

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 20-4235-GW-Ex	Date	December 17, 2020
Title	<i>Brunner Accounting Group v. SVB Financial Group, et al.</i>		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez  
Deputy Clerk

Terri A. Hourigan  
Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:  
Michael E. Adler

Attorneys Present for Defendants:  
Matthew B. Nazareth  
Jesse Smallwood

**PROCEEDINGS: TELEPHONIC HEARING ON DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM [72]**

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court GRANTS the motion to dismiss. Plaintiff will have until January 7, 2021 to file a First Amended Complaint.

The Court sets a status conference for February 4, 2021 at 8:30 a.m. Defendants may also set their motion to dismiss for hearing on February 4.

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***Brunner Accounting Grp. v. SVB Fin. Grp. et al.***; Case No. 2:20-cv-04235  
Tentative Ruling on Motion to Dismiss

**I. Background<sup>1</sup>**

This putative class action arises out of the Paycheck Protection Program (“PPP”), a \$669-billion small-business loan program created by Congress to help businesses continue to pay their workers after the ongoing COVID-19 pandemic led to a shutdown of large portions of the economy. The PPP was established under the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). Although administered by the federal government through the Small Business Administration (“SBA”), loans are made by private lenders. These lenders consist of federally-insured banks and credit unions in addition to other SBA-approved entities. Applicants apply for PPP loans directly with private lenders, sometimes with the help of agents such as attorneys and accounting firms. Agents advise clients on PPP-eligibility requirements and help prepare the application forms.

The central legal question in this case is whether the PPP entitles agents to some portion of the fees paid by the federal government to the private lenders administering PPP loans, where there is no agreement between the agent and the lender requiring the lenders to pay the agents. The theory the plaintiff argues – that has been advanced and rejected by courts in similar agent-fee litigation around the nation<sup>2</sup> – is that the PPP and its implementing regulations automatically entitle them to some portion of these fees regardless of whether they entered into a compensation agreement with the lenders.

Plaintiff Brunner Accounting Group was one of these agents. Brunner alleges that it assisted some of its small-business clients in securing PPP loans from Defendants<sup>3</sup>, which are

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<sup>1</sup> The following abbreviations are used for the filings: (1) Form 159 Fee Disclosure and Compensation Agreement (“Form 159”), ECF No. 72-3; (2) Plaintiff’s Opposition to the Motion to Dismiss (“Opp.”), ECF No. 74.

<sup>2</sup> See, e.g., *Johnson v. JPMorgan Chase Bank, N.A.*, No. 20-cv-4100, 2020 WL 5608683, at \*1 (S.D.N.Y. Sept. 21, 2020) (“The Court holds that, absent an agreement between agent and lender, defendant banks are not required to pay agent fees.”); *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, No. 20-cv-5425-TKW-HTC, 2020 WL 4882416, at \*1 (N.D. Fla. Aug. 17, 2020) (“The central issue of first impression in this case is whether Plaintiff and others like it are entitled to any portion of the fees paid . . . under the [PPP]. The short answer is no.”) (quotation marks and footnote omitted); *Sanchez, PC v. Bank of S. Tex.*, No. 7:20-cv-00139, at 4 (S.D. Tex. Oct. 14, 2020) (joining “the emerging consensus described by the Northern District of Florida and Southern District of New York” in dismissing similar claims).

<sup>3</sup> The Defendants are: (1) Silicon Valley Bank; (2) JP Morgan Chase Bank, N.A.; (3) Bank of America, N.A.; and (4) Cross River Bank.

several major banks that participated in the PPP. When Defendants, refused to pay Brunner, Brunner filed this lawsuit seeking declaratory relief that it is entitled to such fees under the CARES Act and asserting common law and state law claims largely based on the same theory.

The Court holds that, absent an agreement between agent and lender, lenders are not required to pay agent fees under the CARES Act or its implementing regulations. For that reason and others discussed below, the Court **GRANTS** Defendants' motions to dismiss.

## **II. Legal Standard**

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

The court must construe the complaint in the light most favorable to the plaintiff, by accepting all allegations of material fact as true, and drawing all reasonable inferences from well-pleaded factual allegations in favor of the plaintiff. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion, the plaintiff must provide grounds demonstrating its entitlement to relief. *Twombly*, 550 U.S. at 555 (2007). Under the Supreme Court's decisions in *Twombly* and *Iqbal*, this requires that the complaint contains "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

## **III. Discussion**

### **A. Statutory and regulatory background**

#### **i. *The Section 7(a) program***

The PPP was implemented through a pre-existing federal program: the SBA's Section 7(a) loan guarantee. The Section 7(a) loan program is the SBA's primary program for providing financial assistance to small businesses. It encourages private lenders to provide loans to small businesses, by guaranteeing a portion of those loans if certain conditions are satisfied. *See generally* 15 U.S.C. § 636(a).

A small business applying for a Section 7(a) loan may use an "agent" for assistance with

the application process. 13 C.F.R. § 103.2. An agent is not required for that process and, historically, fewer than three percent of approved-loans involved agents. *See* 85 Fed. Reg. 7,627 (Feb. 10, 2020) (reporting statistics for 2013-17). An “agent” is defined as an “authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other individual or entity representing an Applicant or Participant by conducting business with SBA.” *Id.* § 103.1. These agents can be empowered to prepare or submit the application on behalf of the applicant. *Id.* § 103.1(a), (b).

