

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**Edward L. Scherer;
Individually, and on behalf of all
others similarly situated,
Plaintiffs,**

v.

**Wells Fargo Bank, N.A.
Defendant.**

**Civil Action
File No. 4:20-cv-01295**

Jury Trial Demanded

**MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

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**PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

COME NOW PLAINTIFFS, Edward L. Scherer (“Mr. Scherer”) and Donald Kowall (“Mr. Kowall”) (together, the “Plaintiffs”), on behalf of themselves and all others similarly situated, and pursuant to Fed. R. Civ. P. 65, file their Motion for Temporary Restraining Order and Preliminary Injunction. Plaintiffs would respectfully show the Honorable Court as follows:

**I.
Introduction**

Plaintiffs move for a temporary restraining order and preliminary injunction to enjoin Defendant Wells Fargo Bank, N.A. (“Defendant” or “Wells Fargo”) from imposing eligibility requirements other than those set forth in Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) upon any business concern, nonprofit organization, veterans organization, or Tribal business

concern attempting to apply for a loan with Wells Fargo under the CARES Act's Paycheck Protection Program ("PPP"). Plaintiffs respectfully seek the Court to order Wells Fargo to do the following within two (2) hours of the entry of the temporary restraining order and/or preliminary injunction: (a) to remove its illegal eligibility requirement that is the subject of this Motion, and (b) post a statement on its website and its public Twitter and Facebook accounts that the eligibility requirement enjoined herein is no longer in force and effect, and that in accordance with the CARES Act, any small business may apply for a PPP Loan with Wells Fargo.

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 hundreds of thousands of small businesses in this country and the collapse of our economy. In response to the unprecedented crisis impacting every American small business and the tens of millions of employees who depend on them, the federal government promptly enacted the CARES Act to enable America's small businesses to keep their doors open and their employees employed by creating the PPP, which allows lenders to give federally guaranteed loans to protect payroll expenses for two months. The loan pool of \$349 billion, however, is limited in size, and the PPP is run on a strict first-come-first-served basis.¹

¹ It is Plaintiffs' understanding that as of the filing of this Motion, the \$349 billion pool had been depleted, but that Congress is in the process of allocating an additional \$320 billion in funds to the program.

In the midst of an ongoing national emergency, and instead of using this program to help small businesses as Congress intended, Wells Fargo instituted privileged discriminatory policies of corporate greed over the needs of America's small businesses. Wells Fargo did so 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, Wells Fargo chose to prioritize its existing business clients over its remaining depository clients and over other non-depository small businesses whose very existence is at stake in this litigation.

Absent a temporary restraining order and preliminary injunction, Plaintiffs will effectively be precluded from applying for a PPP Loan with Wells Fargo 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."

Wells Fargo's unlawful barriers to PPP loan eligibility 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.

II. Statement of Facts

A. PPP loans are designed specifically to provide immediate emergency assistance to Plaintiffs and other eligible businesses.

On March 27, 2020, President Trump 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.”² The CARES Act was designed, in part, to provide “immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency.” *Id.*, 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.*, 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. *Id.*, 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 per small business, which can be conditionally forgivable, to encourage

² **Exhibit – A:** 13 CFR Part 120, Interim Final Rule, Docket No. SBA-2020-0015, April 2, 2020 (the “Interim Final Rule”).

businesses to retain employees. Ex. A, Interim Final Rule at 3-4. As part of the 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. *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:³

- 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.

³ **Exhibit – B:** Lender Application Form – Paycheck Protection Program Loan Guarantee ("Form 2484") (last accessed Apr. 19, 2020).

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. Ex. A, Interim Final Rule at 5-6. Notably, there is no requirement in the law that the applicant must have an existing business checking account with the lender as of February 15, 2020, or a borrowing relationship with the lender. The Interim Final Rule lists reasons why an applicant may be deemed “ineligible.” *Id.*, at 6-7; see also 13 C.F.R. § 120.110. A specific prior business relationship of any kind with a lender (or lack thereof) appears nowhere in the law.

Importantly, 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.*, at 3-4. Thus, Plaintiffs who do not meet Wells Fargo’s unlawful eligibility requirements cannot apply for these “first-come, first-served” loans unless the gating requirements are removed without further delay.

