UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

T.C. KOZIARA, PLLC, FAHMIA, INC., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WELLS FARGO & CO., WELLS FARGO BANK, N.A., and DOES 1 through 100, inclusive,

Defendants.

Case No. 1:20-cv-00588

MEMORANDUM OF LAW IN SUPPORT OF
WELLS FARGO & CO. AND WELLS FARGO BANK,
N.A.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

September 15, 2020

QUESTION PRESENTED

This action is one of dozens filed across the country by putative "agents" claiming that they are entitled to fees from lenders that provided loans to small businesses through the Paycheck Protection Program ("PPP"). Each action presents the same dispositive question: Are agents who claim that they helped a borrower apply for a PPP loan entitled to payment of a fee from lenders when the lenders never promised or agreed to pay them? As the only court to address this issue has concluded: "The short answer is 'no.'" *Sport & Wheat, CPA, PA* v. *ServisFirst Bank, Inc.*, 2020 WL 4882416, at *1 (N.D. Fla. Aug. 17, 2020).

NATURE OF THE MATTER

Plaintiffs' Complaint is premised on a single, flawed theory: that one line in the Small Business Administration's ("SBA") regulation implementing the PPP created a new, mandatory obligation for participating lenders to compensate agents, despite the absence of any such requirement in the statute itself. It is clear, however, that the SBA's regulation did no such thing. Plaintiffs' theory is refuted by the existing statutory and regulatory framework, the Congressional testimony of the Secretary of the Treasury, and common sense. The regulation "does not <u>require</u> that lenders share their fees" but "simply explains that, if an agent is to be paid a fee, the fee must be paid by the lender from the fee it receives from the SBA." *Sport & Wheat*, 2020 WL 4882416, at *3. Because Plaintiffs have no entitlement to payment under the SBA's regulation, their claims fail as a matter of law and should be dismissed.

Plaintiffs' claims also fail for other, independent reasons, including because Plaintiffs lack a private right of action and fail to plead necessary elements of their state law claims. Plaintiffs therefore fail to state any claim for relief, and their Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

A. The CARES Act and the PPP

On March 27, 2020, the federal government created the PPP as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 ("CARES Act"). The PPP is part of the SBA's "Section 7(a)" lending program, *id.* § 1102, and is administered in partnership with the Department of the Treasury. PPP loans are made by private lenders such as Defendants, not the federal government, but are forgivable and fully guaranteed by the SBA. 15 U.S.C. §§ 636(a)(36), 9005(b).

To encourage lenders to participate in the PPP, Congress provided that the SBA "*shall* reimburse a lender" for processing and issuing PPP loans at fixed percentage rates. *Id.* § 636(a)(36)(P)(i) (emphasis added). In contrast, the CARES Act does not provide that lenders "shall" pay agents or include any other provision mandating such payments. Rather, consistent with the SBA's established practice of regulating — but not requiring — the use and payment of agents, the CARES Act states only that agents assisting borrowers with their PPP loan applications "*may not* collect a fee *in excess* of the limits established by the [SBA]." *Id.* § 636(a)(36)(P)(ii) (emphasis added).

B. The SBA's Existing Loan Programs and Statutory and Regulatory Framework

The SBA administers small business loan programs, including the Section 7(a) program of which the PPP is a part. 15 U.S.C. § 636. Although the SBA contemplates the possible use of "agents" in the loan application process for these programs,[1] the SBA in no case *requires* the use of an agent. 13 C.F.R. § 103.2(a) (borrowers and lenders may "conduct business with SBA without a representative").

To prevent fraud and other abuse, the SBA carefully regulates the relationship between agents, lenders, and borrowers, including when and how agents are paid. (*See* Ex. 1[2] at 166-67, 170-71 (requiring disclosure of agent fee agreements to ensure fees are not "unreasonable or impermissible").) The SBA requires that the agent "execute and provide to SBA a compensation agreement" that "governs the compensation charged for services rendered or to be rendered to the Applicant or lender in any matter involving SBA assistance." 13 C.F.R. § 103.5(a). A loan applicant "must" also identify to the SBA the name of each agent "that helped [it] obtain the loan, describing the services performed, and disclosing the amount of each fee paid or to be paid by the applicant to the [a]gent" for those services. *Id.* § 120.195. These disclosures are mandated by Congress, which

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[1] An "Agent" is "an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other individual or entity representing an Applicant or Participant by conducting business with SBA." 13 C.F.R. § 103.1(a).

