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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KAREN'S CUSTOM GROOMING LLC, a California Limited Liability Company, On Behalf of Itself and On Behalf of Similarly Situated Businesses and Individuals,

Plaintiff,

v.

WELLS FARGO & COMPANY, a Delaware Corporation; WELLS FARGO BANK, NATIONAL ASSOCIATION; and DOES 1-10, Inclusive,

Defendants.

Case No.: 3:20-cv-00956-LAB-BGS

CLASS ACTION

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION OR TO DISMISS FOR FAILURE TO STATE A CLAIM

Special Briefing Schedule Ordered

Judge: Honorable Larry Alan Burns
Courtroom: 14A (14th Floor)
Date: November 2, 2020
Time: 11:30 a.m.

ORAL ARGUMENT REQUESTED

Complaint Filed: May 22, 2020
Trial Date: To be determined.

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Plaintiff Karen's Custom Grooming LLC ("Plaintiff") submits the following opposition to the Motion to Compel Arbitration or Motion to Dismiss filed by Wells Fargo Bank, N.A. ("WFB") and Wells Fargo & Company ("WFC").[1]

I. INTRODUCTION AND FACTUAL OVERVIEW OF ALLEGATIONS

From nearly the moment the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") was signed into law on March 27, 2020, Plaintiff contacted WF in person and/or by e-mail (via its agent/employee named in the Complaint) to seek a Paycheck Protection Program ("PPP") loan ("PPP Loan"). ¶¶31, 34-52. The CARES Act offered $349 billion in PPP Loans, 100% guaranteed by the United States Small Business Administration ("SBA"). ¶31.

The SBA facilitated the PPP Loans via "lenders," such as the Defendants. ¶7. WF affirmatively undertook to act as such a "lender." ¶8. The SBA set regulations for the PPP, including that applications for PPP Loans ("PPP Applications") were to be processed on a first-come, first-served basis ("SBA Regulations"). ¶10. The PPP was a life preserver tossed into a sea of churning uncertainty for small businesses and sole proprietorships, who were at risk of permanent closure, meaning financial devastation for such entities and their employees. As a result of the fact that not enough funds were available to satisfy the crush of applicants (i.e., not enough life preservers to save everyone), applicants were only able to submit one application to a "lender" at a time. ¶¶2-3, 6, 8.

As "lenders" for PPP Loans, Defendants knew, or were on notice of, the terms

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[1] "MTC" refers to the Motion to Compel Arbitration and the term "MTD" refers to the Motion to Dismiss. "Motions" refers collectively to both the MTC and MTD. "WF" as used herein, refers collectively to WFB and WFC for ease of reference. The "Complaint" refers to Dkt. No. 1 in the action. Cites to the "Cullen Decl." are to Dkt. No. 16 in the action. All cites to "¶¶___" are to paragraphs in the Complaint. All emphasis is added and citations and footnotes are omitted, unless otherwise noted herein.

of the CARES Act and the SBA Regulations. Defendants knew, or were on notice, that delayed processing of PPP Applications placed applicants in peril of losing their place in line to obtain these critical loans.

On April 3, 2020, PPP Applications could be made at lenders nationwide, and PPP Loans were being processed by other lenders. ¶9. WF, however, placed several roadblocks that prevented and/or prejudicially delayed Plaintiff and members of the Classes in seeking to apply for PPP Loans. ¶10. Notably, WF was not processing the PPP Applications based on what it directly represented to Plaintiff and members of the Classes, which was that it would place all applicants in a "queue based upon when" they submitted their "initial interest" in applying for PPP Loans through WF, and that it would "work[] through the queue in the order in which customers submitted their initial interest." ¶13.

In addition, WF was unable to, or simply declined to, timely host an active webpage with a link to a PPP Application in order to permit all those seeking PPP Loans to simply apply. ¶16. Ultimately, once the website was even active to permit Plaintiff to submit an expression of interest, it would take nearly another week for WF to provide it with a PPP Application. *Id*. By that time, the initial PPP funding had been depleted. *Id*. As alleged in the Complaint, WF's intentional and/or negligent misconduct prevented and/or delayed Plaintiff and other members of the Classes from submitting their PPP Applications to other lenders, and from being able to make reliable plans on how to conduct their business operations while waiting for the PPP Loans.

WF's alleged misconduct did not go unnoticed by governmental authorities. On May 5, 2020, Wells Fargo revealed that it was under investigation related to the PPP program. ¶19. Indeed, while WF was telling Plaintiff the website was delayed and applications were not able to be processed, Plaintiff's investigation reveals that some apparent WF customers were being provided PPP Applications by WF at least by April

4, 2020. ¶39 n.17.[2]

The Complaint seeks certification of a Nationwide Class and a California Sub-Class (collectively the "Classes"), consisting of businesses and persons (referred to herein as "Eligible Recipients") who contacted Defendants to apply for PPP Loans, and whose PPP Applications were delayed and/or were not processed by Defendants in the order in which they were received in accordance with SBA Regulations for the PPP program and WF's promises. ¶67. Plaintiff seeks monetary damage, injunctive relief, and all other relief the Court deems appropriate.

II. THE MOTION TO COMPEL ARBITRATION MUST BE DENIED

A. WF Does Not Meet the Standard for Compelling Arbitration

In a motion to compel arbitration, the court must determine: "'(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" *Lotsoff v. Wells Fargo Bank, N.A.*, 2019 U.S. Dist. LEXIS 169373, at *4 (S.D. Cal. Sept. 30, 2019) ("*Lotsoff*") (quoting *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 955-56 (9th Cir. 2012) (citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).[3]

On the issue of whether the parties have agreed to a contract, California state law controls. *Greenley v. Avis Budget Grp., Inc.*, 2020 U.S. Dist. LEXIS 54234, at *9 (S.D. Cal. Mar. 27, 2020). "[N]o contract can be formed unless the parties consent to be bound by the contract." *Id*. (citing *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999).

