-08_0.pdf, pp. 3-4.

50 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, pp. 8-10.

guidance to ensure compliance with agency requirements and effective fraud management.[51] Such guidance that lenders sought from the SBA related to recovering fraudulently obtained loan funds that borrowers had already withdrawn, returning potentially fraudulent PPP loan funds back to either the lenders or the SBA, and handling confiscated funds and remaining unspent funds from potentially fraudulent PPP loans.[52] Some of the guidance was only provided by the SBA after the PPP had ended.[53]

C. Disbursements of PPP Loan Funds

26. As depicted in **Figure 1** below, after the SBA approved borrowers for PPP loans, lenders would initiate disbursements of PPP loan funds to borrowers using the ACH payments network.[54] According to Nacha, the organization that manages the ACH payments network, the process for disbursement of PPP loan funds via an ACH transfer is as follows.[55]

a. The lender, *i.e.*, Prestamos in this case (also known as the Originator), initiates a PPP loan disbursement into the payment system according to the arrangement with a borrower (the Recipient). The borrower's name, banking information, and

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51 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, p. 8.

52 Ware, Hannibal "Mike", "SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans," *U.S. Small Business Administration (SBA)*, May 26, 2022, *available at* https://www.sba.gov/sites/default/files/2022-05/SBA%20OIG%20Report%2022-13.pdf, pp. 8-10; "Serious Concerns Regarding the Return of Paycheck Protection Program Funds," *U.S. Small Business Administration*, May 31, 2023, *available at* https://www.sba.gov/sites/default/files/2023-05/SBA%20OIG%20Report%2023-08_0.pdf, p. 1.

53 "SBA Procedural Notice," *U.S. Small Business Administration*, December 18, 2023, *available at* https://www.sba.gov/sites/default/files/2024-01/5000-851892%20-%20Remediated%20%281%29.pdf.

54 "What is an ACH transaction?," *Consumer Financial Protection Bureau*, May 14, 2024, *available at* https://www.consumerfinance.gov/ask-cfpb/what-is-an-ach-transaction-en-1065/.

55 "How ACH Works," *National Automated Clearing House Association*, *available at* https://achdevguide.nacha.org/how-ach-works.

amount information are part of the ACH payment file that the lender provides to the lender's bank.

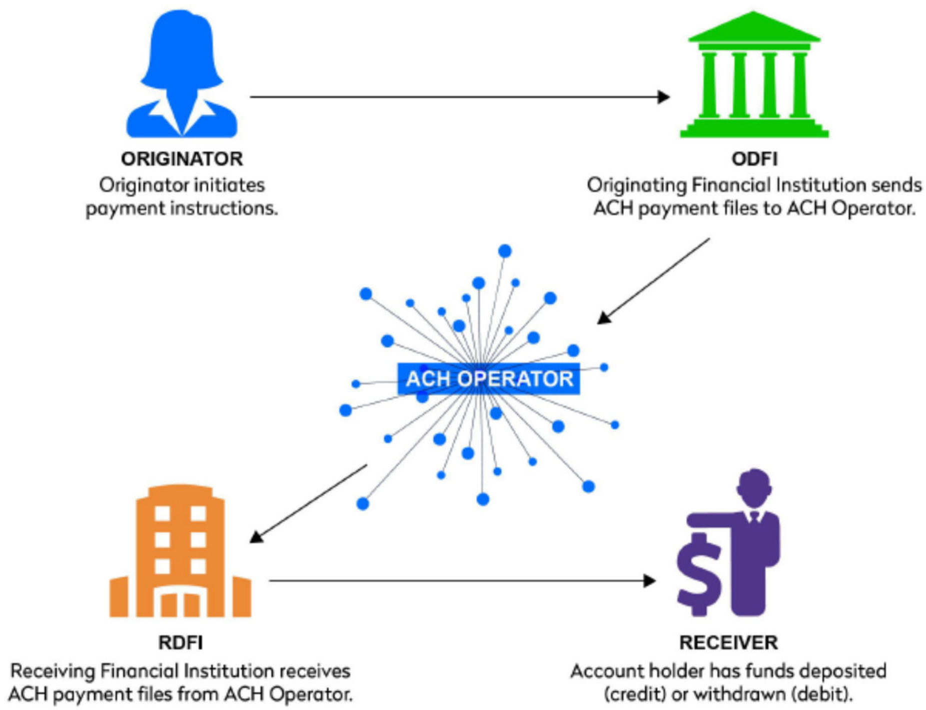
b. The lender's bank, *i.e.*, Evolve Bank & Trust in this case (also known as the Originating Depository Financial Institution, or ODFI), receives the payment instructions from the lender and forwards the instructions (also referred to as an "entry"[56]) to the Federal Reserve (*i.e.*, the ACH Operator).

c. The Federal Reserve is a central clearing facility that receives payments from the lender's bank (such as Evolve Bank & Trust, in this case), distributes payments to the appropriate Receiving Depository Financial Institution, or RDFI (*i.e.*, a financial institution where a borrower's account resides), and performs settlement functions for the ODFI and the RDFI.

d. The RDFI, upon receiving an ACH payment instruction from the Federal Reserve, posts the applicable amount of funds to the account of its Recipient (*i.e.*, the borrower).

[56] "The Complete Guide to Understanding ACH Payments," *Integrated Research*, *available at* https://www.ir.com/guides/ach-payments ("Once a transaction is initiated, an entry is submitted by the bank or payment processor handling the first phase of the ACH payments process. The bank or payment processor is known as the Originating Depository Financial Institution (ODFI).")

Figure 1. PPP Loan Disbursement Process[57]



III. THERE WAS A WIDE VARIETY OF REASONS WHY THE PUTATIVE CLASS MEMBERS DID NOT RECEIVE PPP LOAN FUNDS

27. There was a wide variety of reasons why the Putative Class Members did not receive PPP loan funds. For some, the loan application may have been withdrawn prior to disbursement, or the borrower's bank may have failed to release the funds to the borrower, possibly because of suspected fraud. For others, the ACH fund transfer that Prestamos initiated was returned, with a return code, which in turn led to follow-up with the borrower by Blueacorn, Prestamos, and/or the borrower's bank. However, the return code itself does not convey information on what follow-up was conducted with the borrower by various parties. For some borrowers, this follow-up process seemed to have resulted in non-funding, due to various

[57] "How ACH Payments Work," *National Automated Clearing House Association*, *available at* https://www.Nacha.org/content/how-ach-payments-work.

reasons, including suspected fraud and/or the borrower's failure to provide required documents and/or information. I find that understanding specifics of the various situations that caused the return of PPP loan funds requires more than an analysis of the return codes—it requires individualized analysis of each specific situation that led to the return. It also requires an individualized analysis of the timeline of follow-up actions (or inactions) of different parties after an ACH transfer was returned.

