

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

PROFILES, INC.,

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PROLINE PRODUCTS, INC.
69 South Turnpike Road
Wallingford, Connecticut 06492

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DIASPORA SALON, LLC
2412 North Charles Street
Baltimore, Maryland 21218, and

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ELITE SECURITY GROUP, LLC
8172 Poinsett Terrace,
Pasadena, Maryland 21122,

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**CIVIL ACTION NO. 1:20-cv-00894-SAG
SECOND AMENDED CLASS ACTION
COMPLAINT**

**Individually, for themselves and for all
others similarly situated,**

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PLAINTIFFS,

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v.

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BANK OF AMERICA CORPORATION,

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and

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BANK OF AMERICA, N.A.,

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DEFENDANTS.

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SECOND AMENDED CLASS ACTION COMPLAINT¹

I. INTRODUCTION

1. With the outbreak of coronavirus disease 2019 (“COVID-19”), the People of the

¹ Pursuant to Fed. R. Civ. P. 15(a)(2), Defendants have consented to the filing of the Second Amended Class Action Complaint.

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.

2. In response to this unprecedented crisis impacting every American small business and the millions of employees who depend on them, the federal government enacted emergency legislation 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.

3. Instead of utilizing this program to help small businesses, Defendants Bank of America Corporation ("Bank of America") and Bank of America, N.A. ("BNA") (collectively, "Defendants" or "BOA") have instead privileged discriminatory policies of corporate greed over the needs of America's small businesses.

4. Authorized by Congress and the President under the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748 ("CARES Act") and its loan programs to administer billions of dollars in federal funding to small businesses in a fair, equitable and uniform manner, Defendants initially implemented a loan process that unlawfully prioritized their existing borrowing clients by barring their depository clients and other small businesses from even applying for funds from the governmental loan programs.

5. Following the filing of the Class Action Complaint in this action, BOA revised its policy on April 4, 2020, by allowing depository-only clients to apply for PPP loans but imposed an additional illegal requirement – that depository-only clients must have no credit card or loan with any other bank.

6. BOA has no legal authority under the CARES Act to deny access to, restrict or

otherwise impede the access of small businesses to these critically important business-saving funds. And, the priority of access to these limited “first come, first served” funds is material – the demand is overwhelming as America responds to the economic tsunami of COVID-19 upon small businesses.

7. Named Plaintiffs Profiles, Inc. (“Profiles”), Proline Products, Inc. (“Proline”), Diaspora Salon, LLC (“Diaspora”) and Elite Security Group, LLC (“Elite”) (collectively, “Named Plaintiffs”) bring this action, on behalf of themselves and all others similarly situated, against BOA for violations of the CARES Act, violations of the Small Business Administration’s (“SBA”) 7(A) loan program, 15 U.S.C. § 636(a), unjust enrichment, and for a declaratory judgment and a preliminary and permanent injunction pursuant to 28 U.S.C. §§ 2201 and 2202.

8. The PPP, which is part of the \$2 trillion stimulus package created by the CARES Act in response to the COVID-19 pandemic that was signed in to law on March 27, 2020, empowers lenders to make available as much as \$349 billion in government-guaranteed loans to cover eight weeks of payroll and other expenses.

9. BOA – creating an improper and unlawful restrictions on PPP loans – originally refused to accept a PPP loan application from any small business unless it was an active borrower from BOA. After this lawsuit was filed, BOA amended its policy to illegally bar depository-only clients who have a credit card or loan with another bank from getting a PPP loan. BOA is thus unlawfully prioritizing existing customers who are active borrowers of BOA as of February 2020 or have no credit cards or debt with any other financial institution.

10. Profiles, Proline and Elite, which all have a depository relationship with BOA but not a borrower relationship, were prohibited by BOA from even applying for a PPP loan with BOA on April 3, 2020, despite meeting the statutory requirements for a PPP loan. Diaspora did not even

attempt to apply on April 3, 2020, upon learning that it must be a borrower from BOA in order to apply.

11. Only after this lawsuit was filed, and BOA was criticized by prominent members of Congress for its discriminatory policy, did BOA make any adjustment to its unlawful gating restrictions. One day after prioritizing its lending customers at the expense of all other small businesses, BOA modified its application restrictions, but continued to unlawfully limit classes of applicants. Under the revised restriction, BOA will not permit any client to apply for a PPP loan if it has a credit card or debt with another financial institution.

