IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Edward L. Scherer and Donald Kowall, individually, and on behalf of all others similar situated,	)	**Civil Action**
Plaintiffs,	)	**File No. 4:20-cv-01295**
v.	)	
Wells Fargo Bank, N.A.	)	
Defendant.	)	

Wells Fargo Bank, N.A.'s Motion to
Dismiss Plaintiffs' Amended Class Action Complaint

May 8, 2020

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Defendant Wells Fargo Bank, N.A. ("Wells Fargo") hereby moves for dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6).

SUMMARY OF MOTION

Congress created the Paycheck Protection Program ("PPP") as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 ("CARES Act") to assist small businesses facing hardship during the global COVID-19 pandemic. The PPP provides $659 billion in funding for loans to help small businesses meet payroll and cover other expenses. The loans, which are forgivable and guaranteed by the Small Business Administration ("SBA"), are not made by the federal government or the SBA, but by private lenders like Wells Fargo. No bank is required to take part in the PPP, but—in order to help small businesses in Texas and throughout the nation—Wells Fargo elected to participate. Wells Fargo also announced that it would not keep any fees earned from PPP loans.

Beyond the basic eligibility requirements set forth in the CARES Act and the SBA's Interim Final Rule, 85. Fed. Reg. 20811 ("IFR"), Wells Fargo imposed an additional requirement on PPP applicants: that they had a Wells Fargo business checking account as of February 15, 2020. (Am. Compl. ("AC") ¶ 6, Ex. A, ECF No. 8.) Wells Fargo did so for very good reasons. By prioritizing applications from customers who already have gone through anti-fraud and anti-money laundering due diligence, Wells Fargo can "expedite the processing of loan applications"—which is

both "more efficient for [its] system, and potentially for the overall CARES Act scheme." *Profiles, Inc.* v. *Bank of Am. Corp.*, 2020 WL 1849710, at *12 (D. Md. Apr. 13, 2020).

Notwithstanding Wells Fargo's voluntary participation in the PPP, its good-faith efforts to further the goals of Congress and the SBA, and its decision to retain no fees from PPP loans, plaintiffs now seek significant damages and injunctive relief against the bank, relying on a purported implied private right of action in the CARES Act. Plaintiffs' Amended Complaint fails to state a claim and should be dismissed with prejudice for at least three reasons.

First, there is no private right of action under the CARES Act. The only court to have addressed this issue to date has held that the CARES Act does not provide an express private right of action and contains no rights-creating language that could rebut the presumption that Congress did not intend to create an *implied* private right of action. *Id.* at *5–7. To the contrary, the CARES Act modifies (but does not purport to transform) the Small Business Act, which courts consistently have held lacks an implied private right of action. The CARES Act also relies on the Small Business Act's regulatory enforcement regime, which is further evidence that Congress did not intend to allow *ad hoc* private litigation such as this action.[1]

[1] On May 6, 2020, plaintiffs filed an emergency motion that seeks leave to conduct expedited discovery from Wells Fargo concerning recent governmental

Second, plaintiffs have not pled any violation of the CARES Act. Nothing in the Act or the SBA's IFR prohibits lenders from establishing lender-specific eligibility requirements for PPP loan applicants. Indeed, a previous version of the CARES Act stated that "a lender shall *only* consider" the criteria set forth in the statute, but Congress considered and declined to impose this prohibition. *Id.* at *7. "[T]hat Congress considered including the word 'only' in a previous version of the [CARES Act] that failed to win approval in a Senate committee, suggests, at the very least, that the Court should not read that word back into the statute." *Id.* A contrary reading, moreover, would have counterproductive effects never intended by Congress, including "disincentiviz[ing] lenders from participating in the program altogether," *id.* at *11; potentially slowing down the processing and disbursement of PPP funds to small businesses, *id.* at *12; and prohibiting banks from choosing to prioritize underserved regional or veteran- or minority-owned businesses.

