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

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S OMNIBUS MOTION TO STRIKE PLAINTIFFS' CLASS CERTIFICATION EXPERT REPORTS AND TO EXCLUDE EXPERT TESTIMONY

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Plaintiffs[1] respectfully submit this brief in opposition to Prestamos CDFI, LLC's ("Prestamos") Omnibus Motion to Strike Plaintiffs' Class Certification Expert Reports and to Exclude Expert Testimony (ECF No. 143).

Introduction

The expert reports of Plaintiffs' experts William Manger, William Briggs and Steven Feinstein meet the criteria of *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) and Fed. R. Evid. 702. Each has "specialized expertise" in the subject matter of their testimony; "good grounds" for their opinions which are "reliably applied" and "based on sufficient facts"; and "would help the trier of fact to understand the evidence or determine a fact in issue." *Bombin v. Southwest Airlines Co.*, 2023 WL 5832166, at *6 (Sept. 7, 2023) (Gallagher, J.) (denying motion to exclude portions of an expert's report under Fed. R. Evid. 702).

Prestamos' motion should also be denied for additional reasons. First, unlike the rulings in nearly every case cited in its brief (ECF No. 143-1), Prestamos seeks to strike Plaintiffs' experts wholesale, apparently contending that nothing in their reports or testimony can assist the jury if this case proceeds to trial, or this Court in adjudicating class certification. Contradictorily, however, Prestamos concedes that not everything in the Manger, Briggs and Feinstein reports and testimony even qualifies as an opinion of law. *See* ECF No. 143-1 at 5 ("Each of Plaintiffs' three experts spends *a significant portion* of their report purporting to offer legal opinion."); *id.* at 1 ("The Briggs and Manger reports ... consist *largely* of legal opinions …."). Prestamos' motion is also therefore impermissibly overbroad. Contrary to Prestamos' position to usurp the

[1] Unless otherwise noted, all capitalized terms have the meaning in the Table of Abbreviations set forth in Plaintiffs' class certification brief (ECF No. 139 at v-vi); all emphasis is added; all citations to page numbers are to the native page number; and all internal quotations and citations are omitted.

role, Your Honor can ably judge what may or may not be "helpful to this Court in determining whether Plaintiffs' proposed class meets the requirements of Rule 23." *Id*. at 10.

Second, courts are to evaluate proposed expert testimony under the Fed. R. Evid. 702 and *Daubert* criteria of qualification, reliability and fit based on each case's specific factual circumstances. Thus, Prestamos' reliance on rulings in other cases where courts have stricken other expert testimony is of limited or no value. Indeed, in the only case that the parties agree is factually similar, the court held *the exact opposite* of what Prestamos seeks here, rejected a similarly overbroad omnibus motion to strike reports by the same three experts here in full, and concluded that those expert reports helped the court "better understand certain issues of the case which squarely rest on the SBA lending rules. Determining the correct procedure of the PPP loan process is at the core of this motion." *Greathouse v. Capital Plus Financial, LLC*, 2023 WL 5746927, at *9 n.2 (N.D. Tex. Sept. 6, 2023) ("*CPF*"). Prestamos' characterization is that the court "took pains to emphasize that it 'is not considering this testimony in an 'expert' capacity'" (ECF No. 143-1 at 5). But the end result holding was that defendants' "Motion to Strike (ECF No. 71) is thus **DENIED**." *CPF*, 2023 WL 5746927, at *9 n.2.

Third, disagreement with an expert's opinions does not render them unreliable or unhelpful. The core factual and legal questions in this case concerning Prestamos' alleged breaches of contract and class members' continued obligation to repay loans they did not receive arise from the same classwide evidence -- namely, the parties' Loan Document agreements (ECF Nos. 139-2 – 139-11), Prestamos' false SBA Form 1502 reports that kept class member loans on the SBA's books by reporting that those loans were funded (ECF No. 139-26), Prestamos' PARs to obtain advances secured by and to be used to fund the loans (ECF No. 139-27), and the statutory and regulatory provisions of the PPP. The reports and testimony of Manger and Briggs reliably provide helpful context to understand and interpret that evidence and to adjudicate those questions. And as former senior SBA officials that helped implement and oversee the PPP, Manger and Briggs also have direct and extensive experience with the subject matter, and also identify and describe the bases for their opinions and already testified at length in deposition regarding them.

