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Attorneys for the Chapter 11 Debtors and Debtors In Possession

HONORABLE WHITMAN L. HOLT

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re: ASTRIA HEALTH, *et al.*, Debtors and Debtors in Possession.[1]	Chapter 11 Lead Case No. 19-01189-11 Jointly Administered
ASTRIA HEALTH, *et al.*, Plaintiffs, v.	**Adv. Proc. Case No. 20-80016-WLH** **NOTICE OF CROSS-APPEAL AND STATEMENT OF ELECTION**

[1] The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

UNITED STATES SMALL BUSINESS ADMINISTRATION and JOVITA CARRANZA, in her capacity as Administrator for the United States Small Business Administration, Defendants.

Part 1: Identify the cross-appellants

1. Names of cross-appellants:

- Astria Health;
- SHC Medical Center - Toppenish; and
- Yakima HMA Home Health, LLC.

2. Position of cross-appellants in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

■ Plaintiff
☐ Defendant
☐ Other (describe) _____

Part 2: Identify the subject of this cross-appeal

1. Describe the judgment, order, or decree appealed from:

Order Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit [Docket No. 22]; Transcript of Hearing Held 06/03/2020 [Docket No. 22 at Exhibit A]; Minute Entry Re; Motion for Temporary Restraining Order and Use of PPP Funds. HELD [Docket No. 19].

2. State the date on which the judgment, order, or decree was entered:

Docket No. 22 was entered June 10, 2020, with oral ruling on June 3, 2020.

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Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party:

United States Small Business Administration

Attorneys:

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2. Party:

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Part 4: Optional election to have cross-appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

Although Astria Health, SHC Medical Center - Toppenish, and Yakima HMA Home Health, LLC would prefer to proceed before the Bankruptcy Appellate Panel, because the United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (as appellants in the first instance) have already elected to have their appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel, this cross-appeal will proceed before the District Court as well.

Part 5: Sign below

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Dated: July 7, 2020

DENTONS US LLP

By */s/ Sam J. Alberts*
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Exhibit 1

Docket No. 22 (Order with Transcript)

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re: ASTRIA HEALTH, *et al*., Debtors and Debtors in Possession.[1]	Chapter 11 Lead Case No. 19-01189-11 Jointly Administered **Adv. Proc. Case No. 20-20016-WLH**
Astria Health, *et al*., Plaintiffs, v. UNITED STATES SMALL BUSINESS ADMINISTRATION and JOVITA CARRANZA, in her capacity as Administrator for the United States Small Business Administration, Defendants.	**ORDER GRANTING PRELIMINARY INJUNCTION, DENYING STAY PENDING APPEAL, AND CERTIFYING ISSUES TO THE NINTH CIRCUIT COURT OF APPEALS**

[1] The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

THIS MATTER came before the Court at a telephonic hearing held on Wednesday June 3, 2020 (the "Hearing"), on the Debtors' *Motion For Temporary Restraining Order And Request For Hearing And Briefing Schedule With Respect To The Debtors' Request For A Preliminary Injunction; Declaration Of John M. Gallagher In Support Thereof* [Docket No. 2] (the "Motion for Preliminary Injunction"). At the Hearing, counsel for both sides presented legal argument in support of their respective positions. In addition to the arguments of the parties at the Hearing, the Court considered the following submissions: the *Verified Complaint* [Docket No. 1]; the Motion for Preliminary Injunction; the *Defendants Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order (ECF No. 2) and Request for Preliminary Injunction (ECF No. 1)* [Docket No. 14]; and the Debtors' *Reply to Defendants Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order (ECF No. 2) and Request for Preliminary Injunction (ECF No. 1); Declaration of John M. Gallagher in Support Thereof* [Docket No. 16].

At the conclusion of the Hearing, the Court issued an oral ruling in which the Court found that the Defendants, the United States Small Business Administration (the "SBA") and Jovita Carranza, in her capacity as Administrator for the SBA, do not have sovereign immunity from injunctive relief, and that Plaintiffs meet the four prerequisites considered when determining whether a preliminary injunction should be issued. For the reasons stated on the record in open court at the Hearing, which

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constitutes the Court's findings of fact and conclusions of law (the "Oral Ruling"), and which are incorporated into this order by reference, the Court enters this preliminary injunction pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). A transcript of the Oral Ruling is attached as **Exhibit A** hereto and is incorporated herein by this reference pursuant to Bankruptcy Rule 7052 and Rule 52(a)(1) of the Federal Rules of Civil Procedure.

The Court deems itself fully advised and now finds and concludes as follows:

1. The Court has jurisdiction over the parties and the subject matter hereof, and has authority to enter a final judgment on the matters joined herein.
2. Notice hereof was reasonable and appropriate under the circumstances of this case. This matter is properly before the Court for determination at this time.
3. The Court finds that the Debtors have demonstrated a likelihood of success on the merits of their complaint against the SBA.
4. The Court finds that the Debtors have demonstrated they would suffer irreparable harm without issuance of a preliminary injunction.
5. The Court finds the Debtors have demonstrated that the risk of harm to the Debtors if a preliminary injunction is not granted outweighs the harm to the SBA and other Restrained Parties (as defined below).
6. The Court finds the Debtors have demonstrated that issuance of this

preliminary injunction is in the public interest.

