IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SPORT & WHEAT CPA PA, a Florida corporation, individually and on behalf of a class of similarly situated businesses and individuals, Plaintiff, v. **SERVISFIRST BANK INC.; SYNOVUS BANK; THE FIRST, A NATIONAL ASSOCIATION;** and **TRUIST BANK,** Defendants.	Case No. 3:20-cv-5425-TKW-HTC

DEFENDANT TRUIST BANK'S
MOTION TO DISMISS THE AMENDED COMPLAINT
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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Under Federal Rule of Civil Procedure 12(b)(6), Defendant Truist Bank ("Truist") submits this Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof.

INTRODUCTION

Plaintiff Sport & Wheat CPA PA ("Sport & Wheat") seeks to turn a federal statute's limitation on agent fees into an affirmative entitlement. This effort fails on multiple fronts. Sport & Wheat identifies no valid cause of action it can pursue to obtain fees under federal law, a failure that defeats both its claim for declaratory relief and its common law claims. Sport & Wheat casts these common law claims as arising under state law. But the viability of each depends on whether the federal Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (the "CARES Act") entitles purported "agents" to receive a portion of the fees the Small Business Administration ("SBA") must pay lenders for processing Paycheck Protection Program ("PPP") loans. The CARES Act provides no such right. Nor do the SBA's implementing regulations—assuming those regulations are a valid exercise of the SBA's authority. Because federal law does not entitle purported agents to be paid fees by lenders, especially if those agents lack authorization and a contractual agreement, any remedy under state law for nonpayment of those fees would conflict with and undermine federal law. Such a remedy is thus unavailable, and Sport & Wheat's claims fail.

Not only does federal law defeat Sport & Wheat's claims, but Sport & Wheat's factual allegations do not support any claim for relief. Even if state law governed, Sport & Wheat does not state a claim for relief under that law because it fails to allege facts showing it conferred a direct benefit on Truist or that Truist exercised control over any Sport & Wheat property. The Amended Complaint should be dismissed with prejudice.

STATEMENT OF FACTS

I. Congress Requires the SBA to Reimburse PPP Lenders While Limiting Agent Fees.

This action arises from the federal government's unprecedented response to an equally unprecedented national crisis. The COVID-19 pandemic threw the country and its small businesses into economic turmoil. To help those businesses survive this uncertain time, Congress created the PPP as part of the CARES Act. Am. Compl. ¶ 2. Section 1102 of the Act grafted the PPP onto section 7(a) of the Small Business Act, the federal government's longstanding small business loan program. The PPP greatly expanded the pool of small businesses eligible to receive SBA-backed loans to cover payroll and other costs through 2020. *See* 15 U.S.C. § 636(a)(36)(A), (D), (F).

Although the SBA would guarantee these loans, the Act asked private lenders to process and fund them. *Id.* § 636(a)(36)(F)(iii). The CARES Act required the SBA to reimburse lenders for this work. The Act provides that "[t]he

[SBA] Administrator shall reimburse a lender authorized to make a covered loan." *Id.* § 636(a)(36)(P)(i). The Act sets out the specific rates the SBA must pay lenders "based on the balance of the financing outstanding at the time of disbursement of the covered loan." *Id.* Under this statutory provision, the SBA must reimburse lenders at a rate of:

> (I) 5 percent for loans of not more than $350,000;
>
> (II) 3 percent for loans of more than $350,000 and less than $2,000,000; and
>
> (III) 1 percent for loans of not less than $2,000,000.

Id. Any lender that processes a PPP loan is thus entitled under the statute's clear terms to reimbursement by the SBA in a set amount. And the statute entitles that lender to receive that reimbursement within five days of the loan's disbursement. *Id.* § 636(a)(36)(P)(iii).

Congress took a different approach with respect to "agent fees." Unlike the CARES Act's affirmative requirement that the SBA "shall reimburse a lender" a specific amount based on loan size, the Act addresses only the "Fee limits" applicable to agents. *Id.* § 636(a)(36)(P)(ii). Under the statute, "[a]n agent that assists an eligible [PPP] recipient to prepare an application for a covered loan may *not* collect a fee in excess of the *limits* established by the Administrator." *Id.* (emphasis added). Congress thereby delegated to the SBA the authority to set a maximum limit on the fees that an agent could collect as part of the PPP. Congress

did not provide that agents *shall* collect a fee, nor did it provide that any particular party *shall* pay agents any fee.

Beyond these provisions, Congress did not otherwise modify the existing 7(a) framework applicable to agents. Nor did it delegate to the SBA any authority to do so.

Congress instead left intact the existing regulatory scheme for agent fees. Under that framework, borrowers and lenders participating in the 7(a) loan program are not required to use an agent—they may "conduct business with SBA without a representative." 13 C.F.R. § 103.2(a). But the regulations outline three kinds of agents that borrowers or lenders *may* authorize to assist them in the loan process. *See id.* § 103.1(a). The party that chooses to use an agent and authorizes that agent as its representative is the party that pays the agent. *See id.* For the type of agent at issue here—what the regulations call a "packager" that helps a borrower prepare its application—the borrower authorizes the agent and pays the agent. *Id.* § 103.1(a)(2).[1] The agent must, however, execute a written "compensation agreement" governing this arrangement. *See id*. § 103.5(a).

