IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern District)

PROFILES, INC., *et al.*, on behalf of themselves and all others similarly situated,	*	
PLAINTIFFS,	*	
v.	*	**CIVIL ACTION NO. 20-CV-894 (SAG)**
BANK OF AMERICA CORPORATION, *et al.*,	*	
DEFENDANTS.	*	

* *

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

With the outbreak of coronavirus disease 2019 ("COVID-19"), the People of the United States face the most severe national crisis of our time, which threatens the shutdown of thousands upon thousands of small businesses in this country and the collapse of our economy. In response to this unprecedented crisis impacting every American small business and the tens of millions of employees who depend on them, the federal government enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to enable America's small businesses to keep their doors open and their employees employed by creating a Payroll Protection Program ("PPP"), which allows lenders to give federally guaranteed loans to protect payroll expenses for two months. The loan pool, however, is limited in size, and the PPP is run on a first-come-first-served basis.

In the midst of this national emergency, and instead of using this program to help small businesses, Bank of America Corporation and Bank of America, N.A. (collectively, "BOA") privileged discriminatory policies of corporate greed over the needs of America's small businesses by erecting barriers to prevent eligible businesses from accessing emergency PPP loans authorized by Congress under the CARES Act. In contravention of the requirements set forth in the legislation, BOA chose to prioritize its existing borrowing clients over its depository clients and other small businesses whose very existence is at stake in this litigation.

Absent a temporary restraining order and preliminary injunction, Plaintiffs will be effectively precluded from applying before the June 30, 2020 deadline for these "first-come, first-served" loans that are designed specifically to "provide relief to America's small businesses expeditiously." BOA's unlawful barriers to entry must be removed immediately to prevent irreparable harm to the eligible businesses that the CARES Act was designed to save. Plaintiffs'

Motion should be granted and a temporary restraining order and preliminary injunction should issue.

STATEMENT OF FACTS

I. PPP Loans Are Designed Specifically to Provide Immediate, Emergency Assistance to Plaintiffs and Other Eligible Businesses.

On March 27, 2020, the President signed into law the CARES Act, H.R. 748, P.L. 116-136, "to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic." Ex. A, 13 CFR Part 120, Interim Final Rule, Docket No. SBA-2020-0015, April 2, 2020 (the "Interim Final Rule").[1] Among other purposes, the CARES Act was designed to provide "immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency." *Id.*, Interim Final Rule at 4.

The Small Business Administration ("SBA") receives funding and authority through the CARES Act "to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency." *Id.*, Interim Final Rule at 3. To accommodate for this SBA expansion, the CARES Act has authorized commitments to the SBA 7(a) loan program, as modified by the CARES Act, in the amount of $349 billion. *See id.*, Interim Final Rule at 5.

Section 1102 of the CARES Act, entitled "Paycheck Protection Program," authorizes participating lenders to make general business loans available to eligible recipients in order to cover payroll and other expenses. CARES Act § 1102(a)(2), (b)(1). The PPP loans are federally guaranteed up to a maximum amount of $10 million, which can be conditionally forgivable, to encourage businesses to retain employees. *See* Ex. A, Interim Final Rule at 3-4. As part of the

[1] The Interim Final Rule is available at https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf (last visited Apr. 4, 2020).

relief provided, the CARES Act expands the eligibility criteria for borrowers to qualify for loans that are available through the SBA by adding the PPP to the SBA's gamut of loan programs. CARES Act § 1102(a)(2). In particular, eligible individuals and entities include small businesses and eligible nonprofit organization, veterans organizations, and Tribal businesses described in the Small Business Act, as well as individuals who are self-employed or are independent contractors who meet program size standards. *See id.* § 1102(a)(2); Ex. A, Interim Final Rule at 5-6.

The "General Eligibility" section of the PPP Lender Application Form lists only two requirements for a PPP loan to be approved:

- The Applicant has certified to the Lender that (1) it was in operation on February 15, 2020 and had employees for whom the Applicant paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC, (2) current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant, (3) the funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, and (4) the Applicant has not received another Paycheck Protection Program loan.

- The Applicant has certified to the Lender that it (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, meets the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.

Ex. B, Lender Application Form – Paycheck Protection Program Loan Guarantee ("Form 2484") (last accessed Apr. 4, 2020).[2] These eligibility requirements are consistent with the plain language of section 1102(a)(2) of the CARES Act and section III(2)(a) of the Interim Final Rule. *See* Ex. A, Interim Final Rule at 5-6. There is no requirement in the law that the applicant must have an existing borrowing relationship with the lender, or that the applicant *not* have an existing

[2] This document can be accessed at https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Fillable.pdf.

borrowing or credit relationship with another financial institution. The Interim Final Rule lists reasons why an applicant may be deemed "ineligible." *See id.*, Interim Final Rule at 6-7; *see also* 13 C.F.R. § 120.110. A specific borrowing relationship with a lender (or lack thereof) appears nowhere in the law.

