Brendan P. Cullen (SBN 194057)
(cullenb@sullcrom.com)
Sverker K. Hogberg (SBN 244640)
(hogbergs@sullcrom.com)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5700

David Carlyle Powell (SBN 129781)
(dpowell@mcguirewoods.com)
Carolee Anne Hoover (SBN 282018)
(choover@mcguirewoods.com)
Jamie Danielle Wells (SBN 290827)
(jwells@mcguirewoods.com)
MCGUIREWOODS LLP
Two Embarcadero Center, Suite 1300
San Francisco, California 94111
Telephone: (415) 844-9944
Facsimile: (415) 844-9922

Counsel for Defendant Wells Fargo Bank, N.A.

[Additional counsel listed on signature pages]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICAN VIDEO DUPLICATING, INC., a California corporation, TUSH LAW LTD., a California limited partnership, and KENNETH M. HAHN, a sole proprietor, DBA CAL STATE FINANCIAL, individually and on behalf of a class of similarly situated businesses and individuals,

Plaintiffs,

v.

CITIBANK, N.A., U.S. BANK, N.A., JPMORGAN CHASE BANK, N.A., WELLS FARGO BANK, N.A., BANK OF AMERICA, N.A., LIVE OAK BANKING COMPANY, HARVEST SMALL BUSINESS FINANCE, and DOE LENDERS 1 to 4,975, inclusive,

Defendants.

Case No. 2:20-cv-03815-ODW-AGR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: October 19, 2020
Time: 1:30 p.m.
Judge: Hon. Otis D. Wright II
Court: Courtroom 5D
First Street Courthouse
350 W. 1st Street
Los Angeles, CA 90012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

Statutes, Rules, and Regulations

TABLE OF AUTHORITIES (cont.)

Page(s)

Other Authorities

Defendants U.S. Bank National Association, JPMorgan Chase Bank, N.A., Wells Fargo Bank, N.A., Bank of America, N.A., Live Oak Banking Company, and Harvest Small Business Finance (collectively, "Defendants") hereby move to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[1]

PRELIMINARY STATEMENT

This action is one of dozens filed across the country by putative "agents" claiming they are entitled to fees from lenders that provided loans to small businesses through the federal government's Paycheck Protection Program ("PPP"). Each action raises the same dispositive question: are agents entitled to payment from lenders when the lenders never promised or agreed to pay them? As the only court to rule on this issue to date 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). The same answer applies here and compels dismissal.

At the outset, Plaintiffs fail to allege facts showing that they have standing. The Amended Complaint merely asserts that Plaintiffs helped to prepare unspecified PPP loan applications for unidentified small businesses and are therefore entitled to fees from Defendants, but it never alleges that Plaintiffs specifically assisted any borrowers who received a PPP loan *from Defendants*. Such conclusory allegations fail to show that Plaintiffs suffered any injuries-in-fact traceable to any Defendant's conduct, a requirement for Plaintiffs to sue.

Even if Plaintiffs could establish standing, they have no legally viable claim. The Amended Complaint is based entirely on a single, flawed theory: that one line in the Small Business Administration's ("SBA") regulation implementing the PPP purportedly dispensed with the longtime requirement that a lender agree to pay an agent before having an obligation to do so, and created in its place a new, mandatory

[1] The arguments and grounds for dismissal set forth in Defendant Citibank, N.A.'s Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 83) are consistent with the arguments set forth herein and further support dismissal of Plaintiffs' claims as to all Defendants.

obligation for participating lenders to pay agents notwithstanding the absence of any such requirement in the CARES Act itself. But the SBA's regulation did no such thing, and Plaintiffs' theory is refuted by the plain language of the existing statutory and regulatory framework, the Congressional testimony of the Secretary of the Treasury, and common sense. As the U.S. District Court for the Northern District of Florida explained, Plaintiffs' claims are "premised on the assumption that the CARES Act and its implementing regulation require lenders to pay the borrowers' agent fees," but "[t]his assumption . . . finds no support in the plain language of the statute or the regulation." *Sport & Wheat*, 2020 WL 4882416, at *2. Lacking any entitlement to payment under the governing statute or regulations, all Plaintiffs' claims fail as a matter of law and should be dismissed.

Plaintiffs' claims fail for other, independent reasons, including because Plaintiffs lack a private right of action, and because Plaintiffs fail to plead adequately the necessary elements of their two state law claims. The Amended Complaint should be dismissed in its entirety.

BACKGROUND

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, 134 Stat. 281 ("CARES Act"). It provides $659 billion for loans to help small businesses meet payroll and cover other expenses during the current global pandemic.[2] 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. Like other Section 7(a) loans, PPP loans are made by private lenders like Defendants, but PPP loans are forgivable and fully guaranteed by the SBA. 15 U.S.C. §§ 636(a)(36), 9005(b).

[2] The CARES Act initially allocated $349 billion to the PPP; Congress later provided another $310 billion in PPP funding through the Paycheck Protection Program and Health Care Enhancement Act, Pub. L. 116-139, 134 Stat. 620 (Apr. 24, 2020).

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 that vary based on the size of the loan. *Id.* § 636(a)(36)(P)(i) (emphasis added); *see also* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (published in the Federal Register on Apr. 15, 2020). The CARES Act, however, includes no similar provision mandating payments for agents. 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]." 15 U.S.C. § 636(a)(36)(P)(ii) (emphasis added).