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inquiries about its offering of PPP loans, purportedly to support plaintiffs' request for a preliminary injunction. (Emergency Mot. to Conduct Expedited Disc., ECF No. 21.) Wells Fargo intends to respond to that motion in due course, but whether there is a private right of action under the CARES Act—and therefore whether plaintiffs are entitled to any of the relief they seek in this Court—is a threshold question of law that does not require any discovery to resolve. Accordingly, to preserve resources and for judicial efficiency, the Court should consider and resolve this threshold question first, before considering any request for expedited discovery in this case.

Finally, plaintiffs fail to plead that Wells Fargo caused them any harm. They baldy assert that "[p]laintiffs and class members have suffered damages up to $10 million each due [*sic*] their inability to apply for a PPP loan with Wells Fargo." (AC ¶¶ 54, 61.) This conclusory allegation of harm falls far short of meeting plaintiffs' pleading burden. *See Doe* v. *Robertson*, 751 F.3d 383, 387 (5th Cir. 2014) ("A complaint must fail if it offers only 'naked assertions devoid of further factual enhancement.'"). In denying plaintiffs' request for a temporary restraining order ("TRO") less than two weeks ago, this Court held that plaintiffs failed to show irreparable harm because they "fail to explain why [they] could not obtain loans under the PPP" from one of the thousands of other PPP lenders. (Order at 3, ECF No. 20 ("TRO Order").) Indeed, Congress recently replenished the PPP fund and plaintiffs therefore had (and have) the opportunity to apply for a PPP loan from many of the thousands of other lending institutions besides Wells Fargo that offer PPP loans. Because plaintiffs have failed to allege any facts to show that they actually were deprived of an opportunity to apply for or receive a PPP loan, they have not plausibly pled that Wells Fargo caused them any harm and their Amended Complaint must be dismissed.

BACKGROUND AND ALLEGATIONS OF THE COMPLAINT[2]

The CARES Act was signed into law on March 27, 2020 for the purpose of providing "emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic." IFR, 85 Fed. Reg. at 20811; *see* AC ¶ 5. Among other things, the CARES Act amended certain provisions of the Small Business Act, 15 U.S.C. § 636, to create the PPP and "provide relief to America's small businesses expeditiously" in the form of guaranteed loans. IFR, 85 Fed. Reg. at 20811; CARES Act sec. 1102(a)(2); AC ¶ 18. In plaintiffs' words, the PPP "empowers" participating lenders to make "government-guaranteed loans to cover eight weeks of payroll and other expenses for small businesses across the U.S." (AC ¶ 5.)

On April 5, 2020, Wells Fargo announced that it was planning "to distribute a total of $10 billion to small business customers under the requirements of the PPP" and would focus on serving nonprofits and businesses with under 50 employees,

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[2] "When reviewing a motion to dismiss, a district court 'must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Funk* v. *Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011). "Taking judicial notice of public records directly relevant to the issue in dispute is proper on a Rule 12(b)(6) review and does not transform the motion into one for summary judgment." *Ross* v. *Texas*, 2011 WL 5978029, at *3 (S.D. Tex. Nov. 29, 2011).

which had "fewer resources" than other businesses.[3] Wells Fargo also announced that it would not retain fees generated from PPP loans.[4]

On April 11, 2020, plaintiffs filed their original complaint and a request for preliminary injunction. (Compl., ECF No. 1.) The Court denied the request for a preliminary injunction for lack of notice, sufficient authority, and a proposed order. (Order, ECF No. 7.) On April 20, 2020, plaintiffs filed an amended complaint, which contends that the CARES Act prohibits PPP lenders from imposing *any* eligibility criteria on a loan applicant beyond that the business was in operation and paid employees on February 15, 2020. (AC ¶¶ 20–21, 50.) Plaintiffs seek damages and an injunction under the Act based solely on their allegation that Wells Fargo required its PPP applicants to "[h]ave a Wells Fargo business checking account as of February 15, 2020." (*Id.* ¶¶ 26, 47–70, Ex. A.)[5]

Plaintiffs also filed a motion for a TRO on April 22, 2020. (Mot. for TRO & Prelim. Inj., ECF No. 9 ("TRO Mot.").) On April 29, 2020, the Court denied that

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[3] *Wells Fargo Receives Strong Interest in the Paycheck Protection Program (PPP)*, WELLS FARGO NEWSROOM (Apr. 5, 2020), https://newsroom.wf.com/press-release/community-banking-and-small-business/wells-fargo-receives-strong-interest-paycheck.