WF submits three different "agreements" to support its MTC as to Plaintiff. As

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[2] Indeed, as set forth in footnote 17 of the Complaint, it appears that Wells Fargo may have received applications by April 3, 2020. WF attempts to dispute this allegation, which is improper on a dismissal motion.

[3] WF filed an appeal of the *Lotsoff* decision on October 25, 2019.

detailed herein, none of these "agreements" support the MTC.[4]

Indeed, where a Plaintiff disputes or challenges the existence of an arbitration agreement, "'the presumption in favor of arbitrability does not apply.'" *Greenley*, 2020 U.S. Dist. LEXIS 54234, at *8 (quoting *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014)). Moreover, the policy favoring arbitration "'cannot displace the necessity for a ***voluntary*** agreement to arbitrate.'" *Id*. at *9 (citing *Avery v. Integrated Healthcare Holdings, Inc*., 218 Cal. App. 4th 50, 59 (2013)).

1. The March 27, 2018 Business Account Application (Cullen Decl., Ex. 1)

The first "agreement" is Plaintiff's March 27, 2018 Business Account Application (Ex. 1 to Cullen Decl.) that contains the following clause:

> The Customer's use of any Wells Fargo Bank, N.A. ("Bank") deposit account, product or service will confirm the Customer's receipt of, and agreement to be bound by, the Bank's applicable fee and information schedule and account agreement that includes the Arbitration Agreement under which any dispute between the Customer and the Bank relating to the Customer's use of any Bank deposit account, product or service will be decided in an arbitration proceeding before a neutral arbitrator as described in the Arbitration Agreement and not by a jury or court trial.

a. Exhibit 1 Is Not a Valid Agreement

Exhibit 1 is missing any purportedly contemporaneously dated document bearing the label of an "account agreement," much less an "Arbitration Agreement." Similarly, the MTC fails to provide any evidence that Plaintiff contemporaneously received or agreed to any such agreements, much less ones that were operative when

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[4] Notably, when serving its "demand" (Cullen Decl., Ex. 2), WF only cited its purported arbitration right based on what are now marked as Exhibits 1 and 7 to the Cullen Decl. Only with the filed MTC does WF now also attempt to foist a third purported agreement – pre-dating by nearly a year the time when Plaintiff opened its business account – as another basis for arbitration. This document, Exhibit 8 to the Cullen Decl., fails for the same reason as Exhibits 1 and 7 fail.

Plaintiff opened its account. Moreover, the title of Exhibit 1, "Business Account Application," does nothing to signal that it contains any purported arbitration agreement, and other than some bolding of the paragraph, it is not prominently displayed in Exhibit 1.[5] No agreement to arbitrate is formed with WF based on Exhibit 1.[6] Similarly, incorporation by reference of any purported "account agreement" or "Arbitration Agreement" is not only improper, but WF has not met its burden to show otherwise. *See, e.g.*, *Greenley*, 2020 U.S. Dist. LEXIS 54234, at *9-*10 (covering when consent to incorporation of a document by reference is, or is not proper).

The incorporation by reference test set out in *Greenley*, which is WF's burden to meet, is that: "(1) 'the reference must be clear and unequivocal;' (2) 'the reference must be called to the attention of the other party and he must consent thereto;' and (3) 'the terms of the incorporated document must be known or easily available to the contracting parties.'" *Id*. at *9-*10. Unlike the car rental agreement folder/jacket in *Greenley* that is provided to all renters and typically carried in their rental cars, here there is no evidentiary showing as to the satisfaction of these factors. Indeed, Plaintiff submits there is no way for WF to meet the burden. The reference to a vague "account agreement" or "Arbitration Agreement" is not clear, there is no evidence that it was "called" to Plaintiff's attention and that it consented, nor is there any showing that the terms were known or easily available, particularly as it appears that Exhibit 1 is an

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[5] Plaintiff asserts that both procedural and substantive unconscionability exist as to the purported arbitration agreement in Exhibit 1 to the Cullen Decl. Not only is there no title on the document indicating it was intended by WF to serve as an arbitration agreement or contained any such language and there is no showing that the language concerning arbitration was called to Plaintiff's attention, but also the terms are substantively unconscionable for the reasons set forth herein. The same is true of Exhibits 7 and 8 to the Cullen Decl.

[6] There are two defendants in this Action – WFC and WFB. At best, the "arbitration agreements" presented by Defendants only cover WFB.

electronic document and therefore it is unclear what portion of the document was visible when the signature of Plaintiff's agent was affixed.

Finally, the text of Exhibit 1 is silent as to any delegation of the issue of arbitrability, and thus delegation does not arise under Exhibit 1. Exhibit 1 addresses only the arbitration of an underlying dispute, not questions of whether the dispute is subject to arbitration.[7]

b. **Exhibit 1 Does Not Encompass the Dispute**

Even if the Court determines, however, that Exhibit 1 constitutes a binding arbitration agreement, the second question – does the agreement encompass the dispute at issue – must be answered in the negative. The short one paragraph statement in Exhibit 1 refers only to disputes concerning the "use of any Bank deposit account, product or service."

Plaintiff never received any funds via WF from the SBA such that there was never any "use" of its "account," nor is there any basis to claim that an SBA funded and guaranteed loan (or application therefor) is a WF "product or service." WF's products and services, by common logic, do not include forgivable PPP Loans due to a global pandemic.

