IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PROFILES, INC., et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. Bank of America Corporation, et al., Defendants.	CIVIL ACTION No. 20-CV-894 (SAG)

OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Defendants Bank of America Corporation and Bank of America, N.A. (together, "BofA") respectfully submit this Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

INTRODUCTION

Less than two weeks ago, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. 116-136, to provide immediate economic relief to a nation in crisis. Among other things, the Act created a Payroll Protection Program ("PPP" or "Program"), which provides up to $349 billion in total federal guarantees of loans made by private lenders to small businesses and non-profits. The Act does not create a private right of action in favor of Plaintiffs, or any other private party.

The Act does not require any lender to participate in the Program, and many lenders have chosen not to participate. But to address the critical needs of small business owners in a time of national crisis, Bank of America was the first major institution to establish an online portal to receive applications for loans under the Program, and in a single week has dedicated a force of more than 3,000 employees to process them. Government officials have indicated that more than 2,400 other banks have also begun offering loans under the Program.

The Act also does not require that lenders who elect to participate in the Program lend any particular amount, but BofA has already received applications for loans exceeding $32 billion to small businesses and non-profits, and growing. And contrary to Plaintiffs' allegations, beyond setting minimum eligibility criteria, the Act nowhere prohibits participating lenders from determining how best to prioritize to whom they will lend under the Program. Some lenders have therefore prioritized lending to non-profits, or to businesses who have a particularly small number of employees; other lenders have decided they can best serve their communities by

lending to only those small businesses that are located in their own or adjacent states; at least one lender has chosen to focus on lending to veteran-owned businesses and under-served and rural markets. BofA's decision to prioritize lending to clients who do not have lending relationships with other banks is simply an effort to direct its resources quickly and efficiently. Because lenders already have information about their existing clients, prioritizing those clients streamlines the application process, meaning more loans are processed faster. For example, a lender can more easily identify those existing customers who may be ineligible for PPP loans (say, because they are household employers or have prior delinquent loans under the Small Business Act); and prioritizing existing clients facilitates the lender's compliance with applicable customer due diligence and anti-money laundering laws while still allowing the lender expeditiously to process loan applications.

The PPP presents unusual challenges for lenders. It is a new program, with untested guidelines and regulations that did not exist until last week and that are continually changing and developing, and it depends on a Small Business Administration ("SBA") technology platform that has never been used for the volume of applications and the number of data entry personnel the Program demands. The SBA Administrator has spoken publicly about the unprecedented nature of the program.[1] It is natural and appropriate that BofA, with 9 million small business clients alone, would seek to ensure an orderly and focused process in the very first days of this untested program that one week earlier did not exist in any statute or regulation.

This lawsuit fails at the threshold level because neither the Act nor any other relevant statute creates a private right of action. The design and implementation of this Program are

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[1] *See* Extended Interview with SBA Administrator Jovita Carranza," KEYC NEWS (Apr. 8, 2020), *available at* https://www.keyc.com/video/2020/04/08/extended-interview-with-sba-administrator-jovita-carranza/

public policy matters to be decided in the political sphere. This Court should not supplant Congress's and the Executive's urgent policy decisions by requiring lenders to extend PPP loans to any and all applicants, including specifically at issue here, those who have a lending relationship with another lender. Plaintiffs' lawsuit, asking this Court to dictate the criteria under which banks must accept applications, would significantly interfere with efforts by BofA to provide these needed loans. Such an injunction would perversely chill PPP lending, not just by BofA but by all other lending institutions, because even to enter the Program at all risks lawsuits of this very sort. A temporary restraining order would thus subvert the purpose of the Act and would be contrary to the public interest.

Even were there a right of action, Plaintiffs cannot point to any provision of the Act that BofA has violated. Plaintiffs seek to have this Court impose on BofA—and, by extension, all other lenders—mandatory lending directives that have no basis in the Act or its interim regulation. The CARES Act simply does not speak to how lenders should deploy their administrative resources or lending capital among different applicant profiles—indeed, Congress specifically removed language from a prior bill that would have made clear the threshold eligibility standards in the bill were the "only" criteria a lender could use. *See* Part (II)(A)(2), *infra*. The websites for both the U.S. Department of Treasury and the SBA reflect the clear guidance that small business should begin the PPP process by working with "*your* local lender," suggesting the continued use of a current lender. *See* Exs. 1, 2 (Excerpts from Treasury and SBA Websites).[2] And Treasury Secretary Mnuchin specifically advised small businesses needing payroll assistance to "please contact *your* lenders." Ex. 3 (Apr. 3, 2020 Remarks) (emphasis added).

[2] Citations to "Ex. __" refer to exhibits to the Declaration of Beth A. Stewart.

The familiar four-part test for granting a TRO is stringent. Plaintiffs' motion does not come close to satisfying any, much less all, of the four prongs: likelihood of success on the merits, irreparable harm, balance of equities, and public interest.

First, far from a likelihood of success, Plaintiffs cannot even show a likelihood that they can assert a valid claim, because the CARES Act created no private right of action. Neither does the Small Business Act of which the PPP is now a part. Plaintiffs' request that the Court find an "implied" private right of action, in the absence of any indication that Congress intended to create one, directly contradicts settled Supreme Court jurisprudence.