When a small business chooses to use an agent, the statute and regulations governing Section 7(a) loans set out a comprehensive scheme regulating the payment of agents. First, the statute makes clear that “[n]o loan shall be made” unless the applicant “certif[ies] to the [SBA] the names of any attorneys, agents, or other persons engaged by or on behalf of such [applicant] for the purpose of expediting applications made to the [SBA] for assistance of any sort, and the fees paid or to be paid to any such persons.” 15 U.S.C. § 642. The regulations clarify that an agent “must execute and provide to SBA a compensation agreement,” which “governs the compensation charged for services rendered or to be rendered to the Applicant or lender in any matter involving SBA assistance.” 13 C.F.R. § 103.5(a).

The regulations specify what agents must do to get paid. The SBA “provides the form of compensation agreement . . . to be used by Agents.” *Id.* That form, the Form 159 Fee Disclosure and Compensation Agreement, must “be completed and signed by the SBA Lender and the Applicant whenever an Agent is paid by either the Applicant or the SBA Lender in connection with the SBA loan application.” Form 159 at 1.<sup>4</sup> In the submitted Form 159, the “Agent must be identified, all services provided must be listed, and the party paying the fee and amount paid must also be disclosed.” *Id.* If the fee the agent seeks exceeds \$2,500, the agent must provide “1) a detailed explanation of the work performed; and 2) the hourly rate and the number of hours spent working on each activity.” *Id.*

The regulations also limit how much an agent may be paid. They specify that “[t]otal compensation charged by an Agent or Agents to an Applicant for services rendered in connection with obtaining an SBA-guaranteed loan must be reasonable.” 13 C.F.R. § 103.5(b). Caps on what amounts are “reasonable” – defined as a percentage of the loan amount or some fixed

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<sup>4</sup> The agent must also sign the Form 159.

amount – are set forth in the regulations. *See id.*<sup>5</sup>

ii. *The CARES Act and the PPP*

In response to COVID-19 pandemic, Congress passed the CARES Act in March 2020 to provide assistance to people and businesses affected. At \$2.2 trillion, the CARES Act is the largest economic stimulus bill in American history. Among other things, the Act created the Paycheck Protection Program (the “PPP”), a \$659-billion small-business loan program for eligible small businesses.

PPP loans are “guarantee[d]” by the SBA “under the same terms, conditions, and processes as a loan made under” the Section 7(a) loan program, “except as otherwise provided” by statute. 15 U.S.C. § 636(a)(36)(B). One major difference is that the PPP, unlike the broader Section 7(a) program, compensates participating lenders. The statute provides that lenders “shall” receive from the federal government a specified percentage of the loans they originate. *Id.* § 636(a)(36)(P)(i).

On agent fees, the PPP supplements the general Section 7(a) terms to set fee caps and limit agents to collecting fees from lenders only. Unlike with loans issued under the general Section 7(a) program, agents may not charge the loan applicants. The statute provides that “[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator. *Id.* § 636(a)(36)(P)(ii). In its Interim Final Rule (“IFR”) issued just before the PPP application window opened, the SBA set forth those limits:

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

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

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<sup>5</sup> “SBA considers the following amounts to be reasonable for the total compensation that an Applicant can be charged by one or more Agents:

- (1) For loans up to and including \$500,000: A maximum of 3.5 percent of the loan amount, or \$10,000, whichever is less;
- (2) For loans \$500,001-\$1,000,000: A maximum of 2 percent of the loan amount, or \$15,000, whichever is less; and
- (3) For loans over \$1,000,000: A maximum of 1.5 percent of the loan amount, or \$30,000, whichever is less.”

13 C.F.R. § 103(5)(b).

- i. One (1) percent for loans of not more than \$350,000;
  - ii. 0.50 percent for loans of more than \$350,000 and less than \$2 million;
- and
- iii. 0.25 percent for loans of at least \$2 million.

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

SBA Interim Final Rule, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020). The IFR therefore modified the ordinary Section 7(a) procedures by restricting from whom the agents could receive fees and by limiting the amount they could receive.

B. Whether agents are entitled under the CARES Act to fees for PPP loans they help secure

Brunner does not allege that a Form 159 was ever submitted that would entitle it to payment. Such a Form 159 would have required not only Brunner's signature, but also the signatures of Defendants and the clients Brunner purportedly helped apply for loans (who Brunner does not identify).

Brunner's argument – that the IFR nonetheless entitles it to payment because of the language “[a]gent fees will be paid by the lender out of the fees the lender receives from SBA” – has been rejected by every court that appears to have considered the issue. IFR, 85 Fed. Reg. 20811, 20816. The fact that the PPP regulations limited from whom agents may collect fees (lenders only, not borrowers as the general Section 7(a) program allows) and how much agents may charge does not mean that agents are *entitled* to fees. Brunner claims that it makes “three unique arguments” not considered in those other cases, but none of them are persuasive. Opp. at 20. It alleges that it did “enter into a ‘compensation agreement’” with its clients and insists that it “had no obligation to negotiate its fees with the lenders.” *Id.* Setting aside the fact that the Form 159 itself makes clear that the lender must agree to and sign it, Brunner has not even identified its clients, let alone adequately pled that there was a compensation agreement. And for the other two arguments – both essentially arguing that Defendants wrongfully blocked Brunner from submitting a Form 159 – Brunner has not pled what those actions were.

Brunner's lawyers have brought identical lawsuits in this district, which have also been denied. *See American Video Duplicating, Inc. v. City Nat. Bank*, No. 20-cv-04036, 2020 WL 6882735, at \*6 (C.D. Cal. Nov. 20, 2020); *American Video Duplicating, Inc. v. Citigroup Inc.*, No. 20-cv-04036, 2020 WL 6882735, at \*6 (C.D. Cal. Nov. 20, 2020). The Court sees no reason

to disagree with those rulings.

**IV. Conclusion**

Based on the foregoing discussion, the Court **GRANTS** the motion to dismiss.