A. Overview of Reasons for Failure to Receive PPP Loan Funds

28. As an initial matter, it is informative to distinguish among the following three scenarios.

1. Scenario 1

[redacted]

2. Scenario 2

[redacted]

3. Scenario 3

31. In the PPP loan fund disbursement process depicted in **Figure 1** above, an ACH fund transfer failed and the funds were returned to the ODFI, accompanied by an ACH return code (also referred to as an "ACH return").

32. ACH returns can happen in many payment contexts, when either the payment cannot be completed (*e.g.*, the ACH Operator returns the funds), or when the payment initially settles but is rejected later by the recipient's bank.[58] Common reasons for an ACH return include incorrect recipient account information, a closed recipient bank account, incorrect routing

58 Antosz, Danielle, "ACH Return Codes: What They Mean and How to Minimize Risk," *Plaid*, February 14, 2023, *available at* https://plaid.com/resources/ach/ach-return/ ("ACH returns occur when an ACH payment cannot be completed for any reason, or when the payment initially settles but is rejected later. Essentially, it's the ACH payment equivalent of a bounced check.")

number for the recipient's bank, and errors in entries such as the name associated with the recipient's bank account. There are altogether 47 ACH return codes to choose from when the ACH Operator or the RDFI returns loan disbursement funds.[59]

33. In case of a loan, the borrower typically provides banking information (*i.e.*, bank account details where the borrower would like to receive loan funds) to the lender in the loan application. The lender and/or its LSP will in turn provide such information to the ODFI for ACH transfer. If the borrower has made an error when providing the bank account details to the lender, the ACH transfer based on such erroneous information would fail and would be returned.[60] Even if the borrower has provided the accurate account details, the ACH transfer could still fail if the borrower provides a personal rather than business account to receive business loan proceeds.[61]

34. A suspicion of fraud by a recipient's bank can also lead to an ACH return. However, in my experience, there is no single ACH return code that denotes transfer rejection due to potential fraud. Rather, the RDFI, at its discretion, can select among several ACH return codes in the case of suspected fraud.[62] For example, in their guidance to RDFIs, the SBA OIG

59 Return codes R1-R39 and R40-R47 could be used for return of loan disbursement funds. Return codes R48-R77 include dishonored return codes, contested return codes, and debit-related return codes. *See* "Nacha ISO 20022 Guide to Mapping U.S. ACH Rejected Items," *National Automated Clearing House Association*, August 2023, *available at* https://www.nacha.org/system/files/2023-08/NACHA_ISO20022_Guide_pain.002_reject%2008-09-23.pdf, Table 1: Mapping of Nacha Return Codes to ISO ExternalStatusReason1 Codes, pp. 83-91.

60 "Understanding an ACH Return and What You Should Do About It," *Stax*, *available at* https://staxpayments.com/blog/what-is-an-ach-return/ ("There are many reasons a transaction can fail to process; it could be as simple as a mistyped account number or something more complicated.")

61 A number of Named Plaintiffs appear to have identified personal accounts, rather than business accounts, on their PPP loan applications.

62 "Return for Questionable Transaction," *Nacha*, *available at* https://www.nacha.org/rules/return-questionable-transaction ("Is an RDFI required to use R17 to return an entry with an invalid account number that it believes may be questionable? No, the RDFI may continue to use R03 (No Account/Unable to Locate Account) or R04 (Invalid Account Number Structure) to return those entries.")

and the U.S. Secret Service Office of Investigations note that "the RDFI should select the Return Reason Code that most closely approximates the reason for the return" and list the following codes as "acceptable options" for returning an ACH fund transfer due to a suspicion of fraud:[63]

> "R03 (No Account/Unable to Locate Account)
>
> R17 (File Record Edit Criteria/Entry with Invalid Account Number Initiated Under Questionable Circumstances), which requires "QUESTIONABLE" to be inserted in the first twelve positions of the Addenda Record
>
> R23 (Credit Entry Refused by Receiver)"

35. Not only can multiple codes be used to denote the same reason for the return of funds, but also one return code can be used for multiple (sometimes unrelated) reasons for ACH returns. Therefore, understanding the specifics of the situation that caused the return of PPP loan funds requires more than an analysis of the return codes—it requires individualized analysis of each specific situation that led to the return.

36. Generally speaking, after an ACH return, the ODFI is expected to forward the return to the Originator for action.[64] Upon receiving the return notification, the Originator and

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[63] "Detection and Mitigation of Paycheck Protection Program and Economic Injury Disaster Loan Fraud," *U.S. Secret Service Office of Investigations and U.S. SBA Office of Inspector General*, August 10, 2020, *available at* https://www.neach.org/Portals/0/USSS%20and%20SBA%20OIG%20Joint%20Alert%20-%20PPP%20and%20EIDL%20Fraud%20-%20TLP%20Green.pdf, p. 3. *See also* "Paycheck Protection Program - Application Fraud Indicators," BLUEACORN-02852073 (OIG) pp. 1-2.

[64] *Nacha Operating Rules & Guidelines*, Nacha, 2024, pp. OG52-53. After an ACH return, the ODFI could also choose to reinitiate the fund transfer or dishonor the return. Neither action applies to the ACH returns in this case. The action of reinitiating the fund transfer only applies to return code R01 (Insufficient Funds) or R09 (Uncollected Funds). Those two codes denote a situation where money is withdrawn from a recipient's account, but the account does not have a sufficient amount of funds to withdraw. Those two codes are not

the Recipient would be expected to work together to attempt to resolve the return. For example, in a failed PPP loan disbursement, if the funds were returned because the account number and/or routing number that the borrower provided as part of the loan application were incomplete or incorrect, the lender and the borrower would be expected to work together to obtain correct account and/or routing numbers.[65]

37. The LSP and/or the RDFI may also be expected to assist with resolving returned disbursements. For example, if the LSP, such as Blueacorn, was expected to assist with resolving ACH returns of PPP loan disbursements, the lender and/or the ODFI would generally be expected to notify the LSP about the unsuccessful loan disbursement and the reason for the return.[66] In this case, the LSP would generally be expected to work with the borrower on behalf of the lender to attempt to resolve the returned disbursement.[67] In case of an ACH return due to suspected fraud, the LSP may be expected to be involved.[68] The RDFI, as the borrower's bank,

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relevant for this case because here, funds were being deposited into a recipient's account. The ODFI could also dishonor the return of the funds (if it is untimely, contains incorrect information, is misrouted, is a duplicate or results in an unintended credit to the borrower), and the RDFI could choose to contest the dishonored return. My review suggests that the codes associated with dishonored returns and contested returns do not appear in the data produced by Evolve Bank & Trust (the ODFI) for this case.

