IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

Eric Greathouse, et al.,

Plaintiffs,

v.

Capital Plus Financial, LLC, et al.,

Defendants.

Case No. 4:21-cv-1243-BRW

Plaintiffs' Memorandum in Opposition to
Defendants' Motion to Dismiss

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Introduction

Defendants' motion is notable for what they choose to omit. They say nothing about how many of the 472,036 Small Business Administration ("SBA")-approved Paycheck Protection Program ("PPP") loans, or how much of the over $7.5 billion in total PPP loan proceeds, defendant Capital Plus Financial, LLC ("CPF") committed to fund but failed to. They say nothing about the total PPP loan advances CPF obtained from the Federal Reserve on those unfunded loans or the status and whereabouts of those proceeds. And they say nothing about CPF obtaining PPP loan fees on the backs of Plaintiffs and other unfunded but SBA-approved borrowers; upstreaming $930 million of PPP fees, including those ill-gotten gains, to its corporate parent, defendant Crossroads Systems, Inc. ("Crossroads"); or Crossroad's distribution in turn, within less than a month thereafter, of over $157 million in the form of a special cash dividend to its own senior leadership.

They also ignore that the central purpose of the PPP's second round of funding in 2021 was to help small businesses, especially those owned by minority, underserved, veteran, and women businesses, harmed by the fallout from COVID-19. The four class representatives here, who run, respectively, insurance adjustor, auto repair, landscaping and artist support businesses, each badly needed the financial help the PPP was designed to provide, just like the other SBA-approved but unfunded class members did for their businesses. Denying Plaintiffs a fair opportunity to pursue their claims in this Court would be not only procedurally improper, but add further injustice to the very class of people Congress established the PPP to support. Defendants' motion provides no basis for dismissal.

First, Plaintiffs have sufficiently alleged the Court's personal jurisdiction over Defendants. CPF did substantial PPP lending directly in Arkansas not just with over 2,500 Arkansas resident business owners, but also for thousands more PPP loans for SBA-approved

borrowers within the coverage areas of the SBA's Little Rock Commercial Loan Service Center (the "LRSC"). Defendants publicly touted the depth of their underwriting investigations into each borrower and reaped millions in fees from their Arkansas contacts. Even if that activity were not by itself sufficient to confer jurisdiction (it is), it exceeds by even more the standards to allow Plaintiffs jurisdictional discovery to develop a fuller record of Defendants' PPP contacts here if the Court has any doubt it may fairly assert jurisdiction based on publicly known facts alone.

Defendants' other arguments also do not justify dismissal at this stage of the proceedings. Plaintiffs have Article III standing to assert their breach of contract claims by virtue of the SBA's approval of their PPP loans, their signing binding loan agreements, CPF's breach in failing to fund those loans and the damages Plaintiffs incurred by being deprived of the use of those funds to support their businesses. Defendants acknowledge that those contracts were binding and enforceable when then they submitted them to the SBA for payment of CPF's loan processing fees.

Plaintiffs' unjust enrichment claims are sufficiently pleaded in the alternative to their contract claim, as Plaintiffs conferred benefits on Defendants in the form of PPP loan fees to fund their loans. Plaintiff Covarrubias also sufficiently pleads in the alternative that he and the proposed California subclass are entitled to injunctive relief and restitution under California's Unfair Competition Law ("UCL"), as Defendants' conduct was both "unlawful" and "unfair" under that statute. And plaintiff Myles sufficiently pleads on behalf of the proposed North Carolina subclass a claim under the North Carolina Unfair and Deceptive Trade Practices Act ("NCUDTPA") since, once induced by and locked into CPF for PPP funding, she could not properly apply for another PPP loan. And Crossroads's *own* words show it controlled and

directed CPF's PPP lending and thus was its alter ego, although Defendants' arguments otherwise raise factual disputes inappropriate for resolution now anyway. The Court should deny Defendants' motion in full.

Factual Background

On March 27, 2020, following the worldwide outbreak of COVID-19, Congress passed the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") to provide over $2 trillion in immediate assistance to individuals, families and businesses. ¶ 41.[1] An integral part of the CARES Act was the PPP. Administered by the SBA, the PPP authorized $813.7 billion in PPP loans through May 31, 2021. ¶ 45. PPP loans are guaranteed by the SBA with the expectation that they will be forgiven for all borrowers who use them for authorized purposes. ¶ 44. To ensure that small businesses and sole proprietors received PPP loan proceeds quickly and efficiently, the SBA delegated lending to authorized private PPP lenders and required PPP loans to be funded within ten days of SBA approval and execution of the loan documents. ¶ 55. In return for each PPP loan, the SBA paid PPP lenders loan processing fees. ¶ 4.

Defendants' PPP Operations: On December 27, 2020, PPP loan processing fees were increased to address PPP lenders' neglect of PPP loan applications from sole proprietors and other small businesses, especially minority, underserved, veteran and women-owned businesses. ¶ 50. Whereas originally lenders would receive a five percent fee for loans of $350,000.00 or less, the fee was increased to fifty percent or $2,500.00, whichever is less, for PPP loans of up to

[1] Unless otherwise noted, all paragraph references are to paragraphs in Plaintiffs' Amended Class Action Complaint (Doc. No. 31); all page cites are to the ECF rather than native page number; all emphases are in the original; and all internal quotation marks, alterations, footnotes and citations are omitted.

$50,000.00. As a result, PPP lenders received a flat fee of $2,500.00 for virtually every PPP loan less than $50,000.00. ¶¶ 49-51.

Defendant CPF was an SBA-authorized PPP lender. At the direction of its corporate parent Crossroads, CPF exploited the increased PPP loan fees in 2021 by agreeing to fund 472,036 PPP loans totaling over $7.5 billion in loan proceeds -- the second highest number of PPP loans by any lender in 2021, and more loans than Bank of America, PNC Bank, TD Bank and Wells Fargo combined. ¶¶ 9, 78.

The Federal Reserve advanced the funds to CPF through term loans from the Paycheck Protection Program Liquidity Facility (the "PPPLF") secured by PPP loans. ¶¶ 92-93. PPPLF advances could only be secured by SBA-guaranteed PPP loans, and the principal amount advanced equaled the principal amount of the PPP loan pledged to secure the advance. ¶ 96. In total, CPF received at least $6,458,857,759.43 from the PPPLF to fund PPP loans. ¶ 100.

Crossroads' control over CPF's PPP activities was continuous and substantial. Crossroads is a publicly-traded for-profit company, and wholly owned CPF at all times material. ¶ 7. Among other things, Crossroads directed CPF to upstream to Crossroads the PPP loan processing fees as if Crossroads and CPF were one and the same companies (¶¶ 10-11, 14, 79); both companies shared senior executives including their then-dual CEOs Eric Donnelly ("Donnelly") and CFOs Farzana Giga ("Giga"), who also was a director of Crossroads (¶¶ 30, 83); both companies had overlapping websites that referred to each other (¶ 38); Crossroads made statements in U.S. Securities and Exchange Commission ("SEC") filings and other public statements referring to the companies as one (¶¶ 11, 14, 79, 82); and Crossroads reported in its own SEC filings that *it* earned the PPP lender processing fees even though CPF and not Crossroads was the SBA-approved lender. ¶¶ 11, 79-80.

Defendants' PPP lending activities were extremely lucrative for them and their senior leadership despite failing to fund the SBA-approved loans of Plaintiffs and numerous other SBA-approved borrowers. ¶¶ 117, 133, 144, 155, 158 (a)-(g). In particular, in 2020, CPF's total revenue from operations was $36.6 million. ¶ 77. According to Crossroads's SEC filings, CPF's agreements with Plaintiffs and other SBA-approved borrowers to fund 472,036 PPP loans for over $7.5 billion in 2021 resulted in *Crossroads* reporting that *it* "earned fees from the [PPP] totaling approximately $930 million" (¶ 79), and total revenues of $932.7 million, or *2,446%* higher than the revenues Crossroads earned in the comparable 2020 period. ¶ 88.

Further, less than two months after the PPP lending window closed as of May 31, 2021, Crossroads announced that as a result of a "windfall associated with the PPP loan program" it was "now overcapitalized" and would pay out a special dividend of $40 per share to Crossroads shareholders of record as of July 19, 2021. ¶¶ 14, 85-86. At that time, Donnelly, Giga and other senior executives of Crossroads owned approximately 66% of Crossroads's equity, with Donnelly and Crossroads Chairman Robert Albert ("Alpert") *alone* owning approximately 62.8%. ¶¶ 14, 83-84. The special dividend was paid on July 26, 2021 and totaled approximately $238.9 million, of which Donnelly received $90,227,080, Alpert received $59,691,400 and Donnelly, Alpert, Giga and other senior Crossroads employees and directors collectively received $157,696,080, including from fees earned on SBA-approved class member PPP loans CPF failed to fund. ¶¶ 86-87, 101. No discovery has been produced in this case, but emails from other litigation against CPF reflect that CPF executives were aware of unfunded PPP loan complaints. ¶ 102.

Defendants' PPP Activities in Arkansas: Defendants' PPP activities in Arkansas were substantial and continuous throughout the relevant period. CPF entered into PPP loan agreements

with 2,578 SBA-approved Arkansas residents for $38,715,478.00 in total loan proceeds (¶ 26); collected nearly $7 million in fees attributable to those loans assuming that each such loan resulted in fees of at least $2,500.00 per loan (¶ 27); and conducted underwriting reviews of each PPP loan application. ¶¶ 29-31. *See also* Declaration of Eric Greathouse (the "Greathouse Decl."), attached hereto as **Exhibit A**, ¶¶ 6-15 (describing plaintiff Greathouse's activities in Arkansas to obtain his PPP loan).

While Defendants attempt to minimize, and the Giga declaration largely ignores, CPF's PPP lending activities *in* Arkansas, CPF's underwriting reviews entailed "thorough" investigations of each such borrower. As Alpert and Donnelly stated in a letter to Crossroads's shareholders filed with the SEC: "Though we leaned heavily on our loan service providers for support on the front end, we were *thorough* in reviewing applications on the back end. Whereas most lenders use one to two layers of identity verification and customer compliance mechanisms, we used *four*. This investment in KYC ('knowing your customers') substantially reduced fraud …". ¶ 30 (emphasis added).

Defendants' original motion to dismiss falsely stated that the claims in this case have "no such connection" to Arkansas. Doc. No. 25, at 8. But as Plaintiffs' Amended Complaint alleges, the LRSC they failed to disclose is some three miles from this Court, and is one of only two nationwide SBA service centers. ¶¶ 32-35. CPF communicated directly with the LRSC with respect to PPP loan applicants and borrowers in Arkansas and the other states and territories within the LRSC's coverage area. ¶ 36. The LRSC served not only the East Coast but also Texas, where both Defendants are based, meaning that CPF and also likely Crossroads dealt directly with the LRSC concerning many aspects of PPP lending. ¶¶ 32-37. Three of the four Plaintiffs

reside in states covered by the LRSC (all but plaintiff Covarrubias). ¶¶ 16, 18-19; *see also* https://advocacy.sba.gov/regional-advocates/ (identifying areas covered by the LRSC).

Based on SBA PPP lending data, the coverage areas of the LRSC included 231,268 of CPF's 472,036 in total PPP loan commitments, representing $3,684,000,149 of the over $7.5 billion in total PPP loan proceeds CPF committed to fund in 2021. *See* PPP FOIA - Dataset - U.S. Small Business Administration (SBA) | Open Data (visited May 16-18, 2022); *see also* Declaration of Lawrence J. Lederer in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Request for Jurisdictional Discovery, attached hereto as **Exhibit B**, (the "Lederer Decl.") ¶¶ 8-9 (identifying PPP loan numbers and amounts for areas covered by the LRSC).

Plaintiffs' PPP Loan Contracts: Plaintiffs are the sole proprietors of their own businesses. Plaintiffs all applied for PPP loans to fund their business operations amid COVID, and each:

- timely contracted with CPF for their PPP loans in 2021;
- had their PPP loan applications approved by the SBA;
- signed and returned to CPF all required Loan Documents (¶ 111) namely, the standard form Note; an Additional and Correction Documents Agreement (Errors and Omissions Agreement) (the "Additional Agreement"); a Business Purpose Statement; a Notice – No Oral Agreements signed by each Plaintiff and Ms. Giga; a Written Consent of Governing Body form; an IRS W-9 form; and an Information and Bank Account Certification and Authorization form; *see* Doc. No. 31, at 58-70 (attaching plaintiff Greathouse's standard form Note and other Loan Documents); and
- never received the proceeds of their SBA-approved PPP loans from CPF, despite complying with all of the terms of the Loan Documents.

Despite relying on a provision in the Note containing a limited and inapplicable release (Doc. No. 31, at 62), Defendants contend that no contract exists and that they were not obligated

to actually fund any of Plaintiffs' loans. But that contention is belied by the terms of the Loan Documents and the PPP. In particular, each promissory Note:

- identifies the specific SBA-approved PPP loan, loan number and loan amount;
- specifies that the parties are, respectively, each Plaintiff "Borrower" and the "Lender" defendant CPF;
- states that, "*[i]n return for the Loan*, Borrower promises" to pay the principal plus "interest on the unpaid principal balance, and all other amounts required by this Note" back to CPF if not forgiven (emphasis added);
- contains other loan repayment terms and events of default and CPF's rights in the event of default and other provisions, including that "[a]ll individuals and entities signing this Note are jointly and severally liable"; and
- states that, "[b]y signing below, each individual or entity becomes obligated under this Note as Borrower." *See* ¶¶ 174-177; Doc. No. 31, at 58-70.

Similarly, the Additional Agreement states that, "[i]n consideration of Capital Plus Financial, LLC … *making the above loan*, each of the undersigned, jointly and severally, do hereby agree as follows ….": identifies the loan amount; obligates each Plaintiff class member borrower to deliver other documents "*pertaining to the above loan*"; and states that CPF "is relying on this agreement *in making the above loan* …." Doc. No. 31, at 64 (emphasis added).

