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Attorneys for Plaintiffs and the Proposed Class

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

FRANK M. CASTELLON, doing business as,
CASTELLON PROFESSIONAL SERVICES;
MOMENTUM ACCOUNTING, INC., a
California corporation; and SHIRLEY
PALOMINO CHIRINOS, an individual;
individually and on behalf of all others
similarly situated,

Plaintiff,

vs.

Case No. _____

**CLASS ACTION COMPLAINT FOR
DECLARATORY RELIEF AND
DAMAGES**

1 AMERICAN EXPRESS NATIONAL BANK;
2 BANK OF AMERICA, N.A.; BANK OF
3 MARIN; BANK OF THE WEST;
4 CAMBRIDGE SAVINGS BANK; CELTIC
5 BANK; CITIBANK, N.A.; COMERICA
6 BANK; FIRST BANK; FIRST REPUBLIC
7 BANK; GRASSHOPPER BANK, N.A.;
8 HERITAGE BANK OF COMMERCE;
9 JPMORGAN CHASE BANK, N.A.;
10 KABBAGE, INC.; RIVER CITY BANK;
11 SILICON VALLEY BANK; THE
12 MORTGAGE CAPITAL DEVELOPMENT
13 CORPORATION; U.S. BANK NATIONAL
14 ASSOCIATION; and WELLS FARGO
15 BANK, N.A.,

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Defendants.

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12 Plaintiffs Frank M. Castellon, doing Business as, Castellon Professional Services;
13 Momentum Accounting, Inc.; and Shirley Palomino Chirinos (collectively, “Plaintiffs”) bring
14 this class action complaint on behalf of itself and those similarly situated against defendants
15 American Express National Bank; Bank of America, N.A.; Bank of Marin; Bank of the West;
16 Cambridge Savings Bank; Celtic Bank; Citibank, N.A.; Comerica Bank; First Bank; First
17 Republic Bank; Grasshopper Bank, N.A.; Heritage Bank of Commerce; JPMorgan Chase Bank,
18 N.A., Kabbage, Inc.; River City Bank; Silicon Valley Bank; The Mortgage Capital Development
19 Corporation; U.S. Bank National Association; and Wells Fargo Bank, N.A. (hereinafter
20 “Defendants”), to obtain fees owed to Plaintiff as a result of its work as an agent to assist small
21 business borrowers (the “Applicants”) in getting federally guaranteed loans through the
22 Paycheck Protection Program (“PPP”), a federal program implemented to provide small
23 businesses with loans to combat the economic impact of COVID-19. Federal regulations require
24 Defendants to pay Plaintiff and the proposed Class for their work as agents who facilitated loans
25 between Defendants and small businesses. Despite precise regulatory requirements stating that
26 agent fees are owed to Plaintiff, Defendants have failed to pay Plaintiff and the Class Members.
27 Instead, Defendants have kept the agent fees for themselves. Plaintiff alleges the following based
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1 upon its knowledge and upon information and belief, including investigations conducted by its
2 attorneys.

3 //

4 **I. PARTIES**

5 1. Plaintiff Frank Mario Castellon, DBA, Castellon Professional Services
6 (“Castellon”), is a sole proprietor authorized to do business, and doing business, in the State of
7 California since 2000. Frank Mario Castellon is the owner of Castellon and is a licensed CPA in
8 good standing since 2005. Castellon is located in San Francisco, California. Although Plaintiff
9 assisted its clients with preparing their application(s) for a PPP loan from the Defendants,
10 Defendants have failed to pay Plaintiff the agent fees Defendants owe Plaintiff for Plaintiff’s
11 work in securing the PPP loans.

12 2. Plaintiff Momentum Accounting, Inc. (“Momentum”), is a corporation
13 organized and authorized to do business, and doing business, in the State of California for the
14 last three years. Nikole Mackenzie is the owner of Momentum and is a licensed CPA in good
15 standing for the last 8 years. Momentum is located in San Francisco, California, and provides
16 CFO, controller, and bookkeeping services to small businesses. Although Plaintiff assisted its
17 clients with preparing their application(s) for a PPP loan from the Defendants, Defendants have
18 failed to pay Plaintiff the agent fees Defendants owe Plaintiff for Plaintiff’s work in securing the
19 PPP loans.

20 3. Plaintiff Shirley Palomino Chirinos (“Palomino”) has been in business in the
21 State of California since 2007, providing bookkeeping services and consultation to small
22 business owners. Palomino’s works virtually using cloud computing. Palomino’s location is
23 based in San Rafael, California. Although Plaintiff assisted its clients with preparing their
24 application(s) for a PPP loan from the Defendants, Defendants have failed to pay Plaintiff the
25 agent fees Defendants owe Plaintiff for Plaintiff’s work in securing the PPP loans.

26 4. Defendant American Express National Bank is a national bank. Its principal
27 place of business is in Salt Lake City, Utah. American Express National Bank conducts
28 substantial business in this District. Plaintiffs acted in the statutorily defined role of an agent in

1 securing PPP loans for one Applicant of American Express National Bank in an amount of
2 approximately \$185,000. Although Applicant's PPP loans were funded by American Express
3 National Bank, based on information and belief, American Express National Bank has taken
4 custody of the money owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs
5 the statutorily required agent fees that Plaintiffs are owed.

6 5. Defendant Bank of America, N.A. is a national bank. Its principal place of
7 business is in Charlotte, North Carolina. Bank of America, N.A. conducts substantial business
8 in this District. Plaintiffs acted in the statutorily defined role of an agent in securing PPP loans
9 for four Applicants of Bank of America, N.A. in an amount of approximately \$260,000.
10 Although Applicants' PPP loans were funded by Bank of America, N.A., based on information
11 and belief, Bank of America, N.A. has taken custody of the money owed to Plaintiffs from the
12 Federal Government, yet failed to pay Plaintiffs the statutorily required agent fees that Plaintiffs
13 are owed.

