IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JASON CARR; VICKI LEMASTER; EDWARD FORD SERVICES LLC; CARLTON MORGAN; 365 SUN LLC; and CANDICE WORTHY, *individually and on behalf of all others similarly situated*, Plaintiffs, v. KABBAGE, INC., d/b/a K SERVICING, Defendant.	Civil Action No. 1:22-cv-01249-VMC

ORDER

This matter is before the Court on Defendant Kabbage, Inc.'s d/b/a K Servicing ("Kabbage") Motion to Dismiss ("Motion," Doc. 12).[1] Plaintiffs Jason Carr ("Carr"), Vicki LeMaster ("LeMaster"), Edward Ford Services, LLC ("Edward

[1] On October 3, 2022, Defendant filed a chapter 11 bankruptcy case, In re Kabbage, Inc. No. 22-10951-CTG (Bankr. D. Del.) ("Bankr. Case"). On March 9, 2023, Defendant filed an Amended Chapter 11 Plan of Liquidation ("Plan, Bankr. Case. Doc. 627). On March 13, 2013, the Plan was confirmed. Bankr. Case. Doc. 668. Pursuant to 11 U.S.C. § 362(c)(2)(C), the automatic stay lifted upon confirmation of the Plan. Moreover, pursuant to 11 U.S.C. § 1141(d)(3)(A), Plaintiff's claim was not discharged. See also Plan § 10.3(f) ("Nothing in the Plan or Confirmation Order shall . . . grant the Debtors a discharge pursuant to section 1141(d) of the Bankruptcy Code."). Because there is no automatic stay or discharge of this debt, there is no longer any bankruptcy-related obstacle to the Court issuing this Order.

Servs."), Carlton Morgan ("Morgan"), 365 Sun LLC ("365 Sun"), and Candice Worthy ("Worthy") (collectively the "Representative Plaintiffs") filed this putative class action against Kabbage on March 30, 2022 seeking declaratory judgment, injunctive relief, and damages. (Doc. 1). For the reasons below, the Court will grant Kabbage's Motion.

I. Background

A. The CARES Act and the SBA Act

This case arises out of loans that the Representative Plaintiffs received under the federal government's Paycheck Protection Program ("PPP"). The PPP was enacted as a part of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), PL 116-136, Mar. 27, 2020, 134 Stat 281 (codified at 15 U.S.C. § 636(a)(36)(2020)). Congress designed the PPP to provide economic relief to small businesses nationwide adversely impacted by the Covid-19 pandemic. The PPP amended the Small Business Act ("SBA Act") at 15 U.S.C. 636(a) and authorized the Small Business Administration ("SBA") to temporarily guarantee PPP loans under the SBA's 7(a) Loan Program. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg 20811 (Apr. 15, 2020). The loans guaranteed under the PPP were 100 percent guaranteed by the SBA, and the full principal amount of each loan could be eligible for loan forgiveness. *Id.* at 20812.

The CARES Act required the SBA to issue regulations outlining the PPP loan forgiveness process. 15 U.S.C. § 9012.

Congress initially allocated $349 billion in PPP funds to be distributed on a first-come, first-serve basis through June 20, 2020 ("Round One") but the funds were depleted by April 16, 2020. (Doc. 1 ¶ 42). A week after the funds allocated in Round One were depleted, Congress provided an additional $310 billion to the PPP ("Round Two"). (*Id.* ¶ 43). Kabbage became the second-largest PPP lender in the country with nearly 300,000 approved applications by the end of Round Two. (*Id.* ¶ 70).

B. SBA Act and PPP Loans Forgiveness Regulations

On April 15, 2020, the SBA issued its first interim final rule ("IFR") outlining key provisions of the PPP loan forgiveness process. 85 Fed. Reg. 20811 (Apr. 15, 2020). A month later, the SBA released the first version of the borrower's application for PPP loan forgiveness ("SBA Form 3508"). (*Id.* ¶ 89). And on June 1, 2020, the SBA published an IFR on loan forgiveness and an IFR on loan review procedures. The IFR on the PPP loan forgiveness requirements provided that:

> To receive loan forgiveness, a borrower must complete and submit the Loan Forgiveness Application (SBA Form 3508 or lender equivalent) to its lender (or the lender servicing its loan). As a general matter, the lender will review the application and make a decision regarding loan forgiveness. *The lender has 60 days from receipt of a complete application to issue a decision to SBA*. If the lender determines that the borrower is entitled to forgiveness of

> some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA.