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

The SBA administers multiple loan programs for small businesses, including the Section 7(a) lending program to which the PPP was added. *See generally id.* § 636. Congress and the SBA have recognized that borrowers and lenders will in some instances be assisted by third parties, or "agents," in preparing and processing loan applications under these programs.[3] In no case does the SBA *require* the use of an agent. *See* 13 C.F.R. § 103.2(a) (borrowers and lenders may "conduct business with SBA without a representative").

To avoid fraud and other abuse, the SBA carefully monitors and regulates the relationship between agents, lenders, and borrowers, including when and how agents are paid for their services relating to SBA programs. (*See* Ex. 1 (SBA Standard Operating Procedure 50 10 5(K)) ("SOP"), at 166-67, 170-71 (explaining that the

[3] Under existing regulations, an "Agent" is defined as "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). "[C]onduct[ing] business" with the SBA includes "[p]reparing or submitting on behalf of an applicant an application for financial assistance of any kind" and "[p]reparing or processing on behalf of a lender . . . an application for federal financial assistance." *Id.* § 103.1(b).

SBA requires disclosure of agent fee agreements to ensure any fees charged to applicants are not "unreasonable or impermissible").[4])

To monitor agent fee arrangements, 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 SBA the name of each Agent . . . that helped the applicant obtain the loan, describing the services performed, and disclosing the amount of each fee paid or to be paid by the applicant to the Agent in conjunction with the performance of those services." *Id.* § 120.195. These disclosures are mandated by Congress, which provided in the Small Business Act that "[n]o loan shall be made . . . by the [SBA]" unless the applicant certifies to the SBA the names of any agents working on their behalf and the fees to be paid to those agents. 15 U.S.C. § 642.

To that end, the SBA provides a standard form — SBA Form 159 — for all compensation agreements governing the payment of fees to an agent. (*See* Ex. 2, (SBA Form 159) at 1.) Form 159 requires that the parties document the agreement for the agent's services and the compensation to be paid for those services, and it must be completed by both the lender and the applicant and submitted to the SBA for all agents. (*See id.*; *see also* Ex. 1 (SOP) at 171.) The agreement must "govern[] the compensation charged for [those] services." 13 C.F.R. § 103.5(a).

C. Implementation of the PPP

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

[4] All exhibits are attached to the Declaration of Brendan P. Cullen, dated September 15, 2020, and are subject to judicial notice as set forth in the accompanying Request for Judicial Notice.

> **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*:
>
> 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.

Id. at 20816 (emphasis added). Treasury also published an information sheet for lenders with nearly identical language. (Ex. 3 (PPP Information Sheet).)

On April 3 (just one week after passage of the CARES Act and the day after issuance of the IFR) or shortly thereafter, thousands of lenders, including Defendants, began accepting PPP loan applications. 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).)

Barely two weeks into the program, nearly five thousand lenders had decided to participate and had successfully funded over 1.6 million small businesses. (*See* Ex. 5 at 2 (SBA, Paycheck Protection Program (PPP) Report (Apr. 16, 2020)).) By the close of the program on August 8, 2020, participating lenders had processed over 5.2 million loans totaling $525 billion in partnership with the SBA and Treasury to help American business owners and workers. (*See* Ex. 6 at 2 (SBA, Paycheck Protection Program (PPP) Report (Aug. 8, 2020)).)

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

In the midst of these efforts to assist small businesses and American workers, Plaintiffs American Video Duplicating, Inc., Tush Law Ltd., and Kenneth M. Hahn d/b/a Cal State Financial — allegedly in the business of providing consulting, legal and tax preparation services[5] (Compl. ¶¶ 1-3) — filed this putative class action on April 27, 2020, claiming to be "agents" of borrowers and entitled to a percentage of the fees set aside for lenders. This action is only one part of a wave of class-action complaints filed in more than 25 District Courts across the country, many by the same plaintiffs' counsel as here, with each complaint a near carbon copy of the others and filed against varied and often inexplicable groupings of PPP lenders. *See In re Paycheck Protection Program Agent Fees Litig.*, 2020 WL 4673430, at *1 (J.P.M.L. Aug. 5, 2020) (describing dozens of class actions).

Plaintiffs rely entirely on Section III.4.c of the IFR. Plaintiffs contend that this provision — which limits the fees that agents can collect — somehow *mandates* that lenders pay agents fees, regardless of whether the lenders agreed to do so and regardless of whether the agents have complied with longstanding SBA regulations intended to prevent fraud and abuse. (*See* Compl. ¶¶ 34-37.) Plaintiffs point to no language in the CARES Act or other statute or regulation, or any other indicia of intent by Congress or the SBA, to create such an entitlement to agent fees.[6] To the contrary, the Secretary of the Treasury testified 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*

---

[5] While Plaintiff American Video Duplicating, Inc. alleges that it is a "consulting firm" (Compl. ¶ 1), it certified in June 2020 to the California Secretary of State that its business is "Commission Broker re purchases of raw materials Video Cassetes [*sic*] Etc." (Ex. 7 at 2, § 14, and 3.) Tush Law Ltd. states on its website that it is a plaintiffs' personal injury law firm. *See* https://www.tushlaw.com.

[6] Indeed, the American Institute of Certified Public Accountants ("AICPA"), 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 there is an understanding, preferably in writing, as to how and when any fees will be paid." (Ex. 8 at 4.)

between the agent and the bank." (Ex. 9 at 34 (emphasis added).[7]). Plaintiffs here allege no "contractual relationship" with any Defendant.

