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

INFORMATECH CONSULTING, INC.,
Individually and on behalf of All Others
Similarly Situated,

Plaintiffs,

vs.

BANK OF AMERICA
CORPORATION; BANK OF
AMERICA, N.A.; and DOES 1-10,
inclusive,

Defendants.

Case No.:

CLASS ACTION COMPLAINT

- (1) UNFAIR BUSINESS PRACTICES IN VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200, et seq.;**
- (2) FALSE ADVERTISING IN VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17500, et seq.;**
- (3) BREACH OF FIDUCIARY DUTY; and**
- (4) NEGLIGENCE**

DEMAND FOR JURY TRIAL

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1 Plaintiff Informattech Consulting, Inc. (“Plaintiff”) brings this class action
2 complaint on behalf of itself and those similarly situated (collectively, “Plaintiffs”)
3 against Defendants Bank of America Corporation and Bank of America, N.A.
4 (collectively, “Defendants”). Plaintiffs allege the following based upon their
5 information and belief and the investigation of their counsel and personal
6 knowledge as to the allegations pertaining to them.

7 **I. INTRODUCTION**

8 1. Defendants exploited the Coronavirus crisis to line its pockets with
9 hundreds of millions of taxpayer dollars while compounding the economic
10 hardship suffered by small businesses and independent contractors—“hardworking
11 Americans and businesses that, through no fault of their own, have been adversely
12 impacted by the coronavirus outbreak,” according to U.S. Treasury Secretary
13 Steven Mnuchin.

14 2. The U.S. Small Business Administration (“SBA”) Paycheck
15 Protection Program (“PPP”) was intended to help “overcome the challenges” of
16 the Coronavirus crisis and “provide a direct incentive to small businesses to keep
17 their workers on the payroll” by providing SBA-guaranteed loans of up to \$10
18 million to qualified applicants.¹ Anticipating the massive demand for relief and to
19 ensure non-preferential distribution of funds, the PPP’s governing rules required
20 that banks process applications on a “*first-come, first-served*” basis.²

21 3. In violation of these rules, California law, and their fiduciary
22 obligations, Defendants favored their own interests by prioritizing larger loan
23 applications for bigger businesses and Defendants’ own banking clients ahead of
24

25 ¹ <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program-ppp#section-header-4> (last visited April 22, 2020).

26 ² https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf (last visited
27 April 22, 2020).

1 smaller businesses, independent contractors and applicants who were not existing
2 customers. Indeed, news reports have revealed that banks provided preferential
3 “concierge” treatment for their wealthiest clients, including a two-tiered system
4 providing fast-track procedures for the bank’s most valuable customers that
5 avoided cumbersome and buggy online portals which ordinary mom and pop
6 businesses were required to use.³

7 4. For every loan completed, Defendants received between 1% and 5%
8 of the loan amount in fees, depending on the amount of the loan. Loans worth less
9 than \$350,000 brought in 5% in fees while loans worth between \$2 million and
10 \$10 million brought in 1% in fees. In total, Defendants and other banks have
11 received approximately ***\$10 billion in fees*** to date.

12 5. In addition to enormous fees, Defendants also benefited from moving
13 bigger and existing customers to the front of the line for PPP loans. For example,
14 Defendants’ illegal practices enabled them to mitigate their own risk exposure to
15 default by large, existing clients with whom Defendants maintained outstanding
16 credit lines or other capital commitments. Additionally, favoring existing
17 customers meant that Defendants received the funds deposited into Defendants’
18 accounts, which improved the bank’s liquidity.

19 6. Meanwhile, Defendants bear no risk whatsoever on the SBA loans
20 made under the PPP, and the expedited processes designed to rapidly provide relief
21 meant that Defendants and other banks did less work to vet applications than for
22 traditional SBA or other loans.

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25 ³ <https://www.nytimes.com/2020/04/22/business/sba-loans-ppp-coronavirus.html> (last visited
26 April 23, 2020); [https://www.forbes.com/sites/kotlikoff/2020/04/22/bank-of-america-president-](https://www.forbes.com/sites/kotlikoff/2020/04/22/bank-of-america-president-brian-monyihan-listen-to-these-small-business-owners-on-bofas-horrendous-failure-to-service-payroll-protection-loans/#653ced2e57fa)
27 [brian-monyihan-listen-to-these-small-business-owners-on-bofas--horrendous-failure-to-](https://www.forbes.com/sites/kotlikoff/2020/04/22/bank-of-america-president-brian-monyihan-listen-to-these-small-business-owners-on-bofas-horrendous-failure-to-service-payroll-protection-loans/#653ced2e57fa)
[service-payroll-protection-loans/#653ced2e57fa](https://www.forbes.com/sites/kotlikoff/2020/04/22/bank-of-america-president-brian-monyihan-listen-to-these-small-business-owners-on-bofas-horrendous-failure-to-service-payroll-protection-loans/#653ced2e57fa) (last visited April 27, 2020).