12. Proline and Diaspora each attempted again to apply for a PPP loan through BOA, following imposition of this new restriction. Again, each was prohibited from applying for a PPP loan with BOA. Elite was able to apply online under the new gating restriction, but only by informing BOA that it does not have a lending relationship with any other financial institution. Elite fears that BOA will reject its application upon finding that it does have a lending relationship with another financial institution.

13. BOA has denied PPP loans or chilled BOA clients and other small businesses from applying to BOA for small business loans based on the unlawful requirements that it promulgated.

14. The purpose and motivation behind BOA's discriminatory practice is transparent: it is using the PPP as a credit enhancement – a strategy for improving its own credit risk profile – by giving priority to its clients with preexisting BOA debt at the expense of small business customers who have lending relationships with other banks.

15. Senators Marco Rubio (R-FL), Ben Cardin (D-MD) and Chris Van Hollen (D-MD) have already chastised BOA for imposing criteria not found in the law and selectively choosing who can apply.

16. BOA's discriminatory practices are abhorrent and in violation of federal law. In this time of national need, BOA's discriminatory practices can only be described as corporate greed.

II. PARTIES

17. Named Plaintiff Profiles is a public relations firm incorporated in Maryland with its principal place of business located at 3000 Chestnut Avenue, Suite 201, Baltimore, Maryland 21211. Profiles is a small business that qualifies as an eligible applicant for a PPP loan under the CARES Act.

18. Named Plaintiff Proline is a business that sells automotive roof racks and related accessories incorporated in Connecticut with its principal place of business at 69 South Turnpike Road, Wallingford, Connecticut 06492. Proline is a small business that qualifies as an eligible applicant for a PPP loan under the CARES Act.

19. Named Plaintiff Diaspora is a hair salon incorporated in Washington with its principal place of business at 2412 North Charles Street, Baltimore, Maryland 21218. Diaspora is a small business that qualifies as an eligible applicant for a PPP loan under the CARES Act.

20. Named Plaintiff Elite is a private security services firm incorporated in Maryland with its principal place of business at 8172 Poinsett Terrace, Pasadena, Maryland 21122. Elite is a small business that qualifies as an eligible applicant for a PPP loan under the CARES Act.

21. Defendant Bank of America is a corporation organized under the laws of Delaware, with its principal place of business in Charlotte, North Carolina. It is a diversified global financial services company and a bank holding company. It has transacted business in this district.

22. Defendant BNA is a national banking association headquartered in Charlotte, North Carolina. It has transacted business in this district.

23. Defendant Bank of America, as the corporate parent of BNA, which was involved in the wrongful activities alleged herein, had the practical ability to direct and control the actions and operations of BNA and, in fact, did so through a variety of centralized policy and functions, and coordinated practices.

III. JURISDICTION AND VENUE

24. The subject matter jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1332(d). There are Named Plaintiffs and members of the Class who are citizens of states other than the states of citizenship of Defendants, and the amount in controversy exceeds five million (\$5,000,000) dollars exclusive of interest and costs.

25. Venue lies in this District pursuant to 28 U.S.C. §§ 1391 (a) and (c), as BOA conducts a continuous course of business in the State of Maryland.

IV. FACTS

26. The CARES Act is the largest economic relief bill in U.S. history and will allocate \$2.2 trillion in support to individuals and businesses affected by the coronavirus pandemic and severe economic downturn.

27. As part of the relief provided, the CARES Act expands the eligibility criteria for borrowers to qualify for loans that are available under the SBA criteria by adding the PPP to the SBA's gamut of loan programs.

28. The PPP provides federally guaranteed loans up to a maximum amount of \$10 million to eligible small businesses, which can be conditionally forgivable, to encourage those businesses to retain employees through the COVID-19 crisis by assisting in the payment of certain operational costs. To accommodate for this 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.

29. Eligible individuals and entities under the PPP 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.

30. The PPP funds are provided on a “first-come, first-served” basis. 13 CFR Part 120, p. 13.

31. The SBA’s interim final rule on the PPP provides the following information as to who is eligible for a PPP loan:

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:

i. You are:

A. A small business concern as defined in section 3 of the Small Business Act (15 USC 632), and subject to SBA’s affiliation rules under 13 CFR121.301(f) unless specifically waived in the Act;

B. A tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business; and

ii. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC. You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, you were in operation on February 15, 2020. You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting

documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

Id. at pp. 5-6.

32. The “General Eligibility” section of the PPP loan 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.

SBA Form 2484.

