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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Radix Law, PLC, an Arizona professional
limited liability company,

Plaintiff,

v.

JPMorgan Chase Bank, National
Association, a Delaware Corporation,

Defendant.

Case No. 2:20-cv-01810-SRB

**PLAINTIFF’S RESPONSE IN
OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS**

**(Telephonic hearing scheduled for
December 17, 2020, at 11:15 a.m)**

Plaintiff Radix Law, PLC (“Radix”) hereby responds in opposition to Defendant JP Morgan Chase Bank, NA’s (the “Bank’s) Motion to Dismiss the Complaint (the “Motion to Dismiss”). The Payroll Protection Program (the “PPP”), as administered through the Small Business Administration (the “SBA”), requires lenders to compensate borrowers’ agents for PPP loans. Radix is such an agent. Therefore, the Motion to Dismiss should be denied.

I. INTRODUCTION.

For the most part, the Bank’s Motion to Dismiss does a nice job of generally explaining the purpose of the PPP and PPP loans. However, it ignores clear and unambiguous language requiring lenders to compensate borrowers’ agents.

1 What does the Bank get right? There certainly is a pandemic. Congress passed
2 emergency legislation in order to try to keep small businesses – many of which had been
3 shuttered during the early stages of the Pandemic and some of which remain closed –
4 from closing permanently. The legislation approving the PPP loans was rushed through
5 Congress.

6 What does the Bank get wrong? Although the PPP rules themselves *prohibit*
7 payment from the borrower to its agent, the rules actually *require* payment by the Bank
8 to Radix.

9 First, statutory, regulatory and other written SBA guidance mandates that lenders
10 such as the Bank compensate borrowers’ agents, such as Radix, out of fees that are sent
11 to the lenders by the SBA.

12 Second, the risk, compensation schedule, and purpose of a PPP loan is completely
13 different from the purpose of a typical SBA loan. Therefore, the fee payment system of
14 the PPP replaces that of a typical SBA loan.

15 Third, even if as the Bank argues there is paperwork required before Radix can
16 receive its mandatory compensation, such paperwork is at most procedural. The Bank
17 must allow Radix to complete whatever reasonable paperwork the Bank reasonably
18 requires.

19 Finally, the entire policy behind the emergency implementation of the PPP
20 demonstrates Congress’ intent to compensate agents and, taken in conjunction with the
21 express provisions of the PPP, supports the otherwise clear and unambiguous language
22 requiring lenders to compensate agents with pass-through funds.

23 Defendants’ Motion to Dismiss should be denied.

24 Moreover, and alternatively, if there is some technically deficient pleading
25 element to the Complaint, Radix moves the Court for leave to amend the Complaint to
26 cure any such deficiency.

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1 **II. THE PPP, IMPLEMENTING REGULATIONS, AND WRITTEN SBA**
2 **GUIDANCE REVEAL CONGRESS’ INTENT THAT AGENTS BE**
3 **COMPENSATED FOR THEIR PPP-LOAN-RELATED SERVICES**
4 **DURING THIS ONCE-IN-A-LIFETIME PANDEMIC.**

5 The Bank cites to other written decisions from other jurisdictions. These decisions
6 offer no support here for several reasons.

7 First, the decisions do not address the specific issues being raised herein. For
8 whatever reason, they do not address all of the language in the PPP, implementing
9 regulations, and SBA directives to lenders. It may be the litigants did not argue the
10 complete context of the law and all its provisions. Perhaps they were not the focus of the
11 parties or the courts. For whatever reason, the arguments below and their context in the
12 statutory scheme have not been rejected.

13 Second, the other courts are parallel courts in other jurisdictions. There are no
14 appellate opinions, including from the Ninth Circuit.

15 Third, the decisions primarily simply repeat the arguments the Bank made here.
16 They look at different statutory provisions and do not delve deeper into the important
17 context of the PPP and implementing rules and regulations.

18 The arguments below are of first impression before this Court and in this
19 jurisdiction. Radix urges the Court to look at them in that manner and context, and to
20 appreciate that decisions made by other courts primarily have focused on a different and
21 more limited analysis and interpretation of the PPP rules, without focusing as well on
22 implementing regulations and other written guidance.