Prestamos cherry picks snippets of their testimony to mischaracterize their opinions. Contrary to Prestamos, neither Manger nor Briggs dispute that the PPP required "that the borrower operated a legitimate ongoing business" (ECF No. 143-1 at 9), Prestamos' status as a non-depository CDFI (*id*.), or *when* Prestamos filed SBA Form 1502s. *Id*.

Critically, however, Prestamos' argument (*id*.) via its own employee's declaration that it "had to submit SBA Form 1502 before any money was released by the Federal Reserve" (ECF No. 142-4 ¶ 29) and that it "used '***Funded***' in order to initiate the credit advance from the Federal Reserve" (*id*. ¶ 31) is an ***admission*** that it falsely reported the status of the class member loans from the outset, particularly absent subsequent 1502 monthly reports that should have been updated to reflect the true status of the loans as not funded. Although this will be explored further in Phase II discovery, the importance and classwide nature of Prestamos' 1502s -- which it previously argued were actually "irrelevant to Plaintiffs' breach of contract claim" and objected to even producing (ECF No. 78 at 1) -- is now beyond dispute, as is the probative value of testimony from Manger and Briggs regarding those 1502s.

Prestamos and its experts are also free to disagree with Feinstein's opinion that an award of the class member's loan amount plus interest is a feasible, classwide methodology to compute damages in this case. ECF No. 139-13 at ¶ 23. But it is simply incorrect in arguing that measure fails to "set forth a classwide damages model." ECF No. 143-1 at 12.

The testimony of Manger and Briggs is also probative of Prestamos' defense that it is released from liability. *See* ECF No. 139-12 at ¶ 25; ECF No. 139-14 at ¶¶ 35-36. Although Prestamos ignores the release in both its motion to strike (ECF No. 143-1) and class certification (ECF No. 142) briefs -- in truth, because this defense also indisputably raises a common, classwide issue answerable in a single stroke as Plaintiffs contend (ECF No. 139 at 9, 13) -- this Court specifically held in its ruling granting in part and denying in part Prestamos' motion to dismiss that additional evidence was necessary to interpret the release. *See Marshall v. Prestamos CDFI, LLC*, 2023 WL 2727541, at *11 (E.D. Pa. Mar. 30, 2023) ("Because additional evidence regarding the meaning of undefined terms and/or additional context is necessary to resolve the meaning of the ambiguous language, the Court declines to grant dismissal pursuant to the text of the release, or to determine whether the release applies or does not apply to bar Plaintiffs' claims."). Plaintiffs also intend to further develop that evidence in Phase II merits discovery. ECF No. 102 ¶ 2. In sum, Prestamos' motion to strike has it backwards as it assumes that the Court cannot determine what expert opinion is or is not reliable and relevant, and what weight to give it if any in adjudicating class certification and in instructing the jury.

Factual Background

As discussed more fully below, each of Plaintiffs' three experts describes in their reports and also testified to their educational and professional background, experience and qualifications to address the specific subject matter set forth in their reports; identifies the facts and data on which they relied to base their opinions; and adds facts, opinion and context to assist the Court and the trier of fact in interpreting the evidence and adjudicating both class certification and the merits of the claims and defenses.

Preliminarily, however, and although also ignored in both Prestamos' motion to strike and class certification briefs, Plaintiffs' expert testimony was not filed in isolation but along with their Proposed Trial Plan. ECF No. 139-18. Contrary to Prestamos that Manger and Briggs fail to "connect their allegations relating to Form 1502" (ECF No. 143-1 at 9), that Plan directly links the reports and testimony of Manger and Briggs to specific elements of the breach of contract claim at issue, including the 1502s. ECF No. 139-18 at 3, 5, 7-8.