B. Wells Fargo prevented eligible businesses from applying for PPP Loans under the CARES Act.

As soon as Wells Fargo began accepting PPP Loan applications online from what should have been all small businesses, Wells Fargo unlawfully limited PPP

Loan applications to only those small businesses that had a preexisting “Wells Fargo business checking account as of February 15, 2020.”⁴

- i. Eligible recipients were denied the opportunity to apply for PPP loans through Wells Fargo.

Among numerous other small businesses that have contacted Plaintiffs’ counsel from across the U.S. regarding similar experiences with Wells Fargo’s eligibility requirements is **Plaintiff Donald Kowall**, an independent contractor based in Sacramento, California, providing project management and information technology consulting services since 2000.⁵ Mr. Kowall, a long-time Wells Fargo customer, attempted to submit an application for a PPP Loan with Wells Fargo, but was barred from doing so because he did not have a business checking account with the bank even though his small business otherwise met the eligibility requirements in section 1102(a)(1) of the CARES Act. *Id.* Mr. Kowall’s business does not have a ‘business checking account’ with Wells Fargo Bank. *Id.*, at ¶6. Since 2011, however, Mr. Kowall and his business have been a loyal Wells Fargo customer. *Id.* Mr. Kowall has one personal checking account, one savings account, and one credit card with Wells Fargo. *Id.* Also, in the past, Mr. Kowall took out a loan with Wells Fargo, which was paid off in 2019. *Id.*

⁴ **Exhibit – C**: Wells Fargo’s COVID-19 update regarding the Small Business Administration Paycheck Protection Program, at <https://update.wf.com/coronavirus/paycheckprotectionprogram/> (last accessed Apr. 22, 2020).

⁵ **Exhibit – D**: Sworn Declaration of Donald Kowall.

Prior to March 30, 2020, Mr. Kowall had heard of the PPP program, and he monitored the news actively to see when it was to start. *Id.*, at ¶7. He learned that on March 30, 2020, the Federal Government (via SBA) started the PPP program. *Id.* On April 2, 2020, Mr. Kowall learned through the news media (and received no communication from Wells Fargo) that banks would start accepting PPP loan applications beginning on April 3, 2020. *Id.*, at ¶8. Wells Fargo, however, was not taking applications, and their website set no dates as to when he would be able to apply for a PPP loan for his small business. *Id.* Further, Wells Fargo's website referred only to the SBA.gov PPP website in terms of qualification information at that time. *Id.*

On April 4, 2020, Mr. Kowall learned that Wells Fargo did "open" the application process. *Id.*, at ¶9. But even though he has been a business customer with Wells Fargo since 2011, he received no communication from Wells Fargo indicating that their web portal was opened and receiving PPP loan requests. *Id.*

On April 4, 2020, upon independently discovering that Wells Fargo's web portal was open (again unannounced by them), Mr. Kowall attempted to apply for a PPP loan with Wells Fargo. *Id.*, at ¶10. At this time, he discovered that Wells Fargo was limiting (in Mr. Kowall's case, preventing) his application for a PPP loan because he did not have a business checking account with the bank as of February 15, 2020. *Id.* Mr. Kowall attempted to contact Wells Fargo using its toll-free customer service number, by going to a local branch, and by going to its

headquarters, all with no success in even being able to apply for the PPP Loan assistance. *Id.*

Then, on April 5, 2020, Mr. Kowall attempted to apply again with Wells Fargo for PPP Loan assistance, but could not do so. *Id.*, at ¶11. Because he did not have a business checking account, Mr. Kowall could not apply for a PPP loan with Wells Fargo. *Id.* On the same day, Wells Fargo closed its web portal, claiming of portfolio limitations from the federal government. *Id.* Again, Wells Fargo did not communicate to anyone (including Mr. Kowall) the specifics or reasons for the web portal being closed. *Id.*

April 6, 2020, Mr. Kowall contacted the SBA Disaster Grant assistance team. *Id.*, at ¶12. He advised them of the issue, but was told they were not aware of the problems with Wells Fargo. *Id.* Mr. Kowall then continued to attempt to contact Wells Fargo's customer support with no success. *Id.*, at ¶13. From April 6 to April 17, 2020, he made numerous attempts to contact Wells Fargo, and did not receive any response from them. *Id.*