[2] All exhibits are attached to the Declaration of Jason D. Evans, dated September 15, 2020. The Court "may take judicial notice of public documents and government documents." *Shore* v. *Charlotte-Mecklenburg Hosp. Auth.*, 412 F. Supp. 3d 568, 573 (M.D.N.C. 2019).

provided in the Small Business Act that "[n]o loan shall be made" unless the applicant certifies the names of any agent working on its behalf and the fees to be paid to the agent. 15 U.S.C. § 642.

To that end, the SBA provides Form 159 for all compensation agreements governing payment of fees to an agent. (*See* Ex. 2 at 1.) Form 159 documents the agreement for the agent's services and the compensation for those services and must be completed by both the lender and the applicant and submitted to the SBA. (*Id.*; Ex. 1 at 171.)

C. Implementation of the PPP

On April 2, 2020, the SBA issued an Interim Final Rule ("IFR") to implement the PPP. 85 Fed. Reg. 20811. Among many other aspects of the program, the IFR briefly addresses agent fees. Consistent with Congress's instruction that the SBA set *limits* on the fees an agent may collect, the IFR states in Section III.4.c:

> **c. Who pays the fee to an agent who assists a borrower?**
>
> Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent *may* collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) *may not exceed*:
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> i. One (1) percent for loans of not more than $350,000;
> ii. 0.50 percent for loans of more than $350,000 and less than $2 million; and
> iii. 0.25 percent for loans of at least $2 million.
>
> The Act authorizes the Administrator to establish limits on agent fees. The Administrator, in consultation with the Secretary, determined that the *agent fee limits* set forth above are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.

85 Fed. Reg. at 20816 (emphasis added). Treasury also published an information sheet for lenders that includes nearly identical language. (Ex. 3.)

The next day, on April 3, thousands of lenders, including Wells Fargo, began accepting PPP loan applications or expressions of interest. To apply for a PPP loan, an eligible small business needed only complete a two-page application with basic information about the business, including average payroll expenses, and submit that application to a participating lender. (*See* Ex. 4 (SBA Form 2483).) By August 8, 2020, participating lenders had, in partnership with the SBA and Treasury, issued over 5.2 million loans totaling $525 billion dollars to American small businesses. (*See* Ex. 5 (SBA PPP Report) at 2.)[3]

D. Putative Agents, Including Plaintiffs, Claim Entitlement to Fees

Plaintiffs commenced this putative class action to obtain a percentage of the fees set aside for Wells Fargo. This action is only one in a wave of class-action complaints filed in more than 25 District Courts across the country by entities and persons claiming to be agents. As in the other agent-fee actions, Plaintiffs here rely entirely on Section III.4.c of the IFR. Plaintiffs contend that this provision — which sets limits on the fees that agents can collect — *mandates* that lenders pay agents fees, regardless of whether the lenders actually agreed to do so and regardless of whether the agents have complied with

[3] Wells Fargo also pledged not to retain the lender fees mandated by Congress and is donating them to non-profits working to further help small businesses recover from the economic crisis. (Ex. 6.)

longstanding SBA regulations intended to prevent fraud and abuse. Plaintiffs do not (and cannot) point to the language of the CARES Act or any other statute or regulation, or other indicia of intent by Congress or the SBA, to create this novel entitlement to agent fees.[4] To the contrary, the Secretary of the Treasury stated in testimony before Congress: "What our guidance did say is that banks *could* pay agent fees out of the fees that they received [from the SBA], [and] *that was intended to be based upon a contractual relationship between the agent and the bank*." (Ex. 8 at 34 (emphasis added).) Plaintiffs allege no "contractual relationship" with Wells Fargo.

Instead, based on an implausible and self-serving interpretation of a single section of the IFR, Plaintiffs allege that their unilateral decision to assist borrowers in preparing PPP loan applications requires Wells Fargo to foot the bill for their purported services. (*See* Compl. ¶ 52.) Plaintiffs then go even further and contend that they and putative class members are entitled to the *maximum* amount allowed under Section III.4.c of the IFR. (*See id.* ¶ 6.) Plaintiffs' theory is the basis for each of its causes of action — a request for declaratory relief, breach of contract, violations of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") and California Unfair Competition Law ("UCL"), unjust enrichment, and conversion. (*See id*. ¶¶ 64-103.)