Indeed, while WF would like to treat the PPP Loans as just any other commercial loan that it would make, courts have aptly seen through this argument,

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[7] To support its delegation argument, WF cites *Revitch v. Uber Techs., Inc.*, 2018 U.S. Dist. LEXIS 227333 (C.D. Cal. Sept. 5, 2018). MTC at 7. *Revitch* is not binding in this District, and pre-dates and conflicts with the holding of this District in *Lotsoff*. Further, in *Revitch*, very specific delegation language was included, that is not found here. 2018 U.S. Dist. LEXIS 227333, at *3-*4 ("'[T]he arbitrator . . . and not any . . . court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of [the agreement], including any claim that all or any part of [the agreement] is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches or estoppel.'").

describing PPP Loans not as "loans" but as a "***grant of financial aid*** necessitated by a public health crisis" and noting that they have no underwriting mandates. *See Springfield Hosp., Inc. v. Carranza*, 2020 Bankr. LEXIS 1205, at *12 (Bankr. D. Vt. May 4, 2020).[8] Another court has recently labeled the PPP Loans as "***subsidies***." *See Am. Ass'n of Pol. Consultants v. United States SBA*, No 20-970, 2020 U.S. Dist. LEXIS 69782, at *4-*11 (D.D.C. Apr. 21, 2020) ("PPP loans are no ordinary loans. . . . [They] are . . . legally equivalent to subsidies . . . ."). Thus, Exhibit 1 does not encompass the dispute herein, which relates to Plaintiff obtaining a financial aid grant or subsidy from the SBA, not a WF product or service.

2. The Deposit Account Agreement Effective July 24, 2019 (Cullen Decl., Ex. 7)

a. **Exhibit 7 Is Not a Valid Agreement**

The second document by which WF seeks to bind Plaintiff to arbitration is Exhibit 7 to the Cullen Decl. Exhibit 7 is dated July 24, 2019, more than a year after Plaintiff opened its business account in March 2018. WF has no evidence that Plaintiff was ever provided with Exhibit 7 at any time. Thus, Plaintiff submits that Exhibit 7 fails the first prong of the motion to compel standard – there is no binding agreement formed in Exhibit 7. Further, any purported "agreement" to delegate the issue of arbitrability to an arbitrator does not bind Plaintiff as a result.

b. **Exhibit 7 Does Not Encompass the Dispute**

Second, even assuming Exhibit 7 were a binding agreement between WF and Plaintiff, and/or were not void (as discussed below), it would also fail to encompass the dispute here. Exhibit 7 refers to "claims, disputes, and controversies between or among Wells Fargo and you . . . whether in tort, contract or otherwise arising out of

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[8] "[T]he CARES Act is a grant of financial aid necessitated by a public health crisis. . . . There are very few PPP eligibility requirements under the CARES Act, and no underwriting mandates. . . . In essence, if the borrower complies with the so-called loan program it actually gets a grant, rather than a loan . . . ." *Id.* at *12-*13.

or relating in any way to your account(s) and/or service(s), and their negotiation, execution, administration, modification, substitution, formation, inducement, enforcement, default, or termination (each, a 'dispute')." Cullen Decl., Ex. 7 at 106. Not only is Exhibit 7 not applicable to claims related to PPP Loans under the CARES Act, but the term "service(s)" in the purported Arbitration Agreement is not defined in Exhibit 7 other than some scant references to wire transfer services *(id*. at 117), Debit Card Overdraft Service *(id.* at 127), and some discussion about electronic fund transfer services for consumer accounts only *(id.* at 150).[9] Indeed, a review of the entirety of Exibit 7 does not reference any discernable language about lending services or loans.

3. The Business Account Agreement Dated April 24, 2017 (Cullen Decl., Ex. 8)

a. Exhibit 8 Is Not a Valid Agreement

The MTC fails to provide any evidence that Plaintiff contemporaneously received or agreed to any such "Business Account Agreement," dated in April 2017, nearly a year before Plaintiff opened its WF business account. Nor has WF provided any evidence that this agreement was operative when Plaintiff opened its account. Moreover, the title of Exhibit 8, "Business Account Agreement," does nothing to signal that it contains any purported arbitration agreement. No agreement to arbitrate is formed with WF based on Exhibit 8. As a result, any purported "agreement" to delegate the issue of arbitrability to an arbitrator does not bind Plaintiff as a result.

b. Exhibit 8 Does Not Encompass the Dispute

For the same reasons set forth above, Ex. 8 does not encompass the dispute in the Complaint.

[9] In Exhibit 2, "Wells Fargo" is defined as Wells Fargo Bank, N.A. (Cullen Decl., Ex. 2 at 1).

4. WF's "Arbitration" Agreements Violate *McGill* and *Lotsoff* and Thus Are Invalid, and the Ninth Circuit Has Upheld *McGill* as Not Being Preempted by the FAA

Even assuming arguendo that Plaintiff had ever signed or agreed to be bound by Exhibit 7 (which it did not), it is an invalid arbitration agreement. In *Lotsoff*, 2019 U.S. Dist. LEXIS 169373, at *10-*12, the Honorable Anthony J. Battaglia of this District ruled that a WF Arbitration Agreement, also dated in 2019 and substantially similar to the one contained in Exhibit 7 to the Cullen Decl., violated California law as set forth in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), and that the entire agreement was thus unenforceable due to a "poison pill" clause. The same result should apply here.

While WF asserts that *Lotsoff* only applies when a Plaintiff is seeking a public injunction, that is not accurate. In *Lotsoff*, this District held that it did not matter whether plaintiff was or was not seeking a public injunction, what mattered was that the subject arbitration agreement contained an improper provision, and a clause stating that in such instance, the entire agreement is void. 2019 U.S. Dist. LEXIS 169373, at *11-*12. The improper provision in *Lotsoff* was the portion stating:

> "Wells Fargo and you each agree to waive the right to a jury trial or a trial in front of a judge in a public court. This Arbitration Agreement has only one exception: Either Wells Fargo or you may take any dispute to a small claims court. . . .
>
> [N]either Wells Fargo nor you will be entitled to join or consolidate disputes by or against others as a representative or member of a class, to act in any arbitration in the interests of the general public, or to act as a private attorney general."