The "Notice - No Oral Agreements" identifies each Plaintiff and the SBA-approved loan amount; governs the "**Loan by Lender, Capital Plus Financial, LLC to Borrower**"; states that "**THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES …";** defines the term "Loan Agreement"; and is executed by both parties. Doc. No. 31, at 66. And the Information and Bank Account Certification and Authorization form identified the borrower's account and routing numbers for CPF "to deposit the loan proceeds on the [Plaintiff] company's behalf." Doc. No. 31, at 70. In addition, applicable PPP rules are incorporated in the Loan Documents and affirmatively bound PPP lenders to disburse the loans. *See, e.g.*, 86 Fed. Reg. 3692, 3710 ("The lender *must* make a one-

time, full disbursement of the PPP loan within ten calendar days of loan approval") (emphasis added).

Despite these facts and follow-up efforts to get funding, CPF failed to fund any of Plaintiffs' PPP loans. ¶¶ 115-116, 128-132, 143, 154. As a result, Plaintiffs' businesses were damaged by being deprived of funds to which Plaintiffs were contractually entitled. ¶¶ 119, 135, 146, 157. Once signed up with CPF, moreover, Plaintiffs and other class member borrowers were unable to apply for PPP loans from other PPP lenders. ¶¶ 58-60. The Amended Complaint identifies numerous other complaints by unfunded CPF borrowers. *See* ¶¶ 158(a)-(g). Plaintiffs allege that Defendants' failure to fund their PPP loans breached the standard form Loan Documents of all similarly situated class member borrowers (¶¶ 161, 172-185); constituted unjust enrichment only in the alternative, to the extent Plaintiffs' contract claims provide less than complete relief (¶¶ 193-203); and violated the consumer protection statutes of California again only in the alternative to the contract claim (¶¶ 204-217) and North Carolina (¶¶ 218-230).

Argument

I. The Court Has Personal Jurisdiction Over Defendants

A. Legal Standard

To defeat a motion to dismiss for lack of personal jurisdiction, Plaintiffs need only make "a prima facie showing that personal jurisdiction exists," which requires pleading only "sufficient facts to support a reasonable inference that the defendant can be subjected to jurisdiction within the state." *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 591-92 (8th Cir. 2011). The showing required at this stage is "minimal." *Id.* The evidence should be viewed in the light most favorable to the Plaintiffs, and all factual conflicts should be resolved in their favor in deciding whether they have made the requisite showing. *Id.*; *see also Whaley v. Esebag*, 946 F.3d 447, 451 (8th Cir. 2020). Plaintiffs easily chin that low bar here.

The Court may assert personal jurisdiction over Defendants to the maximum extent allowed by the long-arm statute of the forum state and the Due Process Clause. *See* FED. R. CIV. P. 4(k)(1)(A); *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). Arkansas's long-arm statute authorizes personal jurisdiction to the fullest extent possible under the Due Process Clause. ARK. CODE ANN. § 16-4-101(B); *Anderson v. Dassault Aviation*, 361 F.3d 449, 451 (8th Cir. 2004). Accordingly, to establish personal jurisdiction, Plaintiffs must show only sufficient "minimum contacts" exist so that "traditional notions of fair play and substantial justice" are not offended. *Whaley*, 946 F.3d at 451 (applying Arkansas long-arm statute) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).[2] This requirement is met where the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *K-V Pharm. Co.*, 648 F.3d at 592-93.

The United States Supreme Court's most recent decision on the issue of personal jurisdiction cautions against Defendants' overly narrow view of specific jurisdiction. "None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). There, the Supreme Court clarified that specific jurisdiction requires that "the suit arise out of ***or relate to*** the defendant's contacts with the forum … [and] contemplates that some relationships will support jurisdiction without a causal showing." *Id*. The Supreme Court explained that for specific jurisdiction to attach, a defendant must have "deliberately reached out beyond its home —***by, for example, exploiting a market in the forum State or entering a contractual relationship centered there***." *Id*. at 1025 (emphasis added).

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[2] Because Defendants are not headquartered and do not maintain a principal place of business in Arkansas, Plaintiffs do not advance a general jurisdiction theory. *Daimler*, 571 U.S. at 137.

The Eighth Circuit has established a five-factor test to determine whether sufficient minimum contacts exist, with the first three factors being of "primary importance": "(1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties." *Whaley*, 946 F.3d at 452. The third factor addresses the particular question of specific jurisdiction, and the fourth and fifth factors "carry less weight and are not dispositive." *Id.*

Throughout their motion, Defendants lean heavily on *Walden v. Fiore*, 571 U.S. 277 (2014), but the facts of *Walden* are inapposite. There, the U.S. Supreme Court found no personal jurisdiction existed in Nevada over a Georgia police officer for an intentional tort he committed in Georgia against two Nevada residents as they traveled through the Atlanta airport. *Id*. at 288. *Walden* stands for the unremarkable proposition that a defendant's contacts with a resident alone are not sufficient. But as described below, Defendants have numerous, significant contacts with the State of Arkansas, not just an Arkansas resident. As a result, Defendants' motion to dismiss for lack of personal jurisdiction should be denied.

B. Plaintiff Greathouse's Claims

Plaintiff Greathouse asserts claims for breach of contract and unjust enrichment. Defendants unquestionably are subject to personal jurisdiction with respect to these claims.

The first three factors -- (i) the nature and quality of contacts with the forum state, (ii) the quantity of such contacts, and (iii) the relation of the cause of action to the contacts -- are closely related and may be considered together. *Digi-Tel Holdings, Inc. v. Proteq Telecomms. (PTE), Ltd.*, 89 F.3d 519, 522-23 (8th Cir. 1996). These factors all weigh in favor of the Court's exercise of jurisdiction based on the contractual relationship defendant CPF formed with an Arkansas resident that had foreseeable consequences in the State of Arkansas.

Defendants argue that a contract "in and of itself" is not enough to confer jurisdiction. But the very case cited by Defendants underscores that this principal is one of limited applicability and does not apply to this case. In *Fastpath, Inc. v. Arbela Techs. Corp*., 760 F.3d 816, 824 (8th Cir. 2014), the court found that the defendant was not subject to personal jurisdiction in Iowa because the defendant's solicitation of the confidentiality agreement at issue took place outside Iowa, the contract did not contemplate the exchange of information in Iowa, no information was ever exchanged in Iowa, and any alleged breach of the agreement occurred outside Iowa. There, the only connection to Iowa was the plaintiff's residence, but that is not the case here.

Contrary to Defendants' position, the Supreme Court recently announced that "entering a contractual relationship centered [in the forum]" is indeed sufficient to confer jurisdiction. *Ford Motor Co.*, 141 S. Ct. at 1025. Further, the Supreme Court previously has emphasized the need for a "highly realistic approach" that recognizes that a contract is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985). As a result, factors such as prior negotiations, contemplated future consequences, the terms of the contract, and the parties' course of dealing must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum. *Id*.; *see also K-V Pharm. Co*., 648 F.3d at 594. The Eighth Circuit has determined that solicitation of a business relationship to a resident of the forum,[3] the place of a contract's performance, and a contractual provision requiring a defendant to remit payment to a forum resident are all

[3] The Eighth Circuit has held that these contacts are sufficient even when it is unclear who initiated the contact. *See Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.,*65 F.3d 1427, 1432-33 (8th Cir. 1995).

significant factors that courts should consider in evaluating personal jurisdiction in contract cases. *See, e.g.*, *K-V Pharm. Co*, 648 F.3d at 594-95; *Creative Calling Sols., Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 980-81 (8th Cir. 2015). In light of this well-established precedent, Defendants' argument, relying on the *Calder* effects test, that the effect of a contract in the forum state has no bearing on the jurisdictional analysis, is simply false.

Courts in the Eighth Circuit have applied the same reasoning to financial contracts. For example, in *BPI Development Group, L.C. v. Grange*, the court found jurisdiction proper in Iowa where plaintiffs, Iowa residents, asserted claims for breach of contract and unjust enrichment against non-resident defendants. 181 F. Supp. 3d 604, 613 (S.D. Iowa 2016). Plaintiffs allegedly loaned money to defendants to fund defendants' business outside of Iowa, and defendants failed to repay the loan. *Id*. at 609. The court found that defendants purposefully availed themselves of the laws of Iowa by allegedly soliciting and entering into a loan agreement to be repaid to Plaintiffs in Iowa. *Id.* at 613-14; *see also Razor Cap., LLC v. HP Debt Exch., LLC*, 2013 WL 4483366, at *4 (D. Minn. Aug. 19, 2013) (holding Minnesota court had personal justification over Texas defendant where it had entered into a loan sale agreement with a Minnesota resident even where solicitation and negotiations were handled through defendant's broker).

Defendants make much of the fact that they are not registered to do business in Arkansas, have no employees in Arkansas, maintain no offices in Arkansas and do not advertise in Arkansas. Doc. No. 45, at 29; Doc. No. 44-1, ¶¶ 6-9. But those facts are not dispositive to the personal jurisdiction determination. *See Creative Calling Sols., Inc.*, 799 F.3d at 979 (determining Iowa court had jurisdiction where defendant had no contacts with Iowa apart from one business relationship with plaintiff). Likewise, specific jurisdiction may be exercised where a defendant has never traveled to the forum state. *See Holistic Indus. of Arkansas, LLC v.*

Feuerstein Kulick LLP, 2021 WL 4005872, at *6-7 (E.D. Ark. Sept. 2, 2021) (determining defendant had sufficient contacts where it did not travel to Arkansas, did not advertise in Arkansas and had not actively sought or established any business relationships in the state); *see also Burger King*, 471 U.S. at 476 ("[As] long as a commercial actor's efforts are purposefully directed toward residents of another State ... an absence of physical contacts can[not] defeat personal jurisdiction there.").

In this case, defendant CPF did not just enter into a contract with an Arkansas resident. Rather, it entered into a contract with an Arkansas resident, the terms of which provided that loan proceeds were to be deposited by CPF into a bank account in the State of Arkansas. *See* Doc. No. 31, at 58-70; *see also* Greathouse Decl. ¶¶ 2, 11. Defendants knew the proceeds were to be used to support an Arkansas business given the purposes of the PPP. *Id*. ¶¶ 3, 10. Greathouse completed the loan application in Arkansas and sent it and supporting materials to defendant CPF from Arkansas. *Id.* ¶¶ 6-8, 12-14. Defendant CPF conducted borrower review and underwriting activities with respect to the loan, including confirming the identity of the applicant (an Arkansas resident), reviewing the application and confirming receipt of materials from Arkansas, including the status of the Arkansas business and its payroll. ¶ 29 (citing 86 Fed. Reg. at 3707-08). Defendant CPF then submitted those materials to the federal government on behalf of an Arkansas resident asking the government to fund the loan so CPF could provide money to an Arkansas resident. These facts underscore that this case involves more than a traditional lender-borrower relationship. Here, Defendant CPF agreed to do more than simply loan money; it reviewed and submitted plaintiff's application and materials to the federal government on his behalf and requested federal funding on his behalf.

Further, Defendants admit they, or at least CPF, directed communications, advertisements and documents into Arkansas after the loan was approved by the SBA. Doc. No. 44-1 ¶ 12; Greathouse Decl. ¶¶ 15, 17; *see also Arkansas Labeling, Inc. v. Proctor*, 2022 WL 1498384, at *8 (E.D. Ark. May 11, 2022) ("Although mail, fax, and telephone communications do not alone establish personal jurisdiction, 'in conjunction with other contacts they may support the exercise of personal jurisdiction.'"). As a result of this contractual business relationship with a resident of Arkansas, CPF received, and in turn paid to its corporate parent Crossroads, a benefit in the form of lender fees. ¶¶ 10-11, 25, 79-80. And when CPF failed to fund the loan, damages were felt in Arkansas. Greathouse Decl. ¶ 19.

Defendants also admit that there were borrower-facing advertising and communications directed to Arkansas and services provided in Arkansas (Doc. No. 45, at 32; Doc. No. 44-1, ¶¶ 9-11). Defendants try to hide behind Blueacorn, but their argument is unavailing.[4] As an initial matter, the argument is undermined by Defendants' own representations that "we were thorough in reviewing applications on the back end." ¶ 30. Moreover, to the extent Defendants authorized Blueacorn to take actions on Defendants' or CPF's behalf, courts may exercise personal jurisdiction over a defendant through the acts of its agent. *See Oto Analytics, Inc. v. Capital Plus Financial, LLC*, 2022 WL 1488441, at *5 (stating that "the Court finds Womply was an 'agent'" of CPF's for purposes of PPP lending); *Romak USA, Inc. v. Rich*, 384 F.3d 979, 985 (8th Cir. 2004); *Farmers & Merchs. Bank v. Hamilton Hotel Partners of Jacksonville Ltd. P'ship*, 702 F. Supp. 1417, 1427 (W.D. Ark. 1988) (explaining that Arkansas's long-arm statute "allows the

[4] Under Defendants' own argument, the fact that Greathouse would not have known about CFP's involvement has zero impact on the jurisdictional analysis. Doc. No. 45, at 29; *Walden*, 571 U.S. at 284 (discussing "the defendant-focused 'minimum contacts' inquiry").

court to exercise jurisdiction over one who acts directly or by an agent."). Defendants rely on *Walden* to argue that a defendant's relationship with a third party alone is an insufficient basis for jurisdiction. *Walden*, 571 U.S. at 286. But *Walden* did not address the situation here where, by Defendants' own admission, Crossroads and/or CPF contracted with Blueacorn to provide these services on their behalf. Thus, Blueacorn's contacts are imputed to Defendants.