23 **A. The PPP Plain Language Requires Compensation to Agents.**

24 The Court’s goal here as in any issue of statutory construction is to ascertain the
25 intent of policy makers.

26 “When a word is not defined by statute, [the Supreme Court] normally construe[s]
27 it in accord with its ordinary or natural meaning,” which can often be discerned by
28 reference to the dictionary definition of that word. *Smith v. United States*, 508 U.S. 223,

1 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Moreover, “there is a natural presumption
2 that identical words used in different parts of the same act are intended to have the same
3 meaning,” unless Congress exhibits an intent that the word be given different meanings.
4 *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204
5 (1932)

6 Here, the PPP rules state that the SBA “shall pay” a set fee to lenders. The PPP
7 also states that agents “will be paid” out of the fees that the SBA pays the lender, although
8 the amount of that fee must be reasonable and is capped.¹ The SBA regulations and
9 guidelines implementing the PPP further and consistently use the word “will” when
10 referring to both the fee that the SBA “will” pay lenders, and the fee that lenders “will”
11 pay to agents.

12 The PPP, its implementing regulations, and SBA guidelines all require that fees
13 be paid to both lenders and to agents, using similar and identical words.

14 **1. The PPP Uses “Shall” And “Will” Interchangeably.**

15 Congress’ intent that both lenders and agents receive mandatory fees is found in
16 the PPP itself.

17 First, with regard to fees from the SBA to lenders: “**The [SBA] Administrator**
18 **shall reimburse a lender**” specified amounts, of up to five percent for some loans. 15
19 USC § 636(a)(36)(P)(i) (emphasis added).

20 Second, with regard to fees from lenders to agents: “**Agent fees will be paid by**
21 **the lender out of the fees the lender receives from SBA.**” *Id.* (emphasis added).

22 Congress uses the words “shall” and “will” to describe the payment of fees. The
23 words commonly designate a future act. Courts also have compared the meanings of
24
25

26
27 ¹ This is consistent with any fees attorneys seek to collect. For example, Arizona Rules of
28 Professional Conduct prohibit a lawyer making “an agreement for, charge, or collect an
unreasonable fee or an unreasonable amount for expenses.” Ariz. R. Prof. Cond. 1.5(a).

1 “shall” and “will.” Both typically and similarly are viewed as requiring future action. *See*
2 *Washington v. Harper*, 494 U.S. 210, 221, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (The
3 word “will,” like the word “shall,” is a mandatory term); *Natural Resources Defense*
4 *Council, Inc. v. James R. Perry*, 940 F.3d 1072, 1078 (9th Cir. 2019) (same); *Webber v.*
5 *Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998) (*per curiam*) (same).

6 **2. The Regulations Implementing The PPP Employ Only The**
7 **Word “Will” In Describing The Payment Of Lender Fees And**
8 **Agents Fees.**

9 To enact the PPP, the SBA provided regulatory guidelines through the SBA
10 Interim Final Rule (the “IFR”), 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020) (a copy of
11 which is attached as Ex. “A” hereto).

12 The IFR interpret the PPP and implement rules to enact it. These PPP
13 implementing regulations further spell out the requirement that the SBA pay lenders for
14 issuing PPP loans.

15 “SBA will pay lenders fees for processing loans” IFR at 20816, Ex. “A”
16 hereto (all emphasis added). The Bank obviously agrees that the use of “will” here, with
17 regard to the SBA paying lenders a fee at least, is mandatory.

18 Similarly, with regard to *agent* fees, the IFR states: “**Agent fees will be paid by**
19 **the lender.**” *Id.* at 20816, Ex. “A” hereto (emphasis added). Again, the verb used is
20 “will,” which is used identically and interchangeably in the IFR to describe the mandatory
21 payment of *both* lender fees *and* agent fees.