PPP loans are disbursed out of a limited and eroding fund to eligible businesses on a "first-come, first-served" basis. Ex. A, Interim Final Rule at 13. The Interim Final Rule instructs that "small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020." *Id.*, Interim Final Rule at 3-4. Thus, Plaintiffs who do not meet BOA's unlawful eligibility requirements cannot apply for these "first-come, first-served" loans unless the gating requirements are removed without further delay.

II. BOA Prevented Eligible Businesses From Applying for PPP Loans Under the CARES Act.

On the morning of April 3, 2020, BOA began accepting online applications for PPP loans, becoming the first major bank to do so. That same morning, BOA Chairman and CEO Brian Moynihan appeared on CNBC to tout BOA's participation in the program and BOA's claimed concern and interest for the welfare of small businesses in America.[3] According to BOA's Twitter account, as of 2:10 p.m., BOA had "received over 60,000 applications from small businesses, and those include more than $6 billion in applications through [its] CashPro platform for business clients." Bank of America News (@BofA_News), Twitter (Apr. 3, 2020, 2:10 p.m.),

[3] *CNBC Transcript: Bank of America CEO Brian Moynihan Speaks with CNBC's Jim Cramer on 'Squawk on the Street' Today*, CNBC, https://www.cnbc.com/2020/04/03/cnbc-transcript-bank-of-america-ceo-brian-moynihan-speaks-with-cnbcs-jim-cramer-on-squawk-on-the-street-today.html (last visited Apr. 5, 2020). The Court may take judicial notice of public comments from BOA's representatives. *See Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio*, 364 F. Supp. 3d 253, 263 (S.D.N.Y. 2019) (taking judicial notice of Mayor de Blasio's statements on his official Twitter account and the contents of an interview with Chancellor Carranza on Fox 5 New York).

https://twitter.com/BofA_News/status/1246567296903966721.[4] However, small businesses and public figures throughout the country began to take notice that BOA was imposing unlawful and arbitrary eligibility requirements that appear nowhere in the CARES Act, thus denying otherwise eligible businesses like Plaintiffs from submitting applications for PPP loans.

A. Eligible recipients were denied the opportunity to apply for PPP loans through BOA on April 3, 2020.

Among dozens of other entities who have contacted undersigned counsel regarding similar experiences with BOA's eligibility requirements was Elite Security Group, LLC ("Elite"), a business that provides private security services to bars and other "non-essential businesses" in Maryland. *See* Ex. C, Affidavit of Brandon Burr ¶¶ 2, 8 ("Burr Affidavit"), Apr. 6, 2020.[5] As a result of Governor Hogan's recent orders, all but one of Elite's clients have been forced to close, resulting in lost revenue to Elite in the amount of $30,000 per month. *Id.*, Burr Aff. ¶ 4. Mr. Burr attempted to submit an application to BOA on Elite's behalf on April 3, 2020, but learned that its application would not be accepted because Elite did not have a *borrowing* relationship with BOA—only a depository relationship. *See id.*, Burr Aff. ¶¶ 7, 8. Elite otherwise met the eligibility requirements in section 1102(a)(1) of the CARES Act. *See id.*, Burr Aff. ¶¶ 3-6.

As another example, Proline Products, Inc. ("Proline") is a Connecticut-based sole proprietorship which sells automotive roof racks and related accessories. Ex. D, Affidavit of Greg Storm ("Storm Affidavit") ¶¶ 2-3, Apr. 7, 2020. Faced with a severe drop in revenues and on the

[4] The Court may also take judicial notice of tweets from BOA's representatives. *See Unsworth v. Musk*, Case No. 19-mc-80224-JSC, 2019 U.S. Dist. LEXIS 186481, *11 (N.D. Cal. Oct. 28, 2019) ("The Court agrees that judicial notice is proper because the existence of the publicly-available articles and tweets cannot reasonably be questioned."); *Alexander v. MGM Studios, Inc.*, Case No.: 17-3123-RSWL-KSx, 2017 U.S. Dist. LEXIS 214497, *9 (C.D. Cal. Aug. 14, 2017) (taking judicial notice of "Twitter account screenshots, as they contents are referred to throughout the Complaint, and they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

[5] Elite is also willing to become a named plaintiff in this class action. *See id.*, Burr Aff. ¶ 13.

verge of closing its doors, Proline reached out to BOA, where it had conducted its business banking for the past 25 years. *See id.*, Storm Aff. ¶¶ 4, 7. BOA told Proline that its application would not be accepted due to the lack of a borrowing relationship with the bank. *Id.*, Storm Aff. ¶ 8. In particular, Proline was told that it did not meet BOA's eligibility criteria, and that it should apply elsewhere. *See id.*, Storm Aff. ¶¶ 8-9. Like Elite, Proline otherwise met the eligibility criteria in the CARES Act. *See id.*, Storm Aff. ¶¶ 2-4, 6.