THEREFORE, IT IS HEREBY **ORDERED**:

1. Plaintiffs' Motion for Preliminary Injunction is **GRANTED** as set forth herein.

2. A preliminary injunction order is issued, with notice, and directed to Jovita Carranza in her capacity as Administrator for the United States Small Business Administration, and all agents, servants, employees, and any parties acting in concert with any of the foregoing parties, including Banner Bank, (collectively the "Restrained Parties").

3. The preliminary injunction order is as follows:

   a. Each Plaintiff is hereby authorized to submit a Paycheck Protection Program ("PPP") loan application pursuant to the CARES Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281 (2020); *see also* Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); to any lender with the words "or presently involved in any bankruptcy" stricken from any requisite form.

   b. If each Plaintiff satisfies all the other conditions in Question 1 to the loan application form and each Plaintiff still must mark a box indicating they are in bankruptcy, each Plaintiff may mark the box

"no."

c. The Restrained Parties are enjoined from refusing to guaranty a PPP loan sought by the Debtors on the basis that the applicant is a debtor in bankruptcy or because of a "yes" in response to Question 1 on the official form of application for PPP; and

d. The Restrained Parties are enjoined from authorizing, guaranteeing, or disbursing funds appropriated for loans under PPP without reserving sufficient funds or guaranty authority to provide the Debtors with access to PPP funds if the Debtors are eligible once the words "presently involved in any bankruptcy" are stricken from Debtors' PPP applications.

e. To the extent any bank requires each Plaintiff to execute any other forms, applications, or other documents for a PPP loan that include any language about whether each Plaintiff is involved in any bankruptcy proceedings, Plaintiff is authorized to strike the portion of such language about involvement in any bankruptcy proceedings and the Restrained Parties shall process the each Plaintiff's forms, applications, or other documents without any consideration of the involvement of each Plaintiff in any bankruptcy proceedings.

f. The Restrained Parties shall not make or condition the approval of any PPP loan guaranty to each Plaintiff contingent on each Plaintiff not being "presently involved in any bankruptcy."

4. No bond is required.

5. The SBA's oral motion for stay pending appeal under Bankruptcy Rule 8007 is DENIED.

6. Pursuant to 28 U.S.C. § 158(d)(2)(A) and Bankruptcy Rule 8006, and for the reasons stated on the record at the Hearing, which are incorporated into this order by reference, the Court certifies this Preliminary Injunction Order for direct appeal to the Ninth Circuit under 28 U.S.C. §§ 158(d)(2)(A)(i), 158(d)(2)(A)(ii), and 158(d)(2)(A)(iii).

///End of Order///

PRESENTED BY:

/s/ Samuel R. Maizel
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Exhibit A

[Oral Ruling]

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IN RE:
ASTRIA HEALTH, et al.
Debtors. 1
Lead Case No. 19-01189-11
Adv. Pro. Case No. 20-80016 – WLH
AGREED ORDER REGARDING
SCHEDULING AND
RESERVATION OF PPP FUNDS
ASTRIA HEALTH, et al.,
Plaintiffs,
V.
UNITED STATES SMALL
BUSINESS ADMINISTRATION and
JOVITA CARRANZA, in her capacity
As Administrator for the United States
Small Business Administration,
Defendants.

THE COURT: I appreciate it. I appreciate both you and Mr. Sachs arguments and counsel today and your advocacy. I understand both sides. If you give me a two or three minutes, I just want to dot my I's and cross my T's, then I'll come back with a ruling for everyone. Give me just a couple minutes.

(Whereupon a recess was taken)

THE COURT: All right. Mr. Maizel, are you still on?

MR. MAIZEL: Yes, Your Honor.

THE COURT: Mr. Sachs?

MR. SACHS: Yes, Your Honor.

THE COURT: Okay. I guess it's now afternoon; we started in the morning and I'll say good afternoon to both of you.

All right, so we're here today on the debtor's motion for preliminary injunction on an -- in an adversary proceeding commenced against the Small Business Association relating to the debtors' request and the denial of their requests for paycheck protection program or PPP funding under the recently passed Cares Act. The Court's reviewed the debtor's motion, the supporting declaration, the government's brief in opposition, along with the request for judicial notice and attachments thereto, and the Court has also reviewed the debtor's reply.

During the break, the Court read the recent decision issued today by bankruptcy judge (inaudible) in the district of Maine, so the Court's reviewed that decision as well.

The Court's now prepared to rule on the

debtors' request. In doing so, the Court utilizes the familiar four factors, which largely collapsed to three in this context, regarding whether a preliminary injunction should issue. Although the debtors contested to some extent, I agree with the articulation of the legal standard as set forth on pages 14 to 15 of the government's brief and am applying that heightened standard today. Turning to the factors: Factor one is whether the moving parties or the debtors will probably, or very likely, prevail on the merits. I'm going to break this into two parts and discuss, first, section 525, and then second, the Administrative Procedures Act issue.

