

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In re:

USA GYMNASTICS,¹

Debtor.

Chapter 11

Case No. 18-09108-RLM-11

USA GYMNASTICS,

Plaintiff,

v.

U.S. SMALL BUSINESS ADMINISTRATION,
and JOVITA CARRANZA, in her official
capacity as Administrator for the U.S. Small
Business Administration.

Defendants.

Adversary Case No. 20-_____

**COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, AND WRIT OF MANDAMUS**

Plaintiff USA Gymnastics, as debtor and debtor in possession in the above-captioned chapter 11 case (the “**Plaintiff**” or “**USAG**”), brings this complaint for declaratory judgment, injunctive relief, and a writ of mandamus (the “**Complaint**”) against the U.S. Small Business Administration (“**SBA**”) and Jovita Carranza, solely in her capacity as the Administrator of the SBA (“**Carranza**”, together with the SBA, the “**Defendants**”).

¹ The last four digits of USAG’s federal tax identification number are 7871. The location of USAG’s principal office is 130 E. Washington Street, Suite 700, Indianapolis, Indiana 46204.

INTRODUCTION

1. This is an action against the SBA seeking: (i) a declaratory judgment that the SBA's implementation of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (the "**CARES Act**") and its Paycheck Protection Program ("**PPP**") is unlawful under section 525 of the United States Code, 11 U.S.C. § 101, *et seq.* (the "**Bankruptcy Code**") and section 706 of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (the "**APA**") because it impermissibly discriminates against debtors in bankruptcy and is beyond the SBA's statutory authority; (ii) an order enjoining the SBA from denying USAG access to PPP funds based solely on USAG's status as a chapter 11 debtor; and (iii) a writ of mandamus under 28 U.S.C. § 1361 compelling the SBA to remove from USAG's PPP application any language that purports to disqualify debtors, including USAG, as eligible PPP applicants.

2. On March 27, 2020, in response to the ongoing COVID-19 public health and economic crisis, Congress passed and the President signed the CARES Act. The CARES Act created the PPP, which authorizes the SBA to issue, on a first-come first-served basis, unsecured and forgivable loans to small businesses with fewer than 500 employees, including section 501(c)(3) non-profit organizations, in amounts up to 250% of their monthly payroll costs. Because these forgivable PPP loans are effectively grants, there has been enormous demand for PPP funds. Current appropriations for the PPP will be exhausted in a matter of weeks, if not days.

3. USAG is a non-profit organization with significant need for PPP funds. The COVID-19 pandemic has negatively and substantially impacted USAG's operations and revenues. Most importantly, the current crisis has caused the postponement of the 2020 Olympic Trials and other gymnastics meets and events that contribute materially to USAG's revenues. USAG therefore wants to apply for PPP funds. By any plain reading of the CARES Act, USAG is eligible: USAG is a non-profit organization that employs fewer than 500 individuals on salary, it pays

associated payroll taxes, and it will agree to use any PPP funds only for approved monthly payroll costs. *See generally* 15 U.S.C. § 636(a)(36)(D)(i), (F)-(G) (listing conditions for PPP funding).

4. However, the SBA has adopted a policy that chapter 11 debtors are *per se* ineligible for PPP relief, even though that bar is found nowhere in the text of the CARES Act. In the operative interim final rule implementing the PPP, the SBA announced that “[i]f the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan.” (Fourth PPP Interim Final Rule, 85 Fed. Reg. 23450, 23451 (Apr. 28, 2020), attached hereto as Ex. A.) Similarly, the SBA’s official PPP application form requires applicants to certify that they are not “presently involved in any bankruptcy,” or else PPP funds “will not be approved.” (PPP Borrower Application Form, attached hereto as Ex. B, at Q. 1.) As a result, the SBA will reject any application USAG files for PPP funds, solely because of USAG’s status as a chapter 11 debtor.

5. But the SBA’s no-debtor policy is contrary to the text of the CARES Act, which relaxes the requirements for SBA funding and does not prohibit debtors from participating in the PPP. The SBA’s no-debtor policy also violates the command in section 525 of the Bankruptcy Code that “a governmental unit may not deny . . . a license, permit, charter, franchise, or other similar grant to, condition such a grant to, [or] discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title.” 11 U.S.C. § 525(a). Because the SBA’s implementation of the PPP contravenes the text of the CARES Act and the Bankruptcy Code, USAG requests that the Court declare that USAG is not ineligible for a PPP loan solely because of its status as a chapter 11 debtor, and enjoin the SBA from enforcing its contrary, unlawful policy.

6. The weight of authority supports this result. Bankruptcy courts across the country have invalidated the SBA's no-debtor policy and declared that debtors similarly situated to USAG may qualify for PPP funding even though they are debtors. *See, e.g., J-H-J, Inc., et al. v. Carranza*, No. 20-5014, Dkt. 9 (Bankr. W.D. La. May 11, 2020) (enjoining SBA from enforcing PPP no-debtor policy); *Organic Power LLC v. Carranza*, No. 20-0055, Dkt. 29 (Bankr. D.P.R. May 8, 2020) (same); *Springfield Hosp., Inc. v. Carranza*, No. 20-1003, Dkt. 19 (Bankr. Vt. May 4, 2020) (same); *Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Business Admin.*, No. 20-1026, Dkts. 15-16 (Bankr. N.M. May 1, 2020) (same); *Penobscot Valley Hosp. v. Carranza*, No. 20-1005, Dkt. 18 (Bankr. Me. May 1, 2020) (same); *Calais Regional Hosp. v. Carranza*, No. 20-1006, Dkt. 21 (Bankr. Me. May 1, 2020) (same); *Hidalgo Cty. Emergency Serv. Found. v. Carranza*, No. 20-2006, Dkt. 18 (Bankr. S.D. Tex. Apr. 25, 2020) (same). This Court should do the same, vindicating USAG's rights under the CARES Act, the PPP, and the Bankruptcy Code.

7. By separate motion, USAG requests that the Court grant the requested preliminary injunctive relief on an expedited basis before the appropriations for the PPP run out.

JURISDICTION

8. This Court has jurisdiction pursuant to 28 U.S.C. § 1334(b).
9. Venue is proper in this district pursuant to 28 U.S.C. § 1409(a).
10. This adversary proceeding constitutes a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (D).
11. USAG consents to the entry of final orders or judgments by this Court if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

12. The statutory predicates for the relief requested in this Complaint are section 706 of the APA, section 525 of the Bankruptcy Code, and Rule 7001 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

PARTIES

13. Plaintiff USAG is a nonprofit corporation headquartered in Indianapolis, Indiana and is the debtor and debtor in possession in the above-captioned chapter 11 case. USAG’s principal place of business is located at 130 E. Washington Street, Suite 700, Indianapolis, Indiana, 46204. USAG is recognized by the United States Olympic & Paralympic Committee and the Fédération Internationale de Gymnastique as the national governing body for the sport of gymnastics in the United States.

14. Defendant SBA is an independent agency of the United States government. The SBA, through its Administrator, can sue and be sued in any United States District Court and in any United States Bankruptcy Court to which matters are referred pursuant to 28 U.S.C. § 157(a). *See* 15 U.S.C. § 634(b)(1).

15. Defendant Jovita Carranza is the Administrator of the SBA and is sued solely in her official capacity.

BACKGROUND

I. USAG’s Chapter 11 Case.

16. On December 5, 2018, USAG filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

17. USAG remains in possession of its property and continues to operate and maintain its organization as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner in USAG’s chapter 11 case.

II. CARES Act And PPP Overview.

18. On March 27, 2020, Congress passed and the President signed the CARES Act. Pub. L. 116-136. The CARES Act is intended to provide stimulus to the economy by distributing approximately \$2.3 trillion to various industries, programs, and individuals.

19. The PPP is set forth in Title I of the CARES Act and is a temporary, short-term program under Section 7(a) of the Small Business Act, the regulatory scheme through which the SBA guarantees “covered loans” to small businesses. *See generally* 15 U.S.C. 636(a).

20. Through the PPP, the SBA may issue funding to small businesses, including section 501(c)(3) non-profit organizations, with fewer than 500 employees. *Id.* § 636(a)(36)(D). Nothing in the CARES Act restricts PPP funding to organizations that are not chapter 11 debtors.

21. The SBA can approve PPP funding in amounts up to 250% of an organization’s monthly payroll costs. *Id.* § 636(a)(36)(E). Monthly payroll costs are defined to include salaries; wages; vacation, parental, family, medical, and sick leave; allowances for dismissal or separation; payments for group health care benefits, including insurance premiums; and retirement benefits. *Id.* § 636(a)(36)(A)(viii).

22. So long as the PPP proceeds are used for these purposes, as well as for rent, utilities, mortgage interest, and interest on other existing debt, the funds are eligible for forgiveness by the SBA. *Id.* § 636(a)(36)(F); *see also id.* § 9005.² The amount forgiven will be equal to the amount of monthly payroll costs, group healthcare benefits and insurance premiums, mortgage interest,

² Specifically, the SBA requires 75% of the PPP proceeds to be used for employee payroll, as opposed to rent, utilities, and interest on mortgages, in order for the funding to be forgiven. *See SBA, Loan Details & Forgiveness*, available at sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program. On May 5, 2020, more than 20 senators, of both parties, wrote to the SBA Administrator and the Secretary of the Treasury to request that the 75% threshold be reduced to 50% to ensure that as much PPP funding is forgiven as possible. *See Letter to Secretary Mnuchin and Administrator Carranza*, available at cornyn.senate.gov/sites/default/files/PPP%20forgiveness%20letter_final_.pdf.

rent obligations, and utility payments that the organization paid during the eight-week period following receipt of the PPP funds. *Id.* § 9005(b). The amount forgiven decreases if the borrower reduces the average number of full-time equivalent employees or reduces compensation for such employees. *Id.* § 9005(d). Any forgiveness will not be taxable. *Id.* § 9005(i). All repayments of PPP funds are deferred for at least six months, and up to one year, while the SBA determines whether borrowers have complied with the CARES Act and are entitled to forgiveness. *Id.* § 636(a)(36)(M).³

23. Unlike traditional SBA loans, PPP applicants need not demonstrate that they are unable to obtain credit elsewhere. *Id.* § 636(a)(36)(I). In addition, no collateral or personal guarantees are required to receive PPP funds, unlike traditional SBA loans. *Id.* § 636(a)(36)(J). Finally, neither the SBA nor participating lenders may charge any fees for PPP funding, unlike traditional SBA loans. *Id.* § 636(a)(36)(H).

24. The PPP funding pool, however, is limited in size and administered on a first-come-first-served basis. Congress originally appropriated \$349 billion for the PPP. *See* Pub. L. 116-136 § 1107(a)(1). The demand for the PPP program has been overwhelming, and the original \$349 billion appropriation was exhausted as of April 16, 2020.⁴

25. On April 23, 2020, Congress appropriated a further \$310 billion to the PPP. *See* Pub. L. 116-139, Div. A § 101(a)(1). The SBA announced on May 1, 2020 that it had already

³ To the extent a PPP loan is not forgiven, it will accrue interest no greater than 4% annually, over a maximum period of 10 years. 15 U.S.C. § 636(a)(36)(K)-(L). The CARES Act forbids prepayment penalties. *Id.* § 636(a)(36)(R).

⁴ Thomas Franck & Kate Rogers, *Small Business Rescue Loan Program Hits \$349 Billion Limit and Is Now Out of Money*, CNBC (Apr. 16, 2020), available at [cnbc.com/2020/04/16/small-business-rescue-loan-program-hits-349-billion-limit-and-is-now-out-of-money.html](https://www.cnbc.com/2020/04/16/small-business-rescue-loan-program-hits-349-billion-limit-and-is-now-out-of-money.html).

disbursed \$175 billion of this supplemental \$310 billion appropriation.⁵ As a result, the current funding for the PPP is likely to run out imminently.

III. The SBA's Implementation Of The CARES Act And PPP.

26. The CARES Act grants the SBA emergency rule making authority to implement and carry out the PPP. *See* Pub. L. 116-136 § 1114.

27. In April, the SBA issued three interim final rules providing guidance on, among other things, the eligibility requirements to receive a loan under the PPP. These interim rules adopted the provisions in the SBA's Standard Operating Procedures 50-10-5(K) (the "**SOP**"). (*See, e.g.*, 85 Fed. Reg. 20811, 20812 (April 15, 2020); 85 Fed. Reg. 20817 (April 15, 2020); 85 Fed. Reg. 21747 (April 20, 2020).) The SOP states that businesses listed in 13 C.F.R. § 120.110 are not eligible for a SBA loan.⁶ That regulation, in turn, lists "financial businesses," "passive businesses owned by developers and landlords," "life insurance companies," "pyramid sale distribution plans," and "businesses engaged in any illegal activity" as ineligible SBA applicants—but the regulation does *not* exclude chapter 11 debtors from SBA loan eligibility. 13 C.F.R. § 120.110. As a result, because the SBA's first three interim rules implementing the PPP incorporate the ineligibility provisions of the SOP and 13 C.F.R. § 120.110, these PPP interim rules did not preclude chapter 11 debtors from applying for PPP funding.

28. Regardless, on April 2, 2020, the SBA promulgated forms for small businesses to use to apply for PPP funding and for lenders to use to request SBA guaranties of disbursed PPP funds. Both forms purport to disqualify bankruptcy debtors from participation in the PPP. For

⁵ Danielle Kurtzleben, *Not-So-Small Businesses Continue To Benefit From PPP Loans*, NPR (May 4, 2020), available at npr.org/2020/05/04/850177240/not-so-small-businesses-continue-to-benefit-from-ppp-loans.

⁶ SBA, *Standard Operating Procedures 50-10-5(K)—Lender & Development Company Loan Programs*, Subpart B at 104, available at sba.gov/document/sop-50-10-5-lender-development-company-loan-programs.

instance, Official SBA Form 2483, which is the official form organizations must use to apply for PPP funding, asks in the first question: “Is the Applicant or any owner of the Applicant . . . presently involved in any bankruptcy?” (Ex. B, at Q.1.) The form notes that if this question is “answered ‘Yes,’ the loan will not be approved.” (*Id.* at 1.) Similarly, Official SBA Form 2484, which is the SBA’s official form for PPP lenders to use to request SBA guarantees of disbursed PPP funds, requires lenders to affirm that: the PPP applicant “certified to the Lender that neither the Applicant nor any owner . . . is presently . . . involved in any bankruptcy.” (PPP Lender Application Form, attached hereto as Ex. C, at I.) If the lender does not so affirm, the guarantee “cannot be approved.” The SBA’s PPP application forms therefore enshrine a no-debtor policy that is found nowhere in the text of the CARES Act, the SOP, or 13 C.F.R. § 120.110. (*Id.*)

29. The SBA formalized its no-debtor policy on April 28, 2020 by issuing another interim final rule implementing the PPP (the “**Fourth Interim Final Rule**”). Without citing any provision in the CARES Act or other applicable law, the Fourth Interim Final Rule states that “[i]f the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan.” (Ex. A, at 23451.) The purported justification for the no-debtor policy is that “providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-payment of unforgiven loans.” (*Id.*)⁷ This policy rationale ignores that debtors, like all other PPP applicants, have to agree to abide by the PPP’s terms to receive funding. Moreover, even if this policy rationale was valid (which it is not), it is preempted by the

⁷ Since publishing the Fourth Interim Final Rule, the SBA has published three additional interim final rules implementing the PPP. (*See, e.g.*, 85 Fed. Reg. 26321 (May 4, 2020); 85 Fed. Reg. 26324 (May 4, 2020); 85 Fed. Reg. 27287 (May 8, 2020).) These rules did not rescind or modify the no-debtor policy announced in the Fourth Interim Final Rule.

CARES Act's statutory text, which does not exclude debtors from the PPP, as well as section 525 of the Bankruptcy Code, which prohibits the government from discriminating against debtors in its management of grant programs like the PPP.

IV. USAG's Need For PPP Funding.

30. USAG is a non-profit organization that Congress intended to aid when it passed the CARES Act and PPP. The COVID-19 public health and economic crisis has had a severe and detrimental impact on USAG's operations. On March 24, 2020, the International Olympic Committee and the Tokyo Steering Committee announced that the 2020 Summer Olympic Games would be postponed until the summer of 2021 in order to protect the health and safety of athletes, event staff, and spectators. USAG's cashflow is cyclical and heavily dependent upon increased revenues tied to the quadrennial Olympics. The postponement of the 2020 Olympics, and the corresponding Olympic Trials, has materially and negatively diminished USAG's anticipated cashflow for the foreseeable future.

31. Aside from the Olympics, USAG has had to cancel or postpone virtually *every* competition, meet, or other event that it manages or sponsors, out of concerns for the health and safety of its members and in order to comply with shelter in place orders issued by numerous state governments, including Indiana. These event cancellations and postponements have had a devastating impact on USAG's budget. The events will no longer generate revenues that USAG intended to use to support its general operations and to defray event costs, which USAG has already incurred and is already obligated to pay.

32. Despite the material decrease in USAG's revenues, USAG's non-event expenses have remained constant. USAG still must support athletes, coaches, and gyms in order to fulfill its statutory mission as a national governing body. USAG also is required to satisfy the accumulating professional fees and other administrative expenses associated with this chapter 11 case. USAG

therefore would benefit immensely from an immediate infusion of cash to maintain its operations and continue to administer this chapter 11 case for the ultimate benefit of its members and all other parties in interest.

33. To that end, USAG evaluated whether to apply for PPP funding, subject to the approval of this Court. USAG clearly qualifies for PPP relief: USAG is a non-profit organization that employs fewer than 500 individuals on salary, it pays associated payroll taxes, and it will agree to use any PPP funds only for approved monthly payroll costs such as employee payroll and rent and utility obligations. USAG would also, of course, seek this Court's approval before entering into any funding agreement. But, in light of the Fourth Interim Final Rule and the SBA's application forms, USAG understands that the SBA and any participating lender would reject USAG's PPP application solely on account of USAG's status as a chapter 11 debtor.

34. Indeed, a representative from the SBA confirmed as much. On April 14, 2020, counsel for USAG corresponded with SBA officials to inquire whether the SBA would enforce its no-debtor policy and reject USAG's PPP application on account of its status as a chapter 11 debtor. On April 22, 2020, counsel for the SBA wrote that "the current Chapter 11 bankruptcy would render USA Gymnastics ineligible for the PPP loan." (C.J. Schneider Email Correspondence, attached hereto as Ex. D, at pg. 6 of 14.) She then noted that, "[w]hile there is not language in the CARES Act or Interim Final Rules that make a borrower ineligible because it or one of its owners is in a current bankruptcy or was the subject of a former bankruptcy, the Borrower Application does have a question as to whether there is a pending bankruptcy, and it is our understanding that the loan will be denied if the answer is 'yes.'" (*Id.*) She also stated that, "under our normal loan programs, bankruptcies don't render a business ineligible for funding but rather is considered and examined from a credit standpoint." (*Id.*)

35. Counsel for USAG then responded that the no-debtor policy impermissibly added an eligibility requirement that was found nowhere in the CARES Act. Counsel for the SBA wrote back: “I completely agree. The application seems to be in conflict with the CARES Act, or at best, is the result of a drafting error. Or there was an omission in the drafting of the CARES Act. Whatever the case, the directives do not line up.” (*Id.* at pg. 3 of 14.) As a result, the SBA’s no-debtor policy is contrary to the text of the CARES Act and unlawful.

V. This Court Should Invalidate The SBA’s No-Debtor Policy, Consistent With Decisions Issued By Numerous Other Bankruptcy Courts.

36. The SBA’s no-debtor policy for the PPP is wrongful and contrary to law. No provision of the CARES Act, the SOP, or 13 C.F.R. § 120.110 authorizes the no-debtor policy. Further, section 525 of the Bankruptcy Code prohibits the discrimination embodied in the SBA’s no-debtor policy. This Court should declare that the no-debtor policy is invalid and void, and enjoin the SBA and any participating lenders from enforcing that policy as to USAG and any PPP application it submits.