Id. at *6-*7. The same provision is contained in Exhibit 7 to the Cullen Decl. at 106. Similarly, the "poison pill" in *Lotsoff* stated: "'If any provision related to a class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, the entire Arbitration Agreement will be unenforceable.'" *Id*. at *14. The same provision is contained in

Exhibit 7 to Cullen Decl. at 106.[10]

Indeed, as noted in *Lotsoff*, not only do such provisions violate *McGill*, but the Ninth Circuit has issued a series of decisions holding that the FAA does not preempt *McGill*'s holding. *Lotsoff*, 2019 U.S. Dist. LEXIS 169373, at *12 (citing *Blair v. Rent-A-Center, Inc*., 928 F.3d 819, 830-31 (9th Cir. 2019); *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 159 (2020); *Tillage v. Comcast Corp.*, 772 F. App'x 569 (9th Cir. 2019), *reh'g denied*, 2020 U.S. App. LEXIS 1652 (9th Cir. Jan. 17, 2020), *cert. denied*, 2020 U.S. LEXIS 3014 (June 11, 2020)).[11]

WF attempts to cite cases, largely out of District and predating *Lotsoff,* to support an argument that *McGill* only applies when a plaintiff seeks public injunctive relief. *See* MTC at 8 & n.6. WF submits these as part of its claim that public injunctive relief is not sought here, nor could be sought because the PPP program is over.

First, as even WF's cited case, *Greenley*, 2020 U.S. Dist. LEXIS 54234, at *18-*20, makes clear, a plaintiff seeking to enjoin future violations of consumer protection statutes, such as the UCL, is indeed seeking public injunctive relief. As to WF's argument about the PPP program being over and thus injunctive relief being meaningless, it bears noting that the emphasis in *Greenley* is on "future" violations –

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[10] Similarly, unenforceable provisions, and the same "poison pill" clause, are also contained in Cullen Decl. Ex. 8 at 169.

[11] As set forth above, the MTC must be denied under *Blair*, *McArdle*, *Tillage*, *McGill*, and *Lotsoff*. Indeed, even in jurisdictions not subject to these binding authorities, purported arbitration agreements similar to the one WF seeks to enforce here in Ex. 1 have not supported WF's arguments on a motion, but rather required a summary trial. *See Mitchell v. Wells Fargo Bank*, 280 F. Supp. 3d 1261, 1277-78 (D. Utah 2017). In *Mitchell*, as here, WF also provided a series of agreements, and the *Mitchell* Court raised, in particular, questions about plaintiff's consent to any of these modifications. *Id*. at 1284-88.

not necessarily just enjoining continuing violations. Indeed, Plaintiff here is confident that this Court, in fashioning public injunctive relief in this action, will be able to fashion both mandatory (i.e., requiring WF to take affirmative steps) and prohibitive (i.e., requiring WF to cease violations or refrain from future violations) injunctive relief. Thus, *Greenley* supports Plainitff's claims herein.

WF's wishes, however, to make *Greenley* displace the *Lotsoff* holding, fail. In *Lotsoff*, this District considered an arbitration agreement nearly identical to the ones WF puts forth here, one that specifically barred plaintiff from "'join[ing] or consolidate[ing] disputes . . . ***in the interests of the general public***.'" *Greenley*, 2010 U.S. Dist. LEXIS 54234, at *24 n.6. This language is identical to that in, for example, Exhibit 7 to the Cullen Decl. at 106. As explained in detail in *Greenley*, the arbitration agreement therein was distinguishable. *Id*. at *23-*24.[12]

Accordingly, for the foregoing reasons, the MTC should be denied.

III. THE COMPLAINT ADEQUATELY PLEADS ALL COUNTS

A. The Complaint Complies with Applicable Pleading Standards for a Dismissal Motion

"To 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).[13] Importantly, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (quoting *Twombly*, 550 U.S. at 556). As set forth herein, the allegations meet this standard.

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[12] Plaintiff submits that the other cases, all pre-dating *Lotsoff*, out of District, and not involving the same terms herein, are inapplicable. *See* MTC at 8 n.6.

[13] On a Rule 12(b)(6) motion, the Court accepts all allegations as true, considers them as a whole, and draws all reasonable inferences in plaintiff's favor. *Ass'n for L.A. Deputy Sheriffs v. Cnty. of L.A.*, 648 F.3d 986, 991 (9th Cir. 2011).

Further, pursuant to Fed. R. Civ. P. Rule 8(a), plaintiffs are not required to plead "detailed factual allegations" to state claims at the pleading stage of litigation. *Bell Atl.*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

Pursuant to Fed. R. Civ. P. Rule 9(b), fraud allegations must "be 'specific enough to give defendants notice of the particular misconduct.'" *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Knowledge and state of mind "may be alleged generally." Fed. R. Civ. P. 9(b). Similarly, allegations regarding damages are not subject to Rule 9(b) pleading. *See Wright v. Old Gringo Inc*., 2018 U.S. Dist. LEXIS 210597, at *45 (S.D. Cal. Dec. 13, 2018).

In addition, as to facts within WF's knowledge, Rule 9(b) standards are "relaxed" prior to discovery. *In re Gupta Corp. Sec. Litig*., 900 F. Supp. 1217, 1228 (N.D. Cal. 1994). Similarly, for fraudulent omission claims, Rule 9(b) is relaxed because "a plaintiff cannot plead either the specific time of [an] omission or the place, as he is not alleging an act, but a failure to act." *Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987).

B. Plaintiff Satisfies All Standing Requirements

To allege standing[14], the plaintiff need simply allege: "(1) an injury in fact that is both (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the conduct complained of and the injury; and (3) a favorable decision would likely redress the injury." *Boswell v. Costco Wholesale Corp.*, 2016 U.S. Dist. LEXIS 73926, at *33 (C.D. Cal. June 6, 2016 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). On a Rule 12(b)(1) dismissal motion, the "'[trial court] . . . must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'" *Baum v. J-B Weld Co., LLC*, 2019 U.S. Dist. LEXIS 216052, at *6 (N.D. Cal. Dec. 16, 2019).