22 If “will” is mandatory for payments to lenders, it must also be equally mandatory
23 for payments to agents. There is no qualifying language in the IFR. The IFR does *not*
24 state, for example, “*If* lenders are to be paid, then” Likewise, the IFR does *not* state,
25 “*If* agents are to be paid....” Rather, the SBA “will” pay lenders a fee, and from those
26 fees lenders “will” pay agents.
27
28

1 This is further supported by the different PPP fee scheme. Unlike typical SBA
2 loans where borrowers can hire and pay attorneys and accountants to help, agents “may
3 not collect fees from the Borrower or be paid out of the PPP loan proceeds.” *Id.*

4 The only difference between fees paid to lenders is that the fee schedule for lenders
5 set forth a specific amount for their fees, while the fee schedule for agents puts a cap on
6 the mandatory agent fee of “up to” certain percentages. *Id.* Nevertheless, an agent fee is
7 mandatory; it just must also be reasonable. *Id.* (The agent fee “limits set forth above are
8 reasonable based upon the application requirements and the fees that lenders receive for
9 making PPP loans.”).

10 **3. The SBA Itself Notified Lenders that Agents “Will” be Paid**
11 **Out of the Lenders’ Fees.**

12 The PPP and its regulations provide that fees “shall” and “will” be paid to lenders
13 and to agents. The IFR states that both banks and agents “will” be paid fees. There is still
14 more support for this proposition. The SBA sent written instructions to banks, such as
15 Chase, stating that banks and agents “will” be paid fees.

16 The “PAYCHECK PROTECTION PROGRAM (PPP) INFORMATION SHEET
17 [for] LENDERS” uses the same language as the IFR and PPP to require fees be paid to
18 lenders and to agents:

19 **How will lenders be compensated?** Processing fees will be based on
20 the balance of the financing outstanding at the time of final disbursement.
21 **SBA will pay lenders fees for processing PPP loans** in the following
amounts:

- 22 • Five (5) percent for loans of not more than \$350,000;
- 23 • Three (3) percent for loans of more than \$350,000 and less than \$2,000,000; and
- 24 • One (1) percent for loans of at least \$2,000,000.

25 **Lenders may not collect any fees from the applicant.**

26
27
28 * * *

1 **How will agents be compensated? Agent fees will be paid out of**
2 **lender fees. The lender will pay the agent.** Agents may not collect any fees
3 from the applicant. The total amount that an agent may collect from the
4 lender for assistance in preparing an application for a PPP loan (including
5 referral to the lender) may not exceed:

- 6 • One (1) percent for loans of not more than \$350,000;
- 7 • 0.50 percent for loans of more than \$350,000 and less than \$2 million; and
- 8 • 0.25 percent for loans of at least \$2 million.

9 (March 30, 2020, U.S. Department of Treasury (the “Treasury”) Fact Sheet to lenders, a
10 copy of which is attached as Ex. “B” hereto (all emphasis added)).

11 The PPP requires the SBA to pay fees to lenders, who in turn must pay fees to
12 agents. The IFR has the same requirement. The SBA notice to lenders has the same
13 requirement. This was the reasonable expectation of Radix and any other agent who
14 decided to help borrowers with their applications. They cannot receive payment from the
15 borrower, but they “will” receive a fee from the lender.

16 **B. The PPP Controls Over the SBA 7(a) Requirements.**

17 PPP loans and procedures are different from “typical” SBA loans.

18 PPP loans are intended to be forgivable loans, with funds actually coming from
19 the U.S. Government. As set forth above, lenders “will” be paid a fee – not off interest
20 rates, but off a set schedule. Likewise, borrower agents “will” be paid a fee up to a certain
21 amount. All of these fees flow from the government². They are not paid from the lender;
22 rather, they are paid through the lender. Such fees cannot be paid by a borrower.
23

24 _____
25 ² Significantly, the banks didn’t even have to use their own funds to make these 100%
26 guaranteed and forgivable loans. Rather, the Federal Reserve Board implemented the Paycheck
27 Protection Program Liquidity Facility (PPPLF) to further the purpose of the PPP. *See generally*
28 <https://www.federalreserve.gov/monetarypolicy/ppplf.htm>. In short, the financial institutions
aren’t lenders under the program; they are merely financial clearinghouses for an emergency
governmental financial program.

1 Because the PPP had to be implemented on short notice, there was no time to set
2 up a new procedural mechanism to distribute the PPP funds to desperate small businesses.
3 Thus, the government and lenders used the existing SBA software system.

4
5 **1. The General SBA 7(a) Requirements Relating to Payment of
6 Agents Do Not Apply Here.**

7 The PPP’s plain language, the IFR’s plain language, and the SBA guidelines to
8 lenders’ plain language all require lenders to pay agents, using similar and identical
9 language for the mandatory payment of fees from the SBA to lenders.