1 7. Reports of Defendants' inequitable review and submission process
2 prompted Senator Marco Rubio, Chairman of the Committee of Small Business &
3 Entrepreneurship, to address a formal letter to Defendant Bank of America
4 Corporation explaining "it is important for small businesses and nonprofits of
5 various sizes, regional locations, and missions to have equal access to PPP
6 assistance."⁴ This letter was prompted by "reports of priority being given to certain
7 applicants over others" and was concluded by a series of questions designed to
8 "ensure a neutral distribution of assistance."⁵

9 8. At no time did Defendants disclose and Plaintiff was unaware that
10 Defendants were violating the PPP governing rules by favoring existing customers
11 and applicants seeking larger loans and putting smaller borrowers like Plaintiff to
12 the back of the queue or not submitting their application at all.

13 9. As of the date of this Complaint, Plaintiff and other members of the
14 proposed Class have suffered enormous and potentially irreversible damages. For
15 example, unlike those favored by Defendants and other big banks, Plaintiff and
16 other Class members have not received funds or approval of their loan applications.
17 Additionally, the delay caused by Defendants' misrepresentations and omissions
18 caused hardship, including business cessation, for many applicants who were and
19 are desperately seeking a lifeline through the PPP.

20 10. Through this litigation, Plaintiff seeks an injunction preventing
21 Defendants from continuing their illegal business practices, compensation for the
22 harms caused by misconduct alleged herein, and all other relief that the Court
23 deems appropriate.

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26
27 ⁴ Senator Rubio's letter is attached as Exhibit A.

⁵ *Id.*

1 **II. THE PARTIES**

2 **A. Plaintiff**

3 11. Plaintiff is incorporated in Pennsylvania with its primary business
4 address at 2340 Powell Street, Emeryville, CA 94608.

5 12. Plaintiff provides information technology consulting services and
6 solutions to FDA regulated industries, including pharmaceuticals, biotechnology,
7 and medical device companies.

8 13. At all times relevant herein, Plaintiff met all applicable requirements
9 to obtain loan funds under the PPP.

10 **B. Defendants**

11 14. Defendant Bank of America Corporation is a Delaware corporation
12 headquartered in Charlotte, North Carolina, that provides a range of financial
13 services, including banking, insurance, investments, mortgage banking and
14 consumer finance to individuals, businesses, and other entities.

15 15. Defendant Bank of America, N.A. is headquartered in Charlotte,
16 North Carolina. It is a multinational financial services institution that provides
17 investment, commercial, and private banking; asset management; and credit card
18 services.

19 16. Defendant Bank of America Corporation is the parent corporation of
20 Defendant Bank of America, N.A. Defendant Bank of America Corporation was
21 involved in the wrongful activities alleged herein, had the practical ability to direct
22 and control the actions of Defendant Bank of America, N.A., and in fact did so
23 through a variety of centralized policy and functions and coordinated practices.

24 17. Defendants are one of the largest SBA lenders currently participating
25 in the PPP.

1 **III. JURISDICTION AND VENUE**

2 18. The Court has original jurisdiction over this matter under the Class
3 Action Fairness Act, 28 U.S.C. § 1332(d), because this is a class action in which
4 (i) at least some of the members of the proposed Class have different citizenship
5 from the Defendants; (ii) the proposed Class consists of more than 100 persons or
6 entities; and (iii) the claims of the proposed Class members collectively exceed \$5
7 million.

8 19. The Court has personal jurisdiction over Defendants because they do
9 business in this District and a substantial number of events giving rise to the claims
10 asserted herein took place in California.

11 20. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2)
12 because a substantial number of the events giving rise to the claims asserted herein
13 took place in this District. For example, Plaintiff's principal place of business is
14 located in San Francisco and Defendants marketed, promoted, and received
15 applications for PPP loans within this District.

16 **IV. FACTUAL ALLEGATIONS**

17 21. The Coronavirus Aid, Relief, and Economic Security (CARES) Act,
18 signed into law on March 27, 2020, allocated \$349 billion in taxpayer funds to the
19 SBA to make low interest "forgivable" loans through the PPP to qualifying small
20 businesses, non-profits and independent contractors. Congress enacted the
21 legislation to help keep workers employed and paid amid the Coronavirus
22 pandemic and economic downturn. PPP loans are 100% federally guaranteed;
23 meaning, the banks that originate PPP loans bear no risk unlike loans made using
24 their own funds.

25 22. As an approved SBA lender, Defendants are required to "service and
26 liquidate all covered loans made under the Paycheck Protection Program in
27 accordance with PPP Loan Program Requirements," including any SBA rules or

1 guidance, pursuant to the SBA Lender Agreement they signed.⁶ In particular,
2 Defendants, like all SBA lenders participating in the PPP program, must process
3 applications on a “*first-come, first-served*” basis.

4 23. Moreover, all SBA lenders including Defendants “must act ethically”
5 and may not, among other things, (i) self-deal; (ii) have a real or apparent conflict
6 of interest with a borrower; (iii) knowingly misrepresent or make a false statement
7 to the SBA; (iv) engage in conduct reflecting a lack of business integrity or
8 honesty; or (v) engage in any activity which taints the bank’s objective judgment
9 in evaluating the loan. *See* 13 CFR Part 120.140. Defendants breached these duties,
10 as well as California law and their fiduciary obligations.

11 24. Critically, because each loan will be registered under a Taxpayer
12 Identification Number, small business owners could only apply *once* for a loan
13 through the PPP. Borrowers could not submit multiple applications through
14 different banks. In submitting their PPP loan applications to Defendants, Plaintiffs
15 were precluded from seeking PPP relief through a different lender that was not
16 engaging in the same improper practices as Defendants.