37. The weight of authority supports this result. Bankruptcy courts across the country have invalidated the SBA’s no-debtor policy and declared that debtors similarly situated to USAG may qualify for PPP funding even though they are debtors. *See, e.g., J-H-J, Inc., et al. v. Carranza*, No. 20-5014, Dkt. 9 (Bankr. W.D. La. May 11, 2020) (enjoining SBA from enforcing PPP no-debtor policy); *Organic Power LLC v. Carranza*, No. 20-0055, Dkt. 29 (Bankr. D.P.R. May 8, 2020) (same); *Springfield Hosp., Inc. v. Carranza*, No. 20-1003, Dkt. 19 (Bankr. Vt. May 4, 2020) (same); *Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Business Admin.*, No. 20-1026, Dkts. 15-16 (Bankr. N.M. May 1, 2020) (same); *Penobscot Valley Hosp. v. Carranza*, No. 20-1005, Dkt. 18 (Bankr. Me. May 1, 2020) (same); *Calais Regional Hosp. v.*

Carranza, No. 20-1006, Dkt. 21 (Bankr. Me. May 1, 2020) (same); *Hidalgo Cty. Emergency Serv. Found. v. Carranza*, No. 20-2006, Dkt. 18 (Bankr. S.D. Tex. Apr. 25, 2020) (same).

38. For instance, in *Hidalgo*, the Bankruptcy Court for the Southern District of Texas issued a temporary restraining order requiring the SBA and a local bank to process the debtor's PPP application without regard for its status as a debtor. The court noted that the CARES Act lacks any provision excluding debtors from the PPP, but does contain language excluding debtors from participating in a separate program to provide aid to mid-sized companies with 500 to 10,000 employees. (*Hidalgo* TRO Hearing Transcript, attached hereto as Ex. E, at 7:15-23, 30:19-20.) The court reasoned that this provision indicates Congress intended for debtors to be able to access the PPP. The court also noted that the PPP is a governmental "support program," subject to section 525(a) of the Bankruptcy Code, rather than a traditional loan program because "there really is no underwriting that's done" with respect to PPP applicants. (*Id.* at 16:21-25, 29:7.) It therefore concluded that the SBA's no-debtor policy conflicts with the CARES Act's statutory text and violates section 525's anti-discrimination command. (*Id.* at 28:7-33:9.)

39. In so ruling, the court rejected the SBA's policy rationale for its no-debtor rule—namely, that debtors present too high a credit risk to receive PPP funding. Specifically, the court stated:

I do find that by including the words 'or presently involved in any bankruptcy,' they are intended to be discriminatory. They are intended to be discriminatory toward debtors for reasons offered that somehow we lose control of the money, again I find to be completely frivolous. I cannot imagine anything less controlling than to simply give out money with no underwriting, with no oversight, and then complain that if I have a Federal judge who makes sure that the debtor complies with the law, ensures that the debtors file monthly operating reports, ensure that copies of bank statements are filed on the docket every month, that they somehow lost control. I simply don't buy it. I find the arguments to lack any good faith.

(*Id.* at 31:19-32:6.) Ultimately, the court determined that the “people that need the most help and who have sought protection under our laws are the people who are the targets of discrimination in a government support program; [this] can't possibly be.” (*Id.* at 32:17-20.) The court therefore entered the requested TRO against enforcement of the no-debtor policy.

40. The Bankruptcy Court for the District of Maine reached the same result in *Calais*. There, the court first rejected the argument that it could not enter injunctive relief against the SBA because of 15 U.S.C. § 634(b)(1), which provides that “no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property.” (*Calais*, Dkt. 21, attached hereto as Ex. F, at 2-4.) The court concluded that this anti-injunction bar applies only to orders that attach SBA funds and “interfere with internal agency operations,” rather than orders generally mandating the agency’s compliance with applicable law. (*Id.* at 3.) The Court next found that section 525’s anti-discrimination rule governs administration of PPP funds. The PPP “is a grant of aid necessitated by a public health crisis,” and so the SBA cannot discriminate against debtors when distributing PPP funds. (*Id.* at 7.) The court entered a temporary restraining order barring the SBA and any lender considering the debtor’s PPP application from enforcing the no-debtor policy. (*Id.* at 10-13.)

41. Next, in *Archdiocese of Santa Fe*, the Bankruptcy Court for the District of New Mexico entered a final judgment ordering the SBA to “act on [the Archdiocese’s] PPP loan application forthwith without regard to [the Archdiocese’s] status as a chapter 11 debtor in possession.” (*Archdiocese of Santa Fe*, Dkt. 16, attached hereto as Ex. G, at ¶ 4.) The court explained that “[w]ith only the flimsiest of justifications [the SBA] took one of many underwriting criteria from its ‘normal’ loan programs (bankruptcy status of the borrower), changed it to an eligibility condition, and then applied it to an emergency grant program where it clearly had no

place.” (*Archdiocese of Santa Fe*, Dkt. 15, attached hereto as Ex. H, at 15.) The SBA’s “inexplicable and highhanded decision to rewrite the PPP’s eligibility requirements in this way was arbitrary and capricious, beyond its statutory authority, and in violation of 11 U.S.C. § 525(a).” (*Id.*) The court therefore enjoined enforcement of the no-debtor policy. Even more, it also authorized the debtor to seek “compensatory and, if appropriate, punitive damages” against the SBA if PPP funding was exhausted before the court’s order could be enforced and the debtor’s PPP application processed.

42. As a final example, in *Organic Power LLC*, the Bankruptcy Court for the District of Puerto Rico entered a temporary restraining order prohibiting the SBA and any participating lender from “deny[ing] an application of Organic Power under the PPP solely on the basis that Organic Power is a debtor in bankruptcy or based on the words ‘or presently in bankruptcy’ on the SBA’s application form.” (*Organic Power LLC*, Dkt. 29, attached hereto as Ex. I, at pg. 6.) The court rejected the SBA’s argument that it enjoyed sovereign immunity from suit. (*Id.* at 2-3.) It then concluded that the SBA’s arguments in defense of the no-debtor policy were “frivolous” because “Congress created the PPP plainly to assist non-creditworthy small businesses.” (*Id.* at 4.) Of particular note to the court, “Congress knew how to and did expressly exclude mid-size businesses in bankruptcy from loan help under the CARES Act but did not exclude small businesses in bankruptcy from the PPP under the CARES Act.” (*Id.* at 4.)

43. Consistent with these cases, the Court here should bar the SBA and any participating lender from enforcing the no-debtor policy with respect to any PPP application submitted by USAG.

CLAIMS FOR RELIEF

COUNT ONE

Bankruptcy Code Section 525(a) (Governmental Discrimination Against Debtor)

44. Plaintiff re-states and re-alleges paragraphs 1 through 43 of this Complaint as though fully set forth herein.

45. Section 525(a) of the Bankruptcy Code provides in relevant part that “a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, [or] discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title . . . solely because such bankrupt or debtor is or has been a debtor under this title . . .” 11 U.S.C. § 525(a). Section 525(a)’s list of governmental programs that may not discriminate against debtors is “not intended to be an exhaustive.” *In re Stinson*, 285 B.R. 239, 246 (Bankr. W.D. Va. 2002); accord COLLIER ON BANKRUPTCY ¶ 525.01; H. Rep. No. 95–595, 366–67 (1977).

46. USAG is a debtor in a case under chapter 11 of the Bankruptcy Code.

47. The PPP constitutes a federal program within the meaning of section 525(a) of the Bankruptcy Code because the PPP is designed to provide forgivable loans that function as grants, and which are expressly not dependent upon an applicant’s creditworthiness.

48. Because USAG is a non-profit organization with fewer than 500 employees, it is a small business within the meaning of the CARES Act and is eligible to participate in the PPP.

49. However, through the Fourth Interim Final Rule and the PPP application forms, the SBA has adopted a no-debtor policy for the PPP, without regard for the text of the CARES Act and other applicable law. The SBA will therefore deny any PPP application that USAG submits, solely on account of USAG’s status as a chapter 11 debtor.

50. The SBA's no-debtor policy for the PPP violates the anti-discrimination provisions of section 525 of the Bankruptcy Code.

COUNT TWO
Administrative Procedure Act
(Exceeds Statutory Authority)

51. Plaintiff re-states and re-alleges paragraphs 1 through 50 of this Complaint as though fully set forth herein.

52. Under the APA, courts must "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Defendants may only exercise authority conferred and delegated by statute.

53. No law, regulation, or rule of any kind disqualifies, or authorizes the SBA to disqualify, chapter 11 debtors from participating in the PPP. The text of the CARES Act does not limit PPP relief to non-debtors, and the extensive list of ineligible SBA applicants set forth in the SOP and 13 C.F.R. § 120.110 does not include chapter 11 debtors.

54. However, through the Fourth Interim Final Rule and the PPP application forms, the SBA has adopted a no-debtor policy for the PPP, without regard for the text of the CARES Act and other applicable law. The SBA will therefore deny any PPP application that USAG submits, solely on account of USAG's status as a chapter 11 debtor.

55. The SBA's no-debtor policy for the PPP is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

56. The SBA's adoption of the no-debtor policy, through its issuance of the Fourth Interim Final Rule and the PPP application forms, constitutes final agency action subject to judicial review. *See* 5 U.S.C. § 704. No administrative appeals or remedies are available to USAG to seek review of the SBA's adoption of the no-debtor policy for the PPP.

COUNT THREE
Administrative Procedure Act
(Arbitrary and Capricious)

57. Plaintiff re-states and re-alleges paragraphs 1 through 56 of this Complaint as though fully set forth herein.

58. Under the APA, courts must “hold unlawful and set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A).

59. No law, regulation, or rule of any kind disqualifies, or authorizes the SBA to disqualify, chapter 11 debtors from participating in the PPP. The text of the CARES Act does not limit PPP relief to non-debtors, and the extensive list of ineligible SBA applicants set forth in the SOP and 13 C.F.R. § 120.110 does not include chapter 11 debtors.

60. However, through the Fourth Interim Final Rule and the PPP application forms, the SBA has adopted a no-debtor policy for the PPP, without regard for the text of the CARES Act and other applicable law. The SBA will therefore deny any PPP application that USAG submits, solely on account of USAG’s status as a chapter 11 debtor.

61. The SBA’s no-debtor policy for the PPP is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). Further, the SBA’s stated policy rationale for its no-debtor policy (that debtors present unjustifiable risks with respect to the diversion and nonpayment of PPP funding) is “arbitrary, capricious, [or] an abuse of discretion” in light of the Bankruptcy Court’s oversight of USAG’s use of any PPP funding it receives.

62. The SBA’s adoption of the no-debtor policy, through its issuance of the Fourth Interim Final Rule and the PPP application forms, constitutes final agency action subject to judicial review. *See* 5 U.S.C. § 704. No administrative appeals or remedies are available to USAG to seek review of the SBA’s adoption of the no-debtor policy for the PPP.

COUNT FOUR
Federal Officer Mandamus
(28 U.S.C. § 1361)

63. Plaintiff re-states and re-alleges paragraphs 1 through 62 of this Complaint as though fully set forth herein.

64. Under 28 U.S.C. § 1361, “district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

65. No law, regulation, or rule of any kind disqualifies, or authorizes the SBA to disqualify, chapter 11 debtors from participating in the PPP. The text of the CARES Act does not limit PPP relief to non-debtors, and the extensive list of ineligible SBA applicants set forth in the SOP and 13 C.F.R. § 120.110 does not include chapter 11 debtors.

66. However, through the Fourth Interim Final Rule and the PPP application forms, the SBA has adopted a no-debtor policy for the PPP, without regard for the text of the CARES Act and other applicable law. The SBA will therefore deny any PPP application that USAG submits, solely on account of USAG’s status as a chapter 11 debtor.

67. Plaintiff is entitled to a writ of mandamus under 28 U.S.C. § 1361 compelling the SBA and any participating lenders to remove from USAG’s PPP application any language purporting to disqualify chapter 11 debtors as eligible PPP applicants, and to consider any PPP application submitted by USAG without regard to its status as a chapter 11 debtor.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court enter judgment in its favor and grant the following relief:

- A. On Count 1, enter a declaratory judgment that Defendants' implementation of the PPP is discriminatory against chapter 11 debtors in violation of Section 525(a) of the Bankruptcy Code, and enter preliminary and permanent injunctive relief enjoining Defendants and participating lenders from denying USAG a loan under the PPP based solely on USAG's status as a chapter 11 debtor;
- B. On Count 2, enter a declaratory judgment that Defendants' implementation of the PPP in a manner that causes chapter 11 debtors, including USAG, to be ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" in violation of the APA, and enter preliminary and permanent injunctive relief enjoining Defendants and participating lenders from denying USAG a loan under the PPP based solely on USAG's status as a chapter 11 debtor;
- C. On Count 3, enter a declaratory judgment that Defendants' implementation of the PPP in a manner that causes chapter 11 debtors, including USAG, to be ineligible is "arbitrary, capricious, [or] an abuse of discretion" in violation of the APA, and enter preliminary and permanent injunctive relief enjoining Defendants and participating lenders from denying USAG a loan under the PPP based solely on USAG's status as a chapter 11 debtor;
- D. On Count 4, issue a writ of mandamus pursuant to 28 U.S.C. § 1361 to compel the SBA and participating lenders to remove from USAG's PPP application any language purporting to disqualify chapter 11 debtors as eligible PPP applicants; and,
- E. Grant such other relief as is just and proper under the circumstances.

Dated: May 18, 2020

Respectfully submitted,

JENNER & BLOCK LLP

By: /s/ Catherine Steege

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Exhibit A

**Fourth PPP Interim Final Rule
(85 Fed. Reg. 23450 (Apr. 28, 2020))**

SMALL BUSINESS ADMINISTRATION

[Docket Number SBA–2020–0021]

13 CFR Parts 120 and 121

RIN 3245–AH37

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility**AGENCY:** U.S. Small Business Administration.**ACTION:** Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). The Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. The Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, and April 14, 2020. This interim final rule supplements the previously posted interim final rules with additional guidance. SBA requests public comment on this additional guidance.

DATES: *Effective date:* This rule is effective April 28, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before May 28, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0021 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the

final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:**I. Background Information**

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public’s exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America’s small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the

30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders’ and borrowers’ need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on several important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 28, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility**Overview**

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in the First PPP Interim Final Rule (85 FR 20811), a second interim final rule (85 FR 20817) (the Second PPP Interim Final Rule), and a third interim final rule (the Third PPP Interim Final Rule) (85 FR 21747) (collectively, the PPP Interim Final Rules).

1. Requirements for Promissory Notes and Authorizations

This guidance is substantively identical to previously posted FAQ guidance.

a. Are lenders required to use a promissory note provided by SBA or may they use their own?

Lenders may use their own promissory note or an SBA form of promissory note. *See* FAQ 19 (posted April 8, 2020).

b. Are lenders required to use a separate SBA Authorization document to issue PPP loans?

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 (the Lender Application Form—Paycheck Protection Program Loan Guaranty)¹ to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Sections 1102 and 1106 of the CARES Act, the PPP Interim Final Rules and guidance, and SBA Form 2484. *See* FAQ 21 (posted April 13, 2020). The decision not to require a separate SBA Authorization in order to ensure that critical PPP loans are disbursed as efficiently as practicable.

2. Clarification Regarding Eligible Businesses

a. Is a hedge fund or private equity firm eligible for a PPP loan?

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan. The Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.

b. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.² However, in addition to applying any applicable affiliation rules, all borrowers should

carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

c. Is a hospital owned by governmental entities eligible for a PPP loan?

A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.

d. Part III.2.b. of the Third PPP Interim Final Rule (85 FR 21747, 21751) is revised to read as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible. On further consideration, the Administrator, in consultation with the Secretary, believes this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses.

3. Business Participation in Employee Stock Ownership Plans

Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?

No. For purposes of the PPP, a business's participation in an ESOP (as defined in 15 U.S.C. 632(q)(6)) does not result in an affiliation between the business and the ESOP. The Administrator, in consultation with the Secretary, determined that this is appropriate given the nature of such plans. Under an ESOP, a business concern contributes its stock (or money to buy its stock or to pay off a loan that was used to buy stock) to the plan for the benefit of the company's employees. The plan maintains an account for each employee participating in the plan. Shares of stock vest over time before an

employee is entitled to them. However, with an ESOP, an employee generally does not buy or hold the stock directly while still employed with the company. Instead, the employee generally receives the shares in his or her personal account only upon the cessation of employment with the company, including retirement, disability, death, or termination.

4. Eligibility of Businesses Presently Involved in Bankruptcy Proceedings

Will I be approved for a PPP loan if my business is in bankruptcy?

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.

The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

5. Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate

¹ This requirement is satisfied by a lender when the lender completes the process of submitting a loan through the E-Tran system; no transmission or retention of a physical copy of Form 2484 is required.

² However, the Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.

6. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are "small entities." Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, "along with a statement providing the factual basis for such certification." If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9.

Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,
Administrator.

[FR Doc. 2020–09098 Filed 4–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0095; Product Identifier 2019–NM–192–AD; Amendment 39–19904; AD 2020–08–12]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 747–8 and 747–8F series airplanes. This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the skin lap joints at certain stringers are subject to widespread fatigue damage (WFD). This AD requires modifying the left and right side lap joints of the fuselage skin, repetitive post-modification inspections for cracking, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 2, 2020.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet <https://www.myboeingfleet.com>. You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2020–0095.

Examining the AD Docket

You may examine the AD docket on the internet at <https://>

Exhibit B

PPP Borrower Application Form



Paycheck Protection Program Borrower Application Form

OMB Control No.: 3245-0407
Expiration Date: 09/30/2020

Check One: <input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other	DBA or Tradename if Applicable	
Business Legal Name		
Business Address	Business TIN (EIN, SSN)	Business Phone
		() -
	Primary Contact	Email Address

Average Monthly Payroll:	\$	x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request:	\$	Number of Employees:	
Purpose of the loan (select more than one): <input type="checkbox"/> Payroll <input type="checkbox"/> Lease / Mortgage Interest <input type="checkbox"/> Utilities <input type="checkbox"/> Other (explain): _____					

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input type="checkbox"/>	<input type="checkbox"/>
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.	<input type="checkbox"/>	<input type="checkbox"/>
4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input type="checkbox"/>

If questions (5) or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? Initial here to confirm your response to question 5 → _____	<input type="checkbox"/>	<input type="checkbox"/>
6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 → _____	<input type="checkbox"/>	<input type="checkbox"/>
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?	<input type="checkbox"/>	<input type="checkbox"/>
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?	<input type="checkbox"/>	<input type="checkbox"/>

**Paycheck Protection Program
Borrower Application Form****By Signing Below, You Make the Following Representations, Authorizations, and Certifications****CERTIFICATIONS AND AUTHORIZATIONS**

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (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, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONSThe authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

_____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

_____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

_____ The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

_____ The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.

_____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.

_____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

_____ I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

_____ I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Applicant_____
Date_____
Print Name_____
Title

**Paycheck Protection Program
Borrower Application Form****Purpose of this form:**

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to “purpose of the loan,” payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating “Average Monthly Payroll,” most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as “principals”:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to : Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416., and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503.

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person’s integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain “routine uses” of information protected by that Act. One such routine use is the disclosure of information maintained in SBA’s system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies’ function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) – SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice, or (6) foreclose on collateral or take other action permitted in the loan instruments.

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial



Paycheck Protection Program Borrower Application Form

institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) – Creditors are prohibited from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

Exhibit C

PPP Lender Application Form



Lender Application Form - Paycheck Protection Program Loan Guaranty

The purpose of this form is to collect identifying information about the Lender, the Applicant, the loan guaranty request, sources and uses of funds, the proposed structure (which includes pricing and the loan term), and compliance with SBA Loan Program Requirements. This form reflects the data fields that will be collected electronically from lenders; no paper version of this form is required or permitted to be submitted. As used in this application, "Paycheck Protection Program Rule" refers to the rules in effect at the time you submit this application that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Instructions for Lenders

All Paycheck Protection Program (PPP) loans are processed by all Lenders under delegated authority from SBA. This application must be submitted and signed electronically in accordance with program requirements, and the information requested is to be retained in the Lender's loan file.