65 "The Complete List of ACH Rejection Codes: Why They Happen and How to Handle Them," *Stripe*, February 16, 2024, *available at* https://stripe.com/resources/more/the-complete-list-of-ach-rejection-codes-why-they-happen-and-how-to-handle-them#.

66 "Operation Process: Narrative," BLUEACORN-00001987, p. 14 ("If the ACH transfer from the banks to borrowers fails, the funds are returned to the respective bank's accounts via Evolve; this information is recorded in the activity file Blueacorn receives from the bank"), pp. 16-17 (discussing "bank-code-based rejections.")

67 Blueacorn's pitch deck shows a "Customer Service Reachout" following "Returned Wires/ACH." *See* "Blueacorn Pitch Deck," PRESTAMOS-00300502, p. 26. *See also* "Operation Process: Narrative," BLUEACORN-00001987, p. 18. Communication between Blueacorn and borrowers following an ACH return in some instances refers to "reverification." *See* MARSHALL00028; OWSLEY00009; PRONSKY00040. *See also* "Paycheck Protection Program Loan Processing Script," BLUEACORN-00001570, p. 32.

68 For examples of fraudulent bank statements, Schedule Cs, passports, *see* "Paycheck Protection Program Loan Processing Script," BLUEACORN-00001570, pp. 21-31. *See also* "Paycheck Protection Program Loan Processing Script," BLUEACORN-00001570, p. 32 ("Appendix F: Enhanced Due Diligence" discussing the requirements for applications initially approved by the SBA but where "a full 1040 tax return" that "will have to include a Schedule C" was requested in addition to the "original documentation on file (ID, Schedule C, Bank Statements).")

may also be expected to be involved in following up with the borrower and conducting fraud-related investigations.[69]

38. If follow-up communication with the borrower is successful in resolving the ACH return reason, the lender would resubmit loan disbursement by initiating another ACH transfer or another method of payment.[70] Conversely, if upon the follow-up by the lender, the LSP, or the borrower's bank, the borrower still fails to provide necessary and correct information, it would be the borrower's fault for not receiving PPP loan funds. Therefore, understanding whether the lender was responsible for a failed disbursement requires an individualized analysis of each borrower's situation and the timeline of actions (or inactions) of various different parties, such as the borrower, the borrower's bank, the ODFI, the lender, and the LSP.

B. Analysis of ACH Return Codes Associated With Prestamos's PPP Loan Disbursements

39. Two datasets made available to me (one produced by Evolve Bank & Trust, and another provided by Prestamos) allow me to analyze the ACH return codes for the borrowers to whom Prestamos allegedly failed to disburse the PPP loan proceeds. My analysis finds that there was a variety of reasons why these borrowers did not receive the PPP loan funds. It also

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[69] According to Blueacorn's pitch deck, a "Loan Review by Blueacorn" was part of a process to investigate "Bank-Reported Fraud" based on either the "Borrower's Bank Fraud Officer Report" or the "SBA Officer Report," and Blueacorn's loan review included a number of manual verification steps. *See* "Blueacorn Pitch Deck," PRESTAMOS-00300502, pp. 28-29.

[70] "Operation Process: Narrative," BLUEACORN-00001987, p. 14 ("Sometimes Blueacorn declines the loan [after an ACH return] because it's suspicious; for others Blueacorn attempts to get new data and try again. If there is an ACH failure, there is a semi-formal response to Prestamos/Evolve to fix and/or resend the ACH In case of full failure, ACH funds are returned to their respective banks.") For a description of Blueacorn's "Prepaid Card Process" based on "bank-code-based rejections," *see* "Operation Process: Narrative," BLUEACORN-00001987, pp. 15-17.

confirms that further individualized investigations are necessary in order to understand the specific situation that caused each borrower to fail to receive the loan funds.

1. Available Data

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Figure 2. The ACH Return Codes in Evolve Return Data

Rank	Return Code	Return Description	Frequency	Proportion
1	R03	No Account/Unable to Locate Account	7,230	33.95%
2	R23	Credit Entry Refused by Receiver	5,799	27.23%
3	R02	Account Closed	3,828	17.98%
4	R17	File Record Edit Criteria	1,917	9.00%
5	R16	Account Frozen	1,139	5.35%
6	R04	Invalid Account Number	455	2.14%
7	R05	Unauthorized Debit to Consumer Account Using Corporate SEC Code	383	1.80%
8	R10	Customer Advises Not Authorized	264	1.24%
9	R20	Non-Transaction Account	151	0.71%
10	R06	Returned per ODFI's Request	58	0.27%
11	R08	Stop Payment on Item	18	0.08%
12	R11	Check Truncation Entry Return	14	0.07%
13	R28	Check digit for routing number is incorrect	11	0.05%
14	R13	RDFI not qualified to participate	7	0.03%
15	R07	Authorization Revoked by Customer	6	0.03%
16	R29	Corporate Customer Advises Not Authorized	6	0.03%
17	R45	Invalid Individual Name	4	0.02%
18	R15	Beneficiary or Account Holder Deceased	2	0.01%
19	R12	Branch Sold to Another DFI	1	0.00%
		Total	**21,293**	100.00%

47. ***R03 – No Account/Unable to Locate Account***: This return would be initiated by the RDFI and could represent multiple reasons.[81] Typically, the code suggests that the borrower account number included in the ACH instruction had the right format,[82] but other issues

[81] *Nacha Operating Rules & Guidelines*, Nacha, 2024, p. OR137.