[4] *Id.*

[5] Plaintiffs served Wells Fargo only with their original complaint, after they had filed an amended complaint. In the interest of judicial economy and to address the now operative pleading, Wells Fargo moves to dismiss the amended complaint.

motion because plaintiffs failed to show a subtantial threat of irreparable injury. (TRO Order at 3.) As the Court recognized, plaintiffs do not assert that they applied—or even attempted to apply—for a loan from any of the thousands of other lenders participating in the PPP, or that they were ineligible to apply for loans from every one of these institutions. (*See id.*) Further, though plaintiffs state in the Amended Complaint that they "are unsure if the U.S. Government will replenish the PPP Loan fund once the original $349 billion is depleted" (AC ¶ 3), that question was answered on April 24, 2020 when the President signed into law the Paycheck Protection Program and Health Care Enhancement Act, which amended the CARES Act to provide an additional $310 billion in PPP funding. Paycheck Protection Program and Health Care Enhancement Act, Pub. L. 116-139 ("PPP Enhancement Act"), § 101(a). The SBA has reported that more than 5,400 lenders have extended PPP loans to eligible small businesses.[6]

ARGUMENT

A complaint that "fail[s] to state a claim upon which relief can be granted" is properly dismissed under Federal Rule of Civil Procedure 12(b)(6). Though courts must accept all well-pled factual allegations as true on a motion to dismiss, a complaint based on "conclusory allegations or legal conclusions masquerading as

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[6] *Paycheck Protection Program (PPP) Report: Second Round*, U.S. SMALL BUSINESS ADMINISTRATION (May 1, 2020), https://www.sba.gov/sites/default/files/2020-05/PPP2%20Data%2005012020.pdf.

factual conclusions," *Taylor* v. *Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002), or on otherwise "unwarranted deductions of fact," *United States ex rel. Willard* v. *Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 379 (5th Cir. 2003), cannot survive a motion to dismiss.

I. PLAINTIFFS HAVE NO PRIVATE RIGHT OF ACTION UNDER THE CARES ACT.

"[I]dentif[ying] a private right of action" is a "threshold" requirement "[t]o raise a claim in federal court." *Harris Cty.* v. *MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015). Plaintiffs' claims—for alleged violations of the CARES Act (Count One) and the SBA loan program implementing the CARES Act (Count Two), and for injunctive relief (Count Three) (AC ¶¶ 47–70)—all rely on a purported private right of action under the CARES Act.[7] Because the Act does not provide plaintiffs with a private right of action, plaintiffs fail to state a claim.

There is no dispute that the CARES Act does not provide an *express* private right of action. *See Profiles*, 2020 WL 1849710, at *4, 6–7; AC ¶ 49 (alleging only an "implied" private right of action under the CARES Act). Plaintiffs must therefore identify an *implied* private right of action. *See La. Landmarks Soc'y, Inc.* v. *City of*

[7] To the extent plaintiffs rely on the Declaratory Judgment Act, 28 U.S.C. § 2201, that Act "alone does not create a federal cause of action" but merely affords plaintiffs who already have a right of action additional remedies in federal court. *MERSCORP*, 791 F.3d at 552.

New Orleans, 85 F.3d 1119, 1122 (5th Cir. 1996) (holding that where "Congress d[oes] not expressly provide for a private right of action in passing [a statute], . . . it must be [] implied by the statute"). Doing so is a formidable task: the Court "begin[s] with the standard presumption that Congress did not intend to create a private right of action," and plaintiffs "bear[] the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the relevant statute." *Lundeen* v. *Mineta*, 291 F.3d 300, 311 (5th Cir. 2002) (internal quotation marks omitted). To meet this burden, plaintiffs must show that Congress's intent to imply a private right of action was manifested "in *clear and unambiguous terms*." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002) (emphasis added). As explained by the Supreme Court, "[w]hen Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017). This determination requires an "intent to create not just a private right but also a private remedy." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Without such a clear showing of Congressional intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. Plaintiffs do not come

close to overcoming the presumption against finding an implied private right of action here, for four reasons.