Just two weeks before Defendants filed their motion to dismiss, a federal court in Texas ruled on a similar motion in a case involving CPF. *Oto Analytics, Inc. v. Cap. Plus Fin., LLC*, 2022 WL 1082368, at *8 (N.D. Tex. Apr. 11, 2022). There, the court granted dismissal of Blueacorn and its CEO for lack of personal jurisdiction. But the court there actually held that "[e]very [PPP] application that Blueacorn sent to Capital Plus created a new contact with Texas," and thus held that the sending of those applications into Texas were sufficient minimum contacts. *Id.*, at *6. Instead, the court declined to exercise jurisdiction because the tort and contract claims at issue there "did not solidly connect Blueacorn to Texas." *Id*., at *9. With respect to the contract claims, the court explained that "the contract underlying the business transaction at issue in the lawsuit was not signed in the state and did not call for performance in the state" and further that "[t]he agreements were not delivered in Texas" and that "no premiums were sent to Texas." *Id.* at *8-9. Here, by contrast, CPF sent plaintiff Greathouse and other SBA-approved PPP borrowers thousands of Loan Document contracts into Arkansas to assist Arkansas borrowers; used those contracts to pledge them as collateral and thereby obtain millions of dollars in PPP loan fees; and had additional contacts in Arkansas with the LRSC regarding thousands of additional PPP loans. Moreover, plaintiff Greathouse and other SBA-approved PPP borrowers signed the contracts in Arkansas, and the contracts called for

performance in Arkansas. Also unlike *Oto*, plaintiff Greathouse's contract and unjust enrichment claims arise directly from Defendants' contacts here.

To be clear, Plaintiffs' "unilateral acts" did not drag Defendants into the forum. *Id*. Rather, as the SBA-qualified PPP lender CPF reached out beyond Texas into Arkansas by entering into a contract with future consequences in Arkansas *(i.e*., payment to an Arkansas resident into an Arkansas bank account to help an Arkansas business) and directing communications into Arkansas regarding the contractual relationship. As a result, the first two factors (the nature and quality of contacts with the forum state and the quantity of such contacts) weigh heavily in favor of exercising jurisdiction.

The fact that CPF ultimately breached its promise and failed to provide the PPP loans as Plaintiffs allege does not change the jurisdictional analysis because under the contract, Defendants "could reasonably be expected to have" involvement in the State of Arkansas and to be haled into court here. *K-V Pharm. Co*, 648 F.3d at 594 (reasoning that though contract's terms were never carried out, terms and future consequences of parties' contract supported personal jurisdiction).

With respect to the third factor (the relation of the cause of action to the contacts), all of the contacts with Arkansas described above relate directly to this lawsuit. Defendants' contacts with Arkansas have a direct connection to plaintiff's contract and unjust enrichment claims. All of Defendants' contacts with Arkansas were related to the promissory Note and accompanying Loan Documents and the performance required pursuant to those agreements. And Defendants' non-performance of their obligations to provide the loan proceeds under the agreement triggered the instant lawsuit. As such, this factor weighs in favor of personal jurisdiction over Defendants.

With respect to the fourth factor, Arkansas has a strong interest in providing a forum for its citizens. *See Hotfoot Logistics, LLC v. Shipping Point Mktg., Inc*., 2014 Ark. 460, at 9, 447 S.W.3d 592, 597. Thus, this factor weighs in favor of jurisdiction.

With respect to the fifth factor, Arkansas is a convenient forum for plaintiff Greathouse, and he has a strong interest in litigating here. Greathouse Decl. ¶ 2. Plaintiff Greathouse resides in this district and maintains relevant records here. CPF also had direct contacts with thousands of other SBA-approved PPP borrowers in Arkansas (¶ 26), and other direct communications here concerning other PPP borrowers within the LRSC's coverage areas and will likely maintain relevant records and evidence of those contacts. Defendants CFP and Crossroads are located in neighboring state Texas, so the burden is not so great on them, particularly considering that a plaintiff generally is entitled to "considerable deference" in selecting the forum in which it will litigate. *See Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 695 (8th Cir. 1997); *de Melo v. Lederle Lab'ys, Div. of Am. Cyanamid Corp.*, 801 F.2d 1058, 1062 n.4 (8th Cir. 1986) ("There is ordinarily a strong presumption that a plaintiff's choice of forum will not be disturbed, absent a clear indication that it would be unnecessarily burdensome for the defendant or the court."). Accordingly, the convenience of the parties weighs in favor of jurisdiction.

Looking at the totality of the circumstances, Plaintiffs have pleaded more than sufficient facts to support a reasonable inference that Defendants can fairly be subjected to jurisdiction within the state with respect to the breach of contract and unjust enrichment claims. *K-V Pharm. Co*, 648 F.3d at 591-92, 594; *Whaley*, 946 F.3d at 452.

C. Claims of Non-Resident Plaintiffs

Given the significant contacts that Defendants had with the State of Arkansas related to their many PPP lending activities, this Court also has jurisdiction over the claims of non-resident plaintiffs Covarrubias (a California resident), Sumrall (a Texas resident) and Myles (a North

Carolina resident). In fact, three of the four plaintiffs' PPP loans (Greathouse, Sumrall and Myles) fall within states covered by the SBA's LRSC; only plaintiff Covarrubias falls outside. Thus, the Court may exercise jurisdiction not only over the contract and unjust enrichment claims, but also over the North Carolina and California statutory claims (the "Non-Resident Plaintiffs' Claims").

Defendants lean heavily on *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773, 1778 (2017) (*BSM*) to argue that specific jurisdiction is lacking over the Non-Resident Plaintiffs' Claims, but Defendants ask far more of *BMS* than it can provide.[5] *BMS* involved claims of non-California plaintiffs in a mass tort action against a non-California entity. Importantly, the *BMS* court did not clarify whether its holding applies to class actions. *See id.* at 1789 n.4 (Sotomayor, J., dissenting) ("The Court today does not confront the question whether its opinion here would also apply to a class action[.]")." Although the Eighth Circuit has not directly addressed the applicability of *BMS* to class actions, the vast majority of district courts in the Eighth Circuit have held that *BMS* does not apply to class actions. *See In re Folgers Coffee*, 2021 WL 7004991, at *5 (W.D. Mo. Dec. 28, 2021) (collecting cases); *Krumm v. Kittrich Corp*., 2019 WL 6876059, at *4 (E.D. Mo. Dec. 17, 2019) ("agree[ing] with the better reasoned decisions of the numerous courts across the country that have declined to extend *BMS* to the class action context"); *Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1329 (D. Minn. 2018) (holding *BMS* did not apply to class actions). These courts reasoned that "a class action fundamentally differs from a mass tort action" and "[t]o extend *BMS* to class actions

[5] Defendants also place too much emphasis on *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021), a case that involved a collective action brought under the Fair Labor Standards Act, which is entirely distinct from a class action. *See Fast v. Applebee's Int'l, Inc*., 243 F.R.D. 360, 362 (W.D. Mo. 2007) ("A 216(b) collective action differs significantly from Fed. R. Civ. P. 23 class actions.").

would create an extraordinary sea change in class action practice because nationwide classes would be possible only in the one or two States where the defendant is subject to general jurisdiction." *In re Folgers Coffee*, 2021 WL 7004991, at *5. Only a minority of courts have gone the other way. *See, e.g.*, *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 723 (E.D. Mo. 2019) (relying on authority exclusively from the Northern District of Illinois).

But based on the substantial publicly available facts already known about CPF's nationwide PPP lending, CPF's contractual obligations to fund at least 2,578 separate SBA-approved PPP loans for total proceeds of $38,715,478.00 for qualified borrowers in Arkansas, CPF's underwriting and other communications relating to those loans and CPF's contacts with the LRSC relating to thousands of additional PPP loans, jurisdiction exists independently in this case. Thus, the Court should decline to apply *BMS* to this class action.

Even if *BMS* applied in this case, Defendants nevertheless are subject to personal jurisdiction with respect to the Non-Resident Plaintiffs' Claims. The Supreme Court explained that its decision in *BMS* did not usurp "settled principles" of personal jurisdiction. *BMS*, 137 S. Ct. at 1783. *BMS* simply reiterated that there must be "an affiliation between the forum and the underlying controversy[.]" *Id*. at 1780. The Supreme Court recently confirmed that in order to assert specific jurisdiction over a non-resident defendant, the controversy need only "relate to the defendant's contacts" with the forum. *Ford Motor Co.*, 141 S. Ct. at 1025. Put differently, "there must be an affiliation between the forum and the underlying controversy[.]" *Id*.

Here, there is an affiliation between the forum and the Non-Resident Plaintiffs' Claims, and the connection is much more than just plaintiff Greathouse. Defendants had direct contacts with not only thousands of PPP borrowers in Arkansas, but also with the SBA's LRSC concerning other PPP borrowers. ¶¶ 32-37; *see also* Lederer Decl. ¶¶ 7-9 (citing CPF's

commitment to fund more than $3.6 billion to 231,268 PPP borrowers within the LRSC's coverage areas). The SBA's LRSC assisted with the administration of PPP loans from customer service to disbursement.[6] Publicly available sources reflect that the LRSC received many emails from lenders regarding PPP loans,[7] and lenders were to contact the LRSC regarding voluntary termination of PPP loans.[8] The authority cited by Defendants regarding the LRSC's alleged role being limited to disbursement relates solely to SBA 7a loans, which are not at issue here.

Importantly, since the LRSC serves Texas, CPF was required by the SBA to direct questions relating to aspects of PPP lending there. ¶ 35. The LRSC also covers three of the four plaintiffs. As a result, the Non-Resident Plaintiffs' Claims clearly have a direct connection to Arkansas and relate to Defendants' contacts with Arkansas.

Defendants respond by arguing that their interactions with the SBA are subject to the "government contact exception." But Defendants' out-of-circuit authority is misplaced. The "government contracts" exception is "[r]ooted in the constitutional right to petition the government" *Lamb v. Turbine Designs, Inc*., 41 F. Supp. 2d 1362, 1365 (N.D. Ga. 1999), and "finds its source in the unique character of the District as the seat of national government and in the correlative need for unfettered access to federal departments and agencies for the entire national citizenry[.]" *Env't Rsch. Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.*, 355 A.2d 808, 813

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[6] Because the PPP was an unprecedented program, and without the benefit of jurisdictional discovery, the record is unclear as to the extent of specific PPP services provided by the LRSC. As discussed later, discovery is needed on that issue. Discovery likewise is needed to understand the nature and extent of the specific communications between Defendants and the LRSC, additional detail regarding the involvement of the LRSC in PPP lending, the involvement of the LRSC in the payment of lender fees and the involvement of the LRSC in other aspects of the PPP, including PPP loan forgiveness. *See* Lederer Decl. ¶¶ 11, 13-14.

[7] *See* https://content.govdelivery.com/accounts/USSBA/bulletins/2bdd1e0.

[8] *See* https://www.bangor.com/getmedia/28f48c43-ba69-4d58-ae50-d3401051311e/SBA-Paycheck-Protection-Program-FAQs.pdf (page 92).

(D.C. 1976) (acknowledging a First Amendment gloss to the exception in that it protects one's right to petition the government for a redress of grievances, without fear of the threat of suit).

But the exception is not "a blanket prohibition against assertions of personal jurisdiction in all cases involving interplay with the federal government." *Lex Tex Ltd., Inc. v. Skillman*, 579 A.2d 244, 250 n.15 (D.C. 1990). In this case, Defendants were not exercising the right to petition the government for their sakes. Rather, they were submitting loan applications and seeking fund advances from the PPPLF on behalf of, and to in turn distribute to, SBA-approved PPP borrowers. When a defendant transacts business on behalf of another (*i.e.*, is not exercising its own protected rights), the government contracts exception does not apply, and a defendant is subject to jurisdiction. *See id.* at 249. As a result, Defendants' contacts with the SBA in submitting loan applications and supporting documents on behalf of borrowers likewise subjects them to this Court's jurisdiction.

Even if the Non-Resident Plaintiffs' Claims did not independently subject Defendants to personal jurisdiction (they do), the Court can properly exercise jurisdiction over these claims under the doctrine of pendent jurisdiction. Under this doctrine, "[a] district court has discretion to exercise personal jurisdiction over a claim that it ordinarily lacks personal jurisdiction over only when that claim arises out of the same common nucleus of operative fact as does a claim that is within the personal jurisdiction power of the court." WRIGHT & MILLER, 4A Fed. Prac. & Proc. Civ. § 1069.7 (4th ed.); *see also Fed. Trade Comm'n v. BINT Operations LLC*, 2022 WL 990276, at *3 (E.D. Ark. Mar. 31, 2022) (recognizing doctrine). Courts in this circuit and others have exercised pendent personal jurisdiction over defendants. *See, e.g.*, *Willis Elec. Co. v. Polygroup Macau Ltd. (BVI)*, 437 F. Supp. 3d 693, 704 (D. Minn. 2020); *WhatsApp Inc. v. NSO Group Technologies Ltd.*, 472 F. Supp. 3d 649, 678 (N.D. Cal. 2020). The doctrine applies in

both the diversity and federal question contexts. WRIGHT & MILLER, 4A Fed. Prac. & Proc. Civ. § 10169.7 (4th ed.); *Gen. Electric Capital Corp. v. Mackzilla, LLC*, 2016 WL 1059529, at *6 (S.D. Tex. Mar. 17, 2016) ("[T]he use of pendent personal jurisdiction may be equally or even more justified in some diversity cases than in federal question cases with a mix of federal and state law claims.").

Here, all claims arise out of a common nucleus of operative fact. All claims arise from Defendants' failure to fund the SBA-approved PPP loans. Like the contract and unjust enrichment claims, the California and North Carolina statutory claims involve representations and commitments by Defendants to fund PPP loans, securing advances from the PPPLF via Plaintiffs' PPP loan agreements, reviewing and submitting the required materials and undertaking all underwriting activities, and the subsequent failure to actually fund the approved loans. In fact, Count IV for violation of California's UCL is expressly based on the contract claim. ¶¶ 211, 213. Because all claims arise out of a common nucleus of operative facts, it is proper for the Court to exercise pendent personal jurisdiction over Defendants with respect to the Non-Resident Plaintiffs' Claims should the Court find jurisdiction otherwise is lacking.