B. BOA's unlawful eligibility requirements drew immediate criticism.

Shortly after BOA opened its portal to PPP loan applications, it became widely known that BOA implemented an application process that prioritized their existing borrowing clients and barred their depository clients and other small businesses from submitting an application for PPP funds. *See Cardin Statement on Launch of Paycheck Protection Program*, Cardin for Maryland (Apr. 3, 2020), https://www.cardin.senate.gov/newsroom/press/release/cardin-statement-on-launch-of-paycheck-protection-program; *see also* Marco Rubio (@marcorubio), Twitter (Apr. 3, 2020, 12:37 p.m.), https://twitter.com/marcorubio/status/1246114718990979075. Nothing in the CARES Act permits a lender from discriminating against a small business applicant based on its status as a borrower of that financial institution. *See* CARES Act § 1102(a)(1); Ex. A, Interim Final Rule at 5-7. Nothing in the law allows BOA to determine what small businesses can participate in the federal program based on that improper and unlawful criteria.

III. BOA's Revised Policy Also Does Not Comply With Federal Law.

On April 4, 2020, after the Class Action Complaint had been filed, BOA revised its policy by allowing depository-only clients to apply for PPP loans, but added a new unlawful requirement: that depository-only clients have no credit card or loan with any other financial institution. The new eligibility criteria are featured prominently on BOA's website:

> The Paycheck Protection Program is a federal relief program established by Congress and implemented by the U.S. Treasury Department and the SBA with rules, requirements, protocols and processes that all participating banks, including Bank of America, must follow.
>
> **Small Business clients with a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 *or* a Small Business checking account opened no later than February 15, 2020 and do not have a business credit or borrowing relationship with another bank are eligible to apply for the Paycheck Protection Program through our bank.** A client's preexisting lending relationship with us may include small business, commercial or corporate credit cards, conventional business loan or lease, business lines of credit, business auto loans, practice solutions loans, trade and asset-based loans.
>
> Small Business owners who do not meet these criteria should contact their current business loan provider as soon as possible, if they plan to apply for the federal Paycheck Protection Program. This is the best and fastest method for applying for federal relief, based on the U.S. Treasury requirements and guidance.

Ex. E, Bank of America, *We're here for our small business clients* (printed Apr. 5, 2020) (emphasis added).[6] Therefore, even though an applicant meets the eligibility requirements in the CARES Act, that applicant cannot apply for a PPP loan with BOA if it has "a business credit or borrowing relationship with another bank." *See id.* If Congress had wanted to impose such an eligibility requirement in the CARES Act, it certainly could have done so. It did not.

A. BOA is applying an unlawful "credit elsewhere" requirement that was expressly prohibited by the CARES Act.

In general, to apply for an SBA loan (not under the CARES Act), the applicant must certify "that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal, non-State, and non-local government sources without SBA assistance." 13 C.F.R. §

[6] The Court "may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Jeandron v. Bd. of Regents of the Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013) (quoting Fed. R. Evid. 201(b)).

120.101; *see also* 15 U.S.C. § 636(a)(1)(A). However, for "covered loans" under PPP, Congress expressly provided that, "[d]uring the covered period, the requirement that a small business concern is unable to obtain credit elsewhere . . . shall not apply to a covered loan." CARES Act § 1102(a)(1) (to be codified at 15 U.S.C. § 636(a)(36)(I)). Contrary to the criteria set forth in the CARES Act and applicable SBA regulations, BOA is applying a "credit elsewhere" requirement to PPP loans by requiring every applicant to certify that they "do not have a business credit or borrowing relationship with another bank." *Compare* CARES Act § 1102(a)(1), *with* Ex. E, Bank of America, *We're here for our small business clients*. This arbitrary and unlawful eligibility criterion is tantamount to the "credit elsewhere" requirement that was expressly prohibited by section 1102(a)(1) of the CARES Act.

B. BOA is applying unlawful "ineligibility" criteria that are contrary to the express eligibility provisions in in the CARES Act.