33. At 8:42 am on Friday, April 3, 2020 – the opening day of PPP loans – Treasury Secretary Steven Mnuchin tweeted that community banks “have already processed over 700 loans” for a total of \$2.5 million. Hugh Son & Dawn Giel, *Bank of America’s Small Business Loan Portal is Up, But Most Banks are having Trouble*, CNBC (Apr. 3, 2020) [hereinafter “Hugh Son”], available at <https://www.cnbc.com/2020/04/03/bank-of-americas-small-business-loan-portal-is-up-making-it-the-first-bank-to-accept-applications.html> (last accessed Apr. 3, 2020).

34. By early afternoon on April 3, 2020, the grand total of PPP loans “ballooned to \$1.8 billion,” Stacy Cowley & Emily Flitter, *Frenzy and Desperation as Small Businesses Grab for Government Aid*, The New York Times (Apr. 3, 2020), available at <https://www.nytimes.com/2020/04/03/business/sba-loans-coronavirus.html> (last accessed on Apr.

4, 2020) [hereinafter “Stacy Cowly”], and by that evening “it was \$3.2 billion in loans that will go to more than 10,000 small businesses desperate to save themselves.” *Id.*

35. “Fearful that the money will run out – Treasury Secretary Steven Mnuchin said the loans would be on a first-come, first-served basis – [small business owners] flooded banks with calls and emails as they tried to get to the front of the line.” *Id.*

36. BOA announced on the morning of April 3, 2020, that it was accepting online applications for the Government’s \$349 billion PPP, becoming the first major bank to do so. *See* Hugh Son.

37. 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. In fact, on BOA’s website, under the banner “We Are Here For Our Small Business Clients,” BOA proclaims that “Our Small Business Clients who may be eligible for financial relief through the federal Paycheck Protection Program can now apply online.” https://about.bankofamerica.com/promo/assistance/latest-updates-from-bank-of-america-coronavirus/small-business-assistance?cm_sp=SBC--PPP-Thread-Redirect--PPP-Thread-Redirect (last accessed Apr. 3, 2020).

38. BOA’s PPP loan portal went live Friday morning. *See* Hugh Son. Within an hour, the bank had 10,000 applications for loans. *Id.* By evening, BOA’s loan requests totaled \$22 billion. *See* Stacy Cowly.

39. As of the morning of April 6, 2020, BOA confirmed that it had received PPP applications from 177,000 small businesses for a total of \$32.6 billion in financing - nearly 10% of the entire PPP amount allocated by Congress. Thomas Franck, *Bank of America sees booming rescue loan demand, with applications for nearly 10% of program*, CNBC (Apr. 6, 2020),

available at <https://www.cnbc.com/2020/04/06/bank-of-america-sees-booming-rescue-loan-demand-with-applications-for-nearly-10percent-of-allotment.html> (last accessed Apr. 6, 2020).

40. Profiles is a “small business” as defined under the SBA guidelines and qualifies as an eligible applicant for a PPP loan.

41. Profiles is a private banking client of BOA, maintaining a depository relationship with BOA, including Profiles’ primary checking account and other operational accounts.

42. Profiles is not a current borrower of funds from BOA.

43. In light of the COVID-19 pandemic and the current financial climate, Profiles attempted to apply for a PPP loan from BOA.

44. However, when Profiles tried to do so on the morning of April 3, 2020, Profiles was electronically denied access to an application. The denial flagged the fact that Profiles did not have a preexisting lending relationship with BOA.

45. Confused and distraught, Amy Elias (“Ms. Elias”), owner of Profiles, immediately contacted Marie Conley (“Ms. Conley”), Vice President, Bank of America, Preferred & Small Business Banking, Baltimore Metro Market, via email about BOA refusing to even allow Profiles to apply for a PPP loan.

46. Ms. Conley responded, “Amy, I’m so sorry!!!! I just got the news today on my conference call. I can imagine how devastated you must be. I’m trying to find out where else you can go to get money. Get back to you later.”

47. Ms. Elias responded, “Are you serious? They are not going to make an exception for all of this!?”, to which Ms. Conley replied, “I asked a few minutes ago, thinking of you specifically, and they said no.”

48. In disbelief, Ms. Elias wrote back, “I can not [*sic*] believe this.” Ms. Conley replied,

“I know. . . . I’m very disappointed too.”

49. Proline is a small business that qualifies as an eligible applicant for a PPP loan.

50. Proline is a private banking client of BOA that maintains a depository relationship with BOA.

51. Proline is not a current borrower of funds from BOA. It does have a borrower relationship with other financial institutions – American Express and Chase Bank – via business credit cards.