D. Crossroads Was CPF's Alter Ego

The Court has personal jurisdiction over defendant Crossroads because Crossroads was CPF's alter ego at all times relevant for PPP lending, and CPF's contacts in Arkansas are therefore imputed to Crossroads. *See George v. Davis*, 2015 WL 389895, at *4 (W.D. Ark. Jan. 28, 2015) (imputing contacts of out-of-state defendant that was subject to specific jurisdiction under the alter ego doctrine).

"Personal jurisdiction can be properly asserted over a corporation if another is acting as its alter ego, even if that alter ego is another corporation." *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003) (citing *Lakota Girl Scout Council v. Havey Fund–Raising Mgmt.*,

519 F.2d 634, 637 (8th Cir. 1975)). The alter ego doctrine applies when "the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego." *Id*. District courts in the Eighth Circuit, including in Arkansas, have asserted personal jurisdiction over defendants under the alter ego doctrine. *See Tang v. Northpole Ltd.*, 314 F.R.D. 612, 620 (W.D. Ark. 2016); *George*, 2015 WL 389895, at *3-4; *CitiMortgage, Inc. v. 1st Advantage Mortgage*, 2015 WL 1894378, at *12 (E.D. Mo. Apr. 27, 2015).

A court's assertion of jurisdiction on this basis depends on whether the plaintiffs are able to pierce the corporate veil, which is determined by state law. *Epps*, 327 F.3d at 649. Although the laws of veil-piercing apply, the standard for doing so is typically "less stringent" for the purposes of exercising personal jurisdiction rather than for imposing liability. *Torchmark Corp. v. Rice*, 945 F. Supp. 172, 177 (E.D. Ark. 1996); *see also Dassault Aviation*, 361 F.3d at 452-53 ("For the purposes of the alter ego doctrine, the parent's control of the subsidiary need not be so abusive to the corporate form as to allow corporate veil piercing."). Therefore, at this stage, Plaintiffs need only make a *prima facie* showing that the Court may assert personal jurisdiction over CFP (which they have done) and that the Court should disregard Crossroad's corporate form under state law for corporate veil-piercing.

Arkansas courts recognize the alter ego approach to piercing the corporate veil. *Epps*, 327 F.3d at 649 (citing *Humphries v. Bray,* 271 Ark. App. 962, 965, 611 S.W.2d 791, 793 (1981); *Winchel v. Craig,* 55 Ark. App. 373, 934 S.W.2d 946, 950 (1996)). Arkansas courts have stated that the doctrine of piercing the corporate veil is founded in equity and is applied when the facts warrant its application to prevent injustice. *Humphries,* 271 Ark. at 967, 611 S.W.2d at 793

(citing *Aetna Cas. & Surety Co. v. Stover,* 327 F.2d 288 (8th Cir.1964)). Regardless of which states' law applies, the outcome would be the same.[9]

Plaintiffs sufficiently allege an alter ego claim as to Crossroads. *See, e.g.*, ¶¶ 7, 14, 38, 78-91, 188. Plaintiffs allege that CPF is, and at all relevant times was, controlled and dominated by Crossroads; shared certain of the same senior executives; had a website that referenced and promoted Crossroads and provided links to Crossroads's website; was referred to in Crossroads's SEC filings and other public statements as one and the same company; and was operated by Crossroads as if they were one and the same company. ¶¶ 7, 188. Plaintiffs further allege that CPF's actions were made "at the direction and under the control of its corporate parent Crossroads[.]" ¶ 78. Plaintiffs specifically allege that the Court has personal jurisdiction over Crossroads because it was CPF's alter ego at all times relevant in connection with all aspects of PPP lending. ¶ 38.

Further, the Arkansas Supreme Court has repeatedly held that "[w]hether the corporate entity has been fraudulently abused is a question for the trier of fact." *AgriFund, LLC v. Regions Bank*, 602 S.W.3d 726, 731 (Ark. 2020). *Accord K.C. Properties of N.W. Arkansas, Inc. v. Lowell Invs. Partners, LLC*, 280 S.W.3d 1, 15 (Ark. 2008); *Anderson v. Stewart*, 234 S.W.3d 295, 298 (Ark. 2006); *Black v. Valley Behavioral Health Sys., LLC*, 2015 WL 13655174, at *2 (W.D. Ark. Nov. 9, 2015) (final decision on piercing the corporate veil would be "premature" on a motion to dismiss because the issue "had not yet been fully developed").

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[9] *See George*, 2015 WL 389895, at *3 (describing alter ego doctrine under Texas law and explaining that "Arkansas law is similar"); *Tang*, 314 F.R.D. at 618-19 (describing alter ego doctrine under California law and explaining "[t]he standard is effectively the same under Arkansas law"); *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (setting forth similar standard under North Carolina law).

Arkansas federal courts have upheld alter ego allegations similar to Plaintiffs' allegations here. *See, e.g.*, *George,*, 2015 WL 389895, at *4; *Foreman Elec. Servs., Inc. v. Haliron Power*, LLC, 2022 WL 55015, at *3 (W.D. Ark. Jan. 5, 2022) (denying motion to dismiss where, like here, the plaintiff's "list of challenged transactions suggest that [the shareholder] Defendant received several large payments" from the defendant corporation); *Tang,* 314 F.R.D. at 620 ("[n]ot finding an alter-ego relationship would potentially allow [the shareholder] to evade liability for the [violation] while reaping its rewards. This is exactly the sort of unjust result the alter-ego doctrine is purposed to prevent.").

Defendants argue that "most Arkansas courts and other courts within the Eighth Circuit" apply the law of the state of incorporation to alter ego claims. Doc. No. 45, at 70. But the Eighth Circuit has repeatedly done otherwise. *See, e.g., Kirk v. Schaeffler Grp. USA, Inc*., 887 F.3d 376, 382 n.1, 388 (8th Cir. 2018) (applying Missouri law to Delaware subsidiary); *Weitz Co. v. MH Washington*, 631 F.3d 510, 520-22 (8th Cir. 2011) (applying Missouri law to Colorado corporations); *Radaszewski v. Contrux, Inc.*, 891 F.2d 672, 674 (8th Cir. 1989) (applying Missouri law to Texas corporation).

The sole case upon which Defendants rely, *Container Life Cycle Management LLC v. Safety Management Services Co.*, 2020 WL 2843224, at *4 (W.D. Ark. June 1, 2020), only speculated as to how the Arkansas Supreme Court would rule, and that Court has also held that the alter ego issue should not be resolved at the pleading stage. *Container Life* also relied on the premise that "[t]he Arkansas business and commercial code says the State of Arkansas cannot 'regulate the organization or internal affairs of a foreign corporation'" *Id.* (quoting Ark. Code Ann. § 4-27-1505(c)). But the statute does not say that the State of Arkansas cannot regulate such affairs. It says only that "*[t]his chapter* does not authorize this state to regulate" such

affairs. Ark. Code Ann. § 4-27-1505(c) (emphasis added). *Container Life* also quoted *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983), for its holding that "[d]ifferent conflicts principles apply … where the rights of third parties external to the corporation are at issue." *Container Life*, 2020 WL 2843224, at *4. Such rights are at issue here. Different conflict principles apply.

As the court held in *Foreman,* 2022 WL 55015, at *3:

> A federal court sitting in diversity, like the Court in this case, must apply the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 856 (8th Cir. 2010). The Court is unaware of a federal statutory or constitutional directive providing otherwise, so Arkansas substantive law applies to this case.

Defendants cite no authority for their claim that the law of Delaware (where Crossroads is incorporated) rather than the law of Texas (where CPF is incorporated) applies. *See* Doc. No. 45, at 70. The *Container Life* court quoted *Select Creations, Inc. v. Paliafito Am., Inc.*, 852 F. Supp. 740, 774 (E.D. Wis. 1994), for its holding that "[a] court applies the law of the state of incorporation of the *controlled* corporation to determine whether the corporate form should be disregarded." *Container Life*, 2020 WL 2843224, at *4 (emphasis added). That rule dictates that Texas law, rather than Delaware law, would apply if Arkansas law did not.

And like Arkansas law, Texas law dictates the denial of Defendants' motion to dismiss. *See, e.g.*, *HHH Farms, L.L.C. v. Fannin Bank*, 2022 WL 175967, at *12 (Tex. App. Jan. 20, 2022) ("The ... bas[is] for disregarding the corporate fiction involve[s] questions of fact … Except in very special circumstances, fact questions should be determined by the jury."); *U.S. ex rel. King v. Solvay S.A.*, 823 F. Supp. 2d 472, 549-550 (S.D. Tex. 2011), *vacated in part on other grounds*, 2012 WL 1067228 (S.D. Tex. Mar. 28, 2012) (denying a parent company's motion to dismiss where it wholly owned the defendant subsidiary for part of the relevant period; its CEO

and its Vice President of Finance sat on the subsidiary's Board of Directors; both corporations' financial data was grouped in a global annual report; and the two corporations appeared together on relevant press releases); *Humphreys v. Med. Towers, Ltd*., 893 F. Supp. 672, 689 (S.D. Tex. 1995), *aff'd*, 100 F.3d 952 (5th Cir. 1996) (denying summary judgment for sole shareholder of parent corporation where subsidiary derived almost all its income from operations of indirect subsidiary and paid some of shareholder's personal expenses).

Two other cases Defendants rely on were decided on summary judgment stage. *See MicroStrategy Inc. v. Acacia Rsch. Corp.*, 2010 WL 5550455 (Del. Ch. Dec. 30, 2010); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 269 (D. Del. 1989). The plaintiff in *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999), alleged nothing directed at piercing the corporate veil of a partnership other than that the "purpose of the General Partner is to manage and operate the Partnership." And the bottom line "fairness" standard in *Doberstein v. G–P Indus., Inc.*, 2015 WL 6606484, at *4 (Del. Ch. Oct. 30, 2015), supports Plaintiffs' alter ego claim on the facts here especially at this stage.

Defendants' reliance on *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG* and *Epps v. Stewart Information Services Corp.* for the proposition that contacts of a subsidiary may only be imputed to the parent if the subsidiary is a resident of the forum is misplaced. The analysis in both *Viasystems, Inc.* and *Epps* centered around general personal jurisdiction. *See Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011); *Epps*, 327 F.3d at 650. But general jurisdiction is not at issue here. It is clear that courts may impute the contacts of an out-of-state defendant that is subject to specific jurisdiction to another under the alter ego doctrine. *See George*, 2015 WL 389895, at *4.

Therefore, under governing law, CFP's contacts should be imputed to Crossroads and the Court should exercise personal jurisdiction over both Defendants.

II. Plaintiffs Are Entitled to Jurisdictional Discovery

As discussed above, the extensive and detailed facts alleged over *14* paragraphs in Plaintiffs' Amended Complaint already demonstrate, based exclusively on publicly available information, that both Defendants purposefully availed themselves of, and benefited directly from, substantial PPP business in Arkansas. ¶¶ 23-36. But if the Court has any doubt it may properly exercise personal jurisdiction, the Court should permit jurisdictional discovery. The discovery Plaintiffs seek includes principally CPF's communications with borrowers in Arkansas and within the coverage areas of the SBA's LRSC, Defendants' relationship with Blueacorn and other PPP agents and Ms. Giga's knowledge of those activities, and is identified in the accompanying Lederer Decl. ¶ 13(a)-(f).

The parties agree on the governing standards. In particular, and (largely) as Defendants quote, "jurisdictional discovery is permitted only 'if certain facts necessary to resolving the jurisdictional inquiry are either unknown or undisputed [sic]." Doc. No. 45, at 41 (*quoting Viasystems,* 646 F.3d at 598).[10] Both tests are satisfied here.

First, jurisdictional discovery is warranted under *Viasystems's* "unknown" test. Many core factual issues bearing directly on Defendants' PPP lending activities in Arkansas are unknown. SBA data already show, and Defendants do not dispute or even address in their motion, that CPF committed to fund 2,578 separate SBA-approved PPP loans for qualified

[10] Defendants misquote *Viasystems* in that the Eighth Circuit's actual last word in the quoted sentence is "*disputed*" not "*un*disputed." Plaintiffs understand typographical error. But the important substantive point is that jurisdictional discovery is clearly warranted here under *Viasystems* because the parties dispute several key factual issues regarding whether the already-known extent of Defendants' PPP activities in this state render jurisdiction fair.

borrowers in Arkansas in 2021 for total proceeds of $38,715,478.00. ¶ 26. What emails and other documents and communications did CPF have with, and receive from, those borrowers? What specific underwriting activities did Defendants do for those loans, especially given that they reviewed each PPP loan "thorough[ly]" and with "four" "layers" of review (¶ 30)? How much PPP lender processing fees did it make on those loans, whether CPF actually funded them or not? What contacts did CPF have with the SBA's LRSC concerning the PPP loans for the 231,268 total PPP borrowers within the LRSC's coverage areas? And what information does Ms. Giga, whose declaration addresses largely Defendants' PPP lending activities *outside* of Arkansas, have regarding those in-state activities?[11]

Defendants are correct that this information will also bear on "the scope and claims of the putative class." Doc. No. 45, at 42. But that does not render jurisdictional discovery improper or mean that it "is at best a thinly veiled attempt to … investigate the scope and claims of th[e] putative class." *Id*. Rather, any such factual overlap just shows that this information is also relevant to the merits of the claims at issue. Indeed and for that reason, the jurisdictional discovery Plaintiffs seek would also help shape the parties' Rule 26(f) meet and confer to be scheduled per the Court's Order (Doc. No. 39), and guide, and perhaps even narrow, the contours of discovery going forward as the parties may focus on the SBA-approved but unfunded putative class member loans.

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[11] Defendants argued during the April 27, 2022 hearing that Plaintiffs "say in their [Amended] complaint that there aren't any unknown jurisdictional facts" requiring discovery. Doc. No. 43, at 5. In truth, Plaintiffs' Amended Complaint both specifically alleges the potential need for "jurisdictional discovery regarding CPF's and likely both Defendants' direct dealings and communications with borrowers in this District and with the SBA Little Rock Servicing Center" *and* also discusses the jurisdictional discovery Plaintiffs seek. ¶ 37 & n.1. *Accord* Lederer Decl. ¶ 13(a)-(f).