First, there is no evidence in the text of the CARES Act that Congress intended for enforcement by private litigants. That the Act makes a small business "eligible to receive a covered loan" if it meets certain criteria, sec. 1102(a)(2), § 636(a)(36)(D)(i), does not demonstrate any Congressional intent as to the entirely separate question of whether the business should also be able to sue a lender under the statute. As another district court recently explained, "[e]ven assuming that the CARES Act grants PPP loan applicants with some statutory right to apply through a particular lender of choice (which is, itself, dubious), nothing in its text evidences Congress's intent to enable PPP loan applicants to bring civil suits against PPP lenders, to enforce that right." *Profiles*, 2020 WL 1849710, at *7.[8]

Second, prior to passage of the CARES Act, courts—including in the Fifth Circuit—have uniformly held that the Small Business Act, which the CARES Act supplements but does not purport to transform, does not include an implied right of action. *Profiles*, 2020 WL 1849710, at *6; *see Searcy* v. *Houston Lighting & Power Co.*, 907 F.2d 562, 563–64 (5th Cir. 1990) (explaining that the Southern District of

[8] The Fourth Circuit has denied the plaintiffs' request for emergency injunctive relief pending appeal of the *Profiles* decision. *See* Order, *Profiles Inc.* v. *Bank of Am. Corp.*, No. 20-1438 (4th Cir. May 1, 2020) (*per curiam*).

Texas had dismissed a claim under the Small Business Act because "that statute provides for no private cause of action"); *Crandal* v. *Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996) ("Other circuits that have considered the question have unanimously agreed that the Small Business Act does not create a private right of action in individuals."); *Tectonics, Inc. of Fla.* v. *Castle Constr. Co*., 753 F.2d 957, 960 (11th Cir. 1985) (citing *Royal Services, Inc*. v. *Maintenance, Inc*., 361 F.2d 86, 92 (5th Cir. 1966) for the holding that "there was no intent [in the Small Business Act] to create civil rights of action in private persons").[9] Indeed, in a brief submitted in this Court, the SBA has itself acknowledged that "[i]t is well settled that '[n]either the Small Business Act nor the Small Business Investment Act create a private right of action.'" Receiver's Memorandum of Law in Opposition to Motion to Intervene at 3, 2008 WL 2916816, *United States* v. *Sundance Venture Partners* (S.D. Tex. May 28, 2008) (citation omitted).

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[9] *See also Bulluck* v. *Newtek Small Bus. Fin., Inc.*, 2018 WL 5258630, at *2 (N.D. Ga. Aug. 28, 2018) ("Many of Plaintiff's claims fail as a matter of law because she has no private right of action for alleged violations by Defendants of regulations or guidelines issued by the Small Business Administration."); *United States ex rel. First Am. Engineered Sols., LLC* v. *Olin Corp.*, 2008 WL 4224350, at *6 (E.D. Wis. Sept. 11, 2008) ("Finding no reason to depart from the courts that find no private right of action, I conclude the Plaintiffs' [Small Business Act] claim should also be dismissed."); *Raitport v. Chase Manhattan Capital Corp.*, 388 F. Supp. 1095, 1097 (S.D.N.Y. 1975) ("Neither the Small Business Act, nor the Small Business Investment Act create a private right of action in favor of a frustrated borrower against a small business investment company.").