[82] *Nacha Operating Rules & Guidelines*, Nacha, 2024, p. OR137 ("The account number structure is valid, and it passes the check digit validation.") A check digit is "a digit added to a string of numbers for error detection purposes." (Rouse, Margaret, "Check Digit," July 20, 2016, *available at* https://www.techopedia.com/definition/1430/check-digit.)

prevented a successful transfer, such as no such account number existing at the RDFI,[83] or the account belonging to someone other than the borrower.[84] It is also possible that the RDFI suspected that the ACH transfer was initiated due to fraud and selected this code as the reason for return.[85]

48. ***R23 – Credit Entry Refused by Receiver***: This return would be initiated by the RDFI, but R23 is a catch-all code that could represent multiple reasons.[86] Possible examples include, but not limited to: (1) the borrower's account could be subject to litigation; (2) the borrower had not authorized this account to receive deposits; (3) the borrower indicated that they did not know or recognize the Originator (*i.e.*, Prestamos in this case) or its ODFI (*i.e.*, Evolve Bank & Trust); (4) the borrower indicated that the amount deposited was incorrect.[87] In my experience, returns for these kinds of reasons in the context of PPP lending would be atypical. Thus, it is possible that R23 was chosen because the RDFI suspected that the ACH transfer was initiated due to fraud.[88]

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83 *Nacha Operating Rules & Guidelines*, Nacha, 2024, p. OR137 ("the account number designated is not an existing account.")

84 *Nacha Operating Rules & Guidelines*, Nacha, 2024, p. OR137 ("the account number does not correspond to the individual identified in the Entry.")

85 "Detection and Mitigation of Paycheck Protection Program and Economic Injury Disaster Loan Fraud," *U.S. Secret Service Office of Investigations and U.S. SBA Office of Inspector General*, August 10, 2020, *available at* https://www.neach.org/Portals/0/USSS%20and%20SBA%20OIG%20Joint%20Alert%20-%20PPP%20and%20EIDL%20Fraud%20-%20TLP%20Green.pdf, p. 3.

86 *Nacha Operating Rules & Guidelines*, Nacha, 2024, Appendix Four, p. OR144 ("Any credit Entry that is refused by the Receiver may be returned by the RDFI.)

87 "Return Code (R23) Explanation," *Buildium*, August 15, 2022, *available at* https://help.buildium.com/hc/s/article/Return-Code-R23-Account-holder-refuses-transaction-because-amount-is-inaccurate-or-other-legal ("The Receiver may return a credit entry because one of the following conditions exists: (1) a minimum amount required by the Receiver has not been remitted; (2) the exact amount required has not been remitted; (3) the account is subject to litigation and the Receiver will not accept the transaction; (4) acceptance of the transaction results in an overpayment; (5) the Originator is not known by the Receiver; or (6) the Receiver has not authorized this credit entry to this account.")

88 "Detection and Mitigation of Paycheck Protection Program and Economic Injury Disaster Loan Fraud," *U.S. Secret Service Office of Investigations and U.S. SBA Office of Inspector General*, August 10, 2020, *available at*

49. ***R02 – Account Closed***: This return would be initiated by the RDFI because "a previously active account has been closed by action of the customer or the RDFI."[89]

50. ***R17 – File Record Edit Criteria/Entry with Invalid Account Number Initiated Under Questionable Circumstances***: While an RDFI could use code R17 for routine errors in ACH transfer instructions unrelated to fraud,[90] this code is also used to return a loan fund disbursement when the following two criteria are met: (1) the borrower's account number was invalid (*e.g.*, because either the account had been closed, there was no such account existing at the RDFI, or the account number included in the ACH instruction had a wrong format) and (2) the RDFI believed that the transfer had been initiated under questionable circumstances.[91] To indicate a fraud-related return (and to differentiate it from returns for routine account errors), an RDFI should add the keyword "QUESTIONABLE" in the Addenda Information field of the return with code R17.[92] Nacha further prescribes that in this case, there is a reasonable expectation by the RDFI that the ODFI will be part of the fraud-related follow-up process by the

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https://www.neach.org/Portals/0/USSS%20and%20SBA%20OIG%20Joint%20Alert%20-%20PPP%20and%20EIDL%20Fraud%20-%20TLP%20Green.pdf, p. 3.

89 *Nacha Operating Rules & Guidelines*, Nacha, 2024, Appendix Four, p. OR137.

90 "Return for Questionable Transaction," *Nacha*, *available at* https://www.nacha.org/rules/return-questionable-transaction ("RDFIs may but are not required to use return reason code R17 to indicate that the RDFI believes the entry was initiated under questionable circumstances. […] Can an RDFI still use R17 for 'File Record Edit Criteria'? Yes, R17 will still be used for this reason.")

91 *Nacha Operating Rules & Guidelines*, Nacha, 2024, p. OR142 ("(1) Field(s) cannot be processed by RDFI; or (2) the Entry contains an invalid DFI Account Number (account closed/no account/unable to locate account/invalid account number) and is believed by the RDFI to have been initiated under questionable circumstances; or (3) either the RDFI or Receiver has identified a Reversing Entry as one that was improperly initiated by the Originator or ODFI.")

92 "Return for Questionable Transaction," *Nacha*, *available at* https://www.nacha.org/rules/return-questionable-transaction ("How will the ODFI know the RDFI believed the entry was questionable? RDFIs electing to use R17 for this purpose will use the description "QUESTIONABLE" in the Addenda Information field of the return. An R17 in conjunction with this description enables these returns to be differentiated from returns for routine account number errors. The remaining space in that field may be used for additional information related to the return.")

ODFI and the lender.[93] For over 80 percent of the records with the R17 code in the Evolve Return Data, the Addenda Information field includes references to questionable, fraud-related issues, or lack of proof of a business.[94]

51. ***R16 – Account Frozen/Entry Returned Per OFAC Instruction***: This return would be initiated by either the RDFI or the ACH Operator.[95] There are two possible reasons for this return: (1) the RDFI had taken legal action restricting the borrower's use of this account; or (2) the Office of Foreign Assets Control ("OFAC") had instructed to return this transfer.[96]

52. These top five ACH return codes alone demonstrate that there was a variety of reasons why the borrowers in the Evolve Return Data did not receive PPP loan funds. The discussion above also shows that merely knowing the ACH return code is insufficient to determine the specific reason of each failed disbursement and highlights the need for further individualized investigation in order to understand the specific situation that caused each of these borrowers to fail to receive the loan funds.