A. Lender Information							
Lender Name: _____				Lender Location ID: _____			
Address: _____		City: _____		St: _____		Zip: _____	
Lender Contact: _____		Ph: () - _____		Cell or Ext: () - _____			
Contact Email: _____				Title: _____			

B. Applicant Information	
Applicant	Check One: <input type="checkbox"/> Sole Proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other
	Applicant Legal Name: _____
	DBA: _____ Business Tax ID: _____
	Applicant Address: _____ City, State, Zip: _____
	Applicant Primary Contact: _____ Phone: () - _____

C. Loan Structure Information							
Amount of Loan Request:	\$	Guarantee %:	100%	Loan Term in # of Months:	24	Payment:	Deferred 6 mos.
Applicant must provide documentation to Lender supporting how the loan amount was calculated in accordance with the Paycheck Protection Program Rule and the CARES Act, and Lender must retain all such supporting documentation in Lender's file.							
Interest Rate:	1%						

D. Loan Amount Information	
Average Monthly Payroll multiplied by 2.5	\$
Refinance of Eligible Economic Injury Disaster Loan, net of Advance (if Applicable; see Paycheck Protection Program Rule)	\$
Total	\$

E. General Eligibility (If the answer is no to either, the loan cannot be approved)	
<ul style="list-style-type: none">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.	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none">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.	<input type="checkbox"/> Yes <input type="checkbox"/> No

F. Applicant Certification of Eligibility (If not true, the loan cannot be approved)	
<ul style="list-style-type: none">The Applicant has certified to the Lender that the Applicant is eligible under the Paycheck Protection Program Rule.	<input type="checkbox"/> True

G. Franchise/License/Jobber/Membership or Similar Agreement (If applicable and no, the loan cannot be approved)	
<ul style="list-style-type: none">The Applicant has represented to the Lender that it is a franchise that is listed in the SBA's Franchise Directory.	<input type="checkbox"/> Yes <input type="checkbox"/> No

H. Character Determination <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has represented to the Lender that neither the Applicant (if an individual) nor any individual owning 20% or more of the equity of the Applicant is subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or is presently incarcerated, or on probation or parole. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none"> The Applicant has represented to the Lender that neither the Applicant (if an individual) nor any individual owning 20% or more of the equity of the Applicant has within the last 5 years, for any felony: 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment). 	<input type="checkbox"/> Yes <input type="checkbox"/> No
I. Prior Loss to Government/Delinquent Federal Debt <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has certified to the Lender that neither the Applicant nor any owner (as defined in the Applicant's SBA Form 2483) is presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none"> The Applicant has certified to the Lender that neither the Applicant nor any of its owners, nor any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
J. U.S. Employees <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has certified that the principal place of residence for all employees included in the Applicant's payroll calculation is the United States. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
K. Fees <i>(If yes, Lender may not pass any agent fee through to the Applicant or offset or pay the fee with the proceeds of this loan)</i>	
<ul style="list-style-type: none"> Is the Lender using a third party to assist in the preparation of the loan application or application materials, or to perform other services in connection with this loan? 	<input type="checkbox"/> Yes <input type="checkbox"/> No

SBA Certification to Financial Institution under Right to Financial Privacy Act (12 U.S.C. 3401)

By signing SBA Form 2483, Borrower Information Form in connection with this application for an SBA-guaranteed loan, the Applicant certifies that it has read the Statements Required by Law and Executive Orders, which is attached to Form 2483. As such, SBA certifies that it has complied with the applicable provisions of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) and, pursuant to that Act, no further certification is required for subsequent access by SBA to financial records of the Applicant/Borrower during the term of the loan guaranty.

Lender Certification

On behalf of the Lender, I certify that:

- The Lender has complied with the applicable lender obligations set forth in paragraphs 3.b(i)-(iii) of the Paycheck Protection Program Rule.
- The Lender has obtained and reviewed the required application (including documents demonstrating qualifying payroll amounts) of the Applicant and will retain copies of such documents in the Applicant's loan file.

I certify that:

- Neither the undersigned Authorized Lender Official, nor such individual's spouse or children, has a financial interest in the Applicant.

Authorized Lender Official: _____
Signature

Date: _____

Type or Print Name: _____

Title: _____

NOTE: According to the Paperwork Reduction Act, you are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated burden for completing this form, including time for reviewing instructions, gathering data needed, and completing and reviewing the form is 25 minutes per response. Comments or questions on the burden estimates should be sent to U.S. Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Rm. 10202, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

Exhibit D

C.J. Schneider E-Mail Correspondence

Swingle, Adam T.

Subject: FW: Payroll Protection Program Loan - USA Gymnastics

From: "Ulicny, Suzanne L." <Suzanne.Ulicny@sba.gov>

Date: April 27, 2020 at 3:40:22 PM EDT

To: Lauryn Turner <lturner@usagym.org>, "Schneider, Christopher J." <schneiderc@millerjohnson.com>

Cc: "Poynter, Stacey" <Stacey.Poynter@sba.gov>, "Anderson, Martin R." <martin.anderson@sba.gov>, Bernadette Barron <bbarron@usagym.org>

Subject: RE: Payroll Protection Program Loan - USA Gymnastics

Good afternoon, Lauryn,

Unfortunately not. A new interim rule released Friday addresses the bankruptcy issue directly and the intent of the Act is to exclude parties actively involved in a bankruptcy from receiving PPP loans. Please see the attached. I'm sorry I was not able to deliver better news.

Suzanne Ulicny
District Counsel
Indiana District Office
U.S. Small Business Administration
Cell (347) 365-0161
suzanne.ulicny@sba.gov

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From: Lauryn Turner <lturner@usagym.org>
Sent: Friday, April 24, 2020 5:28 PM
To: Ulicny, Suzanne L. <Suzanne.Ulicny@sba.gov>; CJ Schneider <schneiderc@millerjohnson.com>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>; Bernadette Barron <bbarron@usagym.org>
Subject: Re: Payroll Protection Program Loan - USA Gymnastics

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Suzanne,

Is there anything additional you can do for us? We are at a loss for what next steps we can take with the new round of funding coming out next week. We agree the application has a drafting error, but is there a way around it? Any news from Capital Access?

Thank you for your assistance. Have a good weekend.

Lauryn Turner

USA Gymnastics

Chief of Staff

130 E. Washington Street, Suite 700
Indianapolis, IN 46204

p: 317.829.5663 | usagym.org

c: 901.412.9321

**[CLICK HERE FOR COVID-19 UPDATES
AND RESOURCES FROM USAG](#)**

From: "Ulicny, Suzanne L." <Suzanne.Ulicny@sba.gov>
Date: Wednesday, April 22, 2020 at 4:13 PM
To: CJ Schneider <schneiderc@millerjohnson.com>
Cc: "Poynter, Stacey" <Stacey.Poynter@sba.gov>, "Anderson, Martin R." <martin.anderson@sba.gov>, Lauryn Turner <lturner@usagym.org>, Bernadette Barron <bbarron@usagym.org>
Subject: RE: Payroll Protection Program Loan - USA Gymnastics

I completely agree. The application seems to be in conflict with the CARES Act, or at best, is the result of a drafting error. Or there was an omission in the drafting of the CARES Act. Whatever the case, the directives do not line up. That's why I was hoping Capital Access could confirm what their true intent is. I will let you know if/when I receive that information.

Suzanne Ulicny
District Counsel

Indiana District Office
U.S. Small Business Administration
Cell (347) 365-0161
suzanne.ulicny@sba.gov

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From: Schneider, Christopher J. <schneiderc@millerjohnson.com>
Sent: Wednesday, April 22, 2020 3:58 PM
To: Ulicny, Suzanne L. <Suzanne.Ulicny@sba.gov>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>; Lauryn Turner <lturner@usagym.org>; Bernadette M. Barron (BBarron@USAgym.org) <BBarron@USAgym.org>
Subject: RE: Payroll Protection Program Loan - USA Gymnastics

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Thanks, Suzanne. I appreciate the follow-up and the information. We are aware of that question on the application. That's what prompted my office to look into the issue. Our belief is that question on the application is either an error or improper, because it adds an eligibility requirement not imposed by the CARES Act or the Interim Final Rules. That's why we wanted to run this to ground with you all. If you do hear anything from Capital Access, please let us know. We really appreciate your time and input on this.

Christopher J. Schneider

Attorney at Law

Miller Johnson

45 Ottawa Ave. SW, Suite 1100, Grand Rapids MI 49503

D: 616.831.1738 | schneiderc@millerjohnson.com | vcard

From: Ulicny, Suzanne L. <Suzanne.Ulicny@sba.gov>
Sent: Wednesday, April 22, 2020 3:32 PM
To: Schneider, Christopher J. <schneiderc@millerjohnson.com>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>; Lauryn Turner <lturner@usagym.org>; Bernadette M. Barron (BBarron@USAgym.org) <BBarron@USAgym.org>
Subject: RE: Payroll Protection Program Loan - USA Gymnastics

Good afternoon,

I wanted to write to let you know that while I have not received an answer back from the Office of Capital Access, it would appear to me and my colleagues that the current Chapter 11 bankruptcy would render USA Gymnastics ineligible for the PPP loan. While there is not language in the CARES Act or Interim Final Rules that make a borrower ineligible because it or one of its owners is in a current bankruptcy or was the subject of a former bankruptcy, the Borrower Application does have a question as to whether there is a pending bankruptcy, and it is our understanding that the loan will be denied if the answer is “yes.” You are correct that under our normal loan programs, bankruptcies don’t render a business ineligible for funding but rather is considered and examined from a credit standpoint. But the PPP appears to apply this circumstance differently.

This question has been coming up a lot with respect to PPP eligibility and this is the advice that the District Offices are giving – that the plain language on the loan application disqualifies borrowers currently involved in a bankruptcy. I was hoping Capital Access might provide more information but have not received any to date; and I don’t want to keep you waiting longer for an answer from them.

I thank you for your patience. If I do receive any information from them that would be helpful to your loan application, I will certainly pass it along.

Best regards,

Suzanne

Suzanne Ulicny
District Counsel
Indiana District Office
U.S. Small Business Administration
Cell (347) 365-0161
suzanne.ulicny@sba.gov

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From: Schneider, Christopher J. <schneiderc@millerjohnson.com>
Sent: Monday, April 20, 2020 11:32 AM
To: Ulicny, Suzanne L. <Suzanne.Ulicny@sba.gov>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>; Lauryn Turner <lturner@usagym.org>; Bernadette M. Barron (BBarron@USAgym.org) <BBarron@USAgym.org>
Subject: RE: Payroll Protection Program Loan - USA Gymnastics

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Sounds good. Thank you.

Christopher J. Schneider

Attorney at Law

Miller Johnson

45 Ottawa Ave. SW, Suite 1100, Grand Rapids MI 49503

D: 616.831.1738 | schneiderc@millerjohnson.com | vcard

From: Ulicny, Suzanne L. <Suzanne.Ulicny@sba.gov>
Sent: Monday, April 20, 2020 10:00 AM
To: Schneider, Christopher J. <schneiderc@millerjohnson.com>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>; Lauryn Turner <lturner@usagym.org>; Bernadette M. Barron (BBarron@USAgym.org) <BBarron@USAgym.org>
Subject: RE: Payroll Protection Program Loan - USA Gymnastics

Good morning Christopher,

Thanks for following up. I have not heard back from them and sent another message to them on Friday to see when I could expect to hear back. I will do so again today to see if we can get you an answer ASAP. I appreciate your patience, thank you.

Best,

Suzanne

Suzanne Ulicny
District Counsel
Indiana District Office
U.S. Small Business Administration
Cell (347) 365-0161
suzanne.ulicny@sba.gov

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From: Schneider, Christopher J. <schneiderc@millerjohnson.com>
Sent: Monday, April 20, 2020 9:48 AM
To: Ulicny, Suzanne L. <Suzanne.Ulicny@sba.gov>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>; Lauryn Turner <lturner@usagym.org>; Bernadette M. Barron (BBarron@USAgym.org) <BBarron@USAgym.org>
Subject: RE: Payroll Protection Program Loan - USA Gymnastics

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Hi Suzanne – I wanted to circle back on this. Have you heard anything from the SBA’s Office of Capital Access? We understand the first round of funding may be gone, but we are hopeful that a second round of funding is forthcoming, and we want to be ready if it comes through.

Thanks,

CJ

Christopher J. Schneider

Attorney at Law

Miller Johnson

45 Ottawa Ave. SW, Suite 1100, Grand Rapids MI 49503

D: 616.831.1738 | schneiderc@millerjohnson.com | vcard

From: Schneider, Christopher J.
Sent: Tuesday, April 14, 2020 4:52 PM
To: 'Ulicny, Suzanne L.' <Suzanne.Ulicny@sba.gov>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>; 'Laurn Turner' <lturner@usagym.org>; Bernadette M. Barron (BBarron@USAgym.org) <BBarron@USAgym.org>
Subject: RE: Payroll Protection Program Loan - USA Gymnastics

Thank you. We appreciate the all of the work that you all are doing so quickly right now. I look forward to hearing from you.

From: Ulicny, Suzanne L. <Suzanne.Ulicny@sba.gov>
Sent: Tuesday, April 14, 2020 4:22 PM
To: Schneider, Christopher J. <schneiderc@millerjohnson.com>
Cc: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>
Subject: FW: Payroll Protection Program Loan - USA Gymnastics
Importance: High

**** Ensure you trust and expect email from "suzanne.ulicny@sba.gov" before clicking links/attachments. ****

Mr. Schneider,

Please be advised that I have inquired with SBA's office of Capital Access for guidance on your client's PPP loan eligibility in light of the bankruptcy action. While they are very busy, I don't expect it will take too long for a response. I will revert back to you with an answer as soon as possible. Thank you for your patience.

Best regards,

Suzanne

Suzanne Ulicny
District Counsel
Indiana District Office
U.S. Small Business Administration
Cell (347) 365-0161
suzanne.ulicny@sba.gov

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From: Schneider, Christopher J. <schneiderc@millerjohnson.com>

Sent: Tuesday, April 14, 2020 12:18 PM

To: Poynter, Stacey <Stacey.Poynter@sba.gov>; Anderson, Martin R. <martin.anderson@sba.gov>

Cc: Laurn Turner <lturner@usagym.org>; Bernadette M. Barron (BBarron@USAgym.org) <BBarron@USAgym.org>

Subject: Payroll Protection Program Loan - USA Gymnastics

Importance: High

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Hello Stacey and Martin – I am contacting you to get some clarification on whether an organization that is the debtor in a voluntary Chapter 11 bankruptcy proceeding is eligible for a Payroll Protection Program loan. I am USA Gymnastics' Chief Legal Officer. USAG has been working with PNC to apply for a PPP loan. PNC suggested that we reach out to you with this issue. Do you have some time in the next day or so for a call to discuss?

USAG is the debtor in a voluntary Chapter 11 bankruptcy proceeding. Both the borrower and lender applications for the PPP loan suggest that if the borrower is in bankruptcy then the loan will be denied. But based on our review of the CARES Act and the SBA's Standard Operating Procedures 5010 (SOP) and the regulations, not all debtors in bankruptcy are ineligible for a PPP loan. Rather, Subpart B, Chapter 2.III.A.16 of the SOP only renders a borrower ineligible for the PPP loan if the borrower's bankruptcy resulted in a "Prior Loss" to the government. That section defines "Prior Loss" as "the dollar amount of any deficiency on a Federal loan or federally assisted financing which has been incurred and recognized by a Federal agency after it has concluded its write-off and/or close-out procedures for the particular account" USAG does not have any federal loans or federally assisted financing, so there has not been (and will

not be) any deficiency on either of those things as a result of the bankruptcy. I've attached the email we sent to USAG outlining our analysis of this issue.

Like many other small businesses and non-profit organizations, USAG is experiencing significant financial strain as a result of the COVID-19 pandemic and stay home orders. A PPP loan would make a big difference to USAG's ability to continue operations during this crisis. I can only imagine how busy you all are right now, so I know a call is a lot to ask. But we would very much appreciate the opportunity to talk with you about this issue.

Thanks,
CJ

Christopher J. Schneider

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Exhibit E

***Hidalgo Cty. Emergency Serv. Found. v. Carranza*, No. 20-2006 (Bankr. S.D. Tex.)
TRO Hearing Transcript**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

HIDALGO COUNTY EMERGENCY)	CASE NO: 20-02006
SERVICE FOUNDATION,)	ADVERSARY
)	
Plaintiff,)	Houston, Texas
)	
vs.)	Friday, April 24, 2020
)	
JOVITA CARRANZA,)	(9:01 a.m. to 10:04 a.m.)
)	
Defendant.)	

HEARING

BEFORE THE HONORABLE DAVID R. JONES,
UNITED STATES BANKRUPTCY JUDGE

REMOTE AND TELEPHONIC APPEARANCES:

For Plaintiff: NATHANIEL PETER HOLZER, ESQ.
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Also present: DAVID ELLIOTT

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Court Reporter: Recorded; FTR-Mobile

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 8365
Corpus Christi, TX 78468
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

Houston, Texas; Friday, April 24, 2020; 9:01 a.m.

(Remote and telephonic appearances)

(Call to order)

THE COURT: All right, good morning, everyone. This is Judge Jones. Today is Friday, April the 24th, 2020, which is the docket for Corpus Christi, Texas.

First matter on this morning's docket is Adversary Number 20-2006, Hidalgo County Emergency Services versus the director of the Small Business Administration. Take appearances, please.

Mr. Holzer, I see you there, you want to lead us off, please.

MR. HOLZER: Pete Holzer, your Honor, for the Plaintiff, Hidalgo County Emergency Service Foundation. I believe my co-counsel, Kay Walker, is on the line, and also believe the Chief Restructuring Officer of the Debtor, Mr. Romero, was going to call in.

THE COURT: All right, thank you. Good morning to everyone.

Mr. Kincheloe, and I look at the official title, I said director of the SBA. I see that the title is administrator. I meant nothing by it, my apologies. Do you want to go ahead and make your appearance, please?

MR. KINCHELOE: Thank you, your Honor, Rick Kincheloe for the Defendant.

1 **THE COURT:** All right, thank you. Anyone else wish
2 to make an appearance?

3 **MR. ELLIOTT:** This is David Elliott (indisc.) for
4 Hidalgo County.

5 **THE COURT:** All right, thank you, Mr. Elliott. Good
6 morning to you. Anyone else?

7 **MR. ELLIOTT:** Good morning (indisc.)

8 **THE COURT:** All right, thank you, Mr. Castillo. Let
9 me -- Mr. Holzer and Mr. Kincheloe, let me sort of bring you
10 sort of full circle in my thoughts since yesterday. I spent a
11 good part of the night reading the entirety of the CARES Act.
12 I have come to conclude it is a very long and often complicated
13 document to work your way through, but I spent a lot of time
14 with it. I also have spent significant time reviewing the
15 SBA's final interim (indisc.) I believe the number is 2020-
16 0015. I have also looked at relevant provisions governing --
17 and, again, I will apologize if I don't get the title right,
18 but SBA 7(A) loans. I have also thought a great deal about the
19 jurisdictional issues that are present. And I have gone back
20 and reviewed some recent decisions by my circuit. And I am --
21 it is very clear to me that my circuit has concerns as to just
22 how far the jurisdiction of an Article One court goes. And I
23 don't want to entertain that argument today. And so to the
24 extent that I grant any relief, it will be as to this debtor
25 only in this adversary only. And to the extent that there are

1 what I'm going to call class-like issues, I do not want Rule 23
2 or anything close to Rule 23 to become part of this discussion.
3 I -- for a couple of reasons. Number one, it's my belief that
4 by the time that we were able to work through all of those
5 issues, the Debtor's economic situation might probably have
6 dictated the outcome. And that shouldn't be anyone's goal. I
7 also think that to the extent that there are (indisc.) 23
8 issues in a case like this, they are better left to my Article
9 Three colleagues. I think that's all I wanted to say in terms
10 of what I've done in preparation. Obviously I've read
11 everything. Mr. Kincheloe, I have read your brief. I have had
12 a time -- I have had an opportunity to review the authorities
13 cited in that brief. I've had a chance to do my own research.
14 So I feel like as though I'm fairly well-educated on the
15 applicable law. I think I understand the issue. That doesn't
16 mean that you shouldn't take the opportunity to advance any
17 position that you think. But I am prepared to talk about a
18 number of issues as we work our way through that. Any
19 questions before we get started?

20 **MR. HOLZER:** No, your Honor.

21 **MR. KINCHELOE:** No, your Honor.

22 **THE COURT:** All right, thank you. Mr. Holzer, I
23 think that it is your burden so if you'd like to lead off,
24 please.