52. In light of the COVID-19 pandemic and the current financial climate, Proline wanted to apply for a PPP loan from BOA.

53. However, when Proline tried to do so on April 3, 2020, Proline was electronically denied access to an application. The denial flagged the fact that Proline did not have a preexisting lending relationship with BOA.

54. Greg Storm (“Mr. Storm”), owner of Proline, immediately contacted Jason Rouleau, Proline’s BOA customer representative, who told Mr. Storm that Proline did not qualify for BOA’s PPP program.

55. On April 6, 2020, upon learning that BOA had changed its PPP loan requirements, Proline decided to try and apply again. Seeing that BOA’s website noted a requirement that Proline may not have a lending relationship elsewhere, which Proline has via business credit cards with American Express and Chase Bank, Mr. Storm called BOA and was told that, since Proline has a company credit cards with Chase and Amex, Proline cannot apply for a PPP loan with BOA.

56. Diaspora is a small business that qualifies as an eligible applicant for a PPP loan.

57. Diaspora is a private banking client of BOA that maintains a depository relationship with BOA.

58. Diaspora is not a current borrower of funds from BOA. Diaspora does have a loan with another financial institution.

59. In light of the COVID-19 pandemic and the current financial climate, Diaspora wanted to apply for a PPP loan from BOA.

60. However, on April 3, 2020, when Diaspora saw that it had to have a lending relationship with BOA in order to apply to it for a PPP loan, Diaspora was chilled from doing so.

61. On April 4, 2020, hearing the BOA had changed its PPP loan requirements, Diaspora successfully applied for a PPP loan from BOA. During the online application process, Diaspora was not asked if it met the newly added gating requirement by BOA – that the small business not have a lender relationship with another financial institution.

62. On April 5, 2020, Yasmine Young (“Ms. Young”), founder and owner of Diaspora, logged onto BOA to check the status of Diaspora’s application. Ms. Young saw that the webpage had changed, and that applicants were being required to attest that they did not have a business credit or borrowing relationship with another financial institution. Ms. Young attempted to apply using the new webpage, but she was prevented when she attested that Diaspora had a borrowing relationship with another bank.

63. Elite is a small business that qualifies as an eligible applicant for a PPP loan.

64. Elite is a private banking client of BOA that maintains a depository relationship with BOA.

65. Elite is not a current borrower of funds from BOA. Elite does have a loan with another financial institution.

66. In light of the COVID-19 pandemic and the current financial climate, Elite attempted to submit an application for a PPP loan from BOA.

67. However, when Elite tried to submit its application on April 3, 2020, Elite was electronically denied access. The denial flagged the fact that Elite did not have a preexisting borrowing relationship with BOA.

68. On April 6, 2020, upon learning that BOA had changed its PPP loan requirements, Brandon Burr (“Mr. Burr”), owner of Elite, decided to try and apply again. In order for Elite’s loan application to be accepted, Mr. Burr had to state that Elite did not have a lending relationship with another financial institution – and did so.

69. Mr. Burr fears that BOA will reject Elite’s PPP application, despite being qualified under the federal regulations, because of Elite’s lending relationship with another financial institution.

70. Nothing in the PPP federal law allows for differentiation between a bank’s depository-only clients with no credit cards or loans with other financial institutions and its other clients. Nothing in PPP federal law allows for BOA to determine who can participate in the federal program based on that unlawful and improper criterion.

71. The purpose and motivation behind BOA’s discriminatory practice is transparent. In light of the fact that PPP is a limited funding program, BOA prioritized its credit profile by supporting preexisting loans issued by BOA through the PPP program or lending only to those with no credit cards or debt at any other financial institution at the expense of other small businesses. Had Congress intended to allow financial institutions to limit access to the PPP funding program to only those small businesses that had an existing borrowing relationship with the bank or had no debt with any outside financial institutions, Congress would have so stated. The purpose, however, of the PPP law is to assist all small business who qualify and to provide equal access to those funds.

72. Nevertheless, BOA originally stated on its website on April 3, 2020:

Small Business clients with a business lending and a business deposit relationship at Bank of America are eligible to apply for a Paycheck Protection Program through our bank. A client's pre-existing 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 have a business lending and business deposit relationship with us 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.

See https://about.bankofamerica.com/promo/assistance/latest-updates-from-bank-of-america-coronavirus/small-business-assistance?cm_sp=SBC-_-SBC-Link-_-SBC-Carousel (last accessed Apr. 3, 2020).