Defendants should also be able to readily access much of this information with minimal burden. As an SBA-approved PPP lender, CPF is *required* to maintain and promptly produce details about its PPP lending activities. *See, e.g.*, Federal Reserve Bank Operating Circular No. 10 § 8.0.2 (requiring PPP lenders to keep in an "accessible and secure location on the [lender's] premises … a current statement of outstanding Advances and Indebtedness." Operating Circular No. 10 also mandates that all "Lending Documents shall be immediately and routinely available." *Id.* § 10(l); s*ee also* SBA Procedural Notice (July 15, 2021), at 1-2 (detailing additional PPP recordkeeping requirements).

Second, jurisdictional discovery is also warranted under *Viasystems's* "disputed" test. The parties sharply dispute several jurisdictional issues, including the core one regarding whether the facts already before the Court render jurisdiction fair. The parties also dispute whether, to use Defendants' *own* words, "personal jurisdiction exists [given] (1) CPF contracted with Greathouse; (2) CPF conducted an internal review regarding Greathouse's loan; (3) CPF earned fees in connection with Greathouse's loan; (4) CPF had contracts, conducted reviews, and received fees in connection with PPP loans to others in Arkansas; and (5) CPF communicated regarding the PPP with the U.S. Small Business Administration's service center in Little Rock." Doc. No. 45, at 14-15. Plaintiffs also dispute Defendants' invitation that the Court decide jurisdiction on Ms. Giga's untested declaration which fails to address Defendants' PPP lending activities *in* Arkansas, and which Defendants tellingly failed to update or supplement following the newly added jurisdictional allegations in Plaintiffs' Amended Complaint.[12]

[12] Defendants no doubt failed to update Ms. Giga's declaration in a futile attempt to maintain there are no disputed jurisdictional facts. But that posturing is as meritless as their original denial that this case has any "connection" to Arkansas (Doc. No. 25, at 8) without even mentioning the LRSC, which they now admit they "may have had communications with" (Doc. No. 45, at 42) and which is clearly and spot on jurisdictionally relevant.

Defendants admit that the nature, quality and quantity of their contacts ultimately governs their jurisdictional challenge. Doc. No. 45, at 24. But they would have the Court deny Plaintiffs any discovery exploring those very contacts. Parsing through the doublespeak, Defendants' position is contradictory, highly prejudicial to the Plaintiffs and proposed class and invites potential error. In truth, jurisdictional discovery is clearly warranted under *Viasystems's* "disputed" test.

Jurisdictional discovery is also warranted where, also as here, a plaintiff makes a *prima facie* case for jurisdiction and offers "documentary evidence, and not merely speculations or conclusory allegations" regarding a defendant's contacts with the forum state. *Steinbuch v. Cutler*, 518 F.3d 580, 589 (8th Cir. 2008). *See also Valley View Agri, LLC v. Producers Co-op. Oil Mill,* 2015 WL 853277, at *4 (E.D. Ark. Feb. 26, 2015) (allowing jurisdictional discovery). Defendants' own case is in accord. *See Wesson v. Lamb AB*, 2018 WL 11320712, at *7 (W.D. Ark. June 18, 2018) (where "a plaintiff offers 'documentary evidence' in support of its argument that personal jurisdiction exists, a court should not dismiss the cause of action before allowing the plaintiff an opportunity to conduct jurisdictional discovery."). Here, the SBA's publicly available PPP data regarding the PPP loans defendant CPF committed to fund supports discovery regarding those very data.

Jurisdictional discovery is also appropriate where, again as here, the defendants are corporations or they are affiliated with each other. *Tishner v. Wright Med. Grp., Inc.*, 2017 WL 1520424, at *1 (E.D. Ark. Apr. 25, 2017) (citation omitted). "[A] parent corporation may be subject to a court's personal jurisdiction through the contacts of its subsidiary if the subsidiary constitutes the 'alter ego' of the parent." *BKMJ, Inc. v. Jack Cooper Holdings Corp.*, 2015 WL

6555450 (W.D. Ark. Oct. 28, 2015) (citing *Anderson v. Dassault Aviation*, 361 F.3d 449, 452-53 (8th Cir. 2004)).

Other courts, including this Court, have relied on these principles in requiring jurisdictional discovery. *See, e.g.*, *Weirton Med. Ctr., Inc. v. Cmty. Health Sys., Inc.*, 2017 WL 2789008, at *2 (N.D. W.Va. June 27, 2017) (ordering deposition and other discovery concerning defendant's agents and subsidiaries); *SAS Inst. Inc. v. World Programming Ltd.*, 2011 WL 1059139, at *6, *8 (E.D.N.C. Feb. 3, 2011), *rev'd in part on other grounds*, 2011 WL 1059128 (E.D.N.C. Mar. 18, 2011) (ordering jurisdictional discovery where the declaration, like Ms. Giga's declaration here, left "several material matters unaddressed" and to explore defendant's sales through third-parties); *Davis v. United States*, 2021 WL 2580121, at *3 (E.D. Ark. June 23, 2021) (granting discovery where affidavits insufficient to resolve the outstanding issues); *Thomas v. S. Pioneer Life Ins. Co.*, 2009 WL 4894695, at *1 (E.D. Ark. Dec. 11, 2009); *Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, ECF 81 (E.D. Ark. Feb. 12, 2008).

Defendants' authorities are distinguishable. The court in *Viasystems,* 646 F.3d at 598, held that the district court had not abused its discretion in denying jurisdictional discovery on the factual record there. Plaintiffs concur that whether a court should permit jurisdictional discovery depends on the facts of each case. In general, however, courts in this district have frequently cited *Steinbuch,* 518 F.3d 580, in recognizing that "[t]he Eighth Circuit has instructed that jurisdictional discovery should be permitted where a plaintiff offers 'documentary evidence, and not merely speculations or conclusory allegations' regarding a defendant's contacts with the forum state." *DOXA Total Design Strategy v. DOXA Enters., Inc.,* 2011 WL 13232558, at *5

(E.D. Ark. Jan. 26, 2011) (quoting *Steinbuch*). *Accord Tishner,* 2017 WL 1520424, at *1 (quoting *Steinbuch*). Plaintiffs have done just that here.

Other cases Defendants cite stand for the proposition that the mere existence of a declaration disputing personal jurisdiction does not by itself justify jurisdictional discovery. *See Wesson,* 2018 WL 11320712; *Madrinas Brands, LLC v. Horseshoe Bev. Co., LLC*, 2022 WL 823055 (E.D. Mo. Mar. 18, 2022); *Revenexx v. Regenex Health LLC*, 446 F. Supp. 3d 469 (S.D. Iowa 2020). Plaintiffs' requested discovery is not based on the existence of the Giga declaration alone. But Defendants' reliance on that declaration also favors permitting discovery. *See Ouachita Watch League v. Henry*, 2012 WL 12792161, at *1 (E.D. Ark. May 1, 2012) ("[H]aving submitted testimony [addressed to jurisdiction] in the form of declarations under penalty of perjury, [defendants] cannot now object to answering questions regarding the facts asserted in that testimony."). And the court in *Wesson,* 2018 WL 11320712, at *8, based its decision to deny discovery on the plaintiff's failure to comply with Rule 56, which has no bearing here at all.

III. Plaintiffs Sufficiently Allege Their Claims

A. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient facts to state a claim to relief that is plausible on its face. FED R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the nonmoving party. *Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585, 594 (8th Cir. 2009). A well-pleaded complaint will survive a motion to dismiss even if it appears recovery is very remote or even unlikely. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–556 (2007).

B. Plaintiffs Sufficiently Allege Breach of Contract Claims

Defendants argue that Plaintiffs' breach of contract claims should be dismissed on four grounds. Each argument fails.

1. Plaintiffs Have Article III Standing

Defendants first argue that Plaintiffs' breach of contract claims should be dismissed because Plaintiffs' have not suffered legally cognizable injuries and, as a result, lack Article III standing. Defendants' argument hinges on the flawed idea that Plaintiffs do not plead concrete injuries because they fail to allege (i) they ever tried to obtain PPP loans from other PPP lenders, and (ii) they could have easily so tried. This argument is incorrect.

Plaintiffs agree that the test for Article III standing requires that a plaintiff have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016). Defendants are incorrect, however, that Plaintiffs lack standing because Plaintiffs clearly have alleged injury traceable directly to Defendants that this Court can redress.

For breach of contract claims, a plaintiff may establish Article III standing by alleging that it did not receive the benefit of the bargain under the contract. *See Mitchell v. Blue Cross Blue Shield of N.D.*, 953 F.3d 529, 536 (8th Cir. 2020) ("Traditionally, a party to a breached contract has a judicially cognizable injury for standing purposes because the other party's breach devalues the services for which the plaintiff contracted and deprives them of the benefit of their bargain."); *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017) ("Kuhns alleged that he bargained for and expected protection of his PII, that Scottrade breached the contract when it failed to provide promised reasonable safeguards, and that Kuhns suffered actual injury, the

diminished value of his bargain."); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014) ("When the alleged harm is economic, the injury in fact question is straightforward.").

Here, by definition, Plaintiffs and class member borrowers were eligible and applied for and were approved by the SBA for PPP loans to help fund their respective businesses (¶¶ 13, 104-107, 120-123, 136-139, 147-150); properly completed and signed their Loan Documents (¶¶ 13, 112, 125-126, 141-42, 151-52); and sustained injuries in fact when they did not receive the benefits of their bargain -- the PPP loan proceeds which they were contractually entitled to receive to support their businesses (¶¶ 13, 117, 119, 128, 135, 142, 146, 153-157).

Defendants' arguments are meritless. First, whether Plaintiffs applied for or could have applied for PPP loans with other lenders is irrelevant because Plaintiffs' claims are not based on being denied access to the PPP. Plaintiffs' claims are for breach of actually executed and binding Loan Document agreements that obligated CPF to fund Plaintiffs' SBA-approved PPP loans. Defendants also ignore that, as a result of having applied for PPP loans with CPF, being assigned loan numbers for their approved loans and entering the Loan Documents, Plaintiffs could not properly even *apply* to other PPP lenders but instead were effectively "stuck" with CPF to fulfill its contractual obligation to actually fund. ¶¶ 58-60, 183. Since Defendants were required to fund Plaintiffs' loans after the Loan Documents had been signed, Plaintiffs could no longer certify, as a requirement of any loan application to a different PPP lender, that they would not receive another PPP loan. *Id.*

Second, Plaintiffs are not PPP applicants alleging denial of access to the PPP; rather, they are SBA-approved borrowers alleging breach of CPF's obligation to actually fund their loans. This distinguishes Defendants' cases which were brought by PPP loan applicants and potential borrowers, not SBA-approved counterparties to a binding loan agreement. *See Pinehurst*

Neuropsychology, PLLC v. First-Citizens Bank & Trust Co., 2021 WL 4460273, at *3 (M.D.N.C. Sept. 29, 2021); *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 755 (D. Md. 2020) ("BofA, by definition, has not denied Plaintiffs access to the PPP."); *Scherer v. Wells Fargo Bank, N.A.*, No. H-20-cv-1295, Order, Doc. No. 20 at 3 (S.D. Tex. Apr. 29, 2020) (unpublished) ("Plaintiffs fails to show how Plaintiffs would suffer irreparable injury if not given access to a loan specifically from Wells Fargo."); *Elizabeth M. Byrnes, Inc. v. Fountainhead Commercial Capital, LLC*, 2021 WL 5507225, at *4 (C.D. Cal. Nov. 24, 2021). None of these cases held what Defendants ask the Court to do here -- dismiss a contract claim by parties to enforceable PPP loan contracts for failure of the lender to actually fund their loans.

2. The UCC Does Not Bar Plaintiffs' Claims

Defendants' argument that Plaintiffs' lack statutory standing under Article 3 of the UCC is a red-herring. The UCC provisions on which Defendants rely involve the rights of *holders* (*i.e.*, payees) of promissory notes and other negotiable instruments to enforce those instruments against the obligor (*e.g.*, to collect the amount due from a borrower under a promissory note).

Here, Plaintiffs are not seeking to enforce the notes as holders of negotiable instruments under Article 3 of the UCC. Rather, Plaintiffs' breach of contract claims are premised on CPF's obligation to fund class member PPP loans as required by the parties' Loan Documents and within the framework, purpose and rules governing PPP lending. *See, e.g., Smith v. Arrington Oil & Gas, Inc.*, 664 F.3d 1208, 1213 (8th Cir. 2012) ("Under Arkansas contract law, multiple documents executed as part of a single transaction generally will be construed together as a single contract."). Hence, UCC Article 3 standing does not apply to Plaintiffs' claims, and Defendants do not cite any authority suggesting otherwise.

3. The Loan Documents are Binding Contracts

Defendants' argument that Plaintiffs do not properly allege breach of contract claims ignores basic principles of contract construction, the express terms of the Loan Documents, the purpose and framework of the PPP and Defendants' own actions confirming -- *and reaping the benefits of* -- Plaintiffs' SBA approved loans. Although initially framed as a purported failure by Plaintiffs' to have alleged the "existence of a contract," Defendants clarify that their position is actually that they were not required to fund Plaintiffs' PPP loans. Doc. No. 45, at 49-50. Either way, Defendants are incorrect.

The Loan Documents are indisputably binding contracts that obligated Defendants to fund the PPP loans. In fact, Defendants confirmed the binding nature of the loans set forth in the Loan Document contracts when they pledged them as collateral in order to acquire PPPLF advances. ¶¶ 93, 96, 101, 180.

Section 1 of the Note recites that the consideration for the borrower's agreements under the Note is "the Loan." Doc. No. 31 at 58. CPF obtained PPPLF advances by submitting Plaintiffs' and other absent class members' PPP loans as collateral. ¶¶ 93, 96, 101, 180. Defendants do not and cannot reasonably contest any of these facts; indeed, unenforceable loans could not serve as collateral for PPPLF advances.