On April 7, 2020, Plaintiff Kowall managed to make contact with the Business Bank representative at the main San Francisco Wells Fargo Branch, who attempted to assist Mr. Kowall but could garner no information from internal Wells Fargo contacts regarding Mr. Kowall's inability to apply for the PPP Loan. *Id.*, at ¶14. On April 9 or 10, 2020, Mr. Kowall managed to get a hold of the "Wells Fargo Small business Customer Service Team" to whom he explained the situation, but they had

no answers and said they would open a case for further pursuit. *Id.*, at ¶15. Then, on April 12 through 15, 2020, Plaintiff Kowall followed up with the Customer Service team daily. *Id.* They took no action to assist him and provided no information about how Mr. Kowall could succeed in applying for a PPP loan with Wells Fargo. *Id.*

On April 15, 2020, Wells Fargo's Small Business Support team confirmed that Mr. Kowall's case was still not assigned, but promised assignment and follow-up. *Id.*, at ¶16. To date, however, there has been no follow-up from Wells Fargo, and Mr. Kowall is yet to be able to apply for a PPP loan with Wells Fargo for his small business. *Id.*

Plaintiff Kowall felt that he had the best chance of applying for and obtaining a PPP loan for his small business with Wells Fargo because of his long personal and business relationship with them since 2011. *Id.*, at ¶17. However, having been delayed and rejected by Wells Fargo, Mr. Kowall now fears, like countless other small businesses across the country, that his business will not be able to obtain a PPP loan anywhere, as he understands that the loan pool is either almost depleted or has already been depleted. *Id.*

Knowing that the funds would be depleted on a first-come-first-served basis, even though Mr. Kowall promptly did everything to obtain a PPP loan from Wells Fargo, he was flat-out prevented by Wells Fargo to get the loan his business desperately needed. *Id.*, at ¶18. With a PPP loan, his business would have continued to pay his wages and remained open. *Id.* Now its future is in doubt. *Id.*

Plaintiff **Edward L. Scherer** shares unfortunately a similar fate. Mr. Scherer is a “small business” as defined under the SBA guidelines, and qualifies as an eligible applicant for a PPP loan.⁶ Mr. Scherer’s business did not have a “business checking account” with Wells Fargo as of February 15, 2020, or at any time thereafter, and was thus ineligible to apply for a PPP loan under Wells Fargo’s self-declared criterion that created an impermissible restriction upon, and violated, the CARES Act. *Id.* Like many others who have been prevented by Wells Fargo to even apply for the PPP Loan, Mr. Scherer’s business has suffered while he watches a significant portion of the 349 billion taxpayer dollars (including Mr. Scherer’s tax dollars) being given away to Wells Fargo’s selected “business checking account” customers at his expense. *Id.*, at ¶4. Should there be another infusion of cash into the PPP program by Congress, Mr. Scherer does not want Wells Fargo to continue to place a preexisting “business checking account” requirement that causes him and many thousands of other small businesses to be unfairly locked out of receiving relief for which they are otherwise eligible. *Id.*, at ¶5.

Since the filing of this class action, dozens of small business owners have contacted counsel for Plaintiffs inquiring about how they may join this lawsuit. Not surprisingly, Wells Fargo’s illicit behavior has attracted a lot of interest in this litigation because thousands of small businesses have been damaged by Wells Fargo’s illegal practices that caused damage to the Plaintiffs. The Court has an

⁶ **Exhibit – E**: Sworn Declaration of Edward L. Scherer, ¶3.

opportunity to right this wrong, and to put all small businesses on a fair and level playing field, before the U.S. government injects the highly anticipated additional funds into the PPP Loan program.

- ii. Wells Fargo's unlawful eligibility requirement drew criticism from U.S. Senators, the co-authors of the CARES Act.

Before Wells Fargo instituted its unlawful eligibility requirement, Bank of America engaged in identical behavior (i.e., no small business can apply unless they have a preexisting commercial bank account / banking relationship with the bank) that was immediately criticized by several U.S. Senators. *See Cardin Statement on Launch of Paycheck Protection Program*, Cardin for Maryland (Apr. 21, 2020);⁷ *see* Marco Rubio (@marcorubio), Twitter (Apr. 3, 2020, 11:37 a.m.);⁸ *see also*, April 9, 2020, Letter from U.S. Senators Tim Kaine, Angus S. King, Jr., and Christopher A. Coons to the American Bankers Association.⁹ Nothing in the CARES Act permits a lender from discriminating against a small business applicant based on its status as a 'business account' holder with that financial institution. *See* CARES Act § 1102(a)(1); Ex. A, Interim Final Rule at 5-7. Nothing in the law allows Wells Fargo

⁷ <https://www.cardin.senate.gov/newsroom/press/release/cardin-statement-on-launch-of-paycheck-protection-program>.