25 **MR. HOLZER:** Thank you, your Honor. Pete Holzer for

1 the Plaintiff, Hidalgo County Emergency Services Foundation. I
2 know the Court is up to speed. I'm not going to belabor the
3 facts that have before you in the three sworn declarations.
4 The one of Mr. Romero in the sworn complaint, certain
5 paragraphs of that factual basis. There is a sworn declaration
6 of Mr. Elliott that was filed last night. And then just a few
7 moments ago Mr. Ponce's declaration hit the docket. I don't
8 know if the Court has had a chance to see Mr. Elliott and
9 Mr. Ponce's declarations.

10 **THE COURT:** I've read Mr. Elliott's. I did not see
11 Mister you said Ponce, I've not seen (indisc.) --

12 **MR. HOLZER:** Mr. Ponce.

13 **THE COURT:** Yes, I have not seen that one. I am
14 reading it as you talk. So go ahead.

15 **MR. HOLZER:** I was going to let you finish reading,
16 Judge.

17 **THE COURT:** Pretty short, direct, four paragraphs, I
18 got it.

19 **MR. HOLZER:** Okay, so Mr. Ponce really talks about
20 the background of the company and where it is and touches on
21 the impact of the coronavirus problem.

22 Mr. Elliott is certainly much more specific addressed
23 a few things that may have not been in the complaint that we
24 talked about yesterday, that is the process by which we got to
25 where we are and what we think happened and so forth.

1 So I think what I really want to do is talk sort of
2 in general about some of the issues that Mr. Kincheloe raised
3 in his brief, which is actually quite helpful in my thinking
4 about how things go together and what the administrator does
5 and how the government looks at these kind of issues. I think
6 one very important thing is that despite what we now know from
7 Mr. Kincheloe's brief, we still don't know who, where, why, or
8 how the bankruptcy exclusion came to be -- came about as part
9 of the application form. There's no doubt that it's there in
10 the form. And I do see the I'll call it a tenuous connection
11 that the government makes between the implementing rule and
12 that there's a form, okay, so there is a connection. But it
13 doesn't really tell us -- we just have no understanding and no
14 knowledge or any idea how, who, where, or why this exception
15 language showed up in this application on the PPP loan program.
16 I can speculate, and here's what my speculation is. First of
17 all, I think we're all aware that there are other lawsuits now,
18 a lot of them from what I've read in the papers, where the SBA
19 is being sued about giving these PPP loans to a larger
20 corporation, Fortune 500 companies, that really didn't make any
21 sense to be allowed under the PPP loan program and wound up
22 exhausting it, all these big-monied corporations. And so
23 that's ongoing. That's not really before this Court but it's
24 certainly out there. But it looks to me like what happened in
25 this agency is they took this CARES Act, which I agree, I've

1 read the whole thing, too, and it's, you know, about what you'd
2 expect from legislation that occurred over just a period of a
3 few days and weeks. There is a section that has loans for
4 large companies and like the airlines and so on and so forth
5 that does have a bankruptcy exclusion, it's a specific one in
6 there. And then there's the paycheck protection loan under --
7 in Section 1100, 1102, that does not. And so it looks to me
8 like what the SBA has done is they then drafted the bankruptcy
9 exclusion in the large company section and they've applied it
10 also to the PPP loan protection. And then conversely they let
11 the --

12 **THE COURT:** (Indisc.)

13 **MR. HOLZER:** -- large companies into the PPP
14 (indisc.) --

15 **THE COURT:** Mr. Holzer, if I could just interrupt you
16 because I want to make sure that the record is clear. The
17 bankruptcy exclusion is actually in the section for midsized
18 businesses defined those companies with more than 500, less
19 than 10,000 employees, can be found at page 193 of the Act. I
20 have read it, I'm familiar with it. I just -- I don't think
21 there necessarily is a section that I read with respect to
22 large-sized businesses. The actual subtitle of the provision
23 are loans for midsized businesses.

24 **MR. HOLZER:** All right, (indisc.) --

25 **THE COURT:** (Indisc.)

1 **MR. HOLZER:** -- then I apologize, Judge. I conflated
2 those two and I've done the same mistake that I'm accusing the
3 SBA of. So I'm not -- I guess the point being, there's no ill
4 will. This is not a intentional ill will, they're out to get
5 the bankrupt companies. I think it's just a mistake in a badly
6 implemented process that they've done here, as evidenced by the
7 lawsuits for the big companies getting into this program and
8 exhausting it. In any event, I think it's an abuse of
9 discretion the way they've handled this and the way they've put
10 this bankruptcy exception. They've conflated these two
11 different programs. And then we're faced with this form that
12 has this exception and bank lenders that look at the form and
13 say, well, here's the exception, it's right here in the form I
14 have to use so I can't give you a loan. So with respect to the
15 abuse of discretion, and we are arguing, Judge, both Section
16 525, 523, I forget the number, is discrimination and a exercise
17 of authority that doesn't comply with the statute. And then so
18 I want to jump down to some cases Mr. Kincheloe has. His brief
19 talks about the Anti-Injunction Act in section -- in the Small
20 Business Act. And I looked at those cases. I have a couple of
21 cases, your Honor, if you need them that explain why in a
22 situation like this, the -- in a situation where the
23 administrator of a government agency exceeds the scope of their
24 authority like they're arguing here, that Anti-Injunction Act
25 doesn't apply. And I would start with the Supreme Court. It's

1 the case is -- oh, where'd it go? *South Carolina versus Regan*
2 at 465 U.S. 367 from 1984. That case is a holding where the
3 anti-injunction provisions are inapplicable where Congress
4 didn't provide the plaintiff with an alternative legal way to
5 challenge the administration's ruling. And that was a case
6 related to taxes. We have *Canterbury Career School versus*
7 *Riley*, District of New Jersey, 1993, 833 F.Supp. 1097 basically
8 saying the same thing. This is a Secretary of Department of
9 Education has a similar anti-injunction provision in their
10 statute. The court said if the defendant, the Secretary of
11 Department of Education, has exceeded the scope of his
12 authority, then this court has jurisdiction to grant
13 appropriate injunctive relief, notwithstanding the anti-
14 injunction provision. And then, lastly, a case out of this
15 court from Judge Schmidt back in 1992, an unreported case, it's
16 a 1992 Westlaw 551256 pointing out that the Fifth Circuit has
17 left (indisc.) by implication recognizing that injunctive
18 relief is permissible where the government agency exceeds its
19 statutory authority. So with those cases and my arguments, I
20 think the question of whether or not this Court has
21 jurisdiction authority to enter an injunction, I think it does.
22 And I think it's well-supported in the law and under the facts
23 of this case.

24 So I wanted to talk about next a -- what I think is
25 why this statute does exceed the administrator's authority.

1 And it's partly a policy argument. So let's talk about a
2 hypothetical. So let's say you have a loan applicant who's
3 preparing for bankruptcy, hired bankruptcy counsel, hired the -
4 - hired a -- hired bankruptcy lawyer, paid them a retainer,
5 they're working on the schedules, but they haven't filed
6 bankruptcy yet. And so would that company -- would that
7 potential debtor qualify for these loans? Yes, because they
8 could answer that question "no." Let's talk about another
9 company (indisc.) --

10 **THE COURT:** Could they? I mean, Mr. Holzer, could
11 they?

12 **MR. HOLZER:** Could they --

13 **THE COURT:** (Indisc.)

14 **MR. HOLZER:** Could they?

15 **THE COURT:** I mean, if you look at the -- if you
16 compare the wording in the portion of the statute involving
17 midsized debtors, it actually says you aren't eligible if you
18 are a debtor in a case. The words in the form are: "presently
19 involved in a bankruptcy case." What does that mean? Does
20 that mean that if you (indisc.) a claim against someone in
21 bankruptcy, that you're not eligible under the Act? Does it
22 mean that if you consult with a bankruptcy (indisc.)
23 contemplated bankruptcy that you are not eligible for
24 participation (indisc.). What do the words "presently
25 involved" actually mean in your mind?

1 **MR. HOLZER:** Yes, I don't know because you're right,
2 a creditor in a bankruptcy could be presently involved. A
3 (indisc.) --

4 **THE COURT:** What if you're (indisc.) who has a lease,
5 are you presently involved in a bankruptcy case?

6 **MR. HOLZER:** Right. I do think the most natural
7 construction there is that you're a debtor in bankruptcy. I'm
8 not sure that there's any difference in the way I look at that
9 language and the way the government looks at the language. But
10 I do agree with the Court that there is some ambiguity. But
11 that's -- if you look at that language, a company that's
12 preparing to file bankruptcy is not presently involved in a
13 bankruptcy. It's just thinking about it. And if it hasn't
14 already, would it qualify for this loan, could it check the
15 "no" box on that form? I think there's no doubt it could and
16 should and would qualify for a loan. So let's talk about
17 another company that's insolvent and hasn't hired a bankruptcy
18 lawyer, but they're broke, they (indisc.) business, all the
19 employees have gone home, they're out of money, and they have
20 no idea whether they're going to survive, and can they apply
21 for a loan, you know, get the employees (indisc.) and the
22 answer is, yes, they would check that box "no." And so another
23 company that's virtually shut down, it's overdrawn on its bank
24 account, and would they be able to check the "no" box? The
25 answer is of course, they check the "no" box. And so all three

1 of those hypotheticals are ways where a company who is
2 completely uncreditworthy can get one of these PPP loans. So
3 compare that to a debtor in possession that's operating,
4 complying with all the rules, filing its monthly operating
5 reports, running its business, and not only that, it's a
6 systemically important business, particularly in the time of an
7 active pandemic, and operating, but they don't qualify. It
8 simply makes no sense for the other companies that would
9 qualify to be able to get one of these forgivable loans and for
10 my client (indisc.) that I'm (indisc.) is not.

11 **THE COURT:** Mr. Holzer, let me go back to your
12 example because I'm not sure you really vetted that example
13 out. What if you have a company that is as you said
14 contemplating bankruptcy, and you have an owner in the business
15 who owns one percent of that company and is a creditor in a
16 large oil and gas bankruptcy case that's pending because they
17 own -- that person owns a small royalty interest, could the
18 company check the box or not?

19 **MR. HOLZER:** Haven't though through that one, Judge.
20 I would think they could check the "no" box. But, you know,
21 there's certainly a --

22 **THE COURT:** (Indisc.)

23 **MR. HOLZER:** -- (indisc.) of the language --

24 **THE COURT:** Read the language --

25 **MR. HOLZER:** -- that they would -- yeah.

1 **THE COURT:** Read the language. Is the business or
2 any owner presently involved in any bankruptcy?

3 **MR. HOLZER:** That's right. I think that you're
4 highlighting, your Honor, the flaws in this -- in what this
5 form says and all the ambiguities that are evidence of a poorly
6 instituted program beyond the administrator's authority. All
7 right, so let's see. So that's arbitrary and capricious is
8 what I think and gives you a basis to enter an injunction.

9 Let me just say that I do understand that the limit
10 on the jurisdiction. We never intended to seek relief for
11 anybody but my client, the Plaintiff in this lawsuit. Whether
12 it would be appropriate for a nationwide injunction or even a
13 Southern District injunction is not our concern. I'm only
14 worried about my client. My client only cares about its
15 survival.

16 So I wanted to then go to the question of whether or
17 not this is bankruptcy discrimination. I do agree in reading
18 Mr. Kincheloe's brief, he cited the Exquisito (phonetic) case
19 out of the Fifth Circuit and the Ares (phonetic) case out of I
20 believe it's the Fourth Circuit. And they're both in his brief
21 and those are cases that we came up in our research as well.
22 And I do think they -- those two cases are useful to compare
23 and contrast. Exquisito involved a program that the court
24 said, well, this is really about the jobs, not about a loan.
25 And so the -- so it was discrimination. Ares was more about a

1 loan than anything else and so that was not. So the case law
2 does say that if it's just a loan program, then the anti-
3 injunction -- excuse me, the -- it's not bankruptcy
4 discrimination.

5 So let's look at what we have here. Is this more
6 like the facts in *Exquisito* or more like the facts in *Ares*? I
7 think it's clearly this is more about saving jobs, preventing
8 collapse of the economy. It's not really about a company
9 borrowing money that under the statute it has to show its
10 ability to pay back. And that's in fact if you read the
11 requirements for qualify for a loan, that's just not in there.
12 You just have to say what you're going to use it for and that's
13 what my client needs it for is to pay payroll and help with the
14 rent and the other permissible uses for the funds. It's really
15 more of a grant to protect the economy, save jobs, than it is a
16 straightforward loan. So I would say that the cases that say
17 loans don't apply really don't have any impact here.

18 There's another case Mr. Kincheloe cited in his
19 brief, the *Toth*, T-O-T-H, case, and that also involved an
20 extension of credit which is really not what's happening here.
21 This is a different animal. So with that, Judge, I think I've
22 said everything I wanted to say for now. I think the facts are
23 pretty clear what happened that we qualify, except for this
24 arbitrary inclusion of a bankruptcy exception on the
25 application form, and that it is bankruptcy discrimination and

1 the Court should grant an injunction.

2 **THE COURT:** All right, thank you. Mr. Kincheloe.

3 **MR. KINCHELOE:** Yes, your Honor, Rick Kincheloe.

4 (Indisc.) start with Mr. Holzer's discussion of he -- the
5 reasons for the exclusion. And I will say I really appreciate
6 Mr. Holzer sending me the cases he was going to discuss before
7 today. It certainly was an extreme professional courtesy.

8 I have received a regulation that I understand is
9 going to be published imminently like Monday. I can broadcast
10 it for the Court if the Court would like to read it because I
11 think it does explain (indisc.) saying about the wording of the
12 application but the regulation that's going to be published
13 does add some color to that. So just this is going to be at 13
14 CFR (indisc.) and 121. And then the bankruptcy exclusion
15 appears here. And so this is that if an applicant is currently
16 a debtor in bankruptcy or if it files bankruptcy before the
17 loan is funded, then it is ineligible. And this -- the second
18 paragraph explains kind of the rationale. There's a concern
19 that the SBA loses control over the funds because they become
20 property of the estate. There's also a concern the Court --
21 your Honor, is the Court done reading? I'll stop sharing so I
22 can go back to video.

23 **THE COURT:** Yeah, no, I read it. Thank you.

24 **MR. KINCHELOE:** Okay.

25 **MR. HOLZER:** Mr. Kincheloe, I'm -- I didn't --

1 **MR. KINCHELOE:** Oh, I --

2 **MR. HOLZER:** -- (indisc.) second page.

3 **MR. KINCHELOE:** The second page --

4 **MR. HOLZER:** (Indisc.)

5 **MR. KINCHELOE:** -- is just -- I can send it to you
6 shortly.

7 **MR. HOLZER:** Okay, that'll be fine.

8 **MR. KINCHELOE:** I don't think it was relevant. But
9 the other concern is the pandemic has created a unique public
10 need with unprecedented unemployment to get loans funded
11 extremely quickly. And in this need for speed, the traditional
12 underwriting is just not going to work. it's going to take too
13 long. And so to avoid that traditional underwriting and to get
14 this -- get these loans out guaranteed by SBA as quickly as
15 (indisc.) could, the decision was made to say if you're in
16 bankruptcy, you're excluded. We certainly had maybe a good --
17 it can be argued whether that's a good or bad decision from
18 public policy standpoint but at least that was the motivation
19 is get these loans out quickly and minimize the amount of
20 underwriting that needs to be done.

21 **THE COURT:** In fact there really is no underwriting
22 that's done, right? I mean, aren't the lenders authorized to
23 simply accept what's on the form and act just on the form, and
24 so long as they rely on the form, then they are protected;
25 isn't that the way that it works?

1 **MR. KINCHELOE:** From the interim rule I've read, yes.

2 But from the --

3 **THE COURT:** (Indisc.)

4 **MR. KINCHELOE:** -- regulation I just posted, I
5 haven't read the entire regulation. I got it maybe five
6 minutes before we started. And so unless something in the
7 regulation changes that, that's my understanding.

8 **THE COURT:** Got it.

9 **MR. KINCHELOE:** Turning to the jurisdictional issue,
10 admittedly the provision in the Small Business Act is unique.
11 I'm not aware of any other provision this broad. And certainly
12 there are other anti-injunctive language that appears in
13 various statutes. You know, the Anti-Injunction Act deals
14 (indisc.) I think that's a little different. The one thing I -
15 - there's a case -- well, it's -- there's so many other cases
16 out there, and one that Mr. Holzer shared, where there's a
17 statute that said except as otherwise provided herein, you
18 can't issue an injunction. And certainly that language seems
19 to suggest that, well, okay, if you violate the statute, we can
20 enjoin you, we just can't enjoin you otherwise. For 634, 15
21 USC 634, I don't see any similar condition. I mean, it just is
22 (indisc.) the Fifth Circuit (indisc.) decision I cite at
23 footnote six which, you know, I suppose we could, you know,
24 dispute whether it's holding or dicta, but it's a pretty
25 blanket assertion, thou shalt not enjoin the SBA. And again we

1 can argue whether Congress made a good or bad policy decision
2 in enacting that but I think that's the law. And so turning to
3 106, honestly 106 waives sovereign immunity for the entire
4 Federal government for purposes of 525. But (a)(4) states that
5 waiver is only to the extent it's consistent with applicable
6 non-bankruptcy law, and so I think we have to turn to this
7 likely unique provision applicable to the SBA administrator and
8 say, courts can't enjoin the SBA. Whether that's a good or bad
9 idea, so be it but that's what it says. And so I think
10 106(a)(4) coupled with 15 USC 634 I think means that there is
11 not a waiver of sovereign immunity for an injunction against
12 the SBA, depriving the Court of jurisdiction.

13 On -- moving to the 525(a) argument, it -- in the
14 Exquisito case, as I read it, it seemed to -- one thing that
15 was distinguishable is there was a preexisting relationship
16 between the SBA and the Air Force. That's one thing that's --
17 is noteworthy. The injunction in that case was not against the
18 SBA, it was against the Air Force. The -- there was a pre-
19 bankruptcy relationship in that case. And the Fifth Circuit
20 kind of thought through it and said, you know what, this
21 program is really designed to train minority-owned businesses
22 and so we view it more in the nature of a franchise. Fine, if
23 you're going to call it a franchise then, yeah, it's covered
24 under 525(a). What the Fifth Circuit has not decided, at least
25 as far as I can find, which the (indisc.) court, the *Toth* court

1 and I believe the (indisc.) Watts (phonetic) court in the Third
2 Circuit, and then the Second Circuit in Goldrich (phonetic) --
3 well, Goldrich dealt with student loans which has been
4 abrogated by 525(c), --

5 **THE COURT:** Right.

6 **MR. KINCHELOE:** -- those courts look at the decision
7 to extend credit, more specifically in the (indisc.) case
8 extend a guarantee of credit. That's something totally
9 different. It doesn't trigger this traditional gatekeeper
10 function of the government. Like, you know, for example, state
11 bar licensing, 525 expresses this desire that we don't want
12 lawyers to file bankruptcy, then they'd be unable to practice
13 law because they filed bankruptcy. No, we want them to be able
14 to continue to engage in the profession. Real estate brokers,
15 any other number of professions, we want them to continue being
16 able to engage in that profession and we don't want the
17 government's gatekeeper role to be influenced by bankruptcy.
18 That doesn't mean the government is not allowed to discriminate
19 in other ways. Again, maybe right, maybe wrong, but 525(a)
20 says it only bars discrimination in the context of licenses,
21 permits, charters, franchises, or other similar grant. The
22 (indisc.) case and the other ones, *Toth* and Watts, say that a
23 loan guaranteeing a loan is not really similar to these other
24 claims because it doesn't implicate this gatekeeper function.
25 And because it's not similar, it's not covered by 525(a) so we

1 don't even need to get to the question of whether the
2 government was motivated by the bankruptcy. It's just not
3 covered.

4 On the -- I heard -- as I understand the complaint,
5 there's not an APA claim asserted and so it's just whether
6 statutory authority was exceeded. The language in the CARES
7 Act is very broad. I mean, it's just the language for 1102
8 implementing the PPP loan guarantees (indisc.) may and that
9 leaves a very broad, open-ended grant of authority, leaves a
10 lot of discretion in the administrator which makes sense given
11 the context. I mean, this is imagine probably one of the
12 fastest pieces of legislation ever to make it through House,
13 Senate, and White House. And --

14 **THE COURT:** Well, wouldn't you agree that that
15 discretion has certain boundaries on it? For instance, that
16 discretion shouldn't be allowed to frustrate the purpose of the
17 Act itself, agreed?