10 This is not the only difference between the different schemes behind the separate
11 PPP loan program and typical SBA loans. In a typical SBA loan, a prerequisite to
12 compensation is an agreement between lender and agent. A lot of work goes into
13 approving a typical SBA loan. There are extensive qualifying requirements and an
14 analysis that the lender must conduct. *E.g.*
15 https://www.sba.gov/sites/default/files/SDOLoanFactSheet_Oct_2011.pdf, a copy of
16 which is attached as Ex. “C” hereto. There is lender risk. *Id.* Loan terms can include
17 payments over decades. *Id.* The money from a lender to a borrower is truly from the
18 lender, with an 85 percent guarantee; it is not government money paid through the lender,
19 essentially as with PPP funds. *Id.*

20 Given the emergency nature of the PPP, and the critical need for the loans to be
21 processed as smoothly as possible, the PPP altered many SBA requirements. Some
22 examples include: the SBA waived multiple fees to buyers (IFR, Ex. “A” hereto, p.
23 20817); the SBA allowed non-SBA-approved lenders to submit PPP loans (*id.* at p.
24 20816); and the SBA did not allow PPP funds or applicants to be the source of payment
25 of agent fees (*id.* at p. 20817).

26 Congress and the SBA also changed the manner in which lenders and agents
27 receive their compensation and fees. In a typical SBA loan, there is no fee paid by the
28 SBA to a SBA lender; instead, the lender makes money only on the interest and fees paid

1 by the borrower/applicant, and the SBA guarantees (up to a percentage) repayment of the
2 loan. In addition, an agent on a typical SBA loan may be paid (with certain disclosure)
3 by the applicant / borrower directly or as a referral fee by the lender. (See SBA Form 159
4 instructions at p 1, <https://www.sba.gov/sites/default/files/2018-09/Form%20159%20-%20%28FINAL%29%209.10.18.pdf>, a copy of which is attached as Ex. “D” hereto).

6 These typical SBA loan lender and agent compensation circumstances do not exist
7 under the PPP. Rather, the PPP has its own, completely separate provisions governing
8 the payment of fees, by the SBA to lenders, and by lenders to agents. The only thing that
9 is common is that the lender used the SBA approval portal to process each loan. Here,
10 the PPP fee provisions govern over the SBA compensation provisions where agents can
11 (and do, typically) get paid by the borrower.

12
13 **2. Even If the SBA 7(a) Paperwork Requirement Applies, Then**
14 **the Bank Needs to Comply with the Procedural Formality of**
15 **Executing Form 159.**

16 Even if the 7(a) provisions were to govern the mandatory fee payment from the
17 Bank to Radix, the Bank is reading the Form 159 requirement wrong. That is, the Bank
18 states that, because it has not *yet* entered into Form 159 with Radix, Radix cannot recover
19 the agent fee due it. That is a backwards reading of the PPP.

20 Instead, the analysis should proceed and flow from the plain language of the PPP,
21 its guidelines and instructions. That is, Radix was an Applicant’s agent. (*See generally*
22 *Complaint*). The PPP, regulations, and SBA instructions require the Bank to pay Radix
23 an agent fee. (IFR at p. 20816, Ex. “A” hereto). Therefore, if a Form 159 is required for
24 Radix to get paid, then the Bank needs to go through the procedural formality of
25 executing and submitting the form. (*See e.g.* Ex. “D” hereto). Nowhere does the authority
26 cited herein provide the Bank with the discretion to deny payment to Radix based on the
27 Bank’s refusal to accept a form.
28

1 Other lenders have paid the requested fee to Radix. At least one lender has
2 requested filling out a Form 159. Another has requested other supporting information.
3 Lenders perhaps can request agents to fill out forms and provide reasonable
4 documentation. These perhaps are open procedural questions. What should not be an
5 open question is whether lenders must pay Applicants' agent a fee. Fees are mandatory,
6 to both lenders like the Bank and to agents like Radix.

