IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALICIA MARSHALL, *et al*., individually and on behalf of all others similarly situated, Plaintiffs, v. PRESTAMOS CDFI, LLC, Defendant.	Civil Action No. 5:21-cv-04337-JMG

BRIEF IN SUPPORT OF PLAINTIFFS'
<u>MOTION FOR CLASS CERTIFICATION</u>

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CARES Act: Coronavirus Aid, Relief and Economic Security Act

Plaintiffs: Alicia Marshall, Paris Townsend, Kristina Henderson, Jamie Jones, John Martin, Gregory Lloyd, Alyshia Johnson, Lametria Marvel, Jahbrael Horne and Sharon Bradley Smith

Defendant or Prestamos: Prestamos CDFI, LLC

CDFI: Community Development Financial Institution

Classes: the Damages Class and Declaratory Judgment Class set forth in Plaintiffs' Motion for Class Certification

CPLC: Prestamos' parent corporation Chicanos Por La Causa, Inc.

Class Member States: California, Michigan, Arizona, Utah, Texas, Indiana, Mississippi and New York

Ex: Exhibits filed as part of Plas' App'x

LSP: Lender Service Provider, which in Prestamos' case was Blueacorn PPP, LLC and/or its affiliates ("Blueacorn")

Loan Documents: the Note, Additional and Correction Documents Agreement (Errors and Omissions Agreement), Business Purpose Statement, Notice - No Oral Agreements, Written Consent of Governing Body, IRS W-9 Request for Taxpayer Identification Number and Certification, and Information and Bank Account Certification and Authorization form (*see, e.g.*, ECF No. 108 at Exhibit A; Plas' App'x Exs 1-10)

PARs: Pledge and Advance Request forms for PPPLF advances

Plas' App'x: Appendix in Support of Plaintiffs' Motion for Class Certification

Plaintiffs' Counsel: Bailey & Glasser LLP and Nolan Heller & Kauffman LLP

PPP: Paycheck Protection Program

PPPLF: Paycheck Protection Program Liquidity Facility

SBA: U.S. Small Business Administration

TAC: Plaintiffs' Third Amended Class Action Complaint (ECF No. 108)

Plaintiffs[1] respectfully submit this brief in support of their motion for class certification.

Introduction

This is a single count breach of contract case. Plaintiffs allege that Prestamos failed to fund their PPP loans in breach of the parties' Loan Documents, falsely reported the loans to the SBA as funded to get the fee, and that Plaintiffs remain obligated to repay those proceeds back to Prestamos. The central questions concerning liability are contingent on, and arise from, the *same* standardized provisions in the parties' Loan Documents and PPP rules, namely: whether 1) Prestamos breached the Loan Document agreements; 2) class members are bound to repay; 3) class members were denied an opportunity for forgiveness; 4) Prestamos is released from liability based *on* the Loan Documents; and 5) Prestamos is estopped from claiming any attempt to fund a class member loan immunizes it since, *in this case*, it also both falsely reported to the SBA that the loans were funded, and obtained the loan processing fee.

As the Court is also aware, the ultimate determination of these questions is not at issue now. *See, e.g.*, ECF No. 102 ¶ 2 (directing that discovery "proceed in two phases: (1) initially on the Rule 23 class certification; and (2) all merits discovery necessary for trial and motions for summary judgment"). What is at issue now is whether these questions are susceptible to classwide proof. The answer to that is "yes."

The language of the Loan Documents applies and is uniform without distinction classwide. The controlling provisions contain no material difference. At trial, Plaintiffs will also present other common evidence to support their claim via Prestamos' own SBA Rule 1502s reporting that the loans were funded so Prestamos could get the fee, and Prestamos' PARs to

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1 Unless otherwise noted, all capitalized terms have the meaning set forth in the Table of Abbreviations; all paragraph citations are to Plaintiffs' TAC; all emphasis is added; and all internal quotations and citations are omitted.

obtain advances from the PPPLF that were secured by, and to be used to fund, the loans. *See* Ex 17 (Plaintiffs' Proposed Trial Plan). This evidence will show that Prestamos obtained the fees and PPPLF advances *based on* the loans, and thus is also uniform.