Instead — based on an implausible reading of a single section of the IFR — Plaintiffs allege that they assisted an unidentified set of "Borrowers" to prepare PPP applications, and thus they are now owed fees from Defendants under this purported new entitlement. (*See* Compl. ¶¶ 47-50.) Plaintiffs never identify any specific borrower, application, or loan made by *any* of the Defendants, let alone any agreement by a Defendant to pay them. But according to Plaintiffs, the IFR automatically entitles any agent who assisted a PPP borrower in applying for a loan to fees from the lender that issued that loan, regardless of whether the lender ever agreed to pay that agent. Plaintiffs go even further, contending that they and putative class members are entitled to the *maximum* amount allowed under Section III.4.c of the IFR. (*See id.* ¶ 72 (defendants are "required under the SBA Regulations to pay the Agent Fees at the statutory amount").) Plaintiffs' misbegotten theory underlies each of their causes of action — a request for declaratory judgment (Count I), violation of the "unfair" prong of California's Unfair Competition Law ("UCL") (Count II), and unjust enrichment (Count III). (*See* Compl. ¶¶ 59-114.)

LEGAL STANDARDS

An action is subject to dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction where a plaintiff has failed to establish that it has Article III standing to bring its claims. Plaintiffs bear the burden of establishing that jurisdiction exists. *Chandler* v. *State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010).

[7] *Oversight of the Treasury Department's and Federal Reserve's Pandemic Response*, 116th Cong., House Comm. on Fin. Servs. (June 30, 2020) (testimony of Steven Mnuchin, Sec'y, U.S. Dep't of Treasury). A video recording of the hearing is available at https://www.congress.gov/event/116th-congress/house-event/110839, and the cited testimony is at 1:32:02 to 1:33:48.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *Conservation Force* v. *Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011). 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) (citation omitted). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). In considering a Rule 12(b)(6) motion, the Court may consider the complaint, materials incorporated by reference, and matters of which the Court may take judicial notice. *Karasek* v. *Regents of the Univ. of Cal.*, 956 F.3d 1093, 1104 (9th Cir. 2020).

ARGUMENT

I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS FAIL TO PLEAD STANDING TO BRING THEIR CLAIMS.

At the outset, the Court should dismiss the Amended Complaint because Plaintiffs fail to allege any facts demonstrating that they have standing to bring their claims. "'[T]he irreducible constitutional minimum of standing contains three elements,' all of which the party invoking federal jurisdiction bears the burden of establishing." *Chandler*, 598 F.3d at 1122 (citation omitted). Plaintiffs must demonstrate (1) that they have each suffered a "concrete and particularized" and "actual or imminent" injury-in-fact; (2) a "causal connection proving that [their] injur[ies] [are] fairly traceable to the challenged conduct" of each Defendant; and (3) "that [their] injury will likely be redressed by a favorable decision." *Id.* Plaintiffs do not meet that burden, failing to allege that they suffered an injury-in-fact traceable to any Defendant's alleged conduct.

Plaintiffs' putative injury is Defendants' failure to pay fees for Plaintiffs' alleged assistance with PPP loan applications submitted by their purported clients.

But Plaintiffs fail to identify even a *single PPP loan application* with which they assisted and that was submitted to and approved by any of the Defendants. Plaintiffs allege in conclusory fashion only that they "assisted their clients as Borrowers under the PPP" (Compl. ¶ 47), and that Defendants "did not comply with the SBA Regulations" (*id.* ¶ 52). Such "conclusory [pleading] is insufficient to establish standing." *Carrico* v. *City & Cty. of San Francisco*, 656 F.3d 1002, 1006 (9th Cir. 2011). Plaintiffs do not allege the identity of the purported clients that they assisted, the nature of the assistance provided, and, crucially, that any of their alleged clients' PPP loan applications were actually submitted to and approved by one of the named Defendants. Because Plaintiffs have failed to plead any of these facts, Plaintiffs have not met their burden to show that they suffered *any* injury as a result of *any* conduct by Defendants. Plaintiffs are asking this Court to determine, in the abstract, that agents are entitled to fees under the IFR. Such an advisory opinion is precisely the result that the standing doctrine is intended to avoid. *See Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

II. ALL OF PLAINTIFFS' CLAIMS FAIL BECAUSE THE CARES ACT AND IFR DO NOT CREATE AN ENTITLEMENT TO AGENT FEES.

Even if Plaintiffs had pled facts demonstrating their standing to sue, Plaintiffs' legal theory is facially deficient. Plaintiffs cannot identify a single section, sentence, or even a single word in the CARES Act or any other statute that supports their alleged entitlement to agent fees. Plaintiffs rely solely on a misreading of a single line in the section of the SBA's IFR (and the same language in Treasury's Information Sheet) setting out *limits* on agent fees that can be paid in connection with PPP loans: that "[a]gent fees will be paid by the lender out of the fees the lender receives from SBA." 85 Fed. Reg. at 20816. According to Plaintiffs, that one statement upended the SBA's existing regulatory framework and long-standing practice for when and under what circumstances agent fees are paid by creating a brand new blanket entitlement — namely, that any agent can demand fees from a

PPP lender at the maximum rate allowed simply by claiming to have assisted a borrower with its loan application and regardless of whether the lender ever agreed to pay such compensation. But the IFR says no such thing, and none of the SBA, Treasury, or Congress has stated or even suggested that it intended to create any new sweeping entitlement to agent fees. To the contrary, the CARES Act's plain language contradicts that result, the Secretary of the Treasury has expressly disclaimed Plaintiffs' position in Congressional testimony, and the only federal court to have ruled on this issue has soundly rejected Plaintiffs' theory. *See Sport & Wheat*, 2020 WL 4882416.