73. Following the filing of this lawsuit, BOA altered the language on that website on April 4, 2020 to state:

The Small Business Administration (SBA) and U.S. Treasury have released the Paycheck Protection Program guidelines. Our Small Business clients who may be eligible for financial relief can now apply online. To be eligible, you must have a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 or a Small Business checking account open no later than February 15, 2020 and do not have a business credit or borrowing relationship with another bank. After you have reviewed the complete Bank of America eligibility requirements below and have gathered the necessary documents, you can apply below.

Id. (last accessed on Apr. 4, 2020).

74. In response to emails sent by Alan Rifkin, Esq. on April 3, 2020 that warned BOA to cease its discriminatory practices or his law firm would take additional actions, Michael Ringley, Bank of America Assistant Vice President, Small Business Banking Market Manager

MD/PA, responded on April 4, 2020:

Good Morning Mr. Rifkin,

I forwarded your communication to our legal representatives yesterday. I can appreciate your frustration and concerns. Your voice and that of others was heard and we made a change to our application last night and as of this morning a credit relationship is not required in order to apply.

Thank you for your patience.

Best Regards,
Michael Ringley

75. Shocked that BOA considered it substitution of one illegal PPP restriction for another as satisfactory, Mr. Rifkin replied that same day:

Mr. Ringley, as you know yesterday we filed suit against BOA for discriminatory lending practices. BOA's gating instructions STILL prevent small businesses from applying for a federal program unless they have total fidelity to BOA. Again, the law places no such requirement. At this point, it would be best if BOA communicated to us on these matters through counsel.

76. Indeed, Senator Marco Rubio criticized BOA for its decision, saying via Tweeter, "The requirement that a #SmallBusiness not just have a business account but also a loan or credit card is NOT in the law we wrote & passed or in the regulations." *See* Hugh Son:



77. Likewise, Senator Ben Cardin issued the following Statement on Launch of Paycheck Protection Program:

I am deeply troubled by reports of financial institutions turning away small businesses that desperately need capital through the Paycheck Protection Program. The small business provisions in the CARES Act were written to get funds into the hands of American small business owners as quickly as possible so they can keep employees on payroll and avoid financial ruin while we work to combat COVID-19. Creating artificial barriers that block businesses from much-needed capital is redlining by another name. I will continue working with the administration to ensure that small businesses in every community have access to the programs created by the CARES Act, including the emergency EIDL grant program and the Paycheck Protection Program.

78. On Tuesday, April 7, 2020, the Baltimore Sun quoted Senator Chris Van Hollen as follows:

Since the program opened Friday, unexpected snags have spurred a

growing chorus of criticism from businesses as well as federal and local officials.

“What we’re seeing is a number of banks imposing requirements on borrowers that are not part of the law,” Maryland Sen. Chris Van Hollen, a Democrat, said Monday. “Banks are in some cases inventing their own conditions that create barriers to small business and nonprofits, which is not right.”

Van Hollen said he has heard from more than 100 small businesses in Maryland that have had problems getting access to loans or have other concerns.

Van Hollen and Rep. David Trone, a Democrat representing Maryland’s 6th Congressional District, alerted Treasury Secretary Steven T. Mnuchin about those difficulties in a letter sent Monday.

“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,” they said in the letter. “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.”

Lorraine Mirabella, *Baltimore-area Small Businesses Complain of Continuing Problems Gaining Access to Federal Lending Program*, BALTIMORE SUN (Apr. 7, 2020), available at <https://www.baltimoresun.com/coronavirus/bs-md-small-business-lending-problems-coronavirus-20200407-pp5h2e2z3zco5imzly37zdxpka-story.html> (last accessed Apr. 7, 2020).

79. The letter sent by Senator Van Hallen and Representative Trone to Treasury Secretary Steven T. Mnuchin, which is referenced in the Baltimore Sun article states:

. . . 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.

Letter from Senator Chris Van Hallen & Representative David Trone to the Honorable Steven T. Mnuchin (Apr. 6, 2020).

V. CLASS ACTION ALLEGATIONS

80. Named Plaintiffs incorporate each and every allegation contained in the preceding paragraphs by reference as if fully set forth herein.

81. Named Plaintiffs, in accordance with Fed. R. Civ. P. 23(b)(1), (b)(2) and (b)(3), bring this action on behalf of themselves and as members of the Class defined below.