As discussed *supra*, the sole eligibility requirements for an "eligible recipient" to apply for a "covered loan" are set forth in section 1102(a)(1) of the CARES Act. BOA has decided to institute its own "ineligibility" criterion—the applicant cannot "have a business credit or borrowing relationship with another bank"—which is contrary to the text and purpose of the CARES Act: "Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the Act are eligible . . . ." Ex. A, Interim Final Rule at 7-8. To that end, 13 C.F.R. § 120.110 lists nineteen (19) types of businesses that are ineligible for PPP loans. *See* 13 C.F.R. § 120.110(a)-(s). A particular customer relationship with BOA is not listed in the regulation or in the CARES Act. Nevertheless, BOA has determined that a small business cannot apply for a PPP loan through BOA if the applicant has "a business credit

or borrowing relationship with another bank." Ex. E, Bank of America, *We're here for our small business clients*.

In their recent letter to Secretary Steven T. Mnuchin, Senator Chris Van Hollen (D-MD) and Representative David Trone (MD-06) explained that the ineligibility criteria imposed by BOA are in direct conflict with the plain language and intent of the CARES Act and PPP:

> Furthermore, we are hearing that Maryland constituents are facing difficulties obtaining loans through the PPP. **For example, some financial institutions have required that businesses have an existing line of credit or a credit card account in order to obtain a loan. Imposition of such requirements, which are outside the purpose of the program, are unnecessary at best and, in the case of some of our constituents, harmful to their ability to access the program.** We therefore ask that Treasury firmly prohibit lenders from imposing PPP loan requirements outside the scope of the CARES Act in the Department's final rulemaking.
>
> We have fought successfully to ensure this rescue package throws an economic lifeline to those who need it most by extending help to small and mid-sized businesses struggling to stay afloat. The Treasury Department's guidelines must not undermine Congress's intent for PPP, and we urge you to provide updated guidance that fully addresses and corrects the matters of concern outlined above.

Ex. F, Van Hollen & Trone Letter to Mnuchin, Apr. 6, 2020 (emphasis added). This ineligibility criterion imposed by BOA violates section 1102(a)(1) of the CARES Act and is unlawful.

C. BOA's unlawful application requirements have caused immediate and irreparable harm to eligible businesses.

Shortly after 12:00 a.m. EDT on April 6, 2020, Elite attempted to apply for a PPP loan through Bank of America, and its owner now fears that the application will be rejected due to the fact it has a borrowing relationship with another bank. Ex. C, Burr Aff. ¶¶ 9-10. Although Elite qualifies as an eligible recipient under the CARES Act, it does not meet BOA's arbitrary and unlawful eligibility criteria, and the future of its business is in jeopardy without the PPP loan funds. *See id.*, Burr Aff. ¶¶ 11-12. Proline had the same experience and was turned away from applying

for a PPP loan through BOA because it had company credit cards with Chase and American Express. *See* Ex. D, Storm Aff. ¶ 11. Like Elite, Proline fears it may close its doors for good without the ability to obtain a PPP loan. *See id.*, Storm Aff. ¶¶ 12-13.

As of 6:36 p.m. EDT on Saturday, April 4, BOA had already "received over 145K applications totaling $30B through the @USTreasury Payment Protection Program." Bank of America News (@BofA_News), Twitter (Apr. 4, 2020, 6:36 p.m.), https://twitter.com/BofA_News/status/1246567296903966721. The loan funds are disbursed on a "first-come, first-served" basis from a diminishing pool of funds. Given those realities, the opportunity for eligible recipients like Plaintiffs to apply through BOA under a future revised policy is dwindling each minute. For example, Wells Fargo Bank already reached its lending capacity and closed the PPP loan intake form. Wells Fargo (@WellsFargo), Twitter (Apr. 5, 2020, 10:01 p.m.), https://twitter.com/WellsFargo/status/1246981234582081536.

As a direct consequence of the unlawful eligibility requirements imposed by BOA, at least 145,000 (and likely tens of thousands more) applicants stand in line ahead of Plaintiffs for the "first-come, first-served" loans that are designed to "provide relief to America's small businesses expeditiously." Ex. C, Burr Aff. ¶ 11; Ex. D, Storm Aff. ¶ 12. Without an opportunity to apply for these PPP loans through immediate relief, Plaintiffs and other eligible businesses are unlikely to survive long enough to achieve any meaningful success at trial. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. These businesses will be irreparably harmed as they will no longer exist unless BOA's unlawful application requirements are removed immediately.

LEGAL STANDARD

"The purpose of a temporary restraining order (TRO) or a preliminary injunction is to 'protect the status quo and to prevent irreparable harm during the pendency of a lawsuit, ultimately

to preserve the court's ability to render a meaningful judgment on the merits.'" *J.O.P. v. United States Dep't of Homeland Security*, 409 F. Supp. 3d 367, 375 (D. Md. 2019) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)). "In order to receive a preliminary injunction, a plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat'l Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). "The substantive requirements for a TRO and a preliminary injunction are identical." *J.O.P.*, 409 F. Supp. 3d at 376.