53. Moreover, as I discuss above, after every ACH return, there is a chain of possible actions (or inactions) by the ODFI, the lender, the LSP, the RDFI, and the borrower. For all of

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93 *Nacha Operating Rules & Guidelines*, Nacha, 2024, p. OG54 ("Where the RDFI has flagged one or more entries containing an invalid account as questionable, there is a reasonable expectation by the RDFI that the ODFI will work with its Originator to ensure the appropriateness of payments initiated by its client and to either correct or cease to originate future entries that could be perceived to be questionable.")

94 Based on any of the following key words: "questionable," "question," "fraud," "suspect," "suspicious," "proof of business," "not a business," "non-business," "no business," "not business."

95 *Nacha Operating Rules & Guidelines*, Nacha, 2024, Appendix Four, p. OR141; "International ACH Transactions FAQs," *Nacha*, *available at* https://www.nacha.org/content/international-ach-transactions-faqs ("A Gateway Operator can be either an ACH Operator or a Participating Depository Financial Institution, as defined by the Nacha Operating Rules, that acts as an entry point to or exit point from the U.S. for ACH payment transactions.")

96 *Nacha Operating Rules & Guidelines*, Nacha, 2024, Appendix Four, p. OR141 ("(1) Access to the account is restricted due to specific action taken by the RDFI or by legal action; or (2) OFAC has instructed the RDFI or Gateway to return the Entry.")

the top five ACH return codes that I discuss above, it would be expected that the lender or the LSP would work with the borrower to attempt to obtain additional information in an attempt to resolve the return. In case of a suspicion of fraud, other parties such as the borrower's bank may also be involved, and additional documentation concerning the propriety of the underlying ACH transfer may be requested and/or required.. However, the return code itself does not convey information on the chain of actions or inactions in this follow-up process. Understanding why the borrowers in the Evolve Return Data did not receive PPP loan funds therefore also requires an individualized analysis of the timeline of events and actions (or inactions) by many different parties.

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IV. THERE WAS A WIDE VARIETY OF REASONS WHY THE PUTATIVE CLASS MEMBERS' PPP LOANS MAY NOT HAVE BEEN FULLY FORGIVEN

77. Borrowers may be eligible for PPP loan forgiveness. Generally, PPP loans were forgivable if borrowers used the funds for payroll to retain employees or cover other necessary business expenses.[221] However, there was a wide variety of reasons why borrowers may not be eligible for forgiveness, including, for example: (a) failure to provide documentation supporting using loan proceeds to cover payroll expenses; (b) failure to maintain pre-COVID-19 employee headcount; (c) failure to restore reduced compensation to previous levels; (d) failure to ensure funds were allocated to payroll expenses per PPP forgiveness requirements; and (e) failure to accurately complete the loan forgiveness application with thorough documentation.[222] Inaccuracies in original loan applications such as mistakes or omissions in paperwork could also impact forgiveness eligibility.

78. Furthermore, even if the Putative Class Members' PPP loans would have been eligible for forgiveness, the loan forgiveness requirements prescribed by the SBA indicate that the portion of the loan amount to be forgiven would have varied widely depending on each Putative Class Member's individualized circumstance.

[redacted]

[221] "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, p. 3706.

[222] "ERC - 10 most common PPP loan forgiveness issues," *ERC Today*, March 8th, 2023, *available at* https://erctoday.com/ppp-loan-forgiveness-issues/.

A. Overview of PPP Loan Forgiveness

79. The CARES Act provided for "forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP)."[223] The SBA subsequently provided several updates on loan forgiveness applications and instructions.[224] Generally, a borrower was eligible for loan forgiveness if the PPP loan funds were spent on eligible expenses, including at least 60 percent of funds spent on payroll costs.[225]

80. The loan forgiveness process had three steps: (a) a borrower typically first submitted a forgiveness application and supplemental documents to the lender; (b) the lender processed, reviewed, and submitted its forgiveness decision (*i.e.,* approved, partially approved, or denied) to the SBA; and (c) the SBA reviewed and approved the lender's decision, and remitted the forgiven amount to the lender.[226]

81. SBA staff and government contractors conducted the loan eligibility and forgiveness review process under the supervision of the SBA's Office of Capital Access.[227] All

[223] "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," *Federal Register*, January 14, 2021, *available at* https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, p. 3692.

[224] "Paycheck Protection Program: SBA Added Program Safeguards, but Additional Actions Are Needed," *U.S. Government Accountability Office (GAO)*, July 2021, *available at* https://www.gao.gov/assets/gao-21-577.pdf, p. 19.

[225] "Paycheck Protection Program: SBA Added Program Safeguards, but Additional Actions Are Needed," *U.S. Government Accountability Office (GAO)*, July 2021, *available at* https://www.gao.gov/assets/gao-21-577.pdf, p. 19.

[226] "Paycheck Protection Program: SBA Added Program Safeguards, but Additional Actions Are Needed," *U.S. Government Accountability Office (GAO)*, July 2021, *available at* https://www.gao.gov/assets/gao-21-577.pdf, pp. 20-21.

[227] "SBA's Paycheck Protection Program Loan Review Process," *U.S. Small Business Administration*, February 28, 2022, *available at* https://www.sba.gov/sites/default/files/2022-02/SBA%20OIG%20Report%2022-09.pdf, p.2. ("Government contractors and SBA federal and contract staff, under the supervision of SBA's Office of Capital Access, conduct the loan review process. […] [R]eviews were conducted on loans with a submitted forgiveness application.")

loans along with any submitted forgiveness applications were subject to an automated review. In addition, manual reviews were performed for (a) sampled loans with a principal amount of less than $2 million; (b) all loans with a principal amount greater than $2 million; and (c) loans flagged during the automatic review.[228] The SBA reserved the right to reject or partially adopt the lender's recommendation at its sole discretion, and as a result, the final forgiveness amount can be different from the lender's recommendation.[229]

B. PPP Loan Forgiveness Requirements

82. The PPP loan forgiveness application was onerous and required extensive documentary support. The rules for determining the eligible loan forgiveness amount were also complex. The SBA OIG noted that many PPP loan borrowers did not apply for loan forgiveness because they were "intimidated by the complexity of the PPP forms, processes, and the formality of the forgiveness process."[230] In addition, issues with the SBA's software infrastructure[231] and lack of clarity around forgiveness created further frustrations for both borrowers and lenders.[232]

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[228] "SBA's Paycheck Protection Program Loan Review Process," *U.S. Small Business Administration*, February 28, 2022, *available at* https://www.sba.gov/sites/default/files/2022-02/SBA%20OIG%20Report%2022-09.pdf, pp. 2-3.