82. The Class consists of (a) all individuals or entities who qualify for a loan under the PPP and who:

(i) on the first day that PPP applications could be submitted (April 3, 2020), attempted to apply for a PPP loan from BOA but were denied the right to apply, or were chilled from applying, for a PPP loan from BOA solely because they did not have a pre-existing debt relationship with BOA; or

(ii) on the second day that PPP applications could be submitted (April 4, 2020), attempted to apply for a PPP loan from BOA but were denied the right to apply, or were chilled from applying, for a PPP loan from BOA solely because they did not have a pre-existing debt relationship with BOA, and had credit cards or debt with one or more other financial institutions; or

(iii) on the third day that PPP applications could be accepted (April 5, 2020) through the closing of the application period (June 30, 2020), attempted to apply for a PPP loan from BOA but were denied the right to apply, or were chilled from applying, for a PPP loan from BOA solely because of any other illegal restriction placed on PPP loans by BOA.

83. Excluded from the Class described above are: (a) any Judge or Magistrate presiding

over this action and members of their families; (b) the officers, directors or employees of BOA or BNA; (c) Named Plaintiffs' or the Class's legal representatives, assigns and successors; and (d) all persons who properly execute and file a timely request for exclusion from the Class.

84. The Class is so numerous that joinder of all members is impracticable. See Fed. R. Civ. P. 23(a)(1). The Class consists of individuals and companies throughout the country.

85. There are questions of law and fact common to the Class. See Fed. R. Civ. P. 23(a)(2). These common questions include, but are not limited to:

A. Whether Defendants wrongly imposed additional requirements for PPP loans for the purpose of enhancing their own credit risk, thereby, penalizing small businesses, that the Government intended to benefit from PPP loans, for not having a debt relationship with Defendants and/or having credit cards or loans through other financial institutions;

B. Whether Defendants wrongly denied qualifying small businesses from applying to BOA for PPP loans;

C. Whether Defendants wrongly chilled eligible PPP applicants from applying due to BOA's advertised illegal restrictions;

D. Whether the claims alleged herein can be stated against Defendants by this Class based on the facts alleged in this complaint;

86. The claims of Named Plaintiffs, which arise out of BOA's prohibition of qualifying small businesses to apply for PPP loans with BOA, are typical of the claims of the Class members. Likewise, Defendants' defenses to the Named Plaintiffs' claims – both the legal defenses that can be anticipated, together with the factual defenses – are typical of the defenses to the Class claims. See Fed. R. Civ. P. 23(a)(3).

87. Named Plaintiffs will fairly and adequately represent and protect the interests of the Class. *See* Fed. R. Civ. P. 23(a)(4). Named Plaintiffs are articulate and knowledgeable about their claims, and fully able to describe them. There are no conflicts of interest between Named Plaintiffs, either inter se or with respect to the interests of the Class members. Named Plaintiffs, like the Class members, have suffered financial loss as a result of Defendants' acts. Named Plaintiffs have sufficient financial resources to litigate this case and further the interests of the Class without compromising them.

88. Counsel for Named Plaintiffs are well-suited to represent their interests and the interests of the Class at large. Counsel include M. Celeste Bruce, Esq., Alan M. Rifkin, Esq., Charles S. Fax, Esq., Liesel J. Schopler, Esq. and Barry L. Gogel, Esq. (Rifkin Weiner Livingston LLC). The combined experience and areas of professional concentration of these attorneys are well-suited to representation of the interests of the Class. All these lawyers practice complex civil litigation and are experienced in class action litigation.

89. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(1). Prosecuting separate actions would create a risk of adjudications with respect to individual Class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

90. Class certification is appropriate under Fed. R. Civ. P. 23(b)(2). BOA will continue to commit the violations alleged, and the members of the Classes and the general public will continue to be unfairly denied access to critical relief that they are entitled to under the CARES Act's PPP. BOA has acted and refused to act on grounds that apply generally to the Class so that final injunctive relief and corresponding declaratory relief is appropriate respecting the Class as a

whole.

91. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(3). The questions of law or fact common to the members of the Class, described above, predominate over any questions affecting only individual members.

92. Due to the individual amount at issue as to each Class member, as well as the cost and difficulty in litigating each case separately, the Class members have insufficient interest in individually controlling the prosecution of separate actions. *See* Fed. R. Civ. P. 23(b)(3)(A).

93. The Class has not previously litigated the claims asserted in this complaint. *See* Fed. R. Civ. P. 23(b)(3)(B).

94. This Court is an appropriate forum for the litigation of the Class claims.

95. Any difficulties that might be incurred in the management of this class action are insubstantial. *See* Fed. R. Civ. P. 23(b)(3)(D).