Second, unlike Prestamos which gamed the timing of its proposed expert reports and employee Castillo declaration (which has yet to be subject to cross examination; *see* ECF No. 139 at 19 n.2), Plaintiffs timely submitted and filed *both* opening and rebuttal reports of their three experts per the Court's Amended Scheduling Order. ECF No. 123 ¶¶1(a) and (b). In contrast, Prestamos served and filed *only* a rebuttal but not opening report of its proposed expert Jorge Baez (ECF No. ECF No. 142-22), and filed *only* the opening report of its other proposed expert Kennth Swain (ECF No. 142-21) even though it also served Swain's August 9, 2024 rebuttal report (which Plaintiffs also intend to further explore in Phase II discovery).

Manger

Manger served in the SBA for almost eight years, from 2005-2009 and 2017-Jan. 2021. ECF No. 139-12 ¶ 1. During his second tenure with the SBA, Manger "oversaw and led the SBA's implementation of the" PPP and "was responsible for promulgating PPP-specific rules and guidance, implementing PPP-specific processes at the SBA, and communicating with lenders, trade associations, government agencies, and members of Congress." *Id*.

Manger's opening report also details his professional experience (*id*. ¶¶ 2-6); describes the history, context and purpose of the PPP and the SBA's Section 7(a) Loan Program which served as the framework for the PPP (*id*. ¶¶ 10-15); and offers his interpretation of governing rules (*id*. ¶¶ 16-25). Manger's rebuttal report addresses Swain's opening report, including

Swain's failure to even *mention* SBA 1502 let alone address Prestamos' SBA Form 1502 reporting (ECF No. 139-15 ¶¶ 3-4), and Swain's analysis of loan forgiveness. *Id.* ¶ 6.

Prestamos mischaracterizes Manger's opinions and omits others. ECF No. 143-1 at 3. Manger's actual opinions are as follows:

- "If used for those purposes, PPP loans were also designed and intended to be forgivable. To obtain forgiveness, however, the PPP loan recipient had to actually receive the loan proceeds because the loan recipient had to certify that he or she used those funds for the specific purposes permitted by the PPP." ECF No. 139-12 ¶ 12. *Accord* ECF No. 139-20 at 13 ("The intent was that if you used the loan proceeds for those specific purposes, the loan would be forgiven, and that's why I'm saying, in essence, it became a grant.")

- "A mere attempt to fund a loan, or an attempt to do so that, for instance, the borrower's bank rejected, should have resulted in the loan being cancelled in SBA's e-trans system and no payment of the loan processing fee being made by the SBA to the lender. In fact, as noted above lenders were also required to update and file the 1502 reports on a monthly basis, and to accurately report the information contained in those reports concerning the status of the loan." ECF No. 139-12 ¶ 20. *Accord* ECF No. 139-20 at 11 ("these loans should not have remained open on the SBA's books if they were not fully disbursed. It was certainly the intent of the agency that if a loan did not go through … then that applicant should have been able to go to another lender in hopes of getting a loan.")

- "Second and also unlike [*CPF*], the issue of *why* a loan was not funded is not material in this case because, by definition, all of Plaintiffs' and class members' loans were not funded but Prestamos falsely reported via the Form 1502s that the loans were funded." ECF No. 139-12 ¶ 24 (emphasis in original)

- "The language at the end of the Promissory Note in section 10 'Release of Lender' specifically addresses 'extensions of credit' made 'on or prior to the date hereof.' … PPP loans were not lines of credit. In this situation in the context of the PPP, 'extensions of credit' would mean funding of a loan. For the language to be applicable, the PPP loan would have to have been funded 'on or prior to the date' the Note was signed, which did not happen. Under the PPP as noted above, the Note had to be first executed by the lender and borrower, the borrower had to submit all requisite loan documentation, and then the lender thereafter had to fund the PPP loan within the time period under the PPP rules." *Id.* ¶ 25

- "By not funding loans to approved PPP applicants with SBA loan numbers and who had submitted the loan documents, Prestamos not only deprived Plaintiffs of critical guaranteed federal money, but also precluded them from applying to other lenders, obtaining forgiveness and potentially subjecting them to repayment of loans they did not receive plus interest." *Id.*