[14] WF did not notice a Fed. R. Civ. P. Rule 12(b)(1) motion.

Defendants direct the Article III "injury in fact" statutory standing requirements to the UCL. MTD at 10.[15] UCL statutory standing requires only that the party: "(1) establish a loss or deprivation of money or property sufficient to qualify as an injury in fact, i.e., ***economic injury***, and (2) show that the economic injury was the result of, i.e., ***caused by***, the unfair business practice or false advertising that is the gravamen of the claim." *In re Qualcomm Litig.*, 2017 U.S. Dist. LEXIS 185519, at *16 (S.D. Cal. Nov. 8, 2017) (emphasis in original). Generalized allegations of injury suffice. *Id*. at *19 (citing, among other authorities, *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013)). There are "innumerable ways in which economic injury from unfair competition may be shown." *Kwikset Corp. v. Super. Ct.,* 51 Cal. 4th 310, 323 (2011). Just one of these ways is by showing that one has been "deprived of money or property to which he or she has a cognizable claim." *Id*.

As explained in *Qualcomm*, with regard to the "deprived of money or property standard," only an "'identifiable trifle' of injury" need be alleged, and such injury may, for example, take the form of a loss of customers, goodwill or business relationships. *Qualcomm*, 2017 U.S. Dist. LEXIS 185519, at *18-*19 (also citing decisions involving the loss of sales and market share).[16] Wrongful denial of business opportunities also suffices to allege economic injury. *LegalForce*, 2019 U.S. Dist. LEXIS, at *31-*32. Plaintiff alleges that it, along with members of the Class(es), were denied the ability to timely apply for PPP Loans that were vital to their continued business operations (hence, opportunities), and as such allege a loss of money or

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[15] As explained in *LegalForce RAPC Worldwide P.C. v. UpCounsel, Inc.*, 2019 U.S. Dist. LEXIS 5061, at *33 (N.D. Cal. Jan. 10, 2019), UCL standing satisfies the injury in fact requirements of Article III standing.

[16] *See also Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1347 (2009) (same); *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286 (3d Cir. 2005) (same); *Law Offs. of Mathew Higbee v. Expungement Assistance Servs*., 214 Cal App. 4th 544, 561 (2013) (same).

property. ¶¶8, 37, 60, 63, 65, 93. Thus, injury in fact is alleged.

Article III/UCL causation is also satisfied. As stated in *Qualcomm*, 2017 U.S. Dist. LEXIS 185519, the requirement that a party asserting standing under the UCL lose money or property as a result of unfair competition 'imposes a causation requirement.'" *Id.* at *17. "'[A]s a result of' [is used] in its plain and ordinary sense [to] mean[] 'caused by' and requires a showing of a causal connection or reliance on the alleged misrepresentation." *Id*. Plaintiff submits the allegations satisfy this standard. *See, e.g.*, ¶93 (WF's misrepresentations "played a substantial role in Plaintiff's decision to attempt to apply, or sign up to apply for PPP Loans with Defendants, and Plaintiff would not have made such attempts or applied for a PPP Loan with Defendants in the absence of Defendants' misrepresentations."). The adequacy of Plaintiff's reliance allegations are also demonstrated herein.

Finally, Article III redressability is satisfied. The Complaint seeks injunctive relief, declaratory relief and damages, all remedies that this Court may grant to redress the injuries alleged. Nothing more should be required here to survive dismissal. *Olney v. Job.Com, Inc*., 2013 U.S. Dist. LEXIS 141339, at *15-*16 (E.D. Cal. Sept. 30, 2013).[17]

C. UCL Violations Are Adequately Alleged

The UCL prohibits "any unlawful, unfair or fraudulent business act." Cal. Bus. & Prof. Code §17200 (2020). "The scope of the UCL is quite broad." *McKell v.*

[17] WF's attacks on the injunctive relief sought in this action as not being in the public interest are wrong, as discussed herein. WF also asserts that injunctive relief is not needed or could not be fashioned because the PPP "concluded" on August 8, 2020. MTD at 7. One need only check the news to know, however, that the focus now is on recouping monies improperly doled out to entities and/or persons who were not entitled to the funds. *See, e.g.*, ¶19 n.13. The ongoing nature of the harms resulting from fraud and misuse of the PPP Program are the very reasons that it is not proper on a motion to dismiss to wade into issues of damages and relief.

Wash. Mut. Inc., 142 Cal. App. 4th 1457, 1471 (2006). "'What constitutes . . . [an] "unfair or fraudulent business practice" under any given set of circumstances is a question of fact . . . .'" *People v. Toomey*, 157 Cal. App. 3d 1, 16 (1984); *see also People ex rel. Mosk v. Nat's Rsch. Co.*, 201 Cal. App. 2d 765, 772 (1962) (same). As a result, "whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Williams v. Gerber Prods. Co*., 552 F.3d 934, 938 (9th Cir. 2008). As set forth herein, Plaintiff adequately alleged plausible claims under all three prongs of the UCL.

1. WF's Conduct Is Unlawful

Section 17200's "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999).[18] Any law or regulation can serve as a predicate for California Business & Profession Code §17200's "unlawful" violation. *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1361 (2010). Here, Plaintiff's UCL claim is viable because Plaintiff states (a) violations of SBA Regulations (the ones at issue here being designed specifically to protect Plaintiff and the members of the Class(es) by trying to provide a fair method for the loan process of first come, first served); and (b) misrepresentations violating Cal. Civ. Code Section 1573, 1709, and 1710(1)-(4).