COUNT I
Violations of the CARES Act, H.R. 748
(Against All Defendants)

96. Named Plaintiffs incorporate each and every allegation contained in the preceding paragraphs by reference as if fully set forth herein.

97. The CARES Act, a \$2 trillion stimulus package in response to the COVID-19 pandemic that was signed in to law on March 27, 2020, includes the PPP, which empowers lenders to make available as much as \$349 billion in government-guaranteed loans to cover approximately eight weeks of payroll and other expenses.

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

99. The CARES Act, along with the SBA's interim final rule on the PPP, provides the sole eligibility requirements to apply for a PPP loan.

100. The purpose of the CARES Act's PPP is to assist all entities and individuals who qualify and to provide equal access to those funds.

101. In flagrant disregard for law, BOA has decided to protect itself through the PPP program – rather than intended entities and individuals – by creating unlawful requirements to apply for a PPP loan from it: lending relationship with BOA and/or no credit cards or loans from another financial institution.

102. Profiles, Proline, Diaspora and Elite each meet the eligibility requirements for a PPP loan.

103. Nevertheless, BOA refused to allow Profiles and Proline to apply for PPP loans because they did not have a lending relationship with BOA and/or had a lending relationship with another financial institution.

104. BOA initially allowed Diaspora to apply for a PPP loan on April 4, 2020, but when BOA altered its application form on April 5, 2020 by requiring the applicant to attest that it did not have a credit or lending relationship with any other bank, Diaspora was prohibited from submitting an application for a PPP loan through BOA.

105. BOA initially refused to allow Elite to submit an application for a PPP loan because Elite did not have a lending relationship with BOA. After BOA changed its PPP loan requirements, Elite was able to apply for a PPP loan with BOA only by attesting that it does not have a lending relationship with any other bank, even though it does. Elite fears its application will be rejected due to its lending relationship with a financial institution other than BOA.

106. As a direct and proximate result of BOA's wrongful actions, Named Plaintiffs and Class members have suffered damages up to \$10 million each due their inability to apply for a PPP loan with BOA despite being eligible therefor.

COUNT II

**Violations of the SBA's 7(a) Loan Program, 15 U.S.C. 636(a)
(Against All Defendants)**

107. Named Plaintiffs incorporate each and every allegation contained in the preceding paragraphs by reference as if fully set forth herein.

108. The SBA's 7(a) loan program is designed to help start-up and existing small businesses obtain financing when they might not otherwise be eligible for business loans. Under the program, a participating lender executes the loan with the borrower according to specific SBA requirements.

109. The PPP is part of the SBA's 7(a) loan program.

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

111. In flagrant disregard for law, BOA has decided to protect itself through the PPP program – rather than intended entities and individuals – by creating unlawful requirements to apply for a PPP loan from it: lending relationship with BOA and/or no credit cards or loans from another financial institution.

112. Profiles, Proline, Diaspora and Elite each meet the eligibility requirements for a PPP loan.

113. Nevertheless, BOA refused to allow Profiles and Proline to apply for PPP loans because they did not have a lending relationship with BOA and/or had a lending relationship with another financial institution.

114. BOA initially allowed Diaspora to apply for a PPP loan on April 4, 2020, but when BOA altered its application form on April 5, 2020, by requiring the applicant to attest that it did not have a credit or lending relationship with any other bank, Diaspora was prohibited from

submitting an application for a PPP loan through BOA.

115. BOA initially refused to allow Elite to submit an application for a PPP loan because Elite did not have a lending relationship with BOA. After BOA changed its PPP loan requirements, Elite was able to apply for a PPP loan with BOA only by attesting that it does not have a lending relationship with any other bank, even though it does. Elite fears its application will be rejected due to its lending relationship with a financial institution other than BOA.

116. As a direct and proximate result of BOA's wrongful actions, Named Plaintiffs and Class members have suffered damages up to \$10 million each due their inability to apply for a PPP loan with BOA despite being eligible therefor.

COUNT III
UNJUST ENRICHMENT
(Against All Defendants)

117. BOA unjustly enriched itself by using the PPP program as a credit enhancement vehicle – by prioritizing BOA client with BOA debt or without debt to any other financial institution, BOA was able to improve its own credit risk profile.

118. This credit enhancement benefit was provided by Named Plaintiffs and Class members taking lower priority for a PPP loan with BOA.

119. BOA knew and appreciated the credit enhancement benefit.

120. BOA's acceptance and retention of the credit enhancement under the circumstances is such that it would be inequitable to BOA to retain the benefit without the paying of value in return.

