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 OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs seek to represent a class of individuals who sought small business loans under the federal Paycheck Protection Program (the "PPP") but whose own banks rejected and returned the PPP funds disbursed by Prestamos. This case is virtually identical to *Greathouse v. Capital Plus Financial, LLC*, No. 4:22-CV-0686-P, 2023 U.S. Dist. LEXIS 157204 (N.D. Tex. Sep. 6, 2023), another PPP case brought by these same plaintiffs' counsel, supported by the same experts, in which the court denied class certification and plaintiffs dismissed the case on a non-class basis by stipulation. In both cases, unsuccessful PPP borrowers brought class actions for breach of contract against Community Development Financial Institutions ("CDFIs") devoted to underserved communities.

In denying class certification, the *Greathouse* court held that plaintiffs could not establish commonality or predominance as required by Fed. R. Civ. P. 23 because, as demonstrated by the experiences of the class representatives, the putative class members failed to receive loans for reasons specific to each of them. In particular, borrowers' banks declined to accept or retain the lender's transfer of funds based on the status and nature of the particular borrower's account. As a result, the core questions of whether the lender breached its contractual obligation and, if so, whether that breach caused damages, were not susceptible to class treatment. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.") (internal quotation omitted).

Class discovery in this case—which resulted in voluntary withdrawal of ***54%*** of the named plaintiffs—confirms that commonality and predominance are also absent here. Like the CDFI in *Greathouse*, Prestamos disbursed the loans to bank accounts designated by borrowers, only to have those banks return the disbursements for reasons specific to the borrower, *e.g.*, frozen accounts, incorrect account details, suspicions of fraud, improper account use, and closed accounts. Also as in *Greathouse*, the loan documentation submitted by the class representatives was either incomplete or inaccurate. As a result, the Court here would similarly need to evaluate each borrower's loan file to determine whether defendant Prestamos breached the loan agreement or was excused from performance because the borrower did not meet the requirements of the PPP, of his or her own bank, or both. For this reason alone, plaintiffs cannot establish commonality or predominance, precluding class certification.

Keenly aware of this problem, plaintiffs go to extraordinary lengths to distance this case from *Greathouse*. Their primary contention is that the proposed classes here are "narrower" than in *Greathouse*, as they are limited to borrowers who submitted "all required documentation" but as to whom Prestamos "failed to disburse the PPP loan proceeds."

But this new definition does not resolve the need for individualized inquiry – the *Greathouse* problem persists. First and foremost, the individualized issues that were fatal in *Greathouse* are equally fatal here – borrowers' own banks rejected Prestamos's disbursements of the funds for a host of reasons specific to each borrower. No matter how much plaintiffs try to plead around *Greathouse*, each plaintiff's claim will always hinge on *why* they did not receive their PPP loans. The "required documentation" inquiry is also necessarily individualized, requiring thousands of mini-trials to assess whether the plaintiff's tax returns, bank statements, or payroll records established eligibility for PPP loans. Each of the ten remaining class representatives had his or her own unique set of deficiencies in documentation, and a strong case can be made that none of them is even a member of the classes as now redefined by plaintiffs.

Equally unsuccessful are plaintiffs' remaining efforts to distance themselves from *Greathouse*. They allege that Prestamos filed "false" Form 1502s with the Small Business

Administration (the "SBA") stating the loans were funded. Prestamos has refuted Plaintiffs' theory with unrebutted evidence that, as a non-depository institution, Prestamos had to list the loans as "funded" on the Form 1502 to obtain the credit advances from the Federal Reserve.

Lastly, plaintiffs offer no coherent classwide theory of damages as required by settled case law. They seek funding of each class member's PPP loan based on the premise that every class member, in a but-for world, would have applied and satisfied every condition for loan forgiveness, but they offer no methodology for demonstrating forgiveness on a classwide basis (nor could they). For all of these reasons, the Court should deny class certification.

BACKGROUND

I. The PPP Regulations

Self-employed persons were eligible for a PPP loan if, among other things, their businesses were operating on February 15, 2020, had self-employment income, filed an IRS Form 1040 Schedule C ("Schedule C"), and submitted documentation demonstrating the same. 86 FR 3692, 3695-96. Borrowers were also required to certify "that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects." *Id.* at 3706; *see also* Ex. 1 (G. Lloyd Signed Form 2483) at 3.