7 **C. The Goals Behind Typical SBA Loans and PPP Loans Are Very**
8 **Different and Support Radix's Statutory Interpretation and the PPP's**
9 **and IFR's Plain Meaning.**

10 The PPP, its regulations, and its guidelines require lenders to compensate agents
11 for their services on behalf of borrowers. PPP's requirements govern. All of this was
12 necessitated by the pandemic.

13 Congress enacted the PPP during a once-in-a-century Pandemic, to offer
14 emergency financial assistance to, in the big picture, save the U.S. economy and, on a
15 micro-level, save small businesses and their employees from financial ruin. The
16 regulations implementing the PPP details page by page the complete the scope of the
17 financial disaster that Congress was trying to address. *See generally* the IFR. Although it
18 could be summarized, the length and detail by which the IFR discusses the PPP is best
19 read directly from the rule itself.

20 Through the PPP, lenders were allocated roughly \$349 billion (an amount later
21 increased to well over half a trillion dollars) to be loaned, immediately, through the SBA
22 to small business applicants ("Applicants"). *Id.* The sheer amount of money being loaned
23 dwarfs the amount of typical SBA loans. The SBA usually dolls out somewhere around
24 \$30 billion over an entire year. (*E.g.* <https://www.sba.gov/node/1650010> ("Nationally,
25 SBA loan volume in FY 2019 reached more than \$28 billion.")).

26 It becomes abundantly clear in reading the IFR that Congress absolutely knew that
27 hundreds of billions of dollars in SBA forgivable loans were going to be processed in a
28 matter of weeks. *E.g.* IFR. That did in fact occur. "**In [the first] 14 days**, the Small

1 Business Administration processed **14 years’ worth of loans**, in the first round of
2 funding for the Paycheck Protection Program.”
3 [https://www.cnbc.com/2020/06/02/billions-in-ppp-loan-money-remains-untapped-by-](https://www.cnbc.com/2020/06/02/billions-in-ppp-loan-money-remains-untapped-by-small-businesses.html)
4 [small-businesses.html](https://www.cnbc.com/2020/06/02/billions-in-ppp-loan-money-remains-untapped-by-small-businesses.html) . The total number of loans and amount of loans is staggering. “As
5 of May 30, **4.4 million loans** have been made in both rounds of the PPP program for a
6 total loan value of **\$510.2 billion.**” *Id.* (emphasis added).

7 Congress needed to have this massive program run as smoothly as possible. Of
8 course, business owners needed professionals to assist with and help smooth out such an
9 enormous undertaking. Through the PPP, Congress needed to and intended to provide
10 incentives to lenders and agents to help the process run smoothly, while also preventing
11 Applicants from having to pay fees related to PPP loans in order to maximize the financial
12 benefit to them.

13 This is further demonstrated when considering the different purposes of typical
14 SBA loans and emergency, pandemic-driven PPP loans.

15 Typical SBAA loans are intended to help small businesses grow. “The U.S. Small
16 Business Administration helps Americans **start, build, and grow businesses.** The SBA
17 was created in 1953 as an independent agency of the federal government to aid, counsel,
18 assist and protect the interests of small business concerns, to preserve free competitive
19 enterprise and to maintain and strengthen the overall economy of our nation.”
20 <https://www.sba.gov/about-sba/organization> (emphasis added). Typical SBA loans are
21 designed to provide positive opportunity. <https://www.sba.gov/funding-programs/loans>
22 (“**Start or expand your business** with loans guaranteed by the Small Business
23 Administration”). (emphasis added)).

24 PPP loans, on the other hand, were designed to face pending financial ruin. “The
25 Paycheck Protection Program is a loan designed to provide a direct incentive for small
26 businesses to **keep their workers on the payroll.**” [https://www.sba.gov/funding-](https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program)
27 [programs/loans/coronavirus-relief-options/paycheck-protection-program](https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program) (emphasis
28 added); *see also e.g.* IFR (Ex. “D” to Complaint).

1 Due to the urgent nature of the emergency, and the sheer enormity of the
2 forgivable loans the PPP was going to make, Congress had to enact an entirely different
3 disbursement scheme than what previously and currently exists with normal SBA loans. Also
4 different under the PPP scheme was how both agents and lenders would be paid.

5 Thus, to effectuate the policy behind passing the PPP, the US Department of
6 Treasury wrote into the PPP regulations and guidance different requirements and
7 different language from that supporting typical SBA loans.