[1] Along with "packagers," the regulations describe a "Lender Service Provider" that assists and is paid by a lender, and a "Loan Broker" that either assists a borrower or an agent, and is paid by the party it assists. *Id*. § 103.1(a)(1), (3).

II. The Regulatory Framework Focuses on Limiting Agent Fees.

The SBA purported to exercise its delegated authority to limit agent fees when it promulgated the First Interim Final Rule (the "First IFR").[2] The First IFR sets out maximum limits for agent fees, states that the fees will be paid by the lender out of origination fees received from the SBA, and may not be collected from the borrower or out of the PPP loan proceeds. 85 Fed. Reg. at 20,816. The First IFR focuses on what an *agent* affirmatively may *not* do: it may not collect fees from the borrower, out of the PPP loan proceeds, or beyond the set amounts. In contrast, the IFR's passive reference to fees "being paid" out of lender fees does not place an affirmative obligation on lenders to pay agents no matter if lenders have authorized those agents or permitted borrowers to use them. It simply finds that the listed amounts would be "reasonable" should a lender authorize and decide to pay an agent. The First IFR does not establish that lenders *must* pay any person who purports to act as a borrower agent.[3]

[2] The First IFR states that "[t]he program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10)." 85 Fed. Reg. 20,811, 20,812 (Apr. 15, 2020). The First IFR specifically provided that PPP lenders need not comply with the 7(a) program's stringent lending criteria when reviewing PPP loans and could instead rely on borrowers' certifications to determine eligibility. *Id.*

[3] Beyond stating that lenders would pay agents that assisted borrowers—a change in the existing framework that required borrowers to pay such "packagers"—the First IFR did not set out any other provisions for agents that conflict with pre-existing requirements. In particular, the First IFR did not promulgate any provision conflicting with or eliminating the requirements that an agent be authorized and complete a written compensation agreement to receive payment.

Industry associations communicating with the types of entities that might consider acting as borrower agents share this view that neither the CARES Act nor First IFR guarantees agent fees. The Association of International Certified Professional Accountants advised CPAs that:

> [E]ven though the Treasury has outlined guidelines related to agency fees, there is a possibility that you will not be paid for your services, even when noting you are an agent to the application. . . It is important to discuss this issue with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid.

Ex. A, AICPA, *Small Business Loans Under the Paycheck Protection Program: Issues Related to CPA Involvement* (Apr. 22, 2020). This CPA advocacy organization thus recognized that nothing assured payment to agents claiming to assist with borrower applications—and it voiced that view to accounting firms like Sport & Wheat.

III. Sport & Wheat Had No Reason to Believe Truist Would Pay It Agent Fees.

Even with no law, regulation, or industry paper suggesting Sport & Wheat would receive fees under the PPP, Sport & Wheat alleges that it performed services for Truist clients for which it now expects payment. Yet Sport & Wheat does not allege that Truist ever agreed to pay Sport & Wheat agent fees.

Sport & Wheat alleges "Borrower M" hired it to apply for a PPP loan through Truist. Am. Compl. ¶ 130. Jill Sport, a partner in Sport & Wheat,

allegedly "wrote to Truist" stating Sport & Wheat would be "acting as [Borrower M's] agent." *Id.* Sport & Wheat does not identify what it means to "wr[i]te to Truist." Nor does it specify any particular recipient of its writing or how Sport & Wheat transmitted that writing.

Sport & Wheat further claims that it spent four hours "preparing Borrower M's loan application and gathering supporting documents" before uploading the application and documentation to Truist's application portal. *Id.* ¶¶ 131, 133. Sport & Wheat states it "signed . . . as Borrower M's PPP Agent," but does not explain what that allegation means. *Id.* ¶ 133. Whose name did Sport & Wheat sign? And in response to what certification or attestation sought by Truist on the application?

Leaving these questions unanswered, Sport & Wheat alleges that it communicated with "Truist" by email because Sport & Wheat had improperly uploaded documentation to Truist's application portal, thereby slowing down the application and review process. *Id.* ¶ 134. Again, Sport & Wheat does not identify the name or email address of any Truist employee with whom it corresponded. Nor does Sport & Wheat explain why that individual's communications with Sport & Wheat confer knowledge on Truist that Sport & Wheat was acting as Borrower M's agent.

Sport & Wheat further claims that it "asked Truist what information it would

need in order to compensate Sport & Wheat," but received no reply. *Id.* ¶ 135. Again, Sport & Wheat provides no more detail on whom it corresponded with at Truist or the specific contents of its communication.

Sport & Wheat instead explains that it created another impediment to Truist's processing of Borrower M's application, because Truist had to follow up with Sport & Wheat to ask that an application be signed by an authorized representative of Borrower M—which Sport & Wheat evidently was not. *Id.* ¶ 136. After this issue was corrected, Truist funded Borrower M's loan. *Id.* ¶ 137.

Sport & Wheat alleges that it asked about a fee after Truist funded Borrower M's loan but was told by another unidentified party at Truist that Truist was evaluating its response. *Id.* ¶ 140. Sport & Wheat asserts that it has not received a fee from Truist and that Truist owes it fees for assisting other unidentified clients with Truist PPP applications. *Id.* ¶¶ 141–43. Although Sport & Wheat concedes that the SBA regulations require it to submit a compensation agreement to receive payment, Sport & Wheat never alleges that it did so. *See id.* ¶ 65. Sport & Wheat instead resorts to its putative class claims against Truist for unjust enrichment, contract implied in law, conversion, and declaratory relief. *Id.* at 36–41.