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4 Plaintiffs' own industry group issued a notice in response to the IFR recognizing that agents may not be paid for their services and advising agents to "discuss this issue with clients and the banks to ensure that there is an understanding, preferably in writing, as to how and when any fees will be paid." (Ex. 7 at 3.)

ARGUMENT

To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). A complaint that fails to "state a valid legal cause of action" or "allege sufficient facts to support a legal cause of action" is properly dismissed. *Kearney* v. *Blue Cross & Blue Shield of N.C.*, 233 F. Supp. 3d 496, 505 (M.D.N.C. 2017).

I. THE CARES ACT AND IFR DO NOT CREATE AN ENTITLEMENT TO AGENT FEES.

According to Plaintiffs, a single line in a section of the IFR that sets *limits* on agent fees supposedly upended the SBA's existing regulatory framework and long-standing regulation of agent fees by creating a new, blanket entitlement for any agent to obtain fees from a PPP lender, at the maximum allowable rate, simply by claiming to have assisted a borrower and regardless of whether the lender ever endorsed that work or ever agreed to pay for it. The IFR says no such thing, and none of the SBA, Treasury, or Congress has ever suggested that it intended to create any new entitlement to agent fees. To the contrary, the Secretary of the Treasury expressly disclaimed that interpretation in Congressional testimony. Unsurprisingly, the only court to have addressed this issue rejected Plaintiffs' theory. *Sport & Wheat*, 2020 WL 4882416.

A. The IFR Does Not Create an Entitlement to Agent Fees.

Contrary to Plaintiffs' claims, nothing in Section III.4.c of the IFR mandates that lenders pay fees to agents. That provision only implements Section 636(a)(36)(P)(ii) of the CARES Act and provides that (i) "[a]gent fees will be paid by the lender out of the fees the lender receives from the SBA," and not "from the borrower" or "out of the PPP loan proceeds"; and (ii) the "total amount an agent may collect from the lender for assistance in preparing an application for a PPP loan" cannot exceed the stated maximums. 85 Fed. Reg. at 20816. The regulation directs *how* an agent *can* be paid, and the *maximum* payment *allowed*, but it nowhere mandates that a lender *must* pay an agent any fees in the first place. *See Sport & Wheat*, 2020 WL 4882416, at *3 ("This language does not <u>require</u> that lenders share their fees."). In other words, the IFR contemplates circumstances where a lender and an agent already have reached an agreement that the agent will assist in facilitating a PPP loan, and then "simply explains that [related] fee[s] must be paid by the lender from the fee it receives from the SBA" and cannot exceed the limits set by the rule. *Id.*[5]

Indeed, the SBA's existing regulations specifically contemplate that an agent and the lender or applicant will independently agree to agent services and compensation, the terms of which must be set forth in a "compensation agreement" submitted to the SBA. 13 C.F.R. § 103.5(a). As in the PPP context, the SBA's regulations only serve to *limit* the possible amount of compensation. *See id.* § 103.5(b). The actual obligation to pay an agent fees, therefore, has always arisen, like any ordinary obligation to pay compensation, from

[5] Plaintiffs' reliance on Treasury's "Information Sheet" is also misplaced. (Compl. ¶ 33.) The document merely repeats the language in the IFR. (*See* Ex. 3.) And the Secretary of the Treasury has expressly disclaimed Plaintiffs' contention. (*See* Ex. 8 at 34.)

a contractual arrangement between the lender and the agent, and not from the SBA's regulations.[6]

The SBA did not abandon this framework for the PPP in promulgating the IFR. The compensation agreement and disclosure requirements are still in place, and they apply to "any matter involving SBA assistance," including the PPP. 13 C.F.R. § 103.5(a); *see* Ex. 2 at 1 (Form 159 applies to SBA's "7(a) . . . Loan Programs," of which the PPP is a part). The disclosure to the SBA of an agreement to pay an agent, furthermore, is specifically required by statute. *See* 15 U.S.C. § 642. The Secretary of the Treasury has confirmed as much in testimony before Congress: "What [the PPP] guidance did say is that banks *could* pay agent fees out of the fees that they received," and these payments were "intended to be based upon a contractual relationship between the agent and the [lender]." (Ex. 8 at 34 (emphasis added).) None of this is surprising, because agencies, like Congress, do not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they] do[] not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The SBA's PPP forms and other guidance further confirm that Plaintiffs' theory is incorrect. The PPP Borrower Application Form (SBA Form 2483) that applicants must submit to participating lenders nowhere asks whether the applicant received assistance