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness, 85 Fed. Reg. 33004, 33005 (June 1, 2020) (emphasis added). The IFR on PPP loan review procedures outlined the steps lenders should take when reviewing forgiveness applications.[2] Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010 (June 1, 2020). Further, the IFR reiterated that lenders were required to issue a decision regarding a borrower's forgiveness application within sixty (60) days following a *complete application*. *Id.* at 33013 (emphasis added). This decision:

> [M]ay take the form of an approval (in whole or in part); denial; or (if directed by SBA) a denial without prejudice due to a pending SBA review of the loan for which forgiveness is sought. In the case of a denial without

[2] One step required PPP lenders to "[c]onfirm the borrower's calculations on the borrower's Loan Forgiveness Application, including the dollar amount of the (A) Cash Compensation, Non-Cash Compensation, and Compensation to Owners claimed on Lines 1, 4, 6, 7, 8, and 9 on PPP Schedule A and (B) Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments claimed on Lines 2, 3, and 4 on the PPP Loan Forgiveness Calculation Form, by reviewing the documentation submitted with the Loan Forgiveness Application." 85 Fed. Reg. 33010, 33013.

> prejudice, the borrower may subsequently request that the lender reconsider its application for loan forgiveness, unless SBA has determined that the borrower is ineligible for a PPP loan.

Id.

A few days after the SBA issued the two IFRs, Congress passed the Paycheck Protection Program Flexibility Act of 2020, PL 116-142, June 5, 2020, 134 Stat 641 (codified at 15 U.S.C. § 636(a)(36)(2020)), prompting the SBA to issue a revised IFR to streamline the PPP loan forgiveness process. Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 85 Fed. Reg. 38304 (June 26, 2020). The SBA also released an EZ loan forgiveness application (Form 3508EZ), requiring fewer calculations and less documentation. *See id.* at 38306.

On October 8, 2020, the SBA released another forgiveness application (Form 3508S). The purpose of Form 3508S was to further streamline the loan forgiveness process. Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 85 Fed. Reg. 66214, 66217 (Oct. 19, 2020). The Form 3508S was extended to borrowers with loans of $150,000 or less after passage of the Economic Aid Act. Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Forgiveness Requirements and Loan Review

Procedures as Amended by Economic Aid Act, 86 Fed. Reg. 8283, 8287 n.27 (Feb. 5, 2021).

C. Facts

The Representative Plaintiffs allege that Kabbage has failed to timely and competently process their PPP loan forgiveness applications.[3] (Doc. 1 at 1). The Representative Plaintiffs are residents of North Carolina, Florida, Michigan, California, and Georgia. (*Id.* ¶¶ 24-29). Each have PPP loans serviced by Kabbage. (Doc. 1).

Kabbage is an online financial technology company. (*Id.* ¶ 30). In 2020, Kabbage was authorized to originate PPP loans to small businesses as a part of the CARES Act. (*Id.* ¶ 4). By early August 2020, Kabbage issued the second-largest number of PPP loans in the United States. (*Id.* ¶ 7). Soon thereafter, Kabbage was acquired by American Express. (*Id.* ¶ 73). However, the acquisition did not include Kabbage's PPP Loan servicing division, which was renamed K Servicing. (*Id.* ¶ 75). The Representative Plaintiffs allege that only fifty-four percent of PPP loans originated by Kabbage in 2020 have been forgiven as of early January 2022. (*Id.* ¶ 114). The Representative Plaintiffs generally allege that Kabbage's failure to

[3] Because this case is before the Court on a Motion to Dismiss, the following facts are drawn from Plaintiffs' Complaint and are accepted as true. *Cooper v. Pate*, 378 U.S. 546, 546 (1964).

competently process their loan forgiveness applications resulted in violations of several state consumer statutes.

II. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For the purposes of a motion to dismiss, the court must accept all factual allegations in the complaint as true; however, the court is not bound to accept as true a legal conclusion couched as a factual allegation. *Twombly*, 550 U.S. at 555. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Although the plaintiff is not required to provide "detailed factual allegations" to survive dismissal, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678; *Twombly*, 550 U.S. at 555.