STANDARD OF REVIEW

"[T]o survive a motion to dismiss, a complaint must . . . contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

face.'" *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), or a "formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, are insufficient. When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

ARGUMENT

The Amended Complaint fails in its entirety to state any claim on which relief can be granted. Sport & Wheat's claim for declaratory relief fails because the CARES Act does not provide Sport & Wheat with a private right of action under federal law. Sport & Wheat's remaining state law claims fail because federal law does not entitle Sport & Wheat to fees. Any state remedy providing those fees would therefore conflict with the purposes and objectives of the federal law that controls in this area and is preempted. Sport & Wheat also fails to state any claim under Florida law. This Court should dismiss the Amended Complaint with prejudice.

I. Federal Law Does Not Provide a Private Cause of Action for PPP Agent Fees.

Sport & Wheat's claims fail because they hinge on the faulty assumption that the CARES Act and implementing regulations permit an agent to pursue a

cause of action for fees. In particular, Count Four of the Amended Complaint seeks a declaration under the federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), that Sport &Wheat is entitled to fees "to be paid from [Truist's] origination fees under the Paycheck Protection Program." Am. Compl. ¶¶ 187, 189–90. That claim's viability depends on whether federal law provides a private cause of action for agents claiming an entitlement to fees under the federal CARES Act and PPP. Because federal law does not so provide, this claim fails.

The Declaratory Judgment Act is procedural only and does not establish an independent cause of action. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). It merely operates to provide a "remedy in cases or controversies for which an independent basis of federal jurisdiction exists." *First Fed. Sav. & Loan Ass'n of Lake Worth v. Brown*, 707 F.2d 1217, 1220 (11th Cir. 1983). Sport & Wheat's claim for declaratory relief thus requires an underlying cause of action for agent fees. *See Musselman v. Blue Cross & Blue Shield of Alabama*, 684 F. App'x 824, 829 (11th Cir. 2017) (Tjoflat, J., concurring) ("Congress plainly intended that the declaratory judgment serve as a primary remedy available for any underlying cause of action.").

Sport & Wheat makes no attempt to identify a cause of action—under any body of law—allowing it to pursue a declaratory judgment for agent fees. *See* Am. Compl. ¶¶ 186–90. Count Four therefore fails on its face because Sport & Wheat

does not plead any cause of action supporting it.

Sport & Wheat does not plead any cause of action because none exists. "[T]he CARES Act does not expressly provide a private right of action" for agent fees. *Profiles, Inc. v. Bank of Am. Corp.*, —F. Supp. 3d—, No. 20-0894, 2020 WL 1849710, at *4 (D. Md. Apr. 13, 2020). The statute establishes only a limit on the fees agents may collect.

The Act also does not provide an implied private right of action for PPP agent fees. The Small Business Act, which the CARES Act amends, does not confer any private right of action, express or implied. *See United States v. Fidelity Capital Corp.*, 920 F.2d 827, 838 n.39 (11th Cir. 1991); *Bulluck v. Newtek Small Bus. Fin., Inc.*, 808 F. App'x 698, 2020 WL 1490702, at *3 (11th Cir. Mar. 27, 2020). As the only court to evaluate the CARES Act for a private right of action has determined, the CARES Act does not change this conclusion or add any private right of action. *Profiles*, —F. Supp. 3d—, 2020 WL 1849710, at *7.

Nothing in the statute reflects any intent by Congress to create a cause of action for agents. *See McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 723 (11th Cir. 2002) ("There must be clear evidence of Congress's intent to create a cause of action."); *Love v. Delta Air Lines*, 310 F.3d 1347, 1352 (11th Cir. 2002) (courts rarely impute an intent to create a private right of action when a statute lacks "[r]ights-creating language . . . explicitly conferring a right directly on a class

of persons that includes the plaintiff in a case"). The statute reflects only an intent to *prohibit* agents from collecting excessive fees. Without statutory evidence of Congressional intent to permit agents to pursue claims for fees, the First IFR also does not provide a private right of action. *See Love*, 310 F.3d at 1353 (if a statute does not confer a private right of action, "such a right may not be created or conferred by regulations promulgated to interpret and enforce it").

Because no underlying cause of action supports Sport & Wheat's claim for declaratory relief, that claim fails as a matter of law. This Court should dismiss Count Four. This conclusion also undermines Sport & Wheat's additional claims for relief. Those claims depend on an asserted entitlement to agent fees for which federal law does not provide a cause of action and that federal law in fact precludes.

II. Federal Law Does Not Entitle Agents to PPP Fees.

Even if Sport & Wheat had a private right of action to pursue, its entire case rests on the baseless view that PPP lenders "must" pay agents. Am. Compl. ¶ 50. Lenders have no such payment obligation under federal law. To hold otherwise would conflict with the CARES Act's unambiguous language and the broader regulatory scheme. Because federal law precludes the relief sought here—automatic payment of fees to purported agents using lender reimbursement funds—that relief is also unavailable under state law.