A. The CARES Act, SBA Regulations, and the IFR Do Not Create an Entitlement to Agent Fees.

The CARES Act nowhere mandates that a lender pay fees to an agent for assisting a borrower in applying for a PPP loan. In the sole provision addressing agent fees, Congress merely directed the SBA to set *limits* on the amount that an agent *could* be paid. 15 U.S.C. § 636(a)(36)(P)(ii). That provision immediately follows the provision in which Congress mandated that lenders "shall" receive fees. *Id.* § 636(a)(36)(P)(i). The stark contrast between these two provisions governing lender fees and agent fees — coming one right after the other — confirms, as the court in *Sport & Wheat* concluded, 2020 WL 4882416, at *3, that Congress did not intend to *require* lenders to pay agent fees.

Plaintiffs nevertheless contend that the SBA, through Section III.4.c of the IFR, created an automatic entitlement to such fees. But nothing in Section III.4.c mandates that lenders pay fees to agents. That provision only implements Congress's directive in Section 636(a)(36)(P)(ii) and provides that (i) "[a]gent fees will be paid by the lender out of the fees the lender receives from 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. This

regulation directs *how* an agent can be paid — only by a lender out of its own processing fees, and not by the borrower or out of the loan proceeds — and the *maximum* payment allowed. But nowhere does it mandate 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 require that lenders share their fees."). Like Congress, agencies 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). Plaintiffs' contention that a limitation on agent fees is a purported new entitlement to those fees fails as a matter of law.

Congress inserted the PPP into the existing Section 7(a) framework, and it instructed that the SBA, except as otherwise provided in the CARES Act, may "guarantee [PPP] loans under the same terms, conditions, and processes as" traditional Section 7(a) loans. 15 U.S.C. § 636(a)(36)(B). And the SBA did not fundamentally alter its regulatory requirements concerning the disclosure of agent fee arrangements and the necessity of a compensation agreement before agents may receive a fee. *See* 13 C.F.R. § 103.5(a). Consistent with the SBA's long-standing approach to regulating and limiting — but *not* requiring — the payment of agent fees and requiring that agent fees be paid pursuant to an agreement, the IFR concerns those circumstances in which a lender and an agent have already reached an agreement that the lender will pay the agent for the agent's services, and then "simply explains" that those fees "must be paid by the lender from the fee it receives from the SBA" and cannot exceed the limits set by the rule. *Sport & Wheat*, 2020 WL 4882416, at *3. Plaintiffs' reliance on Treasury's "Information Sheet" is also misplaced. (*See* Compl. ¶ 35.) The Information Sheet only repeats the language in the IFR, explaining that an agent may only be paid by a lender, rather than an applicant, and only within the limits set by the IFR. (*See* Ex. 3.) And, as noted, the Secretary of the Treasury has expressly disclaimed Plaintiffs' contention.

Indeed, under the SBA's existing Section 7(a) regulatory framework, which the CARES Act does not disturb, neither a lender nor an applicant is required to retain or compensate an agent. Rather, the SBA's Section 7(a) regulations specifically contemplate that an agent and the lender or applicant will independently agree to the services to be provided and a compensation arrangement for those services, the terms of which must be set forth in a "compensation agreement" that must be submitted to the SBA. 13 C.F.R. § 103.5(a). As in the PPP context, the Section 7(a) regulations only limit the amount of compensation to which agents and the lenders and borrowers whom they serve can agree. *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 a contractual arrangement between the lender and the agent, and not from the SBA's regulations.[8]

In promulgating the IFR, the SBA did not abandon this framework. The compensation-agreement and disclosure requirements are still in place, and apply to "any matter involving SBA assistance," including the PPP. *Id.* § 103.5(a); *see also* Ex. 2 at 1 (stating that Form 159 applies to SBA's "7(a) . . . Loan Programs," of which the PPP is a part). Further, the disclosure to the SBA of an agreement to pay an agent is specifically required by statute. *See* 15 U.S.C. § 642.[9] These regulations

---

[8] The requirement of assent to create an obligation to pay for services rendered is also a basic and foundational notion 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 . . . ."); Restatement (First) of Restitution § 2 cmt. a (1937) ("A person is not required to deal with another unless he so desires . . . .").

[9] Plaintiffs insist that the compensation-agreement requirement, along with a host of other regulatory provisions that they deem inconsistent with their theory, were implicitly superseded by the IFR. (*See* ECF No. 95 at 2-3.) They rely on the IFR's statement that "[t]he program requirements of the PPP identified in this rule temporarily supersede any conflicting" loan program requirements. 85 Fed. Reg. at 20812. But putting aside the absence of any "program requirements" to pay agent fees, Plaintiffs' assertion that the compensation-agreement and disclosure requirements, the latter of which are mandated by *statute*, necessarily "conflict[]" with the IFR because they repudiate Plaintiffs' preferred reading is self-serving and illogical. (ECF No. 95 at 2.) The traditional agent fee requirements in no way conflict with any requirement in the IFR. *See Sport & Wheat*, 2020 WL 4882416, at *3-4 (finding no conflict between the Form 159 requirement and the IFR). They merely reaffirm that any obligation to pay an agent has always derived and continues to derive from agreement between the parties.