ARGUMENT

I. Plaintiffs are Likely to Succeed on the Merits of Their Claims That BOA Violated and Continues to Violate Federal Law.

As to the first factor, Plaintiffs need only demonstrate they are "likely to succeed at trial" as to one of the causes of action set forth in the Second Amended Class Action Complaint ("SAC"). *See Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (citing *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013)); *Mayor of Balt. v. Azar*, 392 F. Supp. 3d 602, 613-14 (D. Md. 2019); *see also Bethel Ministries, Inc. v. Salmon*, Civil Case No.: SAG-19-01853, 2020 U.S. Dist. LEXIS 9789, *22 (D. Md. Jan. 21, 2020). Here, Plaintiffs have demonstrated that BOA has applied unlawful eligibility requirements that violate the CARES Act, and that Plaintiffs have suffered cognizable injury as a result. SAC ¶¶ 96-106; *see also* Ex. C, Burr Aff. ¶¶ 9-12; Ex. D, Storm Aff. ¶¶ 12-13.

A. There is an implied cause of action in the CARES Act.

As a preliminary matter, Plaintiffs have an implied cause of action against BOA in accordance with the "rights-creating" language in the CARES Act.[7] "As a matter of black letter law, inferring a private right of action is a matter of statutory interpretation." *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 694-95 (4th Cir. 2019). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "To determine whether a statute creates a federal private right, [courts] look to the statutory text for 'rights-creating' language." *Miller v. GE Capital Mortg. Servs., Inc.*, 124 F. App'x 152, 154 (4th Cir. 2005) (citing *Alexander*, 532 U.S. at 288). "'Rights-creating language' is language that 'explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff.'" *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)) (alterations in original).

In *Planned Parenthood*, the Fourth Circuit explained that "Congress's use of the phrase 'any individual' is a prime example of the kind of 'rights-creating' language required to confer a personal right on a discrete class of persons . . . ." 941 F.3d at 697. There, the class of persons was Medicaid beneficiaries; here, the class is "any business concern." To the point, Congress provided "any business concern" with the right under PPP to become eligible for a "covered loan" so long as the business meets the criteria set forth in section 1102(a)(1) of the CARES Act. *See* CARES Act § 1102(a)(1) (to be codified at 15 U.S.C. § 636(a)(36)(D)(i)). The purpose of granting "any business concern" the right to apply for PPP loans is to "provide relief to America's small businesses expeditiously," especially those "businesses affected by the coronavirus pandemic." Ex. A, Interim Final Rule at 3, 5. To further ensure that "any business concern" has the right to

[7] For this Court's convenience, sections 1102 and 1109 of the CARES Act are attached as Exhibit G.

submit an application to BOA, Congress removed from PPP the "credit elsewhere" requirement that would ordinarily apply to SBA loans. *Id.* (to be codified at 15 U.S.C. § 636(a)(36)(I)). And, Congress mandated that any regulations issued by the Secretary of the Treasury "shall" contain "terms and conditions that, to the maximum extent practicable, are consistent with" the borrower eligibility criteria to be codified at 15 U.S.C. § 636(a)(36)(D)(i). *See* CARES Act § 1109(d)(2)(B)(i).

Senator Van Hollen and Representative Trone have recently explained that the unlawful eligibility criteria imposed by BOA "are outside the purpose of the program, are unnecessary at best and, in the case of some of our constituents, harmful to their ability to access the program." Ex. F, Van Hollen & Trone Letter to Mnuchin. This is because Congress intended that "any business concern" shall have an enforceable right to apply for a PPP loan in accordance with the eligibility criteria set forth in section 1102 of the CARES Act—not arbitrary criteria imposed by the lender. *See Daniels v. Hous. Auth. of Prince George's Cnty.*, 940 F. Supp. 2d 248, 266 (D. Md. 2013), *aff'd*, 550 F. App'x 138 (4th Cir. 2013) (finding that 42 U.S.C. § 1437(f) "create[d] a federal right to a properly calculated subsidy based upon the participant's income," and an implied right to have the local housing authority follow proper procedures and methods when verifying a participant's income); *see also Rabin v. Wilson-Coker*, 362 F.3d 190, 201 (2d Cir. 2004) (finding that 42 U.S.C. § 1396r-6 created a private cause of action where the statutory language "reflect[ed] Congress's intention to confer a right to TMA upon persons who meet the various eligibility requirements"); *Hensley v. Koller*, 722 F.3d 177, 182 (4th Cir. 2013) (finding that 42 U.S.C. § 673 created a private cause of action to enforce a "right to parental concurrence in subsidy readjustment determinations"); *Price v. City of Stockton*, 390 F.3d 1105, 1113-14 (9th Cir. 2004) (finding that 42 U.S.C. § 5304(d) created a private cause of action where the statute established an individual

right to "reasonable benefits," the rights asserted were not vague or amorphous, and the statute was clearly mandatory). If a small business that has been denied the ability to submit an application cannot enforce that right immediately, then there will be no right to enforce. The PPP loan program under the CARES Act is open for a short window of time and has ever shrinking funds that when dissipated are gone for good.