8 **III. RADIX'S SPECIFIC LEGAL CLAIMS ARE VIABLE.**

9
10 Radix sets forth three legal claims, all of which are viable and have been properly
11 pled. As a threshold matter, the legal claims fail if the Court interprets the PPP as having
12 discretionary borrower agent fees. But if Radix's interpretation is adopted (and the fees
13 are mandatory), each cause of action survives as a matter of law.

14 The Bank also moves to dismiss on perceived pleading deficiencies. The Court's
15 preliminary order states that the Court disfavors motions to dismiss and requires the
16 parties to discuss any specific pleading deficiencies prior to filing a motion to dismiss.
17 While the parties here did meet and confer, that conversation was almost exclusively
18 devoted to the meaning of the PPP and the IFR. Details regarding specific pleading
19 defects were not discussed. The Court should therefore grant leave for Radix to amend
20 the Complaint to cure any alleged pleading defects.

21 **A. The Court Should Interpret the PPP and Declare That Agents** 22 **Must Be Paid Under the Program.**

23 There are at least two issues regarding the declaratory judgment claim. First, what
24 is the meaning of the statute at issue? The parties dispute its meaning. Radix argues that
25 it should be given the plain mean according to its clear terms, as set forth above. Second,
26 and separate from the first question, can Radix pursue a private claim based on the PPP?
27 Based on the specific statute at issue here, Radix can pursue a direct claim.
28

1 The ability to obtain a declaratory judgment is similar under both federal and
2 Arizona state law.

3 The Arizona declaratory judgment act provides:

4
5 Courts of record within their respective jurisdictions shall have power to
6 declare rights, status, and other legal relations whether or not further relief is or
7 could be claimed. No action or proceeding shall be open to objection on the ground
8 that a declaratory judgment or decree is prayed for. The declaration may be either
9 affirmative or negative in form and effect; and such declarations shall have the
10 force and effect of a final judgment or decree.

11 Ariz. Rev. Stat. sec. 12-1831.

12 The federal declaratory judgment act provides:

13
14 In a case of actual controversy within its jurisdiction, . . . any court of the
15 United States, upon the filing of an appropriate pleading, may declare the rights
16 and other legal relations of any interested party seeking such declaration, whether
17 or not further relief is or could be sought. Any such declaration shall have the force
18 U.S.C. § 2201(a).

19 Here, as set forth above and in the parties' respective filings, the parties disagree
20 (i) as to Congress' intent in passing the PPP (and the meaning of regulations and
21 guidelines) and (ii) as to whether the word "will" is the same when describing mandatory
22 fee payments to lenders and to agents.

23 The arguments set forth herein cover this area. The Court should deny the Motion
24 to Dismiss, declare that Congress' intent is expressed in the PPP, IFR and guidelines and
25 declare that lenders "will" pay agents fees is as mandatory as the requirement that the
26 SBA "shall" and "will" pay lenders fees.

27 Moreover, the PPP impliedly provides a private cause of action. In general, in
28 deciding whether a private cause of action exists, a court is to examine the statute in
question and, based on the text and structure, whether the statute provides for a private
cause of action.

1 Here, the relationship between the lender and the agent is plainly spelled out. As
2 explained above, there are, with regard to fees, two steps. First, the SBA pays a fee to a
3 PPP lender. Second, the PPP lender pays a fee to an agent.

4 This does not appear to impact the SBA or involve the SBA Administrator's
5 oversight of the PPP program. Once the SBA pays the fee to the lender, it is incumbent
6 upon the *lender* to then pay an agent. Thus, the PPP specifically spells out the relationship
7 between a lender and an agent. As set forth above, the agent fee is required. There does
8 not appear to be any other remedy except to pursue the payment from the lender.

9 **B. Radix Has Properly Pled a Consumer Fraud Claim.**

10 In Arizona, as the Bank states, a claim for consumer fraud requires allegations
11 involving “ (1) a false promise or misrepresentation made in connection with the sale or
12 advertisement of merchandise with the intent that others rely on it, (2) the plaintiff relied
13 on the false promise or misrepresentation, and (3) injury resulting from the false promise
14 or misrepresentation.” *Davis v. Bank of Am. Corp.*, 2012 WL 3637903, at *4 (D. Ariz.
15 Aug. 23, 2012) (citing *Kuehn v. Stanley*, 91 P.3d 346, 351 (Ariz. Ct. App. 2004)).