Faced with overwhelmingly common claims and proof, Prestamos will dodge and redirect. It will paint itself as a simple do-good CDFI "with the mission of building strong communities" and "supporting small businesses" in five states per an employee (David Castillo) declaration (*see* n.2 *infra*; quoting Castillo Aug. 9, 2024 Decl. ¶¶ 4, 6-7), when in truth its PPP lending was national in scope and larger than Bank of America, PNC, TD Bank and Wells Fargo combined. ¶ 9. It will blame the Plaintiff victims. It will claim they're the fraudsters despite all being SBA approved; ignore that they're still on the hook to repay and have stepped up to intrusive discovery and cross-examination for basic fairness and funding; and avoid the nearly $1.2 billion total, and over $314 million in *net*, fees (*after* sharing with its LSP Blueacorn, with whom it's reportedly in a dispute over the fees), it milked from the PPP per CPLC's *own* Financial Statements (¶ 12), the over $7.1 billion in PPPLF advances it obtained including on unfunded loans (¶ 113) and the resignation of CPLC's most senior executive (and Prestamos Board member) in late 2023 amid reported financial malfeasance, where one or more other shoes also could drop any day, civil and/or criminal. ¶ 38; Ex 30 ¶ 1 (inquiring whether Plaintiffs communicated with any governmental agency). It will manufacture front-end PPP application and back-end bank ACH code funding issues, and speculate about alleged forgiveness *amount* discrepancies but ignore *the threshold requirement* that class members couldn't certify how they *used* proceeds they never received as even Prestamos' experts concede. Ex 14 ¶ 6; Ex 16 ¶¶ 21-24; Ex 19 p. 15. It will ask the Court to elevate what its proposed expert asserted *12 times* are "individualized" defenses (improperly, because that's a question for the Court; July 12, 2024 report Kenneth Swain ¶¶ 15-16, 27 (twice), 35, 38-39, 52-53, 78, 86, 88) to deny class members an opportunity for *any* relief in particularly aggravating circumstances where they're *still* bound to repay with interest *even if* Prestamos' reasons why it failed to fund *are credited*.

The stakes couldn't be higher for the actual victims. The parties can agree that, although procedural, the class certification issue is pivotal. For class members, this case rises or falls based on it. Without it, small business owners a widely bipartisan Congress passed the CARES Act to help will have no chance at any relief and still be on the hook to repay Prestamos. With it, the already substantially narrowed, *non*-national class has a chance.

This is not an advocate's typically excess zeal; it's very real world. By Prestamos' *own account*, there are 7,417 class members in just the already reduced eight total Class Member States deprived of $122,489,761.00 in total PPP loan principal for which Prestamos was nevertheless paid $17,935,811.00 in fees. Ex 27. Prestamos has already sought repayment from some. *E.g.*, ¶¶ 253-254; Ex 19 pp. 3, 6. Any argument Plaintiffs could obtain counsel to sue individually is not real world; even with full-boat consequential damages, their SBA-approved loans ranged from $1,875 (Henderson; ¶ 204) to just $20,832 (Lloyd; ¶ 288).

The equities also couldn't be more one-sided. Plaintiffs and class members by definition were denied funding and forgiveness, and remain bound to repay amid Prestamos' false SBA Form 1502 reporting -- or else they're not eligible to be class members. But for Prestamos' false 1502s, the loans would be cancelled and Plaintiffs wouldn't be bound to repay as Plaintiffs' proposed expert, former Schedule C-appointed SBA Chief of Staff William Manger, attests. Ex 14 ¶ 4 ("The choice is one or the other. If the PPP loan was not fully disbursed as the rules required, the loan should have been cancelled and any loan processing fee returned."). *Accord* Ex 19 pp. 11-12, 16. On the flip side, Prestamos knowingly exploited an emergency government program intended to help business owners in a dire time, shamefully reaped what its own internal document calls a "*windfall*" and continues to oppose these small borrowers via its many lawyers and scorched earth defense to throw all up it can for anything to stick. That is not community building. Depriving over 7,417 small business owners of over $122.4 million in federally-guaranteed, forgivable loans is community hurting.

Because the claims of Plaintiffs' and class members share the same core factual and legal issues, are susceptible to common evidence and proof, and meet all requirements of Rules 23(a)(b)(2) and (3), the Damages and Declaratory Judgment Classes should be certified.

Factual Background

Following the worldwide outbreak of COVID-19, Congress passed the CARES Act in March 2020 to assist businesses an integral part of which was the PPP. Administered by the SBA, the PPP authorized $813.7 billion in PPP loans through May 31, 2021. ¶ 30. PPP loans are guaranteed by the SBA and designed to be forgiven. To ensure that businesses received their PPP loan proceeds quickly and efficiently, the SBA delegated lending to authorized private PPP lenders and required approved PPP loans to be funded for the lender to get a fee. ¶ 39.