B. BOA's eligibility requirements are unlawful and violate section 1102 of the CARES Act.

For several reasons, Plaintiffs are likely to succeed on the merits of establishing that BOA's unlawful gating requirements interfere with and prevent Plaintiffs from exercising their statutory right to apply for PPP loans under Section 1102 of the CARES Act.

BOA is refusing to apply the eligibility criteria set forth in the CARES Act and the Interim Final Rule, which list the sole requirements to apply for a PPP loan. *See* CARES Act § 1102(a)(2) (defining "eligible recipient" as "an individual or entity that is eligible to receive a covered loan"); Ex. A, Interim Final Rule at 5-6. The Interim Final Rule directs federally insured depository institutions to "follow their existing [Bank Secrecy Act] protocols when making PPP loans to either ***new or existing customers*** who are eligible borrowers under the PPP." *Id.*, Interim Final Rule at 21-22 (emphasis added). In fact, the Administrator has determined there is a "likelihood that ***many borrowers will be new clients of the lender***." *Id.*, Interim Final Rule at 27 (emphasis added). The CARES Act was clearly intended to allow "new" clients of a lender to apply for PPP loans, provided the applicants otherwise met the statutory criteria. BOA has unlawfully foreclosed that ability to "new clients of the lender" as well as existing clients who do not meet BOA's unlawful gating requirements.

Here, Plaintiffs meet the statutory criteria set forth in section 1102 of the CARES Act and are eligible recipients of covered loans under PPP. *See* Ex. C, Burr Aff. ¶¶ 3-6; Ex. D, Storm Aff.

¶¶ 2-4, 6. Plaintiffs do not, however, meet the unlawful criteria that has been arbitrarily established by BOA:

> Small Business clients with a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 *or* a Small Business checking account opened no later than February 15, 2020 and do not have a business credit or borrowing relationship with another bank are eligible to apply for the Paycheck Protection Program through our bank.

Ex. E, Bank of America, *We're here for our small business clients*. Regardless of whether the applicant is an "eligible recipient" under the CARES Act, BOA refuses to accept the PPP loan application unless the business concern meets BOA's self-imposed criteria described in Exhibit E. *See* Ex. C, Burr Aff. ¶¶ 9-11; Ex. D, Storm Aff. ¶¶ 10-11.

By imposing the requirement that an applicant "not have a business credit or borrowing relationship with another bank," BOA is reviving the "credit elsewhere" requirement that was expressly excluded from the PPP loan program. *See* CARES Act § 1102(a)(1), to be codified at 15 U.S.C. § 636(a)(36)(I) ("During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere . . . shall not apply to a covered loan."). In doing so, BOA is violating sections 1102(a)(1) and 1109(d)(2)(B)(i) of the CARES Act by imposing eligibility requirements that are not set forth in the statute.

BOA is introducing "ineligibility" requirements to application for a PPP loan that are contrary to the provisions of the Interim Final Rule and 13 C.F.R. § 120.110, by requiring each applicant to certify that it does not have a business credit or borrowing relationship with another bank. *See* Ex. E, Bank of America, *We're here for our small business clients*. The CARES Act *does* require an applicant to certify that it "does not have an application pending for a loan under section 7(a) of the Small Business Act (15 U.S.C. 636(a)) for the same purpose," *see* CARES Act

§ 1109(f)(1), but there is no requirement in the law that an applicant make the certification required by BOA.

In fact, nothing in the CARES Act or Interim Final Rule allows for the differentiation of a small business loan under the federal program between a bank's depository clients and their lending clients or that an applicant must be an existing client of BOA. Nothing in the law allows for BOA to determine who can participate in the federal program based on that improper and unlawful criteria. BOA is unlawfully denying access to PPP loans to small businesses that either do not have a lending relationship with BOA, or that have a borrowing relationship with another bank. *See* Ex. C, Burr Aff. ¶¶ 9-11; Ex. D, Storm Aff. ¶¶ 10-11. Such discriminatory actions are wholly inconsistent with the plain text of the CARES Act, and Plaintiffs will succeed in establishing that BOA has acted in violation of federal law.