<u>Briggs</u>

Briggs served in multiple roles at the SBA from November 2017 to January 2021, when the new administration took office. ECF No. 139-14 ¶ 2. Briggs also identifies his educational background, work history and specific roles at the SBA (*id*. ¶¶ 3-6, 9-11); states that, despite Prestamos' present effort to strike his testimony, its counsel in another matter actually approached him to serve as *Prestamos*' expert which he declined because he was already retained here (*id*. ¶ 14); describes the purpose and context of the PPP (*id*. ¶¶ 16-21); and also submitted a rebuttal report that addresses Swain's opening report (ECF No. 139-17). Briggs offers the following opinions:

- "Lenders also were obligated to report accurately the status of each PPP loan." ECF No. 139-14 ¶ 20; *accord id*. ¶ 49 ("The 1502 process is an ongoing process and meant to provide to SBA an accurate picture of the status of PPP loans as the lender is the one managing the loans and is in the best position to know with certainty what loans were actually fully disbursed.")

- "PPP was designed as a forgivable loan program and the vast majority of PPP borrowers who did receive their PPP loan proceeds had their loans forgiven." *Id*. ¶ 24. *Accord id*. ¶ 53; ECF No. 139-30 (SBA forgiveness data); ECF No. 139-20 at 14 (Feinstein's testimony that, "[i]n fact, the SBA website today says that of the people who asked for forgiveness, the percentage that received forgiveness was upwards of … 99.5 percent.")

- "In addition, under the parties' note and accompanying loan documents … plaintiffs potentially have to pay back to Prestamos loan proceeds they never received plus interest. In some instances, as alleged in plaintiffs' complaint and quoted from Prestamos collection-related correspondence, these plaintiffs continue to receive notice from the lender Prestamos that they are required to pay back the loan amount with associated interest as of 2023. These notices suggest that SBA records managed by Prestamos continue to show these loans as disbursed since 2021 although plaintiffs allege these loans were not disbursed to them." ECF No. 139-14 ¶ 25; *accord id* ¶ 53 [sic; should be ¶ 54] ("As also noted above, some plaintiffs and class members are now subject to claims by Prestamos to repay …. Assuming the truth of the allegations here, I also believe this is also inconsistent with the intent of the PPP.")

- "The promissory note Prestamos used also contains a release of the lender at section 10 of the note which I understand the defendants argue shield them from all claims. Generally, a PPP lender would not disburse a PPP loan until the parties had signed the note and the borrower returned the required loan documentation." *Id*. ¶ 35

- "Third and unlike [*CPF*], the class here as plaintiffs' complaint also alleges includes only those who failed to receive their approved PPP loans ***and*** who Prestamos 'reported to the SBA that the loan proceeds were disbursed.' Complaint paras. 376 – 377. This also is an important distinction because I believe Prestamos, as a matter of both fairness and the intent of the PPP, should not have it both ways: obtaining the loan processing fee based on reporting the loans as fully disbursed on the one hand, but arguing on the other hand that a mere unsuccessful attempt to fully disburse the loan shields it from claims. The PPP was clear in that the lender should obtain a loan processing fee if it fully disbursed the loan(s). The PPP was also clear that the lender had to accurately report to the SBA concerning the status of PPP loans." *Id.* ¶ 37

- "Assuming the truth of the allegations here, I believe the 'stuck' plaintiffs and class members were harmed when their loans weren't fully disbursed in a timely manner as required by SBA rules. These borrowers weren't eligible to receive PPP funds from another lender as they contracted with Prestamos and Prestamos had reported to SBA that their loans had been fully disbursed." *Id.* ¶ 52

<u>Feinstein</u>

Feinstein's report also identifies his background, credentials and experience (ECF No. 139-13 ¶¶ 9-20); provides context concerning Prestamos and the PPP (*id.* ¶¶ 24-32); and describes the methodologies he considered to support his opinions. *Id.* ¶¶ 33-48. "After considering a variety of damages methodologies" (*id.* ¶ 23), Feinstein concluded that an award of the loan amount plus interest would be both "a feasible common class-wide methodology that provides a conservative measure of the economic damages sustained by each Class member" (*id.*), and that this methodology "is consistent with Plaintiffs' theory of liability." *Id.* ¶ 22.

