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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Radix Law PLC,
Plaintiff,
v.
JPMorgan Chase Bank NA,
Defendant.

No. CV-20-01810-PHX-SRB
ORDER

Pending before the Court is Defendant JPMorgan Chase Bank National Association (“Defendant”)’s Motion to Dismiss Plaintiff’s Complaint (“Motion”). (Doc. 6, Mot. to Dismiss Pl.’s Compl. (“Mot.”).) The Court heard oral argument on December 17, 2020.

I. BACKGROUND

On January 31, 2020, the federal government declared a public-health emergency based on the widespread proliferation of a novel coronavirus which causes the disease COVID-19. *See* U.S. Dep’t of Heath & Hum. Servs., *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus* (Jan. 31, 2020), <https://bit.ly/3mP3551>. In the time since, COVID-19 has taken a devastating toll on the health of individuals and the economy.

In legislative response, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). *See* Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). The CARES Act creates the Paycheck Protection Program (“PPP”), which provides the Small Business Administration (“SBA”) with the funding and authority to operate a loan

1 program to keep small businesses afloat. *See id.* § 1102; 15 U.S.C. § 636. Specifically,
2 the CARES Act amends Section 7(a) of the Small Business Act, a preexisting statutory
3 scheme that authorizes the SBA to issue loans, and guarantee loans made by private
4 lenders, to qualifying businesses. *See* 15 U.S.C. § 636(a); 13 C.F.R. § 120.2(a).

5 Unlike typical Section 7(a) loans, PPP loans are 100% guaranteed by the SBA. *See*
6 Business Loan Program Temporary Changes; Paycheck Protection Program — Revisions
7 to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020). To obtain a PPP
8 loan, a business must apply by submitting certain documents to a lending institution and
9 self-certifying that (a) it is eligible and (b) the current economic “uncertainty” has made a
10 loan “necessary” to support its operations. 15 U.S.C. § 636(a)(36)(G)(i). Businesses may
11 apply directly or through an agent.¹ *See* 13 C.F.R. § 103.2.

12 Plaintiff Radix Law, PLC (“Plaintiff”) is a law firm that helped ten small businesses
13 secure PPP loans from Defendant. (Doc. 1-1, Compl. ¶¶ 6, 18.) Plaintiff alleges that the
14 PPP requires Defendant to compensate Plaintiff for its agent fees, in an amount equal to
15 1% of each loan. (*Id.* ¶ 23.) Plaintiff does not allege that it entered into a written agreement
16 with Defendant mandating such payment or that it completed any form memorializing such
17 an agreement. (*See* Compl.; *infra* Section III.A.1.)

18 On August 26, 2020, Plaintiff filed suit in state court. (Compl.) On September 16,
19 2020, Defendant removed. (Doc. 1, Not. of Rem.) Plaintiff seeks: (1) a declaratory
20 judgment stating that the PPP requires Defendant to pay Plaintiff’s agent fees; (2) damages
21 for violation of the Arizona Consumer Fraud Act, A.R.S. § 44-1522 *et seq.*; and (3)
22 damages for unjust enrichment. (Compl. ¶¶ 20–37.) On October 23, 2020, Defendant filed
23 its Motion requesting dismissal with prejudice of each claim under Federal Rule of Civil
24 Procedure 12(b)(6). (Mot. at 1.) On November 16, 2020, Plaintiff filed its Response.
25 (Doc. 12, Pl.’s Resp. in Opp’n to Mot. (“Resp.”).) On December 3, 2020, Defendant filed
26 its Reply. (Doc. 15, Def.’s Reply in Support of its Mot. (“Reply”).) On December 17,

27 ¹ An “agent” is an “authorized representative, including an attorney, accountant, consultant,
28 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. Agents
may prepare or submit loan applications on behalf of applicants. *Id.* § 103.1(a), (b).

1 2020, the Court heard oral argument.