In their motion for a TRO, plaintiffs relied on the CARES Act's use of the term "any business concern" to argue for a broad implied private right of action. (TRO Mot. at 18–19.) A very similar term ("any qualified small business concern") "was operative" in the Small Business Act, *see* 15 U.S.C. § 636(a), "when courts found that the [that Act] did not contain an implied private right of action." *Profiles*, 2020 WL 1849710, at *6. Had Congress intended for the CARES Act to deviate from the rest of the Small Business Act in this critical respect, it would have done so in far more "clear and unambiguous terms" than the language to which plaintiffs pointed. *Gonzaga*, 536 U.S. at 290; *cf. Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Third, the CARES Act and Small Business Act provide for enforcement by regulators, not private parties. *See* 15 U.S.C. §§ 645, 650; 13 C.F.R. §§ 120.1400, 1500, 1600. For instance, under 15 U.S.C. § 650(c), the SBA Administrator has broad power to "institute a civil action" against a "small business lending company" for violations of the Small Business Act, which now includes the CARES Act's PPP provisions. This regulatory enforcement authority confirms the "view that Congress did not intend to create a separate private right of action in the CARES Act." *Profiles*, 2020 WL 1849710, at *6; *see Sandoval*, 532 U.S. at 289–90 (explaining

that a separate enforcement regime "tend[s] to contradict a congressional intent to create privately enforceable rights").

Fourth, the SBA's IFR is not relevant to the determination of whether Congress intended to create an implied private right of action. *See Sandoval*, 532 U.S. at 291 ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress."). Even if it were, however, nothing therein constitutes a "clear and unambiguous" statement of intent to create a private right of action. *Gonzaga*, 536 U.S. at 290. To the contrary, the IFR mentions only the *SBA*'s "enforcement" authority. *See* 85 Fed. Reg. at 20816 (referencing SBA "enforcement action"). The IFR also repeatedly emphasizes the need for "expeditious[]," "nationwide" relief to small businesses, *id.* at 20811—a goal that is squarely at odds with allowing burdensome, piecemeal private litigation against PPP lenders. (*See infra* at 16–18.)

In light of the CARES Act's and IFR's "plain language," well-settled law regarding the Small Business Act, and the existing regulatory enforcement regime, it is clear, as the *Profiles* court held, that Congress did not "inten[d] to confer the particular right alleged, nor a private remedy against participating SBA lenders." 2020 WL 1849710, at *7. This alone is fatal to all of plaintiffs' claims in this action.

II. PLAINTIFFS HAVE NOT PLED ANY VIOLATION OF THE CARES ACT.

Plaintiffs' claims also fail because they do not adequately plead that Wells Fargo violated the CARES Act by requiring that PPP applicants have business checking accounts with Wells Fargo as of February 15, 2020. Contrary to plaintiffs' overwrought accusation that this requirement is "abhorrent and in violation of federal law" (AC ¶ 10), Wells Fargo's PPP policies are both legal and reasonable.

The CARES Act requires lenders to "*consider*" two basic criteria—whether a borrower was in operation and paid employees on February 15, 2020—but the Act in no way prohibits lenders from considering other criteria. CARES Act, sec. 1102(a)(2), § 636(a)(36)(F)(ii) (emphasis added). To the contrary, the Act "delegate[s] authority" to lenders "to make and approve covered loans." *Id.* As the court in *Profiles* explained, "[t]he statutory language does not constrain banks such that they are prohibited from considering other information when deciding from whom to accept applications, or in what order to process applications it accepts." 2020 WL 1849710, at *7.

In fact, an earlier version of the Act that Congress chose *not* to enact provided that "a lender shall *only* consider" the eligibility requirements in the statute. CARES Act, S. 3548, 116th Cong., § 1102(d)(2)(B) (March 19, 2020) (emphasis added). Congress's omission of the word "only" from the final Act is further evidence that it did not intend to restrict lenders from imposing additional lending criteria. *See*

INS v. *Cardoza-Fonseca,* 480 U.S. 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Carey* v. *Donohue*, 240 U.S. 430, 437 (1916) ("[W]e are not at liberty to supply by construction what Congress has clearly shown its intention to omit."). Indeed, "that Congress considered including the word 'only' in a previous version of the [CARES Act] that failed to win approval in a Senate committee, suggests, at the very least, that the Court should not read that word back into the statute." *Profiles*, 2020 WL 1849710, at *7.