<u>The Governing Legal Standards</u>

"Before testimony can reach the jury under the cloak of expertise, the Court must evaluate it for three criteria: qualification, reliability and fit." *Bombin*, 2023 WL 5832166, at *5. "A witness is *qualified* to provide expert testimony only if the witness has 'specialized expertise' in the testimony's subject matter" (*id* at *6); "A witness's testimony is *reliable* only if it is founded upon 'good grounds'" (*id*); "And lastly, a witness' testimony *fits* a case only if it would help the trier of fact to understand the evidence or determine a fact in issue." *Id.*

Although there is "a strong preference for admitting any evidence that may assist the trier of fact" and "Rule 702 … has a liberal policy of admissibility," *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008), "[t]he burden to establish that each requirement is satisfied by a preponderance of the evidence rests with the party offering the expert testimony." *Bombin*, 2023 WL 5832166, at *6. Plaintiffs' experts satisfy each of these requirements.

Argument

Plaintiffs' Experts are Qualified

Plaintiffs' experts have the necessary experience and expertise to render their opinions in this case. Manger and Briggs helped implement and administer the PPP and their testimony both interprets and provides context for the PPP on which their opinions are based. That subject matter is squarely within their specialized expertise.

Prestamos challenges the testimony of both Manger and Briggs because they are not "a lawyer, let alone an expert in class action litigation." ECF No. 143-1 at 1. But it cites no case or other rule requiring a regulator, let alone a senior regulator with direct experience in the subject matter at issue, to have what Prestamos calls "the benefit of legal training" or be a lawyer. *Id*. Prestamos' position is also contradictory. It argues that Manger and Briggs are unqualified to address any issue that could assist in the Court's adjudication of class certification on the one hand (ECF No. 143-1 at 1), and that their opinions are irrelevant because they fail to address those very issues on the other hand. *Id*. at 12-13.

Likewise, Feinstein's credentials qualify him in this case to render his opinions. In fact, Prestamos correctly notes that Feinstein "has testified '[a]t least a hundred' times" (*id*. at 1), but points to no authority supporting the wholesale striking of his testimony it seeks. Prestamos also asserts that "Feinstein provides improper legal opinion, explaining why he believes class certification should be granted here even though it was denied in" *CPF*. *Id*. at 7. But it supports that argument only by quoting Feinstein's statements that "'[T]his case and proposed Class is materially different" than *CPF* and "Plaintiffs obtained [certain] evidence in discovery" (*id*.).

Prestamos also argues that Manger and Briggs offer improper legal opinion testimony. In doing so, Prestamos ignores the distinction between impermissible conclusions of law and other appropriate conclusions and opinions routinely offered by experts.

First, an expert may form an opinion on an ultimate issue of fact. *See* Fed. R. Evid. 704 ("An opinion is not objectionable just because it embraces an ultimate issue."); *Wagner v. Progressive Corp*., 2021 WL 6137027, at *3 (Dec. 29, 2021) (Gallagher, J.) (accord; "The Court will admit Setcavage's testimony so long as he refrains from framing his opinions as legal conclusions."); *Forrest v. Beloit Corp.*, 424 F.3d 344, 353 (3d Cir. 2005) (affirming admission of expert testimony addressed to ultimate factual issue, holding that "under FRE 704 an expert witness may offer testimony concerning the ultimate issue in the case.").

Second, it is proper for an expert to provide background testimony on federal regulations. *See United States v. Tartaglione*, 815 F. App'x 648, 651 (3d Cir. 2020) ("[T]he District Court did not abuse its discretion by allowing testimony on background non-governing legal standards …"); *Hartle v. FirstEnergy Generation Corp.*, 2014 WL 1117930, at *2 (W.D. Pa. Mar. 20, 2014), on reconsideration in part, 2014 WL 5089725 (W.D. Pa. Oct. 9, 2014) ("Background information about a statute or regulation may be helpful to the jury."); *In re Flonase Antitrust Litig*., 884 F. Supp. 184, 198 (E.D. Pa. 2012) (testimony concerning "FDA regulatory policy and practice is relevant and helpful to the trier of fact").