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[6] That the obligation to pay for services rendered arises from manifestations of assent is also a foundational principle under the common law. *See* Restatement (Second) of Agency § 441 cmt. c (1958) ("[O]ne has no duty to pay for services officiously rendered without request although resulting in benefit to him.").

from an agent, let alone for information that would enable a lender to document the services performed and determine the fees due. (*See* Ex. 4.)[7] By contrast, the Lender Application Form (SBA Form 2484), which a lender must complete for each approved loan submitted to the SBA, specifically asks whether a third party was used "to assist in the preparation of the loan application or application materials, or to perform other services in connection with th[e] loan." (Ex. 10 at 2.) That is because, in circumstances where a third-party agent helps facilitate a PPP loan, the *lender* is the party that will have agreed to compensate that third party. And thus the lender, rather than the borrower, is in a position to disclose that information to the SBA as required under the regulations. Absent an agreement with the agent, a lender could not accurately complete Form 2484.

Ignoring all of this, Plaintiffs insist that the IFR created a new obligation for lenders to pay fees to agents in connection with PPP loans regardless of whether the lenders agreed to do so, and that all agents are automatically entitled to the *maximum* amount permitted under the IFR. This position is nonsensical. Unlike lender processing fees, which Congress expressly mandated ("shall" receive) at set amounts, 15 U.S.C. § 636(a)(36)(P)(i), the SBA set only *maximum* amounts that an agent *could* receive in circumstances where the lender agreed in advance to compensate the agent. *See* 85 Fed. Reg. at 20816 (fees an agent may collect "*may not exceed*" set percentages (emphasis

[7] That omission can only be regarded as intentional. SBA Form 1919, which small businesses submit to apply for a traditional Section 7(a) loan, expressly asks whether an applicant has or intends to use an agent to assist in preparing the application and related materials. (Ex. 9 at 2.)

added)). Setting a *maximum* fee makes no sense if, as Plaintiffs contend, the SBA intended for agents always to receive that amount. In that event, the SBA simply would have specified the amounts agents were to receive, as Congress and the SBA did for PPP lenders. The IFR's imposition of fee caps (at the statute's direction) indicates that the SBA intended for lenders and agents to negotiate compensation amounts up to the maximums, which would be included in the compensation agreement and disclosed to the SBA — which is precisely what is required under existing regulations.

The only court to have considered Plaintiffs' theory has rejected it. Like Plaintiffs here, the plaintiff in *Sport & Wheat* brought claims premised on the same assertion that the IFR created an entitlement to agent fees. The court disagreed, determining that the plaintiff's reading "finds no support in the plain language of the [CARES Act] or the [IFR]." 2020 WL 4882416, at *2. The court concluded, consistent with the existing regulatory framework, that, absent an independent "agreement[] with [lenders] regarding payment for the work [an agent] performed in assisting borrowers in obtaining PPP loans through [the lenders]," those lenders "have no legal obligation" to pay the agent fees. *Id.* at *4.

B. Plaintiffs' Interpretation of the IFR Would Invite Fraud and Abuse.

Plaintiffs' theory that purported agents can simply show up after the fact and claim agent fees would lead to a system that is ripe for fraud and abuse. According to Plaintiffs, agents could demand compensation at the regulatory maximums, and lenders would have no opportunity to assess the value of any services, negotiate a reasonable rate, or ensure the services were adequately performed. Lenders also would have no ability to meet their statutory and regulatory disclosure requirements, depriving the SBA of its ability to monitor agents' conduct and fees and ensure that agents are in good standing with the SBA. *See* 13 C.F.R. § 103.3 (authority to suspend agents); Ex. 1 at 170-72 (disclosure requirements for fees and conduct). These are not idle concerns: a recent report by the SBA's Office of the Inspector General identified "a pattern of fraud by loan packagers and other for-fee agents in the 7(a) Loan Program." (Ex. 11 at 8.)