Regarding section 525, the debtors contend that the exclusion of entities in bankruptcy from PPP funding violates bankruptcy code section 225(a). Section 225(a) bars bankruptcy-related discrimination involving, "A license, permit, charter, franchise, or other similar grant." The parties disagree about whether PPP funding fits within this phrase. In answering this question, the Court is bound by the text of the statute. The statutory text of the bankruptcy code reflects an area of issues considered by Congress and the

code is not for you to ignore the plain meaning of the text even if the policy outcome is unfavorable. Many recent Supreme court opinions make this crystal clear. See, for example, Puerto Rico versus Franklin, California, Tax Free Trust 136 Supreme Court Reporter in 1938 at pages 1946 to 49, a 2016 decision in which the Court held that Puerto Rican municipalities were categorically precluded from any form of bankruptcy relief because of the plain text section 903 of the bankruptcy code, a decision that Congress subsequently addressed by passing the (inaudible) litigation. Baker Box LLP versus (inaudible) LLP 135 Supreme Court Reporter 2158 at page 2169, 2015, in which the Court held that the plain text of the bankruptcy code prevents fees on fees in defending professional fee applications and noted that perhaps that's a bad policy decision, but policy decisions are left to Congress. Rabax (phonetic) Gateway Hotel, LLC versus Amalgamated Bank 566, U.S. Reporter, 639 at page 649, a 2012 decision authored by Justice Scalia, noting that the pros and cons of credit bidding in bankruptcy are left strictly to Congress. Pole versus United States, 566, U.S.

506 at pages 522 to 23, a 2012 decision, authored by Justice (inaudible) finding that Chapter 12 debtors cannot protect tax on the sale of a family farm in the context that's attracted to Chapter 12 case from administrative priority, a decision that Congress subsequently overruled through legislation. Moreover, as Justice Keegan recently explained all of the bankruptcy code generally, "names to make reorganizations possible, it does not commit to anything and everything that might accomplish that goal." And Mission Products Holding, Inc., versus Technology 139 Supreme Court Reporter 1652 at page 1665. That's the decision from last year, 2019.

This court is also duty-bound to apply the statute Congress has provided and simply cannot rewrite the text or advance a desirable result in a particular case. Keeping those foundational principles in mind, the Court cannot conclude that the debtors are likely to prevail on the theory that section 525 is violated here.

First, the Court agrees with the government that PPP loans are properly classified as just that, loans. To be (inaudible) these are highly unusual loans that may openly and

functionally provide free money, but that doesn't matter. They're not loans in the first instance. There's a borrower, a lender, a promissory note, a promise to repay, and the like.

As other -- as many other courts have noted, we certainly are not quote unquote market terms, but there can be many loans in society that are not done on market terms or even economically rational terms. But nevertheless, are loans. For example, private equity sponsors sometimes lend troubled portfolio companies money on highly favorable terms, terms no (inaudible) lender would ever offer. Sometimes this leads to bankruptcy fights about re-characterization, but the equity sponsors win most of those fights. Why? Because there was a loan, even if it is an off-market or friendly loan. (Inaudible), I might loan money to my brother or a good friend on off-market terms, perhaps even on terms that will result in total forgiveness of the loan, such as performing charitable work or donating the money to a worthy cause. The point is that in these contexts, there is still some sort of extension of credit with a corresponding obligation.

I ultimately agree with the various other

bankruptcy judges who have concluded that's the better way to classify PPP loans. Moreover, even if I could conclude the PPP loans -- or I could construe PPP loans as a form of financial grant, I still not -- I still do not think the debtors are likely to succeed on their section 525 argument. I agree with bankruptcy Judge Brendan Shannon from Delaware, that section 525 (a) does not apply to, "money grants." The statute's use of the word similar to modify the word grant has to be given meaning and it plainly functions to limit grants to those that are in the permits licenses and the like. To be sure, many things could fall with (inaudible) increase. The ability to use the FCC spectrum, specified real property (inaudible) and the (inaudible) real property as in the Stoltz case, perhaps patents or trademarks. But an affirmative money grant is different in kind from what are essentially forms of permission or access that are uniquely granted by the government. Access to money, even free money, is not subject to governmental controls or unattainable elsewhere. For example, private parties also give money grants. Every time I turn on and listen to NPR, there's a long list of

different foundations that have issued free money grants to -- to NPR, demonstrating that free money is, at least in some instances, is available from parties other than the government.

The limited reach of section 525 (a) is illustrated perhaps most clearly by contrasting section 525 (a) with section 525 (c). Section 525 (c) prevents discriminatory treatment involving, among other things, "a student grant." A student grant being a Pell grant or University grant is, of course, free money. But it's section 525 (a) already encompassed an economic grant, then there would be no need to include student grants in section 525. The Court must interpret the statute as a whole and avoid a reading that would render any provisions superfluous. The interpretation that best does that as Judge Shannon's exclusion of "money grants" from the scope of 525 (a). So even if it is not truly a loan, and is some variety of grant, section 525 (a) just doesn't stretch far enough to encompass PPP funding.