Third, an expert report may include a discussion of "industry norms and practices[.]" *United States v. Leo*, 941 F.2d 181, 197 (3d Cir. 1991) ("It is … clear that it was within the district court's broad discretion to conclude that Moran's testimony about customs and practices within the defense industry would be helpful to the jury in understanding what someone with Leo's experience in that industry was likely to have known."); *United States v. Xue*, 597 F. Supp. 3d 759, 769 (E.D. Pa. 2022) (admitting testimony regarding "biopharmaceutical industry … customs and practices for protecting information characterized as confidential").

Fourth, expert evidence regarding contract terms may also be helpful, warranted and admissible. *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, 2011 WL 204619, at *13 (E.D. Pa. Jan. 20, 2011) ("[N]umerous courts, both within and outside of the Third Circuit, have permitted expert testimony … as to the meaning of a particular contract term … so long as the expert's testimony does not venture into the realm of purely legal contract construction or interpretation"); *Dow Chem. Canada Inc. v. HRD Corp.*, 656 F. Supp. 2d 427, 437 (D. Del. 2009), as corrected (Oct. 15, 2009), *aff'd*, 587 F. App'x 741 (3d Cir. 2014) (admitting testimony of expert who was "not offering an interpretation of law, but testimony regarding the meaning of technical terms in the field" encompassed by the parties' contract).

Particularly in view of the Court's gatekeeping role and these principles, Plaintiffs' expert reports should not be stricken in full even if they did include conclusions of law. None of Prestamos' cases requires a different result and all are also distinguishable. *See Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 218 (3d Cir. 2006) (admitting expert's "testimony regarding securities industry custom"); *Rivera-Cruz v. Latimer, Biaggi, Rachid & Godreau, LLP*, 2008 WL 2446331, at *5 (D.P.R. June 16, 2008) (excluding testimony of expert who "blindly relied on information given to him by counsel"); *Piepes v. Nai Entm't Holdings LLC*, 394 F. Supp. 3d 315, 319 (E.D.N.Y. 2019) (expert opinion "has no explanation, citation or analysis"); *Kuhar v. Petzl Co.*, 2022 WL 1101580, at *8 (3d Cir. Apr. 13, 2022) ("no quantitative data or quantitative testing results to support the [opinions]"); *Wood v. Showers*, 822 F. App'x 122, 124 (3d Cir.

2020) (expert "did not provide a basis for concluding that his proposed testimony was the product of reliable principles"); *Torain v. City of Phila*., 2023 WL 1749521, *3 (E.D. Pa. Jan. 12, 2023) ("Here, Plaintiff makes no arguments as to how Mr. Pollini's report is reliable or fits to the facts of this case."); *Ctr. City Periodontists, P.C. v. Dentsply Int'l Inc*., 321 F.R.D. 193, 203 (expert "all but admitted his testimony was irrelevant").

The Briggs and Manger Reports are Reliable

Contrary to Prestamos, the Manger and Briggs reports are reliable. Those reports are "based on sufficient facts or data" under Fed. R. Evid. 702(b), are "the product of reliable principles" under Fed. R. Evid. 702(c), and reliably apply to the facts of this case under Fed. R. Evid. 702(d). Prestamos does not even challenge these experts' reliability under Rules 702(b), (c) or (d).

Instead, Prestamos asserts that "[s]ignificant aspects of the Briggs and Manger reports are demonstrably incorrect" by mischaracterizing their opinions. ECF No. 143-1 at 8. In particular, Prestamos first claims that "both Manger and Briggs state that, once a PPP loan application was submitted and an SBA number was assigned, a borrower's loan was required to be funded." *Id*. But the very testimony Prestamos quotes says no such thing. Instead, both Manger and Briggs testified, and all parties *agree*, that the borrower also had to provide the requisite loan documentation. *See, e.g.,* ECF No. 139-12 ¶ 20; ECF No. 139-14 ¶¶ 20, 33.