are consistent and uniformly reflect that the obligation to compensate an agent — whether for assistance with a traditional Section 7(a) loan or a PPP loan — arises from the separate agreement of the parties, subject to the limitations on that compensation imposed by Congress and the SBA. It is inconceivable that an agency would fundamentally alter long-standing policy and practice without an explicit statement of such a change. In fact, the Secretary of the Treasury confirmed in testimony before Congress that "[w]hat [the] guidance did say is that banks *could* pay agent fees out of the fees that they received," and that these payments were "intended to be based upon a contractual relationship between the agent and the [lender]." (Ex. 9 at 34 (emphasis added).) Ignoring all these indications to the contrary, Plaintiffs insist that the IFR creates a new obligation for lenders to pay agents regardless of whether the lenders agreed to do so.[10]

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 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.)[11] 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

[10] Further demonstrating the unreasonableness of Plaintiffs' theory, the IFR purports to set *maximum* fee amounts. 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, consistent with existing regulations. Indeed, because the SBA nowhere says how to determine the fees for an agent's services, Plaintiffs leap to the untenable position that all agents are automatically entitled to the applicable maximum amount. (*See* Compl. ¶ 72.) That is nonsensical. Setting a maximum fee makes no sense if, as Plaintiffs contend, the SBA intended for agents to always 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. *See* 15 U.S.C. § 636(a)(36)(P)(i).

[11] 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. (*See* Ex. 10 at 2.)

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. 11 at 2.) That is because 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.[12]

The only court to have ruled on Plaintiffs' theory has rejected it. Like Plaintiffs here, the plaintiff in *Sport & Wheat* brought claims based on the same assertion that the IFR created an entitlement to agent fees. The court determined that the plaintiff's reading "finds no support in the plain language of the [CARES Act] or the [IFR]." 2020 WL 4882416, at *2. It concluded, consistent with the existing regulatory framework, that absent independent "agreements 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.

In sum, Plaintiffs contend that without explanation or statutory support the SBA disregarded and fundamentally altered the long-standing statutory and regulatory frameworks requiring lenders and agents to contractually agree to agent fees with a single statement in an interim final rule (that does not, in fact, say what Plaintiffs claim) and without promulgating *any* of the regulations, guidance, or forms needed to make that regulatory change workable. There is no statutory or regulatory support for that position, and Plaintiffs' claims must be dismissed.

[12] As noted above, disclosure to the SBA of the agent's identity and agreed-to compensation is required by *statute* before the disbursement of any SBA loan. 15 U.S.C. § 642. The lender could not fulfill that requirement and the SBA could not meet its administrative obligations if, as Plaintiffs insist, an agent can assist a borrower and then demand compensation after the loan has been disbursed without ever previously identifying itself to the lender.

B. Relevant Policy Considerations Reinforce the Plain Language of the CARES Act, SBA Regulations, and the IFR.

Plaintiffs' contention about the IFR not only is contrary to the SBA's existing regime, it also 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 negotiate a reasonable rate for such services, assess the value of such services, or ensure that such services were in fact adequately performed (or performed at all). Here, that would mean a video cassette company (Plaintiff American Video Duplicating, Inc.), a personal injury law firm (Plaintiff Tush Law Ltd.), and a tax preparer (Plaintiff Kenneth M. Hahn d/b/a Cal State Financial), each with no apparent experience serving as an "agent," would automatically be owed a fee. Lenders, furthermore, 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 from performing SBA work); Ex. 1 (SOP) at 170-72 (disclosure requirements used to monitor fees and agent 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. 12 (SBA Off. of the Inspector Gen., Rep. No. 19-01, *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2019* (Oct. 11, 2018)) at 8.)

Plaintiffs' suggestion that, absent a regulatory entitlement to agent fees, borrowers would have been unable to get access to PPP funding quickly, is baseless. (*See* Compl. ¶¶ 36, 38; ECF No. 95 at 12-13.) *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, other than the lender, assisted the

applicant for a fee). *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* Standards for Conducting Business With SBA, 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, those third parties can 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 — something that Plaintiffs admittedly failed to do.[13]

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

Even if the IFR could be construed as Plaintiffs insist to create an automatic entitlement to a portion of lenders' processing fees, such a regulatory entitlement would directly conflict with the express language of the CARES Act and would be invalid. Congress knows how to create a mandatory fee structure and did so explicitly in the CARES Act, mandating that the SBA "*shall reimburse* a lender authorized to make a covered loan at a rate based" on the size of the loan. 15 U.S.C. § 636(a)(36)(P)(i) (emphasis added). 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

[13] Indeed, Plaintiffs disregarded the recommendation of the AICPA to reach an agreement in writing with a lender before rendering "agent" services. (Ex. 8 at 4.)

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) (citation omitted).

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 because the IFR plainly does no such thing. Rather, consistent with Congress's instruction, the IFR simply *regulates* the payment of fees to agents that lenders have independently agreed to pay, including by setting limits on the fees that an agent may collect for assisting an applicant and restricting an agent from seeking any fees from the borrower. *See* 15 U.S.C. § 636(a)(36)(P)(ii); *Sport & Wheat*, 2020 WL 4882416, at *3.

* * *

Plaintiffs have not alleged that Defendants agreed to pay them for their services, nor can they. Because the IFR does not independently create any entitlement to fees, all Plaintiffs' claims must be dismissed.

III. PLAINTIFFS' CLAIM FOR DECLARATORY JUDGMENT FAILS BECAUSE PLAINTIFFS LACK A PRIVATE RIGHT OF ACTION.

Putting aside the implausibility of Plaintiffs' legal theory, Plaintiffs cannot seek a declaratory judgment that Defendants violated the CARES Act and its implementing regulations because neither the CARES Act nor the Small Business Act, which the CARES Act supplements to create the PPP, provides a private right of action.

