EX. 17 -- PLAINTIFFS' PROPOSED TRIAL PLAN

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

Plaintiffs' Proposed Trial Plan

This Proposed Trial Plan identifies the core issues, claims and defenses that Plaintiffs[1] presently believe will be presented at trial, and demonstrates that they are susceptible to classwide proof. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (requiring plaintiff to show that "'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, classwide proof'") (citation omitted)). "[T]he Third Circuit has encouraged district courts to use trial plans submitted by the proponent of class certification." *Brooks v. Trans Union LLC*, 2024 WL 3625142, at *21 (E.D. Pa. Aug. 1, 2024), citing *Wachtel ex rel. Jesse v. Guardian Life Ins. Co*., 453 F.3d 179, 188 n.7 (3d Cir. 2006)). *See also* Fed. R. Civ. P. 23 Advisory Committee Notes (2003) ("A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of classwide proof.").

Plaintiffs submit this Proposed Trial Plan as part of their motion for class certification, and do so per the schedule set forth in the Court's Amended Scheduling Order, prior to the close of merits discovery. ECF No. 123 at ¶ 1(d). *See also* ECF No. 102 at ¶ 2 ("Discovery in this proposed class action case will 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."). Plaintiffs reserve the right to supplement and amend this Proposed Trial Plan prior to trial, including as to any issues that arise in ongoing discovery, summary judgment, any changes in the law or as the Court may otherwise direct or permit.

I. Background

Plaintiffs allege that defendant Prestamos failed to fund SBA-approved PPP loans of Plaintiffs and class members and falsely reported to the SBA that the loans were funded. Plaintiffs were approved by the SBA for their PPP loans and given SBA loan numbers; entered into and returned to Prestamos the standard form Loan Document contracts and all requisite loan documentation; did not receive their PPP loans although Prestamos falsely reported to the SBA that it funded them to obtain the fee; were denied the opportunity to obtain loan forgiveness; and were reliant on Prestamos to fund their loans and remain bound under their Loan Documents to pay back to Prestamos those loan proceeds with interest. ¶¶ 14, 376-377.

Many other SBA-approved but unfunded borrowers have publicly voiced similar complaints about Prestamos' failure to fund their loans. ¶¶ 372(a)-(g), 373(a)-(xx). Data Prestamos produced in discovery show there are 7,417 total class members in just the eight Class Member States whose PPP loan principal totaled $122,489,761.00 and for which Prestamos

[1] Unless otherwise noted, all capitalized terms have the meaning set forth in the Table of Abbreviations in Plaintiffs' brief in support of class certification, and all paragraph citations are to Plaintiffs' TAC (ECF No. 108).

obtained fees of $17,935,811.00. Plas' App'x Ex 27. Plaintiffs' Appendix also identifies the specific respective class member amounts segregated for each Class Member State. *Id*.

Based on Prestamos' alleged false reporting to the SBA that Plaintiffs' loans were funded so Prestamos could obtain the fee, SBA data identifies Plaintiffs' loans as funded even though the loans were not funded. ¶¶ 12, 122-23, 138-39, 149-50, 160-61, 172-73, 184-85, 196-97, 210-11. *Accord* Plas' App'x Ex 25 (attaching Prestamos' SBA Form 1502 reports on Plaintiffs' loans).

Plaintiffs also allege that Prestamos obtained advances from the PPPLF to fund the loans via PPPLF PAR forms. ¶¶ 107-09. *See also* Pls' App'x Ex 26 (attaching Prestamos' PAR forms for Plaintiffs' loans).

In total, Prestamos committed to make 494,415 PPP loans for over $7.6 billion principal in 2021 through May 31, 2021 -- more PPP loans than any other lender in 2021, and more than the total number of PPP loans made in 2021 by Bank of America, PNC Bank, TD Bank and Wells Fargo combined. ¶ 9.

As a result, Prestamos reportedly was paid nearly $1.2 billion by the SBA in total PPP loan fees (¶ 10), and received net fees of over $314 million. Prestamos was obligated to pay a portion of the gross loan fees it obtained to its contractual LSP, Blueacorn (¶ 95).

Prestamos was at all times material to its PPP lending governed by a three person Board of Directors consisting solely of senior CPLC executives Alicia Nunez ("Nunez"), who is presently CPLC's President and CEO; Max Gonzales, who is presently CPLC's Executive Vice President; and David Adame, who served as CPLC's President and CEO until October 6, 2023, when he resigned amid allegations of financial malfeasance, and Nunez took his place. ¶¶ 38, 82. *See* Arizona Independent, Allegations of Fraud Haunt Chicanos Por La Causa As Adame Exits (Oct. 5, 2023) ("While the organization released a statement claiming that Adame left to 'pursue other opportunities,' sources say allegations of financial malfeasance preceded his exit."), available at https://arizonadailyindependent.com/2023/10/05/allegations-of-fraud-haunt-chicanos-por-lacausa-as-adame-exits/.