Prestamos also suggests that as "a non-depository institution" it is immune from the requirement to file accurate Form 1502 reports. ECF No. 143-1 at 9. That of course neither is nor can be the rule, and is also countered in any event by the unrebutted testimony of both Manger and Briggs and the PPP. *See, e.g.*, ECF No. 139-12 ¶ 20; ECF No. 139-14 ¶ 46.

Prestamos also argues that Manger and Briggs fail to "connect their allegations relating to

Form 1502 to any entitlement or duty to Plaintiffs, nor do they explain how the filing of Form 1502s while their loan applications remained pending caused Plaintiffs' injuries." ECF No. 143-1 at 9. This argument is incorrect because Prestamos' 1502s kept Plaintiffs' and class members' loans open on the SBA's books and hence liable to repay them as Manger's unrebutted testimony also states. ECF No. 139-12 ¶ 20; ECF No. 139-20 at 11 ("these loans should not have remained opened on the SBA's books if they were not fully disbursed"). Prestamos' sole case is distinguishable. *See In re Lincoln Nat'l 2017 COI Rate Litig*., 620 F. Supp. 3d 230, 247 (E.D. Pa. 2022) (expert made "unsupported assumptions").

Prestamos also faults Manger and Briggs for their opinion that Prestamos should not receive a loan processing fee for loans it failed to fund. But that too is a disagreement on the merits, not a reason to exclude wholesale the Manger and Briggs reports. *See, e.g., Protocomm Corp. v. Novell Advanced Services*, 171 F. Supp. 2d 473, 481 (E.D. Pa. 2001) (Defendants "focus not on whether the reasoning is valid and the methodology reliable, but rather on whether the conclusions themselves are correct. That is not the proper inquiry in a test for admissibility."). Further, the only authority Prestamos cites for its argument it can keep fees on unfunded loans actually applies as Prestamos concedes only to "a loan that was *cancelled* … *after disbursement* … unless the Lender is found guilty of an act of fraud in connection with the PPP loan." ECF No. 143-1 at 10. Although it asserts otherwise (ECF No. 142 at 18), Prestamos provides no evidence that it cancelled class member loans. To the contrary, Prestamos admits it filed the 1502s reporting the loans as funded to obtain PPPLF advances (ECF No. 143-1 at 9; ECF No. 142-4 ¶ 31) -- by inference, for *all* 7,417 class members, $122,489,761.00 in PPP loan principal, and $17,935,811.00 in fees that Prestamos' own evidence has identified are specifically at issue for the two Classes in this case. *See* ECF No. 139-28.

Finally, Prestamos also argues that "Briggs and Manger also incorrectly assert or imply that Prestamos improperly retained the loans it ultimately could not deposit in borrowers' account." ECF No. 143-1 at 11. It cites the August 9, 2024 Castillo declaration that Prestamos served that same day (the deadline for expert rebuttal reports), and then faults Manger and Briggs for not addressing that declaration in their rebuttal reports due the same day or their opening reports due July 12, 2024. Even with that, however, Castillo merely asserts that "[i]n September 2021, Prestamos returned the credit advances from the Federal Reserve for loans that were not ultimately funded" -- without identifying the amount, which loans, whether it included all the advances on class member loans, the status of income it made on those advances or any other facts (which Plaintiffs will also pursue in Phase II discovery).

Plaintiffs' Expert Testimony Fits in This Case

The requirement that expert testimony "fit" the case is "primarily a relevance concern." *Bombin*, 2023 WL 5832166 at *6. Under *Daubert*, relevance "should be evaluated under the standard expressed in" Fed. R. Evid. 401, which is whether "the proffered evidence … will assist the trier of fact to understand the evidence or determine a fact in issue." *Id*. *Forrest v. Parry*, 930 F.3d 93, 114 (3d Cir. 2019) ("[T]he bar for what constitutes relevant evidence is low. The test is whether the evidence has '*any tendency* to make a fact more or less probable than it would be without the evidence,' where 'the fact is of consequence in determining the action.'") (quoting Fed. R. Evid. 401) (emphasis in original).