It is well established that the Declaratory Judgment Act alone does not create an independent cause of action. *See Shomaker* v. *GMAC Mortg., LLC*, 2012 WL 13020070, at *5 (C.D. Cal. Mar. 7, 2012) ("A request for declaratory judgment is a remedy and, therefore, does not state a cause of action."); *Tillman* v. *Tillman*, 2009 WL 10655839, at *3 (C.D. Cal. Dec. 1, 2009) (same). The Act is procedural only, expanding the remedies available to federal courts, and thus it "presupposes the

existence of a judicially remediable right." *See Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960). Accordingly, plaintiffs can only state a claim for declaratory judgment if they "successfully pled a cause of action that would entitle them to declaratory relief." *Shomaker*, 2012 WL 13020070, at *5. Here, Plaintiffs lack that necessary predicate because the CARES Act does not provide a private right of action.[14]

"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). The CARES Act does not provide an express private right of action. *See Profiles, Inc.* v. *Bank of Am. Corp.*, 2020 WL 1849710, at *4-7 (D. Md. Apr. 13, 2020). And the party asserting an implied private right of action must meet a heavy burden. *See In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230-31 (9th Cir. 2008). To meet their burden, Plaintiffs must demonstrate Congress's intent to imply a private right of action through "clear and unambiguous terms." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002). Plaintiffs can point to no such clear and unambiguous manifestation of intent here, for several reasons.

First, there is nothing in the text of the CARES Act that contemplates enforcement by private litigants. To the contrary, the Small Business Act specifically provides for enforcement of violations by regulators, not private parties. *See, e.g.*, 15 U.S.C. § 650(c) (providing the SBA authority to institute civil actions for violations of the statute); *see also Profiles*, 2020 WL 1849710, at *6 ("[T]he view that Congress did not intend to create a separate private right of action in the CARES Act is further bolstered by the criminal and civil enforcement regime codified in the [Small Business Act]."). *Second*, before enactment of the CARES Act, courts, including the Ninth Circuit, have uniformly held that the Small Business Act does not include an implied right of action. *See Crandal* v. *Ball, Ball &*

[14] To the extent Plaintiffs' declaratory judgment claim is based on their state law claims, they fare no better. Requests for declaratory judgment that are wholly duplicative of other claims should be dismissed, *see Swartz* v. *KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007), and for the reasons explained below (*see infra* Section IV), those state law claims fail in any event.

Brosamer, Inc., 99 F.3d 907, 909-10 (9th Cir. 1996).[15] The CARES Act's amendments do not alter that clear Congressional intent. *See Profiles*, 2020 WL 1849710, at *6-7. *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 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.

The only other court to address whether the PPP provisions of the CARES Act provide a private right of action concluded, in a thorough and well-reasoned opinion, that it does not. *See Profiles*, 2020 WL 1849710, at *4-7.[16] Indeed, in that case, the plaintiff was a potential *small business borrower* seeking to vindicate alleged rights 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 only in the context of *limiting* their compensation.

Where Congress has not created a private right of action to vindicate a violation of a federal statute or regulation, a plaintiff may not circumvent that intent by seeking a declaration under the Declaratory Judgment Act, which is precisely what Plaintiffs seek to do here. *See N. Cty. Commc'ns Corp.* v. *Cal. Catalog &*

---

[15] *See also Aardwoolf Corp.* v. *Nelson Capital Corp.*, 861 F.2d 46, 48 (2d Cir. 1988); *Tectonics, Inc. of Fla.* v. *Castle Constr. Co.*, 753 F.2d 957, 960 (11th Cir. 1985); *Royal Servs., Inc.* v. *Maintenance, Inc.*, 361 F.2d 86, 92 (5th Cir. 1966).

[16] 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.

Tech., 594 F.3d 1149, 1154-56 (9th Cir. 2010) (plaintiff cannot seek declaration that it is entitled to compensation under the Federal Communications Act because the Act provides no private right of action). For that reason, Plaintiffs' request for declaratory judgment must be rejected.

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

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

A. Plaintiffs Fail to State a Claim for Violation of the "Unfair" Prong of the UCL.

Under California's Proposition 64 amendments to the UCL, to demonstrate standing and to state a claim under the "unfair" prong of the California UCL, Plaintiffs must allege that Defendants engaged in unfair business practices and that Plaintiffs have "lost money or property as a result of such unfair" practices. *Lozano* v. *AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731-32 (9th Cir. 2007) (quoting Cal. Bus. & Prof. Code § 17204). Plaintiffs fail to establish their standing and to state a UCL claim under the "unfair" prong for at least three reasons.[17]

First, the only purportedly "unfair" business practice that Plaintiffs identify is Defendants' alleged refusal or failure to pay agents fees. (Compl. ¶¶ 81-82.) But for the reasons explained (*see supra* Section II), nothing in the CARES Act or the

[17] In the context of a UCL claim brought against a business competitor, any alleged unfairness must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Davis* v. *HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1170 (9th Cir. 2012) (quoting *Cel-Tech Commc'ns Inc.* v. *L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999)). Though the California Supreme Court has left open the possibility that a different standard could apply to *consumer* claims under the UCL, *see Nationwide Biweekly Admin., Inc.* v. *Superior Court of Alameda Cty.*, 462 P.3d 461, 471-72 (Cal. 2020), Plaintiffs in this action are not "consumers." Rather, Plaintiffs allege that they are businesses providing services to the same businesses that Defendants also serve. Regardless, even if Plaintiffs were consumers, and even if this Court adopted the broadest definition of unfairness in that context, *see Graham* v. *Bank of Am., N.A.*, 226 Cal. App. 4th 594, 612-13 (2014) (explaining that some, but not all courts, find unfairness as to consumers when a practice "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" (citation omitted)), the Amended Complaint would fail to state a claim for the reasons discussed in this Section.

