EX. 17 -- THE REBUTTAL REPORT OF BRIGGS DATED AUG. 9, 2024

Report of William Briggs – Rebuttal to Report of Kenneth A. Swain

Alicia Marshall, et al.
vs.
Prestamos CDFI, LLC, C.A. 5-21-cv-04337-JMG (E.D. Pa.)

August 9, 2024

1. Counsel for defendant Prestamos CDFI, LLC ("Prestamos") retained Mr. Kenneth A. Swain as a proposed expert on the lending programs of the SBA, including the PPP.[1] Mr. Swain produced a report dated July 12, 2024. This rebuttal addresses certain issues raised in Mr. Swain's report. This rebuttal report does not address every argument in the Swain report. However, that does not mean I agree with any such other arguments, and I reserve the right to supplement or amend this rebuttal if and as the Court may permit.

2. Mr. Swain states in his opening report that he has 35 years of experience in commercial banking, many of those years spent on issues "in and around the SBA and its lending programs." Mr. Swain also notes in that report that he personally processed 330 PPP loan applications of which 300 were approved and funded.[2] But nothing in Mr. Swain's report or his curriculum vitae attached as Appendix A to his report indicates he ever worked at the SBA or for any government agency, whether during the PPP or otherwise. Instead, Mr. Swain's curriculum vitae reflects that, from July 1972 through the present, Mr. Swain worked for 14 different companies ranging from medical products to commercial banking. In contrast, I helped oversee the daily management of the PPP while serving as a senior SBA official from March 2020 to

[1] *Expert Report of Kenneth A. Swain, July 12, 2024, para. 10*
[2] *Expert Report of Kenneth A. Swain, July 12, 2024, para. 3*

January 2021 as reflected in my opening report dated July 12, 2024 (at paras. 9-11).

a. Overview of Swain Report

3. Mr. Swain's report dated July 12, 2024, comprises three separate areas: 1. An overview of the PPP lending program and including the ACH disbursement process; 2. Potential reasons why Putative Class members as he defines it in his report did not receive PPP loan funds; and 3. Why PPP loans may not have been fully forgiven.[3]

4. The Third Amended Complaint asserts that the SBA records provided to the agency by the lender Prestamos, including SBA Form 1502 reports, show Plaintiffs' loans as fully disbursed which in turn triggered the payment of PPP lender fees from SBA to the lender. Those criteria are now a direct part of the definition of the two classes alleged in that Third Amended Complaint (at paras. 376-377).

5. The Plaintiffs' class is narrower (but still noteworthy in terms of the large number of alleged members, even based on Mr. Swain's own analysis and opinions) from the class alleged in the *Greathouse v. Capital Plus Financial, LLC*, No. 4:22-CV-0686-P (N.D. Tex.) lawsuit, where I also submitted an expert report for plaintiffs. The two classes alleged here include only borrowers in Plaintiffs' respective states (not a national class as alleged in *Capital Plus*) who were approved by the SBA for their PPP loans, returned all loan documentation, failed to get funded, but who Prestamos is also alleged to have reported to the SBA that the loans were

[3] *Expert Report of Kenneth A. Swain, July 12, 2024, para. 10*

funded ***and*** thus obtained the SBA loan processing fee. *See* Third Amended Complaint paras. 376-377.

6. PPP lenders usually disbursed their funds electronically to borrowers via the Automated Clearing House (ACH) payment mechanism. Mr. Swain provides an overview of ACH processes. From this overview, Mr. Swain further suggests there are "individualized" reasons why each of the named Plaintiffs' loans may not have been disbursed. In fact, Mr. Swain uses the term "individualized" repeatedly in his report. *See* Swain Report paras. 15, 16, 27 (two times), 35, 38, 39, 52, 53, 78, 86 and 88.

7. Specifically, Mr. Swain's report paras. 28-53 purports to address reasons why a loan may not have been funded, with paras 28-38 focusing on three different general "scenarios" for non-funding. Paras 54-76 address, in widely varying detail, allegedly why some of Plaintiffs' loans weren't funded.[4]

8. Mr. Swain's report concludes that "… understanding whether the lender was responsible for a failed disbursement requires an *individualized* analysis of each borrower's situation and the timeline of actions (or inactions) of various different parties, such as the borrower, the borrower's bank, the ODFI, the lender, and the LSP."[5]

9. However, one element of Mr. Swain's report that, in my opinion, is especially notable is not what it includes, but rather what it omits which, again, is part of the explicitly

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[4] *Expert Report of Kenneth A. Swain, July 12, 2024, pp. 16-47*
[5] *Expert Report of Kenneth A. Swain, July 12, 2024, para. 38* (emphasis added)

defined classes alleged in the Third Amended Complaint. Mr. Swain fails to address that the two alleged classes here include state-specific borrowers whose loans were never fully funded ***and*** who Prestamos filed SBA 1502 reports certifying to disbursement of the loans to receive a lender fee. *See* Third Amended Complaint paras. 376-377.