Second, Plaintiffs are unlikely to succeed on the merits because the CARES Act does not restrict the ability of lenders to prioritize their existing customers in PPP lending. The CARES Act establishes minimum eligibility criteria for obtaining a PPP loan, but it nowhere requires lenders to participate in the Program, much less to accept applications from or extend credit to all comers. Nor does it contain any language restricting lenders in choosing to prioritize lending to the customers they already know and to whom they already lend, which is logically an efficient way for banks to deploy this capital. Had Congress desired to impose such requirements on PPP lenders, it could have easily done so. In fact, Congress considered and rejected a prior bill that would have provided that "a lender *shall only consider*" the eligibility criteria specified in the bill. CARES Act, S. 3548, 116th Cong. § 1102(d)(2)(B) (Mar. 19, 2020) (emphasis added).

In search of a statutory lifeline, Plaintiffs flatly misread the "credit elsewhere" aspect of the CARES Act. The SBA has long contained a general eligibility requirement that a lender must certify that the borrower cannot get credit elsewhere (*i.e.*, through a private lender) before it may apply for a PPP loan. The CARES Act waives that requirement for PPP loans, meaning that a lender need not certify the borrower's inability to obtain "credit elsewhere" to apply for a PPP

loan. That waiver provision is beside the point here. BofA is not requiring borrowers to show that they cannot obtain "credit elsewhere." Instead, it is prioritizing lending to those with whom it has an existing lending relationship rather than those who have credit relationships elsewhere.

Third, Plaintiffs have not shown that they will suffer "irreparable harm" if they cannot obtain a PPP loan from BofA. On the contrary, hundreds of lenders participate in the PPP program; the Program will operate at least through June 30, 2020; and the leadership in Congress and in the Executive Branch reportedly are considering additional funding. There will be ample opportunity for plaintiffs to seek to participate in the PPP in the future.

Fourth, the "public interest" and "balance of equities" strongly weigh against the requested TRO. The public interest is in encouraging lenders to participate in the PPP without fear of lawsuits by borrowers who may be unable to get PPP funding at the bank of their choosing. Equity and the public interest decidedly do not favor injunctive relief that, at best, will delay lenders from making PPP loans until they are certain of the rules and, at worst, will discourage many of them from participating in the Program at all.

Plaintiffs' motion should be denied.

BACKGROUND

On March 27, 2020, Congress passed and the President signed into law the CARES Act, Pub. L. 116–136, to provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic. Section 1102 of the Act amends the Small Business Act, 15 U.S.C. § 636, to create a $349 billion loan program called the "Paycheck Protection Program" ("PPP"). CARES Act § 1102(a)(2). The CARES Act articulates an eligibility floor for borrower participation in the PPP, as well as permissible uses of loan proceeds. § 1102(a)(2). "For the purposes of making covered loans for the purposes" described in the CARES Act, certain lending institutions "shall be deemed to have been

delegated authority by the [Small Business] Administrator to make and approve covered loans." *Id.* The SBA will fully guarantee loans applied for pursuant to the PPP prior to June 30, 2020. *Id.*[3]

On April 2, 2020 at 7:00 PM, mere hours before the PPP application window opened, the SBA issued its interim final rule implementing the PPP. *See* Ex. 4 (SBA Interim Final Rule) ("SBA Rule" or "Rule"). The Rule, among other things, sets a one percent interest rate, bars applications by applicants who have previously defaulted on SBA loans, and requires that lenders comply with anti-money laundering rules. *Id.* The release of the Rule so soon before the window opening meant that many banks were not prepared to lend at the outset. Ex. 5 (Apr. 2, 2020 CNBC Article).

BofA was the first bank to offer an online platform for small businesses to apply for PPP loans. *See* Declaration of Morgan Whitacre, ¶ 5; Ex. 6 (Apr. 6, 2020 Fortune Article). BofA[4] opened its online portal on April 3, 2020. *Id.* As Plaintiffs note, at that time, BofA only accepted applications from clients with a pre-existing business lending and business deposit relationship with BofA. 2d Am. Compl., ECF No. 5, ¶ 72. On April 4, 2020, BofA expanded its policy to accept applications from those clients with pre-existing BofA checking accounts who

[3] This is a modification of the pre-existing SBA lending model under 15 U.S.C. § 636. Under the pre-existing model, small businesses apply for an SBA-guaranteed loan through a financial institution like BofA; the financial institution provides the loan; and the SBA guarantees a *portion* of a loan issued pursuant to the statute. The PPP modifies this regime by guaranteeing *all of* a loan issued pursuant to the PPP.

[4] Bank of America, N.A., was a lender under the SBA's pre-PPP regime and is therefore a qualifying lender under the PPP. *See* Rule at 4 ("All SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis."). Bank of America, N.A. is the entity that will process, disburse, and service any loans pursuant to the PPP. Bank of America Corporation is Bank of America, N.A.'s parent corporation.

did not also have a pre-existing business credit or borrowing relationship with another bank. *Id.* at ¶ 73.

The Named Plaintiffs are entities who claim BofA's eligibility requirements precluded them from applying for a PPP Loan *through BofA*. Based on Plaintiffs' own pleadings and declarations, however, two of the Named Plaintiffs' claims—Profiles, Inc. ("Profiles") and Jerky Coast to Coast (WA), LLC ("Jerky-WA")—appear now to be moot, as both entities appear to satisfy the Bank's revised policy announced on April 4.[5] As to the remaining Named Plaintiffs, none of them has an existing borrowing relationship with BofA; all of them instead have established borrowing relationships with other banks. *See* Complaint, ¶¶ 53 (Proline); 60 (Jerky-MD), 70 (Diaspora), 77 (Elite). The Complaint and the declarations Plaintiffs submitted in support of this motion do not allege that Plaintiffs lack other avenues to apply for PPP funds. Plaintiffs do not state that they have even sought to apply for PPP loans through the banks with which they have their established borrowing relationships, or through any of the thousands of other lenders participating in the PPP program.