18 **MR. KINCHELOE:** (No audible response)

19 **THE COURT:** (Indisc.) there are limits. You simply
20 can't say that you can implement rules and make an argument
21 that says, well, that discretion allows me to implement rules
22 that frustrate the application of the law.

23 **MR. KINCHELOE:** So, your Honor, --

24 **THE COURT:** (Indisc.)

25 **MR. KINCHELOE:** -- I agree that there are limits but

1 I think the use of the word "may," as I read the statute now
2 (indisc.) didn't happen and no one intends for this to happen
3 but if we're just taking the thought experiment to the extreme,
4 I think the use of the word "may," the administrator can say,
5 okay, I've got this authority, I don't have to exercise it.
6 And I think Congress would probably come back and put a shell
7 in there. But I think the way the statute's written, it's
8 pretty broad. Now, there are other limits in the Small
9 Business Act, like the administrator has to ensure that the,
10 you know, loans made under this section are of such sound value
11 or so secured as reasonably to assure repayment. So (indisc.)
12 administrator doesn't do that, the administrator violates the
13 statute. But because Congress prohibited injunctions on the
14 SBA, it really creates this strange space where, yeah, the
15 statute says the administrator has limits but I don't think the
16 statutory -- the statute authorized an injunction against the
17 administrator if the administrator exceeds those limits.

18 **THE COURT:** All right, so let me ask you this. And
19 we're going to come back to that issue in a second. But do I
20 even need to get there? Didn't the SBA effectively delegate
21 the authority to determine who's eligible to the participating
22 financial institutions?

23 **MR. KINCHELOE:** I don't (indisc.)

24 **THE COURT:** Let's take a practical example.

25 Mr. Holzer comes into his local financial institution for a PPE

1 -- I'm sorry, a PPP loan. He fills out the application. Who
2 makes the decision of whether or not he's eligible?

3 **MR. KINCHELOE:** So the -- as I read (indisc.) then
4 the bank has to receive the form, and as long as the bank
5 follows the form and the guidance, it may issue the loan and
6 it's going to be guaranteed by SBA. But it is still SBA who
7 decided those parameters that go into the form.

8 **THE COURT:** I'm not arguing with you on that. I'm
9 just saying who makes the decision of who's eligible and who's
10 not? The bank. Has to be that way. SBA couldn't do it. SBA
11 doesn't have enough employees, it doesn't have enough local
12 offices. It had to delegate part of that process to financial
13 institutions; otherwise, it would have been a program with
14 absolutely no ability to implement. I'm not complaining. I'm
15 just trying to be practical about it.

16 **MR. KINCHELOE:** Right, yeah. So again with the need
17 for speed, the analysis of whether a borrower meets the
18 appropriate criteria is sent to the banks.

19 **THE COURT:** Right. And in fact there really isn't an
20 underwriting function. I mean, if your instruction is
21 (indisc.) this form and you make the decision off the form,
22 there really isn't an underwriting function. There's no
23 evaluation of ability to repay, there's no evaluation of
24 collateral. And you know what I'm doing, I'm undermining your
25 argument that it's consistent with the (indisc.) power of SBA

1 7(A). You know, that just doesn't exist in this program. In
2 fact, let's just be practical. The entire intent of the
3 program is for people not to pay this back. It's a way of
4 getting money from the government to people that are being
5 harmed. And so long as they use it in the right way, they
6 don't have to pay it back. Am I -- tell me where I'm wrong
7 about that.

8 **MR. KINCHELOE:** Your Honor, I (indisc.) agree with
9 the Court that the intent was to get money to people who needed
10 it quickly. And certainly to the extent it's used for the
11 proper purpose, it is intended to be forgiven. And, you know,
12 I think the Court's correct, I mean, the amount of underwriting
13 is virtually nil. I mean, the SBA set up parameters and said
14 banks (indisc.) somebody meets these parameters, that's the
15 amount of underwriting we're going to do. And one of the
16 decisions made by SBA was, well, since we can't really -- we
17 don't have the time to go through and do a traditional credit
18 inquiry, we're going to exclude companies in bankruptcy, you
19 know, together with this purpose of we can't control the money
20 once it goes into the bankruptcy estate (indisc.)

21 **THE COURT:** (Indisc.) said that, I mean, (indisc.)
22 hundred and eighty degrees wrong, I mean, isn't part of my job
23 to ensure that debtors act in accordance with the law? I mean,
24 I would think, I mean, assuming that I'm doing my job, and I
25 try really hard to do my job every day, isn't there actually a

1 greater level of oversight than for someone who's not in
2 bankruptcy who can simply theoretically do what they want to
3 with the money once they get it?

4 **MR. KINCHELOE:** I disagree, your -- I disagree with
5 your Honor's point. It's not a question of oversight. I think
6 it's a question of the way the statute is written, if Hidalgo
7 receives a PPP loan outside of bankruptcy, they are free to
8 choose how to use those funds. Now, --

9 **THE COURT:** Are they?

10 **MR. KINCHELOE:** -- (indisc.) they use -- well, I
11 think they are. But if they use it for certain purposes,
12 they're required to repay it. If they use it for payroll
13 (indisc.) gets forgiven but if let's say company receives a
14 loan, a week later files bankruptcy. Well, all of those funds
15 then become property of the estate, subject to administrative
16 claims. And I don't think there's anything in the CARES Act
17 which would cause the proceeds of a PPP guaranteed loan to be
18 excluded from property of the estate or to be immune from the
19 claim of (indisc.) creditors or priority creditors.

20 **THE COURT:** Okay.

21 **MR. KINCHELOE:** So that's the motivation. Again, the
22 statutory authority is broad. I hear the Court's comment about
23 underwriting and the requirement to make sound loans. This is
24 the administrator's decision. But I go back to the anti-
25 injunction language in the Small Business Act that even to the

1 extent the administrator is wrong, the United States has not
2 waived sovereign immunity for an injunction to be issued
3 against the administrator.

4 **THE COURT:** And tell me why I can't issue -- because
5 it -- there's no doubt that the financial institution is
6 (indisc.) participation with the SBA. I think you just told me
7 they are given follow the form and process these loans. And
8 Rule 65 gives me the ability to issue injunctive relief against
9 anyone acting in participation with the parties, agreed?

10 **MR. KINCHELOE:** Would the Court give me a moment?

11 **THE COURT:** Of course. It would be 65(d)(2).
12 Actually (d)(2)(C).

13 **MR. KINCHELOE:** So, your Honor, I don't think the
14 Court can enjoin the bank. As I read this and I -- the Court
15 knows it way better than I do, but at least my quick reading of
16 the language of the rule is this would be if the Court enjoined
17 the administrator and anyone acting in concert with her, that
18 would capture this. I don't know that this lets the Court
19 enjoin the bank without also enjoining the administrator;
20 because without an injunction against the administrator, the
21 administrator doesn't have to guarantee the loan.

22 **THE COURT:** Well, I think -- I agree with you that I
23 can't order the SBA to guarantee a loan. I 100 percent agree
24 with that. The issue is can I order that the application be
25 considered without those four or five words. And if you're

1 telling me the person making that decision is, what was it,
2 PlainsCapital Bank, Mr. Holzer?

3 **MR. HOLZER:** Yes, your Honor.

4 **THE COURT:** You're telling me that I can't order
5 PlainsCapital Bank to consider the application without giving
6 any consideration for those words in the form?

7 **MR. KINCHELOE:** Then again I don't know that it
8 becomes a can't. I think it becomes a question of should or
9 should not. And with that question of whether or not the Court
10 should enjoin PlainsCapital Bank, I think there is a
11 substantial threat of irreparable injury to the bank because if
12 the bank --

13 **THE COURT:** (Indisc.)

14 **MR. KINCHELOE:** Well, because I think if the bank
15 follows the Court's order, ignores that line, and then issues
16 the loan, I think they are at risk if the SBA says we weren't
17 ordered to guarantee it, we're not guaranteeing it.

18 **THE COURT:** Okay, so you just say that I need to
19 order the SBA to comply with the law if I find discrimination.

20 **MR. KINCHELOE:** No, your Honor.

21 **THE COURT:** Is that it?

22 **MR. KINCHELOE:** I -- that -- your Honor, on that one
23 I think it's a question of can or cannot.

24 **THE COURT:** All right. So you're telling me that I
25 took an oath to uphold the statute, and if I find the statute's

1 been violated by the SBA, that I can do nothing about it?

2 **MR. KINCHELOE:** I think the Court is unable to issue
3 an injunction against the SBA, even if the statute has been
4 violated.

5 **THE COURT:** So tell me what it is I can do.

6 **MR. KINCHELOE:** I don't know, your Honor. For today
7 (indisc.) TRO, I do not think the Court can enter a TRO.

8 **THE COURT:** Got it, okay. Anything else?

9 **MR. HOLZER:** Your Honor, briefly.

10 **THE COURT:** No, I don't need anything else.

11 **MR. HOLZER:** Okay (indisc.)

12 **THE COURT:** Anything else, Mr. Kincheloe?

13 **MR. KINCHELOE:** Yes, your Honor. Just in closing, I
14 do dispute that the public policy considerations weigh in favor
15 of enjoining -- of issuing an injunction allowing this loan to
16 go -- to be made and guaranteed -- and/or guaranteed due to the
17 policy considerations. If the SBA is required to implement
18 traditional underwriting requirements, it is likely to slow
19 down this program and likely to delay proceeds to other
20 applicants.

21 **THE COURT:** Well how can it implement traditional
22 underwriting when it's been told what to do?

23 **MR. KINCHELOE:** Your Honor, I mean --

24 **THE COURT:** Simply because if I were to say that
25 there has been discrimination, that doesn't require the SBA to

1 do anything other than to not discriminate.

2 (Pause)

3 MR. KINCHELOE: Your Honor, I -- sorry, I don't think
4 I understand the Court's point.

5 THE COURT: I got it. Anything else?

6 MR. KINCHELOE: No, your Honor.

7 THE COURT: All right. So I have before me the
8 Debtor's request for a temporary restraining order against the
9 administrator of the SBA. I do find that I have jurisdiction
10 over the matter pursuant to (indisc.) Section 1334. I do find
11 that the adversary and the request for injunctive relief
12 constitutes a core proceeding under 28 USC Section 157. I
13 further find that I have the requisite constitutional authority
14 under the guidance given by our Supreme Court to enter, to the
15 extent it is a final order, and I'm not sure it is, but it may
16 practically be a final order, I do find that I have the
17 requisite constitutional authority to enter final order.

18 I want to go through a couple of the arguments
19 because, again, I spent a lot of time reading all of the
20 relevant wording. And there are certainly the arguments that I
21 simply -- they need to be addressed and I simply think that
22 they just have no foundation in logic or law or fact. I want
23 to start with the argument that (indisc.) that there remains
24 intact, and I wrote it down as a quote, that there's this
25 (indisc.) ensuring that there is sound value or so secure as to

1 reasonably assure repayment. That is so out of context in this
2 program that it's a frivolous argument. The entire --
3 everything said by our President, everything put out by our
4 administration, everything put out by our Congress reflects
5 that this was an emergency reaction to a series of events that
6 had never before been experienced. This isn't a loan program.
7 This is a support program. It is phrased the way it is to try
8 and ensure that the money ends up in the right hands and used
9 for the right purposes. It is intended to protect tax-paying
10 citizens from the effects of government shutdowns, stay-at-home
11 orders, and simply the public not being able to engage in
12 ongoing commerce. To suggest that this is a program that
13 enjoys underwriting and scrutiny in terms of who receives the
14 money is to simply ignore the obvious. The SBA's own rules
15 (indisc.) effectively look at the form, make the loans. You
16 make the loans, and so long as they're used for the right
17 purposes, there's no need to pay it back. That is not a
18 traditional loan program. There is no collateral valuation,
19 there is no credit worthiness test. And, again, to make that
20 argument is simply frivolous.

21 I also want to talk about the 525 argument. And I
22 take a quote out of the briefs. It says that issues under 525
23 (indisc.) the gatekeeper role of the governments or a
24 government entity in determining who may pursue certain
25 livelihoods. All of the cases cited have dealt with the

1 government engaging in regulated commerce. There were
2 commercial alternatives, there were private sector
3 opportunities. Practically speaking, this program isn't
4 designed to be a commercial product; it is a support product.
5 The only entity that would ever engage in this type of activity
6 is the government because, again, it's a support for citizens.
7 I can think of no greater example of the government performing
8 its gatekeeping role as to who can engage in commerce and
9 pursue certain livelihoods than this particular program;
10 because if we didn't have this program, there would be no
11 ambulance services, there would be no nail salons, there would
12 be no convenience stores. Society would be in a very difficult
13 (indisc.) so I do think the requirements of Section 525(a) are
14 absolutely in play. I do think that the choice of the words in
15 the form -- and, again, I made the example with Mr. Holzer, and
16 I am bothered by the use of the words. I disagree with
17 Mr. Holzer that, well, of course everybody knows what that
18 means, it's simply if you're a debtor. Couldn't be further
19 from the truth. Congress knew how to say we don't give these
20 loans to debtors. They did it within the CARES Act itself.
21 And then to have a form that simply says if an owner or a
22 business is presently involved in a bankruptcy, I have zero
23 idea what that means. It means if you have filed a proof of
24 claim in the General Motors bankruptcy umpteen years ago and
25 haven't yet received a final distribution on your claim, you

1 have to check that box "no." That's silly. It's even sillier
2 in light of the purpose of this program.

3 I also have found but I've not been cited to any
4 legitimate basis for including that language in the form. I
5 take umbrage of the fact that if I look at question one and I
6 look at the list and I think just rules of normal construction,
7 and I realize that this is not a statute but it's a form that
8 is derived from a statute, it says if a business or owner is
9 presently suspended, debarred, proposed to be debarred declared
10 ineligible, voluntarily excluded from participation in this
11 transaction by any (indisc.) department or agency all conduct
12 which society frowns upon, involves potentially wrongful acts,
13 involves potentially criminal conduct. And then as an add-on,
14 it says: "Or presently involved in any bankruptcy." Plain
15 meaning: as a creditor, as a landlord, as a partner in another
16 business, as a shareholder in another business. It's entirely
17 inappropriate that those words were added into that form in
18 that list in that manner. And I see no authority anywhere for
19 including those words in that form. It serves no purpose. I
20 do find that by including the words "or presently involved in
21 any bankruptcy," they are intended to be discriminatory. They
22 are intended to be discriminatory toward debtors for reasons
23 offered that somehow we lose control of the money, again I find
24 to be completely frivolous. I cannot imagine anything less
25 controlling than to simply give out money with no underwriting,

1 with no oversight, and then complain that if I have a Federal
2 judge who makes sure that the debtor complies with the law,
3 ensures that the debtors file monthly operating reports, ensure
4 that copies of bank statements are filed on the docket every
5 month, that they somehow lost control. I simply don't buy it.
6 I find the arguments to lack any good faith.

7 I am worried about the argument that I cannot enjoin
8 the administrator of the SBA. I agree I can't tell the SBA
9 administrator what loans to guarantee, what loans to grant. I
10 simply do not accept that when I have evidence of bankruptcy
11 discrimination that I can do nothing about it. And if I am
12 wrong about that, I am very certain that my Article Three
13 colleagues will tell me that I am wrong, and I will accept that
14 criticism. But this can't be what Congress intended. This
15 can't be the way that we are supposed to treat our fellow man
16 in this time. It's inconceivable to me that this distinction
17 could be drawn. The people that need the most help and who
18 have sought protection under our laws are the people who are
19 the targets of discrimination in a government support program;
20 can't possibly be.

21 So I am going to grant the TRO. I am going to enjoin
22 the administrator of the SBA and all those acting in concert
23 with her, which includes PlainsCapital Bank, in the following
24 manner. I am requiring that the application form for the
25 paycheck protection program submitted by Hidalgo County

1 Emergency Service Foundation be considered in accordance with
2 the program without the words in question one: "or presently
3 involved in any bankruptcy." They are stricken from
4 consideration. The application shall be considered on its
5 merits and in accordance with the law with those six words
6 stricken. It is my hope that my government that I serve will
7 realize the error that it has made and that it will act
8 appropriately and ensure that all of our citizens have access
9 to the support they needed.

10 Mr. Holzer, I want you to prepare a revised TRO in
11 accordance with the ruling that I've made on the record
12 pursuant to 7052. Also want to go through in accordance with
13 Rule 65, I am required to state, and I am incorporating my
14 comments on the record, into the form of order to be submitted
15 pursuant to 7052. I have stated the reasons why the temporary
16 restraining order should issue. I have specifically stated its
17 terms. I have specifically described in reasonable detail the
18 limits of the TRO and those acts that are required under the
19 TRO. I will find that pursuant to Bankruptcy Rule 7065, there
20 is no security required. I am also required to set a hearing
21 for issuance of a preliminary injunction. I don't know that it
22 will be necessary because this may all become moot by then.
23 And I recognize, Mr. Kincheloe, that at a preliminary
24 injunction hearing, you may tell me that the law has changed.
25 But as I sit here today, the CFR that you showed me, I'm not

1 aware it's actually governing law; is that correct?

2 **MR. KINCHELOE:** That's correct, your Honor. It has
3 not been published in the register.

4 **THE COURT:** All right, thank you. Let's see,
5 Mr. Kincheloe, Mr. Holzer, can you look at your collective
6 schedules?

7 **MR. HOLZER:** Have it in front of me, Judge.

8 **THE COURT:** All right, today's the 24th. My guess is
9 it's probably, and please tell me if you think I'm wrong, it's
10 probably a better use of everyone's time if we simply go as
11 close to the 14 days as possible to see what actually happens.
12 It may very well be that without waiving any right of review or
13 appeal that the SBA may have, it may make sense to extend the
14 original time. But obviously we're not going to decide that
15 today. Let me ask the parties, does it make sense to set this
16 -- I'm issuing this at 10:00 o'clock on Friday, can we set this
17 for 9:30 on Friday, May the 8th; does that make sense?

18 **MR. KINCHELOE:** Yes, your Honor. I was going to ask
19 for May 8th so perfect.

20 **THE COURT:** Okay, fair enough. And, Mr. Holzer, does
21 that work for your calendar?

22 **MR. HOLZER:** It does, your Honor.

23 **THE COURT:** All right, thank you. What I would like
24 for you to do is once you finish drafting the TRO, I'd like for
25 you to send it to Mr. Kincheloe to review as to form only.

1 Mr. Kincheloe, consistent with my normal practice, by agreement
2 as to form only, you're not waiving any right of review or
3 complaint that you may have, you're simply acknowledging that
4 the paper is consistent with the ruling that I've made on the
5 record. Is that enough of a (indisc.) that you feel
6 comfortable looking at the document?

7 **MR. KINCHELOE:** Absolutely, your Honor. And I'll
8 remain at my computer until I receive it from Mr. Holzer so
9 there's no delay.

10 **THE COURT:** Terrific, thank you. Gentlemen, I very
11 much appreciate the argument. Yes, sir.

12 **MR. HOLZER:** Just a clarification, and I'm trying to
13 think practically about the next two weeks, I understand your
14 ruling and I think I'll be able to get the TRO drafted
15 correctly, but is my client authorized to resubmit an
16 application form striking out that language about the
17 bankruptcy and checking the "no" box in question one?

18 **THE COURT:** Yes. What I would envision, so that
19 there is -- I don't want anyone at the bank to have an issue, I
20 don't want anyone within the SBA to have an issue, is that what
21 I would suggest that we do until this -- until we have an order
22 to the contrary is that your client's authorized to strike
23 through that language, check the box assuming that it (indisc.)
24 and it satisfies all of the other requirements of question one,
25 and then simply attach a copy of the TRO so that it's in the

1 file and everyone understands exactly what the issues are. I
2 would hate for someone to --

3 **(Automated telephone recording played)**

4 **THE COURT:** I don't -- I have 50 people on the
5 telephone so I'm not going to try to spend the time to figure
6 out who that was. You're absolutely authorized to strike
7 through the question. I can't remember where I stopped.
8 Attach a copy of the TRO, that way there is absolutely no
9 chance for error as to why the application was submitted the
10 way it was. And if the Debtor doesn't need -- I want to make
11 it very clear, if the Debtor doesn't meet the requirements,
12 then I'm not changing that. All I'm simply requiring is the
13 application be considered consistent with the (indisc.)
14 practices and governing (indisc.) as all other applications
15 with simply (indisc.) those six words stricken.