By Orders on December 5, 2023 and July 30, 2024, the Court granted CPLC's motion to dismiss for lack of personal jurisdiction. ECF Nos. 93, 134. On March 30, 2023, the Court granted in part and denied in part Prestamos' motion to dismiss. ECF Nos. 56-57. The Court held that Plaintiffs have standing to bring their breach of contract claim only under the laws of the state in which they reside or were injured; denied Prestamos' motion to dismiss the contract claim; and granted Prestamos' motion to dismiss Plaintiffs' other state law claims. ECF No. 56 at 35-36; *Marshall v. Prestamos CDFI, LLC*, 2023 WL 2727541, at *17-18 (E.D. Pa. March 30, 2023).

As a result, Plaintiffs' currently operative TAC alleges only a single count -- breach of contract, individually and on behalf of class members only in Plaintiffs' respective Class Member States. After Phase I discovery, the parties stipulated to the dismissal of 11 of the 21 original plaintiffs. Thus, the 10 remaining Plaintiffs cover the eight Class Member States of California (plaintiffs Marshall and Townsend), Michigan (Henderson), Arizona (Jones), Utah

(Martin), Texas (Lloyd and Smith), Indiana (Johnson), Mississippi (Marvel) and New York (Horne).

Whether this Court applies Pennsylvania law or the law of the Class Member States in which the Plaintiffs reside or were injured, the alleged breaches in this case would similarly violate the laws of all such states as discussed more fully in Plaintiffs' accompanying brief. *See also* Plas' App'x Ex 24 (attaching a chart comparing the contract law of Pennsylvania and the respective eight Class Member States). The same is true as to Plaintiffs' estoppel claim. *See, e.g.*, *Spear v. Fenkell*, 2016 WL 5661720, at *49 (E.D. Pa. Sept. 30, 2016), clarified on denial of reconsideration, 2016 WL 7475814 (E.D. Pa. Dec. 29, 2016) ("[t]he doctrine [of quasi-estoppel] applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit."); *In re Guterl Special Steel Corp.*, 316 B.R. 843, 856 (Bankr. W.D. Pa. 2004) (same); *Sports Imaging of Ariz., L.L.C. v. 1993 CKC Tr.*, 2008 Ariz. App. LEXIS 212 at *103-104 (1st. Div. Sept 30, 2008); *Estate of Shank*, 154 Cal. App. 2d 808, 316 P.2d 710, 711-12 (4th Dist. 1957); *Berg v. Berg*, 151 N.E.2d 321, 331 (Ind. 2020) (superseded on other grounds, 170 N.E.3d 224 (Ind. 2021)); *Bailey v. Estate of Kemp*, 955 So.2d 777 at ¶ 21 (Miss. 2007); *Robins v. Procure Treatment Ctrs., Inc.*, 2017 N.Y.Misc. LEXIS 1463 at *10-11 (Sup. Ct. Apr. 18, 2017) (citing *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415 (2009)); *Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd.*, 817 S.W.2d 160, 164 (Tex. Ct. App. 1991); *B.J.M. v. B.S. (In re R.B.F.S.)*, 2012 UT App 132 at ¶ 31 (2012); *Grand T. W. R. Co. v. Fuller*, 205 Mich. 486, 489, 171 N.W. 498, 499 (1919). ("Where one having the right to accept or reject a transaction takes and retains a benefit thereunder, he becomes bound by the transaction and cannot avoid its obligations or effect by taking a position inconsistent therewith.").

Plaintiffs' claims arise from the parties' same standard form Loan Document contracts executed by Plaintiffs and class members on the one hand, and Jose Martinez, President of Prestamos, on the other. The parties' Loan Documents consist of a standard form SBA note and accompanying standard form documents, a complete set of which was also filed in the case of plaintiff Marshall as Exhibit A to Plaintiffs' TAC. *See* ECF No. 108 at Exhibit A. *See also* Plas' App'x Exs 1-10 (attaching Plaintiffs' Loan Documents).