Prestamos was an authorized PPP lender. In 2020, it processed only 935 PPP loans for less than $27 million and $1.3 million in fees. ¶ 6. After PPP loan fees were increased in December 2020 to encourage more loans to underserved small businesses (¶¶ 35-36), it contracted with Blueacorn and committed to fund 494,415 PPP loans in 2021 for over $7.6 billion (¶ 61), and received at least $7,144,136,133.27 from the PPPLF to fund them. ¶ 71. Although Prestamos has disputed the meaning of "fund" and "disburse" in the *loan* context, it contradictorily asserts via the Castillo declaration (at ¶ 51) that it "returned the credit advances from the Federal Reserve for loans that were ***ultimately not funded***" -- without identifying the amount, which loans, whether it included class member loans, the status of income it made or any other detail (which Plaintiffs intend to pursue in Phase II discovery).

Plaintiffs are or were sole proprietors approved by the SBA for their loans; signed and returned to Prestamos the Loan Documents and other loan documentation; and Prestamos "***ultimately***" failed to "***fund***" their loans, falsely reported to the SBA they were funded to get the fee and already sought repayment from some. ¶¶ 297-98, 376-77; Ex 25 (SBA Form 1502 reports); Exs 1-10 (Plaintiffs' Loan Documents); Ex 19 pp. 3, 6 (testimony as to repayment).

Each Loan Document in the same form language identifies the SBA-approved PPP loan number, amount, "Borrower" and "Lender"; states that, "[i]n return for the Loan, Borrower promises" to pay the principal plus "interest on the unpaid principal balance, and all other amounts required by this Note" back to Prestamos if not forgiven; contains other terms including that "[a]ll individuals and entities signing this Note are jointly and severally liable"; and states that, "[b]y signing below, each individual or entity becomes obligated under this Note as Borrower." *See, e.g.*, ECF No. 108 Ex A ¶¶ 1, 9, 11.

The Additional Agreement states that, "[i]n consideration of Prestamos CDFI, LLC … *making the above loan*, each of the undersigned, jointly and severally, do hereby agree … " and that Prestamos "is relying on this agreement *in making the above loan* …." *Id*. ¶¶ 1, 2, 5.

The "Notice - No Oral Agreements" governs the "**Loan by Lender, Prestamos CDFI, LLC to Borrower**"; states that "**THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES …**"**;** defines "Loan Agreement"; and is executed by both parties. *Id*. ECF p. 113 (original emphasis). The Information and Bank form identifies where Prestamos should "deposit the loan proceeds[.]" *Id*. ECF p. 117. In addition, applicable PPP rules are incorporated in the Loan Documents, bound PPP lenders to report accurately on SBA Form 1502s and PARs, and obtain fees only on loans they ***ultimately funded***. ¶¶ 65, 71-72, 386-92 (quoting PPP rules); Ex 14 ¶ 4; Ex 16 ¶¶ 13-15; Ex 19 pp. 9-12.

Prestamos failed to "***ultimately fund***" the loans despite numerous follow-up attempts by many Plaintiffs and promising several a dash card where there were bank issues. Ex 19 pp. 6-7. Many others have similarly complained. *See, e.g.*, ¶¶ 126-29, 372(a)-(g), 373(a)-(xx). Plaintiffs and class members have been damaged by being deprived of PPP loans and still obligated to repay them; precluded from even seeking loan forgiveness as the PPP intended and widely did (Ex 29; Ex 19 pp. 14-15); and prevented from securing PPP loans from other lenders. Ex 19 p. 11.

Legal Standard

"[E]very putative class action must satisfy the four requirements of Rule 23(a) and the requirements of either Rules 23(b)(1), (2), or (3)." *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 470 n.1 (3d Cir. 2020). *Accord Bombin v. Southwest Airlines Co*., 2023 WL 5832166, at *6 (E.D. Pa. Sept. 7, 2023) (Gallagher, J.). "'[T]rial courts must engage in a rigorous analysis and find each of Rule 23's requirements met by a preponderance of the evidence before granting class certification." *Id*. at *7. "Rigorous analysis" means the court must "resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 307 (3d Cir. 2008).

Argument

I. The Proposed Classes are Ascertainable

A class must also be "'currently and readily ascertainable based on objective criteria.'" *Hargrove*, 974 F.3d at 477. *Accord* Manual for Complex Litigation (Fourth) § 21.222 (2004).