III. Discussion

Kabbage contends that the Representative Plaintiffs' Complaint should be dismissed because 1) they cannot maintain a private cause of action under the CARES Act; 2) their state law claims are preempted by the CARES Act; 3) their claims brought under California, North Carolina, Michigan, and Florida statutes

should be dismissed because Georgia law governs; and 4) their claims under Georgia law fail procedurally and substantively. (Doc. 12-1). Kabbage also argues that Carr's, Edwards Servs's, and Morgan's claims should be dismissed because they failed to exhaust administrative remedies. (*Id.*).

A. Availability of a Private Right of Action under the CARES Act

First, Kabbage argues that the Representative Plaintiffs' claims should be dismissed because there is no private right of action under the CARES Act. (Doc. 12-1 at 8). In opposition, the Representative Plaintiffs contend that none of their claims rely on provisions of either the SBA Act or the CARES Act. (Doc. 18 at 10). Rather, they allege that they are suing "because the manner in which Kabbage serviced their loans was contrary to consumer law and public policy." (*Id.*).

The Representative Plaintiffs' first cause of action seeks a declaration from the Court that Kabbage is obligated to abide by the SBA's IFRs. (Doc. 1 ¶ 243). Specifically, the Representative Plaintiffs seek a declaration that Kabbage is obligated to: 1) review and to process loan forgiveness applications in good faith and within the 60-day time frame according to SBA regulations; 2) process PPP loan forgiveness applications for loans equal to or less than $150,000 via Form 3508S, according to SBA regulations; and 3) process PPP loan forgiveness applications and may not require any documentation other than that explicitly required by SBA regulations. (*Id.*). Thus, if there is no private right of action under

the CARES Act to enforce the SBA IFRs on PPP loan forgiveness, the Representative Plaintiffs are not entitled to relief under the Declaratory Judgment Act.

Kabbage argues that there is neither an express nor implied private right of action under the CARES Act. (Doc. 12-1 at 8). The Representative Plaintiffs appear to acknowledge that there is no express private right of action but contend that there may be an implied right of action under the CARES Act. (Doc. 18 at 12). Because the PPP provisions of the CARES Act temporarily amended the SBA Act's 7(a) loan program, the Court first considers whether there is an implied private right of action under the SBA Act. Based on Eleventh Circuit precedent, the Court finds that there is no implied right of action under the SBA Act. *See U.S. v. Fidelity Capital Corp.*, 920 F.2d 827, 838 n.39 (11th Cir. 1991); *Tectonics, Inc. of Fla. v. Castle Constr. Co.*, 735 F.2d 957, 960 (11th Cir. 1985) (quoting *Royal Servs., Inc. v. Maint., Inc.*, 361 F.2d 86, 92 (5th Cir. 1966)).

Although the Eleventh Circuit has yet to consider whether the CARES Act implies a private cause of action, other federal courts have found that it does not. *See e.g. Diagnostic Affiliates of Ne. Hou, LLC v. Aetna, Inc.*,[4] No. 2:22-CV-00127, 2023 WL 1772197, at *9 (S.D. Tex. Feb. 1, 2023) (disavowing its earlier decision and

[4] The Representative Plaintiffs rely on the now-disavowed earlier decision in their Response to Kabbage's Motion. (Doc. 18 at 13).

holding that "the FFCRA/CARES Act does not carry with it an implied private cause of action to enforce its terms."); *Autumn Ct. Operating Co. LLC v. Healthcare Ventures of Ohio*, No. 2:20-CV-4901, 2021 WL 325887, at *6 (S.D. Ohio Feb. 1, 2021) ("This Court concludes that the CARES Act creates no implied private right of action."); *M&M Consulting Grp., LLC v. JPMorgan Bank, N.A.*, No. SACV 20-01318JVS(KESx), 2021 WL 71436 (C.D. Cal. Jan. 6, 2021) ("Moreover, nothing behind language in the CARES Act suggests that Congress intended to create an implied private right of action."); *Radix Law PLC v. JPMorgan Chase Bank NA*, 508 F. Supp. 3d 515, 520 (D. Ariz. 2020) ("[T]here is no private right of action to enforce the CARES Act."); *Profiles, Inc. v. Bank of Am. Corp.*, 453 F. Supp. 3d 742, 751–52 (D. Md. 2020) ("[e]ven assuming that the CARES Act grants PPP loan applicants with some statutory right to apply through a particular lender of choice (which is, itself, dubious), nothing in its text evidences Congress's intent to enable PPP loan applicants to bring civil suits against PPP lenders."); *see also Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, No. 3:20CV5425-TKW-HTC, 2020 WL 4882416, at *3 n.6 (N.D. Fla. Aug. 17, 2020) (noting that it is "doubtful" that a private right of action exists under the CARES Act.).