⁸ <https://twitter.com/marcorubio/status/1246114718990979075>

⁹ <https://www.kaine.senate.gov/imo/media/doc/KAINE,%20KING,%20&%20COONS%20URG E%20BANKS%20TO%20GIVE%20MORE%20SMALL%20BUSINESSES%20ACCESS%20T O%20PAYMENT%20PROTECTION%20PROGRAM.pdf>

to determine what small businesses can participate in the federal program based on such an improper and unlawful criterion.

C. Wells Fargo’s stated policy does not comply with federal law.

As soon as Wells Fargo began accepting PPP Loan applications online from what should have been all small businesses, Wells Fargo unlawfully limited PPP Loan applications to only those small businesses that had a preexisting “Wells Fargo business checking account as of February 15, 2020.”¹⁰ Therefore, even though an applicant meets the eligibility requirements in the CARES Act, that applicant cannot apply for a PPP loan with Wells Fargo unless as of February 15, 2020, it had a ‘business checking account’ already open at Wells Fargo. *Id.*

On April 3, 2020, Senator Rubio made it clear in his abovementioned Twitter post that if Congress had wanted to impose such an eligibility requirement in the CARES Act, it certainly could have done so. Senator Rubio also made it abundantly clear that the requirement that a small business have a business account “is NOT in the law we wrote & passed or the regulations.”¹¹

¹⁰ **Exhibit – C**: Wells Fargo’s COVID-19 update regarding the Small Business Administration Paycheck Protection Program, at <https://update.wf.com/coronavirus/paycheckprotectionprogram/> (last accessed Apr. 19, 2020).

¹¹ <https://twitter.com/marcorubio/status/1246114718990979075>

- i. Wells Fargo is applying unlawful “ineligibility” criteria contrary to the express eligibility provisions of the CARES Act.

As discussed above, 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. Wells Fargo has decided to institute its own “ineligibility” criterion — that the applicant have a preexisting “Wells Fargo business checking account as of February 15, 2020.”¹² — 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. In this regard, 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 type of preexisting customer relationship with Wells Fargo is not listed in the regulation or in the CARES Act. Nevertheless, Wells Fargo has determined that a small business cannot apply for a PPP loan through Wells Fargo if the applicant did not have a business checking account with the bank as of February 15, 2020. Ex. C.

¹² **Exhibit – C:** Wells Fargo’s COVID-19 update regarding the Small Business Administration Paycheck Protection Program, at <https://update.wf.com/coronavirus/paycheckprotectionprogram/> (last accessed Apr. 19, 2020).

- ii. Wells Fargo's unlawful application requirements have caused immediate and irreparable harm to Plaintiffs and other eligible businesses.

Although both Plaintiffs qualify as eligible recipients under the CARES Act, they do not meet Wells Fargo's arbitrary and unlawful eligibility criteria, and the future of their businesses is in jeopardy without the PPP loan funds.

Knowing that the funds would be depleted on a first-come-first-served basis, even though Plaintiff Kowall promptly did everything to obtain a PPP loan from Wells Fargo, he was flat-out prevented by Wells Fargo to get the loan his business desperately needed. Ex. E, at ¶18. With a PPP loan, his business would have continued to pay his wages and remained open. *Id.* Now its future is in doubt. *Id.*

Similarly, Plaintiff Scherer's business has suffered because of his inability to work in Harris County during the lockdown caused by the ongoing pandemic, and in order to alleviate this, the government promptly passed the CARES Act. Ex. E, at ¶4. However, Wells Fargo's "business checking account" requirement is preventing the sole remedy Mr. Scherer and his small business have, allowing the Defendant to unlawfully prevent Mr. Scherer from receiving the federal government's much needed assistance and relief under the PPP Loan program. *Id.*

As a direct consequence of Wells Fargo's unlawful eligibility requirement, tens of thousands of likely applicants who had a business checking account with Wells Fargo as of February 15, 2020, stand in line ahead of the Plaintiffs for the first-come-first-served loans that are designed to provide relief to America's small

businesses expeditiously. Stated more accurately, Wells Fargo is not even allowing Plaintiffs to stand in line. 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. These businesses will be irreparably harmed as they will no longer exist unless Wells Fargo's unlawful application requirements are removed immediately.