14 6. Defendant Bank of Marin is a California chartered bank. Its principal place of
15 business is in Novato, California. Bank of Marin conducts substantial business in this District.
16 Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for one Applicant
17 of Bank of Marin in an amount of approximately \$1,700,000. Although Applicant's PPP loan
18 was funded by Bank of Marin, based on information and belief, Bank of Marin has taken custody
19 of the money owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the
20 statutorily required agent fees that Plaintiffs are owed.

21 7. Defendant Bank of the West is a California chartered bank. Its principal place
22 of business is in San Francisco, California. Bank of the West conducts substantial business in
23 this District. Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for
24 one Applicant of Bank of the West in an amount of approximately \$125,000. Although
25 Applicant's PPP loan was funded by Bank of the West, based on information and belief, Bank
26 of the West has taken custody of the money owed to Plaintiffs from the Federal Government, yet
27 failed to pay Plaintiffs the statutorily required agent fees that Plaintiffs are owed.

28 8. Defendant Cambridge Savings Bank is a Massachusetts chartered bank. Its

1 principal place of business is in Cambridge, Massachusetts. Cambridge Savings Bank conducts
2 substantial business in this District. Plaintiff acted in the statutorily defined role of an agent in
3 securing PPP loans for one Applicant of Cambridge Savings Bank in an amount of approximately
4 \$25,000. Although Applicant's PPP loan was funded by Cambridge Savings Bank, based on
5 information and belief, Cambridge Savings Bank has taken custody of the money owed to
6 Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the statutorily required agent
7 fees that Plaintiffs are owed.

8 9. Defendant Celtic Bank is a Utah chartered bank. Its principal place of business
9 is in Salt Lake City, Utah. Celtic Bank conducts substantial business in this District. Plaintiff
10 acted in the statutorily defined role of an agent in securing PPP loans for one Applicant of Celtic
11 Bank in an amount of approximately \$55,000. Although Applicant's PPP loan was funded by
12 Celtic Bank, based on information and belief, Celtic Bank has taken custody of the money owed
13 to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the statutorily required
14 agent fees that Plaintiffs are owed.

15 10. Defendant Citibank, N.A. is a national bank. Its principal place of business is in
16 Sioux Falls, South Dakota. Citibank, N.A. conducts substantial business in this District. Plaintiff
17 acted in the statutorily defined role of an agent in securing PPP loans for two Applicants of
18 Citibank, N.A. in an amount of approximately \$82,000. Although Applicants' PPP loans were
19 funded by Citibank, N.A., based on information and belief, Citibank, N.A. has taken custody of
20 the money owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the
21 statutorily required agent fees that Plaintiffs are owed.

22 11. Defendant Comerica Bank is a Texas chartered bank. Its principal place of
23 business is in Dallas, Texas. Comerica Bank conducts substantial business in this District.
24 Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for one Applicant
25 of Comerica Bank in an amount of approximately \$575,000. Although Applicant's PPP loan was
26 funded by Comerica Bank, based on information and belief, Comerica Bank has taken custody
27 of the money owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the
28 statutorily required agent fees that Plaintiffs are owed.

1 12. Defendant First Bank is a Missouri chartered bank. Its principal place of
2 business is in Creve Coeur, Missouri. First Bank conducts substantial business in this District.
3 Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for three
4 Applicants of First Bank in an amount of approximately \$200,000. Although Applicants' PPP
5 loan was funded by First Bank, based on information and belief, First Bank has taken custody of
6 the money owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the
7 statutorily required agent fees that Plaintiffs are owed.

8 13. Defendant First Republic Bank is a California chartered bank. Its principal place
9 of business is in San Francisco, California. First Republic Bank conducts substantial business in
10 this District. Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for
11 one Applicant of First Republic Bank in an amount of approximately \$60,000. Although
12 Applicant's PPP loan was funded by First Republic Bank, based on information and belief, First
13 Republic Bank has taken custody of the money owed to Plaintiffs from the Federal Government,
14 yet failed to pay Plaintiffs the statutorily required agent fees that Plaintiffs are owed.

15 14. Defendant Grasshopper Bank, N.A. is a national bank. Its principal place of
16 business is in New York, New York. Grasshopper Bank conducts substantial business in this
17 District. Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for one
18 Applicant of Grasshopper Bank in an amount of approximately \$80,000. Although Applicant's
19 PPP loan was funded by Grasshopper Bank, based on information and belief, Grasshopper Bank
20 has taken custody of the money owed to Plaintiffs from the Federal Government, yet failed to
21 pay Plaintiffs the statutorily required agent fees that Plaintiffs are owed.

22 15. Defendant Heritage Bank of Commerce is a California chartered bank. Its
23 principal place of business is in San Jose, California. Heritage Bank of Commerce conducts
24 substantial business in this District. Plaintiff acted in the statutorily defined role of an agent in
25 securing PPP loans for one Applicant of Heritage Bank of Commerce in an amount of
26 approximately \$510,000. Although Applicant's PPP loan was funded by Heritage Bank of
27 Commerce, based on information and belief, Heritage Bank of Commerce has taken custody of
28 the money owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the

1 statutorily required agent fees that Plaintiffs are owed.

2 16. Defendant JPMorgan Chase Bank, N.A. is a national bank. Its principal place
3 of business is in New York, New York. JPMorgan Chase Bank, N.A. conducts substantial
4 business in this District. Plaintiff acted in the statutorily defined role of an agent in securing PPP
5 loans for two Applicants of JPMorgan Chase Bank, N.A. in an amount of approximately
6 \$120,000. Although Applicants' PPP loans were funded by JPMorgan Chase Bank, N.A., based
7 on information and belief, JPMorgan Chase Bank, N.A. has taken custody of the money owed
8 to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the statutorily required
9 agent fees that Plaintiffs are owed.

10 17. Defendant Kabbage, Inc. is an approved U.S. Small Business Administration
11 ("SBA") lender. Its principal place of business is in Atlanta, Georgia. Kabbage, Inc. conducts
12 substantial business in this District. Plaintiff acted in the statutorily defined role of an agent in
13 securing PPP loans for two Applicants of Kabbage, Inc. in an amount of approximately \$20,000.
14 Although Applicants' PPP loan was funded by Kabbage, Inc., based on information and belief,
15 Kabbage, Inc. has taken custody of the money owed to Plaintiffs from the Federal Government,
16 yet failed to pay Plaintiffs the statutorily required agent fees that Plaintiffs are owed.