In light of the foregoing authority, the Court agrees that the CARES Act does not create a private right of action.[5] As a result, the Representative Plaintiffs' claim under the Declaratory Judgment Act (Count 1) must be dismissed. *See also Charly v. Holdings, Inc. v. Curtom Classics, LLC*, No. 1:18-CV-2354-LMM, 2018 WL 6254586, at *4 (N.D. Ga. Doc. 14, 2018) ("[T]he Declaratory Judgment Act does not provide an independent cause of action.").

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[5] In determining whether an implied right of action exists under a federal statute, the Eleventh Circuit considers the following factors:

> (1) is the plaintiff one of the class for whose *especial* benefit the statute was enacted; (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one; (3) is it consistent with the underlying purposes of the legislative scheme to imply a remedy for plaintiff; and (4) is the cause of action traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.

Miller v. Chase Home Fin., LLC, 677 F.3d 1113, 1116 (11th Cir. 2012) (citing *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Inves.*, 553 F.3d 1351, 1362 n.14 (11th Cir.2008)). The Representative Plaintiffs have not pointed to any indication of legislative intent to create a remedy or argued that implying a remedy would be consistent with the underlying purposes of the CARES Act. Indeed, they argue that they are not seeking to enforce any provision of the CARES Act and instead are relying on various state consumer protection statutes and common law remedies. Thus applying the factors set out by the Eleventh Circuit do not support a finding of an implied right of action in this case.

B. The Representative Plaintiffs' State Law Claims

Next, Kabbage argues that the Representative Plaintiffs are precluded from bringing their unjust enrichment claim and all of the state law claims because said claims are directly rooted in purported violations of the CARES Act and are thus an attempt to circumvent the fact that the CARES Act does not provide a private right of action. (Doc. 12-1 at 10). In response, the Representative Plaintiffs claim that they "are not seeking to enforce any provision of either statute but rather exclusively state law-based claims regarding loans authorized by these federal statutes, which are not preempted." (Doc. 18 at 11). Assuming arguendo[6] that the SBA/CARES Act does not preempt the Representative Plaintiffs' unjust enrichment and state law claims, for the reasons below those claims still fail and must be dismissed for failure to state a claim.

[6] The Court is inclined to agree that the Representative Plaintiffs' state law claims are an attempt to circumvent the fact that neither the CARES Act nor the SBA create a private right of action. Nonetheless, the Court will consider the Representative Plaintiffs' state law claims because the Eleventh Circuit has indicated that the critical question when determining whether a state statute is preempted "is whether the maintenance of the cause of action will be disruptive to the full performance of an established government contract." *Tectonics, Inc. of Fla.*, 753 F.2d at 963. At this stage, it is unclear whether preemption is appropriate here.

i. Claims Brought Under Georgia Law

a. Unjust Enrichment (Count 2)

The Representative Plaintiffs' second cause of action alleges unjust enrichment. (Doc. 1 ¶¶ 248-254). Specifically, the Representative Plaintiffs claim that because Kabbage "has been unwilling or unable to adequately service the plaintiffs' and class members loans, principles of justice, equity and good conscience demand" that Kabbage not be allowed to retain fees it earned from servicing their PPP loans. (*Id.* ¶ 253). "To state a claim for unjust enrichment a plaintiff must show that (1) a benefit was provided, (2) compensation for that benefit was not received, and (3) the failure to compensate renders the transaction unjust." *Ridgeline Cap. Partners, LLC v. MidCap Fin. Servs., LLC*, 340 F. Supp. 3d 1364, 1372 (N.D. Ga. 2018) (citations and quotations omitted). "The benefit must have been provided by the plaintiff." *Id.* Here, the Representative Plaintiffs neither allege nor identify what fees they paid to Kabbage for servicing their PPP loan. Instead, they allege that "[Kabbage] has obtained hundreds of millions of dollars in benefits in the form of PPP loan origination fees not to mention, on information and belief, additional, undisclosed fees for servicing the PPP loans." (Doc. 1 ¶ 250). But the SBA paid these fees, not the Representative Plaintiffs. (*Id.* ¶6). Accordingly, the Representative Plaintiffs' unjust enrichment claim is dismissed for failure to state a claim.

b. Georgia's Uniform Deceptive Trade Practices Act (Count 4)