16 It's not complicated here.

17 The Bank had a PPP loan submission portal. As Radix pled, the Bank accepted the
18 Radix-submitted Applicant application. (Complaint paras. 18, 19, 31). Both implicitly
19 and expressly, the Bank is committed to complying with the terms of the PPP, the IFR
20 and the SBA guidelines sent to lenders such as the Bank. As set forth above, the Bank is
21 required to pay fees to agents, just as the SBA is required to pay fees to lenders. the Bank
22 has not paid Radix the fee due it from the funds it received from the US Government.

23 The intent element also is straight forward. the Bank always knew of, knows of,
24 and certainly has been advised of the language of the PPP, IFR, and SBA guidelines. The
25 Bank was made aware of Radix and Radix's claim to fees and the Applicant's agent from
26 the time of the application. (Complaint paras. 18, 19, 31). Although the fees merely total
27 in the hundreds of dollars, the Bank refuses to compensate Radix.

28

1 Finally, the argument that the ACFA does not apply to Radix is misguided. the
2 Bank made both express and implied promises that it was following the PPP and other
3 regulations and guidance, and that Applicants would receive SBA PPP loans and, as
4 required by law, Applicant gents would be paid a fee from the Bank.

5 **C. Radix Has a Viable Claim for Unjust Enrichment.**

6 In order to proceed on a claim of unjust enrichment, Radix must have alleged the
7 following elements: that it conferred a benefit upon the defendant, that defendant's
8 benefit was at plaintiff's expense; and it would be unjust to allow defendant to keep the
9 benefit." *In re Ariz. Theranos, Inc., Litig.*, 308 F. Supp. 3d 1026, 1057 (D. Ariz. 2018).

10 Here, Radix has properly pled the elements of unjust enrichment. First, Radix
11 provided lenders with an organized, complete packet on behalf of an Applicant. Radix
12 pleads that this has value. The value of such services is set forth in the PPP, which
13 requires "reasonable" compensation up to certain amounts payable to agents. Second,
14 Radix pleads that it spent a large amount of time and money to learn about the PPP,
15 compile Applicant information, fill out the application, and submit it. Third, Radix has
16 plead that it would be unjust for the Bank not to compensate Radix.

17 The Bank knew that Radix prepared the Applicant information, had entered into
18 an engagement letter with Applicant, and was the Applicant's agent. (Complaint paras.
19 18, 19, 31). The Bank did not object to Radix's involvement and accepted the Applicant's
20 PPP packet. Moreover, the Bank accepted five percent on the amount of this Applicant's
21 loan from the SBA as its agent fee. The PPP loan is without risk to the Bank, because it
22 is loaned by the SBA and forgivable by the SBA. The five percent fee is a windfall under
23 a circumstance that they do not have to pay Radix, which did all the work on the
24 applications that were submitted and approved to the Bank.

25 **III. CONCLUSION.**

26 This issue is being litigated by thousands of agents and banks throughout the
27 country. At its heart is the question about what the reasonable expectations of
28 participating lenders and agents working furiously to help small businesses stay afloat

1 during a pandemic. The answer turns on the meaning of the word “will”. If “will” means
2 “may at the decision of the lender”, then there is a different result. However, in Radix’s
3 view, “will” means that it will get paid for the hundreds of hours spent working on clients’
4 emergency loan requests. Otherwise, because the rule prohibits payment from the
5 borrower, Radix is an unwitting volunteer in a process that generated lenders billions of
6 dollars while Radix did the bulk of the work. The Motion to Dismiss should be denied.

7 **DATED:** November 16, 2020.

8 **RADIX LAW, PLC**

9
10 /s/ Robert Mann

11 Jonathan Frutkin

12 Robert N. Mann

13 *Attorneys for Plaintiff*
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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I electronically transmitted the foregoing document and any attachments to the Clerk of the U.S. District Court for the District of Arizona using the CM/ECF System for filing and a transmittal of a Notice of Electronic Filing was sent to the CM/ECF registered participants as listed below.

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