To the extent there's any ambiguity in section 525, itself. I agree with the SBA's point, that the legislative history plainly states

that the purpose of the provision is to codify the result of Perez versus Candle 402 U.S. 637, a 1971 Supreme Court decision. The Perez case about denial of the driver's license due to nonpayment of a debt owed the State in a bankruptcy case. The Supreme Court held it improperly limited the debtor's fresh start because of the basic need for driver's licenses and the exclusive control of the state over such licensing. This is consistent with section 525 (a) applying to permit the grants of access or privileges controlled by the government, but not consistent with expanding into affirmative economics payments.

As I said, I'm ultimately constrained by the statute that Congress gave me and I don't think that statute gets the debtors where they need to go in order to ultimately prevail on this issue.

Since I'm not sure where this litigation is going after my ruling today, I do note that if section 525 were applicable, there's zero doubt that the SBA cannot claim sovereign immunity protection. Bankruptcy code section 106 (a) very plainly waives sovereign immunity regarding the entirety of section 525 and section 106 (a) is

consistently interpreted and applied in a comprehensive fashion by the Ninth Circuit Court of Appeals, perhaps more so than in any other circuit. See, for example, Huntsinger (phonetic) versus United States 902 F 3rd, 963, Ninth Circuit from 2018, the Valley (phonetic) versus United States in re DBSI, Inc., 1869 F 3rd 1004, a Ninth Circuit decision from 2017.

The Court now turns to address the Administrative Procedures Act issue. The debtors argue that the SBA's bankruptcy exclusion can be classified under the Administrative Procedures Act, which allows judicial nullification of agency action when that action is, among other things, arbitrary, capricious an abusive discretion, or otherwise not in accordance with law -- with law 5 USC section 7062A. Before turning to the substance of this APA argument, the Court first addresses threshold issues raised by the government; I first talk about bankruptcy jurisdiction and power. There's federal subject matter jurisdiction under 28, USC 1334 (b). This is a civil proceeding, "Arising under Title 11," in part the last, including the APA claims or claims, "Arising in a bankruptcy case. And then

the question, (inaudible) related to the Chapter 11 cases." To the extent that there's any doubt, although I don't believe there is, I note that the Court can exercise supplemental jurisdiction under 28 USC section 1367, over any ancillary issues related to bankruptcy. See Montana versus Golden in re Pegasus Gold Corp, 394, F 3rd 1189 at pages 1194 to 95, Ninth Circuit, 2005.

Bankruptcy jurisdiction in the Ninth Circuit is exceptionally broad. All matters within the broad scope of federal bankruptcy jurisdiction have been referred to me by the United States district court for the Eastern District of Washington pursuant to 28 United States code section 157 (a). See the Eastern District's, local civil rule, 83 spot 5 a. That is the end of the jurisdictional analysis.

The next question relates to the allocation of decisional power between this court and the district court. This is the article three issue discussing Stern versus Marshall. To be clear, this has nothing to do with jurisdiction, but rather only relates to whether I can enter a final judgment or need to do a report and recommendation to the district court. Stern

itself makes this point, C 564, U.S. 462 at page 480. And the Ninth Circuit Court of Appeals just recently underscored the exact same point in a case called Hanky versus Grubstiene (phonetic) in re Point Center Financial, Inc., 2020 US app Lexis 13743 at pages star 15 to 16; that's a Ninth Circuit opinion from April 29th of this year that's been designated for publication.

The APA claim is statutorily "core" under 28 USC section 157 B 2 B A, because it's a matter concerning the administration of this bankruptcy estate. Thus, as a statutory matter, I have both subject matter jurisdiction and the power to finally resolve the claim. That now turns to the Stern question. Does this create a constitutional issue? The Court's, the answer to that is no. This is a dispute within the final adjudicatory power of this court. The entire dispute "at issue stems from the bankruptcy itself," which means this court can properly exercise the judicial power needed to resolve it. See Stern at page 499. To be sure that the claim at issue in Stern was quoting the state tort action that exists without regard to any bankruptcy proceedings. The same is not true here. It's not sensible to say

that a claim challenging the SBA's exclusion of bankrupt entities for PPP loans could ever exist "without regard to any bankruptcy proceeding" is contemplated and Stern. Such an action couldn't ever be brought in any other context or court because the plaintiff wouldn't have standing and wouldn't have suffered any harm. This dispute exists only because of the bankruptcy filing and the fact that we're in a bankruptcy case. It depends on and flows entirely from a bankruptcy and could never exist outside of the bankruptcy context. The analysis in Stern versus Marshall makes clear that any claims in stemming from the bankruptcy itself are properly within the adjudicatory powers of the bankruptcy judge. And that's what we have before me today.