After a lender and the SBA approved an application, the SBA would issue an SBA Loan Number. The regulations then required a lender to "**disburse**" the PPP loan funds to the borrower within a prescribed timeframe but provided that "lenders are not responsible for delays in **disbursement** attributable to a borrower's failure to timely provide required loan documentation[.]" 86 FR at 3710 (emphasis added). Lenders were also required to report to SBA "on SBA Form 1502 whether it has **fully disbursed** PPP loan proceeds" for each approved loan. *Id.* at 3709 (emphasis added). The regulations do not require a lender to ensure that a borrower receives and is able to draw upon these funds. *See generally* 86 FR 3692. As noted in

Greathouse, "[t]he PPP program issued no guidance or duty on how to handle bank rejections [of PPP fund disbursements]." 2023 U.S. Dist. LEXIS 157204 at *17.

II. The PPP Loans at Issue

Pursuant to the CARES Act, the Federal Reserve maintained a credit facility from which PPP lenders could borrow funds to issue PPP loans. Ex. 2 (Castillo Decl.) ¶ 21. Prestamos, a non-depository bank that lacks the liquidity of other SBA-approved lenders, utilized credit advances from the Federal Reserve to issue PPP loans. *Id.* ¶ 28.

Each class representative executed a promissory note (the "Note") and other Loan Documents with Prestamos, which included providing an account number at the borrower's bank so Prestamos would know where to disburse the funds. Pls' App. in Supp. of Pls.' Mot. for Class Certification, Exs. 1-10. Consistent with the Loan Documents, Prestamos disbursed the approved amount of PPP funds to each class representative at his or her designated bank account. Ex. 3 (Disbursement and Return Compilation). For different reasons and on different timelines, each class representative's bank returned the PPP funds that Prestamos had disbursed back to Prestamos. *Id.*; Ex. 4 (Bank Return Reasons).

The SBA and the U.S. Secret Service issued guidance to PPP lenders (including Prestamos) and borrowers' banks authorizing banks to return to the lender any PPP disbursements that the bank believed "w[ere] initiated due to fraud." Ex. 5 (SBA and Secret Service "Application Fraud Indicators" Guidance). The guidance directed banks to use certain ACH return codes for suspicious PPP activity. *Id.* Similarly, banks that accepted disbursements of PPP funds for borrowers they suspected were ineligible sometimes contacted Prestamos and the SBA seeking to return these funds. Ex. 6 at '71-73; *see also, e.g.*, Ex. 7 (Compilation of Examples). In such instances, SBA required that Prestamos take prompt action to "investigat[e] the potential fraud on these loans," and "take action immediately to recover on these loans." Ex.

6 at '71; *see also* Ex. 8 (email from SBA to Prestamos identifying fraudulent PPP loan disbursed from Prestamos to a Citizens' Bank account and directing Prestamos to "work with Citizens to have those funds returned."). If borrower fraud was flagged, SBA directed Prestamos as follows: "[p]lease DO NOT disburse these funds until the investigation has been completed." Ex. 9.

Consistent with these directives, when a borrower's bank returned a disbursement of PPP funds to Prestamos, Blueacorn (at Prestamos's direction) would conduct enhanced due diligence on the borrower's loan file by requesting additional document(s) from the borrower to confirm eligibility, including a full federal tax return from either 2019 or 2020. Ex. 10 (Blueacorn Enhanced Due Diligence Guidelines) at '99; Ex. 2 ¶¶ 39-45.

For different, borrower-specific reasons, each class representative failed the enhanced due diligence process, causing Prestamos to cancel each of their loans. Ex. 11 (Deficient Loan Docs.); Ex. 2 ¶ 47. In September 2021, **before this lawsuit was filed,** Prestamos returned the credit advances from the Federal Reserves for those loans to the federal government. Ex. 2 ¶ 51. While irrelevant to this lawsuit, it is worth noting that SBA told Prestamos that Prestamos could "retain the processing fees on these loans." Ex. 12 (Email from Jordan Craig (SBA) to David Castillo (Prestamos), dated September 7, 2021).

III. The Litigation

On May 2, 2024, Plaintiffs filed a Third Amended Complaint (the "TAC"), adding new allegations aimed at distinguishing this case from *Greathouse*, in which the court had denied class certification in September 2023. ECF No. 108. The TAC, while remaining a single-count breach-of-contract complaint, also revised class definitions by adding two new criteria for class membership. The original definitions covered "[a]ll persons and entities . . . who executed their Loan Documents but did not receive the PPP loan proceeds." Second Am. Compl. ¶ 230, May 20, 2022, ECF No. 42. The current definitions include the original group, limited to persons and entities who "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." TAC ¶¶ 376-77. Notwithstanding their newfound focus on Prestamos's reporting obligations "to the SBA," Plaintiffs neither amended their sole claim for breach of contract nor added a claim based on this (allegedly) inaccurate reporting. *See id.* ¶¶ 418-36.