Nor is a regulatory entitlement to agent fees necessary to quickly get PPP funds to small businesses. *First*, as the SBA has recognized, the vast majority of Section 7(a) borrowers do not use agents to prepare their loan applications. *See* 85 Fed. Reg. 7622, 7630 (Feb. 10, 2020) (only 2.78% of approved loans over five-year period reported that an agent assisted the applicant). And the application process for a traditional Section 7(a) loan is far more complex than the two-page PPP loan application. (*Compare* Ex. 4 *with* Ex. 9.) *Second*, third parties can assist applicants — whether by providing advice or preparing ordinary-course business documentation — without acting as an "agent" as that term is defined under SBA regulations. *See* 13 C.F.R. § 103.1(a), (b) (agent is one who "conduct[s] business with SBA," as defined therein); *see also* 61 Fed. Reg. 2679, 2680 (Jan. 29, 1996) (explaining that the definition of "agent" only captures those who "actually prepare or submit" an application and that the SBA "does not intend to regulate [agents] who simply supply information that is used in the preparation of an application"). In that capacity, third parties are allowed to seek fees directly from borrowers, and thus will have an incentive to offer their services to borrowers that need them. *Third*, as has long been the practice, third parties that intend to perform "agent" services could contact lenders to negotiate reasonable compensation for those services within the limitations set by the SBA.

C. The CARES Act Confirms That the IFR Does Not Create an Entitlement to Fees.

Even if the SBA, as Plaintiffs insist, had provided in the IFR that all agents who assisted PPP borrowers automatically are entitled to a portion of lenders' processing fees equal to the maximum permissible amount, Plaintiffs' claims nevertheless should be rejected because such a regulatory entitlement would directly conflict with the express language of the CARES Act. Congress mandated that the SBA "shall reimburse a lender" for making PPP loans at fixed percentages of the loan amount. 15 U.S.C. § 636(a)(36)(P)(i). But under Plaintiffs' reading of the IFR, the SBA has controverted that mandate and instead decided to apportion some of the fees that Congress allocated for lenders, without the lenders' consent, to agents. An agency "has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms . . . ; they must always 'give effect to the unambiguously expressed intent of Congress.'" *Util. Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 325-36 (2014).

For the reasons set forth above, however, the Court need not conclude that the SBA exceeded its statutory authority by creating an entitlement to agent fees under the IFR because the plain language of the regulation does no such thing. Rather, consistent with Congress's instruction, the SBA's IFR simply *regulates* the payment of fees to agents that lenders have independently agreed to pay. (*See supra* Section I.A.)

II. PLAINTIFFS' DECLARATORY RELIEF AND COMMON LAW CLAIMS FAIL BECAUSE PLAINTIFFS LACK A PRIVATE RIGHT OF ACTION.

Even assuming (implausibly) that the IFR had created a new agent fee entitlement, Plaintiffs cannot seek a declaratory judgment or assert a common law claim based on a violation of the CARES Act and its attendant regulation because neither the CARES Act nor the Small Business Act, which the CARES Act supplements, provides a private right of action.

The Declaratory Judgment Act does not create an independent cause of action, *CGM, LLC* v. *BellSouth Telecomms., Inc.*, 664 F.3d 46, 55 (4th Cir. 2011), and instead "presupposes the existence of a judicially remediable right," *Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960). Indeed, a "request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred." *CGM*, 664 F.3d at 55-56. Accordingly, without a private right of action under the CARES Act, Plaintiffs cannot obtain the declaratory judgment they seek.[8]

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). There can be no dispute that the CARES Act does not provide an *express* private right of action. *Profiles, Inc.* v. *Bank of Am. Corp.*, 2020 WL 1849710, at *4 (D. Md. Apr. 13, 2020).

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[8] To the extent Plaintiffs' declaratory judgment claim is based on its state law claims, it fares no better. Requests for declaratory judgment that are wholly duplicative of other claims should be dismissed, *see Sprint Commc'ns Co., L.P.* v. *FairPoint Commc'ns, Inc.*, 2017 WL 2919015, at *6 (W.D.N.C. July 7, 2017), and for the reasons explained below (*see infra* Section IV), those state law claims fail in any event.