2 **II. LEGAL STANDARD**

3 A rule 12(b)(6) dismissal for failure to state a claim can be based on either (1) the
4 lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim.
5 *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). In determining
6 whether an asserted claim can be sustained, “[a]ll of the facts alleged in the complaint are
7 presumed true, and the pleadings are construed in the light most favorable to the
8 nonmoving party.” *Bates v. Mortg. Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th
9 Cir. 2012). “[A] well-pleaded complaint may proceed even if it strikes a savvy judge that
10 actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’”
11 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (quoting *Scheuer v. Rhodes*, 416 U.S.
12 232, 236 (1974)). However, “for a complaint to survive a motion to dismiss, the
13 nonconclusory ‘factual content,’ and reasonable inferences from that content, must be
14 plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*,
15 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).
16 In other words, the complaint must contain enough factual content “to raise a reasonable
17 expectation that discovery will reveal evidence” of the claim. *Twombly*, 550 U.S. at 556.

18 **III. ANALYSIS**

19 Defendant argues that: (1) the PPP does not require lenders to pay agent fees absent
20 a written contract, specifically one memorialized by Form 159; (2) the PPP does not
21 provide for a private right of action; and (3) Arizona law does not provide a private right
22 of action for either of Plaintiff’s state law claims. (Mot. at 2–3, 9 n.6, 14.) The Court
23 groups Defendant’s arguments by claim and addresses them below.

24 **A. Federal Law Claim**

25 All Section 7(a) Program requirements that do not conflict with the CARES Act
26 amendments apply to PPP loans. *See* Business Loan Program Temporary Changes;
27 Paycheck Protection Program, 85 Fed. Reg. 20811, 20812 (April 15, 2020); *Lopez v. Bank*
28 *of Am., N.A.*, No. 20-CV-04172-JST, 2020 WL 7136254, at *7 (N.D. Cal. Dec. 4, 2020);

1 *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, No. 3:20CV5425-TKW-HTC, 2020
 2 WL 4882416, at *3 (N.D. Fla. Aug. 17, 2020). The Court details relevant provisions of
 3 the Section 7(a) Program before turning to the PPP.

4 **1. Section 7(a) Program**

5 When a business applies for a Section 7(a) loan through an agent, a “comprehensive
 6 scheme” governs how and how much that agent is paid. *Johnson v. JPMorgan Chase Bank,*
 7 *N.A.*, No. 20-CV-4100 (JSR), 2020 WL 5608683, at *2 (S.D.N.Y. Sept. 21, 2020). Under
 8 this scheme, the business must “certify to the [SBA] the names of any attorneys, agents, or
 9 other persons engaged by or on behalf of such [applicant] . . . and the fees paid or to be
 10 paid to any such persons.” 15 U.S.C. § 642. For any person so named, the business must
 11 “execute and provide to SBA a compensation agreement” which “governs the
 12 compensation charged for services rendered or to be rendered to the Applicant[.]” 13
 13 C.F.R. § 103.5(a). This agreement must be memorialized by Form 159.² The parties agree
 14 that in a typical Section 7(a) loan, completion of Form 159 is a prerequisite to agent
 15 compensation. (*See* Resp. at 8; Mot. at 3–5); 15 U.S.C. § 642; 13 C.F.R. § 103.5.

16 **2. PPP**

17 Resolution of Plaintiff’s PPP claim turns on whether any provision of the PPP
 18 conflicts with, and therefore dispenses with, Section 7(a)’s Form 159-completion
 19 requirement. Defendant argues that there is no conflict. (Mot. at 3–4.) Plaintiff disagrees.

20 First, Plaintiff argues that 15 U.S.C. § 636(a)(36)(P)(i), read in conjunction with 85
 21 Fed. Reg. 20811,³ requires lenders to pay borrowers’ agent fees irrespective of Form 159’s
 22 completion. (Resp. at 3–4.) Section 636(a)(36)(P)(i), 15 U.S.C., reads in full:

23 (P) Reimbursement for processing

24 (i) In general

25 The Administrator shall reimburse a lender authorized

26 ² The SBA “provides the form of compensation agreement . . . to be used by Agents.” 13
 27 C.F.R. § 103.5(a). The form provided by the SBA is entitled *Form 159 Fee Disclosure*
 28 *and Compensation Agreement*. (*See* Doc 12-1, Ex. A, Form 159 Fee Disclosure and
 Compensation Agreement (“Form 159”).)