[229] "SBA Procedural Notice," *U.S. Small Business Administration*, July 23, 2020, *available at* https://www.sba.gov/sites/default/files/2020-07/5000-20038-508.pdf, p.3 ("The Lender is responsible for notifying the borrower of the forgiveness amount paid by SBA to the Lender. If the forgiveness amount paid by SBA is less than the amount in the forgiveness decision issued by the Lender to SBA, the Lender must also notify the borrower of the amount in the Lender's forgiveness decision. […] SBA reserves the right to review the Lender's decision in its sole discretion.")

[230] "COVID-19 Pandemic EIDL and PPP Loan Fraud Landscape," *U.S. Small Business Administration*, June 27, 2023, *available at* https://www.sba.gov/sites/default/files/2023-06/SBA%20OIG%20Report%2023-09.pdf, p. 27.

[231] Ennis, Dan, "Lenders Report PPP Portal Access Issues Minutes After Relaunch," *Banking Dive*, April 27, 2020, *available at* https://www.bankingdive.com/news/paycheck-protection-plan-bank-of-america-portal-covid/576796/.

[232] "COVID-19: Federal Efforts Could Be Strengthened by Timely and Concerted Actions," *U.S. Government Accountability Office (GAO)*, September 2020, *available at* https://www.gao.gov/assets/710/709492.pdf, p. 233 ("Finally, representatives of two associations commented that the resource demands and the lack of clarity

83. Because of the SBA's specific requirements for loan forgiveness and the complexities of the PPP loan forgiveness application,[233] there could have been a wide variety of reasons why a PPP loan may not have been fully forgiven. Failure to meet one or more of the following requirements would have jeopardized approval or affected the loan forgiveness amount:[234]

a. Covered Period: Only expenses incurred within a specified time window were eligible for determining the loan forgiveness amount. This covered period usually lasted for 8 to 24 weeks starting from the disbursement date of a PPP loan.[235]

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surrounding the application and forgiveness processes have led to lender fatigue with the program"); Reosti, John, "New PPP Angst: Waiting for SBA to Sign Off on Loan Forgiveness," *American Banker*, September 22, 2020, *available at* https://www.americanbanker.com/news/new-ppp-angst-waiting-for-sba-to-sign-off-on-loan-forgiveness ("The GAO report, citing concerns from trade groups, observed that a lack of clarity around forgiveness had resulted in 'lender fatigue with the program.' Borrowers feel the same way, bankers said.")

233 There are three application forms available, namely Forms 3508, 3508EZ, and 3508S. Forms 3508 and 3508EZ are for loans over $150,000. Form 3508S is for loans of $150,000 and below. While required calculations may be more abbreviated for Forms 3508EZ and 3508S, the key requirements are largely the same across all forms. *See* "PPP Loan Forgiveness Application Form 3508," *U.S. Small Business Administration*, *available at* https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Application%20and%20Instructions%20--%203508%20%287.30.2021%29-508.pdf; "PPP Loan Forgiveness Application Form 3508EZ," *U.S. Small Business Administration*, *available at* https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Applications%20and%20Instructions%20--%203508EZ%20%287.30.2021%29-508.pdf; "PPP Loan Forgiveness Application Form 3508S," *U.S. Small Business Administration*, *available at* https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Application%20and%20Instructions%20--%203508S%20%287.30.2021%29-508.pdf.

234 "Business Loan Program Temporary Changes: Paycheck Protection Program - Loan Forgiveness Program Requirements and Loan Review Procedures as Amended by Economic Aid Act," *Federal Register*, February 5, 2021, *available at* https://www.federalregister.gov/documents/2021/02/05/2021-02314/business-loan-program-temporary-changes-paycheck-protection-program-loan-forgiveness-requirementsfootnote-80-p8295footnote-80-p8295, pp. 8286-8295 ("[I]f SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount claimed by the borrower, SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.")

235 The covered period was originally 8 weeks. However, after the enactment of Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) (Pub. L. 116-142) on June 5, 2020, the covered period was extended to 24 weeks. *See* "Business Loan Program Temporary Changes; Paycheck Protection Program - Revisions to First Interim Final Rule," *Federal Register*, June 5, 2020, *available at* https://www.federalregister.gov/documents/2020/06/16/2020-12909/business-loan-program-temporary-changes-paycheck-protection-program-revisions-to-first-interim-final, p. 36310.

b. Payroll Cost 60 Percent Requirement: Payroll costs were required to account for at least 60 percent of the loan forgiveness amount.

c. Eligible Payroll Cost: The total amount of loan funds used for payroll costs eligible for forgiveness could not exceed an annual salary of $100,000 for each employee. For example, if a borrower used PPP loan funds to pay an employee's annual salary of $190,000, the borrower would only be able to use and prorate up to $100,000 over the covered period in the eligible payroll cost for the forgiveness application.

d. Salary/Wage and Full-Time Equivalent ("FTE")[236] Employees Reduction: A borrower should not have (i) reduced salaries by more than 25 percent compared to the most recent full quarter before the covered period and (ii) reduced average FTE employee headcount between January 1, 2020 and the end of the covered period.[237]

e. Owner Compensation: Eligible compensation paid to an owner-employee (with an ownership stake of five percent or more) or self-employed individual/general partner throughout a covered period was capped to the lower of (i) $20,833[238] or (ii) 2.5-months' worth of annual compensation.

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[236] FTE is a measure of the number of employees accounting for each employee's number of hours paid. It is calculated for each employee as the average number of hours paid per week divided by 40. The resulting ratio is capped at one and rounded to the nearest tenth. Alternatively, a borrower could opt to assign a 1.0 FTE for employees that worked 40 hours (or more) per week and a 0.5 FTE for employees that worked less than 40 hours per week.

[237] Exemption for salary reduction may be granted if a borrower restored salary levels. Similarly, exemption for FTE reduction may be granted if a borrower (i) attempted to rehire affected employee or similarly qualified employee but was unable to or (ii) was not able to operate the business at the pre-pandemic level.