Plaintiffs must therefore identify an *implied* private right of action, which is a "stringent" requirement, "given the Court's generally 'restrictive attitude,' toward creating implied rights of action." *Reg'l Mgmt. Corp.* v. *Legal Servs. Corp.*, 186 F.3d 457, 461-62 (4th Cir. 1999). As the Supreme Court explained, Plaintiffs must demonstrate Congress's intent to imply both a private right of action and a private remedy through "clear and unambiguous terms." *Gonzaga Univ*. v. *Doe*, 536 U.S. 273, 290 (2002). Plaintiffs can point to no clear and unambiguous manifestation of intent here, for several reasons.

First, nothing in the text of the CARES Act contemplates enforcement by private litigants. Rather, the Small Business Act specifically provides a comprehensive enforcement scheme by the SBA, and there is a "particularly strong" presumption against finding implied causes of action "where 'Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Trejo* v. *Ryman Hosp. Props., Inc.*, 795 F.3d 442, 450 (4th Cir. 2015); *see* 15 U.S.C. § 650(c) (providing the SBA authority to institute civil actions for violations of the statute); *Profiles*, 2020 WL 1849710, at *6 ("[T]he view that Congress did not intend to create a separate private right of action [is] bolstered by the criminal and civil enforcement regime codified in the [Small Business Act]."). *Second*, before enactment of the CARES Act, courts have uniformly held that the Small Business Act does not include an implied right of action, and the CARES Act's amendments do not alter that clear Congressional intent. *See Profiles*, 2020 WL

1849710, at *6-7 & n.5.[9] *Third*, the only claim Plaintiffs have to a judicially remediable right arises from a *regulation*, and "it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Sandoval*, 532 U.S. at 291. And even if it could, there is certainly no "clear and unambiguous," *Gonzaga*, 536 U.S. at 290, statement of intent to create a private enforceable right in the IFR, which only mentions the SBA's "enforcement" authority, 85 Fed. Reg. at 20816.

In the only decision to address whether the PPP provisions of the CARES Act provide a private right of action, a court in this Circuit concluded in a thorough and well-reasoned opinion that they do not. *See Profiles*, 2020 WL 1849710, at *4-7.[10] Indeed, in that case, the plaintiff was a potential *small business borrower* bringing claims under the CARES Act — a statute designed for the explicit purpose of assisting small businesses — but the court determined that the CARES Act did not "evidence[] the requisite congressional intent to create a private of action" for PPP loan applicants. *Id.* at *7. There is no basis to reach a different conclusion with respect to putative *agents*, who are only briefly mentioned in the CARES Act, and then only to *limit* their compensation.

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9 *See also Bulluck* v. *Newtek Small Bus. Fin., Inc.*, 808 F. App'x 698, 701-02 (11th Cir. Mar. 27, 2020); *Aardwoolf Corp.* v. *Nelson Capital Corp.*, 861 F.2d 46, 48 (2d Cir. 1988); *Royal Servs., Inc.* v. *Maintenance, Inc.*, 361 F.2d 86, 92 (5th Cir. 1966).

10 The Fourth Circuit denied the plaintiff's request for emergency injunctive relief pending appeal of the district court's decision. *See* Order, *Profiles Inc.* v. *Bank of Am. Corp.*, No. 20-1438 (4th Cir. May 1, 2020). The plaintiff voluntarily dismissed its action soon thereafter.

Similarly, this Court should dismiss Plaintiffs' state common law claims because they too are an impermissible end run around the lack of a private right of action to enforce the CARES Act or its regulations. Courts have repeatedly rejected similar attempts to "trump the standard inquiry whether a federal statute creates a private right of action" by instead asserting "state-law claim[s]." *Umland* v. *PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 66 (3d Cir. 2008) (rejecting "attempts to use state common law to circumvent the absence of a private right of action"); *see also Valelly* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2020 WL 2907676, at *7 (S.D.N.Y. June 3, 2020) ("Plaintiff cannot circumvent the lack of a private right of action [] merely by recasting her claim as a violation of a common law duty."); *Lil' Man In the Boat, Inc.* v. *City & Cty. of S.F.*, 2018 WL 4207260, at *4 (N.D. Cal. Sept. 4, 2018) (plaintiff "cannot argue around [the lack of a private right of action] by bootstrapping her cause of action onto [a] claim based on the same statute").