In fact, the Notes included in the Loan Documents would be unenforceable by Defendants or their pledgee (the Federal Reserve) for failure of consideration if CPF was not obligated to fund the loans, and therefore worthless as collateral for PPPLF advances. The only consideration that would render the Notes enforceable against the Plaintiffs -- short of actually funding the loans -- would have been CPF's actual commitment to fund the loans. *See Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893, 902 (8th Cir. 2010) ("Just as with every …. kind of contract, a contract … must be supported by consideration."); *Shearon v. Boise Cascade*

Corp., 478 F.2d 1111, 1115 (8th Cir. 1973) ("Though consideration is essential to the validity of a contract, it is not essential that such consideration consist of a mutual promise.").

Plaintiffs' claims are further supported by the purpose of the PPPLF and the process by which PPP lenders obtained funds from the PPPLF. ¶¶ 92-97; *see also* Paycheck Protection Program Liquidity Facility Term Sheet available at https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20210625a1.pdf (last accessed Sept. 17, 2021). By borrowing from the PPPLF, PPP lenders received advances for the purpose of funding the very same PPP loans which they provided as collateral to secure those advances.

Defendants also do not contest that CPF used the PPP loans of Plaintiffs and other SBA-approved borrowers to obtain PPPLF advances. ¶¶ 93, 96, 101, 180. Further, the PPP required that PPP lenders fund loans promptly after SBA-approval and signing of the Loan Documents, and the PPPLF was designed to advance the proceeds necessary to fund PPP loans. Since the entire PPP and PPPLF framework contemplated that the funding for PPP loans would only be advanced by the Federal Reserve after SBA approval and the Loan Documents were signed and the loans' pledged to the Federal Reserve, Defendants cannot credibly argue that CPF was not obligated to fund Plaintiffs' PPP loans.

To pledge a PPP loan as collateral and request a PPPLF advance, CPF had to complete and submit a Paycheck Protection Program Liquidity Facility PPP Pledge and Advance Request form ("Advance Request Form"). *See* Paycheck Protection Program Liquidity Facility PPP Pledge and Advance Request form *available at* https://www.frbdiscountwindow.org/generalpages/ppplf_historical_documentation. The Advance Request Form required CPF to provide information about each loan, such as the SBA loan

number and the "origination date / issue date," but did not require CPF to specify the loan was funded. *Id.* It is axiomatic that since an unenforceable PPP loan would serve no purpose as collateral for a PPPLF advance, any unfunded loan that CPF pledged as collateral had to be supported by a binding commitment to actually fund the loan. In short, by conceding that Plaintiffs' loans were used as collateral to obtain PPPLF advances, Defendants admit that Plaintiffs' Loan Documents obligated them to fund the loans.

Defendants' argument that CPF was not obligated to fund Plaintiffs' loans is contrary to the plain language of the Loan Documents. "The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1040 (8th Cir. 2000). A "contract must be interpreted to give effect to the parties' intent at the time the contract was drafted." *Id. See also Advantage Consulting Grp., Ltd. v. ADT Sec. Sys.*, 306 F.3d 582, 585 (8th Cir. 2002) ("The court must consider the overall purpose of the contract, as well as its terms.").

Indisputably, the PPP was intended to quickly and efficiently provide forgivable federally backed loans to small businesses and sole proprietors adversely impacted by the COVID-19, including the Plaintiffs here. ¶ 50; *see* 86 FED. REG. at 3692. Notably, the PPP streamlined the lending process by removing traditional loan underwriting requirements and requiring PPP lenders to fund SBA approved PPP loans quickly. *Id.*, at 3707-08.

The Loan Documents unquestionably obligated CPF to fund Plaintiffs' loans. The Note identifies CPF as the "Lender" and each Plaintiff as the SBA-approved "Borrower," and the SBA loan number and amount, payment terms, the lender's rights and other provisions, and was signed and submitted by each borrower and accepted by Defendants. Doc. No. 31, at 58. The Note states that "*[i]n return for the Loan*, Borrower promises to pay to the order of the Lender"

the principal amount of the loan plus interest unless forgiven (*id.*) (emphasis added); the Additional Agreement states that "*[i]n consideration of CPF* … (hereinafter called 'Lender') *making the above loan* …" and contains other conditions "*pertaining to the above loan*" including "that Lender is relying upon this agreement *in making the above loan* …." (*id.* at 64) (emphasis added); and the Information form identifies each Plaintiff's bank account for CPF to actually deposit the loan proceeds. *Id.* at 70. CPF also signed and delivered to Plaintiffs the Notice – No Oral Agreement which defines "Loan Agreement" to "mean[] one or more promises, promissory notes, agreements … or other documents or commitments … pursuant to which a financial institution loans … or agrees to loan," which also evinces CPF's obligation to fund. *Id.* at 66.

Defendants may try to rely on *Oto Analytics*, 2022 WL 1488441, at *14, which dismissed a contract claim against CPF. But that case dismissed the contract claim because, unlike here, the plaintiff did "not identify an independent duty that the Capital Plus Defendants supposedly breached" and because the court held that the claim was "premised on the SBA Fees, which requires a direct contract between Womply and Capital Plus." In fact, plaintiff Womply conceded it lacked any direct contract to share in those fees, and asserted instead an oral contract claim. *Id*.

It is well-established that "the law in effect at the time a contract is made forms a part of the contract as if it had been expressed in the contract." *See Cuellar-Aguilar v. Deggeller Attractions, Inc.*, 812 F.3d 614, 619-20 (8th Cir. 2015) ("Arkansas courts have recognized that 'the law in effect at the time a contract is made forms a part of the contract *as if it had been expressed in the contract*.'") (emphasis added); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) ("Laws which subsist at the time and place of the making of a

contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms."); *Snow v. Admiral Ins. Co.*, 612 F. Supp. 206, 210 (W.D. Ark. 1985) (accord).

In *Cuellar-Aguilar,* plaintiffs alleged that the defendant breached their employment agreements by not paying them the prevailing minimum wage required by statute. The district court dismissed the complaint under Rule 12(b)(6), in part, because the court held that the prevailing minimum wage was not part of the employment agreements. Recognizing that the law in effect at the time of the contract becomes part of the contract, the Eight Circuit reversed and held that plaintiffs had adequately plead causes of action for breach of contract. *See Cuellar-Aguilar,* 812 F.3d at 619-20.

Similarly, Plaintiffs' Loan Documents cannot be viewed in a vacuum and the law in effect at the time those agreements were entered into is incorporated into them. Contrary to Defendants' position, PPP loan funding after SBA approval and execution of the Loan Documents was not voluntary, but mandatory. 86 Fed. Reg. 3692, 3710. The SBA rule regarding PPP loan funding states, in relevant part:

> The lender must make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval; for the purposes of this rule, a loan is considered approved when the loan is assigned a loan number by SBA.
>
> Notwithstanding this limitation, lenders are not responsible for delays in disbursement attributable to a borrower's failure to timely provide required loan documentation, including a signed promissory note. Loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender.

See 86 FED. REG. 3692, 3710.

That funding rule also makes clear that, once the SBA approved a loan and received the signed note and other Loan Documents, a PPP lender was obligated to fund within 10 days. ¶ 55.

CPF's failure to fund within ten days, or at all, constituted a clear breach of its contractual obligations including the SBA funding rule which was incorporated into the Loan Documents as a matter of law. *See Cuellar-Aguilar,* 812 F.3d at 619-20; *Norfolk,* 499 U.S. at 130; *Oto Analytics*, 2022 WL 1488441, at *6 ("Thus, the Court looks to context provided by the SBA regulations, statutes, and traditional dictionaries to determine whether Womply prepared, submitted, or processed SBA loan applications.").

Incorporation of the funding rule is further supported by the context of the PPP. *See* 15 U.S.C. § 9008(g) (requiring PPP lenders to make PPP loans "under the criteria, terms, and conditions" set by the SBA and other governing rules). Additionally, the rules also make clear that the express terms of PPP loan promissory notes must be consistent with the PPP rules. *See* 86 Fed. Reg. 3692, 3709 ("Lenders may include in their promissory notes for PPP loans any terms and conditions ... that are not inconsistent with ... the PPP Interim Final Rules and guidance ...").

Defendants also acted consistent with, reaped the benefits of and made representations confirming its agreement to fund Plaintiffs' loans. For example, Defendants admit that CPF obtained and upstreamed to Crossroads $930 million of PPP loan fees, and Defendants obtained those fees by representing to the SBA that CPF had funded Plaintiffs' and other SBA-approved PPP loans it committed to fund. ¶¶ 79-80, 96-97. Nor do Defendants dispute that CPF obtained over $6.4 billion in loan advances from the PPPFL by pledging Plaintiffs' and other borrowers' loans as collateral. ¶¶ 93, 96, 100-101. Defendants also consistently reported to the SBA -- falsely in the case of Plaintiffs' and other class members' loans -- that CPF had funded those loans. ¶¶ 117, 133, 144, 155, 180.

Based on the foregoing, Defendants are also precluded by quasi-estoppel from arguing that they had not agreed to fund Plaintiffs' PPP loans. The doctrine of quasi-estoppel precludes a party from taking a position that is inconsistent with a position previously taken to obtain a benefit. *See Robb-Fulton v. Robb (In re Robb)*, 23 F.3d 895, 898 (4th Cir. 1994) ("'[Q]uasi-estoppel forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects.'"); *Amtrust, Inc. v. Larson*, 388 F.3d 594, 601 (8th Cir. 2004) ("'Quasi-estoppel' has been invoked by various courts to estop parties from asserting a position in judicial proceedings different than what was reported on their income tax returns.").

Quasi-estoppel may be pled as a separate claim or used to oppose specific legal arguments raised by a motion. *See Cnty. Sch. Bd. v. RT*, 433 F. Supp. 2d 692, 704-05 (E.D. Va. 2006); *Mountain View Hosp., L.L.C. v. Sahara, Inc.*, 2011 WL 4962183, at *23-28 (D. Idaho Oct. 17, 2011). The terms and purpose of the Loan Documents unquestionably obligated CPF to fund Plaintiffs' loans, as did Defendants' actions and representations.

4. Plaintiffs Did Not Release Their Claims

Defendants' contention that Plaintiffs released their claims is also meritless. First, a release cannot immunize a party who, as here, breached the parties' contract. *See, e.g.*, *Harper Enters. v. Aprilia World Serv. USA, Inc.*, 270 F. App'x 458, 461 (8th Cir. 2008) (holding that "the general principle of contract law that a party to a contract cannot claim its benefits where he is the first to violate it"); *Smith v. Chase Grp., Inc.*, 354 F.3d 801, 808 (8th Cir. 2004) ("A party may not enforce the provisions of a contract if it first breached the agreement."); *Horne v. Elec. Eel Mfg. Co*., 987 F.3d 704, 718 (7th Cir. 2021) ("Horne is also correct that, under Illinois law, a party in material breach may not enforce a provision of a contract that is favorable to him, such as an exculpatory clause."). Defendants cite no authority supporting their position that a release

can relieve a party from having to perform its primary contractual obligation which for CPF was to fund the PPP loans.

Second, the release explicitly applies only to alleged acts and omissions "on or prior to the date hereof" (Doc. No. 31 at 62), and Plaintiffs' claims accrued only *after* the contracts had been signed, when CPF failed to fund their loans within 10 days *after* SBA approval and receipt of the Loan Documents. *See* 86 Fed. Reg. 3692, 3710. Since CPF was required to fund the loans after it received the signed Loan Documents, Plaintiffs' claims for breach for failure to fund could only have arisen *after* Plaintiffs' Notes and other Loan Documents were executed and returned. Thus, the release does not apply here for this reason as well. *See Walmart Inc. v. Cuker Interactive, Ltd. Liab. Co.,* 949 F.3d 1101, 1111 (8th Cir. 2020) (holding that release provisions must be construed strictly against the drafter)*; Bowersox Truck Sales & Serv. v. Harco Nat'l Ins. Co.*, 209 F.3d 273, 279-80 (3d Cir. 2000) ("Thus, 'the general words of the release will not be construed so as to bar the enforcement of a claim which has not accrued at the date of release.'"); *Strong v. Caliber Home Loans, Inc.*, 840 F. App'x 890, 891 (8th Cir. 2021) (holding that breach of contract claims accrue at the time of the alleged breach); *TCF Nat'l Bank v. Mkt. Intelligence, Inc.*, 812 F.3d 701, 710 (8th Cir. 2016) (accord); *Pennington v. BHP Billiton Petro. (Fayetteville), LLC*, 2021 Ark. 179, ¶ 3, 631 S.W.3d 555, 557 (2021) ("And a cause of action for breach of contract accrues 'when the plaintiff could have first maintained the action to a successful conclusion.'").

Moreover, a release "is to be restricted to the claim which was within the contemplation of the parties." *Drake & Beemont Mut. Aid Soc'y Against Fire & Lightning v. United States*, 330 F.2d 548, 553 (8th Cir. 1964); *see also Mutz v. Citizens State Bank*, 966 F.2d 434, 437 (8th Cir. 1992) ("Any question regarding the scope of a release is to be determined according to what

fairly may be said to have been within the contemplation of the parties at the time the release was given.").

Plaintiffs' claims for failure to fund cannot be said to have even been within the contemplation of the parties to be covered by the release. *Mutz*, 966 F.2d at 437; *Drake*, 330 F.2d at 553. The release cannot immunize Defendants also for this reason.

Defendants' cases are distinguishable. In Defendants' principal case, *Bender v. Xcel Energy, Inc.*, 507 F.3d 1161, 1170-71 (8th Cir. 2007), the Eight Circuit held that an "employer may validly condition the payment of severance benefits on the employee's agreement to release the employer from any and all claims." *Bender* merely supports the notion that contracting parties may, as with any settlement, condition a payment on a general release. *Bender* does not address the type of release at issue here, which by its own terms is limited temporally to conduct occurring only "on or before" the date the contract was entered. *Accord One Bank & Trust, N.A. v. Galea*, 2012 WL 6019091, at *6 (E.D. Ark. Dec. 3, 2012) (enforcing a release of "any and all claims of Bank misconduct ... which have been, or could have been, asserted by Borrower against the Bank ... ***prior to or contemporaneously with the execution*** of this Modification Agreement") (emphasis added).