Class members are already ascertained in this case. Prestamos' own records identify them, on a total and a specific Class Member State basis. Ex 27. Thus, this requirement is satisfied.

II. Plaintiffs Satisfy the Requirements of Rule 23(a)

Numerosity: Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." "[I]f the named plaintiff demonstrates that the potential number of plaintiffs exceed 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Each Class Member State has more than 40 members. Ex 27. Class members are also geographically dispersed and satisfy the other factors to determine impracticability of joinder. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016) (factors include "judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages").

The "ability to litigate via joinder" and "financial resource" factors bear emphasis. As the Third Circuit stated in *Modafinil*, it "is often still uneconomical for an individual with a negative value claim to join a lawsuit." *Id.* at 257. "As defined by the Third Circuit, a negative value claim is a 'claim[] that could not be brought on an individual basis because the transaction costs of bringing an individual action exceed the potential relief.'" *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013). That is also the case given the loan amounts here.

Further, Plaintiffs are or during the pandemic were in small businesses such as home healthcare (¶¶ 15, 20, 30), hair (¶ 17) and driving (¶¶ 25, 27, 32). The only reasonable inference is that they lack the financial resources necessary to hire counsel to pursue their own claim. *See Modafinil*, 837 F.3d at 257-58 ("claims below $1 million … may be uneconomical" to litigate; stating that a "broader class action goal" is "providing those with small claims reasonable access to a judicial forum for the resolution of those claims").

Commonality: Rule 23(a)(2) requires that "there are questions of law or fact common to the class." This turns on whether there is "a common contention … that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). *See also Myers v. Jani-King of Phila., Inc.*, 2019 WL 4034736, at *4 (E.D. Pa. Aug. 26, 2019) (commonality "is easily met").

Plaintiffs' claim that Prestamos breached the standard form Loan Documents, falsely reported the loans as funded and that they are still bound to repay establishes commonality. *See, e.g., Gillis v. Respond Power, LLC*, 677 Fed. App'x 752, 756 (3d Cir. 2017) ("Because form contracts should be interpreted uniformly as to all signatories, Pennsylvania and federal courts have recognized that claims involving the interpretation of standard form contracts are particularly well-suited for class treatment.").

Here, moreover, the Classes have been narrowed from those alleged in *Greathouse v. Capital Plus Financial, LLC*, 2023 WL 5746927 (N.D. Tex. Sept. 6, 2023) ("*CPF*"). There, the court rejected commonality because "[t]he central question … is whether CPF failed to fund Plaintiffs' loans or timely cancel them" under the *20 day* cancellation rule of 86 FR 3692, 3710, which the court held applies "***only*** … when a borrower fails to submit 'required documentation.'" *Id*. at *5. Here, by contrast, that rule is inapplicable because the Classes include only those who also submitted all required documentation *and* as to whom Prestamos filed false 1502s. Thus, the central question here is whether class member loans should *ever* have been cancelled as Plaintiffs' expert contends. Ex 14 ¶ 4; *accord* Ex 19 pp. 11, 16. Although Prestamos and its experts have not squarely addressed let alone disputed that question, the issue now isn't to adjudicate it but instead to determine whether it is capable of classwide resolution in one stroke. As even the *CPF* court held, the answer to that is "yes"; "If Defendants were indeed required to cancel every unfunded loan … the reasons behind their failure to fund do not matter—thus resolving Plaintiffs' claims in one stroke." *CPF*, 2023 WL 5746927, at *5. *Even if* Prestamos disputes whether loans not "***ultimately funded***" had to be cancelled, that defense is also a common issue.

Further, whether class members were precluded from obtaining forgiveness, Prestamos is released and whether it should be estopped from relying on the defense it attempted to fund a loan since it obtained the fee also raise common legal and factual issues. *See Springfield Hospital, Inc. v. Guzman*, 28 F.4th 403, 424 (2d Cir. 2022) ("A *borrower* must apply for forgiveness, which will only be granted if specified criteria are met …."; "Further, if the loans are not *used* for statutorily authorized purposes … the loans must be repaid in full").

Typicality: Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "'There is a low threshold for typicality'; provided 'the interests of the class and the class representatives are aligned,' courts will find typicality even when class members' claims are only legally similar, and not factually similar." *Stechert v. The Travelers Home & Marine Ins. Co.*, 2021 WL 5235221, at *5 (E.D. Pa. Nov. 9, 2021). "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Myers*, 2019 WL 4034736, at *5.