IFR entitles Plaintiffs to such fees or mandates that Defendants pay them. Indeed, absent Plaintiffs' perceived regulatory entitlement, there are simply no allegations in the Amended Complaint of wrongdoing by Defendants at all. Plaintiffs seek agent fees without the agreement required to recover such fees, and there is no extra-contractual obligation in equity or fairness that Defendants could have violated. Plaintiffs therefore fail to identify any practice that contravenes an established public policy, nor have they alleged a practice that is immoral, unethical, unscrupulous, or substantially injurious in any respect. *See Davis*, 691 F.3d at 1170.

Second, even assuming that the supposedly "unfair practice" — the failure or refusal to pay agents fees that lenders were paid for processing PPP loans — could support a UCL claim, the Amended Complaint contains *no* specific allegations that Defendants actually engaged in that practice and that Plaintiffs suffered an economic harm from it. *See supra* Section I; *Lozano*, 504 F.3d at 731-32 (plaintiff bringing UCL claim must have personally suffered injury as a result of alleged unfair conduct); *see also Van Patten* v. *Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1048-49 (9th Cir. 2017) (UCL standing requires an "*economic injury*" that is "*caused by*" "the unfair business practice . . . that is the gravamen of the claim"). Such bare bones allegations cannot sustain a claim under the UCL. *See Van Patten*, 847 F.3d at 1049.

Third, 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 purported injury is fully compensable through money damages. Further, despite Plaintiffs' cursory request that the Court "enjoin Defendants from continuing to violate the UCL" (Compl. ¶ 86), the PPP has now concluded, and thus there is no future conduct

to enjoin. Nor are Plaintiffs entitled to restitutionary disgorgement.[18] Plaintiffs never possessed the fees that Defendants were paid *by the SBA*. *See Korea Supply*, 63 P.3d at 947. And for the reasons explained (*supra* Section II), Plaintiffs do not have any "ownership interest in" those fees. *Id*. Absent any viable claim to relief, Plaintiffs cannot pursue a UCL claim.

B. Plaintiffs Fail to State a Claim for Unjust Enrichment.

As a threshold matter, this Court should reject Plaintiffs' unjust enrichment claim because it is an impermissible end run around the lack of a private right of action to enforce the CARES Act or its regulations. A plaintiff cannot "argue around" the lack of a private right of action "by bootstrapping [its] cause of action onto an unjust enrichment . . . claim based on the same statute." *Lil' Man In the Boat, Inc.* v. *City & Cty. of San Francisco*, 2018 WL 4207260, at *4 (N.D. Cal. Sept. 4, 2018); *see also Astra USA, Inc.* v. *Santa Clara Cty.*, 563 U.S. 110, 118 (2011) ("The absence of a private right to enforce [a statute] would be rendered meaningless if [plaintiffs] could overcome that obstacle by suing [on a contract claim] instead.") Here, Plaintiffs do not assert any wrongdoing by Defendants other than their alleged refusal to pay fees that Plaintiffs (wrongly) contend they are entitled to under the IFR. Plaintiffs' unjust enrichment claim is therefore premised entirely on the alleged violation of a regulatory provision promulgated under a statute that does not provide a private right of action and which leaves regulatory enforcement authority to the SBA (*see supra* Section III), and should be dismissed for that reason alone.

But even on the merits, Plaintiffs' claim fails. Under California law, "[t]he elements for a claim of unjust enrichment are [1] receipt of a benefit and [2] unjust retention of the benefit at the expense of another." *Lyles* v. *Sangadeo-Patel*, 225

[18] Plaintiffs request "disgorge[ment]" under the UCL. (Compl. ¶ 86.) "Under California law, there are two forms of disgorgement: 'restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment.' Nonrestitutionary disgorgement is unavailable in UCL actions." *Chowning* v. *Kohl's Dep't Stores, Inc.*, 735 F. App'x 924, 925-26 (9th Cir. 2018) (citation and emphasis omitted).

Cal. App. 4th 759, 769 (2014). "The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that . . . it is *unjust* for the person to retain it." *First Nationwide Sav.* v. *Perry*, 11 Cal. App. 4th 1657, 1663, (1992). Unjust enrichment therefore requires both "the transfer of money or other benefits from one party to another" and "it requires injustice." *Berger* v. *Home Depot USA, Inc.*, 741 F.3d 1061, 1070 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017). For enrichment to be "unjust," it "must ordinarily appear that the benefits were conferred by *mistake, fraud, coercion* or *request*." *Nibbi Bros.* v. *Home Fed. Sav. & Loan Ass'n*, 205 Cal. App. 3d 1415, 1422 (1988).