16 **MR. HOLZER:** Understood, your Honor. Thank you.

17 **THE COURT:** All right, Mr. Kincheloe, anything else
18 that I -- any lack of clarification or any issues that we need
19 to talk about?

20 **MR. KINCHELOE:** One issue, your Honor.

21 **THE COURT:** Certainly.

22 **MR. KINCHELOE:** (Indisc.) carry out instructions I
23 need to ask the Court if it will entertain an oral motion for
24 stay pending appeal.

25 **THE COURT:** Of course. And that's denied.

1 **MR. KINCHELOE:** Thank you, your Honor.

2 **THE COURT:** All right, anything else, folks? I very
3 much appreciate the argument. Mr. Holzer, I appreciate the way
4 in which you conducted yourself on behalf of the Debtor. And,
5 Mr. Kincheloe, you know that I think you're the greatest thing
6 ever and I very much appreciate what you do for our country.

7 **MR. KINCHELOE:** Thank you, your Honor.

8 **THE COURT:** Thank you, gentlemen.

9 **MR. HOLZER:** (Indisc.) have a good weekend.

10 **THE COURT:** (Indisc.)

11 **MR. KINCHELOE:** You, too, your Honor.

12 **(This proceeding was adjourned at 10:04 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



April 25, 2020

Signed

Dated

TONI HUDSON, TRANSCRIBER

Exhibit F

***Calais Regional Hosp. v. Carranza*, No. 20-1006 (Bankr. Me.)
Temporary Restraining Order**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re: CALAIS REGIONAL HOSPITAL, Debtor	Chapter 11 Case No. 19-10486
CALAIS REGIONAL HOSPITAL, Plaintiff, v. JOVITA CARRANZA, in her capacity as Administrator for the U.S. Small Business Administration, Defendant	Adv. Proc. No. 20-1006

TEMPORARY RESTRAINING ORDER

On April 27, 2020, the Debtor filed the Emergency Motion for Temporary Restraining Order and Request for Hearing Date and Briefing Schedule with Respect to the Debtor’s Request for a Preliminary Injunction [Dkt. No. 2] (the “Motion”). At a hearing on the Motion on April 30, 2020, the Court heard arguments from the parties and considered the contents of the Motion; the verified allegations in the Debtor’s complaint; the objections to the Motion filed by First National Bank [Dkt. No. 12] and by Jovita Carranza, in her capacity as Administrator for the U.S. Small Business Administration [Dkt. No. 13]; and the Debtor’s Reply in Support of the Motion [Dkt. No. 14]. The Court further considered the text and purpose of the Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”); the Paycheck Protection Program (“PPP”), enacted in § 1102 of the CARES Act; § 7(a) of the Small Business Act (15 U.S.C. §

636(a)); and the Administrator's interim final rules promulgated on April 15, 2020, and April 24, 2020, Docket Nos. SBA-2020-0015 and SBA 2020-0021.

Before deciding whether the Debtor is entitled to a temporary restraining order ("TRO"), the Court must address a threshold question: is the Administrator immune from the Debtor's claims for preliminary and permanent injunctive relief? The analysis begins with the Bankruptcy Code, which, in relevant part, provides as follows:

- (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . .
 - (1) [11 U.S.C. §§ 105 and 525.]
 - (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
 - (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. . . .
 - (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit[.]
 - (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

11 U.S.C. § 106(a). In this proceeding, the Debtor seeks (among other things) injunctive relief against the Administrator to remedy an alleged violation of 11 U.S.C. § 525(a), invoking Fed. R. Bankr. P. 7065 and 11 U.S.C. § 105(a).¹ In isolation, section 106(a) of the Bankruptcy Code would appear to permit such an action. The Administrator, however, asserts immunity from injunctive relief under the following provisions of applicable nonbankruptcy law:

¹ To the extent that the claims are based on 11 U.S.C. § 525 and other provisions of the Bankruptcy Code, this is a proceeding arising in or under the Code, and as a result, is a core proceeding. *See* 28 U.S.C. § 157(b).

(b) Powers of Administrator

In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may —

- (1) sue and be sued . . . in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property[.]

15 U.S.C. § 634(b). In the Administrator’s view, this anti-injunction provision bars any and all injunctive relief against her or her property.

The Administrator’s perspective fails to account for binding caselaw interpreting 15 U.S.C. § 634(b) to permit certain forms of relief against the Small Business Administration (“SBA”) that might be characterized as injunctive. In Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052 (1st Cir. 1987), the First Circuit Court of Appeals affirmed an order invalidating a certificate issued by the SBA for failure to comply with applicable laws and regulations. In so doing, the Court indicated that the anti-injunction provision of 15 U.S.C. § 634(b) “protects the [SBA] from interference with its internal workings by judicial orders attaching agency funds, etc., but does not provide blanket immunity from every type of injunction.” Ulstein, 833 F.2d at 1057. After examining the purposes of the statute, the Court suggested that the anti-injunction language “should not be interpreted as a bar to judicial review of agency actions that exceed agency authority where the remedies would not interfere with internal agency operations.” Id.

In this proceeding, as in Ulstein, the plaintiff seeks an order invalidating an SBA decision due to the Administrator’s asserted failure to comply with applicable law. The Debtor seeks no relief that would interfere with the SBA’s “internal workings” as distinguished from the product of those workings. An award of preliminary injunctive relief directing the Administrator to reserve sufficient authority to grant the Debtor’s application if the Debtor later prevails on the

merits will not interfere with the SBA's internal agency operations in the sense contemplated by Ulstein. As such, the Court may enter a carefully tailored temporary restraining order against the Administrator, notwithstanding the anti-injunction provision of 15 U.S.C. § 634(b). *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); 11 U.S.C. § 525(a) (providing in relevant part that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person that is or has been a debtor under this title . . . solely because such . . . debtor is or has been a debtor under this title"). This conclusion is consistent with the purpose of section 106(a)(4), which requires an order against a governmental unit to be enforced in accordance with appropriate nonbankruptcy law. As explained in the legislative history of section 106, although "an order against a governmental unit will not be enforceable by attachment or seizure of government assets[,]" the court "retains ample authority to enforce nonmonetary orders and judgments." 140 Cong. Rec. H10752-01, at H10766, 1994 WL 545773 (Oct. 4, 1994).

At this juncture, the ultimate question is whether the Debtor is entitled to the TRO that it seeks. The answer turns on the same four factors that govern a motion for a preliminary injunction. *See Animal Welfare Inst. v. Martin*, 665 F. Supp. 2d 19, 22 (D. Me. 2009). Those four factors are:

[1] the probability of the movant's success on the merits, [2] the prospect of irreparable harm absent the injunction, [3] the balance of the relevant equities (focusing on the hardship to the movant if an injunction does not issue as contrasted with the hardship to the nonmovant if it does), and [4] the effect of the court's action on the public interest.

Rosario-Urdaz v. Rivera-Hernandez, 350 F.3d 219, 221 (1st Cir. 2003). "As with a preliminary injunction, the party seeking relief bears the burden of demonstrating that these factors weigh in

its favor.” Animal Welfare Inst., 665 F. Supp. 2d at 22 (quotation marks omitted). Trial courts tasked with balancing these factors “have wide discretion in making judgments regarding the appropriateness of [preliminary injunctive] relief.” Francisco Sanchez v. Esso Standard Oil Co., 572 F.3d 1, 14 (1st Cir. 2009). Due to the preliminary nature of the relief and the undeveloped state of the record, the court’s findings and conclusions on a request for a TRO do not represent an adjudication on the merits and are not binding on the parties in the later action. *See* Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir. 1991) (“[A] court’s conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes.”); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (3d ed.) (“[A] court’s findings on an application for a temporary restraining order do not represent an adjudication on the merits. Thus, they are not binding on the parties in the later action for a permanent injunction.”) (footnotes omitted).

With these principles in mind, the Court FINDS and CONCLUDES as follows:

1. The Debtor is entitled to issuance of a temporary restraining order under Fed. R. Civ. P. 65 and Fed. R. Bankr. P. 7065.
2. The Debtor has shown a likelihood of success on the merits of the claim asserted in Count III of the complaint, namely that the Administrator acted in violation of 11 U.S.C. § 525(a) by refusing to permit the Debtor an opportunity to participate in the PPP solely because the Debtor is presently a debtor in a case under Title 11 (and therefore is unquestionably “involved in any bankruptcy”).² This conclusion rests on the following concessions and preliminary determinations:

² Although the complaint also raises the issue of whether the Administrator exceeded the scope of her authority by issuing a rule and the official PPP application form that rendered the Debtor ineligible to

- (A) The Administrator concedes that the SBA falls within the definition of “governmental unit” in the Bankruptcy Code.
- (B) The Administrator also concedes that the SBA denied the Debtor the opportunity to participate in the PPP solely because the Debtor is currently in chapter 11.
- (C) There is one remaining element of section 525(a) in play. To determine whether the Debtor has shown a likelihood of success on Count III of its complaint, the Court must consider the following question: does the Administrator’s categorical exclusion of the Debtor from the term “eligible recipient,” 15 U.S.C. § 636(a)(36)(A)(iv), constitute the denial of, or discrimination with respect to, a “license, permit, charter, franchise, or other similar grant” for purposes of section 525(a)? There is no binding authority from the United States Supreme Court or the First Circuit Court of Appeals on this precise question. There are, however, several decisions interpreting section 525(a) in other contexts, and many of those decisions consider the language of section 525(a) in light of the stated purpose of the statute. *See, e.g., Stoltz v. Brattleboro Housing Auth. (In re Stoltz)*, 315 F.3d 80 (2d Cir. 2002) (holding that eviction of a debtor from public housing unit solely based on her failure to pay discharged, pre-petition rent constituted illegal discrimination under section 525(a)); *In re The Bible Speaks*, 69 B.R. 368, 374 (Bankr. D. Mass. 1987) (“Congress intended § 525(a) . . . to expand on and develop *Perez* so that the doctrine would extend to many forms of discrimination.”); *Rose v. Conn. Housing Fin. Auth. (In re Rose)*, 23 B.R. 662, 666-67 (Bankr. D. Conn. 1982) (construing section 525(a) in light of the fresh start policy
-

apply for a PPP loan due to the Debtor’s status as a debtor in a chapter 11 case, the Court need not and does not address that issue at this point.

- and concluding that a state may not exempt debtors from a state-sponsored home financing program solely because of bankruptcy); *see also* 4 Collier on Bankruptcy ¶ 525.02 (16th ed.) (“[S]ection 525(a) is designed to protect persons from discriminatory treatment based solely on past financial difficulty.”) (footnote omitted). While the answer is not free from all doubt, the Debtor has articulated a sufficient likelihood of success, when considered along with its showings on the balance of harms and the public interest, to warrant the issuance of a temporary restraining order. Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (3d ed.) (suggesting that the plaintiff must ordinarily demonstrate “at least a reasonable probability of prevailing on the merits” but that the “necessary persuasiveness of this showing” may vary, depending on the facts of the case and the other relevant factors).
- (D) There are cases holding that section 525(a) does not extend to loans or, stated differently, that a loan is not “a license, permit, charter, franchise, or other similar grant” within the meaning of section 525(a). The Administrator correctly points out that the PPP describes “covered loans” and specifies loan features, such as an interest rate and a repayment term. *See, e.g.*, 15 U.S.C. § 636(a)(36)(A)(ii), (B), (E), (F), (L). True enough, but that fixation on the details loses the forest in the trees during a conflagration. The CARES Act is a grant of aid necessitated by a public health crisis. It is one of many responses by federal, state, and local governments designed to help citizens weather an unprecedented storm. Likening a covered loan under the PPP to a garden-variety loan that is not be protected under section 525(a) may miss the point.
- (E) Section 525(c), by its terms, applies to student loans and the Administrator argues that the existence of section 525(c) proves that Congress did not intend section 525(a)

to extend to loans: if section 525(a) extended to loans, why would Congress need to craft specific treatment for student loans in section 525(c)? This is a fair question, but the Supreme Court has, at times, been skeptical of this type of inferential reasoning. *See, e.g., Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1664-65 (2019). The hoary canon of *expressio unius est exclusio alterius* does not, alone, doom the Debtor’s preferred construction of section 525(a). *See Hewlett-Packard Co., Inc. v. Berg*, 61 F.3d 101, 106 (1st Cir. 1995) (indicating that the canon “is an aid to construction and not an inflexible rule”).

(F) The Court’s charge is to consider the language of the statute, the words that Congress did, in fact, use. There is, at this early juncture in the litigation, enough of a showing that participation in the PPP could be characterized as an “other similar grant” such that the Debtor has met its burden on the likelihood of success on Count III.

(G) The Court is sympathetic to the significant challenges faced by the Administrator in the implementation of measures taken by the federal government in response to the extraordinary public health crisis and the resulting economic devastation. The SBA was under—and continues to be under—immense pressure to distribute aid without delay. Time is truly of the essence. That said, this country’s laws cannot be pushed aside, even inadvertently, during times of crisis.

3. The Debtor has demonstrated a risk of immediate and irreparable harm in the absence of a temporary restraining order. This conclusion rests on the following preliminary findings:

- (A) PPP funds are available on a first come, first served basis. The Debtor's application for funds under PPP was not processed and the Debtor did not receive funds prior to their exhaustion under the first tranche of PPP funding.
- (B) On or about April 23, 2020, Congress enacted legislation making additional funds available for PPP.
- (C) The Debtor is a critical access hospital providing services in the Calais area. The Debtor's business operations have been significantly impacted by Covid-19 due to the fact that many non-essential elective and office visits have been rescheduled or canceled. A significant percentage of the Debtor's revenue is derived from non-essential and elective procedures. In the absence of funding from PPP or another source, the Debtor may be forced to discontinue business operations by early June and may not have sufficient funds for an orderly liquidation under those circumstances. This timeline could accelerate depending on the spread of Covid-19 in Washington County.
- (D) According to the application attached to the complaint, the Debtor has 224 employees who may lose their jobs if the Debtor's business operations cease.
- (E) Due to the nature of the Debtor's business operations, it must continue to employ staff in order to meet its charitable mission and provide health care services.
- (F) PPP funds are being exhausted quickly, in a matter of weeks (if not days). If the Debtor is not permitted to submit an application for funding under PPP in the very near term, funding may be exhausted. And, as previously mentioned, if the Debtor does not receive PPP funding, then it may be forced to close. When this relatively concrete forecast is "juxtaposed and weighed in tandem" with the Debtor's showing

of a likelihood of success on the merits, the forecast possesses sufficient substance to meet the Debtor's burden of establishing a prospect of immediate and irreparable harm if the TRO does not issue. *See* Ross-Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) (providing guideposts to measure the "quantum of . . . harm that will suffice to justify interim injunctive relief"); *see also* Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (indicating that the destruction of a business is an irreparable injury that may be properly remedied by injunctive relief).

4. The risk of harm to the Debtor if a temporary restraining order is not granted outweighs the risk of any harm to the Administrator if a temporary restraining order is granted.

5. Given the nature of the Debtor's business operations and the purpose Congress had in enacting the CARES Act and establishing PPP, the public interest is served by issuing a temporary restraining order.

6. The Debtor is a debtor-in-possession and no bond is required under Rule 65.

7. Based on the foregoing, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

(A) The motion is **GRANTED** on the terms and conditions set forth herein.

(B) A temporary restraining order is hereby issued, with notice, and directed to the Administrator and all agents, servants, employees, and any persons acting in concert with any of the foregoing (collectively, the "Restrained Parties"). The Court intends that First National Bank or any other lender participating in PPP with respect to the Debtor shall be one of the Restrained Parties upon actual notice of this order being provided to such bank. As to First National Bank, such notice may be provided by e-

mail to counsel of record for the bank in Case No. 19-10486. This order does not extend to any Restrained Party that submits, considers, or takes any other action with respect to an application under the PPP for any person or entity other than the Debtor.

(C) Until the expiration of this temporary restraining order, its scope shall be as follows:

- (i) The Restrained Parties shall not deny or cause any commercial lender to deny an application of the Debtor under PPP solely on the basis that the Debtor is a debtor in bankruptcy or based on the words “or presently in bankruptcy” on the Administrator’s official form of application.
- (ii) The Restrained Parties shall not refuse to guaranty a loan sought by the Debtor under PPP solely on the basis that the Debtor is a debtor in bankruptcy or because of a “yes” answer in response to question 1 on the official form of PPP application promulgated by the Administrator.
- (iii) The Administrator shall not authorize, guaranty, or disburse funds appropriated for loans under PPP without reserving sufficient funds or guaranty authority within the scope of the second appropriation to fund PPP to provide the Debtor with access to funds under PPP if the Debtor is eligible after implementation of the terms of this temporary restraining order and any appellate or judicial process with respect to any application filed by the Debtor. Rather, the Administrator shall ensure that she has sufficient authority within the scope of amounts appropriated for PPP as of April 30, 2020, to guaranty a loan to the Debtor in an amount the Debtor may be qualified to obtain, if the Debtor is eligible subject to the terms of

this order and after consideration of any administrative and judicial appeals and resolution of the claims in the Debtor's complaint.

- (iv) The Debtor shall be authorized to submit a PPP application to a participating lender of its choosing—or a lender may consider any pending application—with the words “or presently involved in any bankruptcy” stricken from the official form of application and, if the Debtor satisfied all other conditions in question 1 to the official form, to mark the box answering question 1 “no” or, with respect to any pending application, for the participating lender to treat question 1 as if it was answered “no”. The Restrained Parties shall consider the application submitted by the Debtor and fully implement all aspects of the PPP program with respect to the Debtor without any consideration of the involvement of the Debtor in bankruptcy. The application shall be considered an initial application of the submission if a subsequent application would adversely impact the Debtor's ability to qualify for a PPP loan.
- (v) To the extent that any bank requires the Debtor to execute other forms, applications, or other documents for a PPP loan that include any language about whether the Debtor is involved in bankruptcy, the Debtor is authorized to strike the portion of such language about involvement in bankruptcy and the Restraining Parties shall process the forms, applications, or other documents without any consideration of the involvement of the Debtor in bankruptcy.

- (vi) Nothing in this order obligates First National Bank to accept or submit a PPP application on behalf of the Debtor.
- (vii) To the extent that approval of the Court is required for the Debtor to obtain a PPP loan, the Debtor shall file a motion and seek entry of an order authorizing such relief. The Debtor must file any such motion within ten days after the date of this order. Any deadline under the PPP program requiring disbursement of PPP loan proceeds is hereby extended in order to allow consideration of a motion by the Debtor seeking authority to obtain a PPP loan.

8. The Court will conduct a status conference on the Debtor's request for a preliminary injunction consistent with the terms of this order on May 5, 2020 at 9:30 a.m. At the status conference, the Administrator must be prepared to describe, in reasonable detail, the steps she has taken to comply with the terms of this order.

9. This temporary restraining order shall remain in full force and effect until expires at 5:00 p.m. (eastern) on May 14, 2020 unless either (a) terminated earlier by the Court or (b) further extended by applicable law, by order of the Court, or by written agreement of the Debtor and the Administrator.

Dated: May 1, 2020



Michael A. Fagone
United States Bankruptcy Judge
District of Maine

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TOTAL: 6

Recipients submitted to the BNC (Bankruptcy Noticing Center):

dft	Jovita Carranza, in her capacity as administrator for the U.S. Small Business Administration	U.S. Small Business
	Administration 409 3rd St., S.W. Washington, DC 20416	
cr	Katahdin Trust Company 6 North Street Presque Isle, ME 04769	
smg	State of Maine Bureau of Revenue Services Compliance Division Bankruptcy Unit	P.O. Box
	1060 Augusta, ME 04332	
ust	Office of the U.S. Trustee 537 Congress Street Portland, ME 04101	
ust	Office of U.S. Trustee 537 Congress Street, Suite 300 Portland, ME 04101	

TOTAL: 5

Exhibit G

Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Business Admin.,
No. 20-1026 (Bankr. N.M.)
Final Judgment

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

ROMAN CATHOLIC CHURCH OF THE
ARCHDIOCESE OF SANTA FE,

No. 18-13027 t11

Debtor.