The same events and conduct give rise to class members' claims and the claims are based on the same legal theory. Every class member is governed by the same standardized Loan Document agreements and subject to interpretation of identical PPP rules. In addition and unlike

CPF, here all class members also were falsely reported as funded even if Prestamos' "individualized" defenses regarding why it failed to fund are true. Plaintiffs' claim for a declaratory judgment against repayment was not even alleged in *CPF* and is especially important given Prestamos has already pursued some for repayment. In sum, Plaintiffs and class members all share the claim that they were "*ultimately*" not funded regardless of any individualized defenses why; were falsely reported to the SBA; and share the same interests in proving estoppel and defeating Prestamos' *defenses* including that it is released. Thus, the claim in this case is not based on conduct unique to Plaintiffs but shared classwide based on the same legal theories.

Adequacy: Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This tests whether the plaintiff's attorney is "qualified, experienced, and generally able to conduct the proposed litigation[,]" and ensures that the plaintiff "not have interests antagonistic to those of the class." *In re Niaspan Antitrust Litig*., 397 F. Supp. 3d 668, 680 (E.D. Pa. 2019). *See also Stechert*, 2021 WL 5235221, at *5 ("A class representative must represent a class capably and diligently, but this is a low bar: a minimal degree of knowledge about the litigation is adequate."). *Accord* Fed. R. Civ. P. 23(g)(4).

Plaintiffs' and class members' interests are aligned. All entered into the parties' Loan Documents and were falsely reported as funded, denied forgiveness, are still bound to repay and have been actively involved and attest to their commitment to continue to serve the interests of the Classes. Ex 18 ¶¶ 4, 7. Plaintiffs' Counsel combined are experienced litigating commercial and class action cases and have demonstrated their commitment to this case. Exs 22-23 (attaching firm resumes); § V *infra*. Prestamos' ploy to challenge adequacy by inquiring whether we solicited or promised Plaintiffs anything to serve also uniformly failed. Ex 19 pp. 1, 3-4, 7. And the stipulated dismissal of 12 original plaintiffs also does not affect adequacy particularly amid the onerous discovery demands as one withdrawing plaintiff explains. Ex 20 ¶ 6. In sum, if appointed we will continue to do all we can to advance the interests of the Classes.

III. Plaintiffs Satisfy the Requirements of Rule 23(b)(2)

Plaintiffs' request for a declaratory judgment satisfies the requirements of Rule 23(b)(2). The Third Circuit has held that Rules 23(b)(2) and (b)(3) "create two remarkably different litigation devices" and that, to certify a Rule 23(b)(2) class, the challenged conduct must be able to "'be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Shelton v. Bledsoe*, 775 F.3d 554, 560 (3d Cir. 2015). The Rule 23(b)(2) class must also be clearly defined, cohesive and seek primarily non-damage relief. *Barnes v. Am. Tobacco Co*., 161 F.3d 127, 143 (3d Cir. 1998); *Wal-Mart*, 564 U.S. at 362. "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief as to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." *Id*. at 360.

These requirements are satisfied. Plaintiffs' claim for a judgment that they need not repay arises from the same contract and applies to all class members, or none of them. The class is also cohesive, clearly defined and ascertained; and the claim seeks exclusively non-damage relief.

Where separate Rule (b)(2) and (b)(3) classes are sought that include overlapping membership as here, Judge Pratter analyzed the issues extensively and held that the court should also perform a "rigorous analysis" to guard against potential "claims preclusion" -- *i.e.*, the "danger that those individuals who would have a right to a jury trial to seek damages from Defendants would lose their ability to bring claims as a result of their being bound to an unsuccessful Rule 23(b)(2) action." *In re Processed Eggs Products Antitrust Litig*., 312 F.R.D. 124, 166-67 (E.D. Pa. 2015). *See also Hohider v. United Parcel Serv., Inc*., 574 F.3d 169, 201-02

(3d Cir. 2009) (identifying factors where separate Rule 23(b)(2) and (b)(3) classes are sought). Avoiding potential claims preclusion is important also because a Rule 23(b)(2) class is not entitled to notice or to opt out, whereas a Rule 23(b)(3) class contains both those rights.