The Court next addresses the anti-injunctive provisions cited by the SBA as a defense. The Court agrees with the distinction drawn by several other bankruptcy and district judges about why section 634 B 1 of the Small Business Act is not violated in this context. Those courts cogently frame a distinction based on the decision in Olstein (phonetic) Marine limited versus United States, 833 F 2nd 1052, a first

circuit decision from 1987. And the Court has not been pointed to any contrary Ninth Circuit Court of Appeals case law. The debtors here seek to enforce the law against the SBA. They seek no relief that would interfere with the SBA's internal workings and therefore do not run afoul of the statute. As such, the Court now has (inaudible) incorporates by reference the analysis contained in Diamond DB Diamond Club of (inaudible) LLC versus United States SBA 2020 U.S. district Lexus 82213 at pages star 19 to 23, a May 11th, 2020 decision by the Eastern District of Michigan. Also Springfield Medical Care Systems versus Kuranda (phontic) in re Springfield Medical Care Systems, 2020 bankruptcy Lexus 11238 at pages star 1669, a bankruptcy court for the District of Vermont decision from May, 2020.

I think the analysis in these decisions is sufficient to resolve this issue, but to the extent there's some lingering doubts, the Court does believe that the debtors have a compelling plain textual argument that the scope of the statutory bar is limited to the property of the SBA administrator in her personal capacity, not against the government more generally, although it

doesn't appear any court had directly endorsed this conclusion. Even so, that plain textual statutory interpretation is an alternative basis supporting the Court's ruling today.

The Court now turns to the substance of the APA claim. Under the Administrative Procedures Act and the Supreme Court's Chevron decision, which I note is subject to some serious questions, but at least as of today remains binding, courts adopt a deferential standard of review regarding decisions in rulemaking by administrative agencies. The level of Chevron deference, however, is reduced when, as is the case here, at the agency action was not subject to formal process see Reno versus Corey 515 U.S. 50 at page 61. That's a Supreme Court decision from 1995. I'd say see, also, a case called Crozlick (phonetic) versus Republic Title Co. 314, F 3rd 875 at page 8 -- 881. This is the Seventh Circuit decision by 2002, written by then circuit Judge Richard Posner. And his decision explains that Chevron deference requires, "something more than a formal -- something more formal, more deliberate than a simple announcement," because, "a simple announcement is too far removed from the process

by which courts interpret statutes to earn deference." The decision further ultimately provides no difference when, "the simple announcement is all we have here. One fine day, the policy statement simply appeared in the federal register." Regardless, courts will find an action to the arbitrary and capricious, "if an agency has relied on factors, which Congress has not intended 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 (inaudible) possible that it could not be ascribed to a difference in view or the product of agency expertise." That's from Motor Vehicle Manufacturer Association v. United States versus State Farm Mutual Auto Insurance Company, 463 U.S. 29 at page 43, 1983 Supreme Court decision. Moreover, the agency must articulate a rational connection between the facts found and the conclusions made. See, for example, Latino Issues Forum versus United States, EPA 558 at 3rd, 936 at page 941, Ninth Circuit 20 -- 2009. Although a court is not entitled to substitute its own judgment for the agency's judgment, the court must

the ultimately act as a rubber stamp and is obligated to, "ensure that agency decisions are founded on a reasoned devaluation of relevant facts and circumstances. See, for example, Arizona Cattle Growers Association versus United States Fish and Wildlife Bureau of Land Management 273 F 3rd, 1229 at page 1236, a 2001 decision from the Ninth Circuit.

The Court should not go beyond the agency's administrative record, which means, "the basis for the decision must come from the agency. The reviewing court may not substitute regions for agency action that are not contained in the record." That's also Arizona Cattle Growers Association, the same page.

Here, the SBA's decision to categorically exclude all bankrupt debtors from PPP loan eligibility falls far short of the standards. Among other problems, first, there essentially is no administrative record supporting the ultimate conclusion whatsoever. The entirety of the SBA's discussion regarding this matter is encapsulated in paragraph four of the SBA's interim final -- fourth interim final rule, which flatly states that, "the administrator determined that providing

PPP loans to debtors in bankruptcy would prevent -- present an unacceptably high risk of an unauthorized use of funds or non repayment of unforgiven loans." That's it. A nonexistent record, by definition, cannot be sufficient to support any conclusion. This is the problem I described at the last hearing as a failure to, "show your work." There's basically nothing explaining or developing how the SBA's conclusion was reached, let alone anything supporting it is a substantive policy matter. Second, there, likewise, there's nothing indicating a, "reasoned evaluation," of anything. There was no material suggesting the SBA considered the relative pros and cons of excluding bankrupt debtors or evaluated whether anything less than a categorical ban might accomplish whatever goals the SBA did have in mind. It's the show your work problem yet again. The Court see nothing indicating a process of analysis, reasoning, deliberation, debate, study, or consideration. There's just nothing here other than an insignificant conclusion. Third, the Court further believes the SBA has entirely failed to consider important aspects of this problem. The Cares Act was intended to

provide rapid funding to businesses in difficulty. The PPP loans are forgivable if used to pay employees or utilities. Some of the very businesses that are most in need of such relief are going to be operating Chapter 11 debtors. Providing financial support for those debtors so they can, in turn, pay innocent employees, landlords and utilities, is completely consistent with the legislative goal behind the Cares Act, yet nothing indicates the SBA even considered this important aspect of the legislation. Rather, the SBA appears to have unilaterally imposed a categorical ban in the clumsiest way possible.