C. Plaintiffs Sufficiently Allege Unjust Enrichment Claims

Arkansas law governs all Plaintiffs' unjust enrichment claims. Even if that were not the case, those claims are sufficiently alleged -- and alleged only in the alternative, to the extent Plaintiffs' contract claims fail to adequately compensate Plaintiffs and the class. ¶ 194. Contrary to Defendants' contention, California recognizes a cause of action for unjust enrichment. And Plaintiffs' unjust enrichment allegations meet the relevant standards of every state in which they collectively reside.

Plaintiff Covarrubias Sufficiently Alleges Unjust Enrichment: Defendants argue that "Arkansas choice-of-law decisions generally apply the substantive law of the plaintiff's home state to claims for unjust enrichment." Doc. No. 45, at 53. But this Court has employed a practical approach to choice-of-law issues. As this Court held in *Thomas v. General Motors LLC*, 2018 WL 813584, at *1 (E.D. Ark. Feb. 9, 2018) (quoting Eighth Circuit precedent):

> In Arkansas, a choice-of-law analysis requires consideration of "the lex loci delicti rule within the framework of the five *Leflar* factors: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law."

Accord Jones v. Ford, 2008 WL 2986411 (E.D. Ark. July 31, 2008) (applying same factors). Each factor favors applying Arkansas law to plaintiff Covarrubias's unjust enrichment claim.

The first factor, "predictability of results" is directed at preventing forum-shopping. *Id.*, at *3. Applying Arkansas law promotes predictability and plaintiff Covarrubias has clearly not attempted to forum shop to avoid California law; to the contrary, he alleges his own UCL claims as discussed more fully below. The second "maintenance of interstate and international order" factor "is not normally implicated if the state whose law is to be applied has sufficient contacts with and interest in the facts and issues being litigated." *Id.* Arkansas's relevant contacts and interests to the claims here are substantial as discussed above, and thus this factor also supports applying Arkansas law. The "simplification of the judicial task" factor weighs heavily in favor of applying the law of one state to all Plaintiffs' claims. The fourth factor implicates "Arkansas's governmental interest … in preventing vexatious lawsuits" (*id*.), and this lawsuit is not "vexatious." And the "better rule of law" final factor also supports application of Arkansas law. "Arkansas courts have suggested that when, based on a choice of law, a plaintiff could not get

his day in court, the law allowing plaintiff his day in court is superior." *Id*. Arkansas law raises no risk that Covarrubias will not get his day in court.

Even if California law applied, however, Defendants are incorrect because Covarrubias may still maintain his unjust enrichment claim. The Ninth Circuit recognized in *Bruton v. Gerber Prod. Co.*, 703 F. App'x 468, 470 (9th Cir. 2017), that "the California Supreme Court has clarified California law, allowing an independent claim for unjust enrichment to proceed." The California intermediate appellate court decision Defendants cite, *Hooked Media Group, Inc. v. Apple Inc.*, 55 Cal.App.5th 323, 336, 269 Cal.Rptr.3d 406, 417 (2020), does not supersede Ninth Circuit or California Supreme Court precedent. Other more recent court rulings cite *Bruton* in sustaining unjust enrichment claims. *See, e.g*., *In re Generic Pharmaceuticals Pricing Antitrust Litig.*, 2022 WL 1470272, at *10 & nn.92-93 (E.D. Pa. May 10, 2022) (denying Rule 12(b)(6) motion; citing *Bruton* and other cases relying on *Bruton*); *City of Long Beach v. Total Gas & Power N. Am., Inc*., 465 F. Supp. 3d 416, 450 n.192 (S.D.N.Y. 2020), *aff'd*, 2021 WL 5754295 (2d Cir. Dec. 3, 2021); *Potts v. Johnson & Johnson Consumer Inc.*, 2021 WL 2177386, at *13 (D.N.J. May 28, 2021).

Plaintiffs Have Standing: Defendants argue that Plaintiffs "fail to allege that the benefits they seek to recover from Defendants are benefits that they actually conferred." Doc. No. 45, at 55. But the Amended Complaint alleges that both the PPPLF advances CPF obtained and the fees Defendants were paid were attributable directly to -- indeed, were secured exclusively by -- Plaintiffs' PPP loans and the parties' binding Loan Document contracts. *See, e.g.,* ¶¶ 4, 8, 10, 11, 14, 25, 27-29, 96.

It is of no consequence that the SBA, rather than Plaintiffs, paid CPF those fees or the Federal Reserve made those advances. In *Plymouth Cnty., Iowa v. Merscorp, Inc.*, 774 F.3d

1155, 1158 (8th Cir. 2014), the court held that the plaintiff maintained Article III standing to assert an unjust enrichment claim even though defendants had only deprived the plaintiff of funds to which plaintiff was entitled, finding that to be "a sufficient injury in fact to allow the County to maintain an action against the Lenders."

Defendants rely on *Frigillana v. Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979), *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988), and *Progressive American Insurance Co. v. State Farm Mutual Auto. Insurance Co.*, 184 N.C.App. 688, 647 S.E.2d 111 (2007), but they are all state court cases to which Article III does not apply. As the Eighth Circuit held in *Kuhns*, 868 F.3d at 716, "it is crucial ... not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action." That is, "Kuhns alleged that … Scottrade breached the contract … and that Kuhns suffered actual injury, the diminished value of his bargain. Whatever the merits of Kuhns's contract claim, and his related claim[] for … unjust enrichment, he has Article III standing to assert them." *Id.*

Defendants may also try to rely on the court's dismissal of the unjust enrichment claim against CPF in *Oto Analytics*, 2022 WL 1488441, at *13. But that case involved a claim to share in PPP loan fees by a PPP agent that lacked any contractual entitlement to those fees, and the court dismissed the claim "because [plaintiff] Womply did not comply with the applicable statute and regulations that require a compensation agreement" to share in PPP loan fees. *Id*.

Contrary to Defendants, Plaintiffs clearly "conferred a benefit" on Defendants in the form of PPP loan fees secured by Plaintiffs' PPP loans. ¶¶ 4, 8, 10-11, 14, 27, 79-88. Defendants' argument that the federal government was the actual payor ignores the reality of PPP lending and is meritless. In fact, in a case Defendants cite, the federal government, rather than the plaintiff, similarly conferred the relevant benefits on the defendant. *See Frigillana,* 584 S.W.2d at 35

(defendant retained civil service benefits to which plaintiff was allegedly entitled). Defendants cite no authority grafting a strict privity requirement onto an unjust enrichment claim as they in substance seek.

None of Defendants' cases mandate dismissal and all actually sustained the claim. *See Campbell v. Asbury Auto., Inc.*, 381 S.W.3d 21, 36 (Ark. 2011) (reversing summary judgment for the defendant); *Pro-Comp Mgmt., Inc. v. R.K. Enters., LLC*, 237 S.W.3d 20, 24 (Ark. 2006) (remanding case for lower court to assess damages for unjust enrichment claim); *Texas Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 370, 381, 383 (Tex. App. 2009) (reversing summary judgment for each of three defendants); *Holmes v. Solon Automated Servs.*, 752 S.E.2d 179, 185 (N.C. App. 2013) (reversing dismissal of plaintiff's unjust enrichment claim).

D. Plaintiff Covarrubias Sufficiently Alleges a UCL Claim

Defendants' arguments to dismiss plaintiff Covarrubias's UCL claims are also meritless. Plaintiff properly alleges that Defendants' conduct was both "unlawful" and "unfair" under that statute.

Defendants' "Unlawful" Conduct: Plaintiffs need not dispute Defendants' claim that "a plaintiff attempting to use a breach of contract as the predicate act must also plead that the breach is independently unlawful" because Defendants' conduct *is* sufficiently alleged to be independently unlawful. Doc. No. 45, at 59. As the Supreme Court held in *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1673 (2017), a "business act or practice is unlawful under the [California] unfair competition law if it violates a rule contained in some other state or federal statute." *Accord Davis v. HSBC Bank Nev., N.A.,* 691 F.3d 1152, 1168 (9th Cir. 2012).

That rule encompasses CPF's breaches in failing to fund the loans of plaintiff Covarrubias and the other members of the California subclass. *See, e.g., Sandoval v.*

PharmaCare US, Inc., 145 F. Supp. 3d 986, 994 (S.D. Cal. 2015) ("Plaintiff [properly] alleges a violation of FDA regulations … and a resulting violation of the unlawful prong of the UCL.") *Albillo v. Intermodal Container Serv., Inc.*, 2000 WL 35436363, at *18 (Cal. Super. Ct. Sept. 20, 2000), *aff'd in relevant part*, 114 Cal. App. 4th 190, 8 Cal. Rptr. 3d 350 (2003) (defendant who violated Truth in Leasing Regulations "engaged in an 'unlawful' business practice"). The fact that the CARES Act does not provide for a private right of action is irrelevant. *LegalForce RAPC Worldwide P.C. v. UpCounsel, Inc.*, 2019 WL 160335, at *13 (N.D. Cal. Jan. 10, 2019).

Defendants' "Unfair" Conduct: Defendants' claim that their conduct is not "unfair" under the UCL is untethered to any test California appellate courts have adopted for that term. *See Jacobs v. Glob. Tel*Link Corp.*, 2016 WL 5953128, at *8 (W.D. Ark. May 17, 2016) (identifying tests applied by California courts).

One of those definitions encompasses a "balancing test" pursuant to which "the gravity of the harm to the alleged victim must outweigh the utility of the defendant's conduct." *Id.* California courts have repeatedly held that the weighing of the parties' interests pursuant to the "balancing test" is inappropriate at the pleading stage. *See Brooks v. Bank of Am., N.A.,* 2021 WL 1541643, at *4 (S.D. Cal. Apr. 20, 2021) (citing cases); *Chen v. Bank of Am., N.A.*, 2019 WL 9633650, at *5 (C.D. Cal. Oct. 29, 2019). And no such balancing test could credibly even be conducted here at this procedural juncture, as there are no facts in the record attempting to even explain Defendants' failure to fund, much less possibly showing any purported "utility" of that failure. Particularly absent such evidence, Plaintiffs' allegations are sufficient to state a claim that Defendants' conduct was "unfair."

An alternate test "requires the consumer to have suffered an injury that," *inter alia*, "could not reasonably" be avoided. *Jacobs,* 2016 WL 5953128, at *8. That is also the case here.

Accord Zuniga v. Bank of Am. N.A., 2014 WL 7156403, *8-9 (C.D. Cal. Dec. 9, 2014) (denying a motion to dismiss where the plaintiff alleged that the defendant falsely told her she was being offered a modification to lower her monthly mortgage payment); *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 806, 154 Cal. Rptr. 3d 285, 306 (2013) (reversing demurrer where defendant allegedly violated federal regulations and made related misrepresentations to borrowers).

Defendants' cases do not support dismissal. The court in *Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008), did not apply a test that currently prevails in either state or federal court. *See Davis*, 691 F.3d at 1170 (stating prevailing tests). *Salone v. Bank of Am., N.A.*, 2018 WL 3815041, at *5 (C.D. Cal. June 22, 2018), turned on the fact that the plaintiff failed to show that defendants engaged in a "harmful, regular business practice." And contrary to Defendants, *Prudential Ins. Co. of Am. v. Herman*, 2009 WL 10674431, at *4 (C.D. Cal. Aug. 31, 2009), does not state an accepted definition of "unfair." The court's conclusion in *Jacobs,* 2016 WL 5953128, at *8, is apt:

> Given "the absence of an authoritative instruction" from the California Supreme Court as to which, if any, of these three tests for the unfairness prong should control, "this Court is reticent to adopt" any of them at this "pre-answer stage[ ] of litigation" and for now will "err[ ] toward ensuring a hearing on the merits" if the allegations in Plaintiffs' Amended Complaint suffice to satisfy any of them. *McVicar v. Goodman Global, Inc.*, 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014).

Plaintiff Covarrubias is Entitled to Relief: Defendants' argument that plaintiff is not entitled to any form of relief the UCL provides violates the fundamental principle of Rule 12(b)(6) jurisprudence that "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Wilson v. Arkansas Dep't of Hum. Servs.*, 850 F.3d 368, 371-72 (8th Cir. 2017).

It also ignores that plaintiff Covarrubias's request for equitable and injunctive relief in the form of an accounting is proper under the UCL, and that this claim is asserted only in the alternative to the extent his breach of contract claim fails to provide adequate relief. ¶ 216; Prayer for Relief D. California courts have repeatedly held that plaintiffs may be entitled to an accounting based on their UCL claims. *See, e.g.*, *Vertical Doors Inc. v. J.T. Bonn Inc.*, 2008 WL 11343051, at *10-11 (C.D. Cal. Dec. 15, 2008); *Kane v. Valley Slurry Seal Co*., 2018 WL 2126752, at *8 (Cal. Ct. App. May 8, 2018) ("plaintiffs have established an injury in fact, sufficient to order an accounting to determine the extent of the injury"); *Gerawan Farming, Inc. v. Rehrig Pac. Co.*, 2013 WL 1414637, at *14 (E.D. Cal. Apr. 8, 2013), *aff'd*, 587 F. App'x 654 (Fed. Cir. 2014).

Defendants also argue that there is no threat of future violation which immunizes them from injunctive relief under the UCL. But the fact that the PPP was closed to new applicants as of May 31, 2021 does not relieve CPF of its obligations to account for the applicable PPPLF advances and actually fund the PPP loans it committed to fund.

Covarrubias is likewise entitled to restitution, again in the alternative. Defendants contend otherwise based on the premise that he never held the funds at issue and the argument that he therefore had no "vested interest" in those funds. Doc. No. 45, at 61. But the UCL does not require that Covarrubias ever held those funds. As the court stated in *Kivett v. Flagstar Bank, FSB*, 506 F. Supp. 3d 749, 763 (N.D. Cal. Dec. 10, 2020), "[t]he concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person." *See also Nat'l Rural Telecomms. Co-op. v. DIRECTV, Inc*., 319 F. Supp. 2d 1059, 1067, 1083 (C.D. Cal. 2003) (claimant alleged defendant caused third party to breach contractual duty to pass fees to claimant and class members).