Unable to find a violation in the text of the CARES Act or the IFR, plaintiffs instead rely on statements made by a handful of Senators—*after* enactment of the Act—against "restrictive requirement[s]" for PPP loan eligibility. (AC ¶¶ 27–29.)[10] Such "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011). Regardless, none of the statements that plaintiffs cite even hints that the requirements with which the Senators disagree are in any way *illegal* under the CARES Act, as opposed to merely undesirable according to those particular

[10] The first statement, a tweet by Senator Marco Rubio, objects only to Bank of America's requirement that a small business "*not just* have a business account but also a loan or credit card," but plaintiffs do not assert that Wells Fargo had any such additional restriction. (*Id.* ¶ 27 (emphasis added).)

Senators' views. (*See* AC Ex. B at 2 (letter from three Senators to the American Bankers Association "*ask*[*s*] the banking community, particularly those banks with the most resources" to revise certain lending criteria (emphasis added)).)

As a last resort, plaintiffs cite policy considerations, asserting that Wells Fargo's requirement has "no justification" and "flagrant[ly] disregard[s]" the Act's purpose. (AC ¶¶ 3, 52, 59.) That is not only insufficient to allege a violation of the CARES Act, but is also exactly backwards. "The intent of the Act is that [the] SBA provide relief to America's small businesses expeditiously, which is expressed in the Act by giving all lenders delegated authority." IFR, 85 Fed. Reg. at 20812. As the *Profiles* court observed, "prioritizing existing borrowers"—as Wells Fargo and other (but by no means all) PPP lenders are doing—"will expedite the processing of loan applications" and is "more efficient for [the lender's] system, and potentially for the overall CARES Act scheme." 2020 WL 1849710, at *12. That is so because existing Wells Fargo customers have already been subjected to the due diligence required by federal anti-fraud and anti-money laundering laws. *See* IFR, 85 Fed. Reg. at 20815 (expressly permitting lenders to rely on previous due diligence: "PPP loans for existing customers will not require re-verification under applicable [Bank Secrecy Act] requirements"). Contrary to plaintiffs' baseless assertion that Wells Fargo is "driven by corporate greed over the recognized and urgent needs of America's small businesses" (AC ¶ 1), Wells Fargo has designed its PPP process to

provide funding to small businesses with the greatest possible speed, and is not even retaining fees earned from PPP loans (*see supra* at 6).

Plaintiffs' reading of the CARES Act, if it were accepted, threatens to disrupt the process of getting PPP funds to the small businesses that need them. Reinterpreting the Act after thousands of lenders have already been processing loans for weeks will require them to divert their time and resources to overhauling their processes midstream. And, "[i]f fewer lenders are incentivized to participate in PPP, because they are prohibited from prioritizing their own customers . . . , then fewer American small businesses will have access to the pool of readily available PPP funds, and Congress's statutory scheme would be further frustrated, despite the fact that the federal government will ultimately guarantee [$659] billion in loans." *Profiles*, 2020 WL 1849710, at *11. Plaintiffs' reading of the CARES Act also would prohibit regional and community banks from prioritizing their local small business clients, and any lender from prioritizing, for instance, veteran- or minority-owned small businesses, because none of these criteria is listed in the Act. That result is directly contrary to the Act's "Sense of the Senate" provision, which urges the SBA "to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets." CARES Act, sec. 1102(a)(2), § 636(a)(36)(P)(iv). Plaintiffs' request that the Court "impose further limitations on lenders" under the CARES Act therefore contravenes the

statute's plain language, legislative history, and purpose. *Profiles*, 2020 WL 1849710, at *8. As the only court to address this question to date has recognized, any request to change the provisions of the CARES Act is properly directed to Congress, not the courts. *Id.* at *7, 12.