2. WF's Conduct Is Unfair

"Under the unfairness prong of the UCL, '"a practice may be deemed unfair even if not specifically proscribed by some other law."'" *In re Carrier IQ, Inc., Consumer Privacy Litig*., 78 F. Supp. 3d 1051, 1115 (N.D. Cal. 2015). Plaintiff amply alleges Defendants' conduct is "unethical, oppressive, unscrupulous, and/or substantially injurious to consumers (such as Plaintiff and members of the Classes),

[18] There need not be a private right of action for any of the underlying violations that support the "unlawful" standard. *Animal Legal Def. Fund v. Great Bull Run, LLC*, 2014 U.S. Dist. LEXIS 78367, at *23 (N.D. Cal. June 6, 2014).

and there is no utility to be served by Defendants' conduct that in any way outweighs the gravity of the harm caused to consumers, Plaintiff, and members of the Classes." ¶89. This suffices under the "balancing test" standard for "unfair" business practices. *See Qualcomm*, 2017 U.S. Dist. LEXIS 185519, at *27-*28. It is no wonder that Defendants and their conduct is now subject to investigation based on their participation in the PPP Program. ¶19.

3. WF's Conduct Is Fraudulent

"A fraudulent business practice is one which is likely to deceive the public." *McKell*, 142 Cal. App. 4th at 1471. As stated in *McKell*, a fraudulent business practice

> may be based on representations to the public which are untrue, and "'also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under'" [the UCL].

Id. The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer. *Id*. (citing *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 507 (2003)). Reliance is presumed where a misrepresentation is material. *See Friedman v. AARP, Inc.*, 855 F.3d 1047, 1055-56 (9th Cir. 2017) (citing *Chapman v. Skype, Inc.*, 220 Cal. App. 4th 217 (2013) (analyzing reliance and materiality for UCL claims).[19] As with the "unfairness" prong, plaintiff's "'burden of proof is modest.'" *Friedman*, 855 F.3d at 1055 (reversing Rule 12(b)(6) dismissal of UCL claim). Plaintiff has sufficiently alleged, as demonstrated herein, WF's materially false and misleading statements and omissions that are likely to deceive in violation of the UCL.

[19] Because the UCL is intended to deter unfair business practices expeditiously, "'relief under the UCL is available without individualized proof of deception, reliance and injury.'" *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011).

D. Fraud and Deceit Are Adequately Alleged

The elements of common law fraud in California are: "(1) a misrepresentation of a material fact (false representation, concealment, or nondisclosure); (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 259 (2011).

Rule 9(b) is satisfied for misrepresentation claims when a party "specifies the time, place and specific content of the alleged fraudulent representation; the identity of the person engaged in the fraud; and '"the circumstances indicating falseness"' or '"the manner in which [the] representations were false and misleading."'" *Celebrity Chefs Tour, LLC v. Macy's Inc.*, 16 F. Supp. 3d 1123, 1134 (S.D. Cal. 2014). The allegations at ¶¶31-52 and 39 n.17, for example, more than satisfy this requirement.

1. Intentional/Fraudulent Misrepresentation

Under California law, intentional misrepresentation is a species of fraud. *Masters v. San Bernardino Cnty. Emps. Ret. Ass'n*, 32 Cal. App. 4th 30, 41-42 (1995) (intentional misrepresentation is a type of "actual fraud" under Cal. Civ. Code §1572 and common law fraud embodied in Cal. Civ. Code §1710). As set forth below, Plaintiff adequately alleges each element of its fraud-based claims.

a. **WF False Statements of Material Fact Are Pled**

A misrepresentation of fact is material if it induced the plaintiff to alter his position to his detriment. *Okun v. Morton*, 203 Cal. App. 3d 805, 828 (1988). WF gives short shrift to analyzing the repeated statements identified in the Complaint that it would process the PPP Applications in a "queue" and "work[ ]through" the queue "in that order" to process PPP Loans in the order in which they were received. MTD at 17; ¶¶43, 44 & n.21, 45.[20] WF improperly tries to reverse engineer and

[20] Indeed, while the Complaint also focuses on the fact that WF violated the "first come, first served" SBA Regulations, WF's liability is readily based on its own

misrepresent the clear meaning of what it told Plaintiff, in the context in which it was contemporaneously alleged to have been stated, by arguing now that its promises never meant "that Wells Fargo would release applications in any precise order, or that it would process those applications once received in a particular order." MTD at 17, n.14. Bearing in mind that at the time of the issuance of WF's statements about the queue, the SBA Regulations were providing for a first come, first served basis to receive loans, the reasonable inference is that WF was mirroring that urgent warning but reassuring Plaintiff (and other members of the Class(es)) that indeed, other applicants would not be racing ahead of them in the queue for any steps in the processing of those PPP Applications, whether it be their "release" or otherwise.[21] Plaintiff submits the other false statements in the Complaint are similarly actionable.

b. **WF's Knowledge of Falsity Is Pled**

"'[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.'" *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974 (1997). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see also Celebrity Chefs*, 16 F. Supp. 3d

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statements and promises about the "queue," which are simply amplified by the fact that the SBA Regulations were to be followed. Similarly, while WF's failure to follow the SBA Regulations is just one basis (of many) for the UCL claims, negligence claim, and/or negligence per se claim, Plaintiff does not allege a direct count for violation of the CARES Act as it appears the plaintiff did in *Profiles, Inc. v. Bank of Am. Corp.*, 2020 U.S. Dist. LEXIS 64330, at *10-*20 (D. Md. Apr. 13, 2020). *Profiles* is thus inapplicable to the issues in this action, and is also not binding on this District.