17 25. According to the SBA Office of Advocacy, in 2018, the country had
18 30.2 million small businesses, representing 99.9% of all U.S. businesses and 47.5%
19 of all employees in the U.S. Of these 30.2 million U.S. small businesses, 22 million
20 are individually operated, with no employees other than the owner.

21 26. In 2018, the average loan amount backed by the SBA was \$107,000.

22 27. Beginning on April 3, 2020, small businesses and sole proprietorships
23 could apply for and receive loans through the PPP. Beginning on April 10, 2020,
24 independent contractors and self-employed individuals could apply for and receive
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26 ⁶ [https://www.sba.gov/sites/default/files/2020-04/PPP--Agreement-for-New-Lenders-Banks-](https://www.sba.gov/sites/default/files/2020-04/PPP--Agreement-for-New-Lenders-Banks-Credit-Unions-FCS-w-seal-fillable.pdf)
27 [Credit-Unions-FCS-w-seal-fillable.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP--Agreement-for-New-Lenders-Banks-Credit-Unions-FCS-w-seal-fillable.pdf) (last visited April 22, 2020).

such loans. The last day to apply for and receive a loan through the PPP is June 30, 2020.

28. Loans through the PPP were time-sensitive as they were to be administered on a “first-come, first-served” basis. Consequently, loans should have been considered by banks in the order in which they were received, rendering the loan amount insignificant.

29. Lenders of PPP loans earned varying percentages of origination fees, based on the loan amount: 5% on loans not more than \$350,000; 3% on loans more than \$350,000 but less than \$2,000,000; and 1% on loans more than \$2,000,000.

30. Because of the tiered percentage-based origination fees, lenders were financially incentivized to approve of larger loans ahead of smaller ones: one percent fees on a \$5,000,000 loan would earn a bank \$50,000 while five percent on a \$350,000 loan would earn \$17,500.

31. The SBA tracked the numbers of approved loans and dollars for both the first 10 days of the PPP (April 3 through April 13, first chart) and through the last 3 days (April 14 through April 16, second chart).

Loan Size	Approved Loans	Approved Dollars	% of Count	% of Amount
\$150K and Under	725,058	\$37,178,984,187	70.05%	15.02%
>\$150K - \$350K	156,590	\$35,735,615,983	15.13%	14.44%
>\$350K - \$1M	102,473	\$59,291,602,643	9.90%	23.95%
>\$1M - \$2M	31,176	\$43,278,883,532	3.01%	17.48%
>\$2M - \$5M	16,516	\$49,288,997,593	1.60%	19.91%
>\$5M	3,273	\$22,769,309,582	0.32%	9.20%

- Overall average loan size is \$239,152.

32. Not only was the overall average loan size greater during the first ten days (see charts above: \$239,152 vs. \$206,000), but the number of approved loans for applications under \$350,000 was significantly greater in the last three days before PPP funds ran out when compared to the first ten days: 881,648 approved loans in the first ten days versus 1,453,954 approved loans as of the last day PPP funds were available. In the period between April 14 through April 16, 572,306 loans were approved, representing a 65% increase.

Loan Size	Approved Loans	Approved Dollars	% of Count	% of Amount
\$150K and Under	1,229,893	\$58,321,791,761	74.03%	17.04%
>\$150K - \$350K	224,061	\$50,926,354,675	13.49%	14.88%
>\$350K - \$1M	140,197	\$80,628,410,796	8.44%	23.56%
>\$1M - \$2M	41,238	\$57,187,983,464	2.48%	16.71%
>\$2M - \$5M	21,566	\$64,315,474,825	1.30%	18.79%
>\$5M	4,412	\$30,897,983,582	0.27%	9.03%

- Overall average loan size is \$206K.

33. That 65% increase is even more telling when compared with the difference in approved loans for applications above \$2,000,000 for the same period. In the first ten days, 19,789 loans were approved versus 25,978 loans approved as of the last day PPP funds were available, meaning that 6,189 loans were approved between April 14 through April 16, equaling a 31% increase.

34. With such varying data, it is clear that lenders such as Defendants did not process loans on a “*first-come, first-served*” basis as required by the SBA, but that the loan amount influenced when it was processed and approved.

35. For example, early reports note that Defendants failed to provide the same knowledge, technological support, and resources for their retail branches to process applications made by small businesses than they did for their larger and more

1 prominent customers.⁷ This led to nearly all of Defendants' larger and more
2 prominent customers receiving loan assistance through the PPP via a prioritized
3 application review and submission while large percentages of their retail branch
4 customers' applications were de-prioritized without regard to when the applications
5 were filed.

6 36. Plaintiff learned of the CARES Act and PPP when it was passed and
7 was signed into law by President Trump.

8 37. Plaintiff's business activities have been substantially harmed by the
9 world-wide pandemic.

10 38. On March 30, 2020, Plaintiff received a marketing e-mail from
11 Defendants notifying it of the financial assistance available through the PPP and
12 Defendants' "Client Assistance Program".

13 39. On April 3, 2020, Defendants sent Plaintiff an e-mail communication
14 announcing that they will be accepting applications for loans through the PPP.
15 Defendants explained: "In order to ensure an orderly flow of these government-
16 provided funds, we will follow the intent of the U.S. Treasury guidance..." Under
17 the heading "**Here is what we will do next**" Defendants promised to "[c]ontact
18 you with next steps and to collect any required documents" and to "[p]rocess your
19 loan application with the Small Business Administration as quickly as possible"
20 (emphasis in original). Lastly, Defendants affirmed that they are "committed to
21 helping our clients, teammates and communities move through this very
22 challenging time period."