II. Plaintiffs Will Suffer Irreparable Harm if BOA Continues to Prevent Eligible Businesses From Applying for PPP Loans.

Absent a temporary restraining order and preliminary injunction, the "first-come, first-served" PPP loans will not be available at the time of trial and thus any recovery for wrongs committed by BOA will be insufficient to save Plaintiffs. *See* Ex. A, Interim Final Rule at 3-4 ("Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020."). Moreover, without an opportunity to apply for these PPP loans through BOA, Plaintiffs and other eligible businesses are unlikely to survive long enough to achieve any meaningful success at trial. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. Plaintiffs—together with their employees and the communities in which they operate—will suffer immeasurable and irreparable harm without a preliminary injunction to remove the unlawful

barriers to entry that have been erected by BOA. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13.

"Generally, 'irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) (quoting *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973)). "[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied." *Id.* (citing *Merrill-Lynch, Pearce, Fenner & Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985)). More to the point, irreparable harm may exist "where the moving party's business cannot survive absent a preliminary injunction . . . ." *Hughes Network Sys., Inc. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) (citing *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). *See also Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981); *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 972, 994 (N.D. Cal. 2013), *aff'd*, 729 F.3d 967 (9th Cir. 2013) (collecting cases). "But each case for injunctive relief must be examined on its own facts." *Brown v. Bimbo Foods Bakeries Distribution, LLC*, Action No. 2:16cv476, 2016 U.S. Dist. LEXIS 162742, *23 (E.D. Va. Sept. 13, 2016).

"Courts have 'found irreparable harm where a party is threatened with the loss of a business,' particularly when the 'very viability' of the business is at risk." *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 296 F. Supp. 3d 442, 457 (E.D.N.Y. 2017) (quoting *Tom Doherty Assocs, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37-38 (2d Cir. 1995)). *See also Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 345 F. Supp. 3d 614, 653-54 (E.D. Va. 2018) (collecting cases for proposition that "permanent loss of a business constitutes irreparable injury"); *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2d Cir. 1995) ("Major disruption of a business can be as

harmful as its termination and thereby constitute irreparable injury."); *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978) ("A threat to the continued existence of a business can constitute irreparable injury."). As the Second Circuit explained in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), businessowners desire to continue operating their business, "not to live on the income from a damage award." *Id.* at 1205 (quoted with approval in *Federal Leasing*, 650 F.2d at 500).

Here, with each passing minute that BOA unlawfully prioritizes its selected clientele over Plaintiffs in contravention of the eligibility requirements in the CARES Act, the PPP loan funds authorized by Congress continue to evaporate, rendering any prospect for relief at trial illusory at best. *See* Ex. A, Interim Final Rule at 3-4 ("Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020."); *id.*, Interim Final Rule at 13 (acknowledging that PPP loans "must be made on or before June 30, 2020," and are provided on a "first-come, first-served" basis); *see also* Ex. C, Burr Aff. ¶ 11; Ex. D, Storm Aff. ¶¶ 12-13. This fact in and of itself satisfies the "irreparable harm" standard. *See Mt. Valley Pipeline, LLC v. 6.56 Acres*, 915 F.3d 197, 218 (4th Cir. 2019) (explaining that a temporary delay in recovery which threatens a party's very existence by "driving it out of business before litigation concludes" may qualify as irreparable harm) (citing *Federal Leasing*, 650 F.2d at 500); *Henderson ex rel. NLRB v. Bluefield Hosp. Co., LLC*, 208 F. Supp. 3d 763, 772 (S.D. W. Va. 2016) (finding irreparable harm "when the remedy will become unavailable unless a preliminary injunction is granted and the district court's judgment, even if it is favorable, will remain unsatisfied").

Further, absent removal of the unlawful barriers preventing eligible businesses from applying for PPP loans, businesses that lack access to loans under the CARES Act will be unable

to continue operations. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. As such, Plaintiffs will suffer irreparable injury to their business operations absent injunctive relief. *See DeVito v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 778 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991) (finding irreparable harm where the movant "experienced significant declines in gross revenue which . . . necessitated laying off some of its employees," and "estimated that its business cannot continue to operate at current levels for more than six months"); *Salt Pond Assocs. v. United States Arm Corps. of Engineers*, 815 F. Supp. 766, 784-85 (D. Del. 1993) (finding irreparable harm where the moving party's injuries "are not merely a loss of profits," but also left the company facing "complete devastation" if the injunction did not issue); *Faison-Alexander Place III, LLC v. Best Buy Stores, L.P.*, No. 5:08-CV-354-H, 2008 U.S. Dist. LEXIS 125695, *6-7 (E.D.N.C. Aug. 8, 2008) (holding that "loss of its construction loan constitute[d] an irreparable harm to plaintiff' where the plaintiff's lender refused to extend additional credit to the project).

III. The Balance of Equities Favors Plaintiffs, and the Public Interest Will be Served by Allowing Eligible Businesses to Apply for PPP Loans through BOA.