[21] WF submits several items with a Request for Judicial Notice. Plaintiff objects to the RJN to the extent WF seeks to have the Court accept the truth of any facts in the documents attached to the RJN on a dismissal motion. *Gasser v. Kiss My Face, LLC*, 2018 U.S. Dist. LEXIS 162165, at *11-*12 (N.D. Cal. Sept. 21, 2018) ("Whether . . . evidence will support [an] allegation is an issue for summary judgment.").

at 1134. Plaintiff alleges that WF lied to Plaintiff and other members of the Class(es) because WF was actually prioritizing other customers' applications first, in violation of the "queue" it promised. Knowledge of falsity, or at a minimum reckless disregard, is adequately alleged. *See, e.g*,. ¶¶92, 109-111.

c. **WF's Intent to Defraud (Induce Reliance) Is Pled**[22]

Plaintiff alleges that WF intended to induce its reliance in order to avoid detection of the fact that it was actually using the PPP Loan program to curry favor with certain customers or protect its own interests in avoiding possible loan losses in its portfolios. ¶¶14-15, 112. These allegations satisfy the pleading standard.

d. **Plaintiff's Justifiable Reliance Is Pled**

Justifiable reliance is evaluated in view of the plaintiff's own knowledge and experience. *Gray v. Don Miller & Assocs., Inc.*, 35 Cal. 3d 498, 503 (1984).[23] Here, Plaintiff had no knowledge that WF was allowing preferred customers to "cut the line." Accordingly, Plaintiff's reliance on WF's statements about the "queue," for example, are justifiable.

Indeed, in *Beckwith*, 205 Cal. App. 4th 1039, the pleading of justifiable reliance was satisfied because of the pleading of the plaintiff's "'emotionally vulnerable state'" and "'trust in [defendant].'" *Id.* at 1061, 1067. As further explained in *Beckwith*, any negligence on plaintiff's part in "'"failing to discover the falsity of a statement is no defense when the misrepresentation was intentional."'" *Id*. Here,

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[22] As noted in *Beckwith v. Dahl*, 205 Cal. App. 9th 1039 (2012), fraudulent intent is a matter for the trier of fact to decide, such that issues of the truth or accuracy of the allegations are left to the trier of fact. The defendant should not be "arguing that [plaintiff] misunderstood [its] statements and misconstrued [its] intent." *Id*. at 1061.

[23] Normally, however, the issue of whether a plaintiff's reliance is reasonable is a question of fact (*Beckwith*, 205 Cal. App. 4th at 1067), and thus Plaintiff submits should not be determined on a dismissal motion. *See also Cutler v. Rancher Energy Corp.*, 2014 U.S. Dist. LEXIS 34622, at *25 (C.D. Cal. Mar. 11, 2014) (reasonableness of reliance is ordinarily a question of fact).

Plaintiff was understandably under intense time pressure to secure a PPP Loan, was in an environment where "lenders" without a pre-existing relationship with a PPP applicant was not likely to assist in making the PPP Loan, and Plaintiff put WF on notice of this fact and its concern. ¶37. In response to those concerns, WF's representative confirmed that was understood, and reassured Plaintiff that WF was "diligently" working on "getting the application process live." ¶38. As a result, Plaintiff's reliance on WF's statements that it was in a "queue" (such that it was not losing ground in working its way up the chain to obtain a PPP Loan) was reasonable, particularly when combined with WF's continued promises that its website was almost ready to launch. WF's assurances were lies because WF was actually prioritizing some customers, permitting them to "cut the line," so to speak, moving Plaintiff and the members of the Class(es) further down the list – contrary to what was represented.

2. Fraudulent Concealment

The MTD at n.13 sets forth the elements of this count. Significantly, this claim lies even in the absence of a fiduciary or confidential relationship between defendant and plaintiff. An obligation to disclose arises when: """(1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; [or] (3) the defendant actively conceals discovery from the plaintiff."""" *Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal.*, 245 Cal. App. 4th 821, 844 (2016). WF promised that the Loans would be processed (i.e., "work[ed] through" (¶13) in a queue based on when the applicant submitted its initial interest, but did not do so and was prioritizing other customers. This suffices

to allege a concealment claim under any standard.[24]

3. Negligent Misrepresentation

As set forth in *Young v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 170074 (C.D. Cal. Oct. 18, 2011), to allege that WF made a negligent misrepresentation, a plaintiff must allege that "(1) Wells Fargo made a representation as to a past or existing material fact, (2) which was untrue, (3) which, regardless of Wells Fargo's actual belief, was made without any reasonable grounds for believing it was true, (4) which was made with the intent to induce [Plaintiff] to rely on the fact, (5) [Plaintiff] justifiably relied on it, and (6) [it] sustained damages as a result." *Id.* at *19-*20. Negligent misrepresentation claims do not require scienter or an intent to defraud (i.e., intent to induce reliance). *See Tenet*, 245 Cal. App. 4th at 845 (2016) (citing *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173 (2003)). As set forth above, the same facts giving rise to intentional misrepresentation will satisfy the elements of this claim.

Accordingly, the Complaint alleges multiple counts for fraud and deceit.[25]

E. Negligence Is Adequately Alleged

To plead a negligence claim, a plaintiff must plead that "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, and (3) the breach was

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[24] While WF was telling Plaintiff the website was delayed and applications were not able to be processed, some WF customers were being provided PPP Applications by at least April 4, 2020. ¶39 n.17.

[25] Included within such counts is a claim based on a "false promise," which is alleged where "the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing." *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 159 (1991). Plaintiff submits that its allegations concerning its other counts, in particular the count for promissory estoppel, also support this claim (i.e., WF did not intend to process applications in a queue as represented, but nevertheless represented it would do so in order to induce Plaintiff and members of the Class(es) to continue to seek to process a PPP Application with WF to generate fees and stave off loan losses.

a proximate or legal cause of the plaintiff's injuries." *Weimer v. Nationstar Mortg., LLC*, 47 Cal. App. 5th 341, 354 (2020).