During class discovery, Plaintiffs' counsel voluntarily dismissed twelve of the original twenty-two class representatives based on deficiencies and inconsistencies in their loan files and/or their lack of cooperation with discovery.[1] During class discovery, Prestamos produced 176,844 documents and deposed the remaining ten class representatives. Plaintiffs opted <u>not</u> to depose any Prestamos employees, including, most notably, David Castillo (Senior Credit Officer), whose unrebutted declaration addresses facts critical to the Court's class certification analysis. *See* Ex. 2.

Class discovery uncovered substantial individualized issues concerning the loan documentation class representatives submitted and the reasons their banks returned PPP funds Prestamos had disbursed. In particular, discovery from third-party banks confirmed that, similar to the *Greathouse* plaintiffs, "the individuals' banks returned the funds for different reasons unique to each Plaintiff." *Greathouse*, 2023 U.S. Dist. LEXIS 157204, at *17; Ex. 4. Class discovery also confirmed that each class representative submitted documentation in support of his or her loan application that was deficient in different respects. Some submissions were

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[1] Although Plaintiffs intimate that these dismissals were a product of Prestamos's allegedly "onerous discovery demands," Pls.' Br. in Supp. of Mot. for Class Certification at 11, the facts tell a different story. One dismissed class representative was not SBA-approved and did not sign the Loan Documents. Ex. 13 (Dismissed Class Reps.). Another applied for multiple PPP loans. *Id.* Two received their PPP funds and spent them. *Id.* And one received his PPP funds, withdrew some of them, had his account frozen by his bank, returned the withdrawn funds to his bank, and then had his bank return the PPP funds to Prestamos. *Id.*

incomplete, others were inaccurate to the point of appearing fraudulent, and still others confirmed borrower ineligibility for a PPP loan. Ex. 11. The parties also submitted expert reports as part of the class discovery proceedings, and the experts were deposed. This motion for class certification followed.

ARGUMENT

I. The Stringent Standards Governing Class Certification

"In deciding whether to certify a class under Federal Rule of Civil Procedure 23, a district court must make 'findings' and factual determinations." *Wharton v. Danberg*, 854 F.3d 234, 241 (3d Cir. 2017) (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320). The class certification analysis "begins with a determination of whether the plaintiff has satisfied the prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of [representation]." *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015). The "rigorous analysis of the evidence and arguments" may necessitate "a preliminary inquiry into the merits of the plaintiffs' claims to ensure they can be properly resolved as a class action." *Rodriguez v. Nat'l City Bank.*, 726 F.3d 372, 380 (3d Cir. 2013) (internal quotation marks and citation omitted). "When courts harbor doubt as to whether a plaintiff has carried her burden under Rule 23, the class should not be certified." *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 483 (3d Cir. 2018) (citing *In re Hydrogen Peroxide*, 552 F.3d at 321).

In addition to the four requirements of Rule 23(a), plaintiffs must also satisfy the applicable sections of Rule 23(b). Plaintiffs here seek a declaratory judgment class under Rule 23(b)(2) and a damages class under Rule 23(b)(3). Rule 23(b)(2) requires plaintiffs to show that the party opposing the class "has acted or refused to act on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), and that the class is "sufficiently cohesive," *Cave v. Saxon Mortg. Servs.*, Civ. A. No. 11-4585; Civ A. No. 12-5366, 2016 U.S. Dist. LEXIS 141033, at *31

(E.D. Pa. Oct. 11, 2016) (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998)). Rule 23(b)(3) requires proof that (1) "[c]ommon questions 'predominate over any questions affecting only individual members'"; and (2) "class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). In addition, "[a] plaintiff seeking certification of a Rule 23(b)(3) class must prove by a preponderance of the evidence that the class is ascertainable." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

"[A] class may not be certified without a finding that each Rule 23 requirement is met." *In re Hydrogen Peroxide*, 552 F.3d at 310. Failure to meet even one of the foregoing standards is fatal to certification, and as discussed below, Plaintiffs are unable to meet many of them.