The remaining factors, *i.e.*, the balance of equities and the public interest, also weigh in favor of granting preliminary injunctive relief to Plaintiffs. Courts often consider these factors together. *See Di Biase*, 872 F.3d at 235-36; *Bethel Ministries*, 2020 U.S. Dist. LEXIS 9789, at *42.

With regard to the balance of equities, the "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)). "The entire preliminary injunction inquiry, and particularly the requirement that the district court carefully balance the harms to the parties, is intended to ensure that the district court

'chooses the course of action that will minimize the costs of being mistaken.'" *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (quoting *Am. Hospital Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986)). Plaintiffs are simply demanding that they be permitted to apply for the PPP loans on equal footing with BOA's existing lender clients and the other "eligible recipients" under federal law. BOA will suffer no cognizable or credible harm by accepting applications from businesses that are eligible under the statutory framework set forth in the CARES Act. On the other hand, as discussed *supra*, Plaintiffs are likely to be without a remedy at the time of trial and will suffer irreparable harm if a temporary restraining order and preliminary injunctive relief are not granted. *See* Ex. A, Interim Final Rule at 3-4, 13; *see also* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. Therefore, the balance of equities favors Plaintiffs. *See Mt. Valley Pipeline*, 915 F.3d at 218; *see also Int'l Brotherhood of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 239 F. Supp. 3d 906, 916 (D. Md. 2017) (holding that the balance of equities favored the Union where "even if the Union were to prevail in arbitration, the return of any eliminated positions would not be feasible").

Finally, enjoining BOA from unlawfully preventing eligible businesses from applying for PPP loans will further the public interest and intent of the CARES Act; that is, to "provide relief to America's small businesses expeditiously" in an attempt to remedy the "dramatic decrease in economic activity nationwide." Ex. A, Interim Final Rule at 3. The public has an interest in ensuring compliance with statutory requirements designed to protect the public health and welfare. *See Md. Dep't of Human Resources v. United States Dep't of Agriculture*, 617 F. Supp. 408, 416 (D. Md. 1985) (holding that the public had "an interest in the proper construction and implementation of the Food Stamp Act and the protect of those whom the Act was designed to assist"); *see also Hospira, Inc. v. Burwell*, Case No.: GJH-14-02662, 2014 U.S. Dist. LEXIS

115393, *12-13 (D. Md. Aug. 19, 2014) (holding that the public has an interest "in an agency's compliance with its governing statute" which was designed "to protect the public health").

Thus, these final two factors also weigh in favor of granting injunctive relief to Plaintiffs. *E.g.*, *Ga. Voc. Rehab. Agency Bus. Enter. Program v. United States*, 354 F. Supp. 3d 690, 701 (E.D. Va. 2018) (holding that the balance of equities and public interest in granting a TRO favored the plaintiffs where they would "suffer the loss of major funds for programs that train blind vendors and [would] potentially cause the termination of employees, including those at the management level").

IV. The Court Should Waive the Bond Requirement or, in the Alternative, Require the Posting of a Nominal Bond.

"The district court has discretion in fixing the amount for the security bond, and in circumstances where the risk of harm is remote, a nominal bond may suffice." *Potomac Conf. Corp. v. Takoma Academy*, Civil Action No. DKC-13-1128, 2014 U.S. Dist. LEXIS 27123, *73 (D. Md. Mar. 4, 2014) (citing *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999)). "The amount of the bond . . . ordinarily depends on the gravity of the potential harm to the enjoined party." *Hoechst Diafoil*, 174 F.3d at 421 n.3.

Plaintiffs' likelihood of success on the merits and the absence of substantial risk of harm to BOA weigh in favor of waiving the bond requirement in these circumstances. *See Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 630 (D. Md. 2011); *see also Beck v. Hurwitz*, 380 F. Supp. 3d 479, 485 (M.D.N.C. 2019). Alternatively, Plaintiffs request that they be permitted to post a nominal bond for the temporary restraining order or preliminary injunction to take effect. *See Hassay v. Mayor of Ocean City*, 955 F. Supp. 2d 505, 527 (D. Md. 2013) (setting the bond amount at $1.00 where "any costs suffered by defendants during the period of the preliminary injunction will be minimal or nonexistent"); *Potomac Conf.*, 2014 U.S. Dist. LEXIS 27123, at *74.

CONCLUSION

For each of the foregoing reasons, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction should be granted and BOA should be enjoined from applying eligibility requirements other than those requirements set forth in section 1102 of the CARES Act to any applicant for a loan under the Paycheck Protection Program. Further, BOA should be ordered to issue a statement informing the general public that the eligibility requirements enjoined herewith are no longer in effect.

Respectfully submitted,

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