Regardless, Plaintiffs have failed to plead the elements of unjust enrichment. *First*, Plaintiffs cannot demonstrate that they conferred any benefit on Defendants. "An essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant *from the plaintiff*." 66 Am. Jur. 2d Restitution and Implied Contracts § 12 (emphasis added); *see Hernandez* v. *Lopez*, 180 Cal. App. 4th 932, 938 (2009) ("The [unjust enrichment] doctrine applies where *plaintiffs*, while having no enforceable contract, nonetheless have conferred a benefit on defendant." (emphasis added)). But any alleged benefit here was conferred on the unidentified *borrowers*, not Defendants. And the "benefit" allegedly unjustly retained by Defendants consists of fees that they received *from the SBA*, not Plaintiffs. (Compl. ¶ 91.) *See also Sport & Wheat*, 2020 WL 4882416, at *5 (unjust enrichment claim fails because any benefit from agents' services to lenders was merely "incidental"). *Second*, Plaintiffs cannot show that Defendants' retention of their lender processing fees, which are mandated by the CARES Act, would be unjust. Plaintiffs' only basis for claiming that they are entitled to those fees is their claim under the IFR — a claim that, for the reasons explained, is baseless. Plaintiffs

also do not (and cannot) allege any mistake, fraud, or coercion by Defendants. Accordingly, Plaintiffs' claim for unjust enrichment must be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss all of Plaintiffs' claims. Because Plaintiffs already had two opportunities to state a claim, and because Plaintiffs' theory of agent fee entitlement fails as a matter of law and "the pleading could not possibly be cured by the allegation of other facts," *Lopez* v. *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*), the dismissal should be with prejudice.

Dated: September 15, 2020

/s/ Brendan P. Cullen
Brendan P. Cullen (SBN 194067)
(cullenb@sullcrom.com)
Sverker K. Hogberg (SBN 244640)
(hogbergs@sullcrom.com)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5700

David Carlyle Powell (SBN 129781)
(dpowell@mcguirewoods.com)
Carolee Anne Hoover (SBN 282018)
(choover@mcguirewoods.com)
Jamie Danielle Wells (SBN 290827)
(jwells@mcguirewoods.com)
MCGUIREWOODS LLP
Two Embarcadero Center, Suite 1300
San Francisco, California 94111
Telephone: (415) 844-9944
Facsimile: (415) 844-9922

Attorneys for Defendant Wells Fargo Bank, N.A.

/s/ J. Warren Rissier
J. Warren Rissier, Bar No. 197939
(warren.rissier@morganlewis.com)
Megan A. Suehiro, Bar No. 316104
(megan.suehiro@morganlewis.com)
Brianna R. Howard, Bar No. 314642
(brianna.howard@morganlewis.com)
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90071-3132
Tel: +1.213.612.2500
Fax: +1.213.612.2501

Michael S. Kraut, *pro hac vice*
(michael.kraut@morganlewis.com)
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178-0060
Tel: +1.212.309.6000
Fax: +1.212.309.6001

Attorneys for Defendant U.S. Bank National Association

/s/ Robert J. Herrington
Robert J. Herrington (SBN 234417)
(herringtonr@gtlaw.com)
GREENBERG TRAURIG, LLP
1840 Century Park East, 19th Floor
Los Angeles, CA 90067
Telephone: (310) 586-7800
Facsimile: (310) 586-7700

Attorneys for Defendant JPMorgan Chase Bank, N.A.

/s/ Jesse T. Smallwood
Enu A. Mainigi, *pro hac vice*
(emainigi@wc.com)
Kenneth C. Smurzynski, *pro hac vice*
(ksmurzynski@wc.com)
Craig D. Singer, *pro hac vice*
(csinger@wc.com)
Jesse T. Smallwood, *pro hac vice*
(jsmallwood@wc.com)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Tel. 202-434-5000
Fax 202-434-5029

Janice P. Brown, Bar No. 114433
brown@brownlawgroup.com
Arlene R. Yang, Bar No. 297450
yang@brownlawgroup.com
BROWN LAW GROUP
600 B Street, Suite 1650
San Diego, CA 92101
Tel. 619-330-1700
Fax 619-330-1701

Attorneys for Defendant Bank of America, N.A.

/s/ Kevin M. Lally
Kevin M. Lally, SBN 226402
(klally@mcguirewoods.com)
McGUIREWOODS LLP
355 South Grand Avenue, Suite 4200
Los Angeles, CA 90007
Telephone: (213) 457-9862
Facsimile: (213) 457-9882

Henry L. Kitchin, Jr., *pro hac vice*
(hkitchin@mcguirewoods.com)
McGUIREWOODS LLP
300 North Third Street, Suite 320
Wilmington, North Carolina 28401
Telephone: (910) 254-3800
Facsimile: (910) 254-3823

Attorneys for Defendant Live Oak Banking Company

/s/ Nina Huerta
Nina Huerta, Bar No. 229070
nhuerta@lockelord.com
LOCKE LORD LLP
300 S. Grand Avenue, Suite 2600
Los Angeles, CA 90071
Telephone: (213) 485-1500
Fax: (213) 485-1200

Casey B. Howard, *pro hac vice forthcoming*
choward@lockelord.com
Andrew Braunstein, *pro hac vice forthcoming*
andrew.braunstein@lockelord.com
LOCKE LORD LLP
Brookfield Place
200 Vesey Street, 20th Floor
New York, NY 10281-2
Telephone: (212) 415-8600
Fax: (212) 303-2754

Attorneys for Defendant Harvest Small Business Finance, LLC

Pursuant to Civil L.R. 5-4.3.4(a)(2)(i), the filer attests that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of September, 2020, the foregoing document was served on all counsel of record via the Court's CM/ECF system.

/s/ Brendan P. Cullen
Brendan P. Cullen