17 18. Defendant River City Bank is a California chartered bank. Its principal place of
18 business is in Sacramento, California. River City Bank conducts substantial business in this
19 District. Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for one
20 Applicant of River City Bank in an amount of approximately \$22,000. Although Applicant's
21 PPP loan was funded by River City Bank, based on information and belief, River City Bank has
22 taken custody of the money owed to Plaintiffs from the Federal Government, yet failed to pay
23 Plaintiffs the statutorily required agent fees that Plaintiffs are owed.

24 19. Defendant Silicon Valley Bank is a California chartered bank. Its principal place
25 of business is in Santa Clara, California. Silicon Valley Bank conducts substantial business in
26 this District. Plaintiff acted in the statutorily defined role of an agent in securing PPP loans for
27 one Applicant of Silicon Valley Bank in an amount of approximately \$125,000. Although
28 Applicant's PPP loan was funded by Silicon Valley Bank, based on information and belief,

1 Silicon Valley Bank has taken custody of the money owed to Plaintiffs from the Federal
2 Government, yet failed to pay Plaintiffs the statutorily required agent fees that Plaintiffs are
3 owed.

4 20. Defendant The Mortgage Capital Development Corporation is an approved
5 SBA lender. Its principal place of business is in Oakland, California. The Mortgage Capital
6 Development Corporation conducts substantial business in this District. Plaintiff acted in the
7 statutorily defined role of an agent in securing PPP loans for one Applicant of The Mortgage
8 Capital Development Corporation in an amount of approximately \$80,000. Although
9 Applicant's PPP loan was funded by The Mortgage Capital Development Corporation, based on
10 information and belief, The Mortgage Capital Development Corporation has taken custody of
11 the money owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the
12 statutorily required agent fees that Plaintiffs are owed.

13 21. Defendant U.S. Bank National Association is a national bank. Its principal place
14 of business is in Cincinnati, Ohio. U.S. Bank National Association conducts substantial business
15 in this District. Plaintiff acted in the statutorily defined role of an agent in securing PPP loans
16 for two Applicants of U.S. Bank National Association in an amount of approximately
17 \$1,800,000. Although Applicants' PPP loans were funded by U.S. Bank National Association,
18 based on information and belief, U.S. Bank National Association has taken custody of the money
19 owed to Plaintiffs from the Federal Government, yet failed to pay Plaintiffs the statutorily
20 required agent fees that Plaintiffs are owed.

21 22. Defendant Wells Fargo Bank, N.A. is a national bank. Its principal place of
22 business is in Sioux Falls, South Dakota. Wells Fargo Bank, N.A. conducts substantial business
23 in this District. Plaintiff acted in the statutorily defined role of an agent in securing PPP loans
24 for three Applicants of Wells Fargo Bank, N.A. in an amount of approximately \$33,000.
25 Although Applicants' PPP loans were funded by Wells Fargo Bank, N.A., based on information
26 and belief, Wells Fargo Bank, N.A. has taken custody of the money owed to Plaintiffs from the
27 Federal Government, yet failed to pay Plaintiffs the statutorily required agent fees that Plaintiffs
28 are owed.

1 **II. JURISDICTION AND VENUE**

2 23. The Court has original jurisdiction over this action under the Class Action
3 Fairness Act, 28 U.S.C. §1332(d), because this is a class action in which (1) at least some
4 members of the proposed Class have different citizenship from Defendant(s); (2) the proposed
5 class consists of more than 100 persons or entities; and (3) the claims of the proposed members
6 of the Class exceed \$5,000,000 in the aggregate.

7 24. This Court also has original jurisdiction over this action under 28 U.S.C. §1331
8 because the action arises under the laws of the United States, including the Coronavirus Aid,
9 Relief, and Economic Security Act, the CARES Act (P.L. 116-136), and the SBA Regulations
10 (as defined below).

11 25. This Court has personal jurisdiction over Defendants because Defendants do
12 business in this District, and a substantial number of the events giving rise to the claims alleged
13 herein took place in this District.

14 26. The venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because
15 Plaintiff's principal place of business is located in this District, and a substantial part of the
16 events or omissions giving rise to the alleged claims occurred in this District. Plaintiff, on behalf
17 of its clients, applied for the PPP loans while in this District and Defendants, marketed,
18 promoted, and took applications for the PPP loans in this District.

19 //

20 **III. FACTUAL ALLEGATIONS**

21 ***Background***

22 27. On January 21, 2020, the Center for Disease Control and Prevention ("CDC")
23 confirmed the first U.S. case of a new coronavirus, known as COVID-19.

24 28. On January 30, 2020, the World Health Organization ("WHO") declared the
25 COVID-19 outbreak to be a "public health emergency of international concern."

26 29. On March 4, 2020, California Governor Gavin Newsom proclaimed a State of
27 Emergency to exist in California as a result of the threat of COVID-19.

28 30. On March 11, 2020, the WHO declared that the spread of COVID-19 had

1 become a pandemic.

2 31. On March 13, 2020, President Trump issued the Coronavirus Disease 2019
3 (COVID-19) Emergency Declaration applicable to the United States, which declared that the
4 pandemic was of “sufficient severity and magnitude to warrant an emergency declaration for all
5 states, territories and the District of Columbia.”

6 32. The Trump Administration expressly recognized that with the COVID-19
7 emergency, “many small businesses nationwide are experiencing economic hardship as a direct
8 result of the Federal, State, and local public health measures that are being taken to minimize the
9 public’s exposure to the virus.” *See Business Loan Program Temporary Changes; Paycheck*
10 *Protection Program*, 13 CFR Part 120, Interim Final Rule (the “SBA PPP Final Rule”).