The Representative Plaintiffs argue that Kabbage is liable under the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. §§ 10-1-370, *et seq.* ("GUDTPA"). In doing so, the Representative Plaintiffs accuse Kabbage of misrepresenting certain facts regarding the PPP loan forgiveness process. (Doc. 1 ¶ 272). However, the GUDTPA does not apply to "[c]onduct in compliance with orders or rules of or a statute administered by a federal state, or local governmental agency[.]" O.C.G.A. § 10-1-374; *see also Bartels v. Ala. Com. Coll., Inc.*, 918 F. Supp. 1565, 1573 (S.D. Ga. 1995), *aff'd in part, rev'd in part on other grounds, Bartels v. Ala. Com. Coll.*, 189 F.3d 483 (11th Cir. 1999) (finding that the GUDTPA did not apply in student borrowers' suit against college that allegedly recruited the students, induced them to sign up for federally guaranteed student loans, and then failed to provide the promised quality of education or job placement); *Ne. Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc.*, 676 S.E.2d 428, 434 (Ga. Ct. App. 2009) (finding that medical practice could not bring claims against a health insurer because the GUDTPA exempted conduct in compliance with a state's statutes and regulations). Accordingly, Count 4 is dismissed.

ii. Claim Brought Under California's Unfair Competition Law (Count 3)

Representative Plaintiff Morgan, on behalf of the California sub-class, brings a separate claim which alleges that Kabbage is liable under California's Unfair Competition Law ("UCL"), Business & Profession Code, §§ 17200, *et seq.* (Doc. 1 ¶¶ 255-68). Specifically, Morgan alleges that Kabbage's "incompetence throughout the loan forgiveness process" violated the unfair, fraudulent, and unlawful prongs of the UCL. (*Id.* ¶¶ 258-63). In opposition, Kabbage argues that Morgan's claim under the UCL should be dismissed for 1) failing to state a claim and 2) failing to exhaust administrative remedies regarding the denial of her PPP loan forgiveness application. (Doc. 12-1 at 18, 31-32). The Court agrees that Morgan fails to state a claim under the UCL.

"To bring a UCL claim, a plaintiff must show either an (1) unlawful, unfair, or fraudulent business act or practice, or (2) unfair, deceptive, untrue or misleading advertising." *Irigaray Dairy v. Dairy Emps. Union Loc. No. 17 Christian Lab. Ass'n of the U.S. of Am. Pension Tr.*, 153 F. Supp. 3d 1217, 1256 (E.D. Cal. 2015) (*citing Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003)). "An act is 'unfair' under the UCL if it significantly threatens or harms competition, even if it is not specifically proscribed by another law or is tethered to some legislatively declared policy." *Id.* (internal quotations omitted and citations omitted). An act is "fraudulent" under the UCL if members of the public are likely

to be deceived. *See Copart, Inc. v. Sparta Consulting, Inc.*, 339 F. Supp. 3d 959, 987 (E.D. Cal. 2018). And "[u]nder the UCL's 'unlawful' prong, violations of other laws are 'borrowed' and made independently actionable under the UCL." *Galindo v. Ocwen Loan Servicing, LLC,* 282 F. Supp. 3d 1193, 1201 (N.D. Cal. 2017) (internal quotations omitted).

Here, the Representative Plaintiffs argue that Kabbage acted unfairly and fraudulently because it did not competently process their PPP loan forgiveness applications. (Doc. 18 at 24.). However, the Court finds that Kabbage's actions were neither unfair nor fraudulent because they fell within the scope of the authority given to it by the SBA through the issued IFRs. Both the CARES Act and the SBA's IFRs allows PPP loan servicers to collect additional documentation.[7] And while the Representative Plaintiffs may be displeased with the way Kabbage processes PPP loan forgiveness applications, this is insufficient to state a claim under the UCL. *Khan v. CitiMortgage, Inc.*, 975 F. Supp. 2d 1127, 1145 (E.D. Cal. 2013) ("a plaintiff may not bring an action under the unfair competition law if some other statutory provision bars such an action or permits the underlying

[7] "Nothing in subparagraph (A) or (B) shall be construed to exempt an eligible recipient from having to provide documentation independently to a lender to satisfy relevant Federal, State, local, or other statutory or regulatory requirements, or in connection with an audit as authorized under subparagraph (E)." 15 U.S.C. § 636m(l)(C).

conduct.") (quoting *Rothschild v. Tyco Internat. (US), Inc.*, 99 Cal. Rptr. 2d 721, 725 (Cal. Ct. App. 2000)).