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25 ⁷ <https://www.forbes.com/sites/kotlikoff/2020/04/21/bank-of-america-awful-handling-of-payroll-protection-loans---my-case-study/#733e17772f6e> (last visited April 22, 2020);
26 <https://www.forbes.com/sites/kotlikoff/2020/04/22/bank-of-america-president-brian-monyihan-listen-to-these-small-business-owners-on-bofas--horrendous-failure-to-service-payroll-protection-loans/#71805d5657fa> (last visited April 24, 2020)
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1 40. On April 6, 2020, Plaintiff submitted an application for loan
2 assistance through the PPP with Defendants. Plaintiff applied for a loan through
3 the PPP in order to pay mortgage interest, utilities, and other applicable amounts.
4 Plaintiff chose to submit a loan application with Defendants because it conducts
5 business banking with them.

6 41. Regarding PPP loans, Defendants assure all applicants that “[w]e will
7 contact you with next steps and to collect any required documents. Do not
8 proactively deliver or send documents to our Financial Centers or banking teams.”⁸

9 42. Defendants did not contact Plaintiff with “next steps” until April 13,
10 2020, when a representative of Defendants called Plaintiff to inquire about
11 submitting documents for its loan application.

12 43. On the same day, April 13, 2020, Plaintiff submitted all requested
13 documents to the Intralinks Exchange.

14 44. Based on the “first-come, first-served” rule, Plaintiff’s application
15 should have been promptly submitted to the SBA. Instead, Defendants apparently
16 delayed processing the application and submitting to the SBA for approval.

17 45. On April 15, 2020, Defendants sent Plaintiff an e-mail requesting
18 Plaintiff to verify certain information. The link included in the e-mail took Plaintiff
19 to its account page and did not request it to verify information for the PPP.

20 46. Plaintiff contacted a local branch representative of Defendants on
21 April 15, 2020, to ask about the status of its application. Plaintiff received a
22 response on April 16, 2020 stating the entirety of the \$349 billion allocated for the
23 PPP loans had been committed.

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27 ⁸ [https://about.bankofamerica.com/promo/assistance/faqs/small-business-paycheck-protection-](https://about.bankofamerica.com/promo/assistance/faqs/small-business-paycheck-protection-program)
program (last accessed April 22, 2020).

1 47. On April 23, after the entirety of the \$349 billion was already
2 allocated, Plaintiff received an e-mail communication from Defendants labeled as
3 “URGENT” and requesting Plaintiff to click a link to confirm information
4 purportedly required by Defendants. When Plaintiff clicked the link, Plaintiff was
5 directed to its account page and did not identify any information that Plaintiff
6 needed to confirm, as the email indicated would happen, nor note any deficiencies
7 with its application.

8 48. Because Plaintiff submitted an application for a loan through the PPP
9 with Defendants, it was denied access to funds that would have helped it during
10 this economic crisis and was prevented from seeking assistance from a different
11 lender.

12 49. Defendants claim they “will process your loan application with the
13 Small Business Administration as quickly as possible.”⁹ Defendants also assured
14 that they would communicate decisions on loan decisions: “Bank of America will
15 email you with the status once we receive a decision from the Small Business
16 Administration.”¹⁰

17 50. However, Defendants misled and deceived their clients, including
18 Plaintiff, into believing applications for loans through the PPP were processed in
19 the order received with no regard to loan amount, when in fact the loan amount
20 certainly influenced the order in which loans were processed and approved.

21 51. If Defendants had not misled and deceived their small business clients,
22 such clients could have submitted their applications for loans through the PPP with
23 other lenders that were following the required “first-come, first-served” application
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26 ⁹ [https://about.bankofamerica.com/promo/assistance/faqs/small-business-paycheck-protection-](https://about.bankofamerica.com/promo/assistance/faqs/small-business-paycheck-protection-program)
27 [program](https://about.bankofamerica.com/promo/assistance/faqs/small-business-paycheck-protection-program) (last accessed April 22, 2020)

¹⁰ *Id.*

1 processing order. Because small businesses were only allowed to submit one
2 application for PPP loans, they could not go to another lender for assistance.

3 52. Defendants purposefully slowed down the processing of applications
4 submitted by small businesses with lower requested loan amounts through a
5 confusing and uncoordinated application process that was inadequately staffed to
6 process applications on a “first-come, first-served” basis in order to obtain higher
7 origination fees and maintain positive business relationships with their larger
8 commercial customers.

9 53. Defendants knew their clients trusted them and believed they would
10 administer the PPP as required, but chose to exploit their clients’ trust. As a result
11 of Defendants’ greed and focus on their own financial incentives, countless small
12 businesses were prevented from benefitting from the program designed to help
13 them survive during the current Coronavirus crisis. Moreover, the delay and
14 uncertainty caused by preferring bigger loan applications or “concierge” customers
15 has wrecked devastating harm on Plaintiff and Class members. Put simply, every
16 day that passes without relief for these small businesses and other qualified
17 applicants—and the hundreds of thousands of hardworking Americans they
18 employ—pushes them closer or into financial ruin.