COUNT IV
Declaratory Judgment and Preliminary and Permanent Injunction
Pursuant to 28 U.S.C. §§ 2201 and 2202
(Against All Defendants)

121. Named Plaintiffs incorporate each and every allegation contained in the preceding

paragraphs by reference as if fully set forth herein.

122. There is an actual controversy between Defendants and the Class concerning the application of the PPP.

123. Pursuant to 28 U.S.C. § 2201 this Court may “declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

124. BOA wrongfully prevented entities and individuals from applying for PPP loans from BOA, despite meeting all federally-imposed PPP loan eligibility requirements, for lack of a lending relationship with BOA and/or no credit cards or loans from another financial institution.

125. Accordingly, Named Plaintiffs and members of the Class seek a declaration that BOA’s non-statutory requirements to apply for a PPP loan be declared void, invalid and unenforceable.

126. Named Plaintiffs and the Class are likely to succeed on the merits of their causes of action set forth in Counts I-IV.

127. Named Plaintiffs and the Class have suffered and will continue to suffer irreparable harm in the absence of injunctive relief enjoining BOA from depriving Named Plaintiffs and the Class from the rights and benefits bestowed by the CARES Act and its regulations, and do not have an adequate remedy at law.

128. BOA will suffer no injury if the preliminary injunctive relief sought by Named Plaintiffs and the Class is granted.

129. The public interest will be served by the granting preliminary injunctive relief sought by Named Plaintiffs and the Class.

PRAYER FOR RELIEF

WHEREFORE, Named Plaintiffs and the Class pray as follows:

- A. Certify this action as a class action, pursuant to Fed. R. Civ. P. 23, designate Named Plaintiffs as the Class representatives, and counsel for Named Plaintiffs as Class Counsel;
- B. Preliminarily and permanently enjoin BOA from engaging in the wrongful and unlawful conduct alleged herein, viz., imposing restrictions on borrowing under the PPP program that are not part of the CARES Act and its regulations, and depriving Named Plaintiffs and the Class from the rights and benefits bestowed by the CARES Act and its regulations;
- C. Direct BOA to make available to Named Plaintiffs and the Class all of the rights and benefits under the CARES Act and its regulations;
- D. Award damages, including compensatory, exemplary, and statutory damages, to Named Plaintiffs and the Class in an amount to be determined at trial, for the acts complained of herein;
- E. Award Named Plaintiffs and the Class their expenses and costs of suit, including reasonable attorneys' fees to the extent provided by law;
- F. Award Named Plaintiffs and the Class pre-judgment and post-judgment interest at the highest legal rate to the extent provided by law; and
- G. Grant all other and further relief to which Named Plaintiffs and the Class are entitled by law or in equity as may be determined by the Court to be just, equitable and proper.

Respectfully submitted,

/S/ M. Celeste Bruce

M. Celeste Bruce, Maryland Federal Bar No. 10710
Charles S. Fax, Maryland Federal Bar No. 2490
Rifkin Weiner Livingston LLC
7979 Old Georgetown Road, Suite 400
Bethesda, Maryland 20814
Telephone: (301) 951-0150
Telecopier: (301) 951-0172
Cell Phone: (410) 274-1453
Email: cbruce@rwillaw.com; cfax@rwillaw.com

Alan M. Rifkin, Maryland Federal Bar No. 11562
Liesel J. Schopler, Maryland Federal Bar No. 17280
Rifkin Weiner Livingston LLC
225 Duke of Gloucester Street
Annapolis, Maryland 21401
Telephone: (410) 269-5066
Telecopier: (410) 269-1235
Email: arifkin@rwillaw.com; lschopler@rwlls.com

Barry L. Gogel, Maryland Federal Bar No. 25495
Rifkin Weiner Livingston LLC
2002 Clipper Park Road, Suite 108
Baltimore, Maryland 21211
Telephone: (410) 769-8080
Telecopier: (410) 769-8811
Email: bgogel@rwillaw.com

April 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Second Amended Class Action Complaint, in both clean and redline versions, were served on April 7, 2020, by electronic mail and by first class mail to Enu A. Mainigi and Beth A. Stewart of Williams & Connolly LLP, whom David G. Leitch, Global General Counsel for Bank of America Corporation, stated is representing Defendants in this matter, as follows:

Enu A. Mainigi, Esq.
Beth A. Stewart, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
emainigi@wc.com; bstewart@wc.com

/s/ M. Celeste Bruce
M. Celeste Bruce