³ Pursuant to its delegated authority, the SBA issued an interim final rule (“IFR”) to
 implement the PPP. *See* 85 Fed. Reg. 20811.

1 to make a covered loan at a rate, based on the balance
2 of the financing outstanding at the time of disbursement
of the covered loan, of—

3 (I) 5 percent for loans of not more than \$350,000;

4 (II) 3 percent for loans of more than \$350,000
5 and less than \$2,000,000; and

6 (III) 1 percent for loans of not less than
\$2,000,000.

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8 85 Fed. Reg. 20811 provides in relevant part:

9 c. Who pays the fee to an agent who assists a borrower?

10 Agent fees will be paid by the lender out of the fees the lender
11 receives from SBA. Agents may not collect fees from the
12 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:

13 i. One (1) percent for loans of not more than \$350,000;

14 ii. 0.50 percent for loans of more than \$350,000 and less
15 than \$2 million; and

16 iii. 0.25 percent for loans of at least \$2 million.

17 The Act authorizes the Administrator to establish limits on
18 agent fees. The Administrator, in consultation with the
19 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.

20 Read together, these provisions require that the SBA reimburse PPP lenders in specified
21 amounts, and, when agent fees *are* paid, that they be paid out of these sums and in a
22 reasonable amount. These requirements in no way conflict with Section 7(a)'s requirement
23 that an agent seeking compensation submit Form 159 prior to the loan's disbursement.
24 *Accord Am. Video Duplicating, Inc., v. City Nat. Bank*, No. 220CV04036JFWJPR, 2020
25 WL 6882735, at *1 (C.D. Cal. Nov. 20, 2020) ("*Am. Video Duplicating, Inc. I*") ("[T]he
26 CARES Act does not require lenders to pay agent fees absent an agreement to do so.");
27 *Am. Video Duplicating Inc. v. Citigroup Inc.*, No. 220CV03815ODWAGR, 2020 WL
28 6712232, at *4 (C.D. Cal. Nov. 16, 2020) ("*Am. Video Duplicating, Inc. II*") (same); *Leigh*

1 *King Norton & Underwood, LLC v. Regions Fin. Corp.*, No. 2:20-CV-00591-ACA, 2020
2 WL 6273739, at *7 (N.D. Ala. Oct. 26, 2020) (same); *Sanchez v. Bank of South Texas*,
3 2020 WL 6060868, at *2 (S.D. Tex. Oct. 14, 2020) (same); *Johnson*, 2020 WL 5608683,
4 at *7 (same); *Sport & Wheat*, 2020 WL 4882416, at *4 (same).

5 Second, Plaintiff argues that a crucial difference between the Section 7(a) Program
6 and the PPP mandates the payment of agent fees in the latter, irrespective of Form 159's
7 completion. (Resp. at 6.) Agents securing PPP loans, unlike agents securing typical
8 Section 7(a) loans, may not collect agent fees from borrowers or be paid out of PPP loan
9 proceeds. *See* 85 Fed. Reg. 20811. While Plaintiff correctly identifies this as a difference,
10 it presents no conflict with Section 7(a)'s Form 159 requirement.

11 Third, Plaintiff argues that an "information sheet" sent to lenders (including
12 Defendant) which "stat[ed] that both banks and agents 'will' be paid fees" supports its
13 argument that the PPP mandates the payment of agent fees irrespective of Form 159's
14 completion. (Resp. at 6.) But an information sheet is not law. *In re Grain Land Coop*,
15 978 F. Supp. 1267, 1277 (D. Minn. 1997), *aff'd sub nom. Grain Land Coop v. Kar Kim*
16 *Farms, Inc.*, 199 F.3d 983 (8th Cir. 1999) ("Agency statements of guidance are not law.").
17 Whether the information sheet conflicts with any provision of the Section 7(a) Program is
18 irrelevant.⁴

19 Fourth, Plaintiff argues that the emergency nature of the PPP legislation and the dire
20 need of small businesses support finding a congressional intent to "prevent[] Applicants
21 from having to pay fees related to PPP loans in order to maximize the financial benefits to
22 them." (Resp. at 11.) But Plaintiff's speculation, unsupported by any citation, is not
23 suggestive of congressional intent.