A. The CARES Act Limits Agent Fees—It Does Not Create an Entitlement that Lenders Must Pay.

The CARES Act's plain language bars Sport & Wheat's claims that it has a right to receive portions of origination fees Truist receives under the CARES Act. *See Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.") (citation omitted). The CARES Act limits agent fees; nothing more. Congress directed that "[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the [SBA] Administrator." 15 U.S.C. § 636(a)(36)(P)(ii). This unequivocal *restraint* on agents cannot impose an affirmative duty on lenders—especially because it does not even mention lenders.[4]

Sport & Wheat's arguments rely on the premise that this language establishes an affirmative entitlement for anyone who claims to be an agent to be paid by a lender on demand, no matter if the lender agreed to those services or agrees that they were reasonable. The statute's negative limitation provides no basis to create such an affirmative right. *See Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals

[4] Sport & Wheat similarly relies on an "Information Sheet" issued by the Department of Treasury. Am. Compl. ¶ 56. The Information Sheet merely paraphrases the statute and regulations and does not mandate agent fees be paid.

protected create no implication of an intent to confer rights on a particular class of persons.").

Congress knew how to create an affirmative right to fees when it wanted to: it did so for lenders in the provision immediately preceding its limitation on agent fees. There, the CARES Act provides that "[t]he [SBA] Administrator *shall* reimburse a *lender*" at set rates. 15 U.S.C. § 636(a)(36)(P)(i) (emphases added). The stark difference between the lender fee provision and the agent fee limitation reflects Congress's deliberate decision not to guarantee fees to agents. *See In re Failla*, 838 F.3d 1170, 1176–77 (11th Cir. 2016) ("The presumption of consistent usage instructs that 'a word or phrase is presumed to bear the same meaning throughout a text' and that 'a material variation in terms suggests a variation in meaning.'"). Sport & Wheat cannot rewrite the statute to create an entitlement that Congress rejected.

B. The PPP Regulations, Even if Valid, Do Not Create an Entitlement to Agent Fees.

Sport & Wheat further contends that the First IFR entitles it to fees paid by lenders. Am. Compl. ¶¶ 112, 189. But the SBA's First IFR, by purporting to wrest from lenders the statutorily required fees the SBA must pay, exceeds the SBA's authority to implement the PPP. Even if that regulation were valid, it still provides no right for agents to be paid regardless of lender authorization.

1. The SBA Exceeded Its Authority by Providing that Agent Fees Will be Paid Out of Statutorily Mandated Lender Fees.

Congress gave the SBA two responsibilities for PPP fees. First, it required the SBA to pay lenders set reimbursement amounts within a set time. Second, it delegated to the SBA the authority to set limits on agent fees. The SBA properly used its delegated authority to limit agent fees. But it improperly exceeded that authority by calling for lenders to use their statutory reimbursements to pay agents. The SBA also threw the once-straightforward system of agent authorization and payment into disarray by providing that lenders would pay agents that they did not authorize—a result Congress could not have intended by its limited delegation. In two respects, then, the SBA exceeded its authority in issuing the First IFR, its unauthorized subsection regarding agent fees is invalid.[5]

"[A]n agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Congress may expressly delegate authority to an agency "to elucidate a specific provision of [a] statute," but that agency may not then promulgate a regulation that is "manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844

[5] Truist asserts only that the First IFR's subsection addressing the payment of agent fees from the lender's fee is invalid. That provision can be severed from the remainder of the First IFR. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) ("The severance and invalidation of this subsection will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion. Accordingly, [the subsection] must be invalidated for its conflict with the unequivocal language of the statute.").

(1984). If the agency's regulation "conflicts with [the] statute, the statute controls." *Cremeens v. City of Montgomery*, 602 F.3d 1224, 1227 (11th Cir. 2010).

Congress *expressly* required that lenders receive a prescribed amount of fees under the CARES Act. Congress's delegation on *agent* fee limits did not mention lender reimbursements. Instead, in the provisions immediately preceding and following that delegation, Congress obligated the SBA to reimburse lenders. That statutory language does not admit exception and does not delegate to the SBA the authority to change those reimbursement amounts.

Yet the SBA did just that. By providing that "[a]gent fees will be paid by the lender out of the fees the lender receives from SBA," the SBA directly contradicted the statutory requirement that the SBA "*shall* reimburse a lender" at set rates. 85 Fed. Reg. at 20,816; 15 U.S.C. § 636(a)(36)(P)(i). Under the First IFR, the SBA rewrites the statute to subtract from those set rates varying amounts of agent fees. This result is contrary to the SBA's limited delegation of authority and to the statute's unambiguous language, which expresses Congress's intent that the SBA would provide specific reimbursement amounts to encourage lender participation in the PPP. The SBA's regulation reduces those amounts and discourages the voluntary participation that Congress sought to promote. *Cf. Profiles*, —F. Supp. 3d—, 2020 WL 1849710, at *11. This direct contradiction of

the statute renders the First IFR invalid.

The First IFR also exceeds the SBA's authority by going beyond the scope of its express delegation to provide that lenders would pay agents that assist (and are purportedly authorized by) borrowers. In expressly delegating to the SBA the authority to limit the fee amounts agents could collect for PPP work, Congress never mentioned who would pay those fees. Nor did it delegate to the SBA express authority to regulate on that point. Congress otherwise gave the SBA general authority to implement the CARES Act, *see* Pub. L. No. 116-136, § 1102(a), 134 Stat. 281 (2020), but the statutory scheme shows Congress left no ambiguity or "gap" for the SBA to fill on the question of *who* should pay agent fees.[6] *See King v. Burwell*, 135 S. Ct. 2480, 2488 (2015). Instead, the statutory scheme and language show that Congress intended for the pre-existing system of regulations to remain in force, with the SBA simply establishing what fee amounts would be reasonable under that system for the PPP.