Here, membership is the same among both Classes. But there is no danger class members would be precluded from seeking damages even if Plaintiffs did not prevail on their (b)(2) claim. Plaintiffs and the class can still also separately seek damages, whether as part of the Rule (b)(3) class or as opt outs. The Court has already barred Prestamos from seeking repayment as to one former plaintiff who *was actually funded*. *See* ECF No. 136 ¶ 1 (dismissing "with prejudice and Defendant (including its parent and subsidiaries) shall not seek repayment of any PPP loan proceeds or interest from Drevnak or otherwise impair her credit rating"). The case for a judgment declaring that *unfunded* class members do not have to repay is even more compelling.

IV. Plaintiffs Satisfy the Requirements of Rule 23(b)(3)

Predominance: Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.' …When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

"The focus of the predominance inquiry is on whether the *defendant's* conduct was common as to all of the class members, and whether all of the class members were harmed by the *defendant's* conduct." *Myers*, 2019 WL 4034736, at *5. "There is no 'claims' or 'merits' litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof." *Sullivan*, 667 F.3d at 305. Plaintiffs need to prove that common issues predominate overall, not that they will prevail on those issues or "prove that each element of her claim is susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013).

Common factual issues predominate. All parties are bound by the same standardized Loan Document provisions. Those provisions and the fact-finder's interpretation of them will drive the answer in a single stroke classwide to the core factual and legal issues in this case: whether Prestamos' failure to fund breached those provisions or it is released; whether it obtained fees and locked class members in by falsely reporting the loans were funded; and whether class members are still bound to repay and were precluded from forgiveness.

The additional evidence Plaintiffs also intend to use to help interpret the provisions of the Loan Documents and prove their contract claim at trial is also uniform and will apply classwide, specifically Prestamos' own 1502 reports, PAR forms and governing PPP regulations. That same evidence will also drive resolution of Plaintiffs' claim that Prestamos' false reporting and receipt of the loan fees estops it from relying on any "attempted bank funding" defense.

Common issues predominate also concerning damages for the Rule 23(b)(3) class. Whether the measure is the SBA-approved loan amount plus interest as supported by Plaintiffs' expert (Ex 12 ¶ 22) or another measure, damages here "are capable of measurement on a classwide basis" and "consistent with" Plaintiffs' theory of liability. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 35 (2013). Prestamos' position that class certification may deprive Plaintiffs of potentially greater "individualized" damages is pretextual, hypocritical and meritless. Even if true, the opt-out rights Rule 23(b)(3) class members have preserves their ability to pursue that alternative if that is their choice. And the prospect of individualized damages calculations, even *if* necessary, is not a bar to class certification in any event. *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 374-75 (3d Cir. 2015); *see also* 2 W. Rubenstein, Newberg on Class Actions § 4:54 (5th ed. 2012) ("[C]ourts in every circuit have uniformly held that the Rule 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations.") (cited in *Tyson Foods*, 577 U.S. at 453).

The narrowed class definition to include only those as to whom Prestamos falsely reported in SBA 1502s that the loans were funded also distinguishes the predominance analysis of *CPF,* 2023 WL 5746927, where the class definition did not include this limitation. *See id*. at *3 ("Plaintiffs seek certification of … All persons … who, in 2021, applied for PPP loans with defendant CPF as the lender for whom the SBA provided a loan number, and who executed and submitted their Loan Documents but did not receive the PPP loan proceeds."). In *CPF,* the court held that "*[f]actual* predominance is not present" because the many "individualized" defenses as to why a loan was not funded "likely *fall outside* the statutory and contractual duties of the PPP loans at issue." *Id*. at *7-8. Here, by contrast, Plaintiffs' Damages Class brings both the claim, and the evidence necessary to prove it, directly *within* the statutory and contractual provisions of the PPP -- namely, the parties' Loan Documents, Prestamos' 1502s and PARs and PPP rules and the interpretation of those rules. And this, in turn, brings all class member loans together as one at the core of this case for Rule 23(b)(3) predominance factually ***and*** legally: were all class member loans unfunded and falsely reported as funded and, if so, what are the consequences of that? Can it even be remotely permissible for class members to have been locked into Prestamos under the parties' contracts and PPP, not be funded, and still be liable to repay?

Plaintiffs' claim that Prestamos' false 1502 reporting and receipt of the fee for all class member loans estops it from relying on an attempted bank funding defense is also answerable classwide in a single stroke. *See, e.g., Spear v. Fenkell*, 2016 WL 5661720, at *49 (E.D. Pa. Sept. 30, 2016) (estoppel "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he … accepted a benefit"); Ex 17 p. 3. Can Prestamos lawfully lock class members in, falsely report them as funded, deny them forgiveness, bind them to repay, obtain the fee, and evade class certification or liability by arguing it tried to fund some of the loans? However disputed and ultimately determined on the merits, this too is a predominately common factual ***and*** legal issue; Prestamos itself asserts "the equitable doctrine of estoppel" as an affirmative *defense*. ECF No. 119 p. 64.