Any such allegations would be remarkable. At least 2,400 banks across the country have begun accepting PPP applications. *See* Ex. 7 (Apr. 6, 2020 CNBC Article). On April 7, 2020, American Bankers Association President and CEO Rob Nichols stated that: "Despite early difficulties with this unprecedented SBA lending program, banks of all sizes are actively

[5] Specifically, the Complaint and Declarations state that Jerky-WA is a borrower of BofA (it maintains a credit card with BofA) and does not have a borrowing relationship with another bank. *See* TRO Mot. Ex. C, ¶ 9 ("Jerky-WA only has a credit card with Bank of America."); Complaint, ¶ 61. Similarly, the Complaint states that Profiles has a depository relationship with BofA and is silent as to whether it has a business credit or borrowing relationship with another bank. Complaint, ¶¶ 42-49. Profile did not submit any declaration in support of the TRO Motion. Notably, the Complaint is also silent as to whether Profiles sought to re-apply for a PPP Loan with BofA after BofA revised its policy on April 4.

accepting PPP loan applications and trying their best to deliver these funds to small business customers as quickly as possible." *See* Ex. 8 (Apr. 7, 2020 American Bankers Association Statement). Also on Apr. 7, 2020, Treasury Secretary Steven Mnuchin requested that Congress appropriate an additional $250 billion for this program. Ex. 9 (Apr. 7, 2020 Washington Post Article). The CARES Act and the Rule also permit the SBA to give lending authority to entities that have not previously participated in SBA lending programs. CARES Act § 1109(b).

As of April 6, 2020, BofA had received applications from 177,000 small businesses for $32.6 billion in financing, and had 3,000 employees working to process these applications. *See* Whitacre Decl., ¶ 9, 11; Ex. 10 (Apr. 7, 2020 Washington Post Article); Ex. 11 (Apr 7, 2020 Forbes Article). Meanwhile, for the entirety of Fiscal Year 2019, BofA made SBA loans totaling $321 MM. Whitacre Decl., ¶ 10. In other words, there have been financing requests equal to over 100 times the most recent year's SBA lending, in approximately 1/100th the time. *Id.* ¶ 11. By the time this motion is argued, BofA expects to have received applications for billions of dollars in additional loans, and have dedicated thousands more employees to processing them. Through this extraordinary effort, BofA is on track to do as much or more for American small businesses under the PPP than any other single lending institution, and it will continue to make extraordinary efforts in the coming weeks and months.

LEGAL ARGUMENT

I. Legal Standard

TROs and preliminary injunctions are "extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 524 (4th Cir. 2003) (internal quotation omitted). "The limited circumstances amount to the demonstration of a need to protect the status quo and to prevent irreparable harm during the pendency of the litigation to preserve the court's ability in

the end to render a meaningful judgment on the merits. If that need is not presented, then a preliminary injunction should not be considered." *Id.* at 526; *accord Brightview Grp., LP v. Teeters*, No. CV SAG-19-2774, 2020 WL 978665, at *8 (D. Md. Feb. 28, 2020).[6]

To establish that these "limited circumstances" exist, a movant must demonstrate four factors: "(1) that the movant is likely to succeed on the merits, (2) that the movant will face irreparable harm in the absence of preliminary relief, (3) that the balance of equities favors preliminary relief, and (4) that injunctive relief is in the public interest." *Brightview*, 2020 WL 978665 at *8. The "extraordinary and drastic" remedy of a TRO or preliminary injunction "should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129–130 (2d ed.1995) (emphasis in original)); *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "We agree . . . that the . . . 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 21–22 (emphasis in original).

The law also distinguishes between "prohibitive injunctions," which compel a defendant to refrain from changing the status quo, and "mandatory injunctions," which require a defendant to undertake an act that changes its course of conduct and which are strongly disfavored. *See, e.g.*, *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 235–36 (4th Cir. 2014). A court's "application of this exacting standard of review is even more searching when the preliminary injunctive relief ordered by the district court is mandatory rather than prohibitory

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[6] The substantive requirements for a TRO and a preliminary injunction are identical. *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 375–76 (D. Md. 2019).

in nature," accordingly mandatory injunctions are warranted "only in the most extraordinary circumstances." *In re Microsoft*, 333 F.3d at 525 (internal citations omitted);[7] *accord Brightview*, 2020 WL 978665, at *8 (D. Md. Feb. 28, 2020) ("Courts should grant such 'mandatory' preliminary injunctions only when the applicant's right to relief [is] indisputably clear.") (internal quotation omitted). The Fourth Circuit in *Microsoft* applied these principles to vacate an injunction that compelled Microsoft Corporation to include, in every copy of its Windows operating system, certain software produced by its competitor. 333 F.3d 520, 525–26. Because movants' proposed TRO similarly seeks to compel BofA to undertake a specific action, *i.e.*, to alter its lending criteria, it falls with those TROs that are even more strongly disfavored than those that seek to preserve a pre-existing state of affairs.

II. Application of Law

Plaintiffs' claims fail at the outset because neither the CARES Act nor the Small Business Act provides for a private right of action. But, even if Plaintiffs could sue, they would not be entitled to a TRO because their various claims fail on the merits. Finally, even if there *were* plausible claims, Plaintiffs would be unable to make the remaining showings required to obtain a TRO—Plaintiffs will not be irreparably injured by a denial and both the equities and the public interest favor denying the request for a TRO.