19 **V. CLASS ACTION ALLEGATIONS**

20 54. Plaintiff brings this action individually and on behalf of the following
21 class (the “Class”) pursuant to Rule 23:

22
23 All eligible persons or entities in the State of California who applied for a
24 loan under the PPP with Defendants and whose applications were not
25 processed by Defendants in accordance with SBA regulations and
26 requirements or California law.
27
28

1 55. Excluded from the proposed Class are Defendants, any parent
2 companies, subsidiaries, and/or affiliates, officers, directors, legal representatives,
3 employees, co-conspirators, all governmental entities, and any judge, justice, or
4 judicial officer presiding over this matter.

5 56. This action is brought and may be properly maintained as a class
6 action. There is a well-defined community of interests in this litigation and the
7 members of the Class are easily ascertainable.

8 57. The members in the proposed class are so numerous that individual
9 joinder of all members is impracticable, and the disposition of the claims of the
10 Class members in a single action will provide substantial benefits to the parties and
11 Court.

12 58. Questions of law and fact common to Plaintiff and the Class include,
13 but are not limited to, the following:

- 14 • Whether Defendants violated the regulations for administering,
15 processing, and handling loans through the PPP;
- 16 • Whether Defendants made false, misleading, and deceptive
17 misrepresentations and omissions regarding their administration,
18 processing, and handling of the applications for loans from small
19 businesses through the PPP;
- 20 • Whether Defendants failed to the administer, process, and handle
21 loans on a “first-come, first-served” basis as required by the PPP;
- 22 • Whether Defendants administered, processed, and handled larger
23 loans before smaller loans;
- 24 • Whether Defendants violated various California laws;
- 25 • Whether Defendants engaged in false advertising;
- 26 • Whether Defendants fraudulently concealed material facts from their
27 clients;

- Whether Defendants' conduct was negligent per se;
- Whether Defendants breached a fiduciary duty;
- Whether Plaintiff and members of the Class are entitled to statutory and punitive damages; and
- Whether Plaintiff and the members of the Class are entitled to declaratory and injunctive relief.

59. Defendants engaged in a course of common conduct that gave rise to the legal rights sought to be enforced by Plaintiff individually and on behalf of the other members of the Class. Identical statutory violations and business practices and harms are involved. Individual questions, if any, are not prevalent in comparison to the numerous common questions that dominate this action.

60. Plaintiff's claims are typical of those of the members of the Class because they are based on the same underlying facts, events, and circumstances relating to Defendants' conduct.

61. Plaintiff will fairly and adequately represent and protect the interests of the Class, has no interests incompatible with the interests of the Class, and has retained counsel competent and experienced in class action, consumer protection, and false advertising litigation.

62. Class treatment is superior to other options for resolution of the controversy because the relief sought for each member of the Class is small such that, absent representative litigation, it would be infeasible for members of the Class to redress the wrongs done to them.

63. Questions of law and fact common to the Class predominate over any questions affecting only individual members of a Class.

64. As a result of the foregoing, class treatment is appropriate.

FIRST CAUSE OF ACTION

Violation of California Business & Professions Code § 17200, et seq.

65. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

66. The Unfair Competition Law (“UCL”) prohibits any unlawful, unfair, or fraudulent business act or practice.” Cal. Bus. & Prof. Code §17200.

Fraudulent

67. Defendants’ misrepresentations and related omissions that they were working tirelessly to administer, process, and handle loan applications through the PPP in order to provide assistance to as many clients as possible and that they were otherwise following the requirements of the PPP are literally false, misleading, and likely to deceive the public.

Unlawful

68. As alleged herein, Defendants have advertised and represented their administration of loans through the PPP, such that Defendants’ actions as alleged herein violate at least the following law: The False Advertising Law, California Business & Professions Code § 17500, *et seq.* (the “FAL”).

Unfair

69. Defendants’ conduct with respect to the administration, processing, and handling of the applications from small businesses for loans through the PPP was unfair because Defendants’ conduct was immoral, unethical, unscrupulous, or substantially injurious to their clients. The utility of their conduct, if any, does not outweigh the gravity of harm to their victims.

70. Defendants’ conduct with respect to the administration, processing, and handling of the applications from small businesses for loans through the PPP was also unfair because in order to maximize their financial gain associated with loans through the PPP, they prioritized larger loans over smaller ones while

1 deceiving and misleading small business owners into believing their loans were
2 processed on a “first-come, first-served” basis, as required by the PPP.

3 71. In accordance with California Business & Professions Code §17203,
4 Plaintiff seeks an order enjoining Defendants from continuing to conduct business
5 through fraudulent or unlawful acts and practices and to discharge the funds they
6 received from the PPP to Plaintiff and the Class members.

7 **SECOND CAUSE OF ACTION**

8 **Violation of California’s False Advertising Law**

9 **California Business & Professions Code § 17500, et seq.**

10 72. Plaintiff incorporates by reference and realleges each and every
11 allegation contained above, as though fully set forth herein.

12 73. California’s False Advertising Law (“FAL”) prohibits the
13 performance of services, professional or otherwise “which [are] untrue or
14 misleading.” Cal. Bus. & Prof. Code §17500.

15 74. As set forth herein, Defendants’ misrepresentations and omissions
16 regarding compliance with applicable laws and regulations, including SBA rules
17 and requirements, were literally false, misleading, and likely to deceive the public.