Furthermore, the SBA appears to have (inaudible) an important aspect of the problem in so far as the Cares Act can make certification that, "the uncertainty of economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." No healthy business is likely to certify under penalties, penalties of perjury or corporate criminal action, that the loan is, "necessary if it's otherwise able to operate without it: Thus, it's the debtor's note Congress created a framework under which every PPP applicant must

certify that it is concerned that it is going to go out of business under the current economic conditions. The SBA blunderbuss exclusion some of these troubled businesses simply disregards that entire backdrop assumption, that there is a business that's in trouble, which is the "problem" that motivated enactment of the Cares Act. The court sees absolutely no consideration of this important aspect of the -- of the problem whatsoever.

As I noted earlier, under the APA is the SBA's burden to articulate the basis for its decision. Ninth Circuit case law makes clear, here are the articulation is flimsy at best. It is an implausible and insufficient justification for the conclusion. There was no explanation about why the administrator determined debtors in bankruptcy have an "unacceptably high risk of an unauthorized use of funds," and this conclusion flies in the face of the expansive and persistent supervision of such debtors by the bankruptcy court, the United States Trustee Program via the Department of Justice, creditors. And in a case like the Astria case, the entire public and (inaudible). Chapter 11 debtors need to be more

transparent about what they're doing with cash than virtually any other debtors. This perfunctory SBA explanation is wholly conclusory and falls to anyone with even a passing familiarity with the bankruptcy process. It is simply impossible for me to call this a reasoned premise. Likewise, there is no explanation of why Chapter 11 debtors pose a high risk of, "non repayment of unforgiven loans." The bankruptcy code contains an array of tools that can make repayment more likely, including finding leans or lanes or administrative priority claims. These tools are part of the law that every person in the country, including the SBA and everyone who works there, is presumed to know, but there was nothing indicating any consideration of these tools by the SBA. There, similarly, is not discussion or even citation of any academic SBA studies of empirical rates of non repayment of DIP loans versus other kinds of loans. Instead, there's just a blanket unsupported and unsightly uncited statement that is dubious -- that is of dubious veracity, if not wholly implausible. Nothing anywhere in the SBA's published rule, or any other record before me, which is scant at best, provides any reasoned

explanation for this conclusion.

I understand and appreciate there's a massive burden that was placed on the SBA by Congress. Congress, for whatever reason, chose to use the SBA as the funnel to convey this particular allocated money for the public and the businesses that needed it. At the same time however, the Court cannot act as a rubber stamp for something as weak as the analysis and justification offered by the SBA for this categorical PPP bankruptcy exclusion. Members of the public, including the Astria debtors, are entitled to ensure that their government agencies proceed a careful, considered, and a reasoned way. To use the same phrase yet again, the agencies have to both do the work and show the work to the public. Here, there is nothing indicating the SBA actually did any work to show, and they certainly don't show them work. As a result, the apparent knee-jerk conclusion that was reached is not the product of any reasoned agency decision-making, cannot sustain any judicial inquiry whatsoever, and must be nullified as arbitrary and capricious.

The Court notes that other judges have reached the same conclusion. The Court now adopts

and incorporates by reference the further discussion contained in Roman Catholic Church of the Archdiocese of Santa Fe versus United States SBA in re Roman Catholic Church of the Archdiocese of Santa Fe 2020 Bankruptcy Lexis 1211 and pages star 12 through 16 by the decision by the Bankruptcy Court District of New Mexico, May 1st, 2020. In sum, I conclude that the debtors are highly likely to succeed on their administrative procedure act claim that the SBA's bankruptcy exclusion from PPP loan eligibility is subject to invalidation as arbitrary and capricious. As such, this first factor weighed strongly in the debtor.

The second factor that the Court considered is whether the moving parties will suffer immediate and irreparable injury if the relief is denied. Here, the record has established a irreparable harm sufficient to support a preliminary injunction. As set forth in Mr. Gallagher's declaration and discussed in the briefing, the COVID-19 situation is having an adverse impact on the debtors business and financial affairs, which, as we all know, is not in the greatest shape to begin with. I had to

close the hospital in January that I didn't want to do because of the debtors financial affairs. To continue to provide healthcare services and pay frontline nurses for the benefit of community access, money is essential. Without PPP funding there's a threat to the viability of the debtors trader business. Moreover, why this is -- this is ultimately a dispute about money, there's a significant risk that all PPP money will be gone as a result of the pressing June 30th deadline and at the SBA will then assert that it cannot be liable for damages, leaving the debtors with no remedy whatsoever at the end of this litigation, even if their rights have been violated. Several other courts have noted that this prospect of no adequate remedy against the government constitutes irreparable harm for purposes of an injunctive relief analysis. See, for example, DB Diamond Club of Flint, LLC versus United States SBA 2020 U.S. District Lexus 82213 pages, star 43 to 45, May 11th, 2020 decision by the Eastern District of Michigan. I note that a subsequent SBA request for a state pending appeal was denied by the Sixth Circuit Court of Appeals, including based on the Sixth Circuit finding that, and agreeing with the

district court, that there was a prospect of a reputable harm to the plaintiffs. I also cite Camelot Banquet Rooms, Inc., versus United States SBA 2020 U.S. District Lexus 76713 t pages star 34 to 36. That's a decision from the Eastern District of Washington. Again, a district judge May 1st, 2020. See, also, General United States versus Cal Allman, Inc. 102 F 3rd 999 at pages 1002 to 2003. It's a Ninth Circuit decision from 1996.