III. PLAINTIFFS FAIL TO PLEAD REQUIRED ELEMENTS OF THEIR STATE LAW CLAIMS.

Plaintiffs' state law claims are all expressly premised on their unsupported contention about the IFR and therefore fail for that reason, as well as several other independent reasons.

A. Plaintiffs Fail to State a Breach of Contract Claim.

Plaintiffs assert, on "information and belief," that Wells Fargo "entered into an agreement with the SBA in connection with the loans funded in the PPP," that Plaintiffs were "intended [third-party] beneficiaries" of this agreement, and that Wells Fargo breached the agreement by failing to "adhere to all PPP rules." (Compl. ¶¶ 69-72.) This novel breach-of-contract claim fails for at least three reasons.

First, and as noted above (*supra* Section II), a plaintiff cannot use a third-party beneficiary contractual claim to "bootstrap a private right of action onto a violation of [a federal] regulation[]." *Bojorquez-Moreno* v. *Shores & Ruark Seafood Co.*, 92 F. Supp. 3d 459, 468 (E.D. Va. 2015); *see also Astra USA, Inc.* v. *Santa Clara Cty.*, 563 U.S. 110, 114 (2011) (explaining that "[i]f [plaintiffs] may not sue under the statute," then "it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute"). That is exactly what Plaintiffs seek to do through their contractual claim here.

Second, Plaintiffs have not identified a contract between Wells Fargo and the SBA of which they are a third-party beneficiary. Plaintiffs do nothing "to overcome [the] presumption that the contracting parties did not intend to confer a legally enforceable benefit" on third parties. *Fen-Phen Series 2005-01* v. *Farrin*, 2010 WL 1740521, at *3 (M.D.N.C. Apr. 28, 2010). Indeed, there is no indication whatsoever that Wells Fargo and the SBA intended to "direct[ly]" benefit Plaintiffs without ever mentioning them in any of their agreements. *Hospira Inc*. v. *Alphagary Corp.*, 671 S.E.2d 7, 13 (N.C. Ct. App. 2009).

Finally, Plaintiffs' alleged breach of contract is expressly based on a breach of "PPP rules" (Compl. ¶ 70), but, as discussed (*supra* at Section I.A), Plaintiffs fail to plead that Wells Fargo in any way violated those rules.

B. Plaintiffs Fail to State a UDTPA Claim.

Plaintiffs assert that Wells Fargo violated the UDTPA by "failing to disclose material information" regarding a "fail[ure] to adhere to the PPP's rules and regulations." (Compl. ¶ 81.) Once again, this claim relies entirely on the erroneous premise that the IFR required Wells Fargo to pay agent fees, and therefore fails as a matter of law.

Even if Wells Fargo had been required to pay agent fees, however, "'failure to pay a debt' [is] not considered [a] deceptive trade practice[] within the scope of the [UDTPA], unless accompanied by 'some type of egregious or aggravating circumstances.'" *McClean* v. *Duke Univ.*, 376 F. Supp. 3d 585, 608 (M.D.N.C. 2019). Plaintiffs make no effort to plead any such circumstances. Nor could they, given that Wells Fargo's reasonable (and correct) interpretation of the IFR is supported by, among other things, the Secretary of the Treasury's Congressional testimony.

Further, "courts have refused to apply the UDTPA to matters" "where there already exists an extensive regulatory regime to address the violations." *Champion Pro Consulting Grp.* v. *Impact Sports Football, LLC*, 845 F.3d 104, 110 (4th Cir. 2016). The Small Business Act contains a comprehensive enforcement scheme (*see supra* at 15), and thus a UDTPA claim is not "necessary." *Champion*, 845 F.3d at 110.

C. Plaintiffs Fail to State a California UCL Claim.

Plaintiffs assert, but fail to plead, claims under the California UCL's "unlawful" and "unfair" prongs. (Compl. ¶ 85.) As a threshold matter, Plaintiffs fail to show that they are entitled to any relief available under the UCL. Private claimants may obtain only equitable relief under the statute; damages are unavailable. *See Korea Supply Co.* v. *Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003). But to be entitled to equitable relief, Plaintiffs must demonstrate that they "lack[] an adequate remedy at law." *Sonner* v. *Premier Nutrition Corp.*, 2020 WL 4882896, at *7 (9th Cir. June 17, 2020). Plaintiffs do not even attempt to make such a showing here, nor could they, given that any legally cognizable injury would be fully compensable through money damages. Further, despite Plaintiffs' cursory request that Wells Fargo be "enjoined from further refusing to pay … agent fees" (Compl. ¶ 90), the PPP has now concluded, and thus there is no future conduct to enjoin. Nor are Plaintiffs entitled to restitution. Plaintiffs never possessed the fees that Wells Fargo was paid *by the SBA*. *See Korea Supply*, 63 P.3d at 944. And for the reasons explained (*supra* Section I), Plaintiffs do not have any "ownership interest in" those fees. *Id.*