ROMAN CATHOLIC CHURCH OF THE
ARCHDIOCESE OF SANTA FE,

Plaintiff,

v.

Adv. No. 20-1026 t

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION,

Defendant.

FINAL JUDGMENT

For the reasons set forth in the opinion entered herewith, it is hereby ORDERED,
ADJUDGED AND DECREED:

1. Pursuant to 5 U.S.C. § 706(2)(A), the Court holds unlawful Defendant's exclusion of Plaintiff from eligibility to participate in the Paycheck Protection Program (the "PPP"), enacted as part of the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, P.L. 115-136 in that the exclusion is arbitrary and capricious.

2. Pursuant to 5 U.S.C. § 706(2)(C), the Court holds unlawful Defendant's exclusion of Plaintiff from eligibility to participate in the PPP in that the exclusion is in excess of Defendant's statutory jurisdiction, authority, or limitations or short of statutory right.

3. The Court declares that Defendant's attempt to exclude Plaintiff from the PPP solely on the ground that Plaintiff is a chapter 11 debtor-in-possession violates 11 U.S.C. § 525(a).

4. Pursuant to 5 U.S.C. § 706(1), the Court hereby compels Defendant to act on Plaintiff's PPP loan application forthwith without regard to Plaintiff's status as a chapter 11 debtor in possession.

5. If Defendant's actions, whether taken heretofore or in the future, are the proximate cause of Plaintiff losing its requested \$900,000 in PPP funds, Plaintiff may file an adversary proceeding against Defendant for compensatory and, if appropriate, punitive damages.

A handwritten signature in black ink, appearing to read "David T. Thuma", is positioned above a horizontal line.

Hon. David T. Thuma
United States Bankruptcy Judge

Entered: May 1, 2020
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	87120		
ust	United States Trustee	PO Box 608	Albuquerque, NM 87103-0608

TOTAL: 2

Exhibit H

Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Business Admin.,
No. 20-1026 (Bankr. N.M.)
Injunctive Relief Opinion

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

ROMAN CATHOLIC CHURCH OF THE
ARCHDIOCESE OF SANTA FE,

No. 18-13027 t11

Debtor.

ROMAN CATHOLIC CHURCH OF THE
ARCHDIOCESE OF SANTA FE,

Plaintiff,

v.

Adv. No. 20-1026 t

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION,

Defendant.

OPINION

The Court held a preliminary injunction hearing in this proceeding on April 30, 2020. During the hearing, the Court converted it to a trial on the merits, as allowed by Fed. R. Civ. P. 65(a)(2).¹ For the reasons stated herein, Plaintiff is entitled to relief under its complaint.

I. **FINDINGS OF FACT**²

The Court finds:

¹ Rule 65 is incorporated by reference by Fed. R. Bankr. P. 7065. The Court took this admittedly unusual step for two reasons. First, there is enormous time pressure in this proceeding, for the reasons stated below. To provide any effective relief, and/or to avoid a substantial damages claim from accruing, an immediate decision was necessary. Second, the factual issues in the proceeding were few and noncontroversial.

² The Court took judicial notice of the docket in the main case and this adversary proceeding. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (holding that a court may sua sponte take judicial notice of its docket); *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 8 (1st Cir. 1999) (same).

Plaintiff is a catholic archdiocese in New Mexico and a New Mexico corporation. Its principal place of business is at 4000 St. Josephs Place NW, Albuquerque, New Mexico. Plaintiff has 70 employees. On December 3, 2018, Plaintiff filed this chapter 11 case. Since then Plaintiff has been operating as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

Defendant (sometimes referred to as the “SBA”) is an agency of the United States of America. Its central office is located at 409 Third Street, S.W., Washington DC 20416.

On or about March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, P.L. 115-136 (the “CARES Act”). The CARES Act is intended, among other things, to provide stimulus to the economy by distributing approximately \$2.3 trillion to various industries, programs, and individuals.

The CARES Act temporarily added a new “Paycheck Protection Program” (the “PPP”) to be administered by Defendant. The CARES Act provisions relating to the PPP provide in pertinent part:

Section 1102. Paycheck Protection Program

(a) IN GENERAL.—Section 7(a) of the Small Business Act (15 U.S.C. 636(a)) is amended—

(1) in paragraph (2)—

(A) in subparagraph (A), in the matter preceding clause (i), by striking “and (E)” and inserting “(E), and (F)”; and

(B) by adding at the end the following:

“(F) PARTICIPATION IN THE PAYCHECK PROTECTION PROGRAM.—In an agreement to participate in a loan on a deferred basis under paragraph (36), the participation by the Administration shall be 100 percent.”; and

(2) by adding at the end the following:

“(36) PAYCHECK PROTECTION PROGRAM.—

“(A) DEFINITIONS.—In this paragraph—

...

“(iv) the term ‘eligible recipient’ means an individual or entity that is eligible to receive a covered loan;

...

“(B) PAYCHECK PROTECTION LOANS.—Except as otherwise provided in this paragraph, the Administrator may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection.

...

“(D) INCREASED ELIGIBILITY FOR CERTAIN SMALL BUSINESSES AND ORGANIZATIONS.—

“(i) IN GENERAL.—During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of—

“(I) 500 employees; or

“(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.

...

(F) ALLOWABLE USES OF COVERED LOANS.—

“(i) IN GENERAL.—During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for—

“(I) payroll costs;

“(II) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;

“(III) employee salaries, commissions, or similar compensations;

“(IV) payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);

“(V) rent (including rent under a lease agreement);

“(VI) utilities; and

“(VII) interest on any other debt obligations that were incurred before the covered period.

“(ii) DELEGATED AUTHORITY.—

“(I) IN GENERAL.—For purposes of making covered loans for the purposes described in clause (i), a lender approved to make loans under this subsection shall be deemed to have been delegated authority by the Administrator to make and approve covered loans, subject to the provisions of this paragraph.

“(II) CONSIDERATIONS.—In evaluating the eligibility of a borrower for a covered loan with the terms described in this paragraph, a lender shall consider whether the borrower—

“(aa) was in operation on February 15, 2020; and

“(bb)(AA) had employees for whom the borrower paid salaries and payroll taxes; or

“(BB) paid independent contractors, as reported on a Form 1099–MISC.

...

SEC. 1106. Loan Forgiveness.

(a) DEFINITIONS.—In this section—

(1) the term “covered loan” means a loan guaranteed under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), as added by section 1102;

...

(7) the term “expected forgiveness amount” means the amount of principal that a lender reasonably expects a borrower to expend during the covered period on the sum of any—

(A) payroll costs;

(B) payments of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation);

(C) payments on any covered rent obligation; and

(D) covered utility payments; and

(8) the term “payroll costs” has the meaning given that term in paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), as added by section 1102 of this Act.

(b) FORGIVENESS.—An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs incurred and payments made during the covered period:

(1) Payroll costs.

(2) Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).

(3) Any payment on any covered rent obligation.

(4) Any covered utility payment.

SEC. 1114. Emergency Rulemaking Authority.

Not later than 15 days after the date of enactment of this Act, the Administrator shall issue regulations to carry out this title and the amendments made by this title without regard to the notice requirements under section 553(b) of title 5, United States Code.

As can be seen from the statute, funds from the PPP have the following extremely favorable terms:

- No collateral or personal guarantees are required;
- Funds are available regardless of the applicant’s creditworthiness.
- No fees are charged;
- The loans mature in 2 years;
- The interest rate is 1%; and
- *The loans are fully forgiven if the funds are used as required.*

The PPP has very few eligibility requirements. Applicants must:

1. Be a small business concern or any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act;
2. Have fewer than 500 employees or, if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates;
3. Have been in operation on February 15, 2020; and
4. Have had employees to whom the applicant pays salaries and payroll taxes.

Faith-based organizations like Plaintiff are eligible to receive PPP loans. Plaintiff clearly met all eligibility requirements under the CARES Act.

Funds available under the PPP are limited and administered on a first-come, first-served basis. Demand for the PPP funds has been overwhelming. The funds were exhausted once, but were replenished by Congress on or about April 24, 2020. The Court does not know the current status of PPP fund availability or whether Congress will replenish the fund again.

On April 2, 2020, Defendant issued Official SBA Form 2484, which is the form applicants must use to apply for a PPP loan. The form states that the applicants “presently are involved in any bankruptcy” are not eligible.³

³ Defendant introduced into evidence its form of application for a regular 7(a) loan. The application has sixteen questions, including whether the applicant or any affiliate has ever filed for bankruptcy protection. The application asks for details on a separate sheet if the question is answered “yes.”

On April 15, 2020, Defendant published in the Code of Federal Regulations an “interim final rule” implementing the PPP (the “First Rule”). The First Rule, like the CARES Act, says nothing about bankruptcy debtors being ineligible for the PPP.⁴

Plaintiff filed a loan application on April 20, 2020, for a \$900,000 PPP loan. The lender, Wells Fargo, did not act on the application because of the bankruptcy ineligibility provision.

On April 28, 2020, the SBA issued another interim final rule (the “Second Rule”). The Second Rule purports to disqualify bankruptcy debtors from the PPP:

Will I be approved for a PPP loan if my business is in bankruptcy?

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. . . .The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk for an unauthorized use of funds or non-repayment of unforgiven loans.

Like many New Mexico businesses, Plaintiff has been severely financially affected by the federal, state, and local government “lockdown” orders issued in response to the coronavirus pandemic. On March 23, 2020, the New Mexico Department of Health issued a “stay at home” order, prohibiting mass gatherings and requiring all non-essential businesses to cease in-person operations. On April 6, 2020, the Governor issued Executive Order 2020-22, which extended the

⁴ The First Rule adopts the ineligibility standards in section 120.110, title 13 of the Code of Federal Regulations (“CFR 120.110”), as further described in SBA’s Standard Operating Procedure 50-10, Subpart B, Chapter 2 (“SOP 50-10”). *See* First Interim Rule, 2(c) (“Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and further described in SBA’s Standard Operating Procedure”). The SOP 50-10 provides that a “Small Business Applicant” must, among other things: be an operating business; be located in the United States; be “small” (as defined by the SBA); and demonstrate the need for the desired credit. *See* SOP 50-10, pg. 85. The SOP 50-10 also provides that the businesses listed in CFR 120.110 are not eligible for an SBA loan. Bankruptcy debtors are not among the listed ineligible businesses. Nothing in the SOP 50-10 makes the Plaintiff ineligible for a PPP loan.

stay at home order through April 30, 2020. The Governor recently announced that she will further extend the stay at home order through at least May 15, 2020.

A major source of Plaintiff's income is revenue derived from monthly parish assessments. The parishes, in turn, derive a significant portion of their revenue from money collected during masses. Furthermore, a significant portion of the collections occur during Holy Week, which coincided with the lockdown. Because the parishes have been closed to their parishioners and the public, Plaintiff is losing about \$300,000 a month in revenue it otherwise would realize from normal operations. This loss of income will continue until, at a minimum, the Governor's lockdown orders are lifted. Without a PPP loan, the Plaintiff's operations and reorganization effort will be substantially adversely affected. The PPP funds are essential to Plaintiff's "fresh start."

Plaintiff has the financial and accounting ability to follow the PPP rules about use of the funds. Plaintiff is careful in its accounting, files complete and detailed monthly operating reports in this case, and is more than willing to separately account for how it would use PPP funds.

On April 28, 2020, Plaintiff filed a motion to approve its proposed PPP loan as post-petition financing under 11 U.S.C. § 364.

With the Second Rule, Defendant made a final determination that Plaintiff's application will be denied. There are no administrative appeals or remedies available to Plaintiff to seek review of Defendant's decision to exclude it from the PPP.

II. DISCUSSION

A. Jurisdiction and Venue.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. Jurisdiction is proper under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (the "APA"). This is a core proceeding pursuant to 28 U.S.C.

§ 157(b)(2)(A). Defendant's decision to exclude Plaintiff from the PPP is core: it goes to the heart of case administration, as the funds were intended by Congress to replace Plaintiff's lost revenue caused by the government lockdowns. In addition, the Court concludes that a proceeding to determine whether a governmental unit has violated 11 U.S.C. § 525(a) is core.

Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and (e)(1) and 28 U.S.C. § 1409(a).

B. The Administrative Procedure Act.

This proceeding is brought in part under the APA. 5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

In *New Mexico Health Connections v. United States Department of Health & Human Services*, 946 F.3d 1138, 1161 (10th Cir. 2019), the Tenth Circuit held that “[i]n reviewing an APA challenge to agency action, a district court acts as an appellate court.” The scope of the court’s “review under this standard is “narrow”” and the court “is not to substitute its judgment for that of

the agency.” *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011) (citation omitted). Nevertheless, courts retain an important role “in ensuring the agencies have engaged in reasoned decisionmaking” by examining the reasons for the agency decisions, or lack thereof, and determining “whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* at 53 (citation omitted); *Dep’t of Commerce v. N.Y.*, 139 S. Ct. 2551, 2569 (2019) (although a court may not substitute its judgment for that of the agency, it must ensure that the agency remained “within the bounds of reasoned decisionmaking”).

Here, the question is whether Plaintiff is entitled to relief under § 706(2)(A) (arbitrary and capricious) and/or (C) (in excess of authority).

1. Arbitrary and Capricious. Plaintiff argues that Defendant’s prohibition against bankruptcy debtors is arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A). “Under the arbitrary and capricious standard, we must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.” *IMC Kalium Carlsbad Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1012 (10th Cir. 2000) (internal quotation marks omitted). An agency rule is “arbitrary and capricious if the agency has relied on factors [that] Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). While the APA’s arbitrary and capricious standard is generally deferential, prohibiting the court from substituting its judgment for the agency’s, *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002), this principle is borne of the notion that an agency typically has “greater familiarity with the ever-changing facts and circumstances

surrounding the subjects” it regulates. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). No such deference is given to an action taken without statutory authority. *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 321 (2014).

The Court finds that Defendant’s decision to exclude bankruptcy debtors from the PPP is arbitrary and capricious. While a borrower’s bankruptcy status clearly is relevant for a normal loan program, the PPP is the opposite of that. It is not a loan program at all. It is a grant or support program. The statute’s eligibility requirements do not include creditworthiness. Quite the contrary, the CARES Act makes PPP money available regardless of financial distress. Financial distress is presumed. Given the effect of the lockdown, many, perhaps most, applicants would not be able to repay their PPP loans. They don’t have to, because the “loans” are really grants. Repayment is not a significant part of the program. That is why Congress did not include creditworthiness as a requirement.

Considering the unprecedented nature of the PPP and the circumstances underlying its enactment, there is no reason to assume that Congress intended to cede to Defendant discretion to exclude bankruptcy debtors from the PPP. Rather, a review of the CARES Act in its entirety shows the opposite. *E.P.A.*, 573 U.S. at 321 (Congress’s intent may be discerned by examining the enactment in its entirety); *Brown & Williamson*, 529 U.S. at 133 (2000) (same). As discussed below, another CARES Act program (direct loans to mid-sized businesses)⁵ specifically excludes bankruptcy debtors. The unmistakable implication is that Congress did not intend to exclude bankruptcy debtors from the PPP.

The structure of the PPP is simple: PPP funds must be used for payroll, mortgage interest, rent, or utilities. If the funds are used as required, they do not have to be repaid. Given the obvious

⁵ § 4003(c)(3)(D).

purpose of the PPP, it was arbitrary and capricious for Defendant to engraft a creditworthiness test where none belonged.

Furthermore, the test itself (are you a bankruptcy debtor?) is arbitrary and capricious. Why that eligibility criterion and not one of the many others that would more accurately gauge a borrower's likelihood of complying with the PPP?⁶ It makes no sense, and it is unsupported by the terms of the CARES Act. *See E.P.A.*, 573 U.S. 302, 324 (2014). ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'") (citation omitted).

Defendant's only articulated justification for the bankruptcy disqualification is that bankruptcy debtors "present an unacceptably high risk for an unauthorized use of funds or non-repayment of unforgiven loans." As Judge David Jones said last week in ruling on a similar issue, the justification "is completely frivolous."⁷ It is also arbitrary and capricious. Plaintiff, like all chapter 11 debtors in possession, is under the supervision of the Court and the United States Trustee's office. It must file detailed monthly operating reports, attaching bank statements. The unsecured creditors committee appointed in the case is very active and watches how Plaintiff spends money. All creditors have access to the docket and the monthly operating reports. In short, the chapter 11 bankruptcy system is a hundred-eyed Argus. In contrast, nondebtors can spend their

⁶ Other possible underwriting criteria include: balance sheet insolvency; inability to pay debts as they become due; recent profitability; credit score; pending collection actions; current default on secured or unsecured debts; increases in credit card or other debt to pay bills; current ration of accounts receivable to accounts payable; and presence or absence of cash flow problems. There are many more.

⁷ *Hidalgo County Emergency Service Foundation v. Jovita Carranza (In re Hidalgo County Emergency Service Foundation)*, Case no. 19-20497; Adv. pro. No. 20-2006, (Bankr. S.D. Tex.); (transcript of oral ruling rendered April 24, 2020).

PPP funds without any oversight. Defendant's justification for excluding bankruptcy debtors is so weak the Court has to wonder if Defendant really believes it.

The Court concludes that Defendant's decision to insert underwriting criteria into the PPP, and then to use the bankruptcy debtor test as the sole underwriting criterion, is both arbitrary and capricious.

2. Exceeds Statutory Authority. Plaintiff also argues that the prohibition against debtors exceeds Defendant's authority under the CARES Act, in violation of 5 U.S.C. § 706(2)(C). The Court agrees.

In determining whether an agency's regulations are valid under a particular statute, as the Supreme Court's decision in *Chevron* instructs, we begin with the question of whether the statute unambiguously addresses the "precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); accord *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Hous. & Urban Dev.*, 567 F.3d 1235, 1239–40 (10th Cir. 2009); see also *Keller Tank Servs. II, Inc. v. Comm'r*, 848 F.3d 1251, 1269 (10th Cir. 2017) (noting that "[t]he *Chevron*-deference analysis proceeds in two steps," and explicating them both). "If Congress has spoken *directly* to the issue, that is the end of the matter; the court, as well as the agency, must give effect to Congress's unambiguously expressed intent." *Keetoowah Band*, 567 F.3d at 1240 (emphasis added). However, if the statute is silent or ambiguous as to the precise question at issue, a court must determine whether to afford the agency's interpretation *Chevron* deference. *Id.* Such deference is appropriate if " 'Congress delegated authority to the agency generally to make rules carrying the force of law' and the agency's interpretation of the statute was issued pursuant to that authority." *Carpio v. Holder*, 592 F.3d 1091, 1096–97 (10th Cir. 2010) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)). If these conditions are satisfied, then we defer to the agency's interpretation of the statute as long as it is not "arbitrary, capricious, [n]or manifestly contrary to the statute," *id.* at 1096 (alteration in original) (quoting *Herrera–Castillo v. Holder*, 573 F.3d 1004, 1007 (10th Cir. 2009)).

New Mexico v. Dep't of Interior, 854 F.3d 1207, 1221 (10th Cir. 2017).

The CARES Act directly addresses the PPP eligibility requirements. It charged Defendant with issuing "regulations to carry out this title. . . ." Section 1114. Defendant had no authority under this charge to change the eligibility requirements. That, however, is exactly what it did.

Defendant exceeded its authority by trying to prohibit bankruptcy debtors from getting PPP funds. It is not entitled to *Chevron* deference.

Defendant's unlawful behavior is made clear by the CARES Act § 4003(c)(3)(D), which relates to loans to "mid-sized businesses." Unlike PPP loans, the loans to mid-size businesses are intended to be repaid. For that reason, Congress specified *in the statute* that bankruptcy debtors are not eligible. Defendant should have read and understood the fundamental differences between the mid-size business loan program (real loans) and the PPP (grants or support payments). Defendant's refusal to abide by this simple distinction constitutes a usurpation of Congressional authority to determine which business are eligible for PPP funds. Without question, Defendant lacked the authority to change the PPP eligibility requirements and exclude Plaintiff.