10. In fact, Mr. Swain fails to mention in his report anything about SBA Form 1502 reporting or Prestamos' SBA Form 1502 reports in this case. Mr. Swain further fails to address Plaintiffs' allegations that Prestamos also obtained advances from the Federal Reserve's PPP Liquidity Facility (the "PPPLF") that, under the PPP, were secured by and to be used to fund class member loans. Mr. Swain also fails to note that the class criteria have been narrowed and specifically include and incorporate Prestamos' allegedly false reporting to the SBA that the loans were funded in order to obtain the fee. All class members share these characteristics in this case because of the way the two classes are defined. If, for example, Prestamos didn't report the class member loan as funded and obtained a fee, that loan again by definition of the classes would not be included in the alleged classes.

11. Mr. Swain's failure to analyze or mention 1502 reporting is noteworthy as the only way a lender could have received a lender fee for PPP loans is through the SBA 1502 reporting process. Plaintiffs also discuss the SBA reporting process in detail in their Third Amended Complaint which, at Appendix B of his report (at p. App'x B-1), Mr. Swain acknowledges he considered as part of preparing his opening report. *See* Third Amended Complaint paras. 70-72, 385-386, 389-392.

12. There is no mention of Prestamos' SBA Form 1502 reporting process in Mr. Swain's opening report, nor any acknowledgement or discussion by Mr. Swain of public records based on Prestamos' reporting to the SBA falsely showing that named Plaintiffs received their PPP loans when in fact Plaintiffs' claim that their loans were never fully disbursed. *See* Third Amended Complaint paras. 130, 170, 249, 268, 280, 292, 310, 322, 335, 347, 358, 369.

13. As experienced SBA PPP lenders would know, the 1502 reporting process is both how a lender reports and certifies to SBA on ongoing basis about the loans in their PPP loan portfolio and also how a lender receives its fees for allegedly fully disbursing the PPP loan. As noted in a 2021 PPP regulation: "SBA has made available a specific SBA Form 1502 reporting process through which PPP lenders report on PPP loans and collect the processing fee on fully disbursed loans to which they are entitled."[6]

14. As Plaintiffs allege in their Third Amended Complaint (para. 386), the SBA required lenders to file the Form 1502 reports also on a monthly basis to update and identify the status of each PPP loan. Form 1502 for the PPP program repeatedly notes that all loans must be fully disbursed. Lenders were repeatedly instructed in the PPP Form 1502 to leave the field labeled "**Amount Undisbursed on Total Loan:** Enter $0.00. PPP loans must be fully disbursed."[7] There was no option for lenders to report loan amounts that were not fully disbursed

[6] *"Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," Federal Register, January 14, 2021, available at https://www.federalregister.gov/documents/2021/01/14/2021-00451/business-loan-program-temporary-changes-paycheck-protection-program-as-amended-by-economic-aid-act, p. 3709*

[7] *SBA PPP Form 1502 available at https://catran.sba.gov/ftadistapps/ftawiki/pdf/p.cfm?a=Paycheck+Protection+Program+1502+Reporting.pdf&utm_medium=email&utm_source=govdelivery*

as the requirement is and was clear that a one-time full disbursement was required to obtain a lender fee. Lenders were also required to report accurately as to the status of loans in their 1502 reports.

15. Thus, even assuming Mr. Swain is correct in his report that Prestamos failed to fund Plaintiffs' and class member PPP loans for "individualized" reasons, Prestamos' Form 1502 reports are alleged in this case to have falsely reported the status of all of those "loans" as disbursed. *See also* SBA Procedural Notice "Second Updated Paycheck Protection Program Lender Processing Fee Payment and 1502 Reporting Process" (Feb. 8, 2021) (cited in Plaintiffs' Third Amended Complaint at paras. 391-392) (stating 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 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 First Draw Loans and Second Draw 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***" (emphasis added)).

16. Nor does Mr. Swain analyze or mention in his opening report Plaintiffs' allegations that Prestamos obtained advances from the PPPLF to fund the loans, or what Prestamos did with those funds or the present status of those advances. This second omission is also noteworthy, even assuming Mr. Swain is correct that certain Plaintiffs failed to receive their loan proceeds because those proceeds were returned to Prestamos, as the PPPLF advances were

secured by and to be used to fund PPP loans as also alleged in Plaintiffs' Third Amended Complaint (at paras. 106-108, 387-389).