11 33. On March 25, 2020, in response to the economic damage caused by the COVID-
12 19 crisis, the United States Senate passed the Coronavirus Aid, Relief, and Economic Security
13 Act, the CARES Act (P.L. 116-136). The CARES Act was passed by the House of
14 Representatives the following day and signed into law by President Trump on March 27, 2020.
15 This legislation included \$377 billion in federally-funded loans to small businesses and a \$500
16 billion governmental lending program, administered by the United States Department of
17 Treasury (“Treasury”) and the Small Business Administration (“SBA”), a United States
18 government agency that provides support to entrepreneurs and small businesses.

19 34. As part of the CARES Act, the Federal Government created a \$349 billion loan
20 program, referred to as the Paycheck Protection Program or PPP, temporarily adding a new
21 product to the SBA’s 7(a) Loan Program (“SBA 7(a) Program”).

22 35. The PPP provided small businesses with loans to be originated from February
23 15, 2020, through June 30, 2020. The PPP was created to provide American small businesses
24 with eight-weeks¹ of cash-flow assistance and to allow a certain percentage of the loan to be
25 forgiven if the loan is utilized to retain employees and fund payrolls. Although the loans are
26 administered by the Treasury and backed by the Federal Government, the loans are funded by

27
28 ¹ On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (Pub. L. 116-142), extended the
eight-week period to twenty-four weeks.

1 private lenders (“Lenders”), including banks and financial services firms, that review and
2 approve PPP loan applications.

3 36. The Treasury announced on April 3, 2020, that small businesses and sole
4 proprietors could fill out an application (the “Application”) to apply and receive loans to cover
5 their payroll and other expenses through approved SBA Lenders. Beginning on April 10, 2020,
6 independent contractors and self-employed individuals could apply as well.²

7 37. On April 24, 2020, President Trump signed the Paycheck Protection Program
8 and Health Care Enhancement Act (“PPPEA”). The PPPEA added \$310 billion in PPP funding,
9 bringing the total PPP funds available to lend to \$659 billion.

10 38. On June 5, 2020, President Trump signed the Paycheck Protection Program
11 Flexibility Act of 2020 (“Flexibility Act”) (Pub. L. 116-142), which changes key provisions of
12 the Paycheck Protection Program, including provisions relating to the maturity of PPP loans, the
13 deferral of PPP loan payments, and the forgiveness of PPP loans. **The Flexibility Act did not**
14 **change Defendants’ statutory duty to pay Plaintiff the Agent Fees Plaintiff is owed.**

15 39. The Treasury’s Paycheck Protect Program (PPP) Information Sheet for
16 Lenders³ (the “PPP ISL”), consistent with the SBA PPP Final Rule (collectively, the “SBA
17 Regulations”), describes a system to distribute the PPP loans that relies on established SBA
18 Lenders – who approve and fund loan applicants – and the **addition** of independent agents (“PPP
19 Agents”) – who provide small businesses with the necessary assistance enabling them to apply
20 for a PPP loan.

21 40. Under the SBA Regulations, a PPP Agent “can be:

- 22 • An attorney;
- 23 • An accountant;
- 24 • A consultant;

25
26
27 ² *Paycheck Protection Program (PPP) Information Sheet: Borrowers*, Dep’t of Treasury (last visited, June 18,
2020), <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>

28 ³ *Paycheck Protection Program (PPP) Information Sheet: Lenders*, Dep’t of Treasury (last visited, June 18,
2020), <https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf?>

- 1 • Someone who prepares an applicant’s application for financial
- 2 assistance and is employed and compensated by the applicant;
- 3 • Someone who assists a lender with originating, disbursing, servicing,
- 4 liquidating, or litigating SBA loans;
- 5 • A loan broker; or,
- 6 • Any other individual or entity representing an applicant by conducting
- 7 business with the SBA.”⁴

8 41. Unlike the existing SBA 7(a) Program, the SBA Regulations expressly
9 contemplate and encourage PPP Agents to assist small businesses with their Applications. The
10 SBA Regulations allow for and set standards by which PPP Agents are to be paid for their work.
11 **Specifically, the regulations require that PPP Agents be paid from a portion of the set fees**
12 **provided to SBA Lenders for processing the PPP Loan.**

13 42. Before the passage of the CARES Act, **lenders were not compensated** by the
14 SBA for originating SBA 7(a) Loans. Under the newly enacted SBA Regulations for PPP loans,
15 Lenders are **generously compensated** for processing PPP loans (“Lender Fees”) based on the
16 amount of the funded PPP loan. The SBA pays Lender Fees to Lenders who process PPP loans
17 in the following amounts:

- 18 • Five percent (5%) for loans of not more than \$350,000;
- 19 • Three percent (3%) for loans of more than \$350,000 and less than
- 20 \$2,000,000; and
- 21 • One percent (1%) for loans of at least \$2,000,000.⁵

22 43. The CARES Act states, “**Agent fees will be paid by the lender out of the fees**
23 **the lender receives from SBA.** Agents may not collect fees from the **borrower or be paid out**
24 **of the PPP loan proceeds.** The total amount that an agent may collect from the lender for
25 assistance in preparing an application for a PPP loan ... may not exceed:

- 26 • One (1) percent for loans of not more than \$350,000;

27 _____
28 ⁴ *Id.*

⁵ 85 FR 20816 (3)(d).

- 1 • 0.50 percent for loans of more than \$350,000 and less than \$2 million; and
- 2 • 0.25 percent for loans of at least \$2 million.”⁶ (the “Agent Fees”).

3 44. Before the passage of the CARES Act, lenders and agents were **not**
4 compensated by the SBA for originating SBA 7(a) Loans. That is why the CARES Act
5 authorized the Treasury to establish limits on Agent Fees. The Treasury, “in consultation with
6 the Secretary, **determined that the agent fee limits set forth above are reasonable based upon**
7 **the application requirements and the fees that lenders receive for making PPP loans.**”⁷

8 45. In other words, when implementing the CARES Act, the Treasury determined
9 that the best and quickest way to get the PPP loans to the small businesses was to establish **new**
10 regulations where Lenders and PPP Agents work together to quickly and efficiently process
11 Applications. To incentivize this relationship, the Lender and Agent were to split the Federal
12 Government fees approximately 80% to be retained by the Lender and 20% to be forwarded to
13 the Agent.