Congress enacted the PPP against the backdrop of the existing regulations, which establish that only the party who authorizes an agent to assist them should pay that agent. 13 C.F.R. § 103.1(a).[7] This approach adhered to the foundational

[6] Congress left no ambiguity for the SBA to address about who would pay agent fees. But even if it had, the SBA's interpretation of the statute to require payment by lenders would be unreasonable and invalid.

[7] For example, either an applicant or a lender could authorize a loan broker to assist them, but only one of those parties could authorize and pay that loan broker. *See id*. § 103.1(a)(3) ("A

principle that an agency relationship cannot exist unless the principal "manifests assent" for the agent to act on its behalf. Restatement (Third) of Agency §§ 1.01, 1.03 (2006). By ensuring that one principal authorized and compensated one agent, the regulations also avoided the untenable situation driving this litigation: an agent asserting it was authorized by a borrower but seeking payment from a lender it did not assist and by whom it was not authorized.

This involuntary agency problem is not what Congress intended. Congress would have said so had it wished to upend the longstanding approach to SBA agency relationships. *Lindley v. FDIC*, 733 F.3d 1043, 1055–56 (11th Cir. 2013) ("Congress is presumed to know the content of existing, relevant law, and where Congress knows how to say something but chooses not to, its silence is controlling."); *see also In re Gateway Radiology Consultants, P.A.*, —B.R.—, No. 19-4971, 2020 WL 3048197, at *12 (Bankr. M.D. Fla. June 8, 2020) ("Congress' silence ought to be conclusive that Congress did not intend to exclude an entire class of small businesses . . . from the Paycheck Protection Program."). Congress instead wanted the existing payment system to remain intact—just with new controls on the fees agents could seek from borrowers they assisted.

Because the SBA exceeded its authority by promulgating a regulation

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Loan Broker may be employed and compensated by either the Applicant or the SBA Lender (but not both).").

manifestly contrary to the CARES Act and Congress's intent in enacting that statute, the First IFR's provision for agent fees to be paid out of lender fees to borrower's agents is invalid. Sport & Wheat therefore has no claim for agent fees against Truist.

2. The Plain Language of the First IFR Creates No Entitlement to Agent Fees.

The same result obtains even if the First IFR is a valid exercise of the SBA's authority. Even if the First IFR validly requires lenders to pay agents in some circumstances, it does not affirmatively obligate lenders to use agents or to pay fees to an unauthorized agent that has not complied with the SBA's requirements. The IFR instead imposes caps on the "total amount that an agent *may* collect" and prohibits agents from "collect[ing] fees from the borrower or . . . out of the PPP loan proceeds." 85 Fed. Reg. at 20,816 (emphasis added). Like the governing statute, the IFR focuses on limiting agent action and fee collection, not on obligating it.

3. Pre-existing SBA Regulations Confirm There Is No Entitlement to Agent Fees.

The SBA's agent fee regulations pre-dating the PPP confirm that Sport & Wheat lacks any entitlement to agent fees. As Sport & Wheat asserts, the PPP regulations must be read in the context of this pre-existing 7(a) regulatory scheme. *See* Am. Compl. ¶¶ 43, 65–67; *see also* 15 U.S.C. § 636(a)(36)(B). The broader

regulatory scheme imposes substantial checks on the role of "agents," including the circumstances under which an agent may be paid. The PPP-related guidance creates *additional* limits on the amount an agent may be paid—it does not mandate an unchecked transfer of compensation from lenders to purported agents.

The SBA does not require borrowers or lenders to use agents for Section 7(a) loans. *See* 13 C.F.R. § 103.2(a). But any agent used must be an "authorized representative." *Id.* § 103.1(a). As explained above, the pre-PPP regulations required that the party using the agent authorize and pay that agent, but the SBA has thrown that system into disarray. At best, it remains unclear whether the borrower or lender or both must authorize a PPP agent.

The SBA did not alter, however, the requirement that an authorized agent execute a written agreement for compensation.[8] *Id.* § 103.5(a). Sport & Wheat purports to be authorized by Borrower M—and it is uncertain whether that supposed authorization suffices—but does not allege it executed any such agreement with any party involved here. In fact, Sport & Wheat acknowledges that Truist did not consider it to be an authorized representative, as Truist required Borrower M's signature before funding the loan. Am. Compl. ¶¶ 136–37. Without

[8] Secretary of the Treasury Mnuchin confirmed that lenders were not required to use agents and any dealings should be documented in a written agreement during recent Congressional testimony. Secretary Mnuchin stated that the SBA's guidance said "that banks *could* pay agent fees out of the fees that they received," and that this payment "was intended to be based upon a contractual relationship between the agent and the bank." J. Hill, LAW360, *Mnuchin Says He'll Look At PPP Agent Fee 'Confusion,'* https://www.law360.com/articles/1287681 (June 30, 2020).

a compensation agreement, nothing in the CARES Act or regulations requires (or allows) any party to pay Sport & Wheat. Sport & Wheat acknowledges this requirement, but asserts it is entitled to fees even without meeting it. Am. Compl. ¶ 65.