II. Plaintiffs Do Not Satisfy Rule 23(a)'s Threshold Requirements of Commonality and Typicality

A. Plaintiffs' Proposed Classes Lack Commonality

Rule 23(a)(2) requires plaintiffs to show they have "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 . . . the claim[] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). To establish commonality, Plaintiffs first assert without elaboration that Prestamos "breached the standard form Loan Documents," and cite a case for the general proposition that claims involving interpretation of form contracts are appropriately litigated on a class basis. Pls.' Br. at 8.

Plaintiffs' counsel made this "form document" argument in *Greathouse* and the court properly rejected it, holding that the "central question" of whether the lender breached the loan agreement was not common given the wide variety of reasons – expressed in different Automated Clearinghouse ("ACH") rejection codes – that class members did not receive their loans. *See Greathouse*, 2023 U.S. Dist LEXIS 157204 at *16, *17 n.3 (noting that the class representatives' banks "returned the [loan] funds for different reasons unique to each Plaintiff" as evidenced by different ACH codes). Accordingly, it held that the plaintiffs had not satisfied commonality because "[t]he varying circumstances of Lead Plaintiffs' loan processes . . . makes certifying a class for breach of contract **nearly impossible** given the many possible answers that resolve the questions 'why were funds not disbursed[.]'" *Id.* at *18 (emphasis added).

The same "varying circumstances" caused return of the loan funds here. Like in *Greathouse*, the class representatives' banks returned Prestamos's disbursements of PPP funds to class representatives based on different ACH rejection codes. Ex. 4. Notably, the codes most frequently used by the class representatives' banks were the codes the SBA and the Secret Service told banks to use for suspicious activity.[2] Ex. 5.

But the ACH return codes only tell part of the story, because banks sometimes used the same ACH return codes for different situations (as well as different return codes for similar situations), including ineligible accounts and suspicions of fraud. Ex. 4 (Bank Return of Funds Chart). The returns also occurred on different timelines, with some banks returning funds immediately or within a few hours, *e.g., id.* at 36-39, and others taking far longer, *id.* at 40 (ten days); 27-32 (more than a year). In some instances, borrowers withdrew some of the disbursed PPP funds before the bank initiated a return to Prestamos. *Id.* at 40; Ex. 7 at 1, 3-4, 10-18, 29-30, 46-47, 51, 66-71, 77-82, 90-92.

As the *Greathouse* court observed, "[t]he PPP program issued no guidance or duty on how to handle bank rejections." 2023 U.S. Dist. LEXIS 157204, at *17. Indeed, Plaintiffs' own

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[2] These codes were: R03 (No Account/Unable to Locate Account); R17 (File Record Edit Criteria); and R23 (Credit Entry Refused by Receiver).

SBA "experts," William Manger and William Briggs, conceded as much. Ex. 14 (W. Manger Dep.) at 87:6-9; 96:24-97:10 (stating that "the lender would have to understand why this wasn't working properly and try and rectify the situation"); Ex. 15 (W. Briggs Dep.) at 101:10-102:17 (stating that lender should have "work[ed] with the borrower to resolve the issue").

Plaintiffs try to sidestep *Greathouse* by narrowing their class definition to borrowers who submitted "all required [loan] documentation." Pls.' Br. at 8; TAC ¶¶ 376-77. They contend that the *Greathouse* court "rejected commonality because '[t]he central question . . . is whether [the lender] failed to fund Plaintiffs' loans or timely cancel them" under a PPP rule requiring cancellation within 20 days when the borrower has failed to submit "required documentation." Pls.' Br at 8 (quoting *Greathouse*, 2023 U.S. Dist. LEXIS 157204, at *15).[3]

Plaintiffs misstate the holding in *Greathouse*. Although the court did refer to the 20-day cancellation requirement, it ultimately declined to certify the class because of the varying explanations for why the loans were not funded. Furthermore, *Greathouse* had no occasion to consider certifying the narrower class proposed here because none of the class representatives would have been members of that class. 2023 U.S. Dist. LEXIS 157204, at *16.

In any event, the question whether a borrower submitted "required documentation" is an individualized issue not susceptible to class treatment. *Cave*, 2016 U.S. Dist. LEXIS 141033, is illustrative. *Cave* was a putative class action under a federal loan program that, like the PPP, provided relief to borrowers due to a national economic downturn and featured form loan agreements that the lender allegedly breached. Like Plaintiffs here, the *Cave* plaintiffs sought to represent borrowers who allegedly qualified for the loans but did not receive them. Also like

[3] Plaintiffs argue that they added an allegation absent in *Greathouse*, that Prestamos filed "false" Form 1502s with the SBA stating that loans were funded. Pls.' Br. at 8. As discussed *infra* at Section V.B., this contention is irrelevant to Plaintiffs' breach of contract claim.