The same provisions of the Loan Documents will therefore drive the classwide determination of the key liability issues in this case, as also discussed more fully in Plaintiffs' accompanying brief. These include whether the Loan Documents are binding, enforceable contracts requiring Prestamos to fund the loans as Plaintiffs contend (*see, e.g.*, ECF No. 108 at ¶¶ 420-23), or whether "there was no contract between Plaintiffs and Prestamos in which Prestamos committed to funding Plaintiffs' loans" as Prestamos contends (*see, e.g.*, ECF No. 46-1 at 31); whether Prestamos falsely reported to the SBA that the loans were funded and collected a fee; whether Plaintiffs and class members are still obligated to repay Prestamos plus interest on the loans; whether Plaintiffs and class members were locked into and reliant on Prestamos to fund the loans and thereby denied the opportunity for forgiveness; whether the release in the parties' note releases Prestamos; and whether Prestamos should be estopped from arguing that an attempt to fund a loan immunizes it because, in this case, Prestamos is alleged to have also both falsely reported to the SBA that the loans were funded, and collected a fee thereby.

There are additional legal and factual issues concerning the claims and defenses the determination of which apply classwide. For example, Prestamos has also argued that there is no private cause of action under the CARES Act, and that "Plaintiffs' claims are an impermissible attempt to enforce the provisions of a statute under which Congress did not grant them a right to do so." ECF No. 46-1 at 17. Prestamos also argues that the CARES Act "bars Plaintiffs' claims." ECF No. 119 (Tenth Affirmative Defense) at p. 65. Prestamos itself also even asserts that Plaintiffs' claims are barred by the doctrine of estoppel. *Id*. at p. 64 (Sixth Affirmative Defense).

In sum, the core questions underlying the determination of liability in this case are susceptible to common evidence and proof. The parties' standard form Loan Documents and interpretation of uniform PPP rules will drive resolution of Prestamos' obligation to fund, class members' obligation to repay, whether the release applies and whether forgiveness was effectively precluded. Prestamos' SBA Form 1502 reports and fees and PARs for PPPLF advances are additional classwide evidence in this case.

II. <u>The Proposed Classes</u>

Plaintiffs seek to certify the following two Classes:

> **<u>Damages Class</u>**: 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.

> **<u>Declaratory Judgment Class</u>**: 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.

Excluded from the Classes are defendant Prestamos and its corporate parent CPLC; any of their affiliates and entities in which they have a controlling interest; any of their agents and employees; any Judge to whom this action is assigned; and any member of such Judge's staff and immediate family.

III. <u>Proving Liability Through Predominantly Common Evidence</u>

A. <u>General</u>

Plaintiffs allege in Count I (the only Count) breach of contract claims against Prestamos.

Plaintiffs intend to establish liability for their breach of contract claim using evidence common to themselves and the members of the classes. Examples of such common evidence include:

- the standard form note and accompanying Loan Documents that Plaintiffs and the members of the classes entered into with defendant Prestamos

- applicable PPP regulations governing PPP loan funding, obtaining advances from the PPPLF, and loan status and ongoing loan reporting obligations to the SBA concerning the loans

- the SBA Form 1502 Reports Prestamos submitted to the SBA concerning Plaintiffs' and class member PPP loans

- the PARs that Prestamos submitted to Federal Reserve's PPPLF to obtain advances from the PPPLF secured by Plaintiffs' and class member PPP loans

- expert testimony, including without limitation the opening and rebuttal reports and testimony of Plaintiffs' proposed experts William Manger ("Manger") and William Briggs ("Briggs") as to issues relating to liability, and Steven P. Feinstein ("Feinstein") as to issues relating to damages

- other documents and testimony of the parties and non-parties concerning Prestamos' failure to fund SBA-approved PPP loans

B. <u>Elements of Plaintiffs' Breach of Contract Claim</u>

"Under Pennsylvania law, three elements are necessary to plead a cause of action for breach of contract: (1) the existence of a contract, including its essential terms; (2) a breach of the contract; and (3) resultant damages." *Doe v. Univ. of Sciences*, 961 F.3d 203, 211 (3d Cir. 2020), *quoted in Boscov's Dep't Store, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 546 F. Supp. 3d 354, 370 (E.D. Pa. 2021). As set forth in Plas' App'x 24, the laws of the eight Class Member States are materially in accord.