18 75. Defendants knew or reasonably should have known that all these
19 claims were untrue or misleading.

20 76. Plaintiff and the Class members are entitled to statutory, injunctive,
21 and equitable relief in the amount of money in their respective PPP loan
22 applications.

23 **THIRD CAUSE OF ACTION**

24 **Breach of Fiduciary Duty**

25 77. Plaintiff incorporates by reference and realleges each and every
26 allegation contained above, as though fully set forth herein.

1 78. The Defendants owed and owe Plaintiff and the Class members
2 fiduciary obligations. By reason of their fiduciary relationships, the Defendants
3 owed and owe Plaintiff and the Class members the highest obligation of good faith,
4 fair dealing, loyalty, and due care.

5 79. The Defendants violated and breached their fiduciary duties to
6 Plaintiff and the Class members.

7 80. Defendants made false, misleading, and deceptive misrepresentations
8 and omissions regarding their administration, processing, and handling of the
9 applications for loans from small businesses through the PPP.

10 81. Because Defendants misrepresented their compliance with SBA
11 regulations and requirements and California law, and omitted to disclose the
12 material information as to their practice or policies of favoring their customers
13 and/or larger loans, the Defendants did not engage in arms-length transactions with
14 Plaintiff and other Class members.

15 82. Additionally, Defendants unjustly profited from the administration,
16 processing, and handling of loans through the PPP as they received origination fees
17 based on the loan amounts.

18 83. Consequently, as alleged herein, Defendants prioritized larger loans-
19 and thus larger fees—over smaller loans to the detriment of Plaintiff and the Class.

20 84. As a direct and proximate result of the Defendants' breaches of their
21 fiduciary obligations, Plaintiff and the Class members have sustained significant
22 damages, as alleged herein. As a result of the misconduct alleged herein,
23 Defendants are liable to Plaintiff and the Class members.

24 85. Plaintiff and the Class members seek declaratory relief, attorneys'
25 fees, costs, and any other just and proper relief available under the law.

FOURTH CAUSE OF ACTION

Negligence

86. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

87. Defendants' conduct is negligent per se.

88. As set forth above and below, Defendants violated their statutory duties under numerous statutes, including the FAL and UCL.

89. Additionally, Defendants must comply with SBA regulations such as 13 CFR Part 120.140, which states that lenders "must act ethically and exhibit good character" that prohibits "engag[ing] in conduct reflecting a lack of business integrity or honesty." 13 CFR Part 120.140(f).

90. Defendants' violations of such statutes is negligence per se and was a substantial factor in the harm suffered by Plaintiff and the Class members, including their submission of applications for loans through the PPP with Defendants who violated the "first-come, first-served" basis for processing loan applications, as dictated by the PPP, when they processed larger loans ahead of smaller loans.

91. As set forth above, such laws were intended to ensure that a company's claims about its services are truthful and accurate and that they engaged in business in an ethically and honest manner.

92. By virtue of Defendants' negligence, Plaintiff and the Class members have been damaged in an amount to be proven at trial or alternatively, seek rescission and disgorgement under this Count.

VI. DEMAND FOR JURY TRIAL

93. Plaintiff demands a trial by jury on all issues so triable.

VII. PRAYER FOR RELIEF

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

1. Certifying the proposed Class; and appoint Plaintiff as Class representative, and its undersigned counsel as Class counsel;

2. An order requiring Defendants to bear the costs of class notice;

3. An order enjoining Defendants from administering, processing, or handling loans through the PPP in violation of SBA regulations and requirements or California law;

4. An order awarding declaratory relief, and any further retrospective or prospective injunctive relief permitted by law or equity, including enjoining Defendants from continuing the unlawful practices as alleged herein, and injunctive relief to remedy Defendants' past conduct;

5. An order requiring Defendants to disgorge or return all monies, revenues, and profits obtained by means of any wrongful or unlawful act or practice;

6. An order requiring Defendants to pay punitive damages on any count so allowable;

7. An order requiring Defendants to pay all statutory damages permitted under the counts alleged herein;

8. An order awarding attorneys' fees and costs, including the costs of pre-suit investigation, to Plaintiff and the Class members; and

9. An order providing for all other such equitable relief as may be just and proper.

1 Date: April 27, 2020

Respectfully submitted,

2 **WHITFIELD BRYSON LAW LLP**

3 /s/ Alex R. Straus

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7 Tel.: (917) 471-1894
8 E-mail: alex@whitfieldbryson.com

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10 (*pro hac vice* forthcoming)
11 Scott C. Harris
12 (*pro hac vice* forthcoming)
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14 (*pro hac vice* forthcoming)
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16 Raleigh, NC 27605
17 Tel: (919) 600-5000
18 Fax: (919) 600-5035
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28 **LOCKRIDGE GRINDAL NAUEN P.L.L.P.**

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*Attorneys for Plaintiff
and the Proposed Class*

EXHIBIT A

SENATOR RUBIO'S LETTER

MARCO RUBIO, FLORIDA, CHAIRMAN
BENJAMIN L. CARDIN, MARYLAND, RANKING MEMBER

JAMES E. RISCH, IDAHO
RAND PAUL, KENTUCKY
TIM SCOTT, SOUTH CAROLINA
JONI ERNST, IOWA
JAMES M. INHOFE, OKLAHOMA
TODDYOUNG, INDIANA
JOHN KENNEDY, LOUISIANA
MITT ROMNEY, UTAH
JOSH HAWLEY, MISSOURI