The Manger and Briggs reports are relevant because they provide background and context for the PPP and to assist in understanding the Loan Documents, the 1502 reporting obligations and the PARs. The Feinstein report is relevant and arguably even required under Rule 23 given Plaintiffs' burden to demonstrate that damages can be computed classwide consistent with Plaintiffs' claim. *See, e.g., Shields v. State Farm Mut. Auto. Ins. Co*., 2021 WL 4486097, at *1 (W.D. La. Sep. 29, 2021) (denying motion to strike expert report that "offered an opinion on the methodology for calculating damages class-wide"); *Perma-Liner Indus., Inc. v. U.S. Sewer & Drain, Inc.*, 2009 WL 10685093 (E.D. Pa. July 15, 2009) (denying motion to exclude expert report addressed to breach of contract damages); *Fallowfield Dev. Corp. v. Strunk*, 1992 WL 301282, at *8 (E.D. Pa. Oct. 13, 1992) (same).

Prestamos also contradictorily argues that Feinstein's damages model is "simple arithmetic" that does not require an expert on the one hand (ECF No. 143-1 at 12), and that it is wrong because it "fails to consider differences among class members" and "consequential damages" on the other hand. *Id*. at 13. But that does not mean Feinstein fails to set forth a damages model or that his methodology violates *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Instead, it also amounts to a disagreement on the conclusion, not a legitimate challenge to admissibility. Prestamos is also incorrect since Feinstein's model also includes prejudgment interest. ECF No. 139-13 ¶ 42. Indeed, Prestamos' failure to ultimately fund the SBA-approved, widely *forgivable* class member PPP loans at issue here bears no resemblance to the damages testimony in the sole case Prestamos cites, *In re Paulsboro Derailment Cases*, 2014 WL 4162790, at *13 (D.N.J. Aug. 20, 2014), where "individualized determinations" were required to measure lost business income allegedly caused by a nearby train derailment.

Again, moreover, most fundamentally the Court is quite capable to determine not only relevance but also the weight that it may accord to any of Plaintiffs' expert reports and opinions. *See United States v. Xue*, 597 F. Supp. 3d 759, 770 (E.D. Pa. 2022) (denying motion to exclude expert testimony, noting that defendant's arguments "regarding 'reliability' and 'fit' go to the weight of the experts' testimony, rather than to its admissibility"); *ConsulNet Computing, Inc. v.*

Moore, 631 F. Supp. 2d 614, 619 (E.D. Pa. 2008) (denying motion to exclude expert testimony, noting that "any deficiency in corroboration will go to the weight of the evidence at trial").

Prestamos Provides No Basis To Strike The Entirety Of Any Report

For the reasons explained above, Prestamos provides no legitimate basis to strike any of the reports in their entirety. But should the Court determine that any of Plaintiffs' specific expert opinions are subject to being stricken, that still provides no basis to strike the reports in full. Instead, the Court should ignore or strike only the particular opinion or portions of the opinion that the Court may find objectionable. *See, e.g.*, *Chebbani v. United States Dep't of Agric.*, 2023 WL 3182932, at *10 (E.D. Pa. May 1, 2023) (denying in part defendant's motion to exclude plaintiff's expert); *Sec. & Exch. Comm'n v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 250, 262 (E.D. Pa. 2021) (granting *Daubert* motion as to certain issues). Prestamos' own cases are in accord. *See Mahood v. Narcisco*, 549 F. App'x 99, 102 (3d Cir. 2013) (precluding testimony for "several conclusions"); *Elcock v. Kmart Corp*., 233 F.3d 734, 738 (3d Cir. 2000) (qualifying one expert, rejecting another); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003) (limiting testimony); *Taylor v. SEPTA*, 2024 WL 3205209, at *12 (E.D. Pa. June 27, 2024) (admitting certain testimony for "relevant background information"); *In re Lincoln*, 620 F. Supp. 3d at 252 (declining to strike plaintiffs' damages expert where defendant's "argument goes to the weight of his testimony, not its admissibility").

Conclusion

For the foregoing reasons, Prestamos' motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2024, the foregoing was electronically filed and served through the Court's CM/ECF system to counsel of record.

/s/ Lawrence J. Lederer
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