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[7] *In re Microsoft* was abrogated on other grounds by *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126(2006), but the Fourth Circuit has recognized that the abrogation was on grounds irrelevant to the standards for granting a temporary injunction. *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013).

A. Plaintiffs Are Not Likely to Succeed on the Merits.

1. There is no private right of action under the CARES Act or the Small Business Act.

This suit fails at the outset: as Plaintiffs concede, the CARES Act contains no express right of action. The same is true of the Small Business Act, which Title I of the CARES Act amends. And under settled law concerning implied private rights of action, no such right of action can be implied here.

While no court has yet had occasion to interpret the CARES Act, the sections that are operative here are amendments to the Small Business Act. Courts have consistently held that the Small Business Act does not contain an implied private right of action. *See Bulluck v. Newtek Small Bus. Fin., Inc.*, No. 19-10238, 2020 WL 1490702, at *3 (11th Cir. Mar. 27, 2020) (holding that "no private right of action exists for a violation of the Small Business Act") (brackets and quotation omitted); *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."); *id.* (collecting cases from the Second, Fifth, Tenth, and Eleventh Circuits).[8]

Those decisions are dispositive here. They are squarely grounded in Supreme Court precedent, which requires the conclusion that there is no private right of action. Under the Court's decisions, a court may find an implied private right of action in a statute only if

[8] *See also Tectonics, Inc. of Fla. v. Castle Const. Co.*, 753 F.2d 957, 960 (11th Cir. 1985) ("The declared purpose of the Small Business Act is to preserve and expand full and free competition for the economic well-being and security of the Nation, by encouraging and developing the actual and potential capacity of small business, through aiding, counseling, encouraging, assisting and protecting the interests of small businesses. We think the purpose was public in character, viz., the preservation and expansion of full and free competition to insure the Nation's economic well-being and security, and that there was no intent to create civil rights of action in private persons.").

"Congress . . . displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (holding that "a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private *right* but also a private *remedy*.") (emphasis in original) (quotation marks and citation omitted); *Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 117 (2011). Without congressional intent, courts "may not create [a private right of action], no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander*, 532 U.S. at 286–87; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–56 (2017) ("When 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."); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) ("[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one."); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994). In other words, "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985) (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)). This bedrock principle "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Stoneridge*, 552 U.S. at 165 (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990)). Without congressional intent, the judiciary's recognition of a private right to enforce a statute "necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve." *Id.* at 164 (internal quotation omitted).

Courts look to the "text and structure" of the statute to glean congressional intent, examining whether "'rights-creating language'" exists. *In re Miller*, 124 F. App'x 152, 154 (4th Cir. 2005) (quoting *Alexander*, 532 U.S. at 288). No such language is found in the CARES Act or the implementing SBA Rule.

Plaintiffs' argument for an implied right of action relies heavily on *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019), petition for cert. pending, No. 19-1186 (filed Mar. 30, 2020), but that case is inapposite. There, the Fourth Circuit held that the Medicaid Act created an implied private right of action, *enforceable under 42 U.S.C. § 1983*, to sue state actors. Because an explicit statutory remedy under § 1983 exists against state actors, the question in *Planned Parenthood* was whether the Medicaid Act created an individual right that could be enforced through that existing remedy. *Id.* at 695 (applying particular governing standards for recognizing individual rights enforceable under § 1983). Here, BofA is not a state actor, and there is no explicit statutory remedy under § 1983 or otherwise. Unlike in *Planned Parenthood*, therefore, the question here is whether the court should find in the CARES Act or the Small Business Act both an implied private right of action and an implied statutory remedy for that right.[9] The answer is clearly "no," as the many above-cited cases hold.

Importantly, moreover, the language in the CARES Act on which Plaintiffs rely mirrors language that existed in the Small Business Act *before the CARES Act was passed*, including the terms "any qualified small business concern," "any small business concern," and "any qualified

[9] The other four cases relied upon in Plaintiffs' Memorandum of Law at 14–15 are likewise Section 1983 cases and inapposite. *See Daniels v. Hous. Auth. of Prince George's Cnty.*, 940 F. Supp. 2d 248, 259 (D. Md. 2013), *aff'd*, 550 F. App'x 138 (4th Cir. 2013); *Rabin v. Wilson-Coker*, 362 F.3d 190, 202 (2d Cir. 2004); *Hensley v. Koller*, 722 F.3d 177, 181 (4th Cir. 2013); *Price v. City of Stockton*, 390 F.3d 1105, 1114 (9th Cir. 2004) (per curiam).

person." 15 U.S.C. § 636(a). Courts have uniformly rejected a private right of action under the Small Business Act notwithstanding that language.

The "text and structure" of the statute, *Alexander*, 532 U.S. at 288, provide further strong evidence that Congress did not "implicitly" authorize a private right of action. "[W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487–88 (1996) (quotation marks and citation omitted).

The Small Business Act, of which the operative sections of the CARES Act are now a part, includes a robust criminal and civil enforcement regime by which government regulators—not private plaintiffs—can hold borrowers and lenders accountable for any violations. *See, e.g.*, 15 U.S.C. §§ 645, 650, 13 C.F.R. §§ 120.1400, 1500, 1600. Under 15 U.S.C. § 650(c), the SBA Administrator has broad authority to "institute a civil action" against a "small business lending company" for violating the Small Business Act. The Administrator can also "revoke or suspend the authority of the small business lending company to make . . . business loans authorized by section 636(a)." 15 U.S.C. § 650(d)(1). *See also Astra USA*, 563 U.S. at 117 ("Congress vested authority to oversee compliance with the . . . Program . . . in [the agency] and assigned no auxiliary enforcement role to covered entities."). This enforcement mechanism suggests that Congress did not intend to create an implied private right of action in the Small Business Act or the CARES Act. *See Whitman v. Am. Trucking Associations*, 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.").