MARIA CANTWELL, WASHINGTON
JEANNE SHAHEEN, NEW HAMPSHIRE
EDWARD J. MARKEY, MASSACHUSETTS
CORY A. BOOKER, NEW JERSEY
CHRISTOPHER A. COONS, DELAWARE
MAZIE HIRONO, HAWAII
TAMMY DUCKWORTH, ILLINOIS
JACKY ROSEN, NEVADA

MEREDITH WEST, REPUBLICAN STAFF DIRECTOR
SEAN MOORE, DEMOCRATIC STAFF DIRECTOR

United States Senate

COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP

WASHINGTON, DC 20510-6350

TELEPHONE: (202) 224-5175 FAX: (202) 224-5619

April 22, 2020

Brian Moynihan
Chairman of the Board and Chief Executive Officer
Bank of America Corporation
100 North Tryon Street
Charlotte, North Carolina 28255

Dear Mr. Moynihan:

America's nearly 30 million small businesses face an unprecedented challenge in surviving the economic contraction caused by public health restrictions related to the novel coronavirus. Many small business owners face losing their life's work and the prospects of laying off employees they know and care for. In response to this challenge, on March 27, 2020 President Trump signed into law the *Coronavirus Aid, Relief, and Economic Security (CARES) Act* (P.L. 116-136). This law enacted the Paycheck Protection Program (PPP), a historic and bipartisan expansion of financial relief for small businesses.

In the *CARES Act*, Congress authorized and funded \$349 billion in PPP loans, which are forgivable loans made to small businesses and nonprofits to cover payroll costs and fixed debt obligations for an eight-week period. These loans, which are made through the U.S. Small Business Administration (SBA)'s flagship 7(a) Loan Guaranty Program, serve entrepreneurs and business owners ranging from the self-employed and independent contractors, to small and medium sized businesses with up to 500 employees. They are available to borrowers nationwide, regardless of location in an urban or rural area.

Thanks to the hard work of the Department of Treasury, the SBA, and thousands of lenders who have worked around the clock, the Administration has thus far approved over 1.6 million PPP loans for a sum of nearly \$350 billion. The largest category of loan size is under \$350,000, and it is estimated that these loans have saved over 30 million jobs from impending layoffs.

Banks like yours fulfill an important duty of public service through their participation in PPP. Small businesses are the backbone of America and they contribute to the public far more than economic output. Small businesses are also community institutions that provide essential services and employment. During this time of great need, Americans need small businesses to be the source of stability they are used to them being.

Banks' duties to provide assistance during this time correspond to the public necessity of a strong small business sector. Banks are publicly chartered institutions that receive the license of the state to create credit. The PPP provides terms for banks to create credit that sustains small

businesses during this time of uncertainty. Moreover, there is ample private benefit at stake for banks. The largest processing fees banks earn on PPP loans are for loans of less than \$350,000. Preserving small businesses during this crisis by helping them retain their employees and pay their bills will help to ensure a strong economic recovery, and more small business clients in the future.

However, since the program began accepting applications and issuing approvals on Friday, April 3, 2020, I, as well as other members of the Senate, have received reports of priority being given to certain applicants over others. While I recognize the challenges of setting up a program of this size, processes to handle applications, and appropriate guidance to administer the program, it is important for small businesses and nonprofits of various sizes, regional locations, and missions to have equal access to PPP assistance. To ensure a neutral distribution of assistance, I request that you provide the Committee with answers to the following questions:

1. Did your financial institution set up an application process for PPP that is based on a first-come, first-serve basis from within the pool of eligible applicants? If not, please describe why not.
2. Did your financial institution include any filters in its application process that would prioritize certain borrowers over others? If so, please describe the factors for which those filters select.
3. What practices and processes does your financial institution have in place to ensure neutral access to PPP loans for small business borrowers across relevant size, regional, and ownership categories?

I remain committed to working with you to serve small businesses across the country who are shuttered, and devastated, by the public closures as a result of the novel coronavirus. Please provide answers to the Committee by May 1, 2020. I appreciate your attention to this important matter.

Sincerely,



Marco Rubio
Chairman

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
INFORMATECH CONSULTING, INC., Individually and on behalf of All Others Similarly Situated,

(b) County of Residence of First Listed Plaintiff Alameda County, CA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Alex R. Straus, Whitfield Bryson LLP
16748 McCormick Street, Los Angeles, CA 91436 (310) 450-9689

DEFENDANTS
BANK OF AMERICA CORPORATION; BANK OF AMERICA, N.A.; and DOES 1 - 10, inclusive,

County of Residence of First Listed Defendant Charlotte, North Carolina
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

☐ 1 U.S. Government Plaintiff

☐ 3 Federal Question (U.S. Government Not a Party)