Finally, I turned to the remaining factors that collapsed together into a balance and the consideration of the public interest and whether there was favor granting the relief requested. As previewed at the prior hearing, the Court now takes judicial notice of the following facts. First, COVID-19 cases are increasing at an inexplicably high rate in Yakima County. For whatever reason we are doing worse than the rest of Washington State at this point in the process. This is a very troubling situation. In fact, things today are even worse than they were at the prior hearing in May. Governor Inslee just last Friday called Yakima County, "the most dangerous place in Washington State," from a COVID-19 virus

perspective. Again, I don't know why this is the case, but the problem is not getting better here. Second, the Court takes judicial notice that many of the new cases are in the lower Valley, including around Sunnyside and Toppenish. This also continues to be true today as it was in May. Third, the Court takes judicial notice of the fact that there's limited access to healthcare other than at the Astria hospitals. That was true in May; it's true today. Fourth, the Court takes judicial notice that these PPP funds will be used to pay frontline medical staff, including nurses. The Court further takes judicial notice that the nurses are the people who are being correctly recognized in the local and national press as the heros dealing with this virus in the trenches. That was true in May and it true today. It will be true forever. Perhaps there could be a more compelling public interest case, but, again, it's hard to think of one. As I said at the prior hearing, we're clearly in the 99th percentile of public interest cases here. And this context is -- it (inaudible) weight on the scales as it comes to the third factor. I agree with the government, it doesn't affect the first and second factor, but

certainly the third factor is relevant. The balancing here is overwhelming and lopsided and favors the debtors. The government's claim, public interest consideration, simply If we do not have counterbalance. Yes, SBA funds are limited, and this is something of a zero sum exercise where PPP borrowers are competing with each other, but I think we cannot imagine other borrowers, in bankruptcy or out, that would be more deserving of this money than these particular borrowers. Certainly there are many borrowers less deserving. I know there are law firms throughout the country that have received PPP money. Money, as I said a the last hearing, some of my best friends are lawyers, but I don't think law firms need this money while hospitals, particularly critical hospitals in rural areas, are denied the money. So the overwhelming public interest and community interest and the debtors receiving this money is manifests.

So to summarize, all of the factors individually, weigh in favor of the debtors here. And collectively, they weighed in favor with great force. Therefore issuance of a preliminary injunction is warranted.

The details in the process here should resemble what Judge David Jones described in his Hildago County Emergency Services Foundation oral ruling with the exception that I do want the debtors to provide and pin down the stipulations they described with Lapis and other parties regarding segregation of the money. As framed by the debtors, the Court agrees that the debtors have the right to have their PPP applications submitted without being discriminated against on the basis of their status as Chapter 11 debtors should the debtors otherwise be eligible for PPP loans.

I'm not affirmatively ordering the SBA to make any loans that the SBA cannot rely on an eligibility criterion, that must be set aside under the Administrative Procedures Act. I do however, strongly agree with the SBA that any suggestion by the debtors that the Court enter relief beyond this particular cases is inappropriate. So those in question, when "nationwide injunctions" are ever appropriate, but I have a very hard time thinking of when that would be in this bankruptcy court, and certainly this isn't the case for it. My ruling and the

relief I'm granting here is solely related to these particular debtors in this particular case.

Finally, to the extent this is an appealable decision, the Court now on its own motion invokes 28 USC section 158 D2, to certify this dispute for direct appeal to the Ninth Circuit Court of Appeals.

More specifically, the Court now finds and certifies that each of the three alternative connect conditions in section 158 D 2 A are met. More specifically, first, the judgment order decree involves a question of law as to which there's no controlling decision of the Court of Appeals for the Circuit or the Supreme Court of the United States. Although they're controlling decisions about the legal standards, there's certainly nothing involving facts like this. Moreover, for purposes of this first prong, this also involves a matter of public importance. So those are the disruptive factors are satisfied.

Second, the order of judgment or decree involves the question of law requiring resolution of conflicting decisions. Bankruptcy judges are all over the map here. There are decisions that have held section 525 applies. There are courts

that have held that it doesn't. There are courts that have held that the decision is arbitrary and capricious, including this court today. There are courts that are, apparently, although a few of them expressly, rule the other way. So there's certainly a patchwork and conflicting decisions that weren't resolution at the circuit level.

Third and finally, an immediate appeal from the judgment order decree may materially advance the progress of the case of proceeding in which this appeal is taken. The Court's confident in the strength of its decision today. But if the Court's wrong for some reason, it's better to get the final word on that from the Ninth Circuit Court of Appeals than doing a two-tier appeal through the district court of the (inaudible) if the appeal were to go there.