For that same reason, Plaintiffs fail to allege any predicate wrongful conduct. The only purportedly "unfair" or "unlawful" business practice that Plaintiffs identify is Wells Fargo's alleged refusal to pay agents fees. (Compl. ¶¶ 87-88.) But again, nothing in the CARES Act or the IFR entitles Plaintiffs to such fees. Absent an entitlement, there are simply no allegations of "unfair" or "unlawful" conduct at all.

D. Plaintiffs Fail to State an Unjust Enrichment Claim.

To state an unjust enrichment claim, Plaintiffs must plead that (i) they conferred a benefit on Wells Fargo, (ii) Wells Fargo consciously accepted the benefit, and (iii) Plaintiffs did not confer the benefit gratuitously. *Se. Shelter Corp.* v. *BTU, Inc.*, 572 S.E.2d 200, 206 (N.C. Ct. App. 2002). At the outset, Plaintiffs fail to state an unjust enrichment claim because "a party cannot maintain a claim for unjust enrichment where an adequate remedy at law exists." *Thompkins* v. *Key Health Med. Sols., Inc.*, 2015 WL 1292228, at *10 (M.D.N.C. Mar. 23, 2015). Plaintiffs obviously have an adequate remedy at law if they actually had a legally cognizable injury: money damages to compensate them for the fees they claim they are owed.

Regardless, Plaintiffs' conclusory assertion that Wells Fargo obtained "benefits in the form of PPP loan origination fees" and that "[a] portion of those fees were to be paid to agents" (Compl. ¶ 93) fails to support an unjust enrichment claim. The alleged benefits were conferred on Wells Fargo *by the SBA*, not by Plaintiffs. The only purported benefits Plaintiffs conferred were the services they provided *to their clients*, not Wells Fargo. *See Sport & Wheat*, 2020 WL 4882416, at *5 (unjust enrichment claim fails because any benefit from agents' services to lenders was merely "incidental"). Plaintiffs also fail to plead any facts whatsoever to show that Wells Fargo was contemporaneously aware of, much less consciously accepted, Plaintiffs' purported services.

E. Plaintiffs Fail to State a Conversion Claim.

To state a claim for conversion, the plaintiff must show "ownership in the plaintiff and wrongful possession or conversion by the defendant." *Variety Wholesalers, Inc.* v. *Salem Logistics Traffic Servs. LLC*, 73 S.E.2d 744, 747 (N.C. 2012). Plaintiffs plead neither element.

First, as explained above (*supra* Section I), Plaintiffs have no right to agent fees from Wells Fargo and thus cannot establish the requisite "ownership." *See Sport & Wheat*, 2020 WL 4882416, at *4 (plaintiff could not state a claim for conversion because it "had no legal right to any portion of the fee [the lenders] received from the SBA"). *Second*, Wells Fargo's lender fees are not "wrongful[ly]" received, *Variety Wholesalers*, 73 S.E.2d at 747 — to the contrary, they are statutorily mandated. (*See supra* at 2.)

CONCLUSION

For the foregoing reasons, the Court should dismiss all of Plaintiffs' claims.

Dated: September 15, 2020

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CERTIFICATE OF COMPLIANCE WITH LR 7.3(d)

I certify that the foregoing Memorandum of Law in Support of Wells Fargo & Co. and Wells Fargo Bank, N.A.'s Motion to Dismiss Plaintiffs' Complaint complies with the word-count limit in LR 7.3(d).

By: *_/s/ Jason D. Evans_______________*
Jason D. Evans

CERTIFICATE OF SERVICE

I certify that on September 15, 2020, all counsel of record are being served with a copy of this document via the Court's CM/ECF system.

By: *__/s/ Jason D. Evans__*
Jason D. Evans