Plaintiffs' suit therefore fails at the threshold: There is no basis in law for these parties to ask this Court to intervene in administration of the PPP.

2. BofA's conduct is consistent with the text of the Act and the SBA Rule.

Assuming for argument's sake that Plaintiffs have a right of action, all of their claims will fail on the merits. Plaintiffs' theory that BofA violated the CARES Act depends on the incorrect assertion that Section 1102 articulates the "sole" requirements a lender may establish for a PPP loan. That limitation is Plaintiffs' creation. Mot at 15. Neither the Act nor the Rule restricts, much less prohibits, BofA from declining to participate in the PPP altogether or prioritizing applicants who do not have lending relationships with other institutions. Instead, the Act and Rule alike establish only baseline criteria, and as long as lenders comply with those criteria and the existing laws and regulations concerning, e.g., anti-discriminatory practices, lenders remain free to supplement consistent with the statutory scheme, as BofA has done. Accordingly, there is nothing "unlawful" about BofA's policy, *id.* at 16, and Plaintiffs' claim will fail on the merits.

Under the Act, "a lender approved to make loans under this subsection," like BofA, is "delegated authority by the Administrator to make and approve covered loans." § 1102(a)(2). Congress provided only baseline requirements for lenders who choose to exercise that authority, directing that each lender "shall consider" whether the borrower "was in operation on February 15, 2020" and either "had employees for whom the borrower paid salaries and payroll taxes" or "paid independent contractors." § 1102(a)(2). The Act does not say those are the *only* factors the lender may consider. This Court should not read that unwritten limitation into the law because "courts must construe statutes as written, and not add words of their own choosing." *Ignacio v. United States*, 674 F.3d 252, 255 (4th Cir. 2012) (internal quotation, alterations omitted).

That principle of statutory interpretation is particularly important where, as here, the legislative history reinforces the presumption that Congress chose not to impose the very limitation on the PPP that Plaintiffs seek to have this Court impose. As introduced, Senate Bill 3548—a predecessor to the Act—stated that "a lender shall *only* consider" the enumerated factors. Ex. 12, CARES Act, S. 3548, 116th Cong. § 1102(d)(2)(B) (Mar. 19, 2020) (emphasis added). While that language arguably might have provided some support for Plaintiffs' restrictive reading of the PPP, Congress did not enact that language; the final CARES Act omits the word "only." *See* § 1102(a)(2). That legislative decision reflects Congress's judgment, one this Court should decline to unsettle, that the criteria listed in the Act are not exhaustive.

Consistent with Congress's approach in the Act, the SBA Rule implementing the PPP imposes only limited additional requirements on lenders—none of which forbids BofA's conduct here. For example, the Rule asks what lenders "*have to do*" to underwrite PPP loans, before elaborating that "[e]ach lender shall" comply with certain requirements including "[f]ollow[ing] applicable BSA [Bank Secrecy Act] requirements." Rule at p. 21 (emphasis in original). Like the Act, the Rule does not state those are the only requirements a lender may impose.[10]

In short, the Act and the SBA Rule set forth baseline criteria for *eligibility*. They do not obligate lenders to make a loan to every borrower who meets those baseline criteria. Had

[10] Plaintiffs point to purported criticism of BofA's so-called gating requirements, *see* Mot. at 14, but even that criticism highlights that BofA's conduct is not unlawful; the critics Plaintiffs cite take the position the law should be otherwise. For example, the letter Plaintiffs rely on from U.S. Congressman David Trone and U.S. Senator Chris Van Hollen, both of Maryland, to Treasury Secretary Steve Mnuchin urges "Treasury [to] firmly prohibit lenders from imposing PPP loan requirements outside the scope of the CARES Act in the Department's final rule making"—including the requirement "the businesses have an existing line of credit or a credit card in order to obtain a loan." *See* Pl. Ex. F. It goes on to characterize the requirement that "businesses have an existing line of credit or a credit card in order to obtain a loan," among others, as "unnecessary at best." *Id*. at 1. That characterization of the requirement as "unnecessary" is a far cry from Plaintiffs' assertion that it is unlawful.

Congress intended that extreme result, it surely would have said so—but it did not. Instead, Congress delegated the Administrator's authority "to make and approve loans" to lenders. § 1102(a)(2). Plaintiffs' preferred reading would upend that delegation and conscript lenders in a manner Congress did not intend.

3. The "credit elsewhere" requirement is irrelevant.

In an attempt to find support in the statutory text for their interpretation, Plaintiffs point to an entirely irrelevant provision: the Act's "credit elsewhere" waiver. Mot. at 8. The waiver exempts PPP loans from a requirement that applies to SBA loans more generally. For non-PPP loans, a lender in the SBA's loan program must show "that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal sources without SBA assistance." 13 C.F.R. § 120.101. In other words, in a typical case, a lender must "determine that the applicant is unable to obtain the loan on reasonable terms without a Federal Government guaranty, and that some or all of the loan is not available from the resources of the applicant business or the personal resources of the principals of the applicant business." *See, e.g.*, Ex. 13 (SBA Resources for Lenders). The CARES Act waives that "credit elsewhere" requirement for PPP loans, meaning that lenders need not make such certifications regarding PPP loan applicants. *See* § 1102(a)(2).