Prestamos will likely argue that absent fraud under the PPP, it could keep some fees made on unfunded loans. Even if so, Prestamos' haul of over $17.9 million in fees on *just* class members' 7,417 total loans and a pattern of false 1502s *may* amount to fraud. Critically for now, the point is that defense is also answerable classwide based on interpretation of PPP rules just like Prestamos' defense it is immunized by the release in the parties' note. In fact, in a separate ruling in *CPF* analyzing the release, Judge Pittman *sua sponte* framed that issue as "'whether public policy embedded in [the PPP program and SBA Lending Rules] precludes enforcement of [the exculpatory clause]" and held that "the exculpatory clause is void." *Greathouse v. Capital Plus Financial LLC*, 2023 WL 5759250, at *15-16 (N.D. Tex. Sept. 6, 2023).

In the Third Circuit and other courts, alleged breaches "of standard form contracts are particularly well-suited for class treatment." *Gillis*, 677 Fed. App'x at 756 (3d Cir. 2017). *Accord Red Barn Motors, Inc. v. NextGear Capital, Inc.*, 915 F.3d 1098, 1102 (7th Cir. 2019) ("With such a form contract, almost universally signed without negotiation or modification, there is no reason to think that the interpretation of the provision will vary from one signatory to another, and therefore the issue is one that is capable of a common answer and for which that common question predominates over questions affecting individual class members."); *Zeno v. Ford Motor Co., Inc*., 238 F.R.D. 173, 197 (W.D. Pa. 2006) (form contracts "present the classic case for treatment as a class action, and breach of contract cases are routinely certified"); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 255 (5th Cir. 2020) (form contracts "often lend themselves to class treatment"); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1171 (11th Cir. 2010) ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."); *Meyer v. CUNA Mut. Grp*., 2006 WL 197122, at *23 (W.D. Pa. Jan. 25, 2006) ("at least as to the issues of interpreting the contract language and whether the language is ambiguous, common issues of fact and law predominate over any individualized inquiries"); *Rudel Corp. v. Hartland Payment Sys., Inc*., 2017 WL 4422416, at *4 (D.N.J. Oct. 4, 2017) ("Because Plaintiff's claims arise out of a standard, uniform contract and an across-the-board rate increase which Defendant unlawfully applied to all class members, the Court finds that common issues sufficiently predominate here."); *Page v. State Farm Life Insurance Company*, 584 F. Supp. 3d 200, 221 (W.D. Tex. 2022) ("standardized form contract, not subject to individual negotiation").

The fact that Plaintiffs reside or were to be funded in eight Class Member States is no impediment to class certification because the alleged breaches here are actionable under the laws of this forum and all eight such States. *See, e.g., In re OSB Antitrust Litig.*, 2007 WL 2253425, at *17-18 (E.D. Pa. Aug. 3, 2007); *La Fata v. Raytheon Co*., 207 F.R.D. 35, 48 (E.D. Pa. 2002) (Brody, J.) ("Plaintiffs showing that there are, at most, minimal differences between the laws of the different states is a sufficiently credible demonstration that class certification should not be denied due to the possibility that the laws of several states might apply"); *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282, 290 (5th Cir. 2002) ("because contract law is, at its 'core,' uniform and non-diverse, there is little risk of inconsistent state adjudication of contractual obligations"); *Zehentbauer Family Land, LP v. Chesapeake Exploration, L.L.C.*, 935 F.3d 496, 506 (6th Cir. 2019); *In re U.S. Foodservice Inc. Pricing Litigation*, 729 F.3d 108, 127 (2d Cir. 2013); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003); *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953, at *22 (N.D. Cal. June 13, 2014); *Cox v. Spirit Airlines, Inc.*, 2022 WL 939732, at *17 (E.D.N.Y. Mar. 3, 2022) ("The Second Circuit has also explained, in the context of breach-of-contract claims, that 'state contract law defines breach consistently such that the question will usually be the same in all jurisdictions.'"). Ex 24.