C. Protection Against Discriminatory Treatment.

11 U.S.C. § 525(a) provides:

(a) . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

Plaintiff argues that Defendant's decision to exclude debtors from the PPP violates § 525(a). The Court agrees. In *Stolz v. Brattleboro Housing Auth. (In re Stoltz)*, 315 F.3d 80 (2d Cir. 2002), the Second Circuit analyzed the term "other similar grant:"

The term "other similar grant" is not defined by the code. In common parlance, a grant is "a transfer of property by deed or writing." *Merriam Webster's Collegiate Dictionary* 507 (10th ed. 2000). As a legal term, a grant is "[a]n agreement that

creates a right of any description other than the one held by the grantor. Examples include *leases*, easements, charges, patents, franchises, powers, and licenses.” *Black’s Law Dictionary* 707 (7th ed.1999) (emphasis added). Similarly, a lease is “[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration.” *Id.* at 898.

...

The common qualities of the property interests protected under section 525(a), i.e., “license[s], permit[s], charter[s], franchise[s], and other similar grants,” are that these property interests are unobtainable from the private sector and essential to a debtor's fresh start.

Id. at 88-90. *See also In re Saunders*, 105 B.R. 781, 788 (Bankr. E.D. Pa. 1989) (government refusal to give debtor an education grant because of her bankruptcy could violate § 525(a), although the court decided that it did not need to reach the issue); *In re Oksentowicz*, 314 B.R. 638 (Bankr. E.D. Mich. 2004), affirmed, 2005 WL 7466596 (E.D. Mich. 2005) (landlord’s rejection of a chapter 7 debtor housing application violated § 525(a) because the housing complex was considered a governmental unit); *In re Haffner*, 25 B.R. 882, 887 (Bankr. N.D. Ind. 1982) (government refusal to include debtor in a price support program because of debtor’s refusal to repay pre-petition debts violated § 525(a)); *In re Howren*, 10 B.R. 303 (Bankr. D. Kan. 1980) (state university withholding transcript unless debtor paid its prepetition loan violated § 525(a)).

As shown above, the PPP is not a loan program.⁸ It is a grant or support program. The target grant recipients are small businesses in financial distress. The PPP could only be offered by the government; private lenders do not give away money. PPP funds “are unobtainable from the private sector.” *Stolz*, 315 F.3d at 90. They also are essential to Plaintiff’s fresh start. *Id.* Of all the benefits a government can grant, free money might be the best of all. Denying Plaintiff access to PPP funds solely because it is a debtor violates § 525(a).

⁸ The government does not violate § 525(a) by taking borrower’s bankruptcy status into account when considering a loan application. *See, e.g., Watts v. Pennsylvania Housing Fin. Co.*, 876 F.2d 1090, 1094 (3d Cir. 1989); *Ayes v. U.S. Department of Veterans Affairs*, 473 F.3d 104, 110 (4th Cir. 2006).

III. CONCLUSION

With only the flimsiest of justifications Defendant took one of many underwriting criteria from its “normal” loan programs (bankruptcy status of the borrower), changed it to an eligibility condition, and then applied it to an emergency grant program where it clearly had no place. Defendant’s inexplicable and highhanded decision to rewrite the PPP’s eligibility requirements in this way was arbitrary and capricious, beyond its statutory authority, and in violation of 11 U.S.C. § 525(a). By a separate final judgment, the Court will grant Plaintiff the relief it requests. If Defendant’s actions result in Plaintiff not obtaining the \$900,000 it requested, Plaintiff may file an adversary proceeding for compensatory and, if appropriate, punitive damages.



Hon. David T. Thuma
United States Bankruptcy Judge

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Exhibit I

***Organic Power LLC v. Carranza*, No. 20-0055 (Bankr. D.P.R. May 8, 2020)
Temporary Restraining Order**

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF PUERTO RICO

IN RE:

ORGANIC POWER LLC

Debtor

ORGANIC POWER LLC

Plaintiff

V.

SMALL BUSINESS ADMINISTRATION

JOVITA CARRANZA

Defendants

CASE NO. 19-01789-EAG11

Chapter 11

ADVERSARY NUMBER: 20-00055-EAG

FILED & ENTERED ON MAY/08/2020

Temporary Restraining Order

On April 27, 2020, plaintiff Organic Power LLC filed an application for temporary restraining order and preliminary injunction against Jovita Carranza, in her capacity as Administrator of the U.S. Small Business Administration. Organic Power submitted applications for financial help under the Paycheck Protection Program (PPP) to Banco Popular de Puerto Rico and Oriental Bank. Both banks denied the applications because Organic Power is in bankruptcy. The SBA form used to process applications for the PPP states that applicants “presently involved in any bankruptcy” are ineligible for the PPP. Organic Power requests that this court declare the decision to exclude bankruptcy applicants from the PPP beyond the SBA’s statutory and regulatory authority, as arbitrary and capricious under the Administrative Procedures Act (APA), and contrary to the anti-discrimination provision of the Bankruptcy Code. Organic Power further requests that the court enjoin the SBA from denying its PPP application based on its status as a chapter 11 debtor and that the court compel the SBA to remove the language in all PPP applications which disqualifies bankruptcy applicants.

At the hearing held on May 6, 2020, the court heard arguments from the parties and considered the contents of Organic Power’s motions and the SBA’s opposition. The court also considered the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, P.L. 115-136 (CARES Act); the PPP enacted in section 1102 of the CARES Act; section 7(a) of the Small

1 Business Act (15 U.S.C. § 636(a)); the SBA's interim final rules promulgated on April 15, 2020
2 and April 24, 2020 and published in the Federal Register (Docket Nos. SBA-2020-0015 and SBA-
3 2020-0021); and the relevant provisions of the APA (5 U.S.C. §§ 701-706.).

4 The court also examined the temporary restraining orders issued by several bankruptcy
5 courts across the nation in cases filed by debtors against the SBA for similar denials of PPP
6 applications: Springfield Medical Care Systems, Inc. v Carranza, Ch. 11 Case No. 19-10485, Adv.
7 Proc. 20-01004, slip op. (Bankr. D. Vt. May 7, 2020); Springfield Hospital Inc. v Carranza, Ch. 11
8 Case No. 19-10283, Adv. Proc. 20-01003, slip op. (Bankr. D. Vt. May 4, 2020); Roman Catholic
9 Church of the Archdiocese of Santa Fe v. Carranza, Ch. 11 Case No. 18-13027, Adv. Proc. 20-
10 01026, slip op. (Bankr. D.N.M. May 1, 2020); Penobscot Valley Hospital v. Carranza, Ch. 11
11 Case No. 19-10034, Adv. Proc. 20-01005, slip op. (Bankr. D. Me. May 1, 2020); Calais Regional
12 Hospital v. Carranza, Ch. 11 Case No. 19-10486, Adv. Proc. 20-01006, slip op. (Bankr. D. Me.
13 May 1, 2020); and Hidalgo County Emergency Service Foundation v. Carranza, Ch. 11 Case No.
14 19-20497, Adv. Proc. 20-02006, slip op. (Bankr. W.D. Tex. April 25, 2020).

15 First, the court addresses the SBA's claim to sovereign immunity under the Small Business
16 Act, which provides that the SBA may:

17 sue and be sued in any court of record of a State having general jurisdiction, or in any
18 United States district court, and jurisdiction is conferred upon such district court to
19 determine such controversies without regard to the amount in controversy; but no
20 attachment, injunction, garnishment, or other similar process, mesne or final, shall be
21 issued against the [agency] or [its] property. . . .

22 15 U.S.C. §634(b)(1). This section precludes suits for injunctive or any similar relief against the
23 SBA. But, section 106(a) of the Bankruptcy Code allows this court to protect debtors from
24 discrimination made illegal by section 525(a) of the Code notwithstanding an assertion of
25 sovereign immunity. 11 U.S.C. §§ 106(a) & 525(a).

26 The sovereign immunity defense has already been expressly rejected in two cases by
27 another bankruptcy court in this Circuit. Penobscot Valley Hospital, slip op. at 2 and Calais
28 Regional Hospital, slip op. at 2. The bankruptcy court in Vermont also rejected the defense in two
29 more similar cases. Springfield Medical Care Systems, Inc., slip op. and Springfield Hospital Inc.,
slip op.

30 The Maine court interpreted binding case law in this Circuit, Ulstein Mar., Ltd. V. United
31 States, 833 F.2d 1052 (1st Cir.1987), as allowing the same, carefully tailored injunctive relief

1 against the SBA sought by Organic Power here. See Penobscot Valley Hospital, slip op. at 3-4
2 and Calais Regional Hospital, slip op. at 3-4. This court agrees with and adopts the reasoning of
3 the Maine court in Penobscot and Calais. In this case, as in the cases in the Districts of Maine and
4 Vermont, the debtor seeks to invalidate as unlawful the SBA's decision to disqualify it from the
5 PPP. As such, this court may under section 106(a) of the Bankruptcy Code enter a carefully tailored
6 temporary restraining order against the SBA, notwithstanding the anti-injunction provision of 15
7 U.S.C. § 634(b).

8 The court now turns to the SBA's argument that Organic Power's anti-discrimination claim
9 under section 525(a) of the Bankruptcy Code fails because PPP money is a loan and section 525(a)
10 does not protect loans. Section 525(a) provides that:

11 a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit,
12 charter, franchise, or other similar grant to, condition such a grant to, discriminate with
13 respect to such a grant against . . . a person that is or has been a debtor under this title or a
14 bankrupt or a debtor under the Bankruptcy Act. . . .

15 11 U.S.C. § 525(a). As mentioned, the SBA argues that section 525(a) does not protect "PPP
16 loans." It further argues that, even if PPP money is a grant, it is not a grant similar to "a license,
17 permit, charter, [or] franchise," and thus likewise not protected by section 525(a).

18 But this court agrees with the bankruptcy court in New Mexico that the PPP is not a loan
19 program, rather a grant or support program offered by the government to small businesses in
20 financial distress without regard to creditworthiness. See, Archdiocese of Santa Fe, slip op. at 11.
21 Under section 1106 of the CARES Act, if 75% or more of PPP money is used for payroll and the
22 rest for mortgage interest, rent, and utilities, none of it must be repaid. See First Interim Final Rule
23 § 2(o). As Organic Power has committed to using 100% of any PPP money received for payroll,
24 the "loan" will be forgivable and is best characterized as an "other similar grant" under section
25 525(a) of the Bankruptcy Code for the reasons stated in the Archdiocese of Santa Fe opinion and
26 in open court. And, we note that the court has imposed restrictions in this Order to enforce Organic
27 Power's commitment.

28 The SBA also argues that this court cannot issue a temporary restraining order for claims
29 under the APA, because those claims are non-core and the court cannot order injunctive relief in a
non-core matter. We disagree. The SBA's exclusion of Organic Power from the PPP is a core
matter under section 525 of the Bankruptcy Code. See, Penobscot Valley Hospital, slip op. at 2;

1 Calais Regional Hospital, slip op. at 2; Archdiocese of Santa Fe, slip op. at 9. And, the SBA's
2 exclusion of bankruptcy debtors from the PPP is central to the administration of the case as the
3 funds, if disbursed, would replace Organic Power's lost revenue caused by the government
4 lockdown. Archdiocese of Santa Fe, slip op. at 9.

5 The court finds that the SBA's exclusion of applicants in bankruptcy from the PPP is
6 arbitrary and capricious in violation of section 706(2)(A) of the APA for the reasons stated in open
7 court and in the Archdiocese of Santa Fe opinion. Id. slip op. at 11. Congress knew how to and
8 did expressly exclude mid-size businesses in bankruptcy from loan help under the CARES Act but
9 did not exclude small businesses in bankruptcy from the PPP under the CARES Act. Section
10 4003(c)(3)(D) of the CARES Act. Thus, the arguments of the SBA to justify its decision to do so
11 are not convincing.

12 The SBA argues that section 525 of the Bankruptcy Code does not protect PPP money
13 because Congress gave qualifying student loans section 525 protection but did not give it to PPP
14 money. Though the SBA rejects that same logic -- a traditional rule of statutory interpretation --
15 in construing the CARES Act. Rather the SBA justifies doing what Congress did not because,
16 given the need for speed, the bankruptcy exclusion is an easy-to-apply and expeditious litmus test
17 for creditworthiness. But because Congress created the PPP plainly to assist non-creditworthy
18 small businesses, we find the SBA's arguments frivolous. See Archdiocese of Santa Fe, slip op.
19 at 11. And we note that many creditworthy recipients of PPP monies have been publicly shamed
20 and even threatened with legal action by members of Congress and the Executive into returning
21 PPP monies received by them because, being creditworthy, they either have sufficient money on
22 hand or can access money from private sources to weather the Covid-19 pandemic.

23 Now we turn to consideration of the four factors that govern requests for preliminary
24 injunctions: (1) whether there is a likelihood of success on the merits; (2) whether the moving
25 party will suffer irreparable harm in the absence of interim relief; (3) whether preliminary relief
26 will injure other parties; and (4) whether the public interest supports granting the injunction.
27 Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, 794 F.3d 168, 171 (1st Cir. 2015). The
28 critical factor of the four is the likelihood to succeed on the merits. Borinquen Biscuit Corp. v.
29 M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir. 2006). "The balancing of harm is weighed in light
of the likelihood to succeed." Arroyo v. Scotiabank de P.R. (In re Arroyo), 2013 Bankr. LEXIS
2683, at *4 (Bankr. D.P.R. June 28, 2013).

2. Organic Power has shown a substantial likelihood of success on the merits on its claims that the SBA discriminated against Organic Power in violation of section 525(a) of the Bankruptcy Code by excluding Organic Power from the PPP and that in so doing the SBA exceeded its statutory and regulatory authority in an arbitrary and capricious manner in violation of the APA.

4. Organic Power is an energy recycling company which employs at least 25 people. Its operations has been impacted by the crisis. It will need to terminate jobs and close parts of its operations if it does not receive PPP money. The shutdown of operations would pose a potential environmental hazard because organic waste and methane gas is stored in its facilities.

6. Organic Power states that it otherwise meets all other requirements of the PPP. But the court is not ruling on whether Organic Power otherwise meets the requirements of the PPP.

8. Given the purpose Congress had in enacting the CARES Act and establishing the PPP and the nature of the national crisis that led to its enactment, the public interest is served by issuing a temporary restraining order so that Organic Power has an opportunity to continue its operations and paying wages to its employees.

¹ Due to the preliminary nature of the relief and the need for a speedy resolution, the court’s findings and conclusions on a request for a TRO do not represent an adjudication on the merits and are not binding on the parties in the later action. See, Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir. 1991) (“[A] court’s conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes.”)

9. Organic Power is a debtor-in-possession and no bond is required under Federal Rule of Civil Procedure 65.

Based on the foregoing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Organic Power's request for a temporary restraining order is GRANTED on the terms and conditions set forth herein.
2. A temporary restraining order is hereby issued, with notice, and directed to Jovita Carranza in her capacity as Administrator of the SBA and all agents, servants, employees, and any persons acting in concert with any of the foregoing (collectively, the "Restrained Parties"). The court intends that Banco Popular de Puerto Rico, Oriental Bank, or any other financial institution participating in the PPP with respect to Organic Power shall be one of the Restrained Parties upon actual notice of this order being provided to such financial institution.
3. Until the expiration of this temporary restraining order, its scope shall be as follows:
 - i. Organic Power LLC is authorized to submit a PPP application to any participating financial institution with the words "or presently involved in bankruptcy" stricken from the SBA's application form.
 - ii. The Restrained Parties shall not deny or cause any participating financial institution to deny an application of Organic Power under the PPP solely on the basis that Organic Power is a debtor in bankruptcy or based on the words "or presently in bankruptcy" on the SBA's application form.
 - iii. The Restrained Parties shall not refuse to guaranty a loan sought by Organic Power under the PPP solely on the basis that Organic Power is a debtor in bankruptcy or because of a "yes" answer in response to question 1 on the PPP application form.
 - iv. The SBA shall not authorize, guaranty, or disburse funds appropriated for the PPP without reserving sufficient funds or guaranty authority within the scope of the second appropriation to fund the PPP to provide Organic Power with access to funds under the PPP if Organic Power is eligible after implementation of the terms of this temporary restraining order and any appellate or judicial process with respect to any application filed by Organic Power. Rather, the SBA shall ensure

that it has sufficient authority within the scope of amounts appropriated for the PPP as of April 27, 2020 to guaranty a loan to Organic Power in an amount it may be qualified to obtain, if Organic Power is eligible subject to the terms of this Order and after consideration of any administrative and judicial appeals and resolution of the claims in Organic Power's complaint.

- v. Organic Power shall be authorized to submit a PPP application to a participating financial institution of its choosing—or a participating financial institution may consider any pending application—with the words “or presently involved in any bankruptcy” stricken from the application form and, if Organic Power satisfies all other conditions in question 1 of the application form, to mark the box answering question 1 “no” or, with respect to any pending application, for the participating financial institution to treat question 1 as if it was answered “no”. The Restrained Parties shall consider the application submitted by Organic Power and fully implement all aspects of the PPP with respect to Organic Power without any consideration of the involvement of Organic Power in bankruptcy. The application shall be considered an initial application of the submission if a subsequent application would adversely impact Organic Power's ability to qualify for PPP money.
- vi. To the extent that any participating financial institution requires Organic Power to execute other forms, applications, or documents for PPP money that include any language about whether Organic Power is involved in bankruptcy, Organic Power is authorized to strike the portion of such language about involvement in bankruptcy and the Restraining Parties shall process the other forms, applications, or documents without any consideration of the involvement of Organic Power in bankruptcy.
- vii. Nothing in this order obligates Banco Popular de Puerto Rico, Oriental Bank, or any other participating financial institution to accept or submit a PPP application on behalf of Organic Power.
- viii. Upon receipt of any PPP money, Organic Power must:
 - a) deposit those monies in a specially designated, interest bearing account, titled as a DIP account;

- b) immediately file a notice on the docket of this adversary proceeding and the docket of main chapter 11 case stating that its PPP application has been granted and disclosing both the name of the financial institution that granted the application and the amount of the monies received;
 - c) refrain from disbursing any of the PPP monies until it has court approval to do so; and
 - d) within two days after receipt of the PPP monies, file either a motion on shortened (seven-day) notice to the 20 largest unsecured creditors, all secured creditors, and the U.S. Trustee, or a stipulation showing the consent of the U.S. Trustee, that (i) requests authority to disburse PPP monies, (ii) sets forth the proposed distribution of the PPP monies, and (iii) affirms that the proposed distribution meets all requirements for loan forgiveness of the PPP.
- ix. If the Court authorizes Organic Power to disburse the PPP monies, Organic Power must:
- a) create a spreadsheet showing how PPP monies have been disbursed, that includes:
 - 1. the date and purpose of each disbursement (e.g., payroll, mortgage interest, rent, utilities);
 - 2. the section of the CARES Act which authorizes loan forgiveness of the PPP monies used for that purpose;
 - 3. the remaining balance of PPP monies; and
 - 4. any other information Organic Power would find useful for its record keeping or for purposes of demonstrating the entire PPP monies are eligible for forgiveness if and when the SBA audits Organic Power's use of the PPP monies; and
 - b) file on the docket of this adversary proceeding and the docket of Organic Power's chapter 11 case an updated version of the PPP funds spreadsheet within three business days of each disbursement of PPP monies.

4. The parties shall appear at a status conference at 1:00 p.m. (AST) on Tuesday, May 19, 2020, on Organic Power's request for a preliminary injunction. At that status conference:

- a) the SBA shall describe, in reasonable detail, the steps it has taken to comply with the terms of this TRO;
- b) Organic Power shall report on the status of its efforts to implement the terms of this TRO and shall present, in reasonable detail, the contours of the relief it seeks in the form of a preliminary injunction, based on the current status of this proceeding and any pending PPP application;
- c) the parties shall present to the court any additional conditions they propose with respect to Organic Power's receipt, distribution, or accounting of PPP monies in order to ensure the maximum protection of Organic Power's bankruptcy estate and creditors, the SBA, and the participating financial institution; and
- d) the parties shall jointly propose a timeline and litigation schedule (if needed) for a determination of whether this temporary restraining order should be converted to a preliminary injunction and final adjudication of this adversary proceeding. (If the parties cannot reach agreement on these terms, each party shall certify they have made a diligent effort to do so and present their competing proposals.)

5. This temporary restraining order shall remain in full force and effect until it expires at the conclusion of the status conference set for May 19, 2020 unless either (a) terminated earlier by the court or (b) further extended by applicable law, by order of this court, or by written agreement between Organic Power and the SBA.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8 day of May, 2020.


Edward A. Godoy
United States Bankruptcy Judge