BofA's policy bears *no relationship* to the "credit elsewhere" requirement. The "credit elsewhere" requirement seeks to ensure that loans under the SBA program are made available only to those who cannot get private loans. Like other lenders, BofA acknowledges that the Act waives the "credit elsewhere" requirement for PPP loans. BofA is not requiring borrowers to prove they lack access to private loans from another source.

BofA's decision to prioritize existing clients who, among other things, "do not have a business credit or borrowing relationship with another bank" has nothing to do with whether an

applicant is *unable* to get "credit elsewhere." Put another way, whether other banks *would* extend credit to an applicant—the crux of the "credit elsewhere" requirement—is beside the point for BofA's purposes. Plaintiffs' claim that BofA "is applying an unlawful 'credit elsewhere' requirement," Mot. at 7,15, will fail on the merits because BofA is doing no such thing.

4. BofA's conduct is reasonable and appropriate.

Not only is BofA's conduct consistent with the text of the Act and Rule, it is a reasonable and appropriate means of accomplishing the Act's purpose. "The intent of the Act is that SBA provide relief to America's small businesses expeditiously." Rule at 3. The decision to prioritize clients with existing relationships serves that purpose by streamlining the application process, meaning more loans are processed faster. Take, for example, processing the applications. With respect to existing clients, banks have a stable of information they need only supplement or update—a simpler process than starting from scratch. Ex. 14 (Apr. 3, 2020 Interview) ("[I]f you think of the 4,000 banks in America and all the clients that are eligible for this, if they go back to their relationship bank, it will be easier for them to get through the process faster."). Similarly, a bank may have information about existing customers that will inform and expedite the process by, for example, indicating that a preexisting customer is ineligible under the Rule, because the applicant is "a household employer" or "has ever obtained a direct or guaranteed loan from SBA . . . . that is currently delinquent." Rule at 7. As commentators have noted, prioritizing existing clients likewise allows banks more easily to ensure compliance with applicable customer due diligence and anti-money laundering laws while still turning loan applications quickly. *See* Rule at 21–22; Ex. 15 (Apr. 8, 2020 Brookings Article) ("Treasury decided to require—though Congress did not—that lenders in the . . . [Program] . . . comply with the Know Your customer (KYC) requirement . . . a costly and time-

consuming process" that "puts the risk of error on the banks' shoulders," motivating some to "only offer[] these loans to existing customers."). Each of those features of lending to pre-existing clients lowers processing times, enabling banks to process more total applications than they could if they serviced brand new customers. It would be a disservice to the public to make this desperately needed relief slower, more arduous, and ultimately less effective than Congress intended.

5. Plaintiffs' unjust enrichment claim will fail because it does not meet basic pleading requirements.

Plaintiffs' unjust enrichment claim fails for two independent reasons. First, it fails for the same reason all of its claims fail: because BofA's policy is consistent with the CARES Act and therefore it was not "unjust" for BofA to receive an alleged "credit enhancement benefit" (SAC at ¶ 119). *See Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 295, 936 A.2d 343, 351 (2007) (unjust enrichment claim requires showing that defendant accepted or retained a benefit "under such circumstances as to make it inequitable for defendant to retain the benefit without the payment of its value") (internal quotation omitted).

Second, the unjust enrichment claim fails because the alleged benefit was not conferred upon BofA *by the Plaintiffs or at their expense*. In other words, BofA did not receive the credit enhancement "by reason of an infringement of another person's interest, or loss suffered by the other"—*i.e.*, the Plaintiffs. *Berry & Gould, P.A. v. Berry*, 360 Md. 142, 151, 757 A.2d 108, 113 (2000) (quoting Restatement (Second) of Restitution § 1 (Tentative Draft No. 1, 1983)). Plaintiffs' funds had no causal relationship to the alleged benefit.

6. Plaintiffs' claim for declaratory judgment and a preliminary and permanent injunction will fail because plaintiffs have failed to state a valid claim for Counts I-III.

Count IV of Plaintiffs' Second Amended Complaint seeks declaratory judgment and a preliminary and permanent injunction pursuant to 28 U.S.C. §§ 2201 and 2202. As this opposition makes clear, Plaintiffs have failed to establish an actual controversy as required for relief under this statute. *See Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1119 (4th Cir. 2014) (holding that declaratory relief requires a controversy of "sufficient immediacy and reality as to warrant the issuance of a declaratory judgment") (quotation marks, brackets, and citation omitted); *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) ("[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."). Because Counts I, II, and III fail, Count IV necessarily fails.

B. Irreparable injury

1. Plaintiffs are not entitled to temporary injunctive relief because they are not injured.

There is no showing that Plaintiffs have been irreparably harmed by BofA's conduct. Additionally, there is no showing that Plaintiffs will be harmed by the denial of a TRO and the continuance of the matter to a preliminary injunction hearing.

The PPP program is not being implemented solely by BofA, but by a wide array of lenders—some 2,400 according to recent reports—whose ranks are growing daily. Ex. 7 (Apr. 6, 2020 CNBC Article). After unsuccessfully applying through BofA, Plaintiffs had, and still have, the option to pursue a PPP loan through one of these many other lenders. And if they do so, they will have the opportunity to apply PPP funds for the same authorized expenses as they would have had they qualified and received PPP funds through BofA.