17. In my opinion, therefore, a key feature of this case - and unlike the Court found in *Capital Plus* - is not "why" any of the Plaintiffs' loans may not have been fully disbursed. Even assuming Mr. Swain's conclusion is correct that the Plaintiffs' loans weren't funded for many potential "individualized" reasons, the false reporting that the loans were fully disbursed is an explicit part of the class definition here.

18. The allegedly inaccurate 1502 reports are a specific attribute in this case that is shared classwide by class members, and narrows the alleged two classes here from those asserted in the *Capital Plus* case. *See* Third Amended Complaint paras. 376-377 ("… ***and*** reported to the SBA that the proceeds were disbursed.") (emphasis added).

19. Mr. Swain's opening report even clearly admits to the lack of full disbursement by detailing *the reasons* why certain Plaintiffs' loans may not have been fully disbursed and, in some cases, placing potential blame at the Plaintiffs for not receiving a loan, such as for failing to complete all required loan documentation.[8] But the issue of the completeness of the loan documentation is also different in this case, too, from *Capital Plus*, because Plaintiffs' alleged two classes also addressed that issue and explicitly include only those class members who also "provided to Prestamos all required loan documentation" (Third Amended Complaint paras. 376-377).

[8] *Expert Report of Kenneth A. Swain, July 12, 2024, para. 38*

20. Further, Mr. Swain's report also ignores Plaintiffs' claim that Plaintiffs and class members are still potentially liable under the parties' note to pay back PPP loan proceeds to Prestamos, plus interest, on loans they never received. This exact situation isn't just theoretical, but is alleged to have already happened. *See* Third Amended Complaint paras. 253, 254, 296-300. And in any event, the parties' note contains the explicit and ongoing agreement for Plaintiffs and class members to repay their PPP loans to Prestamos with interest. *See* Exhibit A to Third Amended Complaint para 3 (containing "PAYMENT TERMS").

b. Forgiveness Analysis

21. Mr. Swain's report addresses PPP loan forgiveness considerations with respect to specific *borrowers* - that is, unlike Plaintiffs and the class, those who actually received their loans. Mr. Swain's report further attempts to buttress the argument that Plaintiffs' and class members' alleged "*individualized* circumstance(s)" would determine what, if any, amount of forgiveness such class members could be eligible to receive.[9]

22. However, I believe Mr. Swain's PPP loan forgiveness analysis misses a critical threshold issue which casts doubt on why the allegedly "individualized" analysis he does undertake is even relevant in the circumstances of this case. The critical threshold issue is that Plaintiffs and class members all allege in common that their loans were not disbursed – again, *even assuming* Mr. Swain is correct regarding why certain of those loans were not funded.

[9] *Expert Report of Kenneth A. Swain, July 12, 2024, para. 78 (emphasis added)*

Assuming as alleged Plaintiffs' and class member loans were not disbursed, Plaintiffs and class members were effectively precluded from even *applying* for loan forgiveness, because they could not represent in the SBA forgiveness application that the PPP loan proceeds were used for permissible purposes under the PPP. They could not make that representation because they allegedly never received the PPP loan proceeds, let alone properly used those proceeds.

23. In particular, page 1 of the PPP loan forgiveness application requires borrower certification that "The Borrower has complied with all requirements in the" PPP "including the rules related to … eligible uses of PPP loan proceeds …."[10] For instance, borrowers had to certify that they used the PPP loan proceeds for payroll costs among other permissible uses under the PPP. *See* https://www.sba.gov/document/sba-form-3508s-ppp-3508s-loan-forgiveness-application-instructions (last visited Aug. 2, 2024).

24. In my opinion, a borrower who has not received funds would not be able to properly meet this certification. Thus, in my opinion, any presentation speculating about what any borrower may or may not receive in the PPP forgiveness process in this case is of questionable relevance. A far greater consideration is whether they could have properly even sought forgiveness in the first place. If the SBA-approved Plaintiff and class member failed to receive the PPP loan proceeds, the Plaintiff and class member could not properly make any representation regarding the threshold requirement for forgiveness regarding how the proceeds were actually ***used***. If asked by a supposed "borrower" in such a situation what to do, I would direct them work

[10] *See https://www.sba.gov/sites/default/files/2021-07/PPP%20--%20Forgiveness%20Application%20and%20Instructions%20--%203508S%20%287.30.2021%29-508.pdf at p.1*

with the lender to address their issue(s) and forego making false statements on federal loan program documents.

Dated: August 9, 2024

William Briggs

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