24 Lastly, Plaintiff argues that even if Form 159's completion was required, the form
25 is a mere "procedural formality" that exists independently of the PPP's mandate that a
26 lender pay a borrower's agent fees. (*Id.* at 9.) But as detailed above, the PPP does not
27 mandate such a payment. Had Form 159 been completed here, enforcement of the

28 ⁴ The Court expresses no opinion as to whether any aspect of this information sheet
conflicts with the Section 7(a) Program.

1 agreement it memorializes could have required such a payment. But Form 159 was not
2 completed. Lacking that, Plaintiff is not entitled to payment of its agent fees by Defendant.⁵
3 The Court joins the increasing number of courts across the country, including this Court,
4 that have addressed this issue and unanimously held the same. *See Radix Law PLC v.*
5 *Silicon Valley Bank*, No. CV-20-01304-PHX-DWL (D. Ariz. Dec. 16, 2020); *Lopez*, 2020
6 WL 7136254, at *7; *Am. Video Duplicating, Inc. I*, 2020 WL 6882735, at *1; *Am. Video*
7 *Duplicating Inc. II*, 2020 WL 6712232, at *6; *Leigh King Norton & Underwood, LLC*,
8 2020 WL 6273739; *Sanchez*, 2020 WL 6060868, at *2; *Johnson*, 2020 WL 5608683, at
9 *8; *Sport & Wheat*, 2020 WL 4882416, at *3.

10 Even if Plaintiff had a viable argument on the merits, this claim would be dismissed
11 because there is no private right of action to enforce the CARES Act. *See Johnson*, 2020
12 WL 5608683, at *8 (“[T]here is no private cause of action to enforce this provision of the
13 CARES Act.”); *Sanchez*, 2020 WL 6060868, at *7 (“The Court joins the preexisting
14 consensus that “there is no private cause of action to enforce this [agent fee] provision of
15 the CARES Act.”); *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 2020 WL
16 1849710, at *7 (D. Md. Apr. 13, 2020) (“The Court is not persuaded that the language of
17 the CARES Act evidences the requisite congressional intent to create a private right of
18 action.”); *see also Crandal v. Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996)
19 (“[T]he Small Business Act does not create a private right of action in individuals.”).

20 **B. State Law Claims**

21 Defendant argues that Plaintiff’s state law claims for unjust enrichment and
22 violation of the Arizona Consumer Fraud Act are not viable because they are in essence
23 attempts to enforce the CARES Act. (Mot. at 14.) Plaintiff concedes that these claims
24 “fail if the Court interprets the PPP as having discretionary borrower agent fees.” (Resp.
25 at 12.) The Court agrees: these claims fail. *See Astra USA, Inc. v. Santa Clara Cty., Cal.*,
26 563 U.S. 110, 118 (2011) (stating that where plaintiff’s suit is “in essence a suit to enforce”

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28 ⁵ Because Plaintiff has made no allegation that the parties executed a written agreement governing Plaintiff’s compensation, the Court does not reach the issue of whether a written agreement *not* memorialized in Form 159 would suffice.

1 a federal statute lacking a private right of action, it is “incompatible with the statutory
2 regime” to allow common-law claims based on alleged statutory violations).

3 **IV. LEAVE TO AMEND**

4 At oral argument, Plaintiff conceded that if the Court finds for Defendant on the
5 merits, there is no amendment that could cure the Complaint. The Court agrees.


6 **V. CONCLUSION**

7 The PPP does not require lenders to pay a borrower’s agent fees absent the
8 completion of Form 159 prior to disbursement of a PPP loan. Form 159 was not completed
9 here. Additionally, the PPP is not enforceable by private parties. Plaintiff has therefore
10 failed to state a plausible claim for relief under federal or state law. The Court denies leave
11 to amend.

12 **IT IS ORDERED** granting Defendant’s Motion to Dismiss Plaintiff’s Complaint
13 (Doc. 6).

14 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment
15 terminating this action.

16 Dated this 21st day of December, 2020.

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21 _____
22 Susan R. Bolton
23 United States District Judge
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