☐ 2 U.S. Government Defendant

☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3
Incorporated or Principal Place of Business In This State	<input checked="" type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<div>110 Insurance</div> <div>120 Marine</div> <div>130 Miller Act</div> <div>140 Negotiable Instrument</div> <div>150 Recovery of Overpayment Of Veteran's Benefits</div> <div>151 Medicare Act</div> <div>152 Recovery of Defaulted Student Loans (Excludes Veterans)</div> <div>153 Recovery of Overpayment of Veteran's Benefits</div> <div>160 Stockholders' Suits</div> <div>190 Other Contract</div> <div>195 Contract Product Liability</div> <div>196 Franchise</div> <div>REAL PROPERTY</div> <div>210 Land Condemnation</div> <div>220 Foreclosure</div> <div>230 Rent Lease & Ejectment</div> <div>240 Torts to Land</div> <div>245 Tort Product Liability</div> <div>290 All Other Real Property</div>	<div>PERSONAL INJURY</div> <div>310 Airplane</div> <div>315 Airplane Product Liability</div> <div>320 Assault, Libel & Slander</div> <div>330 Federal Employers' Liability</div> <div>340 Marine</div> <div>345 Marine Product Liability</div> <div>350 Motor Vehicle</div> <div>355 Motor Vehicle Product Liability</div> <div>360 Other Personal Injury</div> <div>362 Personal Injury -Medical Malpractice</div> <div>CIVIL RIGHTS</div> <div>440 Other Civil Rights</div> <div>441 Voting</div> <div>442 Employment</div> <div>443 Housing/ Accommodations</div> <div>445 Amer. w/Disabilities-- Employment</div> <div>446 Amer. w/Disabilities--Other</div> <div>448 Education</div> <div>PERSONAL INJURY</div> <div>365 Personal Injury -- Product Liability</div> <div>367 Health Care/ Pharmaceutical Personal Injury Product Liability</div> <div>368 Asbestos Personal Injury Product Liability</div> <div>PERSONAL PROPERTY</div> <div><input checked="" type="checkbox"/> 370 Other Fraud</div> <div>371 Truth in Lending</div> <div>380 Other Personal Property Damage</div> <div>385 Property Damage Product Liability</div> <div>PRISONER PETITIONS</div> <div>HABEAS CORPUS</div> <div>463 Alien Detainee</div> <div>510 Motions to Vacate Sentence</div> <div>530 General</div> <div>535 Death Penalty</div> <div>OTHER</div> <div>540 Mandamus & Other</div> <div>550 Civil Rights</div> <div>555 Prison Condition</div> <div>560 Civil Detainee-- Conditions of Confinement</div>	<div>625 Drug Related Seizure of Property 21 USC § 881</div> <div>690 Other</div> <div>LABOR</div> <div>710 Fair Labor Standards Act</div> <div>720 Labor/Management Relations</div> <div>740 Railway Labor Act</div> <div>751 Family and Medical Leave Act</div> <div>790 Other Labor Litigation</div> <div>791 Employee Retirement Income Security Act</div> <div>IMMIGRATION</div> <div>462 Naturalization Application</div> <div>465 Other Immigration Actions</div>	<div>422 Appeal 28 USC § 158</div> <div>423 Withdrawal 28 USC § 157</div> <div>PROPERTY RIGHTS</div> <div>820 Copyrights</div> <div>830 Patent</div> <div>835 Patent--Abbreviated New Drug Application</div> <div>840 Trademark</div> <div>SOCIAL SECURITY</div> <div>861 HIA (1395ff)</div> <div>862 Black Lung (923)</div> <div>863 DIWC/DIWW (405(g))</div> <div>864 SSID Title XVI</div> <div>865 RSI (405(g))</div> <div>FEDERAL TAX SUITS</div> <div>870 Taxes (U.S. Plaintiff or Defendant)</div> <div>871 IRS--Third Party 26 USC § 7609</div>	<div>375 False Claims Act</div> <div>376 Qui Tam (31 USC § 3729(a))</div> <div>400 State Reapportionment</div> <div>410 Antitrust</div> <div>430 Banks and Banking</div> <div>450 Commerce</div> <div>460 Deportation</div> <div>470 Racketeer Influenced & Corrupt Organizations</div> <div>480 Consumer Credit</div> <div>485 Telephone Consumer Protection Act</div> <div>490 Cable/Sat TV</div> <div>850 Securities/Commodities/ Exchange</div> <div>890 Other Statutory Actions</div> <div>891 Agricultural Acts</div> <div>893 Environmental Matters</div> <div>895 Freedom of Information Act</div> <div>896 Arbitration</div> <div>899 Administrative Procedure Act/Review or Appeal of Agency Decision</div> <div>950 Constitutionality of State Statutes</div>

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding

☐ 2 Removed from State Court

☐ 3 Remanded from Appellate Court

☐ 4 Reinstated or Reopened

☐ 5 Transferred from Another District (specify)

☐ 6 Multidistrict Litigation--Transfer

☐ 8 Multidistrict Litigation--Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. § 1332(d), 28 U.S.C. § 1391(b)
Brief description of cause:
Violations of Cal. Bus. & Prof. Code §17200 et seq., Cal. Bus. & Prof. Code § 17500, et seq., Breach of Fiduciary Duty, etc.

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE Mag. Judge Thomas S. Hixson

DOCKET NUMBER 3:20-cv-02824

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
(Place an "X" in One Box Only)

☒ SAN FRANCISCO/OAKLAND

☐ SAN JOSE

☐ EUREKA-MCKINLEYVILLE

DATE 04/27/2020

SIGNATURE OF ATTORNEY OF RECORD /s/ Alex R. Straus

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
 - c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.