14 46. By assisting businesses in preparing their Applications for PPP funding, PPP
15 Agents play a critical role in fulfilling the goals of the CARES Act and ensuring adherence to
16 the United States Congress’s legislative intent. Indeed, the Senate directed the Treasury to “**issue**
17 **guidance to lenders and agents to ensure that the processing and disbursement of covered**
18 **loans *prioritizes small business concerns and entities in underserved and rural markets,***
19 ***including veterans and members of the military community, small business concerns owned***
20 ***and controlled by socially and economically disadvantaged individuals..., women, and***
21 ***businesses in operation for less than 2 years.*”⁸**

22 47. If not for the PPP Agents, tens of thousands of small businesses would have had
23 difficulty or been unable to apply for PPP loans.

24 48. **Nowhere in the CARES Act or the SBA Regulations does the Federal**
25 **Government state, or even suggest, that Lender’s approval is required in order for an**
26 **Applicant to use an Agent.**

27 ⁶ 85 FR 20816 (4)(c).

28 ⁷ *Id.* (Emphasis Added).

⁸ CARES ACT, PL 116-136, March 27, 2020, 134 Stat 281. (Emphasis Added.)

1 Defendants, Plaintiff spent considerable time familiarizing itself with the CARES Act and the
2 related SBA Regulations. In particular, relevant provisions include Section 1102, which permits
3 the SBA to guarantee 100% of Section 7(a) loans under the PPP, and Section 1106 of the Act,
4 which provides forgiveness of up to the full principal amount of qualifying loans guaranteed
5 under the PPP.

6 55. Complying with the SBA Regulations, Plaintiff assisted Applicants in the PPP
7 Application process. As contemplated by the Federal Government, such assistance contributed
8 to the successful funding of the Applicants' PPP loans with a Defendant.

9 56. Based on the SBA Regulations, Plaintiff understood that it was not allowed to
10 charge its clients any fee relating to the Application process and that it was only permitted to
11 receive compensation from the PPP Agents' share of the Lender Fees the Federal Government
12 entrusted to the Lenders for the PPP Agents benefit.

13 57. Plaintiff further understood that it was not entitled to the Agent Fees until the
14 Lender received its Lender Fees. Based on information and belief, Defendants have received the
15 Lender Fees for the Applicants Plaintiff assisted, thereby making the Agent Fees immediately
16 due to Plaintiff.

17 58. To participate in the PPP, "Lenders **must** comply with the applicable lender
18 obligations set forth in this [SBA PPP Final Rule]..."¹⁰.

19 59. Therefore, Plaintiff believed in good faith that Defendants would comply with
20 the SBA Regulations and pay Plaintiff the statutorily required Agent Fees.

21 60. However, Defendants violated the SBA Final Rule because they did not pay
22 Plaintiff the Agent Fees the Federal Government entrusted to the Defendants for the benefit of
23 the Plaintiff. Instead, Defendants have illegally retained the Agent Fee portion of the Lender
24 Fees.

25 61. A request for payment of the Agent Fees was made to Defendants Bank of
26 Marin, Bank of the West, Cambridge Savings Bank, Comerica Bank, First Bank, First Republic
27 Bank, Grasshopper Bank, N.A., River City Bank, and the Mortgage Capital Development
28

¹⁰ 85 FR 20812 (1). (Emphasis Added).

1 Corporation (the “Contacted Defendants”). The Contacted Defendants either refused to pay or
2 failed to respond that they would pay Agent Fees.

3 62. Plaintiff has not submitted a request for Agent Fees to Defendants American
4 Express National Bank; Bank of America, N.A.; Celtic Bank; Citibank, N.A.; Heritage Bank of
5 Commerce; JPMorgan Chase Bank, N.A., Kabbage, Inc.; Silicon Valley Bank; U.S. Bank
6 National Association; and Wells Fargo Bank, N.A. as they have publicly stated that they are not
7 paying Agent Fees, and as such, a demand for payment to Defendants American Express
8 National Bank; Bank of America, N.A.; Celtic Bank; Citibank, N.A.; Heritage Bank of
9 Commerce; JPMorgan Chase Bank, N.A., Kabbage, Inc.; Silicon Valley Bank; U.S. Bank
10 National Association; and Wells Fargo Bank, N.A. is futile.

11 63. Defendants, as Lenders under the PPP, lack any legal authority under the SBA
12 Regulations to withhold payment of the Agent Fees to Plaintiff.

13 64. As a result of Defendants’ unlawful actions, Plaintiff and the Class have
14 suffered financial harm by being deprived of the statutorily mandated compensation for the
15 professional services they provided in their critical role as a PPP Agent, assisting Applicants in
16 the preparation of their PPP application. Defendants barred Plaintiff from receiving
17 compensation for their role as PPP Agents in the PPP process, which role resulted in significant
18 benefits to both small businesses and the Lenders.

19 //

20 **IV. CLASS ALLEGATIONS**

21 65. Plaintiff brings this action on behalf of itself, and all other similarly situated
22 Class members pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure
23 and seeks certification of the following Nationwide Class:

24
25 All Agents who assisted a business in preparing an Application for a PPP
26 loan pursuant to the CARES Act (the “Nationwide Class”).

27
28 66. To the extent that a Nationwide Class is not certified, in the alternative, Plaintiff

1 brings this action on behalf of itself, and all other similarly situated Class members pursuant to
2 Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of
3 the following Statewide Class:

4
5 All Agents who assisted a business in California in preparing an Application for
6 a PPP loan pursuant to the CARES Act (the “Statewide Class”).

7
8 The Statewide and Nationwide Class may hereafter be referred to as the “Class”.

9 67. For purposes of the Class definition, the term “Agent” has the same meaning as
10 an “agent” under the SBA Regulations.

11 68. Plaintiff reserves the right to expand, limit, modify, or amend this Class
12 definition, including the addition of one or more subclasses, in connection with Plaintiff’s motion
13 for class certification, or any other time, based upon, *inter alia*, changing circumstances and/or
14 new facts obtained during discovery.