WF asserts that it owed no duty to Plaintiff as it was functioning merely as lender. WF's conduct in the Complaint, however, falls under an exception to this general rule because of the "special relationship" it had by virtue of its knowledge that it undertook to act for Plaintiff on its PPP Application, yet acted negligently in carrying out that undertaking, causing harm to Plaintiff. *Id*. at 355-56 (citing *S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 400 (2019); *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979)); *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 864 (1968) (A bank owes a duty of ordinary care to a borrower when the bank acts "beyond the domain of the usual money lender."); *Hatton v. Bank of Am., N.A.*, 2015 U.S. Dist. LEXIS 89448, at *22-*27 (E.D. Cal. Jul. 8, 2015) (acknowledging a substantive duty of care in loan modifications under California law); *accord Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 901-02 (2013) (imposing a duty of ordinary care to both fund a construction loan, and ***to refrain from "negligent delays"*** funding the loan).

The "special relationship" analysis examines the *Biakanja v. Irving*, 49 Cal. 2d 647 (1958) factors: "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm . . . , (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." *Weimer*, 47 Cal. App. 5th at 356.

In *Weimer*, the appellate court found that the *Biakanja* factors warranted holding a lender to a duty of care on a loan modification transaction because, among other things, the lender was alleged to have negligently processed plaintiff's application. *Id*. at 361. Here, it is alleged that the PPP Loan Plaintiff sought was intended to affect the Plaintiff – i.e., it was critical to keep Plaintiff's business operating, and in the time of COVID-19 shutdowns it is beyond question that

foreseeable harm would befall Plaintiff without the loan. Indeed, Plaintiff made clear to WF several times in writing how critical the loan was to secure.[26] Plaintiff submits that these alleged facts suffice to support a duty of care, and that WF was (at a minimum) negligent, thereby breaching its duty.[27] As a result, Plaintiff's other "duty" based claims similarly should survive dismissal.[28]

F. Promissory Estoppel Is Adequately Alleged

Promissory estoppel requires: "'(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.'" *US. Ecology, Inc. v. State of California*, 129 Cal. App. 4th 887, 901 (2005); *see also Young*, 2011 U.S. Dist. LEXIS 170074, at *11-*12 (denying dismissal of promissory estoppel claim in loan modification action).

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[26] Similarly, while WF tries to dispute the Complaint's allegation by suggesting that Plaintiff could simply have gone to any other PPP Lender, timing was critical and other lenders were limiting loans to their own customer pools. Also a fact of which Plaintiff made WF aware. ¶¶37-38.

[27] *Trant v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 98404, at *18-*20, *22 (S.D. Cal. July 12, 2012), similarly upheld a negligence claim against WF for "mishandling [of the loan modification process that] would very foreseeably create harm," even despite the fact that a modification approval was never guaranteed. While a PPP Loan was not guaranteed to Plaintiff by the SBA, WF did promise that it would handle Plaintiff's expression of interest in a queue in the order it was received. The conduct of WF herein is analogous to that in *Weimer* and *Trant*, and created foreseeable harm.

[28] Plaintiff's claims for constructive fraud require the existence of "(1) a fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage." *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006). Plaintiff sufficiently alleges the existence of a fiduciary/confidential relationship and breach, as set forth herein. These facts also suffice to state a claim for breach of fiduciary duty, which requires: (1) the existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting damage. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 483 (1998).

Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 566 (7th Cir. 2012), upheld a promissory estoppel claim on similar facts (promises about how WF would treat a loan modification, and then failure to make good on the promise). A foregone opportunity (such as the opportunity to approach a different lender)[29] is sufficient reliance to support a claim of promissory estoppel. *Id*. Plaintiff herein believed WF's promise to process or "work[ ]through" its queue in order, and that its website would be functioning shortly, and because of WF's promise Plaintiff remained waiting in the purported "queue." ¶13. WF is alleged to have not intended to make good on its promise by, among other things, prioritizing other applicants (i.e., out of the "queue" order). As a result, Plaintiff was harmed. *See also Trant*, 2012 U.S. Dist. LEXIS 98404, at *13 (promissory estoppel claim upheld).

G. Unjust Enrichment and Damages Are Adequately Alleged

WF received fees based on late processing of at least some loans for members of the proposed Class(es). Regardless of whether WF then provided those fees to a charity, it received a financial or other benefit. The count is sufficiently alleged at the dismissal stage.

The allegations at ¶¶8, 60, 63, 65, 93, 106, 114, 121, 128, 138, 147, and 153 are sufficient to allege damage. *See Wright*, 2018 U.S. Dist. LEXIS 210597 at *45.[30] Similarly, WF's attempt to negate Plaintiff's ability to obtain disgorgement on a pleading motion is inappropriate. MTD at 21. Discovery, including the opportunity for expert analysis, should be permitted on that issue at a later stage of the

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[29] Plaintiff alleges why it could not approach other lenders at the time it sought the initial WF loan, and those facts must be taken as true. ¶¶37-38.

[30] WF's cases (MTD at 14) are inapplicable. In *Holly v. Alta Newport Hosp., Inc.*, 2020 U.S. Dist. LEXIS 64104, at *14-*16 (C.D. Cal. Apr. 10, 2020), the plaintiff merely alleged distress or risk of identity theft. Here, Plaintiff alleges damages that included business expenses and other significant financial items that it was prevented from covering due to the inability to obtain a timely PPP Loan.

proceedings. On a pleading motion for purposes of Rule 8(a), the standard by which damages allegations should be analyzed, Plaintiff amply alleges an entitlement to damages and injunctive relief.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Motions.[31]

Respectfully submitted,

Dated: September 24, 2020

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[31] If the Court is inclined to grant the Motion to Dismiss, in whole or in part, Plaintiff respectfully requests leave to amend. Rule 15 is applied with "'extreme liberality,'" *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Similarly, if the Court grants the Motion to Compel Arbitration, Plaintiff requests that the Court stay the Motion to Dismiss and further proceedings in the action, rather than dismiss.

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 24, 2020.

s/Kathleen Herkenhoff
KATHLEEN HERKENHOFF

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