The requirement for a compensation agreement imposes a basic check on third parties involved in SBA loan transactions. Requiring lenders to pay agents for unauthorized and unverified work would exacerbate the risks of fraud and abuse that for-fee agents pose. The SBA has identified a "pattern of fraud by loan packagers and other for-fee agents in the 7(a) Loan program." U.S. Small Bus. Admin., Off. of the Inspector Gen., *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2019*, at 8, 9 (Oct. 11, 2018).[9] The SBA's pre-existing regulations seek to combat this problem by requiring an agent, applicant, and lender to complete SBA Form 159. That requirement ensures that lenders know agents' identities and can comply with their obligations to avoid doing business with disbarred or suspended agents. SBA, *Lender and Development Company Loan Programs, Standard Operating Procedures (SOP) 50 10 5(J)*, Subpart A, Ch. 1, at 11 (2018). The written compensation agreement also serves to prevent "agents" and "loan

[9] *Available at* https://www.sba.gov/sites/default/files/2019-08/SBA-OIG-Report-19-012.pdf.

packagers" from "charging inappropriate or unreasonable fees to applicants and lenders." 75 Fed. Reg. 60,588, 60,594 (Oct. 1, 2010).

Although an agent authorized to perform PPP-related work need not fill out a Form 159, which the SBA marks "[f]or use with 7(a) and 504 Loan Programs,"[10] the execution of a "compensation agreement" between the payor and the agent is required by SBA regulation. 13 C.F.R. § 103.5(a). And perhaps the SBA will still amend Form 159 or roll out a new form documenting agent/lender agreements.[11] Regardless, an agent's obligation to complete an agreement remains. Yet Sport & Wheat alleges it is entitled to fees despite not executing any such agreement or obtaining authorization from Truist to perform services for which it asks Truist to pay.

Given the risks posed by for-fee agents, it would both impede the SBA's efforts to combat fraud and defy common sense to require lenders to pay unauthorized agents with no written agreement governing their fees. In particular,

[10] Available at https://www.sba.gov/sites/default/files/2018-09/Form%20159%20-%20%28FINAL%29%209.10.18.pdf

[11] The SBA would be understandably delayed in issuing any such new form given the extremely expedited and often haphazard nature of the PPP's regulatory rollout. The SBA only released the form that lenders must complete to obtain origination reimbursements on May 21, months after the enactment of the CARES Act's requirement that the SBA pay lenders and do so within five days of loan disbursement. *See* SBA Procedural Notice, *Paycheck Protection Program Lender Processing Fee Payment and 1502 Reporting Process* (May 21, 2020), available at https://www.sba.gov/sites/default/files/2020-05/5000-20028.pdf. And in Secretary Mnuchin's Congressional testimony, he indicated that Treasury may issue additional guidance clarifying any confusion its agent fee guidance has caused. *See supra* n. 7.

there would be no mechanism for lenders to verify agents' identities or the satisfactory nature of any work supposedly performed. Nor would there be anything to prohibit multiple purported agents from claiming fees for work purportedly performed on behalf of a single borrower. The regulations are clear, and they preclude Sport & Wheat's claimed entitlement.

4. The Common Law Confirms There Is No Entitlement to Agent Fees.

Mandating payment of claimed agent fees not only runs contrary to the statutory and regulatory texts, but it upends common law. By requiring a written agreement, the SBA makes agent compensation a question of contract. "There can be no contract without the mutual assent of the parties." *Utley* v. *Donaldson*, 94 U.S. 29, 47 (1876); *see also* Restatement (Second) of Contracts § 17 (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). The agreement is what creates the payment obligation: "it is inferred that a person promises to pay for services *which he requests or permits another to perform for him* as his agent." Restatement (Second) of Agency § 441 (1958) (emphasis added). In contrast, "one has no duty to pay for services officiously rendered without request." *Id.*; *accord* Restatement (First) of Restitution § 2 (1937). "A person is not required to deal with another unless he so desires." *Id.*

Even if the First IFR validly requires lenders to pay agent fees in some

cases, it does not require lenders to do so absent a voluntary agreement with the agent. The Amended Complaint ignores these governing principles by demanding millions of dollars with no such agreement.

C. Federal Law Bars Any Claim for Payment of Purported Fees.

At every turn, federal law precludes the entitlement that Sport & Wheat claims. Nothing in the CARES Act or regulations gives Sport & Wheat (1) a cause of action or (2) a right to agent fees for unauthorized work ungoverned by a compensation agreement. Sport & Wheat's federal declaratory judgment claim fails on both counts to state a claim on which relief can be granted.

So do Sport & Wheat's purported state law claims. Sport & Wheat cannot pursue a state remedy for agent fees when federal law bars such a remedy. Giving Sport & Wheat agent fees under state law would both directly conflict with the CARES Act and stand as an obstacle to the accomplishment of the Act's purposes and objectives. Federal law therefore precludes any remedy based on state law. *Tectonics, Inc. of Fla. v. Castle Const. Co.*, 753 F.2d 957, 962 (11th Cir. 1985).

First, federal law not only does not require, but also does not *permit* payment of agent fees out of lender fees to an unauthorized agent without a compensation agreement. The CARES Act does not guarantee fees to an agent or require that a lender share federal funds with an agent. And even if fully valid, the First IFR does not permit payment to an unauthorized agent who has not complied with the

SBA's requirements. As a result, no state law can require a lender to pay an unauthorized agent without a contract a portion of its federal reimbursement. Such a requirement would directly contradict the CARES Act and the applicable regulations. Federal law thus precludes Sport & Wheat's state law claims. *Tectonics*, 753 F.2d at 962.