15 69. The following are excluded from the Class and/or Subclass: (a) any Judge or
16 Magistrate presiding over this action and members of their families; (b) the officers, directors,
17 or employees of Defendants; and (c) all persons who properly execute and file a timely request
18 for exclusion from the Class.

19 70. *Numerosity*: The Class is composed of hundreds or thousands of Agents (the
20 “Class Members”), whose joinder in this action would be impracticable. The disposition of their
21 claims through this class action will benefit all Class Members, the parties, and the courts.

22 71. *Commonality and Predominance*: Common questions of law and fact affect the
23 Class. These questions of law and fact predominate over individual questions affecting
24 individual Class Members and, include, but are not limited to, the following:

- 25 a. Whether Plaintiff is an “agent” as that term is defined by the Cares Act and
26 relevant regulations;
- 27 b. Whether Defendants were obligated to pay Plaintiff and the Class Agent Fees
28 from the Lender Fees it received under the CARES Act;

- 1 c. Whether Defendants failed to pay Agent Fees they were required to pay;
- 2 d. Whether Class Members are entitled to damages; and if so, in what amount;
- 3 e. Whether Defendants are likely to continue to mislead the public and Class
- 4 Members and continue to violate SBA Regulations regarding paying Agents their
- 5 earned fees under the CARES Act;
- 6 f. Whether Plaintiff and Class Members are entitled to an award of reasonable
- 7 attorney's fees, pre-judgment interest and costs of suit; and
- 8 g. Whether Defendants were unjustly enriched by their practice of refusing to pay
- 9 Agent Fees.

10 72. *Superiority*: In engaging in the conduct described herein, Defendants have acted
11 and/or failed to act on grounds generally applicable to Plaintiff and other Class Members. Such
12 behavior requires the Court's imposition of uniform relief to ensure compatible standards of
13 conduct toward Class Members. A class action is superior to all other available means for the
14 fair and efficient adjudication of Plaintiff's and the Class Members' claims. Few, if any, Class
15 Members could afford or would deem it economically reasonable to seek legal redress of the
16 wrongs complained of herein on an individual basis. Absent a class action, Class Members would
17 not likely recover, or have the chance to recover, and Defendants would be permitted to retain
18 the fruits of their misdeeds. Any difficulties that might occur in the management of this proposed
19 class action are insubstantial. See Fed. R. Civ. P. 23(b)(1)(A).

20 73. *Typicality*: Plaintiff's claims are typical of, and are not antagonistic to, the
21 claims of the other Class Members. Plaintiff and the Class Members have been injured by
22 Defendants' uniform, unfair and unlawful practice of denying PPP Agent Fees, as alleged herein.
23 The factual and legal basis of Defendants' liability to Plaintiff and each Class Member as a result
24 of Defendants' actions are described herein.

25 74. *Adequacy*: Plaintiff is an adequate representative of the Class because it is a
26 member of the Class, and Plaintiff's interests do not conflict with the interests of the other Class
27 Members that Plaintiff seeks to represent. Plaintiff will fairly and adequately represent and
28 protect the interests of the other Class Members. Plaintiff has retained counsel with substantial

1 experience in litigating complex cases, including class actions. Both Plaintiff and its counsel will
2 vigorously prosecute this action on behalf of the Class and have the financial ability to do so.
3 Neither Plaintiff nor counsel has any interest adverse to other Class Members.

4 75. Plaintiff is informed and believes that Defendants keep extensive computerized
5 records of their loan applications through, *inter alia*, computerized loan application systems, and
6 Federally-mandated record-keeping practices. Defendants have one or more databases through
7 which all of the Applicants may be identified and ascertained, and it maintains contact
8 information, including email and mailing addresses. From this information, the existence of the
9 Class Members (i.e., the PPP Agent for the Applicant) can be determined, and thereafter, a notice
10 of this action can be disseminated in accordance with due process requirements.

11 //

12 **V. CAUSES OF ACTION**

13 **COUNT I**

14 **DECLARATORY RELIEF**

15 **AGAINST ALL DEFENDANTS**

16 76. Plaintiff hereby incorporates by reference the foregoing allegations as if fully
17 set forth herein.

18 77. Plaintiff assisted its clients with the PPP Loan application process, allowed
19 Defendants to secure customers for PPP lending, and satisfied all prerequisites for obtaining PPP
20 Agent Fees. Defendants failed to pay Agent Fees owed to Plaintiff as required by the SBA
21 Regulations. Instead, Defendants kept the Agent Fees for themselves, in direct violation of the
22 SBA Regulations.

23 78. An actual controversy has arisen between Plaintiff and Defendants as to the
24 Agent Fees owed to Plaintiff by Defendants. Through their conduct of refusing to pay Agent
25 Fees and otherwise, Defendants have denied that they owe the statutorily required Agent Fees to
26 Plaintiff and the Class.

27 79. Plaintiff and the Class seek a declaration, in accordance with SBA Regulations
28 and pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that Defendants are obligated

1 to set aside money to pay, and to pay the Agent Fees the PPP Agents have earned for the work
2 performed on behalf of their clients that received a PPP loan from the Defendants.

3 80. Plaintiff and the Class seek a declaration in accordance with the SBA
4 Regulations that a portion of the Lender Fees paid to Defendants must be paid to Plaintiff and
5 the Class.

6 //

7 **COUNT II**
8 **UNJUST ENRICHMENT**
9 **AGAINST ALL DEFENDANTS**

10 81. Plaintiff hereby incorporates by reference the foregoing allegations as if fully
11 set forth herein.

12 82. Plaintiff and the Class Members are PPP Agents who assisted small businesses
13 in preparing their Application for a PPP loan from Defendants who, in turn, received a federal
14 guarantee of repayment of the funds as well as a generous Lender Fee for each PPP loan from
15 the U.S. Government.