Plaintiffs here, the *Cave* plaintiffs defined the *Cave I* class as limited to borrowers who "complied with [the lender's] requests for documentation." *Id.* at *3. In holding the plaintiffs could not satisfy commonality, the court explained that "[e]ach borrowers' individual dealings" with the lender affected the liability analysis, and therefore "[t]he mere fact that all prospective class members signed the same contract does not 'drive the resolution of the litigation.'" *Id.* at *56 (quoting *Dukes*, 564 U.S. at 350).

In the instant case, as in *Cave* and *Greathouse*, a review of the individual borrowers' loan files is necessary to determine whether each one provided "all required loan documentation." For example, putative class members were required to submit a Schedule C "to substantiate the applied-for PPP loan amount," a bank statement or other record "that establishes you are self-employed" and, if the borrower's bank returned Prestamos's disbursement of PPP funds and the borrower was subject to enhanced due diligence, the borrower had to submit a full federal tax return that would be "reconciled against the initial [S]chedule [C] data the applicant provided." 86 FR 13149, 13151; Ex. 10 at '99. Whether these documents ultimately demonstrated a borrower's eligibility for a PPP loan, as they were required to do, is an individualized inquiry. For example, certain Plaintiffs submitted Schedule C's that reported information that differed materially from amounts contained on their full federal tax returns. *See* Ex. 11.

This individualized inquiry lies at the core of Plaintiffs' breach of contract claim because borrower's submission of required documentation was a condition precedent to Prestamos's obligation to disburse his or her loan and Plaintiffs bear the burden of proving they satisfied the condition precedent. *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1007 (3d Cir. 1980); *cf. Chemtech Int'l, Inc. v. Chem. Injection Techs*, 247 F. App'x 403, 405 (3d Cir. 2007) (dismissing breach of contract claim for failure to allege satisfaction of condition precedent). Absent required documentation, Prestamos was excused from performance and could not be liable for breach of contract. As the *Cave* court explained in the analogous inquiry into predominance, "[w]hether a borrower submitted accurate financial information to Saxon is a **condition precedent** to receiving a permanent [loan] modification under the terms of the [trial payment plan] and the [applicable federal regulations] and, we find, is an **individual issue** not capable of proof with evidence that is common to the class." 2016 U.S. Dist. LEXIS 141033, at *71-72 (emphasis added).

So too here, class discovery demonstrates that whether the borrower submitted accurate and complete documentation is an individualized issue. Once again, the Court need not look beyond the experiences of the ten remaining class representatives to appreciate that each presents a unique case in terms of their documentation. Ex. 11. In sum, the Plaintiffs cannot establish commonality.

B. The Named Plaintiffs Are Not Typical of the Proposed Class

Plaintiffs fare no better in attempting to satisfy the typicality requirement of Rule 23(a). "Even when common issues exist . . . typicality is designed to 'screen out class actions in which the legal or factual position of the representatives is markedly different from that of the other members of the class[.]" *Ctr. City Periodontists, P.C. v. Dentsply Int'l, Inc.*, 321 F.R.D. 193, 206 (E.D. Pa. 2017) (quoting *Marcus v. BMW of N. Am., Inc.*, 687 F.3d 583, 598 (3d Cir. 2012)). "It is well-established that a proposed class representative is not 'typical' under Rule 23(a)(3) if 'the representative is subject to a unique defense that is likely to become a major focus of the litigation.'" *Marcus*, 687 F.3d at 599 (quoting *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598) (3d Cir. 2009)).

Different factual defenses exist for nearly every class representative, and they necessarily will exist among absent class members as well. *See Stewart v. Abraham*, 275 F.3d 220, 227 (3d

Cir. 2001) ("The typicality inquiry centers on whether the interests of the named plaintiffs align with the interests of the absent class members."). These defenses include (i) the failure of each class representative to submit "all required loan documentation"; and (ii) the inability of each class representative to prove Prestamos "caused" their alleged damages because, as Plaintiffs have acknowledged, Prestamos could not "force" the borrowers' banks to accept the loan proceeds. Ex. 15 at 90:10-23 ("Prestamos . . . cannot force the bank to take money."); Ex. 14 at 86:6-12; Ex. 11; Ex. 4.

These unique defenses preclude a finding of typicality, providing an additional dispositive ground to deny class certification.