The Representative Plaintiffs also allege that Kabbage acted unlawfully by violating the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, and California's Rosenthal Act, Cal. Civil Code §§ 1788 *et seq.*, yet decided not to plead either of those claims in their Complaint. Notwithstanding this decision, the Representative Plaintiffs have not identified the act or omission Kabbage engaged in that is prohibited by the FDCPA or California's Rosenthal Act. The Representative Plaintiffs allege no other violation of any other laws. Lastly, even if Morgan did state a plausible claim under the UCL, the Court would dismiss said claim for failure to exhaust all administrative remedies.[8] Accordingly, Count 3 is dismissed.[9]

[8] Kabbage argues that Morgan's UCL claim should be dismissed because she did not appeal the denial of her PPP forgiveness application to the SBA. (Doc. 12-1 at 31-32). In response, Morgan claims that she attempted to reach out to the SBA but they referred her back to Kabbage. (Doc. 18 at 34-35). But the SBA issued IFRs outlining the steps Morgan should have followed to appeal the denial of her loan forgiveness application and Morgan does not plausibly allege that she followed the process. Nor does Morgan allege that Kabbage's unfair or deceptive practices prevented her from appealing her denial to the SBA.

[9] The Court therefore need not reach the question of whether California law applies to the California subclass. The Court reaches similar outcomes for the other state sub-classes below.

iii. Claim Brought Under North Carolina's Unfair and Deceptive Trade Practices Act (Count 5)

Representative Plaintiff Carr, on behalf of the North Carolina sub-class, brings a fifth cause of action under North Carolina's Unfair and Deceptive Trade Practices Act, N.G.C.S. §§ 75, *et. seq.* ("NCUDTPA") (Doc. 1 ¶¶ 280-87). Specifically, Carr alleges that Kabbage violated NCUDTPA "by attempting to collect a debt by fraudulent, deceptive or misleading representation" when it "misle[d] [him] for months on end, repeatedly requiring him to submit unnecessary paperwork." (*Id.* ¶¶ 282-83). Kabbage argues that Carr's NCUDTPA claim should be dismissed for 1) failure to state a claim and 2) failure to exhaust administrative remedies after the denial of his PPP loan forgiveness application. (Doc. 12-1 at 18, 32). The Court agrees that Carr has failed to state a claim under the NCUDTPA.

"To prevail on a claim of unfair and deceptive trade practice[s] a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Hatteras/Cabo Yachts, LLC v. M/Y EPIC*, 423 F. Supp. 3d 181, 191 (E.D.N.C. 2019) (citations omitted). "A practice is deceptive if it has the capacity or tendency to deceive the average consumer, but proof of actual deception is not required." *Id.* at 191. And an act is unfair if it "offends established public policy, is immoral, unethical, oppressive,

unscrupulous, or substantially injurious to consumers . . ." *Id.* (*citing Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC*, 845 F.3d 104, 109 (4th Cir. 2016)).

Here, the Representative Plaintiffs argue that "Kabbage's conduct related to pre-populated loan forgiveness applications is an unfair and deceptive act or practice that is actionable under North Carolina's UDTPA." (Doc. 18 at 25-26). In response, Kabbage contends that, because Carr was denied loan forgiveness, he could only request $0.00 forgiveness. (Doc. 12-1 at 22). Moreover, Kabbage points to SBA guidelines instructing lenders to enter the amount of $0.00 when an application is denied. (*Id.* at 33).[10] The Representative Plaintiffs do not dispute Kabbage's argument related to SBA guidance for denied PPP loan forgiveness applications. Thus, the Court agrees that it is illogical to conclude that compliance with SBA guidance constitutes an unfair or deceptive practice under the NCUDTPA. *Cf. In re Hinson,* 481 B.R. 364, 377 (Bankr. E.D.N.C. 2012) (finding that defendant's violations of the Home Affordable Modification Program's policies and procedures are within the meaning of unfair and deceptive). Moreover, the Representative Plaintiffs, specifically Plaintiff Carr, had the opportunity to appeal the denial of his PPP loan forgiveness application directly to the SBA. It is unclear whether an appeal was filed. Accordingly, Count 5 is dismissed.