Plaintiffs have plenty of time to do this, and the government has provided increasingly ample funds. At the moment, the PPP program is accepting applications for almost two more months—through June 30, 2020—or until funds are exhausted. Rule at 2. As of the evening of April 7, 2020, it has been reported, banks had processed $70 billion in taxpayer-backed loans since the Program was launched on April 3—meaning approximately $279 billion dollars is still available. Ex. 9 (Apr. 7, 2020 Washington Post Article). In addition, lawmakers are actively considering adding billions more to the fund. *Id.* Given that Plaintiffs have alternative potential lenders and time to apply, and there are available funds, there is no credible argument that BofA's "failure" to process their applications amounts to irreparable harm.

2. Plaintiffs' alleged injury is contingent on future events, and is not present or immediate

The irreparable harm to be forestalled by temporary injunctive relief must be "present," "immediate" or "imminent"; remote harm, risk of harm, and speculative harm are insufficient. *In re Microsoft*, at 333 F.3d at 528.

In *In re Microsoft,* the district court entered a preliminary injunction on the basis that "there is a *serious risk* that *in the near future* the market will tip in favor of [Microsoft's product], that it is impossible to ascertain when such tipping might occur in time to prevent it from happening, and that if the market does tip in favor of [Microsoft's product], Sun could not be adequately compensated in damages." 333 F.3d at 528 (emphasis in original). The Fourth Circuit reversed because this future risk was not present or immediate—even though the district court found that it was an "absolute certainty" that Microsoft would reach this monopoly tipping point in the future. *Id.* at 531.

The *In re Microsoft* court relied heavily on *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802 (4th Cir. 1991), which similarly reversed a district court's grant of

temporary injunctive relief for non-present threats. In *Direx*, the movant sought to enjoin the use of its trade secrets by a competing medical device company. *Direx*, 952 F.2d at 804–05. The court found that the movant could not establish "immediate irreparable harm in the absence of preliminary injunctive relief" because at the time that the motion for injunction was filed, the defendant had not completed the FDA approval process and could not sell its device. *Id.* at 815–16.

> By the district court's own finding, any harm to Direx in this case is at this time problematical and uncertain. Remembering that preliminary injunctions are "extraordinary remedies" involving the exercise of "very far-reaching power" to be granted only "sparingly" and "in limited circumstances," *the grant of such relief in this case, where the harm is admittedly not present or immediate but merely problematic, conditioned on possible future events, would seem contrary to our stated rule: A plaintiff, seeking preliminary relief, must show the present threat of irreparable harm.* The district court should have dismissed the motion for preliminary relief because the plaintiff failed to establish that the denial would result in present irreparable harm.

In re Microsoft, 333 F.3d at 529–30 (emphasis in original) (quoting *Direx*, 952 F.2d at 816).

Plaintiffs' claim of "irreparable harm" fails under these established standards. Plaintiffs appear to recognize that to obtain a TRO the law requires them to show that their "irreparable injury" is permanent loss of business, and not the inability to obtain a loan from a particular lender. Mot. at 17–18 (collecting cases for the proposition that "permanent loss of business constitutes irreparable injury"). But that concession dooms Plaintiffs' motion because they cannot show—and have not tried to show—that they face an actual and imminent permanent loss of business, or even that they cannot obtain the identical loan from another lender.[11]

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[11] Plaintiffs indeed may well be unable to demonstrate their standing to sue. Without an inability to obtain loans from other available sources, Plaintiffs cannot show they suffered a concrete injury-in-fact as required for standing. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized'

3. Plaintiffs may not obtain temporary injunctive relief on a class-wide basis

Plaintiffs' request for injunctive relief is particularly unsuitable because they are seeking to represent a *class* of allegedly disappointed borrowers who are not before the Court, and who Plaintiffs cannot possibly show will suffer "irreparable harm." 2d Am. Compl., ECF No. 5, ¶ 82.

As discussed above, the named plaintiffs have not established that they cannot obtain a PPP loan from an alternative lender or that they will suffer a permanent loss of business. There is no reason to believe that other small businesses that allegedly were "denied the right to apply, or were chilled from applying, for a PPP loan" (*id.* at ¶ 82) by BofA's policies will prove irreparable harms that the Named Plaintiffs have not.

Class relief is accordingly improper on two related bases. First, the alleged irreparable injury is "conditioned on future events" as to the unnamed class members. *In re Microsoft*, 333 F.3d at 529–30 (quoting *Direx*, 952 F.2d at 816). Second, plaintiffs have not established that the absent class members are "likely" to suffer harm absent a temporary injunction. *Cf. Winter*, 555 U.S. at 21–22.

C. The Balance of Equities and the Public's Interest Weigh Strongly Against Granting Plaintiffs' Motion

The remaining factors, the balance of equities and the public interest, both cut strongly against Plaintiffs' proposed TRO. Courts often consider these related factors together. *See Di Biase v. SPX Corp.*, 872 F.3d 224, 235–36 (4th Cir. 2017).

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and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016); *see also South Carolina v. United States*, 912 F.3d 720, 726–29 (4th Cir.), *cert. denied*, 140 S. Ct. 392 (2019) (noting that there is no injury in fact when plaintiff will not be injured unless a contingent "chain of possibilities" comes to pass).

To apply the "balance of equities" factor, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotation omitted). If granted, the proposed injunction would hobble BofA's ability to provide PPP loans to its small business customers—many of which are struggling to make payroll. Aside from the time and cost of litigating this issue, the TRO also would delay—or even bring to a halt—BofA's efficient and orderly efforts to distribute PPP funds, impacting an untold number of small businesses. Plaintiffs, on the other hand, would suffer no immediate harm. As discussed above, the PPP is less than one week old and lasts until June 30, 2020. 15 U.S.C. § 636(a)(36)(A)(iii). Plaintiffs can apply through any number of lenders nationwide and, as of this filing, there are funds remaining and consideration of expanding the program. Ex. 9 (Apr. 7, 2020 Washington Post Article). Therefore, the balance of equities strongly favors BofA.