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

A. Plaintiffs' Proposed Declaratory Judgment Class Is Not Cohesive

To establish "cohesiveness" under Rule 23(b)(2), the plaintiffs must show that the "class's claims are common ones and that adjudication of the case will not devolve into consideration of myriad individual issues." *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 169 (E.D. Pa. 2015) (citations omitted).

Plaintiffs' redefined classes are not cohesive. Once again, *Cave* is instructive. There, the court considered a "class definition requir[ing] that putative members 'complied with [Defendant]' requests for documentation.'" 2016 U.S. Dist. LEXIS 141033, at *37. The *Cave* court observed that determining which persons were included within this definition "requires reviewing the contents of each borrower's loan file and thus raises myriad individual issues[,]" and therefore the class "cannot be certified because it is not cohesive." *Id.* at *37, *47. The same is true here. As explained in Section II.A., *supra*, individualized reviews of each borrower's loan file are required to determine whether each borrower in fact "provided to Prestamos all required loan documentation" (regardless of how Plaintiffs define that term).

B. Common Questions Do Not Predominate for the Damages Class

Principally for the reasons discussed above with respect to commonality, Plaintiffs also cannot establish that common issues "predominate" over individual issues, which is a "far more demanding" standard than commonality and an essential requirement of their proposed damages class under Rule 23(b)(3). *Amchem Products v. Windsor*, 521 U.S. 591, 624 (1997); *see also NBL Flooring, Inc. v. Trumbull Ins. Co*., No. 10-4398, 2014 U.S. Dist. LEXIS 19934, at *13 (E.D. Pa. Feb. 12, 2014) (predominance "even more demanding than" commonality).

As the *Greathouse* court held in language equally applicable here:

> For the same reasons that prevent this Court from finding commonality or typicality, Plaintiffs' claims also fail to satisfy Rule 23(b)(3) as common questions of fact do not predominate over individualized questions in this proposed class. As evidenced above, **the reasons for why a loan was not funded is an individualized affair** that presents too many unique scenarios to properly be considered under a class action. And because the **central identity of the case** rests on this question, the lack of predomination of common facts is fatal . . . .

2023 U.S. Dist. LEXIS 157204, at *21-22 (emphasis added) (citation omitted).

Plaintiffs argue that they have satisfied predominance by narrowing the classes, Pls.' Br. at 14, but that is simply not true because, as discussed above with respect to commonality, applying the "required documentation" element still necessitates individualized treatment. As the *Cave* court explained, "individual issues concerning whether each member of the proposed class satisfied the eligibility requirements for a permanent [loan] modification overwhelm questions that are common to the class." 2016 U.S. Dist. LEXIS 141033, at *72; *see also O'Gara v. Countrywide Home Loans, Inc.*, 282 F.R.D. 81, 89 (D. Del. 2012) ("[W]here . . . numerous individualized inquiries are required to determine breach and damages, class certification is not appropriate.").[4]

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[4] *Accord Corvello v. Wells Fargo Bank, N.A.*, Nos. 10-cv-05072-VC, 11-cv-03884-VC, 2016 US Dist. LEXIS 11674, at *19 (N.D. Cal. Jan. 29, 2016) (rejecting predominance in

Nor have Plaintiffs set forth a classwide damages methodology as required to establish predominance. *See Comcast Corp. v. Behrend*. 569 U.S. 27 (2013). In reversing class certification in *Comcast*, the Supreme Court held that "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 34; *see also In re Paulsboro Derailment Cases*, No. 13-784, 2014 U.S. Dist. LEXIS 115542, at *43 (D.N.J. Aug. 20, 2014) ("At the certification stage, the Court must be assured that the determination of whether the defendant's conduct caused injury to each class member can be made at the class level and without identifying damages that are not the result of the wrong. Damages must be capable of measurement on a classwide basis." (citations and internal quotation marks omitted)).

Here, even assuming *arguendo* that Plaintiffs could establish liability, they cannot measure damages on a classwide basis. To decide the damages question, the Court would have to determine whether each Plaintiff would have ultimately been eligible for *and* applied for loan forgiveness, requiring an individualized inquiry into whether each Plaintiff would have used a sufficient percentage of the loan proceeds for payroll costs. Ex. 16 (Swain Rpt.) ¶ 79; *see also* Ex. 17 (Baez Rebuttal Rpt.) ¶ 16 (explaining that only 81% of Prestamos's PPP loans were fully or partially forgiven). Plaintiffs have no methodology for determining which class members would have applied *and* qualified for forgiveness in the but-for world. Rather, they simply assume that forgiveness was automatic. *Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 424

federal HAMP loan program because "[i]ndividual inquiries, such as whether a particular borrower gave the bank sufficient income documentation, or whether the documentation was accurate, would predominate"); *Campusano v. BAC Home Loans Servicing, LP*, No. CV 11-4609 PSG (JCx), 2013 US Dist. LEXIS 76148, at *17 (C.D. Cal. Apr. 29, 2013) (denying class cert for lack of commonality given individualized questions such as whether conditions precedent were "fulfilled in this instance").