[238] This is 2.5-months' worth of annual compensation of $100,000. This cap was $15,385 for borrowers that received a PPP loan before June 5, 2020 and elected to use an eight-week covered period. *See* "Paycheck

f. Eligible Nonpayroll Costs: Loan funds used for certain nonpayroll costs were eligible for forgiveness provided that they did not exceed 40 percent of the loan forgiveness amount. Examples include mortgage payments, rent obligations, utility payments, operations expenditures, property damage costs, supplier costs, worker protection expenditures.[239] A borrower must have been paying such nonpayroll costs before February 15, 2020, in order for these costs to be eligible for forgiveness. For example, for loan funds used for mortgage payments to be eligible for forgiveness, the borrower's mortgage loan should have been drawn before February 15, 2020.

84. Meeting the requirements above was a necessary but not a sufficient condition for PPP loan forgiveness. A borrower was also required to submit or maintain the following documents:[240]

a. Payroll: Documentation that verified eligible payroll costs. Examples include bank account statements, third-party payroll service provider reports, and tax forms.

Protection Program: Frequently Asked Questions (FAQs) on PPP Loan Forgiveness," August 4, 2020, *available at* https://www.sba.gov/sites/default/files/2020-08/PPP%20Loan%20Forgiveness%20FAQs%208-4-20-508.pdf, p. 4.

239 For detailed definition on what specific costs are eligible, *see* "PPP Loan Forgiveness Application Form 3508," *U.S. Small Business Administration*, *available at* https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Application%20and%20Instructions%20--%203508%20%287.30.2021%29-508.pdf, p. 2.

240 Borrowers applying for forgiveness using Form 3508S were not required to submit additional documentation at the time of submission but were still required to maintain them and provide them if requested for review or audit. *See* "PPP Loan Forgiveness Application Form 3508," *U.S. Small Business Administration*, *available at* https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Application%20and%20Instructions%20--%203508%20%287.30.2021%29-508.pdf; "PPP Loan Forgiveness Application Form 3508S," *U.S. Small Business Administration*, *available at* https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Application%20and%20Instructions%20--%203508S%20%287.30.2021%29-508.pdf.

b. FTE: Documentation that verified the average number of FTE employees on payroll per week.

c. Nonpayroll: Documentation that verified eligible nonpayroll costs and existence of those costs before February 15, 2020. Examples include lender amortization schedules for a business mortgage, a copy of current lease agreement for business rent, and a copy of invoices for business utility and other covered expenditures.

d. Other Records: All records related to a borrower's PPP loan. Examples include documentation supporting that the borrower was not able to operate at the same level of business activity as before February 15, 2020, due to government measures related to COVID-19 such as social distancing,[241] as well as other documentation supporting the loan forgiveness application and demonstrating compliance with PPP requirements, such as worksheet used to calculate wage and employee headcount reductions.

85. In addition, inaccuracies in the original loan application could also impact loan forgiveness eligibility. On February 5, 2021, the SBA published an interim final rule on PPP loan forgiveness that states, "[i]f SBA determines that a borrower is ineligible for the PPP loan, SBA will direct the lender to deny the loan forgiveness application. […] Further, if SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount claimed by the borrower, SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. SBA may also seek repayment of the outstanding PPP loan

[241] This documentation only applied to borrowers seeking exemption from the FTE employee requirement explained in Section IV.B.

balance or pursue other available remedies."[242] Thus, to the extent that a failed disbursement of loan funds to a Putative Class Member was caused by inaccuracies in the borrower's original loan application that would call the borrower's loan eligibility into question, such inaccuracies could also have compromised this Putative Class Member's eligibility for loan forgiveness even if the original loan was not clawed back.

C. The Final Portion of the Loan Amount to be Forgiven Would have Varied Widely

86. Even if the SBA had approved loan forgiveness for the Putative Class Members, the final portion of the loan amount to be forgiven would have varied widely depending on each Putative Class Member's individualized circumstance. To illustrate this point, consider the following example for a self-employed sole proprietor:[243]

a. Recipient A, a self-employed sole proprietor, received $45,385 in PPP loan funds on June 24, 2020.

b. First, a covered period would need to be determined. Suppose that Recipient A opted for an 8-week covered period. Only costs incurred within this period would be eligible for forgiveness.

[242] "Business Loan Program Temporary Changes: Paycheck Protection Program - Loan Forgiveness Program Requirements and Loan Review Procedures as Amended by Economic Aid Act," *Federal Register*, February 5, 2021, *available at* https://www.federalregister.gov/documents/2021/02/05/2021-02314/business-loan-program-temporary-changes-paycheck-protection-program-loan-forgiveness-requirements, p. 8295. This is an update to the original subsection that was published on June 1, 2020. For the original publication, *see* "Business Loan Program Temporary Changes; Paycheck Protection Program - SBA Loan Review Procedures and Related Borrower and Lender Responsibilities," *Federal Register*, June 1, 2020, *available at* https://www.federalregister.gov/documents/2020/06/01/2020-11533/business-loan-program-temporary-changes-paycheck-protection-program-sba-loan-review-procedures-and, p. 33013.

[243] The example has been adapted from loan forgiveness pre-work examples provided by Chase Bank. *See* "Paycheck Protection Program (PPP): Loan Forgiveness Pre-Work Examples," *Chase Bank*, *available at* https://recovery.chase.com/content/dam/chase/recover/sba/documents/ppp-loan-forgiveness-pre-work-examples.pdf.

c. Next, eligible owner compensation would need to be calculated. Suppose Recipient A was making $150,000 in annual compensation, meaning his/her annual wage would first be subject to a statutory cap of $100,000 for this calculation. Then, the $100,000 would be prorated for the covered period. Based on the applicable rule, Recipient A's eligible owner compensation would be $15,385.[244] If Recipient A had chosen a different covered period, such as 24 weeks, the calculation above would have been different.

d. Then, eligible non-payroll costs such as mortgage interest, rent, and utility payments would need to be calculated. Assume that Recipient A incurred (i) a mortgage interest payment of $10,000; (ii) a utility payment of $10,000; and (iii) supplier costs of $10,000. Only non-payroll costs associated with obligations assumed before February 15, 2020 were eligible. Suppose Recipient A drew a mortgage loan on March 15, 2020, which means the (i) mortgage interest payment would not be eligible for forgiveness. Only (ii) utility and (iii) supplier costs would be eligible for forgiveness. In total, Recipient A's non-payroll costs eligible for forgiveness were $20,000.

e. Because the SBA required at least 60 percent of funds to be used for payroll cost, eligible non-payroll costs would have been reduced from $20,000 to $10,257 to maintain the 4:6 ratio with the payroll cost of $15,385. This means that $25,642[245] would be the maximum amount that could be forgiven.