Granting Plaintiffs' TRO would undermine the public interest. The purpose of the PPP is to "provide relief to America's small businesses expeditiously" to counteract the "dramatic decrease" in economic activity caused by COVID-19. Rule at 2–3. During this unprecedented crisis, it is in the public interest to ensure the efficient and swift flow of loans that Congress has deemed essential to protect small businesses and the economy at large. The proposed TRO would harm the public interest by requiring BofA to alter its participation criteria and, consequently, interrupt the flow of loans to small businesses. BofA is one of the largest banks in the United States and one of (or the) largest lenders under the PPP. Interfering with BofA's efforts to provide loans by requiring it to re-tool its criteria could potentially cut off the flow of loans to the tune of tens of billions of dollars.

Additionally, granting Plaintiffs' TRO inevitably would have a chilling effect on other lenders. Throughout the Act and Rule, Congress went to great lengths to give lenders appropriate latitude and to incentivize their participation in the PPP—for example, the Rule entitles lenders to rely entirely on borrower representations. *See* Rule at 5 ("SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower . . .").

This is particularly significant because many participating lenders are imposing some form of restrictions on applications. As just a few examples:

- Wells Fargo, which temporarily ceased lending after $10 billion in PPP loans, initially prioritized loans to nonprofit entities. And although the PPP permits entities with up to 500 employees to seek loans, Wells Fargo's early program also chose to focus on entities with fewer than 50 employees. Ex. 16 (Apr. 7, 2020 CBS Article).
- As of April 8, 2020, Live Oak Bank—the largest SBA section 7(a) lender by loan volume—is "currently focused on existing loan customers" and, as a result, is "unable to accept new applications at this time." Ex. 17 (Excerpt from LiveOak Website).
- As of April 8, 2020, Chase Bank—which has processed applications for $40 billion in PPP loans, Ex. 11 (Apr. 7, 2020 Forbes Article) requires that borrowers have an existing account and states that "other restrictions may apply" without specifying those restrictions. Ex.11 (Excerpt from Chase Website).
- Another April 8, 2020 survey of eighty lenders reflects that 26 banks (including BofA) are only accepting applications from customers with existing relationships, four banks are prioritizing applications from customers with existing relationships, one bank is prioritizing single-owner businesses, and one bank is prioritizing "under-served and rural

markets, veteran-owned businesses, economically disadvantaged owners and businesses that are less than two years old." Ex. 19 (Apr. 8, 2020 Smart Asset Article).[12]

- An additional April 6, 2020 review of eighteen regional banks shows that nine were only accepting loan applications from existing customers, one was accepting only regional clients, and two had stopped accepting applications. Ex. 6 (Apr. 6, 2020 Fortune Article).
- An additional April 8, 2020 review of 25 lenders operating in Philadelphia shows at least ten (including BofA) were only accepting applications from customers with existing relationships, one additional bank was accepting both customer and non-customer applications but giving preference to existing customers, two had not yet begun accepting applications, two had stopped accepting applications, and, as to others, the article provided too little detail to determine the contours of their program.[13] Ex. 2020 (Apr. 8, 2020 Phila. Bus. Journal Article).

In addition, many large banks such as Santander Bank and Citizens Bank have not begun accepting applications, Exs. 21, 22 (Apr. 8, 2020 Screenshots), and may be deterred by temporary injunctive relief that second-guesses the operation of their crisis-response lending.

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[12] Notably, the survey identified at least ten lenders accepting applications from pre-existing and new customers alike (America First FCU, Five Star Bank, Fountainhead SBA, KeyBank, Newtek Small Business Finance, Seacoast Commerce Bank, Stearns Bank, United Business Bank, U.S. Bank, and Zions Bank), in addition to many lenders whose criteria were not easily identifiable online. The inability to submit a PPP application with BofA is not tantamount to exclusion from the Program.

[13] One of the two banks which had ceased accepting applications, Hyperion, is still referring requests to another bank, and is "waiting for guidance on whether the government might buy loans from PPP lenders, which would free up the bank to do more." *Id.*

As it stands, nothing is stopping these Plaintiffs from seeking an identical loan from another lender. But granting Plaintiffs the relief they seek may change that fact. The chilling effect on lender participation if BofA is enjoined, even temporarily, could have far-reaching implications for Plaintiffs and for small business owners nationwide during this time of crisis. If changes to the Program are warranted, Congress is well-suited to make them, having just drafted, passed, and implemented the PPP within the last month. Indeed, Speaker Pelosi has already mentioned the prospect of amending the Act, emphasizing she would be open to a further package of funding for the PPP but signaling Democrats might insist on adding conditions, like ensuring money is set aside for underserved populations. Ex. 23 (Apr. 7, 2020 New York Times Article). Because Congress did not include a private right of action in the CARES Act, it was its intent, and is in the public interest, to develop any subsequent changes to the PPP through the legislative and administrative processes. A TRO here would throw a wrench into the fast-evolving political landscape surrounding the PPP and would adversely affect thousands of small businesses that need help.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

Respectfully submitted,

Dated: April 9, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of April 2020, true and correct copies of Bank of America Corporation and Bank of America, N.A.'s Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction; the Declaration of Morgan Whitacre; the Declaration of Beth A. Stewart, and the exhibits thereto, were served by CM/ECF notice upon:

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