III. Legal Standard

A temporary restraining order operates to preserve the status quo and prevent irreparable harm just so long as is necessary to hold a hearing, and no longer. *Granny Goose Foods, Inc. v. Bd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). To be entitled to a temporary restraining order, a party must demonstrate it meets a four-prong test: (1) a substantial likelihood of success on the merits; (2) a substantial threat of immediate and irreparable harm for which it has no adequate remedy at law; (3) that greater injury will result from denying the temporary restraining order than if it is granted; and (4) that a temporary restraining order will not disserve the public interest. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 582 (5th Cir. 2013); *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). "The decision to grant or deny a preliminary injunction is discretionary with the district court." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

IV.
Argument and Authorities

A. There is a substantial likelihood that Plaintiffs will succeed on the merits of their claim that Wells Fargo violated and continues to violate federal law.

Plaintiffs have amply demonstrated that Wells Fargo has implemented an unlawful eligibility requirement that violates the CARES Act, and that Plaintiffs have suffered cognizable injury as a result. To avoid repetition, Plaintiffs refer the Court to Section II, Statement of Facts, which amply demonstrates that not only does Wells Fargo not have any right to create its own eligibility criteria, but also how such requirements are being criticized by the very U.S. Senators who drafted and passed the CARES Act. As such, there is a substantial likelihood that Plaintiffs will succeed on the merits of their claim because Plaintiffs have demonstrated that Wells Fargo has applied unlawful eligibility requirements that violate the CARES Act, and that Plaintiffs have suffered cognizable injury as a result of Defendant's violation.

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

Plaintiffs have an implied cause of action against Wells Fargo in accordance with the "rights-creating" language in the CARES Act.¹³ "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). The Fifth Circuit has ruled that Congressional intent and

¹³ **Exhibit – F**: Sections 1102 and 1109 of the CARES Act.

“rights-creating” language exists when a statute speaks in terms of individual concerns instead of institutional policy and practice. *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 702-703 (5th Cir. 2007). Or, when the statute is focused on meeting the needs of particular persons (or a group of persons) instead of an ‘aggregate’ focus. *Id.* Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable. *Id.* “‘Rights-creating language’ is language that ‘explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff.’” *Miller v. GE Capital Mortg. Servs., Inc.*, 124 F. App’x 152, 154 (4th Cir. 2005) (citing *Alexander*, 532 U.S. at 288, and quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)) (alterations in original).

Here, 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 submit an application to Wells Fargo, 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 similar unlawful eligibility criteria imposed by another bank, Bank of America, “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. G, 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. 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.

- ii. Wells Fargo’s eligibility requirements are unlawful and violate Section 1102 of the CARES Act.

Plaintiffs are likely to succeed on the merits of establishing that Wells Fargo’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.

Wells Fargo 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 supplied]. 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. Wells Fargo has unlawfully foreclosed that ability to “new clients of the lender” as well as existing clients who do not meet Wells Fargo’s unlawful gating requirements.

Both 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. D, at ¶¶3, 5, 17, 18; Ex. E, at ¶3. Plaintiffs do not, however, meet the unlawful criterion that has been arbitrarily established by Wells Fargo – small business clients with a business checking account with Wells Fargo as of February 15, 2020. Ex. C. Regardless of whether the applicant is an “eligible recipient” under the CARES Act, Wells Fargo refuses to accept the PPP loan application unless the business concern

meets Wells Fargo's self-imposed criterion described in Exhibit C. *See*, Ex. D, at ¶10; Ex. E, at ¶¶3, 5. Nothing in the CARES Act or Interim Final Rule allows for the differentiation of a small business loan under the federal program by requiring that an applicant must be an existing client of Wells Fargo. And, nothing in the law allows for Wells Fargo to determine who can participate in the federal program based on that improper and unlawful criterion. Wells Fargo is unlawfully denying access to PPP loans to small businesses that did not have a 'business checking account' with the bank on or before February 15, 2020. Such a discriminatory action is wholly inconsistent with the plain text of the CARES Act, and Plaintiffs will succeed in establishing that Wells Fargo has acted in violation of federal law.