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[244] Divide $100,000 by 52 weeks then multiply by 8.

[245] The sum of $10,257 and $15,385.

f. Thus, Recipient A received a PPP loan of $45,385. However, only $25,642 would be eligible for forgiveness.

87. For borrowers with employees, the forgiveness amount calculation would be further complicated by salary/wage and FTE reductions. If Recipient A had employees on payroll, but reduced their salary by more than 25 percent, the salary reduction in excess of 25 percent would be deducted from the loan forgiveness amount. Similarly, if Recipient A reduced the number of employees on payroll, the loan forgiveness amount would be reduced.[246]

88. As a result, an individualized analysis of each Putative Class Member's loan forgiveness application that accounts for the covered period, payroll cost, non-payroll cost, employee wage level, and employee headcount would be necessary to determine each Putative Class Member's potential loan forgiveness amount, if any.

Kenneth Swain

July 12, 2024

[246] "PPP Loan Forgiveness Application Form 3508," *U.S. Small Business Administration*, *available at* https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Application%20and%20Instructions%20--%203508%20%287.30.2021%29-508.pdf, "Line 11," "Line 12," and "Line 13," p. 4.

APPENDIX A

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Eleven Canterbury
Expert Witness, Commercial Banking Matters,
primary focus on Payroll Protection Program January 2024-Present

Concurrent with Freedom Bank

Freedom Bank of Virginia
Fairfax, Virginia November 2023-
Present
Relationship Manager, specializing in Commercial Banking.

Sandy Spring Bank
Olney, Maryland February 2016-2023
Senior Vice President, Commercial Banking
Subject Matter Expert:
- NCino Commercial Banking Integration
- Client Experience Team
- Payroll Protection Program

Implemented cross banking division usage by commercial clients, including Wealth and Insurance.
Sourced Commercial Banking business.

Truist (formally SunTrust) Bank
Washington, DC December 2014-2016
Senior Vice President, Medical Specialty Group within
Wealth Management Group
Series 7 and Series 66 Licensed.
Virginia Life, Health, Annuity Licensed.
Created and build Commercial Medical Relationships

PNC Bank
Washington, DC February 2004-2014
Senior Vice President
Managed Business Banking in Washington, DC
Winner of Southeast Territory Manager of the year, 2014
Member Business Finance Group SBA 504 program loan committee

James Monroe Bank

Arlington, Virginia
Chief Credit Officer November 1998-2004
Responsible for approving and managing commercial credits.

Pharmacy Healthcare Industries, (PHI) Inc, CFO, Director May 1986-1996
and Founder
Laguna Hills, California
PHI was an innovator in outsourced contract pharmacy management
In California. It was considered an expert in its field.
Sold to a public company.

Polymed Manufacturing Company
Baltimore, Maryland June 1990-1993
President and CEO and owner

Polymed was a turnaround medical products manufacturing company which I exited with a sale to a public company.

Washington Ventures
Washington, DC May 1968-1990
President, CEO and Director
An SBA licensed Venture Capital Company,
owned by Washington Bancorp
specializing in local DC equity investments

Enterprise Bank
Tysons Corner, Virginia May 1984-1986
Senior Vice President, Commercial Banking

Allied Capital Corp.
Washington, DC
A publicly owned venture capital company April 1978-1984
Manager Allied Lending Corp. (subsidiary)
licensed by the SBA
Expert in Small Business Administration Lending Programs,
using them to build an SBA guaranteed loan portfolio.

United Virginia Bank
Alexandria Virginia June 1975-1978
Vice President, Commercial Relationship Manager

Irving Trust Company
New York, New York July 1972-1975
Assistant Vice President
Commercial Banking trainee and

Commercial Banking relationship manager
Focus on Lending and Treasury Management tools for
Fortune 100 and smaller businesses

Member:
Washington Golf and Country Club, serving on Finance and Audit Committees
Finance Committee, The Child and Family Network Centers, Alexandria, Virginia

Education:
MBA, George Washington University, Washington, DC, 1979
BA, University of Pennsylvania, 1972
Milton Academy, Milton, Massachusetts, 1968

Licenses:
Virginia Life, Health, Annuity-current
Series 7 and Series 66-lapsed
DC Lay Eucharistic Minister

Serving:
Washington National Cathedral, Lay Eucharistic Minister and Usher
St Mary's Episcopal Church, Arlington, Virginia, Team Captain Ushers

APPENDIX B

MATERIALS CONSIDERED

Legal Documents

Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint, *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, Plaintiffs, v. Prestamos CDFI, LLC and Chicanos Por La Causa, Inc., Defendants.*, Case No. 5:21-cv-04337-JMG, June 3, 2022.

Memorandum Opinion, *Alicia Marshall, et al., Plaintiffs, v. Prestamos CDFI, LLC*, Civil Action No. 5:21-cv-04337-JMG, March 30, 2023.

Opinion & Order, *Eric Greathouse, et al., Plaintiffs, v. Capital Plus Financial, LLC, et al., Defendants.*, Case No. 4:22-cv-0686-P, September 6, 2023.

Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss, *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, June 17, 2022.

Reply in Support of Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint, *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, Plaintiffs, v. Prestamos CDFI, LLC and Chicanos Por La Causa, Inc., Defendants.*, Case No. 5:21-cv-04337-JMG, June 24, 2022.

Third Amended Class Action Complaint and Demand for Jury Trial, *Alicia Marshall, Daniel Pronsky, Paris Townsend, Nancilee Holland, Leona Owsley, Kolawole Ahmadou, Kiana Dervin, Kristina Henderson, Dustin Innis, Kelly Stalnaker, Jamie Jones, Georgina Drevnak, John Martin, Ezra Beattie, Gregory Lloyd, Alyshia Johnson, Lametria Marvel, Guy Grichar, Jahbrael Horne, Enobong Etuknwa, and Sharon Bradley Smith, 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, May 2, 2024.

Deposition

Deposition of Alicia Marshall - Rough Draft, *Alicia Marshall, et al. v. Prestamos CDFI, LLC*, July 9, 2024.

Publication

Nacha Operating Rules & Guidelines, Nacha, 2024.

Public Documents from the Internet

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