Second, permitting a state law remedy for a claimed entitlement to agent fees would impede the CARES Act's objectives. Congress passed the CARES Act "with the goal of affording some relief to American small businesses." *Profiles*, —F. Supp. 3d—, 2020 WL 1849710, at *1. Congress relied on private lending institutions to accomplish this goal by rapidly processing and funding billions of dollars of loans for small businesses in need. Am. Compl. ¶ 6. Because lenders could opt not to take on this demanding enterprise, Congress sought to encourage their participation by requiring the SBA to reimburse the lenders for a small portion of their work. *Cf. Profiles*, —F. Supp. 3d—, 2020 WL 1849710, at *11 (noting "the voluntary nature of PPP").

A party cannot invoke state law to take from lenders part of those reimbursement fees the statute provides they receive. Permitting a state law remedy for agent fees paid out of lender reimbursements would lessen incentives to participate in the PPP and thereby "undermine Congress's goal to maximize relief for American small businesses." *Id.* Permitting a state law remedy for agent

fees paid to unauthorized agents with no compensation agreement would also discourage lender participation by exposing lenders to heightened risks of fraud and liability. *Supra* at 21–22. This use of state law is precluded because it would impede the CARES Act's purposes and objectives. *Tectonics*, 753 F.2d at 962. Sport & Wheat cannot pursue its claims for agent fees under federal or state law.

III. Sport & Wheat Also Fails to State Any Claim under Florida Law.

Even if Sport & Wheat could pursue claims under Florida law, it does not state any claim for relief.

A. Sport & Wheat Fails to State a Claim for Unjust Enrichment or Contract Implied in Law.

Florida law treats claims for unjust enrichment and contract implied in law as equivalents. *Resnick v. AvMed, Inc*., 693 F.3d 1317, 1325 n.2 (11th Cir. 2012). Sport & Wheat's claims in Counts One and Two are duplicative, and neither states a claim under Florida law. A plaintiff alleging unjust enrichment must show that: (1) the plaintiff has conferred a direct benefit on the defendant; (2) the defendant knows about the benefit; (3) the defendant has accepted or retained the benefit; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit. *Am. Safety Ins. Serv. v. Griggs*, 959 So. 2d 322, 331 (Fla. 5th DCA 2007).

1. Sport & Wheat Does Not Allege it Conferred a Direct Benefit on Truist of which Truist Had Knowledge.

"[T]o prevail on an unjust enrichment claim, the plaintiff must *directly* confer a benefit to the defendant." *Kopel v. Kopel*, 229 So. 3d 812, 818 (Fla. 2017) (emphasis added). Sport & Wheat pleads no facts showing it directly conferred any benefit to Truist.

Sport & Wheat conclusorily alleges that its actions "benefited each of the Defendants, by bringing completed loan packages to Defendants' banks, earning them origination fees." Am. Compl. ¶ 163. Sport & Wheat also asserts, without factual detail, that the "Defendants performed less work than they would have, absent Sport & Wheat's involvement," *id.* ¶ 164, because Sport & Wheat "perform[ed] work which Defendants did not do" and made it "easier and faster for Defendants to process loans," *id.* ¶ 174. But Sport & Wheat pleads no specific facts to support these bare allegations.

To the contrary: the facts Sport & Wheat pleads about its purported work for Borrower M's Truist application show that Sport & Wheat (1) did not submit a complete loan application to Truist, (2) slowed down the application process, and (3) created more work for Truist. Sport & Wheat improperly uploaded documentation to Truist's application portal, requiring Truist personnel to halt their review to request new documentation. *Id.* ¶ 134. Sport & Wheat further impeded Truist's progress by signing Borrower M's application. *Id.* ¶ 136. This error

required Truist employees to spend time they would not otherwise have spent requesting and waiting on a newly signed application.[12] Sport & Wheat fails to explain how its struggle to properly complete Borrower M's application somehow lessened Truist's workload or expedited the process. Its allegations show instead that Truist performed the same work, if not more, as it would have done without Sport & Wheat's involvement: it would have still reviewed Borrower M's documentation, followed up on issues that arose, and funded the loan when the application was complete.

If anyone received a direct benefit from Sport & Wheat, it was Borrower M: the party that allegedly hired Sport & Wheat to complete its application so Borrower M would not have to. Perhaps Borrower M avoided work it otherwise would have done because of Sport & Wheat's assistance, but Truist did not. Any help Borrower M received does not translate to a direct benefit for Truist. *See A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, No. 14-0310, 2015 WL 12867010, at *5–6 (M.D. Fla. Jan. 22, 2015) (auto repair shop's work for customers did not confer benefit on insurer, which merely incurred an obligation to pay because of its contract with the customers).

[12] Sport & Wheat alleges that "certain Defendants . . . affirmatively requested further assistance from Sport & Wheat in connection with various transactions." Am. Compl. ¶ 175. This allegation does not identify which defendant it describes, but it cannot describe Truist's alleged interactions with Sport & Wheat centered on resolving problems Sport & Wheat created.