The parties' note contains no choice of law provision. Instead, it addresses when federal law applies and limits the claims a "Borrower" may assert against the SBA, but not against the lender. *See, e.g.*, ECF No. 108 Ex A ¶ 7. Accordingly, in a diversity case as this is, the Court should apply "the choice of law rules of the forum state, Pennsylvania." *Karpf v. Mass. Mut. Life Ins. Co.*, 2018 WL 1142189, at *12 (E.D. Pa. Mar. 1, 2018). If there is no outcome-determinative difference in the law of the respective states at issue as is also the case here, then the Court should also apply substantive Pennsylvania law to govern the claim. *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 230 (3d Cir. 2007); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (courts may apply the substantive law of a single state to adjudicate a multistate class action). *See also In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998) (affirming class certification where "the 'elements of common law claims [were] substantively similar"); *Sullivan v. DB Inv.*, Inc., 667 F.3d 273, 301 (3d Cir. 2011) (courts have "a pragmatic response to certifications of common claims arising under varying state laws”). Whether Pennsylvania or the laws of the eight Class Member States governs, the conduct here would breach the laws of all such jurisdictions. *See* Ex 24 (attaching chart of breach of contract elements for forum state Pennsylvania and each Class Member State).

Superiority: Rule 23(b)(3) also requires that a class action be “superior to other available methods for fairly and efficiently adjudicating the controversy,” and that courts consider: (1) class members’ interest in individually controlling separate actions, (2) the extent of any other litigation by class members concerning the claims, (3) the desirability of concentrating the litigation in the particular forum, and (4) the likely difficulties of managing a class action.

First, since the costs of litigating “negative value claims” would exceed the potential recoveries, this factor strongly supports superiority. *Baby Prods*., 708 F.3d at 179. Absent certification, class members will be likely left with no recourse. Although the court in *CPF*, 2023 WL 5746927, at *8, rejected superiority, it did not address the size of the individual claims at issue or the Third Circuit’s standards for negative value claims, or have before it the additional Declaratory Judgment claim Plaintiffs bring here. Second, Plaintiffs are unaware of any other litigation by class members concerning the claims. Third, this Court has presided over this case for over 2-1/2 years, is familiar with the claims and defenses, already in a detailed ruling granted in part and denied in part Prestamos’ motion to dismiss (ECF Nos. 56-57) and granted CPLC’s motions to dismiss (ECF Nos. 93, 134), presided over a number of discovery disputes and thus remains a highly desirable forum. Finally, there are no disabling difficulties of managing this case. To the contrary, Prestamos’ potential liability and class members’ rights and obligations would be inefficient to litigate piecemeal and risk inconsistent adjudication even if class members could separately sue.

V. Plaintiffs’ Counsel Satisfy the Requirements of Rule 23(g)

Fed. R. Civ. P. 23(g)(1) requires courts to appoint class counsel for a certified class and consider: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources that counsel will commit to representing the class[.]"

Plaintiffs' Counsel meet these requirements. Plaintiffs' Counsel are experienced litigating in federal courts; have a deep understanding of the facts and issues; retained and worked with three highly qualified proposed experts; deposed Prestamos' two proposed experts including one (Jorge Baez) who Prestamos only prejudicially identified at rebuttal which precluded Plaintiffs' experts from even addressing the issues he raised in their rebuttals, along with the Castillo declaration;[2] and have demonstrated their steadfast commitment to go toe to toe with experienced defense counsel throughout.

Conclusion

Absent class certification, the Plaintiff Classes will likely not only be deprived of any chance to get any funding, but be left even worse off by having to repay loans they never received as Prestamos has already sought from some of them. Because Plaintiffs meet the requirements of Rules 23(a) and (b)(2) and (3), the Court should certify the two Classes.

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[2] Prestamos' counsel served the August 9, 2024 Castillo declaration and the 22 page Baez rebuttal *the evening of the deadline*, August 9, 2024. ECF No. 123 ¶ 1(b). Prior to that time, Prestamos did not even identify Castillo as a potential declarant, or Baez as a proposed expert. By contrast, all three of Plaintiffs' experts were fairly identified and timely submitted opening and rebuttal reports. Even at that, the bulk of Prestamos' expert reports and the Castillo declaration are either unsubstantiated assertion, impermissible legal conclusion or both. If Prestamos fails to file its proposed expert reports and the Castillo declaration that will corroborate the foregoing timing, Plaintiffs can if and as the Court may permit.

Dated: September 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 2024, the foregoing was electronically filed and served through the Court's CM/ECF system to counsel of record.

/s/ Lawrence J. Lederer
Lawrence J. Lederer