(2d Cir. 2022) (stating "[PPP] forgiveness is neither automatic nor guaranteed. A borrower must apply for forgiveness, which will only be granted if specified criteria are met.").

Plaintiffs' expert Steven Feinstein's proposed damages methodology underscores Plaintiffs' inability to establish damages on a classwide basis. Feinstein offers an oversimplified approach that awards damages to each borrower in the amount of the loan applied for (without regard to forgiveness), plus "prejudgment interest" to compensate plaintiffs for lost profits and other alleged injuries, without regard to whether they suffered consequential damages at all or the size of such damages. Moreover, his "damages methodology does not consider how business in different industries, service types, and locations were impacted by the COVID-19 pandemic," Ex. 17 ¶ 23, or the fact that "[p]roposed class members that did not meet the stipulated loan conditions would have been in default on their loan and thus not in the same position as proposed class members that met these conditions," *id* ¶ 34. The damages calculation for each Plaintiff is complex and individualized. As such, Plaintiffs cannot meet the requirements for class treatment set forth in *Comcast*.

Here, just as in *Greathouse* and *Cave*, individual issues predominate over common issues, and Plaintiffs cannot satisfy Rule 23(b)(3).[5]

IV. None of the Class Representatives is a Member of the Proposed Classes and, In Any Event, The Classes Are Not Ascertainable

Plaintiffs define their proposed classes as persons who "provided to Prestamos all required loan documentation" but as to whom Prestamos "failed to disburse the PPP loan proceeds." TAC ¶¶ 376-77. But "a class representative must be part of the class," *Amchem*

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[5] None of the breach of contract class action cases cited by Plaintiffs in the section of their brief regarding predominance, *see* Pls.' Br. at 15-16, involves circumstances even remotely like those here, namely the situation in which the putative class member's performance of its obligations is a condition precedent to the class member's breach of contract claim.

Prods. v. Windsor, 521 U.S. 591, 625 (1997), and no class representative here is a class member because none of them submitted "all required loan documentation" to Prestamos, Ex. 11 (for example, Plaintiff Marshall was required to submit a full federal tax return after her financial institution returned Prestamos's disbursement, but submitted only a partial return that omitted a complete Schedule C).

Plaintiffs' redefined classes are also not ascertainable for the same reasons. "[T]o satisfy ascertainability as it relates to proof of class membership, the plaintiff must demonstrate his purported method for ascertaining class membership is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 (3d Cir. 2013). Whether a class member submitted "all required documentation" cannot be determined without an individualized review of a loan file. And although borrowers who "fail[ed] to receive loan proceeds" may be "easily identifiable with available data," as the *Greathouse* court found, 2023 U.S. Dist. LEXIS 157204, at *11, there is no similarly feasible approach to determine *why* each borrower failed to receive these proceeds, which is essential to determine whether there was a breach and who caused the resulting damages. While Plaintiffs attempt to define the class with respect to loans that Prestamos (allegedly) "failed to disburse," unrebutted documentary evidence shows that Prestamos disbursed PPP funds to each class representative, Ex. 4 (Bank Return of Funds Chart), rendering the class definition empty. Despite Plaintiffs' game of semantics, they cannot escape that this case is about the multitude of reasons why borrowers did not receive their PPP loans despite Prestamos sending the funds to their banks.

V. Plaintiffs Remaining Efforts to Manufacture Classwide Issues Are Unpersuasive

A. Plaintiffs Are Under No Obligation to Repay Loans They Never Received

Plaintiffs repeatedly contend that they are under an obligation or demand to repay PPP loan proceeds that they never received, which is the sole basis for their proposed Rule 23(b)(2) class. *See* Pls.' Br. at 11-12. The record refutes this contention.

As a threshold matter, the unrebutted declaration of Prestamos's Senior Credit Officer David Castillo states that Prestamos has cancelled each of the Class Members' loans. Ex. 2.[6] Plaintiffs do not identify a single document evidencing a current repayment obligation or demand, and the few documents that do exist show that no such obligation or demand exists.