In addition, Covarrubias is entitled to restitution based on his "vested interests" in the proceeds of his SBA-approved loan. In *Kivett,* 506 F. Supp. 3d at 763, the court held that class members' interest in the funds at issue became vested when those funds would have become payable had defendant not unlawfully withheld them. Covarrubias's interest here likewise became vested ten days after the SBA approved his loan and he signed and submitted his Loan Documents. ¶¶ 3, 55, 61. *See also People ex rel. Harris v. Aguayo*, 11 Cal. App. 5th 1150, 1168, 218 Cal. Rptr. 3d 221, 238 (2017) (holding that rightful owners of misappropriated properties maintained an ongoing vested interest in the rents collected by landlords who misappropriated them).

Defendants' claim that Covarrubias has no vested interest in the proceeds of his SBA-approved loan is based on a case decided by an intermediate appellate court over 100 years ago which does not reference the UCL. *See* Doc. No. 45, at 61 (citing *Lawrence v. Wilson*, 187 P. 30, 32 (1919)). That and other cases involving a conventional loan are also distinguishable because here, Covarrubias and other unfunded California borrowers also expected that their PPP loans would be forgiven, thereby further supporting their interests in those proceeds. *See* ¶¶ 44, 46.

Defendants Are Not Protected by the "Safe Harbor" Rule: Defendants contend that the UCL should not apply because the CARES Act and SBA regulations do not grant Covarrubias a private right of action, but instead effectively grant Defendants unbridled discretion in dealing with PPP borrowers. Defendants are wrong on both counts. The fact that SBA regulations do not provide for a private right of action has no bearing. As the court stated in *LegalForce,* 2019 WL 160335, at *13:

> California courts have repeatedly stated that a plaintiff may bring a UCL claim even when the conduct alleged to constitute unfair competition violates a statute that does not provide a private right of action. [T]o forestall an action under the unfair competition law, another provision must actually 'bar' the

> action....” Thus, [only] if a statute explicitly precludes private enforcement, or if a statute expressly provides immunity for the conduct alleged, a plaintiff may not plead around this bar by bringing a claim under the UCL.

Defendants cite no statute or regulation authorizing them to induce Covarrubias to forfeit his ability to apply for PPP loans with other lenders by misrepresenting CPF's intention to fund his approved loan, or to breach the parties' contract by withholding his loan proceeds. The defendant in *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063, 1089 (N.D. Cal. 2012), like Defendants here, argued at the dismissal stage "that it did nothing more than what was authorized by statute." The court was unmoved: "Though that may be true, it is a fact question to be answered in discovery, not the basis for a motion to dismiss." *Id*.

There is No Basis for Equitable Abstention: Defendants question the Court's ability and authority to adjudicate straightforward UCL claims in pressing for abstention. Doc. No. 45, at 63. But the minimum restitution due Covarrubias is clear, and the injunctive relief required to determine that amount is simple. Defendants proffer no detail as to what it is that may exceed the scope of the Court's capabilities. The fact that the CARES Act provided "the largest economic stimulus package in the nation's history" does not mean that the Act itself is unduly complex, much less that this case addressing a small portion of it or the UCL claim is as well. Doc. No. 45, at 64.

California courts have repeatedly ruled to the effect that "[t]he equitable abstention doctrine applies in rare instances." *Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1082 (N.D. Cal. 2013) (citing *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1134 (C.D. Cal. 2012)). As the court held in *Rex,* 905 F. Supp. 2d at 1135, "resolution of Plaintiffs' claims merely requires this Court to 'interpret the relevant terms of the contract' and 'interpret the

relevant provisions of the' statutes." That is what Covarrubias seeks here. The court's balancing of the relevant equities in *Rex*, 905 F. Supp. 2d at 1135, also applies here:

> [T]his Court is nonplussed that a multi-billion-dollar corporation would invoke an equitable doctrine against borrowers … so as to avoid liability for allegedly imposing illegal contracts on these borrowers and engaging in unfair debt collection practices. Defendant is a corporation with enough resources to have survived the recent recession, which is the largest economic downturn since the Great Depression. … The Court fails to see how the equities of the situation dictate denying Plaintiffs relief.

The cases Defendants cite do not support abstention. Plaintiffs' requests for injunctive relief in two of those cases would have required the trial courts to oversee defendants' post-trial business activities on an ongoing basis. *See Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1383, 1 Cal. Rptr. 446 (1991); *Cal. Grocers Assn. v. Bank of Am.*, 22 Cal.App.4th 205, 27 Cal. Rptr. 2d 396 (1994). The court in *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal.App.4th 997, 1021, 36 Cal. Rptr. 3d 592, 609 (2005), declined to resolve the abstention issue. And Plaintiffs here are not asking the Court to determine "economic policy" as Defendants falsely claim. Doc. No. 45, at 64. In sum, Plaintiffs do not seek anything outside of the Court's capability and authority.

E. Plaintiff Myles Sufficiently Alleges a NCUDTPA Claim

Defendants' claim that plaintiff Myles has not sufficiently alleged "unfair" or "deceptive" conduct under the NCUDTPA is contrary to caselaw applying those terms.

Defendants' "Unfair" and "Deceptive" Conduct: Defendants seek the dismissal of Myles's NCUDTPA claim based in part on the premise that "[w]hether conduct by a defendant constitutes an 'unfair or deceptive act or practice' is a question of law for determination by the court." Doc. No. 45, at 65 (citing *Walker v. Fleetwood Homes of N.C., Inc.*, 653 S.E.2d 393, 399 (N.C. 2007)). But *Walker* says that "[w]hether an act *found by the jury to have occurred* is an

unfair or deceptive practice which violates N.C.G.S. § 75–1.1 is a question of law for the court." *Id.* (emphasis added). That rule has no bearing here.

Defendants' other contentions in this context are no more valid. Myles alleges that Defendants violated the NCUDTPA in the formation of their contracts. Specifically, Defendants "[r]epresent[ed] to plaintiff Myles and members of the North Carolina subclass their willingness to disburse SBA-approved loans by delivering to plaintiff Myles and members of the North Carolina subclass copies of the Note for their signatures, and accepting the signed Notes." ¶ 222(a). That allegation is bolstered by widespread instances of similar complaints by many other unfunded CPF borrowers. ¶ 158(a)-(g). Defendants claim absent any authority that there is no difference between defendants who -- like Defendants here -- induce plaintiffs to sign contracts by misrepresenting their intentions, and defendants who opt to breach their contracts only after having entered into them. Dkt. No. 45, at 66 ("[E]very plaintiff who brings a contract claim" might claim misrepresentations by the defendant).

Courts have rejected this reasoning. In another NCUDTPA case involving a breach of contract, *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989), the court held that a plaintiff can show "substantial aggravating circumstances" justifying treble damages by showing "deception … in the formation of the contact." The court in *Swan Racing Co., LLC v. XXXtreme Motorsport, LLC*, 2015 WL 4430257, at *3 (W.D.N.C. July 20, 2015), denied defendant's motion to dismiss based on allegations that "[defendant] obtained the [contract] with the [plaintiff] by promising to pay without any intention of ever doing so." And the court in a case Defendants cite (Doc. No. 45, at 66) quoted Fourth Circuit precedent in observing that "substantial aggravating circumstances" exist where "the acts or practices complained of are 'present at the time of contract formation.'" *US LEC Commc'ns, Inc. v. Qwest Commc'ns Corp.*,

2006 WL 1367383, at *2 (W.D.N.C. May 15, 2006) (quoting *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir. 1981)). *See also SmithKline Beecham Corp. v. Abbott Labs.*, 2017 WL 1051123, at *13 (M.D.N.C. Mar. 20, 2017) ("[o]btaining a contract without intending to adhere to the contract … can give rise to an action for unfair and deceptive trade practices …."); *Oxley v. Asplundh Tree Expert Co.*, 2006 WL 1642152, at *5 (W.D.N.C. June 12, 2006) (denying motion to dismiss where "plaintiffs have alleged that [defendant] not only knowingly breached the contract, but made deceptive representations to plaintiffs … in the formation of the contract.").

Other cases Defendants cite likewise do not support dismissal. *Bumpers v. Cmty. Bank of N. Virginia*, 747 S.E.2d 220, 226 (N.C. 2013), stands for the proposition that the statute does not "apply to an individual who merely breaches a contract." Plaintiffs in two other cases did not allege that defendants misled them in the formation of the contracts at issue. *See ACS Partners, LLC v. Americon Grp., Inc.*, 2010 WL 883663 (W.D.N.C. Mar. 5, 2010); *Branch Banking & Tr. Co. v. Thompson*, 418 S.E.2d 694 (N.C. Ct. App. 1992). The court in *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison*, 869 S.E.2d 34, 43 (N.C. Ct. App. 2022), allowed plaintiff's NCUDTPA claim to go forward.

Myles' Allegations Satisfy Rule 9(b): Defendants argument that Myles does not state her NCUDTPA claim with sufficient particularity is belied by the Amended Complaint's abundant detail specifying the claims at issue. Defendants are also incorrect that plaintiff fails to "state where in the Note, or what provision of the Note" required PPP funding (Doc. No. 45, at 67) because the Amended Complaint quotes those provisions in detail. ¶¶ 174-176. Those paragraphs are incorporated into Myles' NCUDTPA claim (¶ 218), as are the PPP funding rules

which, again, also require the loans to have been funded. In sum, Defendants cite nothing required by Rule 9(b) that Myles does not allege.

Myles Properly Alleges Reliance: The Amended Complaint also alleges that Myles understood that she was forfeiting her right to seek PPP loans from other lenders upon contracting with CPF. *See, e.g.,* ¶¶ 58-60, 183. And Myles and the North Carolina subclass were at that point "exclusively reliant upon CPF's good faith in actually funding their SBA-approved PPP loans." ¶ 227.

Those allegations are also sufficient under established pleading standards. For example, in *Bank of Am., N.A. v. Drew*, 2017 WL 10604133, at *2 (E.D. Ark. Nov. 16, 2017), the Court held that it was "dubious that Plaintiff was justified in relying on Defendants' misrepresentation, however, this is a fact issue best resolved after discovery has been completed." *See also Epsman v. Martin-Landers, LLC*, 2007 WL 2819592, at *2 (E.D. Ark. Sept. 26, 2007) (plaintiff's reliance was a question of fact for the jury); *Columbia Mut. Ins. Co. v. Arkansas Valley Reg'l Indus. Dev. Co., LLC*, 2006 WL 8444843, at *5 (E.D. Ark. Dec. 21, 2006) (denying Rule 12(b)(6) motion where plaintiffs alleged that had they been fully informed about the relevant transactions, they would not have entered into them).

Defendants cite *Synovus Bank v. Okay Props., LLC*, 2012 WL 3745280, at *10 (W.D.N.C. Aug. 28, 2012), but the plaintiffs "failed to allege with the requisite specificity what misrepresentations that were made to them." And the courts in *Bumpers*, 747 S.E.2d at 227, and *Dan King Plumbing*, 869 S.E.2d at 43, did not address pleading standards.

Plaintiff Myles is an SBA-approved borrower: Despite Myles' well-pleaded claim that she was an eligible PPP borrower and that the SBA reported that her loan had actually been funded based on CPF's false representations (¶¶ 150-151, 155-156), Defendants seize on a single

sentence in an email Myles wrote to infer that she admits she was not eligible. Doc. No. 45, at 69. Defendants do not dispute that the SBA approved Myles' application or that CPF reported her loan to be funded to obtain fees. Defendants' claim that Myles was ineligible is also contrary to Defendants' representation that they confirmed borrowers' employment status as part of their underwriting review. ¶ 29.

At this stage, where the Court is required to read the complaint in the light most favorable to Plaintiffs, those allegations are more than sufficient. The court in *Weisenberger v. Ameritas Mutual Holding Co*., 2022 WL 1078211, at *8 n.4 (D. Neb. Apr. 7, 2022), recently relied on that principle in denying defendant's motion to dismiss even though the plaintiff's allegations "taken as a whole appear[ed] inconsistent." The only case Defendants cite in this context, *Carter v. United States,* 123 F. App'x 253 (8th Cir. 2005), has no bearing as the entirety of the complaint in that case reflected that the facts were inconsistent with plaintiff's theory of liability. Here, Myles's allegations are wholly consistent with Plaintiffs' theories of liability. Even if there were any ambiguity in that regard, it should be the subject of discovery.

Conclusion

The Court should deny Defendants' motion to dismiss in its entirety. Alternatively, if the Court is inclined to dismiss any of Plaintiffs' claims, the Court should do so without prejudice and grant Plaintiffs leave to file a further amended complaint, and grant jurisdictional discovery as requested.

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Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
Marshall S. Ney, AR Bar 91108
Katherine C. Campbell, AR Bar 2013241
3350 S Pinnacle Hills Parkway, Suite 301
Rogers, AR 72758
479-695-6049 Office
501-244-5389 Facsimile
mney@fridayfirm.com
kcampbell@fridayfirm.com

AND

BAILEY & GLASSER, LLP
Lawrence J. Lederer (*pro hac vice*)
Michael L. Murphy (*pro hac vice*)
Bart D. Cohen (*pro hac vice*)
1055 Thomas Jefferson Street NW, Suite 540
Washington, DC 20007
202-463-2101 Office
202-463-2103 Facsimile
llederer@baileyglasser.com
mmurphy@baileyglasser.com
bcohen@baileyglasser.com

AND

NOLAN HELLER KAUFFMAN LLP
Justin A. Heller (*pro hac vice*)
Matthew M. Zapala (*pro hac vice*)
80 State Street, 11th Floor
Albany, NY 12207
518-449-3300 Office
518-432-3123 Facsimile
jheller@nhkllp.com
mzapala@nhkllp.com

Attorneys for Plaintiffs Greathouse, Covarrubias, Sumrall, Myles and the Proposed Class and Subclasses