B. There exists a substantial threat to Plaintiffs of immediate and irreparable harm without an adequate remedy at law if Wells Fargo continues to prevent eligible businesses from applying for PPP Loans.

For a court to issue a temporary restraining order, there must be a substantial threat that irreparable harm will result if the emergency motion is not granted. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). 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 Wells Fargo 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 Wells Fargo, Plaintiffs and other eligible businesses are unlikely to survive long enough to achieve any meaningful success at trial. Plaintiffs will suffer immeasurable and irreparable harm without a preliminary injunction to remove the unlawful barriers to entry that have been erected by Wells Fargo. Ex. D, Ex. E.

Here, with each passing minute that Wells Fargo 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). This fact in and of itself satisfies the “irreparable harm” standard. Further, absent removal of the unlawful barrier preventing eligible businesses from applying for PPP loans, many of these businesses that lack access to loans under the CARES Act will be unable to continue operations in these dire circumstances that result from no fault of their own. As such, Plaintiffs will suffer irreparable injury to their business operations absent injunctive relief.

C. Greater injury will result if Wells Fargo continues to prevent eligible businesses from applying for PPP Loans, and no injury will result if Wells Fargo follows Section 1102 of the CARES Act.

Plaintiffs are simply demanding that they be permitted to apply for the PPP loans on equal footing with Wells Fargo's existing business clients and the other "eligible recipients" under federal law. By removing an impermissible gating impediment, Wells Fargo will suffer no cognizable or credible harm by accepting applications from businesses (on a first-come-first-served basis) that are eligible under the statutory framework set forth in the CARES Act. Wells Fargo will suffer no injury because the CARES Act will make the same compensation to Wells Fargo for servicing a PPP loan to its own business customers, or a PPP loan to a customer who did not have a business checking account with it as of February 15, 2020. On the other hand, as discussed herein, 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.

D. The temporary restraining order will not disserve the public interest; on the contrary, it will immediately serve the public interest in this time of great need and desperation, and will restore faith in a process that is already causing deep distrust in how banks such as Wells Fargo are administering the PPP Loan Program.

Enjoining Wells Fargo 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. Wells Fargo would be hard-pressed to argue otherwise.

E. The Court should waive the bond requirement, or in the alternative, require posting a nominal bond.

Plaintiffs are small business owners who have been ravished by the current state of our nation, and do not have the ability to post a bond. Further, given the high likelihood of success on the merits discussed herein, the public interest served, and the complete non-existence of any conceivable damage to Wells Fargo by simply following the CARES Act, the Court should waive the bond. In this regard, the Fifth Circuit has held as follows: “In holding that the amount of security required pursuant to Rule 65(c) ‘is a matter for the discretion of the trial court,’ we have ruled that the court “may elect to require no security at all.” *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996); *Corrigan Dispatch Company v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir.1978); *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084, 1094 (5th Cir. Unit B Feb. 1981). As such, Plaintiffs respectfully ask the Honorable Court to either waive the bond, or to set bond at the nominal sum of \$100.

**IV.
Conclusion and Prayer**

WHEREFORE, Plaintiffs respectfully request that their Motion for Temporary Restraining Order and Preliminary Injunction be granted and Wells

Fargo 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, Plaintiffs respectfully request that Wells Fargo be ordered to issue a statement informing the general public that the eligibility requirements enjoined herewith are no longer in effect. Plaintiffs also seek the Court to waive the bond requirement, or in the alternative, set bond at the nominal sum of \$100.

Plaintiffs attach a proposed Order.

Respectfully submitted,

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By: /s/ Salar Ali Ahmed

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**and for Members of
the nationwide Class**

CERTIFICATE OF SERVICE

Certificate of service to be filed separately after undersigned counsel has had the opportunity to forward this Motion to Defendant's counsel. Plaintiffs' counsel is currently attempting to ascertain who will represent the Defendant in response to this Motion.

/s/ Salar Ali Ahmed
Salar Ali Ahmed

CERTIFICATE OF CONFERENCE

Certificate of conference to be filed separately after undersigned counsel has had the opportunity to confer with Defendant's counsel. Plaintiffs' counsel is currently attempting to ascertain who will represent the Defendant in response to this Motion.

/s/ Salar Ali Ahmed
Salar Ali Ahmed