So all three of these -- moreover the policy considerations when Congress added this provision to the judicial code are satisfied here. This is important. It's conflicting. It's time to get a final word. It's time this should go up to the Court of Appeals as I think one of these questions already has to the Fifth Circuit. Counsel for the debtor should include their

certification in their proposed form of order and getting clear. And to be clear, I certified the entirety of the issues. So if the debtors intend to cross -- cross appeal me regarding the section 525 issue, which you're certainly free to do, I think -- I think that appeal would satisfy the conditions for certification of a direct appeal as much as the Administrative Procedures Act.

I ask that the debtor's prepares the form of judgment that they wish me to enter consistent with -- with the hearing today. And I then leave it for the parties where -- where things go from there.

MR. MAIZEL: Your Honor, we'll run the proposed form of order by Mr. Sachs and by Mr. Donovan before we send it to.

THE COURT: Thank you, Mr. Maizel. Mr. Sachs, anything further today?

MR. SACHS: I have two points, Your Honor, if you would allow me for a second. Certainly not challenging the legal basis for the injunction, but actually the relief that you're granting.

I think what Mr. Maizel said before, talking about what they're asking for, is he said that he wanted the application to be held in

abeyance and the funds escrowed. And so I'd like to propose something for the Court, if the Court would be willing to consider this. I think the relief you just granted essentially allows them to go out this afternoon and get a loan. And if a bank will process it, then the SBA has no authority to -- to not get enter the guarantee. I understand that's the Court's ruling. And it would be very difficult to unscramble that egg if in deed -- I certainly have no idea what might happen if this case will be appealed or if there is an appeal, but an alternative may be this. If I understand the Court's ruling, the Court found for the plaintiffs on the APA issue in part because the agency could not do its work, show its work, and (inaudible) work. So one alternative may be is if the Court were willing to make the relief that the agency continues to set the money aside and that the application is still held in abeyance -- it's not processed -- and the Court says there's short deadline for the government to produce an administrative records. And then if the government doesn't, then the Court can rule on that. And if the government does then the Court could hold a trial on the merits with that record,

and then enter relief based on that. Obviously the Court has suggested is it has the ability under the APA claims to enter upon a relief from there. So it will not take the fee (inaudible) a this point but I understand the Court's ruling. That would really keep the status (inaudible) om place. And we understand there's a short deadline. June 30th is the statutory cut off and so we understand there'll be short deadlines from the Court on that, but it might allow us to get a ruling on the APA with a record. And the Court may find the record doesn't show the work or do the work or doesn't address the concerns the Court made, or the Court may feel differently once it's seen the record.

The alternative is they go out and get the money today and we have appeal rights, but that money is now within the bankruptcy and what can be done with that question I'm not sure of the answer to. So I'd like the first propose that and see if the Court is willing to entertain that.

THE COURT: Mr. Sachs, I appreciate the proposal. I'm going to deny that, I think for two reasons. First, I think the record supports that the debtors that have (inaudible) business needs

to access the money. You know, you made the point and I don't think Mr. Maizel contested it, that, you know, the record doesn't indicate that the business dies and the hospital's close tomorrow, so they don't get the money. But I think the record does substantiate a logical continuing harm as a result of the orders that Governor Inslee has entered relating to elective surgeries. I think the debtors have -- have a need for the money. And I think that that's established and supported by the record. And that's the request they entered.

Second, I hear you on your point about the administrative record, but, just in all candor and fairness, I -- when we were here in May, I think 15 days ago, I did my best to -- you know, I wasn't deciding anything then. I spent a lot of time thinking about this since then, but I think I fairly, even strongly, outlined my concerns about the administrative record. I think I used the phrase, show your work. I don't know, I haven't really read the transcripts that the debtors filed yesterday, but I think I used it three or four times. I think I outlined -- you know, I Mr. Donald, I'm not going to tell the government how

to litigate his case, but I don't think there can be any claim of sandbagging since -- you've have 15 days to put that together and it's not there. I mean, I gave you that opportunity already.

MR. SACHS: I understand, Your Honor. We're not at all disputing that and I understand the Court's ruling on that request.

If I could make a second request under rule 8007, if the Court would be willing to entertain an oral motion for a state pending appeal?

THE COURT: I will entertain that motion. And as Judge Jones said in Texas, that motion is denied. I think I stayed pending appeal would be inconsistent with my findings on the preliminary injunction factors that stay pending appeal factors are the same. Largely other than a, you know, ground for differences of opinion, but I'm competent in the strength of my decision today. If you want -- if you want to stay, you're going to have to go get it somewhere else.

MR. SACHS: Thanks, Your Honor. That's all I have.

THE COURT: Okay. All right. Anything further, Mr. Maizel?

MR. MAIZEL: No. Thank you, Your Honor.

THE COURT: Okay. Thank you, both. I, again, appreciate the time and argument today. We'll look for the judgment and, you know, this will go wherever it goes.

(Whereupon, hearing concluded)

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