III. PLAINTIFFS HAVE NOT PLED THAT WELLS FARGO CAUSED THEM ANY HARM.

The Amended Complaint seeks two primary forms of relief: an injunction and damages. (AC at 20.) As a threshold matter, plaintiffs cannot obtain an injunction because a required element for that form of relief, whether preliminary or permanent, is "that remedies available at law, such as monetary damages, are inadequate to compensate" for the asserted injury. *ITT Educ. Servs., Inc.* v. *Arce*, 533 F.3d 342, 347 (5th Cir. 2008). Because plaintiffs' alleged inability to obtain a PPP loan and any resulting economic injury can be fully compensated through money damages, plaintiffs are not entitled to injunctive relief.[11]

[11] In recent CARES Act-related litigation, courts have denied preliminary injunctive relief on this basis. *See* Order Denying Application for Temporary Restraining Order and Preliminary Injunction, at 5–6, *Legendary Transport, LLC* v. *JPMorgan Chase & Co.*, No. 2:20-cv-03636 (C.D. Cal. Apr. 24, 2020) (holding that injunctive relief is inappropriate in case asserting "inability to obtain funding" under the CARES Act because harm is "pecuniary in nature"); Order Denying *Ex Parte* Application for Temporary Restraining Order, at 2–3, *Outlet Tile Center* v. *JPMorgan Chase & Co.*, No. 2:20-cv-03603 (C.D. Cal. Apr. 23, 2020) (holding that "injunctive relief" is inappropriate because injury based on inability to obtain funding under the CARES Act might be "compensable in damages").

Nor have plaintiffs pled that Wells Fargo caused them any harm. Plaintiffs assert that they have suffered "damages up to $10 million each due [*sic*] their inability to apply for a PPP loan *with Wells Fargo*." (AC ¶¶ 54, 61 (emphasis added).) This is an entirely conclusory allegation that does not plead a plausible claim that Wells Fargo caused plaintiffs any damages. *See, e.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 561 (2007) (holding that "conclusory statement of claim" cannot survive a motion to dismiss); *Robertson*, 751 F.3d at 387 ("A complaint must fail if it offers only 'naked assertions devoid of further factual enhancement.'"). Indeed, plaintiffs say nothing about any alleged injury to their businesses as a result of their alleged inability to apply for a loan with Wells Fargo. Further, plaintiffs plead no facts whatsoever about their efforts to secure PPP funding from other lenders and, as this Court explained in denying plaintiffs' motion for a TRO, plaintiffs can apply for loans through *thousands* of other PPP lenders. *See* TRO Order at 3 ("Plaintiffs fail to show how Plaintiffs would suffer irreparable injury if not given access to a loan specifically from Wells Fargo. Plaintiffs also fail to explain why Plaintiffs could not obtain loans under the PPP through another lender."); *Profiles*, 2020 WL 1849710, at *9 ("[T]here are thousands of institutions participating in PPP, and several that accept loans from new customers."). To the extent that plaintiffs previously were "unsure" about whether additional PPP funding would be available through those lenders (AC ¶ 3), the additional $310 billion in

PPP funding provided by Congress clears up any such uncertainty. *See* PPP Enhancement Act, § 101(a).

Plaintiffs therefore fail to plead that their alleged harm was caused by Wells Fargo, or that this lawsuit is necessary to obtain the PPP funding that they purport to seek. Accordingly, plaintiffs are not entitled to either of their requested forms of relief. *See ITT*, 533 F.3d at 347 (explaining that plaintiff can only obtain injunctive relief if "it has suffered an *irreparable injury*" (emphasis added)); *Hagerty* v. *L & L Marine Servs., Inc.*, 788 F.2d 315, 316 (5th Cir. 1986) (explaining that a plaintiff can only "sue for his damages" when he "suffers harm caused by the defendant's wrong").

CONCLUSION

Plaintiffs fail to plead that they have an express or implied private right of action under the CARES Act, that Wells Fargo in any way violated the Act, or that Wells Fargo caused them any harm. The Court should grant this motion and dismiss plaintiffs' Amended Complaint with prejudice.[12]

[12] Plaintiffs have already amended their complaint, and the fundamental legal deficiencies in that amended pleading cannot be cured by further amendments. Accordingly, dismissal with prejudice is appropriate. *See Great Plains Tr. Co.* v. *Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (district courts should not afford plaintiffs another opportunity to cure pleading deficiencies when "it is clear that the defects are incurable").

Dated: May 8, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 8, 2020, all counsel of record are being served with a copy of this document via the Court's CM/ECF system.

By: */s/ Charles Hampton*
Charles B. Hampton