16 83. To participate in the PPP, “Lenders **must** comply with the applicable lender
17 obligations set forth in this [SBA PPP Final Rule]...”¹¹. Despite their efforts as PPP Agents,
18 Defendants have failed to pay Plaintiff and the Class Members the Agent Fees in violation of the
19 SBA PPP Final Rule.

20 84. Instead, Defendants have retained the full amount of the Lender Fees from
21 which the SBA Regulations require Agent Fees to be paid. Therefore, Defendants have unfairly
22 retained fees intended to benefit and compensate Plaintiff and the Class for their efforts in
23 promoting the interests of the CARES Act and ensuring small businesses receive PPP loans.

24 85. By holding themselves out as PPP lenders, Defendants’ conduct requested
25 Plaintiffs, and the Class Members, to assist Applicants with their PPP Applications and have the
26 Applications submitted to Defendants for approval.

27 86. Defendants have been, and continue to be unjustly enriched, to the detriment

28 ¹¹ 85 FR 20812 (1). (*Emphasis Added*).

1 and at the expense of the Class Members.

2 87. Defendants have unjustly benefitted through the illegal retention of the Agent
3 Fee portion of the Lender Fees paid by the Federal Government to the Defendants for the benefit
4 of the Plaintiff and the Class.

5 88. If Defendants' practice of retaining the full amount of Lender Fees despite the
6 efforts of PPP Agents who, under the SBA Regulations, are entitled to a portion of the Lender
7 Fees as Agent Fees, then the purpose and intent of the CARES Act would be upset because PPP
8 Agents would receive no due compensation for assisting small businesses seeking a PPP Loan.

9 89. Plaintiff and the Class have no other means of obtaining compensation because
10 **the SBA Regulations prohibit PPP Agents from receiving payment from any source other**
11 **than the Lender Fees and expressly prohibit collecting any fees from the Applicants.**

12 90. Defendants' conduct willfully and intentionally negates the terms of the SBA
13 Regulations by unilaterally refusing to forward to the PPP Agents the regulatorily required Agent
14 Fees that the Federal Government entrusted to the Lenders. Defendants' actions render those
15 terms superfluous and undermine the intent of Congress to promote small business loans under
16 the PPP and CARES Act.

17 91. Defendants should not be allowed to retain the proceeds from the benefits
18 conferred upon it by Plaintiff and the U.S. Government.

19 92. Plaintiff and the Class were injured as a direct and proximate cause of
20 Defendants' misconduct. Therefore, Plaintiff seeks disgorgement of Defendants' unjustly
21 acquired profits and other monetary benefits resulting from Defendants' unlawful conduct, an
22 injunction preventing Defendants from continuing their unlawful conduct, and all other relief
23 afforded under the law that this Court deems just and proper.

24 //

25 **COUNT III**

26 **CONVERSION**

27 **AGAINST ALL DEFENDANTS**

28 93. Plaintiff hereby incorporates by reference the foregoing allegations as if fully

1 set forth herein.

2 94. Under the SBA Regulations, Plaintiff and the Class, as PPP Agents, have a right
3 to, title in, and the legal right of possession of, Agent Fees that must be paid from the amount of
4 Lender Fees provided to Defendants for lending money pursuant to approved Applications.

5 95. The SBA Regulations state that “Agent fees *will* be paid out of lender fees” and
6 provide guidelines on the amount of Agent Fees that should be paid to the PPP Agent, depending
7 on the size of the PPP loan secured.

8 96. Additionally, the SBA Regulations require that Lenders, not Borrowers, pay the
9 Agent Fees. The SBA Regulations unequivocally state that “Agents may not collect fees from
10 the applicant.”

11 97. Plaintiff and the Class fulfilled the role of PPP Agent by assisting small
12 businesses with their Applications. Due to Plaintiff’s efforts, Defendants made federally backed
13 PPP loans, entitling Defendants to Lender Fees from the U.S. Government. As such, Plaintiff
14 has a right to receive, and title to, the regulatorily-mandated Agent Fees.

15 98. Although Plaintiff is entitled to Agent fees under the SBA Regulations,
16 Defendants have failed to pay the required Agent Fees, which the Federal Government paid to
17 the Defendants as part of the Lender Fees. Defendants have no legal claim, authorization, or
18 approval for this wrongful withholding of the Agent Fees. Therefore, Defendants have
19 appropriated, assumed, and exercised dominion over the Plaintiff’s and Class’ Agent Fees.

20 99. In California, money may be the subject of a conversion claim if the money can
21 be described, identified, or segregated, and an obligation to treat it in a specific manner is
22 established. That requirement is met because the Agent Fees are a segregated portion of the
23 Lender Fees awarded through the SBA Regulations for a successfully funded PPP loan.

24 100. At the time they unlawfully retained the Agent Fees, Defendants knew or should
25 have known that the Agent Fees were owed to Plaintiff and the other Class Members.

26 101. Defendants’ improper acts or practices of refusing to pay Plaintiff and the other
27 Class Members the mandated Agent Fees are the proximate cause of the damages sustained by
28 the Plaintiff and the Class Members.

1 by Plaintiff and the Class.

2 110. It would be unjust to allow Defendants to retain the benefit of Plaintiff's and the
3 Class's Agent Fees in light of their reasonable expectation of payment for the services they
4 rendered.

5 111. Defendants, regardless of any intent of the parties, have a quasi-contractual
6 obligation to pay for the services by which they benefited and to compensate Plaintiff and the
7 Class for the reasonable value of their services.

8 112. Plaintiff and the Class have been injured as a direct and proximate cause of
9 Defendants' misconduct. Plaintiffs, as such, seek recovery from Defendants in the amount of the
10 owed Agent Fees, and for all other relief afforded under the law.

11 //

12 **COUNT V**

13 **VIOLATION OF THE "UNFAIR" PRONG OF THE UCL**

14 **CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200, ET SEQ.**

15 **AGAINST ALL DEFENDANTS**

16 113. Plaintiff hereby incorporates by reference the foregoing allegations as if fully
17 set forth herein.

18 114. The California Unfair Competition Law (hereinafter "UCL") defines unfair
19 business competition to include any "unlawful, unfair or fraudulent" act or practice. A business
20 act or practice is "unfair" under the UCL if the reasons, justifications, and motives of the alleged
21 wrongdoer are outweighed by the gravity of the harm to the alleged victims.