1. <u>Existence of an Enforceable Contract</u>

-- Plaintiffs intend to prove the existence of an enforceable contract by common evidence including

- the parties' standard form note and accompanying Loan Documents which, among other provisions, identifies the specific PPP loan, SBA loan number and amount of the loan; specifies that the parties to the note are, respectively, the class member borrower and the "Lender" Prestamos; provides that "[t]his loan is made pursuant to the PPP"; requires the borrower to pay back the principal of the loan plus interest if the PPP loan is not forgiven; contains other PPP loan repayment terms and events of default and the lender's rights in the event of the borrower's default; and contains general provisions, including specifically that "[a]ll individuals and entities signing this Note are jointly and severally liable"

- the Additional and Correction Documents Agreement (Errors and Omissions Agreement) that accompanies the note and provides additional terms and states at the outset: "In consideration of Prestamos CDFI, LLC, located at 1024 E Buckeye RD, Suite 270, Phoenix, AZ 85034 (hereinafter called 'Lender') making the above loan, each of the undersigned, jointly and severally, do hereby agree as follows …."

- the "Notice - No Oral Agreements" document that is also part of the Loan Documents and governs the "Loan by Lender, Prestamos CDFI, LLC to Borrower"; identifies each class member borrower; and is executed by both Prestamos by its President Martinez, and each Plaintiff and class member borrower

- applicable PPP regulations governing PPP loan funding, obtaining advances from the PPPLF, loan status, loan forgiveness and ongoing loan reporting obligations, including without limitation the SBA Form 1502 reports and PARs

- the SBA's Procedural notices concerning the PPP, including the "Second Updated Paycheck Protection Program Lender Processing Fee Payment and 1502 Reporting Process" issued Feb. 8, 2021, which similarly required that "Lenders must submit a complete and accurate 1502 report"; that "PPP loans must be fully disbursed, and the amount reported in this field must match the loan approval amount in the SBA's electronic system"; and that, before the SBA would pay a loan processing fee to the lender, the lender "must make a one-time confirmation" that all PPP loans "included in the report were fully disbursed to the borrowers on the disbursement dates entered and in the loan amounts entered in the report, and … all information in the report is true and correct"

- expert testimony, including without limitation the opening and rebuttal reports and testimony of Manger, Briggs and Feinstein

2. **Breach of Contract**

-- Plaintiffs intend to prove Prestamos breached the parties' Loan Documents by common evidence including

- Plaintiffs' signing of and performance under the Loan Documents and in obtaining an SBA loan number approving their loans and completing and returning to Prestamos all required loan documentation

- the provisions of the Loan Documents

- applicable PPP regulations and guidance referred to above and other provisions of the PPP, including for example the SBA's funding rule which in relevant part states as follows: "The lender *must* make a one-time, full disbursement of the PPP loan within 10 calendar days of loan approval; for the purposes of this rule, a loan is considered approved when the loan is assigned a loan number by SBA." 86 Fed. Reg. 3692, 3710

- Prestamos' PAR forms to the PPPLF to obtain funds from the PPPLF secured by, and to fund, Plaintiffs' and class member PPP loans

- Prestamos' SBA Form 1502 reports to the SBA regarding Plaintiffs' and class member PPP loans and the PPP loan fees Prestamos obtained

- SBA PPP loan forgiveness requirements and application forms such as SBA PPP Loan Forgiveness Application Form 3508S applicable "**ONLY IF THE BORROWER *RECEIVED* A PPP LOAN OF $150,000 OR LESS**" (emphasis in original), including the requirement that the PPP loan forgiveness applicant certify how it used the loan proceeds

- expert testimony, including without limitation the opening and rebuttal reports and testimony of Manger and Briggs

3. <u>Causation</u>

-- Plaintiffs intend to prove that Prestamos' breaches were the cause of Plaintiffs' damages by common evidence such as:

- the evidence identified above including the parties' Loan Documents, Prestamos' Form 1502 reports and fees, Prestamos' PARs and applicable PPP rules and guidance

- other documents and testimony of the parties

- expert testimony, including without limitation the opening and rebuttal reports and testimony of Manger, Briggs and Feinstein

4. <u>Damages</u>

-- Plaintiffs intend to prove that Prestamos' breaches damaged Plaintiffs by common evidence such as:

- the evidence identified above regarding Prestamos' breach of the parties' Loan Documents and applicable PPP rules and guidance

- other documents and testimony of the parties

- expert testimony, including without limitation the opening and rebuttal reports and testimony of Feinstein, and Feinstein's opinions that "Damages in this matter can be computed in a straightforward way for all Class members using a common methodology that is consistent with Plaintiffs' theory of liability" and "that measuring damages for each Class member as the difference between the SBA-approved PPP loan amount and the amount the Class member received, which Plaintiffs alleged is zero, plus prejudgment interest, is a feasible common class-wide methodology that provides a conservative measure of the economic damages sustained by each Class member." Plas' App'x 12 ¶¶ 22-23