[10] *See also* (Doc. 12-1 at 23 n.8) (Kabbage citing guidance from the SBA regarding the values a lender should include when a denied decision is issued).

iv. Claim Brought Under Michigan's Consumer Protection Act (Count 6)

Representative Plaintiff Edward Servs., on behalf of the Michigan sub-class, brings a sixth cause of action under the Michigan Consumer Protection Act, Mich. Comp. Laws Ann. §§ 445.901, *et seq.* ("MCPA"). (Doc. 1 ¶¶ 288-292). Edward Servs. generally alleges Kabbage violated the MCPA by misrepresenting its services. (*Id.* ¶ 291). Kabbage contends that Edward Servs.' claim under the MPCA should be dismissed for 1) failure to state a claim and 2) failure to exhaust administrative remedies after the denial of its PPP loan forgiveness application. (Doc. 12-1 at 26, 31-32). The Court agrees that Edward Servs. has failed to state a claim under the MPCA because the MCPA exempts transactions specifically authorized by a federal statute. *See Liss v. Lewiston-Richards, Inc.*, 732 N.W.2d 514, 516 (Mich. 2007) ("the relevant inquiry "is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited."); MCL 445.904(1)(a) (The MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States"). Accordingly, Count 6 is dismissed.

v. Claim Brought Under Florida's Deceptive and Unfair Trade Practices Act (Count 7)

Lastly, Representative Plaintiffs LeMaster and 365 Sun, on behalf of the Florida sub-class, bring a seventh cause of action under Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501, 201, *et seq.* ("FDUTPA") (Doc. 1 ¶¶ 293-301). Generally, LeMaster and 365 Sun contend that Kabbage violated FDUTPA when it made several misrepresentations on its website regarding the PPP loan forgiveness process. (*Id.* ¶ 297). Kabbage argues that LeMaster's and 365 Sun's claim under the FDUTPA should be dismissed for failure to state a claim. (Doc. 12-1 at 28). The Court agrees.

"In order to state a claim under FDUTPA a consumer must establish: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Washington v. LaSalle Bank Nat. Ass'n*, 817 F. Supp. 2d 1345, 1350 (S.D. Fla. 2011). The Court, however, finds that none of the statements the Representative Plaintiffs rely on are fraudulent. For example, the Representative Plaintiffs allege that Kabbage "[r]epresent[ed] on its website that 'borrowers with loans under $150,000 who qualify to use the new Form 3508S *may not* need to submit any supporting documentation,' but continue[d] to demand thousands of customers with loans under the threshold continue submitting unnecessary documentation. (Doc. 1 ¶ 297). But "may not" suggests that there is a possibility that more documentation will be needed. Thus, there is no misrepresentation or fraudulent conduct where

Kabbage determines that a particular borrower needs to submit additional documentation. Because there are no allegations to support the Representative Plaintiffs' claim that Kabbage committed unfair or deceptive practices under the FDUTPA, Count 7 must be dismissed for failure to state a claim.

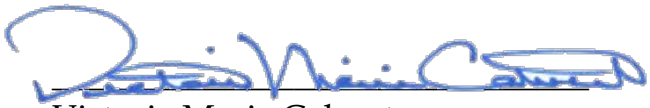
vi. Attorney's Fees and Expenses under O.C.G.A. § 13-6-11 (Count 8)

Georgia law permits an award of attorney's fees in certain circumstances. O.C.G.A. § 13-6-11. Georgia courts are clear that this statute "does not create an independent cause of action but merely permits in certain limited circumstances the recovery of expenses of litigation incurred as an additional element of damages." *Tri-State Consumer Ins. Co. v. LexisNexis Risk Sols., Inc.*, 858 F. Supp. 2d 1359, 1371 (N.D. Ga. 2012); *see also Elliott v. Specialized Loan Servicing, LLC*, No. 1:16-CV-4804-TWT-JKL, 2017 WL 3327087, at *17 (N.D. Ga. July 10, 2017), *report and recommendation adopted*, No. 1:16-CV-4804-TWT, 2017 WL 3315243 (N.D. Ga. Aug. 3, 2017) ("As a technical matter, neither punitive damages nor attorney fees under O.C.G.A. § 13-6-11 are independent causes of action."). As the Court has dismissed all of the Representative Plaintiffs' other claims, Count 8 is also dismissed.

IV. Conclusion

For the reasons above, Kabbage's Motion to Dismiss (Doc. 12) is **GRANTED**. The Representative Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**. The Clerk is directed to close this case.

SO ORDERED this 31st day of March, 2023.



Victoria Marie Calvert
United States District Judge