22 115. Defendants have committed unfair acts and concealed and omitted material facts
23 that have harmed Plaintiff and the Class.

24 116. Specifically, Defendants, despite their obligations under the SBA Regulations,
25 Defendants have failed to pay the required Agent Fees, which the Federal Government paid to
26 the Defendants as part of the Lender Fees. Defendants' conduct constitutes an unfair act because
27 Defendants received Lender Fees as a result of Plaintiff and the Class's efforts to assist
28 Applicants in the Application process to secure PPP loans through Defendants, who are SBA

1 approved lenders.

2 117. By Defendants holding themselves out as PPP Lenders, Defendants necessarily
3 held themselves out as promising to follow the mandatory PPP guidelines and regulations.

4 118. Nevertheless, Defendants have failed to provide Plaintiff and the Class payment
5 in the amount of the mandatory Agent Fees, and instead retained the Agent Fee portion of the
6 Lender Fees for themselves.

7 119. Defendants also concealed and omitted material information, specifically, that
8 despite holding themselves out as PPP lenders under the PPP program, that Defendants would
9 refuse, and continue to refuse despite clear regulatory guidance, to pay regulatorily-mandated
10 Agent Fees. Had Plaintiff and the Class known that Defendants would refuse to pay Agent Fees,
11 they would have taken their loans to other SBA Lenders who complied with the SBA
12 Regulations.

13 120. Defendants' unfair acts and omissions occurred in connection with the sale or
14 advertisement of services, namely, services related to the processing and financing of PPP loans
15 under the CARES Act and SBA Regulations.

16 121. Defendants intended that Plaintiff and the Class rely on their omissions because,
17 had they stated they would not pay Agent Fees as required under the SBA Regulations, Plaintiff
18 and the Class would not have helped secure PPP loans from Defendants for their clients. By
19 concealing and omitting their intention not to pay required Agent Fees, Defendants improperly
20 obtained business from Plaintiff and the Class for which Defendants were compensated through
21 the Lender Fees.

22 122. Plaintiff and the Class have been injured as a direct and proximate cause of
23 Defendants' misconduct. Plaintiffs, as such, seek recovery from Defendants in the amount of the
24 owed Agent Fees, and for all other relief afforded under the law.

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28

COUNT VI

VIOLATIONS OF THE CARES ACT

AGAINST ALL DEFENDANTS

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3
4 123. Plaintiff hereby incorporates by reference the foregoing allegations as if fully
5 set forth herein.

6 124. The CARES Act provides a stimulus package in response to the COVID-19
7 pandemic and includes the PPP, which assists small businesses seeking to maintain payroll and
8 other authorized expenses.

9 125. There is an implied cause of action arising under the CARES Act.

10 126. The CARES Act, along with the SBA's Regulations, provides for the payment
11 of Agent Fees to authorized representatives who assisted PPP loan applicants with their PPP
12 Applications (i.e., PPP Agents consisting of the Plaintiff and the Class Members).

13 127. In flagrant disregard for the law, Defendants have failed and/or refused to pay
14 the Agent Fees to the Applicants' authorized representatives (i.e., PPP Agents consisting of the
15 Plaintiff and the Class Members), and instead, kept the fees to enrich themselves.

16 128. Plaintiffs and Class Members are PP Agents under the CARES Act and the
17 SBA Regulations and, therefore, are entitled to the Agent Fees they have earned. The Agent
18 Fees have been paid to the Lenders by the Federal Government and are to be paid by the Lenders
19 to the Plaintiffs and Class Members as set forth in the CARES Act and the SBA Regulations.

20 129. Nevertheless, Defendants refused to pay Plaintiffs and the Class Members the
21 authorized Agent Fees.

22 130. As a direct and proximate result of Defendants' failure and/or refusal to comply
23 with the CARES Act and the Rule, Plaintiffs and the Class Members have suffered damages in
24 excess of \$5 million.

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COUNT VII

**VIOLATIONS OF THE SBA’s 7(a) LOAN PROGRAM, 15 U.S.C. § 636(a)
AGAINST ALL DEFENDANTS**

131. Plaintiff hereby incorporates by reference the foregoing allegations as if fully set forth herein.

132. The PPP was added to the SBA’s 7(a) loan program, which is designed to assist small businesses in obtaining financing.

133. There is an implied cause of action arising under the SBA’s 7(a) loan program, as applied through the CARES Act.

134. The SBA Regulations provide for the payment of Agent Fees to authorized representatives that assisted PPP Applicants with their PPP Applications (i.e., PPP Agents consisting of the Plaintiff and the Class Members).

135. In flagrant disregard for the law, Defendants have failed and/or refused to pay Agent Fees to Plaintiffs and the Class Members, and instead, have kept the fees to enrich themselves.

136. As a direct and proximate result of Defendants’ wrongful actions, Plaintiffs and the Class Members have suffered damages in excess of \$5 million

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for the following relief:

- a. For an Order certifying the Class as defined above, appointing Plaintiff as Class representative, and appointing Plaintiff’s counsel as Class counsel;
- b. For an Order declaring Defendants’ actions to be unlawful;
- c. For a declaration that all regulatorily-mandated and calculated Agent Fees are owed to Plaintiff and the Class and should be deposited into a mutually agreeable fund or funds within 60 days, to be distributed to the PPP Agents who are entitled to the funds;

- d. For all injunctive and other equitable relief available to Plaintiff and Class Members;
- e. For an award of all recoverable compensatory, statutory, and other damages sustained by Plaintiff and Class Members;
- f. For reasonable attorneys' fees and expenses as permitted by applicable statutes and law;
- g. For costs related to bringing this action;
- h. For pre- and post-judgment interest as allowed by law; and,
- i. Such further relief at law or in equity that this Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff, individually and on behalf of the Class, demand a trial by jury on all issues so triable.

Dated: July 22, 2020

Respectfully submitted,

/s/Michael E. Adler
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