Plaintiffs point to excerpts from the depositions of two class representatives, Gregory Lloyd and Alyshia Johnson. *See* Pls.' Br. at 3, 5. Unrebutted documents refute their testimony. Prestamos disbursed PPP funds to Lloyd on May 31, 2021. Ex. 4. Inexplicably, Lloyd's bank held onto the funds for nearly a year-and-a-half. *Id.* at 27-32. During this period, Prestamos's records accurately showed that Lloyd had received his PPP funds, and Prestamos began sending statements after the apparent forgiveness period on his loan expired indicating that he owed principal and interest on his PPP loan. Ex. 18 (Prestamos Statement to Lloyd). After Lloyd raised this issue with Prestamos, he was informed that "if no funds were used prior to the hold [that Lloyd's bank put on his account] **then no payment plan is required**." Ex. 4 at 27-32 (emphasis added). Johnson testified "I believe I want to say . . . I received an e-mail stating that, I want to say that the loan had to be repaid." Pls.' App. Ex. 19 at 6. Plaintiffs never produced

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[6] Plaintiffs' reference at page 12 of their brief to Prestamos's agreement to refrain from seeking repayment of Drevnak's PPP loan—which she received, spent down, ***and then did not apply for forgiveness on***—in exchange for her voluntary dismissal is inapposite. Defendants routinely agree to forgo potential counterclaims against a plaintiff in exchange for that plaintiff dropping their case.

this alleged email, despite it being within the scope of Prestamos's discovery requests. Ex. 19 (Prestamos First RFPs to Plaintiffs) at RFP Nos. 5, 7. The only conceivably relevant document was an email Blueacorn inadvertently sent to at least some unfunded borrowers informing them that if they did not complete forgiveness applications they would need to repay the full balance of their PPP loan. Ex. 20 (Inadvertent Email Compl.). But later that same day, Blueacorn sent a "CORRECTION" email to the same unfunded borrowers stating: "Earlier today we sent you an email in error about applying for PPP Forgiveness. **You can disregard that email as your loan was not funded and no additional action is required**." Ex. 21 (Correction Email Compl.) (emphasis added).

B. Plaintiffs' Spurious Allegations Regarding Prestamos's Reporting Obligations to the SBA and Prestamos's Retention of Processing Fees Are Irrelevant to Plaintiffs' Breach of Contract Claim

In a last-ditch effort to infuse their case with equitable appeal, Plaintiffs accuse Prestamos of malfeasance in its dealings with the SBA. Specifically, they allege Prestamos submitted false Form 1502s stating loans had been funded when they had not, and baldly assert that Prestamos's retention of loan processing fees "may amount to fraud." Pls.' Br. at 15.

But under basic principles of contract law, dealings with third parties that are not referenced in the contract between the parties have no bearing on the objective terms of the contract as between the parties, or any potential breach thereof. *Pierce Assocs., Inc. v. Nemours Found.*, 865 F.2d 530, 536 (3d Cir. 1988). And the unrebutted facts show that Prestamos ultimately cancelled PPP loans for all borrowers who did not successfully complete the reverification process, which included all class members' PPP loans. Ex. 2 ¶ 47.

Plaintiffs' contention regarding processing fees is equally baseless. SBA guidance provided that "[i]f the Lender has received a processing fee on a loan that was cancelled . . . SBA will not require the Lender to repay [that] fee unless the Lender is guilty of an act of fraud in connection with the PPP loan." Ex. 22 (SBA Procedural Notice 5000-20091) at 7 n.5; *see also* 86 FR 3692, 3708; *see* Ex. 14 at 115:3-6 (acknowledging this requirement); Ex. 15 at 113:1-114:12, 118:8-21 (same).

Prestamos has never engaged in or been charged with – let alone found guilty of – an act of fraud in connection with the PPP. Moreover, Prestamos offered to return the processing fees to the SBA in August and September of 2021, and was told by the SBA that "[t]he lender is able to retain the processing fees on these loans." Ex. 12.

In sum, these new allegations are irrelevant to class certification and liability, and they are demonstrably false as well.

CONCLUSION

For the foregoing reasons, the Court should deny certification to the proposed classes.

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CERTIFICATE OF SERVICE

I, Thomas J. Gallagher IV, hereby certify that on this 4th day of October, 2024, I caused a copy of the foregoing Brief in Opposition to Plaintiffs' Motion for Class Certification and accompanying papers to be served on all counsel of record via the Court's ECF system.

/s/ Thomas J. Gallagher IV
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