Nor do the statutorily required reimbursements Truist will receive from the SBA qualify as a benefit conferred by Sport & Wheat. The attenuated connection between Truist receiving a reimbursement fee and Sport & Wheat purportedly assisting a borrower cannot support an unjust enrichment claim. Sport & Wheat does not pay Truist that money, and Sport & Wheat has no impact on whether Truist receives that money. Truist is entitled to the same reimbursement amount if it processes and funds a PPP loan, no matter how quickly it processes that loan or how much work is involved. Sport & Wheat does not allege that Borrower M would not have applied for a PPP loan from Truist without Sport & Wheat's assistance. So with or without Sport & Wheat in the picture, Truist would have funded Borrower M's loan and received the same fee. No connection exists between Sport & Wheat and the origination fees, much less a direct one that would support an unjust enrichment claim. *See Johnson v. Catamaran Health Sol., LLC*, 687 F. App'x 825, 830 (11th Cir. 2017) (dismissing claim where plaintiff paid membership fees to a third party that in turn paid a premium to defendant); *Peoples' Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., N.A.*, 667 So. 2d 876, 879 (Fla. 3d DCA 1996) (claim failed where the alleged payments in which plaintiff claimed an interest were made by a third party, not plaintiff).

Sport & Wheat also fails to allege that Truist knew about a purported benefit from Sport & Wheat. Sport & Wheat alleges that its owner interacted with

"Truist," but does not identify any specific Truist employee or representative, much less how that individual's purported knowledge could reflect Truist's knowledge of Sport & Wheat's involvement. And even if someone at Truist knew of that involvement, the allegations show they would have only known of the problems Sport & Wheat caused—incorrect documentation, improper signature—not of any benefit conferred.

2. It is Not Inequitable for Truist to Retain the Fee the CARES Act Guarantees.

Sport & Wheat's unjust enrichment claim also fails because Truist's actions are not inequitable. An unjust enrichment hinges on whether "the circumstances are such that it would be inequitable for the defendant to retain the benefit." *Griggs*, 959 So. 2d at 331. The Court should examine "the particular circumstances of [the] individual case as well as the expectations of the parties to determine whether an inequity would result or whether their reasonable expectations were met." *Porsche Cars N. Am., Inc. v. Diamond,* 140 So. 3d 1090, 1100 (Fla. 3rd DCA 2014).

Sport & Wheat had no reasonable expectation under the circumstances that Truist would pay it agent fees. First, the CARES Act and regulations do not require Truist to pay those fees and did not assure Sport & Wheat of any entitlement to them—a view industry guidance expressed to Sport & Wheat. *Supra* at 6–7. Second, Truist never authorized Sport & Wheat to act as its agent

and never agreed to pay Sport & Wheat agent fees. Third, Sport & Wheat's allegations show it never completed a compensation agreement as the SBA requires.

Not only did Sport & Wheat not have a reasonable expectation of receiving fees, Truist had a reasonable expectation that it would not have to pay agent fees if it did not authorize or use an agent. Truist also had a reasonable expectation that it would receive and retain its full and fair reimbursement for processing thousands of loans to assist small businesses. No inequity supports Sport & Wheat's unjust enrichment claim.

B. Sport & Wheat Fails to State a Claim for Conversion.

Sport & Wheat claims in Count Three that "[a] portion of the origination fee each Defendant received was the rightful property of Sport & Wheat." Am. Compl. ¶ 183. "[T]o maintain an action for conversion, one must have possession of the property or an immediate right to possession." *Scherer v. Laborers' Int'l Union of N. Am.*, 746 F. Supp. 73, 84 (N.D. Fla. 1988). As the above discussion shows, Sport & Wheat never possessed the fees at issue and has no right to possess any portion of the reimbursement fees to which Truist is statutorily entitled.

Sport & Wheat also cannot seek to enforce an alleged obligation to pay money using a conversion action. *Kee v. Nat'l Reserve Life Ins. Co.*, 918 F.2d 1538, 1541–42 (11th Cir. 1990). This rule reflects "the principle that an action in

tort is inappropriate where the claim is based on a breach of contract." *Bel-Bel Int'l Corp. v. Cmty. Bank of Homestead*, 162 F.3d 1101, 1109 (11th Cir. 1998). Sport & Wheat's conversion claim reflects an attempt to circumvent the contractual nature of agent fees under the PPP. The SBA's regulations make agent fees, and claims to them, a creature of contract by requiring an agent to complete a compensation agreement. *Supra* at 23–25. That Sport & Wheat has not done so confirms it lacks any right to fees. This requirement also shows that Sport & Wheat cannot maintain a tort action for a claim that should sound in contract. Count Three should be dismissed.

CONCLUSION

For the reasons above, this Court should dismiss the Amended Complaint with prejudice.

This 3rd day of July, 2020.

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LOCAL RULE 7.1(F) WORD LIMIT CERTIFICATION

Pursuant to Northern District of Florida Local Rule 7.1(F), I certify that this Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof is in compliance with the Court's word limit. According to the word processing program used to prepare this motion and memorandum, the document contains 7,950 words, exclusive of the case style, signature block, and this certification.

CERTIFICATE OF SERVICE

I, Cheryl L. Haas, do hereby CERTIFY that a true and correct copy of the foregoing Motion to Dismiss the Amended Complaint and Memorandum of Law in Support Thereof have been furnished to all counsel of record via ECF on this 3rd day of July 2020.

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